

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

) Docket No. CWA-07-2007-0020

)
)
) **Kaw Valley Companies, Inc.,**
) **and**
) **Kaw Valley Sand and Gravel, Inc.,**
)
) Respondents.

) **FINDING OF VIOLATION**
) **AND ORDER FOR**
) **COMPLIANCE ON CONSENT**

)
)
) Proceedings under Section 309(a)(3) of the
) Clean Water Act, 33 U.S.C. § 1319(a)(3)

PRELIMINARY STATEMENT

1. The Following Findings of Violation and Order for Compliance on Consent (Order on Consent) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (EPA) to the Regional Administrator, EPA, Region VII and further delegated to the Director of Region VII's Water, Wetlands and Pesticides Division.

2. Respondent Kaw Valley Companies, Inc., is a corporation incorporated under the laws of Kansas and authorized to conduct business in the State of Kansas. Respondent Kaw Valley Sand and Gravel, Inc., is a corporation incorporated under the laws of Kansas and authorized to conduct business in the State of Kansas. Hereinafter, Kaw Valley Companies, Inc. and Kaw Valley Sand and Gravel, Inc. will be jointly referred to as "Respondents."

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of pollutants" from a "point source" into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in compliance with, inter alia, Section 404 of the CWA, 33 U.S.C. § 1344.

4. Section 404 of the CWA, 33 U.S.C. § 1344, provides that pollutants may be discharged only in accordance with the terms of a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (Corps), for any discharge of dredged or fill material into the navigable waters of the United States.

5. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, rock, sand and agricultural waste.

6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States," which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

General Allegations

7. Respondents are "persons" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

8. At all times relevant to this action, Respondents operated or otherwise controlled the property located in Sections 12 and 14, Township 11 south, Range 24 east, in Wyandotte County, Kansas, which is bounded by the Kansas River between River Miles 9.4-10.4 and 12.8-13.9 (hereinafter the Site).

9. On or about June 2005, Respondents and/or persons acting on Respondents' behalf, discharged dredged or fill material into the Kansas River at the Site. Respondents and/or persons acting on Respondents' behalf, using earth moving equipment, pushed fill material into the Kansas River.

10. The discharge and disposal of dredged and/or fill material into the Kansas River altered the bottom elevation and hydrology of the Kansas River and adversely impacted aquatic life.

11. The earth moving equipment, referenced in paragraph 9 above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

12. The fill and/or dredged materials discharged and disposed of into the Kansas River at the Site included rock, sand and dirt, and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

13. The discharge and disposal of the fill and/or dredged material into the Kansas River at the Site, as described in paragraph 9 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

14. The Kansas River is a "water of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

15. The Corps conducted a Site Visit on June 28, 2005 and referred the matter to EPA by correspondence dated July 26, 2005.

FINDINGS OF VIOLATION

Count 1: Discharge of Dredged or Fill Material without a Permit

16. The facts stated in paragraphs 1 through 15 above are herein incorporated.

17. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to perform the work described in paragraph 9 above, nor were Respondents performing the work described in paragraph 9 above under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

18. Respondents' discharge and disposal of pollutants from a point source into waters of the United States, as described above, occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges and disposals violated Section 301 of the CWA, 33 U.S.C. § 1311.

ORDER FOR COMPLIANCE ON CONSENT

Specific Provisions

19. Based on the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondents CONSENT and are hereby ORDERED as follows:

20. Within sixty (60) days of the effective date of this Order, Respondents shall submit to the EPA and the Corps for approval, a Mitigation Work Plan (MWP) for removing debris and stabilizing the river banks on the Site. The MWP shall include measures Respondents will implement to prevent future erosion of debris into the Kansas River, including but not limited to setback protections and structural controls.

21. Within thirty (30) days of receipt of the MWP, EPA will review the MWP and will notify Respondents in writing of EPA's approval of disapproval of the MWP, or any part thereof. If the MWP is disapproved in whole or in part by EPA, EPA will provide written comments to the Respondents explaining the basis for its decision. Within thirty (30) days of receipt of EPA's comments, Respondents shall amend the MWP by addressing all of EPA's comments, and resubmit the MWP. The approved MWP shall be deemed incorporated into and an enforceable

part of this Order.

22. Within 180 days of EPA approval of the MWP, Respondents shall implement the measures in the MWP.

23. No later than February 28, 2008, or within thirty (30) days after completion of the work required by the MWP, whichever is sooner, Respondents shall submit to EPA a Mitigation Completion Report that shall include but is not limited to a physical description, including dates and location(s), of all work performed pursuant to the MWP, and photographs of the completed projects.

24. Respondents shall submit all reports and deliverables required by this Order on Consent to EPA and the Corps at the following addresses:

Larry Long, Hydrologist
Water, Wetlands and Pesticides Division
U. S. Environmental Protection Agency – Region VII
901 N. Fifth Street
Kansas City, Kansas 66101; and

Mark D. Frazier
U.S. Army Corps of Engineers
Kansas City District, Regulatory Branch
601 E. 12th Street
Kansas City, Missouri 64106.

General Provisions

25. Respondents admit the jurisdictional allegations in this Order on Consent and agree not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Order on Consent.

26. Respondents neither admit nor deny the factual allegations contained in this Order on Consent.

27. Nothing contained in the Order on Consent shall alter or otherwise affect Respondents' obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

28. Compliance with the terms of this Order on Consent shall not relieve Respondents of liability for any violations of the CWA not addressed in this Order on Consent or in the Consent Agreement and Final Order that was filed as a companion to this Order on Consent. In addition,

nothing in this Order on Consent shall prohibit EPA from seeking additional injunctive relief pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

29. Nothing in this Order on Consent shall limit EPA's right to obtain access to the area where the mitigation is being performed and to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and any other authority.

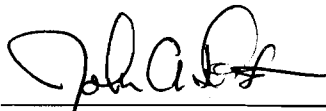
30. If any provision or authority of this Order on Consent, or the application of this Order on Consent to Respondents, is held by federal judicial authority to be invalid, the application to Respondents of the remainder of this Order on Consent shall remain in force and effect and shall not be affected by such a holding.

31. The signatories below certify that he / she is fully authorized to enter into the terms and conditions of this Order on Consent.

32. The terms of this Order on Consent shall be effective and enforceable against Respondents on the Effective Date, which is the date this Order on Consent is signed by EPA.

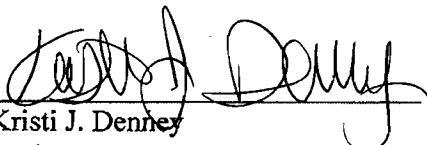
33. This Order on Consent shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order on Consent have been met.

For the Complainant:
The United States Environmental Protection Agency

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William A. Spratlin
Director
Water, Wetlands and Pesticides Division

3/2/07
Date

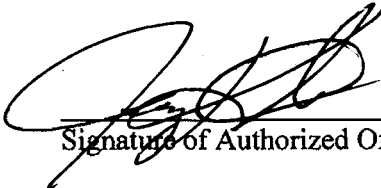


Kristi J. Denney
Assistant Regional Counsel

3/2/07
Date

For the Respondents:

Kaw Valley Companies, Inc.



Signature of Authorized Official.

2-28-07
Date

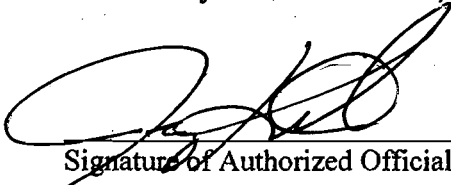
JOEY KATES

Printed Name

VICE PRESIDENT

Title

Kaw Valley Sand and Gravel, Inc.



Signature of Authorized Official

2-28-07
Date

JOEY KATES

Printed Name

VICE PRESIDENT

Title

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Finding of Violation and Order on Consent to the following person:

David R. Erickson
Counsel for Kaw Valley
Shook, Hardy & Bacon L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108-2613.

3/5/07
Date

Esther C. Matchett
Signature

Esther C. Matchett
Printed Name