

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)
)
Nebraska Department of Roads)
)
and) FINDINGS OF VIOLATION/
) ORDER FOR COMPLIANCE
) ON CONSENT
Herbst Construction, Inc.)
)
Respondents) Docket No. CWA -07-2007-0043
)
)
)
Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))

I. FINDINGS OF VIOLATION

Jurisdiction and Preliminary Statement

1. The FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE ON CONSENT (“Order on Consent”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”), by Section 309(a) of the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. §1319(a), as delegated by the Administrator to the Regional Administrator, EPA Region VII, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA Region VII.

2. Respondent Nebraska Department of Roads is an agency of the State of Nebraska, engaged in the construction, maintenance and improvement of roads and highways throughout the State of Nebraska. Respondent Herbst Construction, Inc. is a corporation organized under the laws of Iowa, engaged in the business of highway and bridge construction.

3. The EPA and Respondents agree that settlement of this matter is in the best interest of all parties and the public, and will eliminate the need for prolonged and complicated litigation between the parties, come now and enter into this Order on Consent.

II. ALLEGATIONS

4. The EPA has reason to believe that Respondent Nebraska Department of Roads and Respondent Herbst Construction, Inc. ("Respondents") violated Section 301 of the CWA, 33 U.S.C. §1311, through discharge of fill material into waters of the United States along the North Loup River in Garfield County, Nebraska, near Section 14, Township 21 North, Range 16 West. Specifically, Respondents discharged fill material into the North Loup River, when they placed concrete slabs with steel rebar into the river, without obtaining the necessary permits required by Section 404 of the CWA, 33 U.S.C. § 1344.

5. Each Respondent is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

Statutory and Regulatory Framework of Section 404

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, by any person except in compliance with, inter alia, Section 404 of the CWA, 33 U.S.C. § 1344.

7. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the discharge of dredged or fill material into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, occur in accordance with a permit issued under that Section.

8. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

9. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

10. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, solid waste, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water.

11. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “...the waters of the United States, including the territorial seas.”

12. 40 C.F.R. §§ 232.2 and 33 C.F.R. Part 328 define waters of the United States, in part, as, “...lakes, rivers and streams, ...wetlands.”

13. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “...any discernible, confined and discrete conveyance...from which pollutants are or may be discharged.”

14. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include a State and a corporation.

15. Section 404 of the CWA requires a person to obtain a permit (“Section 404 permit”) from the United States Army Corps of Engineers (“Corps”) prior to any discharge of dredged or fill material into the navigable waters of the United States.

Factual Background

16. On or about March 2006, Respondents or ones acting on their behalf, by using earth-moving construction equipment, placed concrete slabs with steel rebar upstream from the construction site of the Burwell Bridge. The concrete slabs were placed directly into the North Loup River in Garfield County, Nebraska, near the city of Burwell.

17. The construction equipment used by Respondents or ones acting on their behalf, acted as a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

18. The concrete and steel that were discharged as described in Paragraph 16 above in March 2006 are each a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The North Loup River is a navigable water within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and a water of the United States as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

20. The deposition of concrete and steel into waters of the United States constitutes the “discharge of pollutants” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

21. Respondents did not obtain a Section 404 permit prior to conducting the activities described in Paragraph 16 herein.

Findings of Violation

22. The facts stated in Paragraphs 16 through 21 above are herein incorporated.

23. Respondents, or ones acting on their behalf, discharged pollutants into a water of the United States by using construction equipment without obtaining a Section 404 permit.

24. Respondents’ failure to obtain a Section 404 permit prior to conducting activity described in Paragraph 16 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

III. ORDER FOR COMPLIANCE ON CONSENT

Specific Provisions

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

26. Mitigation

- a. Respondents agree to perform Mitigation which shall be defined as the removal of concrete within the North Loup River deposited there as a result of a historical bridge collapse, located at approximately at 41° 47' 17" North, 99° 07' 56" West on the North Loup River, in Garfield County, Nebraska. Respondents' obligation for concrete removal is limited to concrete that is present within the riverbed, and

shall not include concrete present on the river banks. This work shall be done prior to March 2008.

- b. Notwithstanding the foregoing, Respondents may seek an extension of the time within which to complete Mitigation, provided Respondents are making good faith efforts to complete Mitigation and any delay has not been occasioned by the conduct of the Respondents. In the event of an anticipated delay, Respondents shall inform EPA of the need for an extension at least two weeks prior to the date on which Mitigation is to be completed. Respondents shall at that time provide EPA with a written statement concerning the cause for the delay, steps taken to avoid or minimize the delay, status of Mitigation, and a projected timetable for completion of Mitigation. EPA will extend the deadline for completion of Mitigation by at least an additional 30 days, but not more than an additional 180 days. In such an event, this Order on Consent shall be modified pursuant to paragraph 40.

27. Respondents shall transmit to EPA photographs of the concrete in the North Loup River that is to be removed as Mitigation, before the removal occurs and after the removal is completed. Respondents shall submit the photographs taken at the conclusion of the project, along with a statement that the project was concluded. Respondents shall perform the removal and disposal of materials in compliance with all local, state, and Federal environmental laws. The submittals shall be sent to Delia Garcia, PhD., Compliance Officer, or her successor, at:

Water, Wetlands and Pesticides Division
EPA Region VII
901 North 5th Street
Kansas City, Kansas 66101

28. Respondents agree that this Order on Consent shall not constitute a permit under the CWA. Compliance with the terms of this Order on Consent shall not relieve Respondents of their responsibility to obtain any required local, state, and Federal permits.

29. Respondents agree that it shall be in EPA's sole discretion to determine whether Respondents have fully implemented Mitigation. In making these determinations, EPA will take into account Respondents' good-faith efforts as well as any factors beyond Respondents' control. If Respondents disagree with EPA's determination that the Mitigation has not been satisfactorily completed, Respondents may request reconsideration of this determination by objecting in writing to Delia Garcia, PhD., or her successor, at the address specified in Paragraph 27, within ten (10) days of receipt of notification by EPA of the unsatisfactory determination. EPA and Respondents shall have an additional thirty (30) days from the receipt by EPA of the written objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, Respondents may request reconsideration by the Branch Chief of the Water Enforcement Branch of EPA-Region VII. The Branch Chief will provide a written statement of her decision to Respondents, which decision shall be final and binding upon Respondents for purposes of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

30. In the event the Mitigation described in Paragraph 26 herein proves to be unfeasible from an operations or cost standpoint, Respondent Herbst Construction, Inc. shall notify EPA in writing and provide the factual basis for its position, with the following statement:

I certify that the information accompanying this submittal is true, accurate, and complete. I am aware that there are significant penalties for submitting false information to the United States, its agencies and

departments, including the possibility of fine and imprisonment for knowing violations.

EPA will review Respondents' position letter, and advise Respondents of its acceptance of said letter. Within 90 days of receipt of EPA's acceptance, Respondents shall select an alternate mitigation project, which includes a schedule for completion that is acceptable to EPA. Respondents agree that no changes shall be made to the Mitigation, described herein, without prior written approval from EPA.

General Provisions

31. 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.

32. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this Order on Consent. Nothing in this Order on Consent shall constitute or be construed as an admission of liability, fact or law, or of any wrongdoing on the part of Respondents.

33. 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.

34. 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/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 for violations not addressed herein.

35. 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.

36. 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.

37. Each signatory below certifies that he is fully authorized to enter into the terms and conditions of this Order on Consent.

38. 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.

39. EPA reserves the right to enforce the terms of this Order on Consent by initiating a judicial action under Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondents or to seek any other remedy allowed by law.

40. This Order on Consent may be modified by mutual agreement of the parties. Such modification shall be in writing.

41. 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.

In the Matter of Nebraska Department of Roads and Herbst Construction, Inc.
Docket No. CWA-07-2007-0043

Issued this ___ day of _____, 2007.

For the United States Environmental Protection Agency – Region VII

June 28, 2007
Date

William A. Spratlin
William A. Spratlin, Director
Water, Wetlands, and Pesticides Division
U. S. Environmental Protection Agency Region VII

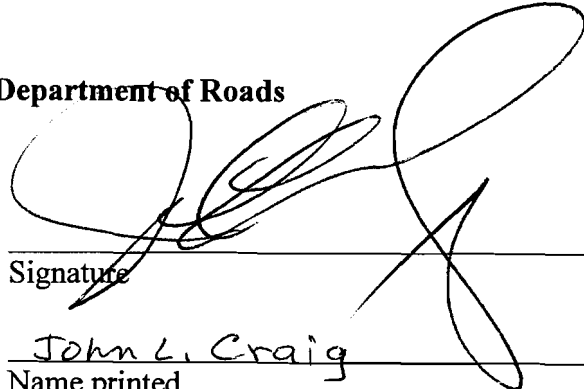
June 1, 2007
Date

Audrey B. Asher
Audrey B. Asher
Senior Assistant Regional Counsel
U. S. Environmental Protection Agency Region VII

The undersigned representative of the Nebraska Department of Roads certifies that he or she is authorized to enter into this Order for Compliance on Consent and to execute and legally bind the Nebraska Department of Roads to the terms and conditions of this Order for Compliance on Consent and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent Nebraska Department of Roads

6-1-07
Date


Signature

John L. Craig
Name printed

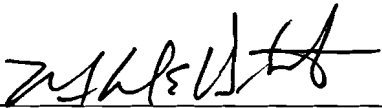
Director - NE Dept. of Roads
Title printed

***In the Matter of Nebraska Department of Roads and Herbst Construction, Inc.
Docket No. CWA-07-2007-0043***

The undersigned representative of Herbst Construction, Inc. certifies that he or she is authorized to enter into this Order for Compliance on Consent and to execute and legally bind Herbst Construction, Inc. to the terms and conditions of this Order for Compliance on Consent and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent Herbst Construction, Inc.

5/30/07
Date


Signature

Michael E Herbst
Name printed

President
Title printed

IN THE MATTER OF Nebraska Department of Roads and Herbst Construction, Inc.,
Respondents
Docket No. CWA-07-2007-0043

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Findings of Violation/Order for Compliance on Consent was sent this day in the following manner to the addressees:

Copy hand delivered to:

Audrey B. Asher
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101


Copy by Certified Mail Return Receipt to:

Jennifer A. Huxoll
Attorney General's Office - Roads Section
1500 Highway 2
P.O. Box 94759
Lincoln, Nebraska 68509-4759

and

Richard A. DeWitt, Esq.
Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C.
2120 South 72nd Street Suite 1200
Omaha, Nebraska 68214

6/28/07
Dated


Kathy Robinson
Hearing Clerk, Region 7