

1:00PM

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION 7
 11201 RENNER BOULEVARD
 LENEXA, KANSAS 66219

Received by
 EPA Region 7
 Hearing Clerk

IN THE MATTER OF:)	
)	
)	Docket No. CWA-07-2022-0060
MICHAEL ZAHNER)	
)	
and)	
)	
ZAHNER MANAGEMENT COMPANY, LLC)	
)	
Respondents)	
)	
)	FINDINGS OF VIOLATION AND
)	ORDER FOR COMPLIANCE
)	
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 are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondents in this case are Michael Zahner and Zahner Management Company, LLC (“Respondents”).

3. This Section 309(a)(3) Order for Compliance is issued to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

Statutory and Regulatory Framework

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

5. The CWA 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.

6. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

7. 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, and which include tributaries to waters of the United States.

8. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

9. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

10. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

Allegations of Facts

11. Respondents are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property containing portions of unnamed tributaries to Buck Creek located in Section 20, Township 33 North, Range 10 East, Bollinger County, Missouri (hereinafter “the Site”).

13. On July 16, 2018, the Corps received a report of possible CWA violations on the Site.

14. On August 22, 2018, Corps personnel conducted an investigation at the Site and observed and documented that Respondents conducted work in three tributaries to Buck Creek using earth moving equipment in order to construct a lake, including clearing trees, grading and filling the tributaries, and constructing a dam across the downstream tributary.

15. Based on the results of the Corps’ investigation, Corps personnel identified that Respondents filled portions of relatively permanent and perennial tributaries to Buck Creek.

16. Buck Creek is a perennial tributary to the Whitewater River, which is a primary tributary to the Mississippi River.

17. On October 24, 2018, the EPA sent a Letter of Warning to Respondent Zahner requesting that he work with the Corps to restore the Site or obtain after-the-fact permitting and immediately implement sediment control practices.

18. On July 20, 2021, a representative from EPA inspected the Site (“EPA Inspection”).

19. The EPA inspector confirmed the grading, fill, and/or inundation in the tributaries to Buck Creek, observed during the Corps’ inspection, that created a lake of approximately 13.5 acres, as well as a second lake upstream from the original impoundment on Respondents’ property of approximately 2.6 acres created by grading, filling, and constructing a dam across and inundating a tributary of Buck Creek.

20. Based on aerial images and laser imaging, detection, and ranging (LIDAR) images, and the results of the EPA inspection, the EPA inspector calculated impacts to three tributaries to Buck Creek as follows: 325 linear feet of Tributary 1; 1,092 linear feet of Tributary 2; and 1,546 linear feet of Tributary 3.

21. During the EPA inspection, the inspector also identified active erosion in areas surrounding the dams and spillways leading to sediment deposits in the downstream tributary.

22. Respondent provided additional information to the EPA on March 13, 2021, in response to an EPA information request issued on February 5, 2021, in accordance with Section 308 of the CWA, 33 U.S.C. § 1318 (hereafter “Section 308 responses”), including that Respondents conducted the clearing and grading with earth moving equipment in the winter of 2017/2018 and constructed the dam in 2018.

23. The three tributaries to Buck Creek, referenced above, are “waters 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.

24. The fill material placed by Respondents into the tributaries to Buck Creek are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

25. The earth moving equipment used by Respondent Michael Zahner to grade the Site and place the fill material into the tributaries to Buck Creek constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

26. The discharge of the fill material into the tributaries to Buck Creek constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

Findings of Violation

27. The facts stated above are herein incorporated by reference.

28. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein.

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

Order for Compliance

Based on the Allegations of Facts and Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED to take the actions described below:

30. Respondents shall comply with the CWA by ceasing the discharge of pollutants into the tributaries to Buck Creek and taking steps to ensure that such discharges do not occur in the future.

31. Stabilization Plan: Within thirty days of the effective date of this Order, Respondents shall submit a plan to EPA for review and approval that shall describe Respondents' plans to stabilize the Site to prevent ongoing erosion and the discharge of sediment. The plan shall include a timeline for completing stabilization that shall not exceed six months after EPA's approval of the plan. Once EPA approves the Stabilization Plan, it shall be incorporated into the terms of this Order and implemented according to the schedule in the approved Stabilization Plan.

32. Mitigation Plan: Within thirty days of the effective date of this Order, Respondents shall submit a plan to EPA for review and approval that shall describe Respondents' plans to mitigate for lost tributary functions and include a timeline for completing mitigation that shall not exceed six months after EPA's approval of the plan. Once EPA approves the Mitigation Plan, it shall be incorporated into the terms of this Order and implemented according to the schedule in the approved Mitigation Plan.

33. Once the work identified in the Stabilization Plan and Mitigation Plan has been completed, Respondents agree to submit a completion report, which shall include copies of relevant documents and a signed statement indicating that the work is complete. The completion report must be submitted within 30 days after work has been completed.

34. The submission of the completion report by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives of Respondents:

I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

35. All documents to be submitted to EPA under this Order shall be submitted by electronic mail to:

Cynthia Sans, or her delegate

sans.cynthia@epa.gov

or by mail at:

U.S. Environmental Protection Agency, Region 7
Attention: Cynthia Sans
11201 Renner Boulevard
Lenexa, Kansas 66219

General Provisions

Opportunity to Confer

36. Respondents have the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of this Order to the Respondents. Within ten days of receipt of this Order, Respondents may request a conference regarding the Order or to submit information to EPA. If Respondents requests a conference or wish to submit information, the conference or submission of information shall take place within twenty days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

Failure to Comply

37. Respondents' failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondents have violated the Act and failed to comply with the terms of the Order.

Effect of Compliance

38. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

39. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Access and Requests for Information

40. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or operated by Respondents and/or to request additional information from

Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Confidential Business Information

41. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondents may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the CWA appear in 40 C.F.R. § 2.302.

Severability

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

Parties Bound

43. This Order shall apply to and be binding upon the Respondents, their agents, successors and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

Judicial Review

44. Respondents have the right to seek federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 upon the effective date. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, provides the grounds for such review.

Effective Date

45. The terms of this Order shall be effective and enforceable against Respondents thirty days after receipt of an executed copy of the Order.

Termination

45. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

For the Complainant, U.S. Environmental Protection Agency, Region 7:

DAVID COZAD
Director
Enforcement and Compliance Assurance Division

SHANE MCCOIN
Assistant Regional Counsel
Office of Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered a true and correct copy of this Findings of Violation and Administrative Order for Compliance electronic mail, to the Regional Hearing Clerk:

U.S. Environmental Protection Agency Region 7
R7_Hearing_Clerk_Filings@epa.gov

I further certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by USPS Certified Mail to:

Michael Zahner
200 Zahner Place
Perryville, Missouri 63775

Michael Zahner, Registered Agent
Zahner Management Company, LLC
26 North Jackson Street
Perryville, Missouri 63775

And by electronic mail to:

Representative for Respondents:

Tom K. O'Loughlin, Esq.
tomo@oloughlinlawfirm.com

Representative(s) for Complainant:

Shane McCoin
Office of Regional Counsel
U.S. Environmental Protection Agency Region 7
mccoin.shane@epa.gov

Cynthia Sans
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency Region 7
sans.cynthia@epa.gov

Representative for Missouri Department of Natural Resources:

Billy.Hackett@dnr.mo.gov

Signature