

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

BILL WILLERS

and

SHANNON KURPGEWAIT
d/b/a Custom Excavation,

Respondents

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

Docket No. CWA-07-2010-0138

CONSENT AGREEMENT/
FINAL ORDER

The United States Environmental Protection Agency, Region 7 (EPA), Bill Willers and Shannon Kurpgeweit ("Respondents") have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order ("CA/FO"). Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules").

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO alleges that the Respondents discharged pollutants into waters of the United States in violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation is the Director of Region 7's Water, Wetlands and Pesticides Division.

4. Respondents in this case are Bill Willers and Shannon Kurpgewei ("Respondents"). Respondent Bill Willer's mailing address is 1415 Andrews Drive, Norfolk, Nebraska 68748. Respondent Shannon Kurpgewei's mailing address is 83080 548th Avenue, Madison, Nebraska 68748.

Statutory and Regulatory Framework

5. 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.

6. 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.

7. 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 United States Army Corps of Engineers (hereinafter "Corps"), for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

8. 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, and wetlands adjacent to, waters of the United States.

9. 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.

Factual Background

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

11. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property located in the South 1/2, Southwest 1/4 of Section 34, Township 25 North, Range 1 East, Wayne County, Nebraska (hereinafter "the Site").

12. In September and/or October 2009, Respondents and/or persons acting on their behalf and using earth moving equipment, authorized and/or directed the damming of an unnamed tributary to Spring Branch Creek. Specifically, Respondents discharged dredged or fill material including, but not limited to, dirt, spoil, rock, and sand, into a tributary to Spring Branch Creek, impacting approximately 1,352 linear feet of the creek and 1.13 acres of adjacent wetlands. The extent of the impact described herein will increase as the current pool continues to fill.

13. On October 30, 2009, the Corps inspected the Site and documented the discharges of fill material described in Paragraph 12.

14. The dredged and/or fill materials discharged by Respondents into a tributary of Spring Branch Creek and adjacent wetlands referenced in Paragraph 12 are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

15. The earth moving equipment referenced in Paragraph 12 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. The discharge of the dredged and/or fill material into the tributary to Spring Branch Creek and adjacent wetlands referenced in Paragraph 12 constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

17. The tributary to Spring Branch Creek and adjacent wetlands referenced in Paragraph 10 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.

18. Respondents' discharge of pollutants from a point source into waters of the United States was performed 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.

A. FINDINGS OF VIOLATION

19. The facts stated in Paragraphs 10 through 18 above are herein incorporated.

20. 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 work described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

21. 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.

CONSENT AGREEMENT

22. Respondents admit the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

23. Respondents neither admit nor deny the factual allegations contained in this CA/FO.

24. Respondents waive any right to contest the allegations and their right to appeal the proposed Final Order accompanying this Consent Agreement.

25. Respondents and Complainant each agree to bear their own costs and attorney's fees.

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

27. The undersigned representatives of Respondents certify that they are fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondents to it.

28. Respondents certify by the signing of this CA/FO that, to the best of their knowledge, Respondents are in compliance with all requirements of Sections 301 and 404 of the CWA, and are scheduled to be in compliance with EPA's March 31, 2010, Administrative Order for Compliance, Docket No. CWA-07-2010-0083.

29. The effect of settlement is conditional upon the accuracy of the Respondents' representations to EPA, as memorialized in Paragraph 28 above, of this CA/FO.

30. Respondents consent to the issuance of the Final Order and consent to the payment of a civil penalty in the amount of \$30,000.

31. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Findings of Violations.

Reservation of Rights

32. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

33. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

1. Respondents shall pay a civil penalty of Thirty Thousand dollars (\$30,000). The penalty shall be paid in full within thirty (30) days following receipt by Respondents of a fully executed copy of this CA/FO. Respondents shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

2. No portion of the civil penalty or interest paid by Respondents pursuant to the requirements of this CA/FO shall be claimed by Respondents as a deduction for federal, state, or local income tax purposes.

Parties Bound

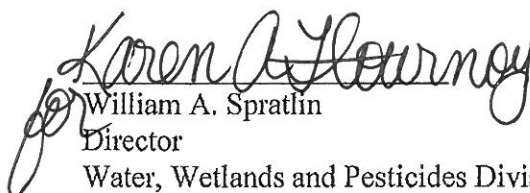
3. This Final Order shall apply to and be binding upon the Respondents, their agents, successors, and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein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

Effective Date


4. This Final Order shall become effective upon receipt by Respondents of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

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COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY


William A. Spratlin
Director
Water, Wetlands and Pesticides Division

8-23-10
Date


Chris Muehlberger
Assistant Regional Counsel

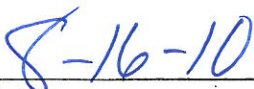
8.23.10
Date

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RESPONDENT:
BILL WILLERS



Bill Willers



Date

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RESPONDENT:
SHANNON KURPGEWAIT
d/b/a Custom Excavation


Shannon Kurpgewait

8-17-2010
Date

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IT IS SO ORDERED.

Oct. 14 2010

Date



Robert L. Patrick
Regional Judicial Officer

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Respondents
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Chris Muehlberger
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Bill Willers
1415 Andrews Drive
Norfolk, Nebraska 68701


and

Shannon Kurpgeweit
83080 548th Avenue
Madison, Nebraska 68748

and

Tom Wilmoth
Blankenau Wilmoth LLP
206 South 13th Street, Suite 1425
Lincoln, Nebraska 68508

Dated: 10/14/10


Kathy Robinson
Hearing Clerk, Region 7