

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)

WENDELL CURTMAN)
Respondent)

) Docket No. CWA -07-2009-0066

) FINDINGS 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)

A. FINDINGS OF VIOLATIONS

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, by Section 309(a)(3) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §1319(a)(3), 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. The EPA has reason to believe that Wendell Curtman ("Respondent") violated Section 301 of the CWA, 33 U.S.C. §1311, by discharging dredged or fill

material into navigable waters of the United States without obtaining the necessary permits required by Section 404 of the CWA, 33 U.S.C. §1344.

3. The EPA and Respondent, having determined that settlement of this matter is in the best interest of both parties, come now and enter into this Order on Consent.

Statutory and Regulatory Framework

4. 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. Section 404 of the CWA provides that pollutants may be discharged only in accordance with the terms of a permit for the discharge of dredged or fill material.

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.

Factual Background

6. Between October 2006 and February 2007, Respondent or one acting on his behalf, performed excavation activities with earth moving equipment in a portion of Red Oak Creek located in Gasconade County, Missouri at the southern ½ of Section 31, Township 42 North, Range 04 West. In performing these excavation activities, Respondent relocated approximately 10,000 cubic yards of dredged spoil onto the banks of Red Oak Creek below the Ordinary High Water Mark (“OHWM”). Respondent also

installed three riprap revetments at the downstream end of the unauthorized channel work.

7. Between February 2007 and April 2009, Respondent or one acting on his behalf, using earth moving equipment, discharged rock below the OHWM in a portion of Red Oak Creek adjacent to Pump Station Road in Gasconade County at the southern ½ of Section 31, Township 42 North, Range 04 West.

8. Conditions existing on Respondent's property described herein include four catch basins and a wing of a catch basin which Respondent may maintain.

9. The earth moving equipment referenced in Paragraphs 6 and 7 above, acted as a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

10. The dredged spoil referenced in Paragraph 6 and the rocks referenced in Paragraph 7 above are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11. The deposition of dredged spoil and rock into a water of the United States, as described in Paragraphs 6 and 7 above, constitutes the "discharge of pollutants" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

12. Red Oak Creek is a perennial stream which flows into the Bourbeuse River, which flows into the Meramac River which flows into the Mississippi River. Red Oak Creek is a navigable water within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and is a water of the United States as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

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

14. Respondent's 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 this discharge violated Section 301 of the CWA, 33 U.S.C. § 1311.

B ORDER FOR COMPLIANCE ON CONSENT

Specific Provisions

Based on the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent CONSENTS and is hereby ORDERED as follows:

15. Respondent agrees to implement Restoration and Mitigation, as described in Attachment 1, attached to and incorporated into this Order on Consent.

16. Restoration: Within 90 days of the Effective Date, Respondent agrees to remove the rock referenced in Paragraph 7 herein and deposit the rock in an area outside of the 30 foot riparian corridor and existing bank of Red Oak Creek. Respondent shall take every precaution to prevent rock from falling into Red Oak Creek, however, the Parties understand that there may be incidental falling of rock as a result of moving berms.

17. Mitigation: Within 45 days of the Effective Date, Respondent shall submit to EPA a letter from the Missouri Department of Conservation (MDC) which documents MDC approval of a design for planting native trees and shrubs in accordance with Attachment 1. Respondent shall plant the trees and shrubs in accordance with the MDC approved design and Attachment 1, within one year of the Effective Date of this

Order. The Parties understand that 200 surviving trees/bushes per acre are sufficient and that native or existing trees shall be included in that count.

18. Respondent agrees to grant EPA and the Corps access to Respondent's property to view the Restoration and Mitigation Area.

19. Respondent agrees that it shall be in EPA's sole discretion to determine whether Respondent has fully implemented Restoration and Mitigation. In making these determinations, EPA will take into account Respondent's good-faith efforts as well as any factors beyond Respondent's control.

20. Respondent agrees to submit Annual Reports to EPA, beginning on the first anniversary of EPA's determination that Mitigation is fully implemented and continuing for four years thereafter. The Annual Reports shall describe, with narrative and photographs, the status of the Mitigation and corrective actions, if any, that will be taken to maintain at least 50% survival rate of the trees and vegetative plants that were part of the Mitigation.

21. Respondent agrees 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 Respondent of his responsibility to obtain any required local, state, and/or Federal permits. Specifically, Respondent agrees to consult with the Corps and agrees to obtain all permits that the Corps determines necessary before commencing any work that could affect a water of the United States, including but not limited to Red Oak Creek. Additionally, Respondent agrees to provide the Corps information necessary to show that three riprap revetments are permitted under Nationwide Permit 32.

22. Respondent agrees that no changes shall be made to the Restoration and Mitigation implemented by Respondent in accordance with Attachment 1, without prior written approval from EPA.

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

Mr. Raju Kakarlapudi, Enforcement Officer
Water, Wetlands, and Pesticides Division
U. S. Environmental Protection Agency – Region VII
901 N. Fifth Street
Kansas City, Kansas 66101

Mr. Shawn Sullivan, Project Manager of Regulatory Branch
St. Louis District, U. S. Army Corps of Engineers
1222 Spruce Street
St. Louis, Missouri 63103-2833

General Provisions

24. Respondent admits the jurisdictional allegations in this Order on Consent and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Order on Consent.

25. Respondent neither admits nor denies the factual allegations contained in this Order on Consent.

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

27. Compliance with the terms of this Order on Consent shall not relieve Respondent of liability for any violations of the CWA not addressed in the Factual Background of 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 that are not identified in the Factual Background of this Order on Consent.

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

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

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

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

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

33. EPA will consider Mitigation complete five years after the Effective Date, provided that Respondent submits annual reports signed by MDC which indicate, among other things, that the plantings referenced in Paragraph 16 herein are consistent with Attachment 1 and the MDC approved design. EPA will provide Respondent a written

notice of termination of this Order on Consent when all of the requirements of this Order on Consent have been met.

Issued this 21 day of July, 2009.

For RESPONDENT:

7/14/09
Date

Wendell Curtman
Wendell Curtman

FOR THE U. S. ENVIRONMENTAL PROTECTION AGENCY:

7-21-09
Date

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

7/17/09
Date

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

ATTACHMENT 1 to ORDER on CONSENT

RESTORATION

Within 90 days of the Effective Date of the Order on Consent, Respondent shall dismantle the two levees on the banks of Red Oak Creek where Respondent had created them with quarry rock. Respondent shall take every precaution to prevent rock from falling into Red Oak Creek, however, the Parties understand that there may be incidental falling of rock as a result of dismantling the levees. Respondent shall incorporate these two areas into the riparian corridor so that the levee area can be planted with trees and shrubs as described below. Respondent shall deposit the rock removed from the levees in an area outside of the 30 foot riparian corridor to eliminate the possibility of this rock migrating into Rock Oak Creek.

MITIGATION

Respondent shall choose native trees and shrubs from the following list to plant in a 30 foot buffer area on Respondent's property:

Native Trees

Sandbar willows
American plum
Black walnut
River birch
Sycamore

Native Shrubs

Hazelnut
Ninebark
Gray dogwood
Silky dogwood
False indigo
Blackberry
Witch hazel

Respondent shall implement Mitigation according to a design approved by the Missouri Department of Conservation (MDC) and documented in a letter from MDC to Respondent. This letter shall be submitted to EPA within 45 days of the Effective Date of the Order on Consent. Respondent shall implement the Mitigation within one year of the Effective Date.

1. Respondent shall set aside a 30 foot buffer from the existing bank that extends for 4,800 linear feet of Red Oak Creek where Respondent performed the unauthorized work referenced in Paragraph 6 of the Order on Consent. The buffer shall consist of the native shrubs and trees which Respondent selected and EPA approved. No artificial construction shall remain in the 30 foot buffer area. However, conditions existing on Respondent's property described herein include four catch basins and a wing of a catch basin which Respondent may maintain.
2. Respondent shall plant these trees and shrubs at the rate of 400 per acre in order to have a survival rate of 200 per acre in this buffer area, according to a design approved by the Missouri Department of Conservation (MDC) with the existing trees to be included in the design.
3. Respondent shall submit to EPA Annual Monitoring Reports signed by MDC that describe the progress of the Mitigation and include photographs of the riparian corridor. These reports shall be due to EPA on the anniversary of the date when EPA determines that Mitigation is fully implemented (Anniversary Date) for four years from the Anniversary Date.
4. Respondent shall maintain at least a 50% survival rate of the trees and shrubs in the buffer area for four consecutive years after the Anniversary Date. If the survival rate is less than 50%, Respondent shall plant additional trees and shrubs.

Note: These trees and shrubs may be purchased from George O. White Nursery operated by the Missouri Department of Conservation.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July 2009, I filed the original of the foregoing Consent Agreement/Final Order with the United States Environmental Protection Agency, Region VII, 901 North Fifth Street, Kansas City, Kansas 66101 with the Regional Hearing Clerk of EPA Region VII; and sent by Federal Express a true and correct copy of the same on the 27th day of July 2009 to Damian Struzzi, Esq., Baylard, Billington, Dempsey and Jensen, PC, 30 S. McKinley, Union, MO 63084.

Audrey B. Asher
Audrey B. Asher