

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5TH

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

ROGER HARDERS)

1775 County Road M)

Wahoo, Nebraska 68066.)

Respondent)

Proceedings under Section 309(a)(3) of the)

Clean Water Act, 33 U.S.C. § 1319(a)(3))

FINDINGS OF VIOLATION,
ORDER FOR COMPLIANCE

Docket No. CWA-07-2004-0332

A. FINDINGS OF VIOLATION

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 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 Water, Wetlands and Pesticides Division of EPA Region 7.

2. The Respondent in this case is Mr. Roger Harders (“Respondent”), an individual whose mailing address is 1775 County Road M, Wahoo, Nebraska 68066. Mr. Harders owns and/or operates a farm located in Saunders County, Nebraska, which has a tributary of Cottonwood Creek flowing through the property. The property is located in the Southwest 1/4 of Section 33, Township 15 North, Range 7 East, Saunders County, Nebraska.

3. The Findings of Violations and Order for Compliance address discharges of pollutants by Respondent into the waters of the United States without the permit(s) required by law. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of “pollutants” by any “person” into “navigable waters” as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in compliance with, inter alia, a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. 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.

4. 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 "wetlands." "Wetlands" are defined at 40 C.F.R. § 232.2 as those areas that are inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

5. At various times between July 1999 and September 2000, Respondent and/or persons acting on his behalf, discharged dredged or fill material into an unnamed tributary to Cottonwood Creek located in the Southwest 1/4 of Section 33, Township 15 North, Range 7 East, Saunders County, Nebraska. The Respondent and/or persons acting on his behalf using earth moving equipment filled the then existing stream channel and excavated a new channel impacting approximately 1,035 linear feet of the waterway. The work performed by Respondent straightened the stream channel by removing two former meanders in the tributary and directing the water flow through a different channel created by Respondent.

6. The United States Department of Agriculture, Natural Resource Conservation Service (NRCS) conducted an on-site inspection on June 13, 2002, which documented the discharges of fill material described above.

7. On June 18, 2002, through the use of a quitclaim deed the Respondent transferred ownership of the property to his two minor children Ethan M. Harders and Elizabeth M. Harders. The Respondent still maintains control of the use of the property.

8. On July 18, 2002, the Corps spoke with the Respondent on the telephone and explained the potential violation of the CWA because of the actions described above. During this phone conversation the Corps explained the CWA Section 404 permitting process and requested a proposal to remedy the violation.

9. The Corps and the Respondent were not able to agree on a satisfactory resolution of the violation, and the Corps referred the matter to EPA, Region 7, through a letter dated August 14, 2002.

10. The EPA made several attempts to resolve the matter with the Respondent, including letters dated January 15, 2004, and April 21, 2004. The Respondent was either uncooperative or unresponsive to EPA attempts to resolve the matter.

Specific Findings

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

12. During the time periods of the discharges of dredged and/or fill material into the tributary of Cottonwood Creek described above, Respondent owned the property on which the discharges took place.
13. Respondent's discharge of dredged and/or fill material within the tributary of Cottonwood Creek altered the natural drainage pattern of the tributary, resulting in the blockage of the natural channel of the tributary of Cottonwood Creek, and the cutting of a new channel which straightened the stream channel by removing two meanders in the channel and affecting approximately 1,035 linear feet of the waterway.
14. The areas of the discharge and disposal of dredged and/or fill material and the area of excavation of the channel on the Respondent's property are characterized as "wetlands," as defined at 40 C.F.R. § 232.2. The discharge and disposal of dredged and/or fill material and the excavation of the channel within the wetlands has altered the natural drainage pattern and hydrology of the area, resulting in the ongoing drainage of approximately 10 acres of wetlands.
15. The dredged and/or fill materials discharged by Respondent into the tributary of Cottonwood Creek and the wetlands includes spoil, rock, sand and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
16. The earth moving equipment referenced in Paragraph A.5 above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
17. The discharge of the dredged and/or fill material into the wetlands and tributary on the property, described in Paragraphs A.5 above, constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).
18. The tributary of Cottonwood Creek which flows into Cottonwood Creek, which flows into Wahoo Creek, which flows into the Platte River, and the wetlands on the Respondent's property 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.
19. Respondent's discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.
20. To date, Respondent has failed to restore the filled areas of the tributary of Cottonwood Creek to their pre-discharge configuration. The adverse effects on the environment of Respondent's illegal discharges into the tributary of Cottonwood Creek are ongoing. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

B. ORDER FOR COMPLIANCE

Based on the 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 as follows:

1. Within fifteen (15) days after receipt of this Order, Respondent shall notify EPA in writing whether it intends to comply with the terms of this Order.
2. In the event Respondent states that it does not intend to comply with the terms of this Order and/or fails to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order and/or seek additional penalties for such noncompliance with the terms of Order.

Restoration Plan

3. Within thirty (30) days after receipt of this Order, Respondent shall submit a Restoration Plan to EPA for review and approval that shall satisfy the following requirements and include, at a minimum, the following information:
 - a. The Restoration Plan shall be prepared by a Professional Engineer (P.E.) with a background in hydrology;
 - b. The Restoration Plan shall include an analysis of the hydrology of the discharge sites and/or areas impacted by the discharges, that is presented in sufficient detail to determine the areas impacted by the discharges, quantity of flows and to provide an adequate basis for review of the Plan;
 - c. The Restoration Plan shall identify and describe the design of all drainage control devices (erosion control, dams, etc.) that control drainage into the areas impacted by the discharges of illegal fill;
 - d. The Restoration Plan shall identify all areas of the tributary of Cottonwood Creek directly impacted by the discharges of illegal fill (i.e., that have suffered erosion, backup of water, overcutting by water), and all downstream areas impacted by sedimentation from the site;
 - e. The Restoration Plan shall propose the work required to remove the discharged fill and to restore the tributary of Cottonwood Creek to pre-discharge configurations, including, the work required to remove fill from the discharge sites and to fill the created channel;

f. The Restoration Plan shall describe the types of equipment proposed to accomplish the removal of the fill, methods to minimize erosion during the removal of fill and designated upland disposal locations for the removed fill;

g. The Restoration Plan shall evaluate alternatives for bank stabilization, and propose an appropriate method(s) of bank stabilization designed to prevent future erosion (i.e., placement of sod or seeding of new grass, placement of erosion control devices such as rip rap);

h. The Restoration Plan shall identify any additional proposed areas of fill within the tributary of Cottonwood Creek that are required to implement the Restoration Plan and shall describe compaction and surface stabilization methods for such proposed fill areas. Specifically, the Restoration Plan shall identify the work required to fill the created channel and to restore flow solely to the original channel of the tributary of Cottonwood Creek; and

i. The Restoration Plan shall propose a schedule of no more than twelve (12) months to accomplish the removal of the fill and the restoration and stabilization of areas impacted by the fill.

4. At its sole discretion, EPA may elect to approve the Restoration Plan as submitted by Respondent, return the Restoration Plan for modification and resubmission by Respondent, or modify the Restoration Plan and then approve the Restoration Plan as modified. Compliance with the Restoration Plan, as approved by EPA, shall be enforceable under the authority of this Order for Compliance and the CWA.

5. In accordance with the requirements and schedules contained in the approved Restoration Plan, Respondent shall remove the discharged fill materials described in Paragraph A.5, above, to upland sites and shall restore the discharge sites to their condition prior to such discharges in a manner that will address the ongoing adverse impacts of the illegal discharges.

6. All documents required to be submitted to EPA by this Order, or by the approved Restoration Plan shall be submitted by mail to:

Steven L. Sanders
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101.

7. At the time of its submission to EPA, Respondent shall also provide a copy of the proposed Restoration Plan to Mr. Michael Rabbe, Nebraska State Program Manager, United States Army Corps of Engineers at the following address:

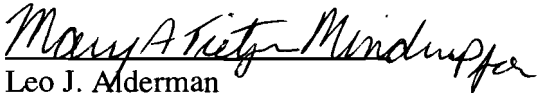
United States Army Corps of Engineers, Omaha District
Nebraska Regulatory Office - Wehrspann
8901 South 154th Street, Suite 1
Omaha, Nebraska 68138-3621

8. Upon approval of the Restoration Plan by EPA, thereafter Respondent shall report in writing to EPA each month on all work undertaken pursuant to the requirements of the approved Restoration Plan.


Effect of Compliance with the terms of this Order

9. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits. Specifically, Respondent shall consult with the United States Army Corps of Engineers, and shall obtain all permits that the Corps determines are necessary to address the discharges and/or to implement the approved Restoration Plan.

10. Compliance with the terms of this Order shall not relieve Respondent of any liability for, or preclude EPA from initiating an enforcement action to recover, penalties for any violations of the CWA, pursuant to Section 309(g) of the CWA, 42 U.S.C. § 1319(g).


Leo J. Alderman
Director
Water, Wetlands and Pesticides Division

9/23/04
Date


Steven L. Sanders
Assistant Regional Counsel

9/23/04
Date

CERTIFICATE OF SERVICE

I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

Mr. Roger Harders
1775 County Road M
Wahoo, Nebraska 68066.

9/28/4
Date

Debby White