

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

Received by
EPA Region 7
Hearing Clerk

IN THE MATTER OF)	
)	FINDINGS OF VIOLATION AND
Tom Villegas)	ORDER FOR COMPLIANCE
)	
and)	
)	Docket No. CWA-07-2022-0103
Amy Villegas,)	
)	
Respondents)	
)	
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 Region 7.

2. The Respondents in this case are Tom and Amy Villegas. (“Respondents”).

Statutory and Regulatory Framework

3. The goal of the CWA, 33 U.S.C. § 1251 et seq., is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

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, except in accord with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

6. Section 404 of the CWA 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.

7. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

8. 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.”

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 Section 13, Township 12 North, Range 28 West and Section 18, Township 12 North, Range 27 West in Lincoln County, Nebraska (the “Site”). The Site is adjacent to the Platte River.

12. In or around June 9, 2017, through May 18, 2021, Respondents and/or persons acting on their behalf used earth moving equipment to excavate and clear vegetation from wetlands, widen existing tributaries, create ponded areas, construct roadways, create culverted road crossings, and construct berms at the Site. In performing these activities, Respondents and/or persons acting on their behalf discharged dredged or fill material including dirt, spoil, rock, culverts, trees, and sand into waters of the United States including the Platte River, tributaries to the Platte River, and adjacent wetlands.

13. On May 18, 2021, representatives from the Corps Omaha District visited the Site, observed fill material and associated excavation in the Platte River, tributaries to the Platte River, and wetlands adjacent to the Platte River, and determined that violations of the CWA had occurred.

14. On May 18, 2022, representatives from the Corps Omaha District and from EPA Region 7 visited the Site, observed fill material and associated excavation in the Platte River, tributaries to the Platte River, and wetlands adjacent to the Platte River, and again determined that violations of the CWA had occurred.

15. Respondents’ actions impacted approximately 5.7 acres of wetlands and 210 linear feet of tributaries to the Platte River.

16. The material discharged by Respondents constitutes “fill material,” and their actions constitute the “discharge of fill material” as those terms are defined in 40 C.F.R. § 232.2.

17. The earth moving equipment referenced herein constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. The fill material discharged by Respondents into the Platte River, tributaries to the Platte River, and adjacent wetlands is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The discharge of the fill material into the Platte River, tributaries to the Platte River, and adjacent wetlands constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

20. The Platte River is a traditionally navigable water, and the tributaries to the Platte River and adjacent wetlands are waters of the United States within the meaning of Section 502(7) of the CWA.

21. 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 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.

Findings of Violation

21. The facts stated above are herein incorporated.

22. 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. Therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. §§ 1311.

Order for Compliance

Based on the Findings of Fact and Findings of Violation set forth above, and, pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondents are hereby ORDERED as follows:

23. Respondents shall immediately cease placing fill material into the Platte River, the tributaries to the Platte River, and adjacent wetlands.

24. Within thirty (30) days of receipt of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents’ plan to resolve the CWA violation described herein. The plan shall be implemented within one year of approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

25. The Work Plan should include, at a minimum:

- a. The name, contact information, and qualifications of the consultant retained to develop the Work Plan and the contractor(s) retained to perform the work.
- b. Detailed written specifications and work descriptions for the restoration project, including, but not limited to, the geographic boundaries of the project; a description of the equipment to be used for removing the fill material and location that the unauthorized fill material will be disposed of, timing, and sequence; source(s) of water, including connections to existing waters and uplands; a planting list for native trees or shrubs; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For stream restoration projects, the work plan must also include other relevant information, such as plan form geometry (including restored channel side-slopes of at minimum 3:1), channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings;
- c. A maintenance plan including a description and schedule of maintenance requirements to ensure the continued viability of the restoration site(s) once construction is completed;
- d. Ecologically-based performance standards that will be used to determine whether the restoration site is achieving its objectives;
- e. A description of parameters to be monitored in order to determine if the restoration site is on track to meet performance standards and if adaptive management is needed;
- f. An adaptive management plan that describes a management strategy to address unforeseen changes in site conditions or other components of the restoration project;
- g. For stream restorations, a riparian buffer with native trees or shrubs, with minimum width dependent on stream size and at least 35 feet from the top of the bank along both sides of the restored channel. Trees should be planted at a rate of 50 per acre for trees larger than 5/8th inch caliper and 400 per acre for seedlings. This area may not be grazed and cattle access shall be prohibited;
- h. The seeding of all disturbed areas with native grasses and appropriate erosion control measures to ensure that sediments are not introduced into waters of the United States during the restoration. A State NPDES permit may be required for this work; and
- i. A schedule, including milestones, to achieve restoration or mitigation no later than twelve (12) months after the approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

26. The EPA will review and approve the Work Plan as follows:

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation set forth therein.
- b. Respondent shall identify and apply for all local, state, and federal permits required to implement the Work Plan within fifteen (15) days of the EPA's approval of the Work Plan.
- c. If EPA does not approve the Work Plan, Respondent shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of EPA's disapproval.
- d. Upon resubmission, EPA, in its sole discretion, may either approve the Work Plan, or if EPA determines that the Work Plan does not adequately address the comments provided by EPA, EPA may unilaterally modify the work plan and will provide Respondents with a copy of the work plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.

27. Once approved by EPA, the Work Plan shall be incorporated by reference and fully enforceable under the terms of this Order.

28. Respondents must notify the EPA should any change in size, location, or methods to accomplish the work occur.

29. Respondents shall allow representatives from the EPA and/or the United States Corps of Engineers to inspect the restoration site any time deemed necessary to ensure compliance.

30. Within thirty (30) days of completion of the work identified in the Work Plan, Respondents shall submit a completion report to EPA, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

31. Respondents shall submit annual monitoring reports to EPA, beginning on the date of the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream and wetland functions. Annual monitoring reports must be submitted by December 1st of each year.

32. The submission of documents by Respondents, as identified in Paragraphs 25, 30, and 31 shall include the following written statement, followed by signature of Respondents or a duly authorized representative 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.

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

Delia Garcia, PhD
garcia.delia@epa.gov
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency Region 7

General Provisions

Effect of Compliance with the Terms of this Order

35. 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.

36. 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 Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

37. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property 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.

Severability

38. 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

39. 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.

Failure to Comply

40. Failure to comply with the terms of this Order may result in your liability for significant statutory civil penalties for each violation under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Upon suit by EPA, the United States may impose such penalties if, after notice and opportunity for a hearing, the court determines that you have violated the Act as described above and failed to comply with the terms of this Order. In determining the amount of any penalty the court will consider the seriousness of your violations, your economic benefit resulting from the violations, any history you may have of such violations, any good faith efforts you have made to comply with legal requirements, the economic impact a penalty may have upon you, and such other matters as justice may require. The district court has the authority to impose separate civil penalties for any violations of the Act and for any violations of this Order.

Judicial Review

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

Opportunity to Confer

42. 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 request a conference or wish to submit information, the conference or submission of information shall take place within 20 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.

Effective Date

43. The terms of this Order shall be effective and enforceable against Respondents immediately upon receipt of an executed copy of the Order. Any amendments shall become effective and enforceable on the date that the amendment is signed by all parties. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from the effective date.

Modification

44. The EPA may subsequently amend this Order, upon written agreement with Respondent, in accordance with the EPA's authority under the CWA. In the event of any such subsequent

amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by the original Order. All deadlines for performance under this Order may be extended upon written approval by the EPA, at its sole discretion, without formal amendment to 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:

Issued on _____.

David Cozad
Director
Enforcement and Compliance Assurance Division

Natasha Goss
Attorney-Adviser
Office of Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance

By electronic mail, to:

Stephen D. Mossman
sdm@mattsonricketts.com

By certified mail, return receipt requested, to:

Amy Villegas
25599 WCR 4
Hudson, Colorado 80642

Tom Villegas
25599 WCR 4
Hudson, Colorado 80642

Date