

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

IN THE MATTER OF:)
)
) Docket No. CWA-07-2011-0009
CHARLES HUNZE, SR.)
and)
CHARLES HUNZE, JR.)
)
Respondents) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE ON
) CONSENT
)
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 on Consent (“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 Water, Wetlands and Pesticides Division of EPA, Region 7.

2. The Respondents in this case are Charles Hunze, Sr. and Charles Hunze, Jr. (“Respondents”). Respondents reside in Cape Girardeau, Missouri.

Statutory and Regulatory Framework

3. 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.

4. 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.

5. 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 (“Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

6. 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.

7. 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

8. Respondents are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

9. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property located east of United States Highway 61 and southeast of its intersection with Southern Expressway in Cape Girardeau, Cape Girardeau County, Missouri (“Site”), and depicted on the map, attached hereto and incorporated herein as Appendix A.

10. On or about August 2004, Respondents and/or persons acting on their behalf and using earth moving equipment, authorized and/or directed the discharge of dredged or fill material into a water of the United States. Specifically, Respondents or one acting on their behalf, performed land clearing activities in wooded wetlands located at the Site and through that land clearing activity, discharged into the wetlands dredged or fill material including, but not limited to, dirt, spoil, rock, and sand, impacting approximately 3.84 acres of wetlands. The wetlands are connected on the north end to a ditch which receives water flowing north through a culvert, under Wilson Road, and into the unnamed tributary of Cape LaCroix Creek which is a primary tributary to the Mississippi River. The wetlands are connected on the south to Ramsey Branch which receives water flowing south and into Dutchtown Ditch, which is a primary tributary to the Mississippi River.

11. On November 1, 2004, the Corps inspected the Site and documented the discharges of fill material described in Paragraph 10.

12. The dredged and/or fill materials discharged by Respondents into the wetlands referenced in Paragraph 10 are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

13. The earth moving equipment referenced in Paragraph 10 constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

14. The discharge of the dredged and/or fill material into the wetlands referenced in Paragraph 10 constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

15. The 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.

16. 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.

A. EPA’s FINDINGS OF VIOLATION

17. The facts stated in Paragraphs 8 through 16 above are herein incorporated.

18. 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.

19. 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.

B. ORDER FOR COMPLIANCE ON CONSENT

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 consent to and are hereby ORDERED as follows:

20. Within two years of the Effective Date of this Order, Respondents shall acquire property rights in a Mitigation Site which meets either of the following criteria: (a) 16 acres of real estate that has wetland characteristics and has the potential to develop into enhanced wetlands in the HUC 8 watershed or in proximity to the HUC 8 watershed or (b) 12 acres of real estate that is prior converted wetlands in the HUC 8 watershed or in proximity to the HUC 8 watershed. Prior to acquisition of property rights in the Mitigation Site, Respondents shall submit to EPA their justification that the Mitigation Site meets either criteria (a) or (b) and shall obtain from EPA its approval that the Mitigation Site meets the criteria of either (a) or (b) of this Paragraph.

21. Within 60 days of acquiring the property rights to the EPA-approved Mitigation Site, Respondents shall submit to EPA a Mitigation Plan for approval. Within 30 days of approval from EPA of the Mitigation Plan, Respondents shall commence implementation of the Plan and within six months of approval of the Plan, Respondents shall complete implementation, unless otherwise agreed to by EPA. The Mitigation Plan shall include: (a) the EPA-approved justification for selection of property for the Mitigation Site; (b) measures Respondents shall take to enhance wetland functions at the Mitigation Site; (c) criteria Respondents shall use to measure wetland enhancement (“Performance Standards”) at the Mitigation Site; (d) provision for five annual reports to include a narrative and photographs of the Mitigation Site; (e) provision for

maintenance of wetland enhancements at the Mitigation Site; and (f) provision for corrective action to be taken at the Mitigation Site in the event that deficiencies are noted in an annual report.

22. If EPA does not approve the Mitigation Plan, Respondents shall resubmit the Plan addressing EPA's comments within thirty (30) days of receipt of EPA's disapproval. Upon resubmission, EPA, in its sole discretion, may either approve the Mitigation Plan, or if EPA determines that the Mitigation Plan does not adequately address the comments provided by EPA, EPA may unilaterally modify the Mitigation Plan to conform with Paragraph 21 above and will provide Respondents with a copy of the plan as modified. Respondents shall implement the modified Mitigation Plan and complete implementation of the Plan within six months from the date of notice by EPA.

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

24. Within 30 days of approval of the Mitigation Plan, Respondents shall become parties to an environmental easement and file it with the Registrar of Deeds of the county in which the Mitigation Site is located unless EPA, in its unreviewable discretion, agrees that a state or federal entity has agreed to take title to the Mitigation Site and will ensure that the Mitigation Site remain wetlands in accordance with the Clean Water Act. The environmental easement shall conform to state law and provide that the Mitigation Site remain wetlands in perpetuity. Within 20 days of filing the environmental easement, Respondents shall provide EPA a file-stamped copy of said easement.

25. Respondents shall provide EPA a Letter Report by electronic or regular U.S. mail on a semi-annual basis beginning six months after the Effective Date of this Order and continuing every six months until the environmental easement is filed with the Registrar of Deeds, consistent with Paragraph 24. The Letter Reports shall identify the measures that Respondents have taken from the sixth month following the Effective Date of this Order until property acquisition occurs as referenced in Paragraph 20.

26. Respondents shall submit annual monitoring reports to EPA, beginning on the first anniversary of the completion of the EPA-approved Mitigation Plan, for a period of five years. These reports shall include photos of the Mitigation Site, a description of the status of the Mitigation Site, and corrective actions, if any, that will be taken to correct any deficiencies in maintaining proper wetland functions at the Mitigation Site.

27. If Performance Standards are not being met under the approved Mitigation Plan, Respondents shall develop an alternative Mitigation Plan to meet Performance Standards and submit it to EPA for approval prior to the conclusion of the five year period for implementation of the originally approved Plan. After approval of the alternative Mitigation Plan, Respondents shall implement the alternate Plan and submit annual reports until Performance Standards are met.

28. The submission of documents by Respondents, as identified in Paragraphs 21 and 24, shall include the following written statement, followed by signature of a duly authorized representative of Respondents:

On behalf 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.

29. If Respondents fail to acquire a Mitigation Site approved by EPA within two years of the Effective Date, as described in Paragraph 20, Respondents shall notify EPA of such within 24 hours after the expiration of the two year period. Within 30 days of this notice, Respondents shall acquire credits for 12 acres at a Mitigation Bank approved by the U.S. Army Corps of Engineers, St. Louis District Office, in the St. Louis area or in the HUC 8 watershed or in proximity to the HUC 8 watershed and shall send notice to EPA within seven days of the acquisition of such credits. Alternatively, in lieu of acquiring a Mitigation Site as described in Paragraph 20, Respondents may acquire mitigation credits on the terms discussed in this paragraph at any time before the expiration of two years after the Effective Date. Respondents may request additional time, up to six months, to acquire a Mitigation Site. Such request will not be unreasonably withheld by EPA.

30. All documents to be submitted to EPA under this Order shall be submitted by electronic or first class mail to:

Diane Huffman, Branch Chief, Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101

Huffman.diane@epa.gov

31. In the event Respondents fail 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 against Respondents and, seek additional penalties against Respondents for such noncompliance with the terms of the Order.

General Provisions

Effect of Compliance with the terms of this Order

32. Respondents admit the jurisdictional allegations in this Order on Consent and agree not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Order on Consent.

33. Respondents neither admit nor deny the allegations in the Factual Background or EPA's Finding of Violation contained in this Order on Consent.

34. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

35. Compliance with the terms of this Order shall not relieve Respondents of liability for any violations of the CWA not addressed in the Factual Background of this Order on Consent. 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.

Access and Requests for Information

36. 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

37. 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 Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

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

Modification

39. This Order may be modified by mutual agreement of the Parties.

Effective Date

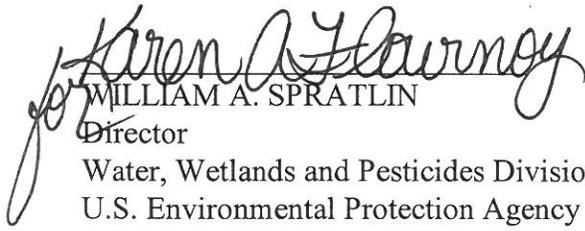
40. The terms of this Order shall be effective and enforceable against Respondents upon the date of his receipt of an executed copy of the Order.

Termination

41. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.

IT IS SO AGREED AND ORDERED

FOR COMPLAINANT U.S. ENVIRONMENTAL PROTECTION AGENCY- REGION 7


WILLIAM A. SPRATLIN
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7

11/18/10
DATE


AUDREY ASHER
Senior Counsel
U.S. Environmental Protection Agency
Region 7

11/18/10
DATE

FOR RESPONDENT CHARLES HUNZE, SR.

Charles Hunze Jr as Attorney-in-Fact for Charles Hunze Sr 11-17-10
CHARLES HUNZE, SR. DATE

FOR RESPONDENT CHARLES HUNZE, JR.

Charles Hunze Jr 11-17-10
CHARLES HUNZE, JR. DATE

CERTIFICATE OF SERVICE

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

Mr. Charles Hunze, Sr.
Mr. Charles Hunze, Jr.
2403 Sprigg Street
Cape Girardeau, Missouri 63703

and

Jason Flower, Esq.
Hush & Eppenberger, LLC
190 Carondelet Plaza, Suite 600
ST. Louis, Missouri 63105-3441

Date

11/22/10

Kathy Robinson