

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

IN THE MATTER OF:)	
)	
)	Docket No. CWA-07-2021-0053
Richard Minor)	
)	
and)	
)	
Cherry County, Nebraska)	
)	
Respondents)	
)	
)	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))	
_____)	

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 Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondents in this case are Richard Minor and Cherry County, Nebraska (“Respondents”).

3. EPA, together with Respondents, enter into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

4. Section 301 of the CWA, 33 U.S.C. § 1311, provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful. It is the parties’ intent through this agreement to address discharges of pollutants by Respondents into the waters of the United States without a permit issued pursuant to Sections 402 and 404 of the CWA.

5. By entering into this Order, Respondents (1) consent to and agree not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) consent to personal service by electronic mail, (3) agree to undertake all actions required by the terms and conditions of this Order, and (4) consent to be bound by the requirements set forth herein. Respondents neither admit nor deny the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondents admit the jurisdictional allegations herein. Respondents also waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondents may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 and 1344.

7. 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.

8. 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 U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p) of the CWA requires, in part, that a discharge of stormwater associated with an industrial activity must comply with the requirements of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Sections 301 and 402 of the CWA.

10. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations at 40 C.F.R. § 122.26 that set forth the NPDES permit requirements for stormwater discharges.

11. 40 C.F.R. § 122.26(b)(14)(x) defines “storm water discharge associated with industrial activity,” in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five acres of total land area which are part of a larger common plan of development or sale.

12. 40 C.F.R. §§ 122.26(a)(1)(ii), 122.26(c) requires dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

13. 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. § 120.2 and 33 C.F.R.

Part 328, and which include tributaries and “waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce.”

14. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

15. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States.”

16. 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.

Allegations of Facts

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

18. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property adjacent to the Snake River located in Sections 23, 26, 35, 36, Township 30 North, Range 40 West, in Cherry County, Nebraska (hereinafter “the Site”). In April 2020, Cherry County assisted Mr. Minor in excavating a ditch to drain water off his property. Mr. Minor completed the approximately 2.5 mile drainage ditch to the Snake River. As a result of the excavation, significant amounts of sand and sediment were discharged, and continue to discharge, into the Snake River.

19. On September 23, 2020, EPA personnel conducted an investigation at the Site and confirmed the ongoing discharges of sand and sediment into the Snake River. EPA estimates approximately 1,600,000 million tons of sand and sediment were discharged between April 2020 and the date of the inspection. The inspector observed large deposits of sand and sediment in the Snake River for approximately three miles downstream from Mr. Minor’s property and that Respondents’ activity “changed the stream morphology from a defined and deep narrow channel river to a shallow channel that is spread out across the river valley with large amounts of sand deposited across the channel.”

20. The Snake River is a tributary to waters that are currently used in interstate commerce and is thus a “water 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.

21. The fill material discharged by Respondents into the Snake River, as well as the sediment in stormwater runoff from the Site, are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The earth moving equipment used to excavate the ditch are “point sources” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

23. The discharge of fill material into the Snake River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

24. The Site has “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14).

Findings of Violations

25. The facts stated in Paragraphs 1 to 24 above are herein incorporated.

26. Respondents did not obtain a permit issued pursuant to Sections 402 and/or 404 of the CWA, 33 U.S.C. §§ 1342 and 1344, prior to the performance of the fill placement described herein, nor did Respondents perform the work described herein under any prior permits issued pursuant to Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 and 1344.

27. Respondents’ discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 and 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Order for Compliance on Consent

Based on the Factual Background and Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

28. Respondents will take immediate steps to abate the ongoing erosion of the above-referenced ditch and discharge of sediment into the Snake River. Such efforts will be implemented and maintained until the implementation of the Work Plan referenced below.

29. Work Plan: Within 60 days of the effective date of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents’ plans to: (1) cut off the confluence of the excavated ditch to the Snake River and install grade control structures in the excavated channel to prevent head cut from migrating upstream; (2) restore, to the extent technically feasible, the original morphology of the Snake River; (3) design and implement controls to prevent the runoff of pollutants into the Snake River, and; (4) mitigate for lost river functions. The work shall be completed within twelve (12) months of approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.
- b. If EPA does not approve the Work Plan, Respondents shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of EPA’s disapproval.

- c. 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 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.

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

31. Once the work identified in the Work Plan has been completed, Respondents agree to submit a completion report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete. The completion report must be submitted within thirty (30) days after work has been completed.

32. Respondents agree to 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 functions. Annual monitoring reports must be submitted by December 1st of each year.

33. The submission of documents by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives 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.

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

Dr. Delia Garcia, or her delegate
garcia.delia@epa.gov
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

General Provisions

35. Respondents' failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondents have violated the Act and failed to comply with the terms of the Order.

36. 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.

37. 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 Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Access and Requests for Information

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

39. 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

40. 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.

Effective Date

41. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Termination

42. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

Signatories

43. The undersigned for each party have the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

For the Complainant, U.S. Environmental Protection Agency Region 7:

DAVID COZAD
Director
Enforcement and Compliance Assurance Division

DATE

CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

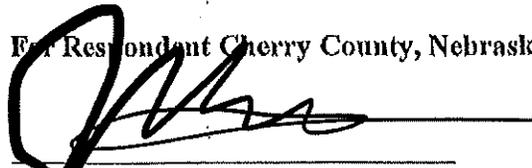
DATE

Richard Minor


SIGNATURE

6-8-2021
DATE

For Respondent Cherry County, Nebraska



SIGNATURE

06/10/2021

DATE

James Ward, Commissioner

NAME/TITLE

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered by electronic mail a true copy of this Administrative Order for Compliance on Consent to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

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

Richard Minor
87746 Minor Hull Road
Gordon, Nebraska 69343
glm@gpcom.net

and

Cherry County, Nebraska
Eric A. Scott, Attorney
P.O. Box 349
Valentine, Nebraska 69201
escott@shwisp.com

Date

Signature