

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

IN THE MATTER OF:)
)
) Docket No. CWA-07-2019-0053
Tim and Benjamin McCandless)
d/b/a McCandless Farms)
)
Respondent.)
)
) 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 (“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. Respondents are Tim and Benjamin McCandless (“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. 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 Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Specifically, 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.

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) agree to undertake all actions

required by the terms and conditions of this Order, and (3) consent to be bound by the requirements set forth 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*, Section 404 of the CWA, 33 U.S.C. § 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 United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. 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. § 112.2 (1993), and which include tributaries to, waters of the United States.

10. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

11. 40 C.F.R. § 232.2 defines “fill material” as material that “replaces any portion of the waters of the United States with dry land” or which “changes the bottom elevation of a water of the United States.”

12. 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

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

14. At all times relevant to this action, Respondents owned, operated, or otherwise controlled properties located in Section 21, Township 93 North, Range 17 West, Butler County, Iowa (42.822559, -92.905623) (hereinafter “Site”).

15. On or around October 2016, Respondents and/or persons on its behalf authorized and/or directed the placement of fill material using heavy equipment into approximately 2,700 linear feet of an unnamed tributary to Parmentar Creek.

16. On May 4, 2017, the Rock Island District received complaints from landowners with properties located near the Site of Respondents' property alleging that Respondents had "tiled and filled a stream."

17. On May 5, 2017, June 6, 2017, December 11, 2017, and April 16-17, 2018 representatives from the Corps conducted site investigations of Respondents' property and confirmed the above-referenced placement of fill material.

18. The sediment discharged by Respondents constitutes "fill material," and its actions constitute the "discharge of fill material" as those terms are defined in 40 C.F.R. § 232.2.

19. The fill material discharged by Respondents into the tributary to Parmentar Creek is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. The heavy equipment used to place fill material into the tributary are "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The discharge of sediment into the tributary of Parmentar Creek constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

22. Parmentar Creek and its tributary are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and 40 C.F.R. § 112.2 (1993).

23. Respondents' discharges 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, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

24. 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.

A. FINDINGS OF VIOLATION

25. 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 AGREE to and are hereby ORDERED as follows:

26. Within thirty (30) days after receipt of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents proposed restoration of the impacted Site. If Respondents and EPA agree that restoration of the impacted Site is not feasible, Respondents shall submit an alternative Work Plan for mitigation to EPA for review and approval. The restoration or mitigation work shall be completed within 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 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. Once the work identified in the Work Plan has been completed, Respondents shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

29. Respondents shall submit annual monitoring reports to EPA, beginning on 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 wetland and/or stream functions.

30. Any submission of documents by Respondents shall include the following written statement, followed by signature of 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.

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

Lantz Tipton
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Blvd.
Lenexa, Kansas 66219

32. 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/or seek additional penalties against Respondents for such noncompliance with the terms of the Order.

General Provisions

33. Failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in your 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 you have violated the Act and failed to comply with the terms of the Order.

34. 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.

35. 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

36. 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

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 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

38. 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

39. 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

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

Signatories

41. The undersigned for each party has 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, United States Environmental Protection Agency, Region 7:



JEFFERY ROBICHAUD
Director
Water, Wetlands and Pesticides Division

3/20/19

DATE



CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

3.20.19

DATE

For Respondent:

Tim McCandless by LME POA
Tim McCandless, OWNER

2-22-19
DATE

Ben McCandless
Benjamin McCandless, OWNER

2-22-19
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. Tim McCandless
3025 Greene Road
Greene, Iowa 50636

Mr. Benjamin McCandless
2020 300th Street
Greene, Iowa 50636

3.25.19
Date

