

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

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| IN THE MATTER OF: |) | |
| |) | Docket No. CWA-07-2020-0175 |
| Thomas Robrahn |) | |
| |) | FINDINGS OF VIOLATION AND |
| and |) | ORDER FOR COMPLIANCE |
| |) | ON CONSENT |
| Skillman Construction, LLC |) | |
| |) | |
| 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 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 Thomas Robrahn and Skillman Construction, LLC (“Respondents”).

3. The 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. 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 agrees 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*, 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 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 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.

11. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

12. 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.”

13. 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

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

15. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property bordering the Neosho River located in Section 26, Township 21 South, Range 15 East, near Burlington in Coffey County, Kansas (hereinafter “the Site”).

16. Beginning in at least 2017, Respondents began placing fill material, including broken concrete rubble and other demolition material, using heavy equipment such as a bulldozer into the Neosho River for bank stabilization purposes.

17. On April 21, 2020, Corps personnel conducted a site investigation and determined a CWA violation had occurred. The Corps observed approximately 400 cubic yards of broken concrete fill material below the ordinary high water mark of the Neosho River. The stream impacts total 240 linear feet.

18. On June 9, 2020, the Kansas City Corps District referred the results of the site investigation to EPA Region 7 for potential enforcement.

19. The section of the Neosho River near Burlington, Kansas and adjacent to the Site has known populations of Neosho Madtom (*Noturus placidus*), a federally-listed threatened species, as sampled and documented by the U.S. Fish and Wildlife Service.

20. Mr. Robrahn has previously obtained Section 404 permit authorizations for bank stabilization projects on the Neosho River, including an after-the-fact permit that was issued by the Corps in 2009 after consultation with the U.S. Fish and Wildlife Service that added required conditions to protect the Neosho Madtom.

21. The Neosho River is a “traditionally navigable water” and, therefore, 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.

22. The fill material discharged by Respondents into the Neosho River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

23. The heavy equipment used to place the fill material into the Neosho River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

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

Findings of Violation

25. The facts stated in Paragraphs 1 to 23 above are herein incorporated.

26. 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 placement 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.

27. 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.

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), the EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

28. Respondents shall comply with the CWA by immediately ceasing the placement of fill material into the Neosho River and taking steps to ensure that they do not place fill material into the Neosho River in the future.

29. Retention of Qualified Consultant: Respondents will retain a qualified consultant to perform a study of the Site and submit to EPA a Work Plan designed to remediate impacts of Respondents' work as follows:

- a. Within thirty (30) days of the effective date of this Order, Respondents shall provide to EPA in writing the name, address, phone number, electronic mail address and qualifications of a consultant.
- b. The EPA will approve/disapprove of Respondents' consultant based upon the person's qualifications and ability to effectively perform this role. The qualifications of the persons undertaking the Work for Respondents shall be subject to the EPA's review, for verification that such persons meet minimum technical background and experience requirements of the EPA. All persons under the direction and supervision of Respondents' consultant must possess all necessary professional licenses required by law.

30. Work Plan: Within thirty (30) days of the EPA's approval of the consultant, Respondents shall submit a Work Plan to the EPA for review and approval that shall describe Respondents' proposed plan to achieve restoration of the Site or mitigation to address the impacts from the unauthorized fill material. The Work Plan shall include:

- a. A determination by the consultant retained by Respondents of whether restoration should be pursued depending on whether it would result in unacceptable impacts to the Neosho madtom that cannot be avoided or mitigated. Respondents shall submit the technical justification for that determination, including the results of any consultation or other coordination with the U.S. Fish and Wildlife Service.
- b. If restoration of the Site will not be pursued, the Work Plan must include a proposed plan to mitigate the impacts to the Neosho River from the unauthorized fill material described herein. Purchase of credits from an approved mitigation bank servicing the area would be the preferred mitigation alternative.
- c. If restoration of the Site will be pursued, the Work Plan must include: any conditions imposed by other agencies; information concerning the methods and equipment proposed to accomplish the work; where the removed fill

material will be placed; visual representations of proposed alterations to the stream and banks; erosion control measures; and information about any planned vegetation that will be planted including species information, size, and quantities.

- d. 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.

31. Review and Approval. 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 in the approved work plan.
- b. Respondents 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 the 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 the EPA's disapproval.
- d. Upon resubmission, the EPA, in its sole discretion, may either approve the Work Plan, or if the EPA determines that the Work Plan does not adequately address the comments provided by the EPA, the 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.

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

33. Completion Report. Within thirty (30) days of completion of the work identified in the Work Plan, 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.

34. Annual Monitoring Reports. Respondents agree to submit annual monitoring reports to the 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 narrative 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.

35. 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.

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

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

General Provisions

37. 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 the 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.

38. 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.

39. 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. The 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. The 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

40. Nothing in this Order shall limit the 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

41. 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

42. 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

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

Termination

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

Signatories

45. 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:

Issued on _____.

DAVID COZAD
Director
Enforcement and Compliance Assurance Division

SHANE MCCOIN
Assistant Regional Counsel
Office of Regional Counsel

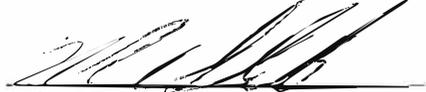
For Respondent Thomas Robrahn


SIGNATURE

11/10/2020
DATE

Thomas F. Robrahn
NAME/TITLE

For Respondent Skillman Construction LLC



SIGNATURE

11-10-2020

DATE

Mike A Skillman

NAME/TITLE

CERTIFICATE OF SERVICE

I certify that on the date noted below I delivered this Findings of Violation and Administrative Order for Compliance on Consent to the Regional Hearing Clerk, U.S. Environmental Protection Agency, by electronic mail to R7_Hearing_Clerk_Filings@epa.gov.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance on Consent by electronic mail to the following:

For Respondent, Thomas Robrahn:

Robrahnlawoffice@terraworld.net

For Respondent, Skillman Construction, LLC:

mike@skillmanconst.com

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

garcia.delia@epa.gov

Delia Garcia, PhD, Enforcement and Compliance Assurance Division

mccoin.shane@epa.gov

Shane McCoin, Office of Regional Counsel

Date

Signature