

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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 901 NORTH 5TH STREET ENVIRONMENTAL PROTECTION
 KANSAS CITY, KANSAS 66101 AGENCY-REGION VII
 REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
)
 KEN PETSKA)
)
 Respondent)
)
 Proceedings under Section 309(a)(3) of the)
 Clean Water Act, 33 U.S.C. § 1319(a)(3))
 _____)

Docket No. CWA 07-2008-0078

FINDINGS OF VIOLATION,
ORDER FOR COMPLIANCE

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: The Respondent in this case is Mr. Ken Petska (“Respondent”). Mr. Petska is an individual whose mailing address is Highway 11, Box 91, Elyria, Nebraska 68837. Mr. Petska owns property near Elyria, Nebraska located along the North Loup River in the northwest quarter of Section 23, Township 20 North, Range 15 West, Valley County, Nebraska.

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 (hereinafter "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 intrastate rivers and streams, and tributaries thereto.

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. Respondent is 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, Respondent owned, operated, or otherwise controlled the property located in the northwest quarter of Section 23, Township 20 North, Range 15 West in Valley County, Nebraska ("the Property"). The Property is adjacent to the North Loup River.

10. At various times between August 2002 and July 2005, the Respondent and/or persons acting on his behalf, discharged dredged or fill material including dirt, spoil, rock and sand, at the Property into an area in and adjacent to the North Loup River near Elyria, Valley County, Nebraska. The Respondent using earth moving equipment placed dredged or fill material in and around the river while trying to construct an access road from the river bank to an island in the North Loup River. These actions impacted approximately 1.5 acres of property within and adjacent to the river along approximately 1,000 feet of the river.

11. On June 29, 2006, the Corps inspected the Property and documented the discharges of fill material described in Paragraph 10.

12. The discharge and disposal of dredged and/or fill material within the river has altered the natural flow of the North Loup River.

13. The dredged and/or fill materials discharged by Respondent into the North Loup River includes spoil, rock, sand, and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

15. The discharge of the dredged and/or fill material into the North Loup River at the Property, described in Paragraph 10 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

16. The North Loup River which flows into the Loup River, which flows into the Platte River, which flows into the Missouri River, are all "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.

17. Respondent's 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, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

A. FINDINGS OF VIOLATION

18. The facts stated in paragraphs 8 through 17 above are herein incorporated.

19. Respondent 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 was the Respondent performing the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

20. Respondent's discharge and disposal of pollutants from a point source into waters of the United States, as described above, occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges and disposals violated Section 301 of the CWA, 33 U.S.C. § 1311.

B. 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), Respondent is hereby ORDERED as follows:

21. Within thirty (30) days after receipt of this Order, Respondent shall submit a Work Plan to EPA for review and approval that shall describe Respondent's proposed mitigation actions, including: (1) a proposal of the work required to restore the free flow of water and aquatic passage from the dredged and fill material obstructing the North Loup River as described in paragraph 10, and (2) a proposal to provide compensatory mitigation for the 1.5 acres impacted by Respondent as described in paragraph 10.

22. Once approved by EPA, the Work Plan identified in paragraph 21 shall be incorporated by reference and fully enforceable under the terms of this Order for Compliance and shall be completed within sixteen (16) months in accordance with the specifications set forth in the Work Plan.

23. Once the work identified in paragraph 21 has been completed, the Respondent shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

24. The submission of documents by Respondent, as identified in paragraphs 22 and 23 shall include the following written statement, followed by the Respondent's signature:

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.

25. In the event Respondent fails 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 the Respondent and/or seek additional penalties against the Respondent for such noncompliance with the terms of the Order.

26. All documents to be submitted to EPA under this Order shall be submitted by mail to the following individuals:

Raju Kakarlapudi
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101

And

Chris Muehlberger
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

General Provisions

Effect of Compliance with the terms of this Order

27. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of his responsibility to obtain any required local, state, and/or federal permits.

28. 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

29. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondent and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

30. If any provision or authority of this Order, or the application of this Order to Respondent, 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

31. This Order shall apply to and be binding upon the Respondent, his agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein comply with the terms of this Order.

Effective Date

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

Termination

33. 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.

for Karen A. Flourney
WILLIAM A. SPRATLIN

Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7

1-7-09
DATE

Chris Muehlberger
CHRIS MUEHLBERGER

Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII

12-16-08
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. Ken Petska
Highway 11, Box 91
Elyria, Nebraska 68837.

Date