

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

11 SEP 26 PM 2:44
ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
)
MILAN LIVESTOCK AUCTION, INC.) Docket No. CWA-07-2010-0122
)
)
)
Respondent) AMENDED CONSENT AGREEMENT/
) FINAL ORDER
)
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

The United States Environmental Protection Agency, Region 7 (EPA) and Milan Livestock Auction, Inc. (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

COMPLAINT

Jurisdiction

1. This Amended Consent Agreement/Final Order (CA/FO) is being filed under the authority vested in the Administrator of EPA, pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g) and in accordance with the Consolidated Rules, 40 C.F.R. Part 22.

2. This CA/FO alleges that the Respondent discharged pollutants into waters of the United States in violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation is the Director of Region 7's Water, Wetlands and Pesticides Division. 4. Respondent is Milan Livestock Auction, Inc., which owns and operates a livestock auction business in Sullivan County, Missouri.

4. Respondent is Milan Livestock Auction, Inc., which owns and operates a livestock auction business in Sullivan County, Missouri.

Statutory and Regulatory Background

5. 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. Section 404 of the CWA provides that pollutants may be discharged only in accordance with the terms of a permit for the discharge of dredged or fill material.

6. 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.

Factual Background

7. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

8. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located in Sections 11 and 14, Township 62 North, Range 20 West, Sullivan County, Missouri (hereinafter “the Site”).

9. In 2008 and 2009, Respondent and/or persons acting on its behalf and using earth moving equipment, authorized and/or directed the discharge of dredged or fill material including, but not limited to, dirt, spoil, rock, and sand, into approximately 17 acres of wetlands. Additionally, Respondent, using earth moving equipment, channelized approximately 590 linear feet of East Locust Creek.

10. On March 31, 2009, and May 26, 2009, the Corps inspected the Site and documented the discharges of fill material and channeling activity described in Paragraph 9.

11. The dredged and/or fill materials discharged by Respondent into East Locust Creek and adjacent wetlands referenced in Paragraph 9 are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

12. The earth moving equipment referenced in Paragraph 9 constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

13. The discharge of the dredged and/or fill material into East Locust Creek and adjacent wetlands referenced in Paragraph 9 constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

14. East Locust Creek and adjacent wetlands referenced in Paragraph 9 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.

15. 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.

FINDINGS OF VIOLATION

16. The facts stated in Paragraphs 7 through 15 above are herein incorporated.

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

18. Respondent’s 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.

CONSENT AGREEMENT

19. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA’s jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

20. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

21. Respondent waives any right to contest the allegations and his right to appeal the proposed Final Order accompanying this Consent Agreement.

22. Respondent and Complainant each agree to bear their own costs and attorney’s fees.

23. Nothing contained in the Final Order shall alter or otherwise affect Respondent’s obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

24. The undersigned representative of Respondent certifies that he is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

25. Respondent certifies by the signing of this CA/FO that it is in compliance with all requirements of Sections 301 and 404 of the CWA, and all regulations promulgated thereunder; and that it is scheduled to be in compliance with the terms outlined in EPA's December 29, 2009 Order for Compliance, Docket No. CWA-07-2010-0045.

26. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 25 above, of this CA/FO.

Reservation of Rights

27. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

28. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

1. EPA has considered the appropriateness of the penalty pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and has determined that the appropriate penalty for the violations set forth in the Complaint is \$39,000. Respondent requested, and EPA agreed to, payment of the penalty in installments including interest for a total penalty of \$39,548.96. After paying an initial penalty payment of \$4,943.62, Respondent claimed that it was unable to pay the remaining penalty amount due to changes in financial circumstances that occurred after the original CA/FO was executed. A review of Respondent's financial records demonstrates that Respondent is unable to pay any remaining penalty in this matter. Therefore, Complainant agrees to resolve the claims alleged in the Complaint for \$4,943.62 dollars.

Parties Bound

2. This Final Order shall apply to and be binding upon the Respondent, its agents, successors, and assigns. Respondent 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 CA/FO.

Effective Date

3. This Final Order shall become effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

8-11-11
Date


Karen A. Flournoy
Acting Director
Water, Wetlands and Pesticides Division

7.19.11
Date


Chris Muehlberger
Assistant Regional Counsel

In the matter of:
Milan Livestock Auction, Inc.
Docket No: CWA: 07-2010-0122

RESPONDENT:
MILAN LIVESTOCK, INC.

08-01-2011
Date


Wendell Fleshman
Owner
Milan Livestock Auction, Inc.

In the matter of:
Milan Livestock Auction, Inc.
Docket No: CWA: 07-2010-0122

IT IS SO ORDERED.

Sept 26, 2011
Date



Robert L. Patrick
Regional Judicial Officer

IN THE MATTER OF Milan Livestock Auction, Inc., Respondent
Docket No. CWA-07-2010-0122

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Amended Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Chris Muehlberger
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Wendell Fleshman
Milan Livestock Auction, Inc.
52825 Business Highway 5
Milan, Missouri 63556

Dated: 9/27/11



Kathy Robinson
Hearing Clerk, Region 7