

FILED

May 16, 2024

12:52PM

U.S. EPA REGION 7
HEARING CLERK

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2024-0045
Rooster Management, LLC)	
)	COMPLAINT AND
Respondent)	CONSENT AGREEMENT /
)	FINAL ORDER
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with 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.

2. Complainant, the U.S. Environmental Protection Agency Region 7 (“EPA”) and Respondent has agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order serves as notice that the EPA has reason to believe that the Respondent has violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311, 1344.

Parties

4. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (collectively referred to as the “Complainant”).

5. The Respondent in this case is Rooster Management, LLC (“Respondent”).

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”, 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.”

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” as the “waters of the United States, including the territorial seas.”

10. 40 C.F.R. § 232.2 defines “dredged material” as material that is excavated or dredged from waters of the United States.

11. 40 C.F.R. § 232.2 defines the “discharge of dredged material” as any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.

12. 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.”

13. 40 C.F.R. § 232.2 defines “discharge of fill material” as the addition of fill material into waters of the United States.

EPA’s General Allegations

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

15. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located at Section 20, Township 46, Range 30, Cass County, Missouri. Lat: 38.777582885429595 Long: -94.26845970376097 (hereinafter “the Site”).

16. Sometime between May and September of 2021, Respondent, using earth moving equipment at the Site, authorized, directed, and/or placed fill material into a 0.47-acre area of wetlands near the southwest corner of the property. On or about October 15, 2021, the Army Corps of Engineers (“Corps”) received a citizen complaint regarding work being done at the Site.

17. On or about November 4, 2021, the Corps conducted a field investigation at the Site. The investigation documented that the Respondent or somebody acting on his behalf had filled approximately 0.47 acres of a wetland in the southwest corner of the Site. During this investigation the Corps told Mr. Clay Kohler, the owner of Rooster Management, LLC, that a CWA 404 permit would be required for any additional fill material added at the Site.

18. On March 1, 2022, Respondent was emailed a letter by the Corps informing him that the wetlands in question were presumed jurisdictional, and that no further fill of waters at the site was allowed without a Corps permit.

19. On July 6, 2022, Respondent was sent a Notice of Violation by the Corps confirming that no further fill material was to be added to the Site without a CWA Section 404 permit.

20. On or about July 20, 2022, the Corps conducted another field investigation at the Site. This investigation revealed that additional fill material had been added to the Site. Activities at the Site had filled 1.64 acres of jurisdictional wetlands with approximately 19,360 cubic yards of fill. Respondent had also filled part of an unnamed tributary that runs through the Site.

21. The unnamed tributary has continuous flow for at least three months of the year and is connected to Big Creek.

22. Big Creek is a perennial stream that typically flows year-round and is connected to South Fork Grand River.

23. South Fork Grand River is a perennial stream that typically flows year-round and is connected to Harry S. Truman Lake, a traditional navigable water.

24. The unnamed tributary at the site, Big Creek, and South Fork Grand River are each a relatively permanent water connected to Harry S. Truman Lake, a traditional navigable water.

25. The wetlands at the Site abut the unnamed tributary.

26. The wetlands at the Site have a continuous surface connection to relatively permanent waters that are connected to a traditional navigable water.

27. Respondent's discharges of fill into the unnamed tributary and wetlands at the Site resulted in the total loss of approximately 330 linear feet of stream and 2.53 acres of wetlands.

28. The fill material discharged by Respondent's activities into the wetlands and unnamed tributary are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

30. The discharge of the fill material into the wetlands and unnamed tributary constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

31. The wetlands and unnamed tributary at the Site are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

EPA’s Findings of Violation

32. The facts stated in Paragraphs 11 to 31 above are herein incorporated.

33. 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 fill placement 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.

34. 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.

Penalty

35. As alleged by EPA above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted pursuant to 40 C.F.R. § 19.4, for violations that occurred on or after November 2, 2015, where penalties are assessed on or after January 6, 2023, Respondent is liable for civil penalties of up to \$25,847 per day for each day during which the violation continues, up to a maximum of \$323,081.

CONSENT AGREEMENT

36. Respondent and EPA agree to the terms of this Consent Agreement/Final Order.

37. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA’s jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.

38. Respondent neither admits nor denies the factual allegations asserted by the EPA in this Complaint and Consent Agreement/Final Order.

39. Respondent waives their right to contest any issue of fact or law set forth above, and their rights to appeal this Consent Agreement/Final Order.

40. Respondent and Complainant agree to conciliate the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney’s fees incurred as a result of this action.

41. Respondent consents to receive service of the filed Consent Agreement and Final Order electronically at the following email addresses:

Todd Hauser
Attorney for Respondent
todd@bushyheadlaw.com

42. The undersigned representative of Respondent certifies that they are fully authorized to enter the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

43. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.

44. Respondent certifies by the signing of this Consent Agreement/Final Order that the Site is in compliance with EPA's Administrative Order for Compliance on Consent, Docket No. CWA-07-2024-0054, which will bring the Site into compliance with Section 404 of the CWA, 33 U.S.C. § 1344.

Penalty Payment

45. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **\$50,431** to be paid in full no later than 30 days after the effective date of this Consent Agreement/Final Order pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g).

46. The penalty payment shall identify Respondent by name and docket number "CWA-07-2024-0045," and shall be by certified or cashier's check made payable to "Treasurer, United States of America," and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

47. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Adam Hilbert, Attorney
Hilbert.adam@epa.gov

48. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

49. Interest on any late payment will be assessed at the annual interest rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date stated in Paragraph 36 above through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

Effect of Settlement and Reservation of Rights

50. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

51. The effect of settlement described above is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in this Consent Agreement/Final Order.

52. Nothing contained in this Consent Agreement/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.

53. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

54. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

General Provisions

55. The Parties acknowledge that this Consent Agreement/Final Order is subject to the public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

56. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective after signature by the authorized regional official and upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

57. The state of Missouri has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

58. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

59. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed electronically in part and counterpart.

For the Complainant, United States Environmental Protection Agency Region 7:

David Cozad
Director
Enforcement and Compliance Assurance Division

Adam Hilbert
Office of Regional Counsel

For Respondent:

Rooster Management, LLC



SIGNATURE

3/4/24

DATE

John C. Kolbr President

NAME/TITLE

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

Certificate of Service

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

Copy by email to representatives for Respondent:

Todd Hauser
Attorney for Respondent
todd@bushyheadlaw.com

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

Delia Garcia, Ph.D
Enforcement and Compliance Assurance Division
garcia.delia@epa.gov

Adam Hilbert
Office of Regional Counsel
hilbert.adam@epa.gov

Date

Signature