

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

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
) Docket No. CWA-07-2010-0122
MILAN LIVESTOCK AUCTION, INC.)
)
)
)
Respondent) 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 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.

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 consents to the issuance of the Final Order and consents to the payment of a civil penalty in the amount of \$39,548.96.

26. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Findings of Violations.

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. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty of \$39,150 plus interest of \$398.96 over a period of two years, for a total payment of \$39,548.96. The total civil penalty of \$39,548.96 shall be paid in eight installments. The first payment of \$4,943.62 is due within thirty (30) days of the effective date of this CA/FO. The remaining payments shall be paid as outlined below:

Date	Payment Amount
11/15/2010	\$4,943.62
2/15/2011	\$4,943.62
5/15/2011	\$4,943.62
8/15/2011	\$4,943.62
11/15/2011	\$4,943.62
2/15/2012	\$4,943.62
5/15/2012	\$4,943.62

Payments of the penalty shall be by cashier or certified check made payable to "United States Treasury." The checks must include the docket number and the name of the case. The checks must be remitted to:

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

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

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.

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

RESPONDENT:
MILAN LIVESTOCK AUCTION, INC.


7-15-2010
Date

Wendell Fleshman
Wendell Fleshman
Owner
Milan Livestock Auction, Inc

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

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

7-26-10
Date


for William A. Spratlin
Director
Water, Wetlands and Pesticides Division

7.26.10
Date


Chris Muehlberger
Assistant Regional Counsel

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

IT IS SO ORDERED.

September 14, 2010
Date

Robert L. Patrick
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 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

Copy by First Class Mail to:

Mr. Michael Comodeca, Esq.
Spencer Fane Britt & Browne LLP
9401 Indian Creek Parkway, Suite 700
Overland Park, Kansas 66210-2005

Dated: 9/14/10



Kathy Robinson
Hearing Clerk, Region 7