

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

Roger Harders,)

Respondent)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

Docket No. CWA-07-2004-0331

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, 40 C.F.R. Part 22.

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Sections 301 and 404 of the CWA, 33 U.S.C. § 1311 and § 1344, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of 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 (Complainant).

4. Respondent, Roger Harders, is a private individual residing at 1775 County Road M, Wahoo, Nebraska 68066.

Statutory and Regulatory Framework

5. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of “pollutants” by any “person” into “navigable waters” as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in compliance with, inter alia, a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

6. 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.

7. 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 “wetlands.”

8. “Wetlands” are defined at 40 C.F.R. § 232.2 as those areas that are inundated or saturated by surface or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

9. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the commencement of an action for administrative penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

General Allegations

10. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

11. At all times relevant to this action Respondent either owned or otherwise controlled property located in the Southwest 1/4 of Section 33, Township 15 North, Range 7 East, Saunders County, Nebraska, which contains a tributary of Cottonwood Creek (hereinafter “the property”).

12. At various times between July 1999 and September 2000, Respondent and/or persons acting on his behalf, discharged dredged or fill material into an unnamed tributary to Cottonwood Creek located in the Southwest 1/4 of Section 33, Township 15 North, Range 7 East, Saunders County, Nebraska. The Respondent and/or persons acting on his behalf using earth moving equipment filled the then existing stream channel and excavated a new channel impacting approximately 1,035 linear feet of the waterway. The work performed by Respondent straightened the stream channel by removing two former meanders in the tributary and directing the water flow through a different channel created by Respondent.

13. The areas of the discharge and disposal of fill and/or dredged material and the area of excavation of the channel on the property are characterized as "wetlands," as defined at 40 C.F.R. § 232.2.

14. The discharge and disposal of dredged and/or fill material and the excavation of the channel within the wetlands has altered the natural drainage pattern and hydrology of the area, resulting in the ongoing drainage of approximately 10 acres of wetlands.

15. On June 18, 2002, through the use of a quitclaim deed the Respondent transferred ownership of the property to his two minor children Ethan M. Harders and Elizabeth M. Harders. The Respondent still maintains control of the use of the property.

16. On July 18, 2002, the Corps spoke with the Respondent on the telephone and explained the potential violation of the CWA because of the actions described in paragraph 12. During this phone conversation the Corps explained the CWA Section 404 permitting process and requested a proposal to remedy the violation.

17. The Corps and the Respondent were not able to agree on a satisfactory resolution of the violation, and the Corps referred the matter to EPA, Region 7, through a letter dated August 14, 2002.

18. The EPA made several attempts to resolve the matter with the Respondent, including letters dated January 15, 2004 and April 21, 2004. The Respondent was either uncooperative or unresponsive to EPA attempts to resolve the matter.

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

20. The fill and/or dredged materials excavated and discharged and disposed of into the wetlands and tributary on the property 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).

21. The discharge and disposal of the fill and/or dredged material into the wetlands and tributary on the property, as described in Paragraphs 12 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

22. The tributary of Cottonwood Creek which flows into Cottonwood Creek, which flows into Wahoo Creek, which flows into the Platte River, and the wetlands on the property 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.

Count 1
Unpermitted Discharge

23. The facts stated in paragraphs 10 through 22 above are herein incorporated.

24. The Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to perform the work described herein, nor was Respondent performing the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

25. Respondents' 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.

26. The Respondent has not made any effort to remedy the discharge of the pollutants to waters of the United States and therefore, the violation is continuing.

Relief

27. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Under the Civil Monetary Inflation Rule, 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$137,500, may be assessed for violations of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, that occur after January 30, 1997.

28. Based on the foregoing Allegations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violation cited above, in the amount of \$66,000.

29. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

30. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

31. If Respondent does not contest the findings and assessments set forth above, Respondent may within thirty (30) days of receipt of this Complaint, make payment of the penalties assessed herein, remitted as follows:

Payment of the penalty -\$66,000- may be made by certified or cashier's check payable to "Treasurer, United States of America" and remitted to:

EPA-Cincinnati Finance Center
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

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 simultaneously be sent to:

Mr. Larry Long
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101

32. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

33. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with 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, a copy of which is enclosed herein.

34. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to

constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk
United States Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101

35. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

36. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

37. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4)(B) of CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

38. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

Informal Settlement Conference

39. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Steven L. Sanders
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone (913) 551-7578

40. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

41. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

42. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

9/23/04
Date

Mary A. Tety Mindrup for
Leo J. Alderman
Director
Water, Wetlands and Pesticides Division

Steven L. Sanders
Steven L. Sanders
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; a copy of the Revised CWA Section 404 Settlement Penalty Policy; and a copy of the U.S. EPA Small Business Resources Information Sheet to the following persons:

Mr. Roger Harders
1775 County Road M
Wahoo, Nebraska 68066

9/28/4
Date

Debby White
Signature

Debby White
Printed Name