

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

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901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

KEVIN VAUGHAN)

and)

BRYCE ANDERSEN,)

Respondents)

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-07-2010-0105

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 (Consolidated Rules).

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondents 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 Kevin Vaughan's mailing address is 800 Stevens Port Drive, Suite DD836, Dakota Dunes, South Dakota 57049. Respondent Bryce Andersen's mailing address is 765 200th Street, Dakota Dunes, South Dakota 68731.

Statutory and Regulatory Framework

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.

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.

7. 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.

8. 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.

9. 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

10. Respondents are "persons" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

11. At all times relevant to this action, Respondents owned, operated, or otherwise controlled the impacted property, as described in Paragraph 12, located in Township 32 North, Range 5 East in Dixon County, Nebraska ("the Property"). The Property is adjacent to the Missouri River.

12. At various times in the fall of 2005, the Respondents and/or persons acting on their behalf, discharged dredged or fill material including dirt, spoil, rock, and sand at the Property into wetlands and waters of the United States in Dixon County, Nebraska. Specifically, the Respondents used earth moving equipment to excavate material from a point bar on the Missouri River. Respondents placed the excavated material into Turkey Creek and wetlands adjacent to Turkey Creek and the Missouri River, impacting approximately 21.84 acres of wetlands and 1,250 linear feet of Turkey Creek.

13. On May 31, 2006, the Corps inspected the Property and documented the discharges of fill material described in Paragraph 12.
14. The discharge of dredged and/or fill material within the river altered the natural flow of the river by disconnecting the river's backwaters and tributaries, including Turkey Creek.
15. The dredged and/or fill materials discharged by Respondents into the river and adjacent wetlands include spoil, rock, sand and dirt, and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
16. 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).
17. The discharge of the dredged and/or fill material into the Missouri River, Turkey Creek and adjacent wetlands, as described in Paragraph 12 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).
18. The Missouri River, Turkey Creek and adjacent wetlands 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.
19. Respondents' 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.

Finding of Violation

20. The facts stated in Paragraphs 10 through 19 above are herein incorporated.
21. Respondents 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 were the Respondents performing the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. To date, since Fall 2005, Respondent has not applied for a Section 404 permit.
22. Respondents' discharge and disposal of pollutants from a point source into waters of the United States, which has continued daily since Fall 2005 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.

Relief

23. 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. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA's implementing regulations at 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 \$157,500, may be assessed for violations of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, that occur after March 15, 2004. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2008, civil administrative penalties of up to \$16,000 per day for each day during which a violation continues, up to a maximum of \$177,500, may be assessed for violations of CWA Sections 301 and 404, 33 U.S.C. §§ 1311 and 1342, that occur after January 12, 2009.

24. Based on the foregoing Finding of Violations, 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 Respondents for the violations cited above, in the amount of up to \$11,000 per day for each day during which a violation occurred between March 16, 2004, and January 12, 2009, and up to \$16,000 per day for each day during which a violation occurred after January 12, 2009, up to a maximum of \$177,500.

25. 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.

26. 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 Respondents establish bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

27. 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

28. Respondents 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, a copy of which is enclosed herein.

29. 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, Respondents 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 Respondents have any knowledge, or shall clearly state that Respondents have 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 Respondents dispute; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

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

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

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

32. 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.

33. If Respondents fail to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondents may be found in default. Such default by Respondents constitutes an admission of all facts alleged in the Complaint and a waiver of Respondents' 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.

34. Whether or not Respondents request 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:

Chris Muehlberger
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone: 913-551-7623.

35. 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.

36. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an 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 (CAFO) issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a CAFO shall constitute a waiver of Respondents' right to request a hearing on any matter stipulated therein.

37. If Respondents have 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.

In the Matter of :
Kevin Vaughan & Bryce Andersen
CWA-07-2010-0105
Page 7

6/23/10
Date


William A. Spratkin
Director
Water, Wetlands and Pesticides Division

6.25.10
Date


Chris Muehlberger
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. Kevin Vaughan
800 Stevens Port Drive
Suite DD836
Dakota Dunes, South Dakota 57049

Mr. Kevin Hupp, Esq.
Ms. Stacia Palser, Esq.
Koley Jessen P.C., L.L.O.
One Pacific Place
1125 South 103 Street, Suite 800
Omaha, Nebraska 68124

6.25.10

Date

Chris Muehlberger

Signature

Chris Muehlberger

Printed Name