

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)
)
)
TIMOTHY D. HENRY, doing business as) Docket No. CWA-07-2011-0049
HENRY BROTHERS FARMS,)
)
)
Respondent,) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
)
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
)

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“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.

2. The Respondent in this case is Timothy D. Henry, doing business as Henry Brothers Farms (“Respondent”). Mr. Henry’s mailing address is 8 East Amador Street, Seneca, Kansas 66538-2302.

Statutory and Regulatory Framework

3. 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.

4. 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.

5. 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.

6. 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 adjacent to waters of the United States.

7. 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

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

9. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located in Section 6, Township 5 South, Range 13 East, in Nemaha County, Kansas (hereinafter "the Site").

10. During August and/or September 2010, Respondent and/or persons acting on its behalf and using earth moving equipment authorized and/or directed the excavation and fill of approximately 2,300 linear feet of Vermillion Creek.

11. On October 7, 2010, the Corps visited the Site and documented the discharges of dredged and fill material described in Paragraph 10.

12. The dredged and fill materials discharged by Respondent into Vermillion Creek referenced in Paragraph 10 are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

13. The discharge of the dredged and fill materials into Vermillion Creek referenced in Paragraph 10 constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

14. The earth moving equipment referenced in Paragraph 10 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

15. Vermillion Creek, referenced in Paragraph 10, is a "water 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.

16. 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 in Paragraph 10, nor did

Respondent perform the work described in Paragraph 10 under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

Findings of Violation

17. The facts stated in Paragraphs 8 through 16 above are herein incorporated.
18. Respondent's discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Order for Compliance

Based on the Factual Background and Findings of Violation set forth above, and pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED as follows:

19. Within 30 days of receipt of this Order, Respondent shall submit a Work Plan to EPA for review and approval that describes Respondent's proposed restoration of the impacted Site described in Paragraph 10 above. If Respondent believes that restoration of the impacted Site is not feasible, Respondent must contact EPA within 7 days of receipt of this Order to discuss the basis for its concerns. If Respondent and EPA agree that restoration of the impacted Site is not feasible, Respondent shall submit a Work Plan to EPA for review and approval within 45 days of receipt of this Order that describes Respondent's proposed mitigation project. The restoration or mitigation work shall be completed within nine months of EPA's approval of Respondent's Work Plan and in accordance with the specifications set forth in the Work Plan.

- a. The Work Plan should include, at a minimum: the projected work and materials necessary to restore the site or mitigate for lost wetlands and/or stream functions, including characterization of the soil, plant, and hydric conditions; the projected cost of the work; a projected schedule for completing the work; and a monitoring plan to maintain and document proper wetland and/or stream functions, pursuant to Paragraph 22 below.
- b. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved Work Plan.
- c. If EPA does not approve the Work Plan, Respondent shall address EPA's comments and resubmit the Work Plan for review within thirty (30) days of receipt of EPA's disapproval.
- d. Upon resubmission, EPA, in its sole discretion, may either approve the Work Plan, or if EPA determines that the Work Plan does not adequately address the comments provided by EPA, EPA may unilaterally modify the Work Plan and will provide Respondent with a copy of the Work Plan as modified. Respondent

shall implement the modified Work Plan according to the schedule contained therein.

20. Once approved by EPA, the Work Plan identified in Paragraph 19 shall be incorporated by reference and fully enforceable under the terms of this Order.

21. Once the work identified in Paragraph 19 has been completed, Respondent shall submit photographic evidence, copies of relevant documents, and a signed statement confirming that the work is complete.

22. Respondent shall submit annual monitoring reports to EPA, beginning on the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a narrative description of the status of the site, and the corrective actions, if any, that will be taken to correct the deficiencies in order to maintain proper wetland and/or stream functions.

23. The submission of documents by Respondent, as identified in Paragraphs 19, 21, and 22, shall include the following written statement, followed by signature of a duly authorized representative of Respondent:

I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

24. All documents to be submitted to EPA under this Order shall be submitted by mail to:

Delia Garcia, Ph.D.
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

25. In the event that Respondent fails to comply with the terms of this Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order against Respondent and/or seek additional penalties against Respondent for such noncompliance with the terms of the Order.

General Provisions

Effect of Compliance with the terms of this Order

26. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state, and/or federal permits.

27. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

28. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondent, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

29. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

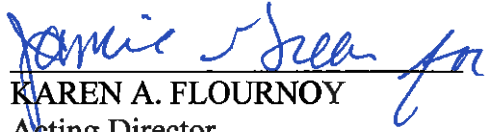
30. This Order shall apply to and be binding upon Respondent and its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

Effective Date

31. The terms of this Order shall be effective and enforceable against Respondent upon the date of its receipt of an executed copy of the Order.

Termination

32. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.



KAREN A. FLOURNOY
Acting Director
Water, Wetlands and Pesticides Division

3/17/11
DATE



ERIN WEEKLEY
Assistant Regional Counsel
Office of Regional Counsel

3/17/11
DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this signed Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a true and correct copy of the foregoing Findings of Violation and Administrative Order for Compliance by certified mail, return receipt requested, to:

Mr. Timothy D. Henry
8 East Amador Street
Seneca, Kansas 66538-2302;

and by first class mail to:

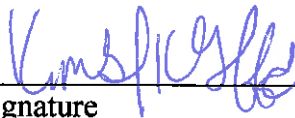
Mark Frazier
Chief, Regulatory Branch
Kansas City District Office
635 Federal Building
Room 402
Kansas City, Missouri 64106

and

Karl Mueldener
Director, Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson St., Suite 420
Topeka, Kansas 66612-1367.

3/17/11

Date



Signature