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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Nebraska Department of Roads	)	
	)	AMENDMENT TO FINDINGS
	)	OF VIOLATION/
and	)	ORDER FOR COMPLIANCE
	)	ON CONSENT
Herbst Construction, Inc.	)	
	)	
Respondents	)	Docket No. CWA -07-2007-0043
	)	
	)	
	)	
Proceedings under Section 309(a) of the	)	
Clean Water Act, 33 U.S.C. § 1319(a)	)	

AMENDMENT

Pursuant to Paragraph 40 of the FINDINGS OF VIOLATION/ ORDER FOR COMPLIANCE ON CONSENT, Docket No. CWA -07-2007-0043 (Mitigation Order), by mutual agreement, the Parties hereby agree to amend the Mitigation Order. All provisions of the original Mitigation Order remain in full force and effect except Paragraphs 26, 27, and 30 which shall be replaced by Paragraphs 26, 27, and 30 below. The replacement paragraphs shall be incorporated into the Mitigation Order and shall become effective upon signature of all Parties.

Replacement Paragraph 26

Respondent Herbst Construction, Inc. (Herbst) agrees to perform Mitigation by contributing $25,000 to the Sandhills Task Force consistent with the Memorandum of Agreement attached hereto and incorporated herein. Respondent shall make this payment within 15 days of the effective date of this Amendment.

Replacement Paragraph 27

Respondent Herbst shall notify EPA when Mitigation is complete and provide a i) description of the completed Mitigation project(s); ii) photographs taken at the conclusion of the project(s); iii) and a statement declaring that the Mitigation project(s) is (are) complete. The submittals shall be sent to Delia Garcia, PhD., Compliance Officer, or her successor at: Water, Wetlands and Pesticides Division, EPA Region VII, 901 North 5th Street, Kansas City, Kansas 66101.

Replacement Paragraph 30

Respondent Herbst shall include in the submittal required by Paragraph 27 above, the following certification:

> I certify that the information accompanying this submittal is true, accurate, and complete. I am aware that there are significant penalties for submitting false information to the United States, its agencies and departments, including the possibility of fine and imprisonment for knowing violations.

For the United States Environmental Protection Agency – Region VII

01/10/08
Date

Betty J. Berry
for William A. Spratlin, Director
Water, Wetlands, and Pesticides Division
U. S. Environmental Protection Agency Region VII

1/9/08
Date

Audrey B. Asher
Audrey B. Asher
Senior Assistant Regional Counsel
U. S. Environmental Protection Agency Region VII

The undersigned representative of the Nebraska Department of Roads certifies that he or she is authorized to enter into this Amendment to Order for Compliance on Consent and to execute and legally bind the Nebraska Department of Roads to the terms and conditions of this Amendment to Order for Compliance on Consent and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent Nebraska Department of Roads

Jan 7, 2008
Date

Signature

John L. Craig
Name printed

Director
Title printed

The undersigned representative of Herbst Construction, Inc. certifies that he or she is authorized to enter into this Amendment to Order for Compliance on Consent and to execute and legally bind Herbst Construction, Inc. to the terms and conditions of this Amendment to Order for Compliance on Consent and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent Herbst Construction, Inc.

12/31/07
Date

Signature

Michael E Herbst
Name printed

President
Title printed

Memorandum of Agreement

Herbst Construction Incorporated
and
Sandhills Task Force
for
Channel Mitigation, North Loup River

December 2007

WHEREAS, The Nebraska Department of Roads (NDOR) contracted with Herbst Construction Incorporated (Herbst Construction) to construct a new bridge over the North Loup River at Burwell, Nebraska; and

WHEREAS, During the course of the project, an earthen and rock jetty was constructed from the north bank into the river, just upstream of the bridge to divert flow and facilitate bridge construction; and

WHEREAS, Construction of the subject jetty was an action that would have required a new or amended Department of the Army (DA) permit, and was not authorized by the U.S. Army Corps of Engineers (Corps) pursuant to the Clean Water Act; and

WHEREAS, The Corps viewed the action as a violation of the Clean Water Act and by policy turned the matter over to the U.S. Environmental Protection Agency (EPA) for their discretionary action; and

WHEREAS, The EPA negotiated with the responsible parties (Herbst Construction and NDOR), and developed a settlement agreement; and

WHEREAS, The settlement agreement prescribed issuance of a financial penalty and mitigation for impacts to fish and wildlife resources that resulted from construction of the jetty; and

WHEREAS, Herbst Construction has requested assistance from the U.S. Fish and Wildlife Service (Service) to identify potential projects to restore and/or protect channel habitats for the purpose of mitigating for impacts to fish and wildlife habitats resulting from jetty construction on the North Loup River channel; and

WHEREAS, These projects could satisfy the mitigation requirements prescribed by EPA in the settlement agreement; and

WHEREAS, Herbst Construction, during the course of discussions with the Service, has committed to contributing $25,000 to the Sandhills Task Force (STF), a Nebraska public benefit corporation to mitigate for channel habitat impacts resulting from construction of the jetty on the North Loup River; and

WHEREAS, The sole responsibility of Herbst Construction for habitat restoration and/or protection of channel habitats is the contribution of $25,000 to the STF.

NOW, THEREFORE, Herbst Construction and the STF agree that the contribution amount shall be utilized for the restoration and/or protection of channel habitats along the North Loup River in accordance with the following stipulations;

STIPULATIONS

A. Restoration and/or protection of channel habitats shall occur within an area starting at the Burwell Bridge and extending upstream for a distance of 50 miles on the North Loup River.

B. The STF and Service will be responsible for all management and administration of the projects to restore and/or protect channel habitats.

C. Restoration and/or protection of channel habitats that are funded with the subject contribution amount will be completed within 3 years from the date of this signed MOA.

D. Potential projects to restore and/or protect channel habitats will be identified and evaluated by the STF, in coordination and concurrence with a representative of the Ecological Service's Nebraska Field Office.

E. A wildlife extension agreement or similar instrument will be implemented on the habitat protection/restoration project to ensure protection of said habitat restoration measures for a period of at least 10 years.

F. The STF will notify a representative of the Ecological Service's Nebraska Field Office who will in turn notify Herbst Construction in writing when the habitat restoration and/or protection project(s) is/are completed. Notification will include a location of the habitat restoration/protection project, description of restoration/protection methods utilized, aerial photographs of the area, and total number of acres of habitat restored and protected. Notification may also include an offer for a site inspection to be conducted at the discretion of the EPA, Corps, Herbst Construction, and Service representatives.

G. Nothing in this MOA shall be construed as a prohibition against the use of additional matching and/or other private, nonfederal, and/or federal funds used in conjunction with the contribution provided such additional funds are used in accordance with applicable regulation and policy.

H. This agreement shall be terminated upon completion and approval of the habitat restoration and/or protection project(s) by the EPA and Service representatives.

I. Modification, amendment, or termination of this agreement as necessary shall be accomplished by the signatories in the same manner as the original agreement, and in coordination and concurrence with the EPA and Service representatives.

J. Disputes regarding the completion of the stipulations of this agreement shall be resolved by the signatories in coordination and concurrence with the EPA and Service representatives. If the signatories cannot agree regarding a dispute, any one of the signatories may request the resolution of the dispute by elevating the matter to the appropriate higher level of management, in coordination and concurrence with EPA and Service representatives.

K. The $25,000 contribution from Herbst Construction shall be provided to the STF prior to the STF beginning work on locating, negotiating, and restoring and/or protecting channel habitats along the North Loup River. Up to 10 percent of the contribution could be used for administrative costs including construction management and project monitoring.

Signatories

Herbst Construction Incorporated

By: _____ Date: 12/13/07

Sandhills Task Force

By: Byron F. Eakington Date: 12-6-07