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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
901 N. 5<sup>TH</sup>  
KANSAS CITY, KANSAS 66101

<b>IN THE MATTER OF:</b>	)	
	)	
<b>STONECREEK DEVELOPMENT, LLC</b>	)	
<b>Tonganoxie, Kansas</b>	)	<b>FINDINGS OF VIOLATION,</b>
	)	<b>ORDER ON CONSENT</b>
	)	<b>FOR COMPLIANCE</b>
	)	
<b>Respondent</b>	)	
	)	<b>Docket No.CWA-07-2006-0168</b>
<b>Proceedings under Section 309(a)(3) of the</b>	)	
<b>Clean Water Act, 33 U.S.C. § 1319(a)(3)</b>	)	
_____	)	

**A. FINDINGS OF VIOLATION**

**Preliminary Statement**

1. The following Findings of Violation are made and Order on Consent for Compliance ("Order on Consent") 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 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 Stonecreek Development, LLC ("Respondent"), which is a company incorporated under the laws of State of Kansas and authorized to conduct business in the State of Kansas. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as the Stone Creek development site located near Tonganoxie, Kansas, at the South East corner of Parallel Road and County Road No. 5 ("the Site"). On or about May 10 and 16, 2005, EPA performed an inspection of the Stone Creek Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the treatment and disposal of storm water at the Stone Creek Site, in accordance with the CWA. At the time of EPA's inspection, the Site had developed four phases, with a total of 10 phases planned. Following EPA's inspection, on May 16, 2005, a Notice of Potential Violation (NOPV) was issued to Respondent.
3. This Findings of Violations and Order on Consent address discharges of pollutants by Respondent into the waters of the United States without the permit(s) required by law.

Specifically, 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. 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.

4. 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.

5. At various times prior to May, 2005, the Respondent and/or persons acting on its behalf using earth moving equipment filled the then existing stream channel and excavated a new channel impacting 1,000 to 5,000 linear feet of unnamed tributaries to Tonganoxie Creek. The work performed by Respondent straightened the stream channel by removing meanders in the tributaries and directing the water flow through different channels and structures created by Respondent.

#### **Specific Findings**

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

7. During the time periods of the discharges of dredged and/or fill material into the unnamed tributaries of Tonganoxie Creek described above, Respondent owned the property on which the discharges took place.

8. Respondent’s discharge of dredged and/or fill material within the tributaries of Tonganoxie Creek altered the natural drainage pattern of the tributaries, resulting in the blockage of the natural channel of the tributaries, and the cutting of a new channel which straightened the stream channel by removing meanders in the channel and affecting an estimated 1,000 to 5,000 linear feet of the waterway.

9. The dredged and/or fill materials discharged by Respondent into the tributary of Tonganoxie Creek and the wetlands 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).

10. The earth moving equipment referenced in Paragraph A.5 above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

11. The discharge of the dredged and/or fill material into the wetlands and tributaries on the property, described in Paragraphs A.5 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

12. The unnamed tributaries of Tonganoxie Creek and Tonganoxie Creek 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.

13. Respondent’s discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

14. To date, Respondent has failed to restore the filled areas of the unnamed tributaries of Tonganoxie Creek to their pre-discharge configuration. The adverse effects on the environment of Respondent’s illegal discharges into the tributaries of Tonganoxie Creek are ongoing. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

### **B. ORDER ON CONSENT FOR COMPLIANCE**

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

1. Respondent and the EPA agree to the terms of this Order on Consent and Respondent agrees to comply with the terms of this Order on Consent.
2. Respondent admits the jurisdictional allegations of this Order on Consent and agrees not to contest the EPA’s jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Order on Consent.
3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Order on Consent.

#### **Mitigation**

4. Respondent agrees that it would have been required to perform mitigation for the impacts of the channelization and discharges of dredged and fill material, if Respondent had properly applied for and obtained the required Section 404 permit(s), before the alleged violations had occurred. As a means of performing such mitigation, Respondent hereby agrees to perform all mitigation required by the Corps in any “after the fact” permit issued by the Corps to address the violations described above, or alternatively, to make a payment in lieu of mitigation, as described in Paragraph B.5, below. If mitigation is performed by Respondent by payment in lieu of mitigation by Respondent (by payment of amount of between \$10,011.55 and \$33,737.76 as described herein), such payment shall fully satisfy any mitigation obligation of Respondent for the violations described by this Order on Consent. However, such payment shall not satisfy any additional mitigation obligations that may be imposed by the Corps for other waters of the United States.

5. In the event that the Corps does not issue an after-the-fact permit within 120 days after the effective date of this Order, or EPA is notified by the Corps that Respondent has failed to perform the mitigation required by the Corps in any "after-the-fact" permit that is issued by the Corps, Respondent hereby agrees to finance performance of the required mitigation for the violations described above by payment of a minimum amount of \$10,011.55 to a maximum amount of \$33,737.76 to an EPA approved organization for the purpose of restoring, preserving, and enhancing stream systems within Kansas (and/or Missouri). This payment shall be made according the following terms and conditions:

a. Such payment shall be made in full within 30 days following receipt by Respondent of a demand for payment by EPA which states the basis for demand for payment and identifies the EPA approved organization designated by EPA to receive the payment in lieu of mitigation;

b. The amount which may be demanded by EPA for payment in lieu of mitigation shall be reduced from the maximum amount of \$33,737.76 by a rate of \$5.93 per linear foot for any amount of the additional 4,000 linear feet of stream which the Corps determines and notifies EPA are not jurisdictional waters under the CWA; and

c. Respondent shall finance the required mitigation by issuance of certified or cashier's check made payable to the designated EPA approved organization, and shall deliver the check, with a transmittal letter that identifies the captioned case name and docket number to that organization. A copy of the transmittal letter and check shall also be mailed to EPA.

6. The deadlines for performance of mitigation, or payment in lieu of mitigation, required by Paragraphs B.4 and B5, above, may be extended by Complainant by provision of written notice to Respondent. Any such written extension shall be incorporated into and enforceable as an element of this Order.

7. All documents required to be submitted to EPA by this Order shall be submitted by mail to:

Howard C. Bunch  
Sr. Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency - Region VII  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Respondent with the terms of this Order on Consent shall not relieve Respondent of its obligations to comply with the CWA or any other applicable local, state or federal laws and regulations. Compliance with the terms of this Order on Consent shall not relieve Respondent of its responsibility to obtain and comply with any required local, state and/or federal permits.

10. No action or decision by EPA pursuant to this Order on Consent shall constitute final agency action giving rise to any rights to judicial review prior to EPA's initiation of a judicial action to compel Respondents' compliance with the requirements of this Order on Consent.

#### **Subsequent Amendment**

11. This Order on Consent may only be amended by mutual agreement of EPA and Respondent. Any amendment shall be in writing, signed by representatives of EPA and Respondent, and shall have as its effective date those dates specified therein, and shall be incorporated into and enforceable as part of this Order on Consent.

#### **Access and Requests for Information**

12. Nothing in this Order on Consent shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, 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**

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

**Effective Date**

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

**Termination**

15. This Order on Consent shall remain in effect until the mitigation required by Paragraphs B.1 and B.2, above, has been completed by Respondent. EPA will provide written notice to Respondent of the termination of the Order when EPA determines that the required mitigation has been completed.

**Signatories**

16. The undersigned signatories for Respondent and EPA hereby certify that they have the authority to sign this Order on Consent and to bind the respective parties to the terms contained herein.

17. This Order on Consent may be signed by EPA and Respondent in part and counterpart. This Order on Consent may be executed by EPA upon receipt from Respondent of a telefaxed signature page. Respondent agrees that the original Order on Consent signed by Respondent shall be transmitted by overnight mail to Howard C. Bunch, Sr. Assistant Regional Counsel, U.S. Environmental Protection Agency, Region VII, 901 N. 5<sup>th</sup> Street, Kansas City, Kansas 66101. Upon EPA's receipt of the signed original from Respondent, the original signature page signed by Respondent shall be filed with the previously executed copy with the Regional Hearing Clerk of Region VII of EPA.

**For STONECREEK DEVELOPMENT, LLC.**



Name:

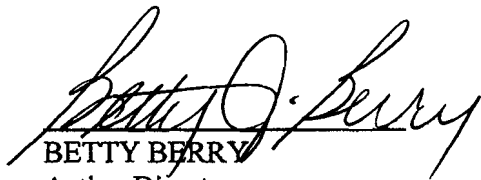
Title:

5-11-06

DATE

Docket No. CWA-07-2006-0168

**For the United States Environmental Protection Agency**



BETTY BERRY  
Acting Director  
Water, Wetlands, and Pesticides Division  
U.S. Environmental Protection Agency - Region VII

05/17/06  
DATE



HOWARD C. BUNCH  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency - Region VII

5/16/2006.  
DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

Art Hancock, Registered Agent  
Stonecreek Development, LLC  
525 E. 4<sup>th</sup> Street  
Toganoxie, Kansas 66086

5/18  
\_\_\_\_\_  
Date

  
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