

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF:)
)
Trager Limestone, L.L.C.) Docket No. CWA-07-2019-0239
)
)
Respondent.)
) FINDINGS OF VIOLATION AND
) ORDER FOR COMPLIANCE
)
Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))
_____)

Preliminary Statement

1. The following Findings of Violation and Administrative Order for Compliance (“Order”) are made and issued pursuant to Section 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a). The authority to take action under Section 309(a) of the CWA, 33 U.S.C. § 1319(a), 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 of the Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondent is Trager Limestone, L.L.C., (“Respondent”), a limited liability company doing business in the state of Missouri.

Statutory and Regulatory Authority

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, including dredged or fill material, into waters of the United States by any person except, *inter alia*, in compliance with Section 404 of the CWA, 33 U.S.C. § 1344.

4. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers of the United States Army Corps of Engineers (hereinafter the “Corps”), to issue permits under Section 404 of the CWA for the discharge of dredged or fill material into the navigable waters of the United States.

5. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), provides that, whenever EPA finds that any person is in violation of, *inter alia*, Sections 301 and/or 404 of the CWA, 33 U.S.C. §§ 1311 and/or 1344, or is in violation of any condition or limitation that implements those sections in a 404 permit, EPA shall issue an order requiring such person to comply with such requirements, conditions, or limitations. Section 309(a)(5) of the CWA, 33 U.S.C.

§ 1319(a)(5), requires that any such order shall specify a time for compliance that EPA determines to be reasonable taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

Definitions

6. Terms used in this Order that are defined in the CWA or EPA regulations promulgated under the CWA have the meanings assigned to them in the CWA or those regulations, unless otherwise provided in this Order.

7. “404 Permit” means a written authorization issued by an approved State to implement the requirements of 40 C.F.R. Part 233, or by the Corps under 33 C.F.R. Parts 320-330.

8. “Day” or “days” means a calendar day or calendar days unless expressly stated to be a business day. In computing any period of time under this Order, should the last day fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.

9. “Discharge of fill material,” as defined in 40 C.F.R. § 232.2, means “the addition of fill material into waters of the United States.” The term generally includes, without limitation, the following activities: site-development fills for recreational, industrial, commercial, residential, or other uses; dams and dikes; and placement of overburden, slurry, or tailings or similar mining-related materials.

10. “Discharge of a pollutant,” as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12), means, *inter alia*, “any addition of any pollutant to navigable waters from any point source.”

11. “Fill material,” as defined in 40 C.F.R. § 232.2, means material placed in waters of the United States where the material has the effect of: replacing any portion of a water of the United States with dry land; or changing the bottom elevation of any portion of a water of the United States. Examples of such fill material include, but are not limited to: rock, sand, soil, clay plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

12. “Navigable waters,” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), means “the waters of the United States, including the territorial seas.” In turn, “waters of the United States,” has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; tributaries to such waters; and wetlands adjacent to the foregoing waters. 40 C.F.R. § 232.2; 33 C.F.R. § 328.3 (1993).¹

¹ The applicable regulatory definition of “waters of the United States” has not changed in Missouri since the time of the initial alleged violations. See Clean Water Rule; Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule); See also *North Dakota v. U.S. Env'tl. Prot. Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminarily enjoining the implementation of the 2015 Rule as to parties before the court); *North Dakota v.*

13. “Owner or operator” as defined in 40 C.F.R. § 232.2, means the owner or operator of any activity subject to regulation under the 404 program.

14. “Person” as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), means an “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body” and, as defined in 40 C.F.R. § 232.2, means an “individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.”

15. “Point source,” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14), means “any discernible, confined and discrete conveyance. . .from which pollutants are or may be discharged.”

16. “Pollutant,” as defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6), means “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.”

Findings of Fact and Conclusions of Law

17. Respondent is a limited liability company, and is therefore a “person” as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 232.2.

18. At all times relevant to this Order, Respondent owned, operated, or otherwise controlled the Nettleton Quarry property, a limestone mining operation, located in Sections 1 and 12, Township 57 North, Range 27 West, and Sections 6 and 7, Township 57 North, Range 26 West in Caldwell County, Missouri (“the Site”). Respondent has been operating at the Site since at least 2005.

19. Kettle Creek, a tributary of the Grand River, flows through the Site. Quarry Lake, a 7-acre lake which Respondent uses as part of its limestone mining operations, is also located at the Site, approximately 0.75 miles north of NE Highway B and just west of NE Des Moines Road.

20. Between January of 2006 and December of 2007, Respondent, and/or persons acting on its behalf, used equipment to excavate a channel that connected Kettle Creek to the previously isolated Quarry Lake. This resulted in Quarry Lake becoming hydrologically connected to Kettle Creek and made Quarry Lake an impoundment of Kettle Creek. Because of Respondent’s actions, Kettle Creek now flows through a channel to Quarry Lake, and then through a culvert back into the stream channel approximately 507 feet upstream of Quarry Lake.

21. Between April of 2013 and April of 2017, Respondent, and/or persons acting on its behalf, used bulldozers, dump trucks, front-end loaders, excavators, backhoes, and/or other equipment to add fill material to approximately 935 linear feet of Kettle Creek and place mine tailings along the stream banks of Kettle Creek and Quarry Lake. The filled section of Kettle Creek is located just west of Quarry Lake. *See* map attached as Appendix A.

22. On August 29, 2017, representatives from the U.S. Army Corps of Engineers, Kansas City District (Kansas City Corps District) conducted a field investigation at the Site and determined that Respondent had placed unauthorized fill material in the stream channel of Kettle Creek. The Kansas City Corps District further determined that Respondent had placed limestone rock, earthen fill, and minor amounts of woody debris within 935 linear feet of stream channel and had connected Quarry Lake to Kettle Creek such that it had become an impoundment on the stream.

23. On September 21, 2017, the Kansas City Corps District referred the results of the field investigation at the Site to EPA Region 7 for potential enforcement.

24. On March 28, 2018, representatives of EPA and the Missouri Department of Natural Resources conducted a joint inspection at the Site to determine Respondent's compliance with the Clean Water Act. During the inspection, EPA representatives observed and documented the presence of fill material in Kettle Creek, as well as discharges from uncontrolled mine tailings to Kettle Creek and Quarry Lake.

25. The limestone rock, earthen fill, woody debris, sediment deposits and mine tailings constitute "fill material," as defined in 40 C.F.R. § 232.2.

26. The bulldozers, dump trucks, front-end loaders, excavators, backhoes, and/or other equipment are "point sources," as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

27. The fill material added to Kettle Creek and Quarry Lake is a "pollutant," as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

28. The discharge described in paragraph 21 is a "discharge of a pollutant," as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

29. Kettle Creek is an intermittent stream with continuous flow at least seasonally. From the Site, Kettle Creek flows approximately 2.69 miles into Lick Fork, a perennial stream. Lick Fork flows approximately 5.8 miles to the Old Channel Grand River, a perennial river that flows approximately six miles to the Grand River. The Grand River is used in interstate or foreign commerce and is a "traditionally navigable water." Thus, Kettle Creek is relatively permanent tributary of a traditionally navigable water and is therefore a "water of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and 40 C.F.R. § 40 C.F.R. § 232.2; 33 C.F.R. § 328.3 (1993).

30. Accordingly, between April 2013 and April 2017, the bulldozers, dump trucks, front-end loaders, excavators, backhoes, and/or other equipment acted as point sources of “discharges of pollutants” to a navigable water.

31. Because Respondent is a person who caused or who owned or operated a facility or operation that caused the discharge of pollutants from a point source to navigable waters, Respondent has been subject to the CWA at all times relevant to this Order.

32. At all times relevant to this Order, Respondent had not applied for and/or was not issued a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the discharge of pollutants from the point sources identified above.

33. Accordingly, each instance in which Respondent discharged pollutants or fill material to navigable waters without a 404 permit authorizing such discharges is a discrete violation of Section 301 of the CWA, 33 U.S.C. § 1311.

34. Each day the discharged material remains in the stream without a 404 permit constitutes a discrete violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Order for Compliance

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

35. Respondent must refrain from any activity at the Site which may result in further unpermitted discharges.

36. Within thirty (30) days of the effective date of this Order, Respondent shall submit a Work Plan to EPA for review and approval that describes Respondent’s proposed restoration for impacts to Kettle Creek and Quarry Lake. The Work Plan shall include:

- a. The name, contact information, and qualifications of the consultant retained to develop the Work Plan and the contractor(s) retained to perform the work.
- b. Respondent’s proposed plan to achieve restoration of the Site, including Kettle Creek and Quarry Lake, to address the impacts from the unauthorized fill material described herein. If Respondent determines that restoration is not feasible, Respondent shall submit the technical justification for that determination and a proposed plan to mitigate the impacts to Kettle Creek and Quarry Lake from the unauthorized fill material described herein.
- c. A schedule, including milestones, to achieve restoration or mitigation no later than 12 months from the effective date of this Order.

37. Review and Approval:

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved Work Plan.
- b. If EPA does not approve the Work Plan, Respondent shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of EPA's disapproval.
- c. 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.
- d. Once approved by EPA, the Work Plan shall be incorporated by reference and fully enforceable under the terms of this Order.

38. Respondent must submit quarterly status reports to EPA starting four (4) months after EPA's approval of the Work Plan until the work is completed. Each status report must include: (a) a description of the actions that have been taken toward achieving compliance with this Order during the previous quarter; (b) a summary of any violations that occurred during the previous quarter; and (c) a list of actions still ongoing or incomplete and a timeline for their completion, in accordance with this Order and/or any other measures appropriate and necessary for the particular project, which may include, for example, proof of any mitigation credits purchased.

39. Once the work identified in the Work Plan has been completed, Respondent shall submit a Completion Report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete. The Completion Report must be submitted within thirty (30) days after the work has been completed.

40. Respondent shall submit annual monitoring reports to EPA, beginning one year after 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 to maintain proper wetland and/or stream functions.

41. The submission of documents by Respondent, as identified above, 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.

42. All information to be submitted to EPA under this Order shall be submitted by email to:

garcia.delia@epa.gov

or by mail to:

Delia Garcia, Ph.D.
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Blvd.
Lenexa, Kansas 66219.

General Provisions

Effect of Compliance with the Terms of this Order

43. 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.

44. 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

45. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or 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

46. 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

47. This Order shall apply to and be binding upon the Respondent, 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.

Failure to Comply

48. Failure to comply with the terms of this Compliance Order may result in Respondent's liability for statutory civil penalties under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondent has violated the CWA and failed to comply with the terms of the Order. In determining the amount of any penalty, the court will consider the seriousness of the violations, the economic benefit resulting from the violations, any history of similar violations, any good faith efforts Respondent has made to comply with the legal requirements, the economic impact a penalty may have on Respondent, and such other matters as justice may require. The district court has the authority to impose separate civil penalties for any violations of the CWA and for any violations of this Order.

Judicial Review

49. Respondent has the right to seek immediate federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706 provides the grounds for such review.

Opportunity to Confer

50. Respondent has the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of this Order to Respondent. Within ten (10) days of receipt of this Order, Respondent may request a conference regarding the Order or may submit information to EPA. If Respondent requests a conference, the conference shall take place within 10 days from the date of the request. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

51. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 42.

Effective Date

52. The terms of this Order shall be effective and enforceable against Respondent fifteen (15) days after the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Termination

53. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.


IT IS SO ORDERED.



DeAndré Singletary
Acting Director
Enforcement and Compliance Assurance Division

7-25-19

Date



Kasey Barton
Assistant Regional Counsel
Office of Regional Counsel

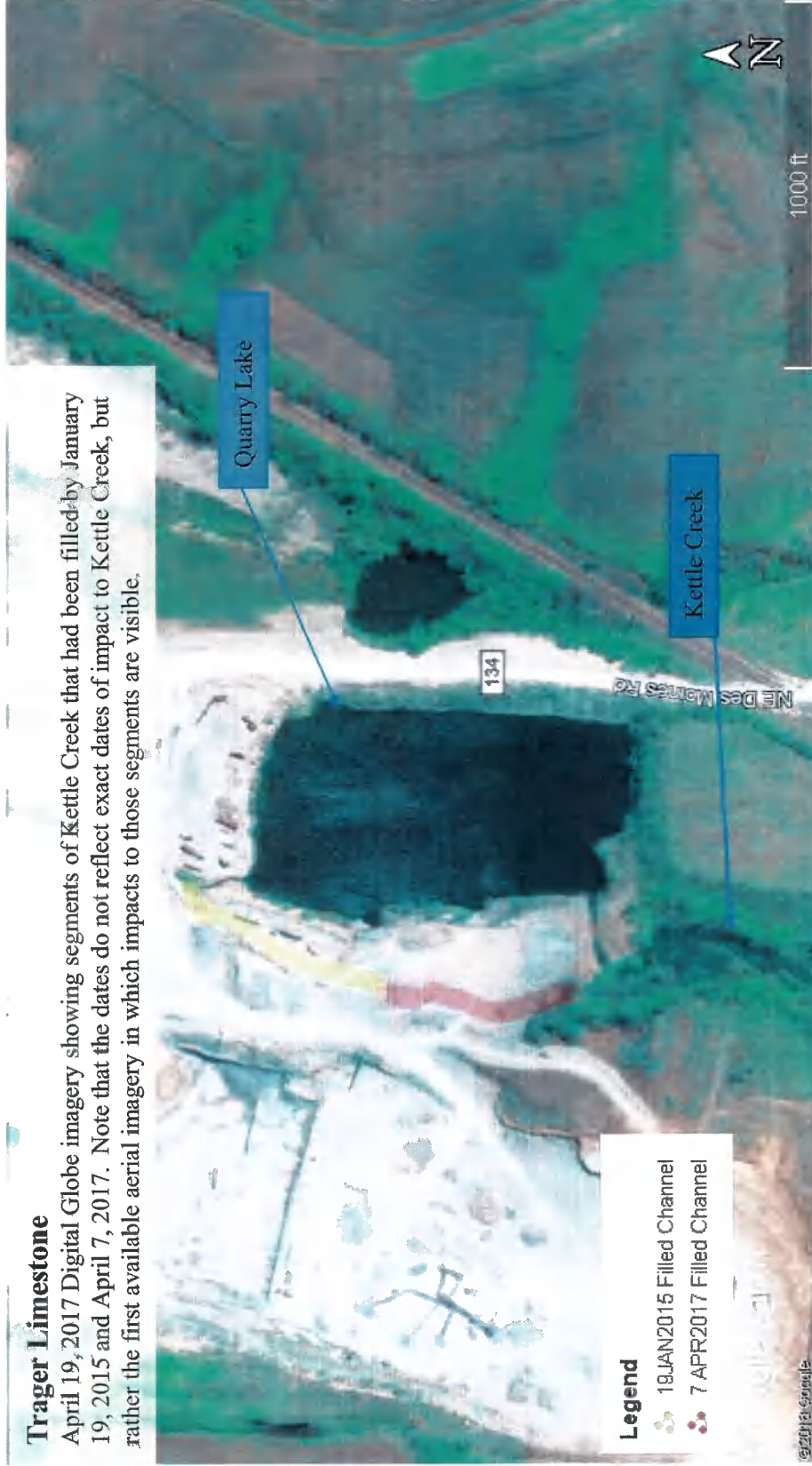
7/25/2019

Date

Appendix A

Trager Limestone

April 19, 2017 Digital Globe imagery showing segments of Kettle Creek that had been filled by January 19, 2015 and April 7, 2017. Note that the dates do not reflect exact dates of impact to Kettle Creek, but rather the first available aerial imagery in which impacts to those segments are visible.



CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below a true and correct copy of the foregoing Order for Compliance was sent in the following manner to the addressees:

Copy via Email to Attorney for Complainant:

barton.kasey@epa.gov

and

Copy via Certified Mail, Return Receipt Requested to Respondent Trager Limestone, LLC:

Mr. Mike Trager, Owner
Trager Limestone, LLC
6468 State Highway Y
Chillicothe, Missouri 64601

Date

7/25/2019

Signature

[Handwritten Signature]