

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2014 MAY 15 PM 2: 50

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
CRISS INVESTMENTS, INC.,)	Docket No. CWA-07-2014-0066
)	
)	ADMINISTRATIVE ORDER FOR
Respondent,)	COMPLIANCE ON CONSENT
)	
)	
Proceedings under Section 309(a)(3) of the)	
Clean Water Act, 33 U.S.C. § 1319(a)(3))	
_____)	

Preliminary Statement

1. This Administrative Order for Compliance on Consent (“Order”) is issued by the United States Environmental Protection Agency (“EPA”) to Criss Investments, Inc., (“Respondent”), pursuant to the authority vested in the Administrator of EPA by Section 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a), as amended. This authority has been redelegated by the Administrator to the Regional Administrator of EPA, Region 7, and further delegated to the Director of Region 7’s Water, Wetlands, and Pesticides Division.

2. EPA, together with Respondent, enters into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

3. It is the parties’ intent through this agreement to address alleged discharges of pollutants by Respondent into the waters of the United States without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful.

4. By entering into this Order, Respondent (1) consents to and agrees not to contest EPA’s authority or jurisdiction to issue or enforce this Order, (2) agrees to undertake all actions required by the terms and conditions of this Order, and (3) consents to be bound by the

requirements set forth herein. Respondent also waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

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. 40 C.F.R. § 232.2 defines the term “fill material” to include material placed in waters of the United States where the material has the effect of changing the bottom elevation of any portion of a water of the United States. The definition provides examples including, *inter alia*, rock, sand, soil, clay, and materials used to create any structure or infrastructure in the waters of the United States.

9. 40 C.F.R. § 232.2 defines the term “discharge of fill material” to mean the addition of fill material into waters of the United States. The definition specifically includes, *inter alia*, the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; dams and dikes; and property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments.

10. 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.

11. 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.

EPA Findings

Findings of Fact and Law

EPA asserts the following findings of fact and law:

12. Each Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondent Criss Investments, Inc. owned, operated, or otherwise controlled property located in Section 31, Township 25 South, Range 6 East, in Butler County, Kansas (hereinafter “the Site”).

14. Respondent Criss Investments, Inc. contracted with Beran Concrete, Inc., Albert Hogoboom Oilfield Trucking, Inc., Eddie Dean d/b/a Custom Homes by Dean & Sons, and Cornejo & Sons, L.L.C. to perform activities associated with the construction of a low-head dam and stream crossing.

15. Sometime between January 2012 and March 2012, Respondent and/or persons acting on its behalf and using earth moving equipment authorized and/or directed the discharge of fill materials into Bird Creek in order to construct a low-head dam and stream crossing. The low-head dam and stream crossing together are approximately 20 feet wide, 6.5 feet high, and span between 75 and 99 feet across Bird Creek. The stream crossing is immediately adjacent to and downstream of the dam. The dam and stream crossing are constructed of riprap, formed concrete, and concrete blocks of two sizes (3 ft x 3 ft x 3 ft and 6 ft x 2.5 ft x 2.5 ft) placed in the streambed. Concrete pavement covers the top of the concrete blocks that constitute the stream crossing.

16. On February 7, 2012, the Corps visited the Site and documented that construction of the low-head dam and stream crossing was substantially completed. On March 7, 2012, the Corps issued a Notice of Violation to Mr. Criss of Criss Investments, Inc., which described the violations and directed him to do no further unauthorized work.

17. On November 19, 2012, EPA received a response from Mr. Criss to a request for information issued by EPA to Mr. Criss on November 6, 2012, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). Mr. Criss’s response stated that work on the low-head dam and stream crossing commenced approximately January 26, 2012, and concluded approximately March 9, 2012. The response also provided invoices spanning the period between December 15, 2011, and May 9, 2012, for the work the contractors did on the low-head dam and stream crossing.

18. The fill materials discharged by Respondent into Bird Creek referenced in Paragraph 15 are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The discharge of the fill material into Bird Creek referenced in Paragraph 15 constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

20. The earth moving equipment referenced in Paragraph 15 constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. Bird Creek 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.

22. Respondent’s discharges of pollutants require a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

23. 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 15, nor did Respondent perform the work described in Paragraph 15 under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

24. On December 10, 2013, Respondent submitted a Work Plan to EPA describing Respondent’s plan to remove the dredged and fill material from Bird Creek and restoring the impacted areas of the Site identified in Paragraph 15. The Work Plan was amended and resubmitted on April 4, 2014. The amended Work Plan included the projected work and materials necessary for the removal and restoration activities, including characterization of the soil, plant and hydric conditions and best management practices that will be used to control soil erosion and sediment runoff; 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. By letter dated April 7, 2014, EPA approved the Work Plan.

25. Respondent neither admits nor denies the findings of fact and law set forth in this section.

Findings of Violation

26. The facts stated in Paragraphs 12 through 24, above, are herein incorporated.

27. EPA finds that 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, and that, as a result, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311. Respondent does not admit to EPA’s finding of violation.

Section 309(a) Order for Compliance on Consent

Based on EPA’s FINDINGS OF FACT and FINDINGS OF VIOLATION set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), EPA hereby ORDERS, and Respondent hereby AGREES to take, the actions described below:

28. Respondent shall remove dredged and fill material from Bird Creek that was discharged as a result of the violations identified in this Order, and restore Bird Creek at the Site in accordance with the Work Plan as approved by EPA, pursuant to Paragraph 29 below.

29. Within 9 months of receipt of this Order, Respondent shall complete the work laid out in the Work Plan approved by EPA on April 7, 2014, which describes the removal of dredged

and fill material and restoration of the impacted areas of the Site described in Paragraph 15 above, including removal of the low-head dam. The work shall be completed in accordance with the specifications set forth in the Work Plan.

30. The Work Plan identified in Paragraph 29, as well as any EPA-approved supplements, addenda, revisions or other additions to the Work Plan, shall be incorporated by reference and fully enforceable under the terms of this Order.

31. Within 30 days of completing the work identified in Paragraph 29, Respondent shall submit photographic evidence, copies of relevant documents, and a signed statement confirming that the work is complete.

32. 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 actions, if any, that will be taken to maintain proper wetland and/or stream functions.

33. The submission of documents by Respondent, as identified in Paragraphs 29, 31, and 32, 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.

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

Lantz Tipton
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

General Provisions

35. Failure to comply with the terms of the Section 309(a)(3) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 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 you have violated the Act and failed to comply with the terms of the Order.

Reservation of Rights

36. 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 Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation alleged in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

37. With respect to matters not addressed in this Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and/or other legal remedies allowed by law.

38. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

39. Respondent reserves the right to contest liability in any subsequent action filed by EPA to seek penalties for violation of this Order on Consent, and reserves the right to contest liability in any subsequent action filed by EPA for any violations alleged in the Findings, above.

Access and Requests for Information

40. Nothing in this Order 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

41. 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.

Modification

42. At EPA's sole discretion, extensions of the compliance schedule/deadlines required by this Order may be made by EPA by written notice to Respondent, without further formal amendment to the Order. All other modifications to this Order may only be made by mutual agreement of the Parties, pursuant to a written amendment signed by each Party.

Effective Date

43. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Termination


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

Signatories

45. The undersigned for each party has the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

For the Complainant, United States Environmental Protection Agency, Region 7:

Issued this 14th day of May, 2014.



Karen A. Flournoy

Director

Water, Wetlands and Pesticides Division

U.S. Environmental Protection Agency – Region 7



Erin Weekley

Assistant Regional Counsel

Office of Regional Counsel

U.S. Environmental Protection Agency – Region 7

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Administrative Order for Compliance on Consent to the Regional Docket Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I sent a copy of the foregoing Administrative Order for Compliance on Consent by first class certified mail, return receipt requested, to:

O.J. Connell, Jr.
Registered Agent, Criss Investments, Inc.
218 W. Central Avenue
El Dorado, Kansas 67042,

Ramon Criss
President, Criss Investments, Inc.
1855 Ridge Road
El Dorado, Kansas 67042-4033,

Kathryn Larkins
Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108,

Mark Frazier
Chief, Regulatory Branch
Kansas City District, Corps of Engineers
635 Federal Building
Room 402
Kansas City, Missouri 64106-2824,

and

Michael B. Tate
Director, Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

5/15/14

Date


Signature