

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 N. 5TH STREET

KANSAS CITY, KANSAS 66104

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
Michael Huttenlocker,)
)
(an individual))
)
Respondent) Docket No. CWA-07-2005-0196
)
)
Proceedings under)
Section 309(a)(3))
of the Clean Water Act)
33 U.S.C. § 1319(a)(3))
_____)

A. ADMINISTRATIVE COMPLAINT

Preliminary Statement

1. This Administrative Complaint ("Complaint") has been filed under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B). This authority has been delegated by the Administrator to the Regional Administrator, EPA Region VII, and redelegated to the Director of Region VII's Water, Wetlands, and Pesticides Division ("Complainant").
2. The Respondent in this case is Michael Huttenlocker, an individual ("Respondent"). Mr. Huttenlocker is a residential real estate developer who between 2000 and 2001 developed a subdivision named Emerald Estates, near the city of Troy, in Section 27, Township 49 North, Range 1 West, Lincoln County, Missouri. During this development, Respondent filled and/or channelized an estimated 263 lineal feet of stream channel of an unnamed tributary of Town Branch, which flows into the Cuivre River, which is a primary tributary to the Mississippi River. Additionally, Respondent discharged fill and/or dredge materials into wetlands adjacent to the tributary.
3. The Findings of Violations and Order for Compliance address discharges of pollutants by Respondent into the waters of the United States, without the permits required by law. 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. Pursuant to Section 502(6) of the CWA, 33 U.S.C. § 1362(6), “pollutants” include fill materials such as “dredged spoil... , rock, sand, [and] cellar dirt.” Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the United States Army Corps of Engineers for any discharge of “dredged or fill material” into the “navigable waters” of the United States. 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.

4. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the 40 C.F.R. Part 22 (“The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits”), Complainant hereby proposes that the Regional Administrator issue a final Order assessing a civil penalty of \$18,766 against Respondent Michael Huttenlocker for his violations of Section 301 of the CWA, 33 U.S.C. § 1311, as described below.

**Respondent’s Failure to Obtain Permit Required by
Section 404 of the CWA, 33 U.S.C. § 1344**

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

6. On February 26, 2001, the United States Army Corps of Engineers (“Corps”) received a complaint that Respondent’s construction of the Emerald Estates subdivision was impacting a wetland and stream without the required Section 404 permit. In response to this complaint, the Corps contacted Respondent by telephone and sent Respondent a letter informing him that the activity was impacting waters within the jurisdiction of the CWA, and that the project would require permit review. The Corps’ letter contained a permit application and, in order to facilitate the permit application, requested Respondent provide information describing the project.

7. Respondent failed to respond to the Corps letter, and on April 9, 2001, the Corps sent Respondent an additional letter, which again requested that Respondent submit the required permit application before proceeding any further with the Emerald Estates development.

8. On April 26, 2001, representatives of the Corps and Respondent meet at the Emerald Estates development site to conduct an inspection. During this site inspection the Corps observed that the development work of the Respondent had continued to proceed without the required permit, in conflict with the Corps’ February 26, 2001, notice to Respondent. The Corps also observed that the Respondent had utilized earth moving equipment that had resulted in a discharge of fill material into waters of the United States, and which had resulted in a significant length of stream being replaced by a buried culvert (later measured as 263 feet of stream channel (hereafter “discharge sites”).

9. On May 4, 2001, the Corps issued Respondent's engineering firm (Cochrane Engineering) a Cease and Desist Order which informed Respondent that a 404 permit was required and directed Respondent "to do no further work at this site until proper authorization has been granted."
10. By correspondence dated July 19, 2001, the Corps referred Respondent's violations of the CWA to EPA for enforcement. By correspondence dated on May 31, 2002, EPA notified Respondent that the case had been referred to EPA by the Corps, and requested a site inspection.
11. On June 10, 2002, representatives of the Corps, EPA and Respondent meet at Emerald Estates to conduct the site inspection. During the June 10, 2002, inspection, EPA and the Corps observed that work at the site was ongoing, in violation of the Corps' May 4, 2001, Cease and Desist Order. During the site inspection, Respondent agreed to submit an "after-the-fact" permit and to perform compensatory mitigation for the impact on the stream and wetlands.
12. By materials dated July 31, 2002, Respondent personally signed and submitted an "after-the-fact" permit application and site maps to the Corps which documented the location of the discharge sites, and the impact of Respondent's discharges on waters of the United States.
13. By correspondence dated September 6, 2002, the Corps notified Respondent that the Corps would allow permit authorization if Respondent performed specified compensatory mitigation and documented the required mitigation to the Corps. The Corps specified that performance of the compensatory mitigation was required within sixty (60) days (by November 5, 2002), and that compliance certification was required within "30 days of project completion or the permit issuance may be revoked and considered null and void."
14. On or about November 7, 2002, Respondent requested a thirty (30) day extension of time to complete the required mitigation and provide documentation to the Corps. The Corps granted the requested one-time extension.
15. By correspondence dated May 13, 2003, the Corps provided Respondent notice that performance of the required mitigation and documentation was required within twenty-one (21) days of the May 13, 2003, letter. The May 13, 2003, letter also informed Respondent that until the Corps received the required documentation, the May 4, 2001, Cease and Desist Order would remain in effect and any work performed after May 4, 2001, would be in violation of the Cease and Desist Order. The May 13, 2003, letter also informed Respondent that unless the mitigation was performed, permit authorization would not be granted, and the discharges "conducted prior to, and resulting in the Cease and Desist Order is an ongoing violation that has not been resolved."
16. To date, Respondent has failed to perform the required mitigation and/or provide documentation of any such mitigation to the Corps, and further, has failed to obtain any permit authorization for the discharges described in Paragraphs A.8 and A.11.

17. The earth moving machinery described in Paragraph A.8 and A.11, above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
18. The dredged and/or fill materials described in Paragraph A.8 and A.11, above, and discharged by Respondent into the stream are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
19. At the time of the Respondent's discharge of pollutants, as described above, the discharge sites were "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.
20. The discharge of the dredged and/or fill material into the waters of the United States described in Paragraphs A.8 and A.11, above, constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).
21. 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 therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.
22. On or about January 7, 2005, pursuant to the authority of Section 309(a) of the Act, EPA issued Respondent an Administrative Order for Compliance (Docket No. CWA-07-2005-0093) that required Respondent to perform compensatory mitigation and/or to obtain all necessary permits from the Corps to conduct the restoration and/or to address the discharges.
23. To date, Respondent has failed to comply with the Corps' prior requests for compensatory mitigation, to obtain the proper permit(s) and/or restore the filled areas of the tributary to their pre-discharge configuration. The adverse effects of Respondent's illegal discharges during the construction of the subdivision, their property and the broader environment are ongoing. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

Notice of Proposed Civil Penalty Assessment

24. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a Class II civil penalty not to exceed \$10,000 per day for each day during the which a violation of the CWA continues, up to a maximum of \$125,000, including violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Based on Respondent's violation of Section 301 of the CWA, 33 U.S.C. § 1311, as alleged above, and pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Complainant hereby proposes that the Regional Administrator issue a final Order assessing administrative penalties to the Respondent in the amount of \$18,766 (including \$1,766 to recover

Respondent's estimated economic benefit or savings from non-compliance and \$17,000 to address the extent and gravity of the violations). In determining the amount of the above proposed penalty, Complainant has taken into account the nature, circumstances, extent and gravity of the violations, and the best available information on Respondent's ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violations and/or other matters that justice may require. In the event that additional information becomes available to EPA after the filing of this Complaint, Complainant shall use this information, if appropriate, to adjust the proposed penalty prior to the issuance of a final Order.

25. When issued a final Order, Respondent shall pay the penalty set forth therein by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the Case Name and Docket No. to:

U.S. Environmental Protection Agency
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

The check must also be annotated with the docket number and with the name of the case. Separate copies of the transmittal letter and the check shall simultaneously be sent to:

Mr. Raju Kakarlapudi (WENF), and
Mr. Howard C. Bunch (ORC)

U.S. Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

26. Pursuant to 40 C.F.R. § 22.38, prior to issuing a final Order assessing a Class II civil penalty, the Administrator (or his or her delegatee) shall provide public notice of, and opportunity to comment on, the Complaint. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A). Public notice and reasonable opportunity to comment will also be provided prior to the proposed issuance of a final Order assessing a civil administrative penalty against Respondent. Pursuant to Section 309(g)(4)(C), 33 U.S.C. § 1319(g)(4)(C), if Respondent does not request a hearing and no hearing is held before the issuance of a final Order assessing a civil administrative penalty, any person who commented on the penalty proposed by the Complaint may petition, within thirty (30) days after the issuance of such a final Order, to set aside the final Order and to provide a hearing on the penalty.

B. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

1. In accordance with 40 C.F.R. Part 22, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, Respondent has the right to request a hearing to contest any material fact contained in the Complaint or to contest the appropriateness of the proposed penalty set forth herein. Such a hearing will be held and conducted in accordance with 40 C.F.R. Part 22, one copy of which is enclosed herein.

2. To avoid being found in default, which constitutes an admission of all facts alleged in this Complaint and a waiver of the right to hearing, Respondent must file a written Answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing (an additional five (5) days for filing an Answer may be added if service occurs by a commercial delivery service). The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The Answer shall also state a) the circumstances or arguments which are alleged to constitute the grounds of defense; b) the facts that Respondent intends to place at issue; and c) whether a hearing is requested.

3. The denial of any material fact or the raising of any affirmative defense shall be construed as a request for hearing. Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations. The Answer shall be filed with the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

4. If Respondent fails to file a written Answer and request for a hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all allegations made in this Complaint and a waiver of Respondent's right to a hearing under CWA. A final Default Order may thereafter be issued by the Regional Judicial Officer, and the civil penalties proposed herein shall become due and payable without further proceedings.

Informal Settlement Conference

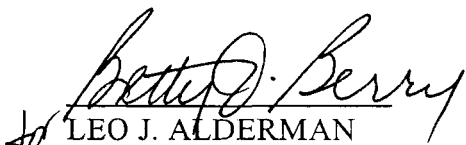
5. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact Mr. Howard C. Bunch, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region VII, 901 N. 5th Street, Kansas City, Kansas 66101; Telephone (913) 551-7879.

6. Note that a request for an informal settlement conference does not extend the twenty (20) day period during which a written Answer and request for a hearing must be submitted.

7. The EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order issued by the Director of the Water, Wetlands, and Pesticides Division, EPA Region VII. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein. Such a Consent Agreement and Final Order shall not constitute a permit or a license and shall not relieve Respondent of its obligation to comply with all applicable federal, state, and local laws and regulations, including, but not limited to, any permit required by Section 404 of the CWA.


8. If Respondent has neither achieved a settlement by informal conference nor filed an Answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a final Default Order.

9. Neither assessment nor payment of an administrative civil penalty shall affect Respondent's continuing obligation to comply with the CWA, or any other federal, state or local law or regulations, including, but not limited to, any Section 404 permit.


LEO J. ALDERMAN
Director

Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region VII

03/17/05
DATE


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

03/17/05
DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I mailed the foregoing Complaint by Federal Express, return receipt requested, to Respondent Michael Huttenlocker at the following addresses:

Michael Huttenlocker
1408 Elm Tree Rd.
Troy, Missouri 63379

Mr. Michael Huttenlocker
#3 Rue DePaix
Lake St. Louis, Missouri, 63367-1434

8/17/05

Date

[Handwritten Signature]
