

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

10 AUG -4 AM 11:00
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

JOHN WALLER)

and)

GRANT WALLER,)

Respondents)

Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))

) Docket No. CWA-07-2010-0062

) AMENDED FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) 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 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 Water, Wetlands and Pesticides Division of EPA, Region 7.

2. The Respondents in this case are John Waller and Grant Waller (“Respondents”). Respondent John Waller’s mailing address is 101 Country Club Lane, Sullivan, Missouri 63080-2165. Respondent Grant Waller’s mailing address is 15730 State Highway N, Bourbon, Missouri 65441-9224.

Statutory and Regulatory Framework

3. 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.

4. 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.

5. 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.

6. 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 tributaries to waters of the United States.

7. 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.

Factual Background

8. Respondents are "persons" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

9. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property located in Section 24, Township 39 North, Range 2 West, in Sullivan County, Missouri (hereinafter "the Site").

10. On April 16, 2008, Respondent John Waller met with the Corps to discuss the channelizing and stabilization of a section of Brazil Creek on Respondent John Waller's property. During that meeting, the Corps informed Respondent that he would need a CWA Section 404 permit to perform these activities. To date, Respondents have not obtained a Section 404 permit.

11. Sometime in April and/or May 2008, Respondents and/or persons acting on their behalf and using earth moving equipment, authorized and/or directed the channelization of approximately 5,823 linear feet of Brazil Creek, resulting in the discharge of dredged and fill material including, but not limited to, dirt, spoil, rock, and sand into Brazil Creek.

12. On May 14, 2008, June 12, 2008, and June 24, 2010, representatives from the Missouri Department of Conservation, the Missouri Department of Natural Resources, and EPA inspected the Site and documented the discharges of fill material and channeling activity described in Paragraph 11.

13. The dredged and/or fill materials discharged by Respondents into Brazil Creek referenced in Paragraph 11 are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

14. The earth moving equipment referenced in Paragraph 11 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

15. The discharge of the dredged and/or fill material into Brazil Creek referenced in Paragraph 11 constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

16. Brazil 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.

17. Respondents’ discharge of pollutants from a point source into a water of the United States was 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.

A. FINDINGS OF VIOLATION

18. The facts stated in Paragraphs 8 through 17 above are herein incorporated.

19. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to or after the performance of the work described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

20. Respondents’ discharge of pollutants from a point source into waters of the United States occurred 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.

B. ORDER FOR COMPLIANCE

Based on the Findings of Fact and Findings of Violation set forth above, and, pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondents are hereby ORDERED as follows:

21. Within thirty days after receipt of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents’ proposed restoration of the impacted Site described above. If Respondents and EPA agree that restoration of the impacted Site is not feasible, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents’ proposed mitigation of no less than 5,823 linear feet of stream. The restoration or mitigation work shall be completed within 18 months of approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

a. The Work Plan should include, at a minimum: the projected work and materials necessary to restore the site or mitigate for lost stream functions, including characterization of the soil, plant, and hydric conditions; the projected cost of the work; the projected deadline(s) for completing the work; and a monitoring plan to maintain and document proper stream functions in monitoring reports to be submitted to EPA pursuant to Paragraph 24 below.

b. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.

c. If EPA does not approve the Work Plan, Respondents shall address EPA's comments and resubmit the work plan for review within thirty (30) days of receipt of EPA's disapproval.

d. 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 Respondents with a copy of the work plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein

22. Once approved by EPA, the Work Plan identified in Paragraph 21 shall be incorporated by reference and fully enforceable under the terms of this Order.

23. Once the work identified in Paragraph 21 has been completed, Respondents shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

24. Respondents 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 description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream functions.

25. The submission of documents by Respondents, as identified in Paragraphs 21, 23, and 24, shall include the following written statement, followed by signature of a duly authorized representative of Respondents:

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.

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

Delia Garcia, PhD
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

27. In the event Respondents fail to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order against Respondents and/or seek additional penalties against Respondents for such noncompliance with the terms of the Order.

General Provisions

Effect of Compliance with the terms of this Order

28. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

29. 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

30. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

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

Parties Bound

32. This Order shall apply to and be binding upon the Respondents, their agents, successors and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein comply with the terms of this Order.

Effective Date

33. The terms of this Order shall be effective and enforceable against Respondents upon the date of his receipt of an executed copy of the Order.

Termination

34. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.

Karen A. Flourney
for WILLIAM A. SPRATLIN
Director
Water, Wetlands and Pesticides Division

8-4-10
DATE

Chris Muehlberger
CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

8.4.10
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:

Mr. John Waller
101 Country Club Drive
Sullivan, Missouri 63080-2165.

Mr. Grant Waller
15730 State Highway N
Bourbon, Missouri 65441-9224

8.4.10

Date


