

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF: )  
)  
)  
BILL WILLERS, )  
)  
)  
Respondent )  
)  
Proceedings under Section 309(a)(3) of the )  
Clean Water Act, 33 U.S.C. § 1319(a)(3) )  
\_\_\_\_\_ )

Docket No. CWA-07-2010-0083

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 Respondent in this case is Bill Willers (“Respondent”). Respondent’s mailing address is 1415 Andrews Drive, Norfolk, Nebraska 68748.

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

9. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located in the South 1/2, Southwest 1/4 of Section 34, Township 25 North, Range 1 East, Wayne County, Nebraska (hereinafter “the Site”).

10. In September and/or October 2009, Respondent and/or persons acting on his behalf and using earth moving equipment, authorized and/or directed the damming of an unnamed tributary to Spring Branch Creek. Specifically, Respondent discharged dredged or fill material including, but not limited to, dirt, spoil, rock, and sand, into a tributary to Spring Branch Creek, impacting approximately 1,352 linear feet of the creek and 1.13 acres of adjacent wetlands. The extent of the impact described herein will increase as the current pool continues to fill.

11. On October 30, 2009, the Corps inspected the Site and documented the discharges of fill material described in Paragraph 10.

12. The dredged and/or fill materials discharged by Respondent into a tributary of Spring Branch Creek and adjacent wetlands referenced in Paragraph 10 are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

14. The discharge of the dredged and/or fill material into the tributary to Spring Branch Creek and adjacent wetlands referenced in Paragraph 10 constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

15. The tributary to Spring Branch Creek and adjacent wetlands referenced in Paragraph 10 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.

16. Respondent's discharge of pollutants from a point source into waters 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**

17. The facts stated in Paragraphs 8 through 16 above are herein incorporated.

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

19. Respondent's 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), Respondent is hereby ORDERED as follows:

20. Within thirty (30) days after receipt of this Order, Respondent shall submit a Work Plan to EPA for review and approval that shall describe Respondent's proposed restoration of the impacted Site described in Paragraph 10 above, including, but not limited to, the removal of the dam. The restoration 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 wetlands and/or 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 wetland and/or stream functions, pursuant to Paragraph 23 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, Respondent shall address the 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

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

21. Once approved by EPA, the Work Plan identified in Paragraph 20 shall be incorporated by reference and fully enforceable under the terms of this Order.

22. Once the work identified in Paragraph 20 has been completed, Respondent shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

23. 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 description of the status of the site, and corrective actions, if any, that will be taken to correct the deficiencies to maintain proper wetland and/or stream functions.

24. The submission of documents by Respondent, as identified in Paragraphs 20, 22, and 23, 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.*

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

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

26. In the event Respondent fails 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 Respondent and/or seek additional penalties against Respondent for such noncompliance with the terms of the Order.

#### General Provisions

#### **Effect of Compliance with the terms of this Order**

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

28. 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**

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

30. 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**

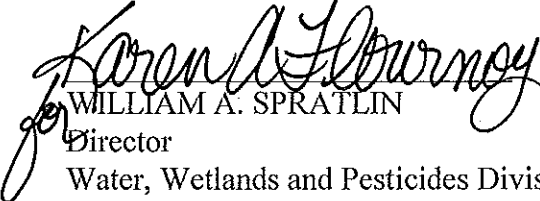
31. This Order shall apply to and be binding upon the Respondent, his agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with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

#### **Effective Date**

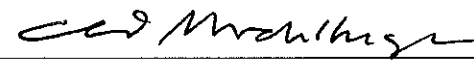
32. The terms of this Order shall be effective and enforceable against Respondent upon the date of his receipt of an executed copy of the Order.

#### **Termination**

33. 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.

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

3-31-10  
DATE

  
CHRIS MUEHLBERGER  
Assistant Regional Counsel  
Office of Regional Counsel

3.31.10  
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. Bill Willers  
1415 Andrews Drive  
Norfolk, Nebraska 68748

and

Tom Wilmoth  
Blankenau Wilmoth LLP  
206 South 13th Street, Suite 1425  
Lincoln, Nebraska 68508.

4.1.10



Date