

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY REGION 7
2012 SEP 12 PM 1:17

IN THE MATTER OF:)
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Creighton Livestock Market, Inc.) Docket No. CWA-07-2012-0045
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)
Respondent) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
)
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))

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 Creighton Livestock Market, Inc. (“Respondent”). Respondent’s mailing address is 1103 Peabody Avenue, Creighton, Nebraska 68729.

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, 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 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 Section 28, Township 29 North, Range 5 West, Knox County, Nebraska (hereinafter "the Site").

10. Since at least the 1970s, Respondent and/or persons acting on Respondent's behalf, using earth moving equipment, authorized and/or directed the placement of fill material into Bazile Creek and an unnamed tributary of Bazile Creek, impacting approximately 120 linear feet of Bazile Creek.

11. On April 25, 2012, the EPA inspected the Site and documented the discharge of fill material described in Paragraph 10.

12. The dredged and/or fill materials discharged by Respondent into Bazile Creek and its tributary 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 Bazile Creek and an unnamed tributary of Bazile Creek referenced in Paragraph 10 constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

15. Bazile Creek and its tributary 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 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 10, 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.

A. FINDINGS OF VIOLATION

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

18. 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. 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:

19. Respondent shall immediately cease placing fill material into Bazile Creek and the unnamed tributary of Bazile Creek.

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 removal of the fill in the impacted Site described in Paragraph 10 above. If bank stabilization is required, Respondent shall consult with the U.S. Army Corps of Engineers, Omaha District, concerning compliance with Section 404 of the CWA. The removal work shall be completed within six (6) 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; the projected cost of the work; and the projected deadline(s) for completing the work.

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 a completion report to EPA, after the completion of the Work Plan. This report shall include photos of the Site, and any corrective actions, that will be taken to correct deficiencies.

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:

Don Hamera
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.

Failure to Comply

32. Failure to comply with the terms of this Order may result in your liability for significant statutory civil penalties for each violation under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Upon suit by EPA, the United States District Court for the District of Nebraska may impose such penalties if, after notice and opportunity for a hearing, the court determines that you have violated the Act as described above and failed to comply with the terms of this Order. In determining the amount of any penalty the court will consider the seriousness of your violations, your economic benefit resulting from the violations, any history you may have of such violations, any good faith efforts you have made to comply with legal requirements, the economic impact a penalty may have upon you, and such other matters as justice may require. The district court has the authority to impose separate civil penalties for any violations of the Act and for any violations of this Order.

Judicial Review

33. Respondent has the right to seek immediate federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, provides the grounds for such review.

Opportunity to Confer

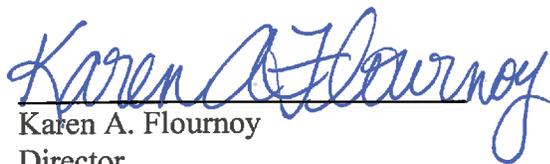
34. Respondent has the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of this Order to the Respondent. Within ten days of receipt of this Order, Respondent may request a conference regarding the Order or to submit information to EPA. If Respondent requests a conference or wishes to submit information, the conference or submission of information shall take place within 20 days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

Effective Date

35. The terms of this Order shall be effective and enforceable against Respondent upon 30 days receipt of an executed copy of the Order.

Termination

36. 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. Flournoy
Director
Water, Wetlands and Pesticides Division

9-13-12
Date



Chris Muehlberger
Assistant Regional Counsel
Office of Regional Counsel

9.13.12
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:

Creighton Livestock Market, Inc.
Warren Diedrichsen, Registered Agent
1103 Peabody Avenue
Creighton, Nebraska 68729

9.13.12

Date

