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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
Nebraska Department of Roads)	
)	
and)	Docket No. CWA -07-2007-0044
)	
Herbst Construction, Inc.)	
)	
Respondents)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	

I. CONSENT AGREEMENT/FINAL ORDER

The United States Environmental Protection Agency, Region VII (“EPA”), the Nebraska Department of Roads and Herbst Construction Inc. (“Respondents”) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) 64 Fed. Reg. 40181, 40183 (July 23, 1999).

This Consent Agreement/Final Order is a complete and final settlement of all civil and administrative claims and causes of action for the violations set forth in this Consent Agreement/Final Order relating to Respondents’ discharge of fill material into a water of

the United States through construction activities in the North Loup River without the permit required by law.

Respondent Nebraska Department of Roads is an agency of the State of Nebraska, engaged in the construction, maintenance and improvement of roads and highways throughout the State. Respondent Herbst Construction, Inc. is a corporation organized under the laws of Iowa, engaged in the business of highway and bridge construction.

The EPA and Respondents agree that settlement is in the best interest of the parties and the public and will eliminate the need for prolonged and complicated litigation between the parties.

II. ALLEGATIONS

A. Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C.

§ 1319(g)(2)(B) and in accordance with the Consolidated Rules.

2. This Consent Agreement/Final Order serves as notice that EPA has reason to believe that Respondents have violated Sections 301 and 404 of the CWA, 33 U.S.C.

§§ 1311 and 1344, and the regulations promulgated thereunder.

3. Respondents are each a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

B. Statutory and Regulatory Framework of Section 404

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, by any person except in compliance with, inter alia, Section 404 of the CWA, 33 U.S.C. § 1344.

5. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the discharge of dredged or fill material into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, occur in accordance with a permit issued under that Section.

6. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

7. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, dredged spoil, solid waste, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “...the waters of the United States, including the territorial seas.”

10. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “...any discernible, confined and discrete conveyance...from which pollutants are or may be discharged.”

11. 40 C.F.R. §§ 232.2 and 33 C.F.R. Part 328 define waters of the United States, in part, as, “...lakes, rivers and streams, ...wetlands.”

12. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include a State and a corporation.

13. Section 404 of the CWA requires a person to obtain a permit from the United States Army Corps of Engineers (“Corps”) prior to any discharge of dredged or fill material into the navigable waters of the United States.

C. Factual Background

14. On or about March 2006, Respondents or ones acting on their behalf, by using earth-moving construction equipment, placed concrete slabs with steel rebar upstream from the construction site of the Burwell Bridge. The concrete slabs were placed directly into the North Loup River in Garfield County, Nebraska, near the city of Burwell.

15. The construction equipment used by Respondents or ones acting on their behalf, acted as a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. The concrete and steel that were discharged as described in Paragraph 14 above in March 2006 are each a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The North Loup River is a navigable water within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and a water of the United States as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

18. The deposition of concrete and steel into waters of the United States constitutes the “discharge of pollutants” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. Respondents did not obtain a 404 permit prior to conducting the activities described in Paragraph 14 above.

D. Findings of Violation

20. The facts stated in Paragraphs 14 through 19 above are herein incorporated.

21. Respondents, or ones acting on their behalf, discharged pollutants into a water of the United States by using earth moving construction equipment without obtaining a Section 404 permit.

22. Respondents' failure to obtain a Section 404 permit prior to conducting activities described in Paragraph 14 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

23. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against Respondents for the violation cited above, in the amount of \$ 60,000.00.

III. CONSENT AGREEMENT

24. Respondents and EPA agree to the terms of this Consent Agreement/Final Order and Respondents agree to comply with the terms of the Final Order portion of this Consent Agreement/Final Order.

25. Respondents admit the jurisdictional allegations of this Consent Agreement/Final Order and agree not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement/Final Order. Nothing herein shall constitute or be construed as an admission of liability, fact or law, or of any wrongdoing on the part of Respondents.

26. Respondents neither admit nor deny the factual allegations and legal conclusions set forth in this Consent Agreement/Final Order.

27. Respondents waive their rights to a judicial or administrative hearing on any issue of fact or law set forth in this Consent Agreement/Final Order.

28. Nothing contained in the Final Order portion of this Consent Agreement/Final Order shall alter or otherwise affect Respondents' obligation to comply with applicable Federal, state and local environmental statutes and regulations and applicable permits.

29. Respondents agree, in settlement of the claim alleged in this Consent Agreement/Final Order, to a penalty amount of \$60,000.00 to be paid in four installments, as described in Paragraph 32 herein.

30. This Consent Agreement/Final Order constitutes a settlement by EPA of all claims for civil penalties pursuant to Section 309 of the Clean Water Act for the violation alleged herein. Nothing in this Consent Agreement/Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondents. Compliance with this Consent Agreement/Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondents to comply with such laws and regulations.

31. Failure to pay any portion of the penalty in accordance with the provisions set forth in this Consent Agreement/Final Order when due, may result in commencement of a civil action in Federal District Court to recover the total penalty required by the terms of the Final Order, together with interest thereon at the applicable statutory rate.

IV. FINAL ORDER

Pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319 (g)(2)(B), and according to the terms of this Consent Agreement/Final Order, IT IS HEREBY ORDERED THAT:

32. Within thirty (30) days of the Effective Date of this Consent Agreement/Final Order (defined in Paragraph 41 herein), Respondents shall pay \$15,000.00 as the first installment of the civil penalty. Within 13 months of the Effective Date, Respondents shall pay the second installment of \$15,000.00 plus interest that has accrued on the balance through the date of payment. Within 25 months of the Effective Date, Respondents shall pay the third installment of \$15,000.00 plus interest that has accrued on the balance through the date of payment. Within 37 months of the Effective Date, Respondents shall pay the third installment of \$15,000.00 plus interest that has accrued on the balance through the date of payment. Prior to making the second, third, and fourth payments, Respondents shall contact the EPA Accountant, as set forth in Paragraph 33, to obtain the total of interest that will be due with each payment.

33. Payment of the penalty shall be by cashier or certified check made payable to "United States Treasury" and remitted to:

U.S. EPA Region VII
P.O. Box 371099M
Pittsburgh, PA 15251

Respondents shall reference the name of the case, In the Matter of the Nebraska Department of Roads and Herbst Construction, Inc. Docket Number CWA 07-2007-0044, on the check. A copy of the check shall also be mailed to:

Audrey Asher, Esq.
Office of Regional Counsel
EPA - Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

Ms. Alice Morrison
EPA Accountant
U.S. EPA – Region VII
901 N. 5th Street
Kansas City, KS 66101

34. Should the first payment of the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

35. Respondents and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

36. This Consent Agreement/Final Order addresses all civil administrative claims for the CWA violation identified above. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement/Final Order.

37. Notwithstanding any other provision of this Consent Agreement/Final Order, EPA reserves the right to enforce the terms of the Final Order by initiating a judicial or administrative action under Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondents or to seek any other remedy allowed by law.

38. This Final Order will terminate upon receipt of the final payment owed as set forth in Paragraph 32.

39. This Final Order shall apply to and be binding upon Respondents and their agents, successors, and assigns.

40. The parties may modify this Consent Agreement/Final Order by mutual agreement. Such modifications shall be in writing.

41. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The Effective Date shall be the date this Final Order is signed by the Regional Judicial Officer.

For the United States Environmental Protection Agency – Region VII

June 28, 2007
Date

William A. Spratlin
William A. Spratlin, Director
Water, Wetlands, and Pesticides Division
U. S. Environmental Protection Agency Region VII

June 1, 2007
Date

Audrey B. Asher
Audrey B. Asher
Senior Assistant Regional Counsel
U. S. Environmental Protection Agency Region VII

IT IS SO ORDERED.

August 22, 2007
Date

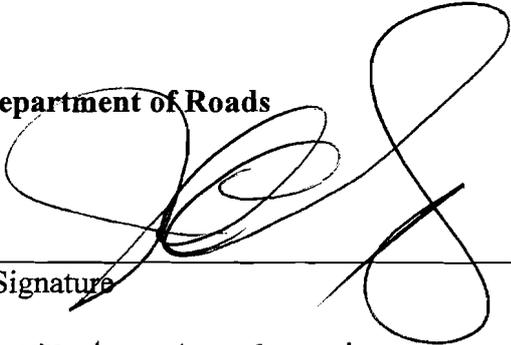
Robert L. Patrick
Robert L. Patrick, Esq.
Regional Judicial Officer

In the Matter of Nebraska Department of Roads and Herbst Construction Company
Docket No. CWA-07-2007-0044

The undersigned representative of the Nebraska Department of Roads certifies that he or she is authorized to enter into this Consent Agreement/Final Order and to execute and legally bind the Nebraska Department of Roads to the terms and conditions of this Consent Agreement/Consent Order and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent Nebraska Department of Roads

6-1-07
Date


Signature

John L. Craig
Name printed

Director - NE Dept. of Roads
Title printed

**In the Matter of Nebraska Department of Roads and Herbst Construction Company
Docket No. CWA-07-2007-0044**

The undersigned representative of Herbst Construction, Inc. certifies that he or she is authorized to enter into this Consent Agreement/Final Order and to execute and legally bind Herbst Construction, Inc. to the terms and conditions of this Consent Agreement/Consent Order and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent Herbst Construction, Inc.

5/30/07
Date


Signature

Michael E Herbst
Name printed

President
Title printed

IN THE MATTER OF Nebraska Department of Roads and Herbst Construction, Inc., Respondent
Docket No. CWA-07-2007-0044

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to:

Audrey B. Asher
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Richard A. DeWitt, Esq.
Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C.
2120 South 72nd Street, Suite 1200
Omaha, Nebraska 68214

and

Jennifer A. Huxoll, Esq.
Attorney General Office - Road's Section
1500 Highway 2
P.O. Box 94759
Lincoln, Nebraska 68509-4759

Aug 23, 2007

Dated

Anna Ruck for

Kathy Robinson
Hearing Clerk, Region 7