

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

2015 AUG 24 PM 1:45
UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

IN THE MATTER OF:)
)
) Docket No. CWA-07-2015-0102
Jerry and Donna Tolliver)
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)
)
Respondents) 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 Respondents in this case are Jerry and Donna Tolliver. (“Respondents”).

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 waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce (hereinafter “traditional navigable waters”) and tributaries to such waters.

7. 40 C.F.R. § 232.2 defines “Discharge of fill material” to include the “placement of fill that is necessary for the construction of any structure in a water of the United States,” including “dams and dikes.”

8. 40 C.F.R. § 232.2 defines “fill material” as any pollutant that “replaces portions of the ‘waters of the United States’ with dry land or which changes the bottom elevation of a water body for any purpose.”

9. 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

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

11. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property located in Southwest ¼ of Section 7, Township 23 North, Range 5 East, Butler County, Missouri (hereinafter “the Site”).

12. Sometime between May and August 2014, Respondents and/or persons acting on Respondents’ behalf, using earth moving equipment, authorized and/or directed the placement of fill material into an unnamed tributary to the Little Black River.

13. On August 20, 2014, the U.S. Army Corps of Engineers, Little Rock District (the “Corps”) inspected the Site and documented the discharge of fill material described herein. The Corps estimated that Respondents had placed approximately 100,000 cubic feet of fill material into the tributary, impacting approximately 100 linear feet of tributary. Corps inspectors also observed that the dam did not allow for any aquatic passage through the dam.

14. On August 4, 2015, an EPA representative confirmed the presence of the unauthorized dam on the unnamed tributary to the Little Black River and also observed that the dam did not allow for aquatic passage.

15. On February 20, 2015 and June 26, 2015, the EPA issued Respondents Letters of Warning prohibiting them from completing further unauthorized work in a water of the U.S. and directing Respondents to work with the Corps to resolve the CWA violation described herein, and to reply to EPA with their plans to come into compliance. To date, Respondents have not replied to EPA.

16. The materials discharged by Respondents into the unnamed tributary to the Little Black River are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6) and “fill material” within the meaning of 40 C.F.R. § 232.2. Respondents’ placement of fill material constitutes the “discharge of fill material” as defined in 40 C.F.R. § 232.2.

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

18. The discharge of the dredged and/or fill material into the unnamed tributary to the Little Black River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. The unnamed tributary to the Little Black River is a perennially flowing tributary with bed, banks, and an ordinary high water mark. The Little Black River is a traditional navigable water. The unnamed tributary to the Little Black River and the Little Black River 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.

20. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill 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.

A. FINDINGS OF VIOLATION

21. The facts stated in Paragraphs 10 through 20 above are herein incorporated.

22. 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. 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:

23. Respondents shall immediately cease placing fill material into the unnamed tributary of the Little Black River.

24. Within thirty (30) days after receipt of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents' plan to resolve the CWA violation described herein. The plan shall be implemented within one year 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 Respondents with a copy of the work plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.

25. Once approved by EPA, the Work Plan shall be incorporated by reference and fully enforceable under the terms of this Order.

26. Respondents shall submit a completion report to EPA, after the completion of the work identified in the Work Plan. This report shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete to correct deficiencies.

27. The submission of documents by Respondents, as identified in Paragraphs 24 and 26, shall include the following written statement, followed by signature of Respondents or 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.

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

Lantz Tipton
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

29. 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 Respondent 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

30. 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.

31. 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

32. 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

33. 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

34. 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 it with respect to matters included herein comply with the terms of this Order.

Failure to Comply

35. 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 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

36. Respondents have 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

37. Respondents have 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 Respondents. Within ten days of receipt of this Order, Respondents may request a conference regarding the Order or to submit information to EPA. If Respondents request a conference or wish 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

38. The terms of this Order shall be effective and enforceable against Respondents 30 days after receipt of an executed copy of the Order.

Termination

39. 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

8-21-15
Date



Chris Muehlberger
Assistant Regional Counsel
Office of Regional Counsel

8.24.15
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:

Jerry and Donna Tolliver
289 County Road 359
Harviell, Missouri 63945.

8/24/15
Date

Carah Moreno