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ENVIRONMENTAL PROTECTION  
AGENCY REGION VII  
REGIONAL HEARING CLERK

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

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF</b>	)	
	)	
Nebraska Department of Roads	)	
	)	FINDINGS OF VIOLATION/
and	)	ORDER FOR COMPLIANCE
	)	ON CONSENT
Hawkins Construction Company	)	
	)	
Respondents	)	Docket No. CWA -07-2007-0040
	)	
	)	
Proceedings under Section 309(a) of the	)	
Clean Water Act, 33 U.S.C. § 1319(a)	)	

**I. FINDINGS OF VIOLATION**

**Jurisdiction and Preliminary Statement**

1. The FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE ON CONSENT (“Order on Consent”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”), by Section 309(a) of the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. §1319(a), as delegated by the Administrator to the Regional Administrator, EPA Region VII, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA Region VII.

2. 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 of Nebraska. Respondent Hawkins Construction Company is a corporation organized under the laws of Nebraska, engaged in the business of highway and bridge construction.

3. The EPA and Respondents agree that settlement of this matter is in the best interest of all parties, and will eliminate the need for prolonged and complicated litigation between the parties, come now and enter into this Order on Consent.

## **II. ALLEGATIONS**

4. The EPA has reason to believe that Respondent Nebraska Department of Roads and Respondent Hawkins Construction Company (“Respondents”) violated Section 301 of the CWA, 33 U.S.C. §1311, through discharge of fill material into waters of the United States along the west bank and the east bank of the Platte River in Sarpy County and Cass County, Nebraska, near the Northeast ¼ of Section 9, Township 12 North, Range 10 West. Specifically, Respondents discharged dredged or fill material into the west bank of the Platte River, approximately 154 feet, and into the east bank of the Platte River, approximately 115 feet, without obtaining the necessary permits required by Section 404 of the CWA, 33 U.S.C. §1344.

5. Each Respondent is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

**Statutory and Regulatory Framework of Section 404**

6. 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.

7. 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.

8. 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.

9. 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.”

10. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, rock, sand and cellar dirt.

11. 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.”

12. 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.”

13. 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.”

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

15. Section 404 of the CWA requires a person to obtain a permit (“Section 404 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.

**Factual Background**

16. On or about February 2006, Respondents or ones acting on their behalf, by using earth-moving construction equipment, built a 154 foot causeway extension made of sand in the Platte River. This construction activity involving the discharge of sand, occurred along the west bank of the Platte River in Cass County, Nebraska, near the Northeast ¼ of Section 9, Township 12 North, Range 10 West.

17. On or about March 2006, Respondents or ones acting on their behalf, by using earth-moving construction equipment, built a 115 foot causeway made of sand in the Platte River. This construction activity involving the discharge of sand, occurred along the east bank of the Platte River in Sarpy County, Nebraska, near the Northeast ¼ of Section 9, Township 12 North, Range 10 West.

18. 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 Act, 33 U.S.C. § 1362(14).

19. The sand that was discharged as described in Paragraph 16 and 17 above in February and March 2006 is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. The Platte 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.

21. The deposition of sand 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).

22. Respondents did not obtain a Section 404 permit prior to conducting the activities described in Paragraphs 16 and 17 herein.

#### **Findings of Violation**

23. The facts stated in Paragraphs 16 through 22 above are herein incorporated.

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

25. Respondents’ failure to obtain Section 404 permits prior to conducting activities described in Paragraphs 16 and 17 above are violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

### **III. ORDER FOR COMPLIANCE ON CONSENT**

#### **Specific Provisions**

Based on the authority of Section 309(a) of the CWA, 33 U.S.C. § 1319(a), Respondents CONSENT and are hereby ORDERED as follows:

26. Respondents agree to perform Mitigation in the same watershed as the site of the activities described in Paragraphs 16 and 17 herein. Mitigation shall include actions listed below.

a. Respondents shall enter into a Memorandum of Understanding (“MOU”) with the Nebraska Land Trust in substantially the form that is attached hereto and incorporated herein as Attachment 1, for the purpose of acquiring and maintaining permanent conservation easements (“the easements”) on ten acres of land located in the lower Platte River Corridor near Schramm State Park (“the Protected Property”), in Sarpy or Cass County, Nebraska, identified on the map that is part of Attachment 1. The easements are to include, among other things, access provisions and restrictions listed on Attachment 2, attached hereto and incorporated herein.

b. Respondents shall arrange for recordation of the easements with the Sarpy or Cass County Register of Deeds, whichever is relevant.

27. Respondents agree that within eight (8) months of the Effective Date, they shall submit to EPA copies of the easements covering the ten acres described in Paragraph 26a herein, file stamped by the relevant county's Register of Deeds. Failure to submit file stamped copies of conservation easements within eight months of the Effective Date or failure to submit file-stamped copies of the easements that contain the provisions set forth in Attachment 2, shall be considered a violation of this Order on Consent. Notwithstanding the foregoing, Respondents may seek an extension of the time within which to complete easement acquisition, provided Respondents and the Nebraska Land Trust are making good faith efforts to acquire the easements and any delay has not been occasioned by the conduct of the Respondents. In the event of an anticipated delay,

Respondents shall inform EPA of the need for an extension at least two weeks prior to the date on which copies of the easements must otherwise be delivered. Respondents shall at that time provide EPA with a written statement concerning the cause for the delay, steps taken to avoid or minimize the delay, number of easement acres acquired, the status of remaining easement negotiations, and a projected timetable for completion of easement acquisition. Upon presentation of the foregoing information and EPA's determination that the delay was not caused by any act or failure to act by Respondents, EPA shall extend the deadline for completion of easement acquisition by at least an additional 30 days, but not more than an additional 120 days from the Effective Date. In such an event, this Order on Consent shall be modified pursuant to Paragraph 39. All submittals under this paragraph shall be sent to Delia Garcia, PhD., Compliance Officer, or her successors at the following address:

Office of Water, Wetlands and Pesticides Division  
EPA Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

28. Respondents agree that this Order on Consent shall not constitute a permit under the CWA. Compliance with the terms of this Order on Consent shall not relieve Respondents of their responsibility to obtain any required local, state, and Federal permits.

29. Respondents agree that it shall be in EPA's sole discretion to determine whether Respondents have fully implemented Mitigation. In making this determination, EPA will take into account Respondents' good-faith efforts as well as any factors beyond Respondents' control. If Respondents disagree with EPA's determination that the Mitigation has not been satisfactorily completed, Respondents may request

request reconsideration of this determination by objecting in writing to Delia Garcia, PhD., at the address specified in Paragraph 27, within ten (10) days of receipt of notification by EPA of the unsatisfactory determination. EPA and Respondents shall have an additional thirty (30) days from the receipt by EPA of the written objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, Respondents may request reconsideration by the Branch Chief of the Water Enforcement Branch of EPA-Region VII. The Branch Chief will provide a written statement of her decision to Respondents, which decision shall be final and binding upon Respondents for purposes of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

30. Respondents agree that no changes shall be made to the Mitigation, described herein, without prior written approval from EPA.

#### **General Provisions**

31. Respondents admit the jurisdictional allegations in this Order on Consent and agree not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Order on Consent.

32. Respondents neither admit nor deny the factual allegations or legal conclusions contained in this Order on Consent. Nothing in this Order on Consent shall constitute or be construed as an admission of liability, fact or law, or of any wrongdoing on the part of Respondents.

33. Nothing contained in the Order on Consent shall alter or otherwise affect Respondents' obligations to comply with all applicable Federal, state, and local environmental statutes and regulations and applicable permits.

34. Compliance with the terms of this Order on Consent shall not relieve Respondents of liability for any violations of the CWA not addressed in this Order on Consent or in the Consent Agreement/Final Order that was filed as a companion to this Order on Consent. In addition, nothing in this Order on Consent shall prohibit EPA from seeking additional injunctive relief pursuant to Section 309 of the CWA, 33 U.S.C. § 1319 for violations not addressed herein.

35. Nothing in this Order on Consent shall limit EPA's right to obtain access to the area where the Mitigation is being performed and to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and any other authority.

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

37. Each signatory below certifies that he is fully authorized to enter into the terms and conditions of this Order on Consent.

38. The terms of this Order on Consent shall be effective and enforceable against Respondents on the Effective Date, which is the date this Order on Consent is signed by EPA.

39. This Order on Consent may be modified by mutual agreement of the parties. Such modification shall be in writing.

40. This Order on Consent 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 on Consent have been met.

Issued this 28<sup>th</sup> day of June, 2007.

**For the United States Environmental Protection Agency – Region VII**

6/28/07  
Date

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

June 25, 2007  
Date

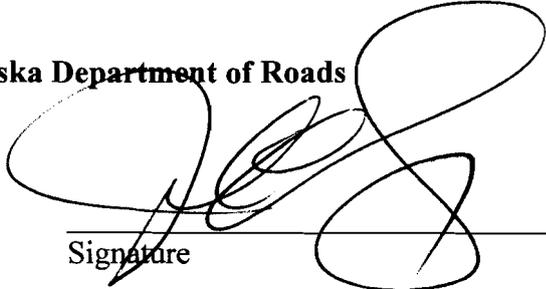
Audrey B. Asher  
Audrey B. Asher  
Senior Assistant Regional Counsel  
U. S. Environmental Protection Agency Region VII

***In the Matter of Nebraska Department of Roads and Hawkins Construction Company***  
***Docket No. CWA-07-2007-0040***

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

**For Respondent Nebraska Department of Roads**

6-14-07  
Date

  
Signature

John L. Craig  
Name printed

Director  
Title printed

***In the Matter of Nebraska Department of Roads and Hawkins Construction Company  
Docket No. CWA-07-2007-0040***

The undersigned representative of Hawkins Construction Company certifies that he or she is authorized to enter into this Order for Compliance on Consent and to execute and legally bind Hawkins Construction Company to the terms and conditions of this Order for Compliance on Consent and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

**For Respondent Hawkins Construction Company**

6/13/07  
Date

*Kim Hawkins*  
Signature  
Kim Hawkins  
Name printed  
President  
Title printed

IN THE MATTER OF Nebraska Department of Roads and Hawkins Construction Company,  
Respondents  
Docket No. CWA-07-2007-0040

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Findings of Violation/Order for Compliance on Consent 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. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Tom Wilmoth  
Attorney at Law  
206 South 13th Street, Suite 1400  
Lincoln, NE 68508

and

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

01/29/07  
Dated

  
Kathy Robinson  
Hearing Clerk, Region 7