

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

07 MAY -2 PM 12: 20

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

Nick Zenger)
211 Lynn Street)
Cuba, Kansas 66940)

) Docket No. CWA-07-2007-0033

) FINDINGS OF VIOLATION
) AND ORDER FOR
) COMPLIANCE ON CONSENT
)

Proceedings under Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))

A. FINDINGS OF VIOLATIONS

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)(3) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §1319(a)(3), 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. The EPA has reason to believe that Nick Zenger ("Respondent") violated Section 301 of the CWA, 33 U.S.C. §1311, by discharging dredged or fill material into navigable waters of the United States without obtaining the necessary permits required by Section 404 of the CWA, 33 U.S.C. §1344.

3. The EPA and Respondent, having determined that settlement of this matter is in the best interest of both parties, come now and enter into this Order on Consent.

Statutory and Regulatory Framework

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, rock, sand and agricultural waste.

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 Act, 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 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.

Factual Background

13. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, Respondent owned the property located in Section 36, Township 2 south, Range 1 west, Republic County, Kansas, which contains a portion of South Fork Mill Creek (hereinafter “Mill Creek Property”).

15. At various times beginning in 2002 and continuing until summer 2003, Respondent and/or persons acting on his behalf, discharged dredged or fill material into two areas South Fork Mill Creek at the Mill Creek Property. Respondent and/or persons acting on its behalf, using earth moving equipment, placed fill material into the main channel of South Mill Creek and diverted flow into a new excavated channel.

16. The discharge and disposal of dredged and/or fill material and the filling of South Fork Mill Creek has altered the natural drainage pattern and hydrology of the area, impacting approximately 2,600 linear feet of South Fork Mill Creek at the Mill Creek Property.

17. The earth moving equipment, referenced in Paragraph 15 above, constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. The fill and/or dredged materials excavated and discharged and disposed of into South Fork Mill Creek at the Mill Creek property include rock, sand and dirt, and are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The discharge and disposal of the fill and/or dredged material into South Fork Mill Creek on the Mill Creek Property, as described in Paragraph 14 above, constitute the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

20. Respondent discharged pollutants into “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

21. Respondent did not obtain a 404 permit prior to conducting the activities described in Paragraph 15 above.

Findings of Violation

22. The facts stated in Paragraphs 13 through 21 above are herein incorporated.

23. The use of earth-moving equipment referenced in Paragraph 15 above indicates that Respondent or one acting on its behalf, discharged pollutants into a water of the United States by using earth-moving equipment without obtaining a Section 404 permit.

24. Respondent’s failure to obtain a Section 404 permit prior to conducting activities described in Paragraph 15 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

B. ORDER FOR COMPLIANCE ON CONSENT

Specific Provisions

Based on the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent CONSENTS and is hereby ORDERED as follows:

25. Respondent hereby agrees to payment of \$11,000 to a designated mitigation program for the purpose of restoring, preserving, and enhancing stream systems within Kansas. This payment shall be made according the following terms and conditions:

- a. Respondent shall submit payment by issuance of certified or cashier's check made payable to "Kansas Aquatic Resources Trust Fund" and submitted to:

The Watershed Institute
Attn: Frank Austenfeld
7211 W. 98th Terrace, Suite 140
Overland Park, Kansas 66212.

- b. Respondent shall deliver the check, with a transmittal letter that identifies the captioned case name and docket number to that organization; and

- c. A copy of the transmittal letter and check shall also be mailed to:

Sarah Thibos LaBoda
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

General Provisions

26. Respondent admits the jurisdictional allegations in this Order on Consent and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Order on Consent.

27. Respondent neither admits nor denies the factual allegations contained in this Order on Consent.

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

29. Compliance with the terms of this Order on Consent shall not relieve Respondent of liability for any violations of the CWA not addressed in 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.

30. Nothing in this Order on Consent shall limit EPA's right to obtain access and to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and any other authority.

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

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

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

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

35. 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 2nd day of May, 2007.

FOR THE U. S. ENVIRONMENTAL PROTECTION AGENCY:

5/1/07
Date

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

4/30/07
Date

Sarah LaBoda
Assistant Regional Counsel
U.S. Environmental Protection Agency Region VII

For the RESPONDENT:

4-23-07
Date

Nick Zenger

4-23-07
Date

Jennifer Zenger

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Mr. Nick Zenger
211 Lynn Street
Cuba, Kansas 66940.

And via first class mail to:

Mark Frazier
U.S. Army Corps of Engineers, Kansas City District
700 Federal Building
Kansas City, Missouri 64106-2896

Luke Cory
U.S Army Corps of Engineers, Kanopolis Field Office
105 Riverside Drive
Marquette, Kansas 67464

Karl Mueldener
Kansas Department of Health and Environment
Bureau of Water
1000 SW Jackson St., Suite 420
Topeka, Kansas 66612-1367.

5/2/07
Date

Kathy Rowson