

IN THE MATTER OF:)	
)	
SOUTH PARK DEVELOPMENT, LLC)	
Tonganoxie, Kansas)	FINDINGS OF VIOLATION,
)	ORDER ON CONSENT
)	FOR COMPLIANCE
)	
Respondent)	
)	Docket No.CWA-07-2006-0166
Proceedings under Section 309(a)(3) of the)	
Clean Water Act, 33 U.S.C. § 1319(a)(3))	
_____)	

A. FINDINGS OF VIOLATION

Preliminary Statement

1. The following Findings of Violation are made and Order on Consent for Compliance (“Order on Consent”) 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 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 South Park Development, LLC (“Respondent”), which is a company incorporated under the laws of State of Kansas and authorized to conduct business in the State of Kansas. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as Jackson Heights development site located near Tonganoxie, Kansas, at the South East corner of Parallel Road and County Road No. 5 (“the Site”). On or about May 10 and 16, 2005, EPA performed an inspection of the Jackson Heights Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the treatment and disposal of storm water at the Jackson Heights Site, in accordance with the CWA. At the time of EPA’s inspection, the Site had developed two phases, with a total of 8 phases planned. Following EPA’s inspection, on May 16, 2005, a Notice of Potential Violation (NOPV) was issued to Respondent. On November 2, 2005, EPA issued Respondent an Administrative Compliance Order (“November 2, 2005 Order”) pursuant to the authority of Section 309 of the CWA, 33 U.S.C. § 1318, which ordered Respondent to take

specific actions to ensure future compliance with the storm water permitting requirements of the CWA (Docket No. CWA-07-2006-0025).

3. This Findings of Violations and Order on Consent address discharges of pollutants by Respondent into the waters of the United States without the permit(s) required by law. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of "pollutants" by any "person" into "navigable waters" as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in compliance with, *inter alia*, a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Section 404 of the CWA, 33 U.S.C. § 1344, specifically 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.

4. 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.

5. At various times between April and September 2004, the Respondent and/or persons acting on its behalf using earth moving equipment filled the then existing stream channel and excavated a new channel impacting approximately 2,800 linear feet of a unnamed tributary to Tonganoxie Creek. The work performed by Respondent straightened the stream channel by removing meanders in the tributary and directing the water flow through a different channel and structures created by Respondent.

Specific Findings

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

7. During the time periods of the discharges of dredged and/or fill material into the tributary of Tonganoxie Creek described above, Respondent owned the property on which the discharges took place.

8. Respondent's discharge of dredged and/or fill material within the tributary of Tonganoxie Creek altered the natural drainage pattern of the tributary, resulting in the blockage of the natural channel of the tributary, and the cutting of a new channel which straightened the stream channel by removing meanders in the channel and affecting approximately 2,800 linear feet of the waterway.

9. The dredged and/or fill materials discharged by Respondent into the tributary of Tonganoxie Creek and the wetlands includes spoil, rock, sand and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

10. The earth moving equipment referenced in Paragraph A.5 above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

11. The discharge of the dredged and/or fill material into the wetlands and tributary on the property, described in Paragraphs A.5 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

12. The unnamed tributary of Tonganoxie Creek 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.

13. Respondent's discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

14. To date, Respondent has failed to restore the filled areas of the unnamed tributary of Tonganoxie Creek to their pre-discharge configuration. The adverse effects on the environment of Respondent's illegal discharges into the tributary of Tonganoxie Creek are ongoing. Each day the pollutants discharged by Respondent remain in place constitutes an ongoing violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

B. ORDER ON CONSENT FOR COMPLIANCE

Based on the Findings of Violation set forth above and, pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent AGREES to the terms below, and is hereby ORDERED as follows:

1. Respondent and the EPA agree to the terms of this Order on Consent and Respondent agrees to comply with the terms of this Order on Consent.
2. Respondent admits the jurisdictional allegations of this Order on Consent and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Order on Consent.
3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Order on Consent.

Mitigation

4. Respondent agrees that it would have been required to perform mitigation for the impacts of the channelization and discharges of dredged and fill material, if Respondent had properly applied for and obtained the required Section 404 permit(s), before the alleged violations had occurred. As a means of performing such mitigation, Respondent hereby agrees to perform all mitigation required by the Corps in any "after the fact" permit issued by the Corps to address the violations described above, or alternatively, to make a payment in lieu of mitigation, as described in Paragraph B.5, below.

5. As an alternative to performing mitigation pursuant to an "after-the fact" permit, or in the event that the Corps does not issue an after-the-fact permit within 120 days after the effective date of this Order, or EPA is notified by the Corps that Respondent has failed to perform the mitigation required by the Corps in any "after-the-fact" permit that is issued by the Corps, Respondent hereby agrees to finance performance of the required mitigation by payment of \$14,826.50 to an EPA approved organization for the purpose of restoring, preserving, and enhancing stream systems within Kansas (and/or Missouri). This payment shall be made according the following terms and conditions:

a. Such payment shall be made in full within 30 days following receipt by Respondent of a demand for payment by EPA which states the basis for demand for payment and identifies the EPA approved organization designated by EPA to receive the payment in lieu of mitigation; and

b. Respondent shall finance the required mitigation by issuance of certified or cashier's check made payable to the designated EPA approved organization, and shall deliver the check, with a transmittal letter that identifies the captioned case name and docket number to that organization. A copy of the transmittal letter and check shall also be mailed to EPA.

6. The deadlines for performance of mitigation, or payment in lieu of mitigation, required by Paragraphs B.4 and B.5, above, may be extended by Complainant by provision of written notice to Respondent. Any such written extension shall be incorporated into and enforceable as an element of this Order.

7. All documents required to be submitted to EPA by this Order shall be submitted by mail to:

Howard C. Bunch
Sr. Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

General Provisions

Effect of Compliance with the Terms of this Order

8. This Order on Consent 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. Compliance with the terms of this Order on Consent shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the

CWA, 33 U.S.C. § 1319. Issuance of this Order on Consent 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.

9. This Order on Consent shall not constitute a permit under the CWA. Compliance by Respondent with the terms of this Order on Consent shall not relieve Respondent of its obligations to comply with the CWA or any other applicable local, state or federal laws and regulations. Compliance with the terms of this Order on Consent shall not relieve Respondent of its responsibility to obtain and comply with any required local, state and/or federal permits.

10. No action or decision by EPA pursuant to this Order on Consent shall constitute final agency action giving rise to any rights to judicial review prior to EPA's initiation of a judicial action to compel Respondents' compliance with the requirements of this Order on Consent.

Subsequent Amendment

11. This Order on Consent may only be amended by mutual agreement of EPA and Respondent. Any amendment shall be in writing, signed by representatives of EPA and Respondent, and shall have as its effective date those dates specified therein, and shall be incorporated into and enforceable as part of this Order on Consent.

Access and Requests for Information

12. Nothing in this Order on Consent shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, 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

13. 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 full force and effect and shall not be affected by such a holding.

Effective Date

14. The terms of this Order on Consent shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order on Consent.

Termination

15. This Order on Consent shall remain in effect until the mitigation required by Paragraphs B.4 and B.5, above, has been completed by Respondent. EPA will provide written notice to

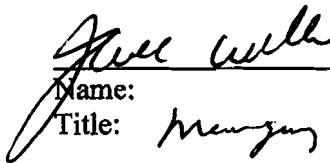
Respondent of the termination of the Order when EPA determines that the required mitigation has been completed.

Signatories

16. The undersigned signatories for Respondent and EPA hereby certify that they have the authority to sign this Order on Consent and to bind the respective parties to the terms contained herein.

17. This Order on Consent may be signed by EPA and Respondent in part and counterpart. This Order on Consent may be executed by EPA upon receipt from Respondent of a telefaxed signature page. Respondent agrees that the original Order on Consent signed by Respondent shall be transmitted by overnight mail to Howard C. Bunch, Sr. Assistant Regional Counsel, U.S. Environmental Protection Agency, Region VII, 901 N. 5th Street, Kansas City, Kansas 66101. Upon EPA's receipt of the signed original from Respondent, the original signature page signed by Respondent shall be filed with the previously executed copy with the Regional Hearing Clerk of Region VII of EPA.

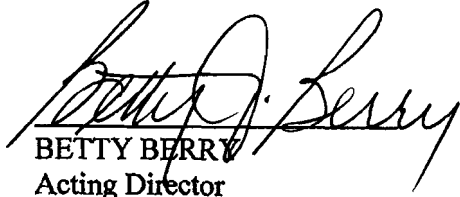
For SOUTH PARK DEVELOPMENT, LLC.


Name: _____
Title: *Managing member*

May 12 2006
DATE

Docket No. CWA-07-2006-0166

For the United States Environmental Protection Agency



BETTY BERRY
Acting Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region VII

05/17/06
DATE



HOWARD C. BUNCH
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII

5/16/2006
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:

Jack Willis, Registered Agent
South Park Development Company. L.L.C.
410 Smiley
P.O. Box 147
Tonganoxie, KS 66086

Date

5/18/06

