

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:

GERALD DIRKS

Respondent

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

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) Docket No. CWA-07-2008-0050
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AMENDED FINDINGS OF VIOLATION/
ORDER FOR COMPLIANCE
ON CONSENT
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I. FINDINGS OF VIOLATION

Jurisdiction and Preliminary Statement

1. The following AMENDED 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 “Act”), 33 U.S.C. § 1319(a), as delegated by the Administrator to the Regional Administrator, EPA Region 7, and further delegated to the Director, Water, Wetlands and Pesticides Division (WWPD), EPA Region 7.

2. The Respondent in this case is Mr. Gerald Dirks who resides at Route 4, Box 432, Butler, Missouri, 64730. Mr. Dirks (Respondent) owns property around a wetland and stream locally known as Lateral Ditch Number Three located in Section 3, Township 39 North, Range 32 West, Butler, Bates County, Missouri.

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

II. ALLEGATIONS

4. Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311, through discharge of fill material into waters of the United States. Specifically, sometime between 1995 and 1997, Respondent discharged fill material into 2.9 acres of wetlands adjacent to a stream locally known as Lateral Ditch Number Three and discharged approximately 200 feet of fill material into

Lateral Ditch Number Three. This activity occurred without Respondent obtaining the necessary permit required by Section 404 of the CWA, 33 U.S.C. § 1344.

5. 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 an individual.

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. At all times relevant to this action, Respondent owned, operated or otherwise controlled approximately 2.9 acres of property located in Section 3, Township 39 North, Range 32 West, Butler, Bates County, Missouri. The property is located adjacent to Lateral Ditch Number Three and includes wetland areas.

17. On October 14, 2003, the Natural Resources Conservation Service (NRCS) entered into a Wetland Restoration Plan (WRP) with Respondent (Attachment 1). The WRP required regeneration of 51.4 acres of previously converted wooded wetlands. The wetland restoration project was located in Section 3, Township 39 North, Range 32 West, Butler, Bates County Missouri. The WRP has not been implemented.

18. Subsequent to entering into the WRP, Respondent and/or persons acting on his behalf, using earth-moving construction equipment, discharged dredged or fill material including dirt, spoil, rock, and sand, into 200 feet of the channel of Lateral Ditch Number Three in order to divert flow. Respondent and/or persons acting on his behalf also discharged dredged or fill material into 2.9 acres of nearby wetlands in order to construct a levee.

19. The construction equipment used by Respondent or ones acting on his behalf, acted as a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

20. The dredged and/or fill materials discharged by Respondent into the wetlands and Lateral Ditch Number Three 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).

21. Lateral Ditch Number Three 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 U.S.C. § 328.3.

22. The 2.9 acres where fill and/or dredged material along Lateral Ditch Number Three was discharged and disposed of by the Respondent is characterized as "wetlands," as defined at 40 C.F.R. § 232.2.

23. Respondent did not obtain a Section 404 permit prior to conducting the activities described in Paragraph 18 herein.

24. Sometime in Summer 2009, the NRCS offered to compensate Respondent in exchange for protection of approximately 275 acres of Respondent's property through NRCS's Wetlands Reserve Program.

Findings of Violation

25. The facts stated in Paragraphs 16-24 above are herein incorporated.

26. Respondent, or persons acting on his behalf, discharged pollutants into a water of the United States by using construction equipment without obtaining a Section 404 permit.

27. Respondent's failure to obtain a Section 404 permit prior to conducting the activities described in Paragraph 18 above is a violation 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), Respondent CONSENTS and is hereby ORDERED as follows:

28. Respondent agrees to remove the fill material from Lateral Ditch Number Three to restore flow solely to the original channel of Lateral Ditch Number Three. The fill material shall be disposed in an upland location in a method that minimizes erosion during the removal. The work shall be fully completed within twelve (12) months of the Effective Date.

29. Respondent agrees to remove the fill material discharged and disposed of in the 2.9 acres of converted wetland adjacent to Lateral Ditch Number Three. The fill material shall be disposed of in an upland location in a method that minimizes erosion during the removal. The work shall be fully completed within 12 months of the Effective Date.

30. Respondent agrees to perform all of the requirements of the October 14, 2003, WRP and Project as set forth in Attachment 1. Attachment 1 is incorporated herein by reference. The WRP and Project shall be fully completed within 12 months of the Effective Date of this Order on Consent. The project is located at Section 3, Township 39 North, Range 32 West, Bates County, Missouri. Those actions include but are not limited to the following:

a. The converted wetland shall be restored using a combination of natural regeneration of desirable native herbaceous and woody plants from root sprouting and available seed sources for 16.9 acres, and tree planting for thirty-four and one half (34.5) acres in designated converted wetland fields. Designated converted wetland fields are depicted in Exhibit 6 of the WRP.

b. Bottomland hardwood forest shall be re-established on the thirty-four and one half (34.5) acres depicted in Exhibit 6 of the Wetland Restoration Tree Planting Plan at a rate of two hundred and fifty (250) bare root seedlings per acre.

c. Seedlings shall be planted in rows or groups on an approximate 12 foot by 15 foot grid.

d. The following tree species shall be planted in the quantity identified:

Scientific Name	Common Name	Quantity
1) <i>carya illinoensis</i>	pecan	2875
2) <i>carya laciniosa</i>	shell bark hickory	100
3) <i>quercus macrocarpa</i>	bur oak	500
4) <i>quercus palustris</i>	pin oak	2850
5) <i>platanus occidentalis</i>	sycamore	400
6) <i>fraxinus Pennsylvania</i>	green ash	500
7) <i>acer saccharinum</i>	silver maple	600
8) <i>quercus bicolor</i>	swamp white oak	500
9) <i>ilex decidua</i>	deciduous holly	100
10) <i>corylus Americana</i>	American hazel	200
TOTAL		8625

e. All planting shall be bare root seedlings, conservation grade or better.

f. Woody plants shall be vigorous, moist but free of mold, free of defects and with well-developed root systems. Plants that do not conform to this description after delivery to the site shall be discarded and shall be replaced by Respondent.

g. Woody material shall be planted according to the species listed above.

h. The seedlings shall be at least one (1) year old and at least 12 inches in height. A root/shoot ratio must be maintained at a range of one-to-one (1:1) to one-to-one and a half (1:1.5). The taproot may not be shortened to less than eight (8) inches in length. Seedlings shall be maintained in a dormant condition until planted.

i. Seedling shall be planted upright with no more than a twenty (20) percent lean and at the same depth as they grew in the nursery. Soil shall be packed firmly around the seedling roots to eliminate air pockets.

j. The Site shall be prepared in the following manner: (1) the entire planting area shall be mowed; (2) stock shall be planted by hand or by use of a tractor-drawn tree planter; (3) all planting stock shall be planted between February 15 and May 15; (4) disking strips where plantings are planned will facilitate ease of planting, however no disking shall be done where natural regeneration is occurring.

k. All tree planting shall be inspected in September following planting.

l. At the end of three years, a minimum of one hundred twenty-five (125) stems per acre of desirable species must be present.

m. Desirable species include: *echinocloa* species (wild millet), *polygonum* species (smartweeds), *carex* species (sedges), *carya illinoensis* (pecan), *carya laciniata* (shell bark hickory), *quercus macrocarpa* (bur oak), *quercus palustris* (pin oak), *fraxinus pennsylvanica* (green ash), *acer saccharinum* (silver maple), *quercus bicolor* (swamp white oak), *salix nigra* (black willow), *cephalanthus occidentalis* (button bush).

31. Respondent agrees that, by donating 51.4 acres of his property to NRCS's Wetlands Reserve Program, as described in paragraph 24, he will not be compensated by the NRCS for the donated 51.4 acres.

32. Respondent agrees 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 Respondent of his responsibility to obtain any required local, state, and/or federal permits. Specifically, Respondent agrees to consult with the Corps and agrees to obtain all permits that the Corps determines necessary before commencing any work required by this Order on Consent.

33. Respondent shall submit all reports and deliverables required by this Order on Consent to EPA and the Corps at the following addresses:

Mr. Raju Kakarlapudi, Enforcement Officer
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency – Region 7
Kansas City, Kansas 66101

and

Mr. Mark Frazier, Reg. Program Manager/Assistant Branch Chief
Kansas City District
U.S. Army Corps of Engineers
601 E. 12th Street
Kansas City, Missouri 64106.

Dispute Resolution

34. Unless this Order on Consent expressly provides otherwise, the dispute resolution procedures of this Paragraph shall be the exclusive mechanism for resolving disputes arising under this Order on Consent. The Parties shall attempt to resolve any disagreement concerning this Order on Consent expeditiously and informally.

a. If Respondent objects to any EPA action taken pursuant to this Order on Consent he shall notify EPA in writing of his objection within fourteen (14) days of such action, unless the objection has been resolved informally. The notice shall set forth the specific points of the dispute, the position Respondent maintains should be adopted as consistent with the

requirements of this Order on Consent, the factual and legal bases for Respondent's position and all matters Respondent considers necessary for EPA to make a determination.

b. EPA and Respondent shall have thirty (30) days from EPA's receipt of Respondent's written objection to resolve the dispute informally or through formal negotiations. This thirty (30) day negotiation period may be extended by agreement of the parties. Any agreement reached by the parties pursuant to this Paragraph shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order on Consent.

c. If the parties are unable to reach an agreement, the dispute shall be presented to the Director of the WWPD ("Director") of EPA Region 7, for resolution. The Director will issue a written decision on the dispute to the Respondent. The Director's decision is EPA's final decision.

d. Respondent's participation in this dispute resolution process shall not constitute a waiver of its right to challenge or object to the decision in an action taken by EPA resulting from or based upon the decision made by EPA under these procedures other than one reached by mutual agreement of the parties.

e. If the pendency of a dispute as defined herein and its resolution cause a delay that prevents Respondent from meeting a deadline set forth in, or established pursuant to this Order on Consent, that deadline shall be extended as necessary; provided, however, that any such deadline shall not be extended if EPA finds that the dispute was not in good faith or otherwise lacks a reasonable basis on the part of the Respondent.

Force Majeure

35. Respondent agrees to perform all requirements of this Order on Consent within the time limits established under this Order on Consent, unless the performance, including but not limited to gaining access to the site, is delayed by a *force majeure*.

a. For purposes of this Order on Consent, a *force majeure* is defined as any event arising from causes beyond the control of the Respondent, or of any entity controlled by the Respondent, including, but not limited to, his contractors and subcontractors, that delays or prevents performance of any obligation under this Order on Consent despite Respondent's best efforts to fulfill the obligation. The requirement that Respondent exercise best efforts to fulfill the obligation includes using best efforts to anticipate any potential *force majeure* event (1) as it is occurring; and (2) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. Examples of *force majeure* include, but are not limited to, natural disasters (earthquakes, tornado, flood, hurricane, or fire); wars, riots and other upheavals; and performance failure of parties beyond the control of the Respondent. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

b. If any event occurs or has occurred that may delay the performance of any obligation under this Order on Consent, Respondent shall notify EPA within five (5) days after Respondent first knew that the event might cause a delay. Within fourteen (14) days of providing notice to EPA as described above, Respondent shall provide to EPA in writing: (1) an explanation and description of the reasons for the delay; (2) the anticipated duration of the delay; (3) all actions taken or to be taken to prevent or minimize the delay; (4) a schedule for implementation of any measures to be taken to prevent or mitigation the delay or the effect of the delay; (5) Respondent's rationale for attributing such delay to a *force majeure* event if he intends to assert such a claim. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

c. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order on Consent that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

General Provisions

36. 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.

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

38. 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.

39. 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.

Effect of Compliance with the Terms of this Order on Consent

40. This Order on Consent shall not constitute a permit under the CWA. Compliance with the terms of this Order on Consent shall not relieve Respondent of his responsibility to obtain any required local, state and/or federal permits.

41. 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. The EPA retains the right to seek any and all remedies available under Sections 309 of the Act, 33 U.S.C. § 1319, for any violation cited in this Order on Consent. 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 Act for any violation whatsoever.

Access and Requests for Information

42. Nothing in this Order on Consent shall limit EPA's right to obtain access to, and/or to inspect Property operated by Respondent 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

43. 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.

Parties Bound

44. This Order on Consent shall apply to and be binding upon the Respondent, his agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein comply with the terms of this Order on Consent.

Effective Date

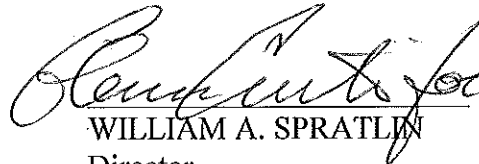
45. The terms of this Order on Consent shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order on Consent is signed by EPA.

Termination

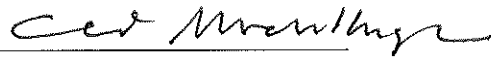
46. This Order on Consent shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order on Consent have been met.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

10-27-09
Date

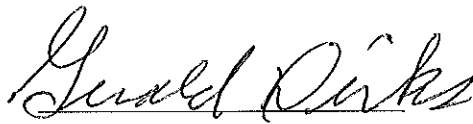

WILLIAM A. SPRATLIN
Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region 7

10.27.09
Date


CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7

FOR THE RESPONDENT:

10-26-09
Date



IN THE MATTER OF Gerald Dirks, Respondent
Docket No. CWA-07-2008-0050

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Amended Findings of Violation/Order for Compliance on Consent was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Christopher Muehlberger
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Gerald Dirks
Route 4, Box 761
Butler, Missouri 64730

Dated: 10/30/09



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7