

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Bricks, Incorporated,) Docket No. CWA-5-2000-012
)
Respondent)

ORDER

The U.S. Environmental Protection Agency (“EPA”) initiated this matter by filing an administrative complaint against Bricks, Incorporated (“Bricks”), pursuant to Section 309(g)(1)(A) of the Clean Water Act (the “Act”). 33 U.S.C. § 1319(g)(1)(A). In the complaint, EPA alleges that Bricks violated Section 301 of the Act, 33 U.S.C. § 1311, by discharging pollutants into navigable waters of the United States without a permit issued pursuant to Section 404. 33 U.S.C. § 1344. For this alleged violation, EPA seeks the assessment of a \$68,750 civil penalty.

Bricks denies that it committed this Clean Water Act violation and it moves for accelerated decision or, alternatively, for a dismissal of the complaint. For the reasons set forth below, respondent’s motion is *denied*.

I. Background

The facts at this early stage are sketchy, with both complainant and respondent substantially relying upon prehearing exchange documents not as yet admitted into evidence. Nonetheless, a general picture of events emerges from the present record. In that regard, it is undisputed that Bricks sought to develop a parcel of land (the “Project”) that according to EPA, includes “wetlands.”¹ Respondent submits that in July, 1999, it notified the U.S. Army Corps of Engineers (“Corps”) that this Project was authorized to proceed under the Nationwide

¹ 40 C.F.R. 232.3(t) provides:

The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

Permit (NWP”).² EPA apparently views this notification as a permit application and preconstruction notification. In any event, at some point thereafter, Bricks performed work on the Project using bulldozers and other machinery. Ans. ¶ 13.

On November 30, 1999, EPA issued a Findings of Violation and Compliance Order (“Compliance Order”) to Bricks pursuant to Section 309(a) of the Clean Water Act. 33 U.S.C. § 1319(a). Resp. Mem., Ex. 1. This EPA action was prompted by work performed on the Project site by Bricks. Specifically, in the Compliance Order, EPA alleged that Bricks used bulldozers and, or, other earth moving machinery to discharge approximately 8,000 cubic yards of fill into 1.05 acres of wetlands located within the Project. EPA further asserted that this discharge constitutes a violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, because Bricks did not have a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344, allowing this discharge to take place.

Accordingly, in the Compliance Order, EPA directed Bricks to take several remedial measures. Insofar as the present enforcement case is concerned, EPA directed that respondent “immediately cease further discharges of fill material into the wetlands on the site, except in compliance with a permit issued pursuant to Section 404 of the [Clean Water Act].” Compliance Order at 4.

In addition, EPA ordered Bricks to seek a permit which would allow respondent to discharge the fill material, as well as provide for a restoration plan. In that regard, the Compliance Order read:

7. That within thirty (30) days of receipt of this Order, the Respondent shall submit a completed application requesting an after-the-fact (“ATF”) permit and/or, as applicable, a prospective permit from the Chicago District U.S. Army Corps of Engineers, to retain any amount of fill that is not to be removed under the restoration plan. The permit application should also disclose any discharges of fill to wetlands that would be deposited as a result of implementation of the restoration plan. The permit application must contain a compensatory mitigation plan that is acceptable to both the Corps and U.S. EPA. The mitigation plan must offset project impacts at a minimum ratio of 5:1. At this ratio, a minimum of 5.25 acres of compensatory mitigation must be provided. The mitigation proposed shall be invalid in the event that the ATF permit is denied....

² Bricks submits that because the Project impacted less than 1/3 acre of wetland, “this proposed work could have commenced without any notification or communication with the Corps.” Resp. Mem. at 2 (fn. omitted).

Compliance Order at 5. It is this portion of the Compliance Order which serves as the cornerstone of respondent's present motion for relief.

In setting forth its version of the background facts, Bricks states that it "acquiesced and submitted the mitigation plan with the ATF Permit application." Resp. Mem. at 4. On June 7, 2000, the Corps issued an ATF permit to Bricks. Resp. Mem., Ex. 2. Bricks has characterized the ATF permit as verifying "that the activity [on the Project site] was authorized by and complied with the terms and conditions of NWP 26 issued by the [Corps'] Chief of Engineers." Resp. Mem. at 4.

EPA, on the other hand, offers its own view as to this sequence of events. It states:

.... U.S. EPA Region 5, issued an Order pursuant to Section 309(a) of the Act ... requiring Respondent to remove fill from some portions of the wetlands and to restore some portions of the wetlands. That Order also required Respondent to apply for an ATF permit regarding the remaining fill and to perform compensatory mitigation, to the satisfaction of both U.S. EPA and the Corps, as a *quid pro quo* for being allowed to leave some of the remaining fill in place and proceed with the development project.

Compl. Mem. at 7.

On July 14, 2000, after the ATF permit had been issued to Bricks, EPA initiated the present civil penalty enforcement action against respondent. As noted, EPA charges that Bricks' discharge of fill into certain wetlands on the Project site, without a Section 404 permit, constitutes a violation of Section 301 of the Clean Water Act.

II. Discussion

The principle argument advanced by Bricks is that the Corps' issuance of the ATF permit resolves all the outstanding legal disputes in this case. In other words, respondent argues that this after-the-fact permit effectively erases any Section 301 violations which might have existed. To support this argument, Bricks relies upon the Corps' enforcement regulations governing wetlands, contained in 33 C.F.R. Part 326. In that regard, Bricks argues that "Corps rules prohibit it from accepting an ATF permit application unless administrative, legal and/or corrective action is concluded or a decision has been made that no enforcement action is to be taken." Resp. Mem. at 5. Thus, Bricks reasons that the issuance of the ATF permit by the Corps resolved all disputes. As explained below, respondent's reliance upon the Corps' enforcement regulations and its issuance of the ATF to support its motion for summary judgment and, or, dismissal is misplaced.

The starting point for analysis of respondent's motion is not 33 C.F.R. Part 326, as respondent suggests, but rather the Clean Water Act. Section 301 of the Act provides that "the discharge of any pollutant by any person shall be unlawful." Section 301, however, does provide for exceptions. One of the exceptions is a permit issued by the Corps under Section 404 of the Act allowing for the discharge of fill material into navigable waters. Here, EPA alleges in its complaint that Bricks did not have a Section 404 permit when it discharged fill material into the wetlands area of the Project and thus, it committed a Section 301 violation. Compl. ¶¶ 12-20.

The issue, therefore, is whether EPA can prove this alleged violation. If it can, it must then establish through testimonial and documentary evidence the appropriate civil penalty to be assessed. This is the clear and unambiguous statutory scheme. EPA has the prosecutorial authority under the Clean Water Act. The respondent, in turn, has a statutory opportunity to dispute the charges. Bricks, however, argues that the ATF permit issued by the Corps somehow trumps this statutory scheme. It suggests that this statutory scheme can be altered by the Corps, through the issuance of a permit, after the alleged Section 404 permit has occurred so as to effectively expunge any such violation from the record. Bricks' argument is rejected.

First, Bricks cites to no provision of the Clean Water Act as support for its position. Indeed, as noted above, the Act's statutory enforcement scheme supports EPA's argument that it possesses the authority to proceed in this matter.

Second, Bricks' reliance upon the Corps' regulations is also unpersuasive. While there is no dispute that EPA and the Corps share authority regarding the enforcement of the Section 404 permitting provisions (*see, e.g.*, Memorandum of Agreement, Resp. Mem., Ex. 4), Bricks has made no showing that the Corps' regulations prevent EPA from prosecuting what it believes is a violation of the Clean Water Act.

In that regard, citing 33 C.F.R. 326.3(e), Bricks states, "[t]o prevent issuance of ATF permits in inappropriate circumstances, Corps rules prohibit it from accepting an ATF permit application unless administrative, legal and/or corrective action is concluded or a decision has been made that no enforcement action is to be taken." Resp. Mem. at 5. Clearly, this regulation is directed to the Corps and not to EPA. Respondent has not explained how any failure by the Corps to follow its own regulations, assuming that to be the case, can somehow serve as a brake upon EPA's enforcement machinery. Nor has respondent shown that it would be unduly prejudiced by allowing EPA to maintain this enforcement action. In that regard, when it issued its Compliance Order to Bricks, EPA reminded the respondent that it retained its Clean Water Act prosecutorial authority in this matter. *See* n.3, *infra*.

Also, Section 326.3(e)(1)(iv) raises the possibility that in granting the ATF permit the Corps was in fact acting within the scope of its regulations. That section provides:

No permit application will be accepted nor will the processing of an application be continued when the district engineer is aware of enforcement litigation that has been initiated by other Federal, state, or local regulatory agencies, *unless he determines that concurrent processing of an after-the-fact permit application is clearly appropriate.*

33 C.F.R. 326.3(e)(1)(iv) (*emphasis added*).³ Thus, even assuming that the Corps' regulations significantly impact upon this case, the question remains as to whether the Corps' issuance of the ATF permit was intended to proceed concurrently with EPA's enforcement action.

In sum, it is safe to say that Bricks has not shown by way of its after-the-fact permit argument that it is entitled to judgment as a matter of law. Likewise for the reasons mentioned above, respondent's argument that EPA has no authority to proceed in this matter once the ATF permit was issued is similarly flawed. As already outlined, EPA's authority to proceed here lies in the statutory provisions of the Clean Water Act. Respondent's assertion that the facts of this case bear a resemblance to the Eighth Circuit's decision in *Harmon Industries, Inc. v. Browner* is incorrect.

Finally, Bricks' request that this tribunal nullify that portion of EPA's Compliance Order directing a 5:1 mitigation is rejected. That simply is not a matter within the tribunal's jurisdiction.⁴

³ For example, in paragraphs 11 and 12 of the Compliance Order, EPA advised Bricks that issuance of the Order did not preclude enforcement action pursuant to Section 309 of the Clean Water Act.

⁴ Nonetheless, it may be relevant to the civil penalty to be assessed in this case, should EPA establish a violation.

III. Order

The motion filed by Bricks, Incorporated, for accelerated decision or alternatively, for a dismissal of the complaint is *denied*. Respondent has failed to show that it is entitled to judgment as a matter of law. 40 C.F.R. 22.20. The hearing set for January 24-25, 2001, in Chicago, Illinois, will proceed as scheduled.

Carl C. Charneski
Administrative Law Judge

Issued: January 9, 2001
Washington, D.C.