

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF |) | |
| |) | COMPLAINT AND NOTICE OF |
| MICHAEL ZAHNER |) | OPPORTUNITY FOR HEARING |
| |) | |
| and |) | |
| |) | Docket No. CWA-07-2022-0141 |
| ZAHNER MANAGEMENT |) | |
| COMPANY, LLC |) | |
| |) | |
| Respondents |) | |
| |) | |
| Proceedings under Section 309(g) of the |) | |
| Clean Water Act, 33 U.S.C. § 1319(g) |) | |
| _____ |) | |

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

2. This Complaint serves as notice that the EPA has reason to believe that Respondents have violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (“Complainant”).

4. The Respondents in this case are Michael Zahner and Zahner Management Company, LLC (“Respondents”).

Statutory and Regulatory Framework

5. The goal of the CWA, 33 U.S.C. § 1251 *et seq.*, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in accord with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

7. Section 404 of the CWA, 33 U.S.C. § 1344, requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (“Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

8. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land” or “changing the bottom elevation of any portion of a water of the United States.”

9. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

10. 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, and which include tributaries to waters of the United States.

11. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the assessment of civil penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

12. Respondents are persons within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property containing portions of unnamed tributaries to Buck Creek located in Section 20, Township 33 North, Range 10 East, Bollinger County, Missouri (hereinafter “the Site”).

13. On July 16, 2018, the Corps received a report of possible CWA violations on the Site.

14. On August 22, 2018, Corps personnel conducted an investigation at the Site and observed and documented that Respondents conducted work in three tributaries to Buck Creek using earth moving equipment in order to construct a lake, including clearing trees, grading and filling the tributaries, and constructing a dam across the downstream tributary.

15. Based on the results of the Corps' investigation, Corps personnel identified that Respondents filled portions of relatively permanent and perennial tributaries to Buck Creek.

16. Buck Creek is a perennial tributary to the Whitewater River, which is a primary tributary to the Mississippi River.

17. On October 24, 2018, the EPA sent a Letter of Warning to Respondent Zahner requesting that he work with the Corps to restore the Site or obtain after-the-fact permitting and immediately implement sediment control practices.

18. On July 20, 2021, a representative from EPA inspected the Site ("EPA Inspection").

19. The EPA inspector confirmed the grading, fill, and/or inundation in the tributaries to Buck Creek, observed during the Corps' inspection, that created a lake of approximately 13.5 acres, as well as a second lake upstream from the original impoundment on Respondent's property approximately 2.6 acres created by grading, filling, and constructing a dam across and inundating a tributary of Buck Creek.

20. Based on aerial images and laser imaging, detection, and ranging (LIDAR) images, and the results of the EPA inspection, the EPA inspector calculated impacts to three tributaries to Buck Creek as follows: 325 linear feet of Tributary 1; 1,092 linear feet of Tributary 2; and 1,546 linear feet of Tributary 3.

21. During the EPA Inspection, the EPA inspector also identified active erosion in areas surrounding the dams and spillways leading to sediment deposits in the downstream tributary.

22. Respondent provided additional information to the EPA on March 13, 2021, in response to an EPA information request issued on February 5, 2021, in accordance with Section 308 of the CWA, 33 U.S.C. § 1318 (hereafter "Section 308 responses"), including that Respondents conducted the clearing and grading with earth moving equipment in the winter of 2017/2018 and constructed the dam in 2018.

23. The three tributaries to Buck Creek, referenced above, are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

24. The fill material placed by Respondents into the tributaries to Buck Creek are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

25. The earth moving equipment used by Respondent Michael Zahner to grade the Site and place the fill material into the tributaries to Buck Creek constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

26. The discharge of the fill material into the tributaries to Buck Creek constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

Findings of Violation

27. The facts stated above are herein incorporated by reference.

28. Respondents did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the fill placement described herein.

29. Respondents’ discharge of pollutants from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Relief

30. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2022, as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and the EPA’s implementing regulations at 40 C.F.R. Section 19.4, civil administrative penalties of up to \$23,989 per day for each day during which a violation continues, up to a maximum of \$299,857, may be assessed for violations of CWA Section 301, 33 U.S.C. § 1311, that occur after November 2, 2015.

31. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against Respondents for the violations cited above in the amount of \$171,481.

32. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violators, ability to pay, any prior history of such violation, the degree of culpability, economic benefit, or savings resulting from the violation, and such other matters as justice may require.

33. The penalty proposed in this Complaint is based upon the best information available to the EPA at the time the Complaint was issued. The penalty may be adjusted if new information becomes available to EPA or Respondents establish bona fide issues of ability to pay or defenses relevant to the appropriate amount of the proposed penalty.

34. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, the EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter within a thirty (30) day period,

and present evidence in the event a hearing is held.

35. The EPA has consulted with the state of Missouri regarding this proposed action and shall notify the state by emailing a copy of this document to the Missouri Department of Natural Resources.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

36. Respondents may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

37. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondents must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondents have any knowledge, or shall clearly state that Respondents have no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondents dispute; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
r7_hearing_clerk_filings@epa.gov

38. Failure to admit, deny, or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

39. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondents in the answer. If Respondents do not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

40. In any hearing on the proposed penalty for this Complaint, members of the public, to whom the EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, the EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will

have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. The EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by the EPA in the issuance of the Final Order.

41. If Respondents fail to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, they may be found in default. Such default by Respondents constitutes an admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

42. Whether or not Respondents request a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Shane McCoin
Attorney-Advisor
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

Telephone: (913) 551-7955
Email: mccoin.shane@epa.gov

43. Please note that a request for an informal settlement conference does *not* extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

44. The EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (CAFO) issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a CAFO shall constitute a waiver of Respondents' right to request a hearing on any matter stipulated on any matter stipulated therein.

David Cozad
Director
Enforcement and Compliance Assurance Division

Shane McCain
Assistant Regional Counsel
Office of Regional Counsel

Certificate of Service

I certify that on the date indicated below, I delivered this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, by electronic mail to: R7_Hearing_Clerk_Filings@epa.gov.

I further certify that on the date noted below I sent by electronic mail a copy of the signed Complaint and Notice of Opportunity for Hearing to a representative of the Missouri Department of Natural Resources by electronic mail to: Billy.Hackett@dnr.mo.gov.

I further certify that on the date noted below I sent a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination, or Suspension of Permits, 40 C.F.R. Part 22; and a true and correct copy of the Complaint and Notice of Opportunity for Hearing to the following persons:

By USPS Certified Mail, to:

Michael Zahner
200 Zahner Place
Perryville, Missouri 63775

Michael Zahner, Registered Agent
Zahner Management Company, LLC
26 North Jackson Street
Perryville, Missouri 63775

By electronic mail, to:

Tom K. O'Loughlin, Esq.
tomo@oloughlinlawfirm.com

Signature