

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7 09 APR 16 PM 12:11

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
)
KEVIN VAUGHAN)
)
and)
)
BRYCE ANDERSEN)
)
Respondents)
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

Docket No. CWA-07-2009-0050

FINDINGS OF VIOLATION,
ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) 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 the U.S. Environmental Protection Agency (“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 Mr. Kevin Vaughan and Mr. Bryce Andersen (“Respondents”). Mr. Vaughan is an individual whose mailing address is 800 Stevens Port Drive, Suite DD836, Dakota Dunes, South Dakota 57049. Mr. Andersen is an individual whose mailing address is 765 200th Street, Dakota Dunes, South Dakota 68731. Mr. Andersen owns property in Dixon County, Nebraska located along the Missouri River in Township 32 North, Range 5 East. Mr. Vaughan is a lessee of a portion of Mr. Andersen’s property.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

4. The CWA 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.

5. 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.

6. 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 intrastate rivers and streams, and tributaries thereto.

7. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

Factual Background

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

9. At all times relevant to this action, Respondents owned, operated, or otherwise controlled the impacted property, as described in Paragraph 10, located in Township 32 North, Range 5 East in Dixon County, Nebraska (“the Property”). The Property is adjacent to the Missouri River.

10. At various times in the fall of 2005, the Respondents and/or persons acting on their behalf, discharged dredged or fill material including dirt, spoil, rock, and sand at the Property into wetlands and waters of the United States in Dixon County, Nebraska. Specifically, the Respondents used earth moving equipment to excavate material from a point bar on the Missouri River to create ponds for waterfowl habitat and hunting purposes. Respondents placed the excavated material into adjacent wetlands, impacting approximately 35 acres of property within and adjacent to the river.

11. On May 31, 2006, the Corps inspected the Property and documented the discharges of fill material described in Paragraph 10.

12. The discharge of dredged and/or fill material within the river has altered the natural flow of the river by disconnecting the river’s backwaters and tributaries, including Turkey Creek.

13. The dredged and/or fill materials discharged by Respondents into the river and adjacent wetlands include spoil, rock, sand and dirt, and are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

15. The discharge of the dredged and/or fill material into the Missouri River and adjacent wetlands at the Property, as described in Paragraph 10 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

16. The Missouri River, Turkey Creek and adjacent wetlands are all "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.

17. 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.

A. FINDINGS OF VIOLATION

18. The facts stated in Paragraphs 8 through 17 above are herein incorporated.

19. 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 work described herein, nor were the Respondents performing the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

20. Respondents' discharge and disposal of pollutants from a point source into waters of the United States, as described above, occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges and disposals violated Section 301 of the CWA, 33 U.S.C. § 1311.

B. ORDER FOR COMPLIANCE

Based on the Findings of Fact and Findings of Violation set forth above and, pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondents are hereby ORDERED as follows:

21. Within thirty days after receipt of this Order, Respondents shall submit to EPA for review and approval a Work Plan that shall describe Respondents' proposed restoration of the impacted areas described in Paragraph 10 above. The Work Plan shall include a schedule for all work to be completed in six months.

22. Once approved by EPA, the Work Plan identified in Paragraph 21 shall be incorporated by reference and fully enforceable under the terms of this Order.

23. Within fifteen days of completion of the approved Work Plan, as described in paragraph 21, the Respondents shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

24. Respondents shall submit the annual reports to EPA, beginning on the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies, to maintain the original conditions of the site.

25. The submission of documents by Respondents, as identified in Paragraphs 21, 23, and 24, shall include the following written statement, followed by the Respondents' signature:

I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

26. All documents to be submitted to EPA under this Order shall be submitted by mail to the following individuals:

Delia Garcia
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101

and

Chris Muehlberger
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

27. In the event Respondents fail to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order against the Respondents and/or seek additional penalties against the Respondents for such noncompliance with the terms of the Order.

General Provisions

Effect of Compliance with the terms of this Order

28. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

29. This Order 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. EPA retains the

right to seek any and all remedies available under Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order 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.

Access and Requests for Information

30. Nothing in this Order 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

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

Parties Bound

32. This Order 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.

Effective Date

33. The terms of this Order shall be effective and enforceable against Respondent upon the date of his receipt of an executed copy of the Order.

Termination

34. This Order 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 have been met.

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

April 2, 2009
DATE

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

3.19.09
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:

Mr. Kevin Vaughan
800 Stevens Port Drive
Suite DD836
Dakota Dunes, South Dakota 57049

and

Mr. Bryce Andersen
Andersen Family Farms
765 200th Street
Dakota Dunes, South Dakota 68731.

Car Munkhøj
Date

4.16.09