

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2014 MAR 31 PM 1:46

IN THE MATTER OF:)
)
CITY OF AURORA)
15151 E. Alameda Parkway)
Aurora, Colorado 80012)
_____)

COMBINED COMPLAINT AND
CONSENT AGREEMENT

Docket No. CWA-08-2014-0020

FILED
EPA REGION VIII
RECORDS CLERK

Complainant, the United States Environmental Protection Agency, Region 8 (EPA or Complainant) and Respondent, the City of Aurora, Colorado (Respondent), by their undersigned representatives, hereby consent and agree as follows:

I. STATUTORY AUTHORITY

1. This matter is subject to 40 C.F.R. Part 22. This Combined Complaint and Consent Agreement (Consent Agreement) is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).
2. The EPA has jurisdiction over this matter pursuant to section 309(g)(1)(A) and (2)(B) of the Clean Water Act (Act), 33 U.S.C. § 1319(g)(1)(A) and (2)(B).

II. PARTIES BOUND

3. The Consent Agreement, upon incorporation into a Final Order, applies to and is binding upon Complainant and upon Respondent, and Respondent's officers, directors, agents, successors and assigns. The signatories to this Consent Agreement certify that they are authorized to execute and legally bind the party they represent to this Consent Agreement.

III. STATEMENT OF THE PARTIES

4. For the purposes of this settlement only, Respondent admits the jurisdictional allegations; however, Respondent neither admits nor denies the specific factual allegations contained herein and makes no admission of any violation of law in entering into this Consent Agreement.

5. In any proceeding to enforce this Consent Agreement, Respondent waives its right to a hearing before any tribunal to contest any issue of law or fact set forth in this Consent Agreement. Respondent further waives its right to appeal the Final Order in this matter.

6. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondent agree that entry of this Consent Agreement and its incorporation into a Final Order without further litigation and without adjudication of any issue of fact or law will avoid prolonged and complicated litigation between the parties.

7. This Consent Agreement contains all settlement terms relating to civil penalties agreed to by the parties.

IV. GENERAL ALLEGATIONS

8. Respondent City of Aurora was at all times relevant a home-rule municipality located in Adams, Arapahoe, and Douglas Counties, Colorado. The City of Aurora maintains its principal offices at 15151 E. Alameda Parkway, Aurora, Colorado 80012.

9. Respondent is and was at all relevant times a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

10. At all relevant times, Respondent managed the city-owned Saddle Rock Golf Course.

11. Piney Creek runs through the Saddle Rock Golf Course. Wetlands abut Piney Creek within the Saddle Rock Golf Course.

12. Piney Creek is a perennial tributary to Cherry Creek, which flows into Cherry Creek Reservoir and thence to the South Platte River, a traditionally navigable water.

13. The wetlands adjacent to and abutting Piney Creek within the Saddle Rock Golf Course are and were at all relevant times “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

V. SPECIFIC ALLEGATIONS

14. In a letter dated April 29, 2012, through its consultant ERO Resources Corp. (ERO Resources), the City of Aurora advised the U.S. Army Corps of Engineers (ACOE) that it intended to undertake a project to remove sediment from a stretch of Piney Creek flowing through the Saddle Rock Golf Course. The City advised the ACOE that it intended to use excavation techniques that would not result in the discharge of dredged or fill material, or the placement of temporary material stockpiles into Piney Creek or its adjacent wetlands.

15. In a responsive letter dated May 11, 2012, the ACOE advised the City of Aurora that it understood that all excavated material would be disposed of in upland areas and that no materials would be placed below the ordinary high water mark or in adjacent wetlands abutting Piney Creek, and based upon this understanding, the City of Aurora would not be required to obtain a permit to discharge dredged or fill material under section 404 of the CWA, 33 U.S.C. § 1344. The ACOE further advised the City of Aurora that if the work required the placement of dredged or fill material either temporarily or permanently into Piney Creek or its adjacent wetlands, a section 404 permit would be required.

16. On November 28, 2012, an inspector from the ACOE inspected the Site and observed that the top layer of wetland soil and vegetative matting had been removed and placed back into wetlands abutting Piney Creek in order to facilitate revegetation, and this activity had resulted in a regulated discharge of dredged and fill material.

17. Approximately .80 acres of wetlands was impacted by the discharge of dredged and fill material.

18. The work had been conducted by Edge Contracting under contract with the City of Aurora.

19. The impacted wetlands at the Site directly abut and are hydrologically connected to Piney Creek.

20. The discharges of fill material described in paragraphs 16 - 18 of this Consent Agreement resulted from the use of common earthmoving vehicles and equipment, which were operated by Edge Contracting acting on behalf of the City of Aurora.

21. The discharged dredged and/or fill material referenced in paragraphs 16 and 17 of this Consent Agreement is and was at all relevant times "dredged material" and "fill material" within the meaning of 33 C.F.R. § 323.2(c) and (e), respectively, and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The vehicles and equipment referenced in paragraph 20 of this Consent Agreement are and were at all relevant times each a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

23. The placement of dredged and/or fill material into wetlands adjacent to and abutting Piney Creek constitutes the "discharge of pollutants" within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

VI. DESCRIPTION OF THE VIOLATION

24. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

25. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the ACOE, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.

26. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the ACOE is required for the discharge of dredged or fill material into waters of the United States.

27. Respondent was not exempted from obtaining a permit pursuant to 33 C.F.R. § 323.4, nor authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraphs 16 and 17 of this Consent Agreement.

28. The activities conducted by the City of Aurora as described in paragraphs 16 and 17 of this Consent Agreement violate section 301 of the CWA, 33 U.S.C. § 1311.

VII. CIVIL PENALTY

29. Pursuant to section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and after consideration of the facts of this case as they relate to the factors set forth in section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), the EPA has determined that a civil penalty of \$5,000.00 is appropriate to settle this matter, to be paid within thirty (30) days of receipt of the Consent Agreement and signed Final Order issued by the Regional Judicial Officer.

30. Respondent consents and agrees to the assessment and payment of the civil penalty cited in the foregoing paragraph for settlement purposes.

31. Respondent shall pay the agreed upon civil penalty by one of the following methods:

a. **Payment by cashier's or certified check:**

A cashier's or certified check, including the name and docket number of this case, for \$5,000.00, payable to "Treasurer, United States of America," to:

Regular Mail:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Overnight Mail:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

b. **Wire Transfer:**

Wire transfers should be directed to the Federal Reserve Bank of New York with the following information:

ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency".

c. **On Line Payment:**

This option is available through the Department of the Treasury.

www.pay.gov

Enter sfo 1.1 in the search field.

Open form and complete the required fields.

Copies of the check or record of payment shall be sent to:

Richard Clark
U.S. Environmental Protection Agency (8ENF-W)
1595 Wynkoop Street
Denver, CO 80202-1129

and

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

A transmittal letter identifying the case title and docket number must accompany the remittance and copies of the check.

32. In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received (i.e., on the first late day, 30 days of interest will have accrued).

33. In addition, a handling charge of fifteen dollars (\$15.00) shall be assessed the 31st day from the due date of the payment, and for each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date. Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

34. The penalty specified in paragraph 29, above, represents civil penalties assessed by the EPA and Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

VIII. OTHER TERMS AND CONDITIONS

35. Failure by Respondent to comply with any of the terms of this Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this Consent Agreement and for such other relief as may be appropriate.

36. Nothing in this Consent agreement shall be construed as a waiver by Complainant of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this of this Consent Agreement.

37. This Consent Agreement shall be subject to a public comment period of not less than forty (40) days pursuant to section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45. The EPA may modify or withdraw its consent to this Consent Agreement if comments received disclose facts or considerations which indicate that the Consent Agreement is inappropriate, improper or inadequate.

38. If comments received during the public comment period do not require modification or withdrawal by the EPA from this Consent Agreement, the parties agree to submit this Consent Agreement to the Regional Judicial Officer following closure of the public comment period specified in 40 C.F.R. § 22.45 and the period for state consultation specified in 40 C.F.R. § 22.38(b), with a request that it be incorporated into a Final Order.

39. This Consent Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the civil penalty owed for violations alleged in this Consent Agreement. This Consent Agreement resolves Respondent's liability for federal civil penalties under section 309(d) and (g) of the Act, 33 U.S.C. § 1319(d) and (g),

for the violations alleged in this Consent Agreement. This Consent Agreement shall not in any case affect the EPA's right to pursue criminal sanctions for any violations of law whether or not alleged in this Consent Agreement.

40. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this Consent Agreement.

IN THE MATTER OF: City of Aurora, Colorado, Combined Complaint and Consent Agreement,
Docket No. CWA-08-2014-0020

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant

Date: March 31, 2014

for Eddie A. Sierra
Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

CITY OF AURORA, COLORADO
Respondent

Date: 3-17-2014

Chas. H. Archel
Charles Richardson
City Attorney
City of Aurora, Colorado