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

IN THE MATTER OF:	)	
	)	
	)	Docket No. CWA-07-2019-0130
JAMES RODNEY AUBUCHON	)	
	)	FINDINGS OF VIOLATION AND
	)	ORDER FOR COMPLIANCE
Respondent	)	ON CONSENT
	)	
Proceedings under Section 309(a)(3) of the	)	
Clean Water Act, 33 U.S.C. § 1319(a)(3)	)	
	)	

Preliminary Statement

1. The following Findings of Violation and Administrative Order for Compliance on Consent ("Order") are made and issued pursuant to 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 Enforcement & Compliance Assurance Division of EPA Region 7.

2. Respondent is Mr. James Rodney AuBuchon ("Respondent").

3. EPA, together with Respondent, enter into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251, *et seq.*, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

4. It is the parties' intent through this agreement to address discharges of pollutants by Respondent into the waters of the United States without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful.

5. By entering into this Order, Respondent (1) consents to and agrees not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) agrees to undertake all actions required by the terms and conditions of this Order, and (3) consents to be bound by the

requirements set forth herein. Respondent also waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§701-706.

Statutory and Regulatory Framework

6. 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.

7. 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.

8. 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 U.S. Army Corps of Engineers (hereinafter "Corps"), for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the "waters of the United States." In turn, "waters of the United States" has been defined to include, *inter alia*, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce and tributaries to such waters. 40 C.F.R. § 122.2 (1993).

10. 40 C.F.R. § 232.2 defines "discharge of fill material" as "the addition of fill material into waters of the United States," including, without limitation, "placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States," and "the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction," and "dams and dikes."

11. 40 C.F.R. § 232.2 defines "fill material" as 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."

12. 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

13. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located at Section 20, Township 39 North, Range 1 East, in Washington County, Missouri (hereinafter "the Site").

15. Beginning on or around July 2017, Respondent and/or persons acting on his behalf and using land-moving equipment, authorized, directed the placement of, and/or placed fill material into Watson Creek associated with the construction of a dam on the Site. Respondent's discharges of fill material into Watson Creek impacted approximately 815 linear feet of stream.

16. In September 2017, the St. Louis District of the Corps received an anonymous complaint regarding Respondent's fill activities.

17. On October 6, 2017, representatives from the Corps, the Missouri Department of Conservation, and the Missouri Department of Natural Resources conducted a site visit and observed downstream impacts from Respondent's placement of fill material.

18. On December 12, 2017, representatives from the Corps, MDNR, and EPA inspected Respondent's property and confirmed the above-referenced placement of fill material.

19. On September 4, 2018, a representative of EPA conducted a site visit and observed downstream impacts from Respondent's placement of fill material.

20. The earth-moving equipment used to place fill in Watson Creek is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The fill material discharged by Respondents into Watson Creek is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. Respondents' actions constitute the "discharge of fill material" as defined by 40 C.F.R. § 232.2 and the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

23. Watson Creek is a "water of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

24. Respondent 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 did Respondent perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

Findings of Violation

25. Respondent's discharge of pollutants from a point source into waters of the United States occurred 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.

Order for Compliance on Consent

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), EPA hereby ORDERS, and Respondent hereby AGREES to take, the actions described below:

26. Within forty-five (45) days of the effective date of this Order, Respondent will submit to EPA a Work Plan describing Respondent's removal of the dam structure on Watson Creek and restoration of the impacted site. The Work Plan will contain, at a minimum: information concerning the methods and equipment proposed to accomplish the work; a schedule for the completion of the work; where the removed fill material will be placed; visual representations of proposed alterations to the stream and banks; and information about the vegetation that will be planted within the riparian corridor.

a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved Plan.

b. If EPA does not approve the Work Plan, EPA will provide comments explaining why. Respondent shall address the comments and resubmit the Work Plan for review within forty-five (45) days of receipt of EPA's disapproval.

c. Upon resubmission, EPA, in its sole discretion, may either approve the Work Plan, or if EPA determines that the Work Plan does not adequately address EPA's comments, EPA may unilaterally modify the Work Plan and will provide Respondent with a copy of the Work Plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.

27. Once approved by EPA, the Work Plan identified above shall be incorporated by reference and fully enforceable under the terms of this Order.

28. Respondent shall identify and apply for all local, state, and federal permits required to implement the Work Plan within thirty (30) days of EPA's approval of the Plan and shall diligently work towards acquiring all required permits in a timely manner. The removal and restoration work shall be completed within eighteen (18) months of the effective date of this Order and in accordance with the specifications set forth in the Work Plan.

29. Once the work identified in the Work Plan has been completed, Respondent agrees to submit a Completion Report, which shall include photographic evidence, copies of

relevant documents, and a signed statement indicating that the work is complete. The Completion Report must be submitted within 30 days after the work has been completed.

30. Respondent agrees to submit monitoring reports to EPA, beginning on the first anniversary of the completion of the work pursuant to the approved Work Plan, and then on the third and fifth anniversary of the completion of the work. These reports shall include photos of the site of the work, a narrative description of the status of the site, and the corrective actions, if any, that will be taken to correct identified deficiencies to maintain proper wetland and/or stream functions.

31. The submission of documents by Respondent, as identified above, shall include the following written statement, followed by signature of a duly authorized representative of Respondent:

> *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.*

32. All documents to be submitted to EPA under this Order shall be submitted by email to:

pollard.stephen@epa.gov

or by mail to:

Stephen Pollard, or his successor
Water Branch
Enforcement & Compliance Assurance Division
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

General Provisions

Effect of Compliance with the Terms of this Order

33. Failure to comply with the terms of this Compliance Order may result in Respondent's liability for statutory civil penalties under Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondent has violated the CWA and failed to comply with the terms of the Order.

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

35. 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

36. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or operated by Respondents 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

37. 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

38. This Order shall apply to and be binding upon Respondent and 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

39. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Termination

40. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

James R AuBuchon

~~Janes~~ Rodney AuBuchon
JAMES

5/14/19
Date

For the Complainant, U.S. Environmental Protection Agency, Region 7:

Wendy Lukey

DeAndre Singletary
Acting Director
Enforcement & Compliance Assurance Division

5/22/19
Date

Kate Reitz

Kate Reitz
Assistant Regional Counsel
Office of Regional Counsel

5/21/19
Date

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below a true and correct copy of the foregoing Order for Compliance was sent in the following manner to the addressees:

Copy via Email to Attorney for Complainant:

reitz.katherine@epa.gov

and

Copy via Email to Attorney for Respondent:

David Shorr
dshorr@lathropgage.com

Copy via Certified Mail, Return Receipt Requested to Respondent:

Mr. James Rodney AuBuchon
707 Levin Drive
O'Fallon, Missouri 63366

6/11/2019
Date

Signature