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

IN THE MATTER OF:	)	
	)	
	)	Docket No. CWA-07-2013-0014
BRENT McMINN	)	
	)	
	)	
Respondent	)	
	)	
	)	FINDINGS OF VIOLATION,
	)	ORDER FOR COMPLIANCE
	)	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 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 Brent McMinn ("Respondent"). Mr. McMinn's mailing address is Highway 72, Patton, Missouri 63662.

3. EPA, together with Respondent, enters 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*, Sections 402 and 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. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

9. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

10. 40 C.F.R. § 122.26(b)(15) defines "storm water discharge associated with small construction activity" as the discharge of storm water from construction activities including clearing, grading, and excavating that result in land disturbance of equal to or greater than one acre.

11. 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.

12. 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.

13. 40 C.F.R. § 232.2 defines "Discharge of fill material" to include the "placement of fill that is necessary for the construction of any structure in a water of the United States," including "dams and dikes."

14. 40 C.F.R. § 232.2 defines "fill material" as any pollutant that "replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose."

15. 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

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

17. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property located in Patton, Missouri in Section 28, Township 33 North, Range 9 East, in Bollinger County, Missouri (hereinafter "the Site").

18. In 2011, Respondent and/or persons acting on his behalf and using earth moving equipment, authorized and/or initiated the discharge of fill material into two tributaries to Baltimore Creek through grading and filling operations associated with the construction of a dam and dam roadway. Respondent's discharges of fill material into the tributaries impacted approximately 3,660 linear feet of stream.

19. On December 14, 2011, the Corps inspected the Site and documented the discharges of fill material described in above.

20. On July 9, 2013, representatives from the Missouri Department of Natural Resources' Southeast Regional Office inspected the Site and documented the presence of sediment in the unnamed tributary to Baltimore Creek as result of Respondent's land disturbance activities.

21. The fill material and sediment discharged by Respondent's activities into tributaries of Baltimore Creek are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

23. The discharge of the dredged and/or fill material into tributaries to Baltimore Creek constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

24. The tributaries to Baltimore Creek are "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.

25. Respondent's 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.

26. 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.

27. Respondent did not obtain a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, prior to Respondent's discharges of storm water associated with industrial activity, nor did Respondent perform the work described herein under any prior permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

A. FINDINGS OF VIOLATION

28. The facts stated in Paragraphs 16 through 27 above are herein incorporated.

29. Respondent's discharge of pollutants from a point source into waters of the United States occurred without permits issued pursuant to Section 402 and 404 of the CWA, 33 U.S.C. §§ 1342 and 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

B. ORDER FOR COMPLIANCE ON CONSENT

Based on the FINDINGS OF FACT and FINDINGS OF VIOLATION set forth above, and pursuant to 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:

30. Respondent agrees to submit a complete application for a Clean Water Act Section 404 "after-the-fact" permit from the Corps no later than two months from the effective date of this Order.

31. If Respondent is denied an after-the-fact permit by the Corps or fails to obtain an after-the-fact permit within one year of the effective date of this Order, Respondent agrees to submit a Work Plan to EPA for review and approval that shall describe Respondent's proposed restoration of the impacted Site described herein, including, but not limited to, the removal of the impoundment in the unnamed tributary to Baltimore Creek. The Work Plan shall be submitted to EPA within 30 days of the Corps' denial of the after-the-fact permit or within 30 days after this Order has been effective for one year. The restoration work shall be completed within 12 months of approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

a. The Work Plan should include, at a minimum: the projected work and materials necessary to restore the Site, including characterization of the soil, plant, and hydric conditions and best management practices that will be used to control soil erosion and sediment runoff; the projected cost of the work; a projected schedule for completing the work; and a monitoring plan to maintain and document proper wetland and/or stream functions, pursuant to Paragraph 35 below.

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

c. If EPA does not approve the Work Plan, Respondent shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of EPA's disapproval.

d. 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 the comments provided by EPA, EPA may modify the work plan and will provide Respondent with a copy of the work plan as modified. Respondent shall implement the modified Work Plan according to the schedule contained therein.

32. If Respondent does not submit a complete after-the-fact permit application within two months of the effective date of this Order, Respondent must submit a Work Plan within 30 days of that date pursuant to the terms outlined above.

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

34. 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 work has been completed.

35. Respondent agrees to submit annual monitoring reports to EPA, beginning on the date of 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 proper wetland and/or stream functions. Annual monitoring reports must be submitted by December 1st of each year.

36. 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.

37. All documents to be submitted to EPA under this Order shall be submitted by mail to:

Dr. Delia Garcia
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa Kansas 66219.

38. Within 30 days of the effective date of this Order, Respondent shall obtain a land disturbance permit from the State of Missouri and comply with all applicable permitting conditions.

General Provisions

39. Respondent's failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 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 Act and failed to comply with the terms of the Order.

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

41. 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 Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

Access and Requests for Information

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

43. 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

44. 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 it with respect to matters included herein comply with the terms of this Order.

Effective Date

45. 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

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

Signatories

47. The undersigned for each party has the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

For the Complainant, United States Environmental Protection Agency, Region 7:

Karen A. Flournoy

KAREN A. FLOURNOY
Director
Water, Wetlands and Pesticides Division

11-14-13
DATE

Chris Muehlberger

CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

11.19.13
DATE

For Respondent:

Brent McMinn
BRENT McMINN

11-6-13
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. Brent McMinn
Highway 72
Patton, Missouri 63662.

11.19.13
Date