

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
THF Grindstone Development, L.L.C.)
)
and) Docket No. CWA -07-2007-0006
)
Emery Sapp & Sons, Inc.)
)
Respondents)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

I. CONSENT AGREEMENT/FINAL ORDER

The United States Environmental Protection Agency, Region VII (“EPA”), THF Grindstone Development, L.L.C. and Emery Sapp & Sons, Inc. (“Respondents”) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(B)(2) 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 (Consolidated Rules) 64 Fed. Reg. 40181, 40183 (July 23, 1999), to be codified at 40 C.F.R. §§ 22.13(b), 22.18(b)(2).

Respondent THF Grindstone Development L.L.C. is a limited liability company, organized under the laws of Missouri for the purpose of, among other things, purchasing

real property and engaging in activities related to commercial development of the real property. Respondent Emery Sapp & Sons, Inc. is a corporation organized under the laws of Missouri, engaged in construction of commercial and residential projects.

This Consent Agreement/Final Order is a complete and final settlement of all claims for civil penalties for the violations set forth in this Consent Agreement/Final Order relating to Respondents' discharge of fill material into waters of the United States through activities they conducted at the Grindstone Plaza Construction Site, located in the West Half of Section 30, Township 48 North, Range 12 West, Boone County, Columbia, Missouri (the "Site"). Specifically, Respondents 1) failed to comply with the Missouri State General Operating Permit, also known as the National Pollution Discharge Elimination System ("NPDES") permit, and 2) discharged pollutants into an unnamed tributary to Hinkson Creek which flows into the Missouri River, a water of the United States in Columbia, Missouri, without the permit required by law.

II. ALLEGATIONS

A. Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B) and in accordance with the Consolidated Rules.

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

3. Respondents are each a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

B. Section 402 Violation

Statutory and Regulatory Framework of Section 402 of the CWA

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, by any person except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of an NPDES permit issued pursuant to that Section.

5. 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.

6. Section 402(p) of the CWA, 33 U.S.C. § 1342(p) sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

7. 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.

8. 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.

9. 40 C.F.R. § 122.26 (b)(14)(x) defines “storm water discharge associated with industrial activity” in part, as construction activity including clearing, grading, and

excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

10. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with the state of Missouri for violations of the CWA.

11. MDNR issued a NPDES General Permit for the discharge of storm water associated with construction sites, Permit Number MO-R100J26 (“the Permit”), specifically:

Construction or land disturbance activity (e.g. clearing, grubbing, excavating, grading, and other activity that results in the destruction of the root zone).

The Permit became effective on February 4, 2004 and remains in effect until May 30, 2007.

Factual Background - Section 402 Violation

12. At all times relevant to this action, Respondents were owners and/or operators of the construction activities at the Site. On or about July 2005, Respondents, or ones acting on their behalf, initiated activities to convert approximately 46 acres of undeveloped land at the Site into a commercial development. Land disturbance activities include excavation, grading and utility construction.

13. Storm water, surface drainage, and runoff water has left the Site moving into the unnamed tributary leading to Hinkson Creek, which is on the EPA’s Section 303(d) list of impaired waters. The runoff and drainage from the Site is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

14. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

15. Storm water runoff is a “discharge of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362.

16. The Site is a “point source” which has caused the “discharge of pollutants” as defined by Section 502 of the CWA, 33 U.S.C. § 1362.

17. Respondents, or ones acting on their behalf, discharged pollutants into an unnamed tributary to Hinkson Creek. Hinkson Creek has a continuous surface connection to the Missouri River, which is a “navigable water” as defined by Section 502 of the CWA, 33 U.S.C. § 1362.

18. Respondents’ discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

19. MDNR issued to Respondents, or ones acting on their behalf, NPDES permit coverage under the Permit described in Paragraph 11 above, for land disturbance activities at the Site.

20. On July 20 and August 16, 2005, MDNR performed inspections of the Site under the authority of Section 644.026.1 RSMo. of the Missouri Clean Water Law to determine Respondents’ compliance with the Permit.

21. On June 16, 2006, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a) to evaluate the treatment and disposal of storm water at the Site in accordance with the CWA.

Findings of Violation of Section 402

22. The facts stated in Paragraphs 12 through 21 above are herein incorporated.

23. Part 2 (Requirements and Guidelines) of the Permit prohibits Respondents from discharging into waters of the state such that the substances cause unsightly color or turbidity. During an inspection by MDNR on September 7, 2005, MDNR observed that the rock check dam below the western drainage area had failed, and sediment was present in the unnamed tributary to Hinkson Creek below the western drainage area. On June 16, 2006, EPA observed sediment in the unnamed tributary to Hinkson Creek below the second culvert and in the storm water retention basins located ¼ mile downstream from the Site.

24. Part 11 (Requirements and Guidelines) of the Permit requires Respondents to inspect a land disturbance site at a minimum of once a week. Part 11 further requires Respondents to correct any deficiencies within seven calendar days of inspection. Respondents' inspections logs indicate that Respondents failed to conduct site inspection from March 22, 2006 to April 7, 2006 and the EPA inspection referenced in Paragraph 21 above indicates that Respondents did not make corrections within seven days of noting deficiencies to problems such as gully erosion (developing below the retaining wall), restoration of the top slab on Inlet AA after it had been knocked out of place, clearance of trash in the tree preservation area at the west end of the Site, and restoration of silt fences and protections in storm inlets.

25. Part 12 (Requirements and Guidelines) of the Permit requires Respondents to maintain at all times all pollution control measures and systems in good order to achieve compliance with the terms of the Permit.

26. The inspections referenced in Paragraphs 20 and 21 above revealed that: a) structural controls were lacking around a soil stockpile at the eastern end of the Site and in the road ditch below; b) storm inlet protection devices, silt fences and rock check dam controls were undermined at several locations; b) stabilization measures on disturbed areas had not been initiated within 14 days after construction activity ceased in an area; and c) deficiencies noted in weekly inspections were not corrected within seven days of that inspection.

27. By failing to protect waters in the unnamed tributary of Hinkson Creek from being free of substances in sufficient amount to cause unsightly color or turbidity, failing to correct deficiencies within seven calendar days of an inspection, failing to maintain at all times all pollution control measures and systems in good order, such as silt fences, storm water control structures and ditch checks, Respondents failed to comply with Parts 2, 11, and 12 of the Permit. Non-compliance with the Permit is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a) and 1342(p).

28. At all times relevant to this administrative action, the unnamed tributary leading to Hinkson Creek and Hinkson Creek are each a “water of the United States” as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

29. Based on information and belief, Respondents, or ones acting on their behalf, discharged pollutants into waters of the United States in violation of the Permit.

30. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondents for the violation cited above, in the amount of \$ 56,833.

B. Section 404 Violation

Statutory and Regulatory Framework of Section 404

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

32. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the discharge of dredged or fill material into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, occur in accordance with a permit issued under that Section.

33. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

34. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

35. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, inter alia, dredged spoil, rock, sand and cellar dirt.

36. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “...the waters of the United States, including the territorial seas.”

37. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “...any discernible, confined and discrete conveyance...from which pollutants are or may be discharged.”

38. 40 C.F.R. §§ 232.2 and 33 C.F.R. Part 328 define waters of the United States, in part, as, "...lakes, rivers and streams, ...wetlands."

39. Section 502 of the CWA defines "person" to include an individual and a corporation.

40. Section 404 of the CWA requires a person to obtain a permit from the United States Army Corps of Engineers ("Corps") prior to any discharge of dredged or fill material into the navigable waters of the United States.

Factual Background – 404 Violation

41. At all times relevant to this action, Respondents were operators of the construction activities at the Site.

42. Between October 2005 and June 2006, Respondents, or ones acting on their behalf, using a track hoe, discharged earthen fill and concrete into an unnamed tributary to Hinkson Creek. Discharges were in the form of concrete footings approximately 18 inches wide and 18 inches tall inside three arched culverts and a concrete blanket approximately 28 feet long and nine feet wide along the right descending bank of the unnamed tributary between the upstream and middle arched culverts. The track hoe used by Respondents or ones acting on their behalf, acted as a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

43. The earthen fill and concrete that were discharged as described in Paragraph 42 above between October 2005 and June 2006 are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

44. The unnamed tributary to Hinkson Creek where earthen fill and concrete were discharged, flows into Hinkson Creek, which flows into the Missouri River. The

Missouri River is a navigable water within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7) and a water of the United States as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

45. The discharge of earthen fill and concrete into waters of the United States constitute the “discharge of pollutants” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

46. Respondents did not obtain a 404 permit prior to conducting the activities described in Paragraph 42 above.

Findings of Violation

47. The facts stated in paragraphs 42 through 47 above are herein incorporated.

48. The use of a track hoe referenced in Paragraph 43 above indicates that Respondents, or ones acting on their behalf, discharged pollutants into a water of the United States by using earth-moving equipment without obtaining a Section 404 permit.

49. Respondents’ failure to obtain a Section 404 permit prior to conducting activities described in Paragraph 42 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

50. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region VII hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondents for the violation cited above, in the amount of \$90,000.00.

III. CONSENT AGREEMENT

1. Respondents and EPA agree to the terms of this Consent Agreement/Final Order and Respondents agree to comply with the terms of the Final Order portion of this Consent Agreement/Final Order.

2. Respondents admit the jurisdictional allegations of this Consent Agreement/Final Order and agree not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement/Final Order.

3. Respondents neither admit nor deny the factual allegations and legal conclusions set forth in this Consent Agreement/Final Order.

4. Respondents waive their rights to a judicial or administrative hearing on any issue of fact or law set forth in this Consent Agreement/Final Order.

5. Nothing contained in the Final Order portion of this Consent Agreement/Final Order shall alter or otherwise affect Respondents' obligation to comply with applicable Federal, state and local environmental statutes and regulations and applicable permits.

6. Respondents agree, in settlement of the claim alleged in this Consent Agreement/Final Order, to pay a cash penalty of \$146,833.

7. This Consent Agreement/Final Order constitutes a settlement by EPA of all claims for civil penalties pursuant to Section 309 of the Clean Water Act for the violation alleged herein. Nothing in this Consent Agreement/Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondents. Compliance with this Consent Agreement/Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondents to comply with such laws and

regulations. EPA's determination of compliance with this Consent Agreement/Final Order shall be a defense to a charge of non-compliance with this Consent Agreement/Final Order.

IV. FINAL ORDER

Pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319 (g)(2)(B), and according to the terms of this Consent Agreement/Final Order, IT IS HEREBY ORDERED THAT:

1. Within thirty (30) days of the effective date of this Consent Agreement/Final Order, Respondent shall pay a civil penalty of \$146,833.

2. Payment of the penalty shall be by electronic fund transfer, transmitted to:

MELLON BANK
ABA 043000261
EPA Account 9109125

On the wire transfer, Respondents shall reference the name of the case, In the Matter of THF Grindstone Development, L.L.C. and Emery Sapp & Sons, Inc., Docket No. CWA-07-2007-0006. A copy of the transaction shall also be mailed to:

Audrey Asher, Esq.
EPA - Region VII
901 North 5th Street
Kansas City, Kansas 66101

3. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

4. Respondents and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

5. This Consent Agreement/Final Order addresses all claims for civil penalties for the CWA violations identified above. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement/Final Order.

6. Notwithstanding any other provision of this Consent Agreement/Final Order, EPA reserves the right to enforce the terms of the Final Order by initiating a judicial or administrative action under Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

7. This Final Order will terminate upon receipt by EPA of payment in full.

8. This Final Order shall apply to and be binding upon Respondents and their agents, successors, and assigns.

9. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

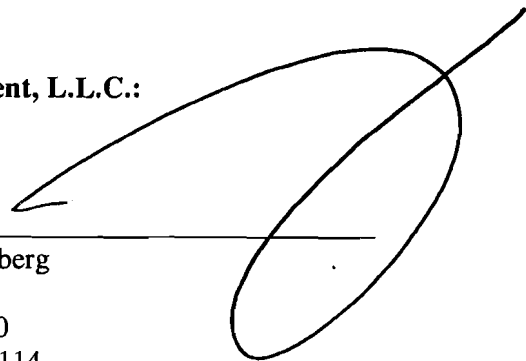
In the Matter of THF Grindstone Development, L.L.C. and Emery Sapp & Sons, Inc.
Docket No. CWA-07-2007-0006

The undersigned representative of THF Grindstone Development, L.L.C. certifies that he or she is authorized to enter into this Consent Agreement/Final Order and to execute and legally bind THF Grindstone Development, L.L.C. to the terms and conditions of this Consent Agreement/Consent Order and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

For Respondent THF Grindstone Development, L.L.C.:

4/16/07
Date

Michael H. Staenberg
2127 Innerbelt
Bus. Ctr. Dr. #200
St. Louis, MO 63114



In the Matter of THP Grindstone Development, L.L.C. and Emery Sapp & Sons, Inc.
Docket No. CWA-07-2007-0006

The undersigned representative of Emery Sapp & Sons, Inc. certifies that he or she is authorized to enter into this Consent Agreement/Final Order and to execute and legally bind Emery Sapp & Sons, Inc. to the terms and conditions of this Consent Agreement/Consent Order and meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

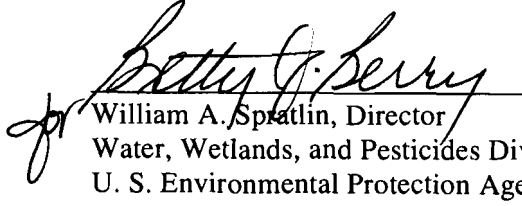
For Respondent Emery Sapp & Sons, Inc.:

4/27/07
Date

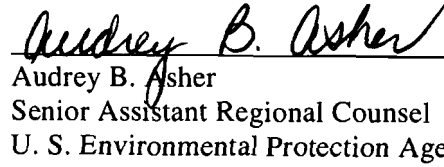
Bill M. Hill, Esq.

For the United States Environmental Protection Agency – Region VII

05/04/07
Date

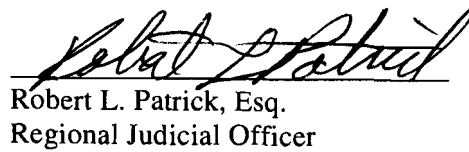

William A. Spratlin, Director
Water, Wetlands, and Pesticides Division
U. S. Environmental Protection Agency Region VII

5/1/07
Date


Audrey B. Asher
Senior Assistant Regional Counsel
U. S. Environmental Protection Agency Region VII

IT IS SO ORDERED.

June 18, 2007
Date


Robert L. Patrick, Esq.
Regional Judicial Officer

IN THE MATTER OF THF Grindstone Development, LLC and Emery Sapp & Sons, Inc.
Respondents
Docket No. CWA-07-2007-0006

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to:

Audrey B. Asher
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 N. 5th Street
Kansas City, Kansas 66101


Copy by Certified Mail Return Receipt to:

Frank H. Hackmann, Esq.
Sonnenschein Nath & Rosenthal LLP
One Metropolitan Square, Suite 3000
St. Louis, Missouri 63102-2741

and to:

Emery Sapp & Sons, Inc.
2602 N. Stadium Boulevard - B
Columbia, Missouri 65202-1271

6/18/07
Dated


Kathy Robinson
Hearing Clerk, Region 7