

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No.

JAMES F. JERGE, JR.,

Defendant

COMPLAINT

The United States of America, through its undersigned counsel, by the authority of the Attorney General, and at the request of the Secretary of the Army acting through the Buffalo District Engineer of U.S. Army Corps of Engineers alleges as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under Sections 309(b) and (d), and 404(s) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1319(b), (d), and 1344(s), to obtain injunctive relief and civil penalties against James F. Jerge, Jr. (“Defendant”), for the failure to comply with the terms and conditions of a permit issued by the Secretary of the Army acting through the Chief of Engineers under Clean Water Act Section 404(e), 33 U.S.C. § 1344(e), for the discharge of dredged or fill material in a water of the United States;

2. In this action, the United States seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of the terms and conditions of

Department of the Army Permit Number 2002-01777(2), and Nationwide Permit Number 39 as published in the Federal Register, Volume 67, Number 10, January 15, 2002, and in violation of CWA sections 301(a) and 404(s), 33 U.S.C. §§ 1311(a), 1344(s) and; (2) to require Defendant, at his own expense and at the direction of the United States Army Corps of Engineers, Buffalo District Regulatory Branch (“Corps”), to restore and/or mitigate the damages caused by his unlawful activities; and (3) to require Defendant to pay civil penalties as provided in 33 U.S.C. §§ 1319(d) and 1344(s)(4).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to CWA sections 309(b) and 404(s)(3), 33 U.S.C. §§ 1319(b), 1344(s)(3), and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in the Western District of New York pursuant to CWA Section 404(s)(3), 33 U.S.C. § 1344(s)(3), and 28 U.S.C. § 1391(b) and (c), because the subject property is in this District, the cause of action alleged herein arose in this District, and Defendant’s residence is in this District.

5. Notice of the commencement of this action has been provided to the State of New York pursuant to CWA Section 404(s)(3), 33 U.S.C. § 1344(s)(3).

PARTIES

6. The Plaintiff in this action is the United States of America. Authority to bring this action is vested in the Secretary of the Army and the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and 33 U.S.C. §§ 1344(s)(3), 1366.

7. Defendant, James F. Jerge, Jr., is a citizen residing at 7645 East Quaker Road, Town of Orchard Park, Erie County, New York, 14127.

8. At all times relevant to the Complaint, the Defendant either owned, leased or otherwise controlled the real property at 7645 East Quaker Road that is the subject of this Complaint and/or otherwise controlled the activities that occurred at such property referred to herein as the “Site.”

STATUTORY BACKGROUND

9. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to the CWA Section 404, 33 U.S.C. § 1344.

10. CWA Section 502(12), 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.”

11. CWA Section 502(6), 33 U.S.C. § 1362(7), defines “pollutant” to include, *inter alia*, dredged spoil, rock sand and cellar dirt.

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

13. 33 C.F.R. § 328.3(a)(1), (2), (3), (5), and (7), and 40 C.F.R. § 232.2, define “waters of the United States” to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) all other waters, such as intrastate lakes, rivers, streams, slough or wetlands, the use, degradation or destruction of which could affect interstate

or foreign commerce; (iv) tributaries to such waters; and (v) wetlands adjacent to such waters or their tributaries.

14. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define “wetlands” as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

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

16. CWA Section 502(5) 33 U.S.C. § 1362(5), defines “person” to include “an individual...”

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

18. 33 C.F.R. § 326.3(e) requires the District Engineer acting on behalf of the Chief of Engineers to accept an after-the-fact permit application from a person to resolve an unauthorized discharge in violation of CWA Section 309(a) unless one of five exceptions applies.

19. CWA Section 404(e), 33 U.S.C. § 1344(e), authorizes the Secretary of the Army to, after notice and opportunity for public comment, issue general permits on a state, regional or nationwide basis for any category of activities involving

discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

20. 33 C.F.R. §§ 330 et seq. describes the policy and procedures used in the Department of the Army's nationwide permit program to issue, modify, suspend or revoke nationwide permits; to identify conditions, limitations and restrictions on the nationwide permits; and to identify any procedures, whether required or optional for authorization by nationwide permits.

21. 33 C.F.R. § 330.4(a) requires a prospective permittee to satisfy all terms and conditions of a Nationwide Permit ("NWP") for a valid authorization to occur.

22. 33 C.F.R. § 330.4(b)(1) provides that District Engineers have authority to determine if an activity complies with the terms and conditions of a NWP.

23. CWA Section 404(s)(1), 33 U.S.C. § 1344(s)(1), authorizes the Secretary of the Army, whenever on the basis of any information available to him he finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary, to issue a compliance order requiring such a person to comply with such condition or limitation, or shall bring a civil action in accordance with paragraph (3) of this subsection.

24. CWA Section 404(s)(3) and (4), 33 U.S.C. § 1344(e)(3), (4), authorize the Secretary to commence a civil action for civil penalties and appropriate relief, including a permanent or temporary injunction, for any violation for which the

Secretary is authorized to issue a compliance order under paragraph 1 of subsection (e).

25. 33 C.F.R. § 326.5 authorizes the District Engineer to refer cases he/she determines to be appropriate directly to the U.S. Attorney.

ALLEGATIONS

26. On or about June 2002, Defendant and/or persons acting on his behalf, discharged dredged or fill material into waters of the United States at the Site without a permit pursuant to CWA Section 404.

27. The dredged or fill material that Defendant and/or persons acting on his behalf, caused to be discharged, includes, among other things, dirt, spoil, rock, and sand, all of which constitute “pollutants” as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

28. Defendant and/or persons acting on his behalf used mechanized land-clearing and/or earth-moving equipment to accomplish the discharges. This equipment constitutes “point sources” as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

29. Defendant had not obtained a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

30. Defendant owned, leased, or otherwise controlled the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

31. Defendant conducted, contracted for, supervised, and/or otherwise controlled the unauthorized activities at issue in paragraph 26.

32. Defendant and/or persons acting on his behalf are “persons” within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

33. On June 14, 2002, a Corps Biologist and the Town of Orchard Park Building Inspector conducted an inspection of Defendant’s property at 7645 East Quaker Road, in the Town of Orchard Park, Erie County, New York. The Corps observed work had occurred in Smoke Creek and the adjacent wetlands and dredged or fill material was placed within the bed and bank of Smoke Creek and the adjacent wetlands on the Site.

34. The Corps sent a letter to Defendant on June 18, 2002, notifying Defendant that there had been placement of dredged or fill material in waters of the United States on Defendant’s property without Department of the Army authorization in violation of the CWA. The letter requested Defendant submit an after-the-fact permit application to obtain authorization for the discharge in accordance with 33 C.F.R. § 326.3(e).

35. Defendant, through his agents/environmental consultants, made several submissions to provide the necessary information required by the Corps that delineated the extent of waters of the United States on the Site.

36. On January 13, 2003, the Corps provided a jurisdictional determination as to the extent of regulated waters of the United States on the Site based on Defendant’s submitted information and requested additional information to continue to process an after-the-fact permit for Defendant. Defendant claimed he did not

receive the January 13, 2003, correspondence and the Corps sent it again on March 27, 2003. Defendant was provided his right to appeal the jurisdictional determination within 60-days and did not do so and submitted the requested information on April 14, 2003.

37. Defendant submitted a final compensatory wetland mitigation and restoration plan to the Corps on August 29, 2003. Defendant proposed to keep 0.45 acres of fill in waters of the United States for a driveway to cross Smokes Creek and the adjacent wetlands to access the single family residence he was constructing on the Site. The Defendant's plan proposed the removal of 0.53 acre of fill and restoration of that area on the Site. The Defendant's plan also proposed creation of 1.2 acre of mitigation at a location on Baker Road in the Town of Orchard Park, Erie County, New York to comply with Nationwide Permit 39 and the requirements of the CWA.

38. On October 6, 2003, the Corps sent Defendant a Provisional Department of the Army Permit Number 2002-01777(2) ("Permit") affirming Defendant's use of Nationwide Permit Number 39 as published in the Federal Register, Volume 67, No. 10, January 15, 2002, based on the information submitted by Defendant. The Permit incorporated by reference Defendant's proposed final compensatory mitigation and restoration plan. The work authorized by the Permit could not commence until a water quality certification pursuant to the requirements CWA Section 401, 33 U.S.C. §1301, was issued by the State of New York Department of Environmental Conservation.

39. New York State Department of Environmental Protection issued a water quality certification to Defendant on December 10, 2003.

40. Nationwide Permit 39 authorized the discharge of less than one half acre of dredge or fill material into waters of the United States provided certain conditions were met.

41. General Condition 19(c) of Nationwide Permit 39 requires that for every acre or fraction of an acre of federal wetland impacted by a proposed project the District Engineer require the permittee to create at least an equal amount of similar type wetland acreage (1:1 ratio).

42. Special Condition one (1) of the Permit required Defendant to remove and restore 0.53 acre of fill material from wetlands on the Site.

43. Special Condition two (2) of the Permit required Defendant to compensate for the temporary impacts to .84 acre of wetlands and permanent impacts to .36 acre of wetlands at the Site by creating 1.2 acres of wetlands in accordance with Defendant's Compensatory Mitigation Plan dated August 29, 2003.

44. Special Condition three (3) of the Permit incorporated Defendant's Compensatory Mitigation Plan dated August 29, 2003, and required implementation of the plan in accordance with Special Conditions four (4) through twelve (12) of the Defendant's permit.

45. Special Condition six (6) required Defendant to begin construction of the mitigation area prior to or concurrent with any additional fill activities authorized by the permit and all construction and planting of the mitigation area was required to be complete by November 31 of the year the mitigation construction began.

46. Defendant failed to comply with Special Conditions 1 of his permit by not removing and restoring 0.53 acres of fill at the Site.

47. Defendant failed to comply with Special Conditions 2 of his permit by not constructing the compensatory mitigation of 1.2 acres of wetland.

48. Defendant failed to comply with the Special Conditions 3 through 12 of the permit.

49. On August 14, 2006, the Corps notified Defendant in writing that Defendant had not complied with the terms and conditions of Permit and requested information on the status of Defendant's compensatory mitigation project required by Special Condition 2 of the Permit. The Corps also requested information on the status of the removal and restoration of the wetland at the Site per Special Condition 1 of the Permit.

50. Between August 2006 and October 2007 the Corps had eight separate communications with Defendant regarding Defendant's failure to comply with the Permit. The purpose of the communications was to notify Defendant of his failure to comply with the Permit requirements and induce Defendant to take steps to comply with Special Conditions 1-12 of the Permit.

51. On December 19, 2007, Defendant submitted a new compensatory mitigation plan for the Corps' consideration as an alternative to the August 29, 2003, Compensatory Mitigation Plan incorporated in the Permit.

52. On January 3, 2008, Defendant submitted a new permit application to the Corps requesting a Nationwide Permit Number 32 authorization for 1.2 acres of fill in waters of the United States at the Site. Defendant proposed to keep the 0.53

acres of fill in waters of the United States that Defendant was required to remove pursuant to Special Condition 1 of the Permit. Defendant also proposed a new compensatory mitigation plan to cover the additional impacts to wetlands.

53. Defendant and the Corps executed a Tolling Agreement on February 11, 2008, as required by 33 C.F.R. 331.11(c) for acceptance of an after-the-fact permit application.

54. From February 2008 until February of 2013 the Corps attempted to get Defendant to submit and implement an acceptable compensatory mitigation plan for Defendant's authorized impacts to waters of the United States and the 0.53 acres of fill Defendant was requesting authorization to keep in waters of the United States.

55. The Corps did not authorize the additional 0.53 acre of fill in waters of the United States as Defendant requested in its January 3, 2008 permit application.

56. Defendant has not complied with Special Conditions 1-12 of the original Permit.

57. Defendant has violated and continue to violate CWA sections 301(a) and 404(s), 33 U.S.C. §§ 1311(a), 1344(s), by his unauthorized discharge of dredged or fill material into waters of the United States, including wetlands at the Site.

58. Each day that such material remains in place constitutes a separate violation of CWA section 301(a) and 404(s), 33 U.S.C. §§ 1311(a), 1344(s).

COUNT I

Site

59. Plaintiff repeats and realleges the facts set forth in Paragraphs 26 through 58.

60. Defendant failed to remove 0.53 acres of dredged or fill material from the Site in violation of Special Condition 1 of the Permit.

61. Defendant failed to complete any compensatory wetland or mitigation measures in violation of Special Condition 2-12 of the Permit.

62. The Site is a “water of the United States” within the meaning of the CWA and the regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, the United States of America, respectfully request that this Court order the following relief:

That the Defendant be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA;

That Defendant be enjoined to undertake measures, at Defendant’s own expense and at the direction of the Corps, to effect and complete restoration of the waters of the United States at the Site as required by the terms and conditions of the Permit and conduct off-site mitigation to compensate for the irreversible environmental damage, as appropriate to comply with the terms and conditions of the Permit;

That the Defendant be assessed, pursuant to CWA sections 309(d) and 404(s)(4), 33 U.S.C. §§ 1319(d), 1344(s)(4), a civil penalty for each day of each violation of CWA sections 301(a) and 404(s), 33 U.S.C. §§ 1311(a), 1344(s), in the amount of fifty thousand dollars (\$50,000).

That the United States be awarded costs and disbursements in this action; and

That this Court grant Plaintiff, the United States of America, such other relief as the Court may deem just and proper.

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