

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

OHIO E.P.A.
JUL 16 2008

ENTERED DIRECTOR'S JOURNAL

In the Matter of:

Herbert Smith
463 First Avenue
Gallipolis, OH 45631

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**Director's Final Findings
and Orders**

Respondent

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

PREAMBLE

It is agreed by the parties hereto as follows:

By: Indy Laesler Date: 7-16-08

I. JURISDICTION

These Director's Final Findings and Orders ("Orders") are issued to Herbert Smith ("Respondent") pursuant to the authority vested in the Director of the Ohio Environmental Protection Agency ("Ohio EPA") under Ohio Revised Code ("ORC") §§ 6111.03 and 3745.01.

II. PARTIES BOUND

These Orders shall apply to and be binding upon Respondent, its heirs, assigns and successors in interest liable under Ohio law. No change in the ownership of the site described below shall in any way alter Respondent's obligations under these Orders.

III. DEFINITIONS

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapter 6111. and the rules promulgated thereunder.

IV. FINDINGS

The Director of Ohio EPA has made the following findings:

1. Respondent is developing a residential subdivision on property he owns inside the city of Rio Grande in Gallia County, on State Route 325, ("site").
2. In October, 2005, Respondent commenced construction of the first phase of the subdivision development, to consist of thirty houses on eighteen acres, by engaging in extensive earthmoving and the construction of six houses.

3. Storm water from the construction activities discharged to an unnamed tributary of Raccoon Creek, which constituted "waters of the state" and sediment contained in that storm water constituted "other wastes."
4. Ohio EPA was notified that Respondent was engaging in construction activities at the site and informed Respondent, via letter dated September 11, 2006, that the construction activities were occurring without coverage under the NPDES Storm Water General Permit for Construction Activities ("Construction Storm Water General Permit") and that without coverage or an individual NPDES permit, the discharge of pollutants, including sediment, to waters of the state, was a violation of ORC Chapter 6111. and the rules adopted thereunder.
5. On September 21, 2006, Ohio EPA received from Respondent a complete Notice of Intent for coverage under the Construction Storm Water General Permit, which stated that the total disturbance was 34 acres and that construction commenced in October, 2005.
6. On October 18, 2006, Respondent received coverage under the Construction Storm Water General Permit, via Ohio EPA Facility Permit No. 0GC00599*AG.
7. OAC Rule 3745-38-02(A) provides that no person may discharge any pollutant or cause, permit, or allow a discharge of any pollutant from a point source without applying for and obtaining an Ohio NPDES individual permit in accordance with the requirements of OAC Chapter 3745-33, complying with the indirect discharge permit program pursuant to OAC Chapter 3745-36, or obtaining authorization to discharge under an Ohio NPDES general permit in accordance with the requirements of OAC Chapter 3745-38.
8. ORC § 6111.04 prohibits any person from causing pollution or causing any sewerage, industrial waste or other waste to be placed in any location where they cause pollution to waters of the state, except if such discharges occur in accordance with an Ohio NPDES permit issued by the Director.
9. ORC § 6111.07(A) prohibits any person from violating, or failing to perform any duty imposed by ORC §§ 6111.01 to 6111.08, or violating any order, rule, or term or condition of a permit issued or adopted by the Director of Environmental Protection pursuant to those sections. Each day of violation is a separate offense.
10. Respondent's commencement of construction activity prior to receiving coverage under the Construction Storm Water General Permit violated the above cited Ohio Revised Code Sections and Ohio Administrative Code Rules.

11. On December 20, 2006, Respondent was notified by letter of the failure to comply with the following requirements of the Construction Storm Water General Permit:
 - a. Development of a storm water pollution prevention plan ("SWP3"), and
 - b. Stabilization of all disturbed areas.
12. In the December 20, 2006 letter, Respondent was requested to contact the U.S. Army Corps of Engineers ("Corps") regarding the placement of culverts and fill material into an on-site stream and whether permits and certifications were required for such activity.
13. On a January 17, 2007 site visit, memorialized in a February 7, 2007 letter, Ohio EPA observed and noted Respondent's failure to comply with the following requirements of the Construction Storm Water General Permit:
 - a. Development of a SWP3;
 - b. Permanent stabilization of all areas at final grade within seven days of the last disturbance;
 - c. Temporary stabilization within seven days of the most recent disturbance of all areas that will lie dormant for more than twenty-one days, but less than one year;
 - d. Conveyance to a sediment pond of concentrated runoff and runoff from drainage areas which exceed the design capacity of silt fences or inlet protection;
 - e. Stabilization of channels and outfalls to prevent erosion flows;
 - f. Incorporation of runoff control practices to divert runoff away from disturbed areas and steep slopes where practicable;
 - g. Maintenance and repair of all sediment control practices until the entire up slope area of the site has been stabilized pursuant to a schedule set forth in the Construction Storm Water General Permit;
 - h. Minimization of off-site vehicle tracking of sediments;
 - i. Installation of silt fences on a level contour; and
 - j. Functionality of all sediment control structures.

14. On a May 24, 2007 site visit, memorialized in a June 12, 2007 letter, Ohio EPA observed and noted Respondent's failure to comply with the following requirements of the Construction Storm Water General Permit:
 - a. Development of a SWP3;
 - b. Permanent stabilization of all areas at final grade within seven days of the last disturbance;
 - c. Temporary stabilization within seven days of the most recent disturbance of all areas that will lie dormant for more than twenty-one days, but less than one year;
 - d. Conveyance to a sediment pond of concentrated runoff and runoff from drainage areas which exceed the design capacity of silt fences or inlet protection;
 - e. Stabilization of channels and outfalls to prevent erosion flows;
 - f. Incorporation of runoff control practices to divert runoff away from disturbed areas and steep slopes where practicable;
 - g. Maintenance and repair of all sediment control practices until the entire up slope area of the site has been stabilized pursuant to a schedule set forth in the Construction Storm Water General Permit;
 - h. Minimization of off-site vehicle tracking of sediments;
 - i. Installation of silt fences on a level contour; and
 - j. Functionality of all sediment control structures.
15. On the May 24, 2007 site inspection, Ohio EPA observed that 1,250 linear feet of the unnamed tributary to Raccoon Creek had been filled, relocated or impounded.
16. Pursuant to state and federal law, before any fill material may be discharged into waters of the state, both a Section 401 water quality certification from Ohio EPA and a Section 404 permit from the Corps must be obtained.
17. On July 9, 2007, Ohio EPA received an application for a Section 401 water quality certification from Respondent.

18. A preliminary review by Ohio EPA indicated that the application was incomplete, with a letter dated July 27, 2007 specifying the deficiencies transmitted to Respondent.
19. On September 28, a revised application for a Section 401 water quality certification was received, with a follow-up application received on October 22, 2007.
20. By letter dated October 24, 2007, Ohio EPA informed Respondent that the revised Section 401 water quality certification was incomplete and identified the specific deficiencies.
21. On November 30, 2007, a revised application for a Section 401 water quality certification was received.
22. On December 27, 2007, U.S. Army Corps of Engineers – Huntington District issued a public notice stating that it had received a Section 404 permit application from Respondent.
23. By letter dated January 31, 2008, Ohio EPA informed Respondent that the revised Section 401 water quality certification was incomplete and identified the specific deficiencies. The letter requested that Respondent submit a complete Section 401 water quality certification by March 3, 2008.
24. Respondent's failure to comply with the provision of the Construction Storm Water General Permit and obtain the necessary certification is a violation of ORC Chapter 6111. and the rules adopted thereunder.
25. The Director has given consideration to, and based his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with these Orders and to evidence relating to conditions calculated to result from compliance with these Orders, and its relation to the benefits to the people of the State to be derived from such compliance in accomplishing the purposes of ORC Chapter 6111.

V. ORDERS

1. Respondent shall achieve and maintain compliance with the Construction Storm Water General Permit and the SWP3, as soon as possible, but not later than forty-five (45) days from the effective date of these Orders.
2. Respondent shall maintain compliance with the Construction Storm Water General Permit and the SWP3.

3. Respondent shall not initiate construction activities in the state of Ohio that disturbs more than one acre of land without having first developed and implemented a SWP3 for the construction site, and obtained coverage of the construction site under the Construction Storm Water General Permit.
4. Respondent shall pay the amount of fifteen thousand dollars (\$15,000.00) in settlement of Ohio EPA's claim for civil penalties, which may be assessed pursuant to ORC Chapter 6111. Within thirty (30) days after the effective date of these Orders, payment to Ohio EPA shall be made by an official check made payable to "Treasurer, State of Ohio" for twelve thousand dollars (\$12,000.00) of the total amount. The official check shall be submitted to Brenda Case, or her successor, together with a letter identifying Respondent and the site, to:

Ohio EPA
Office of Fiscal Administration
P.O. Box 1049
Columbus, Ohio 43216-1049

A photocopy of the check shall be sent to Ohio EPA Southeast District Office in accordance with Section X of these Orders.

5. In lieu of paying the remaining three thousand dollars (\$3,000.00) of the civil penalty, Respondent shall within thirty (30) days of the effective date of these Orders, fund a Supplemental Environmental Project ("SEP") by making a contribution in the amount of three thousand dollars (\$3,000.00) to Ohio EPA's Clean Diesel School Bus Fund (Fund 5CD). Respondent shall tender an official check made payable to "Treasurer, State of Ohio" for said amount. The official check shall be submitted to Brenda Case, or her successor, together with a letter identifying Respondent and the site, to:

Ohio EPA
Office of Fiscal Administration
P.O. Box 1049
Columbus, Ohio 43216-1049

A copy of each check shall be sent to Mark Mann, Environmental Manager, Storm Water and Enforcement Section, or his successor, at the following address:

Ohio EPA
Division of Surface Water
P.O. Box 1049
Columbus, Ohio 43216-1049

6. Should Respondent fail to fund the SEP within the required time frame set forth in Order No. 5 Respondent shall immediately pay to Ohio EPA the remaining three thousand dollars (\$3,000.00) of the civil penalty in accordance with the procedures in Order No. 4.
7. Within fifteen (15) days of the effective date of these Orders, Respondent shall submit a complete and approvable Section 401 water quality certification application (one (1) original and three (3) copies) to Ohio EPA.

VI. TERMINATION

Respondent's obligations under these Orders shall terminate when Respondent certifies in writing and demonstrates to the satisfaction of Ohio EPA that Respondent has performed all obligations under these Orders and Ohio EPA's Division of Surface Water acknowledges, in writing, the termination of these Orders. If Ohio EPA does not agree that all obligations have been performed, then Ohio EPA will notify Respondent of the obligations that have not been performed, in which case Respondent shall have an opportunity to address any such deficiencies and seek termination as described above.

The certification shall contain the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate and complete."

This certification shall be submitted by Respondent to Ohio EPA and shall be signed by a responsible official of Respondent.

VII. OTHER CLAIMS

Nothing in these Orders shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership or corporation, not a party to these Orders, for any liability arising from, or related to the Site.

VIII. OTHER APPLICABLE LAWS

All actions required to be taken pursuant to these Orders shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. These Orders do not waive or compromise the applicability and enforcement of any other statutes or regulations applicable to Respondent.

IX. MODIFICATIONS

These Orders may be modified by agreement of the parties hereto. Modifications shall be in writing and shall be effective on the date entered in the journal of the Director of Ohio EPA.

X. NOTICE

Unless otherwise specified, all documents required to be submitted by Respondent pursuant to these Orders shall be addressed to:

Ohio Environmental Protection Agency
Southeast District Office
2195 Front Street
Logan, Ohio 43138
(ATTN: Enforcement Group Leader)

or where appropriate:

Ohio EPA
Division of Surface Water
401 Section
P.O. Box 1049
Columbus, Ohio 43216-1049

XI. RESERVATION OF RIGHTS

Ohio EPA and Respondent each reserve all rights, privileges and causes of action, except as specifically waived in Section XI. of these Orders.

XII. WAIVER

In order to resolve disputed claims, without admission of fact, violation or liability, and in lieu of further enforcement action by Ohio EPA for only the violations specifically cited in these Orders, through the date of these Orders, Respondent consents to the issuance of these Orders and agrees to comply with these Orders. Compliance with these Orders shall be a full accord and satisfaction for Respondent's liability for the violations specifically cited herein.

Respondent hereby waives the right to appeal the issuance, terms and conditions, and service of these Orders, and Respondent hereby waives any and all rights Respondent may have to seek administrative or judicial review of these Orders either in law or equity.

Notwithstanding the preceding, Ohio EPA and Respondent agree that if these Orders are appealed by any other party to the Environmental Review Appeals Commission, or any court, Respondent retains the right to intervene and participate in such appeal. In such an event, Respondent shall continue to comply with these Orders notwithstanding such appeal and intervention unless these Orders are stayed, vacated or modified.

XIII. EFFECTIVE DATE

The effective date of these Orders is the date these Orders are entered into the Ohio EPA Director's journal.

XIV. SIGNATORY AUTHORITY

Each undersigned representative of a Party to these Orders certifies that he or she is fully authorized to enter into these Orders and to legally bind such Party to these orders.

**IT IS SO ORDERED AND AGREED:
Ohio Environmental Protection Agency**



Chris Korleski
Director

7/14/08
Date

**IT IS SO AGREED:
Herbert Smith.**



By

6/20/08
Date

HERBERT SMITH

Printed or Typed Name

OWNER

Title