

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
) Docket No. CWA-07-2005-0252
)
HAWTHORNE DEVELOPMENT, L.L.C.)
) COMPLAINT AND,
) CONSENT AGREEMENT/
) FINAL ORDER
)
Respondent)
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
)
_____)

COMPLAINT

Jurisdiction

1. This Administrative Complaint (Complaint) has been filed under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), pursuant to Section 309 (a) and (g) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1319 (a) and (g) and in accordance with 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, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order alleges that the Respondent discharged pollutants into the waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. The Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA Region VII, is the Director of Region VII's Water, Wetlands, and Pesticides Division.

4. Respondent, Hawthorne Development, L.L.C. (“Hawthorne”) is a corporation incorporated under the laws of Missouri and authorized to conduct business in the State of Missouri who owns property located in Section 13, Township 46 North, Range 26 West, Johnson County, Missouri. Hawthorne is represented by Mr. David Edwards and Mr. Richard Villers who have a mailing address of 3720 Arrowhead Drive, Suite 200, Independence, Missouri 64057.

Statutory and Regulatory Background

5. 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. Section 404 of the CWA provides that pollutants may be discharged only in accordance with the terms of a permit for the discharge of dredged or fill material.

6. 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.

Factual Background

7. In March 2005, the Respondent and/or persons acting on his behalf, discharged dredged or fill material including dirt, spoil, rock and sand, into a tributary of Blackwater River in Johnson County, Missouri. Approximately 81 cubic yards of fill material was placed in the tributary of Blackwater River affecting 950 linear feet of stream.

8. Respondent and/or persons acting on their behalf, used mechanized land-clearing and/or earth moving equipment to accomplish the discharges described in Paragraph 7.

9. Respondents did not have a CWA Section 404 permit for the discharge of fill material into waters of the United States.

EPA Finding of Violations

10. The dirt, spoil, rock and sand discharged by the Respondents into the tributary of Blackwater River constitutes a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11. Respondent’s work in and along the tributary of Blackwater River described above, constitutes a “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

12. The equipment used by the Respondent in performing the work described above constitutes a "point source" as defined in Section 502(14) of the CWA, 33 U.S.C. §1362(14).

13. The tributary of the Blackwater River is a "navigable water" of the United States, as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

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

15. 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 this discharge violated Section 301 of the CWA, 33 U.S.C. § 1311.

CONSENT AGREEMENT

16. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

17. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement/Final Order.

18. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty as set forth below.

19. Respondent consents to the mitigation set forth below in the Final Order.

20. Respondent waives any right to contest the allegations and his right to appeal the proposed Final Order accompanying this Consent Agreement.

21. Respondent and Complainant each agree to bear their own costs and attorney's fees.

22. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

23. The undersigned representative of Respondent certifies that he is fully authorized to enter the terms and conditions of this Complaint and Consent Agreement/Final Order and to execute and legally bind Respondent to it.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(a) and (g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a) and (g), it is ORDERED that:

1. Respondent shall pay a civil penalty of Sixty Thousand Dollars (\$60,000). Said penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this Complaint and Consent Agreement/Final Order. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

Mellon Bank
U.S. Environmental Protection Agency - Region VII
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Steven L. Sanders
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101

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.

2. The Respondent shall perform a one-acre mitigation project as outlined in the attached mitigation plan. The mitigation shall be completed within 90 days of the effective date of the Final Order. The mitigation plan is an enforceable part of this Final Order.

3. The Respondent shall also assure compliance with all storm water regulations, including but not limited to, maintaining and implementing a proper storm water pollution prevention plan for all permits issued by the State of Missouri.

4. Upon satisfactory completion by Respondent of all activities required by this Order a representative of the Complainant shall notify the Respondent in writing of said completion.

Parties Bound

5. This Final 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 him with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

Reservation of Rights

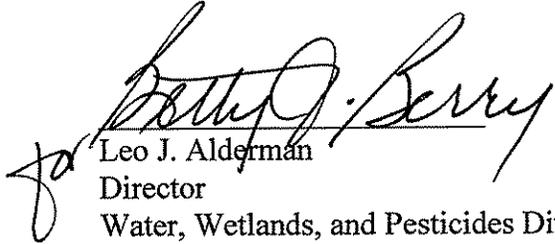
6. The EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

7. With respect to matters not addressed in this Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

Effective Date

8. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

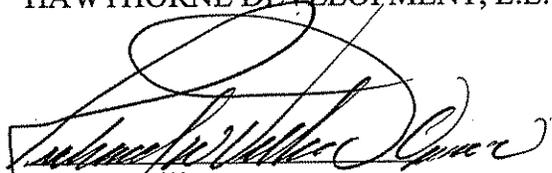
COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

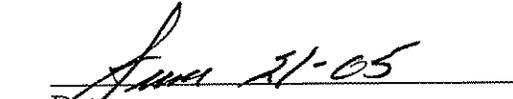

Leo J. Alderman
Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency
Region VII

08/08/05
Date


Steven L. Sanders
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII

RESPONDENT:
HAWTHORNE DEVELOPMENT, L.L.C.

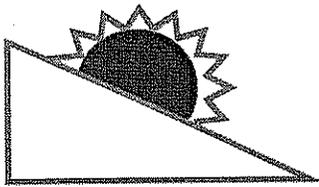

Richard Villers


Date

IT IS SO ORDERED.

August 11, 2005
Date

Robert L. Patrick
Robert L. Patrick
Regional Judicial Officer



TERRA TECHNOLOGIES

MITIGATION PLAN Hawthorne Development LLC

BASELINE INFORMATION

Definition of Location, Type, Function of Impact Debit

Hawthorne Development LLC is proposing to develop a tract of land east of Missouri Highway 13 and south of 175th Street in Warrensburg Johnson County Missouri. The site is found in the East ½ NE ¼ Section 35 Township 49 Range 30. The project has been assigned number 200500196 by the United States Army Corps of Engineers.

Recent enforcement action by the US Environmental Protection Agency (USEPA) requires the owner to provide 1.0 acres of compensatory mitigation as a component of a voluntary settlement agreement with Hawthorne Development LLC. The compensatory mitigation is for impacts to Tributary One, a jurisdictional ephemeral channel filled in portions by the owner without authorization from the US Army Corps of Engineers.

The proposed mitigation area is located on site adjacent to an unnamed tributary to Blackwater River, as indicated on the attached location map. The site contains 1.0 acres of denuded and minimally forested riparian corridor. Mitigation would be constructed by Hawthorne Development LLC with supervision from Terra Technologies Inc. under favorable environmental conditions during the Fall of 2005.

GOALS OF THE MITIGATION

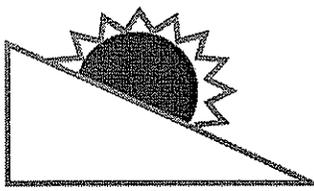
The mitigation goal of this project is three-fold;

- (1) Create a biologically diverse tree and shrub planting zone, thus improving riparian habitat.
- (2) Improve the aesthetic and conservation value of the ecosystem, while buffering the impact of non-point source pollutants.
- (3) Maintain and protect the mitigation area with a designated conservation easement.

SITE SELECTION

The 1.0 acre mitigation site was selected due to the suitability of soils, hydrology, and protection from disturbance. The practicability of this endeavor is ensured through the use of sound soil bioengineering principles and practices. Local ecotype trees and shrubs, produced in the air prune method of plant production, will be installed on 10-foot and 20-foot spacings. Mitigation will occur on site, within the existing watershed. The proposed ecological enhancement will result in the enhancement of approximately 1.0 acres of riparian buffer.

Plan details, previously submitted under separate cover indicate the location of the mitigation area;



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Mitigation Details

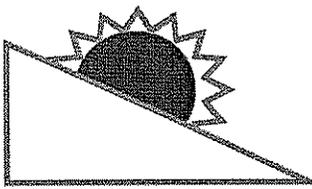
Mitigation Plantings Riparian Enhancement

Scientific Name	Common Name	Size	Type	Class	Group
<i>Acer saccharum</i>	Silver Maple	#5 APM	Tree	FACU	A
<i>Aesculus glabra</i>	Ohio Buckeye	#5 APM	Tree	FAC	A
<i>Amelanchier canadensis</i>	Serviceberry	#5 APM	Tree	FAC	A
<i>Asimina triloba</i>	Paw Paw	#5 APM	Tree	UPL	A
<i>Carya laciniosa</i>	Shellbark Hickory	#5 APM	Tree	FAC	A
<i>Carya ovata</i>	Shagbark Hickory	#5 APM	Tree	FAC	A
<i>Carya tomentosa</i>	Mockemut Hickory	#5 APM	Tree	FAC	A
<i>Celastris scandens</i>	Bittersweet	#5 APM	Shrub	FACU	A
<i>Celtis occidentalis</i>	Hackberry	#5 APM	Tree	UPL	A
<i>Ceanothus americanus</i>	New Jersey Tea	#5 APM	Shrub	UPL	A
<i>Celtis occidentalis</i>	Hackberry	#5 APM	Tree	FACU	A
<i>Cercis canadensis</i>	Redbud	#5 APM	Tree	UPL	A
<i>Cornus racemosa</i>	Gray Dogwood	#5 APM	Shrub	FAC	A
<i>Cornus drummondii</i>	Rough Dogwood	#5 APM	Shrub	FAC	A
<i>Corylus americana</i>	Hazelnut	#5 APM	Shrub	UPL	A
<i>Crataegus</i> spp.	Native Hawthorn	#5 APM	Shrub	FAC	A
<i>Diospyros virginiana</i>	Persimmon	#5 APM	Tree	FACU	A
<i>Euonymus atropurpurea</i>	Wahoo	#5 APM	Shrub	FAC	A
<i>Fraxinus americanus</i>	White Ash	#5 APM	Tree	UPL	A
<i>Gymnocladus dioica</i>	Kentucky Coffeetree	#5 APM	Tree	UPL	A
<i>Hamamelis virginiana</i>	Witch Hazel	#5 APM	Shrub	UPL	A
<i>Juglans nigra</i>	Black Walnut	#5 APM	Tree	UPL	A
<i>Morus alba</i>	White Mulberry	#5 APM	Tree	UPL	A
<i>Pinus</i> spp.	Short Leaf Pine	#5 APM	Tree	UPL	A
<i>Prunus americana</i>	Wild Plum	#5 APM	Tree	UPL	A
<i>Prunus serotina</i>	Black Cherry	#5 APM	Tree	UPL	A
<i>Prunus virginica</i>	Choke Cherry	#5 APM	Tree	FAC	A
<i>Quercus alba</i>	White Oak	#5 APM	Tree	UPL	A
<i>Quercus macrocarpos</i>	Bur Oak	#5 APM	Tree	FAC	A
<i>Quercus muehlenbergii</i>	Chinquapin Oak	#5 APM	Tree	FACU	A
<i>Quercus nigra</i>	Black Oak	#5 APM	Tree	FAC	A
<i>Quercus rubra</i>	Red Oak	#5 APM	Tree	FAC	A
<i>Quercus shumardii</i>	Shumard Oak	#5 APM	Tree	FAC	A
<i>Quercus stellata</i>	Post Oak	#5 APM	Tree	UPL	A
<i>Quercus velutina</i>	Water Oak	#5 APM	Tree	UPL	A
<i>Rhus aromatica</i>	Aromatic Sumac	#5 APM	Shrub	UPL	A
<i>Rhus glabra</i>	Smooth Sumac	#5 APM	Shrub	UPL	A
<i>Sambucus canadensis</i>	Elderberry	#5 APM	Shrub	FACW	A
<i>Symphoricarpos</i> spp.	Coralberry	#5 APM	Shrub	FAC	A
<i>Tilia americana</i>	Basswood	#5 APM	Tree	FACU	A

8680 W. 96th St. Suite 100 • Overland Park, KS 66212

Phone: 913-385-9560 • Fax: 913-385-5295

<http://www.terratechnologies.com> • e-mail: terratech@terratechnologies.com



TERRA TECHNOLOGIES

Mitigation Details					
Mitigation Plantings Riparian Enhancement					
Scientific Name	Common Name	Size	Type	Class	Group
Viburnum prunifolium	Blackhaw	#5 APM	Shrub	UPL	A
Acer rubra	Red Maple	#5 APM	Tree	FAC	A
Amorpha fruticosa	Bush Indigo	#5 APM	Shrub	FACW	A
Betula nigra	River Birch	#5 APM	Tree	FACW	A
Cephalanthus occidentalis	Buttonbush	#5 APM	Shrub	OBL	A
Cornus amomum	Silky Dogwood	#5 APM	Shrub	FACW	A
Fraxinus pennsylvanica	Green Ash	#5 APM	Tree	FACW	A
Ilex decidua	Deciduous Holly	#5 APM	Shrub	FACW	A
Lindera benzoin	Spicebush	#5 APM	Shrub	FACW	A
Physocarpus opulifolius	Ninebark	#5 APM	Shrub	FACW	A
Platanus occidentalis	Sycamore	#5 APM	Tree	FACW	A
Populus deltoids	Cottonwood	#5 APM	Tree	FACW	A
Quercus bicolor	Swamp White Oak	#5 APM	Tree	FACW	A
Quercus palustris	Pin Oak	#5 APM	Tree	FACW	A
Salix interior	Sandbar Willow	#5 APM	Tree	FACW	A
Salix amygdaloides	Peachleaf Willow	#5 APM	Tree	FACW	A
Salix x cottetii	Bankers Willow	#5 APM	Shrub	FACW	A
Taxodium distichum	Bald Cypress	#5 APM	Tree	OBL	A

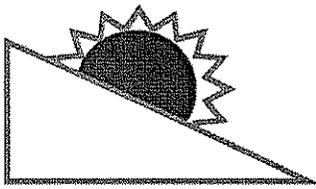
For Group A (Riparian Restoration), select no less than 8 species of trees to comprise 60% of the total mitigation plantings and select no less than 8 species of shrubs to comprise 40% of the total mitigation plantings. Install a total of 132 #5 APM Trees on 20-foot centers and 88 #5 APM Shrubs on 10-foot centers.

Contractor shall make quantity and species selections based on ecological parameters, as approved by the mitigation scientist.

Provide and install per plan details.

All plant materials must originate of local ecotype sources from the Missouri Osage Plains ecotype region.

APM denotes Air Prune Method of tree and shrub production.



TERRA TECHNOLOGIES

MITIGATION WORK PLAN

Boundaries are defined in plan sheets for the mitigation area and summarized in a narrative manner within this document. Trees and shrubs will be planted the week of September 11-17th, under the supervision of Terra Technologies Inc. Plantings will include controlled release fertilizer tablets and mycorrhizal inoculant tablets per recognized industry standards.

ECOLOGICALLY BASED SUCCESS CRITERIA

The mitigation plan details and installation oversight is being performed by a bioengineering consultant experienced in ecological restoration. Long-term measurement and reporting will likely be required by the USEPA for a specified duration. An annual report, complete with photographic documentation, will be provided to the USEPA by October 31, 2006, after the first complete growing season is completed.

SITE PROTECTION

The property will be deed restricted with a conservation easement at the Johnson County Recorder of Deeds. Placards shall be placed on steel posts identifying the area as a federal mitigation site not for disturbance.

CONTINGENCY PLAN

Not applicable.

FINANCIAL ASSURANCES

Not applicable.

MITIGATION TYPES

The proposed project represents the manipulation of physical, chemical, and biological characteristics of the site with the goal of returning natural/historic functions to a former degraded riparian ecosystem. The improvements are preserved by the management of a permanent deed restriction through the project area.

SUBMITTED BY,
TERRA TECHNOLOGIES INC.

David L. Flick

David L. Flick, Principal
Registered Agent for Hawthorne Development LLC

IN THE MATTER OF Hawthorne Development, LLC, Respondent
Docket No. CWA-07-2005-0252

CERTIFICATE OF SERVICE

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

Copy hand delivered to
Attorney for Complainant:

Steven L. Sanders
Senior Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Richard Villers
Hawthorne Development LLC
3720 Arrowhead Drive
Suite 200
Independence, Missouri 64057

Dated: 8/11/05



Kathy Robinson
Regional Hearing Clerk