

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

CHARLES A. FOLSOM,

Plaintiff,

vs.

UNITED STATES ARMY CORPS OF
ENGINEERS NEBRASKA DISTRICT,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, KAREN A.
FLOURNOY, in her official capacity as
Director of the Water, Wetlands and
Pesticides Division for the Environmental
Protection Agency, Region 7,

Defendants.

Case No. _____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiff Charles A. Folsom alleges:

JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

2. Venue is proper under 28 U.S.C. § 1391(e)(2), because the property that is the subject of the action is situated in Nebraska, the Plaintiff resides in Nebraska, and the dispute arose in Nebraska.

PARTIES

3. Plaintiff Charles A. Folsom (“Folsom”) is a citizen of the State of Nebraska, and resides in Fremont, Dodge County, Nebraska.

4. Defendant United States Army Corps of Engineers Nebraska District (the “USACE”) is a branch of the Department of the Army and an agency of the United States.

5. Defendant United States Environmental Protection Agency (the “EPA”), Region 7 is an agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. It is the agency with primary responsibility for the enforcement of the Clean Water Act (the “CWA”).

6. Defendant Karen A. Flournoy is the Director of the Water, Wetlands and Pesticides Division at the EPA, Region 7 office and the signatory to the EPA’s proposed Compliance Order. Ms. Flournoy is being sued in her official capacity only.

LEGAL BACKGROUND

7. In 1972, Congress enacted the CWA to regulate the navigable waters of the United States.

8. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the issuance of permits for the discharge of dredge and fill material into the navigable waters of the United States.

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the unpermitted discharge of dredge and fill material into the navigable waters of the United States.

10. Sections 308 and 309, 33 U.S.C § 1318, 1319, authorize the EPA to issue compliance orders for violations of the CWA, including unpermitted discharges of dredge and fill material into the navigable waters of the United States.

11. The EPA has promulgated regulations to define “waters of the United States” (“WOTUS”). *See* 40 C.F.R. § 230.3(s).

12. Under those regulations, navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands, are considered WOTUS. *See id.* § 230.3(s)(1)-(7).

FACTUAL ALLEGATIONS

13. At all times relevant until June 26, 2017, Folsom owned the land adjacent to and touching the Elkhorn River located in land legally described as Section Twenty (20), Township Eighteen (18) North, Range Nine (9) East the 6th P.M., Dodge County, Nebraska which is subject to this litigation.

14. By Survivorship Warranty Deed filed with the Dodge County Register of Deeds Office on June 26, 2017, Folsom sold the land legally described in the Survivorship Warranty Deed attached hereto as Exhibit "A" and incorporated herein by reference to Duane C. McKenzie and Judi C. McKenzie, husband and wife. However, such sale was subject to the following provision of a Sale of Real Estate Agreement;

14.1 Sellers have placed concrete and other stabilization material along the bank of the Elkhorn River on portions of the property being sold by Sellers to Buyers. Sellers have been involved in a dispute with the United States Army Corps of Engineers as a result of the placement of said stabilization materials. Sellers shall continue negotiations and any litigation expense as a result of the placement of said materials and hold Buyers harmless from any damages, penalties or costs associated and agree to indemnify Buyers for same.

15. In 2012, the Elkhorn River flooded, wiping out the upstream drainage of several hundred acres then owned by Folsom.

16. During that same year, John Moeschen was in charge of riverbank stabilization permits to be issued by the USACE in the Nebraska District.

17. While Mr. Moeschen was in charge, it was virtually impossible to obtain a permit, as he refused to issue permits for bank stabilization.

18. Folsom knew that applying for a permit at the time would be futile and therefore acted in his best interests to stabilize the Elkhorn River's bank and prevent further damage to his property. The stabilization was done by placing pieces of recycled concrete along the bank (above the high water elevation) of the river on Folsom's property to inhibit erosion. Neither recycled concrete nor any other fill materials were placed directly into the Elkhorn River or any jurisdictional wetlands.

19. On August 24, 2015, the USACE sent a letter to Folsom stating he was in violation of the CWA. A true and correct copy of the letter is attached hereto as Exhibit "B" and incorporated herein by reference.

20. In the August 24, 2015 letter, the USACE gave Folsom thirty (30) days to respond with a restoration plan or risk having his case be forwarded to the EPA.

21. On September 18, 2015, the USACE sent another letter to Folsom reiterating his alleged violation of the CWA. A true and correct copy of the letter is attached hereto as Exhibit "C" and incorporated herein by reference.

22. In the September 18, 2015 letter, the USACE again gave Folsom thirty (30) days to respond with a restoration plan or risk having his case be forwarded to the EPA.

23. On February 29, 2016, the EPA sent a letter to Folsom with a proposed Administrative Order for Compliance on Consent ("Compliance Order") and the threat of a civil penalty. A true and correct copy of the letter is attached hereto as Exhibit "D" and incorporated herein by reference.

24. The proposed Compliance Order included a cease and desist to stop placing concrete along the bank of the Elkhorn River, and a demand to submit a "restoration" Work Plan within thirty (30) days to the EPA.

25. In the February 29, 2016 letter, the EPA threatened to take Folsom to District Court to obtain civil penalties for his alleged violations of the CWA.

26. On July 17, 2017, after waiting a year and a half to hear anything further from the USACE or EPA, Folsom sent a letter to the USACE with numerous enclosures in an attempt to either prompt a filing in District Court or to allow him to continue protecting his land. A true and correct copy of the letter is attached hereto as Exhibit "E" and incorporated herein by reference.

27. On August 28, 2017, John L. Hudson, Colonel Corps of Engineers District Commander responded to Folsom's letter of July 17, 2017 indicating that the EPA is the lead Federal Agency for Section 404 enforcement in the case at issue. A true and correct copy of the letter is attached hereto as Exhibit "F" and incorporated herein by reference.

28. To date, Folsom has not been notified of any proceeding being filed in District Court against him by either the EPA or USACE.

29. Through these threats against Folsom, Folsom has lost access to some 25,000 tons of recycled concrete which would have been delivered to him free of charge and on site.

30. The threats have also stopped the maintenance and finalization of Folsom's bank stabilization project. Without such maintenance and finalization there is a great risk that the Elkhorn River will undermine the existing bank stabilization project and create a new channel of the Elkhorn River thereby potentially destroying hundreds of acres of crop land, losing access to additional land, taking out an existing downstream bank stabilization project and jeopardizing additional downstream landowners as well governmental infrastructure projects.

CAUSES OF ACTION

FIRST CAUSE OF ACTION -- INJUNCTION

31. All allegations above are incorporated by reference.

32. If an injunction is not issued enjoining Defendants from enforcing the compliance order against Folsom, Folsom will be irreparably harmed. Folsom is presently and continuously injured by the proposed Compliance Order's issuance because its issuance and coincident threat of enforcement will force Folsom either to restore his property essentially to its original condition at great expense, or to subject himself to severe civil and criminal penalties. In addition, Folsom desires to maintain the bank stabilization project and finalize it in order to protect the property and downstream properties and cannot do so while under this threat of enforcement.

33. Folsom has no plain, speedy, and adequate remedy at law.

34. If not enjoined by this Court, the EPA and USACE will continue to threaten to, and actually, enforce the compliance order in derogation of Folsom's rights.

35. The EPA's compliance order is a final agency action subject to judicial review. *See* 5 U.S.C. § 702.

36. Accordingly, injunctive relief is appropriate.

SECOND CAUSE OF ACTION -- DECLARATORY JUDGMENT

37. All allegations above are incorporated by reference.

38. An actual and substantial controversy exists between Folsom and Defendants over Defendants' failure to comply with the CWA, the APA, and the Constitution in determining that Folsom's actions were violative of the CWA and that he can be held liable for violation of the proposed Compliance Order, or the alleged underlying violation, without proof of a violation or an opportunity to be heard.

39. The EPA's proposed Compliance Order is a final agency action subject to judicial review. *See* 5 U.S.C. § 702.

40. This case is presently justiciable because Defendants' failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Folsom. Folsom is presently and continuously injured by the proposed Compliance Order's issuance because its issuance and coincident threat of enforcement will force Folsom to restore his property to its original condition at great expense, or to subject himself to severe civil and criminal penalties. In addition, Folsom desires to maintain the bank stabilization project and finalize it in order to protect the property and downstream properties and cannot do so while under this threat of enforcement.

41. Declaratory relief is, therefore, appropriate to resolve this controversy.

PRAYER FOR RELIEF

WHEREFORE, Folsom prays that the Court enter judgment as follows:

- A. An injunction enjoining Defendants from taking any enforcement action, or imposing any penalty, against Folsom;
- B. A declaration that the land on which Folsom placed the recycled concrete is not a wetland under the USACE jurisdiction because it is not within the definition of WOTUS;
- C. A declaration that Folsom's stream bank stabilization activities are not in violation of any section of the CWA;
- D. That this Court award Folsom any damages incurred, his costs and attorneys' fees, as allowed by law; and
- E. That this Court grant such other and further relief as the Court deems just, equitable and proper.

DESIGNATION OF PLACE FOR TRIAL

Folsom designates Lincoln, Nebraska, as the place for trial.

CHARLES A. FOLSOM, Plaintiff

By His Attorneys,

MATTSON RICKETTS LAW FIRM

134 South 13th Street, Suite 1200

Lincoln, Nebraska 68508-1901

Telephone No.: (402) 475-8433

Facsimile No.: (402) 475-0105

E-mail: sdm@mattsonricketts.com

E-mail: rkm@mattsonricketts.com


By: /s/ Stephen D. Mossman

Stephen D. Mossman, #19859

Ryan K. McIntosh, #25523

One of Said Attorneys

NEBRASKA DOCUMENTARY STAMP TAX	
JUNE 26, 2017	\$ 2605.50
By: CG	#201703061


 201703061
Carol Givens
 Carol Givens
 Register of Deeds
 DODGE COUNTY, NE

201703061
 Filed:
 June 26, 2017 11:30:00 AM
 Fee \$16.00

After recording, please return to:
 Bradley D. Holtorf, Attorney
 SIDNER LAW
 340 E. Military Ave., Suite 1
 Fremont, NE 68025

COPY

SURVIVORSHIP WARRANTY DEED

Charles A. Folsom and Emiko H. Folsom, husband and wife, and Charles A. Folsom, Trustee, Charles A. Folsom Revocable Trust, Grantor, whether one or more, in consideration of One Dollar (\$1.00) and other valuable consideration, receipt of which is hereby acknowledged, conveys to Duane C. McKenzie and Judi C. McKenzie, husband and wife, Grantees, as joint tenants with rights of survivorship, and not as tenants in common, the following described real estate (as defined in Neb. Rev. Stat. Sec. 76-201) in Dodge County, Nebraska:

That part of the North half of Section 30, Township 18 North, Range 9 East of the 6th P.M., Dodge County, Nebraska, lying East of the Easterly right of way of the BNSF Railway, formerly the C.B.&Q. Railroad, and that part of said North half of Section 30 lying East of the Easterly right of way of the C&NW Railroad, now Fremont Northern Railroad, Inc., and West of the Westerly right of way of the BNSF Railway Railway, formerly the C.B.&Q. Railroad.

That part of the Northwest Quarter of Section 29, Township 18 North, Range 9 East of the 6th P.M., Dodge County, Nebraska, lying West of the Elkhorn River.

The North Half of the Southwest Quarter, Tax Lot 2 in the Southwest Quarter of the Southwest Quarter, and the Southeast Quarter of the Southwest Quarter of Section 20, Township 18 North, Range 9 East of the 6th P.M., Dodge County, Nebraska, EXCEPT: Beginning at the 1/4 1/4 corner west of the center of Section 20, Township 18, Range 9E; thence Southeasterly to a point on the North-South centerline of said Section 20, said point beginning 1800.00 feet south of the center; thence North to the center of said Section; thence West to the point of beginning, lying in the E1/2 SW1/4.

A parcel of land in Sections 19 and 20, Township 18 North, Range 9 East of the 6th P.M., Dodge County, Nebraska, bounded and described as follows: Beginning at a point 1025 feet East of the Quarter Section corner on the section line between Sections 19 and 30, and running thence N37°30'E 300 feet, thence N41°30"E 100 feet, thence N56°45'E 100 feet, thence N67°E 100 feet, thence N73°E 100 feet, thence N79°E 100 feet, thence N87°E 100 feet, thence S87°30'E 200 feet, thence S78°45'E 500 feet, thence S66°30'E 400 feet, thence S59°45'E 100 feet, thence S54°28'E 247.3 feet to a point 2158.3 feet East of the Quarter Section corner on the Section line between Sections 20 and 29, thence West along the South line of Section 20 and 19 to the place of beginning.



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NEBRASKA REGULATORY OFFICE
8901 SOUTH 154TH STREET, SUITE 1
OMAHA, NEBRASKA 68138-3635

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Nebraska.aspx>

August 24, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NOTICE OF VIOLATION

Mr. Charles Folsom
449 West 10th Street
Fremont, Nebraska 68025

Sawyer Construction
220 West Cloverly Road
Fremont, Nebraska 68025

RE: NWO-2015-00859-WEH, Fill – Alleged Violation Washington County

Gentlemen:

Based on information received in this office on May 5, 2015, and our site visit of July 17, 2015, the U.S. Army Corps of Engineers (Corps) has reason to believe that a discharge occurred in violation of Sections 301(a), 309 and 404 of the Clean Water Act (CWA) **within the Elkhorn River located in Section 20, Township 18 North, Range 9 East, Washington County, Nebraska. Material of an unauthorized size and material was placed.** During the site visit, personnel from our office observed the discharge of unauthorized fill within the Elkhorn River and potential wetlands. Impacts to waters of the U.S. (WOUS) include fill activities within Elkhorn River and potential wetlands.

Our preliminary assessment of the violation for discharge activities resulted in the unauthorized discharge of fill material into WOUS estimated at 1500 linear feet of the Elkhorn River. On a phone call on June 30, 2015, the activity discussed was recycled concrete placed on top of the bank and that some fell in the Elkhorn River. At the site visit on July 17, 2015, fill consisting of unauthorized size and material was observed in the Elkhorn River and potential wetlands. Material was placed using heavy equipment with tracks, such as a bull dozer.

Elkhorn River and its adjacent wetlands are jurisdictional WOUS and within the meaning of 33 CFR §3283(a) and a navigable water within the meaning of CWA Section 502(7), 33 USC Section 1362(7). The recently placed fill has impacted the stream and potential wetlands.

Information we have indicates that you are a party associated with this activity, whether as a property owner or as a person performing or causing the performance of this work. You are considered a "person" as defined in the CWA §502(5), 33 USC §1362(5) and are the person responsible for the alleged discharge.

EXHIBIT "B" 000001

The Corps is responsible for administering Section 404 of the Clean Water Act (33 USC §1344) and Section 10 of the Rivers and Harbors Act of 1899 (33USC 403). Section 404 of the Clean Water Act prohibits the discharge of dredged or fill materials into streams, lakes, and wetlands without Department of the Army authorization.

Our records indicate that a permit for the above activity was neither applied for, nor issued; therefore, the observed discharge is in violation of the Clean Water Act and all persons responsible are subject to enforcement actions. Current regulations provide for subsequent enforcement procedures in the form of administrative and/or legal action based on an evaluation of the circumstances surrounding a violation. By undertaking unauthorized activities, responsible parties are subject to substantial civil and/or criminal fines and penalties authorized under Section 309(g) of the Clean Water Act.

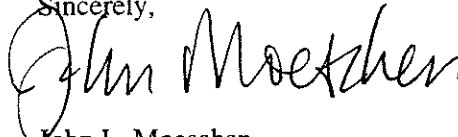
In some cases voluntary restoration may resolve a violation when the restoration of the WOUS eliminates current and future detrimental impacts to the satisfaction of the district engineer. We believe that voluntary restoration is an appropriate resolution of this case. **In order to resolve this violation, a restoration plan detailing the voluntary restoration work to be completed must be received in this office for approval within 30 days of receipt of this letter.** Upon approval of the plan, the restoration work must be completed within 90 days, unless otherwise authorized. Failure to submit a plan and complete the restoration within the timeframe allowed will result in the case being forwarded to U.S. Environmental Protection Agency (EPA) for their enforcement.

In accordance with a Memorandum of Agreement between the Department of the Army and the EPA concerning federal enforcement of Section 404 of the Clean Water Act, a copy of this notification is being sent to the EPA for review and coordination. Copies of this notification are also being sent to other state and federal agencies for review and coordination. No permit application for the work cited in this notification will be processed until the enforcement issues have been resolved and consultation with other agencies has been completed.

Please provide any relevant information pertaining to this violation within thirty (30) days of the date of this letter. Your cooperation in resolving this violation is appreciated.

If you need assistance in understanding permit requirements pursuant to Section 404, Ms. Jolene Hulsing can provide any background information you might need. If you have any questions, please contact her at (402) 896-0896 and refer to file number NWO-2015-00859-WEH.

Sincerely,



John L. Moeschen
Nebraska State Program Manager

cc:

USEPA (Hoffman)
NDEQ (Garber)
NDEQ (Holsten)
CENWO-OD-R (LaGrone)
USFWS (Hines)
NRCS (Washington County)



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NEBRASKA REGULATORY OFFICE
8901 SOUTH 154 STREET, SUITE 1
OMAHA, NEBRASKA 68138-3635

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Nebraska.aspx>

September 18, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NOTICE OF VIOLATION

Mr. Charles Folsom
449 West 10th Street
Fremont, Nebraska 68025

Sawyer Construction
220 West Cloverly Road
Fremont, Nebraska 68025

RE: NWO-2015-00859-WEH, Fill –Violation Washington County

Gentlemen:

Based on information received in this office on May 5, 2015 and our site visit of July 17, 2015 and August, 24 2015, the U.S. Army Corps of Engineers (Corps) has reason to believe that a discharge occurred in violation of Sections 301(a), 309 and 404 of the Clean Water Act (CWA) **within the Elkhorn River located in Section 20, Township 18 North, Range 9 East, Washington County, Nebraska. Material of an unauthorized size and unauthorized type was placed.** Impacts to waters of the U.S. (WOUS) include fill activities within Elkhorn River and potential wetlands.

During site visits on July 17, 2015, with Ms. Jolene Hulsing (Regulatory Specialist), and August 24, 2015, with Ms. Jolene Hulsing, Mr. John Moeschen (Nebraska Regulatory State Program Manager), and Mr. David LaGrone (Omaha District Enforcement Coordinator), fill consisting of unauthorized size and unauthorized type was observed in the Elkhorn River and potential wetlands. Our assessment of the violation for discharge activities resulted in the unauthorized discharge of fill material into WOUS estimated at 1,500 linear feet of the Elkhorn River. Mr. Folsom indicated that this work was initiated in 2012, and that he did not pursue a permit from the Corps. There is currently a large amount of broken concrete stockpiled on top of the bankline outside Section 404 jurisdiction. We recognize that a portion of the material now in the river may have been originally stockpiled on the top of the river bank. However, comparing Google Earth imagery dated July 2012 and April 2015, it is evident that a large portion of material currently in the river extends beyond the 2012 bank line and could not have been stockpiled. Based on the site visits and from Google Earth imagery, it is apparent that material was placed using heavy equipment with tracks, such as a bull dozer.

A letter dated August 24, 2015, was mailed to the Sawyer Construction Company with courtesy copies sent to agencies that may have an interest in the activity. Our intent was to hand deliver the letter to Mr. Folsom during the August site visit, but the letter was not given at that time as we wanted to send a

EXHIBIT "C" 000001

modified letter reflecting our August 24, 2015 site visit. Inadvertently, the other letters had already been sent in the mail the day of the site meeting. Mr. Folsom was given a time extension for the completion of the restoration plan identified in the August 24, 2015 letter. The time extension was until the receipt of this Notice of Violation letter. The original letter is enclosed.

Project number NE-91-75431 was referenced at the site visits and in Mr. Folsom's correspondence dated September 5, 2015 and in a September 2, 2015 letter from Mr. John Miyoshi (General Manager, Lower Platte North NRD). This project does not appear to have been constructed as authorized or within the authorized time frame of the permit and subsequent permit extensions. However, due to the age of the noncompliance, project number NE-91-75431 is not being reviewed as part of the violation activities identified for project number NWO-2015-00859-WEH.

The Elkhorn River and its adjacent wetlands are jurisdictional WOUS and within the meaning of 33 CFR §3283(a) and a navigable water within the meaning of CWA Section 502(7), 33 USC Section 1362(7). The recently placed fill has impacted the stream and potential wetlands.

Information we have indicates that you are a party associated with this activity, whether as a property owner or as a person performing or causing the performance of this work. You are considered a "person" as defined in the CWA §502(5), 33 USC §1362(5) and are the person responsible for the discharge.

The Corps is responsible for administering Section 404 of the Clean Water Act (33 USC §1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403). Section 404 of the Clean Water Act prohibits the discharge of dredged or fill materials into streams, lakes, and wetlands without Department of the Army authorization.

Our records indicate that a permit for the above activity was neither applied for, nor issued; therefore, the observed discharge is in violation of the Clean Water Act and all persons responsible are subject to enforcement actions. Current regulations provide for subsequent enforcement procedures in the form of administrative and /or legal action based on an evaluation of the circumstances surrounding a violation. By undertaking unauthorized activities, responsible parties are subject to substantial civil and /or criminal fines and penalties authorized under Section 309(g) of the Clean Water Act.

In some cases voluntary restoration may resolve a violation when the restoration of the WOUS eliminates current and future detrimental impacts to the satisfaction of the district engineer. We believe that voluntary restoration is an appropriate resolution of this case. **In order to resolve this violation, without forwarding this violation to the U.S. Environmental Protection Agency (EPA) for resolution, a restoration plan detailing the voluntary restoration work to be completed must be received in this office for approval within 30 days of receipt of this letter.** Upon approval of the plan, the restoration work must be completed within 90 days, unless otherwise authorized. Failure to submit a plan and complete the restoration within the timeframe allowed will result in the case being forwarded to EPA for their enforcement.

In accordance with a Memorandum of Agreement between the Department of the Army and the EPA concerning federal enforcement of Section 404 of the Clean Water Act, a copy of this notification is being sent to the EPA for review and coordination. Copies of this notification are also being sent to other state and federal agencies for review and coordination. No permit application for the work cited in this notification will be processed until the enforcement issues have been resolved and consultation with other agencies has been completed.

Please provide any relevant information pertaining to this violation within thirty (30) days of the date of this letter. Your cooperation in resolving this violation is appreciated.

If you need assistance in understanding permit requirements pursuant to Section 404, Ms. Jolene Hulsing can provide any background information you might need. If you have any questions, please contact her at (402) 896-0896 and refer to file number NWO-2015-00859-WEH.

Sincerely,

A handwritten signature in black ink, appearing to read "John L. Moesch". The signature is written in a cursive style with a large initial "J".

John L. Moesch
Nebraska State Program Manager

cc:

USEPA (Hoffman)
USFWS (Hines)
NDEQ (Garber)
NDEQ (Holsten)
NGPC (Grell)
NRCS (Washington County)
CENWO-OD-R (LaGrone)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

11201 Renner Boulevard
Lenexa, Kansas 66219

FEB 29 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Charles Folsom
449 West 10th Street
Fremont, Nebraska 68205

Re: Notice of Administrative Compliance Order and
Invitation to Participate in Prefiling Negotiations

Dear Mr. Folsom:

The Clean Water Act was enacted to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 404 of the CWA provides that the discharge of fill material into a water of the U.S. is unlawful except in compliance with a Section 404 permit issued by the U.S. Army Corps of Engineers.

The U.S. Environmental Protection Agency has received information from the Omaha, Nebraska Corps District concerning fill activities performed and/or authorized by you which impacted approximately 1,500 linear feet of the Elkhorn River in Section 20, Township 18 North, Range 9 East, in Washington County, Nebraska. According to the Corps, this placement of fill material into "waters of the United States" was done without a Section 404 permit.

The EPA believes that actions are necessary to address the CWA compliance issues identified at the facility. Enclosed with this letter is a proposed Administrative Order for Compliance on Consent to establish a schedule to accomplish these actions. By this letter and through the proposed Order, the EPA invites you to discuss the activities necessary for the facility to comply with the CWA.

The EPA also believes that an enforcement action in the form of a civil penalty is appropriate for the above mentioned violations. Under Section 309 of the CWA, the EPA is authorized to seek penalties for violations of the CWA. To determine the appropriate penalty amount, the EPA considers such factors as the nature, extent and gravity of the violation, any prior history of violations, economic benefit gained and degree of culpability. Based on these factors, the EPA has determined that a penalty of \$91,500 is appropriate. Please note that this proposed penalty is for settlement purposes only. Should the EPA decide to file an Administrative Complaint in this matter, it may seek the maximum penalties allowed under the CWA.



Printed on Recycled Paper

EXHIBIT "D" 000001

While the EPA believes it is appropriate to proceed with a formal compliance agreement and penalty action, we recognize that settlement of this matter may be best accomplished by conducting negotiations prior to formalizing any enforcement action. By this letter we are offering you the opportunity to negotiate the attached Administrative Order for Compliance on Consent and a resolution of the proposed penalty before a complaint is filed. As part of these pre-filing negotiations, the EPA will consider any additional information you may have that is relevant to the violations and the actions necessary to address the identified violations. If you are interested in participating in pre-filing negotiations, please contact Chris Muehlberger, the attorney assigned to this matter, within **seven (7) calendar days** of your receipt of this letter at (913) 551-7623. If the terms of the proposed Order and penalty are acceptable, you may also simply choose to sign the proposed Order and return it to the EPA for execution.

If you choose not to sign the proposed Order or contact the EPA within the seven (7) day time period to participate in pre-filing negotiations regarding the Order, or if agreement is not reached within the **60-day pre-filing time period**, the EPA will evaluate other enforcement options to address the identified violations.

If you have any questions, please call Chris Muehlberger at (913) 551-7623. We trust that you recognize the importance of protecting the quality of our Nation's waters. Thank you for your attention to this matter.

Sincerely,



Karen A. Flournoy
Director

Water, Wetlands and Pesticides Division

Enclosure

cc: John Moeschen
David LaGrone
U.S. Army Corps of Engineers
Omaha, Nebraska District
1616 Capitol Ave., Suite 9000
Omaha, NE 68102

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

IN THE MATTER OF:)	
)	
)	Docket No. CWA-07-2016-0029
CHARLES FOLSOM)	
)	
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 Charles Folsom (“Respondent”).

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*, Section 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. 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 U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. 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.

10. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

11. 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.”

12. 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

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

14. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property along the Elkhorn River located in Section 20, Township 18 North, Range 9 East, in Washington County, Nebraska (hereinafter “the Site”).

15. On May 4, May 6 and June 30, 2015, the Corps, Omaha District, received complaints that Respondent was performing fill activities and channel work along the Elkhorn River.

16. On July 17, 2015, Corps and Nebraska Department of Environmental Quality personnel conducted a site visit at the Site. Two additional site visits were conducted by Corps personnel on August 24 and October 21, 2015. During the site visits, the Corps inspected the Site and documented that Respondent used earth moving equipment to discharge fill material comprised of concrete, rebar, roofing materials, asphalt, wood, brick and other materials into the Elkhorn River, impacting approximately 1,500 linear feet of the River. During the October 21, 2015 site visit, a Corps professional engineer confirmed that Respondent placed fill material below the ordinary high water mark of the Elkhorn River.

17. On August 24, 2015, the Corps issued a Notice of Violation to Respondent.

18. The fill material discharged by Respondent into the Elkhorn River are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The earth moving equipment used to place the fill material into the River constitute a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. The discharge of the fill material into the River constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

21. The Elkhorn River is a “water 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.

22. 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.

A. FINDINGS OF VIOLATION

23. Respondent’s discharge of pollutants from a point source into a water of the United States occurred 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.

B. ORDER FOR COMPLIANCE ON CONSENT

Based on the FACTUAL BACKGROUND 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:

24. Respondent shall comply with the CWA by immediately ceasing the discharge of fill material into the Elkhorn River and taking steps to ensure that such discharges do not occur in the future.

25. 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 fill material in the Elkhorn River and the restoration of the riparian corridor along the impacted Site. The Work Plan shall be submitted to EPA within thirty (30) days of the effective date of this Order. The restoration work shall be completed within twelve (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 riparian corridor functions, pursuant to Paragraph 28 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.

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

27. 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 thirty (30) days after work has been completed.

28. 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 (5) 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 stream functions. Annual monitoring reports must be submitted by December 1st of each year.

29. 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.

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

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

General Provisions

31. 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.

32. 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.

33. 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

34. 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

35. 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

36. 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

37. 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

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

Signatories

39. 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, U.S. Environmental Protection Agency, Region 7:

KAREN A. FLOURNOY
Director
Water, Wetlands and Pesticides Division

DATE

CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

DATE

For Respondent:

CHARLES FOLSOM

DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Administrative Order for Compliance on Consent to the Regional Docket Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further 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. Charles Folsom
449 West 10th Street
Fremont, Nebraska 68205.

Date

Folsom Farms
449 West 10th Street
Fremont, NE 68025
17 July 2017

Colonel John W. Henderson, USA, Commander
US Army Corps of Engineers, Omaha District
1616 Capitol Avenue
Omaha, NE 68102-1901

Subj: 1) NOW-2015-00859 WEH, (Alleged) Fill Violation Washington County
2) Request for Bank Stabilization Permit in Section 20-18N-9E Washington County

Encl/Ref:

- 1) LPNNRD Mailgram to COE Omaha dtd 30 Jan 87
 - 2) BGen Dominy Div Eng DOAMRD COE ltr dtd 3 Feb 87
 - 3) Gen Mgr LPNNRD ltr to Mr. Moeschen dtd 2 Sep 15
 - 4) My ltr to Mr. Moeschen dtd 5 Sep 15
 - 5) Map of Sects 20, 29 and 19, 30 of Projects Area
 - 6) Map (Blowup) Center Section of 5 above
 - 7) Map of 1991 – 2012 project less than 80% finished
 - 8) Map of 1991 – 2012 project complete
 - 9) Map (drawn) of Elkhorn River: Arlington to Hooper
 - 10) Map (drawn) of Elkhorn River: current & 1991- 2012 project area
 - 11) Mr. Moeschen's COE, Omaha District, DOA ltr dtd 18 Sep 15
 - 12) EPA Region 7 ltr to Mr. Sawyer dtd 13 Jan 16
 - 13) My ltr to Cdr USACOE, Omaha District dtd 1 Oct 15
 - 14) Mr. Moeschen's USACOE, Omaha District ltr dtd 15 Oct 15
 - 15) Mr. Moeschen's USACOE, Omaha District ltr dtd 22 Dec 15
1. First, for the benefit of the copy to addresses, let me cite my background:
- a. Full career retired Marine Infantry Officer (WWII to 1973)
 - b. 1952 graduate of #4 US Engineering School (Iowa State) where I took an Industrial Education degree one to two quarters earlier than an (engineering degree) to receive USMC Commission and return to active duty for the Korean War.
 - c. 10 Years (1974-83) on Fremont City Planning Commission.
 - d. 15 years (1980-95) on Lower Platte North Natural Resources District (LPN) all on Projects Committee where an emphasis was put on river bank stabilization.
 - e. 4 years (1991-95) on Nebraska Natural Resources Commission as Lower Platte Basin (LPN and LPS NRD's) representative. Elkhorn bank stabilization authorization (Fremont's Rawhide Diversion, Scribner protective dike) and stabilization education were my primary purposes. (all were authorized).
 - f. Put together (on 4 hours sleep – every day since 1948) 3000+ acre farm operation (all contiguous) in Dodge and Washington Counties with the Elkhorn River running through part.

g. Sponsor: North Bend's 1987 protection from the Platte River (with possible loss of life). Accomplished by COE bank stabilization; enclosures (1) and (2) refer.

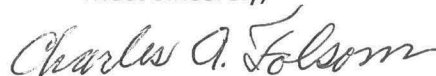
h. Builder (1991-2012) of first and only mile long right angle bank stabilization in the Elkhorn River. Note: The only other significant stabilization project in the Elkhorn River is 1800 feet long (before a river turn) done by the LPNNRD. Details on this mile long project are below.

2. I will attempt, as briefly as possible, to recap what we have already discussed, so that the info addresses will understand. They also need to know the admiration and respect that knowledgeable Marines have for the Army Engineer Corps and the extremely difficult to impossible situation the U.S. Senate has placed you in by tasking you to unscramble the Army's health care problems (similar to the VA health care problems).
3. As you know, Mr. John Moeschon was hired by the Regulatory ladies in 2000 (after testing him and 4 others as best they could) despite rumors have it, of the reasons he was passed over at state. Mr. Moeschon became in charge of riverbank stabilization, which he was not prepared to handle. He therefore ignored it and permits became virtually impossible to obtain until easing somewhat about 2 years ago. Enclosure (3) explains the vital needs for bank stabilization in the Elkhorn River.
4. I was aware in 2012 of the virtual impossibility of gaining Corps approval of a stabilization permit when the Elkhorn wiped out my upstream drainage of several hundred acres. Action had to be immediate (and was) to stabilize that drainage and protect hundreds of downstream acres AND the vital mile long downstream project. Again refer to enclosure (3). The only alternative was a project that had not required Corps approval: placing rock on the bank where it would fall into the river when the bank was eroded to prevent future erosion. This is what I did AND IT WORKED and IS STILL WORKING five years later!!
5. My request for a bank stabilization permit, enclosure (4), was never formally answered although Mr. Moeschon repeatedly told me before and after that letter that he'd never issue one. Additionally, enclosure (4) contains a lot of information that the info addresses will be interested in. Paragraphs 6, 7, 8 and 9 are particularly informative.
6. Enclosure (5) shows what damage the Elkhorn River can do to valuable farm ground. The peninsula under "Sec.29" (north of the river) contains 190+ acres of worthless accretion ground that the river created when it took valuable farm ground (now \$10,000 plus per acre) from its south side. Also shown on enclosure (5) under "G154014" and enclosure (6) a onetime river channel with entrance and exit less than 200 yards apart ruining nearly 140 farm acres AND making irrigation (necessary for profitable production in this area) difficult to impossible as you can easily see.
7. What to do? Stop continuing erosion! In 1991 a 5 year renewable stabilization permit was issued by the COE. How? Queries to the Corps indicated no experience in this area, but suggestions (various types of jetties, etc.) were tried, but failed for several unsolvable reasons. Finally, trial and error proved that protecting the bank with broken concrete (up to 30' deep in some areas) would work. Where and how could concrete be obtained? We found places where it could be loaded if we'd haul it. I bought (and had overhauled two old 12 yard Mack dump trucks (1955 & 1956) which we used to haul nearly 2000 loads of concrete (I hauled about half) until suppliers (as we had anticipated) could/would haul it to us at no cost.

8. We completed 3910' of the project: See enclosure (7). The downstream landowner elected not to participate, felt as most people seemed to, that rivers were going to do what they wanted to so no effort would be worthwhile. When high water in July 1997 (not a flood) took out 100 to 300 feet in width of his land over 500 feet long, he immediately became interested/involved as did the LPNRND. See paragraph 2 of Enclosure (3). The project was completed in 2012: See enclosure (8). The LPNNRD assisted financially in completing the project to the tune of in excess of \$51,000. Just for information quarry rock from Ft. Calhoun at \$360.00 (then, now much more) a load (not delivered or placed in the river) would probably have cost something approaching \$3,000,000. Remember, the only government assistance with this full mile project was the emergency assistance by the LPNNRD as explained above.
9. Enclosures (9) & (10) show The Elkhorn's rather irregular courses with enclosure (10) a blowup of our "problem" areas.
10. Enclosures (11) & (12) are typical of some of Mr. Moeschens actions, and the results thereof, which certainly appear to be intended to confuse, aggravate and cost me dearly, which they did. First, enclosure (11). Although I'm lead addressee of this "CERTIFIED MAIL RETURN RECEIPT REQUESTED" letter I never received a personal copy. The first knowledge I had of it was from Mr. Sawyer (Tom the younger Manager of Sawyer Construction) after he'd gone to considerable attorney expense, etc. (which I reimbursed) gave me a zerox copy. Now, pause for a few moments. First, anyone inquiring about the Sawyers (most Fremont area people are well aware of three generations) and know that they are totally honorable and one of the most (if not the most respected families in/around the city). Second, Mr. Sawyer did NOT place any concrete in or close to the river. We handled it after he had it delivered well back from the river. Mr. Moeschen knew that! Mr. Moeschen's actions involving Mr. Sawyer frightened him actually could have terrified him when he received the EPA letter, enclosure (12) (\$37,500 a day?); if he hadn't been very bright and realized how ridiculous it all was. But, there will be no more concrete from him as he bought a new (expensive) concrete crusher which makes very desirable, in demand, road rock. Note: this was formerly my project, but it now belongs to the COE. It is up to you to maintain and if it fails we'll go to court to determine damage assessment.
11. More on enclosure (11). First, end of paragraph 2, page 1. It was a bulldozer but with a rotary bucket that loaded itself moving backwards as most knowledgeable people should know. Its actions are clearly visible at the two drainage openings where rock has been carefully moved back and placed for future protection. Please also see the last paragraph on page 1 (continued on page 2). I got all of the letters purported to have been sent to me from other sources and was, as listed above, "confused, aggravated and out-of-pocket." 3rd paragraph on page 2: there was no "recently placed fill" in the river. 4th paragraph on page 2: this paragraph is obviously to implicate Mr. Sawyer who, as stated above, was not involved in ANYTHING questionable. HE ONLY DELIVERED BROKEN CONCRETE, well back from the river, which Mr. Moeschen was told. Mr. Sawyer should never have been charged with anything by the COE let alone be referred to the EPA. The reason for Mr. Moeschen's actions are clear: to divert attention from his own actions and the lack thereof.
12. Now, enclosure (12). This letter was probably the result of enclosure (11) and telephone calls between Mr. Moeschen and the EPA (Mr. Muehlberger?) as I don't know of any formal referral. Mr. Sawyer resolved that matter by telephone with the EPA.

13. Mr. Moeschen repeatedly refers to rock that was pushed into the river. First, THERE WASN'T ANY, but if there had been it would have gone right to the bottom AND UNDER THE SURFACE OF THE BOTTOM AND, any effort to retrieve it would require heavy equipment that would destroy the river bank and cause serious problems.
14. This should have been noted earlier: Mrs. Becky L. Pieper, Natural Resources Conservation Service, Compliance Specialist for Dodge and I believe 5 other counties, inspected this property the week after I bought it and found no wetlands or "unusual" soils.
15. Now look at enclosure (5), specifically the section 20 river peninsula (just east of the E in Sec 20-T18N-R09E. The COE has a problem there. The Elkhorn water has one of three options. 1, continue as it has until it breaks through the "peninsula" and takes out farmland to the southeast; 2, break through somewhere along my project (under "Sec. 20?") destroy that pivot irrigated field and proceed south behind the one mile bank stabilization to destroy, beyond any reasonable chance of repair that stabilization-see enclosure (3); 3, route the water south at the east end of the project (the route exists) so no serious damage occurs anywhere (the river will be shortened so water volume will be slightly greater).
16. I note with interest in enclosure (13) Mr. Moeschen states that "At This Time (22 Dec 15) we are preparing a non-compliance letter to Mr. Folsom regarding project number NE 1991-75431". I have received nothing further on this matter for obvious reasons, but would LOVE "to go to "court" with him on it.
17. Enclosures (13 through (15) are for the benefit of the Info Addresses.
18. By now it should be obvious to all who has caused this problem and, as discussed in our afterhours meeting in your restaurant, how to resolve it. You have until 26 July to resolve this matter and/or appoint a committee chaired by a senior (field grade) ENGINEER to resolve it.
19. It is my absolute intention to take this matter to court (a fully qualified attorney was employed a year ago to help resolve it as necessary).
20. Sorry this letter is longer than originally intended but felt and the Info addresses should fully understand.
21. If you or the Info Addresses have any questions I will attempt to answer them, either in writing or by telephone at the number listed below.

Most Sincerely,



Charles A. Folsom
Major, USMC Retired
(402) 721-3223

LOWER PLATTE NORTH NRD
BOX 258
DAVID CITY NE 68632 30AM

Western Union Mailgram



1-007396I030 01/30/87 TWX ESL62867701 OAMA



COPY

LOWER PLATTE NORTH NRD
BOX 258
DAVID CITY NE 68632

SUBJECT: NORTH BEND LEVEE.
YOUR 21 JAN 87 LETTER REFERS. SITUATION NOW CRUTIAL. OUR 15 SEP 86 LETTER OUTLINED WHY DEC STUDY COMPLETION AND SECTION 14 CORPS ASSISTANCE CRITICAL TO PREVENTION TO LEVEE LOSS AND RESULTING INUNDUATION OF NORTH BEND CITY. WITHOUT PROMISED ASSISTANCE SPRING FLOOD DISASTER IMMINENT.
YOUR 9 JAN 87 INSPECTION CONFIRMED NRD/NORTH BEND ACTIONS COMPLETED TO REPLACE 1400 FEET OF NEARLY TOTALED ERODED LEVEE. WITHOUT ARMORING AND/OR ROCK JETTY PROJECTION, REBUILT LEVEE WILL QUICKLY ERODE WITH RESULTANT INUNDATION OF CITY.

LOWER NORTH PLATTE NRD
DAVID CITY NEBRASKA
QIXA

15:17 EST

MGMCOMP

Enclosure (1)



DEPARTMENT OF THE ARMY
MISSOURI RIVER DIVISION, CORPS OF ENGINEERS
P.O. BOX 103, DOWNTOWN STATION
OMAHA, NEBRASKA 68101-0103

February 3, 1987

REPLY TO
ATTENTION OF



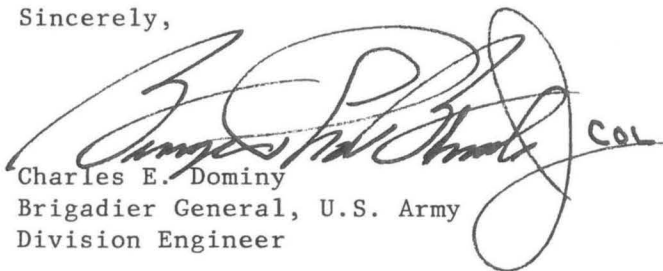
Lower North Platte NRD
David City, Nebraska 68632

Gentlemen:

Reference your Telex message of January 30, 1987 concerning your request for assistance in protecting a section of levee at North Bend, Nebraska from erosion from the Platte River.

Omaha District has been instructed to expedite actions to complete the Section 14 reconnaissance investigation initiated in December 1986 as soon as possible. You may contact the Omaha District Engineer, Colonel West (telephone 402-221-3900), or Arvid Thomsen (telephone 402-221-4575), Chief of Planning, regarding specific inquiries on the study.

Sincerely,

for  COL
Charles E. Dominy
Brigadier General, U.S. Army
Division Engineer

Enclosure(2)



Lower Platte North Natural Resources District

PO Box 126 511 Commercial Park Road Wahoo, NE 68066
402.443.4675 Fax 402.443.5339 Toll-free 888.764.0543
lpnnrd@lpnnrd.org www.lpnnrd.org

September 2, 2015

John Moeschen
USACE Regulatory Office
8901 South 154th Street
Omaha, NE 68138-3635

RE: Folsom Bank Stabilization Project

Dear John,

On August 24, 2015 a field visit was made to the Chuck Folsom bank stabilization project (project 1) along the Elkhorn River and an inspection was made on a second site (project 2) to view protection work he was performing along the Elkhorn River one-half mile to the north.

The existing bank stabilization project (project 1) is properly permitted and the LPNNRD involvement was cost-share assistance to the landowner. The NRD interest in the project is the protection it provides for our Rawhide Diversion Project that empties into the Elkhorn River one-half mile south of the stabilized area. Twice in recent history floodwater has threatened and damaged our diversion project that was constructed to protect the city of Fremont. If the Folsom project is not in place there is little doubt that the Elkhorn River will eventually cut through and decimate the stabilized area where our project enters the Elkhorn River.

LPNNRD is the sponsor for a similar bank stabilization project (project 3) along the Elkhorn River southeast of Fremont. Due to a bend in the river and eroding river bank the Elkhorn River was releasing water overland prior to being bank full and flooding 5,100 acres and threatening county roads and a major highway. If left unchecked this breakout would have eventually cut a new river channel.

The similarity for these bank stabilization projects is the off site consequences if mother nature is allowed to continue to erode and change the river course.

If Folsom's active project (project 2) is not allowed to move forward the consequences could be the loss of his existing downstream project (project 1) and jeopardize the LPNNRD Rawhide project. Again the main purpose for the project is to prevent the off site damages. Once the river cuts a new channel it would be extremely difficult and prohibitively expensive to move it back to it's current location.

Sincerely,

John Miyoshi
General Manager

Enclosure (3)

protecting lives

protecting property

protecting the future

printed on recycled paper and is recyclable



000007

• WRITE LETTER IN SPACE MARKED MESSAGE
 • REMOVE YELLOW COPY FOR YOUR FILE
 • MAIL OTHER COPIES TO ADDRESSEE

CARL MFG. CO., SUGAR CREEK, OHIO 44681 (330) 882-2464
 FORM E - Z 4 U
 COPYRIGHT 1994

• WRITE YOUR REPLY IN SPACE MARKED REPLY
 • KEEP WHITE COPY FOR YOUR FILE
 • MAIL PINK COPY TO SENDER

Mr John Moeschen
 Nebraska State Program Manager
 Corps of Engineers, Omaha District
 8901 South 154th Street, Suite 1
 Omaha, Nebraska 68138-3635

MAJOR C. A. FOLSOM, USMC (Ret)
 449 West 10th Street
 Fremont, Neb. 68025-4162
 402-721-3223

DATE 5 Sep 2015 SUBJECT Request for Bank Stabilization Permit on Elkhorn River in
 Section 20-18 N9E Washington County, Nebraska

Ref: (a) Your ltr of 24 Aug 2015

Encl: (1) Lower Platte North NRD ltr dtd 2 Sep 15
 (2) Dodge County NRES ltr dtd 4 Sep 15

Sir:

1. In accordance with reference (a) it is requested that a bank stabilization permit be issued for 1500 feet at subject location.
2. Paragraph 5 of enclosure (1) clearly states the need for this project. My one mile long downstream project which the COE quickly authorized beginning in 1991 hardened a similar bend to protect the river from reentering an old river channel and jeopardizing the Lower Platte North NRD (LPNDRD) "Rawhide Diversion Project" which protected nearly 1800 homes and businesses (then, more now) in Northern Fremont. For information, that project took over 21 years to complete with nearly 12,000 truck loads (average 10+ cubic yards each) of broken concrete "rocks" to complete. A review of your maps for the 50 plus years prior to 1991 will show the West/South bank erosion turned over 100 acres of mostly prime crop ground into worse than worthless (but still taxed) accretion ground (tightly spaced trees, poison ivy, thistles and weeds which are replenished by each high water).
3. The project was quickly extended to one mile by the COE when not particularly high Summer flows (not a flood) took a strip averaging nearly 150 feet wide of the adjoining downstream South bank of Diers and my land. The LPNDRD immediately became involved (both actively and financially) with Mr. Robert Diers and me. Although this project is in the Lower Elkhorn NRD, it directly protects the the LPNDRD's Rawhide Diversion Project protecting Fremont.
4. Enclosure (2) confirms that there are no wetlands or ponding in this area. For information, this project is in the Dodge County NRES area of responsibility although it is physically located in Washington County.
5. Your 24 August visit and your maps clearly showed where the river overtopped the bank and flowed during high water, and where it will undoubtedly cut a new channel if this project is delayed. Please expeditiously approve it so it can be completed this Fall.
6. For information, when this portion of Section ²⁰ came up for sale I bought it to begin protective bank stabilization, but learned that permits were virtually impossible to obtain. As I was then in physical distress (full career Marine whose combat injuries contributed to both knees and shoulders being replaced) and as time was of the essence I began having broken concrete placed on the bank to allow it to fall in the river as erosion occurred - in accordance with COE regulations previously utilized.
7. The exceedingly wet Spring/Summer prevented us from removing some non rock items which were on/near the bank. The five partial rail road ties (left by an unauthorized hauler), PVC, rebar (3 pieces + a number of short pieces

Enclosure (4)

000008

extending from broken concrete), other metallic pieces and two tree stumps (well back from the bank) have all been removed. I have (had with me on the 24th) receipts from All Metals Market, Inc., Fremont (in Saunders County) for over 4 tons of ferrous metals and several hundred pounds of copper, brass and aluminum removed (rebar hand cut with grinder) from the concrete loads. They are available for your sight/information.

8. You may be interested to know that I have never received my "Certified Copy-Return Receipt Requested" copy of reference (a). I found out about it when Mr Sawyer called and then furnished me a copy.

9. Incidentally, I have not received the current official COE bank stabilization regulations or the regulations covering placement of rock on the bank to allow it to fall into the river when erosion occurs. Nor have I received the requested approved Elkhorn River bank stabilization locations within 10 miles up and down stream of my project, which I requested and Mrs Hulsing noted on your 24 August visit.

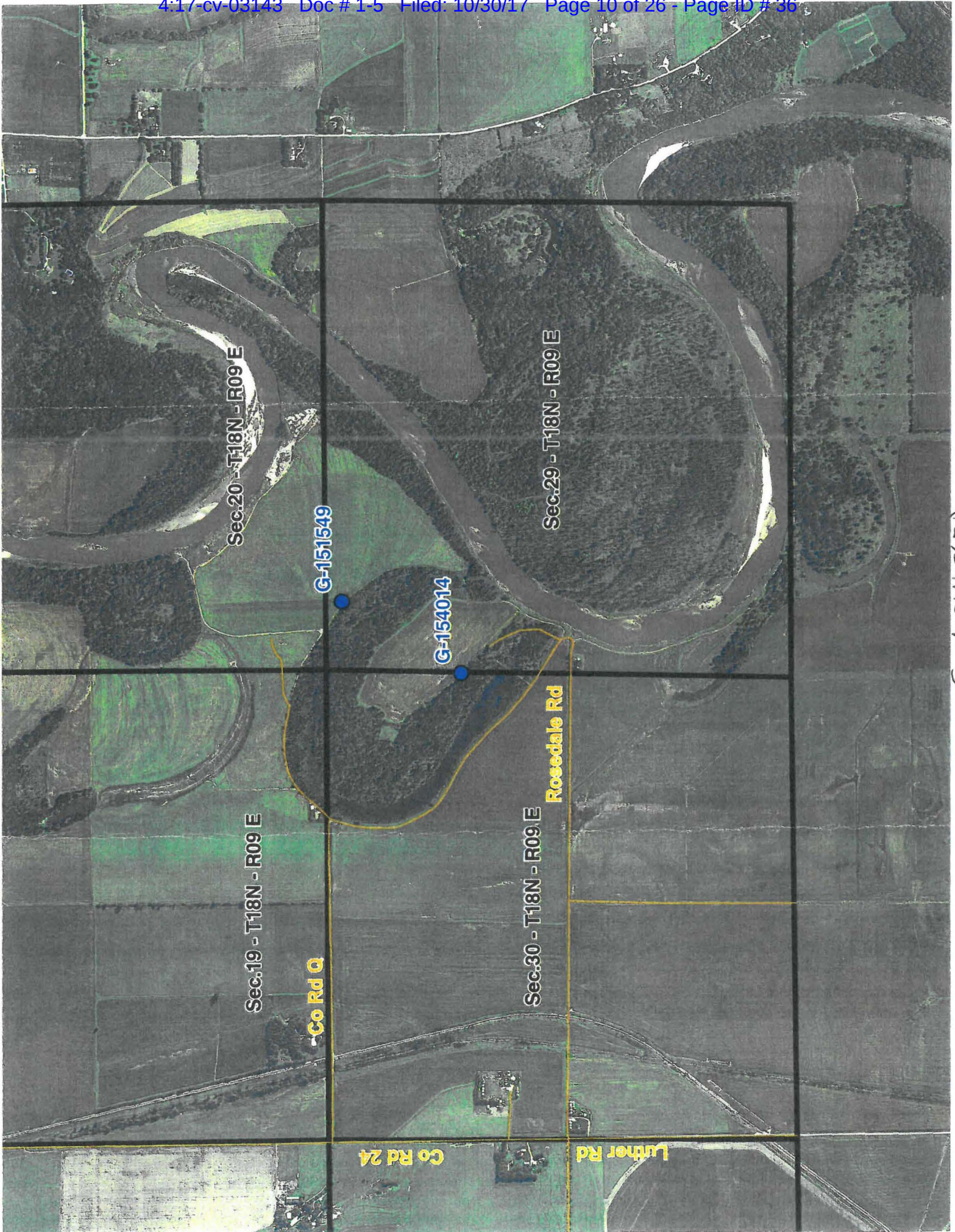
10. This letter will be sent Certified Mail-Return Receipt Requested" to you and Mr David LaGrone when the Post Office ^{OPENS} after Labor Day. It will be hand delivered to Dodge County NRES, LPINRD, and Mr Sawyer

Most sincerely,
Charles E. Folsom
Charles A. Folsom

cc:

David LaGrone
LPINRD
NRES Dodge County
Tom Sawyer

Enclosure()



Facilities (R)



Enclosure(6)

Approximately
139.43 Acres

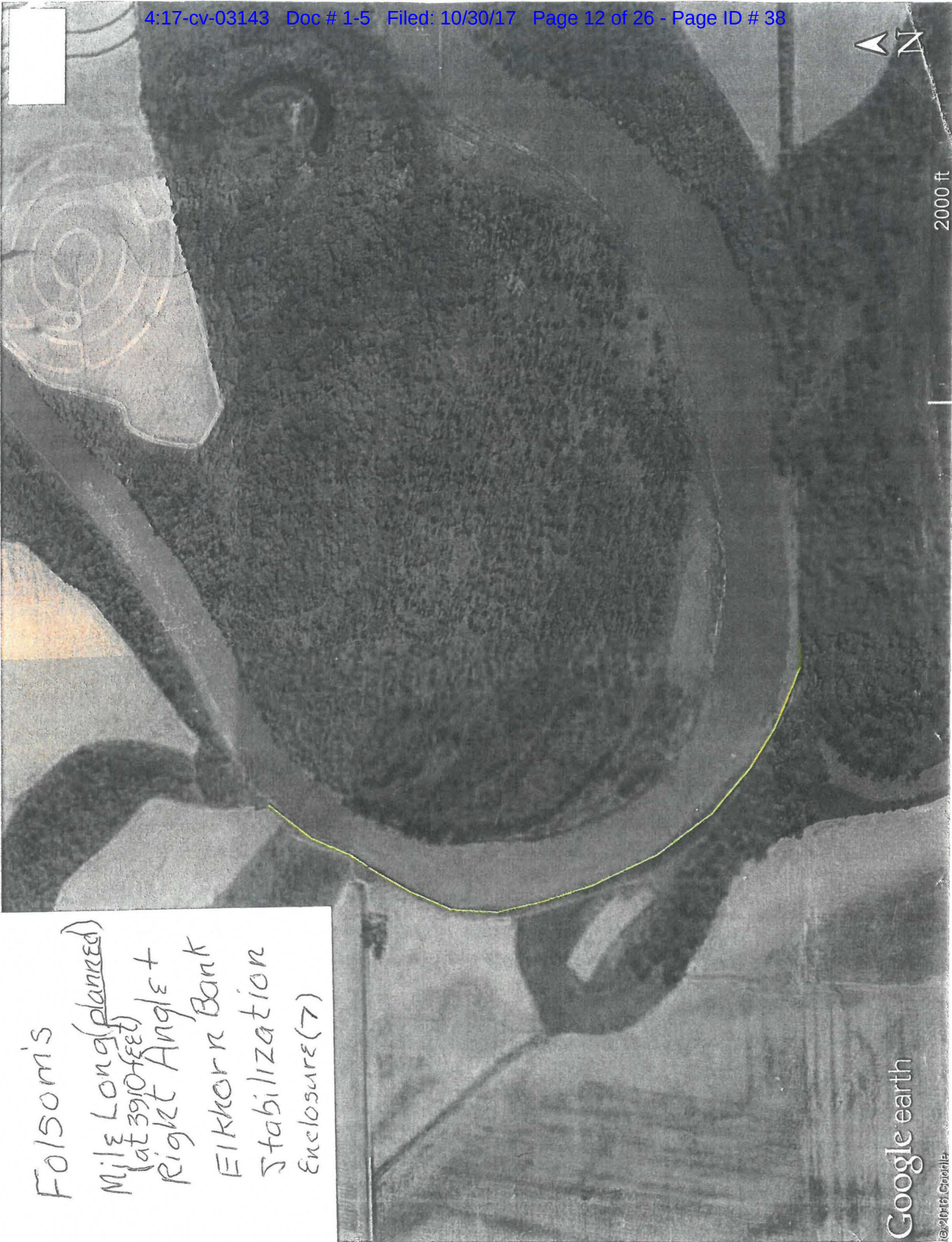
Map created by LPNRRD GIS Dept.
For questions regarding this map or
the packet please contact by phone
(402) 443-4675 or by email
certification@lpnrrd.org



000011



2000 ft



Folsom's
Mile Long (planned)
(at 3910 feet)
Right Angle +
Elkhorn Bank
Stabilization
Enclosure (7)

Folsom's
Mile Long
Right Angle +
Eikkorn Bank
Stabilization
Enclosure(8)



2000 ft



Google earth

© 2017 Google



Enclosure (9)



Enclosure(1)



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NEBRASKA REGULATORY OFFICE
8901 SOUTH 154 STREET, SUITE 1
OMAHA, NEBRASKA 68138-3635

<http://www.nwo.usace.army.mil/Missions/RegulatoryProgram/Nebraska.aspx>

September 18, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NOTICE OF VIOLATION

Mr. Charles Folsom
449 West 10th Street
Fremont, Nebraska 68025

Sawyer Construction
220 West Cloverly Road
Fremont, Nebraska 68025

RE: NWO-2015-00859-WEH, Fill –Violation Washington County

Gentlemen:

Based on information received in this office on May 5, 2015 and our site visit of July 17, 2015 and August, 24 2015, the U.S. Army Corps of Engineers (Corps) has reason to believe that a discharge occurred in violation of Sections 301(a), 309 and 404 of the Clean Water Act (CWA) **within the Elkhorn River located in Section 20, Township 18 North, Range 9 East, Washington County, Nebraska. Material of an unauthorized size and unauthorized type was placed.** Impacts to waters of the U.S. (WOUS) include fill activities within Elkhorn River and potential wetlands.

During site visits on July 17, 2015, with Ms. Jolene Hulsing (Regulatory Specialist), and August 24, 2015, with Ms. Jolene Hulsing, Mr. John Moeschen (Nebraska Regulatory State Program Manager), and Mr. David LaGrone (Omaha District Enforcement Coordinator), fill consisting of unauthorized size and unauthorized type was observed in the Elkhorn River and potential wetlands. Our assessment of the violation for discharge activities resulted in the unauthorized discharge of fill material into WOUS estimated at 1,500 linear feet of the Elkhorn River. Mr. Folsom indicated that this work was initiated in 2012, and that he did not pursue a permit from the Corps. There is currently a large amount of broken concrete stockpiled on top of the bankline outside Section 404 jurisdiction. We recognize that a portion of the material now in the river may have been originally stockpiled on the top of the river bank. However, comparing Google Earth imagery dated July 2012 and April 2015, it is evident that a large portion of material currently in the river extends beyond the 2012 bank line and could not have been stockpiled. Based on the site visits and from Google Earth imagery, it is apparent that material was placed using heavy equipment with tracks, such as a bull dozer.

A letter dated August 24, 2015, was mailed to the Sawyer Construction Company with courtesy copies sent to agencies that may have an interest in the activity. Our intent was to hand deliver the letter to Mr. Folsom during the August site visit, but the letter was not given at that time as we wanted to send a

ENCLOSURE (H)

000016

modified letter reflecting our August 24, 2015 site visit. Inadvertently, the other letters had already been sent in the mail the day of the site meeting. Mr. Folsom was given a time extension for the completion of the restoration plan identified in the August 24, 2015 letter. The time extension was until the receipt of this Notice of Violation letter. The original letter is enclosed.

Project number NE-91-75431 was referenced at the site visits and in Mr. Folsom's correspondence dated September 5, 2015 and in a September 2, 2015 letter from Mr. John Miyoshi (General Manager, Lower Platte North NRD). This project does not appear to have been constructed as authorized or within the authorized time frame of the permit and subsequent permit extensions. However, due to the age of the noncompliance, project number NE-91-75431 is not being reviewed as part of the violation activities identified for project number NWO-2015-00859-WEH.



The Elkhorn River and its adjacent wetlands are jurisdictional WOUS and within the meaning of 33 CFR §3283(a) and a navigable water within the meaning of CWA Section 502(7), 33 USC Section 1362(7). The recently placed fill has impacted the stream and potential wetlands.



Information we have indicates that you are a party associated with this activity, whether as a property owner or as a person performing or causing the performance of this work. You are considered a "person" as defined in the CWA §502(5), 33 USC §1362(5) and are the person responsible for the discharge.

The Corps is responsible for administering Section 404 of the Clean Water Act (33 USC §1344) and Section 10 of the Rivers and Harbors Act of 1899 (33USC 403). Section 404 of the Clean Water Act prohibits the discharge of dredged or fill materials into streams, lakes, and wetlands without Department of the Army authorization.

Our records indicate that a permit for the above activity was neither applied for, nor issued; therefore, the observed discharge is in violation of the Clean Water Act and all persons responsible are subject to enforcement actions. Current regulations provide for subsequent enforcement procedures in the form of administrative and /or legal action based on an evaluation of the circumstances surrounding a violation. By undertaking unauthorized activities, responsible parties are subject to substantial civil and /or criminal fines and penalties authorized under Section 309(g) of the Clean Water Act.

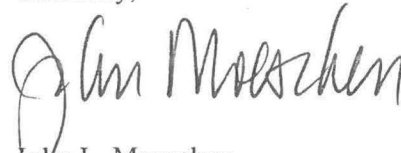
In some cases voluntary restoration may resolve a violation when the restoration of the WOUS eliminates current and future detrimental impacts to the satisfaction of the district engineer. We believe that voluntary restoration is an appropriate resolution of this case. **In order to resolve this violation, without forwarding this violation to the U.S. Environmental Protection Agency (EPA) for resolution, a restoration plan detailing the voluntary restoration work to be completed must be received in this office for approval within 30 days of receipt of this letter.** Upon approval of the plan, the restoration work must be completed within 90 days, unless otherwise authorized. Failure to submit a plan and complete the restoration within the timeframe allowed will result in the case being forwarded to EPA for their enforcement.

In accordance with a Memorandum of Agreement between the Department of the Army and the EPA concerning federal enforcement of Section 404 of the Clean Water Act, a copy of this notification is being sent to the EPA for review and coordination. Copies of this notification are also being sent to other state and federal agencies for review and coordination. No permit application for the work cited in this notification will be processed until the enforcement issues have been resolved and consultation with other agencies has been completed.

Please provide any relevant information pertaining to this violation within thirty (30) days of the date of this letter. Your cooperation in resolving this violation is appreciated.

If you need assistance in understanding permit requirements pursuant to Section 404, Ms. Jolene Hulsing can provide any background information you might need. If you have any questions, please contact her at (402) 896-0896 and refer to file number NWO-2015-00859-WEH.

Sincerely,

A handwritten signature in black ink, appearing to read "John L. Moesch". The signature is written in a cursive style with a large initial "J".

John L. Moesch
Nebraska State Program Manager

cc:

USEPA (Hoffman)

USFWS (Hines)

NDEQ (Garber)

NDEQ (Holsten)

NGPC (Grell)

NRCS (Washington County)

CENWO-OD-R (LaGrone)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

11201 Renner Boulevard
Lenexa, Kansas 66219

JAN 13 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Tom Sawyer, Registered Agent
Sawyer Construction Co.
220 West Cloverly
Fremont, Nebraska 68025

Re: Request for Information Pursuant to Section 308 of the Clean Water Act

Dear Mr. Sawyer:

The U.S. Environmental Protection Agency is investigating the unauthorized placement of fill material into a water of the United States that occurred on property owned by Mr. Charles Folsom within the Elkhorn River in Section 20, Township 18 North, Range 9 East, in Washington County, Nebraska. The EPA received information about this activity from the U.S. Army Corps of Engineers, Omaha District. Specifically, the EPA has learned that, as Mr. Folsom's contractor, your company placed fill material along approximately 1,500 linear feet of the Elkhorn River without obtaining a Clean Water Act Section 404 permit from the Corps. The Clean Water Act includes within the definition of "placement of fill material," "the addition of fill material into waters of the United States" and includes "property protection and/or reclamation devices such as riprap ... and revetments," as well as "placement of pilings in waters of the United States."

Because these fill activities occurred in "waters of the United States," they are potential violations of Section 404 of the CWA. The EPA is requesting that you provide additional information concerning these fill activities.

The EPA is authorized to request this information pursuant to section 308(a) of the CWA. Please provide the information requested below as clearly and completely as possible within ten days of receipt of this letter:

1. Describe in detail the grading and filling work completed by your company for Mr. Folsom. Include in this description the dates of the activities performed as well as a full description of the nature and extent of the work.
2. Provide copies of documents related to any agreement and/or arrangement between you and Mr. Folsom to complete the work described herein, including, but not limited to, contracts, invoices, work plans, and/or correspondence.

Enclosure (12)



Printed on Recycled Paper

3. Provide copies of any permits and/or correspondence between you and any state and/or federal government agency related to the placement of fill material as described above.
4. Provide information on the type of material you hauled to Mr. Folsom's property, including the source of the material, the type of material, and the quantity of the material.
5. Provide a description of the instructions you received from Mr. Folsom regarding the placement of material on the Elkhorn River.
6. Provide the names and contact information for any other individual(s) that assisted with this work.

As stated previously, your response to this information request must be submitted to the EPA within ten (10) days of your receipt of this letter. Your response to this request must be accompanied by the attached certificate, signed and dated by an authorized representative of your company.

Send the requested information to:

Chris Muehlberger
Office of Regional Counsel
11201 Renner Boulevard
Lenexa, Kansas 66219.

The information requested herein must be provided even though you may contend that it includes confidential business information or trade secrets. You may assert a confidentiality claim covering part or all of the information requested, pursuant to Section 308 of the CWA and 40 C.F.R. § 2.203(b). A confidentiality claim requires certain steps on your part to justify such a claim. If the EPA determines that submitted information is confidential business information, the EPA will take steps to protect the confidential portions of the submitted information. Information covered by such claim will be disclosed by the EPA only to the extent permitted by Section 308.

Although the EPA requests your assistance, your response to these questions is mandatory. Section 309 of the CWA provides civil penalties of up to \$37,500 per day of violation for failing to provide information required under Section 308 of the CWA and criminal penalties for knowingly making a false statement under Section 308. If you have questions regarding this request, please contact Chris Muehlberger at (913) 551-7623 or by email at muehlberger.christopher@epa.gov.

Sincerely,



Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Enclosure

Colonel John W. Henderson, Commander
U.S. Army Corps of Engineers, Omaha District
1616 Capitol Avenue
Omaha, NE 68102-1901

1 October 2015

Subj; 1. NWO-2015-00859 WEH, Fill – Violation Washington County (Alleged)
2. Request for Bank Stabilization permit in Section 20-18N-9E Washington County

Ref: (a) My letter CAF dtd 15 Sep 15
(b) COE State Program Manager ltr JLM dtd 18 Sep 15
(c) Our 1 Oct 15 meeting
(d) My ltr CAF dtd 5 Sep 15

1. As requested by reference (a) with the assistance of Ms. Hulsing as offered in reference (b) a two hour plus meeting, reference (c), was held at the Corps Regulatory Office. Attending were two members of the Nebraska State Program Managers office, Mr. David LaGrone, two members of the Papio-Missouri River NRD and the undersigned.

2. We discussed references (a), (b) and (d) and the fact that I have never received the listing of approved (there are many unapproved) Elkhorn River bank stabilization projects requested in paragraph 9 of reference (d). No one other than I seemed to know of any, other than my one mile project referred to in reference (d) although there is another addressed in reference (a).

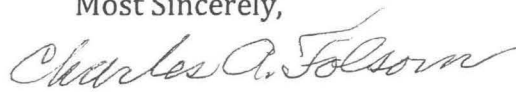
3. I should accurately state the acreage loss in paragraph 2 (line 9) of reference (d) as confirmed by the Dodge County NRCS office. It is 188 acres in an area where prime ground sells for up to \$10,000 per acre. I should also mention that this 21 year Corps approved project cost the Corps absolutely nothing! It should be noted that had the nearly 12,000 loads of rock come from Ft Calhoun as the Corps “preferred;” cost would have been well in excess of \$3.5 Million.

4. In this morning’s meeting, reference (c), my request for directions on how to get a permit for subject 2, met with little assistance and I was told that if a request was submitted and accepted it probably would go “round and round” (my choice of words) until at least next March, which could, as mentioned in enclosures (a) and (d), result in disastrous consequences.

5. I have attempted to resolve the subjects at the lowest level possible, but as indicated above, have been unsuccessful. When I asked in this morning’s meeting if you were aware of the problems above, a less than positive assurance was received; therefore this letter.

6. It is requested that, at your earliest convenience, you meet with Mr. John Miyoshi, Manager of the Lower Platte North NRD and me to resolve subject matters.

Most Sincerely,



Charles A. Folsom
449 W. 10th Street
Fremont, NE 68025

cc:
CENWO-OD-R (LaGrone)
USACE (Moeschen)
LPNNRD (Miyoshi)
NRCS (Dodge County)

Enclosure (13)



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NEBRASKA REGULATORY OFFICE
8901 SOUTH 154TH STREET, SUITE 1
OMAHA, NEBRASKA 68138-3635

<http://www.nwo.usace.army.mil/missions/regulatoryprogram/nebraska.aspx>

October 15, 2015

Ms. Diane Huffman
USEPA-Region 7 (WWPD/WENF)
11201 Renner Boulevard
Lenexa, Kansas 66219

RE: NWO-2015-00859-WEH, Referral of Unauthorized Bank Protection, Washington County

Dear Ms. Huffman:

The Nebraska Regulatory Office (NRO) received a complaint on May 5, 2015, for alleged filling activities in the Elkhorn River. During our site visits on July 17, 2015, and August 24, 2015, we observed construction activities that resulted in the unauthorized discharge of fill material into "water of the U.S." (WOUS) estimated at 1,500 linear feet consisting of unauthorized size and unauthorized type and removal of potential PFOA wetlands of unknown acres at 41.511187°, -96.436696° WGS84, in the Section 20, Township 18 North, Range 9 East, Washington County, Nebraska. This action is an alleged "discharge" as defined in CWA §502(16), 33 U.S.C. §1362(16). The alleged discharge occurred in the Elkhorn River, which is a jurisdictional water of the United States and impacted WOUS, within the meaning of 33 CFR §3283(a), and "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. Section 1362(7).

Onsite investigations were conducted on July 17, 2015, and August 24, 2015. Based on the site investigation and materials enclosed, we determined that an unauthorized excavation and discharge of fill material has occurred in WOUS. The potential PFOA wetlands are of unknown acres as the area is highly disturbed. Mr. Folsom and Sawyer Construction, are "persons" as defined in the CWA §502(5), 33 U.S.C. §1362(5), and are the persons responsible for the alleged discharge.

Nebraska Regulatory project number NE-91-75431 was referenced at the site visits and in Mr. Folsom's correspondence dated September 5, 2015, and in a September 2, 2015, letter from Mr. John Miyoshi (General Manager, Lower Platte North NRD). This project does not appear to have been constructed as authorized or within the authorized time frame of the permit. However, at this time, project number NE-91-75431 is not being reviewed as part of the violation activities identified for project number NWO-2015-00859-WEH.

Enclosure (14)

Mr. Folsom and Sawyer Construction were sent Notice of Violation letters dated August 24, 2015, and September 18, 2015. In accordance with the enforcement Memorandum of Agreement, since this project exceeds established criteria for authorization under the provisions of existing Nationwide or Regional General Permits, we are submitting the incident information for an Environmental Protection Agency enforcement action.

Enclosed please find:

1. Copy of the NWO-2015-00859-WEH File
2. Lead Agency ID worksheet
3. Maps

If you have any questions, feel free to contact Ms. Jolene Hulsing or myself at (402) 896-0896 and refer to file number NWO-2015-00859-WEH.

Sincerely,



John Moeschen
Nebraska State Program Manager

Enclosures

cc:
CENWO-OD-RF (LaGrone)
NDEQ (Garber)



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
NEBRASKA REGULATORY OFFICE
8901 SOUTH 154TH STREET, SUITE 1
OMAHA, NEBRASKA 68138-3635

<http://www.nwo.usace.army.mil/missions/regulatoryprogram/nebraska.aspx>

December 22, 2015

Ms. Diane Huffman
USEPA-Region 7 (WWPD/WENF)
11201 Renner Boulevard
Lenexa, Kansas 66219

RE: NWO-2015-00859-WEH, Unauthorized Bank Protection, Washington/Dodge Counties,
Transfer of Lead Agency

Dear Ms. Huffman:

The enclosed files are forwarded in response to the email dated December 15, 2015, from Ms. Delia Garcia, Environmental Scientist, US EPA Region 7, confirming the determination of lead agency transfer to the EPA. File number NWO-2015-00859 is the current file regarding a violation of Section 404 of the Clean Water Act on property owned by Mr. Charles Folsom, 449 West 10th Street, Fremont, Nebraska 68025.

The Nebraska Regulatory Office (NRO) received a complaint on May 5, 2015, for alleged filling activities in the Elkhorn River. Onsite investigations were conducted on July 17, 2015, August, 24 2015, and October 21, 2015. The U.S. Army Corps of Engineers (Corps) observed construction activities that resulted in the unauthorized discharge of fill material into Waters of the United States (WOUS) estimated at 1,500 linear feet consisting of an unauthorized size and an unauthorized type and removal of potential PFOA wetlands of unknown acres at 41.511187°, -96.436696° WGS84, in the Section 20, Township 18 North, Range 9 East, Washington/Dodge Counties, Nebraska.

Mr. Folsom's activity exceeds established criteria for authorization under the provisions of existing Nationwide or Regional General Permits and is considered a 'knowing' and 'willful' violation. In accordance with the enforcement Memorandum of Agreement, we submitted a request for the lead determination on this enforcement action from the Environmental Protection Agency on October 7, 2015. Originally, we forwarded to your office a copy of the NWO-2015-00859-WEH file, lead Agency ID worksheet, and site maps.

Nebraska Regulatory project number NE 1991-75431 was referenced by Mr. Folsom's correspondence dated September 5, 2015, and in a September 2, 2015, letter from Mr. John Miyoshi (General Manager, Lower Platte North NRD). During our October 21, 2015, site visit, activities observed in non-compliance with NE 1991-75431 permit included the extended length of the original bank protection and added continuous bank revetment. The project does not

Enclosure (15)

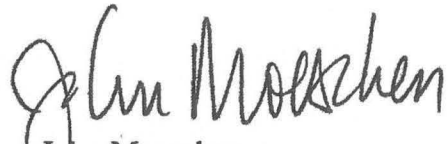
appear to have been constructed as authorized or within the authorized time frame of the permit and subsequent permit extensions that expired in 2001. The project was converted to a continuous bank revetment composed of construction rubble 30 feet into the river, extended length an additional 2300 linear feet, and completed work in approximately 2012. At this time, we are preparing a Non-Compliance letter to Mr. Folsom regarding project number NE 1991-75431. A copy of the project file is also enclosed for your reference.

Enclosed please find:

1. Copy of the NWO-2015-00859-WEH File
2. Copy of the NWO-1991-75431 file
3. Mr. Folsom letter November 23, 2015
4. Corps response letter dated December 18, 2015

If you have any questions, feel free to contact Ms. Jolene Hulsing or myself at (402) 896-0896 and refer to file number NWO-2015-00859-WEH.

Sincerely,



John Moeschen
Nebraska State Program Manager

Enclosures

cc:

CENWO-OD-RF (LaGrone)

NDEQ (Phillips)

INFORMATION ADDRESSES

Maj Gen Donald Jackson Jr.
Deputy for Civil and Emergency Ops
U.S. Army Corps of Engineers
441 G Street NW
Washington D.C. 20314-1000

Mr. Edward Chu
Acting Regional Administrator
EPA Region 7
11201 Renner Blvd.
Lenexa, KS 66219

Senator Deb Fischer
454 Russell Senate Office Building
Washington D.C. 20510

Attorney General Doug Peterson
2115 State Capitol
Lincoln, NE 68509

Congressman Jeff Fortenberry
1514 Longworth House Office Building
Washington D.C. 20515

Senator Lynne Walz
District 15, State Capitol
Lincoln, NE 68509-4604

Senator Ben Sasse
386A Russell Senate Office Building
Washington D.C. 20510

Mayor Scott Getzschman
400 East Military Ave
Fremont, NE 68025

Governor Pete Ricketts
PO Box 94848
Lincoln, NE 68509-4848

Sawyer Construction Co.
220 West Cloverly
Fremont, NE 68025

REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

AUG 28 2017

District Commander

Mr. Charles Folsom
Folsom Farms
449 West 10th Street
Fremont, Nebraska 68025

RE: NWO-2015-00859-WEH, Fill - Violation, Washington County

Mr. Folsom,

I am in receipt of your letter dated July 17, 2017, pertaining to the subject referenced enforcement case. The unauthorized action consists of the discharge of fill material without a Section 404 permit into the Elkhorn River located in Section 20, Township 18 North, Range 9 East in Dodge County, Nebraska.

As you are aware, your enforcement case has been referred to the U.S. Environmental Protection Agency (EPA) Enforcement Program for review. Consequently, the U.S. Army Corps of Engineers (Corps) is not at liberty to accommodate your requests for meetings during the EPA's review of your enforcement case, as the Corps has no further action at this time. Should you have questions regarding the status of your enforcement case, I recommend you direct all further correspondence concerning this case to Chris Muehlberger, Office of Regional Counsel, U.S. EPA Region 7, 11201 Renner Boulevard, Lenexa, KS 66219. He can be contacted by e-mail at Muehlberger.Christopher@epa.gov or by phone at (913) 551-7623.

EPA is the lead Federal Agency for Section 404 enforcement and the Omaha District's continued participation in this matter is limited to providing technical review and information, and participating in field and office meetings when requested by the EPA. If you have any general regulatory questions, not related to the subject matter, please contact Martha Chieply at (402) 995-2451.

Sincerely,

A handwritten signature in black ink, appearing to read "John L. Hudson".

John L. Hudson, P.E.
Colonel, Corps of Engineers
District Commander

CF:
USEPA (Muehlberger)

EXHIBIT "F"