

FILED

IN THE UNITED STATES DISTRICT COURT
FOR
THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2009 MAR 20 PM 2:56

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY,)
a Washington, D.C., non-profit corporation)

Plaintiff,)

v.)

GERALD NICELY, in his official capacity)
as COMMISSIONER OF THE TENNESSEE)
DEPARTMENT OF TRANSPORTATION, and)

THE TENNESSEE DEPARTMENT OF)
TRANSPORTATION, and)

UNKNOWN CONTRACTORS for the)
Tennessee Department of Transportation,)

Defendants.)

Case No 3 09 0276

JUDGE NIXON

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF
AND CIVIL PENALTIES
PURSUANT TO 33 U.S.C § 1311,
ET SEQ.

COMPLAINT

Public Employees for Environmental Responsibility, a Washington D.C., non-profit corporation (the "Plaintiff" or "PEER") files this action for declaratory and injunctive relief pursuant to 33 U.S.C. § 1365(a)(1) against Gerald Nicely (hereinafter, the "Commissioner") in his official capacity as Commissioner of the Tennessee Department of Transportation (hereinafter, "IDOT") and unknown contractors for IDOT (hereinafter, the "IDOT Contractors") (hereinafter, collectively referred to as "the Defendants") for the Defendants' failure to comply with the terms and conditions of permits issued pursuant to 33 U.S.C. §1341 and 13 U.S.C. §1344 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311, et seq. (the

“Clean Water Act” or “CWA”) for the discharge of fill material into wetlands and/or waters of the U.S. or in the alternative, pursuant to §10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

More specifically, the Plaintiff alleges that the Defendants failed to comply with the terms and conditions of Permit No. 52,982, issued by the United States Army Corps of Engineers (the “Corps”) pursuant to 33 U.S.C. § 1344 (the “Permit”), or in the alternative, pursuant to §10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), and the water quality certification issued by the Tennessee Department of Environment and Conservation (“TDEC”) pursuant to 33 U.S.C. § 1341 (the “Certification”), as both documents were later modified and amended. The original Permit and the Certification authorized the discharge of fill material into wetlands and/or waters of the U.S. as part of the construction and widening of State Route 12 from Nashville, Tennessee, to Ashland City, Tennessee. The original Permit and Certification required that the Defendants take certain actions to create, restore, and preserve wetlands as compensation for the wetlands that would be impacted by the road construction at certain sites in this area. As of the filing of this Complaint, the impacted wetlands and/or waters of the U.S. identified in the Permit and the Certification as later modified and amended have been filled.

In the more than nine years since the expiration of the Permit, as amended and modified, only two of the four required wetland creation, preservation and/or restoration sites have been completed. The remaining two sites have not been completed as required, and accordingly, PEER seeks declaratory and injunctive relief, as well as the imposition of civil penalties and an award of costs and attorney fees pursuant to 33 U.S.C. § 1365.

I. THE PARTIES.

1. The Plaintiff, Public Employees for Environmental Responsibility, is a national non-profit alliance of local, state and federal scientists, law enforcement officers, land managers, and other professionals and members of the general public dedicated to upholding environmental laws and values. PEER is a Washington, D.C., non-profit corporation. PEER maintains an office in Tennessee and is authorized to do business in Tennessee.

2. PEER and its individual members live, work, recreate, fish, boat, swim, hike, bird watch, picnic, and work to preserve wetlands and streams, and engage in other forms of outdoor activities in and around the Cumberland River and its tributaries in Cheatham and Davidson County, Tennessee. Defendants' continuing violation of the CWA directly harms and will continue to harm the interests of PEER and its members in the environmental, recreational, and aesthetic values of the Cumberland River and its associated tributaries and wetlands.

3. Defendant Gerald Nicely is the Commissioner of TDOT pursuant to Tenn. Code Ann. § 4-3-2302 and is sued in his official capacity. The Commissioner is charged with supervising, directing, and accounting for the administration and operation of TDOT and its employees pursuant to Tenn. Code Ann. § 4-3-2303. The Tennessee Department of Transportation is a state agency in the executive branch of the state government.

4. The identities of the TDOT Contractors are not known at this time.

II. JURISDICTION AND VENUE.

5. This Court has jurisdiction of this matter pursuant to 33 U.S.C. §1365(a) of the Clean Water Act and 28 U.S.C. § 1331, federal question jurisdiction.

6. An actual, justifiable controversy exists between the Plaintiff and the Defendants. The requested relief is proper under 28 U.S.C. §2201, 28 U.S.C. §2202, and 33 U.S.C. §1365.

7. Venue is properly vested in this Court under 33 U.S.C. §1365(c)(1) because the events giving rise to the claims occurred in this judicial district.

8. The Plaintiff, pursuant to 33 U.S.C. § 1365(b), gave notice to the Commissioner of the violations alleged in this Complaint by letter dated October 3, 2005, and sent by U.S. certified mail, return receipt requested. More than sixty days have elapsed since notice was properly served on the Commissioner. Good faith negotiations were attempted by the parties but were not successful. The violations complained of in the notice letter are continuing and have not been remedied as of the date of the filing of this Complaint.

III. GENERAL ALLEGATIONS.

9. On or about August 25, 1993, the Corps issued Permit No. 52,982, pursuant to 33 U.S.C. § 1344, or in the alternative, pursuant to §10 of the Rivers and Harbors Act of 1899 (33U.S.C. 403), to IDOT and authorized the placement of approximately 0.76 acres of fill material into wetlands and/or waters of the U.S. adjacent to State Route 12 in connection with the construction and improvements of State Route 12 from Nashville, Tennessee, to Ashland City, Tennessee (hereinafter, the "Permit"). More specifically, the Permit authorized the placement of fill into wetlands adjacent to Big Marrowbone Creek, Mile 1.4, Right Bank, in Cheatham County, Tennessee. Big Marrowbone Creek is a tributary of the Cumberland River at Mile 160.0, Right Bank. The Permit included special conditions that were to be satisfied by the Defendants in undertaking the project.

10. On or about July 29, 1993, prior to the issuance of the Permit, IDEC sent a letter to Edward P. Wasserman, Engineering Director - Division of Structures for IDOT, certifying that the project described in paragraph 9 of this Complaint would not violate applicable water quality

standards under the Tennessee Water Quality Control Act (hereinafter, the "Certification"). TDEC sent the Certification pursuant to its obligations set forth in 33 U.S.C. § 1341. The Certification included nine special conditions that were to be satisfied by the Defendants, including erosion control requirements, wetland mitigation area excavation standards, and a requirement that IDOT "monitor and guarantee the success of the wetland mitigation site[s] (*sic*) for five consecutive years."

11 A convoluted series of amendments, modifications, and extensions followed the issuance of the Permit and the Certification with the end result that the number of acres of impacted wetlands increased from 0.76 to 4.5 acres. As evidence of the confusion inherent in the Permit and Certification, the Permit states that it is issued pursuant to §10 of the Rivers and Harbors Act (33 U.S.C. 403); other documents, and indeed the circumstances of the proposed project, indicate that the Corps should have issued the Permit pursuant to 33 U.S.C. § 1344, The Clean Water Act. (Thus, the correct permit may never have been obtained, constituting additional violations.) The amendments, modifications, and extensions of the Permit and the Certification increased the number of acres of wetlands to be created, preserved or restored from 1.6 acres at one location to over 10 acres at four locations. An Aquatic Resource Alteration Permit, No. 95-484 (later noted as "95-184"), issued by TDEC on or about September 8, 1995 and which also served as a modification to the 401 Certification, and a Modification to the Permit issued by the Corps on or about September 12, 1995, confirm these changes.

12. The original issuance of the Permit and the Certification did not comply with the regulations for public notice and comment for permits issued pursuant to the Clean Water Act as required by 33 U.S.C. §§ 1341 and 1344.

13 The amendments, modifications, and extensions described in paragraph 11 of this Complaint did not comply with the regulations for public notice and comment for permits issued pursuant to the Clean Water Act as required by 33 U.S.C. §§ 1341 and 1344. Additionally, the extensions of the Permit and the Certification occurred after each had expired

14 The Permit and Certification, as amended, modified and extended, required wetlands to be created, preserved or restored at the following locations in exchange for the discharge of fill material into naturally occurring wetlands that would be impacted by the Defendants' road building on State Route 12 between Nashville, Tennessee, and Ashland City, Tennessee:

(a) Site One: The Defendants would create an additional 1.5 to 2.0 acres of wetlands along Back Creek as a supplement to the 4.5 acres of naturally occurring wetlands already present at the site.

(b) Site Two: The Defendants would create approximately 3.0 acres of wetlands adjacent to Bull Run Creek.

(c) Site Three: The Defendants would enhance 4.0 acres of naturally occurring wetlands and modify another 4.0 to 5.0 acres to promote conversion to a wetland habitat along Marrowbone Creek.

(d) Site Four: The original Permit required the Defendants to construct 1.6 acres of wetlands "behind the Sunrise Market" near Dry Fork Creek and Marrowbone Creek, on the eastern edge of Ashland City, Tennessee.

IV. COUNT ONE.

15 The Plaintiff hereby incorporates all of the above allegations as if they were realleged herein.

16. The Defendants failed to perform the wetland mitigation on Site 1 and Site 3 and failed to preserve some or all of the sites, as required by the Permit and the Certification, as amended, modified and extended. The Defendants' failure to comply with the conditions of the Permit and the Certification, is ongoing, and has caused and is causing or contributing to degradation of the waters of the Cumberland River and its tributaries in Cheatham and Davidson County, Tennessee. If not enjoined, the Defendants' failure will continue to injure the Plaintiff and its members.

17. Title 33 U.S.C. § 1365(a)(1) of the CWA authorizes any citizen to commence a civil action in the appropriate federal court against any person alleged to be in violation of the Act.

18. Title 33 U.S.C. § 1365(a) of the CWA authorizes the district court, without regard to the amount in controversy or the citizenship of the parties, to enforce the requirements of Act and apply any appropriate civil penalties of up to \$32,500 per day for each violation. 33 U.S.C. §§ 1365(a), 1319(d); 40 C.F.R. § 19.4.

V. REQUEST FOR RELIEF.

For the foregoing reasons, Plaintiff respectfully requests that this Court:

A. Declare that the Defendants have violated the terms and conditions of the Permit and Certification, as both documents were later amended, modified, and extended.

B. Declare that the Defendants' failure to abide by the terms and conditions of the Permit and the Certification, as both documents were later amended, modified and extended, are violations of the Clean Water Act, including 33 U.S.C. §§ 1311, 1341, and 1344.

C. Enter judgment imposing all appropriate civil penalties upon the Defendants, up to and including \$32,500.00 per day per violation for each day of violation of the Clean Water Act, as provided by 33 U.S.C. § 1319;

D. Grant declaratory and injunctive relief sufficient to compel the Defendants to complete construction of the compensatory wetlands as required by the Permit and the Certification, as both documents were later amended, modified and extended, for Site One and Site Three described in Paragraph 14 of this Complaint;

E. Grant declaratory and injunctive relief sufficient to compel the Defendants to create additional acres of constructed or restored wetlands for the delay of over nine years since the expiration of the Permit and the Certification.

F. Grant declaratory and injunctive relief sufficient to restore and maintain the quality of the jurisdictional waters;

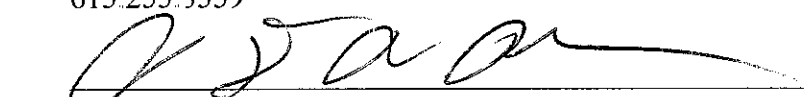
G. Award the Plaintiff its costs, expenses, expert witness fees, and reasonable attorneys' fees as provided in 33 U.S.C. § 1365;

H. Award all other, further, and different relief that appears to the Court to be just and reasonable.

Respectfully submitted,


RAY T. THROCKMORTON, BPR No. 16313

306 Gay Street, Realtors Building
Nashville, Tennessee 37201
615.255.3559


James D. R. Roberts, Jr. #017537

Janet L. Layman, #021569

Roberts & Layman, Attorneys at Law

1700 Hayes Street, Suite 303

Nashville, Tennessee 37203

615.242.2002

Attorneys for the Plaintiff,

Public Employees for Environmental Responsibility