

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

UNITED STATES OF AMERICA,

Plaintiff,

Civ. Action No.

v.

JAMES F. JERGE, JR.,

Defendant.

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the Department of the Army, U.S. Army Corps of Engineers ("Corps") filed the Complaint herein, attached as "Exhibit A," against James F. Jerge, Jr. ("Defendant") alleging that Defendant violated Section 301(a) and 1344 of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), 1344.

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) and 404, 33 U.S.C. § 1311(a), 1344, by failing to comply with the terms and conditions of a Department of the Army Permit Number 2002-1777 regarding the Site located at 7645 East Quaker Road, in the Town of Orchard Park, Erie County, New York, with the Tax ID # 173.00-1-2.21 with the Deed located in Book 11089 at Page 3241 in the records of the Erie County Clerk's Office;

WHEREAS, the Complaint seeks (I) to enjoin the unauthorized discharge of pollutants into waters of the United States in violation of the CWA Section 301(a) and 1344, 33 U.S.C. § 1311(a), 1344; (2) to require Defendant, at his own expense and at

the direction of the United States Army Corps of Engineers, Buffalo District Regulatory Branch, to restore the damages caused by its unlawful activities and comply with the special conditions 1-12 of Defendant's permit; and (3) to require Defendant to pay civil penalties as provided in 33 U.S.C. § 1344(s)(4);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Site;

WHEREAS, the United States and Defendant agree that settlement of this case is in the public interest and that entry of this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendant in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to CWA Sections 309(b) and 404(s)(3), 33 U.S.C. §§ 1913(b), 1344(s)(3), and 28 U.S.C. §§ 1331, 1345, 1355.

2. Venue is proper in the Western District of New York pursuant to CWA Section 404(s)(3), 33 U.S.C. § 1344(s)(3) and 28 U.S.C. § 1391(b) and (c), because the

subject property is in this District, the cause of action alleged herein arose in this District, and Defendant's principal place of business is in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319, and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendant, his heirs, successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with the Defendant whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Site, as described and identified in the Complaint and the second whereas clause above, shall not alter or relieve Defendant of his obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Site, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify the Corps and the United States Department of Justice at the addresses specified in Section IX below that such notice has been given. As a condition to any such transfer, the Defendant making the transfer shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendant under CWA Sections 301 and 404 concerning the Site, 33 U.S.C. §§ 1311(a), 1344.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendant to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. Except as in accordance with this Consent Decree, Defendant and Defendant's agents, heirs, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

9. The parties acknowledge that Nationwide Permit 32 (77 Fed. Reg. 10,277), authorizes the discharge of dredge or fill material to remain in place in so far as such discharge is in compliance with this Consent Decree.

10. This Consent Decree shall resolve any claim against the Defendant for failure to comply with the CWA including, but not limited to, Department of the Army Permit Number 2002-01777 Special Conditions 1 through 13 attached hereto as Exhibit 1. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any future individual permit or any nationwide or regional general permits. Nor shall it limit the ability of the Corps to enforce any other term or

condition of Department of the Army Permit Number 2002-0I777. Nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c) with regard to any future acts of the Defendant.

11. This Consent Decree in no way affects or relieves Defendant of his responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

14. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS
MITIGATION REQUIREMENTS

15. Defendant shall purchase 0.89 wetland credits from the Ducks Unlimited, Inc., New York *in lieu fee* Program, Buffalo-Eighteen Mile Creek Service Area.

16. Defendant shall provide the United States with written notice and confirmation, at the addresses specified in Section IX of this Consent Decree, of the purchase of 0.89 wetland credits from the Ducks Unlimited, Inc. New York *in lieu fee* Program, Buffalo-Eighteen Mile Creek Service Area no later than 30-days after the date of this Consent Decree.

17. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendant shall, by his signature, certify such notices, documents and reports as follows:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

V. RETENTION OF RECORDS

18. Until 3 (three) years after termination of this Consent Decree, Defendant shall retain and instruct their contractors, consultants, and other agents to preserve, all non-identical copies of all documents, records, or other information (including those in electronic form) in their or their contractors' or other agents' possession or control, or that come into their contractors' or other agents' possession or control, and that relate in any manner to the performance of the tasks required in Section IV or this Final Order and Consent Decree. At any time during this information-retention period, upon request by the United States, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

VI. DISPUTE RESOLUTION

19. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendant affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendant cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within thirty

(30) days after the United States informs Defendant of the end of the informal negotiations period and the commencement of a thirty (30) day period to seek court intervention, the Defendant files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendant shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendant's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

20. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendant shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendant shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendant's position will achieve compliance with the terms and conditions of this Final Order and Consent Decree and the CWA.

21. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendant under this Consent Decree, except as provided in Paragraph 37 below regarding payment of stipulated penalties.

VII. FORCE MAJEURE

22. Defendant shall perform the actions required under this Final Order and Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendant, including their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time-period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

23. If Defendant believes that a Force Majeure event has affected Defendant's ability to perform any action required under this Final Order and Consent Decree, Defendant shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section IX. Such notice shall include a discussion of the following:

- what action has been affected;
- the specific cause(s) of the delay;
- the length or estimated duration of the delay; and
- any measures taken or planned by the Defendant to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendant may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

24. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendant shall coordinate with the Corps to determine when to begin or resume the operations that had been affected by any Force Majeure event.

25. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VI of this Consent Decree.

26. Defendant shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendant and any entity controlled by Defendant, including their contractors and consultants; (2) that Defendant or any entity controlled by Defendant could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

VIII. STIPULATED PENALTIES

After entry of this Consent Decree, if Defendant fails to timely fulfill any requirement of the Consent Decree (including Appendix 1), the Defendant shall pay a stipulated

penalty to the United States for each violation of each requirement of this Consent Decree at a rate of \$500 per day each day of non-compliance. Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

27. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VI and/or the Force Majeure provisions in Section VII shall be resolved upon motion to this Court as provided in Paragraphs 21 and 22.

28. The filing of a motion requesting that the Court resolve a dispute shall stay Defendant's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendant does not prevail on the disputed issue, stipulated penalties shall be paid by Defendant as provided in this Section.

29. To the extent Defendant demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 23 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or noncompliance.

30. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the

payment is due until the date the payment is made. The interest shall also be compounded annually.

31. Defendant shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2015V00750, and DOJ case number 90-5-1-1-20429. Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States Attorney's Office for the Western District of New York. Any payments received by the Department of Justice after 4:00P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant shall provide written notice, at the addresses specified in Section IX of this Decree.

IX. ADDRESSES

32. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO US ARMY CORPS OF ENGINEERS, District Counsel, US Army Corps of Engineers, Buffalo District, 1776 Niagara Street, Buffalo, New York 14207

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE, Attorney, Environmental Defense Section, Environment and Natural Resources Division U.S. Department of Justice P.O. Box 7611 Washington, D.C. 20004

C. TO THE UNITED STATES ATTORNEY'S OFFICE, WESTERN DISTRICT OF NEW YORK, 138 Delaware Avenue, Buffalo, New York 14202.

D. TO DEFENDANT: James Jerge
7645 Quaker Road
Orchard Park, New York 14527

WITH A COPY TO: Robert E. Knoer, Esq.
424 Main Street
Suite 1820
Buffalo, New York 14202

X. COSTS OF SUIT

33. Each party to this Consent Decree shall bear its own costs and attorney's fees in this action. Should Defendant subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendant for noncompliance with or enforcement of this Consent Decree.

XI. PUBLIC COMMENT

34. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendant agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendant in writing that it no longer supports entry of the Consent Decree.

XII. CONTINUING JURISDICTION OF THE COURT

35. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIII. MODIFICATION

36. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendant and approved by the Court.

XIV. TERMINATION

37. Except for Paragraph 20, this Consent Decree may be terminated by either of the following:

A. Defendant and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendant may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendant has obtained and maintained compliance with all provisions of this Consent Decree and the CWA;

2. Defendant has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Defendant has certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and

4. Within forty-five (45) days of receiving such certification from the Defendant, has not contested in writing that such compliance has been achieved. If the US Army Corps of Engineers disputes Defendant's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

IT IS SO ORDERED.

Dated and entered this ____ day of _____, 20 .

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. James F. Jerge, Jr.

For Plaintiff UNITED STATES OF AMERICA:

JAMES P. KENNEDY, JR.
Acting United States Attorney

5/17/2017
Date

BY: s/Amy N. Okereke
AMY N. OKEREKE
Assistant United States Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

5/10/2017
Date

s/Michele L. Walter
MICHELE L. WALTER
Environmental Defense Section
999 18th St.
South Terrace – Suite 370
Denver, Colorado 80202

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. James F. Jerge, Jr.

For Defendant JAMES F. JERGE, JR.:

5/2/2017__
Date

s/James F. Jerge, Jr.
JAMES F. JERGE, JR.
7645 Quaker Road
Orchard Park, New York 14527

5/1/2017__
Date

s/Robert E. Knoer
ROBERT E. KNOER, ESQ.
THE KNOER GROUP, PLLC
424 Main Street
Suite 1820
Buffalo, New York 14202