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EPA - REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

MARTIN NYGAARD, and
NYGAARD LAND LLC,
Warrenton, Oregon,

Respondents.

DOCKET NO. CWA-10-2017-0029

**CONSENT AGREEMENT AND
FINAL ORDER**

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 309(g)(2)(B) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(1) and (2)(B) of the CWA, 33 U.S.C. § 1319(g)(1) and (2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Martin

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**U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101
(206) 553-1037**

Nygaard and Nygaard Land LLC (“Respondents”) agree to issuance of, the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to sign agreements between EPA and the party against whom a Class II penalty is proposed to be assessed.

2.3. Part III of this CAFO contains a concise statement of the factual and legal basis for the alleged violations of the CWA together with the specific provisions of the CWA and the implementing regulations that Respondents are alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Background

3.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutants by any person” except, *inter alia*, as authorized by a permit issued pursuant to Sections 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344.

3.1.1 The “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source” and “navigable waters” include “waters of the United States.” CWA § 502(7), (12); 33 U.S.C. § 1362(7), (12).

3.1.2 “Waters of the United States” include waters that are currently used, were used in the past, or may be susceptible to use, in interstate or foreign commerce; all interstate waters; all other waters of which the use, degradation, or destruction could affect interstate or foreign commerce; impoundments of, wetlands adjacent to, and tributaries to those waters. 40 C.F.R. §§ 122.2, 230.3(s).

3.1.3 A “point source” includes, inter alia, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container ... from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14).

3.1.4 A “pollutant” includes dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, rock, sand, and industrial waste discharged into water. CWA § 502(6), 33 U.S.C. § 1362(6).

3.1.5 “Fill material” includes material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land, or changing the bottom elevation of any portion of a water of the United States. Examples of fill material include rock, sand, soil, clay, construction debris, wood chips, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. 40 C.F.R. § 232.2.

3.1.6 Each discharge of pollutants from a point source that is not authorized by permit issued pursuant to the CWA constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Factual Background

3.2. Respondent, Nygaard Land LLC, is a corporation duly organized under the laws of the State of Oregon. Respondent, Martin Nygaard, is the owner of Nygaard Land LLC. Each of the Respondents is a "person" within the meaning of Sections 301(a) and 502(5) of the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

3.3. Respondents own, possess, and/or control Tax Lot 810250000500. This property is located within Section 25, Township 8 North, Range 10 West, Willamette Meridian, in Warrenton, Oregon. Tax Lot 810250000400 is adjacent to Tax Lot 810250000500, and is owned by the Port of Astoria. Tax Lot 810250000400 and that portion of Tax Lot 810250000500 east of Airport Lane and west of Highway 101 both contain wetlands and tidal channels, and are hereinafter collectively referred to as the "Site."

3.4. The Site's wetlands and tidal channels are connected to the Lewis and Clark River, which flows into Youngs Bay, then into the Columbia River, and ultimately into the Pacific Ocean. These bodies of waters, which are subject to the ebb and flow of the tide and are susceptible to interstate commerce, each constitute a "navigable water" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and are a "water of the United States" as defined in 40 C.F.R. § 122.2.

3.5. Beginning in June 2013 and continuing through September 2015, at times more known by Respondents, Respondents and/or persons acting on their behalf used certain heavy earthmoving equipment, such as a front loader, bulldozer, dump truck, etc., to discharge an unspecified quantity of dredged and/or fill material on approximately 72 acres of freshwater wetlands and over 3,500 feet of jurisdictional tidal channels at the Site.

3.6. The construction equipment referenced in Paragraph 3.5 are “point source[s]” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

3.7. The dredged and/or fill materials that Respondents and/or persons acting on their behalf caused to be discharged, as referenced in Paragraph 3.5, include native on-site materials such as soil, gravels, and cobbles, each of which constitutes “dredged material” and/or “fill material” within the meaning of 40 C.F.R. § 232.2, and each of which constitutes a “pollutant” within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

3.8. By causing such dredged and/or fill materials to enter waters of the United States, Respondents engaged in the “discharge of pollutants” from a point source within the meaning of Sections 301(a) and 502(12) of the Act, 33 U.S.C. §§ 1311(a) and 1362(12).

3.9. Respondents’ discharge of dredged and/or fill materials described in Paragraph 3.5 above was not authorized by any permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344. Respondents are therefore in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).

3.10. Each day that the dredged and/or fill material remains in place without the required permit constitutes a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

3.11. In accordance with Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for the administrative assessment of civil penalties for violations at the Site in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$187,500.

3.12. Respondents have agreed to enter into an Administrative Order on Consent (“Consent Order”), which will be issued by EPA under the authority of Section 308 and 309(a)

of the CWA, 33 U.S.C. §§ 1318 and 1319 (a), for implementation of a Restoration Plan for fill removal, revegetation, monitoring, and reporting.

IV. CONSENT AGREEMENT

4.1. Respondents admit the jurisdictional allegations of this Consent Agreement.

Respondents neither admit nor deny the specific factual allegations contained in this Consent Agreement.

4.2. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondents' economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondents agree that an appropriate penalty to settle this action is \$62,924.

4.3. Respondents agree to pay the total civil penalty set forth in Paragraph 4.2 within 30 days of the effective date of the Final Order contained in Part V of this CAFO. 40 C.F.R. § 22.31(c).

4.4. Payment under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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**U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101
(206) 553-1037**

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondents must note on the check the title and docket number of this action.

4.5. Concurrent with payment, Respondents must serve photocopies of the check described in Paragraph 4.4 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Teresa Young, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Yvonne Vallette, Aquatic Ecologist
U.S. Environmental Protection Agency
Region 10, Oregon Operations Office
805 SW Broadway, Ste. 500
Portland, OR 97205

4.6. If Respondents fail to pay the penalty assessed by this Consent Agreement in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondents to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.6.1. *Interest.* Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.

§ 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

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4.6.2. *Attorneys Fees, Collection Costs, Nonpayment Penalty.* Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondents fail to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondents shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondents' penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.7. The penalty described in Paragraph 4.2, including any additional costs incurred under Paragraph 4.6, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.8. The undersigned representative of Respondents certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondents to the terms and conditions of this document.

4.9. Except as described in Subparagraph 4.6.2, above, each party shall bear its own costs in bringing or defending this action.

4.10. Respondents expressly waive any right to contest the allegations and waive any right to appeal the Final Order attached to this Consent Agreement.

4.11. The provisions of this Consent Agreement and Final Order shall bind Respondents and their agents, servants, employees, successors, and assigns.

4.12. The above provisions are STIPULATED AND AGREED upon by Respondents and EPA Region 10.

DATED:

12/5/16

FOR RESPONDENTS:



MARTIN NYGAARD,
Respondent

DATED:

12/15/2016

FOR COMPLAINANT:



EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement
EPA Region 10

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondents are ordered to comply with the terms of settlement.

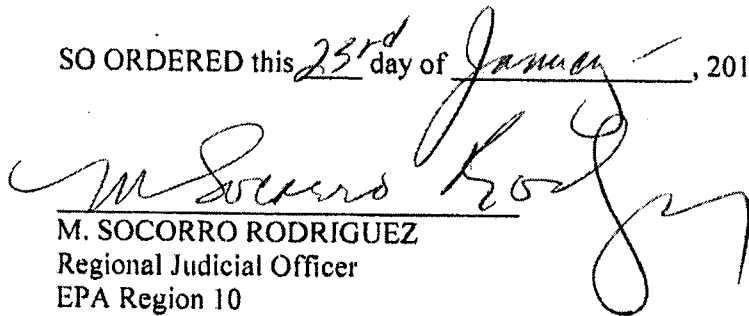
5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish, or otherwise affect Respondents' obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Oregon Department of State Lands has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondents.

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondents. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 23rd day of January, 2017.


M. SOCORRO RODRIGUEZ
Regional Judicial Officer
EPA Region 10

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: MARTIN NYGAARD and NYGAARD LAND LLC, DOCKET NO.: CWA-10-2017-0029** was served on the addressees in the following manner on the date specified below:

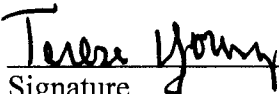
The undersigned certifies that a true and correct copy of the document was delivered to:

Ashley Palomaki
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Martin Nygaard
Nygaard Land LLC
389 NW 13th Street
P.O. Box 100
Warrenton, Oregon 97416

DATED this 23 day of January, 2017



Signature

Teresa Young
Regional Hearing Clerk
EPA Region 10