

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:

JOHN DUGGAN and
DUGGAN HOMES, INC.

Respondents

Proceedings under Section 309(a)(3) of the
Clean Water Act, 33 U.S.C. § 1319(a)(3)

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) Docket No. CWA 07-09-0019
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) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
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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). As an element of this Order, a provision of information is required pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318. These authorities are 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 Respondents in this case are John Duggan and Duggan Homes, Inc. ("Respondents"). Duggan Homes, Inc., is a For Profit Corporation registered to do business in the state of Kansas. John Duggan is the president of Duggan Homes, Inc. John Duggan and Duggan Homes, Inc., owned and/or operated The Hills of Forest Creek located in Section 11, Township 12S, Range 23E in Shawnee, Kansas and Arbor Woods located in Section 21, Township 13S, Range 23E in Olathe, Kansas.

Statutory and Regulatory Framework

3. 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.

4. 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.

5. 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 United States Army Corps of Engineers (hereinafter "Corps"), for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

6. 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 intrastate rivers and streams, and tributaries thereto.

7. 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

8. Respondents are each a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

9. At all times relevant to this action, Respondents owned, operated, or otherwise controlled the properties known as The Hills of Forest Creek ("the Hills") and Arbor Woods. The Hills is adjacent to Clear Creek. Arbor Woods is adjacent to the Little Cedar Creek.

10. At various times beginning in the summer 2003, the Respondents and/or persons acting on their behalf, discharged dredged or fill material including dirt, spoil, rock and sand, at the Hills into approximately 1,739 linear feet of stream channel, 0.71 acre open water farm pond, and 0.75 acres of wetlands in order to conduct: site grading; remove an existing dam embankment; bank stabilization; road construction; two stream crossings and improve the stormwater discharge channel.

11. On or about June 23, 2003, September 25, 2003, and September 27, 2004 the Corps inspected the Hills and documented the discharges of fill material described in Paragraph 10, which continue to remain in place as documented by EPA on or about December 6, 2004, March 16, 2007, and November 7, 2008.

12. The discharge and disposal of dredged and/or fill material within the Hills location eliminated a total of approximately 1,739 linear feet of ephemeral stream channel, 0.71 acre open water farm pond, and 0.75 acres of wetland.

13. The dredged and/or fill materials discharged by Respondents into the wetland and unnamed stream, a tributary of Clear Creek includes spoil, rock, sand, and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

14. The discharge of the dredged and/or fill material into wetlands and the unnamed tributary of Clear Creek described in Paragraph 12 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

15. The wetlands and unnamed tributary, which flow into Clear Creek, are all "waters 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.

16. At various times beginning on or about August 2004, the Respondents and/or persons acting on their behalf, discharged dredged or fill material including dirt, spoil, rock and sand, at Arbor Woods into an unnamed tributary of the Little Cedar Creek by causing fill soil behind lots 58 and 59, to be placed into the stream bed in order to excavate for the foundation of a potential home-site.

17. On or about April 20, 2005, EPA inspected Arbor Woods and documented the discharges of fill material described in Paragraph 16.

18. The discharge and disposal of dredged and/or fill material within the unnamed tributary of the Little Cedar Creek has altered the natural flow.

19. The dredged and/or fill materials discharged by Respondent into the unnamed tributary of the Little Cedar Creek includes spoil, rock, sand, and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. The unnamed tributary, and the Little Cedar Creek, are all "waters 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.

21. The discharge of the dredged and/or fill material into the unnamed tributary of the Little Cedar Creek, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

22. The earth moving equipment used to conduct the work referenced in Paragraphs 10 and 16 above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

23. Respondent's discharges of pollutants from a point source into waters of the United States were performed 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.

A. FINDINGS OF VIOLATION

24. The facts stated in Paragraphs 8 through 23 above are herein incorporated.

25. Respondents 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 were the Respondents performing the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

26. Respondents discharge and disposal of pollutants from a point source into waters of the United States, as described above, occurred without a permit issued pursuant to Section 404

of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges and disposals violated Section 301 of the CWA, 33 U.S.C. § 1311.

B. ORDER FOR COMPLIANCE

Based on the Findings of Fact and Findings of Violation set forth above and, pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3) and Section 308 of the CWA, 33 U.S.C. § 1318, Respondents are hereby ORDERED as follows:

27. Within thirty (30) days after receipt of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents' proposed mitigation actions, including but not limited to: (1) posting of financial assurance to comply with the Work Plan, (2) a proposal to provide compensatory mitigation for the wetlands and stream impacted by Respondents as described in Paragraphs 10 and 16, (3) a proposal of the work required to restore the free flow of water and aquatic passage from the dredged and fill material obstructing the unnamed tributary as described in Paragraph 18, and a (4) reporting schedule.

28. Once approved by EPA, the Work Plan identified in Paragraph 27 shall be incorporated by reference and fully enforceable under the terms of this Order for Compliance and shall be completed in accordance with the specifications set forth in the approved Work Plan.

29. Once the work identified in Paragraph 28 has been completed, the Respondents shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

30. The submission of documents by Respondents, as identified in Paragraphs 27 and 29 shall include the following written statement, followed by the Respondent's signatures:

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.

31. In the event Respondents fails to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order against the Respondents and/or seek additional penalties not to exceed \$37,500 per day for each violation against the Respondents for such noncompliance with the terms of the Order.

32. All documents to be submitted to EPA under this Order shall be submitted by mail to the following individuals:

Delia Garcia
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101

and

Kristina Gonzales
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

General Provisions

Effect of Compliance with the terms of this Order

33. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.

34. 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 Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

35. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property operated by Respondents and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

36. If any provision or authority of this Order, or the application of this Order to Respondents, is held by federal judicial authority to be invalid, the application to Respondents of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

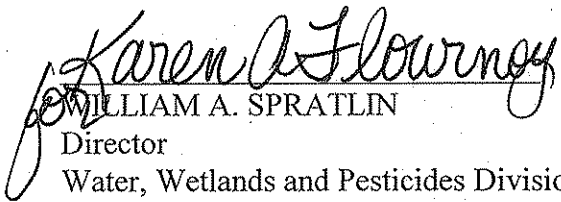
37. This Order shall apply to and be binding upon the Respondents, their agents, successors and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein comply with the terms of this Order.

Effective Date

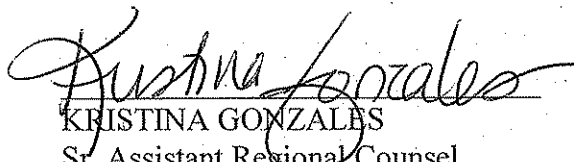
38. The terms of this Order shall be effective and enforceable against Respondents upon the date of their receipt of an executed copy of the Order.

Termination

39. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.


WILLIAM A. SPRATLIN
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7

1-30-09
DATE


KRISTINA GONZALES
Sr. Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7

2/1/09
DATE

CERTIFICATE OF SERVICE

I 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:

Deron Anliker, Esq.
11040 Oakmont
Overland Park, KS 66210

John Duggan
Registered Agent
13151 Rosewood
Overland Park, KS 66210

FEB 02 2009

Date

Kim P. Goff