UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Boyer Young Real Estate	)	
and Development,	)	
Respondent	)	Docket No. CWA-07-2006-0097
	)	
	)	COMPLAINT AND CONSENT
	)	AGREEMENT AND FINAL ORDER
	)	
	)	
Proceedings under Section 309(g)	)	
of the Clean Water Act,	)	
33 U.S.C. § 1319(g)	)	

COMPLAINT

Jurisdiction

1. This Administrative Complaint (Complaint) has been filed under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), pursuant to Section 309 (a) and (g) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1319 (a) and (g) and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order alleges that the Respondent discharged pollutants into the waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. The Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region VII, is the Director of Region VII's Water, Wetlands, and Pesticides Division.

4. Respondent, Boyer Young Real Estate and Development, is a company conducting business in Sarpy County, Nebraska.

Statutory and Regulatory Framework of Section 404 of the CWA

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, by any person except in compliance with, inter alia, Section 404 of the CWA, 33 U.S.C. §§ 1344.

6. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the discharge of dredged or fill material into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, occur in accordance with a permit issued under that Section.

7. Section 404 of the CWA, 33 U.S.C. § 1344, provides that the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

8. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "...any addition of any pollutant to navigable waters from any point source."

9. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, rock, sand and agricultural waste.

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "...the waters of the United States, including the territorial seas."

11. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines "point source" as "...any discernible, confined and discrete conveyance ...from which pollutants are or may be discharged."

12. 40 C.F.R. § 232.2 and 33 C.F.R. Part 328 define waters of the United States, in part, as, "... lakes, rivers and streams ...wetlands."

13. Section 502 of the CWA defines "person" to include a State or a political subdivision of a State.

14. Section 404 of the CWA requires a person to obtain a permit from the United States Army Corps of Engineers ("Corps") prior to any discharge of dredged or fill material into the navigable waters of the United States.

Factual Background

15. On or about August 11, 2004, Respondent or one acting on behalf of Respondent, performed grading of a site located in the SE1/4 of Section 21, Township 14 North, Range 11 East, Sarpy County, Nebraska, generally located at the northwest of the intersection of 168th Street and Cornhusker Road. This grading activity resulted in a fill placed in and along an unnamed tributary to South Papillion Creek within the Big Papillion Mosquito Creek watershed.

16. The grading equipment used by Respondent or one acting on behalf of Respondent, acted as a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

17. The earthen material that was graded in August 2004, is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362)(6).

18. The deposition of earthen material into a water of the United States constitutes the "discharge of pollutants" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. The discharge of pollutants occurred within an area in and along the unnamed tributary to South Papillion Creek. The South Papillion Creek is a water of the United States as defined by 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3.

20. Respondent did not obtain a Section 404 permit prior to conducting the activities described in Paragraph 15 above.

Findings of Violation Of Section 404 Of The CWA

21. The facts stated in Paragraphs 15 through 20 above are herein incorporated.

22. The use of grading equipment referenced in Paragraph 15 and 16 above indicates that Respondent or one acting on its behalf, discharged pollutants into a water of the United States by using earth-moving equipment without obtaining a Section 404 permit.

23. Respondent's failure to obtain a Section 404 permit prior to conducting activities described in Paragraph 15 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

24. Respondent did not obtain a 404 permit prior to conducting the activities described in Paragraph 15 above.

CONSENT AGREEMENT

25. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

26. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement/Final Order.

27. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

28. Respondent and Complainant each agree to bear their own costs and attorney's fees.

29. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

30. Respondent agrees to undertake Supplemental Environmental Projects (SEPs), identified in Attachment 1, which is attached to and incorporated into this Consent Agreement and Final Order. The parties agree that performance of the SEPs set forth in Attachment 1 is intended to secure significant environmental restoration and protection.

31. Respondent consents to the issuance of the Final Order and consents to the payment of a mitigated civil penalty in the amount of Twenty-five Thousand and Nine Hundred and Fifty Dollars (25,950) to be paid within thirty (30) days of the effective date of the Final Order.

32. Respondent understands that its failure to timely pay any portion of the mitigated civil penalty stated in Paragraph 31 above, may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil penalty and any accrued interest are paid in full. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

33. The undersigned representative(s) of Respondent certifies that he is fully authorized to enter the terms and conditions of this Complaint and Consent Agreement/Final Order and to execute and legally bind Respondent to it.

34. This Consent Agreement may be signed by EPA and Respondent in part and counterpart. This Consent Agreement and Final Order may be executed by EPA upon receipt from Respondent of a signature page. Upon its execution, a copy of the executed agreement shall be sent by U.S. mail to Respondent.

35. Respondent agrees that the original Consent Agreement and Final Order signed by Respondent shall be transmitted to Melissa A.C. Bagley, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region VII, 901 N. 5th St., Kansas City, Kansas 66101. Upon the EPA's receipt of the signed original from Respondent, it shall be filed with the Regional Hearing Clerk.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(a) and (g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a) and (g), it is ORDERED that:

1. Respondent shall complete all SEPs by January 31, 2007, consistent with the Final Work Plan, as submitted on April 25, 2006, and attached hereto as Attachment 1.

2. Respondent shall notify EPA of the completion of any SEP in writing within one week of January 31, 2007. Within thirty (30) days of the notification letter to EPA, Respondent shall submit to EPA a SEP Completion Report that shall include but not be limited to the following:

a. A description of the activities that Respondent completed in its implementation of the SEP Work Plan.

b. An itemized accounting of the costs incurred per project in performance of any SEPs. The itemization shall be submitted with the following statement, signed by Respondent:

> I certify that the information accompanying this submittal is true, accurate, and complete. I am aware that there are significant penalties for submitting false information to the United States, its agencies and departments, including the possibility of fine and imprisonment for knowing violations.

3. Respondent shall pay stipulated penalties in the following circumstances:

a. For failure to submit the Work Plan, as required by Paragraph 1 above, or failure to submit it to EPA within the time frame set forth in Paragraph 1 above, Respondent shall pay a stipulated penalty in the amount of $500 for each day after the due date set forth in Paragraph 1, until the report is submitted in a form that satisfies EPA.

b. For failure to submit the SEP Completion Report, as required by Paragraph 2 above, or failure to submit it to EPA within the time frame set forth in Paragraph 2 above, Respondent shall pay a stipulated penalty in the amount of $250 for each day after the due date set forth in Paragraph 2, until the report is submitted in a form that satisfies EPA.

c. Except as provided in subparagraph (e) below, for a SEP which has not been completed satisfactorily as determined by EPA, Respondent shall pay a stipulated penalty to the United States in the amount that equals twice the estimated cost of the SEP as set forth in Attachment 1.

d. If the SEP is not completed satisfactorily, but Respondent made good faith and timely efforts to complete the project and certifies, with supporting documentation, that at least 90% of the amount of money required to be spent for the project was expended on the SEP, Respondent shall not pay any stipulated penalty.

e. If the SEP is satisfactorily completed, but the Respondent spent less than 90% of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty equal to the difference between the amount of the estimated SEP cost set forth in Attachment 1 and the amount expended in implementing the SEP.

f. If the SEP is satisfactorily completed, and the Respondent spent at least 90% of the amount of money required to be spent for the project, Respondent shall not pay any stipulated penalty.

g. If no SEPs are implemented and the penalty of Twenty-five Thousand and Nine Hundred and Fifty Dollars is not made within thirty (30) days of the effective date of this Consent Agreement and Final Order, Respondent shall pay a stipulated penalty of Ten Thousand Dollars ($10,000) in addition to that which is due, along with interest which shall accrue at the statutory rate.

4. Payment of stipulated penalties shall be immediately due and payable upon notice by EPA. Respondent's failure to pay any portion of the penalty assessed herein in accordance with the provisions of this Order may result in commencement of a civil action in Federal District Court to recover the total penalty required by the terms of the Final Order, together with interest thereon at the applicable statutory rate. Payment shall be by cashier's or certified check made payable to the "United States Treasury" and shall be remitted to:

EPA-Region VII
P.O. Box 371099M
Pittsburgh, PA 15251.

The check shall note the case title and the Docket Number. A copy of the check shall be sent to Melissa A.C. Bagley, Assistant Regional Counsel, EPA-Region VII, 901 North Fifth Street, Kansas City, Kansas 66101.

5. Respondent hereby certifies that, as of the date of this Consent Agreement and Final Order, Respondent is not required to perform or develop the SEPs by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in any other enforcement action or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

6. EPA and its authorized representatives shall have access to the property Respondent owns that is the situs of a SEP at all reasonable times to monitor Respondent's implementation of the SEP. Respondent shall use its best efforts to obtain for EPA access to property not owned by Respondent that is the situs of a SEP at all

reasonable times to monitor Respondent's implementation of the SEP. Best efforts shall include payment of reasonable costs to obtain access. Nothing herein shall be construed to limit EPA's access authority under the CWA or any other law.

7. Respondent shall pay a civil penalty of Twenty-five Thousand and Nine Hundred and Fifty Dollars. Said penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this Complaint and Consent Agreement/Final Order. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

EPA-Region VII
P.O. Box 371099M
Pittsburgh, PA 15251.

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101; and

Melissa A.C. Bagley
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

Parties Bound

8. This Final Order shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that its directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for them with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

Reservation of Rights

9. EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

10. With respect to matters not addressed in this Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and for punitive damages.

Effective Date

11. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated from the effective date unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Tony Petruska for
William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII

1-3-07
Date

Melissa A.C. Bagley
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII

1/3/07
Date

In the Matter of
Boyer Young Real Estate & Development

FOR RESPONDENT:
BOYER YOUNG REAL ESTATE AND DEVELOPMENT:

Scott W. Young President

12/18/06
Date

In the Matter of
Boyer Young Real Estate & Development

IT IS SO ORDERED.

February 27, 2007
Date

Robert L. Patrick
Regional Judicial Officer

In the Matter of
Boyer Young Real Estate & Development

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _____ 2006, I hand-delivered the original of the foregoing Findings of Violation and Order for Compliance on Consent with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region VII, 901 North Fifth Street, Kansas City, Kansas 66101; a true and correct copy of the same was sent by first class mail on the ___ day of _____ 2006 to Boyer Young Real Estate and Development, 9805 Giles Road, LaVista, Nebraska 68128.

_____

Name

SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) PLAN

BOYER YOUNG REAL ESTATE & DEVELOPMENT

Date & Document:	Palisades SEP Plan/April 25, 2006
Project [impact site]:	Palisades
Project [SEP]:	The Heritage
Developer of impact site:	Boyer Young Real Estate & Development
Developer of SEP site:	Boyer Young Real Estate & Development
Engineering:	E&A Consulting Group
Location of impact site:	NW corner of 168th &Cornhusker, Sarpy County
Legal for impact site:	SE1/4 of S21, T14N, R11E, Sarpy County
Location of SEP site:	Generally east of 156th Street and southwest of Big Papillion Creek in Douglas County NE
Legal for SEP site:	Part of the SE1/4 of S14, T16N, R11E, Douglas County, NE
Quad/NWI [impact]:	Gretna Quadrangle
Quad/NWI [SEP]:	Elkhorn Quadrangle
Soil Survey [impact]:	Douglas/Sarpy Soil Survey, Sheet 33
Soil Survey [SEP]:	Douglas/Sarpy Soil Survey, Sheet 5
Jurisdictional Impacts:	Impact determined by Corps & EPA: 0.825 acres wetland
Mitigation Required:	3.30 acres determined by a 4:1 mitigation ratio
SEP Acres:	0.82 acres
Total Mitigation and SEP acres:	4.12 acres palustrine emergent wetland*
Mitigation and SEP Location:	Wetlands will be created within the Heritage development in northwest Douglas County. The wetland mitigation and SEP site is within the floodway of the Big Papillion Creek, in the northeast part of the Heritage project.
Function:	The goal of this SEP is to create at least 0.82 acres of PEMC wetland. The functional objective of the created wetland is to provide flood flow velocity attenuation.
Attachments:	Attachment 1 – Wetland Impact Location Attachment 2 – Wetland Mitigation and SEP Location Attachment 3 – Wetland Mitigation/SEP Exhibit Attachment 4 – OPPD Easement/Wetlands Exhibit

*The total acreage of the wetland project will be 5.01 acres, with 0.89 acres located within an Omaha Public Power District easement. Therefore, a total of 4.12 acres will be created for purposes of mitigation/SEP.

The format of this SEP Plan follows the Final Mitigation Plan submitted to EPA as amended January 6, 2006 (the "Mitigation Plan").

1. SEP Goals and Objectives

Impact Site

The impact site was on a parcel of land, approximately 160 acres in size, northwest of the intersection of 168th Street & Cornhusker Road in Sarpy County, Nebraska. Boundaries of the impacted wetland were not delineated and therefore not surveyed during the May 2004 field investigation. Wetland size was determined via an aerial photograph. The total acreage of impacted wetland was determined by the Corps of Engineers and the US Environmental Protection Agency to be 0.825 acres.

The impacted wetland was confined within the boundaries of a vegetated agricultural drainageway (also referred to as *grassed waterways)* and was vegetated exclusively with *Phalaris arundinacea.* The species *Phalaris arundinacea* is invasive, low quality, and provides minimal to no wildlife function.

The Mitigation Plan provides for the creation of 3.30 acres of PEMC/A wetland. This SEP Plan provides for an additional 0.82 acres of PEMC/A wetland. The functional objective of the SEP is to provide flood flow velocity attenuation. The approved location of the SEP site is within the floodway of the Big Papillion Creek and the design of the wetland without an outlet indicates the created wetland should provide the function of flood flow velocity attenuation.

The impacted wetland would have been classified as a palustrine emergent wetland with a water regime of *temporarily flooded.* The project wetland is expected to be classified with a water regime modifier of *seasonally flooded.*

Palustrine emergent wetlands are defined as being "characterized by erect, rooted, herbaceous hydrophytes, excluding mosses and lichens. This vegetation is present for most of the growing season in most years. These wetlands are usually dominated by perennial plants."[1]

The *seasonally flooded* water regime is defined by the following: "Surface water is present for extended periods especially early in the growing season, but is absent by the end of the season in most years. When surface water is absent, the water table is usually at or very near the land surface."[2]

The *temporarily flooded* water regime is defined by the following: "Surface water is present for brief periods during the growing season, but the water table usually lies well below the soil surface for most of the season. Plants that grow both in uplands and wetlands are characteristic of the temporarily flooded regime."[3]

[1]US Department of the Interior Fish and Wildlife Service, Classification of Wetlands and Deepwater Habitats of the Untied States, December 1979 reprinted 1992; page 19.
[2]Id.; page 22
[3]Id.

Saturation characteristics are similar between both the *seasonally flooded* and *temporarily flooded* water regime modifiers. It is not expected the success of the wetland will be based on the strict adherence to either one or the other modifiers, instead the wetland can be deemed successful by sustainable, adequate hydrology and function.

SEP Site

It is the goal of this SEP to provide flood flow velocity attenuation through the creation of PEMC wetland. The US EPA established a 4:1 (4 acres of created wetland for every 1 acre of impacted wetland) mitigation ratio to compensate for losses of jurisdictional wetland at the impact site. Therefore, the compensatory mitigation will be implemented under the Mitigation Plan by establishing a total of at least 3.30 acres of PEMC/A wetland. The SEP will supplement the Mitigation Plan by establishing an additional 0.82 acres of PEMC/A wetland. The total area of wetland created for purposes of mitigation and the SEP will be 4.12 acres.

The primary goal of this SEP is to create 0.82 acres of sustainable wetland. The total acreage of created wetland will be 5.01 acres. However, because of the presence of an OPPD easement on the site, only 4.12 acres are eligible for mitigation/SEP status. The functional objective of this SEP is to provide the function of flood flow velocity attenuation.

This SEP intends to create a wetland which is sustainable, thereby reducing necessary interventions. The hydrologic sustainability of this wetland is increased by placing the wetland within the consistent terrain of the Big Papillion Creek floodway and by the addition of water from a stormsewer outlet pipe from the planned adjacent subdivision.

2. Baseline Information - for proposed impact site and proposed SEP site

a. Location of Impact site & SEP Site

The location of the impact site is northwest of the intersection of 168th Street & Cornhusker Road in Sarpy County, Nebraska. The legal description for this impact site is within the SE¼ S21, T14N, R11E, Sarpy County Nebraska. Exact locations of primary and secondary fill impact are identified in materials in Corps of Engineers File No. 2004-10830. Attachment 1 - Wetland Impact Location - provides the location of said wetlands.

The total project wetland, including both mitigated wetland and SEP wetland, totaling 5.01 acres in size (4.12 acres will be applied toward mitigation and this SEP), will be created within the mitigation/SEP site located in the Heritage development in northwest Douglas County. The project wetland will be located in the northeast portion of the development property; within the floodway west of the Big Papillion Creek.

Attachment 2 - Wetland Mitigation and SEP Location - provides a plan of the proposed wetland and buffer areas.

b. Classification of Impact Site & Mitigation Site

The impacted wetland and the wetland mitigation/SEP sites are both classified as palustrine emergent wetlands. The water regime for the project wetland will be either *seasonally flooded* or *temporarily flooded.* Similarities between these two water regime modifiers is such that the project wetland can be considered a success if either of the two modifier definitions is met.

c. Quantify impacted wetland & mitigated/SEP wetland

Total acreage of impacted wetland was determined by the Corps of Engineers and the US EPA to be 0.825 acres. Total acreage of wetland to be created off site is 5.01 acres. The total acreage of wetlands to be created for purposes of mitigation is 3.30 acres and the total acreage of wetland to be created for purposes of this SEP is 0.82 acres, for a total of 4.12 acres of mitigation/SEP wetlands.

d. Assessment

An assessment method was not used to quantify impacts to the impacted wetland and was not conducted on the mitigation/SEP site. The following baseline information for both the impact and mitigation/SEP sites should satisfy the needs of this SEP Plan.

The impact site was dominated exclusively by *Phalaris arundinacea.* The dominance of this invasive, low quality species of vegetation indicates the impacted wetland would have been assessed as low quality and low functioning. *Phalaris arundinacea* thrives in areas of silt accumulation and provides little to no benefit to the environment or wildlife. It squelches the growth of any high quality native vegetation and does not have stems sturdy enough to support wildlife. Soils were not sampled within the boundaries of the impacted wetland because the field investigation of 2004 was specific to a wetland determination, rather than wetland delineation.

The following provides baseline information for the mitigation/SEP site, prior to any modifications. The proposed mitigation/SEP site has historically been used as productive cropland. No trees, waterways, wetlands, or structures exist within the boundaries of the proposed project wetland. This mitigation/SEP site is within a power line easement and is flanked on the north and south by existing power poles. The power line easement covers 0.89 acres of the total proposed wetland and 0.25 acres of the total proposed buffer.

e. Existing Hydrology for Impact and Mitigation/SEP Site

The water source for the impacted wetland originated from precipitation and runoff from the surrounding agricultural fields.

The drainage area contributing to the wetland mitigation site is 40.5 acres. The water source for the wetland mitigation site will originate from precipitation, surface runoff,

and one flared-end storm-sewer pipe. A possible groundwater interaction is expected in this project wetland. This expectation is based on elevations and the existence of seeps and springs within the land to the south.

f. Existing vegetation

Dominant vegetation within the impact wetland was *Phalaris arundinacea.*

Dominant vegetation within the proposed mitigation/SEP site was *Zea ways.*

g. Existing soils

Soils within the impacted wetland were not sampled. The Douglas/Sarpy Soil Survey, Sheet 33, identified the soil series within the impact wetland as Judson silt loam 3 to 7% (JuB). This soil series is not considered hydric in drainageways.

Soils within the proposed mitigation/SEP site exhibited a hue of 10YR, value of 3, and chroma of 2 with no redoximorphic features. The Douglas/Sarpy Soil Survey, Sheet 5, identifies the soil series within the area of the proposed wetland as Colo and Kennebec soils (Ck). The Colo series is listed as hydric, however Colo and Kennebec is not considered hydric.

h. Existing Wildlife Usage

Wildlife usage was not noted during the activities associated with the wetland determination. Threatened and Endangered species are not expected to be impacted or ameliorated by this SEP.

i. Historic and Current Land Use

The land use for the impacted site as well as the proposed mitigation/SEP site has historically been agricultural.

j. Current Owner

The impact location, Palisades Development LLC, is owned by Boyer Young Development, as its administrative member. The current owner of the mitigation/SEP site is New Street Development LLC. The contact for this entity is Mr. Jerry Banks, PO Box 19999, Omaha, NE 68199, telephone (402) 457-8589.

k. Watershed Context/Surrounding Land Use

The land directly surrounding the proposed mitigation/SEP site is currently undeveloped. The land directly to the south and west of the mitigation/SEP site is currently being platted as a single family subdivision called the Heritage. The mitigation/SEP site is bordered on the north and east by Big Papillion Creek.

The surrounding land use is predominantly agricultural to the east, developed to the south, acreages to the west, and municipal (City of Bennington) to the northwest.

The Big Papillion Creek is listed on the 303(d) list of impaired waters.

3. Mitigation/SEP Site Selection & Justification

a. Site-specific objectives

The mitigation and SEP will establish a total of 5.01 acres of PEMC wetland to satisfy a 4:1 (4 acres of created wetland for every 1 acre of impacted wetland) mitigation ratio with the remainder (0.82 acres) created as a SEP. Only 4.12 acres of the total 5.01 acres will be considered as mitigation/SEP acres due to the existence of a power line easement. Buffers measuring 50-feet in width will be established around the perimeter of the wetland mitigation site. A total of 0.25 acres of the total area of buffer is within the power line easement and therefore will not be placed under a separate restrictive easement.

b. Watershed/regional objectives

The primary goal of this SEP is to establish 0.82 acres of PEMC wetland. The functional objective of this SEP is to provide flood flow velocity attenuation.

The function of flood flow velocity attenuation is best realized by adhering to the following design considerations:

1. Wetlands without an outlet perform best as flood flow attenuating wetlands. Designing a wetland without an outlet, or with a constricted outlet, will allow for the retention/detention of overflow flooding.

2. Wetlands will perform the function of flood velocity attenuation best when there is a high proportion of vegetation in dense stands with little interspersed open water. As stated in A Guide to Wetland Functional Design, "Wetlands with relatively low proportions of open water to vegetation and low interspersion of water and vegetation are more capable of altering floodflows. Vegetation slows floodwaters by creating frictional drag in proportion to stem density. Wetlands with dense stands of vegetation and with little open water are more capable of slowing flood water than open water alone."[4]

3. Wetlands designed to aid in flood flow attenuation should incorporate sheet flow rather than channel flow. As directed in A

[4]Marble, Anne D., A Guide to Wetland Functional Design, 1992; page 88.

Guide to Wetland Functional Design, "Sheet flow, rather than channel flow, offers greater frictional resistance. Therefore, the potential for desynchronization of floodflows is greater when water flows through the wetland as sheet flow."[5]

4. Wetlands should be designed with a sinuous border. The sinuosity of the border design will maximize resistance to flow and additionally increase the area for habitat diversity in the wetland/upland ecotone.

5. Wetlands designed to attenuate floodflow velocities should be constructed to a depth of between 1 and 4 feet to retain peak flows and should incorporate an undulating bottom to increase frictional drag.

c. Connectivity

The project wetland will be located adjacent to the Big Papillion Creek and north of an existing 4+ acre wetland complex, thereby promoting the connectivity of ecological landscapes and habitats.

d. Future Land Use

The existing land surrounding this project is dominantly agricultural. It is expected the increased growth within northwest Douglas County will continue, therefore future surrounding land use is expected to be developed and residential.

e. Site Selection Practicability

The proposed location of the mitigation/SEP site has been approved by the US EPA. The mitigation/SEP site is practical for flood flow velocity attenuation because it is located within the floodway of the Big Papillion Creek in a portion of the county which is quickly being developed.

f. Sustainability

The sustainability of the site can be defended due to the varied hydrologic sources. Hydrology will be received by precipitation, run-off from the surrounding 40 acres, and storm-sewer pipe. A possible interaction with groundwater could be realized.

4. SEP Work Plan

a. Maps of Mitigation/SEP Boundaries

Proposed boundaries of the proposed mitigation site and surrounding buffers are on the Wetland Mitigation and SEP Location, included with this SEP Plan as Attachment 2.

[5]Ibid, page 90.

b. Timing of Mitigation/SEP

The construction and seeding/planting of the wetland mitigation and SEP site is required to be completed by June 1, 2006. Construction will not begin on the mitigation site prior to final approval from both the Corps of Engineers and US Environmental Protection Agency.

c. Grading Plan

Existing and proposed elevations are identified on the Wetland Mitigation/SEP Exhibit in Attachment 3. The existing elevations, in the location of the proposed mitigation site, are between 1080 and 1082. The proposed elevations for the mitigation/SEP site are between 1077 and 1080. The wetland will be constructed with gradual side slopes, undulating bottom elevations, and a sinuous border.

Cross-sections of the proposed mitigation/SEP site are illustrated on the Wetland Mitigation/SEP Exhibit included with this Plan as Attachment 3.

d. Construction Method

Alteration of the topography of the mitigation/SEP site will be necessary to accommodate the required water regime. Utilizing low impact equipment such as long-reach backhoes and eliminating the use of wheel-based equipment will minimize soil compaction of the mitigation/SEP site. When the soil structure becomes compacted the success rate of seeding is greatly reduced.

Sudbeck Construction/Grading, a professional grading contractor, will be retained for topographical modifications. Grading plans detailing elevations, boundaries, and buffers will be provided to the contractor to assure accurately constructed mitigation/SEP areas. If the presence of water impedes seeding of the wetland, the water will need to be diverted during seeding. After seeding activities have been conducted natural flow should resume.

Erosion control measures will be used during and after construction of the mitigation/SEP site.

e. Construction Schedule

Expected start-date for construction of the mitigation/SEP site is after approval of the SEP Plan by the US EPA and Corps of Engineers. Construction and seeding is required to be completed by June 1, 2006.

f. Planned Hydrology

The sources of water for the proposed mitigation/SEP site are precipitation, surface water runoff from the surrounding land and development, stormwater discharge from one

stormsewer pipe, and a possible interaction with groundwater. No structures requiring maintenance, at this juncture, are planned to be included in the mitigation site.

g. Planned Vegetation

The impacted wetland was vegetated exclusively with *Phalaris arundinacea.* This species is invasive and never considered an appropriate species of wetland vegetation, therefore it will not be included in this mitigation/SEP site.

A proposed mix of hydrophytic species proposed to be seeded in this project wetland is the United Seed OBL Mix #133. The species included in the OBL mix are identified as the following: fox sedge *(Carex vulpinoidea),* nodding bur-marigold *(Bidens cernua),* blue vervain *(Verbena hastata),* bristly sedge *(Carex comosa),* rice cutgrass *(Leersia oryzoides),* spotted joe pye weed *(Eupatorium maculatum),* duck potato *(Sagittaria latifolia),* marsh marigold *(Caltha palustris),* three-way sedge *(Dulichium arundinaceum),* rough-leaved goldenrod *(Solidago patina),* giant bur-reed *(Sparganium eurycarpum),* green bulrush *(Scirpus atrovirens),* soft rush *(Juncus effuses),* lurid sedge *(Carex lurida),* woolgrass *(Scirpus cyperinus),* monkey flower *(Mimunus* sp), hard-stem bulrush *(Scirups acutus),* Bailey's sedge *(Carex baileyi),* boneset *(Eupatorium perfoliatum),* eastern lesser bur-reed *(Sparganium americanum),* many-leaved bulrush

(Scirpus polyphyllus), swamp dock *(Rumex verticillatus),* mud plantain *(Heteranthera* sp), hop sedge *(Carex lupulina),* ditch stonecrop *(Penthorum sedioides),* soft stem bulrush *(Schoenoplectus tabernaemontani),* Tuekerman's Sedge *(Carex tuckermanii),* and sharp fruited sedge *(Carex sp).*

The following species are known to exist in a wetland located generally south of the proposed mitigation/SEP site: *Glyceria striata, Carex sp., Phalaris arundinacea, Typha sp., Schoenoplectus tabernaemontani, Aster novae-angliae, Asclepias incarnata, Sagittaria sp., Eupatorium perfoliatum, Salix amygdaloides,* and *Cornus sp.*

Native species of shrubs, although not specifically identified, could also be included in the planting plan for this wetland.

It is expected any of the above referenced species of vegetation, known to exist with the vicinity of the proposed wetland, could naturally colonize the project wetland.

The 50-foot buffer perimeter will be seeded with United Seed Low Grow Grass mix which includes the following species: blue fine fescue, hard fine fescue, sheep fescue, sideoats grama, blue grama, and little bluestem.

Pure Live Seed should be purchased and seeded at a rate of at least 6-8 lbs per acre. Mixing the seed stock with sand aids in even distribution of the seed. Although this SEP Plan states the use of seed for introducing vegetation, the following methods are not excluded as possibilities: transplanting of roots, rhizomes, tubers, seedlings, or mature plants.

h. Planned Soils

Soils should be disked or ripped after construction to assure deconsolidation. If, upon excavation, soils are predominantly rock and/or sandy, the amendment of topsoil will be incorporated. The Colo and Kennebec series does not often include rocky and/or sandy material.

The application of fertilizer and/or topsoil is not planned for this specific wetland.

i. Habitat Features

Habitat features are not planned for this wetland mitigation/SEP site.

j. Buffer

A 50-foot buffer will be established along the perimeter of the project wetland. The buffer will be seeded with native vegetation. Seed species to be used in the buffer are identified above in Section 4-g.

5. Site Protection and Maintenance

a. Maintenance Plan and Schedule

Maintenance of the mitigation site is proposed to include the following: 1) annual mowing of the buffer and 2) installation of fencing after seeding/planting in the event of geese feeding.

Maintenance needs are further discussed in Section 8-b Adaptive Management Plan.

The party responsible for maintaining the mitigation site is the Heritage Homeowners Association and/or Boyer Young Development.

b. Invasive Species Control

The control of invasive species is also discussed in Section 8-b Adaptive Management Plan. It is expected *Phalaris arundinacea* may naturally colonize the slopes of the wetland, especially as it is the dominant hydrophytic vegetation in the county. This species of vegetation often prefers terrestrial conditions and therefore is not expected to become dominant in the wetter portions of the wetland. Within the saturated areas of the wetland it is expected *Typha will* be prolific. If invasiveness of either of these species becomes a hazard to the wetland, various methods could be used for control, such as herbicide application (Gyphosate), or mechanical/manual treatment/removal. Various articles, papers, and studies have been dedicated to finding a panacea to the monotypic nature of both *Phalaris* and *Typha.* Therefore, many resources exist which can be reviewed and discussed with the Corps of Engineers.

6. Adaptive Management Plan

a. Responsible Parties

Ultimately, Boyer Young Development is the responsible party.

b. Contingency Plans

As nature does not abide by the guidelines set forth in SEP plans it is necessary to establish contingency plans. If a deficient condition is assessed during the monitoring investigation the cause should be determined and appropriate contingency plans reviewed. After approval by the Corps the following possible contingency plans should be implemented for the identified potential issues:

Failing Vegetation: Plant additional appropriate vegetation and/or control herbivore destruction. If failing vegetation is due to hydrology, see below.

Wetland Hydrology: If the hydrology is found to be deficient or excessive, it will be necessary to assess the situation with a professional engineer and discuss possible panaceas such as: grading revision, identifying a new/additional water source,

creating an outlet if hydrology is excessive, and/or designing and installing hydraulic structures such as check dams and/or coir logs.

As the critical factor of any mitigation/SEP site is hydrology, this wetland mitigation/SEP site is not projected to experience any major problems as the hydrologic sources on-site should be reliable.

Invasive Vegetation: If invasive species of vegetation prove problematic or begin to hinder the wetland, the following solutions could be implemented: mechanical control and/or herbicide (ie. Glyphosate) control. The species of hydrophytic vegetation known to create problems in saturated wetlands is Typha. Various studies and articles exist which discuss varied applications for control.

Erosion: Erosion cuts at the end of the storm-sewer pipes could cause excess sedimentation in the wetland. An erosion control device and/or placement of rip-rap will need to be installed to create a sheet-flow of water entering the site. Erosion is not expected to be a problem with this site as adequate buffers of 50 feet will allow for sheet flow of any incoming surface water run-off.

Aggradation: The source of any aggradation of silt, sediment and/or

debris within the wetland mitigation/SEP site should be identified. If a solution cannot be applied to the upper watershed then a direct solution must be applied to the channel and/or wetland. For example, securing a contractor to clear the channel and/or wetland of sediment/silt/debris.

Flow incision: If incoming water begins to incise the substrate provisions for sheet flow will need to be addressed.

Unintended Function: In the case the wetland is functioning in an unexpected and unplanned manner the actual function should be assessed and defined. Discussions should be held with the Corps regarding amendment of the original planned function.

Any adaptive management strategies should be discussed with a representative from the Omaha District of the US Army Corps of Engineers. The above stated contingency plans are based on potential issues or challenges. Any unforeseen issues would likely create symptoms which will be identified during the monitoring process. Adaptive Management is not an excuse for failure, but insurance for unforeseen failures.

Attachments

Attachment I - Wetland Impact Location
Attachment 2 - Wetland Mitigation and SEP Location
Attachment 3 - Wetland Mitigation/SEP Exhibit
Attachment 4 - OPPD Easement/Wetlands Exhibit

IN THE MATTER OF Boyer Young Real Estate and Development, Respondent
Docket No. CWA-07-2006-0097

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Complaint and Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Melissa A.C. Bagley
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Boyer Young Real Estate and Development
9805 Giles Road
LaVista, Nebraska 68128

Dated: 2/28/07

Kathy Robinson
Hearing Clerk, Region 7