

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

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Boyer Young Real Estate)
and Development,)
Respondent) Docket No. CWA-07-2006-0096
)
) FINDINGS OF VIOLATION
) AND ORDER FOR
) COMPLIANCE ON CONSENT
)
Proceedings under Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))

A. FINDINGS OF VIOLATIONS

Jurisdiction and Preliminary Statement

1. The FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE ON CONSENT (“Order on Consent”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency, by Section 309(a)(3) of the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. §1319(a)(3), as delegated by the Administrator to the Regional Administrator, EPA, Region VII, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA, Region VII.

2. The EPA has reason to believe that Boyer Young Real Estate and Development (“Respondent”) violated Section 301 of the CWA, 33 U.S.C. §1311, by

discharging dredged or fill material into navigable waters of the United States without obtaining the necessary permits required by Section 404 of the CWA, 33 U.S.C. §1344.

3. The EPA and Respondent, having determined that settlement of this matter is in the best interest of both parties, come now and enter into this Order on Consent.

Statutory and Regulatory Framework of Section 404 of the CWA

4. 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.

5. 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.

6. 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.

7. 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.”

8. 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.

9. 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.”

10. 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.”

11. 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.”

12. Section 502 of the CWA defines “person” to include a State or a political subdivision of a State.

13. 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

14. On or about August 11, 2004, Respondent or one acting on behalf of Respondent, performed grading of a site located in the SE¼ of Section 21, Township 14 North, Range 11 East, Sarpy County, Nebraska, generally located at the northwest corner 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.

15. 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).

16. 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).

17. 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).

18. 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.

19. Respondent did not obtain a Section 404 permit prior to conducting the activities described in Paragraph 14 above.

Findings of Violation Of Section 404 Of The CWA

20. The facts stated in Paragraphs 14 through 19 above are herein incorporated.

21. The use of grading equipment referenced in Paragraph 14 and 15 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.

22. Respondent’s failure to obtain a Section 404 permit prior to conducting activities described in Paragraph 14 above is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

B. ORDER FOR COMPLIANCE ON CONSENT

Specific Provisions

Based on the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent CONSENTS and is hereby ORDERED as follows:

23. Respondent agrees to implement Mitigation as described in the Palisides Revised/Final Mitigation Plan dated January 6, 2006 (“Mitigation Plan”), included as

Attachment 1, enclosed to and incorporated into this Order on Consent, and to complete such Mitigation by June 1, 2006. Respondent may make a request for an extension to complete the Mitigation. Such request shall be made at least seven days prior to the June 1, 2006 date for completion. The granting of an extension shall be in EPA's sole discretion and in making such determination EPA will take into account Respondent's good-faith efforts as well as any factors beyond Respondent's control. An extension shall not be granted for completion of the project for a date beyond August 15, 2006.

24. Respondent agrees to submit a Completion Report to EPA upon completion of Mitigation as set forth in the Mitigation Plan. EPA will review the Completion Report and approve or review and provide comments. If EPA provides comments, Respondent shall modify the Completion Report to address EPA's comments, within 30 days of receipt of EPA's comments. Failure to address EPA's comments shall be a violation of this Order on Consent.

25. Respondent agrees that it shall be in EPA's sole discretion to determine whether Respondent has fully implemented Mitigation. In making these determinations, EPA will take into account Respondent's Mitigation Plan and Respondent's good-faith efforts as well as any factors beyond Respondent's control.

26. Respondent agrees to submit Annual Monitoring Reports to EPA, beginning on December 1, 2006, and continuing for four years thereafter. The Annual Monitoring Reports shall comply with the terms and conditions as described in the Mitigation Plan.

27. Respondent agrees to execute and file with the Douglas County Register of Deeds Office in the state of Nebraska, a conservation easement or deed restriction for the Mitigation Area and associated buffer described in the Mitigation Plan and as depicted in

Attachments 2 and 3 of the Mitigation Plan, to maintain the Mitigation Area and associated buffer in perpetuity as a palustrine emergent wetland. The conservation easement or deed restriction shall provide access to EPA, the state of Nebraska, the Corps and their authorized representatives in order to inspect the Mitigation Area and associated buffer. Respondent shall identify a grantee, name EPA as a third party beneficiary, and identify the Mitigation Area and associated buffer by its legal description in the conservation easement or deed restriction. Respondent shall submit a draft conservation easement or deed restriction to EPA within thirty (30) days of the Effective Date (defined in Paragraph 39 herein) for review and comment, shall revise the conservation easement or deed restriction to conform to EPA's comments, if any, and shall resubmit the conservation easement or deed restriction to EPA within twenty (20) days of receipt of EPA's comments. Failure to address EPA's comments, if any, shall be a violation of this Order on Consent.

28. Respondent agrees to send EPA a file-stamped copy of the conservation easement or deed restriction within 10 days of receiving a final copy from the Douglas County Register of Deeds Office.

29. Respondent agrees that this Order on Consent shall not constitute a permit under the CWA. Compliance with the terms of this Order on Consent shall not relieve Respondent of its responsibility to obtain any required local, state, and/or Federal permits. Specifically, Respondent agrees to consult with the Corps and agrees to obtain all permits that the Corps determines necessary before commencing any work required by this Order on Consent.

30. Respondent agrees that no changes shall be made to Mitigation Plan, included as Attachment 1, without prior written approval from EPA.

31. Respondent shall submit all reports and deliverables required by this Order on Consent to EPA and the Corps at the following addresses:

Diane Huffman
Water, Wetlands and Pesticides Division
U. S. Environmental Protection Agency – Region VII
901 N. Fifth Street
Kansas City, Kansas 66101

and

Mr. David LaGrone
Omaha District, U. S. Army Corps of Engineers
106 S. 15th Street
Omaha, Nebraska 68102.

General Provisions

32. Respondent admits the jurisdictional allegations in this Order on Consent and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Order on Consent.

33. Respondent neither admits nor denies the factual allegations contained in this Order on Consent.

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

35. Compliance with the terms of this Order on Consent shall not relieve Respondent of liability for any violations of the CWA not addressed in this Order on

Consent or in the Consent Agreement/Final Order that was filed as a companion to this Order on Consent. In addition, nothing in this Order on Consent shall prohibit EPA from seeking additional injunctive relief pursuant to Section 309 of the CWA, 33 U.S.C.

§ 1319.

36. Nothing in this Order on Consent shall limit EPA's right to obtain access to the area where the Mitigation is being performed and to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and any other authority.

37. If any provision or authority of this Order on Consent, or the application of this Order on Consent to Respondent, is held by Federal judicial authority to be invalid, the application to Respondent of the remainder of this Order on Consent shall remain in force and effect and shall not be affected by such a holding.

38. The signatory below certifies that he is fully authorized to enter into the terms and conditions of this Order on Consent.

39. The terms of this Order on Consent shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order on Consent is signed by EPA.

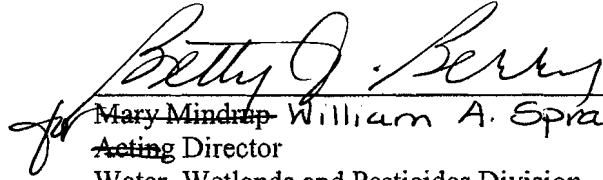
40. This Order on Consent may be modified by mutual agreement of the parties. Such modification shall be in writing.

41. This Order on Consent 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 on Consent have been met.

Issued this ___ day of _____, 2006.

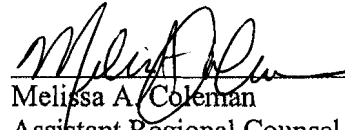
FOR THE U. S. ENVIRONMENTAL PROTECTION AGENCY:

11/09/06
Date



~~Mary Mindrup~~ William A. Spratlin
Acting Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region VII

10/26/06
Date



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

For the RESPONDENT:

2/28/06
Date



Boyer Young Real Estate and Development

IN THE MATTER OF Boyer Young Real Estate and Development, Respondent
Docket No. CWA-07-2006-0096

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Findings of Violation and Order for Compliance on Consent was sent this day in the following manner to the addressees:

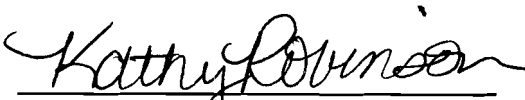
Copy hand delivered to
Attorney for Complainant:

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