

WILLIAMS MULLEN

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May 3, 2022

VIA EMAIL ONLY – rogers.rick@epa.gov

Richard A. Rogers, Chief
Water Branch
Enforcement & Compliance Assurance Division
U.S. Environmental Protection Agency, Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

Re: In re Frazier T. Boyd, III – Administrative Order for
Compliance on Consent; Docket No. CWA-03-2020-0109DW

Dear Mr. Rogers:

This firm represents Frazier T. Boyd, III in connection with the above-referenced Administrative Order (the “Order”) at the property located at Shannon Hill Road and Ambler Road in Louisa County, Virginia (the “Site”). By your April 18, 2022 letter to Mr. Robert Kerr of Wetland Studies and Solutions, Inc. (“WSSI”), EPA disapproved the updated delineation for the Site submitted approximately seven months earlier on September 2, 2021. Pursuant to Section V of the Order, my client disputes the grounds asserted by EPA for its disapproval and hereby initiates dispute resolution.

Initiating dispute resolution could lead some to conclude my client seeks to avoid his obligations. Any such conclusion would not be accurate. Mr. Boyd recognizes his obligation under the Order to delineate the pre-disturbance condition of the Site and has made significant, good-faith efforts at great expense to do just that since 2020. To delineate the Site, my client engaged Mr. Kerr who is now with WSSI. After months of field work, and based on an Aerial Imagery assessment by WSSI (April 27, 2020), WSSI’s delineation report was submitted to EPA on January 28, 2021. EPA disapproved the delineation by a 5-page letter dated April 12, 2021.

WSSI responded to that letter by a 16-page detailed letter dated April 29, 2021 which addressed each of EPA’s comments. The letter provided detailed information about how WSSI conducted the delineation, including its collection and presentation of data, why it did or did not use certain methodologies and reference resources, and the technical basis for its conclusions. The letter also responded in detail to each question asked by EPA during a March 29, 2021 Teams Meeting. Incredibly, despite the significant effort by WSSI to answer EPA’s questions and respond to its concerns, EPA never responded to the points raised in WSSI’s letter. Instead, its letter of June 15, 2021 concluded that all of the issues had been raised before so there was no need to address WSSI’s response. It said, “EPA has determined it would be inefficient at this stage to provide a point by point response to the letter provided by WSSI, especially as it relates to the methodology of the Delineation.” WSSI was told it had been “informed of EPA’s

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concerns and can address those directly in the revised Delineation.” After months of additional field work to address EPA’s requests for more data, WSSI submitted an updated delineation on September 2, 2021. The updated delineation was disapproved by your April 18, 2022 letter. That letter – not EPA’s letter almost a year ago – essentially responds to the points raised in WSSI’s April 29, 2021 letter, and it demonstrates that fundamental differences remain between the parties.

This is not a situation where the delineation is arguably insufficient because the consultant who did the work is inexperienced or unqualified. The work has been performed under the oversight of Bob Kerr. I have included Bob’s resume for your review. It demonstrates that Bob is an extremely qualified environmental scientist who has delineated wetlands and streams in Virginia for 36 years. He holds a BS and MS in Biological and Marine Sciences, respectively, has completed all four levels of natural channel design training by Dave Rosgen, is certified as a Professional Wetland Delineator by the Commonwealth of Virginia, and holds an internationally recognized Senior Professional Wetland Scientist certification by the Society of Wetland Scientists. Among other things, Bob has worked with the Norfolk District USACE and VDEQ in evaluating and providing comment on their stream impact and mitigation methodologies and with the Norfolk District USACE on developing its first written stream mitigation requirements. He has personally delineated thousands of acres and tens of thousands of linear feet of stream in Virginia over his career. There is no question that Bob is one of the top, most recognized wetland and stream delineators in Virginia.

This is also not a situation where the delineation is arguably insufficient because the consultant did not devote enough time and resources to the delineation. I asked Mr. Kerr to calculate the hours WSSI’s employees have worked on this project. The answer is 4,286.08 hours through April 27, 2022. This consists of 2,241.08 office hours and 2,045.00 hours in the field. That’s more than *two years* of work hours devoted to delineating this 1,609-acre Site.

Instead, it appears EPA has determined the delineation is insufficient based in large part on fundamental differences about, among other things, (i) inferences to be drawn from reference resources, such as aerial photographs and LIDAR, (ii) the use and applicability of methodologies, (iii) site observations, and (iv) conclusions reached about whether a feature did or did not exist pre-disturbance. Despite more than 4,200 hours of work by WSSI under the oversight of a pre-eminent expert in the field, and despite WSSI’s second months-long effort to gather additional data requested by EPA, the agency has concluded WSSI’s work is still insufficient and defective. WSSI has not had time to fully assess EPA’s comments, but WSSI disagrees.

My client has no desire to be adversarial with EPA. Instead, as his actions demonstrate at the Hadensville and Tabscott properties where he completed the delineation and performed the corrective action within required deadlines, his desire is to comply with the Order. Those

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properties were also delineated by Bob Kerr with many of the same people who delineated the Shannon Hill Site. VDEQ and Tim Witman, the EPA lead on those two sites, had issues with some aspects of those delineations, but those issues were not near the magnitude of the issues EPA has raised now, even after accounting for any site-specific differences between the properties. The issues there were resolved to the satisfaction of the agencies based on correspondence and discussions with WSSI in the field. Unlike at this Site, EPA was willing to share its conclusions while in the field and make collaborative decisions and adjustments to wetland/upland and stream/upland boundaries in “real time,” something that greatly advanced the delineations.

In your April 18, 2022 letter, EPA provided adverse comment on 27 investigation areas at the Site. It provided no comment on 26 investigation areas. Based on this lack of comment, we have assumed the delineation of the 26 areas is acceptable. Please advise if that is not correct. Regarding the 27 areas on which EPA had comment, it would be inefficient in this letter to attempt to provide points of disagreements on an area-by-area basis. Accordingly, we ask for the opportunity to meet with EPA in person at its offices in Philadelphia in an effort to reach agreement and resolve the dispute.

An in-person meeting will allow us to share and discuss information, imagery and the many area-specific documents without the potential technical limitations of a remote meeting. Trying to accomplish the meeting remotely will be much more difficult, particularly because of the number of documents likely to be referenced during the meeting, technical glitches that can occur when sharing large files of imagery data over the internet in real time, and the difficulty in seeing fine detail in imagery and documents on the small screens often used by videoconference participants. Bob Kerr and Karen Dodson (who spent months at the Site and led the field effort) will attend and make a presentation on the issues in controversy, including addressing WSSI’s conclusions and how they differ from those of EPA. They plan to bring the GIS database of the Site and use it during the meeting to show various layers of data in the areas being discussed. We welcome your participation in the meeting and the participation of any others in your office or in the Office of Water whose expertise and experience with delineations you believe would be beneficial.

The Order requires the parties to use their best efforts to informally and in good faith resolve all disputes or differences of opinion...within 14 business days of notification to the EPA Branch Chief.” Considering that EPA’s April 18, 2022 letter is 19 pages long with comments applicable to 27 investigation areas, we ask that EPA considering extending the deadline so that WSSI can adequately review the comments and prepare its presentation. This, in turn, will make the meeting more productive. We ask that the deadline be extended to the date of the meeting, plus a reasonable number of business days thereafter for the parties to have any follow-up discussions. If this is agreeable, we suggest a meeting on June 1, 2, or 3. If none of these dates work, please suggest others.

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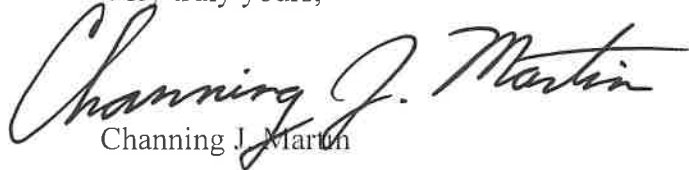
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I look forward to hearing from you.

Very truly yours,

A handwritten signature in black ink that reads "Channing J. Martin". The signature is written in a cursive style with a large, looping "C" and "M".

Channing J. Martin

CJM/rno

Attachment

cc: Frazier T. Boyd, III (via email only)
Robert Kerr, PWS, PWD (via email only)
Karen Dodson, WPIT, CE (via email only)
Pamela Lazos, Esq. (via email only)
Katelyn Almeter (via email only)

(100140757.2)

Firm Association
Wetland Studies and
Solutions, Inc. (WSSI)

Project Assignment
Senior Environmental
Scientist

Years of Experience
With this firm: 20
With other firms: 16

Education
MS/Marine Environmental
Science/State University of
New York at Stony Brook

BS/Biology with Aquatic
Sciences Concentration/State
University of New York at
Fredonia

Registrations & Certifications
Virginia Certified Professional
Wetland Delineator,
No. 3402000060

Certified Senior Professional
Wetland Scientist, Society of
Wetland Scientists, No. 381

Natural Stream Channel Design
and Restoration, Levels I-IV,
Dave Rosgen

Virginia Association of Wetland
Professionals, 1999-Current

Public Involvement &
Presentations
Implementing Sea Level Rise
and Climate Change Provisions,
Ches. Bay Preser. Act,
Regulations and Policy
Revisions, DEQ Stakeholder
Advisory Group, 2021-2022

Wetland Virginia Water
Protection Permit Regulation,
DEQ Citizen Advisory
Committee, 2014

Mr. Kerr has 36 years of experience providing environmental services to federal, state and local government agencies and corporations. His expertise includes regulatory and legislative negotiations, wetland and stream delineations, stream assessments, permitting of stream and wetland impacts, wetland and stream mitigation design, NEPA and SERP documentation. Projects have included federal installations, reservoirs, mitigation banks, roadways, bridges, sewer and water projects, landfills, office parks, and subdivisions; both for design and design-build projects. Mr. Kerr has managed environmental services under annual services contracts for the following jurisdictions in Virginia: Henrico, Chesterfield and James City County; and the Cities of Virginia Beach, Suffolk, Norfolk, Hampton and Newport News. He also managed three state-wide wetland and stream delineation and mitigation services contracts for the North Carolina Department of Transportation (NCDOT). He has worked on projects involving USACE, HUD, FHWA and FERC as lead agencies.

Mr. Kerr's relevant experience includes:

Legislative

Testimony to U.S. House of Representatives, Committee on Science, Space and Technology, Concerning Final Waters of the United States Rule, June 2015. Testified regarding major changes made from Draft to Final Rule.

Stream Delineations and Assessments

Invited Participant, Stream Assessment and Mitigation Protocol Comparison, Public Meeting, Virginia DEQ. Mr. Kerr was invited by the Director of the DEQ to make a presentation at the Public Meeting held jointly by the USACE and DEQ to receive public comments on the SAAM and SICAM methodologies and providing recommendations for the most efficient and reproducible methodology for the assessment of stream condition and mitigation requirements. Mr. Kerr presented findings from the largest side-by-side comparison of the two methods in the State, regarding the 80,020 linear feet of streams being impacted and mitigated for the Cobbs Creek Reservoir. The recommendation of procedures in DEQ's SICAM, led the USACE to work with the DEQ to prepare the *Unified Stream Methodology (USM)* currently used in Virginia.

Cobbs Creek Reservoir, Cumberland County, Virginia. Mr. Kerr supervised and participated in the assessment of all 80,020 linear feet of stream impacts for the approximately 1,200 acre reservoir footprint for the proposed Cobbs Creek Reservoir. The project utilized two different methodologies to assess impacts and mitigation: *U.S. Army Corps of Engineers Stream Attribute Assessment Methodology (SAAM)* and *Virginia Department of Environmental Quality (DEQ), Stream Impact and Compensation Assessment Manual (SICAM)*. The stream data was used to negotiate a mitigation package for the reservoir impacts. A total of 115 data points were collected and compared using both the SAAM and the SICAM. Mr. Kerr negotiated the use of stream preservation within the Cumberland State forest as an innovative and highly cost-effective means of providing stream mitigation that complied with all federal and state mitigation policies. Mr. Kerr also led technical negotiations for stream issues with the Virginia Department of Forestry, the United States Army Corps of Engineers and the Virginia Department of Environmental Quality and the Commonwealth's Attorney Generals' Office regarding a number of topics including: buffer widths in the State Forest, compensation to the Department of Forestry, a unified mitigation package for both the Corps and DEQ, and overall approval of the Conceptual and Final Stream Mitigation Plan.

Hillsville Bypass, Route 58, Stream and Wetland Delineation, Permitting and Mitigation Design, Virginia Department of Transportation, Carroll County, Virginia. Mr. Kerr was the environmental manager for this 5.3 mile 4-lane divided highway, at the time the largest stream impact and mitigation plan in Virginia. Mr. Kerr secured 20 separate wetland and stream permits for approximately several thousand linear feet of stream and 12 acres of wetland impacts; identified and designed 16 acres of mitigation, and negotiated stream mitigation plans and procedures, leading to the first written stream mitigation policy issued by the Norfolk District, USACE all within 15 months of Notice to Proceed while complying with VDOT, USACE and DEQ standards.



TMDL Expert Panel, Defining Pollutant Removal Rates for Stream Restoration Projects, *Urban Stormwater Workgroup, USEPA Chesapeake Bay Program*, 2013

Farmland & Ditches: Policy in Flux- *Virginia Association of Wetland Professionals Annual Program*, 2013

Virginia Legislation Prohibiting Residential Fertilizer from Containing Phosphorus with Some Commercial Exemptions, Leading Advocate and Technical Advisor to VACRE, SB 1055/HB 1831, 2012

State Assumption of Clean Water Act Section 404, *DEQ Stakeholder Advisory Group*, 2012

Virginia Stormwater Management Program Regulations *VDCR Technical Advisory Committee*, 2006-2010

Resource Protection Areas and Nontidal Wetland Policy, *Ad Hoc Committee, Virginia CBLAB*, 2006-2007

Virginia Stream Mitigation Advisory Workgroup *Virginia DEQ*, 2005

Virginia Stream Restoration Design Manual *Invited Commentor*, 2003

Clayhill Farms Stream and Wetland Mitigation Bank-5th *Annual North Carolina Stream Restoration Conference*, 2002

Pasquotank River Basin Watershed Characterization- *Virginia Lakes and Watersheds Assoc. Conference*, 2001

Tulloch Ditching Roundtable, *Invited Speaker, National Meeting, Society of Wetland Scientists*, 2000

King William Reservoir Stream Mitigation Planning & Design, City of Newport News, Virginia. Mr. Kerr was designated the Stream Mitigation Planning Lead for the City's mitigation plan. The goals were to identify and secure agency approval of approximately 13 miles (68,000 linear feet) of streams. When the project ceased, agency concurrence had been secured for all necessary stream restoration including conceptual stream restoration plans. Mr. Kerr's staff lead the effort to identify all stream reference-reaches and prepare all necessary computations to use them as templates for all stream restoration for the project. Also lead conceptual designs for specific sites to be restored by his team.

Stream Delineation, Restoration Site Search and Feasibility Studies, Winston-Salem Northern Beltway, NCDOT, Forsyth County, North Carolina. Mr. Kerr was the project manager responsible for locating 10,600 l.f. of viable stream restoration sites within the County. This led to 12 design studies evaluating a combination of Priority I, II and III stream restoration opportunities.

Northern Wake County Expressway Stream Restoration Site Search and Feasibility Studies, NCDOT, Wake County, North Carolina. Mr. Kerr was the project manager responsible for locating 18,000 l.f. of viable stream restoration sites. Ultimately the owners of 11 sites agreed to allow preliminary engineering studies, also managed by Mr. Kerr, which involved a combination of Priority I, II and III stream restoration alternatives.

Route 460 Delineation & Mitigation Services, Isle of Wight County, Virginia Mr. Kerr managed the team responsible for expediting the delineation of wetlands and Waters of the U.S. (WOUS) for portions of the 55-mile proposed Route 460 corridor. Mr. Kerr was also tasked with preparing two separate bid documents: one for securing existing mitigation bank and in-lieu fee programs credits; and another for entities offering pending banks and/or project specific mitigation sites. Respondents were prioritized by Mr. Kerr on both price and likelihood of ecological and regulatory success.

Parallel Thimble Shoals Tunnel Design-Build, Chesapeake Tunnel Joint Venture, Chesapeake Bay Bridge Tunnel District, Virginia Beach, Virginia Mr. Kerr provided local regulatory knowledge and experience to the regulatory coordination, mitigation strategy and preparation of Joint Permit Application submitted to the US Army Corps of Engineers, Virginia Marine Resources Commission and the DEQ for this \$750 million direct bore tunnel. Mr. Kerr managed much of the planning and permitting with DEQ, DMME and localities for the 750,000cy of materials to be disposed from tunneling and on island excavation. Mr. Kerr also assisted with securing the Nationwide Permit 6 and Section 408 clearance for the geotechnical sampling needed for this tunnel. Mr. Kerr managed preparation of combined Stormwater and Erosion and Sediment Control plans for all on-island construction. He also managed all services for the approvals to modify the Little Creek lay-down facility including wetlands delineations, cultural resources and protected species clearances, stormwater analysis, and Erosion and Sediments Control plans.

I-64 Southside Widening and High-Rise Bridge Replacement Design-Build, Chesapeake, Virginia. Mr. Kerr oversaw the environmental permitting for the \$400 million VDOT I-64 Southside Widening and High-Rise Bridge Design Build Project. This project includes the widening of an approximately nine-mile roadway corridor of I-64 and the construction of a new 6,000 foot fixed-span bridge south of the existing High-Rise Bridge over the Elizabeth River which includes a Federal Navigation Channel. Mr. Kerr supervised the development and processing of the Joint Permit Application for all impacts to wetlands and Waters. Permits and clearances received included: individual permits (IPs) from the U.S. Army Corps of Engineers (USACE), and the Virginia Department of Environmental Quality (DEQ), and the Virginia Marine Resource Commission (VMRC); a Coastal Zone Consistency Determination, and Section 408 certification from the USACE Operations Branch. A USACE Nationwide Permit including Section 408 certification was also secured for pre-construction geotechnical work in the Elizabeth River.