

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
) Docket No. CWA-07-2013-0032
)
PALO ALTO COUNTY BOARD OF)
SUPERVISORS)
)
I & S GROUP, INC.,)
)
and)
)
C.J. MOYNA & SONS, INC.,)
)
) ADMINISTRATIVE ORDER FOR
) COMPLIANCE ON CONSENT
Respondents,)
)
)
Proceedings under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

Preliminary Statement

1. This Administrative Order for Compliance on Consent (“Order”) is issued by the United States Environmental Protection Agency (“EPA”) to the Palo Alto County Board of Supervisors, I & S Group, Inc., and C.J. Moyna & Sons, Inc. (“Respondents”), pursuant to the authority vested in the Administrator of EPA by Section 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a), as amended. This authority has been redelegated by the Administrator to the Regional Administrator of EPA, Region 7, and further delegated to the Director of Region 7’s Water, Wetlands, and Pesticides Division.

2. EPA, together with Respondents, enters into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

3. It is the parties’ intent through this agreement to address discharges of pollutants by Respondents into the waters of the United States without a permit issued pursuant to Section 404

of the CWA, 33 U.S.C. § 1344, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Specifically, Section 301 of the CWA provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful.

4. By entering into this Order, Respondents (1) consent to and agree not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) agree to undertake all actions required by the terms and conditions of this Order, and (3) consent to be bound by the requirements set forth herein. Respondents also waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondents may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Statutory and Regulatory Framework

5. 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.

6. 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.

7. 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.

8. 40 C.F.R. § 232.2 defines the term “dredged material” to mean material that is excavated or dredged from waters of the United States.

9. 40 C.F.R. § 232.2 defines the term “discharge of dredged material” to mean, with specified exceptions, any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, *inter alia*, the addition of dredged material to a specified discharge site located in waters of the United States; and any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

10. 40 C.F.R. § 232.2 defines the term “fill material” to include material placed in waters of the United States where the material has the effect of changing the bottom elevation of any portion of a water of the United States. The definition provides examples including, *inter alia*,

rock, sand, soil, clay, overburden, and materials used to create any structure or infrastructure in the waters of the United States.

11. 40 C.F.R. § 232.2 defines the term “discharge of fill material” to mean the addition of fill material into waters of the United States. The definition specifically includes, *inter alia*, the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; dams and dikes; and property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments.

12. 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 wetlands adjacent to waters of the United States.

13. 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.

EPA Findings

Findings of Fact and Law

14. Each Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant to this action, Respondent Palo Alto County Board of Supervisors owned, operated, or otherwise controlled property located in Section 3 of Township 97 North, Range 32 West, near Graettinger, in Palo Alto County, Iowa, and Section 34 of Township 98 North, Range 32 West, in Emmet County, Iowa (hereinafter “the Site”). The portion of the Site located in Palo Alto County is part of Drainage District No. 15 North, and the portion of the Site located in Emmet County is part of Drainage District No. 21. The water body flowing through Drainage District No. 15 North is known as Drainage Ditch 15N; as it flows north into Drainage District No. 21, it is sometimes called Lateral Six. For the purposes of this Order, the water body flowing through Drainage District No. 15 North and Drainage District No. 21 will be referred to as “DD15N.”

16. Respondent Palo Alto County Board of Supervisors contracted with Respondent I & S Group, Inc. to design and engineer the nutrient removal wetland and drainage tile improvements, and represent the Board during the development of the project; and with C.J. Moyna & Sons, Inc., to perform the construction activities associated with the project.

17. On November 30, 2011, I & S Group submitted an application for a CWA Section 404 permit on behalf of the Palo Alto County Board of Supervisors and over the next year continued to work with the Corps’ Rock Island District on the permit process.

18. Beginning sometime in November 2012, Respondents and/or persons acting on their behalf and using earth moving equipment authorized and/or directed the discharge of dredged and/or fill materials into DD15N in order to construct a nutrient removal wetland and drainage tile improvements. A total of approximately 7,150 feet of stream channel were filled, realigned, dredged, widened, or armored as part of the drainage tile improvements and creation of a 42.72-acre wetland. This included two stream crossings, installation of a 54" drainage tile outlet, structures below drainage tile outlets, the creation of a 108 foot wide earthen berm, and sheet piling, all of which were below the ordinary high water mark of DD15N.

19. On December 13, 2012, the project was placed on Public Notice by the Corps. On December 14, 2012, the Corps received a report that work in jurisdictional areas of the Site had begun. Mr. Don Etlar of I & S Group, Inc., confirmed this report to the Corps on December 18, 2012. On December 27, 2012, the Corps issued a Cease and Desist Order to the Palo Alto County Board of Supervisors, which described the violations and directed the Board to cease all unauthorized work, and referred the violations to EPA.

20. On February 12, 2013, EPA visited the Site and documented that construction of the nutrient removal wetland and drainage tile improvements was partially completed, including the impacts described in Paragraph 18.

21. The dredged and/or fill materials discharged by Respondents into DD15N referenced in Paragraph 18 are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The discharge of the dredged and/or fill material into DD15N referenced in Paragraph 18 constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

23. The earth moving equipment referenced in Paragraph 18 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

24. DD15N is a "water 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.

25. Respondents' discharges of pollutants required a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

26. 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 in Paragraph 18, nor did Respondents perform the work described in Paragraph 18 under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

EPA's Finding of Violation

27. The facts stated in Paragraphs 14 through 26, above, are herein incorporated.

28. Respondents' discharges of pollutants from a point source into a water of the United States were performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Therefore, EPA finds that these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311. The Respondents do not admit to EPA's finding of violation.

Section 309(a) Order for Compliance on Consent

Based on the FINDINGS OF FACT and FINDING OF VIOLATION set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

29. Within 30 days of receipt of this Order, the Palo Alto County Board of Supervisors shall submit a Work Plan to EPA for review and approval that describes the actions needed to complete construction of the nutrient removal wetland and related drainage tile improvements as well as the proposed mitigation of the impacted Site described in Paragraph 18 above. EPA's approval of the Work Plan will be based on an evaluation of the Work Plan's compliance with the CWA and EPA's mitigation rule (40 C.F.R. Part 230) as implemented by the Missouri Stream Mitigation Method (2007); such approval shall not be unreasonably withheld. The actions specified by the Work Plan shall be completed within four months of EPA's approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

- a. The Work Plan must include, at a minimum: the projected work and materials necessary to complete the wetland and drainage tile improvements as well as the proposed mitigation at the Site, including characterization of the soil, plant, and hydric conditions and best management practices that will be used to control soil erosion and sediment runoff; the projected cost of the work; a projected schedule for completing the work; and a monitoring plan to maintain and document proper wetland and/or stream functions, including measurable performance standards, pursuant to Paragraph 32 below.
- b. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved Work Plan.
- c. If EPA does not approve the Work Plan, Respondents shall address EPA's comments and resubmit the Work Plan for review within 30 days of receipt of EPA's disapproval and comments.
- d. Upon resubmission, EPA, in its sole discretion, may either approve the Work Plan, or if EPA determines that the Work Plan does not adequately address the

comments provided by EPA, EPA may modify the Work Plan and will provide Respondents with a copy of the Work Plan as modified. Respondents shall implement the modified Work Plan according to the schedule contained therein.

30. Once approved by EPA, the Work Plan identified in Paragraph 29 shall be incorporated by reference and fully enforceable under the terms of this Order.

31. Within 30 days of completing the work identified in Paragraph 29, the Palo Alto County Board of Supervisors shall submit photographic evidence, copies of relevant documents, and a signed statement confirming that the work is complete.

32. The Palo Alto County Board of Supervisors shall submit annual monitoring reports to EPA, beginning on the first anniversary of the completion of the Work Plan, for a period of five years. These reports shall include photos of the Site, a narrative description of the status of the Site, and the corrective actions, if any, that will be taken to correct the deficiencies in order to maintain proper wetland and/or stream functions.

33. The submission of documents by the Palo Alto County Board of Supervisors, as identified in Paragraphs 29, 31, and 32, shall include the following written statement, followed by signature of a duly authorized representative of Respondents:

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.

34. All documents to be submitted to EPA under this Order shall be submitted by mail to:

Lantz Tipton or successor
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

35. Upon EPA's approval of the Work Plan, EPA will request that the Corps terminate the prohibition on performing work at the Site, as stated in the Cease and Desist Order referenced in Paragraph 19.

General Provisions

36. Failure to comply with the terms of the Section 309(a)(3) Order for Compliance on Consent may result in Respondents' liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an

action seeking penalties for violations of this Order, a United States District Court may impose civil penalties if the court determines that Respondents have violated the Act and failed to comply with the terms of the Order.

Reservation of Rights

37. 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, except that compliance with this Order shall be considered compliance with the CWA for those violations described in the Findings of Fact and Law of this Order and the activities carried out according to the approved Work Plan. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

38. With respect to matters not addressed in this 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/or other legal remedies allowed by law.

39. Compliance with the terms of this Order shall not relieve Respondents of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or seeking additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

40. Subject to the limitations of Paragraph 4, above, Respondents reserve the right to contest liability in any subsequent action filed by EPA to seek penalties for violation of this Order on Consent, and reserve the right to contest liability in any subsequent action filed by EPA for any violations alleged in the Findings, above.

Access and Requests for Information

41. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect the Site, 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

42. 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.

Modification

43. At EPA's sole discretion, extensions of the compliance schedule or deadlines required by this Order may be made by EPA by written notice to Respondents, without further formal amendment to the Order. All other modifications to this Order may only be made by mutual agreement of the Parties, pursuant to a written amendment signed by each Party.

Effective Date

44. The terms of this Order shall be effective and enforceable on the Effective Date, which is the date this Order is signed by EPA. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Termination

45. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

Signatories

46. The undersigned for each party has the authority to bind each respective Party to the terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

For the Complainant, United States Environmental Protection Agency, Region 7:

Issued this 13th day of June, 2013.

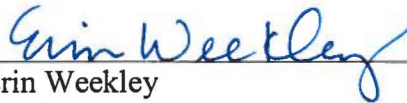


Karen A. Flournoy

Director

Water, Wetlands and Pesticides Division

U.S. Environmental Protection Agency – Region 7



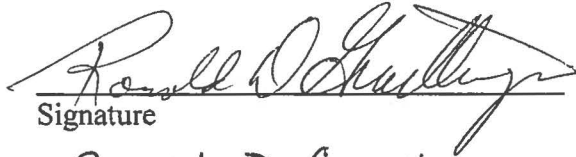
Erin Weekley

Assistant Regional Counsel

Office of Regional Counsel

U.S. Environmental Protection Agency – Region 7

For Respondent Palo Alto County Board of Supervisors:



Signature

6-4-2013
Date

Ronald D. Graettinger
Name

Chair, Palo Alto
Title

For Respondent I & S Group, Inc.:



Signature

6.5.2013

Date

CHAD C. SURPRENANT

Name

PRESIDENT / CEO

Title

For Respondent C.J. Moyna & Sons, Inc.:

Signature John P. Moyna Date 6-7-13
Name JOHN P. MOYNA
Title PRESIDENT

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Administrative Order for Compliance on Consent to the Regional Docket Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I sent a copy of the foregoing Administrative Order for Compliance on Consent by first class certified mail, return receipt requested, to:

Keith Wirtz
Chairman, Palo Alto County Board of Supervisors
1010 Broadway Street
Emmetsburg, Iowa 50536

Kent L. Rode
I & S Group, Inc.
1609 U.S. Highway 18E
Box 715
Algona, Iowa 50511,

and

Ryan Kipp
C.J. Moyna & Sons, Inc.
24412 Highway 13
Elkader, Iowa 52043,

and by first class mail to:

Thomas A. Lawler
Lawler & Swanson, P.L.C.
P.O. Box 280
601 Coates Street
Parkersburg, Iowa 50665,

Charles F. Becker
Belin McCormick, P.C.
666 Walnut St., Suite 2000
Des Moines, Iowa 50309,

Robert L. Johnson
Finley Alt Smith
699 Walnut Street, Suite 1900

Des Moines, Iowa 50309,

Donna Jones
Chief, Enforcement Section
U.S. Army Corps of Engineers, Rock Island District
Clock Tower Building
P.O. Box 2004
Rock Island, Illinois 61204-2004,

and

Dennis Ostwinkle
Iowa Department of Natural Resources, Field Office #6
1023 West Madison Street
Washington, Iowa 52353-1623.

6/14/13
Date

Kathy Robinson
Signature