

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

09 MAY -4 AM 9:26

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

E&A CONSULTING GROUP, INC.)

NS – THE HERITAGE, L.L.C.,)

SANITATION IMPROVEMENT)
DISTRICT NO. 531, and)

M.E. COLLINS CONTRACTING)
COMPANY, INC.)

Respondents)

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

) Docket No. CWA-07-2009-0052

) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7.

2. Respondents in this case are: (1) E&A Consulting Group, Inc., whose mailing address is 330 N. 117th St., Omaha, Nebraska 68154; (2) NS – The Heritage, L.L.C., whose mailing address is 6336 Pershing Drive, Omaha, Nebraska 68110; (3) Sanitation Improvement District No. 531, whose mailing address is 9719 Giles Road, LaVista, Nebraska 68128; and (4) M.E. Collins Contracting Company, Inc., whose mailing address is 980 E. 25th St., Wahoo, Nebraska 68066 (“Respondents”). Respondents performed and/or contracted for dredge and fill activities at the Heritage development project in Douglas County, Nebraska.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.
4. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.
5. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.
6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include wetlands adjacent to waters of the United States.
7. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or Section 404 of the CWA, 33 U.S.C. § 1344, requiring such person to comply.

Factual Background

8. Respondents are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
9. At all times relevant to this action, Respondents owned, operated, or otherwise controlled the property located in part of the North ½ and part of the Southwest ¼ of Section 23, part of the South ½ of Section 14, and part of the West ½ of Section 24, Township 16 North, Range 11 East, Douglas County, Nebraska (hereafter referred to as the “Heritage Development”). Specifically, NS – The Heritage, L.L.C. owns the land on which the Heritage Development is being built; the Sanitation Improvement District (“SID”) holds a Nationwide Permit issued by the Corps for the construction of road crossings; E&A Consulting Group, Inc. contracted with the SID to design and implement the site construction plans; and M.E. Collins Construction Company, Inc. contracted with the SID to construct the road crossings pursuant to plans and specifications prepared by E&A Consulting Group, Inc.
10. A Nationwide Permit No. 39 was authorized for the SID No. 531 on January 25, 2006. The permit prohibits the disruption of “aquatic life movement” and the “management of water flow.”
11. At some time in the fall of 2007, Respondents and/or persons acting on their behalf and using earth moving equipment, created two road crossings at the Heritage Development that were not authorized by Section 404 permits. Specifically, road crossing number six disrupted

aquatic life movement and the management of water flow, in violation of Nationwide Permit No. 39. Road crossing four was identified as an unpermitted structure that diverted stream flow and caused discharges of dredged and/or fill material into adjacent wetlands.

12. On May 9, 2008, the Corps inspected the Heritage Development and issued a Notice of Noncompliance and Violation for violations of Nationwide Permit No. 39 and discharges of dredged and/or fill material, as described in Paragraph 11.

13. The dredged and/or fill materials discharged by Respondents into the unnamed tributaries of Big Papillion Creek and adjacent wetlands include spoil, rock, sand, and dirt and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

14. The earth moving equipment and the road crossings referenced in Paragraph 11 above, constitute a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

15. The discharge of the dredged and/or fill material into the unnamed tributaries of Big Papillion Creek and adjacent wetlands, described in Paragraph 11 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

16. The unnamed tributaries of Big Papillion Creek and adjacent wetlands are all "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

A. FINDINGS OF VIOLATION

17. The facts stated in Paragraphs 8 through 16 above are herein incorporated.

18. Violations of the SID's Nationwide Permit No. 39 at road crossing number six, as described in paragraph 11 above, are violations of Section 404 of the CWA, 33 U.S.C. § 1344.

19. Respondents' discharge and disposal of pollutants from road crossing number four into waters of the United States, as described in paragraph 11 above, occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges and disposals violated Section 301 of the CWA, 33 U.S.C. § 1311.

B. ORDER FOR COMPLIANCE

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

20. Within thirty days after receipt of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents' proposed restoration of the impacted areas described in paragraph 11 above.

21. Once approved by EPA, the Work Plan identified in Paragraph 20 shall be incorporated by reference and fully enforceable under the terms of this Order and shall be completed within three months in accordance with the specifications set forth in the Work Plan.

22. Within fifteen days of completion of the work required pursuant to the approved Work Plan, the Respondents shall submit photographic evidence, copies of relevant documents, and a signed statement to EPA indicating that the work is complete.

23. Respondents shall submit annual reports to EPA, beginning on the first anniversary of the completion of the actions required by the approved Work Plan, for a period of five years. These reports shall include photos of the site, a description of the status of the site, and any corrective actions, if any, that will be taken to correct changes to maintain the site's original condition.

24. The submission of documents by Respondents, as identified in Paragraphs 20, 22, and 23, shall include the following written statement, followed by the Respondents' signature:

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.

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

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

26. In the event Respondents fail to comply with the terms of the Order, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, EPA may seek judicial enforcement of the terms of the Order against the Respondents and/or seek additional penalties against the Respondents for such noncompliance with the terms of the Order.

General Provisions

Effect of Compliance with the terms of this Order

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

28. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

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

Severability

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

Parties Bound

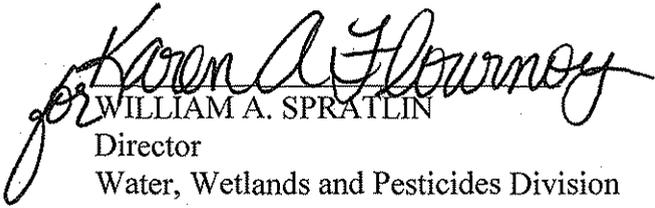
31. This Order shall apply to and be binding upon the Respondents, their agents, successors and assigns. Respondents shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein comply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

Effective Date

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

Termination

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


WILLIAM A. SPRATLIN

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

4-30-09
DATE



CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7

5.4.09
DATE

CERTIFICATE OF SERVICE

I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

Mr. Mark Westergard
E&A Consulting Group, Inc.
330 North 117th Street
Omaha, Nebraska 68154

Mr. Jerry G. Banks
NS – The Heritage, L.L.C.
6336 Pershing Drive
Omaha, Nebraska 68110

Mr. Tim Young
SID No. 531
9719 Giles Road
LaVista, Nebraska 68128

Mr. Michael E. Collins
M.E. Collins Contracting Co., Inc.
980 E. 25th
Wahoo, Nebraska 68066

5.4.09
Date

Ced Mankins