

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

IN THE MATTER OF:)

Eagle 1968, L.C.)

and)

Gene Fritzel Construction Co., Inc.)

Respondents)

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

) Docket No. CWA-07-2020-0140

) FINDINGS OF VIOLATION AND
) ORDER FOR COMPLIANCE
) ON CONSENT

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance on Consent (“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 Enforcement and Compliance Assurance Division of EPA Region 7.

2. The Respondents in this case are Eagle 1968, L.C. and Gene Fritzel Construction Co., Inc. (“Respondents”).

3. EPA, together with Respondents, enter 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.”

4. 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. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, 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.

5. By entering into this Order, Respondents (1) consent to and agrees not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) consent to personal service by electronic mail, (3) agree to undertake all actions required by the terms and conditions of this Order, and (4) consent to be bound by the requirements set forth herein. Respondents neither admit nor deny the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondents admit the jurisdictional allegations 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

6. 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.

7. 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.

8. 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 U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. 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 tributaries and wetlands adjacent to waters of the United States.

10. Section 40 C.F.R. § 232.2 defines “wetlands” as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

11. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

12. 40 C.F.R. § 232.2 defines “fill material” as any material that has the effect of “replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water 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.

Allegations of Facts

14. Respondents are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant to this action, Respondents owned, operated, or otherwise controlled property containing portions of six tributaries to Yankee Tank Creek and a wetland adjacent to one of the tributaries to Yankee Tank Creek located in Sections 3 & 4, Township 13 South, Range 19 East, in Douglas County, Kansas (hereinafter “the Site”). Beginning in 2016, Respondents were collectively involved in a construction project to purchase, renovate, and develop approximately 265 acres of the former Alvamar Country Club and golf course, which included grading, riparian clearing, and stream impoundment, filling, and channelization. Today, the development operates as the Jayhawk Club.

16. On August 16, 2017, the Corps, Kansas City District, received an anonymous complaint that substantial earthwork was occurring in a stream near the complainant’s house and that riparian areas of a stream were being cleared and the potential violator may also be filling the stream.

17. On September 26, 2017, Corps personnel conducted an investigation from public roadways adjacent to the site and determined a CWA violation had occurred. The Corps observed substantial amounts of stream that had been channelized and riparian areas cleared. On October 18, 2017 and July 23, 2018, Corps personnel conducted site visits at the Site and confirmed the activity included filling six unnamed tributaries to Yankee Tank Creek and two wetlands adjacent to one of the unnamed tributaries to Yankee Tank Creek. The stream impacts total 7,000 linear feet and wetland impacts total 0.904 acre.

18. After the Corps’ site visit(s), Corps personnel identified each of the six tributaries and two wetlands as “waters of the United States.”

19. The unnamed tributaries to Yankee Tank Creek and adjacent wetland are “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.

20. The fill material discharged by Respondents into the unnamed tributaries of Yankee Tank Creek and adjacent wetland, as well as stormwater runoff from the Site, are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The earth moving equipment used to grade the Site and place the fill material into the unnamed tributaries to Yankee Tank Creek constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The discharge of the fill material into the unnamed tributaries to Yankee Tank Creek and adjacent wetland constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

Findings of Violations

23. The facts stated in Paragraphs 1 to 22 above are herein incorporated.

24. 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 fill placement described herein, nor did Respondents perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

25. Respondents' discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Order for Compliance on Consent

Based on the Factual Background and Findings 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:

26. Respondents shall comply with the CWA by immediately ceasing the discharge of pollutants into the unnamed tributaries to Yankee Tank Creek and adjacent wetlands and taking steps to ensure that such discharges do not occur in the future.

27. Retention of Professional Engineer: Respondents will retain a professional engineer, to perform a study of the Site and submit to EPA a Work Plan designed to remediate impacts of Respondents' work as follows:

a. Within thirty (30) days of the effective date of this Order, Respondents shall provide to EPA in writing the name, address, phone number, electronic mail address and qualifications of a professional engineer.

b. EPA will approve/disapprove of Respondents' engineer based upon the person's qualifications and ability to effectively perform this role. The qualifications of the persons undertaking the Work for Respondents shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements of the EPA. All persons under the direction and supervision of Respondents' engineer must possess all necessary professional licenses required by law.

28. Work Plan: Within three (3) months of the effective date of this Order, Respondents shall submit a Work Plan to EPA for review and approval that shall describe Respondents' plans to (1) remove remaining fill material in waters of the United States; (2) restore, to the extent possible, existing tributary and wetlands functions; (3) design and implement controls to prevent the runoff of pollutants into tributaries and wetlands, and; (4) mitigate for lost tributary and wetland functions. The work shall be completed within twelve (12) months of approval of the Work Plan and in accordance with the specifications set forth in the Work Plan.

- a. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.
 - b. If EPA does not approve the Work Plan, Respondents shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of EPA's disapproval.
 - c. 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.
29. Once approved by EPA, the Work Plan identified above shall be incorporated by reference and fully enforceable under the terms of this Order.
30. Once the work identified in the Work Plan has been completed, Respondents agrees to submit a completion report, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete. The completion report must be submitted within thirty (30) days after work has been completed.
31. Respondents agree to submit annual monitoring reports to EPA, beginning on the date of 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 description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper stream functions. Annual monitoring reports must be submitted by December 1st of each year.
32. The submission of documents by Respondents, as identified above, shall include the following written statement, followed by signature of duly authorized representatives 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.*
33. All documents to be submitted to EPA under this Order shall be submitted by electronic mail to:

Cynthia Sans, or her delegate
sans.cynthia@epa.gov
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

General Provisions

34. Respondents' failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in 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 Compliance 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.

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

36. 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 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.

Access and Requests for Information

37. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or 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

38. 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

39. 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 it with respect to matters included herein comply with the terms of this Order.

Effective Date

40. 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

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

Signatories

42. The undersigned for each party have 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, U.S. Environmental Protection Agency, Region 7:

DAVID COZAD
Director
Enforcement and Compliance Assurance Division

DATE

CHRIS MUEHLBERGER
Assistant Regional Counsel
Office of Regional Counsel

DATE

For Respondent Eagle 1968, L.C.

SIGNATURE

DATE

NAME/TITLE

For Respondent Gene Fritzel Construction Co., Inc.

SIGNATURE

DATE

NAME/TITLE

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 Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further 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. Timothy B. Fritzel, Registered Agent
Gene Fritzel Construction Co., Inc.
643 Massachusetts Avenue, Suite 300
Lawrence, Kansas 66044

Mr. Thomas S. Fritzel, Registered Agent
Eagle 1968, L.C.
643 Massachusetts Avenue, Suite 300
Lawrence, Kansas 66044

Date

Signature