



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REGION 4
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-8960**

ELECTRONIC EMAIL
CONFIRMATION OF EMAIL RECEIPT REQUESTED

Wyatt Kendall
1600 Atlanta Financial Center
3343 Peachtree Road NE
Atlanta, Georgia 30326
wkendall@mmmlaw.com

Re: Notice of Violation and Opportunity to Show Cause Pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319, for Circle Oak East, LLC and Clarence Nalley near Gay, Meriwether County, Georgia

Dear Wyatt Kendall:

On September 23, 2022, the U.S. Environmental Protection Agency, Region 4 received the Report of Water Needs Assessment performed and prepared by Schnabel Engineering, LLC (Schnabel) on behalf of your client, Circle Oak East, LLC, and Clarence Nalley. This assessment was performed for an impoundment in Meriwether County, Georgia, located at latitude 33.129283°N, longitude 84.555858°W (Site). The purpose of the report was to explain your client's need for a farm pond and whether it meets the requirements of their requested exemption pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344(f)(1)(C).

After reviewing the report's description of the Site's irrigation needs, the EPA has determined that the acreage of the pond, as constructed, is larger than required to meet the irrigation needs identified in Schnabel's report. The EPA determined this based on information provided by your client and utilized within the report. Shoals Creek, which currently flows through the Site, should provide enough flow without impoundment to satisfy the purported required crop irrigation need, if not more than what is reported to be required. The EPA also reviewed the 7Q10 numbers provided by Schnabel, and after they were calculated for cubic feet per day (cf/day), the results suggest that Shoals Creek has enough in-stream flow to not require impoundment at all. Water withdrawal directly from the creek itself could sufficiently augment water needs of the cropland.

In addition, the EPA understands that the current crop area consists of approximately 20 acres and the potential future crop area consists of approximately 13.8 acres. Predicted future needs are not a basis for the farm pond exemption, as the potential cropland is currently in timberland and your client has not proposed to complete the necessary work to clear it.

Potential options moving forward include purchasing mitigation or removing the impoundment. Less environmentally impactful options may also exist, such as drilling an irrigation well, creating a localized "sump" pit within Shoals Creek, or potentially, a smaller impoundment.

Based on the information received from Schnabel, along with a site visit conducted by the EPA on November 30, 2021, the EPA does not agree with the September 23, 2022, Report of Water Needs Assessment and does not agree that your client's impoundment is exempt pursuant to Section 404(f)(1)(C) of the CWA. The EPA has determined that the discharges that have been occurring at the Site since the impoundment's construction are in waters of the United States that are within the jurisdiction of Section 404 of the CWA. The discharge of dredged and/or fill material appears to have occurred during clearing and filling activities to construct a recreational pond resulting in impacts to approximately 20 acres of wetlands adjacent to Shoals Creek and approximately 115 linear feet of direct impact to Shoals Creek as fill for the dam and approximately 1,185 linear feet of secondary impacts from inundation of the channel. Placement of dredged and/or fill materials into any jurisdictional waterway and/or their adjacent wetlands, including material re-deposited during mechanized land clearing or excavation of those waters, require authorization from the U.S. Army Corps of Engineers. As a result, the EPA believes that you are in violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, for the following reasons:

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except in compliance with a permit or exemption issued under Section 404 of the CWA.

Commencing in late 2018 to 2020, Circle Oak East, LLC, and Clarence Nalley and/or those acting on their behalf, discharged dredged and/or fill material into jurisdictional waters using earth moving machinery without COE authorization during activities associated with the construction of an impoundment and installing water control devices within Shoals Creek. To date, the unauthorized dredge and/or fill material remains in waters of the United States.

These unauthorized activities impacted approximately 1,300 linear feet of Shoals Creek and approximately 20 acres of adjacent wetlands. Shoals Creek is a tributary of White Oak Creek which flows into the Flint River. White Oak Creek and the Flint River are navigable waters of the United States.

At no time during the discharge of dredged and/or fill material into waters of the United States did Circle Oak East, LLC, or Clarence Nalley, possess a CWA Section 404 permit authorizing the discharge of dredged and/or fill material, or operated under a valid Section 404 exemption. A discharge into jurisdictional waters without the required permit issued under Section 404 of the CWA or conducted under a valid Section 404 exemption is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Therefore, Circle Oak East, LLC, and Clarence Nalley have violated Section 301 of the CWA, by discharging pollutants into waters of the United States without a valid permit or exemption.

Each day the discharged material remains in waters of the United States without the required permit or exemption under Section 404 of the CWA, constitutes a day of violation of Section 301 of the CWA.

Such violations are subject to enforcement actions pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, which may include the issuance of compliance orders, the assessment of administrative penalties, and/or the initiation of civil or criminal actions. In order to resolve the violation and your client's potential liability for civil penalties, the EPA is offering your client an opportunity to show cause why further enforcement action should not be taken. Within fourteen calendar days of your receipt of this letter please contact Paula Feldmeier to arrange a telephone conference to discuss the violation and the EPA's possible enforcement action.

Your client should be prepared to provide all relevant information with supporting documentation pertaining to the violation, including, but not limited to, any financial information which may reflect an inability to pay a penalty. Please be aware that the EPA may use information provided during the telephone conference in any enforcement proceeding related to this matter. Failure to schedule a show-cause conference may result in the EPA initiating a formal enforcement action against your clients.

The EPA appreciates your prompt attention to this matter. If your clients have any questions regarding this letter, please contact Joel Strange, Enforcement Officer, at (404) 562-9455, or at strange.joel@epa.gov. For legal questions, please contact Paula Feldmeier, Associate Regional Counsel, at (404) 562-8276, or at feldmeier.paula@epa.gov. Thank you for your cooperation in this matter.

Sincerely,

CAROL KEMKER  Digitally signed by CAROL
KEMKER
Date: 2022.12.05 10:37:57 -05'00'

Carol L. Kemker
Director
Enforcement and Compliance Assurance Division

cc: Adam White, U.S. Army Corps of Engineers
Savannah District