



August 15, 2008

Darrell Smith
2435 Albert Pike
Hot Springs, Arkansas 71913

RE: Dam construction on Kelly Creek

Dear Mr. Smith:

On August 1, 2008, I performed a routine compliance inspection of the above referenced construction site in accordance with the provisions of the Federal Clean Water Act, the Arkansas Water and Air Pollution Control Act, and the regulations promulgated thereunder. This inspection revealed the following violations:

1. An earthen embankment was constructed on Kelly Creek without obtaining the appropriate permits; including, but not limited to a State Storm Water Permit; a State Short-term Activities Authorization; a county MS4 Storm Water Permit; and permit pursuant to Section 404 of the Clean Water Act from the U.S. Army Corps of Engineers.
2. During the excavation of this earthen embankment, dredge/fill material was discharged into the waters of the state; this is a violation of the Arkansas Water and Air Pollution Control Act 8-4-217.(a)(1).
3. While still under construction, a portion of the embankment washed out depositing excessive amounts of sediment into Kelly Creek; this is a violation of the Arkansas Water and Air Pollution Control Act 8-4-217.(a)(1).
4. There has been no effort to stabilize the exposed areas or use sediment controls to prevent further sediment from entering the waters of the state.

The above items require your immediate attention. Please submit a written response to these findings to the Water Division Enforcement Section of this Department at the following address:

Water Division Enforcement Section
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

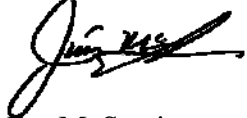
This response should contain detailed documentation describing the course of action taken to correct the items noted. This corrective action should be completed as soon as possible, and the written response is due by August 30, 2008.

Darrell Smith
August 15, 2008
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For additional information you may contact the enforcement section by telephone at 501-682-0639 or by fax at 501-682-0910.

If I can be of any assistance, please contact me at 501-520-0541.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim McSwain", with a stylized flourish at the end.

Jim McSwain
District 7 Field Inspector
Water Division

cc: Water Division Enforcement Branch
Water Division Permits Branch

NPDES Compliance Inspection Report

Section A: National Data System Coding

Transaction Code				NPDES							Yr/Mo/Day					Inspec. Type		Inspector		Fac. Type									
1	N	2	5	3	A	R	R	1	5	0	0	0	0	11	12	0	8	0	8	0	1	17	18	W		19	S	20	2
															Remarks														
Inspection Work Days				Facility Evaluation Rating							BI		QA		-----Reserved-----														
67				69										71	N	72	N	73				74						80	

Section B: Facility Data

Name and Location of Facility Inspected (<i>For industrial users discharging to POTW, also include POTW name and NPDES permit number</i>) The Darrell Smith Dam Construction Site Canyon Spring Circle Royal, AR		Entry Time/Date 1050 8/1/08	Permit Effective Date Not Permitted
		Exit Time/Date 1215 8/1/08	Permit Expiration Date
Name(s) of On-Site Representative(s)/Title(s)/Phone and Fax Number(s) Darrell Smith (Owner)			Other Facility Data
Name, Address of Responsible Official/Title/Phone and Fax Number Darrell Smith (Owner) 2435 Albert Pike Hot Springs, Arkansas 71913		Contacted Yes <input checked="checked" type="checkbox"/> No <input type="checkbox"/>	

Section C: Areas Evaluated During Inspection
(S = Satisfactory, M = Marginal, U = Unsatisfactory, N = Not Evaluated)

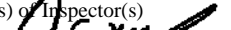
U	Permit	-	Flow Measurement	-	Operations & Maintenance	-	Sampling
-	Records/Reports	-	Self-Monitoring Program	-	Sludge Handling/Disposal	-	Pollution Prevention
-	Facility Site Review	-	Compliance Schedules	-	Pretreatment	-	Multimedia
U	Effluent/Receiving Waters	-	Laboratory	U	Storm Water	-	Other:

Section D: Summary of Findings/Comments (Attach additional sheets if necessary)

This inspection revealed that Mr. Smith constructed an earthen embankment without obtaining any of the applicable permits. At some point prior to this inspection, a portion of this embankment washed out into Kelly Creek. A significant amount of Dredge/Fill was deposited into the creek.

In Talking to the Garland County MS4 Inspector, he stated that he personally instructed Mr. Smith to obtain a storm water permit from the state and the county, along with obtain a 404 permit from the corp. Mr. Smith has made a request for an after-the-fact permit from the corps, but has failed to obtain any of the other required permits.

There is no evidence that any work pertaining to the storm water permit has been performed.

Name(s) and Signature(s) of Inspector(s) Jim McSwain 	Agency/Office/Telephone/Fax AR Dept. of Environmental Quality – Hot Springs Field Office – 501-520-0541 – Fax 501-520-5978	Date 8/8/08
Signature of Reviewer	Agency/Office/Phone and Fax Numbers	Date

A. General InformationSite Name: **Darrell Smith**Latitude: ~ **34°28'51.33"N**Longitude: ~**93°15'30.21"W**Total Acreage: ~**7**Acreage Disturbed: ~**8**Starting Date: **not known**

Project Type:

☒Residential ☐Commercial ☐Industrial ☐Roadway ☐Other:

Construction Stage:

☐Clearing ☐Rough Grading ☐Infrastructure ☐Building Construction ☒Final Stabilization☒Inactive ☐Other:

Permit Type:

☒General ☐Individual ☐Unpermitted

Site Posted:

☐Yes ☒No ☐Improper**B. Storm Water Pollution Prevention Plan (SWPPP)** [Part II Section A of Permit]SWPPP Developed and Onsite? ☐Yes ☒No ☐Incomplete ☐Not Updated as NeededComments: **Permittee has not developed a SWPPP**Are Stabilization Practices Satisfactory? ☐Yes ☒No ☐NAComments: **No stabilization implemented**Are erosion controls Satisfactory? ☐Yes ☒No ☐NAComments: **No Controls**Evidence of sediment leaving the site? ☒Yes ☐No ☐NAComments: **There has been a significant amount of sediment leave this site due to the washout of the overflow area of the embankment. (see attached photos)**Evidence of off-site tracking? ☐Yes ☒No ☐NA

Comments:

Evidence of sediment entering the Waters of the State? ☒Yes ☐Likely ☐No ☐NA

Comments:

Are inspections conducted and records kept as required in the permit? ☐Yes ☒No ☐NA

Comments:

Is corrective action taken based on results of inspections? ☐Yes ☐No ☒NA



Comments:

Are daily rainfall totals recorded? ☐Yes ☒No ☐NARainfall measured using: ☐On-site Rain Gauge ☒NA ☐Other:

Comments:

General Comments: **Mr. Smith was made aware of the permit requirements by Garland County's MS4 inspector (Tommy Kerr). There doesn't appear to be any application of this permit, nor the MS4's. Currently Mr. Smith is under a cease and desist order by the U.S. Army Corps of Engineers and Garland County's MS4.**

Water Division Construction Storm Water Photographic Evidence Sheet									
Location:									
Photographer:		Jim McSwain			Witness:		Tommy Kerr		
Photo #	1	Of	12		Date:	8/1/08	Time:	1110	
Description:		Photo of the earthen embankment constructed by Mr. Smith							
									
Photographer:		Jim McSwain			Witness:		Tommy Kerr		
Photo #	2	Of	12		Date:	8/1/08	Time:	1111	
Description:		Area of the embankment that washed out							
									

Water Division Construction Storm Water Photographic Evidence Sheet									
Location:									
Photographer:		Jim McSwain			Witness:		Tommy Kerr		
Photo #	3	Of	12		Date:	8/1/08	Time:	1111	
Description:		Close-up of the washed out embankment							
 <div data-bbox="1258 478 1412 571" style="border: 1px solid black; padding: 2px; position: absolute; top: 228px; left: 775px;"> A intermittent tributary flows thru here </div>									
Photographer:		Jim McSwain			Witness:		Tommy Kerr		
Photo #	4	Of	12		Date:	8/1/08	Time:	1146	
Description:		Photo of the sediment deposited into Kelly Creek							
<div data-bbox="194 1432 316 1528" style="border: 1px solid black; padding: 2px; position: absolute; top: 682px; left: 120px;"> Kelly Creek </div> 									

Water Division Construction Storm Water Photographic Evidence Sheet								
Location:								
Photographer:		Jim McSwain			Witness:		Tommy Kerr	
Photo #	5	Of	12		Date:	8/1/08	Time:	1146
Description:		Sediment deposited into Kelly Creek						
								
Photographer:		Jim McSwain			Witness:		Tommy Kerr	
Photo #	6	Of	12		Date:	8/1/08	Time:	1147
Description:		The back side of the embankments (no stabilization)						
								

Water Division Construction Storm Water Photographic Evidence Sheet									
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Location:									
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Photographer:	Jim McSwain				Witness:	Tommy Kerr			
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Photo #	7	Of	12		Date:	8/1/08	Time:	1148
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Description:	Sediment in Kelly Creek								
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Photographer:	Jim McSwain				Witness:	Tommy Kerr			
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Photo #	8	Of	12		Date:	8/1/08	Time:	1148
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Description:	Sediment in Kelly Creek (Photos taken as I walk down Kelly Creek.)								
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Water Division Construction Storm Water Photographic Evidence Sheet							
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Location:							
Photographer:	Jim McSwain				Witness:	Tommy Kerr	
Photo #	9	Of	12		Date:	8/1/08	Time: 1150
Description:	Sediment in Kelly Creek (Photos taken as I walk down Kelly Creek.)						



Photographer:	Jim McSwain				Witness:	Tommy Kerr	
Photo #	10	Of	12		Date:	8/1/08	Time: 1152
Description:	Photo taken from Kelly Creek looking back towards the embankment (in the background)						



Water Division Construction Storm Water Photographic Evidence Sheet									
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Location:									
Photographer:		Jim McSwain				Witness:		Tommy Kerr	
Photo #	11	Of	12		Date:	8/1/08	Time:	1153	
Description:		Photo taken from Kelly Creek looking back down the backside of the embankment							



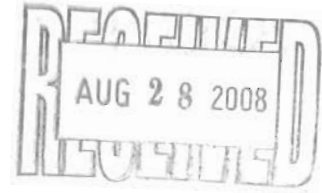
Outfall from
the overflow
structure seen
in photo 1

Photographer:		Jim McSwain				Witness:		Tommy Kerr	
Photo #	12	Of	12		Date:	8/1/08	Time:	1156	
Description:		Standing on the embankment. Overall view of the lake. The inflow from Kelly Cr. In the background.							



DARRELL SMITH
2435 Albert Pike
Hot Springs, AR 71913

August 26, 2008



Water Division Enforcement Section
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 82118-5317
Attn: Jim McSwain
District 7 Field Inspector
Water Division

RE: Dam construction for Pond

Dear Mr. McSwain:

I would like to start this letter by letting you know that I was at no time aware that I was required to have any of these permits being requested of me, but in answer to your questions (1-4), in your letter dated August 15, 2008 are as follows.

I have applied for an After the Fact Permit #404 from the Corps of Engineers (see attached Tolling Agreement). Also, all exposed areas have been covered with hay and seeded to help stabilize exposed areas.

If you have any further questions, please advise.

Sincerely,

A handwritten signature in dark ink, appearing to read "Darrell Smith".

Darrell Smith

TOLLING AGREEMENT

WHEREAS, the United States of America, on behalf of the United States Army Corps of Engineers (Corps) may file a complaint against Mr. Darrell Smith ("potential defendant(s)") for, inter alia, alleged violations of Sections 301(a), 309, and 404 of the Clean Water Act ("CWA"), 33 U.S.C. Sections 1311(a), 1319, 1344 and/or Section 9, 10, or 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. Sections 401, 403, or 407, and/or Ocean Dumping Act Sections 101 and/or 103 (33 U.S.C. 1411, 1413), at a site commonly known as an unauthorized earthen embankment (MVK-2007-1018) located in section 16, T3S-R21W, Garland County, Arkansas.

WHEREAS, the purpose of any such complaint would be to obtain appropriate injunctive relief and to impose appropriate civil or criminal penalties for potential defendant'(s) alleged violations of the statute(s) cited above;

WHEREAS, the Corps will accept an after-the-fact (ATF) permit application from the potential defendant(s) in an attempt to settle the above claims;

WHEREAS, both parties believe that their interests will best be served by continuing the ATF permit process without the disruption that might be occasioned should the United States file a complaint in the immediate future;

AND WHEREAS both parties acknowledge the requirement found at 33 C.F.R. 331.11(c) for an applicant for an ATF permit to provide a signed tolling agreement;

THEREFORE, the United States and potential defendant(s) stipulate and agree as follows:

1. The United States and potential defendant(s) agree that the time between the acceptance by the Corps of the ATF permit application and the final Corps decision (as defined at 33 CFR 331.10), plus one year thereafter, will not be included in calculating any statute of limitations that might be applicable to the alleged statutory violation(s) described above. Potential defendants agree not to assert, plead, or raise in any fashion on behalf of any party, whether by answer, motion, or otherwise, any defense or avoidance based on the running of any statute of limitations that may apply during that period or any defense or avoidance based on laches or other principle concerning the timeliness of commencing a civil action, based on the failure of the United States to file its complaint during that period.

2. Potential defendants further agree not to transfer the property in question during the pendency of this tolling agreement nor during the pendency of any civil action brought as described above, without first notifying the United States and giving the United States a reasonable opportunity to oppose such transfer.

3. Nothing in this tolling agreement shall restrict or otherwise prevent the United States from filing a complaint regarding any alleged statutory violation(s) not described above, at any time.

4. This tolling agreement does not constitute any admission of liability on the part of potential defendants; nor does it constitute any admission or acknowledgment on the part of the United States that any statute of limitations has run or that any statute of limitations is applicable to the statutory claims described above.

5. This tolling agreement contains the entire agreement between the parties, and no statement, promise or inducement made by any party to this agreement, or any agent of such parties, that is not set forth in this agreement shall be valid or binding. This tolling agreement may not be enlarged, modified or altered except in writing signed by the parties. This tolling agreement may be executed in counterparts.

FOR the United States of America:

District Counsel
Vicksburg District
U.S. Army Corps of Engineers

Date

FOR ("potential defendant(s)")



Date

8-4-08



DEPARTMENT OF THE ARMY

VICKSBURG DISTRICT, CORPS OF ENGINEERS

4155 CLAY STREET

VICKSBURG, MISSISSIPPI 39183-3435

REPLY TO

ATTENTION OF:

JUL 29 2008

Operations Division
Regulatory Branch

Mr. Darrell Smith
2435 Albert Pike
Hot Springs, Arkansas 71913

Dear Mr. Smith:

I am in receipt of the information you provided to this office in response to the cease and desist directive for the excavation and discharge of dredged/fill material into waters of the United States below the ordinary high water mark of Kelly Creek, a relatively permanent water. This activity is located near Canyon Springs Circle in section 16, T3S-R21W, Garland County, Arkansas. A map depicting the approximate location of the work is enclosed (enclosure 1).

Information pertinent to the activity has been gathered for use in reviewing the work and determining what course of action should be taken. Our initial investigation is now complete, and I have decided not to pursue additional enforcement action at this time. The application you submitted will be reviewed as an after-the-fact permit request provided you sign and return the enclosed tolling agreement (enclosure 2). The signed tolling agreement should be submitted to this office within 10 days of the date of this letter.

Meanwhile, any work you conduct outside the limits of my regulatory jurisdiction will be performed at your own risk and should not be undertaken if it is dependent upon work requiring authorization from the Corps of Engineers. Until such time as you may be granted a Department of the Army permit, further work in wetlands or other waters of the United States is prohibited. You should also be aware that following my public interest review, modifications, protective measures, mitigation or possibly even restoration of the area may be necessary.

By a copy of this letter, I am advising the appropriate offices of the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the U.S. Attorney, and appropriate State and local agencies of this enforcement action. Their comments will be sought during my public interest review of the activity.

If you have any questions concerning this matter, please contact Mr. David W. Carraway of my Regulatory Branch, telephone number (601) 631-5591, fax (601) 631-5459 or e-mail address: regulatory@usace.army.mil.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael C. Wehr", with a stylized flourish at the end.

Michael C. Wehr
Colonel, Corps of Engineers
District Engineer

Enclosures