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HEARINGS CLERK
REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DEAN AND DOROTHY ORBISON AND
THE ORBISON COMMUNITY PROPERTY
TRUST

Sitka, Alaska

Respondents.

DOCKET NO. CWA-10-2018-0241

CONSENT AGREEMENT

Proceedings Under Section 309(g) of the Clean
Water Act, 33 U.S.C. § 1319(g)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g).

1.2. Pursuant to CWA Section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A), the EPA is authorized to assess a civil penalty against any person that has violated CWA Section 301, 33 U.S.C. § 1311.

1.3. CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of Class II civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to the 2015 amendments to the Federal Civil Penalty Inflation Adjustment Act, 28 U.S.C. § 2461, and 40 C.F.R. Part 19, the administrative assessment of Class II civil penalties may not exceed \$20,965 per day for each day during which the violation continues, up to a

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**U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101
(206) 553-1037**

maximum penalty of \$262,066. See also 82 Fed. Reg. 3633 (January 12, 2017) (2017 Civil Monetary Penalty Inflation Adjustment Rule).

1.4. Pursuant to CWA Section 309(g)(1)(A) and (g)(2)(B), 33 U.S.C. § 1319(g)(1)(A) and (g)(2)(B), and in accordance with Section 22.18 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Dean and Dorothy Orbison and The Orbison Community Property Trust (Respondents) agree to issuance of, the Final Order attached to this Consent Agreement.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a penalty is proposed to be assessed pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g), to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”).

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and implementing regulations that Respondents are alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Framework

3.1. As provided in CWA Section 101(a), 33 U.S.C. § 1251(a), the objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

3.2. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person from any point source into waters of the United States except, *inter alia*, as authorized by a Department of Army permit issued by the United States Army Corps of Engineers (USACE) pursuant to CWA section 404, 33 U.S.C. § 1344.

3.3. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

3.4. The term “navigable waters” is defined as “waters of the United States.” 33 U.S.C. § 1362(7). 40 C.F.R. § 122.2 defines “waters of the United States” to include waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; all interstate waters; and tributaries to those waters.

3.5. Within a non-tidal “waters of the United States,” jurisdiction extends laterally to the ordinary high water mark (OHWM) or, if adjacent wetlands are present, “to the limit of the adjacent wetlands.” 33 C.F.R. § 328.4(c). The OHWM is defined as the “line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 C.F.R. § 328.3(c)(6).

3.6. A “point source” includes, *inter alia*, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete

fissure, [or] container . . . from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14).

3.7. A “pollutant” includes dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, rock, sand, and industrial waste discharged into water. CWA §502(6), 33 U.S.C. §1362(6).

3.8. “Fill material” includes material placed in waters of the United States where the material 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. Examples of fill material include rock, sand, soil, clay, construction debris, wood chips, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. 40 C.F.R. § 232.2.

3.9. Each discharge of pollutants from a point source that is not authorized by a permit issued pursuant to the CWA constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

General Allegations

3.10. Respondents are each a “person” under CWA Section 502(5), 33 U.S.C. § 1362(5).

3.11. Respondents own, possess, and/or control approximately 0.32 acres of real property located at 613 Lake Street in Sitka, Alaska (City and Borough of Sitka Parcel No. 17726000), which is hereinafter referred to as the “Site.”

3.12. The Site abuts Swan Lake. Swan Lake flows into Swan Creek, which flows into Crescent Bay. Crescent Bay is subject to the ebb and flow of the tide and is susceptible to interstate commerce. Swan Lake itself is also susceptible to interstate commerce, particularly in the form of commercial waterborne recreation. As such, Swan lake is a “navigable water” within

the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7), and is a “water of the United States” as defined in 40 C.F.R. § 122.2.

Violations

3.13. As described below, in October 2016, Respondents violated CWA Section 301, 33 U.S.C. § 1311.

3.14. In October 2016, Respondents and/or persons acting on their behalf used certain heavy earthmoving equipment, such as excavators, a roller, and a diesel plate compactor, to discharge dredged and/or fill material along 108 linear feet of shoreline below the OHWM of Swan Lake.

3.15. The construction equipment referenced in Paragraph 3.14 are “point source[s]” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

3.16. The dredged and/or fill materials that Respondents and/or persons acting on their behalf caused to be discharged, as referenced in Paragraph 3.14, include multiple types of large rock and gravel, each of which constitutes “dredged material” and/or “fill material” within the meaning of 40 C.F.R. § 232.2, and each of which constitutes a “pollutant” within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

3.17. By causing such dredged and/or fill materials to enter waters of the United States, Respondents engaged in the “discharge of pollutants” from a point source within the meaning of CWA Sections 301(a) and 502(12), 33 U.S.C. §§ 1311(a) and 1362(12).

3.18. Respondents’ discharge of dredged and/or fill materials described in Paragraph 3.14 above was not authorized by any permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344. Respondents are therefore in violation of CWA Section 301(a), 33 U.S.C. § 1319(g)(2)(B).

3.19. Each day that the dredged and/or fill material remains in place without the

required permit constitutes a violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

IV. TERMS OF SETTLEMENT

4.1. Respondents admit the jurisdictional allegations contained in this Consent Agreement.

4.2. Respondents neither admit nor deny the specific factual allegations contained in this Consent Agreement.

4.3. As required by CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), the EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondents' economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined that an appropriate penalty to settle this action is \$13,500.

4.4. Respondents consent to the assessment of the civil penalty set forth in Paragraph 4.3 and agree to pay the total civil penalty within 30 days of the effective date of the Final Order.

4.5. Payment under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077

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**U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101
(206) 553-1037**

St. Louis, MO 63197-9000

Respondents must note on the check the title and docket number of this action.

4.6. Respondents must serve photocopies of the check, or proof of other payment method described in Paragraph 4.5, on the Regional Hearing Clerk and EPA Region 10

Compliance Officer at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Young.teresa@epa.gov

Mark Jen
U.S. Environmental Protection Agency
Region 10
222 W. Seventh Avenue, # 19
Anchorage, AK 99513
jen.mark@epa.gov

4.7. If Respondents fail to pay the penalty assessed by this Consent Agreement in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondents to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

a. Interest. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

b. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondents fail to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondents shall pay (in addition to any assessed penalty

and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondents' penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondents certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondents to this document.

4.10. Respondents have agreed to enter into an Administrative Order on Consent ("Consent Order"), which will be issued by EPA under the authority of CWA Sections 308 and 309(a), 33 U.S.C. §§ 1318 and 1319(a), for implementation of a restoration and mitigation work plan for fill removal, revegetation, monitoring, and annual reporting.

4.11. Except as described in Subparagraph 4.7.b., above, each party shall bear its own costs in bringing or defending this action.

4.12. Respondents expressly waive any right to contest the allegations and waive any right to appeal this Consent Agreement and the Final Order.

4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondents and its agents, servants, employees, successors, and assigns.

4.14. The above provisions are STIPULATED AND AGREED upon by Respondents and EPA Region 10.

DATED:

1/12/18

FOR RESPONDENTS:

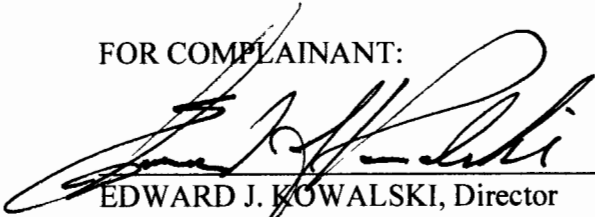


DEAN ORBISON

DATED:

1/24/2018

FOR COMPLAINANT:



EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DEAN AND DOROTHY ORBISON AND
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TRUST

Sitka, Alaska

Respondents.

DOCKET NO. CWA-10-2018-0241

FINAL ORDER

Proceedings Under Section 309(g) of the Clean
Water Act, 33 U.S.C. § 1319(g)

1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) Region 10, who has in turn delegated this authority to the Regional Judicial Officer, EPA Region 10.
2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondents are ordered to comply with the terms of settlement.
3. The Consent Agreement and this Final Order constitutes a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act (CWA) for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondents' obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.
4. Respondents waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondents may have with respect to

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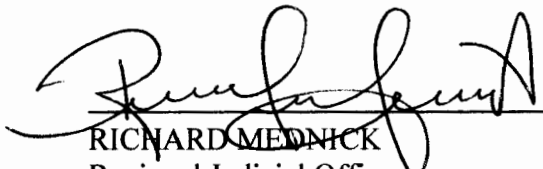
any issue of fact or law set forth in this Final Order, including, but not limited to, any right of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.

5. Pursuant to CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Alaska Department of Environmental Conservation has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondents.

6. Pursuant to CWA Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondents. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

7. This Final Order shall become effective upon filing.

SO ORDERED this 26th day of February, 2018.


RICHARD MEDNICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

Certificate of Service

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of: Dean and Dorothy Orbison and The Orbison Community Property Trust, Docket No.: CWA-10-2018-0241**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

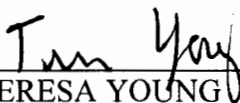
The undersigned certifies that a true and correct copy of the document was delivered to:

Ashley Palomaki
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Dean Orbison
P.O. Box 1751
Sitka, Alaska 99835

DATED this 26 day of February, 2018.



TERESA YOUNG
Regional Hearing Clerk
EPA Region 10