



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET

DENVER, CO 80202-1129

Phone 800-227-8917

http://www.epa.gov/region08

2013 SEP 30 PM 12:04

FILED
EPA REGION VIII
HEARING CLERK

DOCKET NO.: CWA-08-2012-0025

IN THE MATTER OF:

NELCON, INC.

RESPONDENT

)
)
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)
)

FINAL ORDER

Pursuant to 40 C.F.R. §22.13(b) and 22.18, of EPA's Consolidated Rules of Practice, certain provisions of the attached Consent Agreement resolving this matter are hereby approved and incorporated by reference into this Final Order. Any paragraph that provides for compliance or corrective action in the Consent Agreement, including but not limited to, paragraphs 6-9, are not authorized under this Final Order.

Pursuant to 40 C.F.R. §22.1(c) Complainant shall prepare and both parties shall sign an Administrative Order on Consent or a functionally equivalent order that incorporates the compliance and corrective action provisions in the Consent Agreement, including but not limited to paragraphs 6-9. The parties shall file the Order on Consent with the Regional Hearing Clerk within 30 days of the signing of this Final Order.

Respondent is **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondent of this Consent Agreement and Final Order. Both Complainant and Respondent are hereby **ORDERED** to comply with the Final Order.

SO ORDERED THIS 30th DAY OF September, 2013.

Elyana R. Sutin
Regional Judicial Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2013 SEP 30 PM 12:04

In the Matter of:)

Nelcon, Inc.,)

Respondent)

) Docket No. CWA-08-2012-0025

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CONSENT AGREEMENT

Complainant United States Environmental Protection Agency Region 8 (EPA) and respondent Nelcon, Inc. (Respondent), by their undersigned representatives, hereby consent and agree as follows:

1. On July 1, 2013, EPA filed a First Amended Complaint and Notice of Opportunity for Hearing (Amended Complaint), alleging that Respondent discharged pollutants to a waters of the United States without a permit in violation of section 301(a) of the Clean Water Act, as amended (Act), 33 U.S.C. § 1311(a). The Amended Complaint proposed that Respondent pay an administrative civil penalty for its violations, pursuant to section 309(g) of the Clean Water Act (the Act), 33 U.S.C. § 1319(g).

2. Respondent admits the jurisdictional allegations of the Amended Complaint and neither admits nor denies the specific factual allegations of the Amended Complaint. Respondent does not admit to any violations of the Act or to any wrongdoing.

3. Respondent waives its right to a hearing before any tribunal to contest any issue of law or fact set forth in the Amended Complaint or in this Consent Agreement.

4. This Consent Agreement, upon incorporation into a final order (Final Order), applies to and is binding upon the EPA and upon Respondent and Respondent's successors and assigns. This Consent Agreement contains all terms of the settlement agreed to by the parties.

5. Respondent consents and agrees to pay a civil penalty in the amount of one hundred thousand dollars (\$100,000.00) in the manner described below.

- a. Payment shall be in four equal installments of twenty-five thousand dollars (\$25,000.00), and shall be made on or before the due dates set forth in paragraph 5.b below. Respondent, however, may make additional payments in advance of the due dates in its sole discretion. Any such additional payments shall first reduce the amount of the final payment due.
- b. The four installments are due on: (i) October 15, 2013; (ii) December 31, 2013; (iii) March 20, 2014; and (iv) June 20, 2014. If the due date for any payment falls on a weekend or legal federal holiday, then the due date is the next business day. The date the payment is made is considered to be the date processed by U.S. Bank, described below. Payment must be received by 11:00 AM Eastern Standard Time to be considered as received that day.
- c. Each payment shall be made by remitting a cashier's or certified check, or making a wire transfer or on-line payment, including the name and docket number of this case, payable to "Treasurer, United States of America," as follows:

If sent by regular U.S. mail:

U.S. Environmental Protection Agency / Fines and Penalties
P.O. Box 979077
St. Louis, MO 63197-9000

If sent by any overnight commercial carrier:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

If sent by wire transfer: any wire transfer must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA: 021030004
Account Number: 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of Fedwire message should read "D 68010727
Environmental Protection Agency"

Each payment may also be made on-line by accessing "www.pay.gov." Enter sfo 1.1 in the search field. Open the form and complete the required fields.

A copy of each check (or notification of wire transfer or on-line payment) shall be sent simultaneously to:

David Rise
Environmental Protection Specialist (8MO)
U.S. EPA Region 8, Montana Office
10 W. 15th Street, Suite 3200
Helena, Montana 59626

and

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129

- d. If any payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full of the late installment is received. Late payment of any installment shall not delay the due date for any subsequent installments as they become due under this paragraph 5.
- e. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 31st day from the date of the Final Order, and for each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if any payment is not received within 30 days of the due date. Payments made by Respondent are first applied to

outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

- f. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

6. Respondent consents and agrees to undertake additional stabilization efforts at the Willow Creek crossing depicted in the photograph attached as Exhibit A (Willow Creek) and the portion of the Two Medicine crossing depicted in the photograph attached as Exhibit B (Two Medicine) that are consistent with the Criteria for Stabilization section of the National Pollutant Discharge Elimination System General Permit for Discharges from Construction Activities, effective February 16, 2012 (*See*, 77 Fed. Reg. 12286, February 29, 2012; *also see*, http://www.epa.gov/npdes/pubs/cgp2012_finalpermit.pdf) (2012 CGP). In particular, for Willow Creek and Two Medicine Respondent agrees to take measures consistent with section 2.2.2 of the 2012 CGP, and that final stabilization, as defined in section 2.2.2.1(a)(ii) of the 2012 CGP is achieved as quickly as practicable, but in no event later than August 30, 2014.

7. To meet the objectives in paragraph 6 above, Respondent shall:

- a. within thirty (30) days of this Consent Agreement being incorporated into a Final Order, submit a stabilization analysis of Willow Creek and Two Medicine to EPA for EPA review, comment and approval (or approval with modifications). The stabilization analysis shall include a detailed description of the status of presently existing stabilization efforts including dated photographs; a description of additional measures to be taken to ensure the objectives in paragraph 6 are met; and any other related information;
- b. submit an interim stabilization report to EPA within sixty (60) days of EPA's receipt of the stabilization analysis detailing all stabilization work conducted to that date and the status of Respondent's stabilization efforts; and

c. thereafter, Respondent shall submit reports to EPA on a quarterly basis until EPA provides written notice to the Respondent that EPA accepts Respondent's report that final stabilization has been achieved at Willow Creek and Two Medicine. The first quarterly report shall cover the remainder of the month in which the interim stabilization report is submitted and the following three calendar months, and shall be due on the 10th day of the following month. Subsequent reports shall be due on the 10th day of the month following each quarter.

8. Each quarterly report shall, at a minimum, contain: narrative descriptions of Site conditions at the end of the quarter; stabilization work performed at Willow Creek and Two Medicine in the quarter; work Respondent expects to perform at Willow Creek and Two Medicine in the following quarter; other information necessary for EPA to determine whether stabilization is being maintained, or final stabilization has been achieved; and thorough photographic documentation of all of the foregoing.

9. If Respondent observes at any time, or should observe, that stabilization at Willow Creek and Two Medicine is not achieved, or maintained, or that final stabilization may not be achieved by August 31, 2014, Respondent must inform EPA of such observations no later than the next quarterly report. The parties recognize that Respondent's previous stabilization efforts at Two Medicine have been affected by a third-party's pipeline failure, and that it is possible that third party activity or other unforeseen events again may affect Respondent's ability to reasonably meet the August 31, 2014, deadline, particularly at Two Medicine. EPA encourages Respondent to report such observations as early as possible so that EPA and Respondent may attempt to address the issue as quickly as possible.

10. Nothing in this Consent Agreement shall relieve Respondent of the duty to comply with the Act, its implementing regulations, and any permit issued pursuant to the Act.

11. Any failure by Respondent to comply with any of the terms of this Consent Agreement shall constitute a breach of the Consent Agreement and may result in referral of the matter to the Department of Justice for enforcement of this Consent Agreement and for such other relief as may be appropriate.

12. Nothing in this Consent Agreement shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of the Respondent's failure to perform pursuant to the terms of this Consent Agreement.

13. The undersigned representative of the Respondent certifies that s/he is fully authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to the terms and conditions of this Consent Agreement.


14. The parties agree to submit this Consent Agreement to the Regional Judicial Officer, with a request that it be incorporated into a Final Order.

15. Each party shall bear its own costs and attorney fees in this matter.

16. This Consent Agreement, upon incorporation into a Final Order by the Regional Judicial Officer, shall be a complete and full civil settlement of the United States' claims for civil penalties for the violations alleged in the Amended Complaint.

**United States Environmental Protection Agency
Region 8,
Complainant.**

Date: 09/23/13


By: 
Gwenette C. Campbell, Unit Chief
NPDES Enforcement Unit

Date: 9/23/13

By: 
James H. Eppers
Supervisory Enforcement Attorney

**Nelcon, Inc.,
Respondent**

Date: 9/20/13

By: 
Name: MIKE P WHITE
Title: PRESIDENT

Address the area inside the line

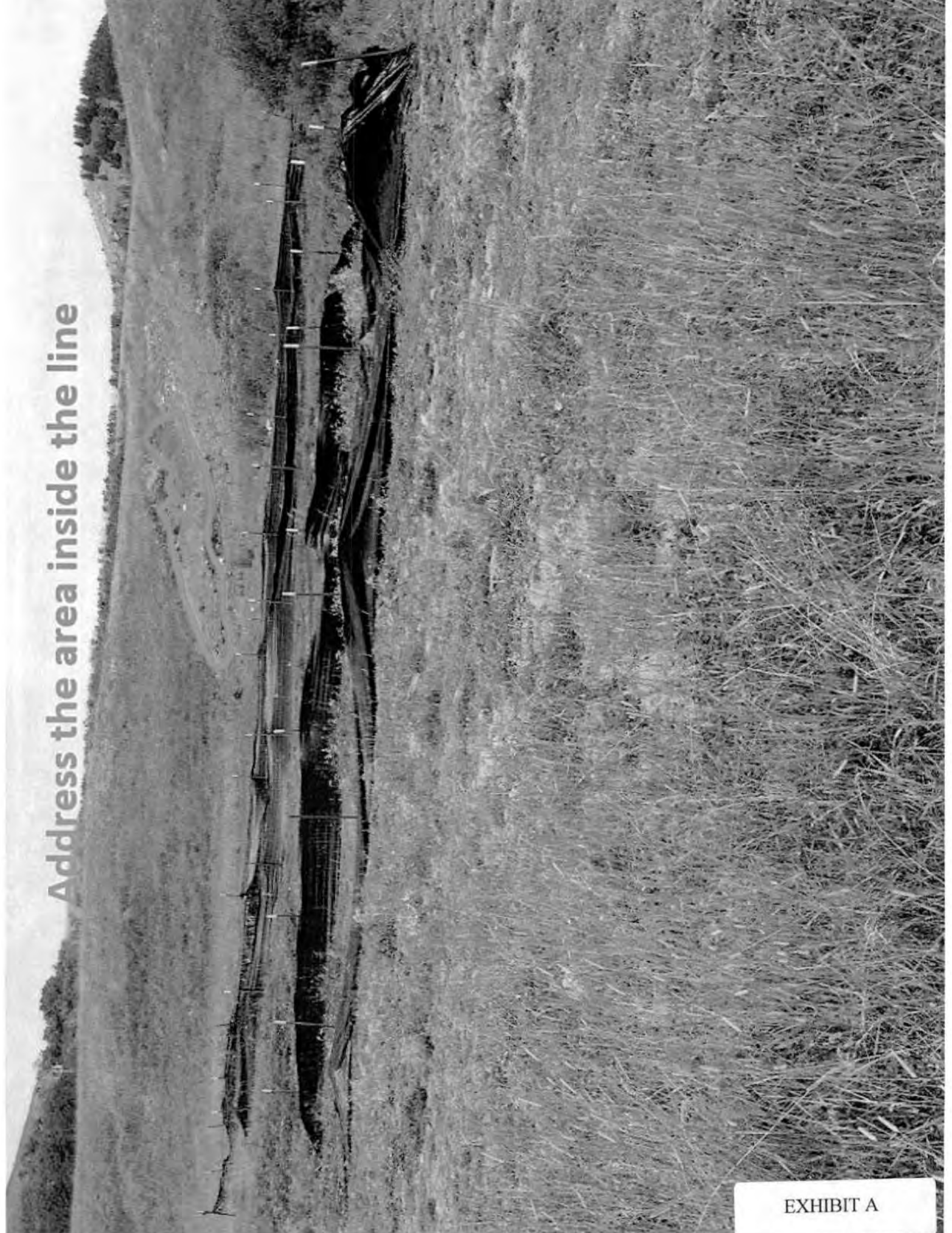


EXHIBIT A

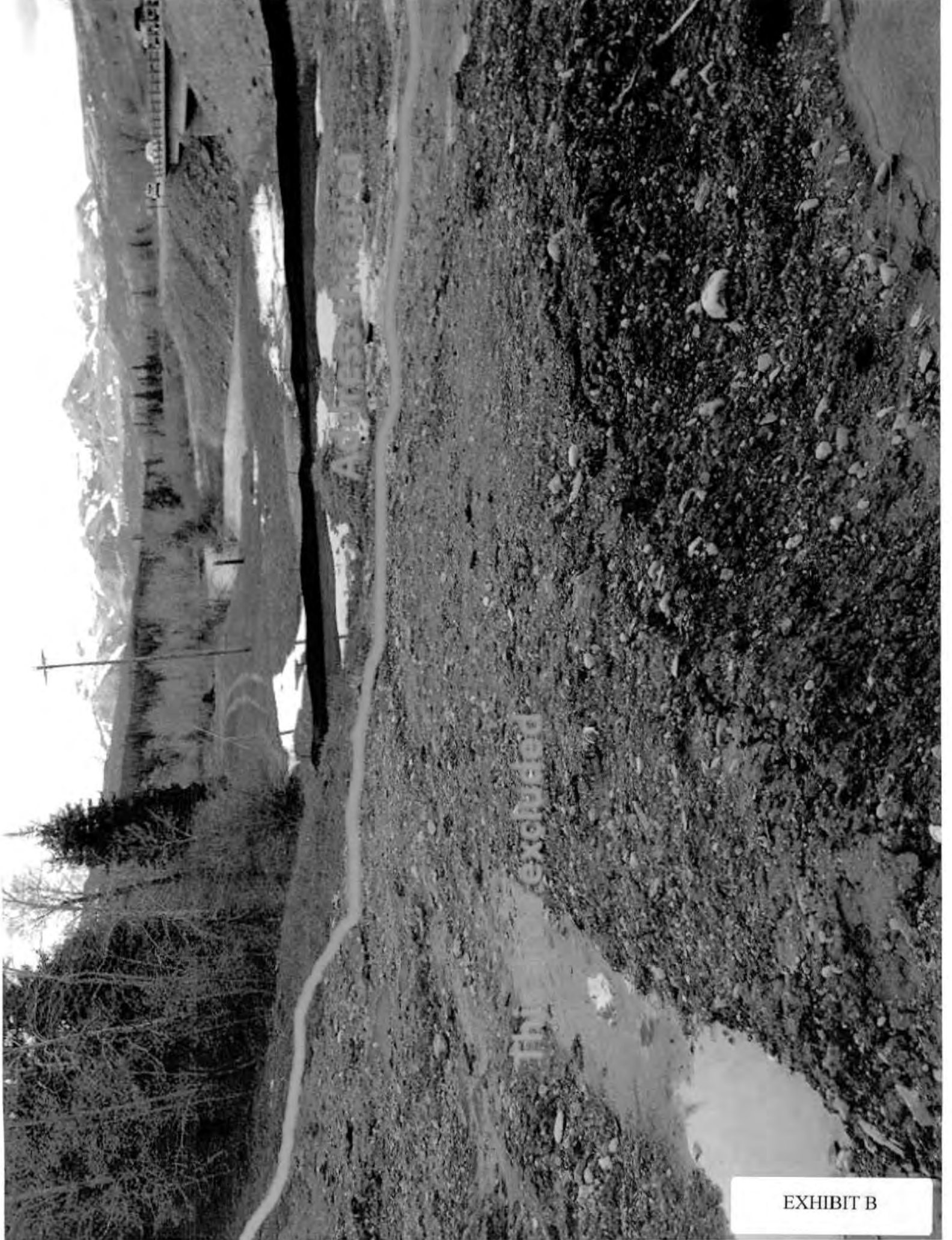


EXHIBIT B

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT and FINAL ORDER** in the matter **NELCON, INC.; DOCKET NO.: CWA-08-2012-0025**. The **CONSENT AGREEMENT AND FINAL ORDER** was filed with the Regional Hearing Clerk on September 30, 2013.

Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Chuck Figur, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were sent and placed in the United States mail certified/return receipt and emailed on September 30, 2013 to:

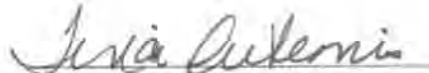
Rebecca L. Summerville
Datsopoulos, MacDonald & Lind, P.C.
201 West Main/Central Square Building
Missoula, MT 59802
rsummerville@dmlaw.com

And emailed to:

Susan L. Biro
Chief Administrative Law Judge
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Kim White
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

September 30, 2013


Tina Artemis
Paralegal/Regional Hearing Clerk



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