

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

IN THE MATTER OF)
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)
C & S ENTERPRISE, L.L.C.,) DOCKET NO. CWA-07-2018-0095
)
)
Respondent)
) COMPLAINANT'S PREHEARING
) EXCHANGE
)
_____)

Pursuant to 40 C.F.R. § 22.19 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22 and the Presiding Officer's Order of August 26, 2010, Complainant United States Environmental Protection Agency submits this Prehearing Exchange.

I. WITNESSES.

1. Dr. Delia Garcia, PhD. Dr. Garcia is an Environmental Scientist in the Water Enforcement Branch of Region 7's Water, Wetlands and Pesticides Division. Dr. Garcia has worked in Region 7's Water Enforcement program for over 12 years, primarily in the Clean Water Act Section 404 enforcement program. Dr. Garcia specializes in stream and wetland ecology and CWA jurisdiction. She will testify to her assessment of Respondent's noncompliance with the Clean Water Act and its regulations based on her review of the evidence concerning Respondent's unauthorized discharge of fill and/or dredged material into waters of the United States. She will testify regarding the facts EPA considered in proposing the penalty. Dr. Garcia will also testify about observations she made during her May 15, 2018, site visit to Respondent's property and a neighboring upstream property, and the factors she evaluated in determining that the affected waters are jurisdictional under the CWA. She will testify as a fact witness. A Photo Log and report memorializing Dr. Garcia's findings is attached as Complainant's Exhibit AX1.

2. Joey Shoemaker. Mr. Shoemaker is a Project Manager with the U.S. Army Corps of Engineers, Rock Island, Iowa District. He will testify about observations he made during his March 30, 2017 site visit to Respondent's property and his May 15, 2018 site visit to the property and an upstream property. He will also testify about the 404 permitting process, Respondent's need for a Section 404 permit, its failure to apply for such permit prior to its unauthorized discharges of fill material into waters of the U.S., and the factors he evaluated in determining that the affected waters are jurisdictional under the CWA. Mr. Shoemaker will testify as an expert witness. Mr. Shoemaker's site visit photographs and descriptions of

photographs are attached as Complainant's Exhibit AX2. His resume is attached as Complainant's Exhibit AX3.

3. Marlyn Schafer. Mr. Schafer was a project manager with the U.S. Army Corps of Engineers, Rock Island, Iowa District for over 12 years and retired in 2016. He will testify to his review of the evidence concerning Respondent's discharges of fill material, including observations he made during a July 29, 2015 site visit to Respondent's property. He will testify regarding the complaint he received from an adjacent property owner, his interaction with the U.S. Department of Agriculture's Natural Resources Conservation Service regarding Respondent's unauthorized discharges, and the factors he evaluated in determining that the affected waters are jurisdictional under the CWA. Mr. Schafer will testify as a fact witness. Mr. Schafer's site visit photographs are attached as Complainant's Exhibit AX4.

4. Lance Schaefer. Mr. Schaefer owns property approximately one mile southwest of Respondent's property. He will testify regarding his use and enjoyment of the unnamed tributary to Deep Creek, the impacts to the tributary and his property resulting from Respondent's discharges of fill material into the unnamed tributary to Deep Creek in July 2015, and to the complaints he made to NRCS and the Rock Island Corps District in July 2015. Mr. Schaefer's emails concerning Respondent's discharges are attached hereto as Complainant's Exhibit AX5.

5. Peter Stokely. Mr. Stokely has been with EPA since 1980 when he began his career as an aerial photography interpreter reviewing hazardous waste sites. Since 1988, Mr. Stokely has focused on stream and wetland science in the areas of CWA regulations and Geographic Information Systems interpretation. Mr. Stokely has become an Agency expert in interpreting wetland boundaries, drainage patterns and hydrological connections in support of CWA programs and enforcement efforts around the country. He has worked on enforcement cases in every EPA Region and has interpreted aerial photography for several Corps of Engineer Districts. Mr. Stokely has testified as an expert witness in aerial photography interpretation in federal court or EPA administrative proceedings two dozen times. Currently, Mr. Stokely provides technical support in CWA enforcement case and policy development for EPA's Office of Civil Enforcement in Washington, DC. He will testify as an expert witness and his resume is attached as Exhibit AX6.

6. Bert Noll. Mr. Noll is an Environmental Specialist with IDNR Field Office 6. He will testify concerning Iowa's setback regulations, construction and siting requirements, and about his interactions with Respondent and MCM Pork, LLC, the company that built the swine animal feeding operation on a portion of Respondent's property sold to the LLC. A December 19, 2017, EPA Region 7 internal memorandum documenting a phone conversation with Mr. Noll is attached as Exhibit AX14.

7. Kate Timmerman. Ms. Timmerman is a District Conservationist with the Natural Resources Conservation Service, Williamsburg, Iowa office. She will testify concerning the facts and NRCS processes leading to the NRCS's conclusion that Respondent filled in approximately 1.3 acres of wetlands abutting the unnamed tributary to Deep Creek.

8. EPA reserves the right to call all fact witnesses named by Respondent. EPA also reserves the right to supplement its witnesses based on information provided by Respondent in its Prehearing Exchange and facts and issues that may come to light subsequent to Prehearing submissions.

II. EXHIBITS.

For purposes of the list of documents below, "Agency's Exhibit" is abbreviated as "AX_."

- AX1 Photographs, photo log and narrative description of May 15, 2018 site visit to Respondent's property and upstream property conducted by EPA and the Corps. Please note that there are three video files from the site visit that are included in the list of exhibits.
- AX2 Photographs and a photo log from the Corps' March 30, 2017 site visit to Respondent's property conducted by Joey Shoemaker.
- AX3 Resume for Joey Shoemaker, Corps, Rock Island, Iowa District.
- AX4 Photographs from the Corps' July 29, 2015 site visit to Respondent's property conducted by Marlyn Schafer.
- AX5 Email complaints with photos from Lance Schaefer to Marlyn Schafer, Corps, and to Katherine Timmerman, NRCS, July 20, 2015.
- AX6 Resume for Peter Stokely, EPA Office of Enforcement and Compliance Assurance.
- AX7 Certified mail receipts signed by Respondent's attorney's law firm and by Respondent's owner, Scott Morrow, demonstrating receipt of EPA's December 28, 2017 Complaint and Notice of Opportunity for Hearing.
- AX8 April 26, 2017 letter from Respondent to Joey Shoemaker, Corps, acknowledging the "surface drainage" work done on Respondent's property.
- AX9 July 27-29, 2015 Telephone Conversation Record memorializing phone calls between Marlyn Schafer, Corps, and Scott Morrow, C & S Enterprise, LLC and Katherine Timmerman, NRCS. Mr. Schafer's notes include Mr. Morrow's acknowledgment of placement of fill material "because it was within the limits set by DNR for distance of the confinement unit to any channel."
- AX10 Historical satellite images of the affected tributary.
- AX11 March 28, 2016 Final Wetland Determination from NRCS for C & S Enterprise, LLC.
- AX12 Iowa Department of Natural Resources Notice of Intent for NPDES Coverage Under

General Permit authorizing construction of MCM Pork, LLC facility at “Morrow 1 Site” with a “discharge start date” of August 2015.

- AX13 December 18, 2017 email from Peter Stokely, EPA Office of Enforcement and Compliance Assistance, verifying that historical photos of Respondent’s property and affected stream indicate a “relatively permanent” water.
- AX14 December 19, 2017 EPA Region 7 internal memorandum documenting a phone conversation with Bert Noll, IDNR Field Office 6 Environmental Specialist, in which Mr. Noll verified that, but for Respondent’s placement of fill material in the tributary to Deep Creek, the animal feeding operation would violate Iowa’s setback regulations. The memorandum includes a map created by EPA Region 7 detailing the actual distance between the animal feeding operation and the tributary. It also includes a map submitted by a consultant to IDNR on behalf of the animal feeding operation owner showing a proposed location for the feeding operation that is further from the tributary than the current location.
- AX15 Scientific literature concerning importance of higher order streams and effects of impacts to those streams: *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, *Ecology: Achievement and Challenge*, *Lost Linkages and Lotic Ecology: Rediscovering Small Streams*.
- AX16 December 21, 2015 Telephone Conversation Record between Corps and Katherine Timmerman, NRCS concerning final wetland determination.
- AX17 April 6, 2017 letter from Corps to Scott Morrow/C & S Enterprise, LLC regarding the Corps’ referral of the case to EPA Region 7.
- AX18 October 7, 2015 letter from Marlyn Schafer of the Corps, Rock Island District to Scott Morrow, C & S Enterprise. The letter summarizes a conversation between Mr. Morrow and Mr. Schafer during a July 29, 2015 site visit to Respondent’s property in which Mr. Morrow explained “the reason for closing the channel is to meet State of Iowa requirements for distance between a planned swine confinement facility and open water.”
- AX19 Videos from EPA May 15, 2018 site visit. A separate thumb drive will be issued to the ALJ and opposing counsel.
- AX20 USGS Maps of Respondent’s property identifying the tributary to Deep Creek as an intermittent tributary.
- AX21 June 14, 2016 letter from NRCS to C & S Enterprise, LLC indicating that Scott Morrow asked NRCS about closing the “gully” ... “in order to put in the hog building.”
- AX22 IDNR web page promoting the English River for fishing and boating, found at: <http://www.iowadnr.gov/idnr/Fishing/Where-to-Fish/Lakes-Ponds-Reservoirs/LakeDetails/lakeCode/RER92>.

AX23 Public Notice of Complainant's December 28, 2017 Complaint and Notice of Opportunity for Hearing.

AX24 Light Detection and Ranging (LiDAR) imagery from site.

III. Detailed Discussion of Proposed Penalty

A. Introduction

The Clean Water Act regulates discharges of pollutants into waters of the United States. Section 301 of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants from a point source into a water of the United States except in compliance with a permit issued under, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2013, civil administrative penalties of up to \$16,000 per day for each day during which a violation continues, up to a maximum of \$187,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after December 6, 2013. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2015, civil administrative penalties of up to \$21,393 per day for each day during which a violation continues, up to a maximum of \$267,415, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after January 15, 2015.

In determining the amount of penalty, the CWA requires that EPA consider the nature, circumstances, extent and gravity of the violations as well as the economic benefit or savings resulting from the violation. EPA must also consider the violator's ability to pay, prior history of such violations, the degree of culpability, and other matters as justice may require. (33 U.S.C. § 1319(g)(3)). The following is a discussion of EPA's consideration of these statutory factors in determining the amount of the proposed penalty.

B. CWA Jurisdiction

For Respondent to be liable for CWA enforcement, including penalties, the affected waters must be "waters of the United States," as defined in Section 502 of the Act, 40 C.F.R. § 232.2 (1993), and further clarified in multiple court cases. At issue here is not whether Respondent placed material in the affected water bodies (to which Respondent has acknowledged; see AX8 and AX9). Rather, Respondent challenges findings by the Corps, EPA and NRCS that the affected water bodies are subject to regulation, and that the material placed in the water body is "fill material" and therefore a "pollutant" under the Clean Water Act.

In the present case, the unnamed intermittent tributary filled in by Respondent discharges directly into Deep Creek on the southern edge of Respondent's property. Deep Creek, a perennial stream, flows approximately 0.3 miles into the North English River. The North English River flows for approximately 24 miles before the name changes into the English River. The English River is a "traditionally navigable water" as it is promoted for fishing and boating by IDNR (AX22).

Prior to the fill activity initiated by Respondent, the section of unnamed tributary to Deep Creek exhibited all the characteristics of a "relatively permanent water" and had a "significant nexus" to a "traditionally navigable water" as those terms are defined in *Rapanos v. United States* (547 U.S. 715, 2009), subsequent clarifying case law, and EPA's post-*Rapanos* guidance.¹ Further, after Respondent appealed a 2015 NRCS determination that wetlands were present along the unnamed tributary to Deep Creek and that Respondent filled in those wetlands, the NRCS made a "final wetland determination" in March 2016 confirming 1.3 acres of "converted" wetlands abutting the tributary to Deep Creek.² Wetlands directly abutting a tributary to a "traditionally navigable water" also fulfill the "relatively permanent water" and "significant nexus" tests as defined in *Rapanos*.

C. Statutory Factors Considered in Penalty Calculation

1. Nature, Circumstances, Gravity and Extent

The Complaint alleges that in July 2015, Respondent discharged fill material into an unnamed tributary to Deep Creek. EPA determined the nature and extent of the violations, or "gravity factor" of the violations by taking into account the actual and potential harm to human health and the environment and the significance of the violations.

In this case, EPA and the Corps allege that Respondent filled in this portion of the tributary in conjunction with the sale of a section of his property to a buyer intending to construct a swine animal feeding operation;³ and that by filling in the tributary, the animal feeding

¹ See exhibit AX10 for historical satellite images showing defined bed and bank as well as the presence of water in the channel throughout multiple months of the year. See exhibit AX24 for LiDAR imagery showing historical presence of defined bed and bank. See exhibits AX1, AX2, AX4, and AX19 for photographs and videos from site visits conducted on May 15, 2018, May 30, 2017, and July 29, 2015, showing the tributary's defined bed and bank and ordinary high water mark upstream and downstream from the fill material, the presence of flowing water upstream from the fill material during each of the three site visits, and the presence of wetland indicators. See AX13, an email from EPA national CWA jurisdiction expert, Peter Stokely, confirming his conclusion the referenced photos indicate a "relatively permanent" water. See EPA's 2008 guidance document, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," found at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf. The guidance states that EPA will assert CWA jurisdiction over "non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)" and "wetlands that directly abut such tributaries."

² See AX11, March 28, 2016 Final Wetland Determination from NRCS for C & S Enterprise, LLC.

³ See AX12, Iowa Department of Natural Resources Notice of Intent for NPDES Coverage Under General Permit authorizing construction of MCM Pork, LLC facility at "Morrow 1 Site" with a "discharge start date" of August

operation avoided the State's setback requirements mandating at least 500 feet between an animal feeding operation and a "water source."⁴ Respondent placed the fill material within 1,871 linear feet of the tributary and approximately 1.3 acres of wetlands without regard to the damage his actions would take on the tributary and abutting wetlands, Deep Creek, or his neighbor's properties.

Harm to Human Health or Welfare: The unauthorized tiling of the tributary and the destruction of the wetland increases the likelihood of flooding on downstream and adjacent properties and decreases wetland ability to filter pollutants.

Extent of Aquatic Environment Impact: Functional loss of 1,871 linear feet of intermittent tributary and 1.3 acres of wetland.

Severity of Impacts to the Aquatic Environment: The discharge of fill in the tributary and wetland destroys access to those areas for aquatic species dependent on them. Respondent's actions severed both upstream and downstream aquatic passage for fish. The majority of game fish species are dependent on smaller streams for breeding and rearing young. Other fish species are completely dependent on small streams for their entire lifecycle (See AX15 for a detailed description of the ecological importance of tributaries).

2. Economic Benefit

EPA's proposed penalty in the present case does not include an alleged economic benefit derived by Respondent through its unauthorized placement of fill material into waters of the U.S. However, EPA reemphasizes its position that Respondent placed fill material into the tributary in conjunction with its sale of property to an animal feeding operation operator, thus conferring an economic benefit to itself through the sale of the property and an economic benefit to the third party animal feeding operation owner for avoiding the State's setback regulation.

2015, approximately one month after the initial complaint concerning Respondent's fill activities. See also AX21, a letter from NRCS to Respondent indicating that Mr. Morrow inquired about filling in the stream in 2016 in conjunction with building the animal feedlot. See also AX18, an October 7, 2015 letter from Marlyn Schafer of the Corps, Rock Island District to Scott Morrow, C & S Enterprise summarizing a conversation between Mr. Morrow and Mr. Schafer during a July 29, 2015 site visit to Respondent's property in which Mr. Morrow explained "the reason for closing the channel is to meet State of Iowa requirements for distance between a planned swine confinement facility and open water."

⁴ Iowa Code 567-65.11 requires animal feedlots to be separated at a distance of at least 500 feet from "(w)ater sources other than major water sources, surface intakes of an agricultural drainage well." See AX9, a conversation record from the Corps containing an admission from Respondent that the setback regulation was the motivation for filling in the tributary. See, also AX14, a telephone conversation record between EPA and IDNR confirming that the animal feedlot would have violated Iowa's setback regulations but for Respondent's placement of fill material into the tributary to Deep Creek. The telephone conversation record also includes a map detailing distance between the animal feedlot and the tributary.

3. Ability to Pay

To date, Respondent has not raised inability to pay as a defense. The Presiding Officer's prehearing order requires the Respondent to provide documentation in its prehearing exchange to support such a claim. Should Respondent provide such a defense, EPA will evaluate the supporting information to determine if Respondent is unable to pay the proposed penalty.

4. Prior History

To EPA's knowledge, Respondent has no prior history with respect to CWA violations.

5. Culpability

The CWA Section 404 prohibition on the unauthorized placement of dredge and fill material into waters of the U.S. has been in place since 1972.

As early as 2011, Respondent indicated his awareness of wetlands regulations when it requested a wetland delineation from NRCS. Respondent commenced with filling in the tributary and wetlands in 2015 without ever obtaining a wetland delineation.

6. Other Matters as Justice May Require

EPA is unaware of any matters that require a penalty reduction.

D. Conclusion

For all the foregoing reasons, the violations alleged in the Complaint constitute serious CWA violations warranting the assessment of penalties.

IV. ESTIMATE REGARDING LENGTH

Complainant estimates that it will require approximately two days to present its case in chief. The length of time required for rebuttal testimony and cross examination of Respondent's witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondent's Prehearing Exchange.


IV. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, has no applicability to this proceeding. Complainant has not alleged a failure to comply with any "collection of information" within the meaning of 44 U.S.C. § 3512, and no Office of Management and Budget control numbers are required for any of the documents at issue in this matter.

V. Reservations

Complainant reserves the right to call all witnesses named by Respondent. Complainant further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to the Presiding Officer and to Respondent.

RESPECTFULLY SUBMITTED this 31st day of May, 2018.


Chris Muehlberger
Assistant Regional Counsel
Region 7

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May 2018, I sent via the OALJ E-filing system the original and one copy of this Prehearing Exchange, to the EPA Headquarters Hearing Clerk, and sent one true and correct copy via email to Mr. Eldon McAfee, Esq. at eldon.mcafee@brickgentrylaw.com.

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Signature of Sender