

RECEIVED  
10 NOV -5 PM 3:45  
HEARINGS CLERK  
EPA--REGION 10

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of: )  
) DOCKET NO. CWA 10-2010-0132  
)  
)  
)  
DAVID D'AMATO, )  
) **COMPLAINANT'S INITIAL**  
) **PREHEARING EXCHANGE**  
)  
)  
Anchorage, Alaska, )  
)  
)  
Respondent )

---

Pursuant to the Presiding Officer's Prehearing Order dated September 10, 2010 and Section 22.19 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" ("Rules of Practice"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby submits the following Initial Prehearing Exchange.

**I. WITNESSES**

Complainant respectfully submits the following list of expert and other witnesses that Complainant intends to call, together with a brief narrative summary of their expected testimony:

COMPLAINANT'S INITIAL  
PREHEARING EXCHANGE  
DOCKET NO. CWA 10-2010-0132

U.S. ENVIRONMENTAL PROTECTION AGENCY  
1200 SIXTH AVENUE, SUITE 900  
SEATTLE, WASHINGTON 98101  
(206) 553-8183

1. **Heather Dean** (expert witness and fact witness): Ms. Dean is employed as an Environmental Scientist for the Aquatic Resources Unit, Office of Ecosystems, Tribal and Public Affairs, EPA Region 10. Her office is located in Anchorage, Alaska. Ms. Dean's duties include managing EPA's wetland protection efforts in various parts of Alaska, primarily the Municipality of Anchorage, identifying and delineating wetlands, assessing project impacts, and evaluating compliance with the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.* Ms. Dean's curriculum vitae is attached hereto as CX-14. Ms. Dean has visited the subject property several times, including during inspections conducted on October 12, 2005, June 5, 2006, July 31, 2008, and August 7 and 13, 2008. Ms. Dean is expected to testify regarding her observations during her visits to the subject property, her review of the evidence in this matter, the factual basis for EPA's determination that Respondent has violated the CWA, and EPA's enforcement response to the violations identified at the subject property. Ms. Dean will also testify regarding EPA's administrative order addressing the CWA violations identified at the subject property and Respondent's failure to comply with that order. Ms. Dean will also offer her opinions about the nature and extent of wetlands and waters of the United States at and near the subject property and the impacts to those waters as a result of Respondent's activities. An expert report detailing Ms. Dean's conclusions with respect to the presence and destruction of waters of the United States at the subject property will be submitted as soon as it is available and no later than fifteen days prior to any hearing held in this matter.

2. **Stanley Carlton Tobin** (expert witness and fact witness): Dr. Tobin has undergraduate and master's degrees in Biological Sciences from the University of Alaska at Fairbanks, and a Ph. D. in Biological Sciences from Northern Arizona University at Flagstaff. He is currently

employed as an Associate Professor in the Department of Environmental Science at Alaska Pacific University in Anchorage. His curriculum vitae is attached hereto as CX-16. He has been conducting monitoring and assessment of Potter Marsh, the important and threatened wetland downstream of Respondent's property, for the past five years. Dr. Tobin has visited Potter Marsh hundreds of times and he visited the area where the violations occurred on May 26, 2007. He is expected to testify to his observations of Respondent's property and downstream conditions. He is also expected to testify to the impacts of unnatural sediment loading to aquatic ecosystems in general and to Potter Marsh and its tributaries in particular. If Dr. Tobin prepares an expert report in this matter, his report will be submitted as soon as it is available and no later than fifteen days prior to any hearing held in this matter.

3. **Lloyd Oatis** (expert witness): Mr. Oatis is employed as a financial analyst for EPA Region 10. His office is located in Seattle, Washington. His resume is attached hereto as CX-15. Mr. Oatis is identified so that he may testify as an expert, should one be necessary, regarding the economic benefit derived by Respondent as a result of his illegal filling activities and regarding his ability to pay the proposed penalty. Mr. Oatis will also testify to his analysis of any evidence Respondent submits concerning economic benefit or an inability to pay the proposed penalty. If Mr. Oatis prepares an expert report in this matter, his report will be submitted as soon as it is available and no later than fifteen days prior to any hearing held in this matter.

4. **Thede Tobish** (fact witness): Mr. Tobish is a Municipality of Anchorage employee and accompanied Ms. Dean on the 2006 and 2008 site visits/inspections. He is expected to testify regarding his observations during his visits to the subject property.

5. **Mike Walters** (fact witness): Mr. Walters is a Municipality of Anchorage employee and accompanied Ms. Dean on the 2006 site visit/inspection. He is expected to testify regarding his observations during his visit to the subject property.

6. **Paul Lacsina** (fact witness) is a Municipality of Anchorage employee and accompanied Ms. Dean on the 2006 site visit/inspection. He is expected to testify regarding his observations during his visit to the subject property.

7. **Tracy DeGering** (fact witness): Ms. DeGering is an EPA employee. Her office is in Anchorage, Alaska. Ms. DeGering accompanied Ms. Dean on the 2008 site visit/inspection, and is expected to testify regarding her observations during her visit to the subject property.

8. **Bryan Herczeg** (fact witness): Mr. Herczeg is an employee of the U.S. Army Corps of Engineers. He accompanied Ms. Dean on the 2008 site visit/inspection. Mr. Herczeg was an EPA employee at the time of the 2008 site visit/inspection. He is expected to testify regarding his observations during his visit to the subject property.

9. **Dr. Maureen McCrea** (fact witness): Dr. McCrea is a retired employee of the U.S. Army Corps of Engineers, and her office during her employment was in Anchorage, Alaska. Dr. McCrea led the October 2005 site inspection, and she performed the Jurisdictional Determination for the U.S. Army Corps of Engineers, which supported the Corps' 2005 Notice of Violation and Order. She is expected to testify regarding her observations during her visits to the subject property.

10. **Scott Wheaton** (fact witness): Mr. Wheaton is an engineer employed by the Municipality of Anchorage. Mr. Wheaton is the author of Paine Road ROW Stream Diversion Analysis (CX-11). He is expected to testify regarding his observations of water transport in the vicinity of the subject property. Should Complainant decide to have Mr. Wheaton testify as an expert in hydrogeology, Complainant will provide a current resume and a summary of his

expected testimony as soon as it is available and no later than fifteen days prior to any hearing held in this matter. Mr. Wheaton's Statement of Qualifications can be found at page 28 of CX-11.

## **II. DOCUMENTS AND EXHIBITS**

Copies of the following documents and exhibits Complainant may introduce into evidence accompany this Prehearing Exchange.

- CX-01 Vicinity Map, Municipality of Anchorage satellite imagery with additions by Heather Dean, EPA
- CX-02 Site Map, Municipality of Anchorage satellite imagery with additions by Heather Dean, EPA
- CX-03 Letter from Harry A. Baij, U.S. Army Corps of Engineers, to David D'Amato (Feb 4, 2005)
- CX-04 Notice of Violation, Hank Baij, U.S. Army Corps of Engineers, to David D'Amato (Oct 21, 2005) with Jurisdiction Determination (Oct 18, 2005) and Notification of Administrative Appeal Options
- CX-05 Answers to request for information, David D'Amato to U.S. Army Corps of Engineers, facsimile transmission (Nov 7, 2005)
- CX-06 Facsimile from David D'Amato to Heather Dean (Nov 1, 2006)
- CX-07 Compliance Order CWA-10-2007-0136 with attached scope of work and cover letter (May 24, 2007)
- CX-08 Notice of Intent to File Administrative Complaint from Michael J. Szerlog to David D'Amato with attachments (Oct 23, 2009)

- CX-09 Reconnaissance of Unauthorized Activities at David D'Amato Property, Memo to File from Heather Dean, with attachments (June 2006 Inspection)
- CX-10 Wetland Determinations & Channel Measurements at David D'Amato Property, Memo to File from Heather Dean, with attachments (July/August 2008 Inspections)
- CX-11 Paine Road ROW Stream Diversion Analysis, Anchorage Watershed Management Services Division (October 2008)
- CX-12 Municipality of Anchorage records of property ownership (retrieved on May 13, 2010, and Jun 17, 2010)
- CX-13 Email from Dick Schroeder to Thede Tobish (May 27, 2006)
- CX-14 Curriculum Vitae of Heather Dean
- CX-15 Resume of Lloyd B. Oatis
- CX-16 Curriculum Vitae of Stanley Carlton Tobin

### **III. HEARING LOCATION AND ESTIMATED DURATION OF PRESENTATION OF COMPLAINANT'S DIRECT CASE**

Complainant proposes Anchorage, Alaska as the location for the hearing. The Respondent and most of the witnesses in the case live in or near Anchorage. Anchorage is a metropolitan area and will have adequate facilities in which to conduct the hearing and to accommodate out-of-town participants.

At this time, Complaint estimates that it will require one and one-half days to present its direct case.

#### IV. FACTUAL INFORMATION RELEVANT TO ASSESSMENT OF A PENALTY

The Presiding Officer's September 10, 2010 Prehearing Order directs Complainant to specify its proposed penalty in a document to be filed within fifteen days of the filing of Respondent's prehearing information exchange and to include all factual information relevant to the assessment of a penalty in this Initial Prehearing Information Exchange. Accordingly, Complainant hereby presents the following factual information as it relates to the statutory penalty factors found at section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3). These factors are "[1] the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator, [2] ability to pay, [3] any prior history of such violations, [4] the degree of culpability, [5] economic benefit or savings (if any) resulting from the violation, and [6] such other matters as justice may require." 33 U.S.C. § 1319(g)(3). Factual information relevant to each of these six factors is discussed briefly below.

##### A. *Nature, Circumstances, Extent, and Gravity of Violation*

The nature, circumstances, extent, and gravity of the violation reflect the "seriousness" of the violation. *In re Urban Drainage and Flood Control District, et al.*, Docket No. CWA-VIII-94-20-PII, Initial Decision (June 24, 1998). The seriousness of a particular violation depends primarily on the actual or potential harm to the environment resulting from the violation, as well as the importance of the violated requirement to the regulatory scheme. *See id.*

Complainant believes that the nature, circumstances, extent, and gravity of the violations in this case are significant and justify a substantial penalty. An unpermitted discharge into waters of the United States is a serious violation that significantly undermines the Clean Water Act's regulatory scheme. *See United States v. Pozsgai*, 999 F.2d 719, 725 (3rd Cir. 1993) (noting that "[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects

the discharger to strict liability”). The evidence in this matter will establish that Respondent excavated approximately one-quarter mile of stream channel and filled approximately 0.7 acre of channel and adjacent wetlands without a permit. These unauthorized activities released sediments into Little Rabbit Creek, an anadromous fish stream, which created turbidity in Potter Marsh, a large wetland that is highly valuable for waterbird nesting, recreation, and tourism and through which the salmonid populations of two other streams—Rabbit Creek and Little Survival Creek—also migrate. Turbidity and sedimentation in anadromous fish streams and waterbird habitat smother eggs and aquatic macroinvertebrates (which are important food sources), interfere with feeding for fish and wildlife by reducing visibility, and can cause direct injury such as gill abrasion in fish. The channel instability resulting from the unauthorized activities continues to cause erosion of tributary bed and banks, leading to further releases of sediment into the system, with the resulting pulses of increased turbidity. The unauthorized activities also caused or contributed to local glaciation (icing) of a public roadway, which can be a safety hazard and has the potential to decrease property values.

Wetlands in the subject property and the adjacent eastern property have been impacted by Respondent’s unauthorized activities such that important ecological functions have been diminished. These functions include flow regulation, base-flow maintenance, erosion control, and nutrient cycling. Although these functions have not been eradicated in the area, they have been impaired by Respondent’s unauthorized actions.

Respondent’s failure to restore the impacted streams and wetlands, despite orders to do so from the U.S. Army Corps of Engineers in October 2005 and from EPA in May 2007, has resulted in several of the impacts described above persisting over several years.



*B. Respondent's Ability to Pay*

In Respondent's Answer, at page 12, Respondent asserts that he is not able to pay a penalty, that he has debt on the subject property that he cannot afford to pay, that he will "likely have to return property to bank," and that restoration costs are "a barrier to completion" of the restoration work. To date, however, Respondent has not provided to Complainant any specific information on income, assets, or debt. Should such information be included in Respondent's prehearing exchange, Complainant will consider it in proposing a specific penalty amount.

*C. Prior History of Violations*

Complainant is unaware of Respondent having any prior history of violations of the Act.

*D. Degree of Culpability*

In other CWA enforcement cases, presiding officers have noted "the respondent's willful disregard of the permit process or Clean Water Act requirements" as supporting the assessment of the maximum penalty allowed by statute. *See, e.g., In re Urban Drainage*, Initial Decision (June 24, 1998). In this case, Respondent's disregard of CWA requirements has manifested itself in his failure to obtain a discharge permit for numerous dredging and filling activities over the past five years despite a February 2005 notification that he likely had wetlands on his property, despite being notified by the Corps of Engineers of his violations in October 2005, despite numerous in-person and written discussions with EPA personnel, and despite EPA's May 2007 Compliance Order. Respondent's disregard of CWA requirements has further manifested itself in his continuing failure to restore the site as ordered by EPA in May 2007 and in his continued expansion of unpermitted dredging and filling activities. Respondent's degree of culpability, as evidenced by all of these considerations, warrants a substantial civil penalty.

*E. Economic Benefit*

Complainant is unaware of Respondent having derived any economic benefit from his violations of the Act.

*F. Other Matters as Justice May Require*

Deterrence is perhaps the most important rationale behind a program of recovering civil penalties for violations of environmental laws. Civil penalties both encourage the violator to comply with the law in the future and discourage others who are similarly situated from engaging in the same outlawed activities. In this case, Complainant believes that deterring others must be an important factor in the assessment of the penalty. The Vicinity Map (CX-01) included in Complainant's exhibits shows that Respondent's property is that the edge of outwardly expanding Anchorage development. It is vital that Respondent and other landowners intending to develop wetland properties in this area do so only after obtaining CWA permits authorizing discharge of dredged or fill material into waters of the United States.

**V. 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.

**VI. RESERVATIONS**

Complainant reserves the right to call all witnesses named or called at hearing by Respondent and to introduce as evidence at hearing any exhibit identified in Respondent's prehearing information exchange. 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 5<sup>th</sup> day of November, 2010.

A handwritten signature in black ink, appearing to read 'JLB', is written over a horizontal line.

JENNIFER L. BYRNE  
Assistant Regional Counsel  
Region 10

**CERTIFICATE OF SERVICE**

*In the matter of David D'Amato*, Docket No. CWA-10-2010-0132, I hereby certify that a copy of Complainant's Initial Prehearing Exchange", with copies of all exhibits, and a copy of "Notice of Appearance and Notice of Substitution" was filed and sent to the following persons in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, WA 98101

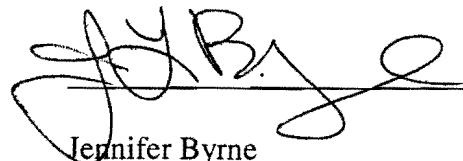
A true and correct copy, by certified mail, return receipt requested:

David D'Amato  
17211 Kings Way Drive  
Anchorage, AK 99516

A true and correct copy, by pouch mail:

Judge Barbara A. Gunning  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460-2001

Dated: 5 November 2010



Jennifer Byrne  
U.S. Environmental Protection Agency

COMPLAINANT'S INITIAL  
PREHEARING EXCHANGE

DOCKET NO. CWA 10-2010-0132

PAGE 1

U.S. ENVIRONMENTAL PROTECTION AGENCY  
1200 SIXTH AVENUE, SUITE 900  
SEATTLE, WASHINGTON 98101  
(206) 553-8183