

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2011 SEP 29 AM 8:11

FILED
EPA REGION VIII
HEADING FILE

IN THE MATTER OF)

Dockmaster Inc.,)

Respondent.)

) Docket No. CWA-08-2011-0002

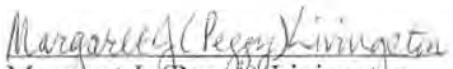
) **SUPPLEMENTAL MEMORANDUM**
) **IN SUPPORT OF**
) **MOTION FOR ASSESSMENT**
) **OF PENALTY ON DEFAULT**

Pursuant to the Order to Supplement the Record issued by the Honorable Elyana R. Sutin, Regional Judicial Officer, dated August 18, 2011, the United States Environmental Protection Agency (EPA) submits this Supplemental Memorandum and the accompanying Declaration of Kenneth Champagne of the EPA Region 8 Technical Enforcement Program.

The Regional Judicial Officer's August 18th order stated that the EPA's filings were not clear as to whether the EPA was asking the court to impose an economic benefit component. For clarification, as of August 10, 2011, when the EPA filed its Motion for Assessment of Penalty on Default and the accompanying Memorandum in Support of Motion for Assessment of Penalty on Default, the EPA had not calculated the economic benefit associated with removing the authorized dredged or fill material from the bottom of Flathead Lake. The EPA had, however, made an estimate, using best professional judgment, that the Respondent had saved less than \$10,000 by not incurring costs to transport and dispose of the soil, dirt, clay, gravel, and rocks from the old crib dock to a proper upland disposal location.

As indicated in the accompanying Declaration of Kenneth Champagne, the EPA has more specifically calculated the economic benefit that the Respondent gained as a result of the costs it would have incurred to transport and dispose of the soil, dirt, clay, gravel, and rocks from the old crib dock to a proper upland disposal location. This computation provides additional support for the EPA's proposed penalty.

Respectfully submitted,


Margaret J. (Peggy) Livingston
Enforcement Attorney
Office of Enforcement, Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202
Telephone Number: (303) 312-6858
Facsimile Number: (303) 312-7202

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the Supplemental Memorandum in Support of Motion for Assessment of Penalty on Default, including the Declaration of Kenneth Champagne and all exhibits, were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1159

and via U.S. mail, certified mail, return receipt requested, to:

Glenda Walton, Registered Agent
Dockmaster Inc.
517 Cleveland St., SW
Polson, MT 59860
Return Receipt # 7009-3410-0000-2594-9562

and

Glenda Walton, Registered Agent
Dockmaster Inc.
517 Cleveland St., SW
Ronan, MT 59864-2906
Return Receipt # 7009-3410-0000-2594-9579

9/29/2011
Date

Judith M. McTernan
Signature

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2011 SEP 29 AM 8:11

FILED
EPA REGION VIII
DENVER COLORADO

IN THE MATTER OF:)
)
Dockmaster Inc.)
)
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Respondent.)
_____)

Docket No. CWA-08-2011-0002

**DECLARATION OF
KENNETH CHAMPAGNE**

I, Kenneth Champagne, declare as follows:

1. I am employed as an Environmental Protection Specialist by the Technical Enforcement Program of Region 8 of the U.S. Environmental Protection Agency (EPA) in Denver, Colorado.

2. I have a B.S. in Environmental Science which I obtained from California University of Pennsylvania in 1995 and an M.S. in Environmental Science Management, which I obtained from Duquesne University in 2000. For these degrees, my studies included biology, chemistry, toxicology, and geology.

3. I have over 11 years of experience as an Environmental Protection Specialist working for the EPA. I have worked as a technical enforcement officer in the EPA Region 8's Clean Water Act Section 404 Technical Enforcement Program for over 8 years.

4. The EPA filed an Administrative Penalty Complaint (Complaint) in this matter on October 28, 2010, alleging that Dockmaster Inc. (Dockmaster or Respondent), a Montana corporation, had violated Section 301(a) of the Clean Water Act (CWA) by discharging dredged or fill material into Flathead Lake, in Montana, without authorization by a permit issued pursuant

to Section 404 of the CWA, 33 U.S.C. § 1344.

5. The Complaint proposed that Dockmaster pay a penalty of \$10,000 for its unauthorized discharges of dredged or fill material into Flathead Lake in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). I am the EPA representative responsible for calculating this proposed penalty amount.

6. When I calculated the penalty that EPA proposed in the Complaint, I considered what I understand to be the factors that Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires the EPA to consider, namely: (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) any such other matters as justice may require.

7. I used the CWA statutory factors in computing the penalty to propose in the Complaint because, although the EPA's CWA Section 404 program has adopted policies for calculating settlement amounts in enforcement actions, it is, in my experience, not EPA Region 8's practice to use these policies for justifying amounts that EPA pleads in administrative or judicial complaints seeking penalties.

8. As to statutory factor #1, regarding the nature, circumstances, extent, and gravity of the violation or violations, I noted that Respondent discharged approximately 400 cubic feet of soil, dirt, clay, gravel, and rocks from its barge into Flathead Lake without a permit. I considered this violation to be serious, for the reasons outlined below.

According to information from the Montana Department of Environmental Quality (MDEQ), Flathead Lake is a valuable aquatic resource. The lake and its tributary rivers and streams are generally in good health with excellent water quality. However, there has been a downward trend in water quality since 1977. Declining water quality has been manifested by increased algal growth and decreased water clarity in the near shore environment. The downward trend in water quality is occurring despite basin-wide efforts to reduce nutrient loads in the Lake. (See the MDEQ's December 28, 2001, Nutrient Management Plan and Total Maximum Daily Load for Flathead Montana (the Flathead Lake TMDL), especially pages vi and 1-1, available at <http://deq.mt.gov/wqinfo/tmdl/FlatheadLake/FlatheadLakeTMDL.pdf>, last visited September 14, 2011.)

The State of Montana has classified Flathead Lake as an A-1 waterbody. (Administrative Rule of Montana (ARM) § 17.30.608(b).¹) An A-1 waterbody is to be maintained at a quality sufficient to be suitable for drinking, culinary, and food processing after conventional treatment for removal of naturally present impurities. An A-1 waterbody is also to be maintained at a quality suitable for bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl, and furbearers; and agricultural industrial water supply. (See ARM § 17.30.622(1) and (2).²) Class A-1 waterbodies are considered high quality. (See Montana's 2010 Water Quality Integrated Report, pages 3-1 through 3-4.³)

Flathead Lake has been on Montana's CWA Section 303(d) list of impaired waterbodies

¹ See Exhibit 5 of the EPA's August 10, 2011, Motion for Assessment of Penalty on Default.

² See Exhibit 5 of the EPA's August 10, 2011, Motion for Assessment of Penalty on Default.

since 1996⁴ as being impaired due to sedimentation and siltation. Flathead Lake only partially supports its aquatic life classification. (See Montana's 2010 Water Quality Integrated Report, pages A-218 of 234 and B-23 of 80.⁵)

Dockmaster's unauthorized discharges could only have increased sedimentation and siltation in Flathead Lake, which would have resulted in the localized destruction of aquatic habitat. As a result of the Respondent's unpermitted activities, habitat used by aquatic species was likely adversely impacted. Dredging and re-depositing the crib dock material would have had immediate, adverse impacts on the aquatic habitat in the area of the discharge, due to increased turbidity and degraded water quality, directly affecting fish and invertebrate populations. High levels of suspended sediment and turbidity can result in direct mortality of fish by damaging and clogging gills. While the impacts to the aquatic environment were temporary, the severity of the impacts immediately following the unauthorized discharges is considerable to the localized area.

The fish community in Flathead Lake includes ten native species with bull trout (*Salvelinus confluentus*) and westslope cutthroat trout (*Oncorhynchus clarki lewisi*) as the dominant species in the upper trophic level of the lake ecosystem. Bull trout were listed as threatened under the Endangered Species Act in July 1998. Both bull trout and westslope cutthroat trout are on the State of Montana's list of Animal Species of Special Concern. Bull

³ See Exhibit 7 of the EPA's August 10, 2011, Motion for Assessment of Penalty on Default.

⁴ As indicated in the EPA's August 10, 2011, Motion for Assessment of Penalty on Default, states are required to provide EPA with CWA § 303(d) lists of impaired waterbodies every two years. 40 C.F.R. § 130.7, except that for the year 2000, no list was required by regulation. (65 Fed. Reg. 17166-17170 (March 31, 2000).)

⁵ See Exhibit 7 of the EPA's August 10, 2011, Motion for Assessment of Penalty on Default.

Trout and Westslope Cutthroat Trout have been seriously reduced in their range due to habitat loss and degradation. (Flathead Lake TMDL, pages 2-4 to 2-6.) Neither of these species tolerates high sediment levels in its spawning areas, as sediment can suffocate the developing embryos before they hatch. (See “Biological Effects of Sediment on Bull Trout and Their Habitat – Guidance for Evaluating Effects,” by Jim Muck, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, Lacey, Washington, July 13, 2010, available at <http://www.fws.gov/wafwo/pdf/2010%20Final%20Sediment%20Document.pdf>, last visited September 14, 2011.)

The increase in sedimentation and siltation as a result of Dockmaster’s unauthorized discharges may have negatively impacted these species of trout and other forms of aquatic life in this localized area. As such, the potential for substantial cumulative loss of the Flathead Lake resource increases as the area continues to experience increased residential and commercial development. (Flathead Lake TMDL, pages 2-7 to 2-8.) For these reasons, the protection of Flathead Lake and the chemical, physical and biological functions and values it provides are increasingly significant.

Another reason to consider this violation serious is that it involves a discharge without a permit. Unpermitted discharges present major challenges to the federal government’s program for regulating discharges to waters of the United States. The permitting process allows the U.S. Army Corps of Engineers (Corps) to evaluate a proposed discharge of dredged or fill material to waters of the United States and the opportunity to allow it, to prohibit it, or to allow it with conditions. The permitting process also allows for public input and EPA review of proposed

discharge permits. When a discharger fails to apply for a permit, the opportunity to protect the nation's waters through permit denial or permit condition is absent.

In light of the considerations outlined above, I consider Dockmaster's unpermitted discharges of soil, dirt, clay, gravel, and rocks into this lake to be serious violations of the CWA.

9. As to statutory factor #2, regarding the violator's ability to pay, Respondent has not indicated that it is unable to pay the proposed penalty amount. The EPA has tried without success to obtain information about Dockmaster's ability to pay a penalty.⁶ Due to the lack of financial information from Dockmaster, EPA has neither increased nor decreased the requested penalty to account for ability to pay.

10. As to statutory factor #3, regarding any prior history of such violations by the violator, the EPA has no information indicating that Dockmaster has or has not been subject to any CWA enforcement actions. Consequently, EPA has neither increased nor decreased the proposed penalty for this factor.

11. As to statutory factor #4, regarding the violator's degree of culpability, Dockmaster is in the business of offering services (primarily dock construction) that could potentially require CWA Section 404 permits. It is incumbent upon Dockmaster to ensure that it complies with all applicable laws and regulations to which it is subject, especially the CWA. Dockmaster's culpability for the CWA violations is therefore greater than that of a business whose operations are not water-dependent. The EPA therefore considered culpability as a factor

⁶ See the ability to pay discussion on pages 7 and 8 of the EPA's August 10, 2011, Motion for Assessment of Penalty on Default.

for increasing the penalty.

12. As to statutory factor #5, regarding the violator's economic benefit or savings (if any) resulting from the violation, Region 8's 404 enforcement program generally considers the economic benefit resulting from a violator's failure to obtain a permit prior to discharge when either an after-the-fact permit with accompanying restoration or mitigation is expected or full restoration is required. Usually, economic benefit due to this factor is a result of a delay of several years from the date of a violation until the date of incurring costs for restoration or mitigation. In this case, because it would be more environmentally damaging to attempt, and most likely not feasible, to remove the unauthorized dredged or fill material from the bottom of Flathead Lake, the EPA has elected not to require restoration or mitigation in this particular case.

However, notwithstanding EPA's decision not to include the economic benefit gained by not removing the unauthorized discharged materials, it is reasonable to expect that Dockmaster gained an economic benefit as a result of the costs it would have incurred to transport and dispose of the soil, dirt, clay, gravel, and rocks from the old crib dock to a proper upland disposal location. By using the estimation methodologies found in the RS Means – Site Work & Landscape Cost Data, 28th Annual Edition, 2009, the cover page for which is attached as Exhibit 1,⁷ I estimated that the cost to haul 400 cubic feet of fill material to a proper disposal location would be approximately \$2,000. Because the unauthorized dredged or fill material will not be removed from Flathead Lake, this cost has been avoided entirely, and Dockmaster has, therefore,

⁷ For more information on RS Works, see www.meanscostworks.com, last visited September 15, 2011.

gained an economic benefit of approximately \$2,000.

13. As to statutory factor #8, regarding any other matters as justice may require, I considered deterrence and the Respondent's lack of cooperation. The EPA considers deterrence as an important factor in this penalty assessment. The EPA has information in the case file that suggests it is common practice for dock companies operating on Flathead Lake to redistribute old crib dock materials (soil, dirt, clay, gravel, and rocks, etc.) within the lake as part of dock renovation projects. Accordingly, the EPA's goal with this penalty action is to send the deterrence message to Dockmaster and the regulated community that these types of activities require authorization under a CWA Section 404 permit. The EPA therefore considered deterrence as a factor for increasing the penalty. In addition, the EPA also considered Dockmaster's lack of cooperation in increasing the penalty. As noted in previous filings, Dockmaster has consistently refused to accept mail from the EPA. Most recently, Dockmaster refused to accept delivery of EPA's August 10, 2011, Motion for Assessment of Penalty on Default and the accompanying Memorandum in Support of Motion for Assessment of Penalty on Default. See Exhibits 2 and 3.

14. The facts related to the statutory factors outlined in paragraphs 6-13, above, support the proposed penalty of \$10,000 for the unauthorized discharge of dredged or fill material into Flathead Lake.

In the Matter of Dockmaster Inc.
Docket No. CWA-08-2011-0002
Champagne Declaration
Page 9 of 9

I declare the foregoing to be true and correct to the best of my knowledge, information
and belief under penalty of perjury.

Dated: 7/29/2011


Kenneth Champagne
U.S. EPA, Region 8
Technical Enforcement Program

EXHIBIT 1
DECLARATION OF KENNETH CHAMPAGNE

RSMeans

Site Work & Landscape Cost Data

28th Annual Edition

2009



RSMeans Catalog No. 60289
Construction: Technical/Professional
\$154.95

Unit Prices (organized in MasterFormat 2004)

- 1 General Requirements
- 2 Existing Conditions
- 3 Concrete
- 4 Masonry
- 5 Metals
- 6 Wood, Plastics & Composites
- 7 Thermal & Moisture Protection
- 8 Openings
- 9 Finishes
- 10 Specialties
- 11 Equipment
- 12 Furnishings
- 13 Special Construction
- 14 Conveying Equipment
- 22 Plumbing
- 23 Heating, Ventilating
& Air Conditioning
- 26 Electrical
- 27 Communications
- 31 Earthwork
- 32 Exterior Improvements
- 33 Utilities
- 34 Transportation
- 35 Waterway & Marine
- 41 Material Processing &
Handling Equipment
- 44 Pollution Control Equipment

Assemblies

- A Substructure
- G Building Sitework

Reference Information

- Equipment Rental Costs
- Crews
- Cost Indexes
- Reference Tables
- Square Foot Costs



RSMeans

Site Work & Landscape Cost Data 2009

28th Annual Edition

Includes unit and assemblies cost tables for earthwork, sewerage, piped utilities, site improvements, handicapped access ramps, drainage, paving, street openings/repairs, trees and shrubs, underground tanks, railroad and marine work, walls . . . site work and landscape construction of all types.

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United States Environmental Protection Agency
 REGION 8
 1595 Wynkoop Street
 Denver, CO 80202-1129

8ENF-L.P.L.

BUSINESS - PENALTY FOR PRIVATE USE - \$300

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL™



7009 3410 0000 2597 6223



\$08.560
 08/10-2011
 Mailed From: B0202
 US POSTAGE

EXHIBIT 2
 DECLARATION OF KENNETH CHAMPAGNE



Indivisible as Addressed
 No Return Address
 Uninsured
 Refused
 Attempted, Not Known
 No Such Street
 No Such Number
 No Recipients
 Recalled

GLENDAL WALTON
 REGISTERED AGENT
 DOCKMASTER INC.
 517 CLEVELAND STREET, S.W.
 RONAN, MT 59864-2906
Refused!

8-17
 8-17
 8-27

CERTIFIED MAIL

RETURN RECEIPT REQUESTED



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: **AUG 10 2011**

GLENDAL WALTON
 REGISTERED AGENT
 DOCKMASTER INC.
 517 CLEVELAND STREET, S.W.
 RONAN, MT 59864-2906

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
X Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

Docket # CWA-08-2011-0002

- Item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: **AUG 10 2011**

GLENDAL WALTON
 REGISTERED AGENT
 DOCKMASTER INC.
 517 CLEVELAND STREET, S.W.
 POLSON, MT 59860

Docket# CWA-08-2011-0002

2. Article Number (Transfer from service label) **7009 3410 0000 2597 6216**

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

X Agent Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No
517 CLEVELAND ST SW
RONAN MT 59860

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

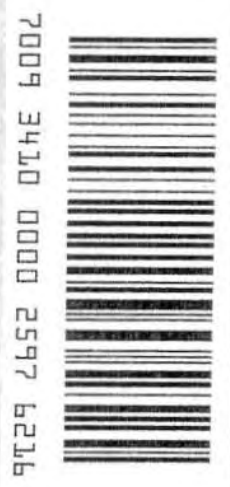
PA United States
 Environmental Protection Agency
 REGION 8
 1595 Wynkoop Street
 Denver, CO 80202-1129
SENFL-PL

L. BUSINESS - PENALTY FOR PRIVATE USE - \$300

GLENDAL WALTON
 REGISTERED AGENT
 DOCKMASTER INC.
 517 CLEVELAND STREET, S.W.
 POLSON, MT 59860

Ronald N 59860

Underivable Address
 Addressed
 Moved, New Address
 Refused
 Registered Not Allowed
 No Street Number
 No Postage
 No Receipt
 No Return Receipt



7009 3410 0000 2597 6216

CERTIFIED MAIL™

RETURN RECEIPT
 REQUESTED

CERTIFIED MAIL

EXHIBIT 3
 DECLARATION OF KENNETH CHAMPAGNE



08.560
 08/10/2011
 United From 80202
 US POSTAGE

8.12
8.17
8.27