

# MESSENGER & OVERFIELD, P.C.

ATTORNEYS AT LAW  
116 NO. 5TH STREET  
THERMOPOLIS, WYOMING 82443



MICHAEL S. MESSENGER  
BOBBI OVERFIELD \*\*

JAMES ALLEN MICHEL, JR. \*  
BRANDEN S. VILOS

\*Also Admitted in Montana  
\*\*Also Admitted in Colorado

2013 NOV -5 AM 8:11 <sup>msd</sup>

FILED  
LYNN D. MESSENGER, LA  
KARLA OHRMUND, LA  
HEARING CLERK

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## ENCLOSURE AND FORWARDING MEMO

October 31, 2013

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

Re: Farmers Canal Company - Docket No. CWA-08-2013-0036

The following is enclosed: **Original and two copies of Answer to Administrative Complaint and Notice of Opportunity for Hearing**

- In accordance with your request.
- Please note and file.
- Please file in the above referenced case and return a file-stamped copy in the enclosed envelope.**
- Please sign and file.
- Please note and see me about this.
- Please answer, sending me a copy of your letter.
- Please prepare answers to these and return to me.
- Please take charge of this.
- To be signed.
- For your information.
- Please review and comment. Any questions or comments, call me.
- For your approval.
- RUSH -- immediate action required.
- Please telephone me.
- Other

Thank you!

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2013 NOV -5 AM 8:12

FILED  
EPA REGION VIII  
Clerk

IN THE MATTER OF: )  
)  
Farmers Canal Company )  
P. O. Box 36 )  
108 Center Street )  
Burlington, Wyoming 82411 )  
)  
Respondent. )

**ANSWER TO ADMINISTRATIVE  
COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

Proceedings to Assess a Civil Penalty  
under Section 309(g) of the  
Clean Water Act, U.S.C. § 1319(g)

Docket No. CWA-08-2013-0036

COMES NOW the Respondent, by and through its undersigned attorney, Michael S. Messenger, of Messenger & Overfield, P.C., and hereby responds to the Administrative Complaint and Notice of Opportunity for Hearing as follows:

**I. JURISDICTIONAL ALLEGATIONS**

1. Answering paragraph 1, the allegations contained therein appear to be legal statements to which no answer is required and to the extent that the Complainant properly summarizes the citations to legal authority, the same is admitted; and to the extent such summary inaccurately describes or cites the legal allegations, the same is denied. Respondent admits receiving a copy of 40 C.F.R. Part 22.

**II. STATUTORY AND REGULATORY FRAMEWORK**

2. Answering paragraphs 2 through 13, except as otherwise hereinafter specifically addressed, the allegations contained therein appear to be legal statements to which no answer is required and to the extent that the Complainant properly summarizes the citations to legal authority, the same is admitted; and to the extent such summary inaccurately describes or cites the legal allegations, the same is denied. However, Respondent affirmatively alleges as follows:

a. Specifically responding to paragraph 3, Respondent affirmatively alleges that it acted in good faith to prevent damage to be caused by flooding and the potential to lose structures associated with its diversion dam, and that such constituted emergency measures taken without intent to violate any federal law or rule or to create harm to the Greybull River;

b. Specifically responding to paragraph 5, Respondent affirmatively alleges that the work performed was under an exemption pursuant to §1344(f)(1)(B) whereby the rising waters of the Greybull River were close to jumping the banks of the river, which would have then washed out private lands, an access road to the diversion dam and washed out the conveyance canal and down canal structures. Further, Respondent did not deposit or remove material from the river and did not pollute the river.

### **III. GENERAL ALLEGATIONS**

3. Respondent admits paragraph 14, but affirmatively alleges that Respondent is a partner with Bench Canal Company, a corporation organized and existing under the laws of the State of Wyoming and that together, Farmers Canal Company and Bench Canal Company own Diversion Water Company in the operation of the diversion structure and canal. It was the Diversion Water Company which performed the exempt work in the Greybull River.

4. Respondent admits paragraph 15.

5. Respondent admits paragraph 16.

6. Answering paragraph 17, Respondent admits the Greybull River is perennial, and is without sufficient information as to whether or not the Greybull River is navigable-in-fact and a traditional navigable water and therefore denies same.

7. Answering paragraph 18, Respondent admits that the Greybull River flows into the Big Horn River and admits that the Big Horn River crosses State lines, but is without sufficient information or belief as to whether or not the Big Horn River is currently used or was used in the past or may be susceptible to use in interstate or foreign commerce and therefore denies same.

8. Answering paragraph 19, Respondent admits that the Big Horn River is perennial, and is without sufficient information or believe that the river is navigable-in-fact and a traditional navigable water and therefore denies same.

9. Answering paragraph 20, Respondent denies that the Greybull River is a “water of the United States” and affirmatively alleges that the water is owned by the State of Wyoming pursuant to the Constitution of the State of Wyoming, Article 8, Section 1, as ratified by the U.S. Congress on July 10, 1890; 26 Statutes at Large 222, Ch. 664.

10. Answering paragraph 21, Respondent denies that the Big Horn River is a “water of the United States” and affirmatively alleges that the water is owned by the State of Wyoming pursuant to the Constitution of the State of Wyoming, Article 8, Section 1.

11. Answering paragraph 22, Respondent denies that there were wetlands located along the banks of the Greybull River and affirmatively alleges that at the time of the alleged violations the alleged wetlands were not providing any “flood attenuation” or “shoreline protection”.

12. Answering paragraph 23, Respondent denies the alleged wetlands are “waters of the United States” and affirmatively alleges that should any wetlands be existing, the water constituting said wetlands are owned by the State of Wyoming pursuant to the Constitution of the State of Wyoming, Article 8, Section 1.

13. Answering paragraph 24, Respondent is without sufficient information or belief to admit or deny the allegations in said paragraph and therefore denies same.

#### **IV. SPECIFIC ALLEGATIONS**

14. Answering paragraph 25, Respondent is without sufficient information and belief about the truth of the allegations in said paragraph and therefore denies same.

15. Answering paragraph 26, Respondent is without sufficient information and belief about the truth of the allegations in said paragraph and therefore denies same.

16. Answering paragraph 27, Respondent admits that it received a letter from the Corps, on December 12, 2012, and responded on January 21, 2013, and again on February 1, 2013, and admitted that Water Diversion Company was working in the river in June or July of 2011 and in April and May of 2012 to prevent the river from breaching its banks and flooding out structures of the Diversion Water Company and down canal structures of Farmers Canal Company and Bench Canal Company. Except as otherwise responded, Respondent alleges that the letters from Respondent speak for themselves and denies the allegations of said paragraph.

17. Respondent admits paragraph 28 and affirmatively alleges that Diversion Water Company was placing the river into its normal and historic channel in order to prevent flooding and damage to be cause by said flooding.

18. Answering paragraph 29, Respondent is without sufficient information and belief as to the allegations set forth in said paragraph and therefore denies same.

19. Respondent admits paragraph 30.

20. Answering paragraph 31, Respondent admits that a bulldozer was utilized for the emergency work and was operated on behalf of Diversion Water Company.

#### **V. VIOLATION - DISCHARGE OF POLLUTANTS WITHOUT A PERMIT**

21. Respondent denies paragraph 32 and affirmatively alleges that at the time of the work performed in 2011, the river was high, muddy and carrying sand, dirt, gravel and debris as flood materials.

22. Respondent denies paragraph 33.

23. Respondent denies paragraph 34 and affirmatively alleges that the water in the Greybull River is owned by the State of Wyoming pursuant to the Constitution of the State of Wyoming, Article 8, Section 1.

24. Respondent denies paragraph 35.

25. Answering paragraph 36, the allegations appear to be legal conclusions to which no response is required; to the extent such a response is required, Respondent affirmatively alleges that Diversion Water Company did proceed without any permit or authorization; and denies the balance of the allegations of said paragraph.

26. Answering paragraph 37, the allegations appear to be legal statements or conclusions and do not require a response; to the extent such a response is required, Respondent denies same.

#### **VI. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY**

27. Answering paragraph 38, and taking into account the foregoing responses of Respondent, and whether or not the Complainant has such authority to assess a penalty, Respondent acknowledges that a penalty of \$25,000.00 is proposed, and Respondent is prepared to forthwith pay the penalty.

28. Answering paragraph 38, Respondent appreciates that consideration taken by the EPA in considering all factors identified as cited and further appreciates the opportunity to request a hearing, which opportunity it will hereinafter set forth.

#### **VII. NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

29. Answering paragraph 40, Respondent does and hereby requests a hearing in this matter by and for the reason that Complainant EPA has named the wrong party as Respondent and that Respondent believes an exemption applies pursuant to the rules and regulations regarding emergency work; that such work did not pollute the river; and that

the Respondent (through the Diversion Water Company) did not improperly dredge or deposit material into the river.

30. Answering paragraph 41, Respondent incorporates herein all foregoing answers, denials and affirmative allegations set forth in the previous paragraphs numbered 1-29.

31. Respondent will comply with paragraph 42.

32. Answering paragraphs 43 and 44, the allegations in said paragraphs appear to provide information and guidance and what will occur should Respondent request a hearing in this matter and do not require a response.

#### **VIII. TERMS OF PAYMENT FOR QUICK RESOLUTION**

33. Answering paragraphs 45-49 inclusive, the allegations in said paragraphs appear to provide information and guidance and what will occur should Respondent choose to pay the civil proposed penalty. Respondent wishes to pay the civil penalty, but wants guidance on what to do when emergencies arise on a weekend or holiday when State and Federal offices are closed; and if it has any further exposure to civil or criminal action. Respondent feels that it has already received guidance by virtue of the Administrative Complaint and does not feel it should have any further problem with complying with rules and regulations, but does need some clarification.

#### **IX. SETTLEMENT CONFERENCE**

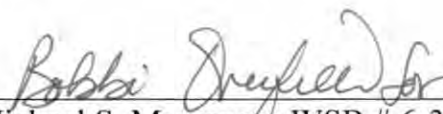
34. Responding to paragraph 50, Respondent desires to explore settlement possibilities through an informal settlement conference. Respondent has protected its rights by filing an Answer in this matter and requesting a hearing. However, when Respondent initially attempted to contact Peggy Livingston, Senior Enforcement Attorney, she was on furlough pursuant to the government shutdown. Respondent has since communicated with Ms. Livingston by telephone and email. Respondent desires to

protect its rights and exercise its opportunities in this matter by meeting its deadline irrespective to the government shutdown and any subsequent shutdown by virtue of the inability of Congress to address the nation's budget.

35. Respondent desires to enter into a consent stipulation with the Complainant and pay the civil penalty of \$25,000.

36. Any allegation not specifically admitted is hereby denied.

DATED this 31st day of October, 2013.



Michael S. Messenger WSB # 6-3631  
Messenger & Overfield, P.C.  
P. O. Box 111  
Thermopolis, WY 82443  
(307) 864-5541

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31st day of October, 2013, I served a copy of the above and foregoing **Answer to Administrative Complaint and Notice of Opportunity for Hearing** on the parties by delivering a true and correct copy thereof as follows:

James H. Eppers, Supervisory Attorney	<input checked="" type="checkbox"/> U.S. MAIL
Legal Enforcement Program	<input type="checkbox"/> FED EX
Office of Enforcement, Compliance and	<input type="checkbox"/> FAX
Environmental Justice	<input type="checkbox"/> HAND DELIVERED
U.S. Environmental Protection Agency	
1595 Wynkoop Street	
Denver, CO 80202	

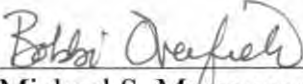


Arturo Palomares, Director  
Water Technical Enforcement Program  
Office of Enforcement, Compliance and  
Environmental Justice  
U.S. Environmental Protection Agency  
1595 Wynkoop Street  
Denver, CO 80202

U.S. MAIL  
 FED EX  
 FAX  
 HAND DELIVERED

Peggy Livingston  
Senior Enforcement Attorney  
U.S. EPA Region 8 (8ENF-L)  
1595 Wynkoop Street  
Denver, CO 80202

U.S. MAIL  
 FED EX  
 FAX  
 HAND DELIVERED

  
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Michael S. Messenger