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EPA--REGION 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

	)	
In the Matter of:	)	
	)	DOCKET NO. CWA-10-2011-0086
	)	
ROBERT M. LOOMIS AND	)	<b>COMPLAINANT'S</b>
NANCY M. LOOMIS	)	<b>SPECIFICATION OF</b>
Haines, Alaska,	)	<b>PROPOSED PENALTY</b>
	)	
Respondents.	)	

**I. INTRODUCTION**

Pursuant to the Presiding Officer's Prehearing Order dated August 18, 2011, and Section 22.19(a)(4) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10, ("Complainant" or "EPA") hereby proposes a specific penalty amount and explains how this proposed penalty was determined in accordance with the Clean Water Act's ("CWA's") statutory penalty factors.

## II. BASIS FOR PROPOSED PENALTY

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2 In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), the Complaint  
3 in this matter did not specify penalty demand. Rather, Complainant decided to consider fully  
4 the information provided through the prehearing exchange process before proposing a specific  
5 penalty. Having done so, and in accordance with Section 22.19(a)(4) of the Part 22 Rules, 40  
6 C.F.R. § 22.19(a)(4), Complainant hereby proposes that Respondents be assessed a penalty of  
7 EIGHTY-FIVE THOUSAND DOLLARS (\$85,000) for the violations identified in the  
8 Complaint.

9         In its Initial Prehearing Information Exchange, Complainant discussed the legal  
10 framework it would employ in specifying a proposed penalty amount. *See* Initial Prehearing  
11 Exchange, Section IV. In addition, Complainant provided a detailed statement describing the  
12 factual information it considers relevant to the assessment of a penalty. *Id.* Having reviewed the  
13 information submitted in Respondent's Prehearing Exchange, Complainant has found no  
14 additional information that would affect its calculation of a proposed penalty. Respondents did  
15 not provide information regarding their ability to pay a penalty, thus Complainant has no  
16 information that would warrant a penalty reduction on that basis. Therefore, Complainant re-  
17 alleges Paragraphs IV.A–F in its Initial Prehearing Information Exchange in justifying the  
18 penalty proposed here and provides additional legal or factual information relevant to  
19 Complainant's consideration of the nature, circumstances, extent, and gravity of the violations  
20 and economic benefit resulting from such violations.  
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1           **A.     The Nature, Circumstances, Extent, and Gravity of Violation:**

2           As stated in Complainant’s Initial Prehearing Exchange, Section IV.A, at pages 15 and  
3 16, the nature, circumstances, extent, and gravity of the violation reflect the “seriousness” of the  
4 violation. *In re Urban Drainage and Flood Control District, et al.*, Docket No. CWA-VIII-94-  
5 20-PH, 1998 EPA ALJ Lexis 42, at \*56 (Initial Decision, June 24, 1998). The seriousness of a  
6 particular violation depends primarily on the actual or potential harm to the environment  
7 resulting from the violation, as well as the importance of the violated requirement to the  
8 regulatory scheme. *See id.* The evidence in this matter indicates that the nature, circumstances,  
9 extent, and gravity of Respondents’ violations – though not extreme – are significant and justify  
10 a substantial penalty.

11           First, it is significant that the unauthorized discharges occurred over a prolonged period  
12 of time. Ninety-seven unauthorized stormwater discharges occurred over four years. The  
13 unauthorized discharges of dredged and fill material into waters of the United States began in  
14 2006 and Respondents’ property remains in non-compliance with the CWA because the dredge  
15 or fill material has not been removed. Any unpermitted discharge into waters of the United  
16 States is a serious violation which significantly undermines the CWA’s regulatory scheme. *See*  
17 *United States v. Pozsgai*, 999 F.2d 719, 725 (3<sup>rd</sup> Cir. 1993) (noting that “[u]npermitted discharge  
18 is the archetypal Clean Water Act violation, and subjects the discharger to strict liability”). These  
19 discharges constitute violations of Section 301 of the Act, 33 U.S.C. §1311, on each of the days  
20 of discharge. All of the dredged and fill material remains in place, and each day that the material  
21 remains constitutes an additional day of violation. *See, e.g., Sasser v. Administrator*, 990 F.2d  
22 127, 129 (4<sup>th</sup> Cir. 1994); *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D.  
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1 Mass. 1986) (noting “[a] day of violation constitutes not only a day in which [defendant] was  
2 actually using a bulldozer or backhoe in the wetland area, but also every day [defendant] allowed  
3 illegal fill material to remain” in the wetland), *aff’d*, 826 F.2d 1151 (1<sup>st</sup> Cir. 1987), *cert. denied*,  
4 484 U.S. 1061 (1988). *See also In re Mobil Oil Corp.*, 5 E.A.D. 490, 517 n.38 (EAB 1994)  
5 (noting that “cases involving ‘continuing harm’ to human health or the environment may be  
6 appropriate for the assessment of the full base penalty for every day that the violation  
7 continues”). As a result, an appropriate starting point for the proposed penalty is at the  
8 maximum administrative penalty of \$177,500. *See Atlantic States Legal Foundation v. Tyson*  
9 *Seafoods*, 897 F.2d 1128, 1142 (11<sup>th</sup> Cir. 1990) (calculating CWA penalty using “top down”  
10 method, starting with the statutory maximum and reducing that amount for any statutory factors  
11 in mitigation of the penalty); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New*  
12 *York*, 244 F. Supp. 2d 41, 49 (N.D.N.Y. 2003) (applying top-down approach to penalty  
13 calculation for CWA violations); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1337  
14 (5<sup>th</sup> Cir. 1996) (“[W]e note that when imposing penalties under the environmental laws, courts  
15 often begin by calculating the maximum possible penalty, then reducing that penalty only if  
16 mitigating circumstances are found to exist.”).

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18 Second, the evidence in this matter will establish that Respondents conducted filling and  
19 land-clearing activities over at least a third of an acre of wetland and surface waters of the United  
20 States, thus seriously impacting the area’s hydrology and undermining the functions and values  
21 historically provided by the site’s aquatic areas.<sup>1</sup> Likewise, the sensitive receiving waters at this  
22 site were impacted by the unauthorized stormwater discharges. EPA will show that  
23 Respondents’ unauthorized activities altered the hydrology (and thereby degraded the functional  
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<sup>1</sup> See Complainant’s Initial Prehearing Exchange at 16-17.

1 values) of those aquatic areas of the site that were not buried by dredged or fill material.  
2 Congress has determined that “the systematic destruction of the Nation’s wetlands is causing  
3 serious, permanent ecological damage.” See *In re Lawrence John Crescio, III*, 2001 EPA ALJ  
4 LEXIS 143, \*87 (Initial Decision, May 17, 2001) (quoting Staff of Senate Comm. Of the  
5 Environment, 95<sup>th</sup> Cong. 2<sup>nd</sup> Sess., 4 Legislative History of the Clean Water Act of 1977, p. 869  
6 (Comm. Print 1978) (remarks of Senator Muskie on S. 1952, Aug. 4, 1977)). Therefore,  
7 imposing a substantial penalty is warranted in order to account for the nature, circumstances,  
8 extent and gravity of Respondents’ construction and filling activities.

9 For these reasons, Complainant believes that the violations at issue in this case are  
10 serious and warrant a substantial civil penalty. The Region nevertheless acknowledges that,  
11 given the relative scale of the destruction and impairment to the impacted aquatic areas (in an  
12 area of the country that characterized by abundant wetland areas), a penalty less than the  
13 statutory maximum administrative penalty would be appropriate. Complainant believes the  
14 penalty proposed today would serve as a deterrent without being disproportionate to the  
15 seriousness of the violations.  
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17 **B. Economic Benefit**

18 Complainant believes that Respondents have realized a significant economic benefit as a  
19 result of the violations. Based on the available information, the economic benefit associated with  
20 the avoided or delayed costs associated with Respondents’ violations of CWA Sections 402 and  
21 404 is approximately \$42,000. The following explains in greater detail EPA’s justification for  
22 the significant economic benefit. If needed, Complainant will submit an expert report prior to  
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1 hearing further supporting Complainant's justification of the economic benefit resulting from the  
2 violations.

3 Respondents avoided the costs associated with obtaining a Section 404 permit prior to  
4 discharging fill material in wetlands and other waters of the United States. Respondents also  
5 avoided the expense of obtaining a CWA § 401 Water Quality Certification from the Alaska  
6 Department of Environmental Conservation ("ADEC"), and also avoided the cost of obtaining a  
7 wetland delineation for the site.

8 Respondents conducted construction activities from 2006 until 2010 without obtaining  
9 coverage through the Construction General Permit ("CGP") as required by Section 402 of the  
10 CWA. Therefore, Respondents enjoyed an economic benefit through their delay in obtaining an  
11 NPDES permit and developing a stormwater pollution prevention plan ("SWPPP").

12 Additionally, Respondents avoided significant costs in failing to implement stormwater controls;  
13 failing to implement stabilization Best Management Practices ("BMPs"); and failing to inspect  
14 the site and BMPs for four years.

15 Respondents benefited by delaying the cost of developing a SWPPP which generally  
16 costs between \$2,000 - \$5,000 for a project of this size. Likewise, Respondents failed to  
17 implement BMPs on the site to control sediment and erosion for four years, thus, benefited by  
18 avoiding the capital costs of such BMPs. Respondents avoided the costs of installing silt  
19 fencing, storm drain protection, or other types of sediment control, which would have required  
20 replacement annually. Given that Respondents discontinued their construction activities during  
21 the months they were absent from Haines, Alaska, the site would have required annual  
22 stabilization prior to the winter months. Sediment controls such as silt fencing and annual  
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1 stabilization should have been implemented on the three sides of the Site adjacent to waters of  
2 the United States. Section 3.13 D of the 2003 CGP states that sites should be stabilized "...as  
3 soon as practicable in portions of the site where construction activities have temporarily or  
4 permanently ceases, but in no case more than 14 days after the construction activity in that  
5 portion of the site has temporarily or permanently ceased."

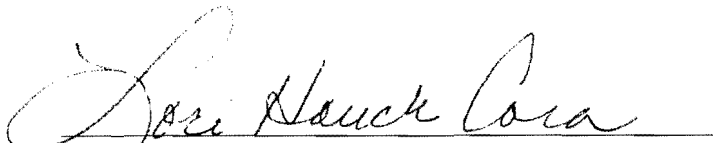
6 Lastly, Respondents accrued economic benefit by failing to conduct inspections. There is  
7 no evidence that Respondents conducted any of the site inspections required by the CGP prior to  
8 obtaining coverage in late April, 2010. According to the 2003 CGP, inspections must be  
9 conducted either: (1) at least once every seven calendar days; or (2) at least once every 14  
10 calendar days and within 24 hours of the end of a storm event 0.5 inch or greater. In addition,  
11 the CGP allows for a waiver of the inspection requirements until one month before thawing  
12 conditions are expected to result in a discharge if all of the following requirements are met: the  
13 project is located in an area where frozen conditions are anticipated to continue for extended  
14 periods of time (i.e., more than one month); land disturbance activities have been suspended; and  
15 the beginning and ending dates of the waiver period are documented in the SWPPP. For  
16 purposes of its economic benefit estimates, Complainant assumes Respondents would have  
17 qualified for this waiver for the months of December through February of each year.  
18 Nonetheless, Respondents accrued economic benefit by the avoided costs of numerous  
19 inspections and inspection reports that would have been required during the period between June  
20 2006 to May 2010.  
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**III. CONCLUSION**

For all of the foregoing reasons, Complainant proposes that Respondents be assessed a civil penalty of \$85,000.00. Such a penalty would be appropriate and would properly reflect the considerations enumerated in Section 309(g) of the CWA.

Respectfully submitted this 18th day of November, 2011

  
LORI HOUCK CORA  
Assistant Regional Counsel  
Region 10



**CERTIFICATE OF SERVICE**

The undersigned certifies that the original of the attached COMPLAINANT'S SPECIFICATION OF PROPOSED PENALTY in In the Matter of Robert M. Loomis and Nancy M. Loomis, Docket No. CWA-10-2011-0086, was filed with the Regional Hearing Clerk on November 18, 2011.

On November 18, 2011, the undersigned certifies that an original and true and correct copy was hand delivered to:

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

On November 18, 2011, the undersigned certifies that a true and correct copy was sent by EPA Pouch Mail to:

The Honorable Barbara A. Gunning  
EPA Office of Administrative Law Judges  
Mail Code 1900L  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460-2001

On November 18, 2011, the undersigned certifies that a true and correct copy was sent by UPS to:

Brian J. Stibitz, Esq.  
Reeves Amodio LLC  
500 L Street, Suite 300  
Anchorage, Alaska 99501-1990

DATED this 18<sup>th</sup> day of November 2011

Signature: Sharon Eng  
Print Name: Sharon Eng  
EPA Region 10