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HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
DAVID D'AMATO,) DOCKET NO. CWA 10-2010-0132
Anchorage, Alaska,) COMPLAINT
Respondent.)

I. AUTHORITIES

1.1 This administrative complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by Section 309 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319. The Administrator has delegated this authority to the Regional Administrator of EPA Region 10 who, in turn, has redelegated this authority to the Director of the Office of Ecosystems, Tribal and Public Affairs in Region 10.

1.2 Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22 ("Part 22 Rules"), Complainant hereby seeks to assess a

1 civil penalty against David D'Amato ("Respondent") for violations of the Act, 33 U.S.C. § 1251
2 *et seq.*

3 1.3 In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40
4 C.F.R. § 22.38(b), EPA shall provide the State of Alaska an opportunity to consult within thirty
5 (30) days following proof of service of this Complaint on Respondent.

6 **II. STATUTORY AND REGULATORY BACKGROUND**

7 2.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the "discharge of any
8 pollutant by any person" except in compliance with, *inter alia*, a permit issued pursuant to
9 Section 404 of the Act, 33 U.S.C. § 1344.

10 2.2 Section 404(a) of the Act, 33 U.S.C. § 1344(a), authorizes the Secretary of the
11 Army to issue permits for the discharge of dredged or fill material into navigable waters at
12 specified disposal sites.

13 2.3 Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term "discharge of
14 a pollutant" as "any addition of any pollutant to navigable waters from any point source."

15 2.4 Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines "pollutant" to include,
16 *inter alia*, dredged spoil, rock, sand, and biological materials.

17 2.5 Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines "navigable waters" as
18 "waters of the United States."

19 2.6 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define "waters of
20 the United States" to include, *inter alia*: (i) all waters which are currently used, were used in the
21 past, or may be susceptible to use in interstate or foreign commerce; (ii) tributaries to these
22 waters; and (iii) wetlands adjacent to these waters or their tributaries.
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1 2.7 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define “wetlands” as
2 “those areas that are inundated or saturated by surface or ground water at a frequency and
3 duration sufficient to support, and that under normal circumstances do support, a prevalence of
4 vegetation typically adapted for life in saturated soil conditions.”

5 2.8 33 C.F.R. § 328.3(c) defines “adjacent” as “bordering, contiguous, or
6 neighboring.”

7 2.9 Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines “point source” to
8 include “any discernible, confined and discrete conveyance ... from which pollutants are or may
9 be discharged.”
10

11 2.10 Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines “person” as “an
12 individual, corporation, partnership, association, State, municipality, commission, or political
13 subdivision of a State, or any interstate body.”

14 2.11 Section 309(g) of the Act, 33 U.S.C. § 1319(g), provides, in pertinent part,
15 “[w]henever on the basis of any information available . . . the Administrator finds that any
16 person has violated Section 301 . . . of this Act . . . the Administrator . . . may . . . assess a . . .
17 class II civil penalty”

18 **III. ALLEGATIONS**

19 3.1 Paragraphs 1.1 through 2.11 are re-alleged and incorporated herein by reference.

20 3.2 Respondent owns, possesses, and/or controls, or, at the time of the circumstances
21 and activities alleged in paragraphs 3.3 through 3.32, did own, possess and/or control,
22 approximately 29.0 acres of real property in Anchorage, Alaska. This property is described as
23 Tract 2 and Lot 3 of Hunter Heights Subdivision, and is located at the southeast corner of Kings
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25

1 Way Drive and Paine Road, in Anchorage, Alaska, within Section 7, Township 11 North, Range
2 2 West, Seward Meridian. This property, and areas disturbed by Respondent immediately to the
3 south, east, and north of his property, are hereinafter referred to as "the Site."

4 3.3 The Site contains at least two acres of wetlands that are adjacent to and
5 hydrologically connected, via surface and shallow groundwater flow, to at least nine unnamed
6 streams and several more tributaries of those streams. The unnamed streams are tributaries of
7 Little Rabbit Creek. Little Rabbit Creek flows into Potter Marsh, a water subject to the ebb and
8 flow of the tide. Potter Marsh drains into Rabbit Creek, which flows into the Turnagain Arm of
9 Cook Inlet. Cook Inlet, which is subject to the ebb and flow of the tide, is used in interstate and
10 foreign commerce.
11

12 3.4 The streams and wetlands described in Paragraph 3.3 are "waters of the United
13 States" within the meaning of 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2, and are therefore
14 "navigable waters" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

15 3.5 Respondent is a person within the meaning of Section 502(5) of the Act, 33
16 U.S.C. § 1362(5).

17 3.6 Between September 2005 and July 2008, at times more fully known to the
18 Respondent and/or persons acting on his behalf, Respondent discharged dredged or fill material
19 into waters of the United States at the Site without a permit issued pursuant to Section 404 of the
20 Act.
21

22 3.7 The dredged or fill material that the Respondent and/or persons acting on his
23 behalf, caused to be discharged included, among other things, excavated material, dredged spoil,
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1 sand, dirt and rock, which constitute "pollutants" as defined in CWA Section 502(6), 33 U.S.C. §
2 1362(6).

3 3.8 Respondent and/or persons acting on his behalf used mechanized earth-moving
4 equipment (an excavator) to excavate native materials from, and discharge those materials into,
5 streams and wetlands, which resulted in the discharges described in Paragraphs 3.6 and 3.7. This
6 equipment constitutes "point sources" as defined in CWA Section 502(14), 33 U.S.C. §
7 1362(14).

8 3.9 Respondent did not obtain a permit from the Secretary of the Army for the
9 discharges of dredged or fill material into waters of the United States as required by Sections
10 301(a) and 404 of the Act, 33 U.S.C. §§ 1311(a), 1344.

11 3.10 Respondent has violated and continues to violate Section 301(a) of the Act, 33
12 U.S.C. § 1311(a), by his unauthorized discharges of pollutants (including dredged spoil, sand,
13 dirt, rock and/or other fill material) into waters of the United States, including wetlands, at the
14 Site.
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16 3.11 Each day that such material remains in place constitutes a separate violation of
17 Section 301(a) of the Act, 33 U.S.C. § 1311(a).

18 Count 1

19 **Discharges of dredged material into unnamed streams and adjacent wetlands in the** 20 **southeastern area of the Site**

21 3.12 Paragraphs 1.1 through 3.11 are realleged and incorporated herein by reference.

22 3.13 In September and/or October 2005, Respondent, and/or persons acting on behalf
23 of Respondent, used earthmoving equipment to clear, dredge, and grade approximately 700
24 linear feet of a previously existing, south-north flowing, stream diversion channel ("southeastern
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1 stream diversion channel”), along the southern east property line of the Site (Tract 2). This
2 stream flows generally northward to connect to another unnamed stream that flows generally
3 westward and empties into Little Rabbit Creek on the west side of the Site. The dredging
4 widened and deepened the southeastern stream diversion channel.

5 3.14 In September and/or October 2005, Respondent, and/or persons acting on behalf
6 of Respondent, used earthmoving equipment to clear, dredge, and discharge dredged spoil in
7 approximately 0.06 acre of wetlands adjacent to the southeastern stream diversion channel, and
8 an unnamed stream, in the southeastern area of the Site.

9 3.15 Between October 2005 and June 2006, Respondent, and/or persons acting on
10 behalf of Respondent, discharged rock and other excavated materials to an unnamed east-west
11 flowing stream, diverting that flow into the southeastern stream diversion channel.

12 3.16 Between June 2006 and July 2008, Respondent, and/or persons acting on behalf
13 of Respondent, dredged the rock and other materials from the unnamed east-west stream and
14 discharged the dredged spoil into the southeastern stream diversion channel, diverting that
15 stream into the east-west channel again.

16 3.17 Between June 2006 and July 2008, Respondent, and/or persons acting on behalf
17 of Respondent, discharged rock into 19 unnamed tributaries of the southeastern stream diversion
18 channel, along the southern east property line of the Site (Tract 2). These tributaries flow
19 generally westward and empty, via the southeastern stream diversion channel, into Little Rabbit
20 Creek on the west side of the Site.
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1 and empties into Little Rabbit Creek to the northwest of the Site. The dredging widened,
2 deepened, and lengthened the northeastern stream diversion channel.

3 3.23 Between June 2006 and July 2008, Respondent, and/or persons acting on behalf
4 of Respondent, discharged rock into 6 unnamed tributaries of the northeastern stream diversion
5 channel along the northern east property line of the Site (Tract 2). These tributaries flow
6 generally westward and empty, via the northeastern stream diversion channel, into Little Rabbit
7 Creek to the northwest of the Site.

8 3.24 Between June 2006 and July 2008, Respondent, and/or persons acting on behalf
9 of Respondent, discharged wood chips and rock (a "silt sock"), as well as additional rock, into
10 the unnamed stream in the northeastern area of the site, downstream (north) of the northeastern
11 stream diversion channel.
12

13 3.25 Discharges into streams and wetlands in the northeastern area of the Site
14 constitute a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). In accordance with
15 Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent
16 is liable for civil penalties not to exceed \$16,000 per day for each day during which the violation
17 continues.
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19 **Count 3**

20 **Discharges of dredged material into adjacent wetlands in the northern area of the Site**

21 3.26 Paragraphs 1.1 through 3.11 are realleged and incorporated herein by reference.

22 3.27 In September and/or October 2005, Respondent, and/or persons acting on behalf
23 of Respondent, used earthmoving equipment to clear, grade, excavate, and discharge excavated
24 material into approximately 0.16 acre of wetlands adjacent to an unnamed tributary of Little
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1 Rabbit Creek to access other areas of the Site and to construct two south-north and one east-west
2 wetland drainage ditches in the northern area of the Site. These ditches convey flow from the
3 wetlands north to the Paine Road right-of-way, where flows are diverted west through
4 constructed and incidental channels to Little Rabbit Creek northwest of the Site.

5 3.28 Discharges into streams and adjacent wetlands in the northern area of the Site
6 constitute a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). In accordance with
7 Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent
8 is liable for civil penalties not to exceed \$16,000 per day for each day during which the violation
9 continues.
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11 **Count 4**

12 **Discharges of dredged or fill material into unnamed streams and adjacent wetlands in the**
13 **central area of the Site**

14 3.29 Paragraphs 1.1 through 3.11 are realleged and incorporated herein by reference.

15 3.30 In September and/or October 2005, Respondent, and/or persons acting on behalf
16 of Respondent, used earthmoving equipment to dredge approximately 200 linear feet of an
17 unnamed stream and discharge the dredged spoil into 0.06 acre of adjacent wetlands in the
18 central area of the Site (Lot 3 and Tract 2). This stream flows generally westward and empties
19 into Little Rabbit Creek in the west part of the Site.

20 3.31 Between October 2005 and August 2008, Respondent, and/or persons acting on
21 behalf of Respondent, used earthmoving equipment to excavate, place two culverts, and
22 discharge dredged spoil into two unnamed streams in the central area of the Site (Tract 2). The
23 streams flow generally westward and empty into Little Rabbit Creek in the west-central area of
24 the Site.
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1 3.32 Discharges into streams and adjacent wetlands in the central area of the Site
2 constitute a violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). In accordance with
3 Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent
4 is liable for civil penalties not to exceed \$16,000 per day for each day during which the violation
5 continues.

6 **IV. PENALTY**

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8 4.1. Based on the foregoing allegations, Respondent violated Section 301(a) of the
9 CWA, 33 U.S.C. § 1311(a). Consequently, pursuant to Section 309(g)(2)(B) of the Act, and 40
10 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties in an
11 amount not to exceed \$16,000 per violation for each day during which the violation continues,
12 up to a maximum of \$177,500.

13 4.2. Respondent has been in continuous and repeated violation of Section 301(a) of the
14 Act since at least September of 2005.

15 4.3. In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii),
16 Complainant proposes that a Final Order be issued to the Respondent assessing administrative
17 penalties in an amount not to exceed \$16,000 per violation for each day during which the
18 violation continues, up to a maximum of \$177,500, taking into account the nature,
19 circumstances, extent and gravity of the violations, and, with respect to the violator, ability to
20 pay, any prior history of such violations, the degree of culpability, economic benefit or savings
21 (if any) resulting from the violations, and such other matters as justice may require. CWA
22 Section 309(g)(3), 33 U.S.C. § 1319(g)(3).
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1 4.3.1 Nature, Circumstances, Extent and Gravity of Violations: Respondent's
2 violations of Section 301(a) of the Act, 33 U.S.C. § 1311(a), are serious violations that
3 significantly undermine the Act's regulatory scheme. In addition, Complainant has
4 determined that the alleged violations have the potential to harm human health and the
5 environment. Respondent excavated over 1300 linear feet of stream channel and filled
6 approximately 0.7 acre of channel and adjacent wetlands. These unauthorized activities
7 released sediments into Little Rabbit Creek, an anadromous fish stream, which created
8 noticeable turbidity in Potter Marsh, a large wetland that is highly valuable for waterbird
9 nesting and recreation/tourism, and through which the salmonid populations of two other
10 streams—Rabbit and Little Survival Creeks—also migrate. Turbidity and sedimentation
11 in anadromous fish streams and waterbird habitat smother eggs and aquatic
12 macroinvertebrates (which are important food sources), interfere with feeding for fish and
13 wildlife, and viewing by human visitors by reducing visibility, and can cause direct injury
14 such as gill abrasion in fish. The channel instability resulting from the unauthorized
15 activities continues to cause erosion of stream beds and banks, leading to further releases
16 of sediment into the system, with the resulting pulses of increased turbidity. Enlarging
17 the channels along the east side of the property has also led to increased seepage and
18 drainage from the wetlands that slope down to those channels from the east, as well as the
19 wetlands on the west side of the northern extension of the channel. The unauthorized
20 activities also caused or contributed to local glaciation of public roadways and driveways,
21 causing safety hazards and potentially decreasing property values.
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1 4.3.2 Respondent's Ability to Pay: Complainant has no information indicating
2 that Respondent is unable to pay a penalty up to the statutory maximum penalty for these
3 violations. Complainant will consider any information submitted by Respondent related
4 to its ability to pay a penalty.

5 4.3.3 Respondent's History of Prior Violations: Complainant is unaware of
6 Respondent having any history of prior violations of the Act.

7 4.3.4 Respondent's Degree of Culpability: Respondent is presumed to know the
8 law. The United States Army Corps of Engineers included Respondent on its mailing list
9 for a February 2005 Public Notice announcing reissuance of its Anchorage General
10 Permits. The mailing included a cover letter advising of the possibility that previously
11 unmapped wetlands existed on Respondent's property. The Corps of Engineers also
12 issued Respondent a Notice of Violation on October 21, 2005, for several of the
13 violations alleged in paragraphs 3.12 through 3.32, and ordered initial corrective actions,
14 which Respondent failed to implement effectively. Finally, on May 24, 2007, EPA issued
15 a Compliance Order to Respondent to restore the site, but, to date, Respondent has not
16 complied with that Order. Several of the violations alleged in paragraphs 3.12 through
17 3.32 occurred after Respondent received the May 2007 Compliance Order.

18 4.3.5 Respondent's Economic Benefit: Complainant is unaware of Respondent
19 having derived any economic benefit from his violations of the Act.

20 4.3.6 Other Matters as Justice May Require: Credible and consistent
21 enforcement of the Act's requirements to comply with Section 301(a) of the Act, 33
22 U.S.C. § 1311(a) and the permitting scheme set forth in Section 404 of the Act, 33 U.S.C.
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1 § 1344, is necessary to deter this Respondent and others similarly situated from violating
2 the Act.

3 **V. OPPORTUNITY TO REQUEST A HEARING**

4 5.1. Respondent has the right to file an Answer requesting a hearing on any material
5 fact contained in this Complaint or on the appropriateness of any proposed penalty. Upon
6 request, the Presiding Office may hold a hearing for the assessment of the civil penalties
7 conducted in accordance with the provisions of the Part 22 Rules (40 C.F.R. Part 22) and the
8 Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies
9 this Complaint.
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11 5.2. Respondent's Answer, including any request for hearing, must be in writing and
12 must be filed with:

13 Regional Hearing Clerk
14 U.S. Environmental Protection Agency, Region 10
15 1200 Sixth Avenue,
16 Suite 900 (Mail Stop ORC-158)
17 Seattle, Washington 98101

18 **VI. FAILURE TO FILE AN ANSWER**

19 6.1 To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent
20 must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30)
21 days after service of this Complaint.

22 6.2 In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and
23 directly admit, deny, or explain each of the factual allegations contained in this Complaint with
24 regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the
25

1 circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts
2 which Respondents intend to place at issue; and (3) whether a hearing is requested. Failure to
3 admit, deny, or explain any material factual allegation contained herein constitutes an admission
4 of the allegation.

5 **VII. INFORMAL SETTLEMENT CONFERENCE**

6 7.1. Whether or not Respondent requests a hearing, Respondent may request an
7 informal settlement conference to discuss the facts of this case, the proposed penalty, and the
8 possibility of settling this matter. To request such a settlement conference, Respondent should
9 contact:
10

11 Jessica A. Barkas
12 Assistant Regional Counsel
13 U.S. Environmental Protection Agency, Region 10
14 1200 Sixth Avenue
15 Suite 900 (Mailstop ORC-158)
16 Seattle, Washington 98101
17 (206) 553-8183

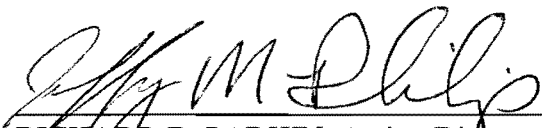
18 7.2. Note that a request for an informal settlement conference does not extend the
19 thirty (30) day period for filing a written Answer to this Complaint, nor does it waive
20 Respondents' right to request a hearing.

21 7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules
22 prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related
23 proceedings with the Administrator, the Environmental Appeals Board or its members, the
24 Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these
25 officials in the decision on this case.

1 **VIII. RESERVATIONS**

2 8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this
3 Complaint shall affect Respondent's continuing obligations to comply with: (1) the CWA and
4 all other environmental statutes; (2) the terms and conditions of all applicable permits issued
5 under the Act; and (3) any Compliance Order issued to Respondent under Section 309(a) of the
6 Act, 33 U.S.C. § 1319(a), concerning violations alleged herein.
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8 Dated this 6th day of July, 2010.
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11 _____
12 For RICHARD B. PARKIN, Acting Director
13 Office of Ecosystems, Tribal and Public Affairs
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1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Complaint" was filed and sent to the following person, in the
3 manner specified, on the date below:

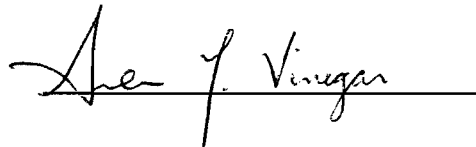
4 Original and one copy, hand-delivered:

5 Carol Kennedy, Regional Hearing Clerk
6 U.S. Environmental Protection Agency, Region 10
7 1200 Sixth Avenue, Mail Stop ORC-158
8 Seattle, WA 98101

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

10 David D'Amato
11 17211 Kings Way Drive
12 Anchorage, AK 99516

13 Dated: 7/6/10



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15 U.S. EPA Region 10
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