

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

OREGON COAST SCENIC RAILROAD

Tillamook County, Oregon

Respondent.

DOCKET NO. CWA-10-2020-0056

CONSENT AGREEMENT

Proceedings Under Section 309(g) of the Clean
Water Act, 33 U.S.C. § 1319(g)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is entered into under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g).

1.2. Pursuant to CWA Section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A), the EPA is authorized to assess a civil penalty against any person that has violated CWA Section 301, 33 U.S.C. § 1311.

1.3. CWA Section 309(g)(2)(A), 33 U.S.C. § 1319(g)(2)(A), authorizes the administrative assessment of Class I civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$25,000.

Pursuant to 40 C.F.R. Part 19, the administrative assessment of Class I civil penalties may not

exceed \$16,000 per day for each day during which the violation continues, up to a maximum penalty of \$37,500. *See also* 85 Fed. Reg. 1751 (January 13, 2020) (2020 Civil Monetary Penalty Inflation Adjustment Rule).

1.4. Pursuant to CWA Sections 309(g)(1)(A) and 309(g)(2)(A), 33 U.S.C. §§ 1319(g)(1)(A) and (g)(2)(A), and in accordance with Section 22.18 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Oregon Coast Scenic Railroad (“Respondent”) agrees to issuance of, the Final Order attached to this Consent Agreement.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), execution of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a penalty is proposed to be assessed pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g), to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Director of the Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”).

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Framework

3.1. As provided in CWA Section 101(a), 33 U.S.C. § 1251(a), the objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

3.2. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters by any person, except, *inter alia*, as authorized by a Department of Army permit issued by the United States Army Corps of Engineers (USACE) pursuant to CWA section 404, 33 U.S.C. § 1344.

3.3. CWA Section 502(12), 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

3.4. The term “navigable waters” is defined as “waters of the United States.” 33 U.S.C. § 1362(7). In turn, “waters of the United States” is and has been defined to include, *inter alia*, all waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; and certain tributaries of those waters. *See, e.g.*, 40 C.F.R. § 230.3(s) (1993).

3.5. Federal jurisdiction over a non-wetland “water of the United States” extends to the “ordinary high water mark,” 33 C.F.R. § 328.4(c), which USACE regulations define as a “line on the shore established by fluctuations of water and indicated by physical characteristics” including a “natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation, [or] the presence of litter and debris.” *Id.* § 328.3(e).

3.6. A “point source” includes, *inter alia*, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container ... from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14).

3.7. A “pollutant” includes rock, sand, biological materials, dredged spoil, and solid waste discharged into water. CWA Section 502(6), 33 U.S.C. § 1362(6).

3.8. “Fill material” includes material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land, or changing the bottom elevation of any portion of a water of the United States. Examples of fill material include rock, sand, soil, clay, construction debris, wood chips, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. 40 C.F.R. § 232.2.

3.9. Each discharge of pollutants from a point source that is not authorized by a permit issued pursuant to the CWA constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

General Allegations

3.10. Oregon Coast Scenic Railroad is a non-profit museum organization registered in Oregon. Respondent is a “person” under CWA Section 502(5), 33 U.S.C. § 1362(5).

3.11. Oregon Coast Scenic Railroad operates tourist trains on a portion of track in Tillamook County, Oregon (Sections 10, 14, and 15, Township 3 North, Range 8 East), which is owned by the Port of Tillamook and is hereinafter referred to as the “Site.”

3.12. A portion of the Site abuts the Salmonberry River. The Salmonberry River is a perennial tributary of the Nehalem River, which flows into the Pacific Ocean. The Nehalem River is perennial and tidally-influenced. As such, the Salmonberry River is a “waters of the

United States” within the meaning of 40 C.F.R. § 230.3(s) (1993), and is a “navigable water” within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

Violations

3.13. As described below, between February 15, 2014, and March 11, 2014, Respondent violated CWA Section 301, 33 U.S.C. § 1311.

3.14. Between February 15, 2014, and March 11, 2014, Respondent and/or persons acting on its behalf, used certain heavy earthmoving equipment, such as a hydraulic excavator, to deposit riprap, fine gravels, and native on-site materials below the ordinary high water mark of the Salmonberry River, in an effort to maintain and repair the existing railroad line.

3.15. The construction equipment referenced in Paragraph 3.14 is a “point source” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

3.16. The dredged and/or fill materials that Respondent and/or persons acting on its behalf caused to be discharged, as referenced in Paragraph 3.14, include riprap, fine gravels, and native on-site materials, each of which constitutes “dredged material” and/or “fill material” within the meaning of 40 C.F.R. § 232.2, and each of which constitutes a “pollutant” within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

3.17. By causing such dredged and/or fill materials to enter waters of the United States, Respondent engaged in the “discharge of pollutants” from a point source within the meaning of CWA Sections 301(a) and 502(12), 33 U.S.C. §§ 1311(a) and 1362(12).

3.18. Respondent’s discharge of dredged and/or fill materials described in Paragraph 3.14 above was not authorized by any permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344. Respondent is therefore in violation of CWA Section 301(a), 33 U.S.C. § 1319(g)(2)(B).

3.19. Each day that the dredged and/or fill material remains in place without the required permit constitutes a violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations contained in this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondent's economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors as they apply to this case, EPA has determined that an appropriate penalty to settle this action is \$5,000.

4.4. Respondent consents to the assessment of the civil penalty set forth in Paragraph 4.3 and agrees to pay the total civil penalty within 30 days of the effective date of the Final Order.

4.5. Payment under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must serve photocopies of the check, or proof of other payment method described in Paragraph 4.5, on the Regional Hearing Clerk and EPA Region 10

Compliance Officer at the following addresses:

Teresa Young
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, M/S 11-C07
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
young.teresa@epa.gov

Yvonne Vallette
Compliance Officer
U.S. Environmental Protection Agency
Region 10, Oregon Operations Office
805 SW Broadway, Suite 500
Portland, OR 97205
vallette.yvonne@epa.gov

4.7. If Respondent fails to pay the penalty assessed by this Consent Agreement in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. Interest. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), any overdue portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

4.7.2. Attorney's Fees, Collection Costs, Nonpayment Penalty. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basis the penalty as described in Paragraph 4.4, Respondent shall pay (in addition to any assessed penalty and interest) attorney's fees and costs for collection proceedings and a

quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7 above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.10. Except as described in Subparagraph 4.7.2 above, each party shall bear its own costs in bringing or defending this action.

4.11. Respondent expressly waives any right to contest the allegations and waives any right to appeal this Consent Agreement and the Final Order.

4.12. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.13. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

FEB 19, 2020

FOR RESPONDENT:

Richard Gitschlag

RICHARD GITSCHLAG, President
Oregon Coast Scenic Railroad

DATED:

FOR COMPLAINANT:

EDWARD J. KOWALSKI, Director
Enforcement and Compliance Assurance Division
EPA Region 10

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DOCKET NO. CWA-10-2020-0056

FINAL ORDER

Proceedings Under Section 309(g) of the Clean
Water Act, 33 U.S.C. § 1319(g)

1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) Region 10, who has in turn delegated this authority to the Regional Judicial Officer in EPA Region 10.
2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.
3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act (CWA) for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

4. This Final Order shall become effective upon filing.

SO ORDERED this _____ day of _____, 2020.

RICHARD MEDNICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Oregon Coast Scenic Railroad, DOCKET NO.: CWA-10-2020-0056** was served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

Ashley Palomaki
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, M/S 11-C07
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Scott Wickert
Oregon Coast Scenic Railroad
P.O. Box 669
Tillamook, OR 97141

DATED this ___ day of _____ 2020.

Teresa Young
Regional Hearing Clerk
EPA Region 10