BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In The Matter of	)	
	)	
Columbia Gas Transmission, LLC,	)	Proceeding to Assess Class II Penalty
1700 MacCorkle Avenue, SE	)	Under Section 309(g)(2)(B) of the Clean Water
Charleston, West Virginia 25314	)	Act, 33 U.S.C. § 1319(g)(2)(B)
Respondent.	)	
	)	
Property Located At:	)	Docket No.: CWA-03-2012-0078
	)	
Steener Fork,	)	
Approximately 2.5 miles north of the	)	**RESPONDENT'S ANSWER**
Intersection of County Road 1/12 and	)	**AND**
State Highway 89	)	**REQUEST FOR**
New Martinsville, WV 26155	)	**HEARING**

I. STATUTORY AUTHORITY

1. Pursuant to Section 309(g) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (EPA) is authorized to assess administrative penalties against persons who violate Section 301(a) of the Act, 33 U.S.C. § 1311(a). The Administrator of EPA has delegated this authority to the Regional Administrator of EPA, Region III, who in turn has delegated this authority to the Director, Environmental Assessment and Innovation Division ("Complainant").

RESPONSE: The allegations in Paragraph 1 of the Complaint merely characterize the nature of Complainant's claims, and although no admission or denial is required, Respondent denies the allegations in Paragraph 1.

2. This action is governed by 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; Final Rule," 40 C.F.R. Part 22 (hereinafter, Consolidated Rules), a copy of which is enclosed.

RESPONSE: Complainant admits that the Consolidated Rules govern this action. Complainant denies the remainder of the allegations in Paragraph 2, including receiving a copy of the Consolidated Rules with this Complaint.

II. FACTUAL AND LEGAL ALLEGATIONS

3. Respondent Columbia Gas Transmission, LLC is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

RESPONSE: Respondent admits that it is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. Respondent, Columbia Gas Transmission, LLC, utilized equipment and conducted work in Steener Fork, adjacent to County Road 1/12, approximately 2.5 miles north of the intersection with State Highway 89, in New Martinsville, Wetzel County, West Virginia, identified as "the Site" on the attached map labeled Exhibit "A".

RESPONSE: Respondent admits that it retained an independent contractor, Ellison Dozer Service, Inc., Rt. 1 Box 118N 10, Elizabeth, WV 26143, to perform road maintenance work near Steener Fork, but denies the remainder of the allegations of Paragraph 4. Further answering, the affected areas were all on the county road or directly adjacent to the county road.

5. Steener Fork is a tributary of Blake Fork, which flows to Lynn Camp Run. Lynn Camp Run flows to Fish Creek, and then to the Ohio River, a navigable-in-fact body of water. Steener Fork is "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2; 40 C.F.R. § 122.2.

RESPONSE: Respondent admits the factual allegations of Paragraph 5 but neither admits nor denies the legal conclusions concerning navigability, and therefore denies them.

6. Respondent, or persons acting on behalf of Respondent, operated equipment which discharged dredged and/or fill material to waters of the United States described in Paragraph 5 above, and further depicted on Exhibit "A", attached hereto. Respondent's activities included filling portions of a stream channel with gravel and cobble for construction of a road.

RESPONSE: Respondent denies that the work performed on behalf of Respondent by Ellison Dozer was for the purpose of constructing a road; rather, the road was a pre-existing, poorly maintained county road. Respondent admits that Ellison Dozer, while conducting road maintenance work contracted by Respondent in a rural wooded area where streams repeatedly

crossed the road, inadvertently allowed gravel to enter the streams in areas where the streams crossed the road. Respondent denies the remaining allegations of Paragraph 6.

7. The term "fill material" within the meaning of 40 C.P.R. § 232.2, includes any pollutant which replaces portions of "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

RESPONSE: Paragraph 7 purports to state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

8. The equipment referenced in Paragraph 4, above, which has discharged dredged and/or fill material to "waters of the United States," constitutes a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

RESPONSE: Paragraph 8 purports to state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

9. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of dredged and/or fill material by any person from point sources to "waters of the United States" except in compliance with a permit issued by the Secretary of the Army under Section 404 of the Act, 33 U.S.C. § 1344.

RESPONSE: Paragraph 9 purports to state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied. Further answering, Respondent reasonably believed that any work would have impacted less than $1/10^{th}$ of an acre and was covered by Nationwide Permit 12.

10. On information and belief, at no time during the discharge of dredged and/or fill material to the "waters of the United States" located on the Site did the Respondent have a permit from the Secretary of the Army as required by Section 404 of the Act, 33 U.S.C. § 1344.

RESPONSE: Upon discovery that Ellison Dozer had not followed oral instructions and had inadvertently allowed gravel to enter the streams that crossed the county road, Respondent admits that it attempted to obtain an "after-the-fact" permit from the Army Corps of Engineers for the road maintenance performed under contract by Ellison Dozer. Also after discovering the gravel, Respondent asked for and received a Stream permit from the State of West Virginia.

The remainder of Paragraph 10 purports to state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

III. FINDINGS OF VIOLATIONS

11. The allegations in Paragraphs 1-10 are incorporated as if repeated and reasserted.

RESPONSE: The responses to Paragraphs 1-10 are incorporated as if repeated and reasserted.

12. Respondent, by discharging dredged and/or fill material to the "waters of the United States" without authorization, has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

RESPONSE: Paragraph 12 purports to state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

IV. PROPOSED CIVIL PENALTY

13. Section 309(g)(2)(B) of the CWA, 33 U.S.C; § 1319(g)(2)(B), provides that any person who has violated, *inter alia*, Section 301 of the CWA (33 U.S.C. § 1311) is liable for an administrative penalty not to exceed $10,000 per day for each such violation, up to a total penalty amount of $125,000.

RESPONSE: Paragraph 13 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

14. Pursuant to the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (effective January 12, 2009), any person who has violated, *inter alia*, Section 301 of the CWA (33 U.S.C. § 1311) after January 12, 2009 is liable for an administrative penalty not to exceed $16,000 per day for each such violation occurring after January 12, 2009, up to a total penalty amount of $177,500.

RESPONSE: Paragraph 14 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

15. Based upon the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Part 22 Procedural Rules, Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to the Respondent in the amount of Ninety-thousand dollars ($90,000) for the

violations alleged herein. This does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.

RESPONSE: Paragraph 15 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

16. The proposed penalty was determined after taking into account the nature, circumstances, extent and gravity of the violation, Respondent's prior compliance history, ability to pay the penalty, the degree of culpability for the cited violations, and any economic benefit or savings to Respondent because of the violations. 33 U .S.C. § 1319(g)(3). In addition, to the extent that facts or circumstances unknown to Complainant or EPA at the time of issuance of this Complaint become known after issuance of this Complaint, such facts or circumstances may also be considered as a basis for adjusting the proposed administrative penalty.

RESPONSE: Paragraph 16 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied. Further answering, Respondent reported the actions promptly upon discovery to the appropriate regulators, and, upon Complainant's approval, mitigated the damage by promptly removing the gravel from the affected county roads. Further, the county and residents along the county road received the benefit of a sturdier road, without expenditure of tax funds. In addition, the Complainant has improperly bifurcated a single set of acts, presumably to increase the penalty obtained.

17. EPA may issue the Final Order Assessing Administrative Penalties after a thirty (30) day comment period unless Respondent either responds to the allegations in the Complaint and requests a hearing according to the terms of Section V, below, or pays the civil penalty in accordance with Section VI herein (Quick Resolution).

RESPONSE: Paragraph 17 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

18. If warranted, EPA may adjust the proposed civil penalty assessed in this Complaint. In so doing, the Agency will consider any number of factors in making this adjustment, including Respondent's ability to pay. However, the burden of raising the issue of an inability to pay and demonstrating this fact rests with the Respondent.

RESPONSE: Paragraph 18 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

19. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, shall affect Respondent's continuing obligation to comply with the Clean Water Act, any other Federal or State laws, and/or with any separate Compliance Order issued under Section 309 of the Act, 33 U.S.C. § 1319, for the violations alleged herein.

RESPONSE: Paragraph 19 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

V. ANSWER TO COMPLAINT AND OPPORTUNITY TO REQUEST HEARING

20. Respondent must file an Answer to this Complaint; failure to file an Answer may result in entry of a Default Judgment against Respondent. Respondent's default constitutes a binding admission of all allegations made in the Complaint and waiver of Respondent's right to a Hearing under the CWA. The civil penalty proposed herein shall then become due and payable upon issuance of the Default Order as provide in 40 C.F .R. § 22.17(d).

RESPONSE: Paragraph 20 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

21. Respondent's failure to pay the entire penalty assessed by the Default Order by its due date will result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In addition, a Default Penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717.

RESPONSE: Paragraph 21 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

22. Any Answer must clearly and directly admit, deny, and/or explain each of the factual allegations contained in the Complaint with respect to which the Respondent has any knowledge, or clearly and directly state that the Respondent has no knowledge as to particular factual allegations in the Complaint. The Answer shall also indicate the following:

a. Specific factual and legal circumstances or arguments which are alleged to constitute any grounds of defense;

b. Specific facts that Respondent disputes;

c. Respondent's basis for opposing the proposed penalty; and

d. Whether Respondent requests a hearing.

Failure to admit, deny or explain any of the factual allegations in the Complaint constitutes admission of such allegations.

RESPONSE: Paragraph 22 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

23. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B) and 40 C.F.R. § 22.15, Respondent may request a hearing on the proposed civil penalty within thirty (30) days of receiving this Complaint.

RESPONSE: Paragraph 23 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

24. EPA is obligated, pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), to give members of the public notice of and an opportunity to comment on this proposed penalty assessment.

RESPONSE: Paragraph 24 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

25. If Respondent requests a hearing on this proposed penalty assessment, members of the public who submitted timely comments on this proposed penalty assessment will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to not only be notified of the hearing but also to be heard and to present evidence at the hearing on the appropriateness of this proposed penalty assessment.

RESPONSE: Paragraph 25 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

26. If Respondent does not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comments on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. 33 U.S.C. § 1319(g)(4)(C). EPA will grant the petition and will hold a hearing if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

RESPONSE: Paragraph 26 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

27. Any hearing that Respondent requests will be held and conducted in accordance with the Consolidated Rules, 40 C.F.R. Part 22.

RESPONSE: Paragraph 27 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

28. At such a hearing, Respondent may contest any material fact contained in the Factual and Legal Allegations listed in Section II above, the Findings listed in Section III, above, and the appropriateness of the amount of the proposed civil penalty in Section IV, above.

RESPONSE: Paragraph 28 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

29. Any Answer to this Complaint, and any Request for Hearing, must be filed within thirty (30) days of receiving this Complaint with the following:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

RESPONSE: Paragraph 29 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

30. Copies of the Answer and any Request for Hearing, along with any and all other documents filed in this action, shall also be sent to the following:

Stefania D. Shamet, Esq.
Senior Assistant Regional Counsel (3RC20)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

RESPONSE: Paragraph 30 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

31. Failure of the Respondent to admit, deny or explain any of the factual allegations in this Complaint constitutes admission of such allegations. 40 C.F.R. § 22.15(b) & (c). The Answer and any subsequent documents filed in this action should be sent to:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

RESPONSE: Paragraph 31 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

VI. QUICK RESOLUTION

32. In accordance with 40 C.F.R. § 22.18(a), and subject to the limitations in 40 C.F.R. § 22.45, Respondent may resolve this proceeding at any time by paying the specific penalty proposed in this Complaint.

RESPONSE: Paragraph 32 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

33. If Respondent pays the specific penalty proposed in this Complaint within forty (40) days of receiving this Complaint, then, pursuant to 40 C.F.R. § 22.18(a)(1), no Answer need be filed.

RESPONSE: Paragraph 33 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

34. If Respondent wishes to resolve this proceeding by paying the penalty proposed in this Complaint consistent with Paragraph 33 instead of filing an Answer, but needs additional time to pay the penalty, pursuant to 40 C.F.R. § 22.18(a)(2), Respondent may file a written statement with the Regional Hearing Clerk within 30 days after receiving this Complaint stating that Respondent "agrees to pay the proposed penalty in accordance with [40 C.F.R. § 22.18(a)(1)]." Such written statement need not contain any response to, or admission of, the allegations in the Complaint. Such statement shall be filed with the following:

Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

and a copy shall be provided to:

Stefania D. Shamet, Esq.
Senior Assistant Regional Counsel (3RC20)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

If Respondent files such a written statement with the Regional Hearing Clerk within 40 days after receiving this Complaint, Respondent shall pay the full amount of the proposed penalty within 60 days of receiving the Complaint. Failure to make such payment within 60 days of receipt of the Complaint may subject the Respondent to default pursuant to 40 C.F.R. § 22.17.

RESPONSE: Paragraph 34 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

35. Upon receipt of payment in full, in accordance with 40 C.F.R. § 22.18(a)(3), the Regional Judicial Officer or Regional Administrator shall issue a final order. Payment by Respondent shall constitute a waiver of Respondent's rights to contest the allegations and to appeal the final order.

RESPONSE: Paragraph 35 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

36. Payment of the penalty shall be made by one of the following methods below. Payment by respondent shall reference Respondent's name and address, and the EPA Docket Number of this Complaint.

Payment by check to "United States Treasury"

a. If sent via first-class mail, to:

U.S. EPA, Region III
Fines and Penalties
Cincinnati Finance Center
P. O. Box 979077
St. Louis, MO 63197-9000

b. If sent via UPS, Federal Express, or Overnight Mail, to:

U.S. Bank
Government Lockbox 979077
US EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
314-418-1028

c. Via wire transfer, sent to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33

33 Liberty Street
New York, NY 10045
Attn: "D 68010727 Environmental Protection Agency"

d. Via ACH (Automated Clearing House) for receiving U.S. currency, sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking
Finance Center Contacts:

1) John Schmid: 202-874-7026
2) REX (Remittance Express) 866-234-5681

RESPONSE: Paragraph 36 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

37. At the same time payment is made, copies of the check and/or proof of payment via wire transfer or ACH shall be mailed to:

Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

and to:

Stefania D. Shamet, Esq. (3RC20)
Senior Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029.

RESPONSE: Paragraph 37 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

VII. SEPARATION OF FUNCTIONS AND *EX PARTE* COMMUNICATIONS

38. The following Agency offices, and the staffs thereof, are designated as the trial staff to represent the Agency as a party in this case: the Region III Office of Regional Counsel, the Region III Environmental Assessment and Innovation Division, the Office of the EPA Assistant Administrator for the Office of Water, and the EPA Assistant Administrator for Enforcement and Compliance Assurance. From the date of this Complaint until the final agency decision in this case, neither the Administrator, members of the Environmental Appeals Board,

Presiding Officer, Regional Administrator, nor the Regional Judicial Officer, may have an *ex parte* communication with the trial staff on the merits of any issue involved in this proceeding. Please be advised that the Part 22 Procedural Rules prohibit any unilateral discussion or *ex parte* communication of the merits of a case with the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, or the Regional Judicial Officer after issuance of a Complaint.

RESPONSE: Paragraph 38 purports to describe a legal process or state a legal conclusion, which does not require an admission or denial, and therefore is deemed denied.

AFFIRMATIVE DEFENSES

Defense 1: The claims are barred, in whole or in part, because they are too vague to determine the nature and scope of the alleged violations.

Defense 2: The claims are barred, in whole or in part, because the CWA, implementing regulations and agency guidance, if relevant, did not provide and has not provided fair notice of the interpretations of law now advanced in the Complaint. Accordingly, Complainant's efforts to retroactively enforce those interpretations deprive Respondent of Due Process of law and Equal Protection of the laws as guaranteed by the 5th and 14th Amendments to the Constitution of the United States and the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

Defense 3: The fines and forfeitures sought by Complainant in this case fail to bear a relationship to the gravity of the alleged offenses and are grossly disproportional. Respondent promptly reported the actions and promptly moved to mitigate any damage. Complainant has divided the allegations into two complaints for the same set of actions, resulting in an improper application of the penalty matrix. For these and other reasons, Respondent unlawfully seeks to impose an excessive fine in violation of the 8th Amendment to the Constitution of the United States.

Defense 4: The claims fail, in whole or in part, because the alleged actions fall within one or more Nationwide Permits that required no separate notification.

Defense 5: The wrongful actions were those of an independent contractor, not Respondent's actions.

REQUEST FOR HEARING

Respondent requests a hearing on this matter.

For Respondent Columbia Gas Transmission LLC

Dated: July 25, 2012

Jane E. Montgomery 6205165 IL
Schiff Hardin LLP
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Chicago, IL 60606
jmontgomery@schiffhardin.com
312.258.5508

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CERTIFICATE OF SERVICE

I certify that on July 25, 2012, I served an Appearance and Respondent's Answer and Request for Hearing, each dated July 25, 2012, to the addressees and by the manner set forth below:

Original and one copy by Certified Mail to:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Two copies by Regular Mail to:

Attorney for Complainant:

Stefania D. Shamet, Esq.
Senior Assistant Regional Counsel (3RC20)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Date: July 25, 2012

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