

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

BARBER VALLEY DEVELOPMENT,
INC.,

Boise, Idaho,

Respondent.

DOCKET NO. CWA-10-2021-0122

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), 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)(B), 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of Class II 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 \$125,000. Pursuant to 40 C.F.R. Part 19, the administrative assessment of Class II civil penalties may not exceed \$22,584 per day for each day during which the violation continues, up to a maximum

penalty of \$282,293. *See* 85 Fed. Reg. 83820 (December 23, 2020) (2021 Civil Monetary Penalty Inflation Adjustment Rule).

1.4. Pursuant to CWA Section 309(g)(1)(A) and (g)(2)(B), 33 U.S.C. §§ 1319(g)(1)(A) and (g)(2)(B), 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 Barber Valley Development, Inc. (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 of 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). At the time of the violations, waters of the United States included, but were not limited to, waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; all interstate waters; tributaries of those waters; and wetlands adjacent to those waters. 40 C.F.R. § 230.3(s) (2014).

3.5. 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 Section 502(14), 33 U.S.C. § 1362(14).

3.6. 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).

3.7. “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 and debris, 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.

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

General Allegations

3.9. Respondent is a “corporation.” Respondent is thus a “person” as defined by CWA Section 502(5), 33 U.S.C. § 1362(5).

3.10. At all times relevant to this action, Respondent was granted permission to perform maintenance on Council Spring Creek on property owned by Idaho Power Company located between Warm Springs Avenue and South Eckert Road in Boise, Idaho in Township 3 North, Range 3 East, Section 29, Tax Lots No. 1000 and 1100 (Site). The Site is used by Idaho Power Company for a transmission line.

3.11. The Site contains Council Spring Creek, an intermittent stream with adjacent wetlands. Council Spring Creek contributes flow to the Boise River through the Trout Unlimited Enhancement Length and is a tributary to the Boise River. Additionally, Council Spring Creek and its adjacent wetlands have a significant nexus to the chemical, physical, and biological integrity of the Boise River. The Boise River is a traditional navigable water and a water of the United States. As such, Council Spring Creek and its adjacent wetlands are “navigable waters” within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7), and are “waters of the United States” within the meaning of 40 C.F.R. § 230.3(s) (2014).

Violations

3.12. As described below, beginning on or around March 30, 2018 and extending until on or around April 3, 2018, EPA alleges that Respondent violated CWA Section 301, 33 U.S.C. § 1311.

3.13. Beginning on or around March 30, 2018 and extending until on or around April 3, 2018, EPA alleges that Respondent and/or persons acting on Respondent's behalf:

3.13.1 Used certain heavy earthmoving equipment, including a track hoe, to relocate and discharge fine sand, small cobbles, and other native materials on the Site; and

3.13.2 Placed those materials into wetlands adjacent to Council Spring Creek.

3.14 The purpose of Respondent's activities was to perform maintenance on Council Spring Creek to reduce flooding.

3.15 EPA alleges that the construction equipment referenced in Paragraph 3.13.1 is a "point source" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

3.16 EPA alleges that the dredged and/or fill materials that Respondent caused to be discharged, as referenced in Paragraph 3.13.1, include fine sand, small cobbles, and native materials, each of which constitutes "dredged material" and/or "fill material" within the meaning of 40 C.F.R. § 232.2, each of which constitutes a "pollutant" within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

3.17 EPA alleges that by causing dredged and 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 fill materials described above was not authorized by any permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344. EPA therefore alleges that Respondent is in 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 CWA Section 309(g)(3), 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 \$7,500.

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 thirty (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, Missouri 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

Enforcement Specialist at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, M/S ORC-11-C07
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
R10_RHC@epa.gov

Charissa Bujak
U.S. Environmental Protection Agency
Region 10, Idaho Operations Office
950 West Bannock Street
Boise, Idaho 83702
Bujak.Charissa@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, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order.

4.7.2. Attorneys 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) attorneys 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 is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.10. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this Consent Agreement, Respondent has corrected the violation(s) alleged in Part III above other than those alleged violations that will be corrected in accordance with Administrative Compliance Order on Consent, Docket Number: CWA-10-2021-0121.

4.11. Except as described in Paragraph 4.7 and its subparagraphs, each party shall bear its own costs in bringing or defending this action.

4.12. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations Consent Agreement and waives any right to appeal the Final Order.

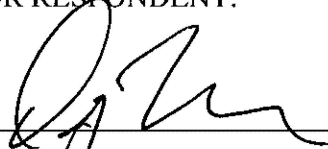
4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondent and his agents, servants, employees, successors, and assigns.

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

DATED:

5-12-21

FOR RESPONDENT:



DOUG FOWLER
President
Barber Valley Development, Inc.

DATED:

FOR COMPLAINANT:

EDWARD
KOWALSKI

Digitally signed by
EDWARD KOWALSKI
Date: 2021.06.21
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EDWARD J. KOWALSKI
Director
Enforcement and Compliance Assurance Division
EPA Region 10

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

BARBER VALLEY DEVELOPMENT,
INC.,

Boise, Idaho,

Respondent.

DOCKET NO. CWA-10-2021-0122

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 _____, 2021.

RICHARD
MEDNICK

Digitally signed by
RICHARD MEDNICK
Date: 2021.06.22
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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 the Matter of: Barber Valley Development, Inc., DOCKET NO.: CWA-10-2021-0122** 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 emailed to:

Patrick B. Johnson
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 10, Alaska Operations Office
222 West Seventh Avenue, No. 19
Anchorage, Alaska 99513
johnson.patrick@epa.gov

Further, the undersigned certifies that a true and correct copy of the aforementioned document was emailed to:

Doug Fowler, President
Barber Valley Development, Inc.
4940 East Mill Station Drive
Suite 101-B
Boise, Idaho 83716
dfowler@lenirltd.com

T. Hethe Clark, Partner
Clark Wardle LLP
251 East Front Street
Suite 310
Boise, Idaho 83702
hclark@clarkwardle.com

DATED this ___ day of _____, 2021.

**TERESA
YOUNG**

Digitally signed by
TERESA YOUNG
Date: 2021.06.22
12:33:44 -07'00'

Teresa Young
Regional Hearing Clerk
EPA Region 10