



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

VIA UPS

Mr. Roy Yoho
RD1, Box 51
Proctor, West Virginia 26055

SEP 06 2012

Re: Administrative Penalty Complaint and Notice of Opportunity to Request Hearing
EPA Docket No.: CWA-03-2012-0036

Dear Mr. Yoho:

Enclosed is a document entitled "Administrative Complaint and Notice of Opportunity to Request Hearing," hereinafter referred to as the "Complaint." The United States Environmental Protection Agency Region III ("EPA" or "the Agency") has filed this Complaint against you under the authority of Section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(g). In the Complaint, EPA alleges that you have violated Section 301 of the Act.

You may elect to resolve the penalty proceeding as set forth in the Complaint. Otherwise, you must file a response addressing each allegation in the Complaint within 30 days of your receipt of the Complaint, or, according to the rules governing this case (enclosed), the allegations will be deemed admitted. Failure to respond may result in the issuance of a Default Order, as well as preclude you from participating in further administrative hearings.

You have the right to request a Hearing regarding the violations alleged in the Complaint and the proposed administrative civil penalty. Such request should be included with your response to the Complaint and must also be made within 30 days of your receipt of this Complaint.

Regardless of whether you request a Hearing, EPA invites you to confer informally with the Agency concerning the alleged violations and the amount of the proposed penalty. You may represent yourself or be represented by an attorney at any conference, whether in person or by telephone. An attorney from the Agency's Office of Regional Counsel will normally be present at any informal conference held.

EPA encourages all parties against whom it files a Complaint proposing assessment of a penalty to pursue the possibility of settlement through an informal conference. If such a mutually satisfactory settlement can be reached, it will be formalized by the issuance of a Consent Agreement and Final Order, which will be signed by you and by the Director of the Environmental Assessment and Innovation Division, EPA, Region III. The issuance of such a

Consent Agreement and Final Order shall constitute a waiver by you of your right to a hearing on, and a judicial appeal of, the agreed upon civil penalty.

A request for an informal conference does not extend the 30-day period by which you must request or waive a Hearing on the proposed penalty assessment, and the two procedures can be pursued simultaneously. A copy of EPA's "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. Part 22, is enclosed for your reference.

To the extent that you or your business may qualify as a "small business" under the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"), a copy of the SBREFA Information Sheet is enclosed for your reference. This Information Sheet provides information on contacting the SBREFA Ombudsman to comment on federal enforcement and compliance activities and also provides information on compliance assistance. As noted in the Information Sheet, any decision to participate in such program or to seek compliance assistance does not relieve you of your obligation to respond in a timely manner to an EPA request or other enforcement action, create any new rights or defenses under law, and will not affect EPA's decision to pursue this enforcement action. To preserve your legal rights, you must comply with all rules governing the administrative enforcement process. The Ombudsman and fairness boards do not participate in the resolution of EPA's enforcement action.

If you wish to discuss the possibility of settlement of this matter, please contact Mark J. Bolender of the Office of Regional Counsel, at 215-814-2642.

Sincerely,


John R. Pomponio, Director
Environmental Assessment and Innovation Division
EPA Region III

Enclosures

cc: Mr. Mark Bolender
Ms. Stephanie Andreescu
Mr. Scott Hans, US Army Corps of Engineers, Pittsburgh District
Ms. Dana Adipietro, US Army Corps of Engineers, Pittsburgh District
Mr. Michael Zeto, WV Department of Environmental Protection
Mr. Kevin Goff, WV Division of Natural Resources

5. Proctor Creek flows directly to the Ohio River, a navigable-in-fact body of water. Proctor Creek 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.
6. Respondent, or persons acting on behalf of Respondent, operated equipment which discharged dredged and/or fill material to waters of the United States. Respondent's activities included discharging fill into Proctor Creek for the construction of a 130 linear foot bulkhead.
7. The term "fill material" within the meaning of 40 C.F.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.
8. The equipment referenced in Paragraph 6, 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).
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.
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 Respondent's property did Respondent have a permit from the Secretary of the Army as required by Section 404 of the Act, 33 U.S.C. § 1344.

III. FINDINGS OF VIOLATIONS

11. The allegations in 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).

IV. PROPOSED CIVIL PENALTY

13. Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), 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 for each such violation, up to a total penalty amount of \$25,000.
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 addressed pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), in an amount not to exceed \$16,000 for each such violation occurring after January 12, 2009, up to a total penalty amount of \$37,500.

15. Based upon the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and in accordance with the Consolidated Rules, Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to the Respondent in the amount of **Eleven Thousand Five Hundred Dollars (\$11,500)** 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.
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.
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).
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.
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.

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 Order against Respondent. Respondent's default constitutes a binding admission of all factual allegations made in the Complaint and waiver of Respondent's right to contest such factual allegations. The civil penalty proposed herein shall become due and payable without further proceedings thirty (30) days after the issuance of the Default Order becomes final, as provided in 40 C.F.R. § 22.17(d).

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.
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 material factual allegation in the Complaint constitutes an admission of the allegation.

23. Pursuant to Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), 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.
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.
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 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.
26. Pursuant to Section 309(g)(4)(C) of the Act, 33 U.S.C. § 1319(g)(4)(C), if Respondent does not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submitted 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. 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.

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

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:

Mark J. Bolender Esq.
Senior Assistant Regional Counsel (3RC43)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

31. 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

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.
33. If Respondent pays the specific penalty proposed in this Complaint within thirty (30) days of receiving this Complaint, then, pursuant to 40 C.F.R. § 22.18(a)(1), no Answer need be filed.
34. If Respondent wishes to resolve this proceeding by paying the penalty proposed in this Complaint 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:

Mark J. Bolender, Esq.
Senior Assistant Regional Counsel (3RC43)
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 30 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.

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.
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

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:

Mark J. Bolender Esq.
Senior Assistant Regional Counsel (3RC43)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029.

VII. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

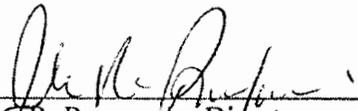
38. The following Agency offices, and the staffs thereof, are designated as the trial staff to represent the Agency as a party in this case: the Region III Office of Regional Counsel, the Region III Environmental Assessment and Innovation Division, the Office of the EPA Assistant Administrator for the Office of Water, and the EPA Assistant Administrator for

In Re: Roy Yoho
EPA Docket No.: CWA-03-2012-0036

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.

SEP 06 2012

Date: _____



John R. Pomponio, Director
Environmental Assessment and Innovation Division
U.S. Environmental Protection Agency
Region III

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2028

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REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

Ms. Lydia Guy
Regional Hearing Clerk
U.S. EPA Region III
1650 Arch St.
Philadelphia, PA 19103

Re: In the Matter of Roy Yoho
EPA Docket No. CWA-03-2012-0036

Dear Ms. Guy:

Enclosed for filing please find a Class I Administrative Complaint and Opportunity to Request a Hearing pursuant to Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), for the unlawful discharge of a pollutant to waters of the U.S. in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Very truly yours,


Mark J. Bolender
Senior Assistant Regional Counsel
U.S. EPA Region III

Cc: Roy Yoho

In Re: Roy Yoho
EPA Docket No.: CWA-03-2012-0036

CERTIFICATE OF SERVICE

I hereby certify that on this day, I filed with the Regional Hearing Clerk an original and one copy of the Administrative Penalty Complaint, EPA Docket No. CWA-03-2012-0036, with a copy sent to Respondent by UPS Overnight Delivery, at the following addresses:

Roy Yoho
RD1, Box 51
Proctor, West Virginia 26055

with a copy to:

Randy C. Huffman, Secretary
West Virginia Division of Natural Resources
601 57th St., SE
Charleston, WV 25304

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2012 SEP -6 AM 11:32
REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

Date:

9/6/2012



Mark J. Bolender, Esq.
Senior Assistant Regional Counsel
US EPA Region III