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HEARINGS CLERK  
EPA - REGION 10

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

David R. Swezey,

Anchorage, Alaska

Respondent.

)  
) DOCKET NO. CWA 10-2008-0131  
)  
) **THIRD STATUS REPORT**  
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The U.S. Environmental Protection Agency ("Complainant") files this Third Status Report to update the Presiding Officer on settlement negotiations between the parties.

On January 16, 2009, the Presiding Officer issued an Order On Respondent's Request For Additional Time To Respond And On Complainant's Motion For Default Order ("order"). The order required Respondent to file its prehearing exchange on or before January 30, 2009, if the parties have not filed a fully executed Consent Agreement And Final Order ("CAFO") beforehand. The order also required that Complainant file its rebuttal prehearing exchange on or before February 13, 2009, if the parties have not filed a fully executed CAFO beforehand.

On February 2, 2009, Complainant and Respondent reached a settlement in principle to resolve this matter with the execution of a CAFO and an Administrative Order On Consent ("AOC"). Complainant transmitted the CAFO and AOC to Respondent for signature on February 9, 2009. On February 13, 2009, Complainant received the signed CAFO and AOC

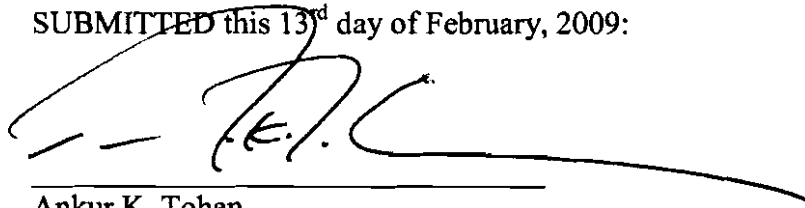
**THIRD STATUS REPORT - 1**  
**DOCKET NO. CWA 10-2008-0131**

**U.S. Environmental Protection Agency**  
**1200 Sixth Avenue, Suite 900**  
**Seattle, Washington 98101**  
**(206) 553-1796**

1 from Respondent. Copies of the CAFO and AOC are attached to this status report. On February  
2 13, 2009, Complainant signed the CAFO and delivered it to the Regional Hearings Clerk for  
3 execution and filing, and routed the AOC for signature. As of the time this status report was  
4 filed, the Regional Judicial Officer had not executed and filed the CAFO.

5 Complainant has chosen not to submit a rebuttal prehearing exchange in this case. When  
6 the Regional Judicial Officer executes and files the CAFO, a true and conforming copy will be  
7 delivered to the Presiding Officer and Respondent.  
8

9  
10 SUBMITTED this 13<sup>th</sup> day of February, 2009:

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12 Ankur K. Tohan  
13 Assistant Regional Counsel  
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1 **CERTIFICATE OF SERVICE**

2 I certify that the foregoing "Third Status Report" was sent to the following persons, in the  
3 manner specified, on the date below:

4 Original and one copy, hand-delivered:

5 Carol Kenndy, Regional Hearing Clerk  
6 U.S. Environmental Protection Agency, Region 10  
7 1200 Sixth Avenue,  
8 Suite 900, Mail Stop ORC-158  
Seattle, Washington 98101

9 A true and correct copy, via regular mail:

10 Robert K. Reiman  
11 Law Offices of Robert K. Reiman  
12 619 E. Ship Creek Avenue, Suite 250  
Anchorage, AK 99501

13 A true and correct copy, via pouch mail and fax:

14 Hon. Susan L. Biro  
15 Administrative Law Judge  
16 Office of Administrative Law Judges  
17 U.S. Environmental Protection Agency  
18 Mail Code 1900L  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
(202) 565-0044

19  
20 Dated: 2/13/2009 Dale Eggert 2-13-09  
21

22 U.S. EPA Region 10

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THIRD STATUS REPORT - 3  
DOCKET NO. CWA 10-2008-0131

U.S. Environmental Protection Agency  
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**BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:	)	DOCKET NO. CWA 10-2009-0100
DAVID R. SWEEZEY,	)	
Respondent,	)	<b>ADMINISTRATIVE ORDER ON</b>
	)	<b>CONSENT</b>
Anchorage, Alaska.	)	

The following Administrative Order on Consent ("Consent Order") is entered into voluntarily by David R. Sweezy ("Respondent") and the United States Environmental Protection Agency to provide a remedy for the unlawful discharge of excavated materials into the waters of the United States.

**I. AUTHORITIES**

1.1. This Consent Order is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or "Complainant") under Sections 308 and 309(a) of the Clean Water Act ("Act"), 33 U.S.C. §§ 1318 and 1319(a).

1.2. The Administrator has delegated this authority to the Regional Administrator, Region 10, and who duly re-delegated to the undersigned Director of the Office of Ecosystems, Tribal and Public Affairs.

**ADMINISTRATIVE ORDER ON CONSENT - 1**  
Docket No. CWA 10-2009-0100

U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Suite 900 (ORC-158)  
Seattle, Washington 98101  
(206) 553-1796

1 1.3. This Consent Order supersedes and replaces the Compliance Order issued under  
2 Docket Number CWA-10-2005-0171 to Respondent on May 26, 2005.

3 **II. APPLICABILITY**

4 2.1. Respondent agrees not to contest EPA's jurisdiction or authority to enter into or  
5 enforce this Consent Order. Respondent and EPA agree not to contest the validity of any terms  
6 and conditions of this Consent Order in any action to enforce, or any action arising from, this  
7 Consent Order.

8 2.2. EPA's decisions or actions in entering into and pursuant to this Consent Order are  
9 not subject to judicial review prior to the United States initiating a judicial action to compel  
10 Respondent's compliance with this Consent Order.

11 2.3. This Consent Order shall bind Respondent and his agents, employees, attorneys,  
12 successors, and assigns, and all persons, contractors, and consultants acting in concert with  
13 Respondent.

14 2.4. Respondent shall provide a copy of this Consent Order to any contractor and/or  
15 consultant retained to perform any work described in this Consent Order at least 48 hours prior to  
16 the initiation of such work.

17 2.5. Respondent shall provide a copy of this Consent Order to any successor in  
18 ownership, control, operation, or any other interest in all or part of the Site described in  
19 Paragraph 3.11, at least 30 days prior to the transfer. In addition, Respondent shall  
20 simultaneously notify EPA in writing that the notice required in this Paragraph was given. No  
21 transfer or contract shall in any way affect Respondent's obligation to comply fully with this  
22 Consent Order.  
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1 **III. FINDINGS AND CONCLUSIONS**

2 3.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the "discharge of any  
3 pollutant by any person" except in compliance with, *inter alia*, a permit issued pursuant to  
4 Section 404 of the Act, 33 U.S.C. § 1344.

5 3.2. Section 404(a) of the Act, 33 U.S.C. § 1344(a), authorizes the Secretary of the  
6 Army to issue permits for the discharge of dredged or fill material into navigable waters at  
7 specified disposal sites.

8 3.3. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term "discharge of  
9 a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

10 3.4. Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines "pollutant" to include,  
11 *inter alia*, dredged spoil, rock, sand, and biological materials.

12 3.5. Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines "navigable waters" as  
13 "waters of the United States."

14 3.6. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define "waters of  
15 the United States" to include: (i) all waters which are currently used, were used in the past, or  
16 may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii)  
17 tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

18 3.7. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define "wetlands" as  
19 "those areas that are inundated or saturated by surface or ground water at a frequency and  
20 duration sufficient to support, and that under normal circumstances do support, a prevalence of  
21 vegetation typically adapted for life in saturated soil conditions."  
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1 3.8. 33 C.F.R. § 328.3(c) defines "adjacent" wetlands as wetlands "bordering,  
2 contiguous, or neighboring" other waters of the United States.

3 3.9. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines "point source" to  
4 include "any discernible, confined and discrete conveyance ... from which pollutants are or may  
5 be discharged."

6 3.10. Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines "person" as "an  
7 individual, corporation, partnership, association, State, municipality, commission, or political  
8 subdivision of a State, or any interstate body."

9 3.11. Respondent owned, leased, or otherwise controlled Lots 2 and 3, of the Sly Fox  
10 Subdivision, located at 11460 Cobra Avenue, in Section 24, Township 12 North, Range 3 West,  
11 Anchorage, Alaska ("Site"), where each unauthorized discharge of dredged or fill material into  
12 waters of the United States occurred.

13 3.12. The Site contains three springs - *i.e.*, a north spring, middle spring, and south  
14 spring - that provide relatively permanent flow of water into three un-named tributaries on the  
15 Site. The three un-named tributaries ultimately drain into Craig Creek, a relatively permanent  
16 tributary to the South Fork of Little Campbell Creek, which joins with the North Fork of Little  
17 Campbell Creek, which ultimately flows into Campbell Creek. Campbell Creek is a "navigable  
18 water" as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and is a "water of the  
19 United States" as defined in 40 C.F.R. § 122.2. Craig Creek and the three un-named tributaries  
20 are "tributaries" within the meaning of 33 C.F.R. § 328.3(a)(5), and 40 C.F.R. § 232.2. The Site  
21 also contains approximately one-half acre of wetlands within the meaning of 33 C.F.R.  
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1 § 328.3(b), and 40 C.F.R. §§ 122.2 and 232.2, which are adjacent to Craig Creek and the three  
2 un-named tributaries.

3 3.13. On or about July 22, 2003, at times more fully known to Respondent and/or  
4 persons acting on his behalf, Respondent discharged dredged or fill material into waters of the  
5 United States at the Site without a permit issued pursuant to Section 404 of the Act.

6 3.14. The dredged or fill material that Respondent, and/or persons acting on his behalf,  
7 caused to be discharged includes, among other things, dirt and rock, which constitute  
8 "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

9 3.15. Respondent and/or persons acting on his behalf used mechanized land-clearing or  
10 earth-moving equipment to clear land, grub trees and vegetation, grade the landscape, and  
11 excavate materials, all of which resulted in the discharges described in Paragraph 3.12. This  
12 equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

13 3.16. Respondent did not obtain a permit from the Secretary of the Army for the  
14 discharges of dredged or fill material into waters of the United States as required by Sections  
15 301(a) and 404 of the Act, 33 U.S.C. §§ 1311(a) and 1344.

16 3.17. Respondent conducted, contracted for, supervised and/or otherwise controlled the  
17 unauthorized activities described in Paragraph 3.13.

18 3.18. Respondent is a "person" within the meaning of Section 502(5) of the Act, 33  
19 U.S.C. § 1362(5).

20 3.19. Each day that such material remains in place constitutes a separate violation of  
21 Section 301(a) of the Act, 33 U.S.C. § 1311(a).

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**ADMINISTRATIVE ORDER ON CONSENT - 5**  
Docket No. CWA 10-2009-0100

**U.S. Environmental Protection Agency, Region 10**  
1200 Sixth Avenue, Suite 900 (ORC-158)  
Seattle, Washington 98101  
(206) 553-1796



1 3.20. Taking into account the seriousness of these violations and Respondent's good-  
2 faith efforts to comply with applicable requirements, the schedule for compliance contained in  
3 the following Consent Order is reasonable and appropriate.

4 **IV. CONSENT ORDER**

5 4.1. Based upon the foregoing FINDINGS AND CONCLUSIONS, and pursuant to  
6 Sections 308 and 309(a) of the Act, 33 U.S.C. §§ 1318 and 1319(a), it is hereby ORDERED and  
7 AGREED as follows:

8 4.2. **Prohibition of Discharge**: Respondent shall not discharge any additional  
9 pollutants into any waters of the United States at the Site except in compliance with this Consent  
10 Order or a permit issued pursuant to the Clean Water Act.

11 4.3. **Implementation of the Restoration and Mitigation Work Plan**: Respondent  
12 shall implement the Restoration and Mitigation Work Plan ("Plan") described in Paragraph 4.14.  
13 Respondent shall comply with the restoration, as well as monitoring and reporting time-frames,  
14 specified in the Plan.

15 4.4. **Notification**: Respondent shall provide EPA's Project Coordinator, identified in  
16 Paragraph 4.9, verbal notification no less than 5 days prior to commencement of any activity  
17 under this Consent Order.

18 4.5. **Site Access**: This Consent Order shall in no way affect EPA's authority to enter,  
19 inspect, sample, or monitor compliance under any law, permit, court order, or agreement.  
20 Respondent shall arrange for access by EPA or its authorized representatives, upon reasonable  
21 notice. EPA or its authorized representatives shall be permitted to move freely at the Site and  
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1 appropriate off-Site areas to determine compliance with this Consent Order and to conduct  
2 actions in accordance with this Consent Order.

3 4.6. **Site Data:** At EPA's request, Respondent shall provide access to all records and  
4 documentation related to the conditions at the Site and to results or data pertaining to the  
5 restoration and mitigation activities conducted under this Consent Order.

6 4.7. **Record Preservation:** Respondent shall preserve and retain, and shall instruct his  
7 consultant, and other persons acting on his behalf, to preserve and retain all records and  
8 documents relating in any manner to the Plan for 3 years after termination of this Consent Order.  
9 Upon termination of the 3-year period, EPA may request Respondent to provide EPA with  
10 copies of any records and documents related to this Consent Order or implementation of the  
11 Plan. If EPA requests records and documents, Respondent shall, at no cost to EPA, but subject  
12 to attorney-client or other privilege, provide EPA the original or copies of the records and  
13 documents within 30 days of EPA's request. If EPA makes no request at the end of the 3-year  
14 period, Respondent may dispose of the records and documents.

15 4.8. **Modification:** EPA may, after consultation with Respondent, make a preliminary  
16 determination that tasks in addition to those defined in the Plan, including any approved  
17 modifications, are necessary to accomplish the purposes of the Plan. EPA shall notify  
18 Respondent of preliminary determinations in writing, and Respondent shall have 7 days from  
19 receipt to submit a written response. Modifications of this Consent Order, including oral  
20 modifications, shall be memorialized in writing and shall take effect only when agreed to in  
21 writing by all parties.  
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1           4.9. **Project Coordinator**: Heather Dean shall be EPA's Project Coordinator and shall  
2 oversee implementation of this Consent Order. The Project Coordinator shall receive  
3 communications, which include, but are not limited to, all documents, reports, comments,  
4 approvals, and other correspondence submitted or exchanged under this Consent Order. All  
5 submissions required by this Consent Order shall be sent to:

6                   Ms. Heather Dean  
7                   U.S. Environmental Protection Agency  
8                   Alaska Operations Office  
9                   222 W. 7<sup>th</sup> Avenue, Box #19  
10                  Anchorage, Alaska 99513-7588  
11                  Ph: 907-271-3490  
12                  Fax: 907-271-3424  
13                  Email: dean.heather@epa.gov

14           4.10. **Force Majeure**: In the event that there is an actual or anticipated delay  
15 attributable to *force majeure*, the time for performance of the obligation shall be extended only  
16 by written agreement of the parties. An extension of the time for performing an obligation  
17 directly affected by a *force majeure* event shall not, of itself, extend the time for performing a  
18 subsequent obligation.

19           1. For the purposes of this Consent Order, "*force majeure*" shall mean any  
20 event entirely beyond the control of Respondent or any entity controlled by Respondent,  
21 including Respondent's contractors, consultants, and subcontractors, that delays or  
22 prevents performance of any obligation under this Consent Order, notwithstanding  
23 Respondent's best efforts to avoid the delay. The best efforts requirement includes using  
24 best efforts to anticipate any such event and minimize the delay caused by any such event  
25 to the greatest extent practicable. Examples of events that are **not force majeure** events

1 include, but are not limited to, increased costs or expenses of any work to be performed  
2 under this Consent Order and Respondent's financial difficulties.

3 2. If any event may occur or has occurred that may delay the performance of  
4 any obligation under this Consent Order, whether or not caused by a *force majeure*,  
5 Respondent shall notify the Project Coordinator within 2 business days of when  
6 Respondent becomes aware that the event might cause a delay. Within 7 days thereafter,  
7 Respondent shall provide in writing the reasons for the delay, its anticipated duration, and  
8 measures taken or to be taken to prevent or minimize the delay, a timetable by which  
9 those measures will be implemented, and whether, in Respondent's opinion, such event  
10 may cause or contribute to an endangerment to public health, welfare, or the environment.  
11 Respondent shall exercise best efforts to avoid or minimize any delay and any effects of a  
12 delay. Failure to comply with the notice requirements shall preclude Respondent from  
13 asserting a *force majeure* claim.  
14

15 3. Respondent shall have the burden of demonstrating, by a preponderance of  
16 the evidence, that the actual or anticipated delay has been or will be caused by a *force*  
17 *majeure* event, that the duration of the delay was or will be warranted under the  
18 circumstances, that Respondent did exercise or is using best efforts to avoid and mitigate  
19 the effects of the delay, and that Respondent complied with the requirements of this  
20 section.  
21

22 4.11. ***Failure to comply:*** Failure to timely and appropriately implement to EPA's  
23 satisfaction any element of the Plan shall be deemed a violation of this Consent Order and the  
24 Clean Water Act.  
25

1           4.12. **Termination and Satisfaction:** In accordance with Paragraph 4.5, Respondent  
2 shall submit to EPA a final report documenting the completion of all requirements described in  
3 the Plan under Paragraph 4.14. Within the final report, Respondent shall also submit post-  
4 construction photographs from fixed, identified locations documenting the work that has been  
5 completed at the Site. Upon receipt of the final report, EPA will schedule an inspection of the  
6 Site with Respondent and other interested state and/or federal agencies as promptly as possible.  
7 After completion of the inspection, EPA will notify Respondent in writing whether the Plan has  
8 been fully implemented. EPA's Project Coordinator will provide this notification by telephone  
9 as promptly as possible. This Consent Order shall terminate when EPA issues a written approval  
10 of Respondent's final report.  
11

12           4.13. **Scope of Consent Order:**

13           1.       This Consent Order is not and shall not be construed to be a permit under  
14 the Clean Water Act, nor shall it in any way relieve or affect Respondent's obligation  
15 under the Act, or any other applicable federal, state or local laws, regulations or permits.  
16 Compliance with this Consent Order shall be no defense to any actions commenced  
17 pursuant to applicable laws, regulations, or permits.

18           2.       This Consent Order shall not be construed to pre-empt or preclude in any  
19 way any future administrative order issued by EPA or judicial action brought by the  
20 United States regarding environmental impacts not addressed under this Consent Order.  
21 This Consent Order shall not be construed to resolve any claims for administrative or  
22 civil penalties that may be assessed or sought by EPA or the United States.  
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3. This Consent Order shall in no way affect the rights of EPA or the United States against any person not a party to this Consent Order.

4. Nothing in this Consent Order shall be deemed to constitute a precedent by any party for any future administrative order, consent decree or civil action relating to the Site and/or any restoration work undertaken at the Site.

5. Respondent represents that he is duly authorized to execute this Consent Order or that the party signing this Consent Order on Respondent's behalf is duly authorized to bind Respondent to the terms of this Consent Order.

4.14. Restoration and Mitigation Work Plan ("Plan"): To successfully implement the Plan, Respondent must:

1. Remove the log pile located atop the Craig Creek channel, approximately 230 linear feet west of Cobra Street, and disperse the material widely throughout disturbed areas of the site, outside stream channels.

2. Rebuild the disturbed segment of Craig Creek channel (approximately 60 linear feet) downstream of the log pile to match the grade, geometry, and substrate of existing undisturbed channel segments up- and downstream.

3. Redistribute excavated and graded material throughout the disturbed portion of the Site to match the elevations of adjacent undisturbed areas. If Respondent elects to retain the pond, excavated and graded materials may be used to form a berm of no more than a one (1) foot in height immediately on the shore of the pond.

4. Rebuild the disturbed channels emanating from the three springs to match the grade, geometry, and substrate of existing undisturbed channels. The north spring

1 channel shall connect to the natural channel near the southeast corner of the 115th  
2 Avenue right-of-way, while the middle and south spring channels shall merge and  
3 connect to the channel near the northeast corner of the parcel immediately west of the  
4 Site. The material redistribution described in paragraph 4.14.3 shall eliminate existing  
5 flow paths once the tributary channels are rebuilt.

6 5. If Respondent elects to retain the pond, direct flow from the seep  
7 immediately west of the house into the pond and redistribute the material described in  
8 paragraph 4.14.3 to eliminate the seep's existing flow path. If Respondent elects to  
9 eliminate the pond, construct a channel from the seep to join the tributary from the north  
10 spring, using the same grade, dimensions, and substrate as that tributary.

11 6. Stream channel reconstruction and excavated material redistribution must  
12 incorporate measures to minimize turbidity in flowing waters.

13 7. Place organic-rich topsoil on regraded areas and revegetate with wetland  
14 and riparian plant species native to the Site, using seed, transplants, plugs, and/or  
15 vegetative mat.

16 8. Implement temporary erosion and sediment controls until revegetation is  
17 sufficient to stabilize the Site.

18 9. The activities described in paragraphs 4.14.1 through 4.14.8 must be  
19 completed by July 31, 2009.

20 10. Respondent shall submit a report providing photographic documentation of  
21 the completion of items in paragraphs 4.14.1 through 4.14.8 from fixed photo points,  
22 utilizing several photographic points per item. Respondent shall provide the report to the  
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1 EPA's Project Coordinator, identified in Paragraph 4.9, no later than July 31, 2010 and  
2 shall also include a description of the plant materials used for revegetation.

3 11. Respondent shall conduct monitoring of the Site through July 31, 2010.  
4 Monitoring shall document the condition of each channel and wetland restoration area  
5 described in paragraphs 4.14.1 through 4.14.8, utilizing the same photo points and  
6 perspectives as for the initial completion report described in paragraph 4.14.10.  
7 Monitoring shall occur four times: approximately one month after initial completion of  
8 the work (i.e., by August 31, 2009); three months after completion (i.e., by October 31,  
9 2009); in early May 2010; and, in late June 2010. Respondent shall provide the results of  
10 each monitoring effort to EPA's Project Coordinator, identified in Paragraph 4.9, within  
11 two weeks of its completion. In addition to the photographic documentation, each  
12 monitoring report shall also describe the composition and aerial coverage of vegetation in  
13 the restored area. Upon review of each monitoring report, EPA will advise Respondent in  
14 writing whether any corrective measures are necessary.  
15

16 **V. SANCTIONS**

17 5.1. Violation of, or failure to comply with, the foregoing Consent Order may subject  
18 Respondent to (1) civil penalties of up to \$37,500 per day of violation pursuant to Section 309(d)  
19 of the Act, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; or (2) administrative penalties of up to  
20 \$16,000 per day for each violation, pursuant to Section 309(g)(2) of the Act, 33 U.S.C.  
21 § 1319(g)(2), and 40 C.F.R. Part 19.  
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ADMINISTRATIVE ORDER ON CONSENT - 13  
Docket No. CWA 10-2009-0100

U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Suite 900 (ORC-158)  
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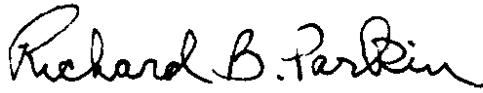
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**VI. EFFECTIVE DATE**

6.1. Respondent has had the opportunity to consult with EPA concerning this Consent Order as provided in Section 309(a)(4) of the Act, 33 U.S.C. § 1319(a)(4). This Consent Order shall therefore take effect upon signature by all parties.

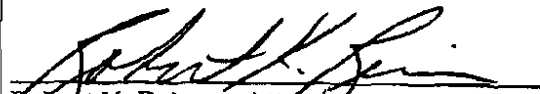
IT IS SO AGREED on this 13<sup>th</sup> day of February, 2009.

For UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10



Richard Parkin, Acting Director  
Office of Ecosystems, Tribal and Public Affairs

For RESPONDENT



Robert K. Reiman, Attorney  
Law Offices of Robert K. Reiman  
for David R. Sweezey