

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RECEIVED

14 DEC 19 AM 10:46
HEARINGS CLERK
EPA -- REGION 10

In the Matter of:

CLACKAMAS COUNTY WATER
ENVIRONMENT SERVICES
Oregon City, Oregon

RICHARD PHILLIPS MARINE, INC.
Boring, Oregon

Respondents.

DOCKET NO. CWA-10-2015-0012

**CONSENT AGREEMENT AND
FINAL ORDER**

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Sections 308, 309(a)(3) and 309(g)(2)(B) of the Clean Water Act (“CWA”). CWA §§ 308, 309(a)(3), 309(g)(2)(B), 33 U.S.C. §§ 1318, 1319(a)(3), 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has in turn delegated this authority to the Regional Judicial Officer.

1.3. Pursuant to Sections 308, 309(a)(3) and 309(g)(2)(B) of the CWA, 33 U.S.C. §§ 1318, 1319(a)(3), and 1319(g)(2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Clackamas County Water Environment Services and Richard Phillips Marine, Inc. (“Respondents”) agree to issuance of, the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Director of the Office of Ecosystems, Tribal and Public Affairs, EPA Region 10 ("Complainant") has been delegated the authority pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to sign consent agreements between EPA and the party against whom a Class II penalty is proposed to be assessed.

2.3. Part III of this CAFO 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 implementing regulations that Respondents are alleged to have violated.

III. ALLEGATIONS

3.1. The CWA prohibits the "discharge of any pollutants by any person" except, inter alia, as authorized by a permit issued pursuant to Section 402 or 404 of the CWA, 33 U.S.C. § 1342 or 1344. Each discharge of pollutants from a point source that is not authorized by such a permit constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.1.1 The CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source" and defines "navigable waters" to include "waters of the United States." CWA § 502(7)(12), 33 U.S.C. § 1362(7),(12).

3.1.2 The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(16), 33 U.S.C. § 1362(14).

3.1.3 The CWA defines a pollutant to include, inter alia, rock, sand, dredged spoil, and solid waste discharged into water. CWA § 502(6), 33 U.S.C. § 1362(6).

3.2. Respondent Clackamas County Water Environment Services (“Clackamas County”) is a local governmental agency, and is a “person” within the meaning of the CWA. CWA §§ 301(a), 502(5); 33 U.S.C. §§ 1311(a), 1362(5).

3.3. Respondent Richard Phillips Marine, Inc. (“Phillips Marine”), a corporation organized under the laws of the State of Oregon, is a “person” within the meaning of the CWA. CWA §§ 301(a), 502(5); 33 U.S.C. §§ 1311(a), 1362(5).

3.4. Respondents directed and/or conducted construction activities in approximately 0.18 acres within and next to the Sandy River (“Site”), located near River Mile 41, within the village of “the Villages of Mount Hood” in Clackamas County, Oregon, for the repair and installation of two sewage outfall pipes.

3.5. The Sandy River is a “navigable water” and “waters of the United States,” and is subject to the jurisdiction of the Clean Water Act. CWA § 311, 33 U.S.C. § 1321; CWA § 502(7), 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a); 40 C.F.R. §§ 110.1, 232.2.

3.6. Respondent Clackamas County submitted a Joint Permit Application to the U.S. Army Corps of Engineers (“Corps”) in June 2011, requesting authorization to discharge 210 cubic yards of fill below the Ordinary High Water level (“OHW”) of the Sandy River, within a 0.1 acre area, in order to repair and relocate the Hoodland Sewage Treatment Plant’s sewage outfall pipes, which were damaged during a flood event in January 2011.

3.7. The Corps issued Permit NWP-2011-271 (“Permit”) on August 11, 2011, and reissued the Permit on May 18, 2012, which authorized Respondent Clackamas County to discharge up to 210 cubic yard of dredged/fill material below the OHW of the Sandy River, for a total of 0.01 acre area of disturbance below OHW. The Corps revised the Permit on July 16,

2012 to authorize a fill volume of 260 cubic yards of dredged/fill material below the OHW of the Sandy River, for a total of 0.01 acre area of disturbance below OHW.

3.8. From July 16 through July 18, 2012, Respondents performed or were responsible for the performance of work that resulted in the discharge of approximately 951 cubic yards of “fill material” and/or “dredged material” below the OHW of the Sandy River, within a 0.05 acre area. 40 C.F.R. § 232.2.

3.8.1 Respondents directed the use of and/or operated earthmoving equipment, including excavators, to place the dredged and/or fill material and construct, among other things, a gravel berm on the north side of the Site of approximately 700 feet in length, and two parallel channels through an in-channel gravel bar of approximately 300 feet in length.

3.8.2 The “fill material” and/or “dredged material” discharged by Respondents into the Sandy River is a “pollutant” under the Clean Water Act. CWA § 502(6), 33 U.S.C. § 1362(6).

3.8.3 Each piece of earthmoving equipment used by Respondents to discharge the “fill material” and/or “dredged material” was a “point source.” CWA § 502(14), 33 U.S.C. § 1362(14).

3.9. Respondents’ discharge of dredged and/or fill material into the waters of the United States constituted a “discharge of pollutants” from a point source. CWA §§ 301, 502(12); 33 U.S.C. §§ 1311, 1362(12).

3.10. Only a small portion of the Respondents’ discharge of dredged and/or fill material (0.01 acres, 260 cubic yards) was authorized, pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, under the Permit.

3.11. On July 30, 2012, the Corps issued a Cease and Desist Order to Respondents Clackamas County and Phillips Marine.

3.12. On August 9, 2012, the Corps issued an Order for Corrective Measures to Respondent Clackamas County, which the Corps amended on August 27, 2012.

3.13. On August 22, 2012, EPA Region 10 conducted a compliance inspection of the Site.

3.14. **Violation:** Respondents' discharge of dredged and/or fill material into the waters of the United States was an exceedance of the amounts authorized in the Corps 2011 issued permit, therefore violating Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.15. Respondents are liable for administrative penalties in an amount not to exceed \$16,000 per day for each day during which the violation continued, up to a maximum of \$177,500. CWA § 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. Part 19.

3.16. Respondent Clackamas County has worked with the Corps to obtain the appropriate after-the-fact permit and has received tentative approval for issuance thereof, subject to completion of a mitigation project of benefit to the hydrology of the watershed and aquatic life, and resolution of the enforcement action.

IV. CONSENT AGREEMENT

4.1. Respondents admit the jurisdictional and specific factual allegations contained in Part III of this CAFO.

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

4.3. **Penalty:** 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 Respondents' economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondents agree that an appropriate penalty to settle this action is Thirty Thousand Dollars (\$30,000).

4.3.1 Respondent Clackamas County shall pay Ten Thousand Dollars (\$10,000) as its share of the appropriate penalty set forth in this paragraph.

4.3.2 Respondent Phillips Marine shall pay Twenty Thousand Dollars (\$20,000) as its share of the appropriate penalty set forth in this paragraph.

4.4. Pursuant to 40 C.F.R. § 22.31(c), Respondents agree to pay their shares of the total civil penalty set forth in Paragraph 4.3 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, Missouri 63197-9000

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

4.6. Respondents must deliver via United States mail photocopies of the checks described in Paragraph 4.5, above, on the Regional Hearing Clerk, EPA Compliance Officer, and Office of Regional Counsel attorney, at the following addresses:

Candace Smith, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, MS ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

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

Sylvia Quast, Regional Counsel
U.S. Environmental Protection Agency
Region 9, ORC-2
75 Hawthorne Street
San Francisco, CA 94105

4.7. If Respondents fail to pay any portion of their share of the penalty assessed by this CAFO by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondents 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. Interest shall accrue from the effective date of the Final Order, at the rate established by the Secretary of the Treasury, and applied to any portion of the assessed penalty which remains unpaid 30 days after the effective date of the Final Order. CWA § 309(g)(9), 33 U.S.C. § 1319(g)(9); 31 U.S.C. § 3717(a)(1), 40 C.F.R. § 13.11(a)(3).

4.7.2 Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondents fail to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondents 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 twenty percent (20%) of the

aggregate amount of Respondents' penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. Federal Tax. Penalties paid pursuant to this Final Order are administrative civil penalties assessed by EPA and shall not be deductible for federal tax purposes.

26 U.S.C § 162(f).

4.9. The undersigned representatives of Respondents certify that he or she is authorized to enter into the terms and conditions of this CAFO and to bind his or her Respondent to this document.

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

4.11. Respondents expressly waive any right to contest the allegations and waive any right to appeal the Final Order set forth in Part V.

4.12. The provisions of this CAFO shall bind Respondents and their agents, servants, employees, successors, and assigns.

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

DATED:

FOR RESPONDENT CLACKAMAS COUNTY WATER ENVIRONMENT SERVICES:

11-13-14



Signature

Print Name: Martha Schrader

Title: Vice Chair VI.1.

DATED:

FOR RESPONDENT RICHARD PHILLIPS MARINE, INC.:

Signature

Print Name: _____

Title: _____

DATED:

FOR COMPLAINANT:

12/11/14



R. DAVID ALLNUTT, Director
Office of Ecosystems, Tribal and Public Affairs

DATED:

FOR RESPONDENT CLACKAMAS COUNTY WATER ENVIRONMENT SERVICES:

Signature

Print Name: _____

Title: _____

DATED:

FOR RESPONDENT RICHARD PHILLIPS MARINE, INC.:

11-5-14



Signature

Print Name: Richard Phillips

Title: President

DATED:

FOR COMPLAINANT:

12/11/14



R. DAVID ALLNUTT, Director

Office of Ecosystems, Tribal and Public Affairs

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondents are ordered to comply with the terms of settlement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO 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 CAFO does not waive, extinguish or otherwise affect Respondents' obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. Respondents waive any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondents may have with respect to any issue of fact or law set forth in this CAFO, including, but not limited to, any right of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-708; provided, however, that this waiver and/or this Final Order generally does not impair or prejudice the ability of Respondent Clackamas County to pursue and obtain, including appeal and review of the process thereof, an after-the-fact permit issued from the Corps.

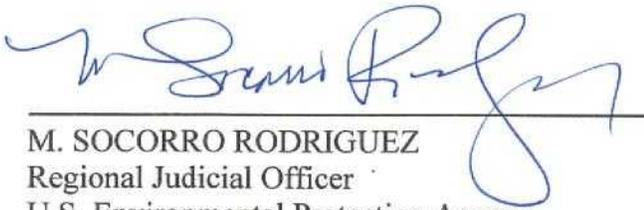
5.4. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Oregon Department of State Lands has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondents.

5.5. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to

comment on its intent to assess an administrative penalty against Respondents. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.6. This Final Order shall become effective upon filing.

SO ORDERED this 19th day of December, 2014.



M. SOCORRO RODRIGUEZ
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: Clackamas County Water Environment Services and Richard Phillips Marine, Inc., Docket No.: CWA-10-2015-0012** 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:

Sylvia Quast, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9, ORC-2
75 Hawthorne Street
San Francisco, California 94105

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:

Greg Geist
Water Quality Manager
Clackamas County Water Environmental Services
150 Beaver Creek Road
Oregon City, Oregon 97045

Richard Phillips
President
Richard Phillips Marine, Inc.
33002 SE Ryder Lane
Boring, Oregon 97009

Chris Storey
Assistant County Counsel
2051 Kaen Road, 4th Floor
Oregon City, Oregon 97045

DATED this 19th day of Dec, 2014


Signature

Candace H. Smith
Regional Hearing Clerk
EPA Region 10