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EPA - REGION IX
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, California 94105

IN THE MATTER OF:

EDWARD LYNN BROWN
Oakdale, California,

Respondent.

DOCKET NO. CWA-09-2015-0001

COMPLAINT/CONSENT
AGREEMENT AND ~~PROPOSED~~ 
FINAL ORDER

*Class II Administrative Penalty
Proceeding under Section 309(g) of the
Clean Water Act, 33 U.S.C. § 1319(g), and
40 C.F.R. §§ 22.13 (b) and 22.18*

CONSENT AGREEMENT

I. AUTHORITY AND PARTIES

1. This is a Class II civil administrative penalty proceeding under section 309(g)(1)(A) and (2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A) and (2)(B), and 40 C.F.R. Part 22 (*Consolidated Rules of the Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*).

2. Complainant is the Director of the Enforcement Division, U.S. Environmental Protection Agency ("EPA"), Region 9, who brings this action pursuant to the authority delegated by the EPA Administrator and EPA Region 9 Administrator.

3. Respondent is Edward Lynn Brown of Oakdale, California.

4. This Consent Agreement and Final Order ("CA/FO"), which contains the elements of a complaint required by 40 C.F.R. § 22.14(a), simultaneously commences and concludes this penalty proceeding, as authorized by 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law, and upon consent by EPA and Respondent, it is hereby STIPULATED, AGREED, AND ORDERED:

II. STATUTORY AND REGULATORY FRAMEWORK

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for a person to discharge pollutants, including dredged or fill material, from a point source into waters of the United States, except as authorized by a CWA permit. Under section 404 of the CWA, 33 U.S.C. § 1344, the U.S. Army Corps of Engineers (“Corps”) issues permits for the discharge of dredged or fill material into waters of the United States.

6. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include an “individual.”

7. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, “dredged spoil,” “biological materials,” “rock,” “sand,” and “cellar dirt.”

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

9. EPA and the Corps regulations define “waters of the United States” to include, *inter alia*: (i) all waters that are currently used, were used in the past, or may be susceptible for use in interstate or foreign commerce (“traditional navigable waters”); (ii) tributaries of traditional navigable waters; and (iii) wetlands adjacent to tributaries of traditional navigable waters. 33 C.F.R. § 328.3(a)(1), (5) and (7) (Corps regulations) and 40 C.F.R. § 230.3(s)(1), (5), and (7) (EPA regulations).

10. Pursuant to CWA section 309(g), 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, EPA may assess a Class II civil administrative penalty of up to \$16,000 per day of violation, not to exceed \$177,500 in total, against a person for CWA section 301(a) violations that occurred from January 12, 2009 through December 6, 2013.

III. GENERAL ALLEGATIONS

11. Respondent is an individual who does business as California Healthy Harvest, a wholesaler of canned foods and nuts in Modesto, Stanislaus County, California.

12. On or about August 16, 2012, Respondent entered into a lease agreement for Merced Ranch (“Ranch”) with the intent to convert it from a cattle grazing operation into an almond orchard. The Ranch is approximately 850 acres and is located at 7450 G Street, west of California State Route 59, north of Nevada Street, east of G Street, north of the City of Merced, in Sections 19 and 30, Township 6 South, Range 13 East, Mount Diablo Meridian Latitude 37.3891942966231, Longitude -120.480866877699, in Merced County, California.

13. The Ranch is bisected by Parkinson Creek, which flows in a northwest to southeast direction through the Ranch to Fahrens Creek to Black Rascal Creek to Bear Creek to the San Joaquin River, all perennial waters.

14. On August 13, 2012, personnel from the Corps Sacramento District met with Respondent and observed wetland features on the relevant portions of the Ranch. During the meeting and in a follow-up letter dated August 14, 2012, the Corps told Respondent to submit a jurisdictional delineation and obtain a CWA section 404 permit prior to commencing any discharge activities in waters subject to CWA regulation. Respondent did not submit a jurisdictional delineation or a CWA section 404 permit application before undertaking the activities described below.

15. On or about August 31 or September 1, 2012, on a date best known to Respondent, Respondent and/or persons acting on his behalf began to prepare approximately 380 acres of the Ranch for the planting of almond trees by using mechanized equipment to drag six-foot-long metal shanks through the ground ("deep ripping").

16. On September 12, 2012, the Corps verbally warned Respondent to cease all unpermitted discharge activities in waters of the United States at the Ranch.

17. On or about September 13, 2012, the California Department of Fish and Wildlife verbally warned Respondent to cease the deep ripping operation at the Ranch.

18. On or about September 13, 2012, on a date best known to Respondent, Respondent ceased the deep ripping operation.

19. Based on information and belief, on approximately 10 separate days within the period from approximately August 31, 2012 through at least September 13, 2012, at times best known to Respondent, Respondent's deep ripping operation on the 380-acre area within the Ranch caused the placement of earthen and biological materials, such as dirt, rocks, sand and vegetative matters, into approximately 32.7 acres of vernal pools, vernal swales and seasonable wetlands (collectively "vernal pool complexes"), obliterating them and converting them into upland.

IV. ALLEGED VIOLATIONS

20. Respondent is a "person" within the meaning of CWA sections 301(a) and 502(5), 33 U.S.C. §§ 1311(a) and 1362(5).

21. The earthen and biological materials described in Section VI above are "dredged materials" or "fill materials" and therefore "pollutants" within the meaning of CWA section 502(6), 33 U.S.C. § 1362(6).

22. The heavy equipment described in Section VI above is a "point source" within the meaning of CWA section 502(14), 33 U.S.C. § 1362(14).

23. Parkinson Creek, a tributary to the San Joaquin River, and the San Joaquin River, a traditional navigable water for the relevant downstream segments, are "waters of the United States" within the meaning of CWA section 502(7), 33 U.S.C. § 1362(7), and 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s). Prior to their obliteration and conversion to upland, the 32.7 acres of vernal pool complexes on the 380-acre area within the Ranch were wetlands adjacent to and discharging into Parkinson Creek and subject to CWA regulation as "waters of the United

States” within the meaning of CWA section 502(7), 33 U.S.C. § 1362(7), and 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

24. Respondent’s discharge of dredged or fill materials into waters of the United States constitutes a “discharge of pollutants” within the meaning of CWA section 502(12), 33 U.S.C. § 1362(12).

25. Respondent did not seek in advance or obtain a CWA section 404 permit from the Corps for the discharge of dredged or fill material described in the preceding paragraphs.

26. Respondent has violated CWA section 301(a), 33 U.S.C. § 1311(a), by discharging pollutants into waters of the United States without any permit under the CWA.

V. ADMINISTRATIVE PENALTY

27. In consideration of the penalty factors of CWA section 309(g), 33 U.S.C. § 1319(g), Respondent shall pay to the United States a civil administrative penalty in the amount of **One Hundred Sixty Thousand Dollars (\$160,000.00)** within thirty (30) calendar days of the Effective Date, as defined in Section X below, of this CA/FO.

28. Respondent shall make penalty payment by one of the options listed below.

a. Check Payment. Payment by a cashier’s or certified check shall be made payable to “Treasurer, United States of America” and be mailed as follows:

i. *If by regular U.S. Postal Service mail:*

U.S. Environmental Protection Agency
Fines and Penalties
PO Box 979077
St. Louis, MO 63197-9000

ii. *If by overnight mail:*

U.S. Environmental Protection Agency
Government Lockbox 979077
USEPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

b. Automated Clearinghouse Payment: Payment by Automated Clearinghouse (ACH) via Vendor Express shall be made through the U.S. Treasury as follows:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency

CTX Format Transaction Code 22 – checking

- c. Fedwire: Payment by wire transfer to EPA shall be made through the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read: D 68010727 Environmental Protection Agency)

29. To ensure proper credit, Respondent shall include the following transmittal information with the penalty payment: (i) Respondent's name (as appeared on the CA/FO), complete address, contact person, and phone number; (ii) the EPA case docket number; (iii) the EPA contact person; and (iv) the reason for payment.

30. Concurrent with the payment, Respondent shall send a true and correct copy of the payment and accompanying transmittal information to the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105

Jessica Kao
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105

31. Respondent shall not, and shall not allow any other person to, deduct any penalties and interest paid under this CA/FO from federal, state or local taxes.

32. Pursuant to CWA section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay the assessed penalty on time, EPA may request the U.S. Department of Justice to bring a civil action to recover the overdue amount, plus interest at currently prevailing rates from the effective date of this CA/FO. In such an action, the validity, amount or appropriateness of the assessed penalty shall not be subject to review. In addition to any assessed penalty and interest, Respondent shall pay attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty, which shall equal 20% of the aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter, for each quarter during

which such failure to pay persists. EPA may also take other debt collection actions as authorized by law, including but not limited to the Debt Collection Act, 33 U.S.C. § 3711, and 33 C.F.R. Part 13.

VI. APPLICABILITY

33. This CA/FO shall apply to and be binding on Respondent, Respondent's officers, directors, partners, agents, employees, contractors, successors and assigns. Changes in ownership, real property interest, or transfer of personal assets shall not alter Respondent's obligations under this CA/FO.

VII. RESPONDENT'S ADMISSIONS AND WAIVERS

34. In accordance with 40 C.F.R. § 22.18(b), for the purpose of this proceeding, Respondent: (i) admits that EPA has jurisdiction over the subject matter of this CA/FO; (ii) neither admits nor denies the specific factual allegations contained in Section III above; (iii) consents to any and all conditions specified in this CA/FO and to the assessment of the civil administrative penalty under Section V above; and (iv) waives any right to contest the allegations contained in this CA/FO; and (v) waives any right to appeal the CA/FO.

VIII. RESERVATION OF RIGHTS

35. In accordance with 40 C.F.R. § 22.18(c), this CA/FO only resolves Respondent's CWA civil penalty liabilities for the violations specifically alleged herein. EPA reserves the right to take enforcement action against Respondent for any past, current or future violations not resolved in this proceeding.

36. This CA/FO is not a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations, and shall in no way relieve or affect Respondent's obligations under any applicable federal, state or local laws, regulations, or permits. Nothing in this CA/FO shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit pursuant to CWA section 404, 33 U.S.C. § 1344, or EPA's ability to exercise its authority pursuant to CWA section 404(c), 33 U.S.C. § 1344(c).

IX. ATTORNEY FEES AND COSTS

37. Unless otherwise specified, each party shall bear its own attorney fees and costs.

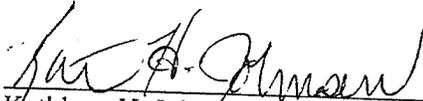
X. EFFECTIVE DATE AND TERMINATION

38. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CA/FO shall take effect on the date that the Final Order, having been signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk (the "Effective Date"), and shall terminate when Respondent has complied with this CA/FO in full.

XI. PUBLIC NOTICE

39. Pursuant to CWA section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b), this Consent Agreement is subject to public notice and comment prior to issuance of the proposed Final Order. Complainant reserves the right to withhold or withdraw consent to this Consent Agreement if public comments disclose relevant and material information that was not considered by Complainant in entering into this Consent Agreement. Respondent may withdraw from this Consent Agreement only upon receipt of written notice from EPA that it no longer supports entry of this Consent Agreement.

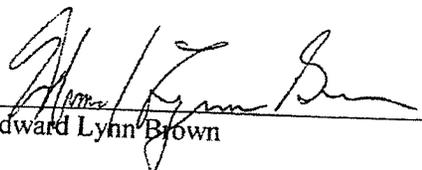
For Complainant the U.S. Environmental Protection Agency, Region 9



Kathleen H. Johnson
Director
Enforcement Division

11/4/14
Date _____

For Respondent Edward Lynn Brown


Edward Lynn Brown

Oct 29, 2014
Date

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:

Edward Lynn Brown,
Respondent.

)
)
) U.S. EPA Docket No.
) CWA-09-2015-0001
)

FINAL ORDER

By motion filed April 28, 2015, the United States Environmental Protection Agency (Complainant) seeks approval of the parties' Consent Agreement and Proposed Final Order.

Consolidated Rules of Practice at 40 C.F.R. § 22.45 set forth the rules governing public notice and comment in proceedings under sections 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). As stated in the parties' Consent Agreement and Proposed Final Order, Complainant assessed the penalties in this matter pursuant to section 309(g) of the Clean Water Act. Therefore, Complainant is subject to the mandatory notice and public comment requirements of 40 C.F.R. § 22.45. Complainant's Motion To Approve Final Order And Proof Of Compliance With Public Notice Requirements demonstrates Complainant complied with the public notice requirements set forth in 40 C.F.R. § 22.45(b).

IT IS HEREBY ORDERED that Respondent shall comply with all the terms and conditions of the Consent Agreement and Final Order, which shall take effect immediately upon filing with the Regional Hearing Clerk.

Dated: April 28, 2015



Steven L. Jawgiel
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complaint/Consent Agreement and Final Order has been filed with:

Regional Hearing Clerk, ORC-1
U.S. Environmental Protection Agency,
Region 9
75 Hawthorne Street
San Francisco, California 94105

That a true and correct copy has been hand delivered to:

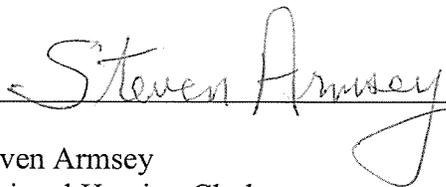
Richard Campbell [for Complainant]
U.S. Environmental Protection Agency,
Region 9
75 Hawthorne Street
San Francisco, California 94105

And that a true and correct copy was placed in the United States Mail, certified (return receipt requested), addressed to the following:

Scott B. Birkey [for Respondent]
Cox, Castle & Nicholson LLP
555 California Street
San Francisco, CA 94104

Certified Mail No.: 7012 1640 0001 2190 5638

Dated: April 29, 2015



Steven Armsey
Regional Hearing Clerk
U.S. EPA Region 9