

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

Received by
EPA Region 7
Hearing Clerk

BEFORE THE ADMINISTRATOR

| | | |
|---|---|-----------------------------|
| IN THE MATTER OF |) | |
| |) | COMPLAINT AND NOTICE OF |
| Tom Villegas |) | OPPORTUNITY FOR HEARING |
| |) | |
| and |) | |
| |) | Docket No. CWA-07-2022-0104 |
| Amy Villegas, |) | |
| |) | |
| Respondents |) | |
| |) | |
| Proceedings under Section 309(g) of the |) | |
| Clean Water Act, 33 U.S.C. § 1319(g) |) | |
| _____ |) | |

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22.

2. This Complaint serves as notice that the EPA has reason to believe that Respondents have violated Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 309(g) to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 (“Complainant”).

4. Respondent Tom Villegas performed work at the site centered at approximately 41.008047, -100.453985, in Section 13, Township 12 North, Range 28 West, Lincoln County, Nebraska (the “Site”).

5. Respondent Amy Villegas owns, and at all relevant times owned, the Site.

Statutory and Regulatory Framework

6. The goal of the CWA, 33 U.S.C. § 1251 *et seq.*, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

7. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in accord with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

8. Section 404 of the CWA requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the U.S. Army Corps of Engineers (“Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. 40 C.F.R. § 232.2 defines “fill material” as any material that 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.”

10. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States.”

11. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

12. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the assessment of civil penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

13. Respondents are persons within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. In or around June 9, 2017, through May 18, 2021, Respondents and/or persons acting on their behalf used earth moving equipment to excavate and clear vegetation from wetlands, widen existing tributaries, create ponded areas, construct roadways, create culverted road crossings, and construct berms at the Site. In performing these activities, Respondents and/or persons acting on their behalf discharged dredged or fill material including dirt, spoil, rock, culverts, trees, and sand into waters of the United States including the Platte River, tributaries to the Platte River, and adjacent wetlands.

15. Complainant and Respondents have entered into a tolling agreement providing that the period commencing on June 8, 2022, and ending on August 2, 2022, inclusive, shall not be included in computing the running of any statute of limitations potentially applicable to any claims for relief brought by the United States pursuant to Sections 301 and 390 of the CWA.

16. On May 18, 2021, representatives from the Corps Omaha District visited the Site, observed fill material and associated excavation in the Platte River, tributaries to the Platte River, and wetlands adjacent to the Platte River, and determined a violation of the CWA had occurred.

17. On May 18, 2022, representatives from the Corps Omaha District and from EPA Region 7 visited the Site, observed fill material and associated excavation in the Platte River, tributaries to the Platte River, and wetlands adjacent to the Platte River, and again determined that a violation of the CWA had occurred.

18. Respondents' actions impacted approximately 5.7 acres of wetlands and 210 linear feet of tributaries to the Platte River.

19. The material discharged by Respondents constitutes "fill material," and their actions constitute the "discharge of fill material" as those terms are defined in 40 C.F.R. § 232.2.

20. The fill material discharged by Respondents into the Platte River, tributaries to the Platte River, and adjacent wetlands is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The earth-moving equipment used to place the fill material into the Platte River, tributaries to the Platte River, and adjacent wetlands is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The discharge of the fill material into the Platte River, tributaries to the Platte River, and adjacent wetlands constitutes the "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

23. The Platte River is a traditionally navigable water, and the tributaries to the Platte River and adjacent wetlands are waters of the United States within the meaning of Section 502(7) of the CWA.

Findings of Violation

24. Respondents' discharge of pollutants from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Relief

25. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2022, civil administrative penalties of up to \$23,989 per day for each day during which a violation continues, up to a maximum of \$299,857, may be assessed for violations of CWA Section 301, 33 U.S.C. § 1311, that occur

after November 2, 2015.

26. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against Respondents for the violations cited above in the amount of \$299,857.

27. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violators, ability to pay, any prior history of such violation, the degree of culpability, economic benefit, or savings resulting from the violation, and such other matters as justice may require.

28. The penalty proposed in this Complaint is based upon the best information available to the EPA at the time the Complaint was issued. The penalty may be adjusted if Respondents establish bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty.

29. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, the EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter within a thirty (30) day period, and present evidence in the event a hearing is held.

30. The EPA has notified the state of Nebraska regarding this proposed action by mailing a copy of this document to the Nebraska Department of Environment and Energy.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

31. Respondents may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

32. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondents must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondents have any knowledge, or shall clearly state that Respondents have no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondents dispute; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
r7_hearing_clerk_filings@epa.gov

33. Failure to admit, deny, or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

34. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondents in the answer. If Respondents do not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

35. In any hearing on the proposed penalty for this Complaint, members of the public, to whom the EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, the EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. The EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by the EPA in the issuance of the Final Order.

36. If Respondents fail to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, they may be found in default. Such default by Respondents constitutes an admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

37. Whether or not Respondents request a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Natasha Goss
Attorney-Advisor
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

Telephone: (913) 551-7752
Email: *goss.natasha@epa.gov*

38. Please note that a request for an informal settlement conference does *not* extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

39. The EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (CAFO) issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a CAFO shall constitute a waiver of Respondents' right to request a hearing on any matter stipulated on any matter stipulated therein.

David Cozad
Director
Enforcement and Compliance Assurance Division

Natasha Goss
Office of Regional Counsel

Certificate of Service

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I sent a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination, or Suspension of Permits, 40 C.F.R. Part 22; and a copy of the Revised CWA Section 404 Settlement Penalty Policy to the following persons

By certified mail, to:

Amy Villegas
25599 WCR 4
Hudson, Colorado 80642

Tom Villegas
25599 WCR 4
Hudson, Colorado 80642

By electronic mail, to:

Stephen D. Mossman, Esq.
Counsel for Tom Villegas
sdm@mattsonricketts.com

Date

Signature