



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

Ref: 8ENF-W

SEP 11 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
#7005-1160-0005-3398-1311

Steve Gunderson, Director
Colorado Department of Public Health
and Environmental
Water Quality Control Division
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: Notice of Proposed Assessment of Class II
Civil Penalty
Docket No. CWA-08-2008-0025

Dear Mr. Gunderson:

Enclosed is a copy of a Consent Agreement which proposes assessment of a civil penalty of \$35,000 against Kenneth L. Schell and Twin Peaks Excavating, Inc. ("Respondents") of Erie, Colorado. The United States Environmental Protection Agency ("EPA") is authorized to assess an administrative civil penalty against the Respondents pursuant to section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Respondents discharged dredged and/or fill material into Rock Creek and its adjacent wetlands without a permit, in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which prohibits the discharge of a pollutant unless authorized by a permit issued under section 404 of the CWA, 33 U.S.C. § 1344. While the section 404 program is not a CWA authorized program in Colorado, EPA is providing notice to you pursuant to CWA section 309(a), 33 U.S.C. § 1319(a) because the violations occurred in Colorado. We are willing to provide further information on this proposed assessment upon request.

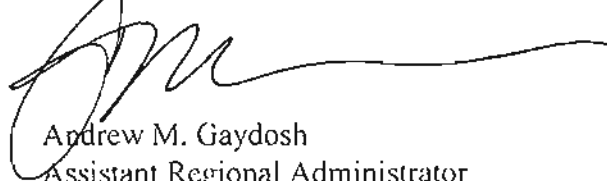
You or your staff may request a conference within thirty (30) days of receiving this letter. The conference may be in person or by telephone and may cover any matters relevant to the proposed assessment.



Printed on Recycled Paper

A copy of EPA procedures governing the administrative assessment of civil penalties under the CWA is enclosed for your reference. If you have any questions, the most knowledgeable person on my staff for legal issues is Thomas Sitz, Enforcement Attorney, who can be reached at 303-312-6918. The most knowledgeable person on my staff for technical issues is Kenneth Champagne, Section 404 Enforcement Officer, who can be reached at 303-312-6608.

Sincerely,

A handwritten signature in black ink, appearing to read 'AM Gaydosh', with a long horizontal flourish extending to the right.

Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosures:

1. Administrative Consent Agreement
2. Certificate of Service

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

SEP 11 AM 8:20

In the Matter of:)
)
Kenneth L. Schell and) **CONSENT AGREEMENT**
Twin Peaks Excavating, Inc.)
)
) Docket No. **CWA-08-2008-0025**

Complainant, United States Environmental Protection Agency, Region 8 ("EPA" or "Complainant"), and Kenneth L. Schell and Twin Peaks Excavating, Inc., (collectively "Respondents") by their undersigned representatives, hereby consent and agree as follows:

1. EPA has jurisdiction over this matter pursuant to section 308 and 309(a) of the Clean Water Act ("Act"), as amended, 33 U.S.C. §§ 1318 and 1319(a). The rules for this proceeding are 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 ("Rules of Practice")," 40 C.F.R. part 22, a copy of which has been provided to Respondents.
2. This Consent Agreement is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).
3. For the purposes of this proceeding, Respondents admit the jurisdictional allegations contained in this Consent Agreement, neither admit nor deny the factual allegations contained in this Consent Agreement, consent to the assessment of the civil penalty, and waive any right to a hearing or appeal before any tribunal and to contest any issue of law or fact set forth herein.
4. Complainant asserts that settlement of this matter is in the public interest, and the parties agree that entry of this Consent Agreement without further litigation and without adjudication of any issue of fact or law, is the most appropriate means of resolving this matter at the least cost and expense to the Respondents and the EPA.
5. This Consent Agreement, upon incorporation into a final order, applies to and is binding upon EPA and upon Respondents, and Respondents' officers, directors, employees, agents, successors and assigns. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal property shall not alter Respondents' responsibilities under this agreement.
6. This Consent Agreement contains all terms of the settlement agreed to by the parties.

7. Respondent Kenneth L. Schell is an individual with a mailing address of 883 State Highway 52, Erie, CO, 80516, and is the registered agent, director, and officer of Twin Peaks Excavating, Inc.
8. Respondent Twin Peaks Excavating, Inc. is a State of Colorado corporation with a business address of 883 State Highway 52, Erie, CO, 80516. Twin Peaks Excavating, Inc. is currently in good standing with the Colorado Secretary of State's Office.
9. Respondents are "persons" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).
10. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into waters of the United States except as in compliance with, among other sections, section 404 of the Act, 33 U.S.C. § 1344.
11. Section 404 of the Act, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into "navigable waters," which are defined as waters of the United States, 33 U.S.C. § 1362(7).
12. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required to discharge dredged or fill material into waters of the United States.
13. At all relevant times, the City of Lafayette, Colorado owned, leased or otherwise controlled open space property containing Rock Creek and its adjacent wetlands located in Section 12, Township 1 South, Range 69 West, Boulder County, Colorado (the "Site").
14. Rock Creek is tributary to Coal Creek, which is tributary to Boulder Creek, which is tributary to St. Vrain Creek, which is tributary to the South Platte River. Boulder Creek and St. Vrain Creek are, and were at all relevant times, navigable waters. The South Platte River is, and was at all relevant times, navigable, interstate waters.
15. Rock Creek and its adjacent wetlands referenced in paragraph 13 of this Consent Agreement is and were at all relevant times "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a), and therefore "navigable waters" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7).
16. During March and April 2007, Respondents, using earthmoving equipment, began excavating a new stream channel, filling adjacent wetlands with the sidecast materials, and filling the original channel of Rock Creek at the Site for the purpose of bank stabilization and erosion control. Respondents actions at the Site were performed without the City of Lafayette's permission or knowledge.

17. The equipment described in paragraph 16 of this Consent Agreement is, and was at all relevant times, a "point source" within the meaning of section 502(14) of the Act, 33 U.S.C. § 1362(14).
18. On or about April 9, 2007, the U.S. Army Corps of Engineers ("Corps") received a complaint from the City of Lafayette regarding the recent discharge of dredged or fill material within the channel of Rock Creek and its adjacent wetlands at the Site.
19. On April 26, 2007, the Corps conducted an inspection at the Site as a follow-up to the April 9, 2007, complaint. The Corps found, and EPA through issuance of this Consent Agreement finds, Respondents or their agents discharged dredged or fill material into Rock Creek and its adjacent wetlands during bank stabilization and erosion control activities at the Site. The Corps estimated that approximately 150 feet of Rock Creek was realigned, resulting in the discharge of dredged or fill material without authorization.
20. By letter dated April 27, 2007, the Corps found, and EPA through issuance of this Consent Agreement finds, that Respondents' actions, as described in paragraph 16 of this Consent Agreement, required prior Corps authorization and the Corps did not grant the required authorization.
21. On April 27, 2007, the Corps referred this case to EPA for enforcement in accordance with the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act," dated January 19, 1989.
22. In a letter to the Corps, dated May 7, 2007, Respondent Kenneth L. Schell acknowledged performing the bank stabilization and erosion control activities at the Site.
23. On December 19, 2007, EPA issued a Findings of Fact and Administrative Order for Compliance ("Order") to Respondents, EPA docket # CWA-08-2008-0004, pursuant to Section 309(a)(3) of the Clean Water Act, 33 U.S.C. § 1319(a)(3) and related to the violations described herein. Among other things, the Order requires Respondents to perform restoration activities in accordance with the Restoration Plan approved by EPA on March 31, 2008.
24. The activities described in paragraph 16 of this Consent Agreement were performed using common earthmoving equipment, all of which were operated by Respondents or by persons acting on their behalf.
25. The discharged dredged or fill material described in paragraph 16 of this Consent Agreement is, and was at all relevant times, "dredged material" and/or "fill material" within the meaning of 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), respectively, and "pollutants" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362(6).

26. Respondents did not obtain a permit pursuant to section 404 of the Act, 33 U.S.C. § 1344, in advance of discharging dredged or fill material into waters of the United States on the Site.
27. The placement of dredged and/or fill material into Rock Creek and its adjacent wetlands constitutes the "discharge of pollutants" within the meaning of section 502(12) of the Act, 33 U.S.C. § 1362(12).
28. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), authorizes EPA, after consultation with the State of Colorado, to impose administrative penalties up to \$11,500, for each violation of the Act, with a total maximum allowed penalty of \$32,500, for Class I violations, and section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), authorizes EPA, after consultation with the State of Colorado, to impose administrative penalties up to \$11,500, for each violation of the Act, with a total maximum allowed penalty of \$157,500, for Class II violations, as adjusted by the Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7,121 (Feb. 13, 2004).
29. Complainant will consult with the State of Colorado on the appropriateness of the penalty in this matter during the public notice period required by 40 C.F.R. § 22.45.
30. Respondents' discharges of dredged and/or fill material into waters of the United States at the Site violate section 301(a) of the Act, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by Respondents into waters of the United States without authorization by a permit issued pursuant to section 404 of the Act, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the Act, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).

TERMS AND CONDITIONS

31. Respondents consent and agree to pay a civil penalty in the amount of \$35,000 in the manner described below:
 - a. The payment of the civil penalty shall be made in four equal quarterly installments of \$8,750. Payment of the first installment is due within 30 calendar days from the date written on the final order, issued by the Regional Judicial Officer, that adopts this Consent Agreement. Payment of the three subsequent installments shall be made according to the following schedule:

Installment	Payment Date
2 nd Installment	Upon the 90 th day after the date written on the final order

3 rd Installment	Upon the 180th day after the date written on the final order
4 th Installment	Upon the 270th day after the date written on the final order

If the due date falls on a weekend or legal federal holiday, then the due date becomes the next business day. The date the payment is made is considered to be the date processed by Mellon Bank described below. Payments received by 11:00 A.M. EST are processed on the same day, those received after 11:00 A.M. are processed on the next business day.

Nothing in this Consent Agreement shall preclude Respondents from paying any or all of the installments in advance of the dates provided herein.

b. The installment payments shall be made by remitting a cashier's or certified check or wire transfer, including the name and docket number of this case; for the amount, payable to "Treasurer, United States of America," to:

Regular Mail:

Mellon Bank
Lockbox 360859
Pittsburgh, PA 15251-6859

Federal Express, Airborne, or other commercial carrier:

U.S. EPA. 360859
Mellon Client Service Center Rm 154-0670
500 Ross Street
Pittsburgh, PA 15251-6859

Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA = 021030004
TREAS NYC/CTR/
BNF=/AC-68011008

A copy of the check or evidence of wire transfer shall be sent simultaneously to:

Kenneth M. Champagne. 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

and

Tina Artemis
Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

c. In the event an installment payment is not received by the specified due date, the entire principal sum then unpaid shall be immediately due and payable without notice or demand, and interest will accrue from the date of the final order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received. (i.e., on the 1st late day, 30 days of interest accrues).

d. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 31st day from the date of the final consent order, and each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6 %) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (i.e., the 121st day from the date the final consent order is signed). Payments are first applied to outstanding handling charges, 6 % penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

e. Respondents agree that the penalty shall never be claimed as a federal or other tax deduction or tax credit.

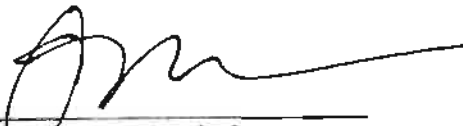
32. Respondents shall comply with the Order and EPA-approved Restoration Plan referenced in paragraph 23 above.
33. Nothing in this Consent Agreement shall relieve Respondents of the duty to comply with the Clean Water Act and its implementing regulations.
34. Failure by Respondents to comply with any of the terms of this Consent Agreement shall constitute a breach of the Consent Agreement and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.
35. Nothing in this Consent Agreement shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated

with any collection action instituted as a result of Respondents' failure to perform pursuant to the terms of this Consent Agreement.


36. The undersigned representatives of Respondents certify that he/she is fully authorized to enter into the terms and conditions of this Consent Agreement and to bind the party he/she represents to the terms and conditions of this Consent Agreement.
37. In accordance with 40 C.F.R. § 22.45, EPA will provide public notice of this action. EPA may modify or withdraw its consent to this Consent Agreement if comments received disclose facts or considerations which indicate that the Consent Agreement is inappropriate, improper, or inadequate.
38. If comments received during the public comment period do not require modification of or withdrawal from this Consent Agreement by EPA, the parties agree to submit this Consent Agreement to the Regional Judicial Officer, with a request that it be incorporated into a final order.
39. Each party shall bear its own costs and attorney fees in connection with this matter.
40. This Consent Agreement, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete and full civil settlement of the specific violations alleged herein.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**

Date: 9/12/08

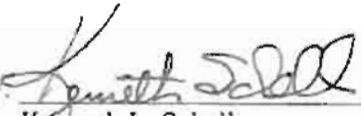
By: 
Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance &
Environmental Justice

Date: 8-22-08

By: 
Thomas E. Sitz
Senior Enforcement Attorney
US EPA, Region 8, ENF-L
1595 Wynkoop St.
Denver, CO 80202
303-312-6918

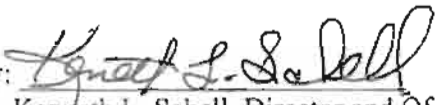
Kenneth L. Schell

Date: 8-22-08


By: 
Kenneth L. Schell

Twin Peaks Excavating, Inc.

Date: 8-22-08

By: 
Kenneth L. Schell, Director and Officer

Date: 8/22/08

By: 
Jeffrey W. Schwarz, Esq.
Counsel for Respondents
Carver Schwarz McNab & Bailey, LLC
1600 Stout Street, Suite 1700
Denver, CO 80202
303-893-0999