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EPA - REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. CWA 10-2008-0131
David R. Sweezey,)	COMPLAINT
Anchorage, Alaska)	
Respondent.)	

I. AUTHORITIES

1.1 This administrative complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by Section 309 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319. The Administrator has delegated this authority to the Regional Administrator of EPA Region 10 who, in turn, has re delegated this authority to the Director of the Office of Ecosystems and Tribal Affairs in Region 10.

1.2 Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 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 ("Part 22 Rules"), Complainant hereby seeks to assess a penalty against David R. Sweezey ("Respondent") for violations of the Act, 33 U.S.C. § 1251 *et seq.*

COMPLAINT - 1
DOCKET NO. CWA 10-2008-0131

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

1 1.3 In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40
2 C.F.R. § 22.38(b), EPA shall provide the State of Alaska an opportunity to consult within thirty
3 (30) days following proof of service of this Complaint on Respondent.

4 **II. STATUTORY AND REGULATORY BACKGROUND**

5 2.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of any
6 pollutant by any person” except in compliance with, *inter alia*, a permit issued pursuant to
7 Section 404 of the Act, 33 U.S.C. § 1344.

8 2.2 Section 404(a) of the Act, 33 U.S.C. § 1344(a), authorizes the Secretary of the
9 Army to issue permits for the discharge of dredged or fill material into navigable waters at
10 specified disposal sites.

11 2.3 Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term “discharge of
12 a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

13 2.4 Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines “pollutant” to include,
14 *inter alia*, dredged spoil, rock, sand, and biological materials.

15 2.5 Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines “navigable waters” as
16 “waters of the United States.”

17 2.6 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define “waters of
18 the United States” to include: (i) all waters which are currently used, were used in the past, or
19 may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii)
20 tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

21 2.7 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define “wetlands” as
22 “those areas that are inundated or saturated by surface or ground water at a frequency and
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1 duration sufficient to support, and that under normal circumstances do support, a prevalence of
2 vegetation typically adapted for life in saturated soil conditions.”

3 2.8 33 C.F.R. § 328.3(c) defines “adjacent” wetlands as wetlands “bordering,
4 contiguous, or neighboring” other waters of the United States.

5 2.9 Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines “point source” to
6 include “any discernible, confined and discrete conveyance ... from which pollutants are or may
7 be discharged.”

8 2.10 Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines “person” as “an
9 individual, corporation, partnership, association, State, municipality, commission, or political
10 subdivision of a State, or any interstate body.”

11 2.11 Section 309(g) of the Act, 33 U.S.C. § 1319(g), provides, in pertinent part,
12 “[w]henever on the basis of any information available ... the Administrator finds that any
13 person has violated Section 1311 [of the Act]. ... the Administrator ... may ... assess a ... class
14 of civil penalty”

15 III. ALLEGATIONS

16 3.1 Paragraphs 1.1 through 2.10 are re-alleged and incorporated herein by reference.

17 3.2 Respondent owned, leased or otherwise controlled Lots 2 and 3, of the Sly Fox
18 Subdivision, located at 11460 Cobra Avenue, in Section 24, Township 12 North, Range 3 West,
19 Anchorage, Alaska (Site), where each unauthorized discharge of dredged or fill material into
20 waters of the United States occurred.

21 3.3 The Site contains three springs – *i.e.*, a north spring, middle spring, and south
22 spring – that provide relatively permanent flow of water into three un-named tributaries on the
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1 Site. The three un-named tributaries ultimately drain into Craig Creek, a relatively permanent
2 tributary to the South Fork of Little Campbell Creek, which joins with the North Fork of Little
3 Campbell Creek, which ultimately flows into Campbell Creek. Campbell Creek is a "navigable
4 water" as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and is a "water of the
5 United States" as defined in 40 C.F.R. § 122.2. Craig Creek and the three un-named tributaries
6 are "tributaries" within the meaning of 33 C.F.R. § 328.3(a)(5), and 40 C.F.R. § 232.2. The Site
7 also contains approximately one-half acre of wetlands within the meaning of 33 C.F.R. §
8 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2, which are adjacent to Craig Creek and the three un-
9 named tributaries.

10
11 3.4 On or about July 22, 2003, at times more fully known to the Respondent and/or
12 persons acting on his behalf, Respondent discharged dredged or fill material into waters of the
13 United States at the Site without a permit issued pursuant to Section 404 of the Act.

14 3.5 The dredged or fill material that the Respondent and/or persons acting on his
15 behalf, caused to be discharged includes, among other things, dirt and rock, which constitute
16 "pollutants" as defined in Section 502(6) of the Act, 33 U.S.C. § 1362(6).

17 3.6 Respondent and/or persons acting on his behalf used mechanized land-clearing or
18 earth-moving equipment to clear land, grub trees and vegetation, grade the landscape, and
19 excavate materials, all of which resulted in the discharges described in Paragraph 3.2. This
20 equipment constitutes "point sources" as defined in Section 502(14) of the Act, 33 U.S.C. §
21 1362(14).
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1 3.7 Respondent did not obtain a permit from the Secretary of the Army for the
2 discharges of dredged or fill material into waters of the United States as required by Sections
3 301(a) and 404 of the Act, 33 U.S.C. §§ 1311(a), 1344.

4 3.8 Respondent conducted, contracted for, supervised and/or otherwise controlled
5 the unauthorized activities at issue in Paragraph 3.4.

6 3.9 Respondent is a person within the meaning of Section 502(5) of the Act, 33
7 U.S.C. § 1362(5).

8 3.10 Respondent has violated and continues to violate Section 301(a) of the Act, 33
9 U.S.C. § 1311(a), by his unauthorized discharges of dredged and/or fill material into waters of
10 the United States, including wetlands, at the Site.

11 3.11 Each day that such material remains in place constitutes a separate violation of
12 Section 301(a) of the Act, 33 U.S.C. § 1311(a).

13
14 **Count 1**

15 **Discharge of dredged and/or fill material into approximately one-half acre of wetlands**

16 3.12 Paragraphs 1.1 through 3.11 are realleged and incorporated herein by reference.

17 3.13 Respondent discharged dredged or fill material into approximately one-half acre
18 of wetlands at the Site.

19 3.14 The wetlands at the Site physically abut one or more of the four tributaries
20 described in Paragraph 3.3.

21 3.15 Discharges into wetlands at the Site constitute a violation of Section 301(a) of the
22 Act, 33 U.S.C. § 1311(a). In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. §
23

1 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed
2 \$11,000 per day for each day during which the violation continues.

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5 **Count 2**

6 **Discharges into Craig Creek**

7 3.16 Paragraphs 1.1 through 3.15 are realleged and incorporated herein by reference.

8 3.17 Respondent discharged dredged or fill material into Craig Creek.

9 3.18 Discharges into Craig Creek at the Site constitute a violation of Section 301(a) of
10 the Act, 33 U.S.C. § 1311(a). In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. §
11 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed
12 \$11,000 per day for each day during which the violation continues.

13 **Count 3**

14 **Discharges into the un-named tributary originating from the south spring**

15 3.19 Paragraphs 1.1 through 3.18 are realleged and incorporated herein by reference.

16 3.20 Respondent discharged dredged or fill material into the un-named tributary
17 originating from the south spring as described in Paragraph 3.3.

18 3.21 Discharges into un-named tributary originating from the south spring constitute a
19 violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). In accordance with Section
20 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable
21 for civil penalties not to exceed \$11,000 per day for each day during which the violation
22 continues.
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1 4.1. Based on the foregoing allegations, Respondent violated Section 301(a) of the
2 Act, 33 U.S.C. § 1311(a). Consequently, pursuant to Section 309(g)(2)(B) of the Act, and 40
3 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties in an
4 amount not to exceed \$11,000 per violation for each day during which the violation continues,
5 up to a maximum of \$157,500.

6 4.2. In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii),
7 this Complaint does not include a specific penalty demand. To determine a specific penalty
8 demand, EPA must consider several penalty factors defined under Section 309(g)(3) of the Act,
9 33 U.S.C. § 1319(g)(3). These statutory penalty factors are as follows: the nature,
10 circumstances, extent, and gravity of the violation or violations, and, with respect to
11 Respondent's ability to pay, prior history of violations, degree of culpability, economic benefit or
12 savings (if any) resulting from the violation, and such other matters as justice may require.

13 4.2.1 Nature, Circumstances, Extent and Gravity of Violations: The proposed
14 penalty reflects Complainant's determination that violations of Section 301(a) of the Act,
15 33 U.S.C. § 1311(a) are serious violations that significantly undermine the Act's
16 regulatory scheme. In addition, the proposed penalty reflects Complainant's
17 determination that the alleged violations have the potential to harm human health and the
18 environment.
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20 4.2.2 Respondent's Ability to Pay: Complainant has no information indicating
21 that Respondent is unable to pay the proposed penalty. Complainant will consider any
22 information submitted by Respondent related to its ability to pay the proposed penalty.
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1 4.2.3 Respondent's History of Prior Violations: Complainant is unaware of
2 Respondent having any history of prior violations of the Act.

3 4.2.4 Respondent's Degree of Culpability: Respondent is presumed to know the
4 law.

5 4.2.5 Respondent's Economic Benefit: Complainant is unaware of Respondent
6 having derived any economic benefit from his violations of the Act.

7 4.2.6 Other Matters as Justice May Require: Credible and consistent
8 enforcement of the Act's requirements to comply with Section 301(a) of the Act, 33
9 U.S.C. § 1311(a) and the permitting scheme set forth in Section 404 of the Act, 33 U.S.C.
10 § 1344, is necessary to deter this Respondent and others similarly situated from violating
11 the Act.
12

13 **V. OPPORTUNITY TO REQUEST A HEARING**

14 5.1. Respondent has the right to file an Answer requesting a hearing on any material
15 fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon
16 request, the Presiding Office may hold a hearing for the assessment of the civil penalties
17 conducted in accordance with the provisions of the Part 22 Rules and the Administrative
18 Procedures Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.
19

20 5.2. Respondent's Answer, including any request for hearing, must be in writing and
21 must be filed with:

22 Regional Hearing Clerk
23 U.S. Environmental Protection Agency, Region 10
24 1200 Sixth Avenue,
25 Suite 900 (Mail Stop ORC-158)
 Seattle, Washington 98101

1 **VI. FAILURE TO FILE AN ANSWER**

2 6.1 To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent
3 must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30)
4 days after service of this Complaint.

5 6.2 In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and
6 directly admit, deny, or explain each of the factual allegations contained in this Complaint with
7 regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the
8 circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts
9 which Respondents intend to place at issue; and (3) whether a hearing is requested. Failure to
10 admit, deny, or explain any material factual allegation contained herein constitutes an admission
11 of the allegation.
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13 **VII. INFORMAL SETTLEMENT CONFERENCE**

14 7.1. Whether or not Respondent requests a hearing, Respondent may request an
15 informal settlement conference to discuss the facts of this case, the proposed penalty, and the
16 possibility of settling this matter. To request such a settlement conference, Respondent should
17 contact:

18 Ankur Tohan
19 Assistant Regional Counsel
20 U.S. Environmental Protection Agency, Region 10
21 1200 Sixth Avenue
22 Suite 900 (Mailstop ORC-158)
23 Seattle, Washington 98101
24 (206) 553-1796
25

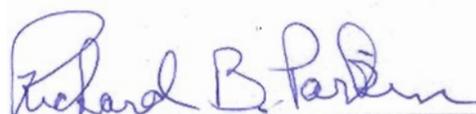
1 7.2. Note that a request for an informal settlement conference does not extend the
2 thirty (30) day period for filing a written Answer to this Complaint, nor does it waive
3 Respondents' right to request a hearing.

4 7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules
5 prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related
6 proceedings with the Administrator, the Environmental Appeals Board or its members, the
7 Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these
8 officials in the decision on this case.

9
10 **VIII. RESERVATIONS**

11 8.1. Neither assessment nor payment of an administrative civil penalty pursuant to this
12 Complaint shall affect Respondent's continuing obligations to comply with: (1) the Clean Water
13 Act and all other environmental statutes; (2) the terms and conditions of all applicable Clean
14 Water Act permits; and (3) any Compliance Order issued to Respondent under Section 309(a) of
15 the Act, 33 U.S.C. § 1319(a), concerning violations alleged herein.

16
17 Dated this 16th day of July, 2008.

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20 RICHARD B. PARKIN, Acting Director
21 Office of Ecosystems, Tribal and Public Affairs

CERTIFICATE OF SERVICE

I certify that the foregoing "Complaint" was filed and sent to the following person, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue,
Suite 900 (Mail Stop ORC-158)
Seattle, Washington 98101

A true and correct copy, via **Seattle Legal to:**

David R. Swezey
819 Orca Street
Anchorage, Alaska 99501

Dated:

7/16/08

Sharon J. Eng

U.S. EPA Region 10

COMPLAINT - 12
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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1796