



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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

SEP 29 2010

Ref: 8ENF-W

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED
#7008-3230-0003-0731-~~3835~~ 3859

John Arrigo, Administrator
Montana Department of Environmental Quality
Enforcement Division
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

Re: Notice of Proposed Assessment of Class I
Civil Penalty - Docket No. **CWA-08-2010-0038**

Johns:
Dear Mr. Arrigo:

Enclosed is a copy of an administrative Complaint and Consent Agreement proposing assessment of a civil penalty against McCrumb Construction & Marine, Inc. and Montana Eagle Development, LLC (Respondents) of Montana. The United States Environmental Protection Agency (EPA) filed the complaint and consent agreement pursuant to § 309(g), 33 U.S.C. § 1319(g), of the Clean Water Act (CWA) to finalize an agreement that assesses an administrative Class I civil penalty of \$15,000 against the Respondents for violations of the CWA. Because the violations occurred in Montana, EPA is offering you the opportunity to confer with us regarding the proposed assessment. Please note that the violations subject to this complaint and consent agreement are the same activity that prompted your office to issue a notice of violation to Flathead Dock & Pile (a prior name for Respondent McCrumb Construction & Marine, Inc.) on November 17, 2008.

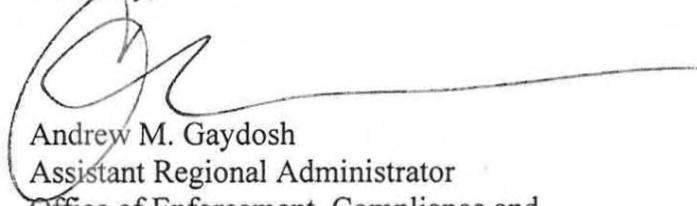
You or your staff may request a conference within thirty (30) days of receiving this letter. The conference may be in person or by telephone and may cover any matters relevant to the consent agreement. We expect that this 30-day period will overlap at least in part with the public comment period that EPA will provide for this complaint and consent agreement pursuant to § 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4).



Printed on Recycled Paper

A copy of EPA's procedures governing the administrative assessment of civil penalties under the CWA is enclosed for your reference. If you have any technical questions regarding this request, please contact Kenneth Champagne at (303) 312-6608. Please direct questions of a legal nature to Peggy Livingston, EPA Enforcement Attorney, at (303) 312-6858.

Sincerely,



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

Enclosures:

1. Administrative Complaint and Consent Agreement
2. Administrative Penalty Procedures (40 C.F.R. Part 22)

cc: Tina Artemis, EPA, Regional Hearing Clerk



1st Page Only

§21.13

approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

- Sec. 22.1 Scope of this part. 22.2 Use of number and gender. 22.3 Definitions. 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment. 22.5 Filing, service, and form of all filed documents; business confidentiality claims. 22.6 Filing and service of rulings, orders and decisions. 22.7 Computation and extension of time. 22.8 Ex parte discussion of proceeding. 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances. 22.11 Intervention and non-party briefs. 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding. 22.14 Complaint. 22.15 Answer to the complaint. 22.16 Motions. 22.17 Default. 22.18 Quick resolution; settlement; alternative dispute resolution. 22.19 Prehearing information exchange; prehearing conference; other discovery. 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing. 22.22 Evidence. 22.23 Objections and offers of proof. 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard. 22.25 Filing the transcript. 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision. 22.28 Motion to reopen a hearing.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 SEP 29 PM 1:01

In the Matter of:)
)
McCrum Construction & Marine, Inc.,)
and)
Montana Eagle Development, LLC,)
)
)
)
Respondents)

FILED
EPA REGION VIII
HEARING CLERK

COMPLAINT AND
CONSENT AGREEMENT

Docket No. CWA-08-2010-0038

Complainant, Region 8 of the United States Environmental Protection Agency (EPA), and Respondents McCrum Construction & Marine, Inc., and Montana Eagle Development, LLC, by their undersigned representatives, hereby consent and agree as follows:

AUTHORITY

1. This Complaint and Consent Agreement (agreement) is entered into under the authority of § 309(g)(1)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1)(A), and 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, a copy of which has been provided to Respondents.
2. This 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 22.18(b)(2) and (3).

FACTUAL AND LEGAL ALLEGATIONS

3. Solely for the purposes of this proceeding, Respondents admit the jurisdictional allegations contained in this agreement, neither admit nor deny the factual allegations contained in this agreement, consent to the assessment of the civil penalty referenced below, and waive any right to a hearing or appeal before any tribunal and to contest any issue of law or fact set forth in this agreement.
4. EPA asserts that settlement of this matter is in the public interest, and the parties agree that entry of this 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 Respondents and EPA.

5. Nothing in this agreement shall constitute or be deemed an admission by Respondents of any violations of the CWA or any regulation issued under the CWA.
6. This 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 any Respondent, including, but not limited to, any transfer of assets or real or personal property shall not alter that Respondent's responsibilities under this agreement.
7. This agreement contains all terms of the settlement agreed to by the parties.
8. Respondent McCrumb Construction & Marine, Inc. (McCrumb Construction) is a corporation incorporated under the laws of the State of Montana. The address of the registered office for McCrumb Construction is 10 7th Avenue East, Polson, Montana, 59860. Its registered agent at that address is Brett McCrumb. Before July 28, 2008, McCrumb Construction & Marine, Inc. was known as Flathead Dock & Pile, Inc.
9. Respondent Montana Eagle Development, LLC (MED) is a corporation incorporated under the laws of the State of Montana. The address of the registered office for Eagle Development is 7135 Highway 93 South, Suite C, Lakeside, Montana, 59922. Its registered agent at that address is T. Lawrence and Armstrong, LLC.
10. On or about November 7, 8, and 9, 2007, Respondents and Dockmaster Inc., a Montana corporation, discharged at least 400 cubic feet of soil, dirt, clay, gravel, and rocks from a barge into Flathead Lake, south of Caroline Point, near Lakeside, Montana, during a renovation project for the Lakeside Marina.
11. The discharge described in the preceding paragraph was accomplished with an excavator, which was on the deck of the barge.
12. The barge mentioned in paragraphs 10 and 11, above, was owned by Dockmaster, Inc.
13. The excavator on the barge mentioned in the preceding paragraph was operated by employees of Dockmaster, Inc.
14. Respondent McCrumb Construction leased or contracted for the use of the barge and excavator mentioned in the preceding paragraph, during the time period in which the discharges described in paragraph 10, above, occurred.
15. The discharges described in paragraph 10, above, were done at the direction of Respondent McCrumb Construction.
16. The soil, dirt, clay, gravel, and rocks mentioned in paragraph 10, above, were wastes consisting of residual building materials from the demolition of a crib dock and/or

construction of a replacement dock near the shore of Flathead Lake near Lakeside, Montana. Respondent MED owns that dock.

17. Flathead Lake has supported and/or is capable of supporting commercial navigation. Part of Flathead Lake is within the external boundaries of the Flathead Indian Reservation.
18. The Respondents discharged and/or allowed the discharge of the dredged or fill material described in paragraph 10, above.
19. The unauthorized dredged or fill material described in paragraph 10, above, has not been removed from Flathead Lake.
20. The discharges described in paragraph 10, above, were performed an excavator, which was operated by or on behalf of Respondents.
21. Each Respondent is a “person” within the meaning of § 502(5) of the CWA, 33 U.S.C. § 1362(5).
22. The soil, dirt, gravel, and rocks referenced in paragraphs 10 and 16, above, are “dredged material” or “fill material” as defined in 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), respectively, and “pollutants” as defined in § 502(6) of the CWA, 33 U.S.C. § 1362(6).
23. The barge referenced above is a “point source” as that term is defined in § 502(14) of the CWA, 33 U.S.C. § 1362(14).
24. The excavator referenced above is a “point source” as that term is defined in § 502(14) of the CWA, 33 U.S.C. § 1362(14).
25. Flathead Lake is a “water of the United States” as defined in 33 C.F.R. § 328.3(a) and a “navigable water” as defined in § 502(7) of the CWA, 33 U.S.C. § 1362(7).
26. The Respondents’ placement of dredged or fill material into Flathead Lake constitutes the “discharge of pollutants” within the meaning of § 502(12) of the CWA, 33 U.S.C. § 1362(12).
27. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with, among other things, § 404 of the CWA, 33 U.S.C. § 1344.
28. Section 404 of the CWA, 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.

29. According to 33 C.F.R. § 323.3(a), unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
30. In a letter to Respondent MED dated January 7, 2005, the Corps determined that its proposal to repair existing docks and structures on Flathead Lake was authorized by Department of Army Nationwide Permit 39: Residential, Commercial, and Institutional Developments. This authorization allowed for approximately 0.2018 of an acre of total fill to be placed below the ordinary high water mark for the project (concrete foundation and foundation piers and sea wall only).
31. The discharge described in paragraph 10, above, was not authorized by the Corps' January 7, 2005, Nationwide Permit 39 verification letter.
32. Except for the dock and structure repair activities described in paragraph 30, above, Respondents are not and never have been authorized by a permit issued pursuant to § 404 of the CWA, 33 U.S.C. § 1344, to conduct the activities described in paragraph 10, above. Additionally, the discharges described in paragraph 10, above, exceeded, and were therefore in violation of, the January 7, 2005, authorization granted by the Corps pursuant to Nationwide Permit 39: Residential, Commercial, and Institutional Developments.
33. The Respondents' discharges of dredged or fill material into Flathead Lake were never exempt from permitting pursuant to § 404(f) of the CWA, 33 U.S.C. § 1344(f), or 33 C.F.R. § 323.4.
34. Respondents' discharges of dredged or fill material into Flathead Lake violate § 301(a) of the CWA, 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 § 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharged dredged or fill material remains in place without the required permit(s) constitutes an additional day of violation of § 301(a) of the CWA, 33 U.S.C. § 1311(a).
35. The discharges described in paragraph 10, above, resulted in the localized destruction of aquatic habitat and degradation of water quality, including but not limited to increases in turbidity.
36. On November 17, 2008, the Montana Department of Environmental Quality (MDEQ) issued a notice of violation to Flathead Dock & Pile, Inc. (as mentioned previously, a prior name for Respondent McCrumb) and to Brett McCrumb, an individual, stating that the discharges described in paragraph 10, above, were in violation of Montana law.

37. Pursuant to CWA § 309(g), 33 U.S.C. § 1319(g), EPA will consult with the MDEQ on the assessment of this administrative penalty by furnishing the MDEQ a copy of this agreement.
38. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), authorizes EPA to assess administrative penalties for violations of the CWA.

TERMS AND CONDITIONS

39. Respondents consent and agree to pay a civil penalty in the amount of \$15,000 in the manner described below:
 - a. Payment shall be in a single payment of \$15,000, due no later than thirty calendar days from the date of the Final Order, issued by the Regional Judicial Officer, that adopts this Consent Agreement. If the due date for the payment falls on a weekend or legal federal holiday, then the due date is the next business day. The date the payment is made is considered to be the date processed by U.S. Bank, described below. Payment must be received by 11:00 AM Eastern Standard Time to be considered as received that day.
 - b. The payment shall be made by remitting a cashier's or certified check, or making a wire transfer or on-line payment, including the name and docket number of this case, for the amount stated in part "a," above, payable to "Treasurer, United States of America," as follows:

If sent by regular U.S. mail:

U.S. Environmental Protection Agency / Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

If sent by any overnight commercial carrier:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

If sent by wire transfer: Any wire transfer must be sent directly to the Federal Reserve Bank in New York City with the following information:

ABA: 021030004
Account Number: 68010727

The payment may also be made on-line by accessing "www.pay.gov."

A copy of the check (or notification of wire transfer or on-line payment) shall be sent simultaneously to:

Kenneth Champagne Environmental Protection Specialist
Water Technical Enforcement Program (8ENF-W)
U.S. EPA, 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

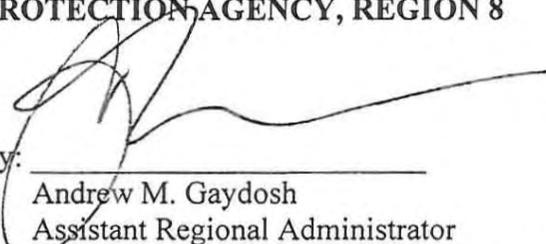
- c. In the event payment is not received by the specified due date, interest will accrue from the date of the final order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received. (i.e., on the 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.
40. Nothing in this agreement shall relieve Respondents of the duty to comply with the CWA and its implementing regulations.
41. Failure by Respondents to comply with any of the terms of this agreement shall constitute a breach of the 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.

42. Nothing in this 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 agreement.
43. Each undersigned representative of a Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this agreement and to bind the applicable Respondent to the terms and conditions of this agreement.
44. 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 agreement if comments received disclose facts or considerations which indicate that the agreement is inappropriate, improper, or inadequate.
45. If comments received during the public comment period do not require modification of or withdrawal from this agreement by EPA, the parties agree to submit this agreement to the Regional Judicial Officer, with a request that it be incorporated into a final order.
46. Each party shall bear its own costs and attorney fees in connection with this matter.
47. This agreement, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete and full settlement of the Respondents' liability for federal civil penalties relating to the violations alleged above.
48. This agreement may be signed in multiple counterparts, each of which shall have the force and effect of an original.

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

Date: 2/28/10

By: 

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

Date: 9/29/10

By: Margaret J. (Peggy) Livingston
Margaret J. (Peggy) Livingston
Senior Enforcement Attorney
US EPA, Region 8, ENF-L
1595 Wynkoop St.
Denver, CO 80202
303-312-6858

**McCRUMB CONSTRUCTION &
MARINE, INC.**

Date: 9/22/2010

By: Brett McCrumb
Brett McCrumb, President

MONTANA EAGLE DEVELOPMENT, LLC

Date: 9/22/10

By: Trevor Schaefer
Trevor Schaefer, Manager

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I hand delivered the original and one copy of the foregoing Complaint and Consent Agreement to:

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

I also certify that on the date noted below, I mailed a copy of the foregoing Complaint and Consent Agreement (as filed with the Regional Hearing Clerk) to each of the following as indicated below.

1. Brett McCrumb, Registered Agent
McCrumb Construction & Marine, Inc.
10 7th Avenue East
Polson, MT 59860
By U.S. Mail, Certified Return Receipt No. 7009-3410-0000-2591-7370
2. Trevor Schaefer, General Manager
Montana Eagle Development LLC
7135 Highway 93 South, Suite C
Lakeside, MT 59922
By U.S. Mail, Certified Return Receipt No. 7009-3410-0000-2591-7387

Date: 9/29/10

Judith M. McTernan