

RECEIVED

11 JUN 16 PM 4:18

HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

DOCKET NO. CWA-10-2011-0086

ROBERT M. LOOMIS AND
NANCY M. LOOMIS
Haines, Alaska

COMPLAINT

Respondents

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(g) of the Clean Water Act ("Act"), 33 U.S.C. § 1319(g). The Administrator has delegated this authority to the Regional Administrator of EPA Region 10 who, in turn, has re delegated this authority to the Directors of the Office of Compliance and Enforcement and the Office of Ecosystems, Tribal and Public 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 proposes the

1 assessment of a civil penalty against Robert M. and Nancy M. Loomis (“Respondents”) for
2 violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

3 1.3. In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40
4 C.F.R. § 22.38(b), EPA will consult with the State of Alaska within thirty (30) calendar days
5 following proof of service of this Complaint on Respondents.

6 7 II. STATUTORY AND REGULATORY BACKGROUND

8 2.1 Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the “discharge of any
9 pollutant by any person” except as authorized by a permit issued pursuant to Section 402 or
10 Section 404 of the Act, 33 U.S.C. § 1342 or 1344. Section 502(12) of the Act, 33 U.S.C. §
11 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to
12 navigable waters from any point source.”

13 2.2 Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines “pollutant” to include,
14 *inter alia*, rock, sand, and other materials.

15 2.3 Section 502(7) of the Act, 33 U.S.C. § 1362(7) defines “navigable waters” as
16 “waters of the United States.” 40 C.F.R. § 122.2 and § 232.2 and 33 C.F.R. § 328.3 define
17 “waters of the United States” to include “tributaries of waters” that “may be susceptible to use in
18 interstate or foreign commerce, including all waters which are subject to the ebb and flow of the
19 tide ...,” as well as “wetlands adjacent to” such tributaries and waters.

20 2.4 Section 502(14) of the Act, 33 U.S.C. § 1362(14) defines “point source” to
21 include “any discernible, confined and discrete conveyance ... from which pollutants are or may
22 be discharged.”

1 2.5 Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines “person” as “an
2 individual, corporation, partnership, association, State, municipality, commission, or political
3 subdivision of a State, or any interstate body.”

4 2.6 Section 402(p) of the Act, 33 U.S.C. § 1342(p), specifies that a NPDES permit is
5 required for any storm water discharge “associated with industrial activity.” 40 C.F.R.
6 § 122.26(b)(14)(x) defines “[s]torm water associated with industrial activity” to include
7 discharges associated with “[c]onstruction activity, including clearing, grading, and excavation”
8 resulting in the disturbance of at least five acres of total land area.

9 2.7 Section 402(p) of the Act, 33 U.S.C. § 1342(p), further authorizes EPA to issue
10 regulations that designate additional storm water discharge sources and establish a
11 comprehensive program to regulate these additional sources. In accordance with Section 402(p),
12 40 C.F.R. § 122.26(a)(9) requires any “storm water discharges associated with small construction
13 activity” to be authorized by a NPDES permit. 40 C.F.R. § 122.26(b)(15) defines “storm water
14 discharge associated with small construction activity” to include the “discharge of storm water
15 from ... [c]onstruction activities ... that result in land disturbance of equal or greater than one
16 acre and less than five acres.”

17 2.8 In July of 2003, EPA re-issued the NPDES General Permit for Storm Water
18 Discharges from Construction Activities (“CGP”) pursuant to Section 402 of the Act, 33 U.S.C.
19 § 1342. The CGP became effective on July 1, 2003 and authorizes certain discharges of storm
20 water associated with construction activities. The CGP’s coverage extends to all facilities in the
21 State of Alaska and requires permittees to comply with the conditions and requirements set forth
22 in the CGP.

1 2.9 To obtain coverage for storm water discharges from a construction site under the
2 CGP, an operator must first “prepare and submit a complete and accurate Notice of Intent.” CGP
3 at Part 2.

4 2.10 An “operator” is defined to include both: (1) “[t]he party [who] has operational
5 control over construction plans and specifications ...,” and (2) “[t]he party [who] has day-to-day
6 operational control of those activities at the project which are necessary to ensure compliance
7 with a [storm water pollution prevention plan] for the site or other permit conditions.” CGP at
8 Appendix A.

9 2.11 Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1) authorizes EPA to assess
10 administrative penalties against any person who violates Section 301 of the Act, 33 U.S.C. §
11 1319(g)(1).

12 13 III. ALLEGATIONS

14 3.1 Robert M. Loomis and Nancy M. Loomis are individuals and are “persons” as
15 defined in Section 502(5) of the Act, 33 U.S.C. § 1362(5).

16 3.2 Respondents own, possess, and/or control approximately 31.3 acres of real
17 property (ASLS 88-21, Tract F and G) at milepost 2.5 of the Haines Highway in Haines, Alaska.
18 This property is located within Section 28, Township 30 South, Range 59 East, Copper River
19 Meridian at Latitude 59.241° N., Longitude 135.494° W. Respondents’ property is hereinafter
20 referred to as “the Site.”

21 3.3 The Site contains wetlands within the meaning of 33 C.F.R. § 328.3(b); the
22 wetlands meet the criteria for jurisdictional wetlands in the 1987 “Federal Manual for Identifying
23 and Delineating Jurisdictional Wetlands.”

1 3.4 Since Respondents have owned and controlled the Site, Respondents solicited
2 local contractors for fill material from construction projects around the Haines area. Fill material
3 was brought to the Site and stockpiled on the Site by local contractors, and occasionally the
4 contractors paid Respondents a disposal fee.

5 3.5 On or about June 2006 and proceeding until approximately July 2009, at times
6 more fully known to Respondents, Respondents operated or directed the operation of certain
7 heavy earthmoving equipment, such as a tracked bulldozers and a wheeled bulldozer, which was
8 used to discharge approximately 13,110 cubic yards of sand, silt, rock, clay, gravel, asphalt,
9 overburden, soils and other material into 0.35 acres of jurisdictional wetlands and other waters of
10 the United States at the Site.

11 3.6 Respondents did not apply for authorization for these discharges under any new or
12 existing permits issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344.

13 3.7 On April 1, 2010, EPA issued Respondents an Administrative Compliance Order
14 (EPA Docket No. CWA-10-2010-0133) to remove all unauthorized fill material in wetlands and
15 restore the Site. To date, the unauthorized fill material has not been removed or the Site restored.

16 3.8 On or about June 2006 and proceeding until approximately July 2009, at times
17 more fully known to Respondents, Respondents and/or persons acting on their behalf undertook
18 construction activity at the Site, including clearing, grading, and excavation activities that
19 resulted in the disturbance of greater than one acre.

20 3.9 The construction activity occurred on approximately three acres of the Site, which
21 involved both an existing pad as well as unauthorized filled wetlands.

22 3.10 Since at least June 2006 until approximately May 2010, the disturbed portion of
23 the Site had highly erodible soils and the Site was not stabilized and lacked best management
24 practices. Due to the lack of stabilization and best management practices and the significant
25

1 amount of precipitation in the Haines area, there were approximately 97 days during the period
2 in question when there was storm water runoff from the construction area on the Site.

3 3.11 Beginning on or about June 2006, at times more fully known to Respondents,
4 storm water discharges containing pollutants from the Site entered waters of the United States.

5 3.12 Respondents did not apply for authorization for these discharges under any new or
6 existing permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

7 3.13 The receiving water for any storm water discharges from the Site is a large
8 wetland complex and an adjacent unnamed anadromous, perennial tributary (State of Alaska
9 catalogue number 115-32-10300-2014). This unnamed tributary flows into the Chilkat River,
10 which flows to the Chilkat Inlet.

11 3.14 The Site's large wetland complex, the unnamed tributary, the Chilkat River and
12 Chilkat Inlet are "navigable waters" as defined in Section 502(7) of the Act, 33 U.S.C.
13 § 1362(7), and are "waters of the United States" as defined in 40 C.F.R. § 122.2 and 33 C.F.R.
14 § 328.3.

15 3.15 The sand, silt, rock, clay, gravel, overburden, asphalt, soil and other materials
16 referenced in Paragraph 3.5 above constitute "fill material" within the meaning of 40 C.F.R.
17 § 232.2 and "pollutants" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6),
18 and 40 C.F.R. § 232.2.

19 3.16 The bulldozers and other heavy equipment referenced in Paragraphs 3.5 above,
20 are "point sources" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

21 3.17 By causing such fill material to enter waters of the United States, Respondents
22 have engaged in the "discharge of pollutants" from a point source within the meaning of Sections
23 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Count 1

Unpermitted Storm Water Discharges

3.18 Paragraphs 1.1 through 3.17 are realleged and incorporated herein by reference.

3.19. Respondents discharged storm water to tributaries of the Chilkat River and to wetlands adjacent to these tributaries without an NPDES permit on approximately 97 days during the four years between 2006 and April 30, 2010. These discharges constitute violations of Section 301(a) of the Act, 33 U.S.C. § 1311(a), on each of the days of discharge.

3.20. In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondents are liable for civil penalties not to exceed \$11,000 per day for each day during which the violation continued before January 12, 2009, and \$16,000 for violations after January 12, 2009.

Count 2

Unpermitted Discharges of Dredged or Fill Material

3.21 Paragraphs 1.1 through 3.17 are realleged and incorporated herein by reference.

3.22 Respondents discharge of fill material as alleged above was not authorized by a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (Corps), 33 U.S.C. §1344. These discharges constitute violations of Section 301 of the Act, 33 U.S.C. §1311, on each of the days of discharge.

3.23 Each day the unauthorized fill material remains in place without the required permit constitutes a day of violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

1 3.24 In accordance with Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B),
2 and 40 C.F.R. Part 19, Respondents are liable for civil penalties not to exceed \$11,000 per day
3 for each day during which the violation continued before January 12, 2009, and \$16,000 for
4 violations after January 12, 2009.

6 **IV. PROPOSED PENALTY**

7 4.1. Based on the foregoing allegations, and pursuant to the authority of Section
8 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Complainant proposes that an
9 administrative penalty not to exceed \$177,500 be assessed against Respondent.

10 4.2. In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii),
11 this Complaint does not include a specific penalty demand. Pursuant to Section 309(g)(3) of the
12 Act, 33 U.S.C. § 1319(g)(3), EPA must, in determining the specific penalty to be assessed in this
13 matter, take into account the nature, circumstances, extent, and gravity of the violation, and, with
14 respect to Respondents, ability to pay, prior history of violations, degree of culpability, economic
15 benefit and savings (if any) resulting from the violation, and such other matters as justice may
16 require. The following five paragraphs of this complaint briefly address each of these statutory
17 penalty factors.

18 4.3. Nature, Circumstances, Extent and Gravity of Violations: The nature,
19 circumstances, extent and gravity of violations by Respondents are significant because the
20 unnamed perennial stream channels impacted by the violations described above are tributaries to
21 the Chilkat River. These receiving waterbodies have a high water quality classification based on
22 designated and actual uses. The waterbodies provide high quality habitat for fish and wildlife.
23
24
25

1 particularly, as they provide a critical ecological use such as excellent cold water fish habitat for
2 anadromous fish. They provide rearing habitat for juvenile salmonids, cutthroat trout and Dolly
3 Varden char, and general habitat for coho salmon. Respondents' unauthorized filling activity
4 eliminated a portion of and altered the natural flow of an unnamed anadromous fish stream (115-
5 32-10300-2014). The Chilkat River tributary wetlands complex provide important nutrients and
6 habitat for a variety of birds and migratory waterfowl, as well as salmon and resident fish
7 species. Brown bears and moose utilize these wetlands for food and shelter.

8 4.4. Respondent's Ability to Pay: Complainant has reviewed publicly available
9 information on Respondents' financial conditions and has found no information indicating that
10 Respondents are unable to pay the proposed penalty. Complainant will consider any information
11 submitted by Respondents related to their ability to pay the proposed penalty.

12 4.5. Respondent's History of Prior Violations: Complainant is unaware of
13 Respondents having any history of prior violations of the Act.

14 4.6. Respondent's Degree of Culpability: Alaska Department of Environmental
15 Conservation (ADEC) informed Respondents about the CGP and permit requirements during an
16 inspection of the Site on May 12, 2009. Thus, Respondents were aware of the terms and
17 conditions of the CGP. However, as of January 22, 2010, Respondents had neither applied for
18 CGP coverage, nor stabilized the site. EPA sent a Notice of Violation on January 22, 2009 to the
19 Loomises regarding non-compliance with the CGP and informing him of his obligations to
20 comply with the permit, now under ADEC's jurisdiction. On April 30, 2010, ADEC issued
21 permit coverage for the Site under tracking number AKR10DD19.
22
23
24
25

1 4.7. As early as May 2004, Southeast Roadbuilders Inc. (SRI) made it clear to Mr.
2 Loomis that the area beyond the existing pad may be considered wetlands, and that a
3 determination of this classification was available from the U.S. Army Corps of Engineers. A
4 permit would be necessary to enlarge the pad footprint. SRI made it clear to Mr. Loomis that
5 any and all material placed in the pad could not be used to enlarge the existing footprint until a
6 permit for fill in wetlands was obtained. After 2004, Mr. Loomis continued to solicit and accept
7 fill material from local contractors and continued to expand the footprint of the pad. Mr.
8 Loomis' purpose was to expand the footprint of the fill pad to make building sites for himself or
9 to sell to others in the future and increase the property value.

10 4.8. On February 26, 2009, the Corps issued Mr. Loomis a Notice of Violations
11 regarding the unauthorized fill activities on site. However, even after issuance of the Notice of
12 Violation, Respondents continued to engage in unauthorized activities at the site, which resulted
13 in the Corps issuing a Cease and Desist Order on July 2, 2009.

14 4.9. Respondents were advised and had prior knowledge of the CWA Section 404
15 permitting requirements. Respondents demonstrated negligence and intent in violating the Act.

16 4.10. Respondent's Economic Benefit: Respondent enjoyed an economic benefit as a
17 result of the activities described above. This economic benefit includes the avoided costs
18 associated with not obtaining and complying with the CGP for storm water discharges, which
19 include the failure to conduct the required inspections and the failure to properly install and
20 maintain control measures at the Site. The economic benefit to Respondents also includes: (1)
21 avoided costs of not obtaining and complying with the requirements of a Corps 404 permit and
22 the Alaska Department of Environmental Conservation 401 Water Quality Certification, and (2)
23
24
25

1 the profit received from the temporary use, including accepting fees from one or more local
2 contractors as a disposal fee.

3 4.11. Other Matters as Justice May Require: Credible and consistent enforcement of
4 the Act's requirements to comply with both Sections 402 and 404 of the Clean Water Act by
5 obtaining and complying with required storm water and fill permits is necessary to deter
6 Respondent and others similarly situated from violating the Act as well as the terms and
7 conditions of the CGP.

8
9 **V. OPPORTUNITY TO REQUEST A HEARING**

10 5.1. Respondents have the right to file an Answer requesting a hearing on any material
11 fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon
12 request, the Presiding Officer may hold a hearing for the assessment of these civil penalties,
13 conducted in accordance with the provisions of the Part 22 Rules and the Administrative
14 Procedure Act, 5 U.S.C. § 551 *et seq.* A copy of the Part 22 Rules accompanies this Complaint.

15
16 5.2. Respondents' Answer, including any request for hearing, must be in writing and
17 must be filed with:

18 Regional Hearing Clerk
19 U.S. Environmental Protection Agency, Region 10
20 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
21 Seattle, Washington 98101

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

VI. FAILURE TO FILE AN ANSWER

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

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

VII. INFORMAL SETTLEMENT CONFERENCE

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

Lori Cora, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
Seattle, Washington 98101
(206) 553-1115


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

4 7.3. Respondents are 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 of this case.


9
10 **VIII. RESERVATIONS**

11 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 CWA and
13 all other environmental statutes; (2) the terms and conditions of all applicable CWA permits; and
14 (3) any Compliance Order issued to Respondents under Section 309(a) of the CWA, 33 U.S.C.
15 § 1319(a), concerning the violations alleged herein.

16 Dated this 5th day of June, 2011.

17
18 

19 Edward J. Kowalski, Director
20 Office of Compliance and Enforcement

21 

22 Kate Kelly, Director
23 Office of Ecosystems, Tribal and Public
24 Affairs

1 CERTIFICATE OF SERVICE

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

4 Original and one copy, hand-delivered:

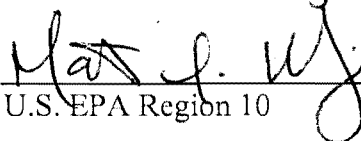
5 Carol Kennedy, Regional Hearing Clerk
6 U.S. Environmental Protection Agency, Region 10
7 1200 Sixth Avenue, Mail Stop ORC-158
8 Seattle, WA 98101

9 A true and correct copy, by certified mail, return receipt requested:

10 Robert M. Loomis
11 Nancy M. Loomis
12 279 Rocking Chair Road
13 Kilgore, Texas 75662-8275

14 Dated: 6/14/2011

Matthew J. Magorian

15 
16 U.S. EPA Region 10