

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

2014 MAR -6 PM 1:57

11201 RENNER BOULEVARD

LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

DR. DANIEL J. McGOWAN,)

Respondent)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

Docket No. CWA-07-2014-0060

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, 40 C.F.R. Part 22 (Consolidated Rules).

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has 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 EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

4. Respondent, Dr. Daniel J. McGowan, resides at 33 Rolling Hills Road, Kearney, Nebraska 68845.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

6. The CWA 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.

7. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include tributaries to, waters of the United States.

9. 40 C.F.R. § 232.2 defines “Discharge of fill material” as “the addition of fill material into waters of the United States.”

10. 40 C.F.R. § 232.2 defines “fill material” as any pollutant that “replaces portions of the ‘waters of the United States’ with dry land or which changes the bottom elevation of a water body for any purpose.”

11. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

Factual Background

12. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. At all times relevant to this action, Respondent owned, operated, or otherwise controlled property in the NE ¼ of Section 32, Township 32 North, Range 22 West, Brown County, Nebraska (hereinafter “the Site”).

14. On December 28, 2011, Respondent and/or persons acting on his behalf authorized and/or directed the release of fill material from the dam located on Respondent’s property into Plum Creek.

15. On January 18, 2012, the Corps Omaha District issued Respondent a Cease and Desist letter ordering Respondent to cease discharges of fill material into Plum Creek.

16. On January 22, 2012, Respondent and/or persons acting on his behalf closed the gates on his dam.

17. On July 18, 2012, Respondent and/or persons acting on his behalf authorized and/or directed the release of fill material from the dam located on Respondent's property into Plum Creek in violation of the Corps' January 18, 2012 Cease and Desist letter.

18. On August 24, 2012, Representatives from the Corps, the Middle Niobrara Natural Resources District, the Nebraska Department of Natural Resources, and the Natural Resources Conservation Service conducted a site investigation of Respondent's property and downstream properties. The agencies confirmed the above-referenced releases of fill material into Plum Creek and estimate that approximately 7.3 miles of stream have been impacted and that approximately 48.6 acres of stream have been "changed, altered, (or) damaged."

19. Between August 13 and October 5, 2012, the Middle Niobrara Natural Resources District ("NRD") received written complaints from all five landowners with properties located between Respondent's dam and the Niobrara River. In the complaints, the property owners asserted:

- a. Respondent's discharge of fill material "created a very turbid flow which filled in and covered habitat for the aquatic insects, brown trout, rainbow trout, creek chubs and other shiner/minnow species in the stream ... Biological sampling was completed by [Nebraska Game and Parks Commission] staff members in 2012. Our sampling indicates there are no trout remaining in the stream on Bobcat [Wildlife Management Area], and that conditions in the stream are no longer conducive to supporting fishable trout populations."
- b. Respondent's discharge of fill material "killed fish and degraded water ... our kids couldn't swim because of the smell of the sediment ..."
- c. Respondent's discharge of fill material resulted in a "vast increase in sand ... Prior to this discharge there were many exposed gravel beds and now there are few if any. During the discharge I noticed the color of the water was almost black ... It is my observation that there are fewer minnows and chubs in the creek since this event."
- d. Respondent's discharge of fill material resulted in "stream bank erosion, trees washed out, dead fish, washed out picnic and swimming area along creek. Damaged bridge and fences."
- e. Respondent's discharge of fill material resulted in "dead fish, large sediment load during low flow and record high temp(eratures), potentially endangered small children with high flows and no warning."

20. The fill material discharged by Respondent into Plum Creek is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. Respondent’s dam is “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The discharge of fill material into Plum Creek constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

23. Plum Creek is a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

24. The sediment discharged by Respondent constitutes “fill material” and his actions constitute “discharge of fill material” as those terms are defined in 40 C.F.R. §232.2.

25. Respondent’s 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.

26. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the work described herein, nor did Respondent perform the work described herein under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

Findings of Violation

27. The facts stated in Paragraphs 12 through 26 above are herein incorporated.

28. Respondent’s discharge of pollutants from a point source into waters of the United States occurred 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

29. 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 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA’s implementing regulations at 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after March 15, 2004. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of

2008, civil administrative penalties of up to \$16,000 per day for each day during which a violation continues, up to a maximum of \$177,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after January 12, 2009.

30. Based on the foregoing Finding of Violations, 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 the Respondent for the violations cited above, in the amount of up to \$16,000 per day for each day during which a violation occurred after January 12, 2009, up to a maximum of \$177,500.

31. 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 violator, 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.

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

33. 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, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

34. EPA has notified the state of Nebraska regarding this proposed action by mailing a copy of this document to the NDEQ.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

35. Respondent 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.

36. 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, Respondent 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 Respondent has any knowledge, or shall clearly state that Respondent has 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 Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Kathy Robinson
Regional Hearing Clerk
U. S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

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

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

39. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g) (4) (B) of 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, 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. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

40. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's 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.

41. Whether or not Respondent requests 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:


Chris Muehlberger
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Telephone: (913) 551-7623

42. 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.


43. 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 Respondent's right to request a hearing on any matter stipulated therein.

44. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

3-4-14
Date


Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

3.6.14
Date


Chris Muehlberger
Assistant 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 by certified mail, return receipt requested, 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; a copy of the Revised CWA Section 404 Settlement Penalty Policy; and a copy of the U.S. EPA Small Business Resources Information Sheet to the following persons:

Dr. Daniel J. McGowan
33 Rolling Hills Road
Kearney, Nebraska 68845; and

Mr. Stephen D. Mossman, Esq.
Mattson, Ricketts, Davies, Stewart & Calkins
134 South 13th Street, Suite 1200
Lincoln, Nebraska 68508.

3.6.14
Date


Signature

Chris Muehlberger
Printed Name