



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, Washington 98101  
JUL - 9 2002

Reply To  
Attn Of: ECO-083

**CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

Gilbert Agee  
Agee Construction Co.  
470 Ryan Heights Lane  
Roseburg, OR 97470

Re: Gilbert Agee, individually, and d.b.a., Agee Construction Co.  
Administrative Complaint  
Docket No. CWA-10-2002-0070

Dear Mr. Agee:

Enclosed is a copy of an administrative Complaint that the U.S. Environmental Protection Agency (EPA) has filed against you pursuant to Section 309(g)(2)(B) of the Clean Water Act (Act), 33 U.S.C. § 1319(g)(2)(B). In the Complaint, EPA alleges that you unlawfully discharged dredged and/or fill material into waters of the United States without a permit in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). EPA proposes that a penalty of \$55,000 be assessed against you for the violations alleged.

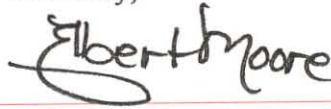
As described more fully in the Complaint, you have the right to request a hearing to contest the factual allegations and/or the penalty proposed in the Complaint. A copy of the Consolidated Rules of Practice in 40 C.F.R. Part 22 (Part 22 Rules), which govern this proceeding, is enclosed. Please note the requirements for filing an Answer in §§22.15 and 22.17. If you wish to contest the allegations and/or the penalty proposed in the Complaint, then within 30 days of receipt of the enclosed Complaint, you must file an Answer with the EPA Regional Hearing Clerk at the following address:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, Washington 98101

If you do not file an Answer within 30 days, you may be held in default. If a default order is entered against you, then each allegation in the Complaint will be deemed to be admitted as true and you will have waived the right to a hearing or to be notified of any EPA proceedings that occur before a civil penalty may be imposed. Upon default, the Presiding Officer may find you liable for the full civil penalty proposed in the Complaint.

You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA. If you have any questions, would like to discuss a settlement of this matter through an informal conference, or would like to receive an extension of the 30-day deadline to file an Answer in order to discuss settlement of this case, please contact Deborah Hilsman, Assistant Regional Counsel, at (206) 553-1810.

Sincerely,

A handwritten signature in black ink that reads "Elbert Moore". The signature is written in a cursive style with a large, sweeping initial "E".

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Elbert Moore, Director  
Office of Ecosystems and Communities

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Enclosures

cc:

Liam Sherlock, Attorney at Law

Larry Evans, U.S. Army Corps of Engineers, Portland District

Anne Haus, Oregon Division of State Lands

Mike Evanson, Oregon Department of Fish and Wildlife

RECEIVED

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HEARINGS CLERK  
EPA -- REGION 10

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
Gilbert Agee, individually,	)	
and doing business as,	)	
Agee Construction Co.,	)	ADMINISTRATIVE COMPLAINT
Douglas County, Oregon,	)	
	)	Docket No. CWA-10-2002-0070
Respondent.	)	
	)	

**STATUTORY AUTHORITY**

1. This Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") 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 redelegated this authority to the Director of the Office of Ecosystems and Communities ("Complainant").

2. Pursuant to Section 309(g)(2)(B) of the Act, and in accordance with 40 C.F.R. Part 22, 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," Complainant hereby proposes the assessment of a civil penalty against Gilbert Agee ("Respondent") for the unlawful discharge of dredged and/or fill material into

navigable waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a), without authorization by an Army Corps of Engineers (“Corps”) permit as required by Section 404 of the Act, 33 U.S.C. § 1344. Complainant also hereby provides notice of Respondent’s opportunity to request a hearing on the proposed penalty assessment.

### ALLEGATIONS

3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of dredged or fill material into navigable waters of the United States, except in compliance with a permit issued by the Corps under Section 404 of the Act.

4. Respondent Gilbert Agee is an individual who does business as Agee Construction Co., a sole proprietorship. Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

5. Upon information and belief, between July 1997 and August 1999, and at times more fully known to the Respondent, Respondent and/or persons acting on his behalf, discharged dredged and/or fill material into the North Umpqua River in Douglas County, Oregon, while constructing bank stabilization and rip-rap along the river at properties owned by the following property owners at the following locations:

Donald and Mary Kelly, 340 Antelope Lane, Roseburg, OR  
Dean Byers, 313 Antelope Lane, Roseburg, OR  
David Bogan, 545 Huntly Creek Lane, Glide, OR  
Wayne West, 2611 Whistlers Park Road, Roseburg, OR  
Estelle DeMoisy, 750 Pioneer Way, Winchester, OR  
Richard Gates, 586 River Bend Road, Roseburg, OR  
Ken Walters, 714 Pioneer Way, Winchester, OR  
Gordon Singleton, 726 Pioneer Way, Winchester, OR

6. The bank stabilization and rip-rap projects took place below ordinary high water along the North Umpqua River. The North Umpqua River is a “navigable waters” and a “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2.

7. Upon information and belief, Respondent used heavy equipment to place the dredged and/or fill material into the North Umpqua River. The heavy equipment Respondent used to dredge and/or fill the North Umpqua River is a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

8. The dredged and/or fill material that Respondent and/or persons acting on his behalf caused to be discharged includes, among other things, dirt, spoil, rock, and sand, each of which constitutes a “pollutant” within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

9. By causing such dredged and/or fill material to enter waters of the United States, Respondent engaged in the “discharge of pollutants” from a point source within the meaning of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12).

10. Respondent’s discharge of dredged and/or fill material was not authorized by any permit issued pursuant to Section 402 or 404 of the Act, 33 U.S.C. § 1312 or 1314, and Respondent is therefore in violation of section 301 of the Act, 33 U.S.C. § 1311.

11. Each day the material remains in the waters of the United States without the required permit constitutes an additional day of violation of Section 301 of the Act.

12. Under Section 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 for the administrative assessment of civil penalties in an amount not to exceed \$11,000 per day per violation, up to a maximum of \$137,500.

13. Pursuant to Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), EPA has consulted with the State of Oregon.

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**PROPOSED PENALTY**

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14. Based on the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(B) of the Act, Complainant proposes that the Presiding Officer assess an administrative penalty against Respondent in the amount of Fifty-Five Thousand Dollars (\$55,000).

Complainant's proposed penalty is based on the applicable statutory penalty factors in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). These are: the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to Respondent, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

15. The nature, circumstances, extent, and gravity of the violations in this case are determined to be major. Respondent significantly altered the natural river bank habitat of the North Umpqua River. Using heavy equipment, Respondent excavated and placed rock, sand, gravel, and rip-rap that remains in place to this day.

16. Respondent is culpable. Respondent was aware of the requirement to obtain a CWA Section 404 permit prior to discharging dredged and/or fill material to waters of the United States. Yet, Respondent constructed the bank stabilization and rip-rap work along the North Umpqua River, which is a water of the United States, below the ordinary high water mark,

without a Section 404 permit.

17. Respondent has no prior history of violations.
18. Respondent enjoyed an economic benefit as a result of his failure to comply with the Act.
19. EPA presumes that Respondent is able to pay a penalty of \$55,000 based upon the information available at the time of the filing of this Complaint. Respondent may submit documentation to rebut this presumption or other information relevant to the appropriate amount of the proposed penalty during settlement negotiations.

**OPPORTUNITY TO REQUEST A HEARING**

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

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

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, ORC-158  
Seattle, Washington 98101

22. If Respondent requests a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right

under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. If Respondent does not request a hearing, EPA will issue a final order assessing administrative penalties and any members of the public who commented on this proposed assessment during the thirty (30) day period following Respondent's receipt of this document will have an additional thirty (30) days to petition EPA to set aside the final order assessing administrative penalties and to request EPA to hold a hearing thereon. EPA will grant the petition and will hold a hearing provided the petitioner's evidence is material and was not considered by EPA in the issuance of the final order assessing administrative penalties.

**FAILURE TO FILE AN ANSWER**

23. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days after service of this Complaint, unless Respondent requests and receives an extension of time to file the Answer.

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



**INFORMAL SETTLEMENT CONFERENCE**

25. Whether or not Respondent requests a hearing, Respondent 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, Respondent should contact:

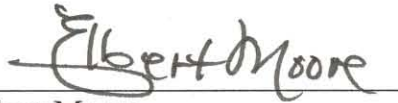
Deborah Hilsman  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 10  
1200 Sixth Avenue, ORC-158  
Seattle, Washington 98101  
(206) 553-1810

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

27. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), shall affect Respondent's continuing obligation to comply with the Clean Water Act, with every term and condition of any applicable Corps permit, and with any separate compliance order issued to Respondent under Section 309(a) of the Act, 33 U.S.C. § 1319(a), concerning the violations alleged herein.

28. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, Environmental Appeals Board Member, Administrative Law Judge, or any person likely to advise these officials in the decision of this case.

Dated this 9<sup>th</sup> day of July, 2002.

A handwritten signature in black ink that reads "Elbert Moore". The signature is written in a cursive style with a horizontal line underneath it.

Elbert Moore  
Director, Office of Ecosystems and Communities  
US EPA, Region 10

**CERTIFICATE OF SERVICE**

I hereby certify that the original of the foregoing Administrative Complaint against Gilbert Agee, Docket No. CWA-10-2002-0070, was filed with the Regional Hearing Clerk, EPA Region 10, Seattle, Washington, and a true and correct copy of such Complaint, together with a copy of the Consolidated Rules of Practice at 40 C.F.R. Part 22, the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, and the Small Business Regulatory Enforcement and Fairness Act Information Sheet was placed in the United States mail, postage prepaid, certified mail, return receipt requested, on this 9<sup>th</sup> day of

July, 2002, addressed to the following:

Gilbert Agee  
Agee Construction Co.  
470 Ryan Heights Lane  
Roseburg, OR 97470

A copy of the complaint was also sent by first class mail to the following:

Liam Sherlock, Attorney at Law  
Hutchinson Cox  
777 High Street, Suite 200  
Eugene, OR 97401

July 9, 2002  
Date

Melissa L. Whitaker  
Melissa Whitaker