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Reply to EPA Complaint

David D'Amato, Respondent
17211 Kings Way Dr.
Anchorage AK, 99516
907 441 4857

ORIGINAL

Docket no. CWA 10-2010-0132

Respondent does hereby request a hearing on the issues raised in the complaint and this reply.

Answer

Paragraphs 1.1-2.11.

No response definable; authorities and regulatory background are presumed to be the EPA's current understanding of their regulatory directives.

Paragraph 3.1.- 3.12

No response definable, Paragraph 3.1-3.11 are generalized allegations based on the EPA's understanding of how the facts they allege align with the regulatory authority generally defined in paragraphs 1.1-2.11.

Count 1

Paragraph 3.13

Denied.

The drainage ditch in this count was constructed sometime between 1966 and 1968. The ditch was created by either the United States military or the Kingsway Development Corporation. The ditches were most likely created in responses to the changes in drainage created by the construction of Brewsters Road (1953 -1960's) and the large drainage swale created by the development of the Goodman Homestead (see photos). Aerial photography throughout the years indicates transportation activity on the same access roads along and adjacent to the ditch utilized by Respondent during his ownership of the site.

The work in this drainage ditch was maintenance and did not "widen or deepen" the ditch as alleged. A comparison of aerial photography from Aero-Metric, Inc. of Anchorage 07-07-1970 and the photography in 2005-06 indicates clearly that the ditch dimensions and the spoil pile are smaller than the originally constructed contours. The maintenance activity on the ditch is 682 ft long, the northernmost 328 ft is considered a stream by the MOA and the other 354 is not considered a stream . There was specific work done in

2006-07 to determine if the ditch was indeed deeper or wider than the original contours, at that time it was determined that it was not deeper or wider based on several undisturbed portions of the ditch in the maintenance area. In addition to having several undisturbed (original vegetation) areas along the maintenance area, slow growing mosses were photographed in their undisturbed relationship to the watercourse's edge. Evidence of the originality of the ditches' contours was presented in the original work plan submitted in 2007, and is alluded to in the MOA's Paine Road Stream Diversion Analysis, published in 2008.

As this ditch was constructed prior to 1968 (Section 33 CFR 330.3), per section 304 of the Clean Water Act (hereinafter CWA) the ditch is a "grandfathered" permitted structure, that should not require permits for maintenance activities. Additionally, Section 404 of the CWA (regarding Statutory Exceptions for Drainage Ditch maintenance) and US Army COE Regulatory Guidance letter 07-02 state the conditions where maintenance of drainage ditches is exempt from permitting per the NWP program; it appears that this ditch falls under those exemptions.

Paragraph 3.14

Denied

This is a "new" allegation, not in the original COE Complaint or any compliance orders from the EPA.

Respondent knows of no wetlands in the area described; additionally the wetlands data that is part of the public record:

1. The Travis Peterson Wetlands Delineation (2006)
2. The wetland data available from the MOA wetland division (current and historical data),
3. The wetland data provided by HDR for the Hillside District Plan (2006-2009), and
4. The Stream Diversion Analysis done by Scott Wheaton of the MOA (2008).

Does not indicate any wetlands in the area described.

Paragraph 3.15

Denied

This allegation does not conform to known and accepted facts. It is a known and accepted feature of the correspondence between respondent and EPA / COE that flow was not diverted into the southeastern diversion channel from the unnamed east west flowing stream, or any other source as part of the original maintenance work in 2005.

Photography presented by the COE to respondent in their original NOV dated October 21 2005 confirms that fact.

In 2007 the property (site) underwent a “watercourse mapping” by the MOA Watershed Management Services. Page 3 of that report states: “A single exception to this is the original stream channel at the far south end of the ditch system. At this location it appears that the original stream has periodically overtopped the diversion at the south end of the ditch and reoccupied its original downstream channel sufficient number of times over the years to have maintained a clear and unobstructed natural channel downslope (D-26 to P-35).

There may be two sources for the confusion:

1. The original work plan from respondent proposed an earthen plug for that intersection, but did not specify that one was already there, and that it was simply to be upgraded and vegetated.
2. The property has on innumerable occasions been subject to “local-activist-discontent” modifications. On these occasion “No Trespassing” and “Private Property” signs have been torn down, log, and stone blocks to access in restoration areas have been removed to facilitate foot, ATV, and 4X4 truck traffic, properly permitted fences have been torn down, brush has been cleared, cross country ski trails cleared...etc. In 2006 local “interested parties” did some shovel work on that ditch and discontinued stream flow, which was restored by Respondent to original configurations. These facts were presented to the EPA in Respondent’s first work plan.

Additionally, the reconnection of natural existing stream channel is a desired environmental activity by EPA and MOA WMS regulators, and is considered to produce positive and desirable environmental outcomes, evidenced by the fact that EPA requested to Respondent and his consultant Tim Terry of Shannon Wilson Inc., that EPA wanted Respondent to travel “off site” and reconnect another steam feature (that was redirected by the 1968 man made north south ditch) approximately 250 linear feet from the connection in this allegation on neighboring property owned by Otto and Hildegard Poehling. Respondent was able to convince the Poehling’s to allow this reconnection.

Paragraph 3.16

Denied

This allegation does not conform to known and accepted facts. It is a known and accepted feature of the correspondence between respondent and EPA / COE that flow was not diverted into the southeastern diversion channel from the unnamed east west flowing stream, or any other source as part of the original maintenance work in 2005.

Photography presented by the COE to respondent in their original NOV dated October 21 2005 confirms that fact.

In 2007 the property (site) underwent a “watercourse mapping” by the MOA Watershed Management Services. Page 3 of that report states: “A single exception to this is the

original stream channel at the far south end of the ditch system. At this location it appears that the original stream has periodically overtopped the diversion at the south end of the ditch and reoccupied its original downstream channel sufficient number of times over the years to have maintained a clear and unobstructed natural channel downslope (D-26 to P-35).

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Paragraph 3.17

Denied.

Respondent believes that there are less than 10 tributaries (mostly ephemeral) that flow into the southeastern ditch, and notes that in the 2007 Watercourse mapping done by the MOA show only 3. (not the 19 enumerated in the Complaint)

Rock in the tributaries were replacement for rock disturbed during maintenance activities, and was done around the time of the placement of the original ESC’s prescribed by the COE.

Rock placed in tributaries was done under the guidance, supervision or direction of COE or other environmental regulators or consultants. Further, Respondent was informed by regulators and private environmental consultants that rock “armoring” was an appropriate way to reduce silt mobility, sedimentation, turbidity and the meandering of the tributaries as they enter the ditch.

Photography provided by the COE in their original October 21 2005 NOV confirms the fact that the tributaries in question contain a large number of similarly sized rocks at their base and the strata of ingress to the ditch.

Paragraph 3.18

Denied.

Silt Sock was placed under the direct guidance supervision and direction of the COE, EPA, and other environmental regulators and private consultants.

The Use of the product known as “Silt Socks” has been approved by the EPA for several years in these applications; Respondent does not believe that that use of silt socks is considered “a discharge of wood and rock” due to the fact that the socks are meant to contain these items, not release them. The use of Silt Socks are considered to be a Best Management Practice (BMP) by the EPA, for the additional benefits that the use of Silt Socks provide to the environment. .

The silt sock was placed in this ditch under the guidance, supervision and approval of the EPA, or other environmental regulators and private environmental contractors. Further, Respondent was informed by regulators and private environmental consultants that the use of “silt sock” was an appropriate way to reduce silt mobility, sedimentation, turbidity as a “check dam”.

Paragraph 3.19

Denied.

Discharges under the circumstances described above constitute maintenance and remediation and improvements to the waters of the United States, under the CWA and under other authority of the EPA, COE State of Alaska and Municipality of Anchorage.

Count 2.

Paragraph 3.20

No response possible

Paragraph 3.21

Denied.

Respondent does not know exactly what site the Complaint refers to, but denies using earthmoving equipment to clear, dredge wetlands, and discharge dredged spoil into any wetland that was not a part of maintenance activities in man made ditches.

Paragraph 3.22

Denied

The drainage ditch in this count was constructed sometime between 1966 and 1968. The ditch was created by either the United States military or the Kingsway Development Corporation. The ditches were most likely created in responses to the changes in drainage created by the construction of Brewsters Road (1953 -1960’s) and the large drainage

swale created by the development of the Goodman Homestead (see photos). Aerial photography throughout the years indicates transportation activity on the same access roads along and adjacent to the ditch and on the private property adjacent to the Paine Road ROW utilized by respondent during his ownership of the site.

The work in this drainage ditch was maintenance and did not widen, deepen or lengthen the ditch as alleged. A comparison of aerial photography from Aero-Metric, Inc. of Anchorage 07-07-1970 and the photography in 2005-06 indicates clearly that the ditch dimensions and the spoil pile are smaller than the originally constructed contours. The maintenance activity on the ditch is just under 350 ft in length ft long, and its totality is considered a stream by the MOA. There was specific work done in 2006-07 to determine if the ditch was indeed deeper or wider that the original contours, at that time it was determined that it was not deeper or wider based on several undisturbed portions of the ditch in the maintenance area. In addition to having several undisturbed (original vegetation) areas along the maintenance area, slow growing mosses were photographed in their undisturbed relationship to the watercourses edge. Evidence of the originality of the ditches contours was presented in the original work plan submitted in 2007, and is alluded to in the MOA's Paine Road Stream Diversion Analysis, published in 2008.

Also in the 2007 Watercourse Mapping by the MOA WMS department is the topographical evidence that all the rivers east of Little Rabbit Creek in and around the site flow in a north westerly direction.

As this ditch was constructed prior to 1968 (Section 33 CFR 330.3), per section 304 of the Clean Water Act (hereinafter CWA) the ditch is a "grandfathered" permitted structure, that should not require permits for maintenance activities. Additionally, Section 404 (f) (1) (b) and (c) of the CWA (regarding Statutory Exceptions for Drainage Ditch maintenance) and US Army COE Regulatory Guidance letter 07-02 state the conditions where maintenance of drainage ditches is exempt from permitting per the NWP program; it appears that this ditch falls under those exemptions. Additionally any discharge of dredged or fill material associated with or incidental to activities provided in Section 404 CWA are not prohibited and are exempt form the need to obtain a Section 404 permit from the Department of the Army.

Paragraph 3.23

Denied.

Respondent states that the MOA WMS survey notes only 3 tributaries in their report not the 6 listed in the complaint.

Rock in the tributaries were replacement for rock disturbed during maintenance activities, and was done around the time of the placement of the original ESC's prescribed by the COE.

Rock placed in tributaries was done under the guidance, supervision or direction of COE or other environmental regulators or consultants. Further, Respondent was informed by regulators and private environmental consultants that rock "armoring" was an appropriate way to reduce silt mobility, sedimentation, turbidity and the meandering of the tributaries as they enter the ditch.

Photography provided by the COE in their original October 21 2005 NOV confirms the fact that the tributaries in question contain a large number of similarly sized rocks at their base and the strata of ingress to the ditch.

Paragraph 3.24

Denied.

Silt Sock was placed under the direct guidance supervision and direction of the COE, EPA, and other environmental regulators and private consultants.

The Use of the product known as "Silt Socks" has been approved by the EPA for several years in these applications; Respondent does not believe that that use of silt socks is considered "a discharge of wood and rock" due to the fact that the socks are meant to contain these items, not release them. The use of Silt Socks are considered to be a Best Management Practice (BMP) by the EPA, for the additional benefits that the use of Silt Socks provide to the environment. .

The silt sock was placed in this ditch under the guidance, supervision and approval of the EPA, or other environmental regulators and private environmental contractors. Further, Respondent was informed by regulators and private environmental consultants that the use of "silt sock" was an appropriate way to reduce silt mobility, sedimentation, turbidity and for use as a "check dam".

Paragraph 3.25

Denied

Discharges under the circumstances described above constitute maintenance and remediation and improvements to the waters of the United States, under the CWA and under other authority of the EPA, COE State of Alaska and Municipality of Anchorage.

Count 3

Paragraph 3.26

No response possible

Paragraph 3.27

Denied.

Respondent denies the construction of a east-west wetlands drainage ditch; and is unaware of any east-west drainage ditches existing in wetlands on the site.

Respondent denies original construction of the two south-north wetland drainage ditches.

The two north south ditches can be divided into the west ditch and the east ditch. Both ditches and their attendant spoil and man made character can be seen throughout the years of aerial photography, both are in place and in use in the 07-07-1970 Aero Metric photos, also in the 06-27-1975 photos, the 05-20-1986 photos, and are still visible in the 2005 photography.

In the MOA Stream diversion Analysis Study (2007), specific mention of the western ditch is made, it is noted that the ditch was in place prior to 1972, and remained in place and in use as a drainage structure throughout the years until its eventual maintenance activities which took place in 2005 by Respondent.

The east ditch can be clearly seen as part of a pioneer road in the 07-07 1970 photography the angle and shape/ and size of the ditch in 1970 mirror the maintenance work which was done in 2005; however, other photography from later years show how other man made activities (06-27-1975 for example) show how the integrity of the original contours may have been compromised and led to the appearance that the ditch was in need of service to keep it maintaining properly.

The drainage ditch in this count was constructed sometime between 1966 and 1968. The ditch was created by either the United States military or the Kingsway Development Corporation. The ditches were most likely created in responses to the changes in drainage created by the construction of Brewsters Road (1953 -1960's) and the large drainage swale created by the development of the Goodman Homestead (see photos). Aerial photography throughout the years indicates transportation activity on the same access roads along and adjacent to the ditch and on the private property adjacent to the Paine Road ROW utilized by respondent during his ownership of the site.

The work in this drainage ditch was maintenance and did not widen, deepen or lengthen the ditch as beyond their original countours. A comparison of aerial photography from Aero-Metric, Inc. of Anchorage 07-07-1970 and the photography in 2005-06 indicates clearly that the ditch dimensions and the spoil pile are smaller than the originally constructed contours. Neither ditch is considered by the MOA.

Also in the 2007 Watercourse Mapping by the MOA WMS department is the topographical evidence that all the rivers east of Little Rabbit Creek in and around the site flow in a north westerly direction.

As these ditches were constructed prior to 1968 (Section 33 CFR 330.3), per section 304 of the Clean Water Act (hereinafter CWA) they are a “grandfathered” permitted structure, that should not require permits for maintenance activities. Additionally, Section 404 (f) (1) (b) and (c) of the CWA (regarding Statutory Exceptions for Drainage Ditch maintenance) and US Army COE Regulatory Guidance letter 07-02 state the conditions where maintenance of drainage ditches is exempt from permitting per the NWP program; it appears that this ditch falls under those exemptions. Additionally any discharge of dredged or fill material associated with or incidental to activities provided in Section 404 CWA are not prohibited and are exempt from the need to obtain a Section 404 permit from the Department of the Army.

All access roads transportation structures on the site were preexisting and can be seen on aerial photography from 1970, their use throughout the years is well documented in the aerial photography referenced earlier in this response. Additionally respondent used the same transportation structures in the beginning of his logging activities which started in 2002-03 and continue to this day.

Paragraph 3.28

Denied.

Discharges under the circumstances described above constitute maintenance and remediation and improvements to the waters of the United States, under the CWA and under other authority of the EPA, COE State of Alaska and Municipality of Anchorage

Count 4

Paragraph 3.29

No response possible

Paragraph 3.30

Denied

The 09-08-1979 photograph, 05-20-1986 photograph, 09-22- 1981 photograph, 06-27-1975 photograph, and 07-07-1970 photograph are all good visual descriptions of the unstable channel which jumped it banks due to massive man made disruptions spanning 30 years. The work in the channel was an emergency repair of an existing structure which flooded Respondent’s home.

Respondent knows of no wetlands in the area described; additionally the wetlands data that is part of the public record:

1. The Travis Peterson Wetlands Delineation (2006)
2. The wetland data available from the MOA wetland division (current and historical data),
3. The wetland data provided by HDR for the Hillside District Plan (2006-2009), and
4. The Stream Diversion Analysis done by Scott Wheaton of the MOA (2008).

Does not indicate any wetlands in the area described.

Subject ditch had a two part change of character based on man made conditions:

1. Increase water volume, and flow due to construction of drainage ditch approximately 1600 feet in length, going well beyond the entire eastern boundary of subject property. Adding more than 10 times the original volume of the original ditch (pre 1968).
2. The photographs listed above show that within the 200ft described, over time and within affected area that there were Quonset type structures, roads and dredging and modification of the ditch. The 1979 and 1986 photography show similar “breaches” of the ditch which flow right through the area where the addition to Respondent’s home was placed.

It was an unknown and unforeseeable breach of this section of the ditch which flooded Respondent’s home and necessitated emergency reconstruction work.

Paragraph 3.31

Denied.

Respondent only knows of one culvert on site. The culvert on site is in a well documented transportation path. Culvert was in place but was not functioning properly; it was essentially buried and clogged and the water was flowing over it. Maintenance was performed to make restore culvert to serviceability.

Paragraph 3.32

Denied

Discharges under the circumstances described above constitute maintenance and remediation and improvements to the waters of the United States, under the CWA and under other authority of the EPA, COE State of Alaska and Municipality of Anchorage

Penalty

Paragraph 4.1

Denied

Paragraph 4.2

Denied

Several of the allegations contained in the Complaint are in dispute or have been resolved.

Paragraph 4.3

Respondent believes that a final order is premature, and that any penalties are inappropriate, these statements will be developed more in the following paragraphs.

Paragraph 4.3.1

Respondent denies categorically that work on site has increased or has caused glaciation. Since performing the work on site glaciation has been less severe than in previous years.

In terms of causing safety hazards and decreasing property values Respondent offers the following time line of activities undertaken by Respondent in the Bear Valley area:

1999 Respondent moves back to Alaska and buys residence. Residence is an abandoned and blighted property. Respondent spends next two years repairing damage and making property livable; according to MOA property tax assessors, property more than quadruples in value by 2009.

2001 (November) Respondent buys subject property adjacent to residence.

2001 Respondent “co-signs” for Girlfriend buy 7936 Marino also in Bear Valley, This property is also boarded up and blighted. Respondent assists in restoring this property to habitability. According to MOA property Assessors, property triples in value in the 4 year period of her ownership.

2002 Respondent, at his own cost and at the request of no one removes between 11-13 cars and trucks that had accumulated over several decades from Tract 1 and 2 of the Hunter Heights Subdivision.

2003-2004 Respondent on his own initiative gets involved with the FIP program, and removes an estimated 400 dead beetle killed trees from the subject property. Respondent is still largest landowner in MOA to undertake this type of “fire break” activity. Given that the wind blows generally from the south and that there is only one access point into and out of Bear Valley, this large fire break provides Respondent and the surrounding community with a substantial firebreak advantage.

2005 Respondent undertakes maintenance activities on ditches on property with a view of reducing glaciation on Paine rd and restoring serviceable structures.

2006 Respondent buys 17250 Kingsway (across street from site) because the neighbor there dumps human feces and the feces of 11 dogs and seven llamas into Little Rabbit

Creek. Prior to Respondents purchase, reference point on creek (just below this address) cause this section of river to be “listed” for fecal coliform. Latest analysis performed by Anchorage Waterways Council indicates due to work performed by Respondent that section of creek could now be “de-listed”. After purchase house torn down and site restored to natural state; Property doubles in value.

2007-2008 Respondent organizes land sale with owners over 200 acres of land in the Bear Valley area, to achieve an outcome the MOA, HLB and the State of Alaska state that they desire: to create another large multiuse park adjacent to the Chugach park to relieve some of the pressure from Hilltop and the Glen Alps recreation areas. Land sale unsuccessful, but awareness raised about recreational issues affecting local area and property owners

2008-2010 Respondent appointed by Anchorage Assembly to be on Hillside District Plan. Plan seeks to establish a regulatory regimen for the Hillside and will include issues of drainage. Residents in land use area to be brought in to regulatory service area, and Residents in area to be made aware of regulatory responsibilities via public service campaign.

Respondent asserts that he has seen no evidence to accept or deny the potential environmental outcomes (gill abrasion, egg and micro invertebrates smothering).

Respondent further asserts that he is not aware of any increases in turbidity in Little Rabbit Creek.

Paragraph 4.3.2

Respondent is not able to pay penalty.

Respondent in 2010 had to sell his residence to pay for debts related to Hunter Heights tract 1 and lot 3.

Respondent still owes \$550,000 on subject property, this is a “high risk” loan where the lender lends against the property and not the borrower. Respondent will most likely have to return property to bank in July / August when note on property comes due.

Respondent informed the EPA of costs being a barrier to completion in June of 2009 after receiving a bid from Shannon and Wilson to develop a restoration plan for \$34,040. Tim Terry from Shannon and Wilson estimated that the costs to actually do the work in the restoration plan could be “a couple hundred thousand dollars”.

In July of 2009 Respondent asked NRSC and the COE on a federal level and Department of Fish and game on a State level for some “free” assistance in developing the plan. After a meeting with these agencies NRSC agreed to help. NRSC attempted to come out in the fall and begin the site work, but were unable to due to early snowfall and freeze.

Respondent informed the EPA that he was working with NRSC to develop a plan; EPA contacted NRSC to confirm this fact. NRSC sent respondent a letter stating that NRSC had spoken to EPA and that NRSC would be working with Respondent to develop a plan. A Notice of Intent to file Administrative complaint was mailed to Respondent on October 26, 2009.

NRSC did site work on subject property in 15th of June of 2010, and began working on the plan. On the 6th of July 2010, an Administrative Complaint was filed by EPA. On July 20th NRSC informed respondent that drawings were finished.

Paragraph 4.3.3

Respondent hereby certifies that he has not had any prior violations of the act.

Paragraph 4.3.4

Respondent was in 2005 and remains in 2010 not sure about a precise application of the CWA, it appears to be a constantly evolving body of law.

Respondent has lived since 1990 in a “land use area” that the subject property resides; the Bear Valley area, has to this day a regulatory regimen that essentially states that if you have a certified well and septic system, most other building decisions can be made by the landowner. The HDP (which respondent was Citizens Advisory Committee (CAC) member) will go some way to reorienting residents into modern regulatory compliance awareness. The public campaign initiated by the EPA against the Respondent with this Complaint should also raise some awareness about the presence of the EPA and the need to consult the federal government before undertaking any activity on land.

Respondent does not recall receiving or reading anything from the COE regarding wetlands on his property in 2005.

Respondent strongly contests the suggestion that the Respondent has not been vigorously attempting to comply with the COE and the EPA since this action was commenced in 2005. Respondent’s received the original COE NOV on October 21, 2005; Respondents reply to the COE was timely and indicated to the COE that although jute mat was not available that more expensive coconut mat was, and that Respondent bought it and got it in place before the snow flew that year (a few weeks later). When an after the fact permit was suggested to the COE the case was transferred to the EPA; the case was transferred to the EPA before the snow melted in the spring of 2006.

In 2006 Travis Peterson undertook a wetland delineation the results of which were necessary to inform the future activities of the Respondent. More sophisticated ESCs were asked for by the EPA and plans were made for those as well as the restoration plan. IN 2007 a streams watercourse mapping was commissioned and completed by WSM this study was undertaken to confirm from a regulatory standpoint the legal status of any streams that were on or adjacent to the property. A work plan was proffered in 2007 and

the more sophisticated ESC's were installed during this time period. A stream diversion analysis was undertaken in the summer of 2008 to further understand the character, nature and history of the streams on and adjacent to the site; this information was to inform Respondent about proposing appropriate remediation measures

EPA questions about the original work plan required a revised work plan to be submitted in early 2008, which prompted a site visit by EPA in the summer of 2008. The site visit by EPA raised new issues previously undiscovered by EPA, which necessitated a further addition to the work plan. Consultants were interviewed over the winter; and in the early summer 2009 another site visit by EPA consultant and Respondent was undertaken. In mid-summer the consultant reported that their fees would be in excess of \$34,000 and restoration activities could be "several hundred thousand dollars". Respondent found NRSC willing to do the site analysis for no cost, NRSC attempted to do the site work in late 2009 but due to an early freeze up had to do the work in early 2010. NRSC was finishing their work whilst this case was being filed.

Paragraph 4.3.5

Respondent certifies that he has received no economic benefit from the alleged violations of the CWA.

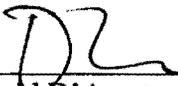
In 2005 Respondent owed approximately \$100,000 on the property; now in 2010, due to being unable to sell the subject property as a result of this action, costs related to this action, and increased rates of lending, Respondent now owes approximately \$550,000 on subject property.

Respondent has also spent a substantial amount of time and money in the attempting to comply with the compliance order and the attendant studies, reports and physical remediation work.

Paragraph 4.3.6.

Issues related to this section will addressed in a later brief by Respondent.

By:



David D'Amato





