

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Evergreen Development, Inc.	)	Docket No. CWA-07-2022-0134
	)	
and	)	COMPLAINANT’S INITIAL
	)	PREHEARING EXCHANGE
Mark Schmidt,	)	
	)	
Respondents	)	
	)	
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
_____	)	

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45, and Administrative Law Judge Christine Donelian Coughlin’s Prehearing Order of February 6, 2023, the United States Environmental Protection Agency (“EPA” or “Complainant”) submits this Initial Prehearing Exchange.

**1.(A) WITNESSES**

1. Delia Garcia, PhD. Dr. Garcia is an Environmental Scientist in the Water Branch of Region 7’s Enforcement and Compliance Assurance Division. Dr. Garcia has worked in Region 7’s Water Enforcement program for over 16 years, primarily in the Clean Water Act (“CWA”) Section 404 enforcement program. She is currently the Section 404 Enforcement Coordinator and the Enforcement Technical Liaison for Region 7. Dr. Garcia specializes in stream and wetland ecology and is an expert in applying CWA regulations, policies, guidance documents pertaining to streams and wetlands, as well as analyzing and interpreting aerial images. She will testify to her assessment of Respondents’ noncompliance with the Clean Water Act and its regulations based on her review of the evidence concerning Respondents’ unauthorized discharges of fill and/or dredged material into waters of the United States. She will testify regarding the facts EPA considered in proposing the penalty. Dr. Garcia will also testify about observations she made during her May 17, 2021, inspection of Respondents’ property, and roadside investigation on May 17, 2022, and the factors she evaluated in determining that the affected waters are jurisdictional under the CWA. She will testify as an expert witness. Reports and attachments memorializing Dr. Garcia’s conclusions from the inspection and roadside investigation are attached as Complainant’s Exhibits CX1-CX4 and CX 9. Dr. Garcia’s resume is attached as Complainant’s Exhibit CX 21.

2. David Smith-Watts. Mr. Smith-Watts is the National Coordinator for Civil Penalties and Financial Analyses at the EPA. He has given dozens of trainings to EPA, states, state organizations, and foreign countries on calculating economic benefit, and has calculated economic benefit and consulted with EPA enforcement case teams about economic benefit on a regular basis. He will testify as an expert on how EPA calculates economic benefit from noncompliance and the economic benefit in this case. Mr. Smith-Watts's resume is attached as Complainant's Exhibit CX 22. Upon completion of Respondents' Final Restoration Plan, which EPA intends to submit it as Exhibit CX 14, EPA intends to submit Mr. Smith-Watts' Expert Report regarding EPA's calculation of economic benefit in this case as Exhibit CX 23, in its Rebuttal Exchange.

3. Keith Simmons. Mr. Simmons is a Project Manager with the U.S. Army Corps of Engineers ("Corps"), Omaha District. He will testify about observations he made during his September 20, 2020 and November 5, 2020 roadside investigations of the Site (as defined in the Complaint, ¶ 18), and EPA's May 17, 2021, inspection. Reports and documentation of those visits are included in Complainant's Exhibit CX 15. He will also testify about the Section 404 permitting process, Respondents' need for a Section 404 permit, their failure to apply for such permit prior to their unauthorized discharges of fill material into waters of the U.S., and the factors he evaluated in determining that the affected waters are jurisdictional under the CWA. Mr. Simmons will testify as a fact witness.

4. Mark Pomajzl. Mr. Pomajzl is an Environmental Specialist at JEO Consulting Group. He was previously employed by the Nebraska Department of Energy and Environment ("NDEE") as a Program Specialist for NDEE's Wastewater NPDES Compliance Unit and, in that capacity, he conducted several Site visits and inspections of Respondents' Site. Reports and documentation of those visits are included in Complainant's Exhibit CX 19. Mr. Pomajzl will testify as a fact witness.

5. Jason Windhorst. Mr. Windhorst is employed by the NDEE as a Program Specialist. He conducted the April 20, 2021 Site visit along with Mr. Pomajzl. The report from that Site visit is included in Complainant's Exhibit CX 19. Mr. Windhorst will testify as a fact witness.

## **1.(B) EXHIBITS**

CX 1 EPA CWA 404 Inspection Report (May 17, 2021)

CX 2 Attachment 1 to EPA Inspection Report: Maps

CX 3 Attachment 2 to EPA Inspection Report: Photo Log and Photos

CX 4 Attachment 3 to EPA Inspection Report: Documents Received from Mr. Schmidt

CX 5 Invitation to Participate in Prefiling Negotiations (February 23, 2022, first email attempt)

CX 6 Invitation to Participate in Prefiling Negotiations (March 22, 2022, certified mail attempt; and May 11, 2022, second certified mail attempt)

CX 7 Email of Prefiling Letter (April 18, 2022)

CX 8 Email of Inspection Report (April 18, 2022)

CX 9 EPA Roadside Investigation Trip Report (May 17, 2022)

CX 10 Cover Letter and UAO (August 22, 2022, UPS Service, first attempt)

CX 11 Findings of Violation and Order for Compliance (personally served by Sheriff's Office)

CX 12 Proof of Service of Complaint and Opportunity for Hearing

CX 13 Public Notice of Complaint and Opportunity for Hearing

CX 14 [Placeholder for Respondents' Final Restoration Plan]

CX 15 Corps Referral Package to EPA

CX 16 National Pollutant Discharge Elimination System ("NPDES") general construction stormwater permit, NER160000

CX 17 Respondents' Notice of Intent, Authorization, Termination, and New Authorization

CX 18 Respondents' Stormwater Pollution Prevention Plan ("SWPPP") (April 5, 2019)

CX 19 NDEE Correspondence and Reports

CX 20 Nebraska Secretary of State Corporation and Business Entity Searches for Evergreen Development, Inc.

CX 21 Resume of Dr. Delia Garcia

CX 22 Resume of David Smith-Watts

CX 23 [Placeholder for Expert Report by David Smith-Watts]

CX 24 Nebraska Stream Condition Assessment Procedure

CX 25 Nebraska Stream Condition Assessment Procedure Calculations

CX 26 U.S. Geological Survey ("USGS") Topographic Map

CX 27 LIDAR Image

CX 28 U.S. Fish and Wildlife Service ("USFWS") National Wetlands Inventory Map

CX 29 USFWS IPaC Resource List

CX 30 Aerial Images

CX 31 Pictometry Images

CX 32 Antecedent Precipitation Tool analysis

CX 33 Scientific Literature

## **1.(C) AMOUNT OF TIME**

Complainant estimates that it will require approximately 2 days to present its case in chief. The length of time required for rebuttal testimony and cross examination of Respondents' witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondents' Prehearing Exchange. Complainant does not anticipate that the services of an interpreter with regard to the testimony of any witnesses will be necessary.

## **2.(A) SERVICE OF COMPLAINT**

The Complaint was personally served upon Mr. Mark Schmidt as Respondent and as Respondent Evergreen Development's Registered Agent by the Lancaster County Sheriff's Office on October 13, 2022. See CX 12 for a copy of the Proof of Service filed with the Regional Hearing Clerk that contains a copy of the process service return.

## **2.(B) BASES FOR ALLEGATIONS DENIED OR NOT OTHERWISE ADMITTED**

### **I. Introduction**

The Clean Water Act regulates discharges of pollutants into waters of the United States. Section 301 of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants from a point source into a water of the United States except in compliance with a permit issued under, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, or Section 404 of the CWA, 33 U.S.C. § 1344. For violations of Section 402 of the CWA, the EPA must show that Respondents: (1) are each a person (2) who violated a condition of their NPDES Permit. For violations of Section 404 of the CWA, the EPA must show that Respondents are (1) persons who (2) discharged a pollutant (3) from a point source (4) into the waters of the United States (5) without a Section 404 permit.

### **II. Respondents' Violations**

#### **A. CWA Section 402**

In this case, EPA can show that Respondents: (1) are each a person (2) who violated condition(s) of their NPDES Permit. Respondents neither admit nor deny that they are "persons" within the meaning of 33 U.S.C. § 1362(5) which includes both individuals and corporations within its definition. As Respondents are, respectively, an individual and a corporation, Respondents are indisputably "persons" under the terms of the CWA. See CX 1, CX 4 and CX 20.

Federal regulations define facilities that are considered to be engaging in "industrial activity" to include "[c]onstruction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area." 40 C.F.R. § 122.26(b)(14)(x). Federal regulations also require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c). Respondents applied for coverage under the Nebraska general construction stormwater NPDES Permit NER 160000, CX 16, and received authorization from NDEE on March 22, 2019. See CX 17. One of the

requirements of the NPDES Permit is to prepare and implement a SWPPP, which Respondents prepared on April 5, 2019. See CX 18. NDEE inspected Respondents' construction site on September 8, 2020, October 14, 2020, November 5, 2020, and April 20, 2021, and observed and documented violations of Respondents' NPDES Permit and SWPPP. See CX 19.

## **B. CWA Section 404**

In this case, the EPA can show that Respondents are “persons” within the meaning of the CWA, (2) discharged dredged or fill material including dirt, spoil, rock, and/or sand (3) using earth moving equipment (4) into waters of the United States including the tributary to the Little Nemaha River and adjacent wetlands (5) without a permit from the Corps.

Respondents neither admit nor deny that they are “persons” within the meaning of 33 U.S.C. § 1362(5) which includes both individuals and corporations within its definition. As discussed above, Respondents are, respectively, an individual and a corporation and, therefore, “persons” under the terms of the CWA. See CX 1, CX 4, and CX 20.

Section 502(12) defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Section 502(6) of the CWA defines “pollutant” to include, inter alia, dredged spoil, solid waste, garbage, biological materials, rock, sand, and industrial waste discharged into water. 33 U.S.C. § 1362(6). “Fill material” includes material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States. Respondents “discharged a pollutant” when they conducted work using heavy equipment within the tributary to the Little Nemaha River and abutting wetlands in September through October of 2020. EPA, Corps, and NDEE personnel observed that grading activity had occurred and fill material had been placed within the unnamed tributary to the Little Nemaha River at the Site. See CX 1, CX 3, CX 4, CX 15, and CX 19.

Section 502(14) of the CWA defines “point source” to include, inter alia, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Respondents conducted grading and earthmoving work using a trackhoe, backhoe, bulldozer, and/or other heavy equipment to discharge fill material into the tributary to the Little Nemaha River and its abutting wetlands. See CX 1, CX 3, CX 4, CX 15, and CX 19. The equipment used by Respondents constitute point sources as defined by Section 502(14) of the CWA.

Section 502(7) of the CWA defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Federal regulations define “waters of the United States” to include all tributaries of traditionally navigable waters and abutting wetlands of such tributaries, and case law has upheld the inclusion of tributaries and abutting wetlands as “waters of the United States.” An unnamed tributary to the Little Nemaha River flows through the Site and flows 0.27 miles into the Little Nemaha River. The tributary is a relatively permanent water with a hydrological connection to the Little Nemaha River and the tributary and

its abutting wetlands are “navigable waters” as defined by Section 502(7) of the CWA. See CX 1 – CX 4, CX 15, CX 26 – CX 32.

Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Corps, for any discharge of “dredged or fill material” into the “navigable waters” of the United States. Furthermore, under 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c), dischargers of stormwater associated with industrial activity are required to apply for individual NPDES permits or to seek coverage under a promulgated stormwater general permit. Respondents did not obtain a CWA permit issued by the Corps prior to conducting the fill placement activity described in the Complaint. See CX 15. Respondents admit that they performed, in their words, “development activities” within the Village of Bennet, Nebraska (Answer at ¶ 22) and that they did not receive any permit from the Corps (Answer, at 4).

### **III. Allegations Admitted, Denied, or Neither Admitted nor Denied**

#### **A. Items admitted in Respondents’ Answer**

In summary, Respondents have admitted the allegations in the following paragraphs of the Complaint:

- Paragraph 18 (partial admission that Respondent Evergreen Development, Inc., owned, operated, or otherwise controlled the property and Site at all times relevant to this action)
- Paragraph 19 (partial admission that the Site is a residential development within the extra territorial zoning jurisdiction of the Village of Bennet, Nebraska)
- Paragraph 22 (partial admission that Respondents performed development activities for a residential development)
- Paragraph 36 (partial admission that Respondent conducted residential development activities on the Site in September and October of 2020)
- Paragraph 40 (partial admission that Respondents acknowledge that there were individuals purporting to represent governmental authorities on Site on May 17, 2021)

#### **B. Items denied or neither admitted nor denied in Respondents’ Answer**

In summary, Respondents have denied the allegations in the following Paragraphs of the Complaint, the bases for which include the legal and factual information discussed above and the particular exhibits cited below:

- Paragraph 17 (neither admit nor deny that Respondents are each a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5)). Respondents are an individual and a corporation. See CX 1, CX 4, and CX 20.
- Paragraph 18 (denied that Respondent Mr. Mark Schmidt in his individual capacity owned, operated or otherwise controlled the residential

construction site). Mr. Mark Schmidt signed the Notice of Intent for coverage under the NPDES permit, conducted much of the construction work himself, and held himself out as the operator and responsible party at the construction site. See CX 17 and CX 19.

- Paragraph 19 (denied that the Site is 16.5 acres). Respondents identified the size of the Site in the Notice of Intent. See CX 17.
- Paragraphs 20-21, 27-28, 31, 36-37 (denied that any tributary to the Little Nemaha River enters the Site or that a tributary exists or is affected or that the tributary or its abutting wetlands are navigable waters). This conclusion is based on observations of and information gathered by EPA and Corps personnel. See CX 1, CX 15, CX 26 – CX 32.
- Paragraphs 22-23 (denied that starting on or about April 2019, Respondents conducted clearing and grading activities and/or disturbed 12.1 acres). Respondents identified this time frame and the size of the disturbed construction site in the Notice of Intent. See CX 17.
- Paragraphs 24-26, 28-29, 31 (denied that stormwater discharges into the tributary to the Little Nemaha River; neither admit nor deny that the Site has “stormwater discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14) and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14); denied that the activity is an “industrial activity”; neither admit nor deny that stormwater contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6); denied that any surface water runoff contains “pollutants”; neither admit nor deny that Respondents discharge of pollutants requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342). See discussion above and the CWA sections and regulations cited herein; See also CX 17 and 19.
- Paragraphs 30, 32-35 (denied for lack of knowledge that the NDEE granted authorization to Respondents on March 22, 2019, for construction stormwater discharges under NPDES general permit NER160000, and terminated it on June 14, 2022, conducted stormwater inspections, sent a Notice of Noncompliance, and filed a Compliance Order, that Respondents failed to respond to NDEE, or that NDEE requested that the EPA pursue the NPDES permit violations). See CX 17 and CX 19.
- Paragraph 36 (denied that Respondents directed, caused, or conducted earthmoving work using a trackhoe, backhoe, bulldozer, and/or other heavy equipment that widened and deepened the channel and placed fill material). Respondent admitted to EPA, Corps, and NDEE personnel that he used a trackhoe and other equipment to conduct this work in the stream and photographs show the heavy equipment. See CX 1, CX 3, CX 4, CX 15, and CX 19.
- Paragraphs 37-39 (denied for lack of knowledge that the Corps conducted site investigations, observed fill material in the tributary and determined a

CWA violation had occurred, attempted to contact Mr. Schmidt, and referred the case to the EPA for enforcement). See CX 15.

- Paragraph 40 (denied for lack of knowledge that EPA and Corps representatives observed impacts in the tributary to the Little Nemaha River immediately downstream of the box culvert under Bennet Road and continuing along approximately 230 linear feet and to approximately 0.13 acres of abutting wetlands during the inspection on May 17, 2021). See CX 1 – CX 4.
- Paragraphs 41-43 (neither admit nor deny that the fill material discharged by Respondents into the tributary to the Little Nemaha River is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6), that the heavy equipment used to place the fill material into the unnamed tributary to the Little Nemaha River constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and that the discharge of the fill material into the tributary to the Little Nemaha River constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12)). See the discussion above and CWA sections and regulations cited herein; See also CX1, CX 3, CX 4, CX 15.
- Paragraph 44 (denied for lack of knowledge that on May 17, 2022, a representative of EPA conducted a road-side investigation and observed that the fill material remains in the unnamed tributary and observed rough grading, earth-moving equipment, and ongoing construction activities at the Site, and denied that there is a tributary, that it was disturbed or damaged and that any construction activities are on-going at the Site further affecting the alleged tributary). See CX 9, CX 17, CX 18, CX 33.
- Respondents generally denied all other paragraphs of the Complaint stating that they are almost exclusively legal conclusions rather than factual allegations. Answer at 4. See the discussion above and CWA sections and regulations cited herein; See also CX 16 – CX 19 (regarding stormwater requirements and violations in Counts 1 and 2 of the Complaint) and all other information contained in and attached to this Prehearing Exchange.

## **2.(C) PENALTY POLICY**

None.

## **2.(D) GUIDANCE AND PREAMBLES**

Section 502(7) of the CWA defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Federal regulations define “waters of the United States” to include tributaries and wetlands adjacent to tributaries to traditionally navigable waters. 40 C.F.R. § 232.2(q)(1), (5), (7) (1988).<sup>1</sup> In this case, Respondents’ activities

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<sup>1</sup> Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988); *See also* Final Rule for Regulatory Programs of the Corps of



occurred in and/or discharged to a relatively permanent tributary to the Little Nemaha River, which is a tributary to the Missouri River, a traditionally navigable water, and abutting wetlands, all of which are “waters of the United States” as defined in federal regulations, *Rapanos v. United States*, 547 U.S. 715 (2006), subsequent clarifying case law, and EPA’s post-Rapanos guidance.<sup>2</sup>

In 2008, the U.S. Army Corps of Engineers and EPA issued a joint rulemaking, which expanded the CWA Section 404(b)(1) Guidelines to include more comprehensive standards for compensatory mitigation (Compensatory Mitigation Rule).<sup>3</sup> Applicable guidance also includes EPA documents regarding the BEN model<sup>4</sup> and the Antecedent Precipitation Tool.<sup>5</sup>

## **2.(E) EXPLANATION OF PROPOSED PENALTY**

### **I. Introduction**

For violations of CWA Sections 301, 402, and 404, 33 U.S.C. §§ 1311, 1342, and 1344, 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 2022, as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and the EPA’s implementing regulations at 40 C.F.R. Section 19.4, civil administrative penalties of up to \$23,989 per day for each day during which a violation continues, up to a maximum of \$299,857, may be assessed for violations of CWA Sections 301, 402, and 404, 33 U.S.C. §§ 1311, 1342, and 1344, that occur after November 2, 2015, where penalties are assessed on or after January 12, 2022, but before January 6, 2023. 87 Fed. Reg. 1676 (January 12, 2022). The Civil Monetary Penalty Inflation Adjustment Rule of 2023 has now adjusted the civil administrative penalties again to up to \$25,847 per day for each day during which a violation continues, up to a maximum of \$323,081, for violations

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Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986). In Nebraska, the Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule) never went into effect. *See North Dakota v. U.S. Envtl. Prot. Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminarily enjoining implementation of the 2015 Rule as to parties before the court); Definition of “Waters of the United States” – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (recodifying pre-2015 Rule regulations, effective Dec. 23, 2019). In addition, the Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (April 21, 2020) (NWPR or 2020 Rule) was vacated by *Pascua Yaqui Tribe, et al. v. U.S. Envtl. Prot. Agency*, No. CV-20-00266 (D. Ariz. Aug. 30, 2021), and given the retroactive applicability of the vacatur (*i.e.*, from June 22, 2020 to August 30, 2021 for all jurisdictions except Colorado), the applicable regulatory definition has remained the same in Nebraska since the 1986/1988 regulations.

<sup>2</sup> For currently-applicable guidance on implementing Supreme Court precedent as to “waters of the United States,” see EPA’s 2008 guidance document, “Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*,” found at [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf) (last visited March 7, 2023)

<sup>3</sup> 73 FR 19594 (April 10, 2008), found at [https://www.epa.gov/sites/default/files/2015-03/documents/2008\\_04\\_10\\_wetlands\\_wetlands\\_mitigation\\_final\\_rule\\_4\\_10\\_08.pdf](https://www.epa.gov/sites/default/files/2015-03/documents/2008_04_10_wetlands_wetlands_mitigation_final_rule_4_10_08.pdf) (last visited March 7, 2023)

<sup>4</sup> <https://www.epa.gov/enforcement/penalty-and-financial-models> (last visited March 7, 2023)

<sup>5</sup> <https://www.epa.gov/wotus/antecedent-precipitation-tool-apt> (last visited March 7, 2023)

that occur or occurred after November 2, 2015, where penalties are assessed on or after January 6, 2023. 88 Fed. Reg. 986 (January 6, 2023).

In determining an appropriate penalty, the CWA requires that EPA consider the nature, circumstances, extent and gravity of the violations as well as the economic benefit or savings resulting from the violation. EPA must also consider the violator's ability to pay, prior history of such violations, the degree of culpability, and other matters as justice may require. 33 U.S.C. § 1319(g)(3). EPA has considered these statutory factors in determining the amount of the proposed penalty.

## **II. Nature, Circumstances, Gravity and Extent of Violations**

EPA determined the nature, circumstances, gravity and extent of the violations by taking into account the actual and potential harm to human health and the environment and the significance of the violations. As the Complaint alleges, in or around April 2019, Respondents began working on a residential development site in the Village of Bennet, Nebraska. Respondents' activities at the Site included clearing and grading, which consequently disturbed 12.1 acres, and failed to follow their NPDES Permit and SWPPP over the course of several years. Respondent also failed to maintain continuous NPDES permit coverage and final stabilization has still not been achieved at the Site. In addition, in September through October of 2020, Respondents cleared vegetation, graded, widened and deepened a tributary to the Little Nemaha River and its adjacent wetlands. The tributary and wetlands have not been restored.

Respondents failed to follow their SWPPP or comply with all requirements of their NPDES Permit, which resulted in sediment erosion and uncontrolled runoff containing pollutants entering the tributary on Site. Respondents also used earth moving equipment to clear, grade, and deposit fill material in the tributary to the Little Nemaha River, impacting approximately 230 linear feet of the tributary and 0.13 acres of wetlands. The Respondents' actions caused actual harm to the tributary and wetlands themselves and destroyed the surrounding riparian areas. Respondents' lack of erosion controls in the construction site resulted in silt and sediment deposits in the tributary to the Little Nemaha River. The EPA inspector noted large quantities of silt deposits within the bed of the tributary caused by the grading and/or the erosion and sediment-laden runoff from the construction site. CX 1. Respondents' grading and fill activities also resulted in sediment deposits in the tributary to the Little Nemaha River, destroyed wetland habitat and widened and deepened the channel, reducing the scope and extent of the tributary and wetlands and impeding their reach and circulation. Dominant vegetation in the subject wetlands included reed canary grass (*Phalaris arundinacea*), black willows (*Salix nigra*), green ash (*Fraxinus pennsylvanica*), and eastern cottonwood (*Populus deltoides*) and was replaced by Respondents with non-native brome grass (*Brome sp.*). CX 1. The services provided by the abutting wetland, such as flood risk reduction, flow maintenance, filtering of nutrients to improve water quality, and habitat for fish and other aquatic species were removed when the wetland and tributary were altered. See CX 33. Respondents' unauthorized grading and fill also impeded the flux of water, sediments, biota and nutrients and caused harm to downstream waters, including the Little Nemaha River and, ultimately, the Missouri River. This has fundamentally changed the structure and dynamics of upstream and downstream aquatic and riparian habitats and associated biotic communities. Habitat alterations might have impacted the

following federally listed threatened, endangered, or candidate species that exist in the area: the Northern Long-eared Bat, Piping Plover, Pallid Sturgeon, Monarch Butterfly, and Western Prairie Fringed Orchid. CX 29.

In addition, by not installing and maintaining best management practices or conducting inspections and corrective actions as required by the NPDES Permit and SWPPP, failing to maintain NPDES Permit coverage, and not obtaining a Section 404 permit before grading the tributary and wetlands, Respondents harmed the regulatory scheme and upset the level playing field that the permitting system seeks to maintain, discharging pollutants and removing resources from the watershed without mitigating the damage.

### **III. Economic Benefit**

To find the economic benefit of the CWA Section 404 violation, EPA determined the delayed costs if Respondents had applied for and obtained a CWA Section 404 permit from the U.S. Army Corps of Engineers, including compensatory mitigation. In 2008, the U.S. Army Corps of Engineers and EPA, through a joint rulemaking, expanded the CWA Section 404(b)(1) Guidelines to include more comprehensive standards for compensatory mitigation. 73 FR 19594 (April 10, 2008).<sup>6</sup> The 2008 rule established a preference for the purchase of mitigation credits from third-party mitigation banks to offset permitted impacts. The cost of bank credits is established independently by mitigation banks.

In this case, Dr. Delia Garcia used the Nebraska Stream Condition Assessment Procedure, CX 24, to determine that Respondents would have had to purchase 690 credits to offset the impacts to the stream, CX 25. In order to offset the impact to wetlands, the Respondents would have had to purchase credits to offset 0.13 acres of wetlands. In Nebraska, based on information provided by the Corps, average mitigation credits cost \$55,000 per wetland credit and \$30 per stream credit. Dr. Garcia also determined that Respondents would need to apply for a section 404 permit at a cost of \$100 and retain a consultant for 15 hours at a \$100 hourly rate to act as their agent in applying for a permit, participating in preapplication meetings, providing alternative analysis, responding to comments from the public, and researching mitigation options. Dr. Garcia used the BEN computer model<sup>7</sup> to calculate the economic benefit gained from delayed compliance costs, calculated by date range of when the impacts occurred to get a more accurate estimate of the impacts. The result was an economic benefit output of \$4,703.

To find the economic benefit of the CWA Section 402 violation, EPA determined the delayed or completely avoided pollution control expenditures Respondents should have made to remain in compliance with their construction stormwater NPDES permit. Dr. Garcia estimated the average annual cost for installation and maintenance of two construction entrances, cost for conducting and documenting inspections, cost for installation and maintenance of silt fence, and cost of temporary stabilization measures. Dr. Garcia used the BEN computer model to calculate the economic benefit gained from delayed and avoided compliance costs, calculated by date

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<sup>6</sup> See supra, n. 4

<sup>7</sup> See supra, n. 5

range of noncompliance for each type of violation to get a more accurate estimate of the impacts. The result was an economic benefit output of \$13,755.

Respondents have submitted a proposed mitigation plan to EPA pursuant to the Findings of Violation and Order for Compliance, Complainant's Exhibit CX 11. Upon completion, EPA plans to submit Respondents' Final Mitigation Plan as Exhibit CX 14, and an Expert Report by David Smith-Watts regarding the economic benefit in this case as Exhibit CX 23. Mr. Smith-Watts' independent economic benefit calculation may result in a higher or lower amount than previously calculated.

#### **IV. Ability to Pay**

Respondents have raised their ability to pay in their Answer, requesting that if a penalty is assessed, "a financial hardship waiver be considered and granted to reduce the said penalty." Answer at 4. EPA has provided ability to pay guidance and forms to Respondents. Respondents have begun to provide some information regarding their ability to pay and EPA expects Respondents to complete their submittal of the requested information soon or in their Prehearing Exchange, and EPA will evaluate it once complete.

#### **V. Prior History**

To EPA's knowledge, Respondents have no prior history of CWA violations.

#### **VI. Degree of Culpability**

During the EPA's inspection of the Site, Respondent Mr. Mark Schmidt stated that he had not hired another contractor to work at the Site and had conducted the "development activities" with his brother. CX 1. As admitted by Respondents, they obtained state and local permits in order to conduct construction activities at the Site. Answer at ¶ 22. As a developer, and after receiving the NPDES general stormwater permit and preparing a SWPPP, Respondents were aware or should have been aware of the requirements of the NPDES permit and that they were required to follow their SWPPP. See CX 16 – CX 18. Furthermore, after NDEE's site visits, Respondents were notified of the violations, including by personal service, and that corrective actions that needed to be taken and, although some problems were corrected, violations at the Site persisted. CX 19. Respondents were also unresponsive to NDEE's Compliance Order to correct conditions at the Site, which was personally served.

Respondents do not dispute that they did not obtain a permit from the Corps for in-stream work. During the EPA inspection, Respondents provided a print-out of a portion of 40 C.F.R. § 232.3 which outlines activities for which a 404 permit is not needed. CX 4. To this effect, Respondent Schmidt informed inspectors that he believed his activities were exempt as "maintenance" under 40 C.F.R. § 232.3(c)(2) despite Respondents not performing work on any enumerated "serviceable structure" listed under the referenced subparagraph and the subparagraph's explicit language which states that "[m]aintenance does not include any modification that changes the character, scope, or size of the original fill design." CX 1 and CX 4. In other words, Respondents were aware of CWA restrictions, and they just neglected, failed, or refused to comply. Respondents have not produced any evidence that they consulted the Corps

on whether or not they would need a 404 permit. To the contrary and during the EPA inspection, Respondent Mr. Mark Schmidt produced to EPA personnel an email from Mark Pomajzl, Program Specialist for NDEE's Wastewater NPDES Compliance Unit, in which Mr. Pomajzl informed Respondent: "The other day you asked if you needed a permit to remove sediment from the Creek bottom. I just found out that you do need a 404 permit." CX 4. Respondent also provided an email from December 17, 2019, in which Respondents' consultant explicitly stated he would submit an application to the Corps for a Section 404 permit once they received plans related to the project. Respondent also provided other emails from Respondents' consultant in July 2020 stating that the consultant was waiting to hear back from the Corps; however, the Corps has no record of being contacted by Respondents or their consultant. CX 1 and CX 4. Subsequently, personnel from the Corps made multiple attempts to contact Respondents about their in-stream construction activities. CX 15. Respondents still never obtained a 404 permit.

## **VII. Other Matters as Justice May Require**

EPA is unaware of any matters that justify a penalty adjustment.

### **2.(F) PROOF OF PUBLIC NOTICE**

The Public Notice was posted on October 10, 2022, here: <https://www.epa.gov/mo/evergreen-development-inc-and-mark-schmidt-clean-water-act-public-notice>. A copy of the public notice document is provided as Complainant's Exhibit CX 13.

### **RESERVATIONS**

Complainant reserves the right to call all witnesses named by Respondents. Complainant further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to the Court and to Respondents.

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF SERVICE**

I certify that on the date noted below I filed via the OALJ E-Filing System the original and one copy of this Complainant's Prehearing Exchange with the Headquarters Hearing Clerk.

I further certify that on the date below I served a copy of this Complainant's Prehearing Exchange to each party by electronic mail to:

Jovan W. Lausterer  
Attorney for Respondents  
Bromm, Lindahl, Freeman-Caddy & Lausterer  
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