

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) DOCKET NO.
Kirk Wilson, an Individual,) CWA-10-2020-0181
Glennallen, Alaska,) **COMPLAINT**
Respondent.)
_____)

I. STATUTORY AUTHORITY

1.1. This administrative complaint (Complaint) is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (EPA or Complainant) by Section 309(g)(2)(B) of the Federal Water Pollution Control Act (CWA), 33 U.S.C. § 1319(g)(2)(B). 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 Enforcement and Compliance Assurance Division in Region 10.

1.2. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA hereby proposes the assessment of a civil penalty against Kirk Wilson (Respondent) for violations of the CWA.

1.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), EPA shall notify the State of Alaska within 30 days following proof of service of this Complaint on the Respondent and provide the State of Alaska with an opportunity to consult with EPA on this matter.

II. STATUTORY AND REGULATORY BACKGROUND

2.1. As provided in CWA Section 101(a), 33 U.S.C. § 1251(a), the objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

2.2. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters by any person, except, *inter alia*, as authorized by a Department of Army permit issued by the United States Army Corps of Engineers (Corps) pursuant to CWA section 404, 33 U.S.C. § 1344.

2.3. CWA 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).

2.4. CWA Section 502(6) defines “pollutant” to include dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, rock, sand, and industrial waste discharged into water. 33 U.S.C. § 1362(6).

2.5. “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. Examples of fill material include rock, sand, soil, clay, construction debris, wood chips, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. 40 C.F.R. § 232.2.

2.6. CWA Section 502(5) defines “person” to include “an individual, corporation, partnership, [or] association” 33 U.S.C § 1362(5).

2.7. CWA Section 502(14) 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).

2.8. CWA Section 502(7) defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). At the time of the discharge, “waters of the United States” was defined to include, *inter alia*, all waters that were currently used, were used in the past, or that were susceptible to use in interstate or foreign commerce, including all waters which were subject to the ebb and flow of the tide; tributaries to such waters; and wetlands adjacent to the foregoing waters. 40 C.F.R. § 230.3 (2014).

2.9. On June 22, 2020, a new regulatory definition of “waters of the United States” became effective in Alaska. 40 C.F.R. § 120.2 (2020). Each day that dredged and/or fill material remains in place without the required permit constitutes a violation of CWA Section 301(a), 33 U.S.C. § 1311(a). Accordingly, from June 22, 2020, through the filing of this Complaint, “waters of the United States” is defined to include the territorial seas and traditional navigable waters; tributaries to such waters; lakes and ponds, and impoundments to the foregoing waters; and wetlands adjacent to the foregoing waters. 40 C.F.R. § 120.2 (2020).

2.10. Each discharge of pollutants from a point source that is not authorized by a permit issued pursuant to the CWA constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2.11. Under CWA Section 309(a), EPA can issue administrative compliance orders that require a violator to stop any ongoing illegal discharge activity and, where appropriate, to remove the illegal discharge and otherwise restore the site. 33 U.S.C. § 1319(a)(3). Each day that the dredged and/or fill material remains in place without the required permit constitutes a violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

2.12. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess administrative penalties against any person who violates Section 301 of the CWA or any permit condition or limitation implementing Section 301 of the CWA, 33 U.S.C. § 1311, in a permit issued under Section 404 of the CWA, 33 U.S.C. § 1342.

III. ALLEGATIONS

3.1 Respondent is an individual and is therefore a “person” as defined by CWA Section 502(5), 33 U.S.C. § 1362(5).

3.2 At all times relevant to this action, Respondent, owned, possessed, and/or controlled real property located within Section 19, Township 4 North, Range 4 West, Copper River Meridian, Latitude 62.108536° N, Longitude -146.035771° W at Tolsona Lake, near Glennallen, Alaska (Site). The Site consists of a number of parcels that border and are adjacent to Tolsona Lake.

3.3 The Site contains black spruce wetlands, a subclass of palustrine scrub-shrub wetlands. The wetlands at the Site have a hydrological surface connection with Tolsona Lake. Tolsona Lake is a traditional navigable water because it supports commercial waterborne recreation. Accordingly, the wetlands at the Site are “waters of the United States” within the meaning of 40 C.F.R. § 230.3 (2014) and 40 C.F.R. § 120.2 (2020), and are therefore “navigable waters” within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

3.4 As described below, beginning in or around September 2013 and continuing through the filing of this Complaint, Respondent violated CWA Section 301, 33 U.S.C. § 1311.

3.5 On September 25, 2018, the Corps received a complaint alleging that Respondent had constructed an unauthorized gravel road through wetlands on the Site.

3.6 The Corps confirmed that although it had received previous permit applications for construction activities on Respondent's property, including Respondent's 2002 application for a substantially similar road, which it denied, the Corps neither issued nor received an application for a CWA Section 404 permit for construction of the road.

3.7 On October 11, 2018, the Corps visited the Site to investigate the alleged violation. During the site investigation, the Corps documented that a gravel road approximately 938 feet in length by 37.4 feet wide had been constructed through wetlands; a 12-inch culvert had been installed under the fill material used to construct the road; and material excavated from a ditch along the east side of the road had been side cast into wetlands.

3.8 On October 23, 2018, the Corps issued Respondent a Notice of Violation (NOV) and requested information regarding the property and the construction of the unauthorized road.

3.9 On November 7, 2018, Respondent submitted a written response to the Corps' NOV. Respondent stated that between the approximate dates of June 15 through June 20, 2014, he constructed "a road approximately 930 feet long and 16-18 feet wide and 2 feet deep" and installed two 8-inch culverts. Respondent further stated that "fabric was put down" and "approximately 1180 yards of gravel [was] used." Respondent reported that he used heavy earthmoving equipment to complete the work, including "a dump truck, D3 cat dozer, and a small excavator."

3.10 Respondent's statement that he constructed the road in June 2014 is refuted in written and oral statements provided to the Corps and in affidavits submitted to the Superior Court for the State of Alaska Third Judicial District at Palmer,¹ which indicate that Respondent

¹ Property in the area surrounding Tolsona Lake, including the area of the unauthorized fill that is the subject of EPA's enforcement action, is also the subject of litigation in Daniel Anderson, et al., v. Kirk Wilson and Julie Wilson, Case No. 3PA-18-01020 CI, to which EPA is not a party.

constructed the road beginning in the fall of 2013 when Respondent blocked existing easements on his property. Aerial imagery supports that the gravel road was constructed at least prior to April 2014.

3.11 In his response to the Corps' NOV, Respondent stated that a representative of the State of Alaska Department of Natural Resources (ADNR) informed him that "as long as [he] performed the work on [his] own property, [he] needed no permit" and that it was "an oversight on [his] part in thinking [he] didn't need a permit" from the Corps. Respondent's alleged understanding is refuted by a history of CWA Section 404 permit applications to the Corps to perform work on his property, as well as a history of CWA Section 301 violations for discharges without CWA Section 404 authorization for which the Corps required Respondent to perform certain restoration activities before it would issue any after-the-fact permit to Respondent.

3.12 In constructing the road, Respondent discharged approximately 1,180 cubic yards of fill into approximately 0.35 acres of wetlands that share a surface hydrological connection to Tolsona Lake, a traditional navigable water.

3.13 Between approximate dates of July 26 through July 27, 2014, Respondent and/or persons acting on his behalf performed additional work on the road, including to widen the road from its approximate width of 16-18 feet to a width of approximately 37.4 feet, and to excavate a drainage ditch along the east side of the road.²

3.14 On information and belief, Respondent directed the work to widen the road and excavate the drainage ditch, provided and operated an excavator, and provided and operated a dump truck.

² According to an ADNR representative the road encroaches on land owned by the State of Alaska. The road also encroaches on private property to the north of Respondent's property.

3.15 Respondent subsequently claimed control over the full width of the road, including attempting to require a license for its use.

3.16 In widening the road and excavating the drainage ditch, Respondent and/or persons acting on his behalf discharged approximately 400 cubic yards of additional fill into approximately 0.35 acres of wetlands that share a surface hydrological connection to Tolsona Lake, a traditional navigable water.

3.17 Respondent's actions impacted a total of approximately 0.7 acres of wetlands that share a surface hydrological connection to Tolsona Lake, a traditional navigable water, and are therefore waters of the United States.

3.18 The Corps and EPA share authority under CWA Section 404. In 1989, EPA and the Corps entered into a Memorandum of Agreement³ (MOA) on enforcement to ensure efficient and effective implementation of this shared authority. Under the MOA, the Corps, as the federal agency that issues permits, has the lead on cases involving permit violations. For unpermitted discharges, as here, EPA and the Corps determine the appropriate lead agency based on criteria outlined in the MOA and any established Field Level Agreement⁴ (FLA) between the EPA Region and the Corps District.

3.19 On May 29, 2019, the Corps referred this enforcement case to EPA consistent with CWA Section 404, the 1989 MOA, and the 2017 FLA between the Corps, Alaska District and EPA, Region 10, which both indicate that EPA will act as the lead enforcement agency when unpermitted activities involve, *inter alia*, a "repeat violator" or a "flagrant violation."

³ Memorandum of Agreement Between the Department of Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act. 1989.

⁴ Field Level Agreement Between the Alaska District of the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, Region 10 Concerning the Coordination of Enforcement Actions Under Section 404 of the Clean Water Act. 2017.

3.20 Respondent is a knowing, repeat, and flagrant violator of the CWA.

3.21 EPA accepted the Corps referral and became the lead enforcement agency on June 25, 2019.

3.22 On or about September 6, 2019, an EPA wetlands enforcement specialist conducted an independent site investigation and discussed the violations with Respondent.

3.23 The equipment referenced in Paragraphs 3.9 and 3.14 are “point sources” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

3.24 The dredged and/or fill material that Respondent and/or persons acting on his behalf caused to be discharged, as referenced in Paragraphs 3.9, 3.12, and 3.16, include silt, fine gravels, and native on-site materials, each of which constitutes “dredged material” and/or “fill material” within the meaning of 40 C.F.R. § 232.2, and each of which constitutes a “pollutant” within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

3.25 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 CWA Sections 301(a) and 502(12), 33 U.S.C. §§ 1311(a) and 1362(12).

3.26 Respondent’s discharge of dredged and/or fill material described in Paragraphs 3.9, 3.12, and 3.16 was not authorized by any permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344. Respondent is therefore in violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

IV. PROPOSED PENALTY

4.1. Based on the foregoing allegations, Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Consequently, pursuant to Section 309(g)(2)(B) of the CWA, 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 for violations in an amount not to exceed \$22,320 per day for each day during which the violation occurred, up to a maximum of \$278,995.

4.2. Between approximate dates of July 26 through July 27, 2014, Respondent discharged pollutants to wetlands that are waters of the United States without authorization under a CWA Section 404 permit, in violation of 33 U.S.C. § 1311(a).

4.3. Each day that the dredged and/or fill material remains in place without the required permit constitutes a violation of CWA Section 301(a), 33 U.S.C. § 1311(a). At the time of the filing of this Complaint, the unauthorized dredged and/or fill material has been in place for approximately 2,258 days.

4.4. In accordance with Section 22.14(a)(4)(ii) of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), Complainant proposes that a Final Order be issued to Respondent assessing an administrative penalty in an amount not to exceed \$278,995 taking into account the nature, circumstances, extent and gravity of the violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require. 33 U.S.C. § 1319(g)(3).

4.5. *Nature, Circumstances, Extent, and Gravity of the Violations:* Respondent's unauthorized discharge of pollutants into waters of the United States is a serious violation that significantly undermines the CWA's regulatory scheme and causes potential harm to the environment.

4.5.1 Under the CWA 404 permitting system, no discharge of dredged or fill material shall be permitted if a practicable alternative exists that would be less damaging to the aquatic environment or if the nation's waters would be significantly degraded. EPA's CWA

Section 404 enforcement program has three goals: to protect the environment and human health and safety, to deter violations, and to treat the regulated community fairly and equitably.

Compliance with a permit's conditions and restrictions are vital to the CWA 404 regulatory scheme, and failure to obtain a permit undermines the statutory and regulatory purposes of the CWA.

4.5.2 Respondent's actions eliminated the black spruce wetlands, which may have impacted local hydrologic, sediment, and nutrient functions that indirectly contribute to the maintenance of flow and water quality within the watershed, including Tolsona Lake and other downstream waters of the United States. Black spruce wetlands perform a number important functions within the watershed including groundwater discharge and recharge, stream flow regulation through storage and release of precipitation, erosion control, sediment retention, nutrient cycling, contaminant removal, carbon cycling and storage, nutrient export, food chain support, habitat for birds, mammals, and amphibians, and consumptive and non-consumptive uses for humans.

4.6. *Respondent's Ability to Pay:* Complainant has no information indicating that Respondent is unable to pay a penalty up to the statutory maximum penalty for this violation. The burden to prove an inability to pay falls on Respondent. Complainant will consider any information submitted by Respondent related to his ability to pay a penalty.

4.7. *Respondent's History of Prior Violations:* Respondent has a history of previous CWA Section 301 violations for discharges without CWA Section 404 authorization on his property in Tolsona Lake, near Glenallen, Alaska.

4.7.1 On January 9, 2002, the Corps issued Respondent an NOV for the discharge of fill material into waters of the United States associated with construction of approximately 1,000 feet of road through approximately 500 feet of wetlands.

4.7.2 On June 25 and 26, 2002, the Corps conducted a site visit and confirmed the unauthorized discharge of fill material into waters of the United States, including wetlands.

4.7.3 On August 4, 2002, Respondent signed and submitted three permit applications to the Corps. One application requested permit authorization to construct a road described as 730 feet long by 20 feet wide requiring 3,000 cubic yards of fill material to be placed in wetlands along the east boundary of Respondent's property in the vicinity of, and substantially similar to, the current unauthorized road.

4.7.4 On September 4 and 5, 2002, the Corps documented additional unauthorized discharges of fill into waters of the United States associated with the construction of an airstrip and turnaround.

4.7.5 On September 30, 2002, the Corps returned the three permit applications referenced in Paragraph 4.7.3 to Respondent, including the application to construct a road substantially similar to the current unauthorized road. Although the Corps denied the permits due to the ongoing investigation of the CWA violations referenced in Paragraph 4.7.4, the Corps informed Respondent that the proposed work would require a permit.

4.7.6 On October 4, 2002, the Corps issued Respondent a Cease and Desist Order, which documented additional discharges of fill material into waters of the United States that occurred between the Corps' site visits of June 25 and 26, 2002, and September 4 and 5, 2002.

4.7.7 On June 25, 2003, the Corps notified Respondent of restoration measures that would be required before it could accept an after-the-fact permit application for the airstrip and turnaround.

4.7.8 On August 27, 2003, the Corps notified Respondent that the required restoration measures were complete, and that the Corps would accept an after-the-fact permit application.

4.7.9 On April 20, 2004, Respondent received after-the-fact permit no. 2002-00012-4 to retain a 23- by 600-foot road with a pull out and a 25- by 400-foot airstrip with a 67- by 78-foot turnaround.

4.8. *Respondent's Degree of Culpability:* Respondent has demonstrated a high degree of culpability.

4.8.1 As described above, Respondent has engaged extensively with the Corps' CWA Section 404 regulatory program and thus has knowledge of CWA Section 404 requirements. Respondent has applied for numerous CWA Section 404 permits, has engaged with the Corps to resolve unpermitted discharges into wetlands, and has received after-the-fact and Nationwide permits from the Corps.

4.8.2 Moreover, as noted in Paragraph 4.7.3, Respondent previously submitted a permit application to the Corps dated August 4, 2002, which identified an intent to "realign RS2477" and "Realing [sic] state easement" by constructing a road 730 feet long and 20 feet wide requiring 3,000 cubic yards of fill material to be placed in wetlands along the east boundary of Respondent's property in the vicinity of the current unauthorized road. In the Corps' response, which ultimately denied the permit application because of an ongoing investigation into other of Respondent's CWA violations, the Corps explicitly informed Respondent that "the wetlands on the site are waters of the United States," that the "proposed project would involve

placement of fill material into waters of the U.S.,” and that a permit would be required to conduct the proposed work.

4.8.3 Thus, Respondent was aware that wetlands were present on the Site, that the Corps had previously determined that those wetlands were waters of the United States, and that a CWA Section 404 permit was required to place fill material in those wetlands.

4.8.4 Respondent’s CWA violations are knowing, repeat, and flagrant.

4.9. *Respondent’s Economic Benefit:* Respondent received an economic benefit by, at a minimum, avoiding the costs associated with obtaining the required permits and authorizations to constructing the road, including a CWA Section 404 permit prior to discharging fill material into wetlands adjacent to Tolsona Lake, a CWA Section 401 Water Quality Certification, and a CWA Section 402 Construction General Permit (CGP) for Stormwater Runoff from the Alaska Department of Environmental Conservation (ADEC).

4.10. *Other Matters as Justice May Require:* There are no facts justifying the use of this factor to adjust the penalty amount.

V. OPPORTUNITY TO REQUEST A HEARING

5.1. 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.

5.2. Respondent’s Answer, including any request for hearing, must comply with 40 C.F.R. § 22.15 and must be filed with the Regional Hearing Clerk within thirty (30) days after service of the Complaint, as determined by reference to 40 C.F.R. § 22.7(c).

5.3. The Part 22 rules provide that “[t]he Presiding Officer . . . may by order authorize or require filing by facsimile or an electronic filing system subject to any appropriate conditions and limitations.” 40 C.F.R. § 22.5(a)(1).

5.4. Pursuant to their authority as Presiding Officers, the Regional Judicial Officers of EPA, Region 10, have issued a Standing Order to designate EPA’s Outlook-based email system to serve as EPA Region 10’s Electronic Filing System (EFS). The Standing Order does not require that documents be filed using the email EFS. Rather, it authorizes the use of the email EFS as an option, in addition to those methods already authorized by the Part 22 Rules for the filing of documents with the Regional Hearing Clerk. A copy of the Standing Order accompanies this Complaint.

5.5. The original and one copy of the Answer to this Complaint, as well as the original and one copy of all other documents which Respondent files in this action, must be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, Mail Stop ORC-11-C07
Seattle, Washington 98101

or if Respondent elects to use the email EFS, Respondent’s Answer may be emailed to the Regional Hearing Clerk at R10_RHC@epa.gov.

VI. FAILURE TO FILE AN ANSWER

6.1. 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.

6.2. If Respondent fails to file a timely Answer to this Complaint, Respondent may be found to be in default, pursuant to 40 C.F.R. § 22.17, which constitutes an admission of all the facts alleged in the Complaint and a waiver of the right to a hearing.

6.3. Pursuant to 40 C.F.R. § 22.17(d), the penalty assessed in any default order shall become due and payable by Respondent without further proceedings thirty (30) days after the default order becomes final.

VII. INFORMAL SETTLEMENT CONFERENCE

7.1. 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:

Caitlin M. Soden
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, Mail Stop ORC-11-C07
Seattle, Washington 98101
(206) 553-6635
soden.caitlin@epa.gov

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

7.3. Respondent is advised that, after the Complaint is issued, the Part 22 Rules prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings with the Administrator, the Environmental Appeals Board or its members, the

Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision of this case.

VIII. RESERVATIONS

Neither assessment nor payment of an administrative civil penalty pursuant to this Complaint shall affect Respondent's continuing obligation to comply with: (1) the CWA and all other environmental statutes, and (2) the terms and conditions of all applicable CWA permits.

Dated this ____ day of _____

EDWARD J. KOWALSKI, Director
Enforcement and Compliance Assurance Division