

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66209

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DR. DANIEL J. McGOWAN	)	COMPLAINANT'S MOTION TO
	)	AMEND THE COMPLAINT
	)	
Respondent	)	Docket No. CWA-07-2014-0060
	)	
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
_____	)	

COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT

Introduction

1. The Complaint in this matter was filed March 6, 2014. The Complaint contains one count alleging that Respondent violated the Clean Water Act ("CWA"). The count alleges that Respondent is a person that discharged pollutants through a point source into a water of the United States without a CWA Section 404 permit in violation of Section 301 of the CWA. In the original complaint, EPA pleaded up to the statutory maximum of \$177,500.
1. Respondent, Dr. Daniel J. McGowan., filed an Answer with EPA's Regional Hearing Clerk on April 4, 2014.
2. Hearing on this matter has not yet been scheduled.
3. Complainant seeks to amend the Complaint to include two regulatory citations found at

40 C.F.R. § 232.2 that define the terms “discharge of dredged material” and “dredged material.”

4. Complainant seeks to amend the Complaint to allege that Respondent’s discharges of sediment from his dam constitute the “discharge of dredged material” and that the sediment meets the definition of “dredged material” as those terms are defined in 40 C.F.R. § 232.2.
5. Pursuant to 40 C.F.R. 22.14, the Complainant may amend the complaint after the Respondent has filed an answer only upon motion granted by the Presiding Officer.
6. Such motions are freely granted where the ends of justice are served and no prejudice to the opposing party results.
7. Complainant is providing notice to Respondent and an opportunity to answer prior to the filing of a Prehearing Exchange and before a hearing date is set. Thus, Respondent has the opportunity to address the amendment in his rebuttal exchange and the amendment will not cause prejudice. Moreover, this amendment is in the public interest and will promote the justiciable disposition of this matter.

For the reasons cited above, Complainant respectfully requests leave of the Court to amend the Complaint.

Respectfully submitted,



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Chris Muehlberger  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region VII  
11201 Renner Boulevard  
Lenexa, Kansas 66209  
(913) 551-7623

CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of February, 2015, I sent via the OALJ E-filing system the original and one copy of this Status Update, to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via email to Mr. Stephen D. Mossman, Esq. at [SDM@MattsonRicketts.com](mailto:SDM@MattsonRicketts.com).



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Signature of Sender

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REGION VII  
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Lenexa, Kansas 66209

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DR. DANIEL J. McGOWAN,	)	Docket No. CWA-07-2014-0060
	)	
Respondent	)	MEMORANDUM IN SUPPORT OF
	)	COMPLAINANT'S MOTION FOR
	)	LEAVE TO FILE AMENDED
	)	COMPLAINT

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR LEAVE TO  
FILE AN AMENDED COMPLAINT

Pursuant to Rules 22.14(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, Complainant, the United States Environmental Protection Agency, Region VII ("EPA") seeks leave of the Court to amend the Administrative Complaint filed by EPA on March 6, 2014. The proposed Amended Complaint is attached. In support of this Motion, Complainant avers the following:

**Background**

1. The Complaint in this matter was filed March 6, 2014. The Complaint contains one count alleging that Respondent is a person that discharged pollutants into a water of the United States without a permit issued by the U.S. Army Corps of Engineers in violation of Section 301 of the Clean Water Act ("CWA"). In the original Complaint, EPA

pleaded up to the statutory maximum of \$177,500.

2. Respondent, Dr. Daniel J. McGowan, filed an Answer with EPA's Regional Hearing Clerk on April 4, 2013.
3. Hearing on this matter has not yet been scheduled.

**Complainant seeks the following changes in the Amended Complaint:**

4. Complainant seeks to add the definition of “discharge of dredged material” from 40 C.F.R. § 232.2 to the Statutory and Regulatory Framework section of the complaint. The definition specifically includes as discharges needing a CWA Section 404 permit, “any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.” Complainant’s Amended Complaint and Notice of Opportunity for Hearing (“Amended Complaint”), Paragraph 11. Complainant alleges that Respondent’s unauthorized discharges from his dam into Plum Creek included “discharges of dredged material.” Amended Complaint, Paragraphs 16, 19.
5. Complainant seeks to add the definition of “dredged material” from 40 C.F.R. § 232.2 to the Statutory and Regulatory Framework section of the complaint. “Dredged material” is defined as, “material that is excavated or dredged from waters of the United States.” Complainant’s Amended Complaint and Notice of Opportunity for Hearing (“Amended Complaint”), Paragraph 12. Complainant alleges that the sediment released by Respondent’s unauthorized discharges from his dam into Plum Creek included “dredged material.” Amended Complaint, Paragraphs 16, 19.

### Controlling Legal Authority

6. Pursuant to 40 C.F.R. 22.14, the Complainant may amend the complaint after the Respondent has filed an answer only upon motion granted by the Presiding Officer. It is a general legal principle that "administrative pleadings are liberally construed and easily amended" and permission to amend will usually be freely given. *Yaffe Iron & Metal Co., Inc. v. EPA*, 774 F.2d 1008, 1012 (10<sup>th</sup> Cir. 1985). If leave to amend is to be denied, it must generally be shown that the amendment will result in prejudice to the opposing party and that the prejudice would constitute a serious disadvantage that goes beyond mere inconvenience. *In re: Port of Oakland*, MPRSA Appeal No. 91-1 (EAB, August 5, 1992).
7. After review of the case evidence, Complainant seeks to amend the Complaint to allege that discharges of sediment through a dam into a water of the United States constitute "discharges of dredged material" and such sediment constitutes "dredged material." *Greenfield Mills v. Macklin*, 361 F. 3d 934, 949 (7<sup>th</sup> Cir. 2004). EPA alleges that Respondent's discharges of sediment from his dam into Plum Creek, a water of the United States, constitute "discharges of dredged material" and that the sediment released constitutes "dredged material."
8. The amendments EPA seeks will not require additional fact witnesses for the Complainant or the Respondent nor do the amendments result in additional counts. Respondent is not required to file his pre-hearing exchange until March 6, 2015 and a hearing has not yet been scheduled. As a result, such amendments will not prejudice the Respondent.

9. This amendment is in the public interest and will promote the justiciable disposition of this matter.
10. Per the Prehearing Order, Complainant contacted opposing counsel on February 20, 2015 to inquire whether he objects to the filing of the Motion for Leave to Amend the Complaint. Opposing counsel responded that he did not object to the filing.

Respectfully submitted,



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Chris Muehlberger  
Assistant Regional Counsel  
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Region VII  
11201 Renner Boulevard  
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(913) 551-7623

CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of February, 2015, I sent via the OALJ E-filing system the original and one copy of this Memorandum in Support of Complainant's Motion for Leave to File Amended Complaint, to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via email to Mr. Stephen D. Mossman, Esq. at [SDM@MattsonRicketts.com](mailto:SDM@MattsonRicketts.com).



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Signature of Sender



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BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DR. DANIEL J. McGOWAN,	)	COMPLAINT AND NOTICE OF
	)	OPPORTUNITY FOR HEARING
Respondent	)	
	)	Docket No. CWA-07-2014-0060
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
_____	)	

**COMPLAINT**

**Jurisdiction**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules).

2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Sections 301 and 404 of the CWA, 33 U.S.C. § 1311 and § 1344, and regulations promulgated thereunder.

**Parties**

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 (Complainant).

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

### **Statutory and Regulatory Framework**

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

6. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

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

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

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

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

11. 40 C.F.R. § 232.2 defines “Discharge of dredged material” as “any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.”

12. 40 C.F.R. § 232.2 defines “dredged material” as “material that is excavated or dredged from waters of the United States.”

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

### **Factual Background**

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

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

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

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

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

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

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

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

- a. Respondent’s discharge of dredged and/or fill material “created a very turbid flow which filled in and covered habitat for the aquatic insects, brown trout, rainbow trout, creek chubs and other shiner/minnow species in the stream ... Biological sampling was completed by [Nebraska Game and Parks Commission] staff members in 2012. Our sampling indicates there are no trout remaining in the stream on Bobcat [Wildlife Management Area], and that conditions in the stream are no longer conducive to supporting fishable trout populations.”
- b. Respondent’s discharge of dredged and/or fill material “killed fish and degraded water ... our kids couldn’t swim because of the smell of the sediment ...”
- c. Respondent’s discharge of dredged and/or fill material resulted in a “vast increase in sand ... Prior to this discharge there were many exposed gravel beds and now there are few if any.

During the discharge I noticed the color of the water was almost black ... It is my observation that there are fewer minnows and chubs in the creek since this event.”

d. Respondent’s discharge of dredged and/or fill material resulted in “stream bank erosion, trees washed out, dead fish, washed out picnic and swimming area along creek. Damaged bridge and fences.”

e. Respondent’s discharge of dredged and/or fill material resulted in “dead fish, large sediment load during low flow and record high temp(eratures), potentially endangered small children with high flows and no warning.”

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

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

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

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

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

27. Respondent’s discharge of pollutants from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

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

#### **Findings of Violation**

29. The facts stated in Paragraphs 14 through 28 above are herein incorporated.

30. Respondent’s discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore,

these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

### Relief

31. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA's implementing regulations at 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after March 15, 2004. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2008, civil administrative penalties of up to \$16,000 per day for each day during which a violation continues, up to a maximum of \$177,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after January 12, 2009.

32. Based on the foregoing Finding of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the amount of up to \$16,000 per day for each day during which a violation occurred after January 12, 2009, up to a maximum of \$177,500.

33. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

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

35. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

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

## NOTICE OF OPPORTUNITY TO REQUEST A HEARING

### Answer and Request for Hearing

37. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules, a copy of which is enclosed herein.

38. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

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

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

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

41. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g) (4) (B) of CWA, 33 U.S.C. § 1319(g) (4) (B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

42. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

43. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

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

44. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

45. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of an informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order (CAFO) issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a CAFO shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

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

2-27-15  
Date

  
Karen A. Flournoy  
Director  
Water, Wetlands and Pesticides Division

2.27.15  
Date

  
Chris Muehlberger  
Assistant Regional Counsel