

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7

<b>In the Matter of</b>	)	
	)	
Tom Villegas	)	Docket No. CWA-07-2022-0104
	)	
and	)	
	)	
Amy Villegas,	)	COMPLAINANT’S PREHEARING
	)	EXCHANGE
Respondents	)	
	)	

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Pursuant to 40 C.F.R. § 22.19 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, and the Presiding Officer’s Order of September 8, 2022, Complainant United States Environmental Protection Agency submits this Prehearing Exchange.

**I. 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 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, and guidance documents pertaining to streams and wetlands. 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 18, 2022, inspection of Respondent’s property and a neighboring downstream property, and the factors she evaluated in determining that the affected waters are jurisdictional under the CWA. She will testify as an expert witness. A Photo Log and inspection report memorializing Dr. Garcia’s conclusions from the inspection is attached as Complainant’s Exhibit CX1. Dr. Garcia’s resume is attached as Complainant’s Exhibit CX20.

2. Keith Simmons. Mr. Simmons is a Project Manager with the U.S. Army Corps of Engineers, Omaha District. He will testify about observations he made during his May 18, 2021, and May 18, 2022, site visits to Respondents’ property. 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. Mr. Simmons’s site visit photographs and descriptions of photographs are attached as Complainant’s Exhibit CX2.

3. Peter Stokely. Mr. Stokely has been with EPA since 1980 when he began his career as an aerial photography interpreter reviewing hazardous waste sites. Since 1988, Mr. Stokely has focused on stream and wetland science in the areas of CWA regulations and Geographic Information Systems interpretation. Mr. Stokely has become an Agency expert in interpreting wetland boundaries, drainage patterns and hydrological connections in support of CWA programs and enforcement efforts around the country. He has worked on enforcement cases in every EPA Region and has interpreted aerial photography for several Corps of Engineer Districts. Mr. Stokely has testified as an expert witness regarding the presence of wetlands prior to filling or other disturbance, evidence of filling, and aerial photography interpretation in federal court or EPA administrative proceedings approximately two dozen times. Currently, Mr. Stokely provides technical support in CWA enforcement case and policy development for EPA's Office of Civil Enforcement in Washington, DC. Mr. Stokely will testify as an expert witness and his resume is attached as Complainant's Exhibit CX6.

4. 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. Mr. Smith-Watts's resume is attached as Complainant's Exhibit CX23.

5. EPA reserves the right to call all fact witnesses named by Respondents. EPA also reserves the right to supplement its witnesses based on information provided by Respondents in its Prehearing Exchange and facts and issues that may come to light subsequent to Prehearing submissions.

## **II. Exhibits**

For purposes of the list of documents below, "Complainant's Exhibit" is abbreviated as "CX\_."

CX1 Photographs, photo and video log, and narrative description of May 18, 2022, inspection of Respondents' property and upstream property (the "Site") conducted by EPA and the Corps. Videos are attached as separate exhibits.

CX2 Annotated photographs and narrative description from the Corps' May 18, 2021, site visit to Respondents' property conducted by Keith Simmons and Drew Vlazny.<sup>1</sup>

CX3 Notice of Violation – Cease and Desist Letter from the Corps to Tom Villegas dated June 17, 2021.

CX4 Violation determination memorandum dated June 17, 2021.

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<sup>1</sup> Mr. Vlazny is not listed as a potential witness because he is no longer employed by the Corps and Complainant does not have current contact information.

- CX5 Corps Memorandum for Record dated June 17, 2021.
- CX6 Resume for Peter Stokely, EPA Office of Enforcement and Compliance Assurance.
- CX7 Tolling agreement signed by the Department of Justice and Respondents.
- CX8 Certified Mail receipts and USPS tracking demonstrating receipt of EPA's Complaint and Notice of Opportunity for Hearing.
- CX9 Public Notice of Complainant's August 2, 2022, Complaint and Notice of Opportunity for Hearing.
- CX10 Findings of Violation and Order for Compliance.
- CX11 Work Plan proposed by Respondents.
- CX12 2009 Light Detection and Ranging (LiDAR) imagery of the Site.
- CX13 Aerial images.
- CX14 2020 LiDAR imagery of the Site.
- CX15 USGS topographic map of the Site.
- CX16 Literature concerning importance of wetlands and stream-wetland connectivity.
- CX17 Map of hydric soils at the Site.
- CX18 Property boundary records and maps.
- CX19 Printout of U.S. Fish and Wildlife Information for Planning and Consultation website describing species known or expected to be on or near the Site.
- CX20 Resume for Dr. Delia Garcia.
- CX21 Close-ups of aerial images from CX13.
- CX22 Broker's brochure advertising the Site as "planned and developed perfectly for hunting success."
- CX23 Resume for David Smith-Watts.
- CX24 Map of EPA soil sample locations.
- CX25 Websites discussing paddling and kayaking on the Platte River near Kearney, Nebraska, downstream of the Site.

CX26 Guide to Nebraska Stream Condition Assessment Procedure.

CX27 Video from inspection in CX1 that shows multiple tree piles near the northern boundary of the Site, corresponding to DSCN0059.MP4 in the CX1 photo and video log.

CX28 Video from inspection in CX1 that shows fish swimming in a channel at the Site, corresponding to DSCN0053.MP4 in the CX1 photo and video log.

CX29 Short video from inspection in CX1 taken at the same location as DSCN0053.MP4, corresponding to DSCN0052.MP4 in the CX1 photo and video log.

### **III. Allegations Denied or Not Otherwise Admitted**

While Respondents admit that Tom Villegas performed work on the Site (Answer paragraph 4) and that Amy Villegas owned the Site at all relevant times (Answer paragraph 5), they deny the Agency's specific allegations in paragraphs 14, 16–22, 24, and 26–28 of the Complaint as to the work that was performed and the appropriate penalty.

Respondents deny the Agency's allegations about the specific work done and the impacts that resulted. Respondents deny that, as stated in paragraph 14 of the Complaint, in or around June 9, 2017, through May 18, 2021, Respondents and/or persons acting on their behalf used earth moving equipment to excavate and clear vegetation from wetlands, widen existing tributaries, create ponded areas, construct roadways, create culverted road crossings, and construct berms at the Site, and that in performing these activities, they discharged dredged or fill material including dirt, spoil, rock, culverts, trees, and sand into waters of the United States including the Platte River, tributaries to the Platte River, and adjacent wetlands. Respondents further deny paragraphs 16–22 and 24 of the Complaint, in which the Agency describes the May 18, 2021, and May 18, 2022, inspections by the Corps and EPA, the extent of impacts to wetlands, and the findings that Respondents discharged pollutants from a point source into waters of the United States without a permit, violating 33 U.S.C. § 1311. In a proposed work plan prepared in response to the Agency's Findings of Violation and Order for Compliance, which the Agency has not approved, Respondents admit the presence of wetlands on the Site and propose to restore portions of the property.

Respondents neither admit nor deny the statement in Paragraph 23 that the Platte River is a traditionally navigable water, and the tributaries to the Platte River and adjacent wetlands are waters of the United States within the meaning of Section 502(7) of the CWA, characterizing it as a statement of law.

Respondents deny paragraphs 26–28 of the Complaint, which pertain to the penalty. In paragraphs 26 and 27, the Agency proposes a penalty in the amount of \$299,857 based upon the facts stated in the Complaint and the factors set forth in 33 U.S.C. § 1319(g): the nature, circumstances, extent, and gravity of the violation, and with respect to the violators, 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. In paragraph 28, the Agency notes that the proposed penalty is based upon the best information available to the EPA at the time the Complaint was issued and adds that the penalty may be adjusted if Respondents establish bona fide issues of ability to pay or other relevant defenses.

Respondents assert they have insufficient information to respond to Paragraph 30 of the Complaint, which states that the EPA has notified the state of Nebraska regarding this proposed action by mailing a copy of this document to the Nebraska Department of Environment and Energy, and deny it accordingly.<sup>2</sup>

Respondents affirmatively assert that their actions did not cause a “discharge of fill material” as the term is defined in 40 C.F.R. § 232.2, that their actions did not excavate wetlands, and that the proposed penalty in the sum of \$299,857 is unreasonable and unwarranted under the facts.

#### **IV. Detailed Discussion of Bases for Allegations and Proposed Penalty**

##### **A. 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 404 of the CWA, 33 U.S.C. § 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, 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 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after November 2, 2015, where penalties are assessed on or after January 12, 2022.

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 as set forth in Section IV.B below.

##### **B. Respondents’ Violations**

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<sup>2</sup> Paragraph 30 of the Complaint erroneously indicated the Nebraska Department of Energy and Environment had already been notified of the filing of the Complaint and provided an opportunity to consult. The EPA apologizes to the Court for this error. At the time of this filing, the EPA has now notified NDEE, provided an informal opportunity to consult with EPA, and provided NDEE a copy of the complaint on October 19, 2022. The CWA Section 404 Supervisor at NDEE reviewed the document and communicated his assent over email on October 20, 2022.

For Respondents to be liable under the CWA, the Agency must show that they are (1) persons who (2) discharged a pollutant (3) from a point source (4) into the waters of the United States (5) without a permit. 33 U.S.C. § 1311(a) *et seq.* The agency can make that showing by establishing that Respondents, who (1) admit they are “persons” within the meaning of the CWA, (2) discharged dredged or fill material including dirt, spoil, rock, culverts, trees, and sand, (3) using earth moving equipment, (4) into waters of the United States including the Platte River, tributaries to the Platte River, and adjacent wetlands (5) without any permit from the Corps of Engineers.

Respondents admit that they are persons within the meaning of 33 U.S.C. § 1362(5). (Answer paragraph 13.)

Discharge of a pollutant includes any addition of any pollutant, including dredged spoil, rock, sand, and cellar dirt, to navigable waters from any point source. 33 U.S.C. § 1362(6), (12); *see* 40 C.F.R. § 232.2 (defining “fill material” and “discharge of fill material”). In May 2021 and May 2022, Corps of Engineers employees and an EPA inspector observed the addition of fill—specifically, dirt, spoil, rock, culverts, trees, and sand—to waters of the United States. These additions are recorded in photographs and video taken during the inspection as well as aerial photography showing that the work was done between June 9, 2017, and May 18, 2021.

The CWA covers discharges that occur through a “point source.” 33 U.S.C. § 1362(14). The earth-moving equipment used to place the fill material into the Platte River, tributaries to the Platte River, and adjacent wetlands, including the Kubota backhoe present during the May 2021 Corps inspection, is a “point source” within the meaning of Section 1362(14).

To establish the Agency’s jurisdiction, this discharge must be to “waters of the United States,” as defined in 33 U.S.C. § 1362, 40 C.F.R. § 232.2 (1993), and as further clarified in multiple court cases.<sup>3</sup> The Platte River, adjacent tributaries, and abutting wetlands are “waters of the United States” regulated under the Clean Water Act.

Respondent’s property includes a portion of the Platte River, which is an interstate and traditionally navigable water, as well as tributaries to the Platte River, which are relatively permanent waters as the term is defined in *Rapanos v. United States*, 547 U.S. 715, (2009), subsequent clarifying case law, and EPA’s post-*Rapanos* guidance.<sup>4</sup> That portion of the Platte

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<sup>3</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).

<sup>4</sup> *See supra* n. 2.

River is directly abutted by wetlands. Wetlands directly abutting a traditional navigable water also fall within the Agency's jurisdiction under the same authorities and guidance documents.<sup>5</sup>

Respondents dispute the extent of the wetlands present at the Site. The EPA and Corps have confirmed the presence of those wetlands through review of resources including USGS maps, LiDAR imagery, aerial photographs, and in-person inspection. During the May 18, 2022, inspection, an EPA inspector and a Corps representative took soil core samples and confirmed the presence of hydric soils.

Respondents' actions took place without a permit issued by the Army Corps of Engineers. As noted in the June 17, 2021, Cease and Desist letter sent by the Corps (CX3), the Corps has no record of an application for, authorization of, or exemption for the work performed at the Site.

### **C. Statutory Factors Considered in Penalty Calculation**

#### **1. Nature, Circumstances, Gravity, and Extent**

The Complaint alleges that in or around June 9, 2017, through May 18, 2021, Respondents and/or persons acting on their behalf discharged fill material into the Platte River, tributaries to the Platte River, and adjacent wetlands, impacting 5.696 acres of wetlands and 210 linear feet of tributaries to the Platte River. EPA determined the nature and extent of the violations, or "gravity factor" of the violations, by taking into account the actual and potential harm to human health and the environment and the significance of the violations.

In this case, EPA and the Corps allege that Respondents used earth moving equipment to excavate and clear vegetation from wetlands, widen existing tributaries, create ponded areas, construct roadways, create culverted road crossings, and construct berms in order to increase the commercial value of the property and to use it for hunting. Respondent placed the fill material within 210 linear feet of tributaries and at least 5.696 acres of wetlands without regard to the damage his actions would cause to the Platte River, its tributaries, wetlands abutting the Platte River, and neighboring properties.

**Harm to Human Health or Welfare:** The unauthorized placement of fill material within the wetland, the Platte River, and its tributaries impacted the aesthetic value of the area and the property of an adjoining landowner. The Platte River provides sport fishing opportunities for residents and visitors alike, and Respondents' actions impacted fish habitat.

**Extent of Aquatic Environment Impact:** Functional loss of 5.696 acres of wetland and 210 linear feet of tributary.

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<sup>5</sup> See exhibits CX1, CX2, and CX27–29 for photographs and videos from site visits conducted on May 18, 2021, and May 18, 2022, showing the presence of wetland indicators. The *Rapanos* guidance, *see supra* n.2, states that EPA will assert CWA jurisdiction over wetlands adjacent to traditional navigable waters.

**Severity of Impacts to the Aquatic Environment:** The discharge of fill in the tributary and wetland destroys access to those areas for aquatic species dependent on them. According to the US Fish and Wildlife Information for Planning and Consultation (IPaC) website (last visited October 20, 2022), this stretch of the Platte River might provide habitat for species including federally threatened piping plover (*Charadrius melodus*), endangered whooping crane (*Grus americana*), endangered pallid sturgeon (*Scaphirhynchus albus*), threatened American burying beetle (*Nicrophorus americanus*), endangered blowout penstemon (*Penstemon haydenii*) and threatened western prairie fringed orchid (*Platanthera praeclara*). Furthermore, wetlands serve as the kidneys of the ecosystem, helping to remove and filter contaminants.

## **2. Economic Benefit**

Had Respondents applied for and obtained a CWA Section 404 permit from the U.S. Army Corps of Engineers, they would have had to offset the losses of the aquatic resources through 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. Dr. Delia Garcia determined using the Nebraska Stream Condition Assessment Procedure that Respondents would have had to purchase 1.022 stream credits to offset the impacts of their work at the property. In order to offset the impact to wetlands, the Respondents would have had to purchase credits to offset 5.7 acres of wetlands. In Nebraska, 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 40 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.

EPA used the BEN computer model<sup>7</sup> to calculate the economic benefit gained from delayed or avoided compliance costs, calculated by date range of when the impacts occurred to get a more accurate estimate of the impacts.

## **3. Ability to Pay**

To date, Respondents have not raised inability to pay as a defense. The Presiding Officer's prehearing order requires Respondents to provide documentation in its prehearing exchange to support such a claim. Should Respondents provide such a defense, EPA will consider the supporting information to evaluate whether Respondents are unable to pay the proposed penalty.

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<sup>6</sup> [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 October 20, 2022.)

<sup>7</sup> <https://www.epa.gov/enforcement/penalty-and-financial-models> (last visited October 20, 2022).



#### **4. Prior History**

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

#### **5. Culpability**

The CWA Section 404 prohibition on the unauthorized placement of dredge and fill material into waters of the U.S. has been in place since 1972.

Mr. Villegas owns and operates Colorado Siteworks, a business which among other things specializes in excavation, site grading, building pad preparation, commercial and residential demolition. Through operation of that business, he should have gained an awareness of environmental regulations, federal jurisdiction over wetlands and tributaries, and the CWA Section 404 permitting program and, therefore, known that his actions might have required a permit. Furthermore, Respondents have attempted to sell the property as improved land suitable for hunting, seeking to benefit from their "improvements" made without authorization.

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

EPA is unaware of any matters that require a penalty reduction.

#### **D. Conclusion**

For all the foregoing reasons, the violations alleged in the Complaint constitute serious CWA violations warranting the assessment of penalties. The proposed penalty amount is based on the information currently available to the EPA and the EPA reserves its right to revise the amount and its evaluation of the statutory factors based on information provided by Respondents.

#### **V. Estimate Regarding Length**

Complainant estimates that it will require approximately 3 days to present its case in chief. No interpreter will be required. 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.

#### **VI. Paperwork Reduction Act**

The Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, has no applicability to this proceeding. Complainant has not alleged a failure to comply with any "collection of information" within the meaning of 44 U.S.C. § 3512, and no Office of Management and Budget control numbers are required for any of the documents at issue in this matter.

#### **VII. 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 Presiding Officer and to Respondents.

RESPECTFULLY SUBMITTED this 21st day of October, 2022.

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Natasha Goss  
Attorney-Advisor  
Region 7

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October 2022, I sent via the OALJ E-filing system the original and one copy of this Prehearing Exchange, to the EPA Headquarters Hearing Clerk, and sent one true and correct copy via email to Mr. Steve Mossman, Esq. at [sdm@mattsonricketts.com](mailto:sdm@mattsonricketts.com) and to Andrew R. Spader, Esq. at [ars@mattsonricketts.com](mailto:ars@mattsonricketts.com).

Natasha Goss  
Attorney-Advisor  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66209  
(913) 551-7752  
[goss.natasha@epa.gov](mailto:goss.natasha@epa.gov)

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Signature of Sender