

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7

IN THE MATTER OF )  
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)  
DR. DANIEL J. McGOWAN, ) DOCKET NO. CWA-07-2014-0060  
)  
)  
Respondent )  
) COMPLAINANT'S PREHEARING  
) EXCHANGE  
)  
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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 (CROP) and the Presiding Officer's Order of August 26, 2010, Complainant United States Environmental Protection Agency (EPA) submits this Prehearing Exchange.

**I. WITNESSES.**

1. Dr. Delia Garcia, PhD. Dr. Garcia is an Environmental Scientist in the Water Enforcement Branch of Region 7's Water, Wetlands and Pesticides Division. Dr. Garcia has worked in Region 7's Water Enforcement program for over eight years. She will testify to her assessment of Respondent's noncompliance with the Clean Water Act and its promulgated regulations based on her review of the evidence concerning Respondent's unauthorized discharge of fill and/or dredged material into a water of the U.S. She will testify regarding how the penalty was calculated using the statutory factors set forth in the CWA and describe the appropriateness of the penalty in light of the seriousness of the violations, the actual harm and potential for harm caused by the violations and the economic benefit gained by Dr. McGowan as a result of his failure to comply with the CWA. Dr. Garcia will also testify about observations she made during her March 18, 2014, site visit to various properties downstream of Respondent's reservoir and her review of documents concerning the Middle Niobrara watershed, including Plum Creek. She will testify as a fact witness. A Photo Log memorializing Dr. Garcia's findings is attached hereto as Complainant's Exhibit C32.

2. David LaGrone. Mr. LaGrone is a Civil Engineer with the U.S. Army Corps of Engineers, Omaha, Nebraska District (Corps). He will testify about observations he made during his March 18, 2014, site visit to various properties downstream of the Respondent's reservoir. He will also testify about the 404 permitting process, including permitting for dam structures. Finally, he will testify concerning Dr. McGowan's need for a Section 404 permit and his failure to apply for such permit prior to his discharges of sediment into Plum Creek. Mr. LaGrone will testify as an expert witness. His resume is attached as Complainant's Exhibit C52.

3. Barbara Friskopp. Mrs. Friskopp was a project manager with the U.S. Army Corps of Engineers, Omaha, Nebraska District and will testify to her review of the evidence concerning the discharges of sediment from the Respondent's dam. She will testify regarding the complaints she received from downstream property owners, her interactions with other regulatory agencies as well as her interactions with Respondent regarding the discharges. She will also testify to the observations she made during her site visit to Respondent's reservoir and the various properties downstream of the reservoir. Mrs. Friskopp will testify as a fact witness.

4. Jason Appelt. Mr. Appelt owns property adjacent to Plum Creek and downstream from Respondent's reservoir. He will testify regarding his observations of Plum Creek, his use and enjoyment of Plum Creek, the impacts to Plum Creek and his property resulting from Respondent's discharges of fill and/or dredged material into Plum Creek in December 2011 and July 2012. Mr. Appelt's Complaint concerning Respondent's discharges, submitted to the Middle Niobrara Natural Resources District on August 15, 2012, is attached hereto as Complainant's Exhibit C27. He will testify as a fact witness.

5. Jeffrey Scherer. Mr. Scherer owns property adjacent to Plum Creek and downstream from Respondent's reservoir where the Creek meets the Niobrara River. Mr. Scherer is an avid fisherman and will testify about his use and enjoyment of Plum Creek and the impacts to Plum Creek and to his property resulting from Respondent's discharges of fill and/or dredged material into Plum Creek in December 2011 and July 2012. Mr. Scherer will testify that, prior to the discharge, he was impressed with the natural beauty of the creek, the clarity of the water, the large amount of minnows and aquatic life within the creek, and the large amounts of exposed gravel beds and shale along and within the creek bed. Mr. Scherer will testify that the release of sediment effectively ruined Plum Creek. He will testify that all of the exposed gravel beds are covered with sand/silt as is much of the exposed shale. Based on his observations, he will also testify that prior to the discharge there was once a healthy trout population upstream of his property that has not yet repopulated. Mr. Scherer's Complaint concerning Respondent's discharges, submitted to the Middle Niobrara Natural Resources District, is attached hereto as Complainant's Exhibit C28. He will testify as a fact witness.

6. Barry and Sue Harthoorn. Mr. and Mrs. Harthoorn own property adjacent to Plum Creek and immediately downstream from Respondent's reservoir. They will testify about their observations of Plum Creek, their use and enjoyment of Plum Creek, and the impacts to Plum Creek and to their property resulting from Respondent's discharges of fill and/or dredged material into Plum Creek in December 2011 and July 2012. The Harthoorns will testify that the dam is very close to the area of Plum Creek where their family, as well as friends and church groups enjoy fishing and swimming. The Harthoorns will testify that, after the sediment discharge in July 2012, they were unable to do these activities for the remainder of 2012. The Harthoorn's will testify that, based on their observations, they believe the fish in the section of Plum Creek near their property were killed. The Harthoorn's will testify that the trout have not repopulated Plum Creek. The Harthoorns' Complaint concerning Respondent's discharges, submitted to the Middle Niobrara Natural Resources District, is attached hereto as Complainant's Exhibit 30. The Harthoorn's will testify as fact witnesses.

7. Gregory Wilke. Mr. Wilke owns property adjacent to Plum Creek and downstream from Respondent's reservoir. He will testify to his use and enjoyment of Plum Creek, his observations of Plum Creek and the impacts to Plum Creek and his property resulting from Respondent's discharges of dredged and/or fill material into Plum Creek in December 2011 and July 2012. Mr. Wilke will testify that the sediment discharges resulted in approximately four feet of sand in Plum Creek adjacent to his property. Based on his observations, Mr. Wilke will testify that the sediment discharges covered the aquatic habitat for trout as well as micro and macro invertebrates. He will testify that the rise in sand from the discharge permanently changed the course of the stream. Mr. Wilke's Complaint concerning Respondent's discharges, submitted to the Middle Niobrara Natural Resources District on August 8, 2012, is attached hereto as Complainant's Exhibit 31. He will testify as a fact witness.

8. Andy Glidden. Mr. Glidden is a Fish and Wildlife Biologist II for the Northeast District for the Nebraska Games & Parks Commission (NGPC), which manages the Bobcat Wildlife Management Area (BWMA). His duties include management of fishery resources, public and private, in North Central Nebraska. These include, but are not limited to, fish sampling, data collection and compilation relating to fish populations, aquatic habitat monitoring and improvements, access improvements, fish stocking, and report writing. He also provides assistance to other divisions within NGPC as well as other agencies who deal with natural resource issues. Mr. Glidden will testify to his understanding of the aquatic habitat and fish populations in Plum Creek based on fish sampling, data collection and observations of Plum Creek over the years. He will testify as to his observations of the impacts to Plum Creek from Respondent's sediment discharges, including the fish kill investigation he conducted on January 17, 2012, and his subsequent site investigations during and after the July 2012 discharges (see Exhibit C3). Mr. Glidden will testify as a fact and expert witness. His resume is included as Exhibit C51.

9. Michael Murphy. Mr. Murphy is the General Manager of the Middle Niobrara Natural Resources District (NRD). The NRD is responsible for protection of the Middle Niobrara Watershed, which includes Plum Creek. NRD duties include reduction of flood threats, wildlife conservation, and groundwater and surface water protection. Mr. Murphy will testify concerning his observations of the Middle Niobrara watershed, the impacts to the Middle Niobrara Watershed from Respondent's discharges his interactions with Respondent's downstream property owners after Respondent's 2012 discharges into Plum Creek as well as the initial site visit he conducted on July 30, 2012 and the Site Investigation he conducted on August 24, 2012. A copy of Mr. Murphy's Site Investigation report dated August 24, 2012, is attached hereto as Complainant's Exhibit C26. He will testify as a fact witness.

10. David Bubb. Mr. Bubb is a Program Specialist II with the Nebraska Department of Environmental Quality. He has been with the agency for 29 years. His duties include water quality sampling, conducting and reporting fish kill and citizen complaint investigations, and writing, editing, and reviewing Lake and Reservoir Monitoring Quality Assurance Project Plan addendums in accordance with agency policies. Mr. Bubb will testify concerning observations he made during an August 24, 2012 site investigation of properties downstream from Respondent's dam. His investigation report is included as Exhibit C17.

11. Paul M. Boyd, Ph.D. P.E. Mr. Boyd is a licensed professional civil engineer and the Regional Technical Specialist for Sedimentation and Alluvial Processes, United States Army Corp of Engineers, Omaha, Nebraska District. Mr. Boyd will provide expert testimony regarding the removal of sediment from reservoirs and the permitting of dam structures. Mr. Boyd's resume is attached as Exhibit 53.
12. Jonathan S. Shefftz. Mr. Shefftz is a financial analyst with JShefftz Consulting in Amherst, Massachusetts, and his services are provided via EPA's contract with Industrial Economics, Incorporated. Mr. Shefftz will testify as an expert witness regarding the economic benefit enjoyed by Respondent as a result of non-compliance. Mr. Shefftz's CV is attached as Exhibit 54.
13. EPA reserves the right to call all fact witnesses named by Respondent. EPA also reserves the right to supplement its witnesses based on information provided by Respondent 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 "C\_\_\_."

- C1 December 28, 2011 Complaint from Barry Harthoorn to the U.S. Army Corps of Engineers
- C2 January 17-20, 2012 Photos taken by Andy Glidden
- C3 January 17, 2012, Plum Creek Flushing Investigations Report, including Fish Kill Notification Report by Andy Glidden, NRD
- C4 January 18, 2012 Conversation Record between Barb Friskopp, Corps, and Andy Glidden, NGPC
- C5 January 18, 2012 Cease and Desist Order from Corps to Respondent
- C6 January 26, 2012 Conversation Record between Barb Friskopp, Corps and Respondent
- C7 June 11, 2003 Nebraska Department of Natural Resources Dam Inspection Report of Plum Creek Reservoir Dam
- C8 August 20, 2008 Nebraska Department of Natural Resources Dam Inspection Report of Plum Creek Reservoir Dam
- C9 October 31, 2012 Nebraska Department of Natural Resources Dam Inspection Report of Plum Creek Reservoir Dam
- C10 February 14, 2012 email from Respondent to Barb Friskopp, Corps plus photos

- C11 July 18, 2012 Inspection Report from meeting between Barb Friskopp, Corps and Will Williams, Plum Creek Reservoir caretaker plus photos
- C12 July 20, 2012 Cease and Desist Order from Corps to Respondent
- C13 July 20, 2012 email to Respondent from Barb Friskopp, Corps
- C14 July 25, 2012 Conversation Record between Barry Harthoorn and Barb Friskopp, Corps
- C15 July 31, 2012 email from Barry and Sue Harthoorn to Barb Friskopp, Corps with photos showing aftermath of July 18, 2012 sediment release
- C16 August 22, 2012 Conversation Record between Mike Murphy, NRD and Barb Friskopp, Corps
- C17 August 24, 2012 Nebraska Department of Environmental Quality Complaint Investigation Report
- C18 September 4, 2012 emails (2) from Mike Murphy, NRD, to Barb Friskopp, Corps with “before” photos of Plum Creek
- C19 September 7, 2012 email from Andy Glidden, NGPC, to Mike Murphy, NRD, explaining that “no trout” were collected at various Plum Creek sampling stations during an August 30, 2012 sampling
- C20 September 10, 2012 email from Mike Murphy, NRD, to Barb Friskopp summarizing downstream property owner complaints from Respondent’s July 18, 2012 sediment release
- C21 August 24, 2012 Inspection Report with photos from Barb Friskopp, Corps
- C22 August 22, 2012 email from Mike Murphy, NRD, to Barb Friskopp, Corps, showing photos of aftermath from Respondent’s July 18, 2012 sediment release
- C23 August 22, 2012 email from Mike Murphy, NRD, to Barb Friskopp, Corps forwarding photos from Barry Harthoorn, downstream property owner of aftermath from Respondent’s July 18, 2012 sediment release
- C24 July 27, 2012 emails (4) from Barry and Sue Harthoorn, downstream property owners, to Barb Friskopp, Corps, showing “before and after” photos of their property pre and post-July 18, 2012 sediment release
- C25 October 29, 2012 letter from Stephen Mossman, Respondent’s attorney, to U.S. Army Corps of Engineers, on behalf of Respondent

- C26 August 24, 2012 Site Investigation report from Mike Murphy, NRD
- C27 September 6, 2012 Nebraska Erosion and Sediment Control Act Complaint Form completed by Jason Appelt, downstream property owner
- C28 October 5, 2012 Nebraska Erosion and Sediment Control Act Complaint Form completed by Jeffrey Scherer, downstream property owner
- C29 October 5, 2012 Nebraska Erosion and Sediment Control Act Complaint Form completed by Frank Albrecht, Nebraska Game & Parks Commission Assistant Division Administrator
- C30 August 13, 2012 Nebraska Erosion and Sediment Control Act Complaint Form completed by Barry and Sue Harthoorn, downstream property owners
- C31 August 13, 2012 Nebraska Erosion and Sediment Control Act Complaint Form completed by Gregory J. Wilke, downstream property owner
- C32 EPA Photo Log from March 18, 2014 site visit
- C33 January 29, 2014 email from Andy Glidden, NGPC, to Delia Garcia, EPA with photos of continued impacts to Plum Creek
- C34 April 24, 2014 email from Mike Murphy, NRD, to Delia Garcia, EPA with photos of continued impacts to Plum Creek
- C35 August 19, 2005 U.S. Army Corps of Engineers Regulatory Guidance Letter, "Guidance on the Discharge of Sediments From or Through a Dam and the Breaching of Dams, for Purposes of Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899"
- C36 USGS Topographic Map, Google Earth and Brown County images of Plum Creek
- C37 Nebraska Administrative Code Water Quality Standards for Plum Creek
- C38 February 3, 2014 email from Andy Glidden, NGPC, to Delia Garcia, EPA with photos of brown trout caught on Plum Creek prior to discharges
- C39 Economic Benefit Worksheet
- C40 March 6, 2013 email from John Macy, National Park Service, to Delia Garcia, EPA with photos of organic material and sediment on the Niobrara River
- C41 July 27, 2012 emails from Barb Friskopp, Corps, to Delia Garcia, EPA with photos of Plum Creek taken by her and one of the downstream property owners

- C42 August 9, 2012 email from Barb Friskopp, Corps, to Delia Garcia, EPA forwarding photos of the impoundment above the dam sent to her by Barry Harthoorn
- C43 January 30, 2015 email sent by Andy Glidden, NGPC, to EPA with photos of the Bobcat WMA and downstream Plum Creek from July 20, 2012
- C44 January 30, 2015 email sent by Andy Glidden, NGPC, to EPA with photo of the impoundment taken by local pilot on July 2012, and other photos showing impacts to Plum Creek
- C45 January 30, 2015 email sent by Andy Glidden, NGPC, to EPA with photos of impacts to Plum Creek taken on August 30, 2012
- C46 January 30, 2015 email sent by Andy Glidden, NGPC, to EPA with Plum Creek trout stocking information, and flushing investigation chart
- C47 February 4, 2015 email sent by Andy Glidden, NGPC, to EPA with photos of Plum Creek which shows impacts following the sluicing events
- C48 Economic benefit expert report: EPA has not yet received the economic benefit expert report prepared by Jonathan Schefftz. The EPA requests to reserve the right to supplement this prehearing exchange with the expert report once it is completed.
- C49 January 21, 2015, Request for Information Pursuant to Section 308 of the CWA
- C50 February 6, 2015 Response to the January 21, 2015 Request for Information Pursuant to Section 308 of the CWA
- C51 Resume for Andy Glidden
- C52 Resume for David LaGrone
- C53 Resume for Paul Boyd
- C54 Resume for Jonathan Schefftz

### **III. Detailed Discussion of 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 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.

In determining the amount of 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)). The following is a discussion of EPA's consideration of these statutory factors in determining the amount of the proposed penalty.

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

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

The Complaint alleges that Respondent discharged dredged and/or fill material from Respondent's dam into Plum Creek on December 28, 2011 through January 22, 2012 and again on July 18, 2012 through July 22, 2012. 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, Respondent had various options available to him for the removal of sediment from his reservoir, such as sediment excavation or sediment release on a schedule set forth in a Section 404 permit issued by the Corps. Without regard to the damage his actions would take on Plum Creek or his neighbor's properties, Respondent instead chose to discharge approximately 130,000 cubic yards of sediment that had accumulated above his dam for over a decade in a short amount of time. Respondent's actions had devastating impacts to over seven miles of Plum Creek. Plum Creek has yet to recover from these discharges.

Approximately 15 years ago, Respondent purchased property in Brown County, Nebraska that includes a 42 acre reservoir impounded by an old hydroelectric dam, completed in 1910. Plum Creek, a "water of the United States," runs through the reservoir and empties into a section of the Niobrara River designated as a National Scenic River approximately 7.3 miles from the reservoir. Respondent acknowledged that he had "never drained the lake once" since purchasing the property in 2000, despite his understanding that the previous owner had released sediment "every two years" (see Exhibit C10). As a result, Respondent had accumulated a significant amount of sediment in his reservoir. This situation created by Respondent's negligence led to the



discharge of damaging amounts of sediment from his dam beginning on December 28, 2011 until January 22, 2012.

On December 28, 2011, the Corps received a complaint from Barry Harthoorn, a property owner downstream from the Plum Creek Reservoir, that Respondent had “opened the gates on the dam” and that the “lake is draining.” On January 17, 2012, the Nebraska Game and Parks Commission conducted a fish kill investigation and discovered a very high sediment load in the stream along with approximately 90 dead carp immediately downstream of the dam. On January 18, 2012, the Corps issued Respondent a Cease and Desist Order alleging that he had violated the CWA by not obtaining a 404 permit for his discharge of dredged and/or fill material and ordering him to “desist the discharge by closing the gates on the dam.” In a January 26, 2012 telephone conversation with the Corps, Respondent told the Corps that he was afraid the dam would fail due to the build-up of sediment in the reservoir and asked the Corps if he could keep the dam gate open until “he could fix the dam.” Without being in a position to evaluate whether in fact the dam might fail or whether repairs to the dam were necessary, the Corps agreed to Respondent’s request and suggested to Respondent that he needed to develop a release schedule with the Corps. Following this conversation and without consultation with the Corps, Respondent chose to close the dam gate on January 22, 2012 allowing the further accumulation of water and sediment above the dam.

Despite Respondent’s claims that he needed to draw down sediment from above the dam to address an emergency and make repairs to the dam, Respondent made no such repairs to his dam and failed to contact the Corps to develop a release schedule.

Instead of working with Corps to obtain a permit with conditions that would have greatly minimized the impact of the activity, Respondent chose to once again open the dam gate and discharge even more sediment between July 18, 2012 and July 22, 2012. During a July 18, 2012 inspection of the dam, Corps personnel observed that the gate was open on the dam and that “huge amounts of sand are being flushed out and downstream.” (In the same letter noted above, Respondent’s attorney explained that the gate was reopened the week of July 16, 2012 for the stated purpose of sluicing.) On July 20, 2012, the Corps issued Respondent an email ordering him to “close the dam gates immediately” and a second Cease and Desist Order ordering Respondent to close the gates immediately. Mr. Harthoorn, downstream property owner, reported to the Corps that the gate was closed again on or around July 23, 2012.

Between August 13, 2012 and October 15, 2012, the Middle Niobrara Natural Resources District (NRD) received written complaints from each of the five downstream property owners that Respondent’s discharge of sediment from the dam had resulted in extensive physical damage to their properties and the use and enjoyment of Plum Creek. The complaints asserted that 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.”

- “killed fish and degraded water ... our kids couldn’t swim because of the smell of the sediment ...”
- 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.”
- resulted in “stream bank erosion, trees washed out, dead fish, washed out picnic and swimming area along creek. Damaged bridge and fences.”
- resulted in “dead fish, large sediment load during low flow and record high temperatures), potentially endangered small children with high flows and no warning.”

On August 24, 2012, Representatives from the Corps, the NRD, NDEQ, and the Natural Resources Conservation Service (NRCS) 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.”

In this case, Respondent’s refusal to obtain a Section 404 permit and wanton disregard for impacts to his neighbors’ properties warrants a significant penalty for several reasons. First, a significant penalty is needed to deter Respondent from again discharging sediment from his reservoir into Plum Creek. Second, it is important to send a message to the community, particularly the downstream property owners, that Respondent is held accountable for his actions. Third, the environmental harm from Respondent’s reckless actions is substantial. According to downstream landowners, Respondent’s discharges devastated a beautiful cold water stream that has not yet fully recovered. Downstream property owners have yet to see the removal of sediment from the once-pristine gravel and shale beds nor have they seen a return of the once healthy trout populations.

Based on our evidence, EPA alleges that Respondent discharged dredged and/or fill material over 31 days. Also, because sediment remains in Plum Creek, EPA alleges that Respondent’s unauthorized discharges represent a continuing violation.

## **2. Economic Benefit**

EPA performed an economic benefit analysis associated with the CWA violations at Respondent’s facility. The analysis assesses the economic benefit enjoyed by Respondent by violating the CWA. Specifically, EPA calculated the avoided costs associated with the implementation of a sediment control plan in conjunction with a CWA Section 404 permit issued by the Corps. Included in this analysis are the costs associated with a controlled release of sediment, including sediment monitoring, water quality sampling and monitoring for fish and invertebrate impacts. At hearing, EPA is prepared to present testimony that Respondent gained an economic benefit of approximately \$124,274 by delaying the implementation of a sediment control plan.

For all the foregoing reasons, the violations alleged in the Complaint constitute serious CWA violations warranting assessment of a penalty in the amount of \$177,500, the statutory maximum.

### **3. Ability to Pay**

To date, Respondent has not raised inability to pay as a defense. The Presiding Officer's prehearing order requires the Respondent to provide documentation in its prehearing exchange to support such a claim. Should Respondent provide such a defense, EPA will evaluate the supporting information to determine if Respondent is unable to pay the proposed penalty.

### **4. Prior History**

To EPA's knowledge, Respondent has no prior history with respect to CWA violations. However, and as demonstrated in the Culpability section below, Respondent violated the terms of the initial Cease and Desist Order issued by the Corps in January 2012 when he reopened the gate on his dam in July 2012.

### **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.

Respondent is particularly culpable in the present case having received a Cease and Desist Order from the Corps on January 18, 2012 and violating the terms of the Order – which specifically required Respondent to cease discharges from his dam – when he reopened the gate on his dam sometime in July 2012.

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

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

### **C. Conclusion**

For all the foregoing reasons, the violations alleged in the Complaint constitute serious CWA violations warranting the assessment of penalties.

## **IV. LOCATION, ESTIMATE REGARDING LENGTH, AND AVAILABILITY FOR HEARING**

### Location

Complainant proposes Lincoln, Nebraska for a hearing location. Lincoln is located within a few hours of Respondent's property and is where Respondent's attorney resides. Holding the hearing in Lincoln would be a convenient, central location for many of

Respondent's and Complainant's witnesses. Lincoln is approximately one hour's drive from a national airport and has many options for a hearing location.

As an alternative, Complainant proposes Omaha, Nebraska, for the hearing location. It is the nearest city of significant size to Respondent's property with an airport.

Estimated Time for Hearing

Complainant intends to present some of the testimony in the form of "written testimony" as authorized by Section 22.22 of the CROP Rules. If the parties are unable to stipulate to significant facts and findings in this case and Complainant presents its entire case orally, Complainant estimates that it will require approximately three days to present its case in chief. The length of time required for rebuttal testimony and cross examination of Respondent's witnesses will depend on the numbers and substance of documents and witnesses disclosed in Respondent's Prehearing Exchange.

Availability for Hearing

Complainant is available any time after May 1, 2015.

**IV. 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.

**V. Reservations**

Complainant reserves the right to call all witnesses named by Respondent. 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 Respondent.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of February, 2015.



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Chris Muehlberger  
Assistant Regional Counsel  
Region 7

CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of February 2015, I sent via UPS overnight the original and one copy of this Complainant's Prehearing Exchange, to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via UPS overnight to Mr. Stephen D. Mossman, Esq. at the following addresses:

Ms. Sybil Anderson, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave., NW  
Washington, DC 2004

Mr. Stephen M. Mossman, Esq.  
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Signature of Sender

