

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
C & S ENTERPRISE, L.L.C. ,)	COMPLAINT AND NOTICE OF
)	OPPORTUNITY FOR HEARING
Respondent)	
)	Docket No. CWA-07-2018-0095
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, C & S Enterprise, L.L.C., is a limited liability company established under the laws of Iowa.

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 *inter alia*: (i) all waters which are currently, used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) tributaries to such waters; and (iii) wetlands adjacent to such waters or their tributaries.

9. 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated conditions.”

10. 40 C.F.R. § 232.2 defines “Discharge of fill material” as “the addition of fill material into waters of the United States.”

11. 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.”

12. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the assessment of civil penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

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

14. At all times relevant to this action, Respondent owned, operated, or otherwise controlled a 75-acre parcel of property located in Section 20, Township 79 North, Range 12 West, Iowa County, Iowa (41.6368, -92.2685) (hereinafter “the Site”).

15. In or around July 2015, Respondent and/or persons acting on its behalf, using land-moving equipment, eliminated a portion of an unnamed tributary to Deep Creek by authorizing and/or directing the placement of fill material into approximately 1,871 linear feet of the tributary. Respondent also filled in approximately 1.3 acres of wetlands adjacent to the tributary.

16. In July 2015, the Corps Rock Island District received written complaints from landowners with properties located near Respondent’s property and Deep Creek.

17. On July 29, 2015, representatives from the Corps and the United States Department of Agriculture Natural Resources Conservation Service conducted a site investigation on Respondent’s property and confirmed the above-referenced placement of fill material.

18. The material discharged by Respondent constitutes “fill material,” and its actions constitute the “discharge of fill material” as those terms are defined in 40 C.F.R. § 232.2.

19. The fill material discharged by Respondent into the Deep Creek tributary is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

20. The land-moving equipment used to fill in the tributary and wetlands is a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The discharge of fill material into the tributary of Deep Creek constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

22. Deep Creek and its tributaries are “waters 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.

Findings of Violation

23. 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.

Relief

24. 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 2013, civil administrative penalties of up to \$16,000 per day for each day during which a violation continues, up to a maximum of \$187,500, may be assessed for violations of CWA Sections 301, 33 U.S.C. § 1311, that occur after December 6, 2013.

25. 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 \$40,500.

26. 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.

27. 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.

28. 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 within a thirty (30) day period, and present evidence in the event a hearing is held.

29. EPA has notified the state of Iowa regarding this proposed action by mailing a copy of this document to the Iowa Department of Natural Resources.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

30. 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.

31. 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:

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

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

33. 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.

34. 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.

35. 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.

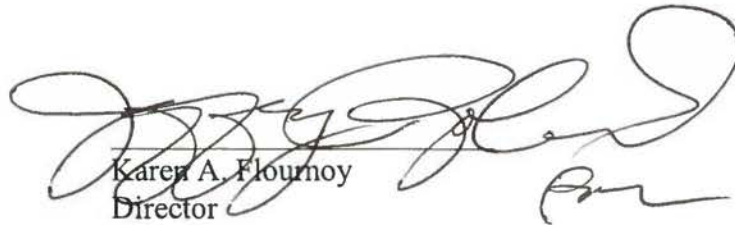
36. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

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

37. 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.

38. 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.

12-20-17
Date


Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

12.20.17
Date


Chris Muehlberger
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; a copy of the Revised CWA Section 404 Settlement Penalty Policy; and a copy of the U.S. EPA Small Business Resources Information Sheet to the following persons:

Mr. Scott Morrow, Registered Agent
C & S Enterprise, L.L.C.
2454 480th Avenue
Deep River, Iowa 52222; and

Mr. Eldon McAfee, Esq.
Brick Gentry, P.C.
6701 Westown Parkway, Suite 100
West Des Moines, IA 50266-7703.

12.28.17
Date


Signature

Chris Muellerberger
Printed Name