

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

2018 SEP 27 PM 2:22

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Mark Severson,

and

Bruening Rock Products, Inc.

Respondents

Proceedings under Section 309(g) of the
Clean Water Act, 33 U.S.C. § 1319(g)

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

Docket No. CWA-07-2018-0287

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 U.S. Environmental Protection Agency (“EPA”) has reason to believe that Respondents have 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 Mr. Mark Severson, an individual, resides in Iowa.
5. Respondent Bruening Rock Products, Inc., a corporation doing business in the state of Iowa.

Statutory and Regulatory Framework

6. 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.
7. 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.
8. 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 U.S. Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.
9. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.”
10. 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. § 112.2 (1993), and which include tributaries to waters of the United States.
11. 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “those 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.”
12. 40 C.F.R. § 232.2 defines “discharge of fill material” as “the addition of fill material into waters of the United States,” and which includes, but is not limited to, placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for commercial or other uses; and causeways or road fill.
13. 40 C.F.R. § 232.2 defines “fill material” as “material placed in waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with

dry land; or (b) changing the bottom elevation of any portion of a water of the United States.” Examples of fill material include, but are not limited to, rock, sand, soil, clay, construction debris, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

Factual Background

14. Each 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 Mark Severson owned, operated, or otherwise controlled a parcel of property located at 1795 Main Street in Lansing, Allamakee County, Iowa (hereinafter “the Site”).

16. At all times relevant to this action, Respondent Bruening Rock Products, Inc. operated a soil and rock excavation and fill company located at 900 Montgomery Street in Decorah, Winneshiek County, Iowa.

17. Beginning on or around August 2015, Respondents and/or persons acting on their behalf, using land-moving equipment, authorized, directed the placement of, and/or placed the fill material into approximately one acre of wetland abutting Clear Creek, a tributary to the Mississippi River, located on the Site.

18. In October 2015, the Rock Island District of the Corps received an anonymous complaint regarding the fill activities at the Site.

19. On October 14, 2015, representatives from the Corps conducted a site investigation on the Site and confirmed the above-referenced placement of fill material. The fill material remains in place as of the date of this filing.

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

21. The fill material discharged by Respondents into the wetland abutting Clear Creek is a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The earth-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).

23. The discharge of sediment into Clear Creek constitutes the “discharge of a pollutant” within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

24. Clear Creek, the Mississippi River, and adjacent wetlands are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

Findings of Violation

25. Respondents’ 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 and continue to Section 301 of the CWA, 33 U.S.C. § 1311.

Relief

26. 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. The Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and implementing regulations at 40 C.F.R. Parts 19 and 27, increased the statutory maximum penalty to \$16,000 per day for each day during which a violation continues, up to a maximum of \$187,500, for violations of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, that occur after December 6, 2013. Most recently, the 2018 Civil Monetary Penalty Inflation Adjustment Rule, 83 Fed. Reg. 1190 (Jan. 10, 2018), promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, increased these statutory maximum penalties to \$21,393 per day for each day during which a violation continues, up to a maximum of \$267,415, for violations that occur after November 2, 2015.

27. 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 Respondents for the violations cited above in the amount of \$46,500.

28. 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 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.

29. 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 Respondents establish bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

30. 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.

31. The 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

32. Respondents 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.

33. 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, each 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. Respondents may file a written answer jointly or individually. 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.

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

35. A hearing upon the issues raised by this Complaint and the answer may be held if requested by a Respondent in its answer. If neither Respondent requests a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

36. 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. The EPA will grant the petition and will hold a

hearing only if the petitioners' evidence is material and was not considered by the EPA in the issuance of the Final Order.

37. If either Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, that Respondent may be found in default. Such default by a Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of that 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.

38. Whether or not Respondents request 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:


Kate Reitz
Assistant Regional Counsel
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
(913) 551-7745

39. 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.

40. The 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 issued by the Regional Judicial Officer, EPA Region 7. The issuance of such a CA/FO shall constitute a waiver of that Respondent's right to request a hearing on any matter stipulated therein.

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

9/27/18
Date



Jeffrey Robichaud
Director
Water, Wetlands, and Pesticides Division

9/27/18
Date



Katherine Reitz
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, U.S. 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. Mark Severson
Severson Service, Inc.
1795 Main Street
P. O. Box 122
Lansing, Iowa 52151

Mr. Greg Bruening, President and Registered Agent
Bruening Rock Products, Inc.
900 Montgomery Street
P. O. Box 127
Decorah, Iowa 52101

9/27/18
Date


Signature

Carolina F Adams
Printed Name