

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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF: )  
)  
)  
JAMES RODNEY AUBUCHON, ) Docket No. CWA-07-2019-0212  
)  
Respondent. ) COMPLAINT AND  
) CONSENT AGREEMENT/  
Proceedings under Section 309(g) of the ) FINAL ORDER  
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 known as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), 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. The United States Environmental Protection Agency, Region 7 (“EPA”) and Mr. James Rodney AuBuchon (“Respondent”) have agreed to a settlement of this action before the filing of a complaint, and thus, this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. This Complaint and Consent Agreement/Final Order (“CA/FO”) alleges that Respondent discharged pollutants into waters of the United States in violation of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

**Parties**

4. 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 of EPA Region 7, who in turn has delegated it to the Director of the Enforcement & Compliance Assurance Division of EPA Region 7 (collectively referred to as “Complainant”).

5. Respondent is an individual who resides in the state of Missouri and owned, operated, or otherwise controlled a parcel of property located at Section 20, Township 39 North, Range 1 East, in Washington County, Missouri.

### **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 United States 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(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States.”

10. 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.”

11. 40 C.F.R. § 232.2 defines “discharge of fill material” to include the “placement of fill, including site-development fills for commercial and other uses.”

12. 40 C.F.R. § 232.2 defines “fill material” as material that “replaces any portion of the waters of the United States with dry land” or which “changes the bottom elevation of a water of the United States.”

13. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the assessment of a civil penalty against any person who violates Sections 301 or 404 of the CWA, 33 U.S.C. §§ 1311 or 1344.

### **Factual Background and Allegations of Violation**

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 a parcel of property located at Section 20, Township 39 North, Range 1 East, in Washington County, Missouri (hereinafter “the Site”).

16. Beginning on or around July 2017, Respondent and/or persons acting on his behalf, using land-moving equipment, authorized, directed the placement of, and/or placed the fill material into Watson Creek associated with the construction of a dam on the Site. Respondent’s discharges of fill material into Watson Creek impacted approximately 815 linear feet of stream.

17. In September 2017, the St. Louis District of the Corps received an anonymous complaint regarding Respondent’s fill activities at the Site.

18. On October 6, 2017, representatives from the Corps, the Missouri Department of Conservation, and the Missouri Department of Natural Resources (“MDNR”) conducted a site visit and observed downstream impacts from Respondent’s placement of fill material.

19. On December 12, 2017, representatives from the Corps, MDNR, and EPA inspected Respondent’s property and confirmed the above-referenced placement of fill material.

20. On September 4, 2018, a representative of EPA conducted a site visit and observed downstream impacts from Respondent’s placement of fill material.

21. The fill material discharged by Respondent into Watson 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 place fill material in Watson Creek 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. Watson Creek is a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

25. 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.

26. 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.

### **CONSENT AGREEMENT**

27. Respondent and Complainant agree to the terms of this CA/FO.
28. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.
29. Respondent neither admits nor denies the factual allegations and legal conclusions contained in this CA/FO.
30. Respondent waives his right to contest any issue of fact or law set forth above, and his right to appeal this CA/FO.
31. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and agree to bear their own costs and attorneys' fees incurred as a result of this action.
32. Respondent certifies that he is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.
33. This CA/FO shall apply to and be binding upon Respondent, his agents, successors, and/or assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms, or other persons or entities acting under or for him with respect to matters included herein comply with the terms of this CA/FO.
34. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty in the amount of \$20,000.

### **Penalty Payment**

35. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Twenty Thousand Dollars (\$20,000) plus interest, as set forth below.
36. By signing this Order, Respondent certifies that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship. In addition to this statement, Respondent has submitted a signed and certified statement to EPA of its current financial condition articulating a basis for its contention that it cannot pay the penalty within 30 days of the effective date without experiencing an undue financial hardship.
37. EPA has considered the appropriateness of the penalty pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and has determined that based on Respondent's signed, certified statement to EPA as described in the paragraph above and EPA's best interests,

the appropriate penalty for the violations is \$20,000 to be paid in two installments. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Twenty Thousand Dollars (\$20,000), plus interest of Sixty-Two Dollars and Fifty Cents (\$62.50) over a period of 6 months for a total payment of [penalty + interest] Twenty Thousand Sixty-Two Dollars and Fifty Cents (\$20,062.50). The total penalty payment shall be paid in the following installments:

- a. Payment #1 shall be made for Five Thousand Dollars (\$5,000) within 30 days of the effective date of this Order; and
- b. Payment #2 shall be made for Fifteen Thousand Sixty-Two Dollars and Fifty Cents (\$15,062.50) on or before February 3, 2020;

38. Each penalty payment shall identify Respondent by name and docket number "CWA-07-2019-0212," shall be by certified or cashier's check made payable to the "United States Treasury," and sent to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

or by an alternate payment method described at <http://www.epa.gov/financial/makepayment>.

39. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Lisa Haugen  
Regional Hearing Clerk  
U.S. Environmental Protection Agency Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219  
haugen.lisa@epa.gov

and

Kate Reitz  
Office of Regional Counsel  
U.S. Environmental Protection Agency Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219  
reitz.katherine@epa.gov.

40. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

41. Interest will be set at the effective rate for debts to the United States as of the effective date of the CA/FO. For the calendar year 2019, the rate is 1% per annum. Upon the due date of the first installment, interest shall begin to accrue on the remaining penalty balance. Interest will not be compounded, and interest will be calculated based on a 360-day year. At any time, Respondent may make advance payment of the remaining penalty balance and interest due, after obtaining a payoff figure and date from EPA.

42. Respondent understands that should the civil penalty not be paid as provided above, pursuant to 40 C.F.R. § 13.18, interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs or interest.

#### **Effect of Settlement and Reservation of Rights**

43. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order.

44. Respondent has entered into an Administrative Order for Compliance on Consent, CWA-07-2019-0130, certifies that it is in compliance with the terms of that Order, and agrees to maintain compliance with the requirements of that Order. The effect of the settlement described in the paragraph above is conditioned upon the accuracy of this certification.

45. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

46. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

47. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties, and punitive damages.

**General Provisions**

48. Respondent and Complainant acknowledge that this CA/FO is subject to public notice and comment requirements pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

49. Pursuant to 40 C.F.R. § 22.31(b), this CA/FO shall become effective upon filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated from the effective date in calendar days unless otherwise provided in this CA/FO.

50. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

51. Respondent and Complainant agree that this CA/FO may be signed in part and counterpart.

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

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DeAndre Singletary  
Acting Director  
Enforcement and Compliance Assurance Division

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Date

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Kate Reitz  
Attorney Adviser  
Office of Regional Counsel

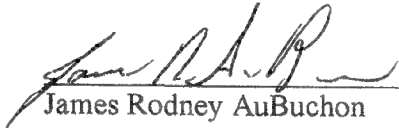
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Date



RESPONDENT:

JAMES RODNEY AUBUCHON

  
James Rodney AuBuchon

7/22/19  
Date

**FINAL ORDER**

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

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Karina Borromeo  
Regional Judicial Officer

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Date

**CERTIFICATE OF SERVICE**

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy via Email to Attorney for Complainant:

Kate Reitz  
reitz.katherine@epa.gov

Copy via Email to Attorney for Respondent James Rodney AuBuchon:

David Shorr  
dshorr@lahtropgage.com

and

Copy via Certified Mail, Return Receipt Requested to Respondent James Rodney AuBuchon:

Mr. James Rodney AuBuchon  
707 Levin Drive  
O'Fallon, Missouri 63366

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
Signed