

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

KEN PETSKA
Highway 11, Box 91
Elyria, Nebraska 68837

Respondent

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

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) Docket No. CWA-07-2008-0082
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) CONSENT AGREEMENT/
) FINAL ORDER
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CONSENT AGREEMENT AND FINAL ORDER

~~This proceeding for the assessment of a civil penalty was initiated on or about~~
January 12, 2009, 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), when the United States Environmental Protection Agency ("Complainant" or "EPA") issued to Ken Petska, Elyria, Nebraska ("Respondent"), a Complaint and Notice of Opportunity for Hearing.

The Complaint charged Respondent with a violation of Sections 301 and 404 of the CWA, 33 U.S.C. § 1311 and § 1344, and the regulations promulgated thereunder.

The Complaint proposed a civil penalty of Forty Thousand Five Hundred Dollars (\$40,500) for this violation. The parties entered into negotiations in an attempt to settle the allegations contained in the Complaint; this Consent Agreement and Final Order are the result of such negotiations.

CONSENT AGREEMENT

1. 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.
2. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

3. Respondent waives any right to contest the allegations and his right to appeal the proposed Final Order accompanying this Consent Agreement.
4. Respondent and Complainant each agree to bear their own costs and attorney's fees.
5. 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.
6. The undersigned representative of 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.
7. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty in the amount of \$6,750 and the performance of a Supplemental Environmental Project (SEP) as set forth below.
8. In settlement of this matter and within thirty (30) days of receipt of this CA/FO, Respondent shall submit a Work Plan to EPA for review and approval that shall propose the work required to perform the SEP, which will create critical backwater habitat for numerous fish and other wildlife species along the North Loup River. The Work Plan shall also include a provision for the legal protection of the SEP site. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations. The total expenditure for the SEP is estimated to be \$48,030.25. Respondent shall include documentation of the expenditures made in connection with the SEP as part of the SEP completion report.

9. Once approved by EPA, the work identified in paragraph 8 shall be incorporated by reference and fully enforceable under the terms of this Consent Agreement and shall be completed within sixteen (16) months in accordance with the specifications set forth in the Work Plan.
10. Respondent certifies that it is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant, or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.
11. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.
12. Respondent shall submit annual reports to EPA, beginning on the first anniversary of the completion of the SEP, for a period of five years. These reports shall include photos of the site, a description of the status of the SEP, and any corrective actions, if any, that will be taken to correct the deficiencies, to maintain the original conditions of the SEP. The annual reports shall be submitted by mail to:

Raju Kakarlapudi
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101

13. Within sixty (60) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA. The SEP Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented;
- (ii) Itemized costs;
- (iii) A description of any operating problems encountered and the solutions thereto;
- (iv) A certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order; and
- (v) A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).
- (vi) The report shall be submitted via first class mail to Raju Karkalapudi, identified in paragraph 12 above.
- (vii) The submission of the SEP Completion Report shall include the following written statement, followed by the Respondent's signature:

I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

14. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all reimbursable SEP expenditures. Where the SEP Completion Report includes costs not eligible for reimbursement, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

15. After receipt of the SEP Completion Report described in paragraph 13, above, EPA will notify Respondent, in writing, regarding:

- (i) any deficiencies in the SEP report itself along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or
- (ii) indicate that EPA concludes that the project has been completed satisfactorily; or
- (iii) determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with paragraph 17 herein.

16. Respondent agrees that failure to submit the SEP Completion Report required by paragraph 13 above, shall be deemed a violation of this CA/FO and Respondent shall become liable for stipulated penalties pursuant to paragraph 17 below.

17. Stipulated Penalties

a) In the event that Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in paragraph 8 above, and/or to the extent that actual expenditures for the SEP do not equal or exceed the cost of the SEP described in paragraph 8 above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- (i) Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed satisfactorily pursuant to this CA/FO, Respondent shall pay a stipulated penalty to the United States in the amount of \$20,250.
- (ii) If the SEP is not completed in accordance with paragraph 8, but the Complainant determines that the Respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.
- (iii) If the SEP is completed in accordance with paragraph 8, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States in the amount of \$2,500.
- (iv) If the SEP is completed in accordance with paragraph 8, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.
- (v) For failure to submit the SEP Completion Report required by paragraph 13 above, Respondent shall pay a stipulated penalty in the amount of \$100 for each day after the due date of the Completion Report stated in paragraph 13 above, until the report is submitted.

b) The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.

c) Stipulated penalties for paragraph (v) above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

d) Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with

the provisions of paragraph 1 below. Interest and late charges shall be paid as stated in paragraph 19 herein.

18. Respondent understands that the failure to pay any portion of the mitigated civil penalty as stated in paragraph 7, or any portion of a stipulated penalty as stated in paragraph 17, in accordance with the provisions of this order may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest at the applicable statutory rate.

19. Pursuant to 31 U.S.C. §3717, EPA is entitled to assess interest and penalties on debts owed to the United States and charge to cover the costs of processing and handling delinquent claims. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States tax and loan rate in accordance with 31 C.F.R. § 901.9(b). A charge will be assessed to cover the debt collection, including processing and handling costs and administrative costs. In addition, a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue from the date the penalty becomes due and is not paid, 31 C.F.R. §§ 901.9(c) and (d).

20. Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

21. Respondent shall undertake and complete the SEP as set forth in Paragraph 8 of the Consent Agreement. Respondent shall give EPA 30 days notice before performing or initiating work for the SEP.

22. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable federal, state, and local laws, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent in connection with the SEP undertaken pursuant to this Agreement.

Reservation of Rights

23. 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.

24. 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.

FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

1. Respondent shall pay a civil penalty of Six Thousand Seven Hundred Fifty Dollars (\$6,750). Said penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this CA/FO. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

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

The check must also be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

And

Chris Muehlberger
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

Should the civil penalty not be paid as provided above, interest 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.

2. 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.

Parties Bound

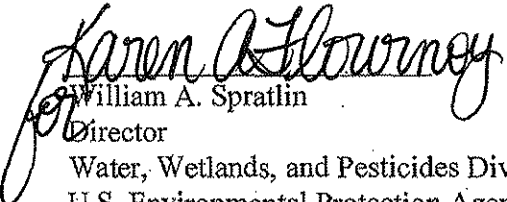
3. This Final Order shall apply to and be binding upon the Respondent, its agents, successors and assigns. Respondent shall ensure that any directors, officers, employees,

contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this CA/FO.


Effective Date

4. This Final Order shall become effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY


William A. Spratlin
Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency
Region 7

4-28-09
Date


Chris Muehlberger
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

4.28.09
Date

RESPONDENT:
KEN PETSKA


Ken Petska

4/15/09
Date

IT IS SO ORDERED.

May 4, 2009
Date


Robert L. Patrick
Regional Judicial Officer

IN THE MATTER OF Ken Petska, Respondent
Docket No. CWA-07-2008-0082

CERTIFICATE OF SERVICE

I certify 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 hand delivered to
Attorney for Complainant:

Christopher Muehlberger
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Ken Petska
Highway 11, Box 91
Elyria, Nebraska 68837

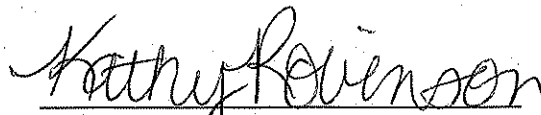
Copy by First Class Pouch Mail to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
U. S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, D. C. 20005

and

The Honorable Barbara A. Gunning
Administrative Law Judge
U. S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, D. C. 20005

Dated: 5/4/09


Kathy Robinson
Hearing Clerk, Region 7