



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, CA 94105-3901

IN THE MATTER OF:) Docket No. CWA-09-2022-0007
)
EDWARD LYNN BROWN)
Oakdale, California) COMPLAINT/CONSENT AGREEMENT
) AND FINAL ORDER
)
Respondent.) Class II Administrative Penalty Proceeding under
) Section 309(g) of the Clean Water Act, 33 U.S.C. §
) 1319(g), and 40 C.F.R. §§ 22.13(b) and 22.18
)

CONSENT AGREEMENT

I. AUTHORITY AND PARTIES

1. This is a Class II civil administrative penalty proceeding under section 309(g)(1)(A) and (2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A) and (2)(B), and 40 C.F.R. Part 22 (Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits).

2. Pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (EPA) is authorized to assess administrative penalties against persons who violate section 301(a) of the CWA, 33 U.S.C. § 1311(a). The Administrator has delegated this authority to the Regional Administrator of the EPA Region 9, who in turn has delegated this authority to the Director of the Enforcement and Compliance Assurance Division, hereinafter "Complainant."

3. Respondent is Edward Lynn Brown of Oakdale, California.

4. This Consent Agreement and Final Order ("CA/FO"), which contains the elements of a complaint required by 40 C.F.R. § 22.14(a), simultaneously commences and concludes this penalty proceeding, as authorized by 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law, and upon consent by EPA and Respondent, it is hereby STIPULATED, AGREED, AND ORDERED:

II. STATUTORY AND REGULATORY FRAMEWORK

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for a person to discharge pollutants, including dredged or fill material, from a point source into waters of the United States, except as authorized by a CWA permit. Under section 404 of the CWA, 33 U.S.C. § 1344, the U.S. Army Corps of Engineers (“Corps”) issues permits for the discharge of dredged or fill material into waters of the United States.

6. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include an “individual.”

7. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, “dredged spoil,” “biological materials,” “rock,” “sand,” and “cellar dirt.”

8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

9. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “waters of the United States, including the territorial seas.”

11. Regulations codified at 33 C.F.R. § 323.2(c) define “dredged material” as “material that is excavated or dredged from waters of the United States.” The term “discharge of dredged material” means “any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States.” 33 C.F.R. § 323.2(d)(1).

12. Regulations codified at 33 C.F.R. § 323.2(e)(1) define “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 (ii) Changing the bottom elevation of any portion of a water of the United States.”

13. Pursuant to CWA section 309(g), 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, EPA may assess a Class II civil administrative penalty of up to \$22,584 per day of violation, not to exceed \$282,293 in total, against a person for CWA section 301(a) violations that occurred after November 2, 2015, where penalties are assessed on or after December 23, 2020.

III. GENERAL ALLEGATIONS

14. Respondent is an individual and a “person” within the meaning of CWA sections 301(a) and 502(5), 33 U.S.C. §§ 1311(a) and 1362(5).

15. At all times relevant to this matter, Respondent has owned approximately 850 acres of real property (the “Property”) known as the Bird Ranch located at 7450 G Street, west of California State Route 59, north of Nevada Street, east of G Street, north of the City of Merced, in Section 19 and 30, Township 6 South, Range 13 East, in Merced County, California..

16. The Property is bisected by Parkinson Creek, which flows in a northwest to southeast direction through the Property to Fahrens Creek to Black Rascal Creek to Bear Creek to the San Joaquin River, all perennial waters. Therefore, Parkinson Creek is a “waters of the United States” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

17. The Property contains seasonal wetlands that are adjacent to and abut Parkinson Creek. Therefore, the wetlands are “waters of the United States” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

18. On October 3, 2018, EPA Region 9 received information from the Corps’ Sacramento District that it had identified fill activity in potential waters of the United States on the Property performed without prior submittal of a jurisdictional delineation, notification to the Corps, or request for authorization to conduct such fill activities pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

19. On March 14, 2019, EPA Region 9 inspected the Property and confirmed that Respondent, or persons acting on behalf of Respondent, operated equipment to conduct earthmoving activities in 2016 through sometime in 2017, on dates best known to Respondent, that resulted in the discharge of dredged and/or fill materials to potential waters of the United States on the Property. On April 30, 2019, EPA Region 9 provided its March 14, 2019 Inspection Report to Respondent by email.

20. On October 30, 2020, and October 22, 2021, Respondent provided EPA Region 9 with information confirming Respondent’s earthmoving activities in 2016 through sometime in 2020 impacted 2.71 acres of wetland and other waters of the United States at the Property.

21. The earthmoving equipment described in paragraph 20 above is a “point source” within the meaning of CWA section 502(14), 33 U.S.C. § 1362(14).

22. Based on its March 14, 2019, inspection of the Property, and information provided by Respondent, EPA alleges that Respondent discharged fill material to approximately 2.71 acres of seasonal wetlands and vernal pool complexes located on the Property subject to CWA regulation as “navigable waters” and “waters of the United States” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7), and its implementing regulations.

23. Respondent’s discharge of dredged and/or fill materials into waters of the United States referenced in paragraph 20 constitutes a “discharge of pollutants” within the meaning of CWA section 502(12), 33 U.S.C. § 1362(12).

24. On January 31, 2022, EPA entered into an Administrative Order for Compliance, Docket No. CWA-309(a)-22-001 (“Order”) with Respondent that requires restoration and

enhancement of 2.44 acres of waters of the United States at the Property impacted by Respondent's unauthorized fill activity in 2016 through sometime in 2020, as well as preservation of 12.66 acres of wetlands adjacent to Parkinson Creek in accordance with EPA and Corps requirements.

IV. ALLEGED VIOLATION

25. As a result of the alleged earthmoving activity at the Property in 2016 through sometime in 2020, on dates best known to Respondent, Respondent and/or persons acting on Respondent's behalf, discharged or caused to be discharged fill material without authorization under section 404 of the CWA, 33 U.S.C. § 1344, in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

V. ADMINISTRATIVE PENALTY

26. In consideration of the penalty factors of CWA section 309(g), 33 U.S.C. § 1319(g), Respondent shall pay to the United States a civil administrative penalty in the amount of **Two Hundred and Twelve Thousand Dollars (\$212,000.00)** within thirty (30) calendar days of the Effective Date, as defined in Section X below, of this CA/FO.

27. Respondent shall pay the penalty by check (mail or overnight delivery), wire transfer, automated clearing house, or online payment. Payment instructions are available at <https://www.epa.gov/financial/makepayment>. If clarification regarding a particular method of payment remittance is needed, contact the EPA Cincinnati Finance Center at (513) 487-2091.

a. Check Payment:

- i. Checks sent by regular U.S. Postal Service mail shall be made payable to "Treasurer, United States of America" and mailed to:

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

- ii. Checks sent by express mail (non-U.S. Postal Service entities that do not deliver to P.O. Boxes) shall be made payable to "Treasurer, United States of America" and mailed to:

U.S. Environmental Protection Agency
Government Lockbox 979077
USEPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

- b. Automated Clearinghouse Payment: Payment by Automated Clearinghouse (ACH) via Vendor Express shall be made through the U.S. Treasury as follows:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking

- c. Fedwire: Payment by wire transfer to EPA shall be made through the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA: 021030004
Account: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read: D 68010727
Environmental Protection Agency)

- d. On-line Payment: Go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter SFO 1.1 in the search field. Open “EPA Miscellaneous Payments – Cincinnati Finance Center” form and complete the required fields.

28. Concurrent with the payment, Respondent shall send a true and correct copy of the payment and accompanying transmittal information to the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105
r9HearingClerk@epa.gov

Scott McWhorter
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105
mcwhorter.scott@epa.gov

29. Respondent shall not, and shall not allow any other person to, deduct any penalties and interest paid under this CA/FO from federal, state, or local taxes.

30. Pursuant to CWA section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay the assessed penalty on time, EPA may request the U.S. Department of Justice to bring a civil action to recover the overdue amount, plus interest at currently prevailing rates from the effective date of this CA/FO. In such an action, the validity, amount, or appropriateness of the assessed penalty shall not be subject to review. In addition to any assessed penalty and interest, Respondent shall pay attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty, which shall equal 20% of the aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter, for each quarter during which such failure to pay persists. EPA may also take other debt collection actions as authorized by law, including but not limited to the Debt Collection Act, 31 U.S.C. § 3711.

VI. APPLICABILITY

31. This CA/FO shall apply to and be binding on Respondent, Respondent's officers, directors, partners, agents, employees, contractors, successors, and assigns. Action or inaction of any persons, firms, contractors, employees, agents, or corporations acting under, through, or for Respondent shall not excuse any failure of Respondent to fully perform its obligations under this CA/FO. Changes in ownership, real property interest, or transfer of personal assets shall not alter Respondent's obligations under this CA/FO.

VII. RESPONDENT'S ADMISSIONS AND WAIVERS

32. In accordance with 40 C.F.R. § 22.18(b), solely for the purpose of this proceeding, Respondent: (a) admits the jurisdictional allegations of the complaint; (b) neither admits nor denies the specific factual allegations contained in this Consent Agreement; (c) consents to all conditions specified in this CA/FO and to the assessment of the civil administrative penalty set forth in Section V above; (d) waives any right to contest the allegations set forth in this CA/FO; and (e) waives its right to appeal this proposed Final Order.

VIII. RESERVATION OF RIGHTS

33. In accordance with 40 C.F.R. § 22.18(c), full payment of the penalty set forth in this CA/FO only resolves Respondent's CWA civil penalty liabilities for the violations specifically alleged herein and does not in any case affect the right of the EPA to pursue appropriate injunctive relief or other equitable relief or criminal sanction for any violations of law.

34. This CA/FO is not a permit or modification of any existing permit issued pursuant to any federal, state, or local laws or regulations, and shall in no way relieve or affect Respondent's obligations under any applicable federal, state, or local laws, regulations, or permits. Nothing in this CA/FO shall limit the ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit pursuant to CWA section 404, 33 U.S.C. § 1344.

IX. ATTORNEY FEES AND COSTS

35. Unless otherwise specified, each party shall bear its own attorney fees and costs.

X. EFFECTIVE DATE AND TERMINATION

36. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CA/FO shall take effect on the date that the Final Order, having been signed by the Regional Judicial Officer, is filed with the Regional Hearing Clerk (the “Effective Date”), and shall terminate when Respondent has complied with this CA/FO in full.

XI. PUBLIC NOTICE

37. Pursuant to CWA section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b), this Consent Agreement is subject to public notice and comment prior to issuance of the proposed Final Order. Complainant reserves the right to withhold or withdraw consent to this Consent Agreement if public comments disclose relevant and material information that was not considered by Complainant in entering into this Consent Agreement. Respondent may withdraw from this Consent Agreement only upon receipt of written notice from EPA that it no longer supports entry of this Consent Agreement.

38. Pursuant to section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), EPA has consulted with the State of California regarding this penalty action.

For Respondent Edward Lynn Brown

A handwritten signature in cursive script, appearing to read "Edward Lynn Brown", written over a horizontal line.

Edward Lynn Brown

1-31-22

Date

For Complainant the U.S. Environmental Protection Agency, Region 9

Amy C. Miller-Bowen
Director, Enforcement and Compliance Assurance Division

Of counsel:
Sarah Rowan
Attorney-Advisor
Office of Regional Counsel

FINAL ORDER

It is Hereby Ordered that this Consent Agreement and Final Order (U.S. EPA Docket No. CWA-09-2022-0007) be entered and that Respondent shall pay a civil penalty in the amount of two hundred and twelve thousand dollars (\$212,000) in accordance with the terms of this Consent Agreement and Final Order.

Steven L. Jawgiel
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complaint/Consent Agreement and Final Order in the matter of EDWARD LYNN BROWN (CWA-09-2022-0007) has been filed with the Regional Hearing Clerk, and a copy was served on both Respondent and Counsel for Respondent by email, as indicated below:

COMPLAINANT:

Rich Campbell
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, California 94105
Email: campbell.rich@epa.gov

RESPONDENT:

Scott B. Birkey
Cox, Castle & Nicholson LLP
50 California Street
Suite 3200
San Francisco, California 94104
Email: sbirkey@coxcastle.com

Ponly Tu
Regional Hearing Clerk
U.S. EPA Region 9