

04 SEP 28 AM 9:37

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 N. 5<sup>th</sup> STREET

KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

SCOTT BENSON

Respondent

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

)  
)  
) Docket No. CWA-07-2004-0253  
)  
)  
)

) COMPLAINT AND,  
) CONSENT AGREEMENT/  
) FINAL ORDER  
)  
)  
)

**COMPLAINT**

Jurisdiction

1. This Administrative Complaint (Complaint) has been filed under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), pursuant to Section 309(g) of 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order alleges that the Respondent discharged pollutants into the waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. The Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA Region VII, is the Director of Region VII's Water, Wetlands, and Pesticides Division.

4. Respondent, Scott Benson ("Mr. Benson"), is an owner of property along the Platte River in the Southwest Quarter of Section 30, Township 9 North, Range 12 West, Hall County, Nebraska. Mr. Benson has a mailing address of 2824 South 148<sup>th</sup> Street, Omaha, Nebraska 68144.

#### Statutory and Regulatory Background

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. Section 404 of the CWA provides that pollutants may be discharged only in accordance with the terms of a permit for the discharge of dredged or fill material.

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.

#### Factual Background

7. At various times between July 1997 and July 2002, the Respondent and/or persons acting on his behalf, discharged dredged or fill material including dirt, spoil, rock and sand, into an area on the Platte River in Hall County, Nebraska. Three ponds were created along the edge of the Platte River. These actions impacted approximately 11 acres of riverine wetlands.

8. Respondents and/or persons acting on their behalf, used mechanized land-clearing and/or earth moving equipment to accomplish the discharges described in Paragraph 7.

9. Respondents did not have a CWA Section 404 permit for the discharge of fill material into waters of the United States.

#### EPA Finding of Violations

10. The dirt, spoil, rock and sand discharged by the Respondents into the Platte River constitutes a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11. Respondent's work in and along the Platte River described above, constitutes a "discharge of a pollutant" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

12. The equipment used by the Respondent in performing the work described above constitutes a "point source" as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

13. The Platte River is a "navigable water" of the United States, as defined by CWA Section 502(7), 33 U.S.C. § 1362(7).

14. Respondent Mr. Benson is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. 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 this discharge violated Section 301 of the CWA, 33 U.S.C. § 1311.

### **CONSENT AGREEMENT**

16. Respondent admits the jurisdictional allegations of this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

17. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement/Final Order.

18. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty as set forth below.

19. Respondent consents to the mitigation set forth below in the Final Order.

20. Respondent waives any right to contest the allegations and his right to appeal the proposed Final Order accompanying this Consent Agreement.

21. Respondent and Complainant each agree to bear their own costs and attorney's fees.

22. 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.

23. The undersigned representative of Respondent certifies that he is fully authorized to enter the terms and conditions of this Complaint and Consent Agreement/Final Order and to execute and legally bind Respondent to it.

**FINAL ORDER**

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

1. Respondent shall pay a civil penalty of Sixty Three Thousand One Hundred Twenty Five Dollars (\$63,125). Said penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this Complaint and Consent Agreement/Final Order. 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:

Mellon Bank  
U.S. Environmental Protection Agency - Region VII  
P. O. Box 371099M  
Pittsburgh, Pennsylvania 15251

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:

Steven L. Sanders  
Office of Regional Counsel  
U.S. Environmental Protection Agency - Region VII  
901 N. 5<sup>th</sup> 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. For mitigation of the violation the Respondent shall be responsible for the completion of the work for two projects as outlined in the attached mitigation plan. The mitigation plan is an enforceable part of this Final Order. The two projects shall be completed within 24 months of the effective date of the Agreement.

3. Upon satisfactory completion by Respondent of all activities required by this Order a representative of the Complainant shall notify the Respondent in writing of said completion.

**Parties Bound**

4. This Final Order shall apply to and be binding upon the Respondent, his agents, successors and 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 Consent Agreement and Final Order.

Reservation of Rights

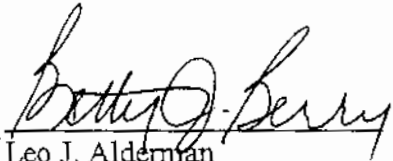
5. The EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

6. With respect to matters not addressed in this Final Order, 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.

Effective Date

7. This Final Order shall be 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



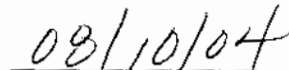
Leo J. Alderman

Director

Water, Wetlands, and Pesticides Division

U.S. Environmental Protection Agency

Region VII



Date



Steven L. Sanders

Assistant Regional Counsel

U.S. Environmental Protection Agency

Region VII

RESPONDENT:  
SCOTT BENSON

Scott A. Benson  
Scott Benson

August 9<sup>th</sup>, 2004  
Date

IT IS SO ORDERED.

Sept. 28, 2004  
Date

Robert L. Patrick  
Robert L. Patrick  
Regional Judicial Officer



## MITIGATION PLAN

The following two mitigation projects will be completed as part of this settlement.

### **Martin's Reach Wildlife Management Area**

Martin's Reach WMA consists of approximately 89 acres located ½ mile south and 3 miles west of I-80 at the Wood River exit. This property was purchased and managed primarily for deer and turkey with waterfowl use limited to existing open channels on and adjacent to the property.

Management of this property to increase habitat available for migratory waterfowl and crane began in the winter of 1999 with the clearing of approximately 20 acres of mature cottonwood forest from a Platte River island. In addition, approximately 3000 linear feet of slough excavation took place on the cleared area. With this project completed, sandhill cranes began using the river stretch as a roost site adjacent to and including the cleared tract the following spring. A whooping crane was also confirmed using the site the spring of 2000. Other waterfowl that have utilized the site during spring migration include northern pintail, mallard, white-fronted geese, Canada geese, and snow geese.

Clearing interior cottonwood timber began in the winter of 2001 with approximately 20 acres of mature cottonwood trees removed along with an additional 20+ acres of gray dogwood understory. This project took place adjacent to approximately 2,000 linear feet of backwater channels. In addition, 2 small ephemeral pools were created in non-active channels. Each pool was excavated to 1-2 feet of permanent water during the spring and has created an excellent water source for breeding amphibians, wildlife watering sites, as well as loafing and feeding sites for waterfowl. All areas disturbed during this project were seeded with a high diversity local ecotype grass and forb mix.

The proposed project was developed to compliment existing efforts that have occurred on the property. The first site is located along the north bank of the Platte River immediately adjacent to the 1999 project. This project will consist of removing approximately 7.4 acres of trees and shrubs along 2,000 feet of river channel. In addition, approximately 480 feet of slough will be restored. This will create a more open channel in this area in an effort to increase use by migrating waterfowl and cranes.

The second portion of this project will expand the interior tree removal along and adjacent to restored backwater sloughs. Approximately 10.5 acres of trees will be removed or thinned and 2,750 linear feet of sloughs restored. This will provide habitat for waterfowl feeding and loafing as well as providing important habitat for many other wildlife species that utilize this area.

As before, all areas disturbed during these projects will be seeded with a high diversity grass and forb mix with the exception of the near river tree clearing. To maintain this area as open habitat,

disking and herbicide application will occur as needed. Annual maintenance costs for the first 10 years is included in the cost estimate.

Costs that are estimated for this project are:

Tree removal	17.0 acres at \$600/acre	\$10,700
Slough excavation	3,240 linear feet at \$2.50/ft	\$ 8,100
Annual maintenance	Years 1-3 @ \$50/year	\$ 150
Annual maintenance	Years 4-10 @ \$25/year	\$ 175
Total Costs Estimate for Martin's Reach Project		\$19,125

### **Dahms Island Habitat Restoration Project**

This project would enhance a 25 acre cleared area on an island owned by the The Nature Conservancy by creating 3,200 linear feet of wetland swales/backwater channels and two small depressional wetlands with embedded islands. The site was originally cleared of trees through the U.S. Fish and Wildlife Service's Partners for Wildlife Program in 1999. The next phase of the project is designed to provide roosting and feeding habitat for whooping cranes, sandhill cranes, and other waterbirds, as well as to create experimental breeding habitat for piping plovers and interior least terns.

#### **Swales/Backwater Channels**

Approximately 3,200 linear feet of wetlands would be created as shown in the attached map. The wetlands would be laid out in such a way that they would take advantage of existing low areas, but would also hook up with both the main channel of the river as well as a small side channel to the south. The wetlands would have an average width of 35-40 feet, and average depth of 2-3 feet, and shallow slopes. The depth and width would vary so that some areas would have standing water much of the year and others would be ephemerally wet. These would most likely have to be created by an excavator and bulldozer combination as most of the site would be inaccessible to scrapers because of the moisture and texture of the soils.

#### **Depressional Wetlands**

Two small 1-acre depression-type wetlands would be created on the site. These would be created by excavating a sandbar in selected areas to create shallow depressions. The existing sandbar would remain in the center of the excavated depressions, ultimately resulting in a shallow sloped island surrounded by water. The island would be created in such a way that it would meet criteria for suitable nesting habitat for terns and plovers, but would also serve as suitable roosting and feeding areas for cranes and other waterbirds. The wetland depth would be set so that the

wetlands would stay wet for most of the summer (through the breeding season for terns and plovers).

Cost Estimates for the Dahms Island Habitat Restoration Project

1.	Restore approximately 3,200 linear feet of swales/ backwater channels @ \$3.00/linear foot (35-40 feet wide, 2 to 3 feet deep)	\$ 9,600
2.	Create two 1-acre depressional type wetlands with suitable nesting habitat for least terns and piping plovers and roosting and foraging habitat for cranes and other waterbirds (approximately \$3,000/wetland X 2 wetlands)	\$ 6,000
Total Cost Estimate for Dahms Island Project		\$15,600

IN THE MATTER OF Scott Benson, Respondent  
Docket No. CWA-07-2004-0253

CERTIFICATE OF SERVICE

I certify that the foregoing Complaint and Consent Agreement/Final Order was sent this day in the following manner to the addressees:


Copy hand delivered to  
Attorney for Complainant:

Steven L. Sanders  
Senior Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by U.S. Certified Mail,  
Return Receipt Requested, to:

Bradley K. Schweer, Esq.  
Lake Regency Building  
444 Regency Parkway Drive  
Suite 202  
Omaha, Nebraska 68114

Dated: 9/28/04

  
Kathy Robinson  
Regional Hearing Clerk