

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

DAN EOFF,)	
)	
Plaintiff and Counterclaim Defendant,)	
)	Civil Action No. 4:13-cv-00368-DPM
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY and GINA)	
MCCARTHY, in her official capacity as)	
Administrator of the U.S. Environmental)	
Protection Agency,)	
)	
Defendants and Counterclaimants.)	

CONSENT DECREE

WHEREAS, the Plaintiff and Counterclaim Defendant Dan Eoff filed a Complaint challenging an administrative compliance order issued by the United States Environmental Protection Agency (“EPA”), which challenge has been resolved by the Court (Doc. Nos. 57, 81);

WHEREAS, the Defendant and Counterclaimant, the United States of America, on behalf of EPA, filed the Counterclaim herein against Plaintiff and Counterclaim Defendant Dan Eoff (“Defendant”), alleging that Defendant violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the Counterclaim alleges that Defendant violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at four sites located in Van Buren County, Arkansas

(the “Sites”), as more fully described in the Counterclaim, without authorization by the United States Department of the Army (“the Corps”);

WHEREAS, the Counterclaim seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendant, at his own expense and at the direction of EPA, to restore and/or mitigate the damages caused by his unlawful activities; and (3) to require Defendant to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States’ claims under the CWA set forth in the Counterclaim regarding the Sites;

WHEREAS, the United States and Defendant agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States’ claims under the CWA against Defendant in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States’ claims against Defendant in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal laws.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION, VENUE, AND SUFFICIENCY OF COMPLAINT

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Eastern District of Arkansas pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendant conducts business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Counterclaim states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. For the duration of this Consent Decree, the obligations of this Consent Decree shall apply to and be binding upon Defendant and any successors, assigns, or other entities or persons otherwise bound by law whether or not such entity or person has notice of this Consent Decree. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, including any contractor or consultant retained to comply with obligations under the Consent Decree. In any action to enforce this Consent Decree, Defendant shall not raise as a defense failure by any officer, employee, or agent whose duties might reasonably include compliance with any provision of this Consent Decree to take any actions necessary to comply with this Consent Decree. Transfer of ownership or other interest in the Sites shall not alter or relieve Defendant of his obligation to comply with all of the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

5. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Counterclaim against the Defendant under CWA Section 301 concerning the Sites.

6. It is the express purpose of this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendant to achieve and maintain full compliance with, and to further the purposes of, the CWA.

7. Except as in accordance with and until the termination of this Consent Decree, Defendant and Defendant's agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations, including the statutory exemption for farm road crossings. The Defendant may maintain farm roads and crossings in accordance with the requirements of the Clean Water Act.

8. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

9. This Consent Decree in no way affects or relieves Defendant of his responsibility to comply with any applicable federal, state, or local law, regulation or permit.

10. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

11. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

12. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

13. Defendant shall pay a civil penalty to the United States in the amount of seventy-five thousand, two hundred and fifty dollars (\$75,250), within 60 days of entry of this Consent Decree.

14. Defendant shall make the above-referenced payment by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (to be provided), EPA Region 6 and the DOJ case number (90-5-1-4-19920). Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the Eastern District of Arkansas. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

15. Upon payment of the civil penalty required by this Consent Decree, Defendant shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payment was made.

16. Upon payment of the civil penalty required by this Consent Decree, the United States shall provide written notice as to receipt of payment to the Defendant, at the addresses specified in Section X of this Consent Decree.

17. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

PURCHASE OF MITIGATION CREDITS

18. Defendant shall purchase \$124,750 worth of stream mitigation credits within 210 days of the effective date of this Consent Decree. Defendant will make this purchase in three installments, as follows:

- a. Within 30 days of the effective date of this Consent Decree, Defendant shall reserve \$41,583.33 worth of stream mitigation credits from a mitigation bank within the primary geographic service area.
- b. Within 120 days of the effective date of this Consent Decree, Defendant shall reserve an additional \$41,583.33 worth of mitigation credits from a mitigation bank within the primary geographic service area.
- c. Within 210 days of the effective date of this Consent Decree, Defendant shall reserve an additional \$41,583.34 worth of mitigation credits from a mitigation bank within the primary geographic service area.
- d. Within 210 days of the effective date of this Consent Decree, upon making the final payment described in subparagraph (c) of this paragraph, Defendant shall purchase the reserved mitigation credits described in subparagraphs (a) - (c) of this paragraph.

19. Within 7 days after any reservation of mitigation credits—i.e., after the initial reservation of \$41,583.33 worth of mitigation credits; the second reservation of \$41,583.33 worth of mitigation credits; and the remaining reservation of \$41,583.34 worth of mitigation credits—Defendant shall provide a copy of each reservation receipt to EPA and the United States Department of Justice at the addresses specified in Section X of this Consent Decree. Within 7 days after the final purchase of mitigation credits from the mitigation bank to Defendant under subparagraph 18(d) of this Consent Decree, Defendant shall also provide notice in accordance with Section V of this Consent Decree to EPA and the United States Department of Justice at the addresses specified in Section X of this Consent Decree that the Defendant has purchased \$124,750 worth of stream mitigation credits in compliance with this Section.

OBTAINING ENGINEERING CERTIFICATION

20. By September 30, 2016, Defendant shall obtain a certification from a professional engineer that the earthen dam at Site 4, as detailed in the United States' Counterclaim, complies with the Arkansas Natural Resources Commission's "Rules Governing Design and Operation of Dams (Title 7)."

21. Within 7 days of obtaining this certification in accordance with this Section, Defendant shall provide a copy of the certification to EPA and the United States Department of Justice at the addresses specified in Section X of this Consent Decree.

22. Defendant's compliance with this Section of this Consent Decree shall not be construed as waiving any requirement of Defendant to comply with any applicable federal, state, or local law, regulation or permit.

V. NOTICES

23. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendant shall certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision. The information submitted is, to the best of my knowledge and belief, true, accurate and complete.

VI. RETENTION OF RECORDS

24. Until three years after entry of this Consent Decree, Defendant shall preserve and retain all records and documents now in his or his contractors' or other agents' possession or control, or which come into his or his contractors' or other agents' possession or control, that relate in any manner to Defendant's performance of his obligations under this Consent Decree. At any time during this information-retention period, upon request by the United States, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

VII. DISPUTE RESOLUTION

25. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section ("Dispute Resolution") shall be the exclusive mechanism for Defendant to resolve all of his disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude him from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under or with respect to this Consent Decree.

26. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United

States and Defendant to attempt to resolve such dispute. The dispute shall be considered to have arisen when either party sends notice to Counsel for the Defendant or EPA written Notice of Dispute, at the addresses in Section X. Such Notice of Dispute shall state clearly the matter in dispute. The period for informal negotiations shall not extend beyond 30 days from the date the dispute arises, unless that period is modified in writing by the United States. If a dispute between the United States and Defendant cannot be resolved by informal negotiations, then either party may file a motion with the Court seeking resolution of the dispute.

27. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendant under this Consent Decree, except as provided in Paragraph 39 below regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

28. Defendant shall perform the actions required under this Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendant, his employees, agents, and consultants and contractors whose duties might reasonably include compliance with the terms of this Consent Decree, which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, financial inability to perform any obligation under this Consent Decree, or failure to reasonably seek federal, state, or local permits.

29. If Defendant believes that a Force Majeure event has affected Defendant's ability to perform any action required under this Consent Decree, Defendant shall notify EPA and the United States Department of Justice in writing within 14 calendar days after the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

- a. what action has been affected;
- b. the specific cause(s) of the delay;
- c. the length or estimated duration of the delay; and
- d. any measures taken or planned by the Defendant to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendant may also provide to the United States any additional information that he deems appropriate to support his conclusion that a Force Majeure event has affected his ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

30. If the United States determines that the conditions constitute a Force Majeure event, then the time for performance of obligations under this Consent Decree that are affected by the Force Majeure event may be extended by the United States for such time as is necessary to complete those obligations. An extension of time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation.

31. If the United States does not agree that the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue

should be extended, then the United States' position shall be binding, unless Defendant invokes Dispute Resolution under Section VII of this Consent Decree.

32. If Defendant invokes Dispute Resolution under Section VII of this Consent Decree, Defendant shall bear the burden of proving the existence of a Force Majeure event as defined by this Section, and, to the best of Defendant's knowledge, the number of days of delay or anticipated delay that was or will be caused by such a Force Majeure event.

IX. STIPULATED PENALTIES

33. After entry of this Consent Decree, if Defendant fails to timely fulfill any requirement of the Consent Decree, the Defendant shall pay a stipulated penalty to the United States of \$1,000 per day for each day of non-compliance.

34. Stipulated penalties shall begin to accrue the day after a violation occurs and shall continue to accrue until the violation ceases, except to the extent that a Force Majeure event occurs under Section VIII. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

35. Stipulated penalty payments shall be made within 30 days of receiving a written demand from the United States. Upon any such payment, Defendant shall provide written notice, at the addresses specified in Section X of this consent decree.

36. Defendant shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (to be provided), EPA Region 6 and the DOJ case number (90-5-1-4-19920). Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States

Attorney's Office for the Eastern District of Arkansas. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

37. Prior to issuing a written demand under Paragraph 35 of this Consent Decree, the United States may, in its unreviewable exercise of its discretion, waive or reduce stipulated penalties that have accrued under this Consent Decree.

38. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, are subject to the Dispute Resolution provisions of Section VII.

39. The filing of a motion requesting that the Court resolve a dispute shall stay Defendant's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendant does not prevail on the disputed issue, stipulated penalties shall be paid by Defendant as provided in this Section.

40. To the extent Defendant demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 28 above) or otherwise prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

41. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

42. Nothing in this Section shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties. The stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendant's violation of this Consent Decree or applicable law.

X. ADDRESSES

43. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

a. TO EPA:

Russell Murdock
Office of Regional Counsel (6RC-EC)
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue
Suite 1200
Dallas, TX 75202

b. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Lisa Bell
John Sullivan
Trial Attorneys
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044

c. TO DEFENDANT:

Dan Eoff
c/o Kent Tester
TESTER LAW FIRM, P.A.
230 Hwy. 65 North, Suite 7
Clinton, AR 72031

J. Grant Ballard
Charles A. Banks
BANKS LAW FIRM PLLC
100 Morgan Keegan Dr.
Suite 135
Little Rock, AR 72202

44. Any party may, by written notice to the other party, change its designated notice recipient or notice address provided above.

45. Notice submitted under this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the parties in writing.

XI. COSTS OF SUIT

46. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action.

XII. PUBLIC COMMENT

47. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendant agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendant in writing that it no longer supports entry of the Consent Decree.

XIII. CONTINUING JURISDICTION OF THE COURT

48. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

49. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendant and approved by the Court.

XV. TERMINATION

50. This Consent Decree may be terminated by either of the following:
- a. Defendant and the United States may at any time make a joint motion to the Court for termination of this Consent Decree or any portion of it; or
 - b. Defendant may make a unilateral motion to the Court to terminate this Consent Decree after each of the following has occurred:
 - i. Defendant has obtained and maintained compliance with all provisions of this Consent Decree for twelve consecutive months;
 - ii. Defendant has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

- iii. Defendant has certified compliance pursuant to subparagraphs i and ii above to the Court and all parties; and
- iv. within 30 days of receiving such certification from the Defendant, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Defendant's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

XVI. SIGNATORIES/SERVICE

51. Each undersigned representative of the parties certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

52. This Consent Decree may be signed in counterparts, such counterpart signature pages shall be given full force and effect, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XVII. INTEGRATION

53. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree and supersedes any prior agreements and understandings, whether verbal or written, concerning the settlement embodied herein.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2016.

United States District Judge

ON BEHALF OF THE UNITED STATES:

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

Dated: _____

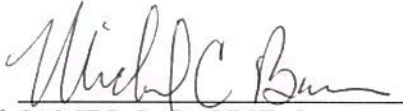
Lisa Bell, Trial Attorney
John E. Sullivan, Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box. 7611
Washington, D.C. 20044
Tel: (202) 514-9275
Fax: (202) 514-8865

ON BEHALF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:



WILLIAM K. HONKER, P.E.
Director, Water Division
United States Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202

Dated: 8/3/16



Acting For

JAMES O. PAYNE, Jr.
Regional Counsel
United States Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202

Dated: 8/3/2016



RUSSELL W. MURDOCK
Assistant Regional Counsel
United States Environmental Protection Agency
Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202
Telephone: 214-665-3189
Facsimile: 214-665-3177

Dated: 8/3/2016

**ON BEHALF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
(Continued):**

for 

MARK POLLINS
Director, Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

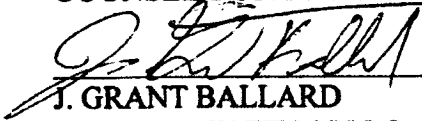
Dated: 8/4/2016

FOR DEFENDANT DAN EOFF:


DAN EOFF

Dated: 8/4/16

COUNSEL FOR DEFENDANT DAN EOFF:


J. GRANT BALLARD
BANKS LAW FIRM PLLC
100 Morgan Keegan Dr.
Suite 135
Little Rock, AR 72202
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Facsimile: (501) 280-0166

Dated: 8/3/16