

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

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

DEFENDANTS’ ANSWER AND COUNTERCLAIM

The United States of America, including Defendants the United States Environmental Protection Agency and Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency, (collectively, “EPA”), herein (1) respond to the Complaint filed by Plaintiff Dan Eoff on June 21, 2013 (Dkt. #1), and (2) assert a counterclaim under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

ANSWER TO ALLEGATIONS

Mr. Eoff’s Complaint seeks judicial review under the Administrative Procedure Act of an administrative compliance order issued by EPA under section 309(a) of the Clean Water Act. 33 U.S.C. §§ 1318 and 1319. Because the Complaint involves review under the Administrative Procedure Act, review is limited to the administrative record compiled by EPA. 5 U.S.C. § 706. Although the allegations of fact in the Complaint and any responses contained in an answer are not part of the record on judicial review, EPA responds to the numbered paragraphs of Mr. Eoff’s complaint below.

INTRODUCTION

1. Paragraph 1 characterizes Plaintiff's Complaint and no response is required. To the extent a response is required, these allegations are denied.

2. EPA admits that on June 10, 2013 it issued an administrative compliance order (hereinafter, "Administrative Order") under the Clean Water Act to Plaintiff. *See* Compl., Att A (Dkt. #1). The remaining allegations in Paragraph 2 purport to characterize that Administrative Order, which speaks for itself and is the best evidence of its contents. To the extent Paragraph 2 is inconsistent with that Administrative Order, the allegations are denied.

3. The allegations in the first and third sentences of Paragraph 3 purport to characterize the Administrative Order, which speaks for itself and is the best evidence of its contents. To the extent the allegations in the first and third sentences of Paragraph 3 are inconsistent with that Administrative Order, the allegations are denied. EPA lacks sufficient knowledge or information to form a belief as to the truth of the allegations contained in the second sentence of Paragraph 3, and on that basis denies them. In addition, EPA denies that Plaintiff was not provided an opportunity to be heard.

4. Paragraph 4 characterizes Plaintiff's Complaint and no response is required. To the extent a response is required, these allegations are denied.

JURISDICTION AND VENUE

5. Paragraph 5 states conclusions of law to which no response is required. To the extent a response is required, these allegations are denied.

6. EPA admits the allegations in Paragraph 6.

PARTIES

7. EPA admits that Plaintiff owns the property that is the subject of this action. EPA lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 7, and on that basis denies them.

8. EPA admits the allegations in Paragraph 8.

9. EPA admits that Defendant Gina McCarthy is the Administrator of EPA. Gina McCarthy replaced Bob Perciasepe, who had been Acting Administrator of EPA. EPA further admits that the authority to issue the Administrative Order challenged in the present action was delegated by the Administrator to the Regional Administrator of Region 6, who has further delegated such authority to the Director of the Water Quality Protection Division of EPA Region 6. The remaining allegations in Paragraph 9 characterize Plaintiff's Complaint and no response is required. To the extent a response is required, these allegations are denied.

LEGAL BACKGROUND

10. The allegations in Paragraph 10 purport to characterize the Clean Water Act ("CWA"), a federal statute which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 10 are inconsistent with the CWA, the allegations are denied.

11. The allegations in Paragraph 11 purport to characterize the CWA, a federal statute which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 11 are inconsistent with the CWA, the allegations are denied.

12. The allegations in Paragraph 12 purport to characterize the CWA, a federal statute which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 12 are inconsistent with the CWA, the allegations are denied.

13. The allegations in Paragraph 13 purport to characterize the CWA, a federal statute which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 13 are inconsistent with the CWA, the allegations are denied.

14. The allegations in Paragraph 14 purport to characterize the CWA, a federal statute which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 14 are inconsistent with the CWA, the allegations are denied.

15. The allegations in Paragraph 15 purport to characterize a federal regulation, which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 15 are inconsistent with the cited regulation, the allegations are denied.

16. The allegations in Paragraph 16 purport to characterize a federal regulation, which speaks for itself and is the best evidence of its contents. To the extent the allegations in Paragraph 16 are inconsistent with the cited regulation, the allegations are denied.

17. The allegations in Paragraph 17 state conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

FACTUAL BACKGROUND

18. EPA admits that Plaintiff owns real property in Van Buren County, Arkansas. The remaining allegations in Paragraph 18 are so vague that EPA lacks sufficient knowledge or information to form a belief as to their truth, and on that basis denies them.

19. EPA admits that Plaintiff owns real property in Van Buren County, Arkansas that contains an area known as "Branch Hollow." EPA lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 19, and on that basis denies them.

20. EPA admits that Branch Hollow collects surface water runoff and drains into the South Fork Little Red River. EPA denies that Branch Hollow contains no named stream and that Branch Hollow does not contain a regularly flowing water body. United States Geological Survey maps identify “Branch Hollow” as an intermittent stream.

21. EPA denies the allegations in Paragraph 21. Plaintiff’s referenced property, including Branch Hollow, substantially affects the physical, chemical, and biological integrity of the South Fork Little Red River.

22. EPA admits that Plaintiff constructed an earthen dam across Branch Hollow, resulting in the creation of a large pond in Branch Hollow and the surrounding property. EPA lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 22, and on that basis denies them.

23. EPA admits that on June 10, 2013 it issued an Administrative Order to Plaintiff. *See Compl., Att A (Dkt. #1)*. The remaining allegations in Paragraph 23 purport to characterize that Administrative Order, which speaks for itself and is the best evidence of its contents. To the extent Paragraph 23 is inconsistent with that Administrative Order, the allegations are denied.

24. The allegations in Paragraph 24 purport to characterize an Administrative Order, which speaks for itself and is the best evidence of its contents. To the extent Paragraph 24 is inconsistent with that Administrative Order, the allegations are denied.

INJUNCTIVE RELIEF

25. Paragraph 25 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

26. Paragraph 26 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

27. Paragraph 27 characterizes Plaintiff's request for relief and requires no response. To the extent a response is required, EPA denies that Plaintiff is entitled to the relief requested, or to any relief whatsoever.

28. Paragraph 28 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

29. Paragraph 29 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

DECLARATORY RELIEF

30. Paragraph 30 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

31. Paragraph 31 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

32. Paragraph 32 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

33. Paragraph 33 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

JUDICIAL REVIEW OF AGENCY DETERMINATION

34. Paragraph 34 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

35. The allegations in Paragraph 35 purport to characterize EPA's Clean Water Act Jurisdiction Guidance Memo, which speaks for itself and is the best evidence of its contents. To the extent Paragraph 35 is inconsistent with that guidance document, the allegations are denied.

36. The allegations in Paragraph 36 purport to characterize EPA's Clean Water Act Jurisdiction Guidance Memo, which speaks for itself and is the best evidence of its contents. To the extent Paragraph 36 is inconsistent with that guidance document, the allegations are denied.

37. The allegations in Paragraph 37 are vague and EPA lacks sufficient knowledge or information to form a belief as to the truth of the allegations, and on that basis denies them. EPA notes that United States Geological Survey maps identify "Branch Hollow" as an intermittent stream.

38. Paragraph 38 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

ALLEGED CONSTITUTIONAL VIOLATION (Procedural Due Process)

39. Paragraph 39 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

40. Paragraph 40 sets forth Plaintiff's request for relief and requires no response. To the extent a response is required, EPA denies that Plaintiff is entitled to the relief requested, or to any relief whatsoever.

ALLEGED CONSTITUTIONAL VIOLATION (Substantive Due Process)

41. The allegations in the first sentence of Paragraph 41 purport to characterize section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), which speaks for itself and is the best evidence of its contents. To the extent Paragraph 41 is inconsistent with the CWA, the allegations are denied. EPA admits that on June 10, 2013, it issued an Administrative Order to Plaintiff under authority of CWA section 309(a).

42. Paragraph 42 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

43. Paragraph 43 states conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

PRAYER FOR RELIEF

The remainder of the Complaint sets forth prayers for relief and requires no response. To the extent a response is required, EPA denies that Plaintiff is entitled to the relief sought, or to any relief whatsoever.

GENERAL DENIAL

With respect to allegations that characterize or summarize the contents of documents attached as Exhibits to the Complaint, EPA denies any allegations contrary to the plain language and meaning of the documents. With respect to all other allegations, EPA denies each and every allegation of the Complaint not specifically admitted in its responses to the Complaint's specific Paragraphs, set forth above. To the extent that any allegations of fact in the Complaint remain unanswered, EPA denies such allegations. In addition, EPA states that its Administrative Order was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in excess of statutory jurisdiction, authority or limitations, or short of statutory right, or without observance of procedure required by law and is supported by substantial evidence and was made in accordance with the CWA and applicable guidelines and regulations.

WHEREFORE, EPA requests the Court to enter judgment in its favor on Mr. Eoff's Complaint and grant it all other appropriate relief.

COUNTERCLAIM

The United States of America, by and through its undersigned attorney, by the authority of the Attorney General, alleges as follows for its counterclaim against Mr. Eoff:

NATURE OF THE ACTION

1. The counterclaim is asserted under sections 309(b) and (d) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319(b) and (d), to obtain injunctive relief and civil penalties against Mr. Eoff for the discharge of pollutants into waters of the United States in Van Buren County, Arkansas, without a permit authorized by CWA section 404, 33 U.S.C. § 1344, in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

2. In this action, the United States seeks (1) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of CWA section 301(a), 33 U.S.C. § 1311(a); (2) to require Mr. Eoff, 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 Mr. Eoff to pay civil penalties as provided in 33 U.S.C. § 1319(d).

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this counterclaim pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

4. Venue is proper in this District pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because Mr. Eoff resides in this District, the subject property is located in this District, and the cause of action alleged herein arose in this District.

5. Notice of the commencement of this action has been provided to the State of Arkansas pursuant to CWA section 309(b), 33 U.S.C. § 1319(b).

THE PARTIES

6. The Counterclaim Plaintiff in this action is the United States of America.

Authority to bring this action is vested in the United States Department of Justice pursuant to 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

7. Counterclaim Defendant Dan Eoff is an individual who resides in Clinton, Van Buren County, Arkansas. Mr. Eoff owns real property in Van Buren County located along the South Fork Little Red River.

8. At all times relevant to the Counterclaim, Mr. Eoff, either in his personal capacity and/or in his capacity as trustee of Shake Rag Trust, owned or controlled the real property – identified by tax parcel numbers 0000-09941-0200, 0000-06934-0000, 1965-00063-0000, 1965-00044-000 and 0000-06826-0000 and located in Section 25, T 11, R 15, Section 30, T 11, R 14, Section 15, T 11, R 14, Section 15, T 11, R 14 and Section 22, T 11, R 14 – near Clinton, Van Buren County, Arkansas that is the subject of this Counterclaim, and/or otherwise controlled the activities that occurred on these properties.

STATUTORY AND REGULATORY BACKGROUND

9. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

10. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

11. Pursuant to a 1989 Memorandum of Agreement between the Department of the Army and EPA, the Corps and EPA jointly share enforcement responsibilities for CWA section 404, 33 U.S.C. § 1344(a).

12. CWA section 502(5), 33 U.S.C. § 1362(5), defines “person” to include individuals and corporations.

13. CWA section 502(12), 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.”

14. CWA section 502(6), 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, dredged spoil, rock, sand and cellar dirt. Fill material constitutes a pollutant within the statutory definition. *U.S. v. Tull*, 615 F. Supp. 610, 622 (E.D. Va. 1983), *aff’d* 769 F.2d 182 (4th Cir. 1985), *rev’d on other grounds and remanded*, 481 U.S. 412 (1987). In addition, Corps regulations define fill as “[a]ny material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body.” 33 C.F.R. § 323.2(e).

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

16. The Corps and EPA share responsibility for implementing and enforcing the CWA, and have promulgated substantively equivalent regulatory definitions of the term “waters of the United States.” *See* 33 C.F.R. § 328.3(a) (Corps definition); 40 C.F.R. § 230.3(s) (EPA definition). The definition encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, 33 C.F.R. § 328.3(a)(1); “tributaries” of traditional navigable waters, *id.* § 328.3(a)(5); and wetlands that are “adjacent” to other covered waters, *id.* § 328.3(a)(7).

17. CWA section 502(14), 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.” Excavators, bulldozers, and other earthmoving equipment are also “point sources” under the CWA. *See, e.g., United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 204 (D. Mont. 1990); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D.Va.1983) aff’d 769 F.2d 182 (1985) rev’d on other grounds 481 U.S. 412 (1987).

18. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

GENERAL ALLEGATIONS

19. Mr. Eoff is a “person” within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

20. Commencing in approximately 2012, Mr. Eoff and/or persons acting on his behalf, discharged dredged or fill material into waters of the United States without a permit under CWA section 404 at four locations near Clinton, Van Buren County, Arkansas.

21. The four locations referenced above in Counterclaim Paragraph 20 are described below and illustrated on the attached map. *See* Att. A.

- a. Site One: Gravel low-water crossing of the South Fork Little Red River.
- b. Site Two: Channelization of approximately 800 linear feet of West Hollow approximately 200 yards north (downstream) of Site One and 200 feet upstream from the mouth of West Hollow and the South Fork Little Red River.

- c. Site Three: Diversion levee in the South Fork Little Red River, located within the city limits of Clinton, AR. The work appears to have occurred partially below the ordinary high water mark of the South Fork Little Red River.
- d. Site Four: Earthen dam constructed at the mouth of Branch Hollow as it enters the South Fork Little Red River. The earthen dam is approximately 30 feet high and more than 400 feet in length, and resulted in the filling of approximately 1,200 linear feet of Branch Hollow. The western side toe of the dam has fill below the ordinary high water mark of the South Fork Little Red River. Plaintiff states that the resulting reservoir created by the dam is 13 acres in size. *See* Compl. ¶ 3.

22. Mr. Eoff owns, possesses, or controls real property identified as tax parcel number 0000-09941-0200 in Van Buren County, Arkansas, located at Section 25, T 11, R 15. This parcel contains the violation described in Counterclaim Paragraph 21 as “Site One.”

23. Mr. Eoff owns, possesses, or controls real property identified as tax parcel number 0000-06934-0000 in Van Buren County, Arkansas, located at Section 30, T 11, R 14. This parcel contains the violation described in Counterclaim Paragraph 21 as “Site Two.”

24. Mr. Eoff owns, possesses, or controls real property identified as tax parcel number 1965-00063-0000 in Van Buren County, Arkansas, located at Section 15, T 11, R 14. This parcel contains the violation described in Counterclaim Paragraph 21 as “Site Three.”

25. Mr. Eoff owns, possesses, or controls real property identified as tax parcel numbers 1965-00044-000 and 0000-06826-0000 in Van Buren County, Arkansas, located respectively at Section 15, T 11, R 14 and Section 22, T 11, R 14. These parcels contain the violation described in Counterclaim Paragraph 21 as “Site Four.”

Timeline

26. On March 8, 2012, Mr. Eoff submitted a CWA section 404 permit application to the United States Army Corps of Engineers (“Corps”) requesting authorization for construction of a dam 300 feet long, 24 feet tall, and 200 feet wide and a pond on Branch Hollow.

27. On March 16, 2012, the Corps sent a letter to Mr. Eoff acknowledging receipt of the application and stating that it is unlawful to start work without a Department of the Army permit if one is required.

28. Between May and August 2012, Mr. Eoff and/or persons acting on his behalf discharged dredged or fill material into waters of the United States without a permit under CWA section 404 at the four locations described in Counterclaim Paragraph 21.

29. On information and belief, Mr. Eoff and/or persons acting on his behalf discharged dredged or fill material into West Hollow at Site Two starting in approximately 2007.

30. On August 7, 2012, the Corps conducted a field inspection of the four locations described above in Counterclaim Paragraph 21. Mr. Eoff was present during the inspection.

31. On August 23, 2012, the Corps issued a letter to Mr. Eoff directing him to cease and desist from further work below the ordinary high-water mark of the South Fork Little Red River and its tributaries, or any other waters of the United States. The Corps informed Mr. Eoff that the construction of the earthen dam was considered a flagrant violation and that the work has had significant adverse impacts, including the potential to release excessive amounts of sediment into the South Fork Little Red River and the threat to habitat for two federally listed endangered species, the yellowcheek darter fish and the speckled pocketbook mussel.

32. On June 10, 2013, the United States Environmental Protection Agency issued to Mr. Eoff an Administrative Order, Docket No. CWA-06-21-3-2714, pursuant to section 309 of

the CWA, for discharging dredged and/or fill material into Branch Hollow without a permit as required by section 404 of the CWA. *See* Compl., Att. A. The Administrative Order directed Mr. Eoff to cease any further unauthorized discharges, and to remove the unauthorized fill associated with the construction of the large earthen dam.

33. By letter dated June 21, 2013, counsel for Mr. Eoff informed EPA that Mr. Eoff planned to challenge the Administrative Order.

34. To date, Mr. Eoff has not complied with the Administrative Order.

35. On June 12, 2013, the Arkansas Natural Resources Commission (“ANRC”) issued a Notice of Violation to Mr. Eoff for failure to comply with Ark. Code Ann. 15-22-201, *et seq.*, and the Rules Governing Design and Operation of Dams. After holding a hearing, the ANRC issued an Order on July 17, 2013 (“ANRC July 2013 Order”) finding that Mr. Eoff had constructed the earthen dam in a Federal Emergency Management Agency floodway without conducting necessary studies or submitting engineering reports prior to construction, and that the dam does not adequately protect the lives and property of persons downstream from the dam or persons drinking water provided by the Clinton Public Water System. The ANRC July 2013 Order directs Mr. Eoff to remove the earthen dam at his expense, in accordance with plans approved by the ANRC Chief Engineer and the ANRC Dam Safety Supervisor.

36. Mr. Eoff has challenged the ARNC July 2013 Order in the Circuit Court of Van Buren County, Arkansas. *See Eoff v. Arkansas Natural Resources Commission*, Circuit Court of Van Buren County, 1st Division, Case No. 71CV-13-113, filed August 7, 2013.

Discharges

37. Mr. Eoff owned or otherwise controlled the land on which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

38. At Site One, the continued maintenance by Mr. Eoff and/or persons acting on his behalf of the gravel low-water crossing of the South Fork Little Red River resulted in discharges of dredged or fill material due to pushing gravel and grading across the stream channel to provide a smooth road crossing.

39. At Site Two, Mr. Eoff and/or persons acting on his behalf discharged approximately 600 cubic yards of gravel fill in West Hollow, resulting in the channelization of approximately 800 linear feet of West Hollow.

40. At Site Three, Mr. Eoff and/or persons acting on his behalf discharged dredged or fill material in the South Fork Little Red River, resulting in the construction of a diversion levee at the upstream end of a floodplain over-flow channel. The levee is approximately 100 feet long and 10 feet high. The upstream base of the levee appears to be 6 to 12 inches below the ordinary high water mark of the South Fork Little Red River.

41. At Site Four, Mr. Eoff and/or persons acting on his behalf constructed an earthen dam approximately 30 feet high and more than 400 feet in length, resulting in the discharge of fill material into approximately 1,200 feet of Branch Hollow. The western side toe of the dam has fill below the ordinary high water mark of the South Fork Little Red River. Plaintiff states that the resulting reservoir is approximately 13 acres in size. Compl. ¶ 3.

42. The dredged or fill material that Mr. Eoff and/or persons acting on his behalf caused to be discharged at the four locations described in Counterclaim Paragraph 21 includes, among other things, dirt, spoil, rock and sand, all of which constitute “pollutants” as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

43. Mr. Eoff and/or persons acting on his behalf used mechanized earth-moving equipment to accomplish the discharges at the four locations described in Counterclaim

Paragraph 21. This equipment constitutes “point sources” as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

44. Mr. Eoff did not obtain a permit from the Secretary of the Army, acting through the Corps of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344.

Waters of the United States

45. The South Fork Little Red River, at the four violation locations described above in Counterclaim Paragraph 21, is a continuously flowing body of water that possess a bed, bank, established ordinary high water mark, year-round flows, and an average width of over 70 feet. From here it flows downstream to its confluence with Greers Ferry Lake (approximately 5 miles from Sites Three and Four, and approximately 7 miles from Sites One and Two), at which point it has been designated by the Corps as a “traditional navigable water” for purposes of Section 10 of the Rivers and Harbors Act because it has been used in the past, is currently used, and is susceptible to use in interstate commerce.

46. The South Fork Little Red River has been designated as an Ecologically Sensitive Waterbody under Arkansas Pollution Control and Ecology Commission Regulation 2. It is also habitat for two endangered species: the yellowcheek darter (*Etheostoma morrei*) and the speckled pocketbook mussel (*Lampsilis streckeri*).

47. The addition of sediments to the South Fork degrades water quality and can bury spawning and foraging areas of small fish and smother the invertebrates they feed on and negatively impact the habitat of the endangered species.

48. The discharges described in Counterclaim Paragraphs 37-41 disrupted habitat for the yellowcheek darter and the speckled pocketbook mussel.

49. The South Fork Little Red River, including the portion that contains the locations of the four violation sites described above in Counterclaim Paragraph 21, substantially affects the physical, chemical, and biological integrity of the downstream portion of the South Fork Little Red River that has been designated as a traditional navigable water, and as such, possesses a “significant nexus” with that water.

50. Branch Hollow is named on United States Geological Survey maps and is indicated as an intermittent stream.

51. During the Corps’ August 2012 site inspection of the four locations described in Counterclaim Paragraph 21, Corps field staff observed that Branch Hollow possessed a defined bed and bank and ordinary high water mark.

52. Branch Hollow is a relatively permanent water that flows directly into the South Fork Little Red River.

53. Branch Hollow runs through an expansive wooded area. Branch Hollow and the wooded riparian corridor it creates provide aquatic habitat for wildlife.

54. Branch Hollow drains a 1,320-acre watershed and receives runoff from the surrounding hillsides and two headwater tributaries.

55. The construction of the dam across Branch Hollow has the potential to increase the velocity and volume of water and sediment entering the South Fork Little Red River.

56. Branch Hollow substantially affects the physical, chemical, and biological integrity of the portion of the South Fork Little Red River designated as a traditional navigable water, and as such possesses a “significant nexus” with that water.

57. West Hollow is named on United States Geological Survey maps and is indicated as an intermittent stream.

58. West Hollow is a relatively permanent water that flows directly into the South Fork Little Red River.

59. West Hollow drains a 1,851-acre watershed and receives runoff from the surrounding hillsides and three headwater tributaries within a densely forested area.

60. The channelization of West Hollow (Site Two) has the potential to increase the velocity and volume of water and sediment entering the South Fork Little Red River.

61. West Hollow substantially affects the physical, chemical, and biological integrity of the portion of the South Fork Little Red River designated as a traditional navigable water, and as such possesses a “significant nexus” with that water.

62. The South Fork Little Red River, Branch Hollow, and West Hollow are waters of the United States and navigable waters under CWA section 502(7), 33 U.S.C. § 1362(7).

Claim for Relief:

Discharge Into Waters of the United States Without a Section 404 Permit

63. The United States repeats and realleges the allegations set forth in Counterclaim Paragraphs 1 through 62.

64. Commencing in approximately 2012, at times better known to Mr. Eoff, Mr. Eoff and/or persons acting on his behalf discharged dredged or fill material into waters of the United States in Van Buren County, Arkansas.

65. The South Fork Little Red River, Branch Hollow, and West Hollow are “waters of the United States” within the meaning of the Clean Water Act and the regulations promulgated thereunder.

66. Mr. Eoff did not obtain a permit from the Secretary of the Army for the discharges of this dredged or fill material into waters of the United States as required by section 404 of the CWA, 33 U.S.C. 1344.

67. Mr. Eoff has violated and continues to violate CWA section 301(a), 33 U.S.C. § 1311(a), by his unauthorized discharges of dredged or fill material into waters of the United States at the four locations described above in Counterclaim Paragraph 21.

68. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

69. Under CWA Sections 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, Defendants are liable for a civil penalty of up to \$32,500 (\$37,500 for violations occurring after January 12, 2009) per day for each violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

70. Unless enjoined, Mr. Eoff is likely to continue to discharge dredged or fill material into and/or to allow dredged or fill material to remain in the waters of the United States described in Counterclaim Paragraph 21, in violation of CWA section 301, 33 U.S.C. § 1311.

PRAYER FOR RELIEF

WHEREFORE, the Counterclaim Plaintiff, the United States of America, respectfully requests that this Court order the following relief:

That Mr. Eoff be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the Clean Water Act;

That Mr. Eoff be enjoined to undertake measures, at Mr. Eoff's own expense and at the direction of EPA, to effect complete restoration of the impacted waters and/or to conduct mitigation for irreversible environmental damage, as appropriate;

That Mr. Eoff be assessed pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA section 301(a), 33 U.S.C. § 1311(a), at each of the four sites;

That the United States be awarded costs and disbursements in this action; and

That this Court grant the United States such other relief as the Court may deem just and proper.

Dated: September 13, 2013

Respectfully submitted,

ROBERT G. DREHER
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/s/ Christina L. Richmond
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CERTIFICATE OF SERVICE

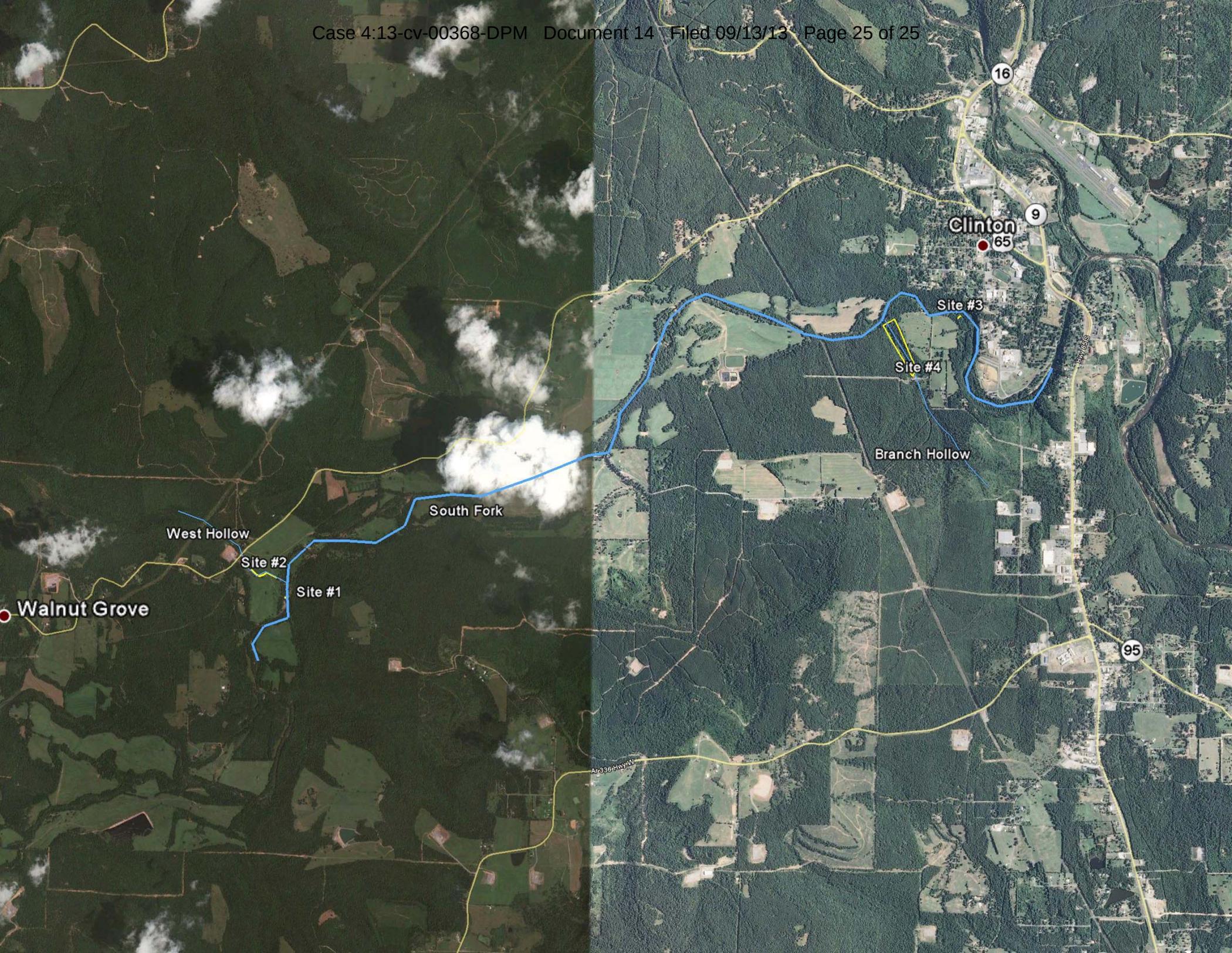
I hereby certify that on September 13, 2013, I electronically filed the foregoing document with the Clerk of the Court by using the Court's CM/ECF system. Service of all counsel of record was effected through the CM/ECF system.

Dated: September 13, 2013

/s/ Christina L. Richmond

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ATTACHMENT A



West Hollow

Site #2

Site #1

South Fork

Branch Hollow

Site #3

Site #4

Clinton
65

16

9

95

Walnut Grove