

KAREN BUDD-FALEN (WY Bar #5-2467)
karen@buddfalen.com
Budd-Falen Law Offices, L.L.C.
P.O. Box 346
Cheyenne, Wyoming 82003
(307) 632-5105/FAX: (307) 637-3891

DANIEL B. FRANK (WY Bar #5-2978)
frank@tribcsp.com
Frank Law Office, P.C.
519 East 18th Street
Cheyenne, Wyoming 82001
(307) 432-0520/FAX: (307) 632-0159

M. REED HOPPER (CA Bar #131291)*
mrh@pacificalegal.org
JONATHAN WOOD (CA Bar #285229)*
jw@pacificalegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
(916) 419-7111/FAX: (916) 419-7747
**Pro Hac Vice Pending*

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

ANDY JOHNSON,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; and GINA McCARTHY,
in her official capacity as Administrator of the United
States Environmental Protection Agency,

Defendants.

) No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Introduction

1. In 2013, Andy Johnson created a stock pond by damming a small creek that runs across his private property in Fort Bridger, Wyoming. In addition to serving its primary purpose of providing water for Johnson's livestock, the pond confers numerous incidental environmental benefits. It provides habitat for fish and wildlife, contributes to the growth of wetlands and riparian areas, and filters the water that passes through it.

2. This work was exempt from the Clean Water Act, pursuant to its exemption for the "construction or maintenance of farm or stock ponds." 33 U.S.C. § 1344(f)(1)(C). Nonetheless, in January, 2014, the Environmental Protection Agency (EPA) issued a compliance order,¹ asserting that Johnson violated the Clean Water Act by building this stock pond without first obtaining a federal permit. The order commands that he restore the property to its prior condition pursuant to a federally approved restoration and mitigation plan. And it threatens him with fines of up to \$37,500 per day for failing to comply with the order. In the year and a half that Andy and his environmental consultant have spent trying to explain to EPA why this stock pond is exempt, that potential fine has already grown to nearly \$20 million and will only continue to grow.

3. To remove the threat of these ever mounting fines, Johnson requests injunctive and declaratory relief under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.* See *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012). He seeks a declaration that EPA's compliance order is null and void because it was issued without jurisdiction. Further, he seeks to enjoin EPA from enforcing the order.

¹ Attachment 1 is an accurate copy of the compliance order.

Jurisdiction and Venue

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

5. Venue is proper under 28 U.S.C. § 1391(e)(1)(B), because the property that is the subject of the action is situated in this district.

Parties

6. Andy Johnson is an owner of the property that is the subject of this action. He has owned the property for eleven years and throughout that time has raised livestock on it. Before constructing the stock pond, Johnson obtained all the necessary state and local permits. He performed the work himself and took every care to maximize the pond's incidental environmental benefits.

7. The United States Environmental Protection Agency (EPA) is an agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. It is the agency with primary responsibility for the enforcement of the Clean Water Act.

8. Gina McCarthy is the Administrator of EPA, and oversees EPA's enforcement of the Clean Water Act. She is sued in her official capacity only.

Legal Background

9. In 1972, Congress enacted the modern-day Clean Water Act to regulate the discharge of pollutants into the navigable waters of the United States.

10. Section 301(a), 33 U.S.C. § 1311(a), generally prohibits the unpermitted discharge of dredge and fill material into the navigable waters of the United States.

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

12. EPA has promulgated regulations to define “waters of the United States.” *See* 40 C.F.R. § 230.3.²

13. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the issuance of federal permits for the discharge of dredge and fill material, *i.e.*, rocks or soils, into the navigable waters of the United States.

14. Subsection “f” of Section 404, 33 U.S.C. § 1344(f), contains a list of activities that result in discharges of dredge and fill material that are exempt from regulation under the Clean Water Act. This list includes discharges “for the purpose of construction or maintenance of farm or stock ponds.” 33 U.S.C. § 1344(f)(1)(C).

15. The only way an exempt activity can become subject to the act’s requirements is if it both (a) is for the purpose of bringing an area of the navigable waters into a use to which it was not previously subject, and (b) impairs the flow or circulation or reduces the reach of navigable waters. 33 U.S.C. § 1344(f)(2).

16. Section 309(a), 33 U.S.C. § 1319(a), authorizes EPA to issue compliance orders for violations of the act, including unpermitted discharges of dredge and fill material into the navigable waters of the United States.

17. The regulations in place at the time the compliance order was issued provided that navigable waters, interstate waters, intrastate waters with uses that could affect interstate or foreign

² EPA recently adopted a new regulation to define “waters of the United States,” which have been incorporated into 40 C.F.R. Section 230.3. 80 Fed. Reg. 37,054 (June 29, 2015). However, the compliance order was issued under the prior regulation. The definition of “waters of the United States” at issue here can be found at 38 Fed. Reg. 34,164 (Dec. 11, 1973).

commerce, impoundments of waters, tributaries of waters, territorial seas, and wetlands adjacent to other waters that are not themselves wetlands were considered “waters of the United States.”

18. In 2006, the Supreme Court held in a split decision that the statute does not provide EPA with jurisdiction over certain wetlands that are connected to non-navigable tributaries of traditional navigable waters. *See Rapanos v. United States*, 547 U.S. 715 (2006). The judgment of the Court was announced by Justice Scalia, who authored a plurality opinion joined by three other justices. Justice Kennedy wrote separately, concurring only in the judgment.

19. The *Rapanos* plurality opinion set forth two jurisdictional tests: one for tributaries of navigable waters, and one for wetlands adjacent thereto. With respect to tributaries, the *Rapanos* plurality concluded that “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes’” are subject to the Act. *Rapanos*, 547 U.S. at 739 (plurality opinion) (quoting Webster’s New International Dictionary 2882 (2d ed. 1954)). Consequently, the Act does not apply to “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Rapanos*, 547 U.S. at 739 (plurality opinion).

20. In contrast to the plurality, Justice Kennedy’s concurrence approaches the jurisdictional question under the rubric of “significant nexus.” A tributary is jurisdictional if, based on the tributary’s volume of flow, proximity to navigable waters, or other relevant considerations, it and any associated wetlands “perform important functions for an aquatic system incorporating navigable waters.” *Id.* at 780-81 (Kennedy, J., concurring in the judgment). A corollary of this test is that, if the water has only an insignificant effect on the downstream traditional navigable waterway, there is no jurisdiction. *See id.* at 780 (Kennedy, J., concurring in the judgment).

Factual Allegations

21. Andy Johnson owns an 8-acre parcel at 686 County Road 260, Fort Bridger, Wyoming 82933. The property contains both his home and surrounding land that he uses to raise various farm animals, including horses and cattle. The property lies in a rural area primarily made up of farm and ranch land.

22. A small perennial stream segment called Six Mile Creek crosses the property, near where it borders County Road 260. The water that runs through this stream is return flow from agricultural runoff. Previously, the site along this stream contained neither adjacent wetlands, riparian vegetation, nor any significant wildlife or fisheries habitat. The creek ultimately empties into a controlled irrigation canal and reservoir, and the water is diverted for agricultural use.

23. Historically, the stretch of Six Mile Creek that crosses Johnson's property has been used to water livestock, both his and prior owners'. However, the creek did not provide a sufficiently reliable and safe source of water. In particular, the steep incline down to the water during winter and periods of low flow created a risk of injury for the animals.

24. In order to provide more reliable and safe access to drinking water for these animals, Johnson applied for a stock pond permit from the State of Wyoming. During the process of applying for that permit, he consulted with state officials regarding how best to construct it. Together they came up with ways to minimize any incidental impacts of the pond on the environment and maximize its incidental benefits.

25. The State of Wyoming State Engineer's Office issued a permit for Johnson to construct his pond.³ The permit expressly stated that the pond is "for stock watering purposes." The permit also requires the pond to include a spillway that will maintain downstream flow. With this

³ Attachment 2 is an accurate copy of the state permit.

spillway, water flows out of the pond at the same rate that it flows into the pond upstream, once the pond initially fills.

26. Having obtained the state permit, Johnson constructed the stock pond on his private property during the Summer of 2012. The dam was created using earth fill and the upstream face is buffered by one-foot-thick rock riprap.

27. In September, 2012, the Army Corps of Engineers contacted Johnson, investigating the possibility that the stock pond violates the Clean Water Act.

28. In his initial discussion with the Corps, Johnson explained that he had no idea that the Clean Water Act might potentially apply and that, if he needed a federal permit, he would certainly work with the Corps. Understanding the Clean Water Act to be primarily focused on protecting the environment, he also explained that he built his pond intending it to be environmentally beneficial, including as habitat for fish.

29. On January 30, 2014, EPA issued a compliance order against Johnson, asserting that the pond is in violation of the Clean Water Act.⁴ The compliance order requires Johnson to conduct restoration and mitigation activities and hire a stream or wetland restoration expert to prepare a plan to do so. He must also allow EPA, U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service, or any of their contractors, to access his private property to inspect and monitor it.

30. The compliance order also explains that fines of up to \$37,500 can be imposed for every day that Johnson does not comply with its dictates.

31. After receiving the compliance order, Johnson consulted with Ray and Susan Kagel regarding the need for a permit and to prepare a restoration and mitigation plan.

⁴ Attachment 1 is an accurate copy of the compliance order.

32. Ray and Susan Kagel are both experts in stream and wetland restoration and mitigation. They both hold graduate degrees in biological sciences and have substantial experience in stream and wetland restoration and mitigation. Ray Kagel was a senior regulatory project manager and enforcement officer for the U.S. Army Corps of Engineers. At the Corps, he was responsible for reviewing and approving wetland and stream restoration and mitigation plans for the federal government, like the one requested from Johnson.

33. Ray and Susan Kagel inspected the site twice and prepared initial and final reports on the pond and its environmental impacts.⁵

34. The Kagels' final report found that, prior to the construction of the stock pond, a small perennial stream crossed the property, with no adjacent wetlands. Because the stream crosses through historically grazed agricultural lands, its steep banks were subject to substantial erosion, leading to increased turbidity and degraded water quality. There were also little to no riparian areas, wetlands, or habitat for fish and wildlife around the stream.

35. The Kagels' final report also confirmed that the construction of the pond had numerous incidental environmental benefits. These include the creation of wetlands, riparian vegetation areas, and habitat for migratory birds, fish, and wildlife. The pond also allows sediment and other suspended particles to settle before the now-cleaner water continues flowing downstream. Ultimately, the Kagel report concluded that the pond's environmental impact is positive, with no countervailing negative impacts.

⁵ Attachment 3 is an accurate copy of the Kagels' initial report. Attachment 4 is an accurate copy of the Kagels' final report.

36. The Kagels' initial and final reports also noted that the primary purpose of the stock pond is to provide a safe and reliable source of water for livestock, consequently it is exempt from the Clean Water Act.

37. Having learned that the stock pond was exempt from the Clean Water Act, Johnson informed EPA that he did not need a federal permit.

38. On May 7, 2014, Johnson shared the Kagels' initial report with EPA, documenting the ponds exempt status and numerous environmental benefits. On May 5, 2015, Johnson shared the Kagel's final report with EPA, confirming its initial findings.

39. Despite receiving explanations that the environmentally friendly stock pond is exempt from the Clean Water Act, EPA has not withdrawn the compliance order, allowing the threatened fines to continue to mount.

Allegations Supporting Injunctive Relief

40. Johnson realleges each and every allegation contained in Paragraphs 1 through 39 and incorporates them by reference.

41. If a permanent injunction does not issue enjoining EPA from enforcing the compliance order, Johnson will be irreparably harmed. He is currently and continuously injured by the order. Its issuance and ongoing threat of substantial daily fines forces him to alter how he uses and enjoys his private property and attempts to coerce him into removing his stock pond, despite the lack of any violation of the Clean Water Act. Specifically, as a result of the compliance order and its threat of enforcement, Johnson has suffered and will continue to suffer a diminution in the value of his land and its available uses.

42. Johnson has no plain, speedy, and adequate remedy at law.

43. If not enjoined by this Court, EPA will continue to threaten to enforce the compliance order against Johnson, and the coercive daily fines will continue to mount, in derogation of Johnson's rights.

44. Injunctive relief is, therefore, appropriate to resolve this controversy.

Allegations Supporting Declaratory Relief

45. Johnson realleges each and every allegation contained in Paragraphs 1 through 44 and incorporates them by reference.

46. An actual and substantial controversy exists between Johnson and EPA over EPA's failure to comply with the Clean Water Act and the APA in determining that Johnson's construction of a stock pond on his private property is subject to the Clean Water Act.

47. This case is currently justiciable because EPA's failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Johnson. He is currently and continuously injured by the issuance of the compliance order.

Claim for Relief

(Violation of Administrative Procedure Act, 5 U.S.C. § 706(2))

48. Johnson realleges each and every allegation contained in Paragraphs 1 through 47 and incorporates them by reference.

49. Johnson's construction of a stock pond on his private property, and any associated deposit of dredge and fill materials, is exempt from regulation under the Clean Water Act. Johnson did not change the use of this water, which has long been a source of water for his and prior owners' livestock. Nor did he impair the flow or circulation or reduce the reach of any navigable water.

50. Johnson's construction of a stock pond is also beyond the reach of the Clean Water Act because six-mile creek is not a "water of the United States." The water that flows over

Johnson's property is return flow from upstream agricultural users as it makes its way to a controlled irrigation canal and reservoir. It is not a tributary of any traditional navigable water nor is there any significant nexus between it and any traditional navigable waters.

51. EPA's compliance order—which determines that Johnson's construction of a stock pond on his private property violated the Clean Water Act—is therefore arbitrary and capricious, and contrary to law. *See* 5 U.S.C. § 706(2).

52. The compliance order is a final agency action subject to judicial review. *See* 5 U.S.C. §§ 702, 704.

53. Despite receiving evidence demonstrating that the environmentally friendly stock pond is exempt from the Clean Water Act, EPA has not withdrawn the compliance order. Instead, it has allowed the potential fines to continue to grow.

54. EPA's failure to withdraw the compliance order in light of the pond's exempt status is agency action unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1).

Prayer for Relief

Johnson respectfully requests relief as follows:

1. A declaration that his construction of a stock pond on his private property is exempt from the Clean Water Act, that the stream that crosses his property is not subject to the Clean Water Act, and that the compliance order is null and void;
2. A declaration that the compliance order is arbitrary, capricious, and contrary to law under the Administrative Procedure Act;
3. An injunction enjoining EPA from enforcing the compliance order;
4. An award of attorneys' fees, expenses, and costs; and,

5. Any other relief the Court deems just and proper.

DATED: _____, 2015.

Respectfully submitted,

M. REED HOPPER*
CA Bar #131291
JONATHAN WOOD*
CA Bar #285229
Pacific Legal Foundation
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
(916) 419-7111/FAX: (916) 419-7747
E-mail: mrh@pacificlegal.org
E-mail: jw@pacificlegal.org
**Pro Hac Vice Pending*

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WY Bar #5-2467
Budd-Falen Law Offices, L.L.C.
P.O. Box 346
Cheyenne, Wyoming 82003
(307) 632-5105/FAX: (307) 637-3891
E-mail: karen@buddfalen.com

DANIEL B. FRANK
WY Bar #5-2978
Frank Law Office, P.C.
519 East 18th Street
Cheyenne, Wyoming 82001
(307) 432-0520/FAX: (307) 632-0159
E-mail: frank@tribcsp.com

Attorneys for Plaintiff