

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

ALEX MADONNA, an INDIVIDUAL, dba)	Master File No. CV 01-07515-LGB
MADONNA CONSTRUCTION CO.,)	(Ex); CV 02-00092-LGB(Ex)
)	
Plaintiff,)	
)	[PROPOSED] CONSENT DECREE
v.)	
)	
UNITED STATES ARMY CORPS OF ENGINEERS,)	
et al.)	
Defendants.)	
)	
This Document Relates To: All Actions)	

CONSENT DECREE

WHEREAS, the United States of America, on behalf of the United States Army Corps of Engineers, (“United States”) filed the Complaint in CV 02-00092 LGB (“U.S. Complaint”) against Alex Madonna, an individual, dba Madonna Construction Co. (“Madonna”), alleging that Defendant violated Sections 301(a) and 404(s) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311(a) and 1344(s);

WHEREAS, the U.S. Complaint alleges that Madonna 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 sites located in San Luis Obispo, California (the “Sites”) and more fully described in the U.S. Complaint, without authorization by the United States Department of the Army (“the Corps”);

WHEREAS, the U.S. Complaint alleges that Madonna violated CWA Section 404(s) by discharging pollutants into waters of the United States in violation of a permit issued under section 404 of the CWA;

WHEREAS, the U.S. Complaint 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 enjoin the discharge of pollutants into waters of the United States in violation of a permit issued under section 404 of the CWA, 33 U.S.C. § 1344; (3) to require Madonna, at his own expense and at the direction of the Corps, to restore and/or mitigate the damages caused by his unlawful activities; and (4) to require Madonna to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, Madonna filed a first amended complaint against the United States Army Corps of Engineers, Colonel Richard G. Thompson, District Engineer, United States Army Corps of Engineers, an Individual; and United States Department of the Army, Named as Thomas E. White, Secretary of the United States Department of the Army, (collectively “Corps”) in CV 01-07515 LGB (Ex) (the “Madonna Complaint”) alleging (1) violations of sections 706 and 558 of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 706 and 558, (2) breach of conservation easement, and (3) violation of Fifth Amendment due process rights;

WHEREAS, the Court consolidated the U.S. Complaint and the Madonna Complaint on March 11, 2002;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of both the U.S. Complaint and the Madonna Complaint;

WHEREAS, the United States and Madonna 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 U.S. Complaint and the Madonna Complaint; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the Complaints, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

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 AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties 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 Central District of California pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Madonna 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 U.S. Complaint 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. The obligations of this Consent Decree shall apply to and be binding upon Madonna and his agents, successors, assigns, employees, contractors, and consultants. In any action to enforce this Consent Decree against Madonna, Madonna shall not raise as a defense the failure of any person, firm or corporation who acquires the “Restoration Areas” and “Mitigation Site” (as defined in Appendix A appended hereto and incorporated herein by reference), or who is an agent, successor, assign, employee, contractor, or consultant of Madonna with responsibility for the matters addressed in this Consent Decree, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Restoration Areas and/or the Mitigation Site shall not alter or relieve Madonna of his obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the Restoration Areas and/or the Mitigation Site, Madonna shall provide written notice and a true copy of this Consent Decree to the successors in interest and shall simultaneously notify the Corps and the United States Department of Justice at the addresses specified in Section IX below that such notice has been given. As a condition to any such transfer, Madonna shall reserve all rights necessary to comply with the terms of this Consent Decree. If the transferee agrees to assume Madonna's obligations under this Consent Decree, the transferee shall be made a party to the Consent Decree through the modification procedure specified in Section XIII.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the U.S. Complaint and all claims alleged in the Madonna Complaint.

7. It is the express purpose of the United States in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Madonna to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. The parties acknowledge that Nationwide Permit 32, 67 Fed. Reg. 2020 (Jan. 15, 2002), including all of its conditions, applies to any unpermitted fill or structure that is allowed to

remain in place pursuant to this Consent Decree subject to Madonna's compliance with all remaining conditions in the Consent Decree. The parties further acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any discharge authorized by Nationwide Permit 32 shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

9. 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).

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

11. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree. Except as expressly provided in Paragraph 13, below, the United States releases and covenants not to take any administrative action against Madonna for any violations of the Clean Water Act alleged in the U.S. Complaint.

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

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

party.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

14. Madonna shall pay a civil penalty to the United States in the amount of FIFTEEN THOUSAND Dollars (\$15,000.00), within 30 days of entry of this Consent Decree.

15. Madonna 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 2001 V02068, U.S. Army Corps of Engineers, Los Angeles District, and the DOJ case number (90-5-1-4-16481). Payment shall be made in accordance with instructions provided to Madonna by the Financial Litigation Unit of the United States Attorney's Office for the Central District of California. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

16. Upon payment of the civil penalty required by this Consent Decree, Madonna shall provide written notice, at the addresses specified in Section IX of this Consent Decree, that such payment was made in accordance with Paragraph 16.

17. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VIII) 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.

INJUNCTIVE RELIEF

18. Madonna shall perform restoration and mitigation projects in accordance with the

terms and conditions described in the Restoration and Mitigation Plan in Appendix A of this Consent Decree.

19. Upon completion of the terms and conditions of the Restoration and Mitigation Plan, Madonna shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever the Restoration Areas or Mitigation Site, except as approved by the Corps.

20. To ensure that the Mitigation Site remains undisturbed and that all requirements of the Restoration and Mitigation Plan are observed as to the Restoration Areas, Madonna shall, within fifteen (15) days of entry of this Consent Decree, record a certified copy of this Consent Decree with the Recorder of Deeds Office, in San Luis Obispo, California. Thereafter, each deed, title, or other instrument conveying an interest in any property identified in the Restoration and Mitigation Plan shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree.

21. Except as in accordance with this Consent Decree, Madonna and his agents, successors and assigns are enjoined from discharging on or adjacent to the Sites any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

V. NOTICES AND OTHER SUBMISSIONS

22. Within 30 days after the deadline for completing any task set forth in the “Wetlands Mitigation and Restoration Tasks” contained in the Restoration and Mitigation Plan, Madonna shall provide the United States with written notice, at the addresses specified in Section IX of this Consent Decree, specifying whether or not that task has been completed.

23. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Restoration and Mitigation Plan.

24. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, Madonna 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 in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

25. Until termination of this Consent Decree, Madonna shall preserve and retain all records and documents now in their possession or control or which come into his possession or control that relate in any manner to the performance of the tasks identified in the Restoration and Mitigation Plan. Until five years after entry of this Consent Decree, Madonna shall also instruct his contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in the Restoration and Mitigation

Plan.

26. A. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Site, upon reasonable prior notice, to:

- 1) Monitor the activities required by this Consent Decree;
- 2) Verify any data or information submitted to the United States;
- 3) Obtain samples;
- 4) Inspect and evaluate Madonna's restoration and/or mitigation activities; and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from Madonna as authorized by law.

VI. DISPUTE RESOLUTION

27. 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 Madonna to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within thirty (30) days after the end of the informal negotiations period, Madonna files a motion with the Court seeking resolution of the

dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the controlling standard shall be which of the parties' proposals most appropriately fulfills the terms, conditions, requirements, and objectives of this Consent Decree and the CWA.

28. If either party believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The responding party shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the controlling standard shall be which of the parties' proposals most appropriately fulfills the terms, conditions, requirements, and objectives of this Consent Decree and the CWA.

29. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any of Madonna's obligations under this Consent Decree, except as provided in Paragraph 37 below regarding payment of stipulated penalties.

VII. FORCE MAJEURE

30. Madonna shall perform the actions required under this 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 Madonna's control, including his employees, agents, consultants and contractors, which could not be overcome by due diligence and 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, changed labor relations, 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. A failure to obtain federal, state or local permits does not constitute a Force Majeure event unless Madonna has diligently taken all necessary steps to obtain such permits in a timely manner. A failure to secure a grantee for the conservation easement for the Mitigation Site shall not constitute a Force Majeure event, but shall be grounds for modifying the Consent Decree.

31. If Madonna believes that a Force Majeure event has affected his ability to perform any action required under this Consent Decree, he shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section IX. 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 Madonna to prevent or minimize the delay and a schedule for the implementation of such measures.

Madonna 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.

32. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Madonna shall coordinate with the Corps to determine when to begin or resume the operations that had been affected by any Force Majeure event to provide for an alternate solution mutually acceptable to the parties and consistent with this Consent Decree.

33. If the parties are unable to agree whether 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, any party may seek a resolution of the dispute under the procedures in Section VI of this Consent Decree.

34. Madonna shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond his control and any entity under his control, including his contractors and consultants; (2) that Madonna or any entity under his control could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

VIII. STIPULATED PENALTIES

35. After entry of this Consent Decree, if Madonna fails to timely fulfill any requirement of the Consent Decree (including any requirement set forth in the Restoration and Mitigation Plan), he shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- | | | |
|----|---|------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$500.00 per day |
|----|---|------------------|

- | | | |
|----|--|--------------------|
| B. | For Day 31 up to and including
60 of non-compliance | \$1,000.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$1,500.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

36. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VI and/or the Force Majeure provisions in Section VII shall be resolved upon motion to this Court as provided in Paragraphs 27 and 28.

37. The filing of a motion requesting that the Court resolve a dispute shall stay Madonna'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 Madonna does not prevail on the disputed issue, stipulated penalties shall be paid by Madonna as provided in this Section.

38. To the extent Madonna demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 30 above) or otherwise prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

39. 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.

40. Madonna shall make any payment of a stipulated penalty 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 2001 V02068, U.S. Army Corps of Engineers, Los Angeles District, and the DOJ case number (90-5-1-4-16481). 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 Central District of California. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant shall provide written notice, at the addresses specified in Section IX of this Decree.

IX. ADDRESSES

41. 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 THE CORPS

Tiffany A.R. Welch
Office of Counsel
U.S. Army Corps of Engineers
Los Angeles District
2151 Alessandro Dr., Ste. 110
Ventura, CA 93001

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Pamela S. Tonglao, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

C. TO ALEX MADONNA, dba MADONNA CONSTRUCTION CO.

Alex Madonna
c/o Madonna Construction Company
Post Office Box 3910
San Luis Obispo, CA 93406

Alex Madonna
c/o K. Robin Baggett
Sinsheimer, Schiebelhut & Baggett
1010 Peach St.
P.O. Box 31
San Luis Obispo, CA 93401

X. COSTS OF SUIT

42. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Madonna subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, he shall be liable for any costs or attorneys' fees incurred by the United States in any action against Madonna for noncompliance with or enforcement of this Consent Decree.

XI. PUBLIC COMMENT

43. 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. Madonna agrees not to withdraw from, oppose entry of,

or to challenge any provision of this Consent Decree, unless the United States has notified him in writing that it no longer supports entry of the Consent Decree.

XII. CONTINUING JURISDICTION OF THE COURT

44. 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.

XIII. MODIFICATION

45. 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.

XIV. TERMINATION

46. Except for Paragraphs 19 and 21, this Consent Decree may be terminated by either of the following:

A. Madonna and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Madonna may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Madonna has achieved and maintained compliance with all provisions of this Consent Decree and the Restoration and Maintenance Plan, which is incorporated herein;

2. Madonna has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Madonna has certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and

4. within forty-five (45) days of receiving such certification from Madonna, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Madonna's full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

47. The Madonna Complaint is hereby dismissed.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 200__.

United States District Judge

FOR THE UNITED STATES:

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources Division

Dated: _____

Pamela S. Tonglao, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

FOR ALEX MADONNA, dba MADONNA CONSTRUCTION CO.

K. Robin Baggett
Sinsheimer, Schiebelhut & Baggett

Dated:

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing [PROPOSED] CONSENT DECREE was served by overnight mail on June 21, 2002 to counsel named below:

K. Robin Baggett
Eric Laurence
Sinsheimer, Schiebelhut & Baggett
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San Luis Obispo, CA 93406
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