

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5



In the Matter of:)

Johnson County Surveyor)
Johnson County Drainage Board)
Franklin, Indiana)

Respondents.)
_____)

Proceeding to Assess a Class II Civil
Penalty Under Section 309(g) of the
Clean Water Act, 33 U.S.C. § 1319(g)

Docket No. CWA-05-2014-0007

CONSENT AGREEMENT AND FINAL ORDER

CONSENT AGREEMENT

WHEREAS, the parties to this administrative action have agreed to simultaneously commence and conclude the above-captioned action before the filing of a complaint via the filing of this Consent Agreement and Final Order ("CAFO") pursuant to Section 309(g) of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. §§ 1319(g), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. § 22.13(b) and 22.18(b)(2) and (3).

WHEREAS, the Complainant is, by lawful delegation of the Administrator and the Regional Administrator, the Director of the Water Division, Region 5, United States Environmental Protection Agency ("EPA").

WHEREAS, the Respondents in this proceeding are Johnson County Surveyor and Johnson County Drainage Board ("Respondents"), units of government in the State of Indiana, both located at 86 West Court Street, Franklin, Indiana.

WHEREAS, the Respondent admits that the Administrator of EPA has jurisdiction of this proceeding pursuant to Sections 301 and 309 of the Act, 33 U.S.C. §§ 1311 and 1319, and the regulations at 40 C.F.R. § 22.38, and pursuant to 40 C.F.R. § 22.18(b)(2).

WHEREAS, the Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms and conditions of this CAFO.

WHEREAS, the Respondent neither admits nor denies the specific factual allegations and legal conclusions in this CAFO.

WHEREAS, the Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

WHEREAS settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in the public interest.

STATUTORY AND REGULATORY BACKGROUND

1. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits any person from discharging any pollutant from any point source into navigable waters except, among other things, in accordance with the terms of a valid permit issued by the U.S. Army Corps of Engineers (“ACOE”) under Section 404 of the CWA, 33 U.S.C. § 1344.
2. The term “person” is defined as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).
3. A “pollutant” is defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive

materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

4. The term “discharge of pollutants” is defined as “any addition of any pollutant to navigable waters from any point source....” 33 U.S.C. § 1362(12).

5. A “point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

6. The term “navigable waters” is defined as all “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

7. The term “waters of the United States” is defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2, to include the following: (i) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all other waters, such as, among others, rivers, streams or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; and (iii) tributaries of such waters.

8. The term “wetlands” is defined at 40 C.F.R. § 230.3(t) to mean “those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

9. Each Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

10. Grassy Creek is a relatively permanent water which flows into Young's Creek, which flows into Sugar Creek, which flows into the Driftwood River, which flows into the East Fork of the White River.

11. Short Run exhibits seasonal water flow.

12. Short Run is a relatively permanent water which flows into Grassy Creek.

13. The East Fork of the White River is a Traditional Navigable Water, 21.9 miles above its mouth with the White River.

14. The White River is a tributary to the Wabash River, an interstate water body.

15. Grassy Creek is a "water of the United States," as defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and thus a "navigable water" as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7).

16. Short Run is a "water of the United States," as defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and thus a "navigable water" as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7).

17. Beginning on approximately March 24, 2008 and continuing periodically until approximately July 6, 2009, Respondent, through its contractor Nasby Construction, performed or directed the placement of fill material, known as rip rap, in Grassy Creek below the ordinary high water mark of the creek. The material placed covered approximately 10,169 linear feet of Grassy Creek. The activity was located in Sections 17 and 20, Township 13 North, Range 4 East, Johnson County, Indiana.

18. Beginning on approximately May 19, 2011 and continuing periodically until approximately May 31, 2011, Respondent, through its contractor Nasby Construction, performed or directed the placement of fill material, known as rip rap, in Short Run below the ordinary high

water mark of the creek. The material placed covered approximately 1,217 linear feet of Short Run. The activity was located in Sections 17 and 20, Township 13 North, Range 4 East, Johnson County, Indiana.

19. At no time relevant to these discharges did Respondent have a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344, to discharge fill material into Grassy Creek and/or Short Run.

20. The fill material discharged into Grassy Creek and Short Run is a "pollutant" as defined by Section 502(6) of the Act, 33 U.S.C. §1362(6).

21. Respondent's contractor, Nasby Construction, used equipment including but not limited to an excavator, backhoe, and bulldozer, in order to place the fill material in Grassy Creek and Short Run.

22. Excavators, backhoes, and bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constitute "point sources" as defined by Section 502(14) of the Act, 33 U.S.C. §1362(14).

23. The addition of fill material from excavators, backhoes, and bulldozers into wetlands and/or waters of the United States constitutes a "discharge of a pollutant" as defined by Section 502(12) of the Act, 33 U.S.C. §1362(12).

24. Therefore, Respondent is a person who discharged pollutants from a point source into waters of the United States, without a permit, in violation of Section 301 of the Act, 33 U.S.C. §1311.

25. Each day the pollutants remain in the waters of the United States constitutes a continuing violation of the Act and an additional day of violation of Section 301 of the Act, 33 U.S.C. §1311.

26. Each day the pollutants remain in the waters of the United States constitutes a continuing violation of the Act and an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a Class II civil penalty of \$10,000 per day for each day during which the violation continues, up to a total of \$125,000, for violations of, among other things, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any limit or condition in a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and its implementing regulations at 40 CFR Part 19, provide for the increase of penalty amounts to account for inflation. The rule increasing the civil monetary penalty amount for a Class II civil penalty to \$16,000 per day of violation, up to a total of \$177,500, took effect on January 12, 2009, for violations occurring after that date.

PENALTY

27. After consideration of the facts alleged in this CAFO; the nature, circumstances, extent and gravity of the violations alleged; the Respondent's ability to pay, prior history of such violations, degree of culpability and economic benefit resulting from the violation; the Respondent's good faith and cooperation in resolving this matter; and such other matters as justice may require, EPA hereby proposes to issue a Final Order assessing civil penalties to Respondent in the amount of \$9,500.

28. Respondent shall pay the civil penalty amount of \$9,500 within 30 days after the effective date of this CAFO by certified or cashier's check payable to "Treasurer, the United States of America," and shall deliver it, with a transmittal letter identifying the CAFO, to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

29. The check must be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall simultaneously be sent to these recipients:

Greg Carlson (WW-16J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

and

Mony Chabria
Associate Regional Counsel
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

30. This civil penalty is not deductible for federal tax purposes.

31. If Respondent fails to timely pay the civil penalty, the Complainant may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and EPA's enforcement expenses for the collection action.

32. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15.00 handling charge each month that any portion of the penalty due is more than 30 days past due. The Complainant will assess a six percent per year penalty on any principal amount not paid timely pursuant to this CAFO.

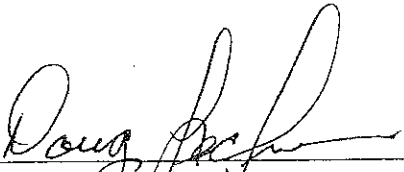
GENERAL PROVISIONS

33. This CAFO constitutes a complete and full settlement of, and resolves Respondent's liability with prejudice for, the violations alleged in this CAFO.
34. This CAFO does not affect the right of the Complainant or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
35. This CAFO does not affect the Respondent's responsibility to comply with the Act and other applicable federal, state, and local, laws and regulations.
36. The terms of this CAFO bind EPA and the Respondent and their successors and assigns.
37. Each person signing this CAFO certifies he or she has the authority to sign this CAFO for the party he or she represents and to bind that party to its terms.
38. Each party agrees to bear its own costs and fees, including attorney's fees, for this action.
39. This CAFO constitutes the entire agreement between the parties.
40. No modification shall be made to this CAFO without written notification to, and written approval of, all parties hereto and no oral modification of this CAFO shall be effective.
41. Before the Regional Administrator signs this CAFO, it shall be subject to the requirements of Section 309(g)(4) of the CWA. 33 U.S.C. § 1319(g)(4).
42. The effective date of this CAFO is the date EPA files it with the Regional Hearing Clerk.

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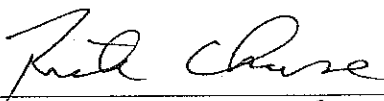
Johnson County Surveyor, Respondent

Date: 6-3-2014


Name: Doug Lechner
Johnson County Surveyor
86 W. Court Street
Franklin, Indiana 46131

Johnson County Drainage Board, Respondent

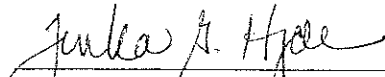
Date: 6-3-2014


Name: Rick Chase
Johnson County Drainage Board
86 W. Court Street
Franklin, Indiana 46131

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United States Environmental Protection Agency, Region 5, Complainant

Date: 6/12/14



Tinka G. Hyde, Director
Water Division
United States Environmental Protection
Agency, Region 5

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FINAL ORDER

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Date: _____

Susan Hedman
Regional Administrator
United States Environmental Protection
Agency, Region 5