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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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| In the Matter of: |) | |
| |) | |
| LaOtto Farm Supplies, Inc., |) | Proceeding to Assess a Class II Civil |
| Dexter Lutter, and |) | Penalty Under Section 309(g) of the |
| Cynthia Lutter, |) | Clean Water Act, 33 U.S.C. § 1319(g) |
| LaOtto, Indiana, |) | |
| |) | |
| Respondents. |) | Docket No. CWA-05-2013-0002 |
| _____ |) | |

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 LaOtto Farm Supplies, Inc., a corporation under the authorities of the State of Indiana, and Dexter Lutter and Cynthia Lutter as sole shareholders of LaOtto Farm Supplies, Inc. ("Respondents").

WHEREAS, the Respondents admit 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 Respondents consent to the assessment of the civil penalty specified in this CAFO and to the terms and conditions of this CAFO.

WHEREAS, the Respondents neither admit nor deny the specific factual allegations and legal conclusions in this CAFO.

WHEREAS, the Respondents waive their rights to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and their 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, among other things, an “individual” and a “corporation.” 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 area 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. Respondent, LaOtto Farm Supplies, Inc., is a corporation under the authorities of the State of Indiana. Respondents Dexter Lutter and Cynthia Lutter are the sole shareholders of Respondent LaOtto Farm Supplies, Inc..

10. Respondents are each a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

11. Simon Ditch referenced in paragraph 12 is a “water of the United States” as defined under 40 C.F.R. § 232.2, and therefore constitutes a “navigable water” as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7).

12. Between December 11, 2007, and January 31, 2008, LaOtto Farm Supplies, Inc., and Dexter Lutter and Cynthia Lutter, acting on behalf of the Noble County Drainage Board, discharged approximately 7,000 cubic yards of fill and dredged material and organic debris from excavators and bulldozers into 3,300 feet of Simon Ditch, on both sides of County Road 250 South (or Swan Road), within the east half of Section 16, Township 33 North, Range 11 East, in Swan Township, Noble County, Indiana. An outline of the discharge areas is illustrated on Exhibit 1 to this CAFO.

13. The fill or dredged material and organic debris discharged into Simon Ditch constitute “pollutants” as defined under Section 502(6) of the Act, 33 U.S.C. § 1362(6).

14. An excavator and bulldozer are discernible, confined and discrete conveyances, specifically rolling stock, and constitute “point sources” as defined under Section 502(14) of the Act, 33 U.S.C. § 1362(14).

15. The addition of dredged and fill material and organic debris from excavators, or earth moving equipment, into waters of the United States constitutes a “discharge of a pollutant” as defined under Section 502(12) of the Act, 33 U.S.C. § 1362(12).

16. At no time did Respondents have a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344, prior to discharging fill or dredged material and organic debris into Simon Ditch.

17. Therefore, Respondents are persons 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. § 1344.

18. 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. Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, provides 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, 73 Fed. Reg. 75340-6 (Dec. 11, 2008).

PENALTY

19. Based upon the facts alleged in this CAFO; upon the nature, circumstances, extent and gravity of the violations alleged; after consideration of the Respondents' ability to pay, prior history of such violations (or lack of such history), degree of culpability and economic benefit resulting from the violation; the Respondents' 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 \$11,000.

20. Respondents shall pay the civil penalty amount of \$11,000 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

21. 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

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

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

23. If Respondents fail 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.

24. 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. Respondents 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

25. This CAFO constitutes a complete and full settlement of, and resolves Respondents' liability with prejudice for, the violations alleged in this CAFO.

26. 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.

27. This CAFO does not affect the Respondents' responsibility to comply with the Act and other applicable federal, state, and local, laws and regulations.

28. The terms of this CAFO bind EPA and the Respondents and their successors and assigns.

29. 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.

30. Each party agrees to bear its own costs and fees, including attorney's fees, for this action.

31. This CAFO constitutes the entire agreement between the parties.

32. 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.

33. 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).

34. The effective date of this CAFO is the date EPA files it with the Regional Hearing Clerk.

In the Matter of LaOtto Farm Supplies, Inc., and Dexter Lutter and Cynthia Lutter as sole
shareholders of LaOtto Farm Supplies, Inc.

Docket No.

LaOtto Farm Supplies, Inc., Respondent

Date: 11/11/2012

Dexter Lutter
Dexter Lutter, President
LaOtto Farm Supplies, Inc.

Dexter Lutter, Respondent

Date: 11/11/2012

Dexter Lutter
Dexter Lutter

Cynthia Lutter, Respondent

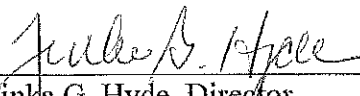
Date: 11/11/2012

Cynthia Lutter
Cynthia Lutter

In the Matter of LaOtto Farm Supplies, Inc., and Dexter Lutter and Cynthia Lutter as sole
shareholders of LaOtto Farm Supplies, Inc.
Docket No.

United States Environmental Protection Agency, Region 5, Complainant

Date: 11/30/12



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

In the Matter of LaOtto Farm Supplies, Inc., and Dexter Lutter and Cynthia Lutter as sole shareholders of LaOtto Farm Supplies, Inc.

Docket No. **CWA-05-2013-0002**

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