

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
)
WILSON EXCAVATING, INC.)
)
Respondent.)
)
_____)

Docket No. CWA-05-2011-0004

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

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CONSENT AGREEMENT AND FINAL ORDER

1. Complainant, the Director of the Water Division, U.S. Environmental Protection Agency, Region 5 (EPA), and Respondent, Wilson Excavating, Inc. (Respondent), have agreed to the settlement of this action before the filing of a complaint. Therefore, this action is simultaneously commenced and concluded under Rules 22.13(b) and 22.18(b) 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* found at 40 C.F.R. §§ 22.13(b) and 22.18(b).
2. EPA institutes this civil administrative proceeding for the assessment of a civil penalty pursuant to the authority granted in Section 309(g)(1)(A) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1)(A).
3. The Administrator of EPA has delegated this authority to the Regional Administrator of EPA Region 5, who has duly re delegated this authority to the Water Division Director, Region 5, who hereby issues this Consent Agreement and Final Order (CAFO).
4. Respondent consents to the entry of this CAFO, all of the conditions of this CAFO, and the assessment of the civil penalty as outlined in this CAFO.

5. EPA and Respondent agree that the settlement of this matter pursuant to 40 C.F.R. § 22.13(b) is in the public interest and that the entry of this CAFO without engaging in litigation is the most efficient means of resolving this matter.

STATUTORY AND REGULATORY BACKGROUND

6. To restore and maintain the integrity of the nation's water, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into navigable waters of the United States by any person, except in compliance with, *inter alia*, a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

7. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (Corps), to issue permits for the discharge of dredged or fill material into navigable waters.

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term "pollutant" to mean, *inter alia*, dredged spoil, solid waste, sewage, garbage, sewage sludge, biological materials, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

9. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutant" to mean any addition of any pollutant to navigable waters from any point source.

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" to mean the waters of the United States.

11. 40 C.F.R. § 230.3(s) defines the term "waters of the United States" to include all waters which are, were or may be used in interstate or foreign commerce, tributaries thereof, and wetlands adjacent to such waters.

12. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” to mean any discernible, confined and discrete conveyance from which pollutants are or may be discharged.

13. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator to assess a Class II civil penalty under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), after consultation with the State, when the Administrator finds, on the basis of any information available, that a person has violated Section 301 of the CWA, 33 U.S.C. § 1311.

GENERAL ALLEGATIONS

14. Respondent is a corporation organized under the laws of Ohio. As such, Respondent is a "person" as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

15. At all times relevant to this Complaint, Respondent was an excavation and earthmoving firm.

16. This CAFO concerns a forested parcel of land adjacent to the north side of Harcourt Road, near the western city limits of Angola, in Steuben County, Indiana (Site).

17. The Site is located on the western side of the William Palfreyman Drain, a drainage feature operated and maintained by Steuben County or departments of Steuben County.

18. The William Palfreyman Drain is a tributary of Crooked Lake, which is a tributary of Crooked Creek, which is a tributary of the Fawn River, which is a tributary of the St. Joseph River, which flows to Lake Michigan.

19. The water bodies identified in Paragraph 18 are each “waters of the United States” and “navigable waters” as those terms are defined by 40 C.F.R. § 230.3(s) and 33 U.S.C. § 1362(7), respectively.

20. Located on the Site is an area which is inundated or saturated by groundwater at a frequency and duration sufficient to support, and that under normal circumstances can support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

21. The area described in Paragraph 20 is a “wetland” as that term is defined by 40 C.F.R. § 230.3(t).

22. The wetland described in Paragraph 20 is located adjacent to the William Palfreyman Drain.

23. The wetland described in Paragraph 20 is a “water of the United States” and a “navigable water” as those terms are defined by 40 C.F.R. § 230.3(s) and 33 U.S.C. § 1362(7), respectively.

VIOLATION

24. The allegations of Paragraphs 1-23 are realleged and reincorporated herein by reference.

25. In November and December 2007 and June 2008, Respondent was hired by the Steuben County Surveyor and the landowner to grade and clear vegetation at the Site. Respondent contends that it worked under the direct supervision and instruction of the Steuben County Surveyor and landowner. During this work, Respondent used bulldozers and other earth moving machines to deposit soil and organic debris into the wetlands located on the Site.

26. The bulldozers and other earth moving machines used as described in Paragraph 25 are "point sources," as that term is defined at Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

27. The soil and organic debris referred to in Paragraph 25 are "pollutants," as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

28. The deposition of material into wetlands at the Site as referred to in Paragraph 25 constitutes a "discharge of pollutants," as that term is defined by Section 502(12), 33 U.S.C. § 1362(12), to the waters of the United States.

29. At no time relevant to the violation alleged herein did Respondent possess a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the discharge of pollutants at the Site.

30. Each day Respondent discharged pollutants at the Site without a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

31. Each day the pollutants discharged by Respondent remain within navigable waters without a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

TERMS OF SETTLEMENT

Assessment and Payment of Penalty

32. Based upon the penalty factors set forth in Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA and Respondent agree to settle this matter for \$10,000.00.

33. For the purposes of this proceeding, and pursuant to 40 C.F.R. §§ 22.18(b) and (c), Respondent: (1) admits that EPA has jurisdiction over the subject matter set forth in this CAFO; and (2) neither admits nor denies the facts set forth in this CAFO.

34. For purposes only of the allegations and agreements made herein, upon execution of this CAFO, Respondent waives all rights to request a judicial or administrative hearing on any issue of law or fact set forth in this CAFO, including, but not limited to, its right to request a hearing under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and its right to appellate review of the CAFO found at Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B).

35. Respondent must pay the \$10,000.00 civil penalty by mailing a certified or cashier's check made payable to "Treasurer, United States of America" within 30 days after the effective date of this CAFO.

36. Respondent must send the check to the following address:

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

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

38. A transmittal letter, stating Respondent's name, complete address, and the case docket number must accompany the payment. Respondent shall simultaneously and separately send notice of such payment, including a copy of the check, to each of the following three persons at the address indicated:

Regional Hearing Clerk, (E-19J)
EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Charles Mikalian
Associate Regional Counsel
EPA, Region 5 (C-14J)
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Gregory Carlson
Water Division (WW-16J)
EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

39. Respondent's failure to pay the assessed civil penalty in accordance with the provisions of this CAFO will result in the referral of this matter to the United States Department of Justice for collection in accordance with Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. In addition to any unpaid balance and interest on this penalty, Respondent shall also be required to pay attorneys' fees and costs for collection proceedings and a quarterly nonpayment penalty. This nonpayment penalty shall be in an amount equal to 20% of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of each such quarter.

40. Notwithstanding any other provision of this CAFO, interest shall accrue on any amount overdue under the terms of this CAFO at an annual rate calculated in accordance with 40 C.F.R. § 13.11.

OTHER MATTERS

41. This CAFO settles EPA's claims for civil penalties for the violations alleged above.

42. Nothing in this CAFO relieves Respondent of the duty to comply with the CWA or other federal, state or local laws or statutes.

43. Nothing in this CAFO is intended to, nor shall be construed to, operate in any way to resolve any criminal liability of Respondent arising from the violations alleged in this CAFO. Notwithstanding any other provision of this CAFO, EPA expressly reserves any and all rights to bring an enforcement action pursuant to the Section 504 of the CWA, 33 U.S.C. § 1364, or other statutory authority should EPA find that the Site is presenting an imminent and substantial endangerment to the health or welfare of persons. EPA also expressly reserves the right: (A) to take any action authorized under Section 309 of the CWA for any matters other than the violations alleged in this CAFO; and (B) to enforce compliance with this CAFO.

44. This CAFO binds both parties, their officers, directors, employees, successors, and assigns to this action. The representative of each party signing this CAFO certifies that he or she has authority to enter into the terms of this CAFO and bind that party to it. Respondent shall give notice and a copy of this CAFO to any successor in interest prior to any transfer of ownership or operational control of the Site.


45. Each party agrees to bear its own costs accrued in the course of this action.

46. Pursuant to 40 C.F.R. § 22.38, the State of Indiana was notified of this proceeding and the terms of this settlement.


47. The effective date of this CAFO is the date that the CAFO is filed in the office of the Regional Hearing Clerk, after having been signed by the Regional Administrator or her designated representative and subjected to the requirements of Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C).

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

49. The information required to be maintained or submitted pursuant to this CAFO is not subject to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 et seq.


for Tinka G. Hyde, Director
Water Division
U.S. Environmental Protection Agency
Region 5

2/18/11
Date


Doug Wilson
Wilson Excavating, Inc.

2/2/11
Date

CONSENT AGREEMENT AND FINAL ORDER
In the Matter of: Wilson Excavating, Inc.
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FINAL ORDER

This CAFO is hereby approved. The Respondent is hereby ORDERED to comply with all of the terms of the CAFO effective immediately upon filing of this CAFO with the Regional Hearing Clerk. This CAFO disposes of this matter pursuant to 40 C.F.R. § 22.18(c).

By: _____

Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region 5

Dated: _____