



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 13 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REPLY TO THE ATTENTION OF:
WW-16J

Jack Herendeen, Chairman
Noble County Drainage Board
Noble County Annex Building
107 East Weber Road
Albion, Indiana 46701

Re: Consent Agreement and Final Order
Docket No. CWA-05-2013-0001

Dear Mr. Herendeen:

Enclosed is a copy of your signed and filed Consent Agreement and Final Order (CAFO) resolving the Noble County Drainage Board's Simon Drain matter. The CAFO's effective date is December 13, 2012. Please refer to the case name and docket number above when remitting payment. Payment obligations and instructions for the \$15,000 civil penalty are noted in paragraphs 20-21 of the CAFO. The civil penalty payment is due within 30 days of the effective date or January 12, 2013.

Please contact me at 312/886-0124 if any questions arise regarding the CAFO. Thank you for your cooperation in resolving this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gregory T. Carlson".

Gregory T. Carlson, Enforcement Officer
U.S. EPA – Region 5

Enclosure

cc: Noble County Surveyor's Office (w. encl.), 2090 S.R. 9 (Suite B), Albion, IN 46701-9577
Don Reinke (w. encl.), U.S. Army Corps of Engineers – Detroit District, Detroit, MI
Allison Klement (w. encl.), U.S. Army Corps of Engineers – South Bend Field Office,
2422 Viridian Dr. (Suite 200), South Bend, IN 46628
Randy Braum (w. encl.), IDEM, Indianapolis, IN

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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PROTECTION AGENCY

In the Matter of:)
)
Noble County Drainage Board,)
Albion, Indiana,)
Respondent.)
_____)

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-05-2013-0001

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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 Respondent in this proceeding is the Noble County Drainage Board, located at the Noble County Annex Building, 107 E Weber Road, Albion, Indiana 46701 ("Respondent" or the "Board"), an organization created under the authorities of the State of 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, among other things, 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, Noble County Drainage Board, is an organization created under the authorities of the State of Indiana.

10. Respondent is 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., 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 Respondent 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, 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. § 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 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 \$15,000.

20. Respondent shall pay the civil penalty amount of \$15,000 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 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.

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. 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

25. This CAFO constitutes a complete and full settlement of, and resolves Respondent's 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 Respondent's 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 Respondent 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 Noble County Drainage Board

Docket No. **CWA-05-2013-0001**

Noble County Drainage Board, Respondent

Date: 10-22-12


A handwritten signature in blue ink, reading "Jack Hendler", written over a horizontal line.

Noble County Drainage Board
Noble County Annex Building
107 E Weber Road
Albion, Indiana 46701

In the Matter of Noble County Drainage Board
Docket No. **CWA-05-2013-0001**

United States Environmental Protection Agency, Region 5, Complainant

Date: 10/31/12

for 

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

In the Matter of Noble County Drainage Board

Docket No. **CWA-05-2013-0001**

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: 12-10-12



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

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CHICAGO, IL 60604-3590

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REPLY TO THE ATTENTION OF:

CERTIFICATE OF SERVICE

I, Gregory T. Carlson, hereby certify that an original of the Complaint/Consent Agreement and Final Order (Docket No. CWA-05-2013-0001) was filed with the Regional Hearing Clerk on December 13, 2012, and that a copy was served by United States Mail, Certified and Postage Prepaid, on the 13th day of December 2012, upon the following:

Dennis D. Graft, Esq.
Attorney at Law
P.O. Box 790
Avilla, Indiana 46710; and

Jack Herendeen, Chairman
Noble County Drainage Board
Noble County Annex Building
107 East Weber Road
Albion, Indiana 46701.

A Complaint/Consent Agreement and Final Order copy (Docket No. CWA-05-2013-0001) was served by United States Mail, Certified and Postage Prepaid, on the 13th day of December 2012, upon the following:

Honorable Chief Judge Susan Biro
Chief Administrative Law Judge
Office of Administrative Law Judges (1900L)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Gregory T. Carlson
U.S. Environmental Protection
Agency - Region 5 (WW-16J)
77 West Jackson Boulevard
Chicago, Illinois 60604