

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2020 MAR 10 AM 8:58

IN THE MATTER OF:

FOXRIDGE DEVELOPMENT
CORPORATION
225 Buckingham Drive
Providence, Utah 84332

Respondent.

Docket No. **CWA-08-2020-0001**

CONSENT AGREEMENT

I. INTRODUCTION

1. This is an administrative penalty assessment proceeding pursuant to sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules of Practice), as codified at 40 C.F.R. part 22.
2. Foxridge Development Corporation (Respondent) owned and/or operated the housing development known as Saddlerock Subdivision, Phases 2-4, located at 900 East 600 South, River Heights, Utah (the Site).
3. EPA and Respondent, having agreed settlement of this action is in the public interest, consent to the entry of this consent agreement (Agreement) without adjudication of any issues of law or fact herein, and Respondent agrees to comply with the terms of this Agreement.

II. JURISDICTION

4. This Agreement is issued under the authority vested in the Administrator of EPA by Section 309(g)(1)(A) of the Clean Water Act (Act), 33 U.S.C. § 1319(g)(1)(A). The undersigned EPA official has been duly authorized to institute this action.
5. The Regional Judicial Officer is authorized to approve this Agreement with a final order. 40 C.F.R. §§ 22.4(b) and 22.18(b).
6. The final order approving this Agreement simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).

III. GOVERNING LAW

7. The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a).

8. To accomplish the objective of the Act, section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person from a point source into waters of the United States except in compliance with certain provisions of the Act, including compliance with the specific terms and conditions of a National Pollutant Discharge Elimination System (NPDES) permit issued by EPA pursuant to section 402 of the Act, 33 U.S.C. § 1342; *see also* 40 C.F.R. Part 122.
9. The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).
10. "Pollutants" are defined as "dredged spoil, solid waste, incinerator residue, filter backwash sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2.
11. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).
12. "Navigable waters" are defined as "waters of the United States including the territorial seas." 33 U.S.C. § 1362(7). "Waters of the United States" has been further defined to include, among other things, waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; interstate waters; and tributaries of such waters. 40 C.F.R. § 122.2.
13. Section 402(p) of the Act, 33 U.S.C. § 1342(p), establishes a NPDES program under which EPA (and states with authorization from EPA) may permit discharges of pollutants into navigable waters associated with industrial activities, subject to specific terms and conditions.
14. EPA issued regulations that further define requirements of NPDES permits for storm water discharges as required by section 402(p) of the Act, 33 U.S.C. § 1342(p). The regulations are found at 40 C.F.R. part 122.
15. EPA regulations define discharges associated with industrial activity to include construction activities. 40 C.F.R. § 122.26(b)(14)(x).
16. Construction activities include clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activities also include the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more. 40 C.F.R. § 122.26(b)(14)(x).
17. Each person discharging storm water to waters of the United States must request and obtain authorization to discharge under either an individual NPDES permit or a promulgated NPDES general permit issued by EPA or by a state with an EPA-approved NPDES program. 40 C.F.R. § 122.26(c)(1), 33 U.S.C. §§ 1311(a) and 1342(p).

18. The United States may enforce a state-issued NPDES permit under section 402(i) of the Act, 33 U.S.C. § 1342(i).
19. The Utah Department of Environmental Quality (UDEQ) Division of Water Quality (DWQ) was approved by EPA to administer the NPDES program on July 7, 1987. 52 Fed. Reg. 27578-2757 (July 22, 1987). A permit issued by DWQ under Utah's EPA-approved NPDES program is known as a Utah Pollutant Discharge Elimination System (UPDES) permit.
20. Effective July 1, 2014, DWQ issued a NPDES General Permit for Discharges from Construction Activities No. UTRC00000 (hereinafter the Permit) authorizing discharges of storm water associated with construction activities, if done in compliance with its terms and conditions. Permit, Part 1.
21. Under 40 C.F.R. § 122.21(c), a discharger proposing a new discharge of storm water associated with construction activities covered by 40 C.F.R. § 122.26(b)(14)(x) must submit an application 90 days prior to the date construction is to commence, or by the deadlines provided by the terms of any applicable general permit. See 40 C.F.R. § 122.28(b)(2).
22. Dischargers may apply for authorization to discharge under the Permit by submitting a Notice of Intent (NOI) and a yearly permit fee for coverage to the DWQ. Permit, Part 1.4.
23. A unique UPDES Permit Number is generated by DWQ for each NOI upon authorization to discharge storm water from the designated site under the Permit.
24. The Permit requires owners and operators of construction sites to prepare a Storm Water Pollution Prevention Plan (SWPPP), consistent with the SWPPP requirements of Part 7 of the Permit, prior to submitting the NOI.
25. The Permit requires owners and operators to retain a copy of the SWPPP and all reports required by the Permit, for a period of at least three years from the date that the site is finally stabilized. Permit, Appendix G.1.1, Standard Permit Conditions, Records Retention.
26. Any person subject to the Permit must implement best management practices (BMPs) designed to prevent or reduce the discharges of pollutants from a site. BMPs include storm water controls, pollution prevention controls, perimeter controls, and sediment controls to minimize the discharge of pollutants from a site. Permit, Part 2.
27. The Permit also requires dischargers to conduct site inspections in accordance with one of the following schedules: (a) at least every seven calendar days; or (b) once every 14 days and within 24-hours of the occurrence of a storm event of 0.5 inches or greater. Permit, Part 4.1.2.
28. The Permit requires dischargers to keep records of inspections. Permit, Part 4.1.7. All inspection reports completed for Part 4 of the Permit must be retained for at least three years from the date that permit coverage expires or is terminated.
29. A "person" is defined as an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body" in section 502(5) of the Act, 33 U.S.C. § 502(5).

30. An “owner” under the Permit is defined as “the party that owns/leases the land on which the construction activities occur and has ultimate control over the project and the destiny of a project. The owner has control over construction plans and specifications, including the ability to make modifications at the highest level, to those plans and specifications. Permit, Part 1.1.1.
31. An “operator” under the Permit is defined as “the party (usually the general contractor) that has day-to-day operational control over those activities at a project that are necessary to ensure compliance with the permit conditions (e.g., they are authorized to direct workers at a site to carry out activities required by the permit).” Permit, Part 1.1.1.
32. A “permittee” under the Permit is defined as “the owner and/or operator named in the NOI for the project.” Permit, Appendix A.

IV. ALLEGED FACTS

33. Respondent is a Utah corporation.
34. Respondent is a "person" as defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
35. Respondent was previously engaged in construction activities at the Site.
36. The Site encompasses approximately 11.15 acres, including Phases 2-4 of construction. The allegations in this complaint are limited to construction activities on Phase 2 (approximately 6.6 acres) and Phase 3 (approximately 4.53 acres) of the Site.
37. Construction activities on Phase 2 of the Site began on or about March 2, 2015.
38. Construction activities on Phase 3 of the Site began on or about February 25, 2017.
39. The runoff and drainage from the Site is "storm water" as defined in 40 C.F.R. § 122.26(b)(13).
40. Storm water contains "pollutants" as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).
41. Storm water, snow melt, surface drainage and runoff water have discharged from the Site through various discernible, confined, and discrete conveyances and flowed into the River Heights municipal separate storm sewer system (MS4) located on the Site and immediately south of the Site. In the vicinity of the Site, water in the River Heights MS4 flows into Spring Creek (located approximately 0.54 miles from the Site).
42. Spring Creek is a relatively permanent water.
43. Spring Creek is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and a "water of the United States" as defined by 40 C.F.R. § 122.2.
44. Spring Creek flows into the Logan River, which is a relatively permanent water.
45. The Logan River is a “navigable water” as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and a "water of the United States" as defined by 40 C.F.R. § 122.2.

46. Each storm water discharge from the Site is the "discharge of a pollutant" as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.
47. Each storm water discharge from the Site is a discharge from a "point source" as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
48. Respondent was authorized, under the Permit, to discharge storm water. Respondent received authorization from DWQ on March 2, 2015, under UPDES Permit number UTR370179, which authorized the discharge of storm water from construction activities for Phases 2-4 at the Site until March 2, 2016.
49. Respondent was listed as the "owner" and "operator" on the Permit.
50. Respondent owned lots in Phase 2 at the Site until the date of sale for lot number 51 on or about October 4, 2017 (deed reception number 1181519, Book 1973 Page 1880).
51. On February 25, 2017, DWQ issued a second authorization under Permit number UTR370179, which authorized the discharge of storm water from construction activities for Phases 2-4 at the Site until February 25, 2018.
52. Respondent was listed as the "owner" and "operator" on the Permit.
53. Respondent owned lots in Phase 3 until the date of sale for lot number 70, on or about June 5, 2018 (deed reception number 1197159 Book 2022 Page 1810) .
54. Part 1 of the Permit requires entities engaged in construction activities equal to or greater than one acre to obtain coverage under the Permit.
55. Respondent did not have Permit coverage for storm water discharges from the Site from construction activities between March 3, 2016 (expiration of UDPEs Permit No. UTR370179) and February 24, 2017 (Respondent's second authorization under UPDES Permit No. UTR370179 for Phases 2-4). See Permit Part 1.4 (requiring a yearly permit fee).
56. On March 3, 2016, Respondent's coverage under the Permit expired. Respondent did not submit a NOI and yearly fee to DWQ for renewal upon or before the date of expiration.
57. On July 11, 2016, EPA inspectors conducted a storm water inspection of Phase 2 of the Site to determine compliance with the Permit (Inspection). Because coverage under the Permit had expired on March 3, 2016, during the Inspection, Respondent did not have permit coverage.
58. On December 21, 2016, EPA sent Respondent, by certified mail, a *Summary of Findings and Corrective Actions*, for the Inspection. EPA requested a response to the findings and corrective actions and for any information that may change the findings, including but not limited to: a copy of the SWPPP and site map, a copy of the certified NOI, records of inspections conducted and corrective actions at the Site, records of relevant stormwater training and certification for persons inspecting the Site and persons responsible for pollution prevention measures, and evidence of several corrective actions pertaining to storm water and sediment control BMP implementation at the Site.

59. Respondent submitted a response to EPA's *Summary of Findings and Corrective Actions* on March 3, 2017 (March 3, 2017 Response). In the March 3, 2017 Response, Respondent provided a copy of the NOI, photos of some corrective measures for BMPs at the Site, inspector training certification, a sign that allegedly contained the Permit and SWPPP information, and documentation for inlet cleanings and road sweeping.
60. EPA has the authority to request information under section 308 of the Act, 33 U.S.C. § 1318, in order to carry out its responsibility for protecting the nation's water from pollution.
61. On September 28, 2017, EPA sent, by certified mail, a request for information pursuant to section 308 of the Act.
62. Respondent did not provide a response to the section 308 information request.
63. On April 10, 2018, the Regional Judicial Officer entered an Administrative Order (Order) for Compliance (Docket No. CWA-08-2018-0005) that required Respondent comply with the requirements of the Permit and reply to the section 308 information request.
64. Respondent provided EPA with an incomplete written response to the Order on April 27, 2018 (Order Response). In the Order Response, Respondent provided a Dropbox link for the Site that included SWPPP files, photos, and Warranty Deeds. The Order Response did not provide the following information about the Site: description of arrangements between Respondent and other persons regarding environmental permitting, controls, inspections and documentation of all inspections; details of when, where and by whom structural controls were installed and removed; a site map; construction activities start and end dates; and a description of stabilization measures.
65. During an in-person meeting on March 10, 2018, Respondent provided to EPA copies of inspection reports for Phase 3 between February 1, 2017, and October 23, 2017. On October 10, 2018, Respondent provided copies of inspection reports for Phase 3 construction activities between February 1, 2017 and August 21, 2018.
66. Based on the Inspection, and EPA's review of documents provided by the Respondent, EPA determined that Respondent was authorized for coverage under the Permit between March 2, 2015 and March 2, 2016, as the named owner and operator of the NOI dated March 2, 2015. During the authorization to discharge under the Permit, Respondent failed to comply with the terms and conditions of the Permit, as alleged below.
67. Based on documents provided by Respondent, Respondent was authorized for coverage under the Permit until February 25, 2018, as the named owner and operator of the NOI dated February 25, 2017. During the authorization to discharge under the Permit, Respondent failed to comply with the terms and conditions of the Permit, as alleged below. The date of compliance for construction activities in Phase 3 of the Site was the date of sale for lot number 70, on or about June 5, 2018 (deed reception number 1197159 Book 2022 Page 1810).

V. ALLEGED VIOLATIONS OF LAW

Permit Condition Violations

68. Between March 2, 2015, and March 2, 2016, Respondent obtained coverage under the Permit by submitting a NOI as the named permittee of the Site.
69. Between March 2, 2015, and March 2, 2016, Respondent did not have a SWPPP for the Site (Phase 2) in violation of Part 7 of the Permit. Between March 2, 2015, and March 2, 2016, the site map failed to include all required elements including, but not limited to, locations where sediment, soil, or other construction materials would be stockpiled; locations of existing vegetation cover; storm water and allowable non-storm water discharge locations; locations of potential pollutant-generating activities; and locations of all storm water control measures, in violation of Part 7.2.5 of the Permit. Each finding constitutes a separate violation of the Permit's conditions and limitations pursuant to 40 C.F.R. § 122.41(a) and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.
70. Between March 2, 2015, and March 2, 2016, Respondent did not conduct self-inspections at the Site (Phase 2) in violation of Part 4 of the Permit.
71. Each missed inspection by Respondent in paragraph 70 is a failure to conduct inspections and complete inspection reports in compliance with Part 4 of the Permit. Each finding constitutes a separate violation of the Permit's conditions and limitations pursuant to 40 C.F.R. § 122.41(a) and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.
72. Between February 25, 2017, and February 25, 2018, Respondent obtained coverage under the Permit by submitting a NOI as the named permittee of the Site.
73. Between February 25, 2017, and February 25, 2018, the SWPPP for the Site (Phase 3) failed to include all required elements for a site map including, but not limited to, locations where sediment, soil, or other construction materials would be stockpiled; locations of existing vegetation cover; storm water and allowable non-storm water discharge locations; locations of potential pollutant-generating activities; and locations of all storm water control measures, in violation of Part 7.2.5 of the Permit. Each finding constitutes a separate violation of the Permit's conditions and limitations pursuant to 40 C.F.R. § 122.41(a) and is subject to the assessment of penalties pursuant to section 309(g) of the Act, 33 U.S.C. § 1319(g), for each day during which the violations continued.

VI. TERMS OF CONSENT AGREEMENT

74. For the purpose of this proceeding, Respondent:
 - a. admits the jurisdictional allegations in section II of this Agreement;
 - b. neither admits nor denies the factual allegations stated in section IV of this Agreement;
 - c. consents to the assessment of a civil penalty as stated below;

- d. acknowledges this Agreement constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
 - e. waives any right to contest any final order approving this Agreement; and
 - f. waives any rights it may possess at law or in equity to challenge the authority of EPA to bring a civil action in a United States District Court to compel compliance with the Agreement or Order, or both, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action.
75. Section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(3), authorizes EPA to assess a civil penalty in this matter.
76. In determining the amount of any penalty to be assessed, EPA considered the statutory penalty factors, including the nature, circumstances, extent and gravity of the violations alleged and, with respect to Respondent, the ability to pay, the effect of the proposed penalty on the ability to continue to do business, any history of prior violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require, in accordance with section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3).
77. Based on the Alleged Violations of Law, and after consideration of the statutory factors in paragraph 76 above, EPA has determined a civil penalty of **\$20,000** is appropriate to settle this matter.
78. Penalty Payment. Respondent agrees to:
- a. pay a civil penalty in the amount of **\$20,000** within 30 calendar days of the Effective Date of this Agreement;
 - b. pay the civil penalty using any method provided on the following website:
<https://www.epa.gov/financial/makepayment>;
 - c. identify each and every payment with the docket number that appears on the final order; and
 - d. within 24 hours of payment, email proof of payment to Emilio Llamozas, Environmental Engineer at Llamozas.Emilio@epa.gov ("proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate payment has been made according to EPA requirements, in the amount due, and identified with the docket number that appears on the final order).
79. If Respondent fails to timely pay any portion of the penalty assessed under this Agreement, EPA may:
- a. request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); and the United States' enforcement expenses;

- b. refer the debt to a credit reporting agency or a collection agency pursuant to 40 C.F.R. §§ 13.13, 13.14, and 13.33;
 - c. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. part 13, subparts C and H; and
 - d. suspend or revoke Respondents' licenses or other privileges or suspend or disqualify Respondents from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17.
80. Consistent with section 162(f)(1) of the Internal Revenue Code, 26 U.S.C. § 162(f)(1), Respondent will not deduct penalties paid under this Agreement for federal tax purposes.
81. This Agreement applies to Respondent and its officers, directors, employees, agents, trustees, authorized representatives, successors, and assigns. Respondent must give written notice and a copy of this Agreement to any successors-in-interest prior to transfer of any interest in the SaddleRock Subdivision. Any change in ownership or control of Respondent, including but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Agreement.
82. The undersigned representative of Respondent certifies he or she is fully authorized to execute and enter into the terms and conditions of this Agreement and has the legal capacity to bind the party he or she represents to this Agreement.
83. Except as qualified by paragraph 79 each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

VII. EFFECT OF CONSENT AGREEMENT

84. In accordance with 40 C.F.R. § 22.18(c), completion of the terms of this Agreement resolves only Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.
85. The terms, conditions, and compliance requirements of this Agreement may not be modified or amended except upon the written agreement of both parties, and approval of the Environmental Appeals Board Regional Judicial Officer, or other delegatee.
86. Any violation of this Agreement, and subsequently issued final order approving this Agreement, may result in a civil judicial action for an injunction or civil penalties of up to \$21,933 per day per violation, or both, as provided in section 33 U.S.C. § 1319(g)(2)(B) and adjusted for inflation pursuant to 40 C.F.R. part 19. EPA may use any information submitted under this Agreement in an administrative, civil judicial, or criminal action.
87. Nothing in this Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws, nor shall it restrict EPA's authority to

seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

88. Nothing herein shall be construed to limit the power of EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment to the public health, welfare, or the environment.
89. If and to the extent EPA finds, after signing this Agreement, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to EPA, EPA reserves any and all of its legal and equitable rights.

VIII. PUBLIC NOTICE

90. As required by section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45, EPA will provide public notice and a reasonable opportunity to comment on the penalty that Respondent has agreed to pay in this matter. EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.
91. If comments received during the public comment period do not require modification or withdrawal by EPA from this Agreement, the parties agree to submit this Agreement to the Regional Judicial Officer for Region 8 following the close of the public comment period specified in 40 C.F.R. § 22.45, with a request that it be incorporated into a Final Order.

IX. EFFECTIVE DATE

92. This Agreement shall become effective on the date the Final Order is filed by the hearing clerk.

Consent Agreement In the Matter of FOXRIDGE DEVELOPMENT CORPORATION.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 8,
Complainant.**

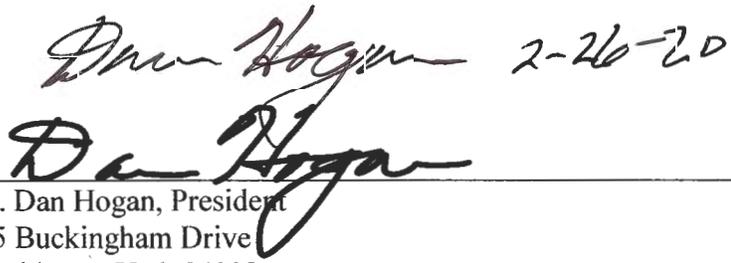
Date: 03/06/2020

By: 

Suzanne J. Bohan, Director
Enforcement and Compliance Assurance Division

**FOXRIDGE DEVELOPMENT CORPORATION
Respondent.**

Date: 02/13/2020

By: 

Mr. Dan Hogan, President
225 Buckingham Drive
Providence, Utah 84332

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT** in the matter of **FOXTRIDGE DEVELOPMENT CORPORATION; DOCKET NO.: CWA-08-2020-0001** was filed with the Regional Hearing Clerk on March 9, 2020 and **FINAL ORDER** was filed with the Regional Hearing Clerk on April 24, 2020.

Further, the undersigned certifies that a true and correct copy of the documents were emailed to, Laurianne Jackson, Enforcement Attorney, and sent via certified receipt email on April 24, 2020, to:

Respondent

Dan Hogan, President
Foxridge Development Corporation
foxridgedev@gmail.com

And emailed to:

Jessica Chalifoux
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

April 24, 2020

MELISSA
HANIEWICZ

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Melissa Haniewicz
Regional Hearing Clerk