

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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U.S. ENVIRONMENTAL  
PROTECTION AGENCY

\_\_\_\_\_) )  
In the Matter of: ) )  
 ) )  
INDIANA DEPARTMENT OF ) )  
TRANSPORTATION, ) )  
INDIANAPOLIS, INDIANA, ) )  
 ) )  
Respondent. ) )  
\_\_\_\_\_)

CWA-05-2013-0009

Docket No.

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

CONSENT AGREEMENT AND FINAL ORDER

JURISDICTIONAL ALLEGATIONS

1. This is an administrative action commenced and concluded under section 309(g) of the Clean Water Act (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 and the Revocation/Termination or Suspension of Permits (the Consolidated Rules) as codified at 40 C.F.R. part 22, for violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. According to 40 C.F.R. § 22.13(b), where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO).

3. Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency (U.S. EPA) Region 5.

4. Respondent is the Indiana Department of Transportation, a division of the government of the State of Indiana. Respondent is a "person" as that term is defined at section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 501.2.

5. The parties agree to settle this action without the filing of a complaint or the

adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

#### **JURISDICTION AND WAIVER OF RIGHT TO HEARING**

7. Respondent stipulates that U.S. EPA has jurisdiction over the subject matter of this CAFO and waives any jurisdictional objections it may have. Respondent neither admits nor denies Complainant's factual allegations set forth in paragraphs 19 through 30 of this CAFO.

8. 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.

#### **STATUTORY AND REGULATORY BACKGROUND**

9. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states that: "Whenever, on the basis of any information available the Administrator finds that any person has violated [section 301 of the CWA, 33 U.S.C. § 1311], ... the Administrator ... may, after consultation with the State in which the violation occurs, assess a ... class II civil penalty under this subsection."

10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that "Except as in compliance with [section 404 of the CWA] the discharge of any pollutant by any person shall be unlawful."

11. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states: "The Secretary [of the Army] may issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

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

13. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “ ... any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, ... [or] discrete fissure... from which pollutants are or may be discharged.”

14. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” as “ ... dredged spoil, solid waste, ... biological materials, ... rock, sand [or] agricultural waste discharged into water.”

15. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “ ... the waters of the United States ... .”

16. Federal regulations, at 40 C.F.R. § 232.2, define the term “waters of the United States” to include rivers, streams and “wetlands.”

17. Federal regulations, at 40 C.F.R. § 230.3(t), define “wetlands” as “ ... those areas that are inundated or saturated by surface or ground water 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.”

18. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and its implementing regulations at 40 C.F.R. part 19, increased the statutory maximum penalty under section 309(g)(2)(B) of the CWA, 42 U.S.C. § 1319(g)(2)(B), for violations occurring after January 12, 2009, from \$10,000 to \$16,000 per day of violation and from a \$125,000 to a \$177,500 maximum penalty.

### GENERAL ALLEGATIONS

19. Among other things, Respondent constructs, maintains and operates state roads and highways within the State of Indiana. Respondent regularly contracts with private firms to accomplish these tasks.

20. Little Honey Creek is a tributary of Honey Creek, which is tributary to the Wabash, Ohio and Mississippi Rivers, which are traditional navigable waters.

21. Adjacent to Little Honey Creek and its unnamed tributaries are areas that are inundated or saturated by surface or ground water 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. These areas are “wetlands” pursuant to 40 C.F.R. § 230.3(t).

22. Little Honey Creek, its unnamed tributaries and the wetlands adjacent to them are “waters of the United States” pursuant to 40 C.F.R. § 232.2.

### ALLEGATIONS OF LIABILITY

23. On January 4, 2012, Respondent contracted with Linkel Company of Batesville, Indiana (Linkel), to perform tree and shrub clearing and other grubbing activities in areas along Little Honey Creek and its unnamed tributaries beginning at the intersection of existing State Road 641 and McDaniel Road and ending at the intersection of Moyer Road and State Road 46 in Terre Haute, Vigo County, Indiana (the site).

24. Between the February and May of 2012, Linkel, on behalf of Respondent, performed tree and shrub clearing and other grubbing activities at the site using bulldozers, backhoes and other earthmoving equipment. Linkel’s bulldozers, backhoes and other

earthmoving equipment constitute point sources pursuant to 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. While performing the tree and shrub clearing and other grubbing at the site, Linkel, on behalf of Respondent, on several occasions deposited dredged spoil, solid waste, garbage, biological materials, discarded equipment and other wastes in the streambeds and wetlands at the site. The dredged spoil, solid waste, garbage, biological materials, discarded equipment and other wastes deposited by Respondent at the site constitute “pollutants” as that term is defined at section 502(6) of the CWA, 33 U.S.C. § 1362(6).

26. At no time between February and May of 2012 did Respondent possess a permit from the Secretary of the Army, through the Army Corps of Engineers, under section 404(a) of the CWA, 33 U.S.C. § 1341(a), authorizing the fill activities in the streambeds and wetlands at the site.

27. Through the activities of its agent, Respondent's several depositions of dredged spoil, solid waste, garbage, biological materials, discarded equipment and other wastes into the streambeds and wetlands at the site between February and May of 2012, constitute discharges of pollutants to the waters of the United States without an appropriate permit and consequently violate section 301(a) of the CWA, 33 U.S.C. § 1415(a).

28. Each day Respondent's several depositions of dredged spoil, solid waste, garbage, biological materials, discarded equipment and other wastes remain in place in the streambeds and wetlands at the site constitutes a separate violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

**CIVIL PENALTY**

29. Based on an analysis of the factors as specified in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the facts of this case, Respondent's cooperation in quickly resolving this matter and other factors as justice may require, Complainant has determined that an appropriate civil penalty to settle this action is \$40,000.

30. Within 30 days after the effective date of this CAFO, Respondent must pay the \$40,000 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

31. The check must note the case caption and the docket number of this CAFO.

32. A transmittal letter, stating Respondent's name, the case title, Respondent's complete address and the case docket number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Scott McWhorter (WW-16J)  
Wetlands Enforcement Section  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Robert S. Guenther (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5

77 West Jackson Blvd.  
Chicago, IL 60604

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

34. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, nonpayment penalties and the United States' enforcement expenses for the collection action. Respondent acknowledges that the validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

35. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondent must pay the United States' enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue.

#### GENERAL PROVISIONS

36. This CAFO resolves Respondent's liability for only federal civil penalties for the violations and facts alleged in this CAFO.

37. This CAFO does not affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

38. This CAFO does not affect Respondent's responsibility to comply with the CWA or other applicable federal, state and local laws or regulations.

39. This CAFO is a “final order” for the purposes of any future enforcement action under section 309 of the CWA, 33 U.S.C. § 1319.

40. The terms of this CAFO bind Respondent and Respondent’s officers, directors, employees, agents, successors and assigns.

41. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

42. Each party agrees to bear its own costs and fees, including attorneys’ fees, in this action.

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

44. According to section 309(g)(5) of the CWA, 33 U.S.C. § 1319(g)(5), this CAFO will become effective 30 days after filing with the Regional Hearing Clerk.

45. Complainant is providing public notice of and reasonable opportunity to comment on the proposed issuance of this CAFO pursuant to section 309(g)(4), 33 U.S.C. § 1319(g)(4).

**Indiana Department of Transportation, Respondent**

4-11-13  
Date

Michael B. Cline  
Michael B. Cline, Commissioner  
Indiana Department of Transportation

**U.S. Environmental Protection Agency, Complainant**

4-19-13  
Date

Tinka G. Hyde  
Tinka G. Hyde, Director  
Water Division

In the Matter of:  
Indiana Department of Transportation,  
Docket No: CWA-05-2013-0009

FINAL ORDER

This Consent Agreement and Final Order, as agreed to by the parties, will become effective immediately upon filing with the Regional Hearing Clerk. **IT IS SO ORDERED.**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Susan Hedman  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5