

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
LINKEL COMPANY,)
BATESVILLE, INDIANA,)
a Partnership,)
THOMAS LINKEL, and)
JOHN LINKEL,)
General Partners,)
Respondents.)

RECEIVED
JUN 04 2013
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Docket No. CWA-05-2013-0014
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 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. Respondents are the Linkel Company, a partnership constituted by Thomas Linkel and John Linkel, who as general partners are also respondents. Respondents are "persons" 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.

Respondents are collectively referred to as “Linkel.”

5. The parties agree that settling 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. Linkel consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

JURISDICTION AND WAIVER OF RIGHT TO HEARING

7. Linkel stipulates that U.S. EPA has jurisdiction over the subject matter of this CAFO and waives any jurisdictional objections it may have.

8. Linkel 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.

9. By executing this CAFO, Linkel does not admit liability or admit Complainant’s factual allegations set forth in the CAFO. Linkel’s execution of this CAFO does not constitute a waiver or admission of any kind, including without limitation a waiver of any defense, legal or equitable, which Linkel may have in this or any other administrative or judicial proceeding, other than a proceeding to enforce this CAFO.

STATUTORY AND REGULATORY BACKGROUND

10. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), 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 [section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B)]. ”

11. 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.”

12. 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.”

13. 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.”

14. 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.”

15. 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.”

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

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

18. 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.”

19. 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) of the CWA, 33 U.S.C. § 1319(g)(2), 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

20. Among other things, Linkel contracted with the State of Indiana Department of Transportation (INDOT) to perform land clearing and grubbing activities to prepare land for road and highway construction.

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

22. 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).

23. 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

24. On December 14, 2011, Linkel contracted with INDOT 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).

25. Between February and May of 2012, Linkel, under contract with INDOT, 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).

26. While performing the tree and shrub clearing and other grubbing at the site, Linkel on several occasions allegedly 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 allegedly deposited by Linkel at the site constitute "pollutants" as that term is defined at section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. At no time between February and May of 2012 did Linkel 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. § 1344(a), authorizing fill activities in the streambeds and wetlands at the site.

28. Linkel's several alleged 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. § 1311(a).

29. Each day Linkel's several alleged 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 the prohibition contained section 301(a) of the CWA, 33 U.S.C. § 1311(a).

30. According to 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. part 19, the Administrator may assess a penalty not to exceed \$16,000 for each day of violation of section 301 of the CWA to a maximum of \$177,500 for Linkel's alleged violations of section 301(a) of the CWA.

CIVIL PENALTY

31. 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, Linkel'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 \$15,000.

32. Within 30 days after the effective date of this CAFO, Linkel must pay the \$15,000 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

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

34. A transmittal letter, stating Linkel's name, the case title, Linkel's complete address and the case docket number must accompany the payment. Linkel 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

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

36. If Linkel 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 any collection action. Linkel acknowledges that the validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

37. Linkel 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). Linkel 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, Linkel must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue.

GENERAL PROVISIONS

38. This CAFO resolves Linkel's liability, and any liability of Linkel's owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, servants, successors and assigns for only federal civil penalties for the violations and facts alleged in this CAFO.

39. 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.

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

41. 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.

42. The terms of this CAFO bind Linkel, Linkel's owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, servants, successors and assigns.

43. 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.

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

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

46. The effective date of this CAFO is the date it is filed with the Regional Hearing Clerk, after having been signed by the Regional Administrator and subject to the requirements of

section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C).

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

Linkel Company, Thomas Linkel and John Linkel, Respondents

5/22/13
Date


Thomas Linkel

5/22/13
Date


John Linkel

U.S. Environmental Protection Agency, Complainant

June 3, 2013
Date


Tinka G. Hyde, Director
Water Division

In the Matter of:
Linkel Company, Thomas Linkel and John Linkel, Batesville, Indiana
Docket No: CWA-05-2013-0014

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

RECEIVED
JAN 10 2013
REGIONAL HEARING CLERK
REGION 5
EPA