

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 4

In the Matter of:

**BLUEGRASS CONTRACTING  
CORPORATION,**

Respondent.

Docket No. **CWA-04-2021-0506(b)**

**CONSENT AGREEMENT**

**I. NATURE OF ACTION**

1. This is an administrative penalty assessment proceeding brought under Section 309(g)(2)(B)] of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), (CWA or the Act) and Sections 22.13(b) and 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at Title 40 of the Code of Federal Regulations (C.F.R.), Part 22.
2. This Consent Agreement and the attached Final Order shall collectively be referred to as the CAFO.
3. Having found that settlement is consistent with the provisions and objectives of the Act and applicable regulations, the Parties have agreed to settle this action pursuant to 40 C.F.R. § 22.18 and consent to the entry of this CAFO without adjudication of any issues of law or fact herein.

**II. PARTIES**

4. Complainant is the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency (EPA), Region 4, who has been delegated the authority on behalf of the Administrator of the EPA to enter into this CAFO pursuant to 40 C.F.R. Part 22 and Section 309(g)(2)(B) of the CWA.
5. Respondent is **BLUEGRASS CONTRACTING CORPORATION**, (Respondent), a corporation formed under the laws of the Commonwealth of Kentucky doing business in the Commonwealth of Kentucky.

**III. GOVERNING LAW**

6. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with a permit issued under, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344. Section 404 of the CWA authorizes the

Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (COE), to issue permits for the discharge of dredged or fill material into navigable waters.

7. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a “discharge of pollutants” as “[a]ny addition of any pollutant to navigable waters from any point source . . . .”
8. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny 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.”
9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”
10. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with the Complainant regarding this matter.
11. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45, Complainant will provide public notice of and reasonable opportunity to comment on the proposed issuance of this CAFO prior to issuance of the Final Order.

#### **IV. EPA’s FINDINGS OF FACTS**

12. The term “Discharge Area” means the jurisdictional waters that have been impacted either through the discharge of dredged and/or fill material as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area is located on and near property owned by Mr. Virgil Warren at 2713 Brooks Hill Road, near Brooks, Bullitt County, Kentucky 40109, near latitude 38.060098° N and longitude -85.738917° (the Site) and includes 9,083 linear feet of an unnamed intermittent tributary of Bluelick Creek and approximately 41 linear feet of Bluelick Creek. The discharge of the dredged and/or fill material occurred as a result of the disposal at the Site of concrete slurry from a Kentucky road project for which Respondent was the prime contractor. The Discharge Area is depicted on the enclosed Exhibits A and B.
13. The term “Site” means the parcel or parcels of land on which the Discharge Area is located.
14. Commencing on or about March 24, 2019, to April 8, 2019, Wagman Heavy Civil, Inc. (“Wagman”), a subcontractor of Respondent acting pursuant to its subcontract with Respondent, disposed of approximately 205,000 gallons of concrete slurry material at the Site from approximately 41 tanker trucks. Upon disposal at the Site, the slurry then flowed down the slope and, after flowing briefly through an ephemeral channel, entered the unnamed intermittent tributary at the base of the fill slope, ultimately impacting approximately 9,083 linear feet of the unnamed intermittent tributary and approximately 41 linear feet of Blue Lick Creek, resulting in the discharge of such concrete slurry into the Discharge Area. The slurry was generated as a result of Wagman’s grinding/grooving work at the Kentucky road project under Wagman’s subcontract with Respondent.

15. Bluelick Creek is a perennial tributary of Floyds Fork. Floyds Fork flows approximately 3.2 miles to the Salt River, a traditionally navigable water of the United States.

## **V. ALLEGED VIOLATIONS**

16. At all times relevant to this action, Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
17. The discharged concrete slurry material deposited at the Discharge Area contains “pollutants” as defined under the CWA § 502(6); 33 U.S.C. § 1362(6).
18. Fill material means material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land; or changing the bottom elevation of any portion of a water of the United States.” 40 C.F.R. § 232.2. The concrete slurry material discharged into the Discharge Area constitutes fill material, the discharge of which requires a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344
19. The truck/tanker equipment employed by the Respondent’s subcontractor Wagman to deposit the concrete slurry at the Property is a “point source” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
20. The discharge of the fill material into the Discharge Area by Respondent’s subcontractor constitutes a “discharge of pollutants” as defined under the CWA § 502(12), 33 U.S.C. § 1362(12).
21. At no time during the discharge of fill material at the Discharge Area from March 24, 2019 to April 8, 2019 did the Respondent or its subcontractor possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent’s subcontractor.
22. Respondent, as prime contractor, directed selection of the Site for disposal of concrete slurry. Therefore, the Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants into navigable waters without a permit. Respondent claims that its selection of the Site was made with the agreement of the Kentucky Transportation Cabinet.
23. Each discharge by the Respondent or its subcontractor, of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
24. Each day the material discharged by the Respondent or its subcontractor remained in waters of the United States without the required permit under 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.

## **VI. STIPULATIONS**

25. The issuance of this CAFO simultaneously commences and concludes this proceeding. 40 C.F.R.

§ 22.13(b).

26. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits that EPA has jurisdiction over the subject matter alleged in this CAFO;
- (b) neither admits nor denies the factual allegations set forth in Section IV (EPA's Findings of Facts) and Section V (Alleged Violations) of this CAFO;
- (c) consents to the assessment of a civil penalty as stated below;
- (d) consents to the conditions specified in this CAFO;
- (e) waives any right to contest the allegations set forth in Section V (Alleged Violations) of this CAFO; and
- (f) waives its rights to appeal the Final Order accompanying this CAFO.

27. For the purpose of this proceeding, and without admitting liability for the alleged violations, Respondent:

- (a) agrees that this CAFO states a claim upon which relief may be granted against Respondent;
- (b) acknowledges that this CAFO constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
- (c) 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 CAFO, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action;
- (d) waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum, or communication is to persuade such official to accept and issue this CAFO; and
- (e) agrees to comply with the terms of this CAFO.

28. In accordance with 40 C.F.R. § 22.5, the individuals named in the certificate of service are authorized to receive service related to this proceeding and the parties agree to receive service by electronic means.

29. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a proposed CAFO based on comments received during the public comment period.

## VII. TERMS OF PAYMENT

30. Respondent consents to the payment of a civil penalty, which was calculated in accordance with the Act, in the amount of **\$76,000**, which is to be paid within thirty (30) calendar days of the Effective Date of this CAFO.
31. Payment shall be made by cashier's check, certified check, by electronic funds transfer (EFT), or by Automated Clearing House (ACH) (also known as REX or remittance express). If paying by check, the check shall be payable to: Treasurer, United States of America, and the Facility name and docket number for this matter shall be referenced on the face of the check. If Respondent sends payment by the U.S. Postal Service, the payment shall be addressed to:

United States Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

If Respondent sends payment by non-U.S. Postal express mail delivery, the payment shall be sent to:

U.S. Bank  
Government Lockbox 979077  
U.S. EPA Fines & Penalties  
1005 Convention Plaza  
Mail Station: SL-MO-C2-GL  
St. Louis, Missouri 63101  
Contact Number: (314) 425-1819

If paying by EFT, Respondent shall transfer the payment to:

Federal Reserve Bank of New York  
ABA: 021030004  
Account Number: 68010727  
SWIFT address: FRNYUS33  
33 Liberty Street  
New York, New York 10045  
Field Tag 4200 of the Fedwire message should read:  
"D 68010727 Environmental Protection Agency"

If paying by ACH, Respondent shall remit payment to:

US Treasury REX / Cashlink ACH Receiver  
ABA: 051036706

Account Number: 310006, Environmental Protection Agency  
CTX Format Transaction Code 22 – checking  
Physical location of US Treasury facility:  
5700 Rivertech Court  
Riverdale, Maryland 20737  
Contact: Craig Steffen, (513) 487-2091  
REX (Remittance Express): 1-866-234-5681

32. Respondent shall send proof of payment, within 24 hours of payment of the civil penalty, to:

Regional Hearing Clerk  
U.S. EPA Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
R4\_Regional\_Hearing\_Clerk@epa.gov

and

Mr. Joel Strange  
U.S. EPA Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
strange.joel@epa.gov

33. “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 that payment has been made according to EPA requirements, in the amount due, and identified with the Facility name and “Docket No. **CWA-04-2021-0506(b)**.”

34. Pursuant to 33 U.S.C. § 1319(g)(9), If Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may recover, in addition to the amount of the unpaid penalty assessed, the following amounts on any portion overdue:

- a. Interest. Interest will begin to accrue on the civil penalty from the Effective Date of this CAFO. If the civil penalty is paid within 30 days of the Effective Date of this CAFO, Interest is waived. However, if the civil penalty is not paid in full within 30 days, Interest will continue to accrue on any unpaid portion until the unpaid portion of the civil penalty and accrued Interest are paid. Interest will be assessed currently prevailing rates.
- b. Non-Payment Penalty. A 20 percent quarterly nonpayment penalty pursuant to 33 U.S.C. § 1319(g)(9); and
- c. Attorneys’ Fees and Costs of Collection. The United States’ attorneys’ fees and costs of collection.

35. In addition to what is stated in the prior Paragraph, if Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may:
- (a) refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13 and 13.14;
  - (b) 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;
  - (c) suspend or revoke Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17; and/or
  - (d) request that the Attorney General bring a civil action in the appropriate district court to recover the amount assessed, in addition to the amounts described above, pursuant to 33 U.S.C. § 1319(g)(9). In any such judicial action, the validity, amount, and appropriateness of the penalty and of this CAFO shall not be subject to review.
36. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.

37. Effective upon signature of this CAFO by the Respondent, the Respondent agrees that the time period commencing on the date of its signature and ending on the Effective Date shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by EPA related to the matters addressed in this CAFO and that, in any action brought by EPA related to the matters addressed, the Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period.

### **VIII. EFFECT OF CAFO**

38. In accordance with 40 C.F.R. § 22.18(c), Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.
39. Full payment of the civil penalty, as provided in Section VII (Terms of Payment), shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. 40 C.F.R. § 22.18(c).
40. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws or statutes, 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, except as expressly provided herein.

41. 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 as provided under the Act.
42. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of both Parties, and approval of the Regional Administrator.
43. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.
44. Any change in the legal status of the Respondent, or change in ownership, partnership, corporate or legal status relating to the Facility, will not in any way alter Respondent's obligations and responsibilities under this CAFO.
45. By signing this Consent Agreement, Respondent acknowledges that this CAFO will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.
46. By signing this Consent Agreement, the Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.
47. By signing this Consent Agreement, both Parties agree that each party's obligations under this CAFO constitute sufficient consideration for the other party's obligations.
48. By signing this Consent Agreement, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and continues to be, true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.
49. EPA also reserves the right to revoke this CAFO and settlement penalty if and to the extent that EPA finds, after signing this CAFO, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to EPA. If such false or inaccurate material was provided, EPA reserves the right to assess and collect any and all civil penalties for any violation described herein. EPA shall give Respondent notice of its intent to revoke, which shall not be effective until received by Respondent in writing.
50. Unless specifically stated otherwise in this CAFO, each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.

51. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.
52. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the matters addressed and resolved in this CAFO, including but not limited to, any claim that any of the matters or actions described in this CAFO have resulted in a taking of Respondent's property without compensation.

#### **IX. EFFECTIVE DATE**

53. This CAFO shall become effective after execution of the Final Order by the Regional Administrator, on the date of filing with the Hearing Clerk.

The foregoing Consent Agreement in the Matter of **BLUEGRASS CONTRACTING CORPORATION, Docket No. CWA-04-2021-0506(b)**, is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT:

	<u>September 20, 2021</u>
Signature	Date
Printed Name: <u>Tanner McKenzie</u>	
Title: <u>Vice President</u>	
Address: <u>1075 Red Mile Road, Lexington, KY 40504</u>	

The foregoing Consent Agreement in the Matter of **BLUEGRASS CONTRACTING CORPORATION**, Docket No. **CWA-04-2021-0506(b)**, is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

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Carol L. Kemker  
Director  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency, Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

In the Matter of:

**BLUEGRASS CONTRACTING  
CORPORATION**

Respondent.

Docket No. **CWA-04-2021-0506(b)**

FINAL ORDER

The Regional Administrator is authorized to ratify this Consent Agreement which memorializes a settlement between Complainant and Respondent. 40 C.F.R. §22.18(b)(3). The foregoing Consent Agreement is, therefore, hereby approved, ratified and incorporated by reference into this Final Order in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22.

The Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Final Order disposes of this matter pursuant to 40 C.F.R. §§ 22.18 and 22.31.

**BEING AGREED, IT IS SO ORDERED.**

  
\_\_\_\_\_  
Daniel Blackman  
Regional Administrator

## CERTIFICATE OF SERVICE

I certify that the foregoing Consent Agreement and Final Order, in the Matter of **BLUEGRASS CONTRACTING CORPORATION**, Docket No. **CWA-04-2021-0506(b)**, were filed and copies of the same were emailed to the parties as indicated below.

**Via email to all parties at the following email addresses:**

To Respondent:                    Mr. Morgan Salisbury  
    Attorney for Bluegrass Construction Company  
    Lewis Brisbois  
    250 East 5th Street, Suite 2000  
    Cincinnati, Ohio 45202  
    Morgan.Salisbury@lewisbrisbois.com

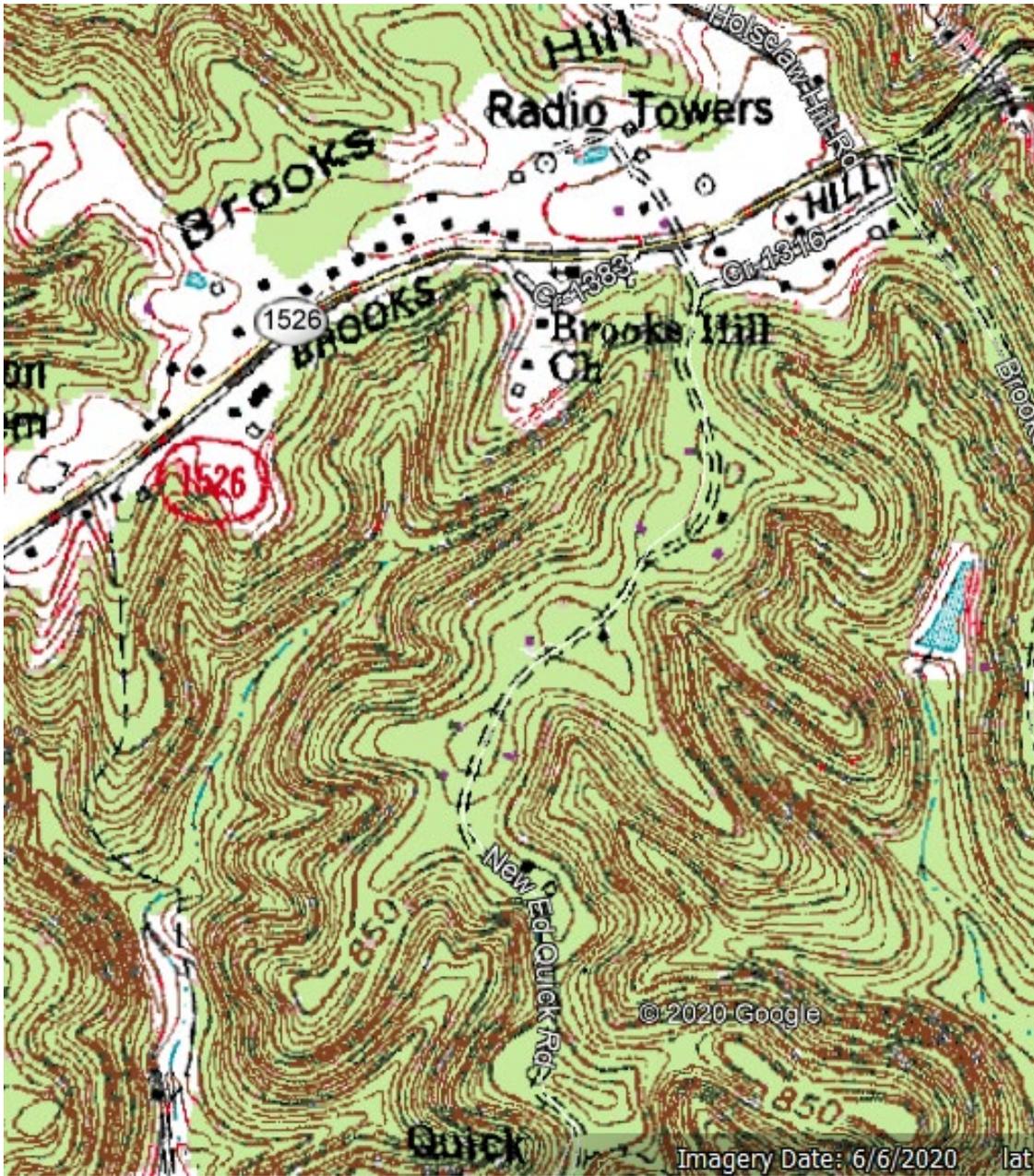
To EPA:                                Mr. Joel Strange  
    Water Enforcement Branch  
    Waterways and Wetlands Enforcement Section  
    Enforcement and Compliance Assurance Division  
    U.S. Environmental Protection Agency, Region 4  
    Atlanta Federal Center  
    61 Forsyth Street, S.W.  
    Atlanta, Georgia 30303  
    Strange,joel@epa.gov

    Mr. Paul Schwartz  
    Office of Regional Counsel  
    U.S. Environmental Protection Agency, Region 4  
    Atlanta Federal Center  
    61 Forsyth Street, S.W.  
    Atlanta, Georgia 30303  
    Schwartz.paul@epa.gov

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Shannon L. Richardson, Regional Hearing Clerk  
U.S. EPA Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

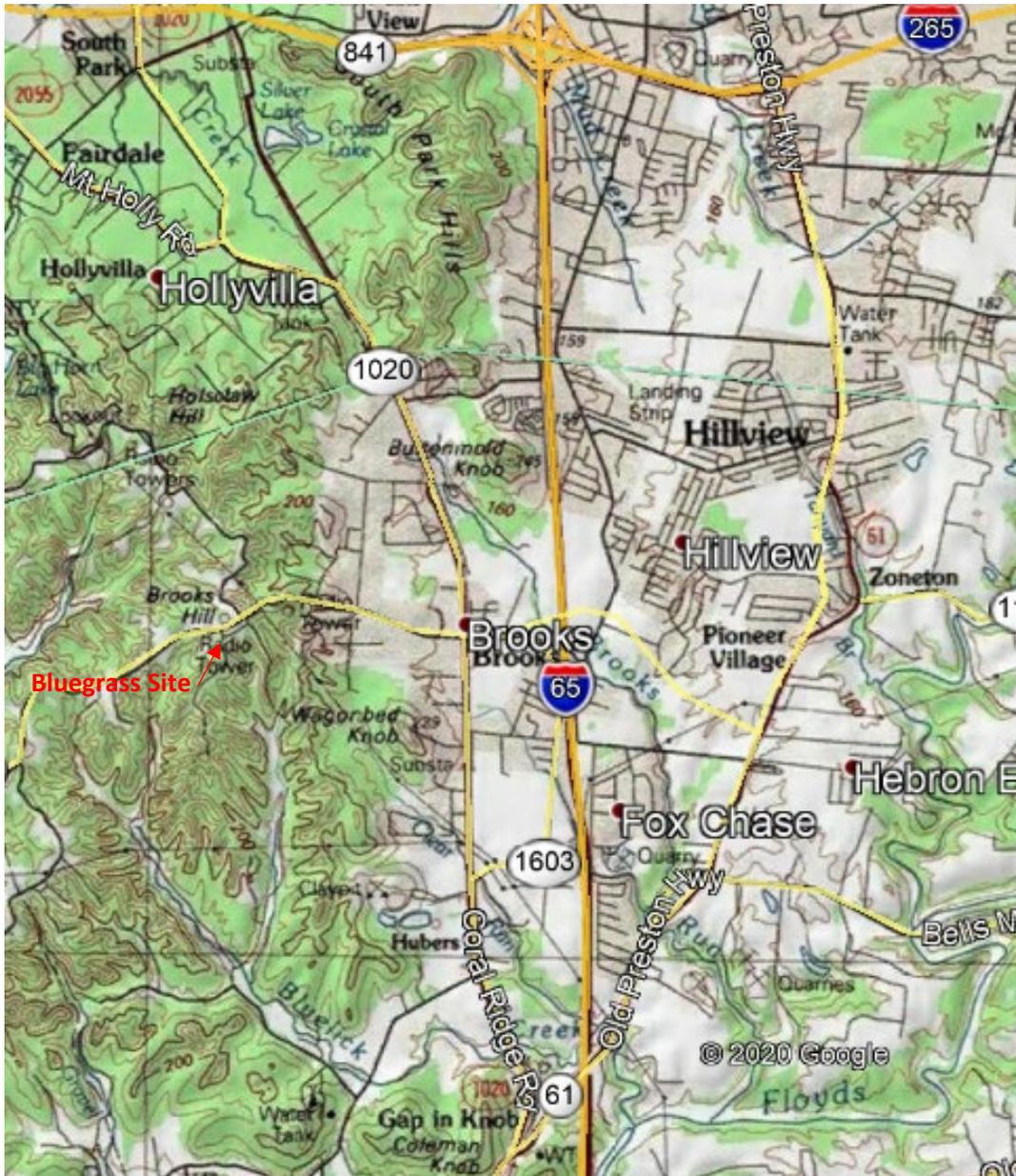
Exhibit A



Bluegrass Contracting Corporation

Bullitt County, Kentucky

# Exhibit B



Bluegrass Contracting Corporation

Bullitt County, Kentucky