

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**In the Matter of:** ) **Docket No. CWA-05-2013-0023**  
)  
**Kinas Excavating, Inc.,** ) **Proceeding to Assess a Class II Civil Penalty**  
**Green Lake, Wisconsin** ) **Under Section 309(g) of the Clean Water Act,**  
) **33 U.S.C. § 1319(g)**  
)  
Respondent. ) **Docket No.**



**CONSENT AGREEMENT AND FINAL ORDER**

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act (Act), 33 U.S.C. § 1319(g), and 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 40 C.F.R. Part 22.
2. The Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency, Region 5 (Complainant or U.S. EPA).
3. Respondent is a corporation organized under the laws of Wisconsin with a business address of N6205 Lawson Drive, Green Lake, Wisconsin.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).
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. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of the CAFO.

### **Jurisdiction and Waiver of Right to Hearing**

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the general allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c) and Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

### **Statutory and Regulatory Background**

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344.

10. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (Corps), to issue permits for the discharge of dredged or fill material into navigable waters.

11. Section 502(5) of the Act defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).

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

13. Section 502(6) of the Act defines "pollutant," 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).

14. Section 502(14) of the Act defines “point source,” 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).

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

16. The regulation at 40 C.F.R. § 230.3(s) defines the term “waters of the United States” to include “all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...[including] intrastate lakes, rivers, streams (including intermittent streams)...wetlands...the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters...tributaries of [such] waters...[and] wetlands adjacent to [all such] waters.”

17. The regulation at 40 C.F.R. § 230.3(t) defines “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.”

#### **Factual Allegations and Alleged Violations**

18. Respondent is a corporation located in and doing business in the State of Wisconsin.

19. Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

20. The Property is Lot Three (3) of Certified Survey Map No. 3288, as recorded in Volume 18 of Certified Survey Maps on Page 3288-3288C, and being part of the Southeast ¼ of the Southeast ¼ of Section 25, and part of Government Lot 1 of Section 36, in Township 16

North, Range 12 East, and part of Government Lot 4, in Section 30, Township 16 North, Range 13 East, all in the Town of Brooklyn, Green Lake County, Wisconsin (Property).

21. The Property contains approximately five thousand (5,000) square feet of wetlands (wetland).

22. The wetland is adjacent to Big Green Lake.

23. Big Green Lake is a Traditional Navigable Water.

24. The wetland is a “water of the United States,” as defined by the regulations at 40 C.F.R. § 230.3(s) and 232.2 and constitutes a “navigable water” as defined at section 502(7) of the Act, 33 U.S.C. § 1362(7).

25. On approximately July 26, 2010, Respondent leveled the ice ridge that separated the wetland from Big Green Lake and placed the dredged material into the wetland. The material placed covered approximately five thousand (5,000) square feet of the wetland.

26. At no time relevant to these discharges did Respondent have a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344, to discharge dredged material into the wetland.

27. The dredged and fill material discharged into the wetland is a “pollutant” as defined by Section 502(6) of the Act, 33 U.S.C. § 1362(6).

28. Respondent used equipment, including but not limited to a bulldozer, in order to place the dredged material in the wetland.

29. Bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constitute “point sources” as defined by Section 502(14) of the Act, 33 U.S.C. § 1362(14).

30. The addition of fill and dredged material from bulldozers into wetlands constitutes a “discharge of a pollutant” as defined by Section 502(12) of the Act, 33 U.S.C. § 1362(12).

31. 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. § 1311.

32. Each day the pollutants remained in the waters of the United States constituted a continuing violation of the Act and an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

#### **Civil Penalty**

33. Under Section 309(g) of the Act, 33 U.S.C. § 1319(g), the Administrator may assess a civil penalty of up to \$10,000 per day of violation up to a total of \$125,000 for violations of Section 301 of the Act that occurred prior to January 31, 1997. The Debt Collection Improvement Act of 1996 increased the statutory maximum penalty to \$11,000 per day of violation up to a total of \$137,500 for violations of Section 301 of the Act on or after January 31, 1997, 31 U.S.C. § 3701 and 40 C.F.R. Part 19. After March 15, 2004, the maximum total penalty for violations of Section 301 of the Act increased to \$157,500. Effective January 12, 2009, the Administrator may assess a Class II civil penalty not to exceed \$16,000 per day for each day during which the violation continues, to a maximum amount of \$177,500.

34. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violation alleged, as well as Respondent’s ability to pay, prior history of such violation, culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, U.S. EPA agrees to a penalty of \$19,500.

35. Within 30 days after the effective date of this CAFO, Respondent must pay the \$19,500 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

**For checks sent by regular U.S. Postal Service mail**  
U.S. EPA Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

**For checks sent by express mail**  
U.S. Bank  
Government Lockbox 979077  
U.S. EPA Fines and Penalties  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101

36. A transmittal letter, stating Respondent's name, complete address, the case docket number, and the billing document number must accompany the payment. Respondent must write the case docket number and the billing document number on the face of the check and send copies of the check and transmittal letter to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard (E-19J)  
Chicago, IL 60604-3590

Greg Carlson (WW-16J)  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Robert M. Peachey (C-14J)  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard  
Chicago, IL 60604-3590.

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

38. If Respondent does not timely pay the civil penalty, Complainant may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and Complainant's enforcement expenses for the collection action.

39. 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. Complainant will assess a 6% per year penalty on any principal amount not paid timely pursuant to this CAFO.

#### **General Provisions**

40. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

41. This CAFO does not affect the rights 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.

42. This CAFO does not affect Respondent's responsibility to comply with the Clean Water Act and other applicable federal, state, local laws or permits.

43. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31 and the EPA's Clean Water Act Section 404 Settlement Penalty Policy (December 2001).

44. The terms of this CAFO bind the Respondent, its successors, and assigns.

45. Each person signing this 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.

46. Each party agrees to bear its own costs and attorney's fees in this action.

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

**SIGNATORIES**

Each undersigned representative of a party to this Consent Agreement and Final Order certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement and Final Order and to bind legally such party to this document.

**Kinas Excavating, Inc., Respondent**

9-04-13

Date

John W. Kinas

John W. Kinas

President

Kinas Excavating, Inc.

**United States Environmental Protection Agency, Complainant**

9/17/13

Date

Tinka G. Hyde

Tinka G. Hyde, Director

Water Division

United States Environmental Protection Agency

Region 5

Chicago, Illinois





**In the Matter of:**  
**Kinas Excavating, Inc.**  
**Docket No. CWA-05-2013-0023**

**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.

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