



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

**SEP 21 2012**

CERTIFIED MAIL 70101060000217045684  
RETURN RECEIPT REQUESTED

Mr. Burt Exum  
Post Office Box 1967  
Wilmington, North Carolina 28402

RE: Consent Agreement and Final Order  
Docket No. CWA-04- 2012 -5509(b)

Dear Mr. Exum:

Enclosed is a copy of the Consent Agreement and Final Order (CAFO) that has been finalized by the U.S. Environmental Protection Agency, Region 4 and the Regional Administrator. Please make note of the provisions under Section V, payment.

Thank you for your cooperation in settling this matter. Should you have any questions or concerns, please contact Mr. Chris Parker, of my staff, at (404) 562-9838, or your attorney may contact Mr. Philip Mancusi-Ungaro, Attorney Advisor at (404) 562-9518.

Sincerely,

A handwritten signature in black ink that reads "Denisse Diaz".

Denisse D. Diaz, Chief  
Clean Water Enforcement Branch  
Water Protection Division

Enclosure

cc: Ms. Jennifer Frye  
U.S. Army Corps of Engineers, Wilmington Regulatory Office

Mr. Jim Gregson  
North Carolina Department Environment and Natural Resources, Wilmington

Mr. John Hennessey  
North Carolina Department Environment and Natural Resources, Raleigh

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

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2012 SEP 21 PM 2:36

HEARING CLERK

IN THE MATTER OF: )  
)  
) ADMINISTRATIVE  
YDV, Inc., ) CONSENT AGREEMENT AND  
Hood Creek, LLC ) FINAL PENALTY ORDER  
Brunswick County, North Carolina )  
)  
RESPONDENTS ) Docket No.: CWA-04-2012-5509(b)  
\_\_\_\_\_)

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding under Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(A), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, published at 64 Fed. Reg. 40176 (July 23, 1999), codified at 40 Code of Federal Regulations (C.F.R.) Part 22 (Part 22).

2. The Administrator has delegated this authority to the Regional Administrator of EPA Region 4, who in turn has delegated this authority to the Director of the Water Protection Division, who in turn has delegated this authority to the Chief of the Clean Water Enforcement Branch of EPA Region 4 (Complainant).

**II. Statutory and Regulatory Background**

3. Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A), states "[w]henever, 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 I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)]."

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states "[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful." Section 404 of the CWA, 33 U.S.C. § 1344, 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.

5. 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 . . ."

6. 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.”

7. 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.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or groundwater 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.”

10. The term “Discharge Area” means the jurisdictional waters that have been impacted either through filling or dredging as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area is approximately 5.22 acres of wetlands that are adjacent to two unnamed perennial tributaries, which are tributary to Alligator Branch. Alligator Branch is a perennial tributary that flows to Hood Creek. Hood Creek is a perennial tributary that flows to the Cape Fear River, a navigable-in-fact water of the United States. The Discharge Area is located near the city of Leland, Brunswick County, North Carolina, 34°16’11.43” north and longitude 78°05’25.54” west and is indicated on the enclosed Exhibits A and B.

11. The term “Site” means the parcel or parcels of land on which the Discharge Area is located.

### **III. Allegations**

12. Respondents, YDV, Inc. and Hood Creek, LLC, at all times relevant to this Administrative Consent Agreement and Final Penalty Order (CAFO), were the owners and operators of the Site.

13. Respondents are persons within the definition set forth under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Commencing on or about January 1, 2008 to March 1, 2012, Respondents, or those acting on behalf of the Respondents, discharged dredged and/or fill material into jurisdictional wetlands on the Site using earth moving machinery, during unauthorized activities associated with the construction of a residential golf course community known as Compass Pointe.

15. Respondents’ unauthorized activities impacted approximately 5.22 acres of wetlands that are adjacent to two unnamed perennial tributaries, which are tributary to Alligator Branch. Alligator Branch is a perennial tributary that flows to Hood Creek. Hood Creek is a

perennial tributary that flows to the Cape Fear River, a navigable-in-fact water of the United States.

16. The discharged dredged and/or fill material, including earthen material deposited at the Discharge Area, are “pollutants” as defined under Section § 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The earth moving machinery employed by the Respondents to deposit the dredged and/or fill material at the Discharge Area are “point sources” as defined under Section § 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. Respondents’ placement of the dredged and/or fill material at the Discharge Area constitutes a “discharge of pollutants” as defined under Section § 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. At no time during the discharge of dredged and/or fill material at the Site did the Respondents possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by the Respondents. Each discharge by the Respondents 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).

20. Each day the material discharged by the Respondents remains 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.

#### **IV. Stipulations and Findings**

21. Complainant and Respondents have conferred for the purpose of settlement under 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this CAFO will simultaneously commence and conclude this matter.

22. For the purposes of this CAFO, Respondents admit the jurisdictional allegations set out above and neither admits nor denies the factual allegations set out above.

23. Respondents hereby waives their right to contest the allegations set out above and their rights to appeal the Final Penalty Order accompanying this Consent Agreement.

24. Respondents consent to the assessment of and agree to pay the administrative penalty as set forth in this CAFO and consent to the other conditions set forth in this CAFO.

25. By signing this CAFO, the Respondents certify that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondents realize that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

26. Complainant reserves the right to assess and collect any and all civil penalties for any violation described in this Consent Agreement to the extent that any information or certification provided by the Respondents were materially false or inaccurate at the time such information or certification was provided to Complainant.

27. Complainant and Respondents agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of the CWA.

**V. Payment**

28. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, and considering the nature of the violations and other relevant factors, Complainant has determined that twenty-two thousand (\$22,000) dollars is an appropriate civil penalty to settle this action.

29. Respondents shall submit full payment of the penalty specified in the preceding paragraph on or before January 15, 2013, via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of the Respondents and the Docket Number of this CAFO. Such payment shall be submitted by U.S. Postal Service to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

30. At the time of payment, Respondents shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Mr. Chris Parker  
Clean Water Enforcement Branch  
Wetlands Enforcement Section  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

31. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

32. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g) (9), failure by the Respondents to pay the penalty assessed by the CAFO in full by its due date may subject the Respondents to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

## **VI. General Provisions**

33. This CAFO shall not relieve the Respondents of their obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit. Other than as expressed herein, compliance with this CAFO shall not be a defense to any actions subsequently commenced under federal laws and regulations administered by the EPA.

34. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of United States to seek any other remedies or sanctions available by virtue of Respondents' violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondents' violation of any federal or state statute, regulation or permit.

35. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondents of all claims for civil penalties under the CWA with respect to only those violations alleged in this CAFO. Except as otherwise set forth in this document, compliance with this CAFO shall resolve the allegations of violations contained in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondents, or other liability resulting from violations that were not alleged in this CAFO. Other than as expressed in this document, Complainant does not waive any right to bring an enforcement action against Respondents for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

36. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

37. This CAFO applies to and is binding upon Respondents and any officers, directors, employees, agents, successors and assigns of the Respondents.

38. Any change in the legal status of the Respondents including, but not limited to, any transfer of assets of real or personal property, shall not alter the Respondents' responsibilities under this CAFO.

39. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CAFO.

40. In accordance with 40 C.F.R. § 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant: Mr. Philip Mancusi-Ungaro  
Attorney Advisor  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street  
Atlanta, Georgia 30303  
(404) 562-9518

For Respondents: YDV, Inc.  
Hood Creek, LLC  
Attn: Mr. Burt Exum  
P.O. Box 1967  
Wilmington, North Carolina 28402

41. 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 consent agreement and proposed final order based on comments received during the public comment period.

42. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the State of North Carolina was provided a prior opportunity to consult with Complainant regarding this matter.

43. This CAFO in no way affects the rights of the Complainant as against any person or entity not a party to this CAFO.

#### **VII. Release by Respondents**

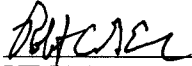
44. Respondents hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a taking of Respondents' property without compensation.

#### **VIII. Effective Date**

45. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

**AGREED AND CONSENTED TO:**

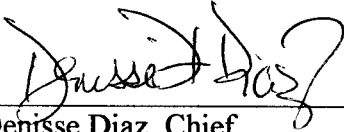
For RESPONDENTS:



YDV, Inc.  
Hood Creek, LLC

Date: 8-13-12

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



Denisse Diaz, Chief  
Clean Water Enforcement Branch  
Water Protection Division  
U.S. EPA Region 4

Date: 9/18/12



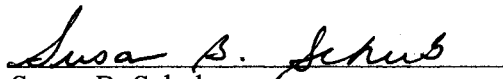
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

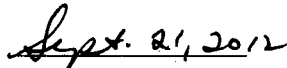
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Brunswick County, North Carolina )  
)  
RESPONDENTS ) Docket No.: CWA-04-2012-5509(b)  
)  
\_\_\_\_\_)

**FINAL PENALTY ORDER**

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Penalty Order. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondents are hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

  
Susan B. Schub  
Regional Judicial Officer

Date: 

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of: **Docket No. CWA-04-2012-5509(b)** on the parties listed below in the manner indicated:

EPA Internal Mail:

Chris Parker  
Clean Water Enforcement Branch  
Wetlands Enforcement Section  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

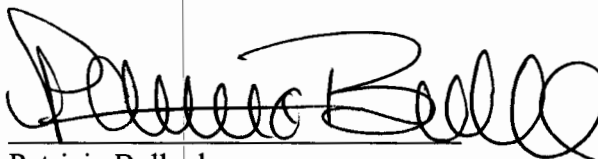
Philip Mancusi-Ungaro  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9613

By Certified mail,  
Return receipt requested:

YDV, Inc.  
Hood Creek, LLC  
Attn: Mr. Burt Exum  
P.O. Box 1967  
Wilmington, North Carolina 28402

Dated:

9-21-12



Patricia Bullock  
Regional Hearing Clerk  
U. S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9511