



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

AUG 19 2009

**CERTIFIED MAIL 7001 1140 0001 5045 3260**  
**RETURN RECEIPT REQUESTED**

Tim Kennedy  
Thomas Kennedy  
650 Kennedy Lane  
Biloxi, Mississippi 39532

Re: Consent Agreement and Final Order  
Docket No. CWA-04-2009-5505(b)

Dear Messers. Kennedy:

Enclosed is a copy of the Consent Agreement and Final Order that has been finalized by the U.S. Environmental Protection Agency and the Regional Judicial Officer. Please make note of the provisions under Section VII. Payment.

Thank you for your cooperation in settling this matter. Should you have any questions or concerns, please contact Ms. Mara Linsdley of my staff at (404) 562-9296, or your attorney can contact Ms. Wilda Cobb, Attorney Advisor, at (404) 562-9530.

Sincerely,

A handwritten signature in black ink, appearing to read "J. D. Giattina".

James D. Giattina  
Director  
Water Protection Division

Enclosure

cc: U.S. Army Corps of Engineers, Louisville, KY  
Kentucky Division of Water, Frankfort, KY  
U.S. Army Corps of Engineers, Newburgh, IN

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )

Tim Kennedy )  
Thomas Kennedy, Sr. )  
Biloxi, Mississippi )

RESPONDENTS. )

) ADMINISTRATIVE  
) CONSENT AGREEMENT AND  
) FINAL PENALTY ORDER

) Docket No.: CWA-04-2009-5505(b)

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P.B.~~

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding under Section 309(g)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1), 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 authority to take action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), is vested in the Administrator of the United States Environmental Protection Agency (EPA). The Administrator has delegated this authority to the Regional Administrator Region 4, who in turn has redelegated 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) of the CWA, 33 U.S.C. § 1319(g)(1), 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 [33 U.S.C. § 1319(g)(2)(A)] or a class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)]."

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 . . ."

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MEMPHIS, TENN

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.”

### **III. Allegations**

10. The term “Discharge Area” means the jurisdictional waters that have been impacted either through filling or dredging with a 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 the Back Bay of Biloxi and wetlands adjacent to the Back Bay of Biloxi, within Section 24, Township 7 South, Range 9 West, Biloxi, Harrison County, Mississippi, at approximately 30°25'37.52" N Latitude and 88°56'10.13"W Longitude. The Discharge Area 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.

12. Respondents, at all times relevant to this Consent Agreement and Final Order, were the owners and/or 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 April, 2008, Respondents, or those acting on behalf of Respondents, discharged dredged and/or fill material into wetlands on the Site using earth moving machinery, during unauthorized activities associated with the reclamation of two shrimp boats washed ashore during Hurricane Katrina.

15. Respondents impacted approximately 0.39 acres of waters of the United States, the Back Bay of Biloxi, and tidal wetlands adjacent to those waters (Discharge Area).

16. The discharged dredged and/or fill material, including earthen material deposited at the Discharge Area, are "pollutants" as defined under the CWA § 502(6).

17. The mechanized, earth moving machinery employed by Respondents to deposit the dredged and/or fill material at the Discharge Area are "point sources" as defined under the CWA § 502(14).

18. Respondents' placement of the dredged and/or fill material at the Discharge Area constitutes a "discharge of pollutants" as defined under the CWA § 502(12).

19. At no time during the discharge of dredged and/or fill material at the Discharge Area on or about August 3, 2007, to the present, did Respondents possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondents. Each discharge by 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 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 Administrative Consent Agreement and Final Order (CAFO) will simultaneously commence and conclude this matter.

22. For the purposes of this CAFO, Respondents admit the jurisdictional allegations set out above and the factual allegations set out above.

23. Respondents hereby waive their right to contest the allegations set out above and its right to appeal the Final 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 consents to the other conditions set forth in this CAFO.

25. By signing this CAFO, Respondents certify that the information 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. EPA 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 Respondents was materially false or inaccurate at the time such information or certification was provided to EPA.

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, EPA has determined that five thousand dollars (\$5,000) is an appropriate civil penalty to settle this action.

29. Respondents shall submit payment of the penalty specified in the preceding paragraph within 30 days of the effective date of this CAFO 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 Respondents and the Docket Number of this CAFO. Such payment shall be tendered to:

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

For payments submitted by any overnight mail service (Fed Ex, UPS, DHL, etc.):

U.S. Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101

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  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Mara Lindsley  
U.S. Environmental Protection Agency - Region 4  
Wetlands Enforcement Section – 15<sup>th</sup> Floor  
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 40 C.F.R. Part B § 13 and 31 U.S.C. § 3717 et seq., if EPA does not receive payment of the penalty assessed by this CAFO in full by its due date, interest shall accrue on the unpaid balance from the due date through the date of payment at an annual rate equal to the rate of the current value of funds to the United States Treasury as prescribed and published by the Secretary of the Treasury. If all or part of the payment is overdue, EPA will assess a late-payment handling charge of \$15.00, with an additional delinquent notice charge of \$15.00 for each subsequent 30 day period. EPA will also assess on a monthly basis an up to six per cent per annum penalty on any principal amount not paid within 90 days of the due date.

33. 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 20 percent 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**

34. This CAFO shall not relieve 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.

35. 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.

36. 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 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.

37. 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.

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

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

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

7-15-0000  
Attorney Advisor  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
(404) 562-9530

For Respondents:

Tim Kennedy  
Thomas Kennedy, Sr.  
650 Kennedy Lane  
Biloxi, Mississippi 39532  
(228) 392-2200

42. 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.

43. 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 Florida was provided a prior opportunity to consult with Complainant regarding this matter.

44. 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**

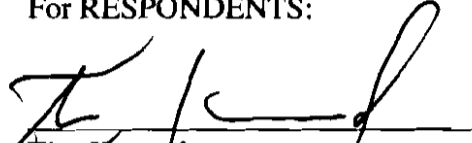
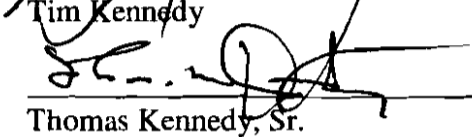
45. Respondents hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a taking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



**VIII. Effective Date**

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

For RESPONDENTS:

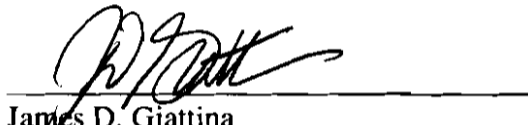
  
\_\_\_\_\_  
Tim Kennedy  
  
\_\_\_\_\_  
Thomas Kennedy, Sr.

Date: 7-6-09

Date: 7-6-09

**AGREED AND CONSENTED TO:**

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

  
\_\_\_\_\_  
James D. Giattina  
Director  
Water Protection Division

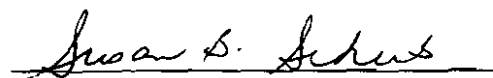
Date: AUG 10 2009

**FINAL 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 Order. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondents are hereby ordered to comply immediately with the terms of the foregoing Consent Agreement which are fully incorporated into this Final Order.

**U.S. ENVIRONMENTAL PROTECTION AGENCY**

Date: 8/19/09

  
Susan B. Schub  
Regional Judicial Officer  
U.S. EPA, Region 4

**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: **Tim Kennedy and Thomas Kennedy, Sr.**  
**Docket No.: CWA-04-2009-5505(b)** on the parties listed below in the manner indicated:

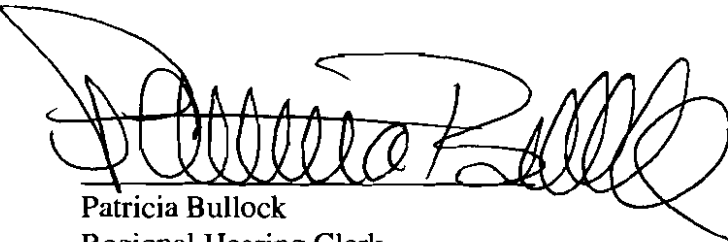
Mara Lindsley  
Enforcement Officer (Via EPA's internal mail)  
U.S. EPA, Region 4  
Wetlands Enforcement Program  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Wilda Cobb (Via EPA's internal mail)  
Associate Regional Counsel  
Office of Environmental Accountability  
U.S. EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

Mr. Tim Kennedy (Via Certified Mail – Return Receipt Requested)  
Mr. Thomas Kennedy, Sr.  
650 Kennedy Lane  
Biloxi, Mississippi 39532

Ms. Willa J. Brantley (Via Regular Mail)  
Mississippi Department of Marine Resources  
1141 Bayview Avenue  
Biloxi, Mississippi 39530

Dated: 8/19/09

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

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM  
=====

TO BE COMPLETE BY ORIGINATING OFFICE:

(attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Mara Lindsley 7/9/2009  
[Name] [Date]  
in the Wetlands Enforcement Section/Water Protection Division at 404-562-9296  
[Office] [Telephone Number]

- Non-SF Judicial Order/Consent Decree. USAO COLLECTS.  Administrative Order/Consent Agreement. FMS COLLECTS PAYMENT.  
 SF Judicial Order/Consent Decree. FMS COLLECTS.  Other Receivables  
 This is an original debt.  This is a modification.

PAYEE: Tin Kennedy and Thomas Kennedy, Sr.  
[Name of person and/or Company/Municipality making the Payment]

The Total Dollar Amount of Receivable: \$ 5000.00  
[If in installments, attach schedule of amounts and respective due dates]

The Case Docket Number: CWA-04-2009-5505(b)

The Site-Specific Superfund (SF) Account Number: \_\_\_\_\_

The Designated Regional/Headquarters Program Office: Region 4 Water Protection Division

=====

TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT SECTION:

The IFMS Accounts Receivable Control Number is: \_\_\_\_\_  
If you have any questions call: \_\_\_\_\_ in the Financial Management Section,  
Telephone Number: \_\_\_\_\_

=====

DISTRIBUTION:

- A. JUDICIAL ORDERS: Copies of this form with an attached copy of the front page of the FINAL JUDICIAL ORDER should be mailed to:
- 1. Debt Tracking Officer  
Environmental Enforcement Section  
Department of Justice/RH 1647  
P.O. BOX 7611, Benjamin Franklin Station  
Washington, DC 20044
  - 2. Originating Office (ORC)
  - 3. Designated Program Office
- B. ADMINISTRATIVE ORDERS: Copies of this form with an attached copy of the front page of the ADMINISTRATIVE ORDER should be sent to:
- 1. Originating Office
  - 2. Designated Program Office
  - 3. Regional Hearing Clerk
  - 4. Regional Counsel