



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

SEP 30 2014

CERTIFIED MAIL 7010 1060 0002 1705 3856
RETURN RECEIPT REQUESTED

Ethan R. Ware, Esq.
McNair Law Firm, P. A.
1221 Main Street, Suite 1600
Columbia, South Carolina 29201

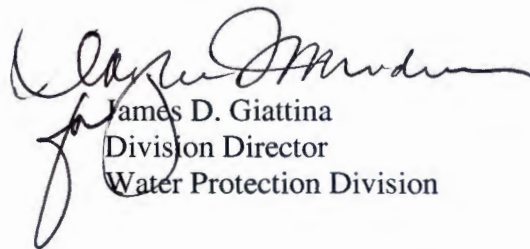
Re: Consent Agreement and Final Order No.: CWA-04-2014-5513(b)
Appolo Fuels, Inc.
Bell County, Kentucky

Dear Mr. Ware:

Enclosed is a copy of the Consent Agreement and Final Order 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.

Thank you for you and your client's cooperation in settling this matter. Should you have any questions or concerns, please contact Ms. Tanya Floyd, Associate Regional Counsel, at (404) 562-9813.

Sincerely,



James D. Giattina
Division Director
Water Protection Division

Enclosure

cc: Mr. Travis Wylie
U.S. Army Corps of Engineers, Nashville District

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

RECEIVED
EPA REGION IV
2014 SEP 30 PM 2:44
HEARING CLERK

IN THE MATTER OF:)
) ADMINISTRATIVE
APPOLO FUELS, INC.,) CONSENT AGREEMENT AND
FONDE, KENTUCKY,) FINAL PENALTY ORDER
)
RESPONDENT.) Docket No.: CWA-04-2014-5513(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)(1) of the CWA, 33 U.S.C. § 1319(g)(1), 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 re-delegated this authority to the Director of the Water Protection Division 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]henver, 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 (“Corps”), 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 Areas” means the areas the EPA has determined to be jurisdictional waters of the United States that have been impacted either through filling or dredging as a result of the alleged unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Areas include 1,195 linear feet of two unnamed tributaries to Clear Fork of the Cumberland River at the Jellico Surface Mine #1 near Fonde, in Bell County, Kentucky at latitude 36° 35' 44" north, longitude 83° 52' 04" west. The Discharge Areas are indicated on the enclosed Exhibits A and B.

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

III. Allegations

12. Appolo Fuels, Inc. (“Respondent”) was the operator of the Site at all times relevant to this Consent Agreement and Final Order.

13. Respondent is a company duly organized under the laws of the Commonwealth of Kentucky and, as such, is a person within the definition set forth under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Commencing on or about August 18, 2009, Respondent, and/or those acting on behalf of Respondent, discharged dredged and/or fill material into jurisdictional waters of the United States on the Site using earth moving machinery, during the construction of a hollow fill (Hollow Fill 1) and two sediment retention ponds (Ponds 1 and 4). To date, the unauthorized dredged and/or fill material remains in waters of the United States.

15. Respondent's discharge of dredged and/or fill material impacted approximately 1,195 linear feet of two unnamed tributaries to Clear Fork of the Cumberland River, which flow into to the Clear Fork of the Cumberland River, a navigable water of the United States.

16. The discharged dredged and/or fill material, including earthen material deposited into the Discharge Areas, are "pollutants" as defined under the CWA § 502(6), U.S.C. § 1362(6).

17. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material into the Discharge Areas are "point sources" as defined under the CWA § 502(14), U.S.C. § 1362(14).

18. Respondent's placement of the dredged and/or fill material into the Discharge Areas constitutes a "discharge of pollutants" as defined under the CWA § 502(12), U.S.C. § 1362(12).

19. Respondent applied for partial coverage under a Section 404 CWA permit, 33 U.S.C. § 1344, for impacts totaling 655 linear feet in an unnamed tributary to Clear Fork of the Cumberland River associated with the construction of Hollow Fill 1 and Pond 1 on July 28, 2009. However, at no time during the discharge of dredged and/or fill material into the Discharge Areas from on or about August 18, 2009, to the present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the discharge of dredged and/or fill material by Respondent, and/or those acting on its behalf. Each discharge by the Respondent, and/or those acting on its behalf, 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 Respondent 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 Respondent have conferred for the purpose of settlement under 40 C.F.R. Part 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. Part 22.13(b), this Administrative Consent Agreement and Final Penalty Order ("CAFO") will simultaneously commence and conclude this matter.

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

23. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

24. Respondent consents to the assessment of and agrees 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, Respondent certifies 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. Respondent realizes 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. The 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 Respondent was materially false or inaccurate at the time such information or certification was provided to the EPA.

27. Complainant and Respondent 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)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 19, and considering the nature of the alleged violations and other relevant factors, the EPA has determined that One Hundred Thirty-Five Thousand Dollars (\$135,000.00) is an appropriate civil penalty to settle this action.

29. Respondent 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 Respondent 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

For other payment options (ex: Wire Transfers, Overnight Mail, ACH, and On Line) please refer to Attachment A.

30. At the time of payment, Respondent 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. EPA, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

and

Ms. Mary Mattox
Clean Water Enforcement Branch
Wetlands Enforcement Section
U.S. EPA, 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 Respondent to pay the penalty assessed by the CAFO in full by its due date may subject the Respondent 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 Respondent of its 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 the United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any federal or state statute, regulation or permit not set out above.

35. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent 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 Respondent, 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 Respondent 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 Respondent and any officers, directors, employees, agents, successors, and assigns of the Respondent.

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

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

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

For Complainant:

Ms. Tanya Floyd
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-9813

For Respondent:

Mr. Ethan Ware
McNair Law Firm, P.A.
1221 Main Street
Suite 1600
Columbia, South Carolina 29201
(803) 799-9800

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 each commenter, who is not a party to this CAFO, a right to petition to set aside a consent agreement and proposed final order within 30 days of receipt thereof on the basis that material evidence was not considered.

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 Commonwealth of Kentucky 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.

44. Effective upon signature of this CAFO by Respondent, Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from Respondent the payment required by this CAFO shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the EPA related to the matters addressed in this CAFO and that, in any action brought by the EPA related to the allegations set forth herein, 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. If EPA gives notice to Respondent that it will not make this CAFO effective, the statute of limitations shall begin to run again commencing ninety days after the date such notice is sent by the EPA.

VII. Release by Respondent

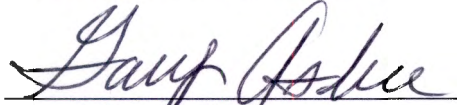
45. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the allegations resolved in this CAFO, including but not limited to, any claim that any of the allegations or actions described in this CAFO have resulted in a taking of Respondent's 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.

AGREED AND CONSENTED TO:

For RESPONDENT, APPOLO FUELS, INC.:



Gary Asher, President
Appolo Fuels, Inc.

Date: 8/7/14

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



James D. Giattina, Director
Water Protection Division
U.S. Environmental Protection Agency
Region 4

Date: 9/26/14

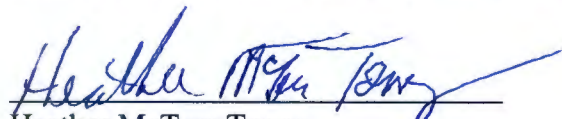
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)
)
) APPOLO FUELS, INC.,) ADMINISTRATIVE
) CONSENT AGREEMENT AND
) FINAL PENALTY ORDER
)
) RESPONDENT.) Docket No.: CWA-04-2014-5513(b)
)
_____)

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)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY



Heather McTeer Toney
Regional Administrator
U.S. Environmental Protection Agency
Region 4

Date: SEP 29 2014

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-04-2014-5513(b)** on the parties listed below in the manner indicated:

EPA Internal Mail:

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

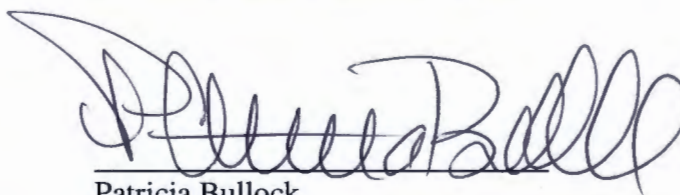
By hand-delivery:

Ms. Tanya Floyd
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

By Certified mail,
return receipt requested:

Mr. Ethan Ware
McNair Law Firm, P.A.
1221 Main Street
Suite 1600
Columbia, South Carolina 29201

Dated: 9-30-14



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

ATTACHMENT A

COLLECTION INFORMATION

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

OVERNIGHT MAIL:

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

St. Louis, MO 63101

Contact: Natalie Pearson

314-418-4087

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact – Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

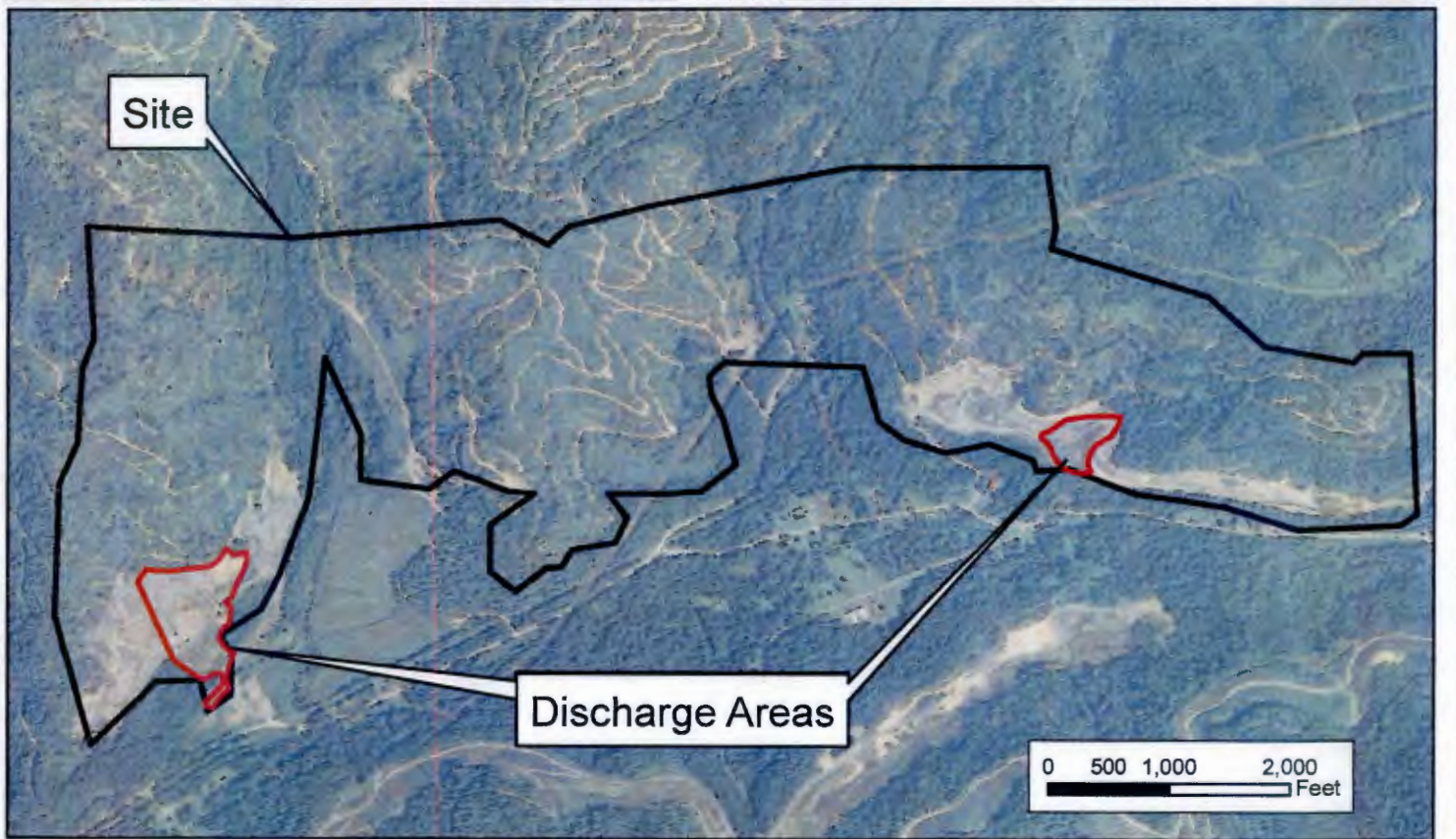
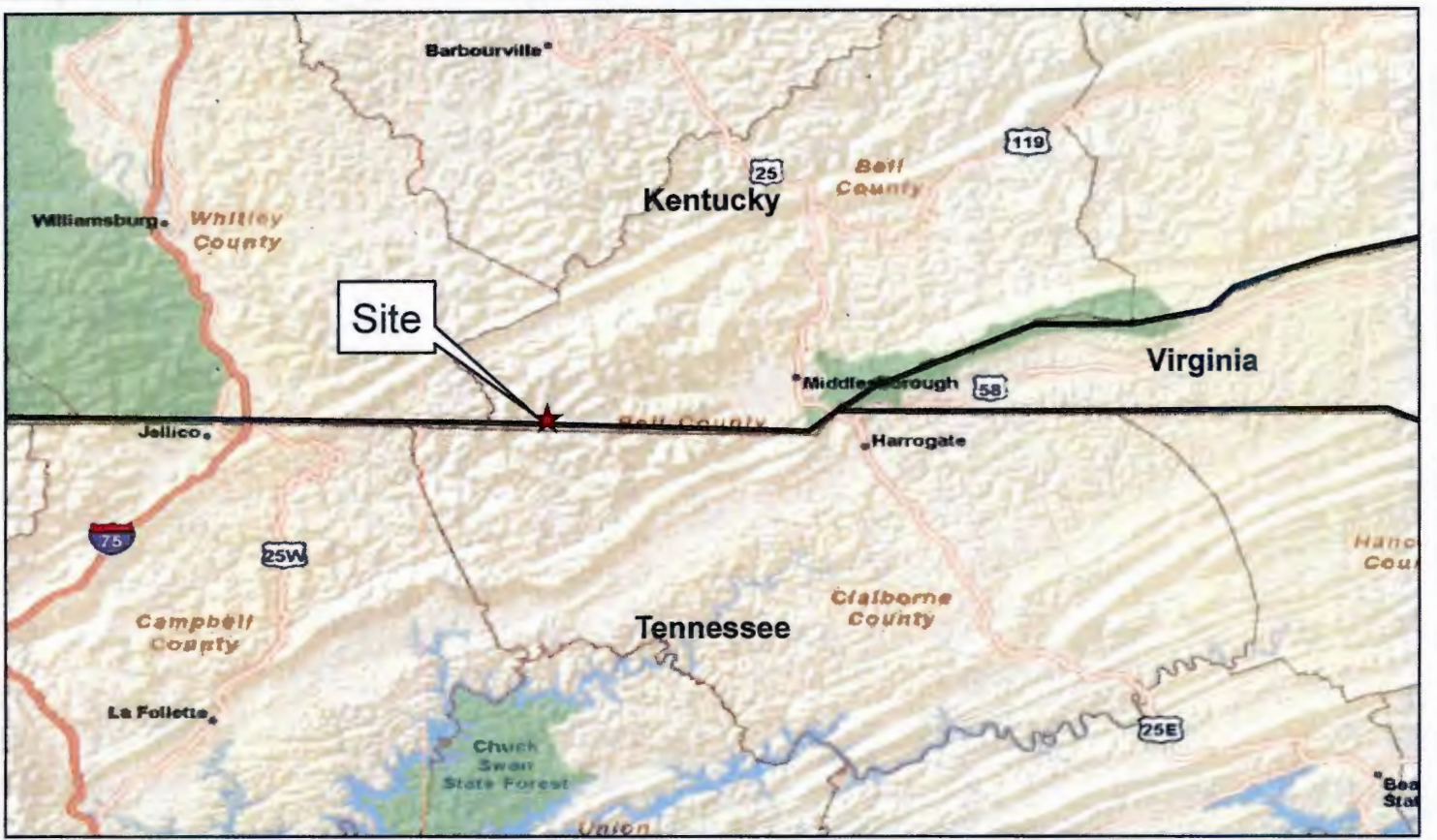
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.

This payment option can be accessed from the information below:

WWW.PAY.GOV (Enter sfo 1.1 in the search field Open form and complete required fields).



Appolo Fuels, Inc.

Exhibit A





Appolo Fuels, Inc.

Exhibit B

0 105 210 420 Feet



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: Mary Mattox 9/25/14
[Name] [Date]
in the WPD/CWEB/Municipal and Industrial Section at 404-562-9733
[Office] [Telephone Number]

- | | |
|--|--|
| <input type="checkbox"/> Non-SF Judicial Order/Consent Decree.
USAO COLLECTS. | <input checked="" type="checkbox"/> Administrative Order/Consent Agreement.
FMS COLLECTS PAYMENT. |
| <input type="checkbox"/> SF Judicial Order/Consent Decree.
FMS COLLECTS. | <input type="checkbox"/> Other Receivables |
| <input type="checkbox"/> This is an original debt. | <input type="checkbox"/> This is a modification. |

PAYEE: Appolo Fuels, Inc., Bell County, KY
[Name of person and/or Company/Municipality making the Payment]

The Total Dollar Amount of Receivable: \$ 135,000
[If in installments, attach schedule of amounts and respective due dates]

The Case Docket Number: CWA-04-2014-5513(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
3. Regional Hearing Clerk | 2. Designated Program Office
4. Regional Counsel |
|--|---|