



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

MAY 08 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Gary B. Cress
Post Office Box 1280
Ridgeland, Mississippi 39158

SUBJ: Consent Agreement and Final Order
Docket No. CWA-04-2008-5506(b)

Dear Mr. Cress:

Enclosed please find the Consent Agreement and Final Order (CAFO), Docket Number, CWA-04-2008-5506(b), which the U.S. Environmental Agency (EPA) has executed. The required public comment period is over and EPA has reviewed and resolved all comments on the CAFO. In accordance with the terms of the CAFO, the Regional Hearing Officer has signed the Final Order, which is the effective date of the CAFO.

If you have any further comments or questions regarding this matter, please contact Mr. Joel Strange of my staff at (404) 562-9455, or your attorney can contact Mr. Philip Mancusi-Ungaro, Associate Regional Counsel, at (404) 562-9519.

Sincerely,

A handwritten signature in black ink, appearing to read "T. C. Welborn".

Thomas C. Welborn
Chief
Wetlands, Coastal and Nonpoint Source Branch

Enclosure

cc: U.S. Army Corps of Engineers, Vicksburg
U.S. Fish and Wildlife Service
Mississippi Department of Environmental Quality

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)
)
Gary B. Cress,)
Ridgeland, Mississippi,)
)
RESPONDENT.)
_____)

CONSENT AGREEMENT AND
FINAL PENALTY ORDER

Docket No.: CWA-04-2008-5506(b)

RECEIVED
EPA REGION 4
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REGIONAL CLERK

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 Federal Register 40176 (July 23, 1999), codified at 40 Code of Federal Regulations (CFR) 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 re-delegated this authority to the Director of the Water Management Division, who in turn has delegated this authority to the Chief of the Wetlands, Coastal and Nonpoint Source 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 or a class II civil penalty under this subsection."

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.”

III. Allegations

10. Respondent, Gary Cress, at all times relevant to this Consent Agreement and Final Order (CAFO), was the owner and operator of a tract of land located adjacent to Persimmon Creek, southwest of the City of Canton, Madison County, Mississippi, near latitude 32° 32' 28" north, and longitude 90° 11' 10" west (the Site or Discharge Area) (see Exhibits A and B).

11. During a November 7, 2005, site investigation, the COE verified that the Respondents unauthorized work affected an unnamed tributary of Persimmon Creek and its adjacent wetlands. The work adversely impacted approximately 0.4 acres of jurisdictional wetlands and 1,070 linear feet of other waters of the United States.

12. Based upon a December 20, 2005, CWA enforcement case referral prepared by the COE, EPA has determined that the Respondent discharged dredged and/or fill material into waters of the United States during construction activities at the Discharge Area.

13. On March 16, 2006, EPA issued an Administrative Compliance Order, Docket No. CWA-04-2006-5760, under Section 309(a) of the CWA, 33 U.S.C. § 1319(g)(2)(A), alleging that the Respondent was in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

14. Respondent is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. Section 1362(5).

15. Respondent and/or those acting on behalf of or with permission from Respondent, using mechanized equipment, discharged dredged and/or fill material into the Discharge Area in conjunction with the construction of a residential development.

16. Prior to Respondents activity described above, the Discharge Area was a "water of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. Section 1362(7) and associated regulations.

17. The mechanized equipment constitutes a point source within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. §1362(14).

18. The discharged earthen material constitutes a pollutant within the meaning of the definition set forth in Section 502(6) of the CWA, 33 U.S.C. §1362(6).

19. The placement of dredged and/or fill material into the Discharge Area constitutes a discharge of a pollutant within the meaning of Section 502(12) of the CWA, 33 U.S.C. Section 1362(12).

20. Section 301(a) of the CWA, 33 U.S.C. §1311(a), makes unlawful the discharge of any pollutant into waters of the United States except as in compliance with certain sections of the CWA, including Section 404, 33 U.S.C. §1344. Under Section 404, a permit is a legal prerequisite to discharges of the type described above.

21. No CWA Section 404 Permit authorizing the aforesaid discharges into the Discharge Area has been issued by the COE. These discharges have, therefore, been made in violation of Section 301(a) of the CWA.

22. 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

23. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and admits the factual allegations set out above.

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

25. 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.

26. By signing this CAFO, Respondent certifies that the information he 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.

27. EPA reserves the right to assess and collect any and all civil penalties for any violation described herein 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 EPA.

28. 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

29. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors, EPA has determined that eighteen thousand dollars (\$18,000) is an appropriate civil penalty to settle this action.

30. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (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 tendered to:

U.S. Environmental Protection Agency
Cincinnati Accounting Operations
Mellon Lockbox 371099M
Pittsburgh, PA 15251-7099

31. 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. Environmental Protection Agency - Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

and

Joel Strange
U.S. Environmental Protection Agency - Region 4
Wetlands Regulatory Section
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

32. 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.

33. Under 40 C.F.R. § 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 thirty (30) day period. EPA will also assess on a monthly basis an up to six per cent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date.

34. 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

35. This CAFO shall not relieve Respondent of his 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

36. 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 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.

37. 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 and in the Administrative Penalty Complaint. 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.

38. 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.

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

40. 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.

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

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

For Complainant:

Philip Mancusi-Ungaro
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street
Atlanta, Georgia 30303
(404) 562-9562

For Respondent:

Solutions, Inc.
Attn: Anna W. Schoonover
P.O. Box 820127
Vicksburg, Mississippi 39182
601-634-6118

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 Mississippi 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 Respondent

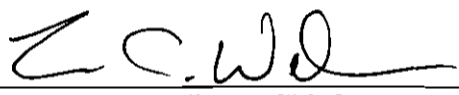
45. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a 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:

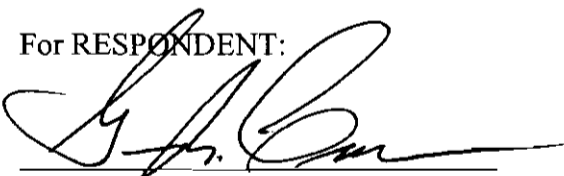
For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



Thomas C. Welborn, Chief
Wetlands, Coastal and Nonpoint Source Branch
Water Management Division
U.S. EPA, Region 4

Date: 4/23/08

For RESPONDENT:



Stribling Lake, LLC
Gary B. Cress, Managing Member

Date: 4-2-07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

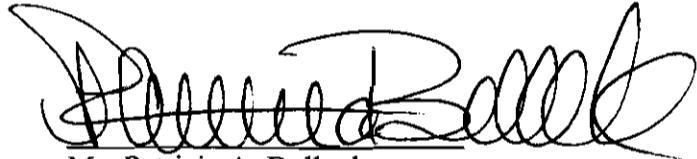
IN THE MATTER OF:)
)
 Gary B. Cress,) CONSENT AGREEMENT AND
 Ridgeland, Mississippi) FINAL PENALTY ORDER
)
 RESPONDENT.) Docket No.: CWA-04-2008-5506(b)
)
 _____)

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL PENALTY ORDER** in the matter of Gary B. Cress, Docket No. CWA-04-2008-5506(b) (filed with the Regional Hearing Clerk on MAY 08 2008, 200) was served on MAY 08 2008, 200 , in the manner specified to each of the persons listed below.

By hand-delivery: Jennifer Wills
Associate Regional Counsel
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303

By certified mail,
return receipt requested: Mr. Gary B. Cress
Post Office Box 1280
Ridgeland, Mississippi 39158



Ms. Patricia A. Bullock
Regional Hearing Clerk
61 Forsyth Street, SW
Atlanta, GA 30303
(404) 562-9511