

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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PROTECTION AGENCY

In the Matter of:) **Docket No. CWA-05-2012-0003**
)
Hintz Excavating & Blacktop,)
Adams, Wisconsin,) **Proceeding to Assess a Class II Civil Penalty**
) **Under Section 309(g) of the Clean Water Act,**
) **33 U.S.C. § 1319(g).**
Respondent.)

CONSENT AGREEMENT AND FINAL ORDER

CONSENT AGREEMENT

I. Preliminary Statement

1. This civil administrative action is commenced and settled under the authority vested in the Administrator of the United States Environmental Protection Agency pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules of Practice) as codified at 40 C.F.R. Part 22.

2. Complainant is by lawful delegation the Director, Water Division, Region 5, United States Environmental Protection Agency.

3. Respondent is Hintz Excavating & Blacktop (Hintz), located at 667 S. Main Street, Adams, Wisconsin 53910.

4. Respondent admits that the Administrator of the EPA has jurisdiction of this proceeding pursuant to Sections 301 and 309 of the CWA, 33 U.S.C. §§ 1311 and 1319, and the regulations at 40 C.F.R. §§ 22.18(b)(2) and 22.38.

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. This Consent Agreement and its accompanying Final Order (“CAFO”) simultaneously commences and concludes this administrative penalty proceeding, as provided by Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), for Respondent’s alleged violations of Section 301 of the CWA, 33 U.S.C. § 1311.

7. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

II. Factual Allegations

8. Brian Daliege owns 86 acres of real property in the North half of the Northeast quarter of Section 4, Township 19 North, Range 7 East, Town of Colburn, Adams County, Wisconsin (the “Site”). The Site contains wetlands abutting an unnamed tributary to Buckner Creek. On March 12, 2004, Daliege obtained a CWA Section 404 permit (Permit No. MVP-2003-06216-WMS) to expand an existing impoundment on the unnamed tributary by excavating the existing north and south impoundment shorelines. No wetland fill impacts were authorized by this permit as all dredged material was to be placed in an upland location.

9. Daliege hired Respondent Hintz to conduct excavation activities at the Site.

10. In January and February 2007, Respondent used excavators and a bulldozer to deposit approximately 3,200 cubic yards of dredged material and organic debris into approximately two (2) acres of wetlands on the north side of the impoundment identified in paragraph 8 above, to expand the impoundment.

11. The dredged material described in paragraph 10 above remained emplaced on-site until July 2008 when Daliege hired another contractor to restore the wetlands disturbed by the activities described in paragraph 10.

III. General Allegations

12. Respondent Hintz is a Wisconsin business which is and was at all times relevant to this CAFO, conducting business in and located in central Wisconsin.

13. Respondent is a “person” within the definition set forth at Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. The unnamed tributary on the Site is a perennial stream which is a tributary to Buckner Creek, which is a tributary of Big Roche a Cri Creek, which is tributary to the Wisconsin River.

15. The Wisconsin River is a navigable-in-fact interstate water.

16. The unnamed tributary, Buckner Creek and Big Roche a Cri Creek are “waters of the United States” as that term is defined under 40 C.F.R. §§ 230.3(s) and 232.2, and thus are “navigable waters” under the CWA.

17. Directly abutting and immediately adjacent to the Site’s unnamed tributary is an area, comprising in excess of 10 acres, which is inundated or saturated by groundwater at a frequency and duration sufficient to support, and that under normal circumstances can support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

18. The dredged material fill areas described in paragraph 10 above constitute “wetlands” as that term is defined under 40 C.F.R. §§ 230.3(t) and 232.

19. The wetlands described in paragraph 10 above constitute “waters of the United States” as that term is defined under 40 C.F.R. §§ 230.3(s) and 232.2, and thus a “navigable water” under the CWA.

20. The deposited materials identified in paragraph 10 above are “pollutants,” as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

21. The excavators and bulldozers identified in paragraph 10 above are “point sources,” as that term is defined at Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The emplacement of dredged material as described in paragraph 10 above, into the wetlands identified in paragraph 8, constitutes a “discharge of pollutants,” as that term is defined by Section 502(12), 33 U.S.C. § 1362(12), to the waters of the United States.

23. As an operator on the property identified in paragraphs 8 and 10 above, Respondent is liable for acts conducted on the property owner’s behalf with respect to the property, and thus constitutes a person who discharged pollutants into navigable waters.

24. At no time during the depositing of material as described in paragraph 10 above, into the wetlands described in paragraph 8, did Respondent or the property owner possess a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, purporting to authorize the activities performed as described in paragraph 10.

IV. Alleged Violations

25. Each day that Respondent discharged pollutants into navigable waters without a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a separate day of violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

26. Each day that the pollutants discharged by Respondent remained within navigable waters without a permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a separate day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

V. Stipulations

27. Respondent neither admits nor denies the specific factual allegations of this Consent Agreement and Final Order, pursuant to 40 C.F.R. § 22.18(b)(2).

28. Respondent consents to the assessment of the civil penalty set out in the Consent Agreement and Final Order, pursuant to 40 C.F.R. § 22.18(b)(2).

29. Respondent waives any right to contest the allegations of the Consent Agreement and its right to appeal the proposed Final Order, pursuant to 40 C.F.R. § 22.18(b)(2).

VI. Civil Penalty

30. Respondent agrees to pay a civil penalty in the amount of \$1250.

31. Within 30 days after the effective date of this CAFO, Respondent must pay the full penalty by sending a cashier's or certified check, payable to the order of the U.S. Treasury, to:

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

32. Respondent's check must note the Name, Docket Number, and Billing Document Number of this action.

33. Respondent must include with its cashier's or certified check a transmittal letter stating the Name, Docket Number, and Billing Document Number of this action, as well as Respondent's complete address. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk
U.S. Environmental Protection Agency (E-13J)
77 West Jackson Boulevard
Chicago, IL 60604-3511

Gregory T. Carlson
U.S. Environmental Protection Agency (WW-16J)
77 West Jackson Boulevard
Chicago, IL 60604-3511

Reginald A. Pallesen
Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3511

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

35. If Respondent fails to pay the civil penalty timely, Complainant may bring an action to collect any unpaid portion of the penalty with additional interest, handling charges, nonpayment penalties, and Complainant's enforcement expenses for the collection action.

36. 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 thirty (30) days past due. Complainant will assess a six percent (6%) per year penalty on any principal amount not paid timely pursuant to this CAFO.

VII. General Provisions

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

38. This CAFO does not affect the right of the EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

39. This CAFO does not affect Respondent's responsibility to comply with the CWA and other applicable federal, state and local laws and regulations.

40. Respondent certifies that it is complying fully with Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344.

41. The terms of this CAFO bind the EPA and Respondent and its successors and assigns.

42. Each person signing this CAFO certifies he or she has the authority to sign this CAFO for the party he or she represents and to bind that party to its terms.

43. Each party agrees to bear its own costs and fees, including attorneys' fees, for this action.

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

VIII. Public Notice and Effective Date

45. This CAFO is subject to the public notice and comment provisions of Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

46. The effective date of this CAFO is the date the EPA files it with the Regional Hearing Clerk.

IT IS SO AGREED

Hintz Excavating & Blacktop



Timmy L. Hintz

10-30-11

Date

United States Environmental Protection Agency



Tinka G. Hyde
Director, Water Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3511

12-1-11

Date

In the Matter of: Hintz Excavating & Blacktop

Docket No. CWA-05-2012-0003

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Respondent Hintz Excavating & Blacktop is hereby **ORDERED** to comply immediately with all of the terms of the foregoing Consent Agreement upon the filing of this CAFO with the Regional Hearing Clerk, U.S. EPA, Region 5. This Final Order disposes of this matter pursuant to Sections 22.18(b) and 22.31 of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.18(b) and 22.31.

Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3511

Date

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