

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:)
)
Russell Wise) ADMINISTRATIVE COMPLAINT
Cool Springs, South Carolina) FOR CLASS II PENALTY
) UNDER SECTION 309(g)
) OF THE CLEAN WATER ACT
RESPONDENT) 33 U.S.C. § 1319(g)
) Docket No. CWA-04-2009-5504

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ADMINISTRATIVE COMPLAINT

I. Statutory Authority

1. This is an Administrative Complaint issued under the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and 40 C.F.R. Part 22, the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits.” The Administrator has delegated this authority to the Regional Administrator of EPA, Region 4, who has duly redelegated this authority to the Director of the Water Protection Division, Region 4, who hereby issues this Complaint and Notice.

II. Statutory and Regulatory Background

2. 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)(B)].”

3. 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.

4. 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”

5. 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.”

6. 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.”

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

8. Federal regulations under 40 C.F.R. Part 232.2 and 33 C.F.R. Part 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

9. Respondent, Russell Wise, at all times relevant to this Complaint, was the owner of a tract of land located adjacent to Chinners Swamp, on Edwards Road, near the city of Cool Springs, Horry County, South Carolina, near latitude 33° 58.8' north and longitude 79° 8.5' west (the Site) (Exhibits A and B).

10. Russell Wise is a “person” within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

11. Commencing on or about November 20, 2002, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into wetlands on the Site using earth moving machinery, during unauthorized activities associated with the clearing and filling of wetlands for a lake.

12. Respondent impacted approximately 18 acres of wetlands and an adjacent stream in Chinners Swamp, which are navigable waters of the United States. Chinners Swamp is a tributary of the Little Pee Dee River, a navigable water of the United States.

13. The discharged dredged and/or fill material, including earthen material deposited at the Site, are “pollutants” as defined under the CWA § 502(6).

14. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Site are “point sources” as defined under the CWA § 502(14).

15. Respondent’s placement of the dredged and/or fill material at the Site constitutes a “discharge of pollutants” as defined under the CWA § 502(12).

16. On May 30, 2001, the United States Army Corps of Engineers (COE) communicated to the Natural Resource Conservation Service (on behalf of Respondent) that Respondent's proposed farm pond was exempt from permit requirements under Section 404(f) of the CWA, 33 U.S.C. § 1344(f), provided that the construction met the following conditions: 1) the pond does not exceed the size required to facilitate a normal farming/ranching operation; 2) specifically constructed for the purpose of irrigating livestock/pastureland; 3) impacts to wetlands were minimized; 4) no discharges of toxic substances or hazardous materials during pond construction; 5) the farm pond construction will not convert extensive areas of water to dry land or impede the circulation or result in significant alterations to the flow, reach or size of waters of the United States; 6) BMPs such as stabilization and sediment controls are to be utilized during and after pond construction. The letter further stated that "a change in use of a farm pond from irrigation or livestock watering to a non-farming purpose will void the exemption status and a Department of the Army permit will be required."

17. The COE communicated to Respondent several times thereafter that he was not complying with the conditions necessary to maintain the exemption under Section 404(f) of the CWA, 33 U.S.C. § 1344(f). On March 10, 2003, the COE issued Respondent a cease and desist order providing Respondent with three options to come into compliance: 1) meet the conditions necessary to maintain the 404(f) exemption; 2) apply for a 404 permit, or 3) return the site to its prior condition and abandon the pond construction. On June 30, 2003, the COE recommended EPA take an enforcement action against Respondent for violations of the CWA due to his failure to comply with the cease and desist order. The COE referred the matter to EPA pursuant to the Memorandum of Agreement between the COE and EPA on enforcement matters.

18. At no time during the discharge of dredged and/or fill material at the Site from November 2002 to the present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent, nor did these activities qualify for a permitting exemption under Section 404(f) of the CWA, 33 U.S.C. § 1344(f). Each discharge by the Respondent 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).

19. 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. Notice

20. As required under the CWA § 309(g), EPA has consulted with the South Carolina Department of Health and Environmental Control regarding this proposed action by mailing a copy of this document to the appropriate official of the State of South Carolina and offering an opportunity for the State to consult with EPA on the proposed penalty assessment. EPA,

contemporaneously with the issuance of this proposed action, will publish a public notice on our website (www.epa.gov/region4/water/wpeb/) regarding this proposed action.

V. Penalty

21. Consistent with the 2004 Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004), based on the above Findings of Violation and under Section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), the Administrator may assess a civil penalty of up to \$11,000 per violation per day, not to exceed a maximum of \$157,500, for violations of Section 301(a) and 404 of the CWA, 33 U.S.C. § 1311(a) and 1344 that occurred after March 15, 2004 through January 12, 2009. For violations occurring after January 12, 2009 under the 2008 Civil Monetary Penalty Adjustment Rule 73 Fed. Reg. 75340 (Dec. 11, 2008), the penalties are \$16,500 per day up to a maximum of \$177,500. Based upon the facts alleged in this Complaint, and based upon the nature, circumstances, extent and gravity of the violations alleged, as well as the Respondent's ability to pay, prior history of such violations, and such other matters as justice may require, EPA Region 4 hereby proposes to issue an Administrative Penalty to the Respondent for violations alleged in this Complaint. This Complainant proposes that Respondent pay a penalty in an amount of up to \$177,500 for the violations stated in this Complaint.

VI. Hearing

22. As provided under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Respondent has the right to request a hearing to contest any material fact contained in this Complaint, or to contest the appropriateness of the amount of the proposed penalty. If the Respondent wishes to avoid being found in default, Respondent must file a written Answer to this Complaint and a Request for Hearing within thirty (30) days of service of this Complaint with the:

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

23. The Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which the Respondent has any knowledge, or clearly state that the Respondent has no knowledge as to particular factual allegations in the Complaint. The Answer also must state:

- a. the circumstances or arguments that are alleged to constitute grounds of defense, and

b. the facts which the Respondent intends to place at issue.

24. Failure to deny any of the factual allegations in this Complaint constitutes admission of the undenied allegations. A copy of this Answer and any subsequent documents that the Respondent files in this action should be sent to Mr. Philip Mancusi-Ungaro, Attorney, OEA, U.S. Environmental Protection Agency, 61 Forsyth Street S.W., Atlanta, Georgia 30303. Mr. Philip Mancusi-Ungaro represents EPA in this matter and is authorized to receive service for EPA in this proceeding. He may be telephoned at (404) 562-9519.

25. Any hearing that Respondent requests regarding this Complaint will be held and conducted in accordance with the provisions of 40 C.F.R. Part 22. If Respondent fails to file a written Answer within thirty (30) calendar days of receipt of this Complaint, a Default Order may be issued against Respondent by the Regional Administrator. Issuance of a Default Order will constitute a binding admission of all allegations made in the Complaint and a waiver of Respondent's right in this case to a hearing under the provisions of 40 C.F.R. § 22.17. The civil penalty proposed in this Complaint will then become due and payable without further proceedings sixty (60) days after the Default Order becomes the Final Order of the Administrator 40 C.F.R. § 22.31. Respondent's failure to fully pay the proposed penalty, as assessed by the Final Order, by its due date will result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty under section 309(g)(9)(B) of the CWA, 33 U.S.C. § 1319(g)(9)(B).

26. Should Respondent request a hearing on the proposed penalty amount, members of the public who have exercised their right to comment, and to whom EPA is obligated to give notice of this proposed action, will have a right under section 309(g)(4)(B), 33 U.S.C. § 1319(g)(4)(B), to present evidence on the appropriateness of the penalty assessment. If Respondent does not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who commented on this proposal during the thirty (30) day period following Respondent's receipt of this document will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. EPA will grant the petition and hold the hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

VII. Settlement Conference

27. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case and to arrive at a settlement. To request a settlement conference, please contact:

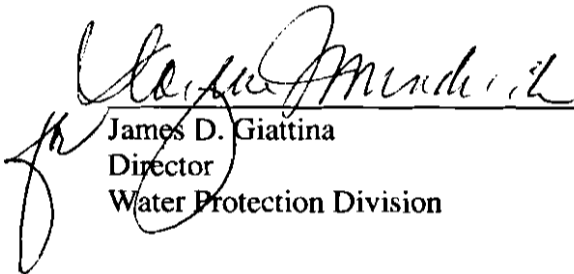
thirty (30) day period during which a written Answer and Request for Hearing must be submitted. Respondent may pursue the informal conference procedure, however, simultaneously with the adjudicatory hearing procedure. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. EPA, however, will not reduce the penalty simply because such a conference is held. Any settlement that may be reached as a result of such conference will be embodied in a Final Order. Respondent's consent to a Final Order will constitute a waiver of the right to request a hearing on any matter stipulated to therein.

29. Neither assessment nor payment of an administrative civil penalty under this section of the CWA will affect Respondent's continuing obligation to comply with the CWA, or any other Federal, State or local law or regulation.

30. The following individual represents EPA in this matter and is authorized to receive service for EPA in this proceeding:

Philip Mancusi-Ungaro
Associate Regional Counsel
EPA Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303
(404) 562-9519

31. Any settlement reached as a result of the informal conference will be finalized by the issuance of a written Consent Agreement and Final Order approved by EPA Region 4.


James D. Giattina
Director
Water Protection Division

Date: SEP 17 2009

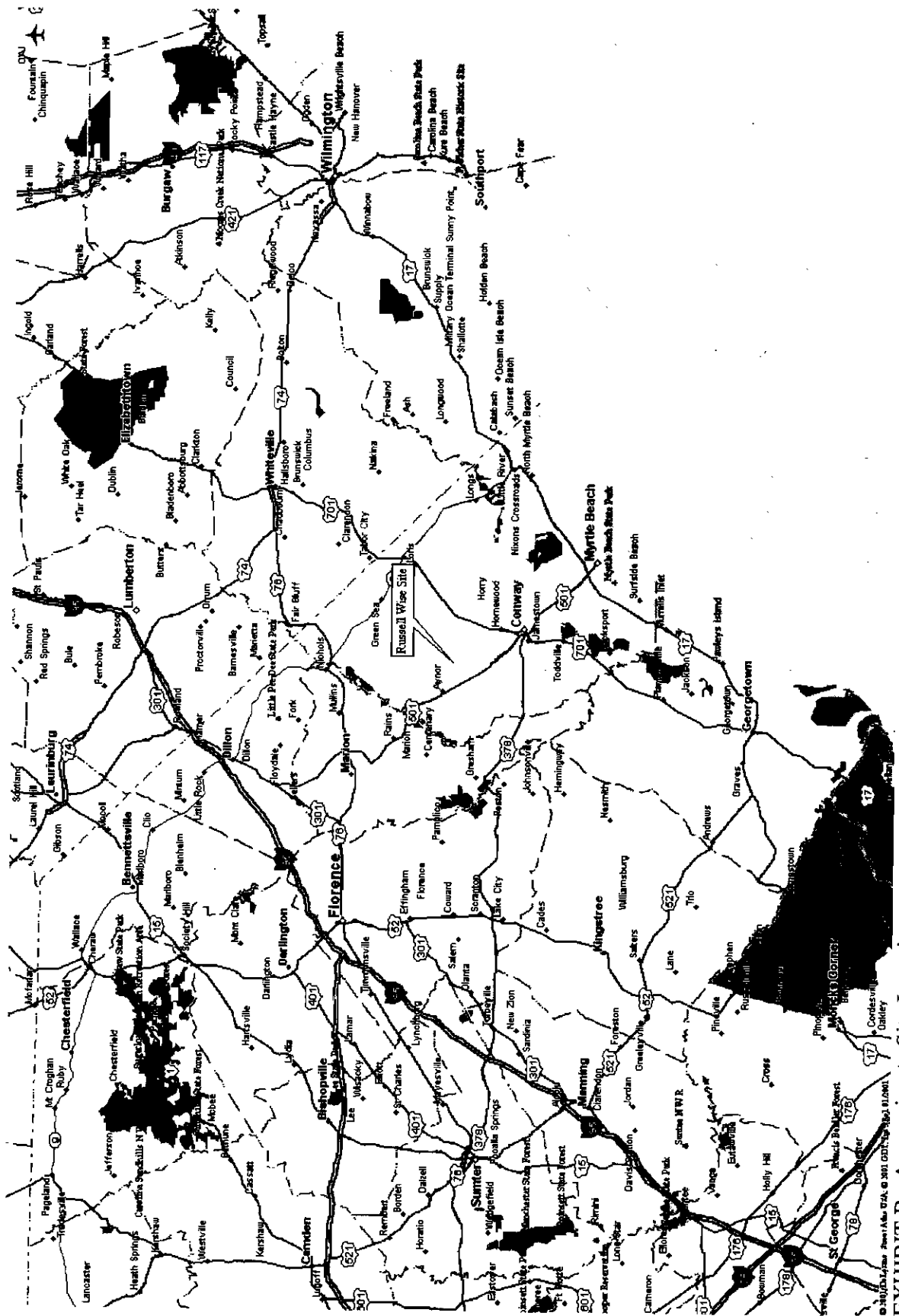


EXHIBIT B: Approximate Site Location

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that I have this day served a true and correct copy of the foregoing **ADMINISTRATIVE COMPLAINT** in the matter of: **Russell Wise Docket No.: CWA-04-2009-5504** on the parties listed below in the manner indicated:

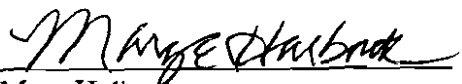
By hand-delivery: Mike Wylie
 Enforcement Officer
 U.S. EPA, Region 4
 Wetlands Enforcement Program
 61 Forsyth Street, S.W.
 Atlanta, Georgia 30303

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

By certified mail,
return receipt requested: Mr. Russell Wise
 1400 Horry Road
 Aynor, South Carolina 29511

By certified mail,
return receipt requested: Mr. C. Earl Hunter
 South Carolina Department of Health and Environmental Control
 12600 Bull Street
 Columbia, SC 29201

Dated: 9/17/09


Mary Halback
Environmental Protection Specialist
U.S. EPA, Region 4
Wetlands Enforcement Program
61 Forsyth Street, S.W.
Atlanta, Georgia 30303