

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In The Matter Of:

Solar Sources, Inc.,

Respondent.

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REGION 5

Docket No. CWA-05-2010-0004

Consent Agreement
and
Final Order
Pursuant to

Section 309(g) of the Clean Water Act,
33 U.S.C. § 1319(g).

CONSENT AGREEMENT AND FINAL ORDER

Consent Agreement

WHEREAS, the parties to this administrative action have agreed to simultaneously commence and conclude the above-captioned action before the filing of a complaint via the filing of this Consent Agreement and Final Order ("CAFO") pursuant to Section 309(g) of the Clean Water Act, (the "Act" or "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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

WHEREAS, the Complainant is, by lawful delegation of the Administrator and the Regional Administrator, the Director of the Water Division, Region 5, United States Environmental Protection Agency ("EPA").

WHEREAS, the Respondent in this proceeding is Solar Sources, Inc., a corporation doing business in the State of Indiana.

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

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

WHEREAS, the Respondent neither admits nor denies specific factual allegations

WHEREAS, the Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

WHEREAS settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in the public interest.

Statutory and Regulatory Background

1. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits any person from discharging any pollutant from any point source into navigable waters except, among other things, in accordance with the terms of a valid permit issued by the U.S. Army Corps of Engineers (“ACOE”) under Section 404 of the CWA, 33 U.S.C. § 1344.
2. Pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of fill material into the navigable waters at specified disposal sites.
3. The term “person” is defined as, among other things, a “...corporation...” 33 U.S.C. § 1362(5).

4. "Fill material" means "material placed in the waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 232.2(e).
5. The term "discharge of fill material" means "the addition of fill material into waters of the United States." 33 C.F.R. § 232.2(f).
6. A "point source" is defined as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14).
7. The term "navigable waters" is defined as all "... waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).
8. The term "waters of the United States" is defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2, to include the following: (i) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all other waters, such as, among others, rivers, streams or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; and (iii) tributaries of such waters.

Count I

9. At all times relevant to this CAFO, the Respondent (a corporation doing business in Indiana) either owned, leased or otherwise controlled parcels of property situated south of the cities of Cannelburg and Montgomery within the Alfordsville, Glendale, Loogootee, and Montgomery quadrangles of Daviess County, Indiana (the "Cannelburg Mine") and/or otherwise controlled the activities that occurred on such parcels of property.

10. The Respondent has been mining for coal at the Cannelburg Mine since 1992.
11. The Cannelburg Mine is located at the boundary of the Lower White River watershed and the Lower East Fork White River watershed. Six smaller streams and their associated wetlands comprise these two basins. Draining the north half of the site, the Veale Creek and South Fork Prairie Creek watersheds drain to the Lower White River watershed. Draining the southern half of the site, the Haw Creek, Sugar Creek, Mud Creek, and Aikman Creek watersheds drain to the Lower East Fork White River watershed.
12. The White River and the East Fork White River are Traditionally Navigable Waters as defined by the ACOE.
13. Based on United States Geological Survey topographic maps, National Hydrography Dataset coverage, National Resource Conservation Service soil survey maps, and various aerial photos, the watersheds of four streams on the site have been impacted by the Respondent's mining activities since 2004: Aikman Creek, South Fork Prairie Creek, Sugar Creek, and Veale Creek.
14. The Respondent's mining activities include mechanized: 1) land clearing of riparian vegetation, 2) relocation and channelization of streams, 3) impoundment of streams, and 4) placement of dredge and fill material to construct dams, berms, and other water control structures within stream channels.
15. The Respondent's mining activities resulted in fill material being placed into Aikman Creek, South Fork Prairie Creek, Sugar Creek, and Veale Creek and their tributaries. In all, the Respondent impacted 23,425 linear feet of stream from 2004 to 2008.

16. The Respondent has been mining for coal at the Cannelburg Mine without a Section 404 permit from the ACOE.
17. The Respondent's mining operations at the Cannelburg Mine are ongoing.
18. The Respondent is a corporation and a "person" within the meaning of the definition set forth in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
19. Aikman Creek, South Fork Prairie Creek, Sugar Creek, Veale Creek, White River, East Fork White River, and their tributaries are "navigable waters" as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and "waters of the United States" as defined at 40 C.F.R. § 232.2.
20. The mechanized land moving equipment constituted a "point source" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
21. The sediment, dirt, sand, rock and/or vegetation constituted "fill material" within the meaning set forth in 33 C.F.R. § 232.2(e).
22. The placement of fill material by the Respondent in the streams and creeks constituted a "discharge of fill material" within the meaning of 33 C.F.R. § 232.2(f).
23. Each placement of fill material, by the Respondent, into navigable waters without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constituted a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.
24. Each day the material placed by the Respondent remains in navigable waters without the required permit issued pursuant to 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.

25. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), EPA has consulted the Indiana Department of Environmental Management regarding the assessment of this civil penalty.
26. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a Class II civil penalty of \$10,000 per day for each day during which the violation continues, up to a total of \$125,000, for violations of, among other things, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any limit or condition in a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344. Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, provides for the increase of penalty amounts to account for inflation. The rule increasing the civil monetary penalty amount for a Class II civil penalty to \$16,000 per day of violation, up to a total of \$177,500, took effect on January 12, 2009, 73 Fed. Reg. 75340-6 (Dec. 11, 2008).

Count II

27. Paragraphs 1 – 26 are realleged and incorporated herein by reference.
28. At all times relevant to this CAFO, the Respondent either owned, leased or otherwise controlled parcels of property situated northeast of the city of Lewis within the Lewis quadrangle of Vigo County, and the Saline quadrangle of Clay County, Indiana (the "Lewis Mine") and/or otherwise controlled the activities that occurred on such parcels of property.
29. The Respondent has been mining for coal at the Lewis Mine since 2001.

30. The Lewis Mine is located in the Eel River watershed. Two smaller streams and their associated wetlands comprise the larger basin. Draining the northern two-thirds of the site is the Splunge Creek watershed. Draining the southern one-third of the site is the Watkins Creek watershed.
31. Splunge Creek and Watkins Creek flow into the Eel River.
32. The Eel River flows into the White River, a Traditionally Navigable Water, as defined by the ACOE.
33. Based on United States Geological Survey topographic maps, National Hydrography Dataset coverage, National Resource Conservation Service soil survey maps, and various aerial photos, the watershed of one stream on the site—Splunge Creek—has been impacted by mining activities since 2004.
34. The Respondent's mining activities include mechanized: 1) land clearing of riparian vegetation, 2) relocation and channelization of streams, 3) impoundment of streams, and 4) placement of dredge and fill material to construct dams, berms, and other water control structures within stream channels.
35. The Respondent's mining activities resulted in the placement of fill material into Splunge Creek and its tributaries. In all, the Respondent impacted 9,381 linear feet of stream from 2004 to 2008.
36. The Respondent has been mining for coal at the Lewis Mine without a Section 404 permit from the ACOE.
37. The Respondent's mining operations at the Lewis Mine are ongoing.

38. The Respondent is a corporation and a "person" within the meaning of the definition set forth in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
39. Splunge Creek, Eel River, White River, and their tributaries are "navigable waters" as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and "waters of the United States" as defined at 40 C.F.R. § 232.2.
40. The mechanized land moving equipment constituted a "point source" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
41. The sediment, dirt, sand, rock and/or vegetation constituted "fill material" within the meaning of the definitions set forth in 33 C.F.R. § 232.2(e).
42. The placement of fill material by the Respondent in the streams and creeks constituted a "discharge of fill material" within the meaning of 33 C.F.R. § 232.2(f).
43. Each placement of fill material by the Respondent, into waters of the United States without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constituted a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.
44. Each day the material placed by the Respondent remains in navigable waters without the required permit issued pursuant to 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.
45. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), EPA has consulted the Indiana Department of Environmental Management regarding the assessment of this civil penalty.

46. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a Class II civil penalty of \$10,000 per day for each day during which the violation continues, up to a total of \$125,000, for violations of, among other things, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any limit or condition in a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344. Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, provides for the increase of penalty amounts to account for inflation. The rule increasing the civil monetary penalty amount for a Class II civil penalty to \$16,000 per day of violation, up to a total of \$177,500, took effect on January 12, 2009, 73 Fed. Reg. 75340-6 (Dec. 11, 2008).

NOW THEREFORE:

47. Based upon the facts alleged in this CAFO; upon the nature, circumstances, extent and gravity of the violations alleged; after consideration of the Respondent's ability to pay, prior history of such violations, degree of culpability and economic benefit resulting from the violation; the Respondent's good faith and cooperation in resolving this matter; and such other matters as justice may require; EPA hereby proposes to issue a Final Order assessing civil penalties to Solar Sources, Inc. in the amount of \$299,500 for Counts I and II.
48. The Respondent shall pay this civil penalty within 30 days of the effective date of this CAFO by certified or cashier's check payable to "Treasurer, the United States of America," and shall deliver it, with a transmittal letter identifying the CAFO, to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center

P.O. Box 979077
St. Louis, Missouri 63197-9000

49. The check must be annotated with the docket number and with the name of the case. Copies of the transmittal letter and the check shall simultaneously be sent to these recipients:

Yone Yu
Watershed and Wetlands Branch (WW-16J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

and

Mark Koller
Associate Regional Counsel
Office of the Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

50. This civil penalty is not deductible for federal tax purposes.
51. If the Respondent fails to timely pay the civil penalty, the Complainant may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and EPA's enforcement expenses for the collection action.
52. 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. The Respondent must pay a \$15.00 handling charge each month that any portion of the penalty due is more than thirty days past due. The Complainant will assess a six percent per year penalty on any principal amount not paid timely pursuant to this CAFO.

53. Within 30 days of the effective date of this CAFO, the Respondent shall submit a revised mitigation plan (as instructed by the ACOE) to the Louisville District of the ACOE as part of its after-the-fact permit application to obtain Section 404 authorization for the Lewis Mine. Copies of the mitigation plan (cover letter only) shall be sent simultaneously to EPA at the addresses listed in paragraph 49 above.
54. Within 60 days of the effective date of this CAFO, the Respondent shall submit a complete application (as determined by the ACOE) to the Louisville District of the ACOE for an after-the-fact permit to obtain Section 404 authorization for the Cannelburg Mine. Copies of the application (cover letter only) shall be sent simultaneously to EPA at the addresses listed in paragraph 49 above.
55. This CAFO constitutes a complete and full settlement of, and resolves the Respondent's liability with prejudice for, the violations alleged in this CAFO.
56. This CAFO does not affect the right of the Complainant or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
57. This CAFO does not affect the Respondent's responsibility to comply with the Act and other applicable federal, state, and local, laws and regulations.
58. The terms of this CAFO bind EPA and the Respondent and their successors and assigns.
59. 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.
60. Each party agrees to bear its own costs and fees, including attorney's fees, for this action.
61. This CAFO constitutes the entire agreement between the parties.

62. No modification shall be made to this CAFO without written notification to, and written approval of, all parties hereto and no oral modification of this CAFO shall be effective.
63. The effective date of this CAFO is the date EPA files it with the Regional Hearing Clerk.

In the Matter of Solar Sources, Inc.
Docket No.

Solar Sources, Inc., Respondent


Date: 1-26-10

Felson Bowman
Felson Bowman, President
Solar Sources, Inc.
P.O. Box 47068
Indianapolis, Indiana

In the Matter of Solar Sources, Inc.
Docket No.

United States Environmental Protection Agency, Region 5, Complainant

Date: February 4, 2010



Tinka G. Hyde, Director
Water Division
United States Environmental Protection Agency,
Region 5

In the Matter of Solar Sources, Inc.

Docket No.

CWA-05-2010-0004

FINAL ORDER

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Date: _____

Bharat Mathur
Acting Regional Administrator
United States Environmental Protection Agency,
Region 5