

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of:

Bacon Construction, LLC,  
Hancock, Wisconsin,

Respondent.

) Docket No. CWA-05-2010-0007  
)  
)  
) Proceeding to Assess a Class II Civil Penalty  
) Under Section 309(g) of the Clean Water Act,  
) 33 U.S.C. ' 1319(g).  
)

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FEB 17 2010

CONSENT AGREEMENT AND FINAL ORDER

REGIONAL HEARING CLERK  
USEPA  
REGION 5

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 (U.S. EPA) 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 Bacon Construction, LLC ("Bacon"), Hancock, Wisconsin.

4. Respondent admits that the Administrator of U.S. 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. §§ 22.18(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. Specific 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, Mr. 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. Mr. Daliege hired Respondent Bacon to complete the excavation activities in 2006 on the property described in paragraph 8, above.

10. Respondent Bacon, between August and October 2006, used an excavator, bulldozer and trucks to deposit approximately 6,000 cubic yards of dredged material and organic debris into approximately 3.6 acres of wetlands on the south side of the impoundment identified in paragraph 8, to expand the impoundment and to construct and maintain haul roads.

11. The dredged material described in paragraph 10 above remained emplaced on-site until July 2008 when respondent Bacon, on behalf of Mr. Daliege, restored the wetlands disturbed by the activities described in paragraph 10.

### **III. General Allegations**

12. Respondent Bacon Construction, LLC is a Wisconsin business which is and was at all times relevant to this Complaint, conducting business in and located in central Wisconsin.

13. Respondent Bacon as a limited liability corporation 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 constitute "wetlands" as that term is defined under 40 C.F.R. §§ 230.3(t) and 232.

19. The wetlands described in paragraph 10 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 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 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, 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, 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, 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 \$7000, plus applicable interest, on the following installment schedule.

SUMMARY:				
1st 30 days interest free	Due by:	Payment	Principal	Interest
Payment 1	within 30 of File Date	<b>2,500.00</b>	2,500.00	0.00
Payment 2	File Date+120 days	<b>1,533.29</b>	1,500.00	33.29
Payment 3	File Date+240 days	<b>1,522.19</b>	1,500.00	22.19
Payment 4	File Date+360 days	<b>1,511.10</b>	1,500.00	11.10
	<b>Totals:</b>	<b>7,066.58</b>	7,000.00	66.58

31. Respondent agrees to pay the penalty by sending cashier's or certified checks, 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. Each of Respondent's cashier's or certified checks must note the Name, Docket Number, and Billing Document Number of this action.

33. Respondent must include with its cashier's or certified checks 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 copies of each 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. In addition, if Respondent misses an installment payment, U.S. EPA may, upon written notice to Respondent, collect the entire penalty amount remaining due.

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 constitutes a complete and full settlement of, and resolves Respondent's liability with prejudice for, the violations alleged in the CAFO.

38. This CAFO does not affect the right of Complainant 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 Act 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. This CAFO constitutes a "Final Order."

42. The terms of this CAFO bind U.S. EPA and Respondent and its successors and assigns.

43. 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.

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

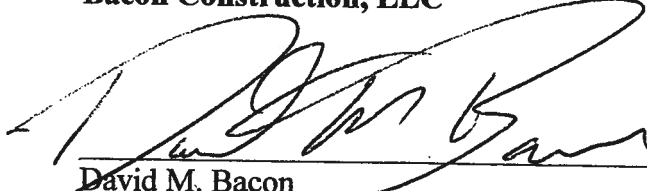
45. This CAFO constitutes the entire agreement between the parties.

46. No modification shall be made to this CAFO without written notification to, and written approval of, all parties hereto. No oral modification of this CAFO shall be effective.

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

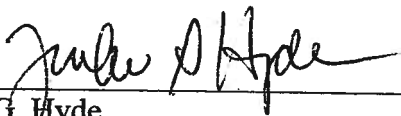
**IT IS SO AGREED**

**Bacon Construction, LLC**

  
\_\_\_\_\_  
David M. Bacon

2-2-2010  
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 60604-3590

2-11-2010  
Date

**In the Matter of: Bacon Construction, LLC**

**Docket No.**  
**CWA-05-2010-0007**



## FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Respondent Bacon Construction, LLC 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.

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Bharat Mathur  
Acting Regional Administrator  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

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Date

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