

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

Rauch Excavating Inc.
3724 Middlesboro Road
Morrow, Ohio 45152

Respondent.



) Docket No. CWA-05-2018-0010

)
) Proceeding to Assess a Class II Civil
) Penalty under Section 309(g) of the Clean
) Water Act, 33 U.S.C. § 1319(g)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b)(2)-(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2)-(3).

2. The Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is Rauch Excavating Inc., an Ohio corporation doing business in Morrow, Ohio.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).

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. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO including, but not limited to, its right to request a hearing under 40 C.F.R. § 22.15(c) and Sections 309(g)(2)(B) and (4)(C) of the CWA, 33 U.S.C. § 1319(g)(2)(B) and (4)(C); its right to appellate review under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B); its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CAFO; and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a permit for the discharge of dredged or fill material into navigable waters pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

10. 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 (Corps), to issue permits for the discharge of dredged or fill material into navigable waters.

11. Section 502(12) of the CWA defines “discharge of a pollutant,” as, *inter alia*, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

12. Section 502(6) of the CWA defines “pollutant,” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

13. Section 502(14) of the CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

14. Section 502(7) of the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

15. 40 C.F.R. 230.3(t) define “wetlands” as “. . . those areas that are inundated or saturated by surface or ground water 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.”

16. Section 502(5) of the CWA defines a “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

17. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator to assess a Class II civil penalty under Section 309(g)(2)(B) of the CWA, 33 U.S.C.

§ 1319(g)(2)(B), when the Administrator finds, on the basis of any information available, that a person has violated Section 301 of the CWA, 33 U.S.C. § 1311, which includes discharges not in

compliance with a permit under Section 404 of the CWA, 33 U.S.C. § 1344. EPA may conduct such enforcement consistent with the January 1989 Memorandum Between the Department of the Army and The Environmental Protection Agency, Federal Enforcement for the Section 404 Program of the Clean Water Act.

Factual Allegations and Alleged Violations

18. Respondent is a corporation and therefore a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

19. From the time period beginning on or about August 2009 through the present, Respondent, either directly or through its officers or agents, owned the property located at 5669 Route 22 & 3, City of Morrow, Salem Township, Warren County Parcel Identification Number 13014520010 (Latitude 39.354636, Longitude -84.106307), Warren County, Ohio, located in Morrow, Ohio (“the Site”).

20. The property includes an impoundment of the waters of Whittaker’s Run, a perennial tributary and adjacent, contiguous and indistinguishable wetland that flows into Todd’s Fork, a perennial tributary, which flows into the Little Miami River. The Little Miami River is a navigable water.

21. These waters above are waters of the United States.

22. From the time period beginning on or about August 2009 through at least January 2015, the Respondent discharged solid and municipal waste, rock, sand, cellar dirt, or fill material from a 953 loader, i.e., bulldozer, into approximately 2.23 acres of waters of the United States at the site.

Unlawful Discharge of Pollutants into Waters of the United States

23. The statements in Paragraphs 1 through 22 are hereby incorporated by reference as if set forth in full.

24. The addition of solid waste, municipal waste, rock, sand, cellar dirt, or fill material into the waters of the United States referenced herein constituted a “discharge of pollutants” within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

25. At no time relevant to this discharge did Respondent have or apply for a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material into waters of the United States for the discharge described in paragraph 22.

26. The solid waste, municipal waste, rock, sand, cellar dirt, or fill material discharged into the waters is a “pollutant” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. Respondent used a 953 loader, *i.e.*, bulldozer to place the solid waste, municipal waste, rock, sand, cellar dirt, or fill material in the waters of the United States.

28. A 953 loader, *i.e.*, bulldozer is a discernible, confined and discrete conveyance, and constitutes a “point source” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

29. Respondent’s addition of solid waste, municipal waste, rock, sand, cellar dirt, or fill material, from the time period beginning on or about August 2009 through at least January 2015, from a 953 loader, *i.e.*, bulldozer into waters constitutes a “discharge of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

30. Because Respondent owned or operated a facility with a point source for the discharge of pollutants to waters of the United States, Respondent and the facility have been subject to the CWA at all times relevant to this Order. Thus, any such discharge has been and is subject to the CWA.

31. Therefore, Respondent is a person who discharged pollutants from a point source into navigable waters, without a permit, in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

32. Each day the pollutants remained in the navigable waters constituted a continuing violation of the CWA and an additional day in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

Civil Penalty

33. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, the Administrator may assess a Class II civil penalty of up to \$16,000 per day of violation up to a total of \$187,500, for violations of Section 301 of the CWA that occurred after December 6, 2013 through November 2, 2015, or after November 2, 2015, for which penalties are assessed before August 1, 2016.

34. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violation alleged, as well as Respondent's ability to pay, prior history of such violation, degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, U.S. EPA has determined that an appropriate civil penalty to settle this action is \$5,000

35. Within 30 days after the effective date of this CAFO, Respondent must pay the \$5,000 civil penalty by

[For checks sent by regular U.S. Postal Service mail] sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

[For checks sent by express mail (non-U.S. Postal Service which won't deliver mail to P.O. Boxes] sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, Missouri 63101

The check must note Respondent's name and the docket number of this CAFO.

[For electronic funds transfer] electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045

In the comment or description field of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

[For Automated Clearinghouse (ACH) also known as REX or remittance express] ACH electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency

CTX Format Transaction Code 22-checking

In the comment area of the electronic funds transfer, state Respondent's name and the docket number of this CAFO.

[For on-line payment] an on-line payment. To pay on-line, go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter SFO 1.1 in the search field. Open the form and complete the required fields.

36. A transmittal letter, stating Respondent's name, complete address, and the case docket number must accompany the payment. Respondent must write the case docket number on the face of the check and send copies of the check and transmittal letter to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (E-19J)
Chicago, Illinois 60604-3590

Kerryann Weaver (WC-15J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

L. Oviedo (C-14J)
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

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

38. If Respondent does not timely pay the civil penalty, Complainant may request the United States Department of Justice bring a civil action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action. Respondent acknowledges that the validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

39. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established pursuant to 26 U.S.C. § 6621(a)(2). In addition to the assessed penalty and interest, Respondent must pay the United States' attorney's fees and costs for collection proceedings, and Respondent must pay a nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 20 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. *See* 33 U.S.C. § 1319(g)(9).

General Provisions

40. Full payment of the penalty as described in paragraphs 33 and 34 and full compliance with this CAFO shall not in any case affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

41. Full payment of the penalty as described in paragraphs 33 and 34 and full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in this CAFO.

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

43. Respondent certifies that it is complying with Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344.

44. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31 and the EPA's Clean Water Act Section 404 Settlement Penalty Policy (Dec. 2001).

45. The terms of this CAFO bind Respondent and its successors and assigns.

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

47. Each party agrees to bear its own costs and attorney's fees in this action.

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

49. The effective date for this CAFO is the date it is filed with the Regional Hearing Clerk, which is after completion of the notice and comment requirements of Sections 309(g)(4)(C) and 309(g)(5) of the CWA, 33 U.S.C. §§ 1319(g)(4)(C), (5) and 40 C.F.R. §§ 22.38, 22.45, and which shall be at least 30 days after the CAFO has been signed by the Regional Judicial Officer or Regional Administrator.

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Docket No. CWA-05-2018-0010

Brian Rauch, President
On behalf of Rauch Excavating Inc., Respondent

Brian Rauch

Brian Rauch

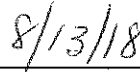
7-29-18

Date

United States Environmental Protection Agency, Complainant



Linda Holst, Acting Director
Water Division
United States Environmental Protection Agency
Region 5
Chicago, Illinois



Date

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Docket No. CWA-05-2018-0010

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.

By: _____ Date: _____
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

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Docket No: CWA-05-2018-0010

Certificate of Filing and Service

I hereby certify that today I filed with the Regional Hearing Clerk, Region 5, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (C-19J), Chicago, Illinois, 60604-3590, the original and one copy of the fully executed Consent Agreement and Final Order for this civil administrative action.

I hereby certify that today I served a true and correct copy of this fully executed and filed Consent Agreement and Final Order for this civil administrative action as follows:

Copy to Respondent by Certified U.S. Mail, Return-Receipt Requested:

Marty Hubbell
Diehl & Hubbell, LLC
Counsel for Respondent
304 E. Warren St.
Lebanon, OH 45036

Copy to Counsel for Complainant, Via E-Mail:

Luis Oviedo
Oviedo.Luis@epa.gov

Copy to Regional Judicial Officer, Via E-Mail:

Ann L. Coyle
coyle.ann@epa.gov

Dated: _____
LaDawn Whitehead
Regional Hearing Clerk
Region 5
United States Environmental Protection Agency