



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JAN 21 2005

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

WW-16J

Mr. Larry Fitzgerald
Shrum Manufactured Housing
9201 West Washington Street
Indianapolis, Indiana 46231

RE: In the Matter of Indiana Department of Transportation, Atlas Excavating, Inc. and Larry Fitzgerald, d/b/a Shrum Manufactured Housing
Docket No.: ~~CWA-05-~~ 2005 0002

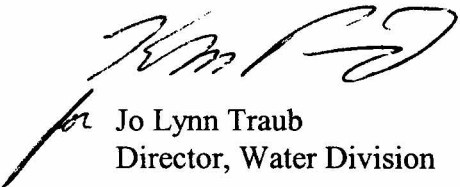
Dear Mr. Fitzgerald:

I have enclosed a complaint filed against you under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). The complaint alleges violations of Section 301 of the Clean Water Act, in that the Respondents filled wetlands without first obtaining a permit to do so.

As provided in the complaint, if you would like to request a hearing, you must do so in your answer to the complaint. Please note that if you do not file an answer with the Regional Hearing Clerk within 30 days of your receipt of this complaint, a default order may be issued and the proposed civil penalty will become due 30 days later.

In addition, whether or not you request a hearing, you may request an informal settlement conference. If you wish to request a conference, or if you have any questions about this matter, please contact Gregory T. Carlson, Enforcement Officer, 77 West Jackson Boulevard, Chicago, Illinois 60604, at (312) 886-0124.

Sincerely,


Jo Lynn Traub
Director, Water Division

Enclosure



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Terry Dillon, President
Atlas Excavating, Inc.
4740 Swisher Road (Building A)
West Lafayette, Indiana 47906

RE: In the Matter of Indiana Department of Transportation, Atlas Excavating, Inc. and Larry Fitzgerald, d/b/a Shrum Manufactured Housing
Docket No.:

~~CWA-05~~ 2005 0002

Dear Mr. Dillon:

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Jo Lynn Traub
Director, Water Division

Enclosure



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CHICAGO, IL 60604-3590

JAN 21 2005

REPLY TO THE ATTENTION OF:

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WW-16J

J. Bryan Nicol, Commissioner
Indiana Department of Transportation
100 North Senate Street (Room N755)
Indianapolis, Indiana 46204-2249

RE: In the Matter of Indiana Department of Transportation, Atlas Excavating, Inc. and Larry Fitzgerald, d/b/a Shrum Manufactured Housing

Docket No.: ~~CWA-05~~ 2005 0002

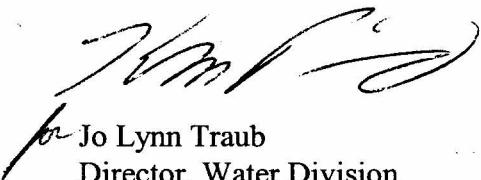
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Sincerely,


Jo Lynn Traub
Director, Water Division

Enclosure

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Proceeding to Assess a Class II Civil
)	Penalty Under Section 309(g) of the
Indiana Department of Transportation,)	Clean Water Act, 33 U.S.C. § 1319(g)
Atlas Excavating, Inc., Larry)	
Fitzgerald, d/b/a Shrum Manufactured)	Docket No.
Housing,)	CWA-05-2005 0002
)	05 JAN 21 P1 54
Respondents.)	RECEIVED REGIONAL HEARING

COMPLAINT

I. General Allegations

1. This is an administrative action instituted by Region 5 of the United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 309(g) of the Clean Water Act, ("the Act"), 33 U.S.C. § 1319(g), and 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 at 40 C.F.R. Part 22. The Administrator of U.S. EPA has delegated the authority to take this action to the Regional Administrator of Region 5 who has delegated this authority to the Director of the Water Division.

2. The Respondents in this matter are the Indiana Department of Transportation (INDOT), Atlas Excavating, Inc. (Atlas) and Larry Fitzgerald/Shrum Manufactured Housing (Fitzgerald).

3. In or about the month of August 1999, and at times known to the Respondents, Respondent Atlas, on behalf of Respondent INDOT, and with agreement from Respondent Fitzgerald, added approximately 35,555 cubic yards of road construction debris from dump trucks and bulldozers, into approximately 1.8 acres of wetlands (located in a portion of the southwest quarter of the northwest quarter of Section 21, Township 15 North, Range 2 East, City

of Indianapolis, Marion County, State of Indiana).

4. 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, to issue permits for the discharge of dredged or fill material into navigable waters.

5. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344.

6. The wetlands noted in paragraph 3, above, are adjacent to the East Fork of White Lick Creek, which flows into White Lick Creek, which flows into the White River, which flows into the Wabash River, an interstate stream.

7. Respondent Larry Fitzgerald is sole proprietor of Shrum Manufactured Housing and is an individual.

8. Respondent Atlas is a corporation organized under the laws of the State of Indiana.

9. Respondent INDOT is a State of Indiana governmental unit organized under the laws of the State of Indiana.

10. Therefore, each Respondent is a "person" as defined by Section 502(5) of the Act, 33 U.S.C. §1362(5).

11. Respondents' addition of road construction debris into 1.8 acres of wetlands are "discharges" as defined by Section 502(12) of the Act, 33 U.S.C. §1362(12).

12. Therefore, Respondents "discharged" as defined by Section 502(12) of the Act, 33 U.S.C. §1362(12).

13. Road construction debris is a "pollutant" as defined by Section 502(12) of the Act,

33 U.S.C. §1362(12).

14. Therefore, Respondents discharged “pollutants” as defined by Section 502(6) of the Act, 33 U.S.C. §1362(6).

15. Dump trucks and bulldozers are rolling stock.

16. Therefore, Respondents discharged pollutants from a “point source” as defined by Section 502(14) of the Act, 33 U.S.C. §1362(14).

17. Therefore, Respondents discharged pollutants from a “point source” as defined by Section 502(14) of the Act, 33 U.S.C. §1362(14).

18. The Respondents discharged pollutants from a point source into areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

19. Therefore, Respondents discharged pollutants from a point source into “wetlands” as defined by the regulation at 40 C.F.R. § 232.3.

20. The wetlands are “waters of the United States” as defined by the regulation at 40 C.F.R. § 232.3 and “navigable waters” as defined by Section 502(7) of the Act, 33 U.S.C. §1362(7).

21. Respondent did not have a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, for discharges of pollutants as described above.

22. Therefore, in or about August 1999, Respondents were persons who discharged pollutants from point sources into navigable waters in violation of Section 301 of the Act, 33 U.S.C. § 1311.

23. Each discharge by Respondents of pollutants into navigable waters of the United States 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.

24. Each day the pollutants remained in navigable waters constituted an additional day of violation of Section 301 of the Act, 33 U.S.C. §1311.

II. Notice of Proposed Penalty Assessment

Pursuant to Section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(2), the Administrator may assess a Class II civil penalty not to exceed \$10,000 per day for each day during which the violation continues, to a maximum amount of \$125,000 for violations of Section 301 of the Act, 33 U.S.C. § 1311, up until January 30, 1997. After January 30, 1997, the per day maximum amount increased - not to exceed \$11,000 per day for each day during which the violation continues, to a maximum amount of \$137,500, through March 15, 2004. After March 15, 2004, the maximum amount increased - not to exceed \$11,000 per day for each day during which the violation continues, to a maximum amount of \$157,500.

Based upon the facts alleged in this Complaint, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondent's ability to pay, prior history of such violations, culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, U.S. EPA proposes a civil penalty of \$157,500.

Respondents shall pay this penalty by certified or cashier's check payable to "Treasurer, the United States of America," and shall send it with a transmittal letter identifying the Complaint to:

Region 5
U.S. Environmental Protection Agency
P.O. Box 70753
Chicago, Illinois 60673

Copies of the transmittal letter and check shall be sent to:

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

and;

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

III. Notice of Opportunity to Request a Hearing

As provided in Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and Section 22.15 of the Consolidated Rules of Practice, 64 Fed. Reg. 40137, at 40182 (1999) (codified at 40 C.F.R. § 22.15), Respondents have the right to request a hearing to contest any material fact alleged in this Complaint and to contest the appropriateness of the amount of the proposed penalty. To request a hearing, Respondents must specifically make such request in the Answer, which is discussed below.

Any hearing Respondents request regarding this Complaint will be held and conducted in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Order, and the Revocation,

Termination or Suspension of Permits,” 40 C.F.R. Part 22, a copy of which accompanies this Complaint.

IV. Answer

If Respondent contests any material fact alleged in this Complaint, contends that the proposed penalty is inappropriate, or contends that it is entitled to judgment as a matter of law, Respondent must file the original and one copy of a written Answer to this Complaint with the Regional Hearing Clerk, Region 5, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, IL, 60604-3511, within 30 days after service of this Complaint. In computing any period of time allowed under this Complaint, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included, except when a time period expires on such, in which case the time period shall be extended to the next business day.

Respondent’s Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint or state clearly they have no knowledge of a particular factual allegation. Where Respondent states it has no knowledge of a particular factual allegation, the allegation is deemed denied.

Respondent’s Answer must also state:

- a. The circumstances or arguments Respondent alleges constitute grounds of defense;
- b. The facts Respondent disputes;
- c. The basis for opposing the proposed penalty; and
- d. Whether Respondent requests a hearing.

Respondent's failure to admit, deny or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation.

A copy of the Answer and all subsequent documents filed in this action must be sent to Richard Murawski, Associate Regional Counsel, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (C-14J), Chicago, IL, 60604-3590, who may be telephoned at (312) 886-6721.

If Respondent fails to file a written Answer within 30 days after service of this Complaint, the Presiding Officer may issue a Default Order, after motion, under Section 22.17 of the Consolidated Rules of Practice, 64 Fed. Reg. 40137, at 40182 (1999) (codified at 40 C.F.R. § 22.17). Default by Respondent constitutes an admission of all factual allegations made in the Complaint and a waiver of Respondent's right to contest the factual allegations made in the Complaint. Respondent must pay any penalty assessed in a Default Order without further proceedings 30 days after the Order becomes a Final Order of the Administrator of U.S. EPA under 40 C.F.R. § 22.27(c). Respondents' failure to pay the entire proposed penalty assessed by the Default Order by its due date may result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs of collection proceedings, and an additional quarterly nonpayment penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9).

If Respondent requests a hearing on the Complaint, members of the public who have exercised their right to comment will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to present evidence on the appropriateness of the penalty assessment. If a hearing is not held, U.S. EPA may issue a Final Order assessing penalties and only members of the public who commented on the proposed penalty assessment during the 30 day period

following issuance of the public notice will have an additional 30 days to petition U.S. EPA to set aside the Final Order assessing penalties and to hold a hearing thereon. U.S. EPA will grant the petition and hold the hearing only if the petitioner's evidence is material and was not considered by U.S. EPA in the issuance of the Final Order assessing penalties.

VIII. Settlement Conference

Whether or not Respondents request a hearing, Respondents may request an informal conference to discuss the facts of this case and to arrive at a settlement. To request a settlement conference, please write to Greg Carlson, Enforcement Officer, Water Division, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (WW-16J), Chicago, IL, 60604-3511, or telephone him at (312) 886-0124.

Respondents' request for an informal settlement conference will not extend the 30 day period for Respondents to submit a written Answer and Request for Hearing. Respondents may pursue the informal conference procedure simultaneously with the adjudicatory hearing procedure. U.S. EPA encourages all parties against whom a penalty is proposed to pursue settlement through an informal conference. U.S. EPA 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 Consent Agreement and Final Order. Respondent's consent to a Consent Agreement and Final Order shall constitute a waiver of the right to request a hearing on any matter stipulated to therein.

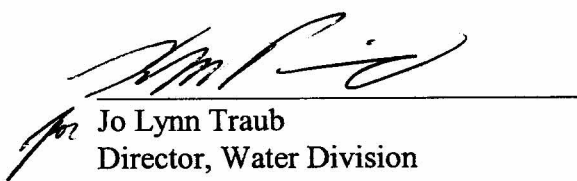
IX. Notice to the State and Public

U.S. EPA is consulting with the State of Indiana regarding this action by contemporaneously mailing a copy of this Complaint to Tom Easterly, Commissioner, Indiana Department of Environmental Management, and by offering Indiana an opportunity to comment

on the proposed penalty. U.S. EPA, contemporaneously with the issuance of this Complaint, caused a public notice to be published in a local newspaper regarding this action.

X. Continuing Obligation to Comply

Neither assessment nor payment of a penalty pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), shall affect Respondent's continuing obligation to comply with the Act, with any other Federal, State or local law or regulation and with any Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a).


Jo Lynn Traub
Director, Water Division
U.S. Environmental Protection Agency
Region 5


Date

~~CWA 05~~ 2005 - 0002