



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

APR 9 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

REPLY TO THE ATTENTION OF:
WW-16J

Mr. Tim Hintz
Mr. Walter Hintz
Hintz Excavating and Blacktop
P.O. Box 39
Adams, Wisconsin 53910

Re: In the Matter of Hintz Excavating and Blacktop
Docket No.: CWA-05-2010-0009

Dear Messers. Hintz:

I have enclosed a complaint filed against your firm 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 your company, Hintz Excavating and Blacktop, filled wetlands abutting an unnamed tributary to Buckner Creek, in Adams County, Wisconsin, 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,

A handwritten signature in black ink, appearing to read "Tinka G. Hyde".

for Tinka G. Hyde
Director, Water Division

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

RECEIVED
APR 09 2010

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF:

Hintz Excavating & Blacktop,
Tim and Walter Hintz, Owners,

RESPONDENT.

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DOCKET NO. CWA-05-2010-0009

PROCEEDING TO ASSESS
CLASS II ADMINISTRATIVE
PENALTY PURSUANT TO
SECTION 309(g)
OF THE CLEAN WATER ACT,
33 U.S.C. § 1319(g)

ADMINISTRATIVE 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 ("CWA"), 33 U.S.C. § 1319(g), and the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R. Part 22("Consolidated Rules"). The Administrator of U.S. EPA has delegated the authority to take this action to the Regional Administrator of Region 5, who has redelegateed this authority to the Water Division Director.

2. The Complainant in this matter is the Water Division Director, Region 5.

3. The Respondent in this matter is:

Hintz Excavating & Blacktop ("Hintz")
Tim and Walter Hintz, Owners
P.O. Box 39
Adams, Wisconsin 53910

4. Section 309(g)(1)(A) of the CWA, 33 U.S.C.

§ 1319(g)(1)(A), states that: "Whenever, 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 II civil penalty under [33 U.S.C. § 1319(g)(2)(B)]."

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states: "Except as in compliance with ... [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any pollutant by any person shall be unlawful."

6. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, Corps of Engineers ("Corps"), to issue permits for the discharge of dredged or fill material into navigable waters.

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

8. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of pollutants," as, inter alia, any addition of any pollutant to navigable waters from any point source.

9. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), 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."

10. Section 502(14) of the CWA, 33 U.S.C. § 1362(14) 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."

11. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters," in part, as the waters of the United States, including the territorial seas.

12. 40 C.F.R. §§ 230.3(s) and 232.2 define "waters of the United States" to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in

interstate or foreign commerce; (ii) all inter-state waters; (iii) all other waters, such as intrastate lakes, rivers, streams (including intermittent streams), sloughs or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; (iv) tributaries to such waters; and (v) wetlands adjacent to such waters or their tributaries.

13. 40 C.F.R. §§ 230.3(t) and 232.2 define "wetlands" as "those 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."

SPECIFIC ALLEGATIONS

14. 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 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.

15. Mr. Daliege hired Respondent Hintz to complete the excavation activities on the property described in paragraph 14.

16. In February and March 2007, Respondent Hintz used excavators and a bulldozer to deposit approximately 3,200 cubic yards of dredged material and organic debris into approximately two (2) acres of wetlands on the north side of the impoundment identified in paragraph 14, to expand the impoundment. See Exhibit 1 for an illustration of the filled areas.

17. The dredged material described in paragraph 16 above remained emplaced on-site until July 2008 when Mr. Daliege, hired another contractor to restore the wetlands disturbed by the activities described in paragraph 16.

18. Respondent Hintz Excavating & Blacktop is a Wisconsin business which is and was at all times relevant to this Complaint, conducting business in and located in central Wisconsin at the address noted in paragraph 3, above.

19. Respondent Hintz, as a partnership, is a "person" within the definition set forth at Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

20. 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.

21. The Wisconsin River is a navigable-in-fact interstate water.

22. 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.

23. 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.

24. The dredged material fill areas described in paragraph 16 constitutes "wetlands" as that term is defined under 40 C.F.R. §§ 230.3(t) and 232.

25. The wetlands described in paragraph 16 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.

26. The deposited materials identified in paragraph 16 are "pollutants," as that term is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. The excavators and bulldozers identified in paragraph

16 are "point sources," as that term is defined at Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The emplacement of dredged material as described in paragraph 16, into the wetlands identified in paragraph 14, 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.

29. As an operator on the property identified in paragraphs 14 and 16, Respondent is liable for acts conducted on property owner Daliege's behalf with respect to the property, and thus constitute a person who discharged pollutants into navigable waters.

30. At no time during the depositing of material as described in paragraph 16, into the wetlands described in paragraph 14, 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 16.

31. Each day the 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), by Respondent.

32. Each day that the pollutants discharged by the 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, by Respondent.

NOTICE OF PROPOSED ASSESSMENT OF A CIVIL PENALTY

33. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Administrator may assess a civil penalty of up to \$10,000 per day of violation up to a total of \$125,000 for violations of Section 301(a) of the CWA that occurred prior to January 31, 1997. To adjust these amounts for inflation, the Debt Collection Improvement Act of 1996 increased the statutory maximum penalty to \$11,000 per day of violation up to a total of \$137,500 for violations of Section 301 of the CWA on or after January 31, 1997. See 31 U.S.C. § 3701 and 40 C.F.R. part 19. Pursuant to a second adjustment in penalty amounts under the Debt Collection Improvement Act, the Administrator may seek penalties up to a total \$157,500 under Section 309(g) of the CWA for violations of Section 301(a) occurring after March 15, 2004. Pursuant to a third adjustment in penalty amounts under the Debt Collection Improvement Act, the Administrator may seek penalties up to a total \$157,500 under Section 309(g) of the CWA for violations of Section 301(a) occurring after March 15, 2009.

34. Under Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the Administrator, when assessing a penalty under this subsection, must consider the nature, circumstances, extent and gravity of the violations alleged, as well as Respondent's ability to pay, history of violations, culpability, economic benefit of saving resulting from the violations, and other matters as justice may require.

35. Based upon an evaluation of the facts alleged in this complaint, and the factors specified in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), Complainant proposes that the Administrator assess a civil penalty against Respondent Hintz Excavating and Blacktop, LLC in the amount of \$72,000.

36. Complainant developed the proposed penalty based on the best information available to Complainant at this time. Complainant may adjust the proposed penalty if Respondents establishes bona fide issues of ability to pay or other defenses relevant to the penalty's appropriateness.

RULES GOVERNING THIS PROCEEDING

37. The Consolidated Rules, codified at 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. A copy of the Consolidated Rules is enclosed with this Complaint.

FILING AND SERVICE OF DOCUMENTS

38. Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-13J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

39. Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Reginald Pallesen, Associate Regional Counsel, to receive any answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Mr. Pallesen at (312) 886-0555, and his address is:

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

PENALTY PAYMENT

40. Respondent may resolve this proceeding by paying the proposed penalty by certified or cashier's check payable to "Treasurer, the United States of America", and by delivering the check to:

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

41. Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Complainant's counsel at the address provided in paragraph 39 above and to:

Gregory Carlson (WW-16J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

OPPORTUNITY TO REQUEST A HEARING

42. The Administrator must provide an opportunity to request a hearing to any person against whom the Administrator proposes to assess a penalty under Section 309(g) of the CWA, 33 U.S.C. § 1319(g). Respondent has the right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of the proposed penalty, or both. To request a hearing, Respondent must specifically make the request in its answer, as discussed in paragraphs 43 through 47 below.

ANSWER

39. Respondent must file a written answer to this complaint if the Respondent contests any material fact of the complaint; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law. To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified in paragraph 34, above, and must serve copies of the written answer on the other parties.

40. If Respondent chooses to file a written answer to the complaint, it must do so within 30 calendar days after receiving the complaint. In counting the 30-day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

41. Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the complaint; or must state clearly that the Respondent has no knowledge of a particular factual allegation. Where a Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

42. A Respondent's failure to admit, deny, or explain any material factual allegation in the complaint constitutes an admission of the allegation against that Respondent. A Respondent's answer must also state:

- a. the circumstances or arguments which a Respondent alleges constitute grounds of defense;
- b. the facts that any Respondent disputes;
- c. the basis for opposing the proposed penalty; and
- d. whether each Respondent requests a hearing as discussed in paragraph 42, above.

43. If Respondent does not file a written answer within 30 calendar days after receiving this complaint the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by a Respondent constitutes an admission of all factual allegations in the complaint and a waiver of the right to contest the factual allegations. A Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

SETTLEMENT CONFERENCE

44. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a

settlement. To request an informal settlement conference, Respondent may contact counsel for Complainant at the address or phone number specified in paragraph 39, above.

45. A Respondent's request for an informal settlement conference does not extend the 30 calendar day period for filing a written answer to this complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. U.S. EPA encourages all parties facing civil penalties to pursue settlement through an informal conference. U.S. EPA, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

NOTICE TO THE STATE AND PUBLIC

46. U.S. EPA has consulted with Wisconsin Department of Natural Resources regarding this proposed action by mailing a copy of this document to the appropriate official of the State of Wisconsin, and offering an opportunity for the State to consult with U.S. EPA on the proposed penalty assessment. U.S. EPA, contemporaneously with the issuance of this proposed action, caused a public notice to be published on the Region 5 website.

CONTINUING OBLIGATION TO COMPLY

47. Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the CWA and any other applicable federal, state or local law.

Date: 8 APRIL 2010



for

Tinka G. Hyde
Director, Water Division
U.S. Environmental Protection
Agency, Region 5
Chicago, Illinois 60604

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CHICAGO, IL 60604-3590

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U.S. EPA REGION 5

2010 APR -9 PM 1:39

REPLY TO THE ATTENTION OF

WW-16J

CERTIFICATE OF SERVICE

This is to certify that the original and one copy of this Class II Section 309(g) Complaint and Notice of Opportunity of Hearing, was filed with the Regional Hearing Clerk on April 9, 2010, and that a true and correct copy was mailed, with the Consolidated Rules of Practice, 40 C.F.R. Part 22, to Respondent, on April 9, 2010, at:

Walter and Tim Hintz, Principals
Hintz Excavating and Blacktop
P.O. Box 39
Adams, Wisconsin 53910

April 9, 2010
Date

Gregory T. Carlson (WW-16J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604

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