

SPALDING & HILMES, PC

Attorneys At Law

Rosemary G. Spalding

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OVERNIGHT DELIVERY VIA UPS EXPRESS

August 11, 2010

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

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U.S. ENVIRONMENTAL
PROTECTION AGENCY**

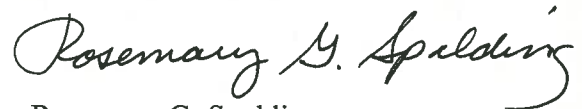
**Re: In the Matter of Batesville Gas & Water Utility and
Don Gunter Excavating, LLC
Docket No. CWA-05-2010-0013**

Dear Regional Hearing Clerk:

Enclosed please find for filing one original and two copies each of an “Appearance by Counsel” and “Answer, Defenses and Request for Hearing of Don Gunter Excavating, LLC.” Please return a file-stamped copy of each document to me in the enclosed, self-addressed envelope.

Please let me know if you have any questions about the enclosed documents. Thank you for your assistance.

Sincerely,



Rosemary G. Spalding

Enclosures

cc: (w/enc.)

The Honorable Marcy Toney, Regional Judicial Officer

Jeffrey A. Cahn, Attorney for Complainant

Larry Kane, Attorney for Respondent Batesville Water & Gas Utility

Don and Brenda Gunter, Don Gunter Excavating, LLC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of)
)
Batesville Water & Gas Utility,)
Batesville, Indiana,)
)
and)
)
Don Gunter Excavating, LLC)
Batesville, Indiana,)
)
)
Respondents.)
_____)

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

Docket No. CWA-05-2010-0013

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PROTECTION AGENCY

APPEARANCE BY COUNSEL

The undersigned counsel hereby appears on behalf of Respondent Don Gunter
Excavating, LLC in the instant cause.

Respectfully submitted,

Rosemary G. Spalding

Rosemary G. Spalding
Spalding & Hilmes, PC
330 South Downey Avenue
Indianapolis, IN 46219
(317) 259-5790

Date: August 11, 2010

CERTIFICATE OF SERVICE

I certify that the foregoing "Appearance by Counsel," dated August 11, 2010, was sent this day in the following manner to the addresses listed below:

Original by U.S. Mail or Overnight Express:

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

Copy by U.S. Mail or Overnight Express:

Regional Judicial Officer: The Honorable Marcy Toney
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Attorney for Complainant: Jeffrey A. Cahn
Associate Regional Counsel
Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604-3590

Attorney for Respondent Batesville Water & Gas Utility:

Larry Kane
Bingham McHale, LLP
2700 Market tower
10 West Market Street
Indianapolis, IN 46204


Rosemary G. Spalding

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 5

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Don Gunter Excavating, LLC,)
Batesville, Indiana,)
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**ANSWER, DEFENSES AND REQUEST FOR HEARING
OF DON GUNTER EXCAVATING, LLC**

In accordance with 40 C.F.R. § 22.15, Respondent, Don Gunter Excavating, LLC ("Gunter"), by counsel, hereby submits its Answer and Defenses ("Answer") to the United States Environmental Protection Agency's ("U.S. EPA") Administrative Complaint ("Complaint") in this matter. Gunter also hereby submits its Request for Administrative Hearing. Each allegation of the Complaint is restated herein prior to Gunter's corresponding answer.

On July 26, 2010, U.S. EPA filed a motion to amend its complaint to provide the Parties with Exhibit 1, which had been omitted. Although the motion has not been granted as of the date of filing Gunter's Answer, Gunter does not object to said motion and includes the allegations contained therein in this Answer.

ANSWER

I. Nature of the Action

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" or "CWA"), 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," 64 Fed. Reg. 40137 (codified 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 redelegate this authority to the Water Division Director.

ANSWER: Gunter admits the allegations of Paragraph 1 of the Complaint.

2. The Respondents in this matter are:

Batesville Water & Gas Utility ("Batesville")
7 N. Eastern Avenue
Batesville, IN 47006

and

Don Gunter Excavating, LLC
3598 East County Road 1200 N
Gunter, IN 47006.

ANSWER: Gunter admits that Batesville Water & Gas Utility and Don Gunter Excavating, LLC are the named Respondents in this matter.

II. Statutory and Regulatory Background

3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters by any person except in compliance with, inter alia, a permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344.

ANSWER: The statutes cited in Paragraph 3 of the Complaint speak for themselves and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

4. Section 404 of the Act authorizes the Secretary of the Army, acting through the Chief of Engineers of the United States Army Corps of Engineers ("Corps"), to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. 33 U.S.C. § 1344.

ANSWER: The statute cited in Paragraph 4 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

5. Section 502(5) of the Act defines "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).

ANSWER: The statute cited in Paragraph 5 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

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

ANSWER: The statute cited in Paragraph 6 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

7. Section 502(6) of the Act 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).

ANSWER: The statute cited in Paragraph 7 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

8. Section 502(14) of the Act 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).

ANSWER: The statute cited in Paragraph 8 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

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

ANSWER: The statute cited in Paragraph 9 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

10. 40 C.F.R. § 230.3(s) defines the term "waters of the United States" to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce... [and] all other waters such as intrastate lakes, rivers, streams (including intermittent streams) ... [or] wetlands ... the use, degradation, or destruction of which could affect interstate or foreign commerce, ... tributaries of [such other] waters, ... [and] wetlands adjacent to [all such] waters."

ANSWER: The statute cited in Paragraph 10 of the Complaint speaks for itself and no response is

required. To the extent that a response may be required, Gunter denies all such allegations.

11. 40 C.F.R. § 230.3(t) defines "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."

ANSWER: The statute cited in Paragraph 11 of the Complaint speaks for itself and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

12. Section 309(g)(1)(A) of the Act, 33 U.S.C. § 1319(g)(1)(A), authorizes the Administrator to assess a Class II civil penalty under 33 U.S.C. § 1319(g)(2)(B), "whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of Section 301 of the Act, 33 U.S.C. § 1311.

ANSWER: The statutes cited in Paragraph 12 of the Complaint speak for themselves and no response is required. To the extent that a response may be required, Gunter denies all such allegations.

13. Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the Administrator to assess a Class II civil penalty of up to \$11,000 per day for each day during which a violation continues, up to a maximum amount of \$157,500.

ANSWER: The statutes cited in Paragraph 13 of the Complaint speak for themselves and no response is required. To the extent that a response may be required, Gunter denies all such

allegations.

III. Allegations

14. Respondent, Batesville Water & Gas Utility, is an organization created under the authorities of the State of Indiana.

ANSWER: Gunter is without sufficient knowledge or information to admit or deny the allegations of Paragraph 14 of the Complaint.

15. Respondent, Don Gunter Excavating, LLC, is a corporation under the authorities of the State of Indiana.

ANSWER: Gunter admits the allegation contained in Paragraph 15 of the Complaint.

16. Respondents are "persons" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

ANSWER: To the extent that the allegations of Paragraph 16 of the Complaint apply to Gunter, Gunter admits such allegations. To the extent that the allegations of Paragraph 16 of the Complaint apply to Batesville, Gunter is without sufficient knowledge or information to admit or deny such allegations.

17. Mollenkramer Reservoir referenced in paragraph 18 is a "water of the United States" as defined under 40 C.F.R. § 232.2, and constitutes a "navigable water" as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7).

ANSWER: The allegations of Paragraph 17 of the Complaint state a legal conclusion to which no response is required. To the extent that a response may be required, Gunter denies all such allegations.

18. Between October 9, 2008, and November 5, 2008, Don Gunter Excavating, LLC, acting on behalf of Respondent Batesville Water & Gas Utility, discharged approximately 21,100 cubic yards of fill and dredged material and organic debris from excavators and bulldozers into the Mollenkramer Reservoir, on either side of Coonhunters Road, within the city of Batesville, Ripley County, Indiana. An outline of the discharge areas is digitized on Exhibit 1 to this Administrative Complaint.

ANSWER: To the extent that the allegations of Paragraph 18 of the Complaint apply to Gunter, Gunter denies all such allegations. To the extent that the allegations of Paragraph 18 of the Complaint apply to Batesville, Gunter is without sufficient knowledge or information to admit or deny such allegations.

19. The fill or dredged material and organic debris discharged into the Mollenkramer Reservoir constitute "pollutants" as defined under Section 502(6) of the Act, 33 U.S.C. § 1362(6).

ANSWER: The allegations of Paragraph 19 of the Complaint state a legal conclusion to which no response is required. To the extent that a response may be required, Gunter denies all such allegations.

20. An excavator and bulldozer are discernible, confined and discrete conveyances, specifically rolling stock, and constitute "point sources" as defined under Section 502(14) of the Act, 33 U.S.C. § 1362(14).

ANSWER: The allegations of Paragraph 20 of the Complaint state a legal conclusion to which no response is required. To the extent that a response may be required, Gunter denies all such allegations.

21. The addition of dredged and fill material and organic debris from excavators, or earth moving equipment, into waters of the United States constitutes a "discharge of a pollutant" as defined under Section 502(12) of the Act, 33 U.S.C. § 1362(12).

ANSWER: The allegations of Paragraph 21 of the Complaint state a legal conclusion to which no response is required. To the extent that a response may be required, Gunter denies all such allegations.

22. At no time did Respondents have a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344, to discharge fill or dredged material and organic debris into the Mollenkramer Reservoir.

ANSWER: To the extent that the allegations of Paragraph 22 of the Complaint apply to Gunter, Gunter admits all such allegations. To the extent that the allegations of Paragraph 22 of the Complaint apply to Batesville, Gunter is without sufficient knowledge or information to admit or deny all such allegations.

23. Therefore, Respondents are persons who discharged pollutants from a point source into waters of the United States, without a permit, in violation of Section 301 of the Act, 33 U.S.C. § 1344.

ANSWER: The allegations of Paragraph 23 of the Complaint state a legal conclusion to which no response is required. To the extent that a response may be required, Gunter denies all such allegations with respect to Gunter and is without sufficient information to admit or deny the allegations with respect to Batesville.

24. Each day the pollutants remain in the waters of the United States constitutes a continuing violation of the Act and an additional day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

ANSWER: The allegations of Paragraph 24 of the Complaint state a legal conclusion to which no response is required. To the extent that a response may be required, Gunter denies all such allegations.

IV. Proposed Civil Penalty

In Section IV of the Complaint, the U.S. EPA alleges that:

Based upon the facts alleged in this Complaint, and upon the nature, circumstances, extent and gravity of the violations, as well as available information as to Respondents' ability to pay, prior history of such violations, culpability, economic benefit or saving (if any) resulting from the violations, and such other matters as justice may require, the U.S. EPA proposes to issue a Final Order to Respondents assessing a penalty in the amount of \$60,000.00 against Batesville Water & Gas Utility and \$20,000.00 against Don Gunter Excavating, LLC.

U.S. EPA further alleges that:

This amount of civil penalties was determined based upon an analysis of relevant evidence now known to Complainant, in consideration of the statutory penalty criteria identified at Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3).

ANSWER: Gunter is without knowledge to admit or deny the factors upon which U.S. EPA based the proposed penalties against Gunter because U.S. EPA has not provided those factors to Gunter. Furthermore, Gunter denies that any penalty is appropriate because Gunter denies that it violated Sections 301 and 404 of the Clean Water Act, as set forth above. With respect to the civil penalty proposed by the U.S. EPA against Batesville, Gunter is without sufficient knowledge or information to admit or deny all such allegations relating to the amount of the proposed penalty.

DEFENSES AND FACTS IN DISPUTE

Gunter contests the material facts upon which the Complaint is based, contends that the amount of the penalty proposed in the Complaint is excessive or otherwise erroneous and inappropriate, and contends that Gunter is entitled to judgment as a matter of law. Gunter also asserts the following defenses:

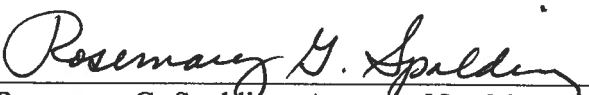
1. The allegations in the Complaint and the proposed penalty are in error, arbitrary and capricious, an abuse of discretion, contrary to law and not supported by substantial evidence;
2. Even if the proposed penalty is appropriate, which Gunter argues it is not, Gunter is unable to pay it due to economic hardship, and therefore, the proposed penalty is in error, arbitrary and capricious, an abuse of discretion, contrary to law and not supported by substantial evidence.

REQUEST FOR HEARING

Pursuant to 33 U.S.C. § 1319(g)(2)(B) and 40 C.F.R. § 22.15(c), Gunter respectfully requests a hearing upon the issues raised by the Complaint and Gunter's Answer.

WHEREFORE Gunter prays for entry of judgment in its favor, against the U.S. EPA and that the U.S.EPA take nothing by way of its Complaint, and for all other just and proper relief.

Respectfully submitted,



Rosemary G. Spalding, Attorney No. 8614-49
Kathryn A. Watson, Attorney No. 1939-49

Spalding & Hilmes, PC
330 South Downey Avenue
Indianapolis, IN 46219
(317) 375-1140 (telephone)
(877) 352-9340 (facsimile)
Attorneys for Don Gunter Excavating, LLC

CERTIFICATE OF SERVICE

I certify that the foregoing "Answer, Defenses and Request for Hearing of Don Gunter Excavating, LLC" was sent August 11, 2010, in the following manner to the addresses listed below:

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