

July 12, 2010

**VIA UPS EXPRESS**

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

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JUL 13 2010

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U.S. ENVIRONMENTAL  
PROTECTION AGENCY**

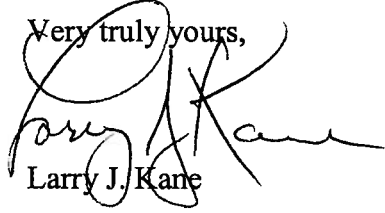
RE: Answer, Defenses and Request for Hearing of  
Batesville Water & Gas Utility  
Docket No. CWA-05-2010-0013

Dear Clerk:

Enclosed are an original and two copies of the Answer, Defense and Request for Hearing of Batesville Water & Gas Utility (Answer) to the Administrative Complaint in the above-referenced matter. Please file the Answer on behalf of our client, Batesville Water & Gas Utility in reference to the above Docket Number. Please return a file-stamped copy of the Answer to me in the enclosed, preaddressed envelope.

If you should have any questions, please feel free to contact me.

Very truly yours,



Larry J. Kane

**Enclosures**

cc: Jeffrey A. Cahn  
Tinka G. Hyde  
Kathryn A. Watson

1507870

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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PROTECTION AGENCY

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

**ANSWER, DEFENSES AND REQUEST FOR HEARING  
OF BATESVILLE WATER & GAS UTILITY**

In accordance with 40 CFR § 22.15, Defendant, Batesville Water & Gas Utility ("Batesville"), by counsel, hereby submits its answer to the United States Environmental Protection Agency's ("U.S. EPA's") Administrative Complaint ("Complaint") in this matter. Batesville also submits herewith its Request for Administrative Hearing. Each allegation of the Complaint is restated herein prior to Batesville's corresponding 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 redelegated this authority to the Water Division Director.

**ANSWER: Batesville admits the allegations of Paragraph 1 of the Complaint.**

2. The Respondents in this matter are:

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

and

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

**ANSWER: Batesville admits that Batesville 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: To the extent that the allegations contained in Paragraph 3 of the Complaint are a restatement of federal statutory law, the referenced statutes speak for themselves and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 3, Batesville 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: To the extent that the allegations contained in Paragraph 4 of the Complaint are a restatement of federal statutory law, the referenced statute speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 4, Batesville 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: To the extent that the allegations contained in Paragraph 5 of the Complaint are a restatement of federal statutory law, the referenced statute speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 5, Batesville 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: To the extent that the allegations contained in Paragraph 6 of the Complaint are a restatement of federal statutory law, the referenced statute speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 6, Batesville 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: To the extent that the allegations contained in Paragraph 7 of the Complaint are a restatement of federal statutory law, the referenced statute speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 7, Batesville 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: To the extent that the allegations contained in Paragraph 8 of the Complaint are a restatement of federal statutory law, the referenced statute speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 8, Batesville 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: To the extent that the allegations contained in Paragraph 9 of the Complaint are a restatement of federal statutory law, the referenced statute**

**speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 9, Batesville 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: To the extent that the allegations contained in Paragraph 10 of the Complaint are a restatement of federal regulatory law, the referenced regulation speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 10, Batesville 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: To the extent that the allegations contained in Paragraph 11 of the Complaint are a restatement of federal regulatory law, the referenced regulation speaks for itself and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 11, Batesville 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: To the extent that the allegations contained in Paragraph 12 of the Complaint are a restatement of federal statutory law, the referenced statutes speak for themselves and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 12, Batesville 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: To the extent that the allegations contained in Paragraph 13 of the Complaint are a restatement of federal law, the referenced statutes and regulations speak for themselves and no response is required. To the extent that a response may be required to the allegations contained in Paragraph 13, Batesville 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: Batesville admits 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: Batesville is without sufficient knowledge or information to admit or deny the allegations of 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 Batesville, Batesville admits all such allegations. To the extent that the allegations of Paragraph 16 of the Complaint apply to Don Gunter Excavating, LLC, Batesville is without sufficient knowledge or information to admit or deny all 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. If a response is deemed to be required notwithstanding, Batesville denies the allegations of Paragraph 17 of the Complaint.**

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:** With regard to the U.S. EPA's allegation of Paragraph 18 of the Complaint that the outline of the alleged discharge areas are represented in Exhibit 1, the Complaint received by Batesville did not include an Exhibit 1 and therefore Batesville does not have sufficient knowledge or information to admit or deny the allegation. To the extent that the remainder of the allegations of Paragraph 18 of the Complaint apply to Batesville, Batesville denies all such allegations. To the extent that the allegations of Paragraph 18 of the Complaint apply to Don Gunter Excavating, LLC, Batesville is without sufficient knowledge or information to admit or deny all 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. If a response is deemed to be required notwithstanding, then Batesville denies the allegations of Paragraph 19 of the Complaint.

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. If a response is deemed to be required notwithstanding, then Batesville denies the allegations of Paragraph 20 of the Complaint.

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. If a response is deemed to be required notwithstanding, then Batesville denies the allegations of Paragraph 21 of the Complaint.**

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 Batesville, Batesville admits all such allegations. To the extent that the allegations of Paragraph 22 of the Complaint apply to Don Gunter Excavating, LLC, Batesville 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. If a response is deemed to be required notwithstanding, then, to the extent that the allegations of Paragraph 23 of the Complaint apply to Batesville, Batesville denies all such allegations. To the extent that the allegations of Paragraph 23 of the Complaint apply to Don Gunter**

**Excavating, LLC, Batesville is without sufficient knowledge or information to admit or deny all such allegations.**

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. If a response is deemed to be required notwithstanding, then Batesville denies the allegations of Paragraph 24 of the Complaint.**

#### **IV. Proposed Civil Penalty**

In Section IV of the Complaint, the U.S. EPA alleged 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 alleged 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).”

**RESPONSE:** With respect to the U.S. EPA's alleged consideration of various factors in determining the amount of civil penalty proposed by the U.S. EPA against Batesville in Section IV of the Complaint, Batesville is without sufficient knowledge or information to admit or deny such allegations relating to the amount of the proposed penalty. However, regardless of its lack of knowledge as to the specific bases upon which U.S. EPA calculated the proposed penalty, Batesville DENIES any penalty is warranted because Batesville denies, as more specifically stated above, that violations of Sections 301 and 404 of the Clean Water Act occurred as alleged in the Complaint. With respect to the civil penalty proposed by the U.S. EPA against Don Gunter Excavating, LLC in Section IV of the Complaint, Batesville is without sufficient knowledge or information to admit or deny all such allegations relating to the amount of the proposed penalty.

#### **DESCRIPTION OF BASIS OF DEFENSE AND FACTS IN DISPUTE**

Batesville 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 Batesville is entitled to judgment as a matter of law. Batesville intends to place all allegations denied or deemed denied at issue to formulate the following defenses:

1. The allegations contained in the Complaint are in error, arbitrary and capricious, an abuse of discretion, not in accordance with the law and not supported by substantial evidence;
2. Based on the nature, circumstances, extent and gravity of the alleged violations, culpability, and economic benefits or savings resulting from the

alleged violations, the proposed penalty is in error, arbitrary and capricious, an abuse of discretion, not in accordance with the law and not supported by substantial evidence;

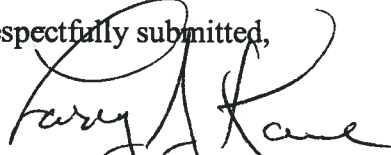
3. Even assuming for sake of argument that the proposed penalty was properly calculated, Batesville contends that it is unable to pay the proposed penalty due to economic hardship and that Batesville's application for an inability to pay determination was improperly denied and therefore was in error, arbitrary and capricious, an abuse of discretion, not in accordance with the law and not supported by substantial evidence;
4. At all times relevant to the Complaint, Batesville complied with all applicable laws, regulations and standards.

#### **REQUEST FOR HEARING**

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

WHEREFORE Batesville 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,



Larry J. Kane, Attorney No. 5066-53  
E. Ryan Murray, Attorney No. 27606-49  
Bingham McHale LLP  
2700 Market Tower  
120 W. Market Street  
Indianapolis, IN 46204-4900  
(317) 635-8900 (telephone)  
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*Attorneys for Defendant. Batesville Water & Gas Utility*

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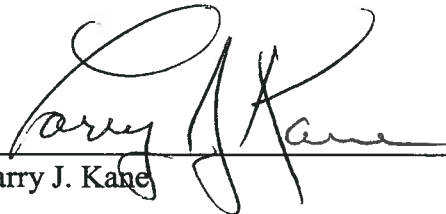
### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by United States First Class Mail or Overnight Express, postage prepaid, or UPS Express, delivery charges prepaid, this 12<sup>th</sup> day of July, 2010:

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

Kathryn A. Watson  
Attorney at Law  
Spalding & Hilmes, PC  
330 South Downey Avenue  
Indianapolis, IN 46219-7047

Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard (WW-16J)  
Chicago, IL 60604-3590



Larry J. Kane