



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

JUN - 7 2010

REPLY TO THE ATTENTION OF:

WW-16J

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

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

Re: In the Matter of Don Gunter Excavating, LLC  
Docket No.: CWA-05-2010-0013

Dear Mr. Gunter:

I have enclosed a complaint filed against Don Gunter Excavating, LLC ("Gunter") 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 Gunter excavated and sidecasted dredged material from the Mollenkramer Reservoir – an impoundment of Bob's Creek – in Batesville, Ripley County, Indiana, without first obtaining a permit to do so.

As provided in the complaint, if Gunter would like to request a hearing, it must do so in its answer to the complaint. Please note that if Gunter does not file an answer with the Regional Hearing Clerk within 30 days of its 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 Gunter requests a hearing, it may request an informal settlement conference. If Gunter wishes to request a conference, or if it has any questions about this matter, please contact Gregory T. Carlson, Enforcement Officer, 77 West Jackson Boulevard, Chicago, IL 60604, at (312) 886-0124.

Sincerely,

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

Tinka G. Hyde  
Director, Water Division

Enclosure



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REGION 5  
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JUN 07 2010

REPLY TO THE ATTENTION OF:

WW-16J

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Sue Siefert, Chairperson  
Batesville Water and Gas Utility Board  
7 White Oak Court  
Batesville, IN 47006

Re: In the Matter of Batesville Water & Gas Utility  
Docket No.: CWA-05-2010-0013

Dear Chairperson Siefert:

I have enclosed a complaint filed against the Batesville Water & Gas Utility ("the Utility") 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 Utility hired contractors to excavate dredged material from the Mollenkramer Reservoir – an impoundment of Bob's Creek – in Batesville, Ripley County, Indiana, without first obtaining a permit to do so.

As provided in the complaint, if the Utility would like to request a hearing, the Utility must do so in its answer to the complaint. Please note that if the Utility does not file an answer with the Regional Hearing Clerk within 30 days of its 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 the Utility requests a hearing, it may request an informal settlement conference. If the Utility wishes to request a conference, or if it has any questions about this matter, please contact Gregory T. Carlson, Enforcement Officer, 77 West Jackson Boulevard, Chicago, IL 60604, at (312) 886-0124.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tinka G. Hyde".

Tinka G. Hyde  
Director, Water Division

Enclosure

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

<b>In the Matter of:</b>	)	
	)	
<b>Batesville Water &amp; Gas Utility, Batesville, Indiana,</b>	)	<b>Proceeding to Assess a Class II Civil Penalty Under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)</b>
	)	
<b>and</b>	)	
	)	
<b>Don Gunter Excavating, LLC, Batesville, Indiana,</b>	)	<b>Docket No. CWA-05-2010-0013</b>
	)	
<b>Respondents.</b>	)	
_____	)	

**RECEIVED**  
JUN 10 2010  
REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY.

**ADMINISTRATIVE COMPLAINT**

**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.

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.

## 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.

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.

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).

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).

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).

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).

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).

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.”

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.”

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.

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.

### **III. Allegations**

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

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

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

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).

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.

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).

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).

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).

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.

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.

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.

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

Pursuant to Section 309(g)(2) of the Act, 33 U.S.C. § 1319(g)(2), and 40 C.F.R. Part 19, the Administrator may assess a Class II civil penalty not to exceed \$11,000 per day for each day during which the violation continues, to a maximum amount of \$137,500, for violations of Section 301 of the Act, 33 U.S.C. § 1311, up until March 14, 2004. After March 14, 2004, the maximum total penalty for violations of Section 301 of the Act increased to \$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 available information as to Respondents’ 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

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.

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).

Respondents shall pay this penalty by certified or cashiers' checks payable to "Treasurer, the United States of America," and shall send them, with transmittal letters identifying the Complaint, to:

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

Copies of the transmittal letters and checks shall be sent to:

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

and

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

#### **V. 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) (to be 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/or 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," 64 Fed. Reg. 40137 (1999) (to be codified at 40 C.F.R. Part 22), a copy of which accompanies this Complaint.

#### **VI. Answer**

If Respondents contest any material fact alleged in this Complaint, contend that the proposed penalty is inappropriate, or contend that they are entitled to judgment as a matter of law, then each 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, 60604-3590, 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.

Each Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which that Respondent has any knowledge, or must clearly state that 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.

Each Respondent's Answer must also state:

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

A 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 each Answer and all subsequent documents filed in this action must be sent to Jeffrey A. Cahn, Associate Regional Counsel, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (C-14J), Chicago, IL, 60604-3590, who may be telephoned at (312) 886-6670.

If a 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 a 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. A 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). A Respondent's 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, attorneys' 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 a 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.

#### **VII. Settlement Conference**

Whether or not a Respondent requests a hearing, a Respondent 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 Gregory Carlson, Enforcement Officer, United States Environmental Protection Agency, 77 West Jackson Boulevard (WW-16J), Chicago, IL, 60604-3590, or telephone him at (312) 886-0124.

A Respondent's request for an informal settlement conference will not extend the 30-day period during which that Respondent must submit a written Answer and Request for Hearing. A Respondent 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. A 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.

### VIII. Notice to the State and Public

U.S. EPA has consulted with the State of Indiana regarding this action by mailing a draft copy of this Complaint to Bruno Pigott, Assistant Administrator, Office of Water Quality, 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 posted on the Region 5 web page ([www.epa.gov/R5/public\\_notices](http://www.epa.gov/R5/public_notices)) regarding this action.

### IX. 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 a 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).

  
\_\_\_\_\_  
Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection Agency  
Region 5

6/9/10  
\_\_\_\_\_  
Date

**RECEIVED**  
JUN 10 2010  
REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY



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

REPLY TO THE ATTENTION OF

CWA-05-2010-0013

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 June 10, 2010, and that a true and correct copy was mailed, with the Consolidated Rules of Practice, 40 C.F.R. Part 22, to Respondents, on June 10, 2010, at:

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

Larry Kane, Partner  
Bingham-McHale, LLP  
2700 Market Tower  
10 West Market Street  
Indianapolis, Indiana 46204;

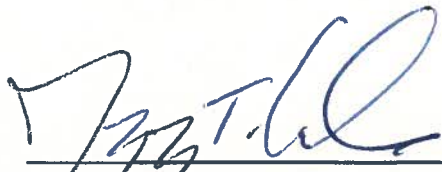
and,

Susan Siefert, Chairperson  
Batesville Water & Gas Utility Board  
7 N. Eastern Avenue  
Batesville, IN 47006

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JUN 10 2010

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

June 10, 2010  
Date

  
\_\_\_\_\_  
Gregory T. Carlson (WW-16J)  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard