



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

AUG 13 2009

CERTIFIED MAIL 7001 1140 0001 5045 3284
RETURN RECEIPT REQUESTED

James C. Bickett
4610 U.S. Highway 81
Owensboro, Kentucky 42301

Re: Consent Agreement and Final Order
Docket No. CWA-04-2009-5501(b)

Dear Mr. Bickett:

Enclosed is a copy of the Consent Agreement and Final Order that has been finalized by the U.S. Environmental Protection Agency and the Acting Regional Administrator. Please make note of the provisions under Section VII. payment.

Thank you for your cooperation in settling this matter. Should you have any questions or concerns, please contact Mr. Chris Parker of my staff at (404) 562-9838, or your attorney can contact Mr. Kevin Smith, Attorney Advisor, at (404) 562-9525.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Giattina".

James D. Giattina
Director
Water Protection Division

Enclosure

cc: U.S. Army Corps of Engineers, Louisville, KY
Kentucky Division of Water, Frankfort, KY
U.S. Army Corps of Engineers, Newburgh, IN

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

2009 AUG 13 11:25
EPA REGION 4
WATER MANAGEMENT DIVISION

IN THE MATTER OF:)
)
 James C. Bickett) ADMINISTRATIVE
 Henderson County, Kentucky,) CONSENT AGREEMENT AND
) FINAL PENALTY ORDER
)
 RESPONDENT.) Docket No.: CWA-04-2009-5501(b)
)

CONSENT AGREEMENT

I. Statutory Authority

1. This is a civil penalty proceeding under Section 309(g)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1), 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*, published at 64 Fed. Reg. 40176 (July 23, 1999), codified at 40 Code of Federal Regulations (C.F.R.) Part 22 (Part 22).

2. The authority to take action under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), is vested in the Administrator of the United States Environmental Protection Agency (EPA). The Administrator has delegated this authority to the Regional Administrator Region 4, who in turn has redelegated this authority to the Director of the Water Management Division of EPA Region 4 (Complainant).

II. Statutory and Regulatory Background

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states "[w]henever, 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 I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)]."

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states "[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful." 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 (COE), to issue permits for the discharge of dredged or fill material into navigable waters.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a "discharge of pollutants" as "[a]ny addition of any pollutant to navigable waters from any point source"

6. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged.”

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose 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.”

III. Allegations

10. The term “Discharge Area” means the jurisdictional waters that have been impacted either through filling or dredging as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area is three to five acres of jurisdictional wetlands immediately adjacent to the Ohio River on Farm Security Agency Farm No. 3385, Tract 1987, located just south of Ohio River No. 2 Road approximately 400 to 3,000 linear feet upstream of the Newburgh Locks and Dam, near the City of Scuffletown, Henderson County, Kentucky, centered near 37° 55.45' north longitude and 87° 22.52' west latitude (Discharge Area). The Discharge Area is indicated on the enclosed Exhibits A and B.

11. The term “Site” means the parcel or parcels of land on which the Discharge Area is located.

12. Respondent, Mr. James C. Bickett, at all times relevant to this Consent Agreement and Final Order, was the owner and operator of the Site.

13. Respondent is a person within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Commencing on or about September 30, 2004, until the present, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into wetlands on the Site using earth moving machinery, during unauthorized activities associated with the clearing and filling of wetlands for row crop production.

15. Respondent impacted approximately three to five acres of wetlands (Discharge Area) that are adjacent to the Ohio River, a navigable-in-fact water of the United States.

16. The discharged dredged and/or fill material, including earthen material deposited at the Discharge Area, are “pollutants” as defined under the CWA § 502(6), 33 U.S.C. § 1362(6).

17. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Discharge Area are "point sources" as defined under the CWA § 502(14), 33 U.S.C. § 1362(14).

18. A "discharge of a pollutant," as defined at Section 502(12)(A) of the CWA, 33 U.S.C. § 1362 (12)(A), is any addition of any pollutant to navigable waters from any point source.

19. Respondent's placement of the dredged and/or fill material at the Discharge Area constitutes a "discharge of pollutants" as defined under the CWA § 502(12), 33 U.S.C. § 1362(12).

20. Section 301(a) of the CWA, 33 U.S.C. §1311(a), makes unlawful the discharge of any pollutant into waters of the United States except as in compliance with certain sections of the CWA, including Section 404, 33 U.S.C. §1344. A Section 404 permit is a legal prerequisite to discharges of the type described above.

21. At no time during the discharge of dredged and/or fill material at the Discharge Area on or about September 30, 2004, to the present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent.

22. The discharges have, therefore, been made in violation of Section 301(a) of the CWA. Each discharge by the Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

23. Each discharge by the Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

24. Each day the material discharged by the Respondent remains in waters of the United States without the required permit under 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.

IV. Stipulations and Findings

25. Complainant and Respondent have conferred for the purpose of settlement under 40 C.F.R. Part 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. Part 22.13(b), this Administrative Consent Agreement and Final Penalty Order will simultaneously commence and conclude this matter.

26. For the purposes of this Consent Agreement and Final Order (CAFO), Respondent admits the jurisdictional allegations set out above and the factual allegations set out above.

27. Respondent hereby waives his right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

28. Respondent consents to the assessment of and agrees to pay the administrative penalty as set forth in this CAFO and consents to the other conditions set forth in this CAFO.

29. By signing this CAFO, Respondent certifies that the information he has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

30. EPA reserves the right to assess and collect any and all civil penalties for any violation described in this Consent Agreement to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to EPA.

31. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of the CWA.

V. Restoration

32. The Respondent will undertake the following restoration plan at the Discharge site:

a. Respondent will remove fill material impeding flood waters from the Ohio River to Sites 1-1-2, 1-1-4 and 1-1-5 allowing natural water movement to and from the impacted areas.

b. The Respondent shall notify EPA of the anticipated construction start date for the restoration within twenty (20) days after receipt of the signed CAFO. Restoration must be completed by January 1, 2010. Within twenty (20) days after completion of restoration, the Respondent shall submit a written statement of completion and schedule an inspection of the restored site.

c. The Respondent shall inspect Sites 1-1-2, 1-1-4 and 1-1-5 semi-annually for two years and annually for the following three years. Within twenty (20) days of each inspection, the Respondent must submit a report to EPA that includes:

1. Date of inspection;
2. Color photographs from the same locations;
3. Any remedial restoration measures taken to stabilize the site.

33. The Respondent is agreeing to undertake or has undertaken the restoration to mitigate the environmental harm from the illegal discharge.

34. The Respondent will pay a penalty as specified in Section VII and EPA, in determining the amount of the penalty, has taken into account the violator's agreement to undertake the restoration as part of the statutory factors.

35. The Respondent agrees that, if he or it does not complete the project to the satisfaction of EPA, the Agency retains the authority to assess an additional penalty of a specified amount for the continuing violations and to take additional enforcement actions.

VI. Site Access

36. EPA, its employees, and its authorized agents (including contractors and subcontractors) shall have access to the Site at all reasonable times for the purposes of inspecting, investigating or verifying compliance with the terms of this CAFO. Access shall include access to, and the right to make copies of, all unprivileged records, documents or information relating to or pertaining to the Site.

37. Respondent shall have the right to accompany EPA representatives and employees throughout their presence at the Site and to monitor and record the investigative activities conducted by EPA. If such a recording of the Agency's investigatory activities is made, the Respondent shall, upon written request, provide a copy of the recording to EPA.

38. This section in no way limits any right of inspection and/or entry available to EPA under applicable federal or state laws, regulations, or permits.

VII. Penalty and Payment

39. Under Section 309(g)(2)(b) of the CWA, 33 U.S.C. § 1319(g)(2)(b), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors, EPA has determined that **FOURTY THOUSAND DOLLARS (\$40,000)** is an appropriate civil penalty to settle this action.

40. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CAFO via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CAFO. Such payment shall be tendered to:

For payment submitted by U.S. Postal Service:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

For payment submitted by any overnight mail service (Fed Ex, UPS, DHL, etc.):

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

41. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

U.S. Environmental Protection Agency, Region 4
Office of Environmental Accountability
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
ATTN: Ms. Patricia Bullock – Regional Hearing Clerk

and

Ms. Mary E. Halback
Wetlands Enforcement Section
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960

42. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

43. Under 40 C.F.R. § 13 and 31 U.S.C. § 3717 *et seq.*, if EPA does not receive payment of the penalty assessed by this CAFO in full by its due date, interest shall accrue on the unpaid balance from the due date through the date of payment at an annual rate equal to the rate of the current value of funds to the United States Treasury as prescribed and published by the Secretary of the Treasury. If all or part of the payment is overdue, EPA will assess a late-payment handling charge of \$15.00, with an additional delinquent notice charge of \$15.00 for each subsequent thirty (30) day period. EPA will also assess on a monthly basis an up to 6 per cent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date.

44. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by the Respondent to pay the penalty assessed by the CAFO in full by its due date may subject the Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In

any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

VIII. General Provisions

45. This CAFO shall not relieve Respondent of his obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CAFO shall not be a defense to any actions subsequently commenced under federal laws and regulations administered by the EPA

46. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any federal or state statute, regulation or permit.

47. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent of all claims for civil penalties under the CWA with respect to only those violations alleged in this CAFO. Except as otherwise set forth in this document, compliance with this CAFO shall resolve the allegations of violations contained in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent, or other liability resulting from violations that were not alleged in this CAFO. Other than as expressed in this document, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

48. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

49. This CAFO applies to and is binding upon Respondent and any officers, directors, employees, agents, successors and assigns of the Respondent.

50. Any change in the legal status of Respondent including, but not limited to, any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CAFO.

51. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CAFO.

52. In accordance with 40 C.F.R. Part 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Kevin B. Smith, Esq.
Senior Attorney
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street
Atlanta, Georgia 30303
(404) 562-9525

For Respondent:

James C. Bickett
4610 U.S. Highway 81
Owensboro, Kentucky 42301

53. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

54. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

55. This CAFO in no way affects the rights of the Complainant as against any person or entity not a party to this CAFO.

IX. Release by Respondent

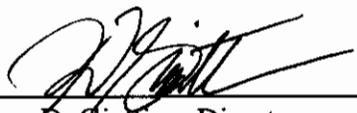
56. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a taking of Respondent's property without compensation.

X. Effective Date

57. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:



James D. Giattina, Director
Water Protection Division
U.S. EPA Region 4

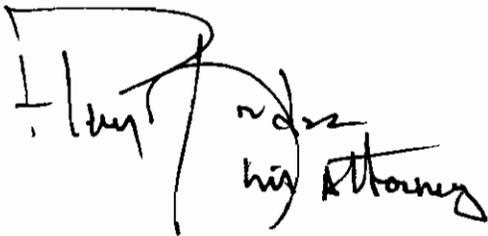
Date: AUG 10 2009

FOR RESPONDENT, JAMES C. BICKETT:



James C. Bickett

Date: 7-8-09


his Attorney

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:)	
)	
)	
James C. Bickett)	CONSENT AGREEMENT AND
Henderson County, Kentucky)	FINAL PENALTY ORDER
)	
RESPONDENT.)	Docket No.: CWA-04-2009-5501(b)
_____)	

FINAL ORDER

In accordance with 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*, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 8/12/09



A. Stanley Meiburg
Acting Regional Administrator
U.S. EPA, Region 4

CERTIFICATE OF SERVICE

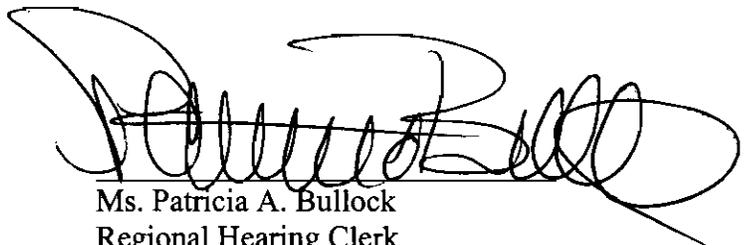
The undersigned certifies that a true and correct copy of the attached **ADMINISTRATIVE CONSENT AGREEMENT AND FINAL PENALTY ORDER** in the matter of James C. Bickett, **Docket No. CWA-09-5501(b)** filed with the Regional Hearing Clerk on AUG 13 2009, 2009) was served on AUG 13 2009, 2009, in the manner specified to each of the persons listed below.

By hand-delivery: Kevin Smith
Attorney Advisor
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303

By certified mail,
return receipt requested: Mr. James C. Bickett
4610 U.S. Highway 81
Owensboro, Kentucky 42301

By certified mail,
return receipt requested: Mr. Alan Grant
Kentucky Division of Water
200 Fair Oaks, 4th Floor
Frankfort, KY 40601

By certified mail,
return receipt requested: Mr. Jeff Cummins
Kentucky Division of Water
300 Fair Oaks
Frankfort, KY 40601



Ms. Patricia A. Bullock
Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303
(404) 562-9511

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM
=====

TO BE COMPLETE BY ORIGINATING OFFICE:

(attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Mary Halback 8/6/2009
[Name] [Date]
in the Wetlands Enforcement Section/Water Protection Division at 404-562-9978
[Office] [Telephone Number]

- Non-SF Judicial Order/Consent Decree. USAO COLLECTS.
- SF Judicial Order/Consent Decree. FMS COLLECTS.
- This is an original debt.
- Administrative Order/Consent Agreement. FMS COLLECTS PAYMENT.
- Other Receivables
- This is a modification.

PAYEE: James C. Bickett
[Name of person and/or Company/Municipality making the Payment]

The Total Dollar Amount of Receivable: \$ 40,000
[If in installments, attach schedule of amounts and respective due dates]

The Case Docket Number: CWA-04-2009-5501(b)

The Site-Specific Superfund (SF) Account Number: _____

The Designated Regional/Headquarters Program Office: Region 4 Water Protection Division

=====

TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT SECTION:

The IFMS Accounts Receivable Control Number is: _____
If you have any questions call: _____ in the Financial Management Section,
Telephone Number: _____

=====

DISTRIBUTION:

- A. **JUDICIAL ORDERS:** Copies of this form with an attached copy of the front page of the FINAL JUDICIAL ORDER should be mailed to:
- 1. Debt Tracking Officer
Environmental Enforcement Section
Department of Justice/RH 1647
P.O. BOX 7611, Benjamin Franklin Station
Washington, DC 20044
 - 2. Originating Office (ORC)
 - 3. Designated Program Office
- B. **ADMINISTRATIVE ORDERS:** Copies of this form with an attached copy of the front page of the ADMINISTRATIVE ORDER should be sent to:
- 1. Originating Office
 - 2. Designated Program Office
 - 3. Regional Hearing Clerk
 - 4. Regional Counsel