



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

**JUN 28 2007**

**CERTIFIED MAIL** 7005 3110 0003 6266 0271  
**RETURN RECEIPT REQUESTED**

Ms. Kelly A. Dant, Esq.  
Greenebaum Doll & McDonald, PLLC  
300 W. Vine Street, Suite 1100  
Lexington, KY 40507

SUBJ: Consent Agreement and Final Order No. CWA-04-2007-4514(b)  
Shadow Creek Subdivision Section 5  
Elizabethtown, Kentucky

Dear Ms. Dant:

Enclosed please find a fully executed copy of the Consent Agreement and Final Order that has been finalized by the Environmental Protection Agency and the Regional Administrator. Please make note of the provisions under Paragraph IV. Payment.

Should you have any questions or concerns regarding this matter, please contact Araceli Bonilla at (404) 562-9790.

Sincerely,

A handwritten signature in cursive script that reads "Douglas F. Mundrick".

Douglas F. Mundrick, P.E. Chief  
Water Programs Enforcement Branch  
Water Management Division

Enclosure

cc: Kentucky Department for Environmental  
Protection  
Kentucky Department for Environmental  
Protection-Louisville District

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
 )  
PHILLIPS BROTHERS CONSTRUCTION )  
SHADOW CREEK SUBDIVISION SECTION 5 )  
ELIZABETHTOWN, KENTUCKY )  
 )  
RESPONDENT. )  
\_\_\_\_\_ )

CONSENT AGREEMENT AND  
FINAL ORDER

DOCKET NO. CWA-04-2007-4514(b)

RECEIVED  
EPA REGION IV  
2007 JUN 28 PM 1:32  
HEARING CLERK

CONSENT AGREEMENT

I. Statutory Authority

1. This is a civil penalty proceeding pursuant to Section 309(g)(2)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(A), 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*, including Subpart I, published at 64 Fed. Reg. 40176 (July 23, 1999) and codified at 40 Code of Federal Regulations ("C.F.R.") Part 22.

2. The authority to take action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), 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 delegated this authority to the Director of the Water Management Division, who in turn has delegated this authority to the Chief of the Water Programs Enforcement Branch of EPA, Region 4 ("Complainant").

II. Allegations

3. At all times relevant to this action, Phillips Brothers Construction, "Respondent", was a corporation duly organized and existing under the laws of the Commonwealth of Kentucky and is, therefore, a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. At all times relevant to this action, Respondent owned and/or operated a construction site known as Shadow Creek Subdivision Section 5 ("Facility") located at Pine Valley Drive, Elizabethtown, Kentucky.

5. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of

pollutants by any person into waters of the United States except as in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including storm water, into navigable waters subject to specific terms and conditions. EPA has granted the Commonwealth of Kentucky through the Department for Environmental Protection ("KDEP") approval to issue NPDES permits pursuant to Section 402(b) of the CWA.

7. The KDEP issued a *General KPDES Permit for Storm Water Point Source Discharges, Construction Activities* (the Permit), Permit No. KYR10, in accordance with the provisions of the Kentucky Revised Statutes Chapter 224 16-050 and pursuant to 401 KAR 5:055, Sections 1 and 5 and the CWA. The Permit was effective October 1, 2002, and expires September 30, 2007.

8. The KDEP is responsible for the issuance, compliance, and enforcement of Kentucky Revised Statutes Chapter 224 16-050 and 40 KAR 5:055, Sections 1 and 5, and the approval of coverage under the Permit upon submission and approval of a Notice of Intent ("NOI") requesting Permit coverage.

9. On August 26, 2005, Respondent submitted a NOI requesting permit coverage to the KDEP. A Notice of Coverage was sent to Respondent with an effective date of August 26, 2005, and an expiration date of August 26, 2007.

10. Part II of the Permit incorporates 401 KAR 5:065 Section 1 by reference.

A. 401 KAR 5:065 Section 1(4) requires the Permittee to take all reasonable steps to minimize or prevent any discharge in violation of the Permit which has a reasonable likelihood of adversely affecting human health or the environment.

B. 401 KAR 5:065 Section 1(5) of the Permit requires the Permittee to properly operate and maintain at all times all facilities and systems of treatment and control and related appurtenances which are installed or used by the Permittee to achieve compliance with the conditions of the Permit.

11. Part IV of the Permit requires the Permittee to modify the Best Management Practices (BMP) plan within seven days if it proves to be ineffective in controlling the discharge of pollutants, or when there is a change in the design, construction, operation, or maintenance of

the site which has a significant effect on the potential for the discharge of pollutants to surface waters, and to implement such modifications within seven (7) days.

12. Part IV.A of the Permit requires the BMP plan to include a clear description of the nature of the construction activity; the order of major soil disturbing activities, estimates of the total project area and the total disturbed area, the post construction runoff coefficient, any existing data describing soil condition or discharge quality, receiving water name, and a site map. The site map shall indicate drainage patterns and show approximate slopes after grading, areas of disturbance, the location of control measures, surface waters or wetlands, and storm water discharge locations.

13. Part IV.B of the Permit requires the BMP plan to include a clear description of what sediment and erosion control measures will be used and when they will be implemented.

14. Part IV.B.(1) of the Permit requires the Permittee to preserve existing vegetation where possible and to stabilize all disturbed areas within fourteen (14) days on areas of the site where construction activities have permanently or temporarily (for twenty-one (21) days or more) ceased.

15. Part IV.B.(3) of the Permit requires the Permittee to install management devices during construction to control the pollutants in storm water discharges that will occur after construction has been completed. Velocity dissipation devices shall be placed at discharge locations and along the length of any outfall channel as necessary to provide a non-erosive flow so that the original physical and biological characteristics and functions of the receiving waters are maintained and protected. The installation of management devices may be subject to Section 404 of the CWA.

16. Part IV.C of the Permit requires the Permittee to ensure that no solid materials, including building materials, are discharged to surface waters, except as authorized by a Section 404 Permit.

17. Part IV.E of the Permit requires the BMP plan to include a clear description of the maintenance procedures necessary to keep the control measures in good and effective operating condition.

18. Part IV.F of the Permit requires the Permittee to make revisions to the BMP plan based on the results of self-inspections within seven days.

19. Part IV.H of the Permit requires the BMP plan to clearly identify all contractors or subcontractors who will implement each control measure identified in the BMP plan, and have all contractors and subcontractors sign a certification statement.

20. On October 26, 2006, representatives of EPA in conjunction with the KDEP performed a Compliance Storm Water Evaluation Inspection ("CSWEI") at Respondent's Facility. EPA's CSWEI was to evaluate the treatment and disposal of storm water at the facility in accordance with the CWA, the regulations promulgated thereunder at 40 C.F.R. § 122.26, and the KDEP Permit.

21. As a result of the CSWEI, EPA, Region 4 has determined that Respondent discharged storm water associated with industrial activity from its Facility within the meaning of Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and its implementing regulations.

22. During the CSWEI, EPA inspectors observed the following:

- A. Respondent failed to take all reasonable steps to minimize or prevent any discharge which has a reasonable likelihood of adversely affecting human health or the environment, as required by Part II of the Permit and 401 KAR 5:065 Section 1(4). Unprotected street inlets allowed the discharge of storm water and sediment into the lower pond. Sediment and sediment laden storm water had discharged from the sediment basin on the southern portion of the site into the Unnamed Tributary of Mill Creek.
- B. Respondent failed to reduce the pollutants in storm water discharges by properly operating and maintaining all facilities and systems of treatment and control and related appurtenances in accordance with Part II of the Permit and 401 KAR 5:065 Section 1(5). The sedimentation basin on the southern portion of the site needed maintenance. Rock check dams had washed away south of Kensington Way. The outfall and inlet/outlet structures on site needed proper protection and silt fencing was either not toed in properly or toppled over with sediment.
- C. Respondent failed to modify the BMP plan when there is a change in design, construction, operation, or maintenance of the site which has a significant effect on the potential for the discharge of pollutants to surface waters within seven (7) days in accordance with Part IV of the Permit. The BMP plan was not updated to reflect modifications present on the site the day of the inspection such as additional silt fencing near the creek and a sediment trap near an inlet structure off of Kensington Way.
- D. Respondent failed to provide in the BMP plan, a clear description of the order of major soil disturbing activities, the post construction runoff coefficient, any existing data describing soil condition or discharged quality, receiving water name and a site map. The site

map shall indicate drainage patterns and show approximate slopes after grading, areas of disturbance, the location of control measures, surface waters or wetlands, and storm water discharge locations in accordance with Part IV.A of the Permit. The BMP plan did not include the order of major soil disturbing activities, the post construction runoff coefficient, any existing data describing soil condition or discharge quality or receiving water name.

- E. Respondent failed to provide in the BMP plan a clear description of what sediment and erosion control measures will be used and when they will be implemented in accordance with Part IV.B of the Permit. The BMP plan did not contain a clear description of the sediment and erosion control measure and their scheduled implementation.
- F. Respondent failed to preserve existing vegetation where possible; stabilization shall begin within fourteen (14) days on areas of the site where construction activities have permanently or temporarily (for twenty-one (21) days or more) ceased in accordance with Part IV.B.(1) of the Permit. The banks of the sediment basin, the area surrounding the outfall, and areas near the series of check dams needed to be stabilized to prevent further erosion.
- G. Respondent failed to install management devices during construction to control the pollutants in storm water discharges that will occur after construction has been completed in accordance with Part IV.B.(3). The BMP plan did not address post-construction storm water management measures and inlet/outlet structures were not properly protected with rip rap to dissipate the flow of storm water.
- H. Respondent failed to cease the discharge of solid materials including building materials, except as authorized by a Section 404 permit in accordance with Part IV.C of the Permit. A concrete washout area near a curb inlet/outlet structure was not properly contained and debris around the area was not properly disposed.
- I. Respondent failed to include in the BMP plan a clear description of the maintenance procedures necessary to keep the control measures in good and effective operating condition in accordance with Part IV.E of the Permit. The BMP plan and/or site map did not provide a clear description of the maintenance procedures.

- J. Respondent failed to make revisions to the BMP plan based on the results of self-inspections within seven (7) days in accordance with Part IV.F of the Permit. The BMP plan did not reflect the current conditions and updated BMPs as a result of the blowout caused by the last major rain event.
- K. Respondent failed to identify all contractors and/or subcontractors that will implement each control measure identified in the BMP plan and have all contractors and subcontractors signed a certification statement in accordance with Part IV.H of the Permit. The BMP plan did not identify all the contractors and/or subcontractors nor did it contain a signed certification statement.

23. Therefore, it is alleged Respondent has violated Sections 301 and 402(p) of the CWA, 33 U.S.C. §§ 1311 and 1342(p), by failing to comply with the Permit, and also for discharges not authorized by the Permit.

### **III. Stipulations and Findings**

24. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Consent Agreement and Final Order ("CA/FO") will simultaneously commence and conclude this matter.

25. For the purposes of this CA/FO, Respondent admits the jurisdictional allegations set out above and neither admits nor denies the factual allegations set out above.

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

27. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CA/FO and consents to the other conditions set forth in this CA/FO.

28. By signing this CA/FO, Respondent certifies that the information it 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.

29. EPA reserves the right to assess and collect any and all civil penalties for any violation described herein 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.

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

#### **IV. Payment**

31. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, and considering the nature of the violations and other relevant factors, EPA has determined that twenty thousand dollars (\$20,000) is an appropriate civil penalty to settle this action.

32. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CA/FO 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 CA/FO. Such payment shall be tendered to:

U.S. Environmental Protection Agency  
Cincinnati Accounting Operations  
Mellon Lockbox 371099M  
Pittsburgh, PA 15251-7099

33. 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 CA/FO, to the following persons at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 4  
61 Forsyth Street, S.W.  
Atlanta, GA 30303-8960

and

Mary Mattox  
U.S. Environmental Protection Agency-Region 4  
Water Programs Enforcement Branch  
Water Management Division  
61 Forsyth Street, S.W.  
Atlanta, GA 30303-8960



34. The penalty amount specified above shall represent civil penalties assessed by EPA and shall not be deductible for purposes of federal taxes.

35. Pursuant to 40 C.F.R. Part 13 and 31 U.S.C. § 3717 et seq., if EPA does not receive payment of the penalty assessed by this CA/FO 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 six percent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date.

36. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CA/FO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CA/FO), 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 twenty 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 CA/FO shall not be subject to review.

#### **V. General Provisions**

37. This CA/FO shall not relieve Respondent of its 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 CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA.

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

39. Except as otherwise set forth herein, this CA/FO constitutes a settlement by Complainant and Respondent of all claims for civil penalties pursuant to the CWA with respect to only those violations alleged in this CA/FO. Except as otherwise set forth herein, compliance with this CA/FO shall resolve the allegations of violations contained herein. Nothing in this CA/FO is intended to nor shall be construed to operate in any way to resolve any criminal

liability of Respondent, or other liability resulting from violations that were not alleged in this CA/FO. Other than as expressed herein, 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.

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

41. This CA/FO applies to and is binding upon Respondent and its officers, directors, employees, agents, successors and assigns.

42. 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 CA/FO.

43. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CA/FO.

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

For Complainant:

Robin Allen  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street  
Atlanta, GA 30303-8960  
(404) 562-9583

For Respondent:

Kelly A. Dant, Esq.  
Greenebaum Doll & McDonald, PLLC  
300 W. Vine Street  
Suite 1100  
Lexington, KY 40507  
(859) 288-4641

45. The parties acknowledge and agree that this CA/FO 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.

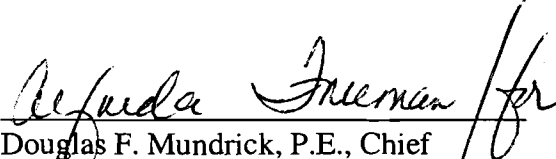
46. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

**VI. Effective Date**

47. The effective date of this CA/FO shall be the date on which the CA/FO is filed with the Regional Hearing Clerk.

**AGREED AND CONSENTED TO:**

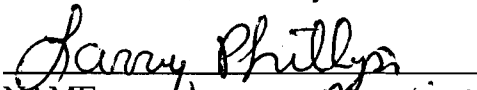
**For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:**

  
Douglas F. Mundrick, P.E., Chief  
Water Programs Enforcement Branch  
Water Management Division  
U.S. EPA, Region 4

Date: 5/17/07

**For RESPONDENT:**

Phillips Brothers Construction  
Shadow Creek Subdivision Section 5  
Elizabethtown, Kentucky

  
NAME: Harry Phillips  
TITLE: MEMBER MANAGER

Date: 5-9-07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )

PHILLIPS BROTHERS CONSTRUCTION )  
SHADOW CREEK SUBDIVISION SECTION 5 )  
ELIZABETHTOWN, KENTUCKY )

RESPONDENT. )

CONSENT AGREEMENT AND  
FINAL ORDER

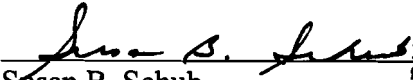
DOCKET NO. CWA-04-2007-4514(b)

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

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: June 28, 2007

  
Susan B. Schub  
Regional Judicial Officer

HEARING CLERK

2007 JUN 28 PM 4:32

RECEIVED  
EPA REGION IV

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL ORDER** in the matter of \_\_\_\_\_, **Docket No. CWA-04-2007-4514(b)** (filed with the Regional Hearing Clerk on JUN 28 2007, 2007, was served on JUN 28 2007, 2007, in the manner specified to each of the persons listed below.

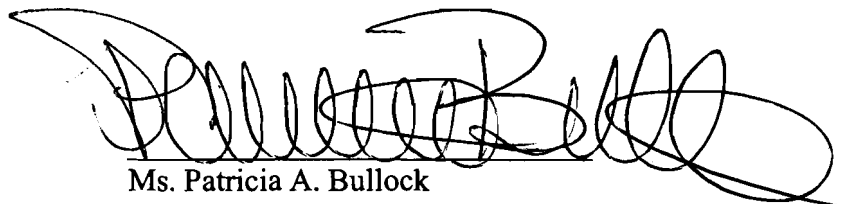
By hand-delivery:

Ms. Robin Allen  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, GA 30303-8960

By certified mail,

Ms. Kelly A. Dant, Esq.  
Greenebaum Doll & McDonald, PLLC  
300 W. Vine Street  
Suite 1100  
Lexington, KY 40507

Ms. Susan Rose Green, Director  
Division of Enforcement  
Kentucky Department for Environmental Protection  
14 Reilly Road  
Frankfort, KY 40601



Ms. Patricia A. Bullock  
Regional Hearing Clerk  
Sam Nunn Federal Center  
61 Forsyth Street, S.W.  
Atlanta, GA 30303-8960  
(404) 562-9511

**EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM**

**TO BE COMPLETED BY THE ORIGINATING OFFICE:**

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

This form was originated by: Mary Mattox on 6/28/07  
(Name) (Date)

in the WMD/WPEB/GES at (404) 562- 9733  
(Office) (Telephone Number)

Non-SF Judicial Order/Consent Decree  
USAO COLLECTS

Administrative Order/Consent Agreement  
FMO COLLECTS PAYMENT

SF Judicial Order/Consent Decree  
DOJ COLLECTS

Oversight Billing - Cost Package required:  
Sent with bill

Other Receivable

Not sent with bill

This is an original debt

Oversight Billing - Cost Package not required

This is a modification

PAYEE: Shadow Creek Subdivision Section 5, Elizabethtown, Ky  
(Name of person and/or Company/Municipality making the payment)

The Total Dollar Amount of the Receivable: \$ 20,000  
(If installments, attach schedule of amounts and respective due dates. See Other side of this form.)

The Case Docket Number: \_\_\_\_\_

The Site Specific Superfund Account Number: \_\_\_\_\_

WMD

The Designated Regional/Headquarters Program Office: \_\_\_\_\_

**TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT OFFICE:**

The IFMS Accounts Receivable Control Number is: \_\_\_\_\_ Date \_\_\_\_\_

**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<br>Environmental Enforcement Section<br>Department of Justice RM 1647<br>P.O. Box 7611, Benjamin Franklin Station<br>Washington, D.C. 20044 | 2. Originating Office (EAD)  |
|  | 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 to:

- |                           |                              |
|---------------------------|------------------------------|
| 1. Originating Office     | 3. Designated Program Office |
| 2. Regional Hearing Clerk | 4. Regional Counsel (EAD)    |