



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

2012 APR 27 PM 4:08

APR 27 2012

By Hand Delivery

REPLY TO THE ATTENTION OF:

Ms. LaDawn Whitehead
Regional Hearing Clerk
United States
Environmental Protection Agency-Region 5
77 West Jackson Blvd. - 19th Fl.
Chicago, IL 60604-3590

C-14J

Re: U.S. EPA v. Joseph L. Bollig & Sons, Inc., Docket No. CWA-05-2011-0008
Motion to Amend Administrative Complaint

Dear Ms. Whitehead:

Enclosed please find an original and one copy of U.S. EPA's Motion to Amend the Administrative Complaint and proposed Amended Administrative Complaint in the above-referenced case. I have served copies of this Motion and Attachment with the Administrative Law Judge (ALJ) and on Respondent by certified mail, return receipt requested.

Sincerely yours,

Thomas P. Turner
Associate Regional Counsel

Enclosure

cc: Hon. M. Lisa Buschmann, ALJ (mail code: 1900L)
Greg T. Carlson, Water Division (WW-16J)
Kevin C. Chow, Esq., U.S. EPA, ORC, Region 5 (C-14J)
William T. Curran, Esq.,
Curran, Hollenbeck & Orton, S.C., Counsel for Joseph L. Bollig & Sons, Inc.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

IN THE MATTER OF:)
)
Joseph L. Bollig & Sons, Inc.,) DOCKET NO. CWA-05-2011-0008
)
Respondent.)
) Hon. M. Lisa Buschmann
) Presiding
)
_____)

MOTION TO AMEND THE COMPLAINT

COMES NOW the Complainant, by its attorneys, and pursuant to 40 CFR 22.14(c), seeks leave of this Court to grant its Motion to Amend the Complaint. In support of this motion, the Complainant states as follows:

1. This matter was initiated when Complainant filed its Complaint on August 18, 2011. The Complaint is composed of a “General Allegations” section, and one (1) count, with that count being composed of two (2) specifically alleged violations of sections 301 and 404, 33 U.S.C. §§ 1311 and 1344, of the Clean Water Act (CWA). (See, Complaint, at Paragraphs 14-22, 29 and 30.
2. The Complaint contains one (1) attached Map (“Attachment A”), depicting relevant portions of the affected Site, and referenced at Paragraphs 17, 19, and 24.
3. The Complaint also contains one section (“Proposed Civil Penalty”) referencing the Complainant’s assertion of a proposed penalty against Respondent for the alleged violations of the CWA described in Paragraph 1 of this Motion to Amend the Complaint. The Proposed Civil Penalty section is composed of four (4) distinct paragraphs.

4. Complainant would note one (1) typographic error at p. 4 of its August 18, 2011 Complaint in the “General Allegations” section, at Paragraph 17, pp. 3-4, where the word “principle” is used. Complainant seeks to have the word amended to “principal”.
5. Complainant would further note one (1) typographic error in the citation portion of the Complaint in the “General Allegations” section, at Paragraph 29, p. 5, where Complainant has alleged a violation of “Section 301 of the Act, 33 U.S.C. § 1344”, the proper citation reference should be to Section 404 of the CWA. Complainant seeks to correct the aforementioned typographic error.
6. Complainant would note one (1) typographic spacing error in the text describing the Proposed Civil Penalty of the Complaint, at section IV, p. 6. The apparent second paragraph of the section’s text, beginning on the fourth line with, “33 U.S.C. § 1311,” should follow consistently as a part of the sentence on the prior (third) line. Complainant seeks to have the initial tab at the beginning of the fourth line of this section removed.
7. Complainant would lastly note the one (1) attached Map (“Attachment A”) to the August 18, 2011 Complaint, depicting relevant portions of the affected Site, and referenced at Paragraphs 17, 19, and 24. Since the filing of the Complaint, Complainant has determined that another map of the Site area better portrays the location of referenced unnamed tributary number 1. This other map is one (1) of Complainant’s submissions in the March 30, 2012 Initial Prehearing Exchange, at Complainant’s Exhibit 21. Complainant seeks to have the current Map at Attachment

- A of the August 18, 2011 Compliant supplemented with the addition of Complainant's March 30, 2012 Prehearing Exchange exhibit CE 21, as Attachment B.
8. Complainant's amendment to the Complaint is necessary to conform the pleadings to the evidence that will be presented at hearing.
 9. The Environmental Appeals Board (EAB) has recognized the principle "that the purpose of pleading is to facilitate a proper decision on the merits." In Re Asbestos Specialists, Inc., TSCA Appeal No. 92-3 at 19 (October 6, 1993). To this end, the EAB instructed that, "[t]he objective of the Agency's rules should be to get to the merits of the controversy." Asbestos Specialists, TSCA Appeal No. 92-3 at 23 citing In Re Wego Chemical & Mineral Corp., TSCA Appeal No. 92-4 at 15 (February 24, 1993).
 10. Accordingly, the EAB has directed that: "[a]dministrative pleadings are intended to be 'liberally construed' and 'easily amended.'" Asbestos Specialists, TSCA Appeal No. 92-3 at 20, citing Yaffe Iron and Metal Company, Inc. v. U.S. Environmental Protection Agency, 774 F.2d 1008, 1012 (10th Cir. 1985), affirming In re Yaffe Iron and Metal Company, Inc., TSCA Appeal No. 81-2 (Aug. 9, 1982). In fact, in the Agency's decision in Yaffe, the EAB affirmed the Administrative Law Judge's ruling permitting a *post-hearing* amendment of the complaint.
 11. In determining whether to grant leave to amend a Complaint, the EAB has set forth factors that a Court may consider in reviewing a motion to amend, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to any opposing party, and the futility of any

amendment. Asbestos Specialists, TSCA Appeal No. 92-3 at 20.

12. In the case at hand, the amended Complaint will conform the pleadings to the evidence, and as such, clarify the issues before this Court and facilitate a proper decision on the merits of the case. However, the amendment *does not* otherwise change any issues of proof. Rather, Complainant must still demonstrate that the actions by Respondent during the time period of approximately February 2008 through March 2009, were violations of Sections 301 and 404 of the CWA. No amendments or additional pre-hearing exchanges are needed to address the allegations in the amended Complaint. The amended Complaint *does not* otherwise add or change the facts as plead, or require any additional witnesses. The amended Complaint *does not* otherwise change the Count plead against Respondent. The amended Complaint merely clarifies a portion of the General Allegations, Count I, the Proposed Penalty, and supplements the reference Map at Attachment A with a Map Attachment B. Thus, allowing the amendment will cause no delay in the resolution of this matter.
13. Complainant's request to amend the Complaint is not the result of bad faith or dilatory motive, but seeks to conform the pleadings to the evidence and allegations it will present at hearing.
14. Respondent is clearly not prejudiced by EPA's request for an amendment. As stated above, the amended Complaint *does not* otherwise change any issues of proof, and realistically may lessen the defense that Respondent may be required to provide. The amended Complaint *does not* otherwise add new factual issues or evidence. The

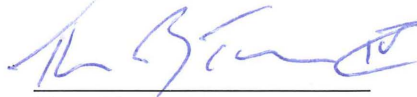
amended Complaint *does not* require any new or additional witnesses. The amended Complaint *does not* otherwise change the Count plead against Respondent.

Permitting such an amendment cannot prejudice Respondent.

15. The EAB has directed that “[i]t is only where the defect in the Complaint is not curable by amendment that leave to amend should be denied.” Id. For example, “leave to amend is properly denied where the facts show that the claim is barred by the relevant statute of limitations.” Id. at 20.
16. Such is not the case before this Court. Rather, Complainant’s Amended Complaint merely seeks to conform the pleading and proposed penalty to what it intends to seek at hearing. The issues of proof remain the same. EPA has not alleged additional facts or otherwise changed the counts or changed the proposed penalty.
17. Pursuant to this Court’s February 29, 2012, Prehearing Order (at Section VI, pp. 5-6, “Procedures for Motions and Extensions of Time”), on April 26, 2012, Complainant contacted Respondent and sought to inquire as to whether Respondent would object to this motion. Respondent has stated that, subject to its right to reply, it has no objection to Complainant’s Motion to Amend the Complaint. A copy of Complainant’s proposed Amended Administrative Complaint is attached.

WHEREFORE, Complainant respectfully requests that this Court grant Complainant's Motion to Amend the Complaint, and allow Complainant to file the attached Amended Complaint. Complainant also requests an opportunity to file a written reply to any response that Respondent may make to this Motion.

Respectfully Submitted,



Tom Turner
Kevin C. Chow
Associate Regional Counsels
U.S. EPA, C-14J
77 W. Jackson Blvd.
Chicago, IL. 60604
(312) 886-6613
(312) 353-6181

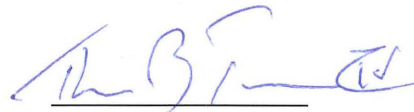
Attachment

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CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Complainant's Motion to Amend the Complaint and Proposed Amended Complaint was served on the Regional Hearing Clerk, U.S. EPA Region 5 and that true and correct copies were served on Administrative Law Judge M. Lisa Buschmann and Counsel for Respondent (service by certified mail, return receipt requested). Dated in Chicago this 27 day of April, 2012.



Thomas P. Turner
Associate Regional Counsel
U.S. EPA - Region 5

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

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|---|---|--|
| In the Matter of: |) | |
| |) | |
| Joseph L. Bollig & Sons, Inc., |) | Proceeding to Assess a Class II Civil |
| New Lisbon, Wisconsin, |) | Penalty Under Section 309(g) of the Clean |
| |) | Water Act, 33 U.S.C. § 1319(g) |
| Respondent. |) | |
| _____ |) | Docket No. |

AMENDED 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 ("CWA" or "the Act"), 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," 40 C.F.R. Part 22, to obtain civil penalties against Joseph L. Bollig & Sons, Inc. ("Respondent") for filling wetlands without a permit pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. The Administrator of U.S. EPA has delegated the authority to take this action to the Regional Administrator of Region 5, who has re-delegated this authority to the Water Division Director.
2. Complainant in this action is the Director, Water Division, Region 5, United States Environmental Protection Agency ("U.S. EPA" or "the Agency").
3. Respondent Joseph L. Bollig & Sons, Inc. ("Bollig"), is a corporation organized under the laws of Wisconsin with a business address of N5990 State Road 58, New Lisbon, Wisconsin.
4. Respondent Bollig, is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

II. Statutory and Regulatory Background

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

6. Section 404 of the Act authorizes the Secretary of the Army, acting through the Chief of Engineers, 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.

7. 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).

8. 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)

9. 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).

10. 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).

11. 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).

12. The regulation at 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,...intrastate lakes, rivers, streams (including intermittent streams) rivers, streams,...wetlands...the use of which could affect interstate or foreign commerce,...tributaries of [such other] waters,... [and] wetlands adjacent to [all such] waters."

13. The regulation at 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."

III. General Allegations

14. Respondent Bollig is a corporation located in and doing business in the State of Wisconsin.

15. Respondent is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5).

16. The Mauston-New Lisbon Union Airport (Airport) is located at W7493 Ferdon Road, Mauston, Wisconsin (Juneau County).

17. The Airport is an airfield, created by public ordinance (City of Mauston, WI, Mauston-New Lisbon Union Airport Ordinance, Chapter 10, September 27, 2005) and operated as a joint public venture by a 'Union Airport Commission', located in the southeast quarter, Section 28, Township 16 North, Range 3 East, Town of Lisbon, Juneau County, Wisconsin. The area of disturbance is an approximately seven (7) acre portion of forested and scrub/shrub wetland, as defined above in Paragraphs 12 and 13, to the immediate southwest of

the principal airstrip of the Airport. The seven acre portion of forested and scrub/shrub wetland immediately abuts a relatively permanent water (RPW), unnamed tributary number 1 (see Maps as Attachments A, B).

18. The Airport is owned and operated by the Mauston-New Lisbon Union Airport Commission.

19. Unnamed tributary number 1 is a relatively permanent water which flows into the Lemonweir River. The Lemonweir River is historically a Traditional Navigable Water. Unnamed tributary number 1 is labeled on Attachment A, which is incorporated herein.

20. The Lemonweir River is a tributary to the Wisconsin River, an interstate water body.

21. Prior to Respondent Bollig's filling activities, unnamed tributary number 1 exhibited seasonal characteristics of water flow during the winter thaw, spring and summer rain or thunder storms.

22. Unnamed tributary number 1 is a water of the United States, as defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 and thus a "navigable water" as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7).

Count I

23. The statements in Paragraphs 1 through 22 are hereby incorporated by reference as if set forth in full.

24. Beginning in February 2008 and continuing into approximately March 2009, and at times better known to Respondent Bollig, Respondent Bollig, working on behalf of the Airport, performed or directed the discharge of dredged and fill material and organic debris from

excavators and bulldozers into approximately seven (7) acres of forested and scrub/shrub wetland occupying the portion of Airport property described above in Paragraph 17. An outline of the discharge areas is included on Attachment A, which is incorporated herein.

25. At no time did Respondent have a permit issued pursuant to Section 404 of the Act, 33 U.S.C. § 1344, to discharge dredge material and organic debris into the forested and scrub/shrub wetland area referenced in Paragraphs 17 and 24.

26. The dredge material and organic debris discharged into the unnamed tributary on the Property constitute "pollutants" as defined by Section 502(6) of the Act, 33 U.S.C. §1362(6).

27. Excavators and bulldozers are discernible, confined and discrete conveyances, specifically rolling stock, and constitute "point sources" as defined by Section 502(14) of the Act, 33 U.S.C. §1362(14).

28. The addition of dredge material and organic debris from excavators and bulldozers, or earth moving equipment, into wetlands and/or waters of the United States constitutes a "discharge of a pollutant" as defined by Section 502(12) of the Act, 33 U.S.C. §1362(12).

29. Therefore, Respondent is a person who discharged pollutants from a point source into waters of the United States, without a permit, in violation of Section 404 of the Act, 33 U.S.C. § 1344.

30. 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), the Administrator may assess a Class II civil penalty of up to \$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. Effective January 12, 2009, the Administrator may assess a Class II civil penalty not to exceed \$16,000 per day for each day during which the violation continues, to a maximum amount of \$177,500.

Based upon the facts alleged in this Complaint, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondent's 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 will propose to issue a Final Order to Respondent assessing a penalty of \$11,000 per day of violation up to a maximum of \$60,000.00 against Respondent.

This amount of civil penalty 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).

Respondent shall pay this penalty by certified or cashier's check payable to "Treasurer, the United States of America," and shall send it, with a transmittal letter identifying the Complaint to:

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

Copies of the transmittal letter and check shall be sent to:

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

and

Tom Turner (C-14J)
Associate Regional Counsel
Office of Regional Counsel
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, 40 C.F.R. § 22.15, Respondent has 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, Respondent must specifically make such request in the Answer, which is discussed below.

Any hearing on Respondent's 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," 40 C.F.R. Part 22, a copy of which accompanies this Complaint.

VI. Answer

If Respondent contests any material fact alleged in this Complaint, contends that the proposed penalty is inappropriate, or contends that it is entitled to judgment as a matter of law, 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.

Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or must clearly state that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied.

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 Respondent requests a hearing.

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 the Answer and all subsequent documents filed in this action must be sent to Tom Turner, Associate Regional Counsel, U.S. Environmental Protection Agency, 77 West Jackson Boulevard (C-14J), Chicago, IL, 60604-3590, who may be telephoned at (312) 886-6613.

If 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, 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, attorney's 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 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 Respondent requests a hearing, 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 Greg 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.

Respondent's request for an informal settlement conference will not extend the 30 day period during which 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. 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 Wisconsin regarding this action by mailing a draft copy of this Complaint to Bruce Baker, Administrator, Division of Water, Wisconsin Department of Natural Resources, and by offering Wisconsin 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) 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 Respondents' 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).

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

Date