US EPA ARCHIVE DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF: OHIO DEPARTMENT OF TRANSPORTATION 1980 WEST BROAD STREET COLUMBUS, OHIO 43223, Respondent.	Proceeding to Assess a Class II Civil Penalty Under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) Docket No. CWA-05-2014-0009

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U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 5

CONSENT AGREEMENT AND FINAL ORDER

JURISDICTIONAL ALLEGATIONS

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the Consolidated Rules) as codified at 40 C.F.R. part 22, for violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. According to 40 C.F.R. § 22.13(b), where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO).

3. Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency (U.S. EPA) Region 5.

4. Respondent is the Ohio Department of Transportation, 1980 West Broad Street, Columbus, Ohio, an organization of state government under the laws of the State of Ohio. Respondent is a "person" as that term is defined at Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 501.2.

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

JURISDICTION AND WAIVER OF RIGHT TO HEARING

7. Respondent stipulates that U.S. EPA has jurisdiction over the subject matter of this CAFO and waives any jurisdictional objections it may have.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

9. By executing this CAFO, Respondent does not admit liability or admit Complainant's factual allegations set forth in this CAFO. Respondent's execution of this CAFO does not constitute a waiver or admission of any kind, including without limitation a waiver of any defense, legal or equitable, which Respondent may have in this or any other administrative or judicial proceeding, other than a proceeding to enforce this CAFO.

STATUTORY AND REGULATORY BACKGROUND

10. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), states that: "Whenever, 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 II civil penalty under [Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B)]."

11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that "Except as in compliance with [Section 404 of the CWA] the discharge of any pollutant by any person shall be unlawful."

12. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states: "The Secretary [of the Army] may issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

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

14. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" as " ... any 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."

15. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" as " ... dredged spoil, solid waste, ... biological materials, ... rock, sand [or] agricultural waste discharged into water."

16. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as " ... the waters of the United States ... ."

17. Federal regulations, at 40 C.F.R. § 232.2, define the term "waters of the United States" to include rivers, streams and "wetlands."

18. Federal regulations, at 40 C.F.R. § 230.3(t), define "wetlands" as " ... those areas that are inundated or saturated by surface or ground water 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."

19. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and its implementing regulations at 40 C.F.R. Part 19, increased the statutory maximum penalty under

Section 309(g)(3) of the CWA, 42 U.S.C. § 1319(g)(3), for violations occurring after January 12, 2009, from $10,000 to $16,000 per day of violation and from a $125,000 to a $177,500 maximum penalty.

20. Respondent is an organization of state government under the laws of the State of Ohio. Respondent, solely or through the activities of its agents:

a. excavated sediment from 705 linear feet of an unnamed tributary to Rich Run and sidecast dredged material into the stream and adjacent wetland, between July 13 and July 28, 2010, to facilitate drainage of the stream channel away from State Route 124.

b. discharged soil, dirt and rock into unnamed tributaries of the Ohio River, between June 13, 2011 and January 23, 2012, to clear trees, excavate the hill slope, install sediment basins and place rip rap to stabilize a hill slope along State Route 7.

c. discharged dirt and rock into McQueen Run, on September 21 and 30, and October 3 and 4, 2011, to address washouts, berm buildup and guardrail repair along an embankment adjacent to State Route 39.

21. The unnamed tributaries to Rich Run near Route 124 flow to Little Raccoon Creek, which flows to Raccoon Creek, which is a traditional navigable water. The unnamed tributaries near State Route 7 flow to the Ohio River, a traditional navigable water. McQueen Run near State Route 39 flows to the Ohio River, a traditional navigable water.

22. The unnamed tributaries to Rich Run, the unnamed tributaries to the Ohio River, and McQueen Run are "waters of the United States" pursuant to 40 C.F.R. § 232.2.

ALLEGATIONS OF LIABILITY

23. The first property subject to this Order (Site 1) is located in the NE ¼ of Section 14, and

SE ¼ of Section 11, Township 09 North, Range 17 West, Jackson County, Ohio. The current owners of record for Site 1 are Mr. Robert A. Stevens and Mrs. Elizabeth A. Stevens. The site is also within the Ohio State Route 124 right-of-way, which is under the ownership of Respondent. Respondent did not own all of the property at the time of the discharges described in paragraph 20(a), but caused those discharges to occur.

24. The second property subject to this Order (Site 2) is located in the NE ¼ of Section 14 and in Section 08, Township 09 North, Range 02 West, Jefferson County, Ohio. The current owner of record for Site 2 is Respondent. Respondent purchased the property from Ms. Joyce Abdalla on July 28, 2011. Respondent acquired ownership of the site during the time of the discharges described in paragraph 20(b), and Respondent caused those discharges to occur.

25. The third property subject to this Order (Site 3) is located in the NE ¼ SE ¼ of Section 16 and SW ¼ of Section 10, Township 09 North, Range 02 West, Columbiana County, Ohio. The site is within the Ohio State Route 39 right-of-way and under the ownership of Respondent.

26. Respondent's activities at Site 1 using an excavator, Site 2 using bulldozers, backhoes and excavators, and Site 3 using a trackhoe resulted in the deposit of sediment, dirt, soil, and/or rock into unnamed tributaries to Rich Run at Site 1, unnamed tributaries to the Ohio River at Site 2, and McQueen Run at Site 3, respectively. EPA estimates the length of impacted streams to be 705 linear feet and impacted wetlands to be 0:48 acres at Site 1, 1,217 linear feet of impacted stream at Site 2, and approximately 2,200 linear feet of intermittently impacted stream at Site 3. Respondent's bulldozers, backhoes, excavators and trackhoe constituted "point sources" within the meaning of the definition set forth in Section to 502(14) of the CWA, 33 U.S.C. § 1362(14). The sediment, dirt, soil and/or rock constituted "pollutants" within the meaning of the definition

set forth in Section 502(6) of the CWA, 33 U.S.C. § 1362(6). The addition of sediment, dirt, soil and/or rock into streams and/or wetlands on Sites 1, 2, and 3 constituted a "discharge of pollutants" within the meaning of the definition set forth in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

27. At no time during the activities referenced in paragraph 20 did the Respondent possess a permit from the Secretary of the Army, through the Army Corps of Engineers, under Section 404(a) of the CWA, 33 U.S.C. § 1341(a), authorizing the fill activities in the streambeds or wetlands at the sites.

28. Respondent's deposition of sediment, dirt, soil and/or rock into the streambeds and/or wetlands at Sites 1, 2, and 3 constitutes discharges of pollutants to the waters of the United States without an appropriate permit and consequently violates Section 301(a) of the CWA, 33 U.S.C. § 1415(a).

29. Each day Respondent's sediment, dirt, soil and/or rock deposits remain in place in the streambeds and/or wetlands at Sites 1, 2, and 3 constitutes a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

30. According to 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, the Administrator may assess a penalty not to exceed $16,000 for each day of violation of Section 301 of the CWA to a maximum of $177,500 for these violations.

CIVIL PENALTY

31. Based on an analysis of the factors as specified in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the facts of this case, Complainant has determined that an appropriate civil penalty to settle this action is $51,500.

32. Within 30 days after the effective date of this CAFO, Respondent must pay the $51,500 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

33. The check must note the case caption and the docket number of this CAFO.

34. A transmittal letter, stating Respondent's name, the case title, Respondent's complete address and the case docket number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Kerryann Weaver (WW-16J)
Wetlands Enforcement Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Susan Tennenbaum (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

35. This civil penalty is not deductible for federal tax purposes.

36. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, nonpayment penalties and the United States' enforcement expenses for the collection action. Respondent acknowledges that the

validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

37. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondent must pay the United States' enforcement expenses, including but not limited to attorneys' fees and costs incurred by the United States for collection proceedings. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue.

GENERAL PROVISIONS

38. This CAFO resolves Respondent's liability, and any liability of Respondent's owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, servants, successors and assigns for only federal civil penalties for the violations and facts alleged in this CAFO.

39. This CAFO does not affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

40. This CAFO does not affect Respondent's responsibility to comply with the CWA or other applicable federal, state and local laws or regulations.

41. This CAFO is a "final order" for the purposes of any future enforcement action under Section 309 of the CWA, 33 U.S.C. § 1319.

42. The terms of this CAFO bind Respondent and Respondent's owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, successors and assigns.

43. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

44. Each party agrees to bear its own costs and fees, including attorneys' fees, in this action.

45. This CAFO constitutes the entire agreement between the parties.

46. The effective date of this CAFO is the date it is filed with the Regional Hearing Clerk, after having been signed by the Regional Administrator and subject to the requirements of Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C).

47. Complainant is providing public notice of and reasonable opportunity to comment on the proposed issuance of the CAFO according to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4).

In the Matter of: Ohio Department of Transportation, Columbus, Ohio
Docket No: CWA-05-2014-0009

Ohio Department of Transportation, Respondent

7-14-2014
Date

Jerry Wray
Director

U.S. Environmental Protection Agency, Complainant

Tinka G. Hyde
Date

8/11/14
Tinka G. Hyde, Director
Water Division

Reviewed as to Form
Office of Chief Legal Counsel
Ohio Department of Transportation
7/11/14

In the Matter of: Ohio Department of Transportation, Columbus, Ohio
Docket No: CWA-05-2014-0009

FINAL ORDER

This Consent Agreement and Final Order, as agreed to by the parties, will become effective immediately upon filing with the Regional Hearing Clerk. **IT IS SO ORDERED.**

Date: _____

By: _____
Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency
Region 5