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

FEB 17 2005

REPLY TO THE ATTENTION OF:

WW-16J

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Tom Warfield
4027 South U.S. Highway 421
Versailles, Indiana 47042

Subject: Request for Information (Docket No. V-404-308-05-03)

Dear Mr. Warfield:

The United States Environmental Protection Agency (U.S. EPA) is issuing this request for information, in accordance with Section 308(a) of the Clean Water Act (CWA), 33 U.S.C. § 1318(a), regarding alleged violations of Section 301 of the CWA, 33 U.S.C. § 1311.

In a September 28, 2004, letter, the U.S. Army Corps of Engineers-Louisville District notified you of a violation of Section 301/404 of the CWA for your conversion of 22.1 - 33.7 acres of wetlands in the southeast quarter of Section 34, Johnson Township, Ripley County, Indiana. No Department of the Army permit under Section 301 of the CWA has been issued for this work.

This information request is to assist U.S. EPA in determining the nature, circumstances and extent of the alleged work done in "waters of the United States," particularly, wetlands. The provisions of Section 308(a) of the CWA provide that whenever required to carry out the objective of the CWA, including whether any person is in violation of the CWA, the Administrator of the U.S. EPA shall require that person to provide such information as may reasonably be required to make that determination.

Accordingly, pursuant to the authority vested in the Administrator, which authority has been duly redelegated to the Water Division Director, you are to respond and provide information pertaining to the enclosed "Request for Information" no later than 30 days from receipt of this letter.

Please submit the information requested in the accompanying document in a notarized statement certifying that all representations contained therein are true and accurate to the best of your knowledge and belief. You should exercise care to assure that responses are complete and accurate, since Section 309(c)(2) of the CWA provides for the imposition of criminal penalties where false information is knowingly provided to the Agency. This Information Request is not

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subject to the approval requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 et seq.

If you have any questions, please contact Mr. Gregory T. Carlson, Enforcement Officer, at 312/886-0124.

Sincerely yours,

for Jo Lynn Traub
Director, Water Division

Enclosure

cc: Jane Archer (w/encl.), Louisville Corps District, Louisville, KY
Mike Litwin (w/encl.), U.S. F&WS, Bloomington, IN
Jason Randolph (w/encl.), IDEM, Indianapolis, IN
Dwayne Howard (w/encl.), USDA-NRCS, 6013 Lakeside Blvd., Indianapolis, IN 46278

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**REQUEST PURSUANT TO SECTION**
	)	**308 OF THE CLEAN WATER ACT**
Tom Warfield,	)	**(CWA), 33 U.S.C. § 1318(a)**
Versailles, Indiana,	)	
	)	
Bertha Gookins Estate,	)	
c/o Hester Lucille Warfield,	)	
Versailles, Indiana,	)	
	)	
J.F. New & Associates, Inc.	)	
Walkerton, Indiana,	)	
	)	
and	)	**DOCKET NO. V-404-308-05-03**
	)	
Dwight and David Jolly,	)	
Jolly Bros. Farms, L.L.C.,	)	
Versailles, Indiana,	)	
	)	
Respondents.	)	
	)	

The following request is made pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("U.S. EPA") by the above referenced statute and duly redelegated to the undersigned Director, Water Division. This request for information pertains to the alleged unauthorized discharge of dredge or fill material or both into waters of the United States in conjunction with the clearing of land, including logging, grading, root raking, plowing or any other earth moving activity, in preparing land for planting agricultural row crops. The area subject to this information request is within the southeast quarter of Section 34, Township 7 North, Range 11 East (Johnson Township), north of and including Little Graham Creek, in Ripley County, Indiana ("the site"). See Exhibit #1 for an illustration of the site.

REQUEST FOR INFORMATION

Please provide the information described below within 30 days of receipt of this request, verified by, and submitted under a notarized, authorized signature to the address below, Attention: Regulatory Team (WW-16J).

1. Delineate the extent of your property ownership with regard to the site. Provide any property deeds, Plats of Survey, Certified Survey Maps or any other documentation that illustrates your property ownership or describes its location. For the purposes of answering this

question, the time frame of your response should be any time after you first obtained full or partial ownership interest in the site or any part thereof.

2. Provide all documents and information you possess which physically describe the site or records the sequence of recent site clearing activities, including, but not limited to:

A) surveys, both topographic or boundary;
B) soil borings, samples or descriptions;
C) vegetation surveys;
D) site hydrological surveys, e.g., plans and data characterizing ground, surface or storm water flows;
E) engineering design or site plans (including planning, zoning or development plans);
F) all site imagery, including satellite, aerial or ground based photographs, digital products, videotape or equivalent formats or platforms;
G) site clearing and planting documentation, e.g., mechanized clearing of vegetation, the dredging, grading, or stockpiling of mineral and organic soils or standing vegetation, plowing, root raking, planting of crops, applications of fertilizers/pesticides, soil the placement of dredged or fill material, tile replacement repair, installation of drainage or water control structure and street, storm water, utility or building construction; and
H) delineations or determinations of "waters of the United States," including wetlands. This includes all field notes and is not limited to formal reports.

If you do not have any documentation, or it is incomplete, you are invited to supplement your response by providing a narrative response, including describing general site development activities and illustrating these activities with site drawings.

3. Provide any and all documentation that memorialized the business relationship between you and the operators of equipment used in Question No. 2(G), above, including, but not limited to contracts, contractor payments, work logs or time records, invoices, canceled checks, receipts, or bills of sale.

4. Identify the equipment and the equipment's use in clearing the site of vegetation, preparing the site for crop production and planting and harvesting any crops.

5. Provide any and all documentation concerning any efforts you made or directed to determine whether the site or any portion thereof contained "wetlands" or other "waters of the United States" as defined in Volume 33 of the Code of Federal Regulations, Part 328 (applicable excerpt attached as Exhibit #2).

6. Provide copies of all site specific documents relating to whether you, individually or as part of a business, partnership or corporation, have ever applied for and/or received a permit,

including nationwide, regional, general, individual or after-the-fact permits, issued pursuant to Section 404 of the CWA or had any other prior knowledge of the Section 404 regulatory program. Documents may include, but are not limited to, permits, permit application materials and related correspondence, or specific informational sources that address the Section 404 regulatory program.

7. Provide any and all documentation concerning your interaction with the U.S. Department of Agriculture - Farm Service Agency or Natural Resources Conservation Service regarding wetland delineations or determinations, including any U.S.D.A. wetland appeal or mediation process (e.g., Highly Erodible Land and Wetland Conservation Determination, Form NRCS-CPA_026E, NRCS-CPA-38, etc.). For the purposes of answering this question, submit all such documentation between the years 1995 to the present.

8. Provide all State and local governmental approvals and permits obtained for the site's clearing and crop preparations, including, but not limited to any Indiana Departments of Natural Resources or Environmental Management, water supply entities, Ripley County, Indiana governmental units (including the County Drainage Board) or Johnson Township units of government.

9. Please provide any other information and/or documentation that you deem relevant to this matter.

The information requested herein must be provided notwithstanding its possible characterization as confidential information or trade secrets. You may, if you desire, assert a business confidentiality claim covering all or part of the information requested, in the manner described by 40 C.F.R. 2.203(b). Information covered by such claim will be disclosed by U.S. EPA only to the extent, and only by means of the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by U.S. EPA it may be made available to the public by U.S. EPA without further notice to you.

This request for information is made under authority provided by Section 308 of the CWA, 33 U.S.C. 1318. Section 308 provides that: "Whenever required to carry out the objective of this Act,...the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment and methods (including where appropriate, biological monitoring methods), (iv) sample such effluents...and (v) provide such other information as he may reasonably require; and the Administrator or his authorized representative, upon presentation of his credentials, shall have a right of entry to...any premises in which an effluent source is located or in which any records...are located, and may at reasonable times have access to and copy any records...and sample any effluents...."

Please be advised that the submission of false statements may subject you to federal prosecution under 18 U.S.C. § 1001 and that this or any other failure to comply with the requirements of

Section 308 as requested by U.S. EPA may result in enforcement action under the authority of Section 309 of the CWA, which provides for specified civil and/or criminal penalties. The U.S. EPA has the authority to use the information requested herein in an administrative, civil or criminal action.

The written statements submitted pursuant to this request must be notarized and returned under an authorized signature certifying that all statements contained therein are true and accurate to the best of the signatory's knowledge and belief. Moreover, any documents submitted to the Agency pursuant to this request should be certified as authentic to the best of the signatory's knowledge and belief. This Information Request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, 44 U.S.C. Section 3501, et seq.

Please submit your response within the designated time period to the Director, Water Division, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, Attention: Regulatory Team (WW-16J).

Date: February 15, 2005

for Jo Lynn Traub
Director, Water Division
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Rcd 9/8/04 NRCS office

Late Summer 2003

Exhibit #2

purchased by any person from the Corps of Engineers or the reporter of such hearing. A copy will be available for public inspection at the office of the appropriate district engineer.

(f) All written statements, charts, tabulations, and similar data offered in evidence at the hearing shall, subject to exclusion by the presiding officer for reasons of redundancy, be received in evidence and shall constitute a part of the record.

(g) The presiding officer shall allow a period of not less than 10 days after the close of the public hearing for submission of written comments.

(h) In appropriate cases, the district engineer may participate in joint public hearings with other Federal or state agencies, provided the procedures of those hearings meet the requirements of this regulation. In those cases in which the other Federal or state agency allows a cross-examination in its public hearing, the district engineer may still participate in the joint public hearing but shall not require cross examination as a part of his participation.

§ 327.9 Filing of the transcript of the public hearing.

Where the presiding officer is the initial action authority, the transcript of the public hearing, together with all evidence introduced at the public hearing, shall be made a part of the administrative record of the permit action or Federal project. The initial action authority shall fully consider the matters discussed at the public hearing in arriving at his initial decision or recommendation and shall address, in his decision or recommendation, all substantial and valid issues presented at the hearing. Where a person other than the initial action authority serves as presiding officer, such person shall forward the transcript of the public hearing and all evidence received in connection therewith to the initial action authority together with a report summarizing the issues covered at the hearing. The report of the presiding officer and the transcript of the public hearing and evidence submitted thereat shall in such cases be fully considered by the initial action authority in making his decision or recommendation to higher authority as to such permit action or Federal project.

§ 327.10 Authority of the presiding officer.

Presiding officers shall have the following authority:

(a) To regulate the course of the hearing including the order of all sessions and the scheduling thereof, after any initial session, and the recessing, reconvening, and adjournment thereof; and

(b) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authority under which the Chief of Engineers functions, and with the policies and directives of the Chief of Engineers and the Secretary of the Army.

§ 327.11 Public notice.

(a) Public notice shall be given of any public hearing to be held pursuant to this regulation. Such notice should normally provide for a period of not less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.

328.1 Purpose.
328.2 General scope.
328.3 Definitions.
328.4 Limits of jurisdiction.
328.5 Changes in limits of waters of the United States.

Authority: 33 U.S.C. 1344.

§ 328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR Parts 320–330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR Parts 322 and 329).

§ 328.2 General scope.

Waters of the United States include those waters listed in § 328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and non-tidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "wetlands" means 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term "ordinary high water mark" means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

§ 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal Waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-Tidal Waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

§ 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the boundaries of the waters of the United States. For example, changing sea levels or subsidence of land may cause some areas to become waters of the United States while siltation or a change in drainage may remove an area from waters of the United States. Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer. Verification of changes to the lateral limits of jurisdiction may be obtained from the district engineer.

PART 329—DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Sec.
329.1 Purpose.
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329.15 Inquiries regarding determinations.
329.16 Use and maintenance of lists of determinations.

Authority: 33 U.S.C. 401 *et seq.*

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR Parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied: