

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

FEHN COMPANIES
ALBERTVILLE, MINNESOTA.

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-05-2016-0018



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 Fehn Companies, 5050 Barthel Industrial Drive, Albertville, Minnesota. 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, the Respondent does not admit liability or admit Complainant's factual allegations set forth in this CAFO. The 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)(2)(B) of the CWA, 42 U.S.C. § 1319(g)(2)(B), for violations occurring after

December 6, 2013, from \$10,000 to \$16,000 per day of violation and from a \$125,000 to a \$187,500 maximum penalty.

ALLEGATIONS OF LIABILITY

20. On or about July and August of 2014, Respondent was the Subcontractor of record for Ebert Construction, 23350 County Road 10, Corcoran, Minnesota, and completed construction at real property located at the Lexington Athletic Complex (Sec. 32, T.31N., R. 23W., Anoka County, Minnesota, (Latitude 45.18748° N, Longitude -93.16018° W)), in Blaine, Minnesota, (“Lexington”).

21. On or about July and August of 2014, Respondent, added 7,165 cubic yards of rock or sand or cellar dirt or fill material from bulldozers and backhoes into 1.11 acres of waters at the Lexington Athletic Complex in Blaine, Minnesota.

23. Therefore, Respondent “discharged” into waters at the Lexington Athletic Complex as defined at section 502(12) of the Act, 33 U.S.C. § 1362(12).

24. Respondent added 7,165 cubic yards of rock or sand or cellar dirt or fill material into waters at the Lexington Athletic Complex.

25. Therefore, Respondent discharged “pollutants” into waters at the Lexington Athletic Complex as defined at section 502(6) of the Act, 33 U.S.C. § 1362(6).

26. Respondent added 7,165 cubic yards of rock or sand or cellar dirt or fill material into waters at the Lexington Athletic Complex and used a bulldozer and backhoe, also known as rolling stock.

27. Therefore, Respondent discharged pollutants from a “point source” into waters at the Lexington Athletic Complex as defined at section 502(14) of the Act, 33 U.S.C. § 1362(14).

28. The 1.11 acres of water at the Lexington Athletic Complex were inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances did support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

29. Therefore, the 1.11 acres of waters at the Lexington Athletic Complex were “wetlands” as defined at 40 C.F.R. § 232.2.

30. The waters of the wetlands were adjacent, and flowed into, the waters of a private ditch that flowed into Anoka County Ditch No. 53-62, Branch 2, Lateral Peebles.

31. The waters of Anoka County Ditch No. 53-62, Branch 2, Lateral Peebles, flowed into Anoka County Ditch No. 53-62, Branch 2, Lateral 3.

32. The waters of Anoka County Ditch No. 53-62, Branch 2, Lateral 3 flowed into Anoka County Ditch No. 53-62, Branch 2.

33. The waters of Anoka County Ditch No. 53-62, Branch 2 flowed into the waters of the Anoka County Ditch No. 53-62 Main Branch.

34. The waters of Anoka County Ditch No. 53-62 flowed into Rice Creek.

35. The waters of Rice Creek flowed into the waters of the Mississippi River.

36. The Mississippi River was used in interstate and foreign commerce.

37. Therefore, the Mississippi River was “waters of the United States” as defined at 40 C.F.R. § 232.2.

38. The waters of Rice Creek were a “tributary” to the waters of the Mississippi River.

39. Therefore, the waters of Rice Creek were “waters of the United States” as defined

at 40 C.F.R. § 232.2.

40. The waters of Anoka County Ditch No. 53-62 Main Branch were a "tributary" to the waters of Rice Creek.

41. Therefore, the waters of County Ditch No. 53-62 Main Branch, were "waters of the United States" as defined at 40 C.F.R. § 232.2.

42. The waters of Anoka County Ditch No. 53-62, Branch 2 were a "tributary" to the waters of Anoka County Ditch No. 53-62 Main Branch.

43. Therefore, the waters of Anoka County Ditch No. 53-62, Branch 2, were "waters of the United States" as defined at 40 C.F.R. § 232.2.

44. The waters of Anoka County Ditch No. 53-62, Branch 2, Lateral 3 were a "tributary" to the waters of Anoka County Ditch No. 53-62 Branch 2.

45. Therefore, the waters of Anoka County Ditch No. 53-62, Branch 2, Lateral 3 were "waters of the United States" as defined at 40 C.F.R. § 232.2.

46. The waters of Anoka County Ditch No. 53-62, Branch 2, Lateral Pebbles were a "tributary" to the waters of Anoka County Ditch No. 53-62 Branch 2, Lateral 3.

47. Therefore, the waters of Anoka County Ditch No. 53-62, Branch 2, Lateral Pebbles were "waters of the United States" as defined at 40 C.F.R. § 232.2.

48. The waters of the private ditch were a "tributary" to the waters of Anoka County Ditch No. 53-62, Branch 2, Lateral Pebbles.

49. Therefore, the waters of the private ditch were "waters of the United States" as defined at 40 C.F.R. § 232.2.

50. The waters of the wetlands were next to, and flowed into, the waters of the private

ditch.

51. Therefore, the waters of the wetlands were “adjacent” to, and a “tributary” of, the waters of the private ditch as defined at 40 C.F.R. § 232.2.

52. Therefore, the waters of the wetlands were “waters of the United States” as defined at 40 C.F.R. § 232.2.

53. Therefore, the waters of the wetlands, the waters of the private ditch, the waters of the Anoka County Ditch No. 53-62, Branch 2, Lateral 3, the waters of the Anoka County Ditch No. 53-62, Branch 2, the Anoka County Ditch No. 53-62 Main Branch, the waters of Rice Creek, and the waters of the Mississippi River, were “navigable waters” as defined at section 502(7) of the Act, 33 U.S.C. § 1362(7).

54. Respondent discharged pollutants from a point source into navigable waters without a Dredge and Fill Permit as required by section 404(b) of the Act, 33 U.S.C. § 1344(b).

55. Therefore, Respondent discharged pollutants from a point source into navigable waters in violation of section 301 of the Act, 33 U.S.C. § 1311.

56. Each day the pollutants remained in navigable waters constituted an additional day of violation of sections 301 and 404 of the Act, 33 U.S.C. §§ 1311 and 1344.

CIVIL PENALTY

57. 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 \$1,000.00.

58. Within 30 days after the effective date of this CAFO, Respondent must pay the \$1,000.00 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

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

60. 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

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

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

62. 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.

63. 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 attorney's 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

64. This CAFO resolves Respondent's liability, and any liability of the 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.

65. 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.

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

67. 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.

68. 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.

69. 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.

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

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

72. 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).

73. 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: Fehn Companies, Albertville, Minnesota

Docket No:

Consent Agreement and Final Order

Fehn Companies, Respondent

6/21/14
Date

Gary Fehn
Gary Fehn, President

U.S. Environmental Protection Agency, Complainant

7/8/16
Date

Tinka G. Hyde
Tinka G. Hyde, Director
Water Division

In the Matter of: Fehn Companies, Albertville, Minnesota
Docket No: CWA-05-2016-0018
Consent Agreement and Final Order

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: _____
Robert Kaplan
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 5