

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In The Matter Of:

Jeffrey Hoffman
1963 330th Street North
Minneota, Minnesota 56264

and

Michael Hoffman
3292 190th Avenue North
Minneota, Minnesota 56264

Respondents.

Docket No. CWA-05-2009-0010

Consent Agreement
and
Final Order
Pursuant to
Section 309(g) of the Clean Water Act,
33 U.S.C. § 1319(g).

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REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY,

CONSENT AGREEMENT AND FINAL ORDER

Consent Agreement

WHEREAS, the parties to this administrative action have agreed to simultaneously commence and conclude the above-captioned action before the filing of a complaint via the filing of this CAFO and Final Order (CAFO) pursuant to Section 309(g) of the Clean Water Act, ("the Act"), 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. § 22.13(b) and 22.18(b)(2) and (3).

WHEREAS, the Complainant is, by lawful delegation of the Administrator and the Regional Administrator, the Director, Water Division, Region 5, United States Environmental Protection Agency (EPA).

WHEREAS, the Respondents in this proceeding are Mr. Jeffrey Hoffman and Mr. Michael Hoffman, individuals who, at all times relevant to this CAFO, resided in or near Minnesota, Minnesota and conducted business within the State of Minnesota.

WHEREAS, the Respondents admit that the Administrator of EPA has jurisdiction of this proceeding pursuant to Sections 301 and 309 of the Act, 33 U.S.C. §§ 1311 and 1319, and the regulations at 40 C.F.R. § 22.38, and pursuant to 40 C.F.R. § 22.18(b)(2).

WHEREAS, Respondents consent to the assessment of the civil penalty specified in this CAFO and to the terms and conditions of this CAFO.

WHEREAS, Respondents 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.

WHEREAS, Respondents waive their 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 their right to appeal this CAFO.

WHEREAS, Respondents certify that they are in compliance with Section 309(g) of the Act, 33 U.S.C. § 1319(g).

WHEREAS, the parties agree to the following statement of facts and law:

1. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits any person from discharging any pollutant from any point source into waters of the United States except in accordance with the terms of a valid permit issued by the U.S. Army Corps of Engineers (ACOE) under Section 404 of the CWA, 33 U.S.C. § 1344.
2. The term "person" is defined as, among other things, an "...individual..." 33 U.S.C. § 1362(5).

3. The term “discharge of pollutants” is defined as “any addition of any pollutant to navigable waters from any point source...” 33 U.S.C. § 1362(12).
4. A “pollutant” is defined 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).
5. The term “waters of the United States” is defined at 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 (1995), to include the following: (i) all waters which are currently used , or were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all other waters, such as, among others, rivers, streams or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce (iii) tributaries of such waters; (iv) and wetlands adjacent to such waters or their tributaries.
6. The term “navigable waters” is defined as all “...waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
7. A “point source” is defined 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).
8. At all times relevant to this CAFO , one or more of the Respondents either owned, leased or otherwise controlled a parcel of property situated in the Northwest ¼ of Section 13,

Township 114 North, Range 43 West, Yellow Medicine County, Minnesota ("the Site") and/or otherwise controlled the activities that occurred on such property.

9. Mr. Jeffery Hoffman is or was a member of the Board of Managers of the Yellow Medicine River Watershed District (YMRWD) representing Yellow Medicine County, Minnesota. The mission of the YMRWD is to provide an organized means for proper management and protection of the water resources in the Yellow Medicine River Watershed. The YMRWD places an emphasis on flood control, water control management through the process of viewing and approving drainage permits and solving water quality problems. The YMRWD reviews and approves all water-related projects in the district and partners with Federal, State, Counties, Cities, and Townships in water planning and management. The YMRWD employs technical staff who conduct water quality monitoring of lakes, rivers and streams in the watershed, and establish and maintain records and hydrological data. The YMRWD endeavors to provide for wildlife and create opportunities to enhance the recreational opportunities as a supplementary benefit of projects that improve water quality and provide flood protection.
10. Prior to Respondents' activities as alleged below, the Site contained a wetland area, constituting a water of the United States, of at least ten (10) acres containing water, hydric soils and hydrophytic vegetation adjacent to an unnamed tributary to Spring Creek (See Exhibit 1).

11. On April 14, 2006, Respondent Jeffery Hoffman submitted a joint Minnesota Local/State/Federal Application for a Water/Wetland project to the ACOE for a permit to repair, replace or add drainage tile lines to facilitate agricultural drainage on the Site.
12. The map attached to Respondent's application identifies an area where Respondent will "repair existing tile to same size" and neither the application nor the map indicate that any work will be done in the watercourse flowing through the Site.
13. The Respondents' application was received by the ACOE on May 4, 2006 and identified with the file number 2006-2229-TMV.
14. On May 16, 2006, the Minnesota Department of Natural Resources (MDNR) notified Respondent Jeffery Hoffman that Respondents' proposed agricultural drainage maintenance project could proceed as long as the work did not impact a wetland identified as Minnesota Public Waters Wetland 87-140W (MPWW 87-140W) on or near Respondents' property (See Exhibit 2).
15. The May 16, 2006 MDNR letter also advised respondents not to remove any sediment from the public watercourse flowing through Respondents' property unless a proper permit was obtained from MDNR and noted that MDNR had some concerns about work which had already occurred near the watercourse.
16. On June 28, 2006, the ACOE issued to the Respondents a general permit for the proposed agricultural drainage maintenance project.
17. The ACOE permit did not authorize any additional work in wetlands or streams beyond the scope of the tile maintenance project and the Respondents were specifically warned by the

ACOE that any changes to the design, purpose, or location of the project required them to contact the ACOE to ensure that the work did not violate Federal law.

18. During the period from approximately July to August of 2006, the Respondents and/or persons acting on behalf of the Respondents, used mechanized land moving equipment to perform construction activities, including but not necessarily limited to grading and sidecasting dredged or fill material for the purpose of channelizing 2,500 feet of an unnamed tributary to Spring Creek, at the Site. This area is identified in Exhibit 1.
19. Respondents' construction activities resulted in the discharge of a significant amount of sediment, dirt, sand, rock and/or vegetation, i.e. pollutants, into approximately ten (10) acres of wetlands located on the Site
20. The construction activities described in paragraph 18 above, were not part of the tile maintenance project authorized by the ACOE in the ACOE General Permit issued on June 28, 2006.
21. The Respondents did not notify the ACOE about the unauthorized construction activities described in paragraph 18, above, prior to the Respondents engaging in these activities.
22. The Respondents did not apply for nor did Respondents obtain a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, for these activities which resulted in the discharge of pollutants referenced in paragraph 19, above.
23. The wetlands identified in Paragraph 10 about an unnamed tributary to Spring Creek.
24. The unnamed tributary flows through the Site into MPWW 87-140W. See Exhibit 2.
25. This protected wetland flows into an unnamed tributary, which then flows into Spring Creek.

26. Spring Creek flows into the Yellow Medicine River.
27. The Yellow Medicine River flows into the Minnesota River.
28. The Minnesota River is a traditionally navigable waterway.
29. On October 13, 2006, the Minnesota Department of Natural Resources (MnDNR) inspected the Site to determine the nature and extent of Respondents' construction activities.
30. During the October 13, 2006, site inspection, MnDNR concluded that the mechanical alteration of the Site resulted in a loss of aquatic habitat, a reduction in the overall stream length, an increased stream gradient, and siltation of the stream channel and downstream Minnesota Public Waters Wetland 87-140W.
31. On October 13, 2006, MnDNR issued the Respondents a Public Waters Cease and Desist Order to Respondents.
32. October 18, 2006, the ACOE issued a preliminary jurisdictional determination (File No. MVP-2006-2229-TMV) finding that there appeared to be navigable waters of the United States on the Site.
33. October 19, 2006, after receiving notification of these violations, the ACOE issued a Cease and Desist Order (CDO) to the Respondent Jeffery Hoffman alleging that the Respondent had mechanically altered approximately 2,500 feet of stream channel and an undetermined number of acres of adjacent wetlands.
34. The ACOE CDO advised Respondents to not perform any further such work without prior authorization while further investigation of the violation was undertaken.

35. On November 8, 2006, MnDNR issued a Restoration Order to Respondents to restore the stream channel to its original alignment and plant permanent filter strips along both sides of the channel.
36. During approximately November to December of 2006, the Respondents performed corrective actions on the Site to restore the stream channel to its original configuration.
37. On February 9, 2007, the ACOE notified Respondent Jeffery Hoffman in writing that the ACOE had transferred its enforcement case to U.S. EPA for resolution in accordance with the Memorandum of Agreement between the Department of the Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA) Concerning Federal Enforcement of Section 404 of the Clean Water Act.
38. On May 17, 2007, U.S. EPA notified Respondent Jeffery Hoffman in writing that representatives of U.S. EPA, the ACOE and the MDNR intended to conduct an inspection of the site on May 25, 2007
39. On May 25, 2007, U.S. EPA, the ACOE and MDNR conducted an inspection of the Site with the permission of the Respondents.
40. The inspection identified a previously disturbed area at the site of approximately (ten) 10 acres containing water within twelve inches of the soil surface, hydric soils and hydrophitic vegetation.
41. The inspection also identified the presence of dredged and fill material in this ten (10) acre area which appeared to have been the result of side-casting by mechanized equipment during the channelization of the adjacent stream.

42. On March 7, 2008, U.S. EPA issued to Respondents information requests, pursuant to section 308 of the CWA, 33 U.S.C. § 1318, requesting additional information concerning alleged discharges of dredged or fill material on two (2) parcels of property owned by Respondents at or near the Site.
43. On April 7, 2008, Respondents provided the requested information to U.S. EPA.
44. On July 22, 2008, the MnDNR issued to the Respondents a Public Waters Certificate of Satisfactory Restoration for completing restoration of the unnamed tributary to Spring Creek.
45. Because the Respondents are individuals, they are "person(s)" within the meaning of the definition set forth in Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
46. Because the area identified in paragraph 10 is an area of land that is 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, it is a "wetland" within the meaning of the definition set forth at 40 C.F.R. § 232.2.
47. Because the wetland identified in paragraph 10 abuts an unnamed tributary which flows through the Site into Minnesota Public Waters Wetland 87-140W, which flows into an unnamed tributary, which flows into Spring Creek, which flows into the Yellow Medicine River, flows into the Minnesota River, a traditionally navigable waterway, the wetlands identified in Paragraph 12, are "waters of the United States" as defined at 40 C.F.R. § 232.2 and "navigable waters" as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

48. Because the mechanized land moving equipment used to perform the construction activities referenced in paragraph 18 is or was rolling stock, such equipment constituted a "point source" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
49. Because the dredged or fill material referenced in Paragraph 19 was sediment, dirt, sand, rock and/or vegetation , above constituted "pollutants" within the meaning of the definitions set forth in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
50. Because the Respondents used a point source to add pollutants to navigable waters of the United States, the placement of such materials by Respondents in the wetlands referenced in Paragraph 10, above 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).
51. Each discharge of pollutants, by the Respondents, into navigable waters without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constituted a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.
52. Each day the discharged material remained in the wetland without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constituted a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.
53. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), on June 11, 2009, EPA consulted the MnDNR regarding the assessment of this administrative penalty and has provided an opportunity for public notice and comment as required by 40 C.F.R. § 22.45.

54. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), the Administrator may assess a civil penalty of \$11,000 per day for each day during which the violation continues, up to a total of \$157,500, for violations of, inter alia, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or any limit or condition in a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344.

NOW THEREFORE:

55. Based upon the facts alleged in this CAFO; upon the nature, circumstances, extent and gravity of the violations alleged; after consideration of Respondents' ability to pay, prior history of such violations, degree of culpability and economic benefit resulting from the violation; Respondents' good faith and cooperation in resolving this matter; and such other matters as justice may require; EPA hereby proposes to issue a Final Order Assessing Administrative Penalties to Jeffrey and Michael Hoffman assessing a penalty in the amount of Ten Thousand Dollars and No Cents (\$10,000).

56. Respondents agree to the amount of this civil penalty and agree to pay this civil penalty to the United States per the terms and conditions of this CAFO.

57. Respondents shall pay this penalty by certified or cashier's check payable to "Treasurer, the United States of America," and shall deliver it, with a transmittal letter identifying the CAFO, to:

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

58. The check must be annotated with the docket number and with the name of the case. Copies of transmittal letter and the check shall simultaneously be sent to these recipients:

Yone Yu
Watershed and Wetlands Branch (WW-16J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

and

John P Steketee
Associate Regional Counsel
Office of Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

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

60. If Respondents fail to pay the civil penalty timely, Complainant may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and EPA's enforcement expenses for the collection action.

61. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15.00 handling charge each month that any portion of the penalty due is more than thirty (30) days past due. Complainant will assess a six percent (6%) per year penalty on any principal amount not paid timely pursuant to this CAFO.

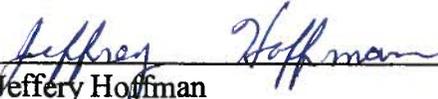
62. This CAFO constitutes a complete and full settlement of, and resolves Respondents' liability with prejudice for, the violations alleged in the Complaint.

63. This CAFO does not affect the right of Complainant or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
64. This CAFO does not affect Respondents' responsibility to comply with the Act and other applicable federal, state, and local, laws and regulations.
65. The terms of this CAFO bind EPA and Respondents and their successors and assigns.
66. Each person signing this CAFO certifies he or she has the authority to sign this CAFO for the party he or she represents and to bind that party to its terms.
67. Each party agrees to bear its own costs and fees, including attorney's fees, for this action.
68. This CAFO constitutes the entire agreement between the parties.
69. No modification shall be made to this CAFO without written notification to, and written approval of, all parties hereto and no oral modification of this CAFO shall be effective.
70. The effective date of this CAFO is the date EPA files it with the Regional Hearing Clerk.

In the Matter of Jeffery Hoffman and Michael Hoffman, Minneota, Minnesota
Docket No.

Jeffery Hoffman, Respondent

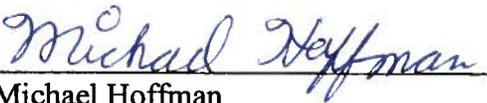
Date: 7-1-09



Jeffery Hoffman
1963 330th Street North
Minneota, Minnesota

Michael Hoffman, Respondent

Date: 6-29-09



Michael Hoffman
3292 190th Avenue North
Minneota, Minnesota

In the Matter of Jeffery Hoffman and Michael Hoffman, Minneota, Minnesota
Docket No.

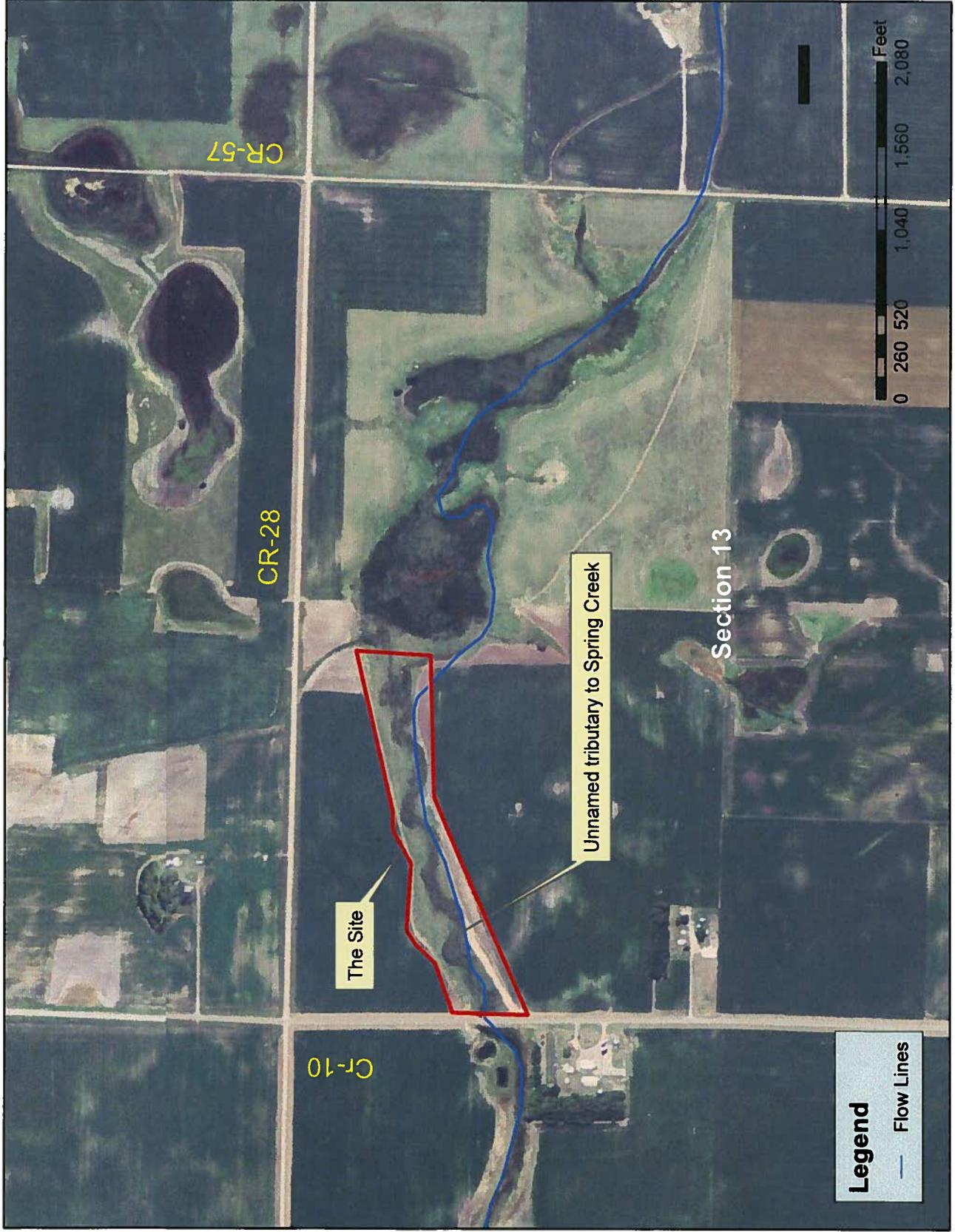
United States Environmental Protection
Agency, Region 5, Complainant

Date: July 27, 2009



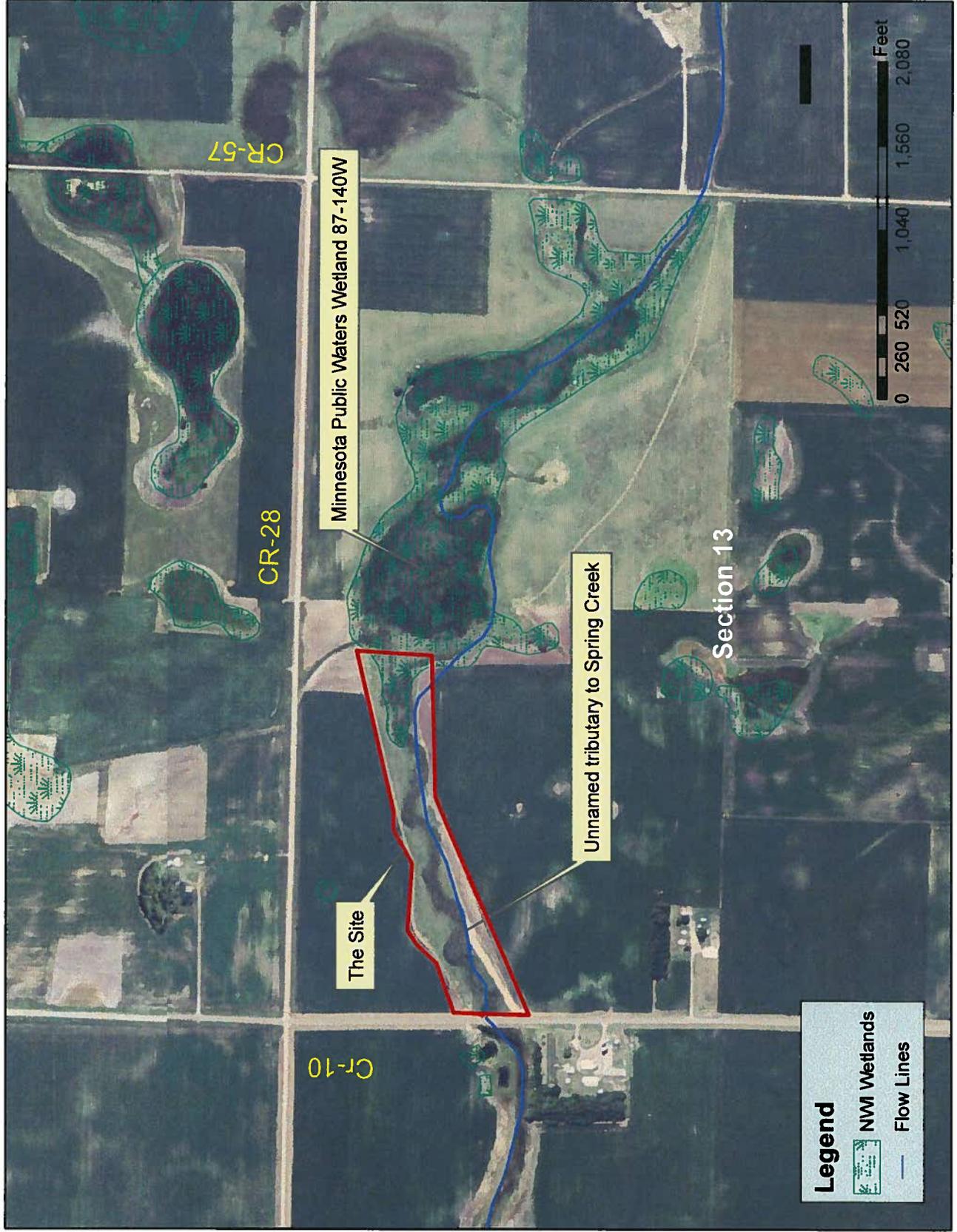
for Tinka Hyde, Director
Water Division
United States Environmental Protection
Agency, Region 5

Exhibit 1



NW 1/4 of Section 13, Township 114 North, Range 43 West, Yellow Medicine County, Minnesota

Exhibit 2



Created 4/23/09

FSA 2005 Aerial Photo

NW 1/4 of Section 13, Township 114 North, Range 43 West, Yellow Medicine County, Minnesota