

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

**Faulks Brothers Construction, Inc.
E3481 Highway 22 and 54
Waupaca, Wisconsin 54981**

Respondent.

) **Docket No. CWA-05-2010-0006**
)
) **Proceeding to Assess Class II**
) **Administrative Penalty under Section**
) **309(g) of the Clean Water Act, 33 U.S.C.**
) **§ 1319(g)**

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CONSENT AGREEMENT AND FINAL ORDER **REGIONAL HEARING CLERK
USEPA
REGION 5**

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act (Act), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b).
2. Complainant is the Director of the Water Division, United States Environmental Protection Agency, Region 5 (Complainant or U.S. EPA).
3. Respondent is Faulks Brothers Construction, Inc. (Faulks), a corporation doing business in the State of Wisconsin.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a Consent Agreement and Final Order (CAFO). 40 C.F.R. § 22.13(b).
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. Faulks consents to entry of this CAFO and the assessment of the specified civil penalty, and agrees to comply with the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Faulks admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations or alleged violations in this CAFO.

8. Faulks waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c) and 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), any right to contest the allegations in this CAFO, and its right to appeal this CAFO under Section 309(g)(8)(B) of the Act, 33 U.S.C. § 1319(g)(8).

Statutory and Regulatory Background

9. Section 301 of the CWA, 33 U.S.C. § 1311, prohibits the discharge of pollutants into navigable waters except in compliance with, among other things, a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344.

10. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (Corps), to issue permits for the discharge of dredged or fill material into navigable waters.

11. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines “discharge of pollutants” as “any addition of any pollutant to navigable waters from any point source....”

12. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines a “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.”

13. Section 502(6) of the Act, 33 U.S.C. § 1362(6), 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.”

14. Section 502(7) of the Act, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States....”

15. 40 C.F.R. § 230.3(s) defines the term “waters of the United States” to include “wetlands.”

Factual Allegations and Alleged Violations

16. Respondent is a corporation incorporated under the laws of Wisconsin since at least 1969.

17. Respondent is a “person” under Section 502(5) of the Act, 33 U.S.C. § 1362(5).

18. In August 2008, Faulks constructed a pond on property owned by Charles Leiby (the “site”).

19. The site includes a wetland which abuts an unnamed perennial stream.

20. The unnamed perennial stream flows to the Little Wolf River which then flows to the Wolf River. The Wolf River is a traditionally navigable water of the United States.

21. While constructing the pond at the site, Faulks added dredged material from an excavator into the site wetland.

22. The site wetland is a “water of the United States” as defined at 40 C.F.R. § 230.3(s), and “navigable water” as defined at Section 502(7) of the Act, 33 U.S.C. § 1362(7).

23. The dredged material deposited in the site wetlands is a “pollutant” as defined Section 502(6) of the Act, 33 U.S.C. § 1362(6).

24. Faulks used an excavator to move the dredged material.

25. The excavator is a “point source” as defined at Section 502(14) of the Act, 33 U.S.C. § 1362(14).

26. The depositing of dredged material described in paragraph 21, above, constitutes the “discharge of pollutants” as defined at Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

27. Faulks discharged dredged material into the site wetlands without a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344.

28. Each discharge by Faulks of pollutants into navigable waters, as described in paragraph 21, above, that is not authorized by a permit issued under Section 404 of the Act, 33 U.S.C. § 1344, constitutes a day of violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).

29. Each day the material discharged by Faulks remains in navigable waters without authorization under a permit issued under section 404 of the Act, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the Act, 33 U.S.C. § 1311.

Civil Penalty

30. In consideration of Faulks’ cooperation in settling this matter, U.S. EPA agrees to a penalty of \$4,000.

31. Within 30 days after the effective date of this CAFO, Faulks must pay the \$4,000 civil penalty by sending a cashier’s or certified check, payable to the “Treasurer, United States of America,” to:

for checks sent by regular U.S. Postal Service mail

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

for checks sent by express mail

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

32. A transmittal letter, stating Faulks' name, complete address, the case docket number, and the billing document number must accompany the payment. Faulks must write the case docket number and the billing document number on the face of the check and send copies of the check and transmittal letter to:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (E-19J)
Chicago, Illinois 60604-3590

Greg Carlson, Enforcement Officer
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (WW-16J)
Chicago, Illinois 60604-3590

Brian Barwick
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604-3509

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

34. If Faulks fails 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 Complainant's enforcement expenses for the collection action.

35. 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.

Supplemental Environmental Project

36. Respondent must complete a supplemental environmental project (SEP) designed to restore and enhance the environment by restocking fish into Marion Pond which is located in Marion, Wisconsin.

37. Marion Pond is a 108 acre impoundment of Doty Creek which flows to the Pigeon River. The Pigeon River flows to the Wolf River. The site and Marion Pond are both located within the Wolf River watershed.

38. Marion Pond was drained in 2009 in order to make emergency repairs to a dam and bridge. The Marion Pond Association will restock the pond beginning on or around April 2010. A similar restocking effort in 2006 cost approximately \$30,000. No Federal funds are being used to restock the pond.

39. Faulks shall assist in the restoration of the Marion Pond by funding the restocking of fish in the amount of \$10,000.

40. Faulks shall coordinate its restocking efforts with the Marion Pond Association restocking efforts. Therefore, the timing of the restocking as well as the specific fish restocked will be determined by the Marion Pond Association.

41. Once a restocking date is established by the Marion Pond Association, Faulks shall notify EPA of that date and arrange to complete its restocking efforts on that same date. By no later than 30 days following the restocking date, Faulks shall submit a project completion letter specifying when the restocking occurred, total costs incurred, species and number of fish restocked, and a certification as follows:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

42. Faulks must submit all notices and reports required by this CAFO by first class mail to Greg Carlson at the address specified in paragraph 32.

43. Faulks certifies that it is not required to perform or develop the SEP by any law, regulation, grant, order, or agreement, or as injunctive relief as of the date it signs this CAFO. Faulks further certifies that it has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

44. Following receipt of the SEP completion letter, EPA must notify Faulks in writing that:

- a. Faulks has satisfactorily completed the SEP requirements of this CAFO, or
- b. Faulks did not satisfactorily complete the SEP by spending \$10,000 on restocking.

45. If EPA exercises option b in Paragraph 44, Faulks may object in writing to the

deficiency notice within ten days of receiving the notice. The parties will have 30 days from EPA's receipt of Faulk's objection to reach an agreement. If the parties cannot reach an agreement, EPA will give Faulks a written decision on its objection. Faulks will comply with any requirements that EPA imposes in its decision. If Faulks does not complete the SEP as required by EPA's decision, Faulks will pay stipulated penalties to the United States equal to the difference between the amount it spent on the SEP and \$10,000.

46. If Faulks fails to comply with the schedule in paragraph 41 for implementing the SEP or fails to submit timely the SEP completion letter, Faulks must pay stipulated penalties for each failure to meet an applicable milestone, as follows:

| <u>Period of violation</u> | <u>Penalty per violation per day</u> |
|--|--------------------------------------|
| 1 st through 14 th day | \$100 |
| 15 through 30 th day | \$200 |
| 31 st day and beyond | \$500 |

These penalties will accrue from the date Respondent was required to meet each milestone until it achieves compliance with the milestone.

47. Respondent must pay any stipulated penalties within 15 days of receiving EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraph 31, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

48. Any public statement that Faulks makes referring to the SEP must include the following language, "Faulks Brothers Construction undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against Faulks Brothers Construction for alleged violations of Section 301 of the Act, 33 U.S.C. § 1311."

49. If an event occurs which causes or may cause a delay in completing the SEP as

required by this CAFO, Faulks must notify the U.S. EPA in writing within ten days after learning of an event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Faulks' past and proposed actions to prevent or minimize the delay, and a schedule to carry out those actions. Faulks must take all reasonable actions to avoid or minimize any delay. If Faulks fails to notify U.S. EPA according to this paragraph, Faulks will not receive an extension of time to complete the SEP.

50. If the parties agree that circumstances beyond the control of Faulks caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.

51. If the EPA does not agree that circumstances beyond the control of Faulks caused or may cause a delay in completing the SEP, EPA will notify Faulks in writing of its decision and any delay in completing the SEP will not be excused.

52. Faulks has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

53. For Federal Income Tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

General Provisions

54. This CAFO resolves only Faulks' liability for federal civil penalties for the violations and facts alleged in the CAFO.

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

56. This CAFO does not affect Faulks' responsibility to comply with the Clean Water Act and other applicable federal, state, local laws or permits.

57. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31 and the EPA's Clean Water Act Section 404 Settlement Penalty Policy (December 2001).

58. The terms of this CAFO bind Faulks, its successors, and assigns.

59. Each person signing this 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.

60. Each party agrees to bear its own costs and attorney's fees in this action.

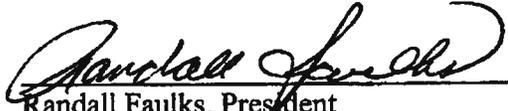
61. This CAFO constitutes the entire agreement between the parties.

SIGNATORIES

Each undersigned representative of a party to this Consent Agreement and Final Order certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement and Final Order and to bind legally such party to this document.

Faulks Brothers Construction, Respondent

2-19-10
Date



Randall Faulks, President

United States Environmental Protection Agency, Complainant

2/9/10
Date



Tinka G. Hyde, Director
Water Division
United States Environmental Protection Agency
Region 5
Chicago, Il

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Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Date

Bharat Mathur
Acting Regional Administrator
United States Environmental Protection Agency
Region 5