

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

Received by
EPA Region 1
Hearing Clerk

IN THE MATTER OF

Silenex Associates, LLC
30 Old Indian Trail Road
Middlefield, CT 06455

Respondent

DOCKET NO: CWA-01-2023-0033

**ADMINISTRATIVE CONSENT
AGREEMENT AND FINAL ORDER**

Proceeding under Section 309(g)
of the Clean Water Act,
33 U.S.C. § 1319(g)

INTRODUCTION

1. This Consent Agreement and Final Order (“CAFO”) is entered into by the U.S. Environmental Protection Agency (“EPA”) and Silenex Associates, LLC (“Respondent”) pursuant to Section 309(g)(2)(B) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, at 40 C.F.R. Part 22 (the “Consolidated Rules”). The authority to enter into CAFOs has been delegated to the Regional Administrator, EPA Region 1, and has been re-delegated to the undersigned Director of the Enforcement and Compliance Assurance Division, EPA Region 1.

2. Pursuant to 40 C.F.R. § 22.13(b) of the Consolidated Rules, the parties agree to simultaneously commence and conclude this action for civil penalties by the issuance of this CAFO. An Administrative Compliance Order on Consent will be issued separately to address the injunctive relief required to come into compliance with the CWA.¹

¹ See *In the Matter of Silenex Associates, LLC* (CWA-AO-R01-FY23-04).

3. Respondent agrees to the effect of this CAFO and agrees to carry out the terms and conditions described herein.

STATUTORY AND REGULATORY AUTHORITY

4. EPA takes this action under the authority of Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), for violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a) and Section 404 of the Act, 33 U.S.C. § 1344.

5. Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and in accordance with 40 C.F.R. § 22.38(b), EPA notified the Connecticut Department of Energy and Environmental Protection (“CT DEEP”) of this action and has given them an opportunity to consult with EPA.

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, including dredged and/or fill material, from a point source into navigable waters by any person, except as authorized by a permit issued pursuant to Sections 402 or 404, 33 U.S.C. §§ 1342 or 1344, or as otherwise authorized under the CWA.

7. Each discharge of pollutants from a point source that is not authorized by such a permit or other authorization constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

8. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers of the U.S. Army Corps of Engineers (“Corps”), to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

9. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include, *inter alia*, “an individual, corporation, partnership, [or] association.”

10. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

11. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, dredged spoil, rock, sand, and agricultural waste.

12. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”

13. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

FACTUAL ALLEGATIONS

14. Respondent Silenex Associates, LLC is a limited liability company duly organized in the State of Connecticut with a principal office at 30 Old Indian Trail in Middlefield, Connecticut.

15. Since 2003, and at all times relevant to this case, Silenex Associates, LLC has owned and continuously used the property located at 186 Cherry Lane in Durham, Connecticut (“the Site”).

16. Prior to 2018, and as generally depicted on Exhibit 1, the Site contained approximately 16 acres of undisturbed vegetated forested and scrub/shrub freshwater wetlands.

17. The wetlands on the Site are adjacent to and directly abut a perennial stream, known as Fowley (or Fowler) Brook, that runs through the Site as well as various other unnamed intermittent streams on the Site that flow into Fowley Brook. *See* Exhibit 1.

18. Fowley Brook flows into Allyn Brook, a perennial tributary of the Coginchaug River which, in turn, flows into the Mattabeset River. Both the Coginchaug River and the Mattabeset

River are navigable in fact within the meaning of 33 C.F.R. Part 329.

19. The Mattabeset River flows into the Connecticut River. The Connecticut River is a traditionally navigable water designated by the Corps under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403. *See* Exhibit 2.

20. Between approximately 2018 and 2021, Respondent operated, directed, supervised and/or controlled the operation of an excavator and/or other earthmoving equipment to clear, stump, grub, and grade approximately 12 acres of vegetated wetlands on the Site. *See* Exhibit 3.

21. In addition, between approximately November 2020 and January 2021, Respondent operated, directed, supervised and/or controlled the operation of such excavator and/or other earthmoving equipment to widen, deepen and channelize approximately 1,500 linear feet of Fowley Brook; remove woody vegetation from its banks; and install stone armoring along approximately 900 linear feet of the channel. *Id.*

22. During the same time period, Respondent operated, directed, supervised and/or controlled the operation of such excavator and/or other earthmoving equipment to widen, deepen and channelize sections of the three additional unnamed tributaries on the Site totaling approximately 1,500 linear feet; to remove woody vegetation from the banks and adjacent wetlands of those tributaries; and deposited fill comprised of excavated soil and stone along portions of the tributary banks and adjacent wetlands. *Id.*

23. In doing so, Respondent engaged in the unauthorized “discharge” of “pollutants,” specifically “dredged” and/or “fill” material, by a “person” from a “point source” into “waters of the United States” in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

ALLEGED VIOLATIONS

24. Paragraphs 1 through 23 are repeated and the allegations therein are realleged.

25. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. §§ 1311(a) and 1362(5).

26. The materials Respondent, and/or persons acting on its behalf, caused to be discharged during performance of the activities referenced in Paragraphs 20 through 23, above, including, but not limited to, stumps, soil, sediments, stone, and other materials, constitute “dredged and/or fill” material as defined by 40 C.F.R. § 232.2 and are therefore “pollutant[s]” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

27. The movement of soils and placement of dredged and/or fill materials into the wetlands and other waterways on the Site constitute a “discharge of pollutants” under Section 502(12) of the Act, 33 U.S.C. § 1362(12).

28. The excavator and/or other earthmoving and/or mechanical equipment referenced in Paragraphs 20 through 23, above, are “point source[s]” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

29. The impacted wetlands, Fowley Brook, and the three unnamed tributaries on the Site are all “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated thereunder.

30. Fowley Brook is a relatively permanent tributary to other jurisdictional waters, as described Paragraphs 32 through 35, below, and is therefore a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated thereunder.

31. The three unnamed streams on the site are relatively permanent tributaries to Fowley Brook and are therefore also “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated

thereunder.

32. As indicated above, Fowley Brook flows into Allyn Brook. Allyn Brook is a relatively permanent tributary to the Coginchaug River, which then flows into the Mattabeset River.

33. Both the Mattabeset River and the Coginchaug River are navigable in fact and are therefore “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated thereunder.

34. Because Allyn Brook is a relatively permanent tributary to the Coginchaug River it is also a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated thereunder.

35. The Mattabeset River flows into the Connecticut River. The Connecticut River is a traditional navigable water designated by the Corps under Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and is therefore a “water of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated thereunder.

36. The impacted wetlands generally depicted on Exhibit 1 are adjacent to and directly abut Fowley Brook as well as other unnamed Site tributaries falling under the jurisdiction of the CWA.

37. In addition, prior to their alteration, the wetlands and tributaries on the Site exhibited flow characteristics and ecological functions that, when considered alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and/or biological integrity of other covered waters more readily understood as navigable, such as the Mattabeset, Coginchaug, and Connecticut Rivers. Specifically, the

wetlands, alone and in combination with similarly situated lands in the region, provided important ecological functions, including, but not limited to groundwater discharge and recharge, flood flow alteration, nutrient retention, nutrient export to lotic food webs, purification of surface water run-off prior to discharge into the Fowley Brook, and valuable plant and wildlife habitat.

38. Accordingly, for the reasons set forth in Paragraphs 36 and 37, the impacted wetlands on the Site are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and the regulations promulgated thereunder.

39. Respondent’s discharges of dredged and/or fill materials were not authorized by any permit issued by the Corps pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, nor were they authorized under by any other permit or provision of the CWA.

40. Respondent is therefore liable under the CWA for the unauthorized discharge of dredged and/or fill material into jurisdictional wetlands and other waters of the United States. 33 U.S.C. §§ 1311(a) and § 1344.

CONSENT AGREEMENT

41. EPA and Respondent agree that settlement of this cause of action is in the public interest and that entry of this CAFO without further litigation is an appropriate means of resolving this matter. Therefore, before taking any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the parties, it is hereby ordered and adjudged as follows:

Terms of Settlement

42. This CAFO shall be binding on Respondent and its successors, and assigns, or other entities or persons otherwise bound by law.

43. For purposes of this proceeding, Respondent admits the jurisdictional allegations contained in this CAFO and waives any defenses it might have as to jurisdiction and venue. Respondent neither admits nor denies the specific factual or other non-jurisdictional allegations contained herein and consents to the issuance of this CAFO and the conditions specified herein.

44. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law or any terms and conditions set forth in this CAFO, including any right of judicial review of this CAFO under the Administrative Procedure Act, 5 U.S.C. §§ 701-708 providing for judicial review of final agency action.

45. EPA proposes, and Respondent consents to, the assessment of a civil penalty of \$24,500 for all violations alleged in this CAFO through the effective date of the CAFO.

46. Respondent shall pay the total penalty of \$24,500 within 10 calendar days of the date this CAFO becomes final.

47. In agreeing to the penalty set forth in the previous Paragraph, EPA has taken into account the statutory penalty factors at Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3).

48. Respondent shall make the payment by cashier's or certified check, or by wire transfer. Respondent shall include the case name and docket number (*In the Matter of: Silenex Associates, LLC*; Docket No. CWA-01-2023-0033) on the face of the check or wire transfer confirmation. A check should be payable to "Treasurer, United States of America."

49. The payment shall be remitted as follows:

If check is remitted by regular U.S. mail:
U.S. EPA / Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077

St. Louis, Missouri 63197-9000

If check is remitted by any overnight commercial carrier:

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

If remitted by wire transfer: Any wire transfer must be sent directly to the Federal Reserve Bank in New York City using the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read “D 68010727
Environmental Protection Agency”

In addition, at the time of payment, Respondent shall also forward notice of payment of the civil penalty as well as copies of the payment check or payment receipt either via email or in hard copy to:

Wanda Santiago, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, Massachusetts 02109-3912
R1_Hearing_Clerk_Filings@epa.gov

and

Laura Beveridge, Senior Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square (MC 4-WO)
Boston, Massachusetts 02109-3912
beveridge.laura@epa.gov

50. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), a failure by Respondent to pay the penalty assessed by this CAFO in full by its due date shall subject Respondent to a civil action to collect the assessed penalty, plus interest at the prevailing rates,

from the date this CAFO becomes final. The rate of interest assessed shall be at the rate set forth in 31 C.F.R. § 901.9(b), promulgated under 31 U.S.C. § 3717. Any person who fails to pay on a timely basis the amount of an assessed penalty shall be required to pay, in addition to such amount and interest, attorney's fees, costs for collection proceedings, and a quarterly non-penalty payment for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent of the aggregate amount of such person's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

PUBLIC NOTICE

51. Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), provides that, prior to issuing an order assessing a penalty under Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA must provide public notice of, and reasonable opportunity to comment on, the proposed issuance of such order. EPA will satisfy this requirement for notice by providing public notice of, and reasonable opportunity to comment on, this Consent Agreement prior to the issuance of the Final Order.

GENERAL PROVISIONS

52. The civil penalty provided under this CAFO, and any interest, nonpayment penalties, and charges described in this CAFO, shall represent penalties assessed by EPA within the meaning of 26 U.S.C. § 162(f) and are not tax deductible for purposes of federal, state, or local law. Accordingly, Respondent agrees to treat all payments made pursuant to this CAFO as penalties within the meaning of 26 C.F.R. § 1.162-21, and further agree not to use those payments in any way as, or in furtherance of, a tax deduction under federal, state, or local law.

53. Issuance of this CAFO constitutes a final settlement by EPA of all claims for judicial and administrative civil penalties pursuant to Sections 309(d) and (g) of the Act, 33 U.S.C. §§ 1319(d) and (g), for all past violations of the CWA specifically alleged herein.

54. Issuance of this CAFO does not constitute a settlement by EPA of its right to enforce the substantive legal requirements underlying this administrative penalty assessment, whether administratively or judicially pursuant to Sections 309(a), (b) and (c) of the CWA, 33 U.S.C. §§ 1319(a), (b) and (c), or Section 504 of the Act, 33 U.S.C. § 1364.

55. This CAFO is not a permit, and Respondent's liability under the CWA or any other federal, state, or local law or regulation is not excused by compliance with the terms of this CAFO.

56. Payment of the penalty pursuant to this CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged herein through the effective date of this CAFO.

57. This CAFO in no way relieves Respondent or its employees of any criminal liability, and EPA reserves all its other criminal and civil enforcement authorities, including the authority to seek injunctive relief and the authority to undertake any action against Respondent in response to conditions which may present an imminent and substantial endangerment to the public health, welfare, or the environment.

58. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO, or by virtue of any other violations by Respondent of the statutes and regulations upon which this CAFO is based, or for Respondent's violation of any applicable provision of law.

59. This Consent Order in no way affects the rights of EPA and/or the United States against any person as defined in the CWA other than Respondent Silenex Associates, LLC. All rights and claims against any person other than the afore-mentioned Respondent are specifically reserved.

60. The terms, conditions, and requirements of this CAFO may not be modified or amended except upon the written agreement of all parties, and approval of the Regional Administrator or his or her properly authorized delegee.

61. Except as described in Paragraph 50, above, the parties shall bear their own costs and fees in this action, including attorney's fees, and specifically waive any right to recover such costs from the other party pursuant to the Equal Access to Justice Act, 5 U.S.C § 504, or other applicable laws.

62. Respondent's obligations under the CAFO shall end when it has paid in full the scheduled civil penalty, and any interest or nonpayment penalties, and submitted the documentation required by this CAFO.

63. This CAFO shall become effective upon the date of the Final Order.

64. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

65. Respondent agrees to acceptance of (a) EPA's digital or an original signature on this CAFO and (b) EPA's service of the fully executed CAFO by regular mail or electronic mail. EPA agrees to acceptance of the Respondent's digital or original signatures on this CAFO.

FOR SILENEX ASSOCIATES, LLC

Date: 18 May 2023

Name: Nicholas C Xercher

Title: President

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: _____

James Chow, Acting Director
Environmental Compliance and Assurance Division
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109

FINAL ORDER

In accordance with 40 C.F.R. § 22.18(b) of the United States Environmental Protection Agency’s Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (“CROP”) found at 40 C.F.R. Part 22, the parties to the above-captioned matter have forwarded an executed Consent Agreement to the undersigned for final approval. In accordance with 40 C.F.R. § 22.13(b) of the CROP, the parties have simultaneously commenced and settled the above-captioned action. Pursuant to Section 311 of the CWA, 33 U.S.C. § 1321, the Consent Agreement and this Final Order resolve the Clean Water Act violations described in the Consent Agreement.

As required by Section 311(b)(6)(C)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(i), EPA has provided the public a thirty-day opportunity for public notice and comment before issuance of this Final Order. In addition, as required by the CROP at 40 C.F.R. § 22.45(b)(1), this Final Order is being issued more than forty days after issuance of the public notice.

The foregoing Consent Agreement is hereby ratified and incorporated by reference into this Final Order. **Respondent Silenex Associates, LLC** is hereby ordered to comply with the terms of the above Consent Agreement, which will become final 30 days from the date it is signed by the undersigned unless a petition to set aside the Final Order is filed by a commenter pursuant to Section 311(b)(6)(C)(iii) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(iii), and the CROP at 40 C.F.R. § 22.45(c)(4).

Date: _____

LeAnn Jensen, Regional Judicial Officer
U.S. Environmental Protection Agency, Region 1