

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

June 16, 2020
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Received by
EPA Region VIII
Hearing Clerk

In the Matter of:)	
)	
)	ADMINISTRATIVE ORDER
Mandan, Hidatsa, Arikara Nation)	ON CONSENT
404 Frontage Road)	
New Town, ND 58763)	
)	
)	Docket No. CWA-08-2020-0015
)	
Lakeview Aggregates Facility)	
)	
Respondent.)	

I. INTRODUCTION

1. This Administrative Order on Consent (Consent Order) is entered into voluntarily by the U.S. Environmental Protection Agency (EPA), and the Mandan, Hidatsa, and Arikara Nation (MHA Nation or Respondent), to carry out the goals of the Clean Water Act (CWA or Act), 33 U.S.C. §§ 1251-1387, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

II. STATUTORY AUTHORITY

2. This Consent Order is issued under section 309(a) of the CWA, 33 U.S.C. § 1319(a). The authority to issue this Consent Order has been properly delegated to the undersigned EPA official.

III. PARTIES BOUND

3. This Consent Order shall apply to and be binding upon the EPA and the Respondent and Respondent’s agents, successors, and assigns. Each undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to bind the Respondent to the terms and conditions of this Consent Order. No change in the ownership or operation of the Respondent shall alter its responsibilities under this Consent Order unless the EPA, the Respondent, and the transferee agree in writing to allow the transferee to assume such responsibilities. Additionally, no later than 30 calendar days prior to such transfer, the Respondent shall notify the EPA of the transfer at the addresses specified in Paragraph 52 of this Consent Order.

IV. FACTUAL AND LEGAL ALLEGATIONS

4. The MHA Nation is located on the Fort Berthold Indian Reservation in central North Dakota.
5. The Four Bears Segment is one of six segments that comprise the MHA Nation.
6. The Four Bears Economic Development Corporation (FBEDC), is a MHA Nation registered non-profit corporation chartered under the MHA Nation Business Corporation Act, owned directly or indirectly by the Respondent, and operated and/or controlled by former officials of the Four Bears Segment.
7. Bird Industries, Inc. (Bird Industries), is a North Dakota corporation created on April 24, 2012.
8. The FBEDC entered into a joint venture with Bird Industries on approximately June 17, 2015, to form a North Dakota LLC, Lakeview Aggregates, LLC, (Lakeview) to mine and market gravel and aggregate at the Lakeview Aggregates Facility (Facility), located within the exterior boundaries of the Fort Berthold Reservation, at 207 Highway 23, New Town, North Dakota.
9. On September 2, 2015, the Respondent approved a Gravel and Aggregate Lease with the FBEDC for the Facility.
10. Lakeview operated the aggregate and concrete activities at the Facility.
11. The North Dakota Secretary of State's website states that, as of May 30, 2018, Lakeview was involuntarily cancelled, dissolved, terminated, expired or revoked.
12. The North Dakota Secretary of State's website states that as of May 11, 2015, Bird Industries was voluntarily inactive and on May 19, 2015 filed articles of dissolution.
13. The Respondent is a "municipality" as defined in section 502(4) of the Act, and is therefore a "person" as defined in section 502(5) of the Act, 33 U.S.C. § 1362(4)-(5), and 40 C.F.R. § 122.2.
14. The United States owns the land underlying the Facility in trust for the benefit of the Respondent.
15. The Facility is located in Indian country, as defined by 18 U.S.C. § 1151.
16. The Facility encompasses approximately 31 acres.
17. Aggregate and concrete activities at the Facility began in 2015.

18. Lakeview engaged in at least one “industrial activity” at the Facility, as defined in 40 C.F.R. § 122.26(b)(14).
19. The EPA alleges that storm water runoff, snow melt runoff, and surface runoff leave the Facility and flow into the directly adjacent Lake Sakakawea, which is part of the Missouri River, which is a navigable-in-fact waterway, within the meaning of section 502(7) of the Act, 33 U.S.C § 1362(7).
20. The runoff and drainage from the Facility are “storm water” as defined in 40 C.F.R. § 122.26(b)(13).
21. According to the EPA’s December 2006, “Mineral Mining and Processing Facilities,” EPA-833-F-06-025, https://www3.epa.gov/npdes/pubs/sector_j_mineralmining.pdf (last visited November 2, 2018), sand and gravel operations are a type of mineral mining and processing facility, and pollutants associated with this type of facility include total suspended solids (TSS), total dissolved solids, turbidity, pH, dust, diesel/gas fuel, oil, solvents, heavy metals, acid/alkaline wastes, arsenic, lead, cadmium, chromium, benzene, polycyclic aromatic hydrocarbons, tetrachloroethylene, trichloroacetic acid, lime, solvents, nitrogen, and phosphorus.
22. According to the EPA’s December 2006, “Industrial Storm Water Fact Sheet Series – Sector E: Glass, Clay, Cement, Concrete and Gypsum Product Manufacturing Facilities,” EPA-833-F-06-020, https://www3.epa.gov/npdes/pubs/sector_e_glass.pdf (last visited November 2, 2018), pollutants associated with concrete facilities include TSS, pH, chemical oxygen demand, potassium sulfate, oil and grease, lead, iron, zinc, aluminum, arsenic, cadmium, chromium, benzene, gas/diesel fuel, and fuel additives.
23. The storm water discharged from the Facility contains “pollutants” within the meaning of section 502(6) of the CWA, and 33 U.S.C. § 1362(6).
24. The EPA alleges that the storm water discharge from the Facility is a “discharge of a pollutant” as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12), and 40 C.F.R. § 122.2.
25. The EPA alleges that the storm water discharge from the Facility is a discharge from a “point source” as defined in section 502(14) of the Act, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.
26. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of any pollutant by any person into navigable waters, unless authorized by certain other provisions of the CWA, including section 402 of the CWA, 33 U.S.C. § 1342.
27. Section 402 of the CWA, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA or states with approved

NPDES programs may issue permits authorizing discharges into navigable waters, subject to specific terms and conditions.

28. More specifically, section 402(p) of the Act, 33 U.S.C. § 1342(p), establishes that NPDES permits may be issued to authorize discharges of storm water associated with industrial activities.
29. Any person who discharges storm water associated with industrial activity to waters of the United States is required to seek NPDES permit coverage and to comply with the permit. 40 C.F.R. § 122.26(c).
30. The EPA directly implements the NPDES program in Indian country in Region 8.
31. Effective June 4, 2015, the EPA issued a NPDES Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity (MSGP). The MSGP authorizes discharges of storm water associated with industrial activities, if done in compliance with its terms and conditions. Dischargers may apply to the EPA for authorization to discharge under the MSGP for coverage.
32. Part 1.2 of the MSGP describes how to obtain authorization under the MSGP.
33. Part 5 of the MSGP describes the requirement to develop a Storm Water Pollution Prevention Plan (SWPPP) prior to submitting the Notice of Intent (NOI).
34. On August 24 and 25, 2017, inspectors from the EPA conducted a NPDES storm water industrial inspection of the Facility from the public right-of-way.
35. At the time of the EPA's August 24 and 25, 2017 inspection, Lakeview had not sought or obtained authorization from the EPA to discharge storm water from the Facility under any CWA permit.
36. During the EPA's inspection, the inspectors observed lack of any storm water control measures at the Facility, the Facility's slope in a general direction towards Lake Sakakawea, and what appeared to be deposited sediment next to the lake, which indicated that storm water discharges from the Facility have flowed directly into Lake Sakakawea.
37. The EPA alleges that Lakeview may have discharged pollutants from the Facility without authorization by the MSGP, any other applicable general permit, or any individual permit, in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).
38. On April 17, 2019, Respondent provided the EPA with a document titled "Lakeview Aggregate-General Overview October 2018-April 2019". This document outlined the Respondent's completed and planned activities at the Facility, including a completed moratorium on further mining or industrial use of the area, a partially completed engineering analysis of slopes and potential sloughs, ongoing clean up of trash and debris at the Facility, and planned installation of physical barriers as needed such as berms.

39. On June 14, 2019, inspectors from the EPA conducted a NPDES storm water construction inspection of the Facility accompanied by MHA Nation representatives.
40. At the time of the EPA's June 14, 2019 inspection, Respondent had neither sought nor obtained authorization from the EPA to discharge storm water from the facility under any CWA permit.
41. During the EPA's inspection, the inspectors observed unstabilized soils at the Facility, lack of satisfactory storm water control measures at the Facility, the Facility's southeast slope in a general direction towards Lake Sakakawea, and noted that the eastern earthen berm was next to Lake Sakakawea. Due to the closeness of the earthen berm to Lake Sakakawea and the steep slope of the earthen berm towards the lake, some of the sediment of the earthen berm had washed down into Lake Sakakawea during storm water discharges.
42. During the inspection MHA Nation representatives indicated that aggregate and concrete activities ceased at the facility in 2017. However, the Facility was left unstabilized with several stockpiles throughout the Facility.
43. On June 13, 2019, MHA Nation representatives provided the EPA inspectors with a copy of a SWPPP for the Facility and indicated that they were in the process of getting a Construction Stormwater Permit for the Facility.
44. Discharges associated with industrial activity include discharges associated with construction activity that disturbs at least five acres of total land area. Construction activity includes clearing, grading, and excavating. 40 C.F.R. § 122.26(b)(14)(x).
45. Effective February 16, 2017, the EPA issued a general permit (2017 Permit), authorizing discharges of storm water associated with construction activities in Indian country in North Dakota, if done in compliance with the terms and conditions of that permit. Dischargers may apply for authorization to discharge under the 2017 Permit by submitting a notice of intent (NOI) for coverage to the EPA. The 2017 Permit is still in effect. See <https://www.epa.gov/npdes/epas-2017-construction-general-permit-cgp-and-related-documents> (last visited April 6, 2018); see also 82 Fed. Reg. 6523-6540 (January 19, 2017).
46. Part 1.4 of the 2012 Permit states, "To be covered under this Permit, you must submit to the EPA a complete and accurate NOI prior to commencing construction activities. The NOI certifies to the EPA that you are eligible for coverage according to Part 1.1 and 1.2, and provides information on your construction operation and discharge."
47. Part 1.4 of the 2017 Permit states, "All 'operators' (as defined in Appendix A) associated with your construction site, who meet the Part 1.1 eligibility requirements, and who seek

coverage under this permit, must submit to the EPA a complete and accurate NOI in accordance with the deadlines in Table 1 prior to commencing construction activities.”

48. On July 25, 2019 the MHA Nation submitted a NOI for the Facility to be covered under the 2017 Permit. The Construction Permit for the Facility became effective on August 8, 2019. The permit number is NDR10I01I.
49. On August 1, 2019 the EPA provided a copy of the inspection report for the June 14, 2019 inspection to the MHA Nation. The inspection report identified findings and deficiencies found in the SWPPP and at the Facility.

V. TERMS AND CONDITIONS

50. The Respondent shall:
 - a) comply fully with all requirements of the 2017 Construction General Permit including, but not limited to, all requirements relating to developing and implementing a SWPPP, implementing all best management practices (“BMPs”) required by the 2017 Construction General Permit and/or the SWPPP, conducting inspections, implementing corrective actions and submitting a Notice of Termination;
 - b) No later than 30 calendar days after the effective date of this Consent Order, Respondent shall submit to the EPA a SWPPP that fully complies with the requirements for SWPPPs set forth in the 2017 Construction General Permit;
 - c) No later than 45 calendar days after the effective date of this Consent Order, Respondent shall provide photographic documentation of each of the BMPs installed at the Facility and the date of each BMP installation;
 - d) After the effective date of this Consent Order, the Respondent shall submit quarterly reports to the EPA that contain copies of all inspection reports required pursuant to the Construction General Permit prepared during the quarter and written and photographic documentation that all aspects of the SWPPP and Construction General Permit are being implemented, including, but not limited to: (1) erosion, sediment and other controls; (2) good housekeeping practices; (3) storm water management; and (4) BMPs. The first report is due October 15, 2020, and shall cover the time period from July 1, 2020 through September 30, 2020. Subsequent reports are due on January 15, 2021 (covering October 1, 2020 – December 31, 2020), April 15, 2021 (covering January 1, 2021 – March 31, 2021), July 15, 2021 (covering April 1, 2021 – June 30, 2021). The quarterly submissions shall continue for the life of the construction project or until the Facility has reached final stabilization, as defined in the 2017 Construction General Permit and confirmed in writing by EPA.

- a. The inspection reports must include:
 - i. The inspection date;
 - ii. Names and titles of personnel making the inspection;
 - iii. A summary of your inspection findings, covering at a minimum the observations you made in accordance with Part 4.6 of the 2017 Construction General Permit, including any necessary maintenance or corrective actions;
 - iv. If you are inspecting your facility at the frequency specified in Part 4.2.2, Part 4.3, or Part 4.4.1b, and you conducted an inspection because of rainfall measuring 0.25 inches or greater, you must include the applicable rain gauge or weather station readings that triggered the inspection; and
 - v. If you determined that it is unsafe to inspect a portion of your facility, you must describe the reason you found it to be unsafe and specify the locations to which this condition applies.

51. All reports and information required by this Consent Order shall include the following certification statement, signed and dated by an individual meeting the definition in 40 C.F.R § 122.22(a)(3) of a principal executive officer or ranking elected official:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

52. The Respondent shall send all written notices, documentation, and reports required by this Consent Order to the following:

Emilio Llamozas (8ENF-W-NW)
U.S. EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-1129

53. Any failure to comply with the requirements of this Consent Order shall constitute a violation of this Consent Order and may subject the Respondent to penalties as provided under the Act. 33 U.S.C. § 1319.

54. Without any admission of liability, the Respondent consents to issuance of this Consent Order and agrees to abide by its terms. The Respondent neither admits nor denies the FACTUAL AND LEGAL ALLEGATIONS. Respondent reserves the right to defend itself in any action to enforce this Consent Order. Nothing in this Consent Order may be construed to diminish the treaty rights of or the United States' trust responsibility to the Mandan, Hidatsa, and Arikara Nation.
55. Subject to the provisions of paragraph 54, the Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review the Respondent may have concerning any issue of fact or law set forth in this Consent Order including, but not limited to, any right of judicial review of the FACTUAL AND LEGAL ALLEGATIONS under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, providing for judicial review of final agency action. The Respondent further agrees not to challenge the jurisdiction of the EPA in any proceeding to enforce this Consent Order or in any action taken pursuant to this Consent Order.
56. This Order does not constitute a waiver or election by the EPA to forego any civil or criminal action to seek penalties, fines, or other relief as it may deem appropriate under the Act. Section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes the assessment of civil penalties of up to \$52,414 (as adjusted for inflation by 40 C.F.R. part 19) per day for each violation of the Act. Section 309(c) of the Act, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the Act.
57. Nothing in this Consent Order shall be construed to prevent the EPA from instituting further action under section 309 of the Act for the violations cited in this Consent Order or to relieve the Respondent from responsibilities, liabilities, or penalties pursuant to any applicable federal, state, or local law or regulation.
58. If EPA finds that any information in this Consent Order provided by the Respondent was materially false or inaccurate at the time such information was provided to EPA, EPA reserves any and all of its legal and equitable rights.
59. This Consent Order shall be effective on the date it is filed by the hearing clerk.
60. The EPA and the Respondent consent to service of the Consent Order by e-mail at the following valid e-mail addresses: agee.erin@epa.gov (for Complainant), and jfredericks@jf3law.com (for Respondent).

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Complainant

Date: 06/16/2020

By: *Suzanne J. Bohan*
Suzanne J. Bohan, Director
Enforcement and Compliance Assurance Division

MANDAN, HIDATSA, AND ARIKARA NATION
Respondent

Date: 6/12/20

By: Mark A Fox
Mark Fox, Chairman