

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
The City of Blaine,) **Docket No. CWA-05-2016-0019**
)
Respondent.)

COMPLAINANT PREHEARING EXCHANGE

Complainant hereby files its Prehearing Exchange for this civil administrative action pursuant to the Court's Prehearing Order, dated November 29, 2016.

I. Prospective Fact Witnesses

- A. Andrew Beaudet
Regulatory Branch
U.S. Army Corps of Engineers
180 East Fifth Street, Suite 700
St. Paul, Minnesota 55101
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andrew.d.beaudet@usace.army.mil
- B. Kerryann Weaver, Environmental Scientist
Pesticides & Toxics Compliance Section
Chemicals Management Branch
Land and Chemicals Division
Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard (LC-8J)
Chicago, IL 60604-3590
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Mr. Beaudet and Ms. Weaver will testify to their respective educational backgrounds, employment experiences, the factual allegations of the complaint, and the proposed civil penalty, including but not limited to the following.

1. This is an administrative action instituted by Region 5 of the United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 309(g) of the Clean Water Act, ("the Act"), 33 U.S.C. § 1319(g), and 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 at 40 C.F.R. Part 22. The

Administrator of U.S. EPA has delegated the authority to take this action to the Regional Administrator of Region 5 who has delegated this authority to the Director of the Water Division.

2. The Respondent in this matter is the City of Blaine, Blaine, Minnesota.

Aquatore Park

3. On or about July and August of 2014, Respondent was the owner of record for real property located at Aquatore Park, (Sec. 12, T.31N., R 23W., Anoka County, Minnesota (Latitude 45.13831° N, Longitude -93.24151° W)) in Blaine, Minnesota, ("Aquatore Park").

4. On or about July and August of 2014, Respondent, or its contractors, added 4,520 cubic yards of solid waste or municipal waste or rock or sand or cellar dirt or fill material from bulldozers and backhoes, into 1.22 acres of water on Aquatore Park.

5. Respondent was a city.

6. Therefore, Respondent was a municipality as defined at section 502(4) of the Act, 33 U.S.C. § 1362(4).

7. Therefore, the Respondent was a "person" as defined at section 502(6) of the Act, 33 U.S.C. § 1362(5).

8. Respondent added 4,520 cubic yards of solid waste or municipal waste or rock or sand or cellar dirt or fill material into 1.22 acres of waters at Aquatore Park.

9. Therefore, Respondent "discharged" into waters at Aquatore Park as defined at section 502(12) of the Act, 33 U.S.C. § 1362(12).

10. Respondent added 4,520 cubic yards of solid waste or municipal waste or rock or sand or cellar dirt or fill material into waters at Aquatore Park.

11. Therefore, Respondent discharged "pollutants" into waters at Aquatore Park as defined at section 502(6) of the Act, 33 U.S.C. § 1362(6).

12. Respondent added 4,520 cubic yards of solid waste or municipal waste or rock or sand or cellar dirt or fill material into waters at Aquatore Park and used a bulldozer and backhoe, also known as rolling stock.

13. Therefore, Respondent discharged "pollutants" from a "point source" into waters at Aquatore Park as defined at section 502(14) of the Act, 33 U.S.C. § 1362(14).

14. The 1.22 acres of water at Aquatore Park 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.

15. Therefore, the 1.22 acres of waters at Aquatore Park were “wetlands” as defined at 40 C.F.R. § 232.2.

16. The wetlands were next to, and flowed into, the waters of Springbrook Creek (also known as County Ditch 17).

17. The waters of Springbrook Creek flowed into the waters of the Mississippi River.

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

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

20. The waters of Springbrook Creek were a “tributary” to the waters of the Mississippi River.

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

22. The waters of the wetlands were “adjacent” to and a “tributary” of Springbrook Creek as defined at 40 C.F.R. § 232.2.

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

24. Therefore, the wetlands, Springbrook Creek, and the Mississippi River, were “navigable waters” as defined at section 502(7) of the Act, 33 U.S.C. § 1362(7).

25. 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).

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

27. 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.

The Lexington Athletic Complex

28. On or about July and August of 2014, Respondent was the owner of record for 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”).

29. On or about July and August of 2014, Respondent, or its contractors, 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.

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

31. 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).

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

33. 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).

34. 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.

35. 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).

36. 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.

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

38. 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.

39. 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.

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

41. 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.

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

43. The waters of Rice Creek flowed into the waters of the Mississippi River
44. The Mississippi River was used in interstate and foreign commerce.
45. Therefore, the Mississippi River was “waters of the United States” as defined at 40 C.F.R. § 232.2.
46. The waters of Rice Creek were a “tributary” to the waters of the Mississippi River.
47. Therefore, the waters of Rice Creek were “waters of the United States” as defined at 40 C.F.R. § 232.2.
48. The waters of Anoka County Ditch No. 53-62 Main Branch were a “tributary” to the waters of Rice Creek.
49. 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.
50. 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.
51. 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.
52. 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.
53. 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.
54. 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.
55. 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.
56. The waters of the private ditch were a “tributary” to the waters of Anoka County Ditch No. 53-62, Branch 2, Lateral Pebbles.
57. Therefore, the waters of the private ditch were “waters of the United States” as defined at 40 C.F.R. § 232.2.
58. The waters of the wetlands were next to, and flowed into, the waters of the private ditch.

59. 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.

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

61. 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).

62. 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).

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

64. 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.

II. Documents and Exhibit

- A. U.S. Army Corps of Engineers, St. Paul District, (“Corps”), documents for Aquatore Ballpark. (Complainant Exhibit No. 1, Bate Stamp Nos. 1-16).
- B. James Hafner E-Mail, dated Tuesday, December 17, 2013, to Andrew Beaudet. (Complainant Exhibit No. 2, Bate Stamp Nos. 17-18).
- C. Jim Hafner, City of Blaine, Memorandum and Permit Application for Ball Field Project at Aquatore Park In Blaine, Minnesota, dated December 30, 2013. (Complainant Exhibit No. 3, Bate Stamp Nos. 19-40).
- D. Corps Preliminary Determination of City of Blaine, Memorandum and Permit Application for Ball Field Project at Aquatore Park In Blaine, Minnesota, dated January 2, 2014. (Complainant Exhibit No. 4, Bate Stamp Nos. 41-44).
- E. Minnesota Wetland Conservation Act Technical Evaluation Panel Findings Report, dated January 16, 2014, for Aquatore Park. (Complainant Exhibit No. 5, Bate Stamp Nos. 45-46).
- F. Andrew Beaudet, Corps, Conversation Record, dated January 16, 2014, with Rebecca, Tim, Dennis, Gary, and Jim, City of Blaine regarding its Permit Application for Aquatore. (Complainant Exhibit No. 6, Bate Stamp Nos. 47-48).

- G. Corps Letter, dated February 11, 2014, to Jim Hafner, City of Blaine, regarding Permit Application for Aquatore Park. (Complainant Exhibit No. 7, Bate Stamp Nos. 49-52).
- H. City of Blaine Response, dated February 17, 2014, to Corps Letter, dated February 11, 2014, to Jim Hafner, City of Blaine, regarding Permit Application for Aquatore Park. (Complainant Exhibit No. 8, Bate Stamp Nos. 53-66).
- I. Andrew Beaudet, Corps, E-Mail, dated March 10, 2014, to James Hafner, Rebecca Haug, Dennis Rodacker and Aaron Diehl, City of Blaine, regarding its Permit Application for Aquatore. (Complainant Exhibit No. 9, Bate Stamp Nos. 67-68).
- J. James Hafner, City of Blaine, E-Mail, dated March 14, 2014, to Andrew Beaudet, Corps, regarding its Permit Application for Aquatore. (Complainant Exhibit No. 10, Bate Stamp Nos. 69-72).
- K. Andrew Beaudet, Corps, E-Mail, dated June 9, 2014, to James Hafner, City of Blaine, regarding its Permit Application for Aquatore. (Complainant Exhibit No. 11, Bate Stamp Nos. 73-74).
- L. MaryJo Flemming, State of Minnesota, E-Mail, dated June 25, 2014, to Dennis Rodacker, BWSR, Andrew Beaudet, Corps, and T. Kelly at the Coon Creek Organization, regarding Wetland Bank Withdrawal Credits for Aquatore. (Complainant Exhibit No. 12, Bate Stamp Nos. 75-78).
- M. Corps Letter, dated July 16, 2014, to Jim Hafner, City of Blaine, for Aquatore. (Complainant Exhibit No. 13, Bate Stamp Nos. 79-84).
- N. Corps Aerial Site Photograph, undated, and On-Site Photographs, post July 16, 2014, of Aquatore Park. (Complainant Exhibit No. 14, Bate Stamp Nos. 85-90).
- O. Andrew Beaudet, Corps, E-Mail, dated July 16, 2014, to James Hafner, City of Blaine, regarding Letters. (Complainant Exhibit No. 15, Bate Stamp Nos. 91-92).
- P. Rebecca Haug, Coon Creek Watershed District, E-Mail, dated July 18, 2014, to Aaron Diehl, Andrew Beaudet, Corps, and Dennis Rodacker, State of Minnesota, regarding WCA's Notice of Decision for Aquatore. (Complainant Exhibit No. 16, Bate Stamp Nos. 93-94).
- Q. Robert Therres, Public Services Manager, City of Blaine, Letter, dated August 5, 2014, to Andrew Beaudet, Corps, regarding its Response Letter, dated July 16, 2014. (Complainant Exhibit No. 17, Bate Stamp Nos. 95-98).
- R. Corps Photographs of Aquatore Park, dated August 13, 2014. (Complainant Exhibit No. 18, Bate Stamp Nos. 99-104).

- S. Corps Approved Jurisdictional Determination Form, dated August 16, 2014, for Aquatore Park. (Complainant Exhibit No. 19, Bate Stamp Nos. 105-112).
- T. Andrew Beaudet, Corps, E-Mail, dated April 10, 2015, to Kerryann Weaver, U.S. EPA, with Photographs for Aquatore. (Complainant Exhibit No. 20, Bate Stamp Nos. 113-122).
- U. U.S. EPA Request for Information, dated April 9, 2015, to Clark Arneson, City Manager, The City of Blaine, for Aquatore Park and the Lexington Athletic Complex, in Blaine, Minnesota. (Complainant Exhibit No. 21, Bate Stamp Nos. 123-134).
- V. The City of Blaine Response, dated April 27, 2015, to U.S. EPA Request for Information, dated April 9, 2015, to Clark Arneson, City Manager, The City of Blaine, for Aquatore Park and the Lexington Athletic Complex, in Blaine, Minnesota. (Complainant Exhibit No. 22, Bate Stamp Nos. 135-640).

III. Desired or Required Hearing Location

Complainant prefers the Court hold the hearing in Chicago, Illinois, as provided by sections 22.21(d) and 22.19(d) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("the Consolidated Rules"), 40 C.F.R. §§ 22.21(d) and 22.19(d).

However, if the Court chooses to hold the hearing at a suitable location in the county where the Respondent resides (Anoka County), or conducts the business which the hearing concerns (Anoka County), Complainant does not object.

Complainant requests approximately six (6) hours to complete its direct-examination of its two witnesses for its case-in-chief.

IV. Factual and/or Legal Bases for Allegations Denied by Respondent

Respondent's Answer, dated August 30, 2016, denied 55 of the Complaint's 64 allegations, which essentially denied that 1) on or about July and August of 2014, Respondent, or its contractors, added 4,520 cubic yards of solid waste or municipal waste or rock or sand or cellar dirt or fill material from bulldozers and backhoes, into 1.22 acres of waters of the U.S. at Aquatore Park, without a permit; and, 2) on or about July and August of 2014, Respondent, or its contractors, 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 of the U.S. at the Lexington Athletic Complex, without a permit. This Prehearing Exchange cites Complainant's witness testimony and documentary evidence, including many City of Blaine admissions, which demonstrate the specific allegations of the Complaint.

V. The Calculation of the Proposed Civil Penalty

In determining the amount of any penalty assessed under this Section 309(g) of the Clean Water Act, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. 33 U.S.C. § 1319(g).

Complainant proposed its \$90,000.00 civil penalty pursuant to the alleged facts and the civil penalty factors of Section 309 of the Clean Water Act, 33 U.S.C. § 1319(g).

Complainant Proposed a \$45,000.00 Civil Penalty for the Violations Alleged at Aquatore Park

In assessing the nature, circumstances, extent and gravity of the violation under Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g), we considered the harm to human health, the extent and type of aquatic environment impacted, the severity of the impacts to the aquatic environment, the uniqueness/sensitivity of the affected resources, any secondary or off-site impacts, and the duration of the violation to determine an appropriate civil penalty figure.

The discharge of fill material has likely not adversely impacted drinking water supplies nor is it likely that the fill endangers the health or livelihood of persons by virtue of the chemical nature of the discharge. However, the impacted area is in an urban area of Minnesota adjacent to a Clean Water Act Section 303(d) listed water that has an aquatic recreation impairment for *E. coli*. As such, the loss of wetland acres and function (i.e. reducing storm water and capturing polluted runoff) from the violation could potentially exacerbate the existing recreation based impairment.

The total amount of wetland impact is approximately 1.22 acres of forested and scrub shrub wetland. The amount of wetland impacted is above a threshold which requires authorization under a St. Paul District Army Corps of Engineers Letter of Permission (LOP) as opposed to a General Permit. Activities authorized under LOPs require the Army Corps of Engineers to consult with state fish and wildlife agencies and the U.S. Fish and Wildlife Service and require a public interest review, with a 15-day public notice posted on the Army Corps of Engineers website, as opposed to General Permits which cover a range of activities determined by the Army Corps of Engineers to be substantially similar in nature and causing only minimal individual and cumulative environmental impacts.

The U.S. Fish and Wildlife's National Wetlands Inventory (NWI) map indicates the presence of freshwater forested/shrub wetlands, specifically palustrine forested broad-leaved deciduous and palustrine scrub-shrub temporary flooded (PFO1/SS1A) in the impact area. According to the most recent National Wetlands Report by the US Fish and Wildlife Service, forested wetlands experienced the greatest decline of all wetland types, with a loss of 1.2 million acres (2.4 percent change). Forested wetlands are important because they contain a number of diverse habitats and support high numbers of plant and animal species. They filter nutrients (especially nitrogen and

phosphorus), wastes, and sediments from water flowing within them. Forested wetlands also provide flood control by stabilizing soils with their extensive root systems and absorbing excessive water. Finally, forested uplands and wetlands sequester carbon dioxide and act as a sink for carbon. The impacted wetlands are adjacent to a Clean Water Act Section 303(d) listed water that is impaired for aquatic biological indicators as well as an aquatic recreation impairment for *E. coli*. As such, the loss of wetland acres and function potentially exacerbates the existing impairments as these wetlands were part of a buffer between the stream and the existing infrastructure (i.e. parking lots, hockey rink, curling arena, roadways).

The entire project area was completely denuded of vegetation and soil during initial construction. Soil disturbance in wetland areas adjacent to streams can increase the likelihood of sedimentation in the streams from precipitation runoff and invites the emergence of invasive species which out-compete native vegetative communities. However, the secondary or off-site impacts appear to be minor as it was assumed that Best Management Practices (BMPs) were likely in place at the time of impact but that can't be confirmed. At the time of the site visit by EPA staff and the St. Paul District Corps on April 28, 2015, BMPs appeared to be in place at the Site.

On May 23 and 27, 2014, tree stumps were removed from the site by the City's subcontractor, Forest Lake Contracting. Fill material was imported to the site throughout the period of June 23, 2014, to October 24, 2014. The violation was discovered by St. Paul District Corps office on July 14, 2014, and they issued a Notice of Violation on July 16, 2014, requesting that the City provide additional information and advised the City to "not perform any work that requires Department of the Army authorization without obtaining that authorization." Based on review of Google Map aerial imagery, the City of Blaine appears to have completed construction of the baseball field by the Spring of 2016.

With respect to Respondent and the alleged violation, we considered its ability to pay, prior history of similar violations, the degree of culpability, and any economic benefit resulting from the alleged violation as penalty factors.

The City of Blaine is an organization of state government under the laws of the State of Minnesota and has several sources of revenue to pay the penalty. Inability to pay was not considered a factor and the City did not raise this as an issue.

The City of Blaine has a prior history of noncompliance with previous and existing Clean Water Act Section 404 permits as per EPA conversations with the St. Paul District Army Corps of Engineers Regulatory Staff. This violation also occurred concurrently with unauthorized impacts at another City owned site, the Lexington Athletic Complex.

The City of Blaine had complete ownership of the site, and complete and direct control over all activities at the site, and any violations that occurred at the site. The City of Blaine had knowledge and experience with the Clean Water Act Section 404 Program. In the Fall of 2012, the City, or its subcontractors, removed the trees from this exact site (in anticipation of the later work which is the subject of this action). At that time, the City did not remove tree stumps or perform earth-moving work, but the City of Blaine was informed by the St. Paul District Army

Corps of Engineers just how close it came to being in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. § 1311 and 1344. The City stated it understood, and agreed it would work with the St. Paul District Army Corps of Engineers to proceed with this project appropriately and completely in the future. Therefore, the City of Blaine knew it would need a Clean Water Act Section 404 Permit for the work which is the subject of this action, and applied for one with the St. Paul District Army Corps of Engineers. However, the St. Paul District Army Corps of Engineers review of its permit application stalled because the City of Blaine's chosen state wetland mitigation bank did not have federally-approved wetland credits available to meet the strict federal Clean Water Act Section 404(b)(1) Guidelines. The St. Paul District Army Corps of Engineers continued to work with the state wetland mitigation bank to resolve this issue to complete its review of the City of Blaine's permit application, but the City of Blaine did not wait, and knowingly started work on the site without a Clean Water Act Section 404(B) Dredge and Fill Permit.

The only potential economic benefit to the City of Blaine from this project would be any fees generated from the reservation and use of the completed ballpark. This was assumed to be negligible.

Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), also requires we consider additional factors as justice may require in the determination of this penalty. Such factors included the need for deterrence and consideration of recalcitrance. The City of Blaine is a growing urban area and it likely has similar projects in which it plans to build on its existing infrastructure within wetlands at Aquatore Park as well as creating new recreational and developmental facilities throughout the City. Deterrence is necessary in this area as other entities are likely to develop both recreational and residential infrastructure, suggesting that the prevalence of this type of violation in the regulated community is high and must be deterred with appropriate civil penalties where warranted. The violator's recalcitrance is reflected in the fact that despite its knowledge, experience, and history with the Clean Water Act Section 404 Program and the St. Paul District Army Corps of Engineers, it knowingly began a CWA Section 404 Dredge and Fill Operation at the site without a permit, and notwithstanding a Notice of Violation, dated July 16, 2014, from the St. Paul District Army Corps of Engineers, which requested it cease work on the site until it received an appropriate permit. The lead the St. Paul District Army Corps of Engineers to refer this matter to EPA for enforcement.

**Complainant Proposed a \$45,000.00 Civil Penalty for
the Violation Alleged at the Lexington Athletic Complex**

In assessing the nature, circumstances, extent and gravity of the violation under Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g), we considered the harm to human health, the extent and type of aquatic environment impacted, the severity of the impacts to the aquatic environment, the uniqueness/sensitivity of the affected resources, any secondary or off-site impacts, and the duration of the violation to determine an appropriate civil penalty figure.

The discharge of fill material has likely not adversely impacted drinking water supplies. It is likely that the fill has not endangered the health or livelihood of persons by virtue of the chemical nature of the discharge. However, the impacted area is in a rapidly developing urban

area of Minnesota. The loss of wetland acres and function (i.e. reducing storm water and capturing polluted runoff) may potentially impact existing recreation based water quality standards and introduce a potential harm to human health or welfare.

The total amount of wetland impact is approximated at 1.11 acres of palustrine emergent wetlands. The amount of wetlands impacted is above a threshold which requires authorization under a St. Paul District Army Corps of Engineers Letter of Permission (LOP) as opposed to a General Permit. Activities authorized under LOPs require the Army Corps of Engineers to consult with state fish and wildlife agencies and the U.S. Fish and Wildlife Service and require a public interest review, with a 15-day public notice posted on the Army Corps of Engineers website, as opposed to general permits which cover a range of activities determined by the Army Corps of Engineers to be substantially similar in nature and causing only minimal individual and cumulative environmental impacts.

The NWI map indicates the presence of palustrine emergent wetlands within the Lexington Athletic Complex site, specifically PEM1A which are palustrine emergent wetlands with a temporary flooded water regime and persistent vegetative species. The City of Blaine, or its contractors, cleared the site for two ball fields, recreational facilities and associated infrastructure. It denuded the site of vegetation, and its construction of parking lots, pathways and buildings increased the amount of impervious surfaces. Its removal of vegetation in riparian areas and wetlands, and its creation of impervious surfaces, contributes to higher storm water flows, increased sediment and structural degradation to downstream waters.

The impacted wetlands abutted unnamed tributaries of County Ditch 53-62. These tributaries and their associated wetlands contribute to the health and stability of downstream waters, especially in this area that is both intensely farmed and becoming heavily developed. They provide natural floodwater retention, improve water quality by diluting and filtering pollutants from surface water runoff, trap excess sediment, provide processed leaf litter and organic matter, which are important to sustaining biological communities in downstream waters.

The secondary impacts appear to be minor as it was indicated by the City of Blaine that Best Management Practices (BMPs) were likely in place at the time of impact, but that can't be confirmed. At the time of the site visit by EPA staff and the St. Paul District Corps on April 28, 2015, it appears BMPs were in place. Soil disturbance in wetland riparian areas adjacent to streams increases the likelihood of sedimentation in the streams from precipitation runoff and invites the emergence of invasive species which out-compete native vegetative communities.

On June 24, 2014, the City of Blaine, or its contractors, began to discharge fill material at the site without a permit. On July 14, 2014, the St. Paul District Army Corps of Engineers discovered the violation, and issued to the City of Blaine a Notice of Violation which requested the City provide it additional information, and advised it to "not perform any work that requires Department of the Army authorization without obtaining that authorization." However, the City of Blaine continued and completed construction of the baseball fields and infrastructure by December of 2014.

With respect to the City of Blaine, we considered its ability to pay, prior history of similar

violations, degree of culpability, and any economic benefit resulting from the violation as penalty factors.

The City of Blaine is an organization of state government under the laws of the State of Minnesota and has several sources of revenue to pay the penalty. Inability to pay was not considered a factor and the City did not raise this as an issue.

The City of Blaine has a prior history of noncompliance with previous and existing Clean Water Act Section 404 permits as per EPA conversations with the St. Paul District Army Corps of Engineers Regulatory Staff. This violation also occurred concurrently with unauthorized impacts at another City owned site, Aquatore Park.

The City of Blaine had complete ownership of the site, and complete and direct control over all activities at the site, and any violations that occurred at the site. It had knowledge and experience with the Clean Water Act Section 404 Program. It knew it needed a Clean Water Act Section 404 Permit for the work which is the subject of this action, and applied for one with the St. Paul District Army Corps of Engineers. The St. Paul District Army Corps of Engineers began review of its permit application, but the City of Blaine did not wait, and knowingly started work on the site without a Clean Water Act Section 404(B) Dredge and Fill Permit.

The only potential economic benefit to the City of Blaine from this project would be any fees generated from the reservation and use of the completed ballpark. This was assumed to be negligible.

Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), also requires we consider additional factors as justice may require in the determination of this penalty. Such factors included the need for deterrence and consideration of recalcitrance. The City of Blaine is a growing urban area and it likely has similar projects in which it plans to build on its existing infrastructure within wetlands at Aquatore Park as well as creating new recreational and developmental facilities throughout the City. Deterrence is necessary in this area as other entities are likely to develop both recreational and residential infrastructure, suggesting that the prevalence of this type of violation in the regulated community is high and must be deterred with appropriate civil penalties where warranted. The violator's recalcitrance is reflected in the fact that despite its knowledge, experience, and history with the Clean Water Act Section 404 Program and the St. Paul District Army Corps of Engineers, it knowingly began a CWA Section 404 Dredge and Fill Operation at the site without a permit, and notwithstanding a Notice of Violation, dated July 16, 2014, from the St. Paul District Army Corps of Engineers, which requested it cease work on the site until it received an appropriate permit. The lead the St. Paul District Army Corps of Engineers to refer this matter to EPA for enforcement.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'J. Trevino', written over a horizontal line.

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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:

The City of Blaine,

Respondent.

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Docket No. CWA-05-2016-0019

CERTIFICATE OF SERVICE

I, Jeffery M. Trevino, Associate Regional Counsel, Region 5, U.S. Environmental Protection Agency, certify that I filed (electronically) with the Office of Administrative Law Judges for the U.S. Environmental Protection Agency, at its Office of Administrative Law Judges (OALJ) E-Filing System, available at www.epa.gov/oalj, this **STATUS REPORT**.

I further certify that I provided (electronically) to opposing counsel, Patrick J. Sweeney, Esquire, Attorney for the City of Blaine, 1809 Northwestern Avenue, Stillwater, Minnesota, 55082, at pweeney@eckerglammers.com, one copy of this **STATUS REPORT**.



Jeffery M. Trevino
Associate Regional Counsel

19 January 2017
Date

