

IN THE DISTRICT COURT FOR THE STATE OF ALASKA AT KETCHIKAN

WB File
44a

STATE OF ALASKA

VS.

BEN H. FLEENOR d/b/a
LUMBER CO., HERRING BAY

JUDGMENT (Count 1)

DOB: 09-12-23 AK DL#/ID#:

CASE NO: IKE-87-01025CR

Date of Offense: 10/02/87

Statute/Ord./Reg.: AS 16.05.840

Crime Charged: FISHWAY REQUIRED

PLEA: No Contest

The defendant was found and adjudged:
GUILTY of the crime named above.
Any appearance bond in this case is exonerated.

**** SENTENCE ****

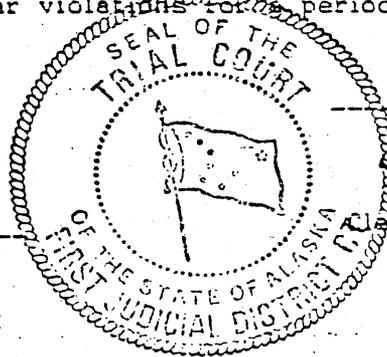
Sentence is imposed as follows:

Defendant is fined \$1500.00 with \$1000.00 suspended. The unsuspended \$500 is to be paid by 10/13/88.

Defendant is ordered:
TO RESTORE STREAM AS AGREED WITH FISH & WILDLIFE

Defendant is placed on probation until 10/6/89 subject to the following conditions:
Defendant shall commit no similar violations for a period of 1 year(s).

EFFECTIVE DATE : 10/06/88



Judge George L. Gucker

Clerk: /gk

I certify that on 10/14/88
copies of this form were sent to:
DA; PD; Deft; Records; Ekkpr
KASAP; CS; Arresting Agency; DOC
Atty. J. Peterson F&W

Received

NOV - 1 '88

Habitat Division
Ketchikan

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

IN THE MATTER OF:

Mr. Ben H. Fleenor
Herring Cove Lumber Company

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No. 1088-08-23-309
FINDINGS OF FACT AND
COMPLIANCE ORDER

Pursuant to Sections 308 and 309 of the Clean Water Act, 33 U.S.C. §1318 and §1319, and the authority thereunder of the Administrator of the U.S. Environmental Protection Agency (EPA), which authority has been duly delegated to the EPA Regional Administrator, Region 10, the following FINDINGS OF FACT are made and COMPLIANCE ORDER is issued.

FINDINGS OF FACT

1. Mr. Ben Fleenor, Respondent, owns or controls property located near Mile 8.5, South Tongass Highway, Ketchikan, Alaska (S. 35 and S. 36, T. 75 S., R. 91 E., C.R.M.). Respondent is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

1 2. On October 2, 1987, a representative of the Alaska Department
2 of Fish and Game (ADF&G) observed the unauthorized filling of a grass/sedge
3 tideland marsh with dumptruck loads of organic silts and woody debris in a
4 portion of the area which is described in paragraph 1. The dump site is
5 located near the Herring Cove Lumber Mill in the upper intertidal area of
6 Herring Cove. Dumping was observed to cover a channel used for the migration
7 and spawning of anadromous salmon. Dozens of dead spawned-out and unspawned
8 pink salmon were observed adjacent to and upstream of the area where the
9 stream channel was being covered.

10
11 3. On October 8, 1987, the U.S. Army Corps of Engineers notified
12 Respondent that he had undertaken unauthorized dredge and fill activity on
13 property described in paragraph 1. The Corps of Engineers determined that
14 this work was not authorized by any previously issued Corps permit.

15
16 4. On July 13, 1988, a field investigation was conducted by Linda
17 Comerci of the EPA Alaska Operations Office at property owned by the
18 Respondent and described in paragraph 1.

19
20 5. During her field investigation, Ms. Comerci observed that fill
21 material consisting of sand, silt and logs had been discharged into an unnamed
22 tributary of Herring Bay Creek [ADF&G Stream No. 101-45-10070-2011], and its
23 adjacent wetlands. The presence of coho salmon fry was also observed in
24 Stream No. 101-45-10070-2011.

1
2 6. Also, during her field investigation, Ms. Comerchi verified that
3 the site of dredge and fill activity included an estuarine emergent wetland.
4 The site is a wetland based upon its degree of soil saturation and the normal
5 prevalence on the site of vegetation typically adopted for life in saturated
6 soil conditions.

7 7. It is a violation of Section 301 of the Clean Water Act
8 (33 U.S.C. §1311) to discharge dredged or fill materials to waters of the
9 United States, including wetlands adjacent to such waters, unless such
10 discharges are authorized by a permit issued under Section 404 of the Clean
11 Water Act (33 U.S.C. §1344) or are otherwise authorized by U.S. Army Corps of
12 Engineers regulations.

13
14 8. The dredged and fill material discharged by the Respondent,
15 consisting of sand, silt, and logs, is a pollutant within the meaning of
16 Section 502(6) of the Clean Water Act, 33 U.S.C. §1362(6) and constitutes the
17 discharge of a pollutant within the meaning of Section 502(12), 33 U.S.C.
18 §1362(12).

19
20 9. Stream No. 101-45-10070-2011 and its adjacent wetlands to which
21 the discharges described in paragraphs 2, 3, and 5 were made is a water of the
22 United States within the meaning of §502(7) of the Clean Water Act, 33 U.S.C.
23 §1362(7).

24 10. The discharges by Respondent to the subject waters of the
25 United States were not authorized by a Section 404, 33 U.S.C. §1344, permit or
26 by any regulation issued by the U.S. Army Corps of Engineers.

1 11. Therefore, Respondent has violated Section 301(a) of the Clean
2 Water Act, 33 U.S.C. §1311(a) by discharging dredged and fill material into
3 stream No. 101-45-10070-2011 and its adjacent wetlands without authorization
4 by a permit issued by the U.S. Army Corps of Engineers.
5

6 12. Herring Bay Creek, and Stream No. 101-45-10070-2011 provide
7 migration and intertidal spawning habitat for pink and coho salmon. The
8 instream discharges into Stream No. 101-45-10070-2011 adversely affected
9 salmon habitat and water quality, and cumulatively pose a significant
10 ecological risk to the aquatic resources of the Herring Bay Creek system.
11

12 13. On August 11, 1988, the Alaska Department of Fish and Game
13 issued an order directing Respondent to restore the area described in
14 paragraph 2 by removing the unauthorized dredged and fill material. The
15 Respondent has not complied with that order.
16

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18 ORDER

19 Based upon the foregoing Findings of Fact, and pursuant to Section
20 308 and Section 309 of the Clean Water Act [33 U.S.C. §1318 and §1319], it is
21 hereby ORDERED as follows:
22

23 1. Upon receipt of this ORDER, Respondent shall cease all
24 discharges of fill material into the above described waters of the United
25 States.
26

1 2. Within fifteen (15) days of receipt of this ORDER, Respondent
2 shall provide the following information to the address listed in paragraph 3
3 below:

- 4
- 5 (a) A full chronological description of the nature, purpose,
6 and extent of the described fill project.
- 7 (b) Identification of the parties who directed, carried out,
8 financed, or were otherwise responsible for the described
9 fill project.
- 10 (c) A clear and concise statement describing any plans for
11 further fill activities in the above-described area.
- 12 (d) Copies of all plans, specifications, project schedules,
13 and other technical documents that relate to actual or
14 planned fill activities by Respondent in the described
15 area.
- 16 (e) A full description of all measures that Respondent has
17 taken or plans to take to mitigate any environmental harm
18 caused by the discharge of fill materials in the subject
19 area, including compliance with the restoration directive
20 issued by ADF&G on August 11, 1988.

21 3. Submittals required by this ORDER shall be sent to

22

23 U.S. Environmental Protection Agency
24 Federal Building, Room E-551
25 701 C Street, Box 19
26 Anchorage, Alaska 99513
27 Attn: Linda Comerci
28 (907) 271-5083

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2 4. EPA's regulations covering this subject appear in 40 CFR §§
3 2.201 - 2.309, and 41 Fed. Reg. 36902 - 24 (September 1, 1976) as amended at
4 43 Fed. Reg. 40003 (September 8, 1978); and

5 5. Information may not be withheld from EPA on grounds that it is
6 confidential.

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8
9 OPPORTUNITY TO CONFER

10 1. Nothing in this Order shall preclude Respondent from requesting
11 a conference with EPA to discuss any terms of the Order which Respondent
12 considers unwarranted or any requirements which Respondent considers
13 unachievable. Any amendments or modifications to this Order shall be at the
14 discretion of EPA. Any such requests shall include at least the following:

- 15
16 (a) A clear and concise presentation of the reasons for
17 modification or waiver of the requirement at issue.
18 (b) Evidence of Respondent's efforts, if any, to comply
19 with the requirement.
20 (c) A detailed presentation of any alternatives to the
21 requirement which Respondent believes are appropriate.
22 (d) The request shall be sent to the EPA contact listed in
23 paragraph 3 of the Order.
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