



U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 SIXTH AVENUE
SEATTLE, WASHINGTON 98101

APR 06 1989

WB FILE
44(c)

REPLY TO
ATTN OF: WD-138

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ben Fleenor
Route 1, Box 69
Ketchikan, Alaska 99901

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages 14

To	Alan Henning	From	Heather Dean
Dept./Agency		Phone #	
Fax #		Fax #	

NSN 7540-01-317-7368

5099-101

GENERAL SERVICES ADMINISTRATION

Re: In the Matter of the Findings of Fact and Compliance Order
No. 1088-08-23-309

Dear Mr. Fleenor:

The enclosed Administrative Order supersedes the Environmental Protection Agency's (EPA) administrative order issued to you on August 26, 1988. Based on available information, we find that you have violated Section 301 of the Clean Water Act, 33 U.S.C. §1311, in that you discharged or caused to be discharged, dredged and fill material into waters of the United States without the authorization of a U.S. Army Corps of Engineers' Section 404 permit or EPA Section 402 permit.

The Order requires you to cease unauthorized discharges of dredged and fill material and to remove all such material from the stream and wetlands into which it was placed. This restoration must be completed on or before July 15, 1989.

Compliance with the provisions of this Order is expected within the maximum time periods established by each part of the Order. Your cooperation and prompt attention will be appreciated. Since it is the policy of the Environmental Protection Agency to achieve full compliance with the Clean Water Act as rapidly as possible, this office is prepared to help you in any way it can. EPA is willing to stake the area from which fill is to be removed, if that would assist you in complying with the requirements of this Order.

2

Questions regarding the technical requirements of this Order should be directed to Linda Comerçi in our Anchorage Operations Office at (907) 271-5083. Legal questions may be directed to Adrienne Allen, Assistant Regional Counsel, at (206) 442-7660.

Sincerely,



Robert S. Burd, Director
Water Division

Enclosure

cc: Alaska Department of Environmental Conservation
Alaska Department of Fish & Game
Alaska Department of Natural Resources - Juneau
Corps of Engineers - Anchorage District

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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
Respondent,

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

Pursuant to Section 309 of the Clean Water Act, 33 U.S.C §1319, and the authority thereunder of the Administrator of the U.S. Environmental Protection Agency (EPA), which authority has been duly delegated to the undersigned EPA Region 10 official, the following FINDINGS OF FACT are made and COMPLIANCE ORDER is issued. This ORDER supersedes the FINDINGS OF FACT and COMPLIANCE ORDER issued on August 26, 1988.

FINDINGS OF FACT

1. Respondent, Mr. Ben Fleenor, 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.). This property consists of tax lots 95 and 96 owned by

1 Respondent. The Respondent also owns approximately 4 acres consisting of tax
2 lots 77 and 105. This property is bounded on the east side by tax lot 36,
3 which is owned by the state of Alaska. Furthermore, portions of tax lots 77
4 and 105 located below the mean high water elevation are state owned
5 tidelands. The Herring Cove Lumber Company mill is located on this property.
6 Respondent is a person within the meaning of Section 502(5) of the Clean Water
7 Act, 33 U.S.C. §1362(5).

8 2. On December 31, 1979, a Section 404 permit (Permit No. 2-790069;
9 33 U.S.C. §1344) was issued to Respondent by the U.S. Army Corps of Engineers
10 authorizing fill in the vicinity of the subject stream described in
11 paragraph 3. This permit expired on December 31, 1982.

12 3. On October 2, 1987, a representative of the Alaska Department of
13 Fish and Game (ADF&G) observed the discharge by dumptrucks of fill material
14 into a stream and its adjacent wetlands on a portion of the property described
15 as tax lots 77 and 105 in paragraph 1. The placement of this fill was
16 authorized by the Respondent. The fill site is located to the west of the
17 Herring Cover Lumber Mill in the upper intertidal area of Herring Cove. The
18 fill was placed in wetlands adjacent to an unnamed tributary of Herring Bay
19 Creek know as ADF&G Stream No. 101-45-10070-2011 ("subject stream").

20 4. The fill material, consisting of organic silts and woody debris, is
21 a pollutant within the meaning of Section 502(6) of the Clean Water Act,
22 33 U.S.C. §1362(6) and constitutes the discharge of a pollutant within the
23 meaning of Section 502(12), 33 U.S.C. §1362(12). The fill was observed to
24 block the subject stream and dozens of dead spawned-out and unspawned pink
25 salmon were observed adjacent to and upstream of the area where the subject
26

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28 FINDINGS OF FACT AND COMPLIANCE ORDER PAGE 2 of 9

1 stream channel was being covered.

2 5. The subject stream and its adjacent estuarine emergent wetlands are
3 waters of the United States within the meaning of §502(7) of the Clean Water
4 Act, 33 U.S.C. §1362(7).

5 6. On October 8, 1987, the U.S. Army Corps of Engineers notified
6 Respondent that the fill activity described in paragraph 3 was not authorized
7 by any previously issued Corps permit.

8 7. On July 13, 1988, a field investigation was conducted by an EPA
9 Environmental Protection Specialist at the site described in paragraph 3.
10 During the field investigation, it was observed that fill material consisting
11 of organic silts and woody debris had been discharged into the subject stream
12 and its adjacent estuarine emergent wetlands.

13 8. It is a violation of Section 301 of the Clean Water Act (33 U.S.C.
14 §1311) to discharge dredged or fill materials to waters of the United States,
15 including wetlands adjacent to such waters, unless such discharges are
16 authorized by a permit issued under Section 404 of the Clean Water Act
17 (33 U.S.C. §1344).

18 9. The discharge by Respondent described in paragraph 3 was not
19 authorized by a permit issued under Section 404 or Section 402 of the CWA,
20 33 U.S.C. §1344 or 33 U.S.C. §1342.

21 10. Therefore, Respondent has violated Section 301(a) of the Clean Water
22 Act, 33 U.S.C. §1311(a), by discharging dredged and fill material into the
23 subject stream and its adjacent wetlands without authorization by a permit
24 issued by the U.S. Army Corps of Engineers.

25 11. On August 11, 1988, the Alaska Department of Fish and Game issued an
26 order directing Respondent to restore the area described in paragraph 3 by
27

28 FINDINGS OF FACT AND COMPLIANCE ORDER PAGE 3 of 9

1 removing the unauthorized fill material. On October 6, 1988, Respondent was
2 ordered by the district court of the state of Alaska to comply with the fill
3 removal requirements of the Alaska Department of Fish and Game. On March 7,
4 1989, the Alaska Department of Fish and Game directed Respondent to restore
5 the original stream channel and to stabilize streambanks by revegetation.

6 12. Herring Bay Creek and the subject stream provide migration and
7 intertidal spawning habitat for pink and coho salmon. On September 15, 1988,
8 a National Marine Fisheries Service biologist inspected the fill site
9 described in paragraph 3. Spawning pink salmon were observed in the
10 Herring Bay Estuary and the subject stream, both above and below the
11 blockage. Salmon were able to move upstream around the blockage only during
12 extreme high tide. The placement of fill material into the subject stream and
13 its associated wetlands adversely affected salmon habitat and water quality,
14 and cumulatively pose a significant ecological risk to the aquatic resources
15 of the Herring Bay Creek system.

16 13. It is reasonable, relative to the violations described above, to
17 ameliorate the harm done by directing the Respondent to restore the area to
18 its pre-fill condition. Restoration in the manner directed below is expected
19 to produce substantial environmental benefits, cause minimal environmental
20 damage during the restoration operation, and is considered to be achievable as
21 a technical and practical matter.

22
23 ORDER

24
25 Based upon the foregoing FINDINGS OF FACT, and pursuant to Section 309 of
26 the Clean Water Act, 33 U.S.C. §1319, it is hereby ORDERED as follows:

27 1. Upon receipt of this ORDER, Respondent shall cease all discharges of
28 fill material into the above described waters of the United States.

1 2. No later than July 15, 1989, Respondent shall completely remove all
2 fill material deposited in the subject stream and in wetlands adjacent to that
3 stream as described in paragraph 3 of the FINDINGS OF FACT. This unauthorized
4 fill encompasses an area of approximately one acre in extent located
5 approximately 200 feet south of the confluence of the subject stream and
6 Herring Bay Creek. This would include the removal of all fill material placed
7 in the wetlands to the west of the subject stream, removal of all fill
8 material placed in the subject stream, thus reestablishing the original
9 channel, and removal of all fill material placed within twenty-five feet of
10 the original stream channel (measured from the stream edge at mean high tide)
11 on the east side of subject stream. The area from which fill must be removed
12 is outlined in red on the enclosed schematic drawing (Attachment A). An EPA
13 representative will stake the area from which fill should be removed.

14 3. The Respondent shall, within fifteen (15) days of the effective date
15 of this ORDER, provide to EPA:

- 16 a. A statement of Respondent's intent to comply with this ORDER.
17 b. A site restoration plan and schedule under which the Respondent
18 commits to remove unauthorized dredged and fill material, as
19 described in paragraph 3 of the FINDINGS OF FACT. This restoration
20 plan will include the following:

- 21 1. The original stream channel shall be restored, and
22 the slopes on the east side, adjacent to any existing fill
23 material above mean high water, shall be graded to a 2:1 or
24 gentler slope and stabilized by revegetation or riprap. If
25 revegetation is not established on or before October 15, 1989,
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riprap will be required to stabilize the slope. Riprap shall be placed no later than November 15, 1989. Any remaining fill located above the mean high water elevation shall be graded such that drainage is away from the slope which leads to the stream or adjacent wetlands.

2. The plan shall provide for the complete reestablishment of the wetland plant community as it existed in the wetland areas prior to the unauthorized filling. If natural revegetation has not occurred within one year, EPA shall inform Respondent that planting shall be required to revegetate the area.

3. All removed fill material shall be deposited in an approved upland location.

4. Work shall commence at the site no earlier than June 1, 1989, and be completed by July 15, 1989.

5. Submittals required by this ORDER shall be sent to:

U.S. Environmental Protection Agency
Federal Building, Room E-551
701 C Street, Box 19
Anchorage, Alaska 99513
ATTN: Linda Comerci
(907) 271-5083

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6. Nothing in this ORDER shall be construed to relieve Respondent of any obligations under an applicable federal, state, or local law. Respondent must expeditiously apply for necessary permits and approvals. Delays in completing the restoration required by the ORDER shall not be authorized if they arise from Respondent's failure to make timely and complete applications for permits and approvals necessary for such work.

7. Any noncompliance with the terms of this ORDER shall be reported to EPA, Region 10, by telephone, within 24 hours from discovery of the violation. A written report of the violation shall be submitted within five (5) days.

8. Nothing in this ORDER shall preclude EPA from
(a) obtaining any judicial relief which it deems appropriate,
(b) requiring further and additional activities as may be authorized by law, or (c) amending or modifying this ORDER as circumstances may, in EPA's judgment, warrant from time to time. This ORDER shall not preclude Respondent from making a request to EPA for an extension of time to comply with the requirements of the ORDER or for other amendments to or modification of the ORDER. Any such extensions, amendments, or modifications shall be at EPA's discretion.

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OPPORTUNITY TO CONFER

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

- a. A clear and concise presentation of the reasons for modification or waiver of the requirement at issue.
- b. Evidence of Respondent's efforts, if any, to comply with the requirement.
- c. A detailed presentation of any alternatives to the requirement which Respondent believes are appropriate.
- d. The request shall be sent to the EPA contact listed in paragraph 5 of the ORDER.

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EFFECTIVE DATE

This ORDER shall become effective on the date it is issued, as indicated below.

SANCTIONS

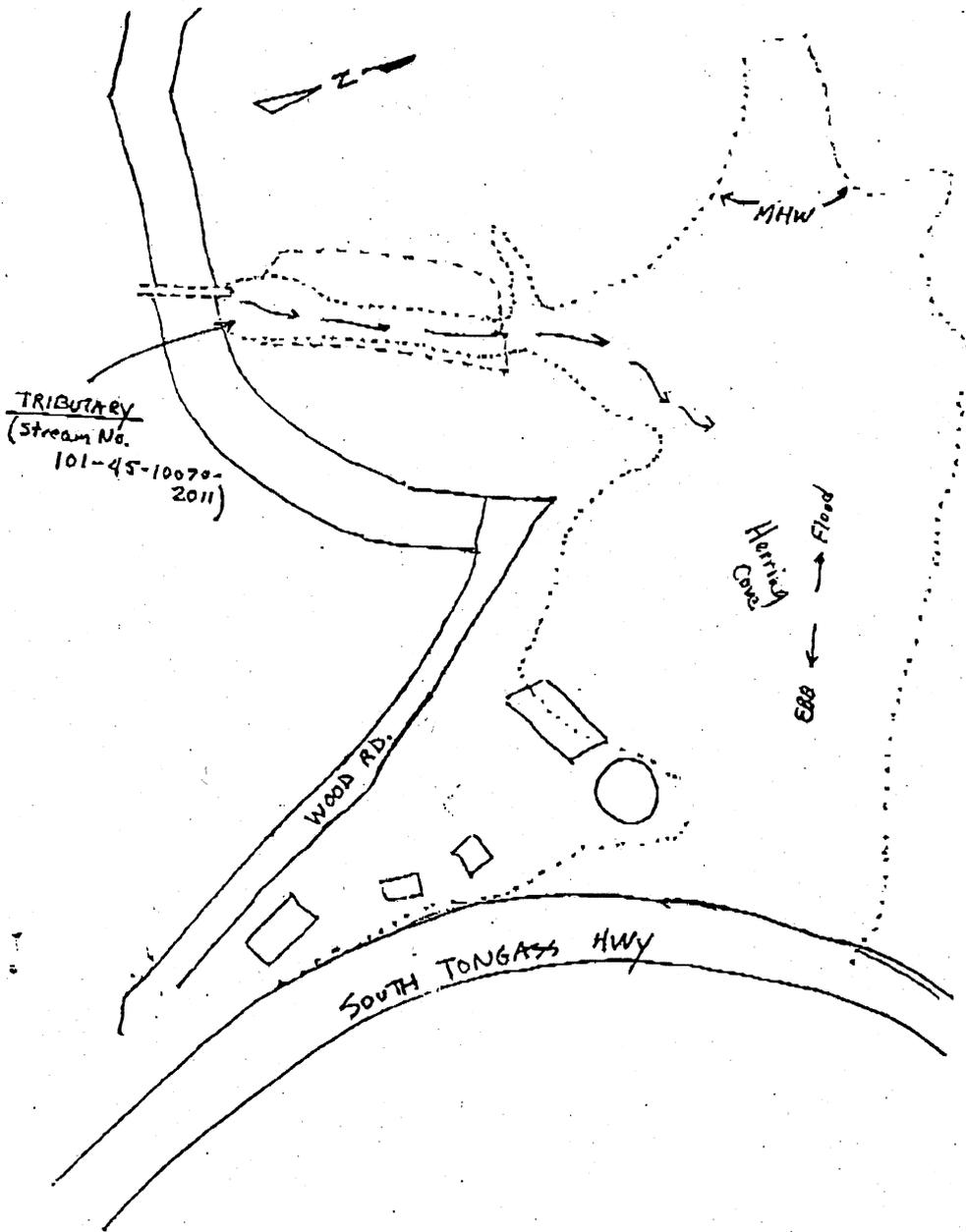
Notice is hereby given that violations of or failure to comply with any of the provisions of the foregoing ORDER shall subject Respondent to civil penalties pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. §1319(d).

Dated 6th day of April, 1989.

Robert S. Burd

Robert S. Burd
Director, Water Division

Attachment A



Herring Cove - Ketchikan, AK

(adapted from permit application
submitted by
Ben Fleenor
(11/8/87) Approx Scale: 1"=20'
Revillagigedo Channel 1:

United States
Environmental Protection
Agency

Region 10
10 Sixth Avenue
Seattle WA 98101

Alaska
Idaho
Oregon
Washington



AUG 08 1990

REPLY TO
ATTN OF: WD-138

Ben Fleenor
Herring Bay Lumber Co.
Route 2, Box 69
Ketchikan, Alaska 99901

RE: Findings of Fact and Compliance Order No. 1088-08-23-309

Dear Mr. Fleenor:

This letter confirms that you have complied with the site restoration requirements of the referenced compliance order. A July 23, 1990 site inspection by Scott Menzies of the Alaska Department of Environmental Conservation confirmed the success of vegetation sprigged on the bank and satisfactory natural reestablishment of the wetland plant community.

We appreciate your cooperation in this matter. Heather Dean of my Alaska Operations Office staff (271-5083) will be happy to assist you in complying with Clean Water Act requirements in future projects.

Sincerely,

Ronald A. Kreizenbeck
Acting Director, Water Division

cc: John W. Peterson
Heather Dean, EPA AOO
Jeff Towner, COE

RECEIVED

AUG 13 1990

EPA AOO - ANCHORAGE

CONCURRENCE PAGE

Subject:

bcc: Author File
Reading File
Official File

a:FLEENOR.GV

FROM HEATHER 3AUG90

Date:
WordPerfect 5.0
File Name:
New Addresses

CONCURRENCES					
SURNAME	<i>Heather</i>	ALLEN	RILEY	LEE	
INITIALS	<i>H</i>	AA	<i>GR</i>	<i>PL</i>	
DATE	<i>8/3</i>	<i>8/6</i>	<i>8/6/90</i>	<i>8/6/90</i>	

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