

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No. \_\_\_\_\_

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 GEROME G. HENKEMEYER; )  
 HENKEMEYER LANDFILL, INC.; and )  
 RILEY BROS. CONSTRUCTION, )  
 INC., )  
 )  
 Defendants. )

**COMPLAINT**

Plaintiff, the United States of America, by and through its undersigned attorneys, alleges as follows:

**NATURE OF THE ACTION**

1. This is a civil action commenced under sections 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1319(b) and (d), to obtain injunctive relief and civil penalties against Gerome G. Henkemeyer ("Henkemeyer"), Henkemeyer Landfill, Inc. ("Henkemeyer Landfill"), and Riley Bros. Construction, Inc. ("Riley Brothers"), for the discharge of pollutants into waters of the United States in Watab Township, Benton County, Minnesota. Because the Secretary of the Army, acting through the Chief of Engineers (the "Corps"), did not authorize the discharge under section 404 of the CWA,

33 U.S.C. § 1344, the discharges violated section 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. By this action, the United States seeks to: (1) enjoin the discharge of pollutants into waters of the United States without a permit in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a); (2) require Defendants, at their own expense and at the direction of the Corps, to restore and/or mitigate the damages caused by their unlawful activities; and (3) require Defendants to pay civil penalties as provided in CWA section 309(d), 33 U. S. C. § 1319(d).

**AUTHORITY AND NOTICE**

3. Authority to bring this action is vested in the United States Department of Justice under 28 U.S.C. §§ 516 and 519 and in accordance with CWA sections 309(b) and 309(d), 33 U.S.C. §§ 1319(b) and 1319(d).

4. Notice of the commencement of this action has been provided to the State of Minnesota pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b).

**JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter of this action pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

6. Venue is proper in the District of Minnesota pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b), 1391(c), and 1395(a), because one or more of the Defendants resides in this District, one or more of the Defendants conducts business in this District, the subject property is located in this District, and the violations alleged herein occurred in this District.

**THE PARTIES**

7. The Plaintiff in this action is the United States of America.

8. Defendant Gerome G. Henkemeyer is a private individual residing in Benton County, Minnesota.

9. Defendant Henkemeyer Landfill, Inc., is a corporation organized under the laws of Minnesota with a business address of 6045 Lark Road N.W., Sauk Rapids, Minnesota 56379.

10. Defendant Riley Brothers is a corporation organized under the laws of Minnesota with a business address of 46369 208th Street, Morris, Minnesota 56267.

**STATUTORY AND REGULATORY BACKGROUND**

11. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in

compliance with, *inter alia*, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344 ("Section 404 permit").

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

13. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

14. CWA section 309(d), 33 U.S.C. § 1319(d), provides that violators of CWA section 301, 33 U.S.C. §§ 1311, are subject to injunctive relief and civil penalties of up to \$25,000 per day for each violation. Pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note; Public Law 104-134, enacted April 26, 1996; 110 Stat.1321), such violators are subject to civil penalties of up to \$27,500 for each day of noncompliance between

January 31, 1997, and March 15, 2004, and civil penalties of up to \$32,500 for each day of noncompliance after March 15, 2004.

15. The term "person" is defined in CWA section 502(5), 33 U.S.C. § 1362(5), to include "an individual" and a "corporation."

16. The term "pollutant" is defined in CWA section 502(6), 33 U.S.C. § 1362(6) to include, *inter alia*, "dredged spoil, solid waste, ... rock, sand, [and] cellar dirt."

17. The term "discharge of a pollutant" and the term "discharge of pollutants" both are defined in CWA section 502(12), 33 U.S.C. § 1362(12), to include *inter alia* "any addition of any pollutant to navigable waters from any point source[.]"

18. The term "point source" is defined in CWA section 502(14), 33 U.S.C. § 1362(14), as "any discernible, confined and discrete conveyance...from which pollutants are or may be discharged."

19. The term "navigable waters" is defined in CWA section 502(7), 33 U.S.C. § 1362(7), as "the waters of the United States, including the territorial seas."

20. The term "waters of the United States" is defined in 33 C.F.R. § 328.3(a) to include: "(1) All waters which are

currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands;... (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;... [and] (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section."

21. The term "wetlands" is defined in 33 C.F.R. § 328.3(b) as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

22. The term "adjacent" is defined in 33 C.F.R. § 328.3(c) as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"

23. The term "dredged material" is defined in 33 C.F.R.

§ 323.2(c) as "material that is excavated or dredged from waters of the United States."

24. The term "discharge of dredged material" is defined in 33 C.F.R. § 323.2(d)(1), in pertinent part, as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States." The term includes, but is not limited to, "[t]he addition of dredged material to a specific discharge site located in waters of the United States" and "[a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation."

25. The term "fill material" is defined in 33 C.F.R. § 323.2(e), in pertinent part, as "material placed in waters of the United States where the material has the effect of: (I) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States."

26. The term "discharge of fill material" is defined in 33 C.F.R. § 323.2(f) as "the addition of fill material into

waters of the United States.” The term generally includes, without limitation, “[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills;...[and] placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills[.]”

**GENERAL ALLEGATIONS**

27. The defendants are persons within the meaning of CWA section 502(5), 33 U.S.C. § 1362(5).

28. The real property which is the subject of this complaint is located at and has the legal description of the S ½ of the NE ¼ of Section 34, Township 37 North, Range 31 West, Benton County, Minnesota (hereinafter the “Site”).

29. At all times relevant to this action, one or more of the defendants either owned, leased, or otherwise controlled the Site and/or controlled the activities at the Site.

30. Defendant Henkemeyer alone and/or through Defendant Henkemeyer Landfill owns and/or operates a landfill at the Site.

31. On January 3, 1996, the Corps issued an after-the-fact permit to Henkemeyer for a previous unauthorized discharge at the Site.

32. The after-the-fact permit, which was signed by Henkemeyer, included a provision that "no filling, grading, or excavation shall take place in the wetland areas without prior approval from the Corps of Engineers."

33. Prior to the activities which are the subject of this complaint, the Site contained a palustrine emergent seasonally flooded wetland that was listed on the National Wetland Inventory overlay for the Little Rock Lake, Minnesota Quadrangle Map.

34. Field Data collected in October 2000 by Mark Erickson, an employee of Henkemeyer's consultant Widseth, Smith and Nolting, confirmed the presence of wetlands on the Site.

35. As of 2000, there were wetlands to the west and north of the existing landfill. Part of these wetland areas were

the subject of the after-the-fact permit issued by the Corps to Henkemeyer in 1996.

36. The wetlands on the Site are abutting an unnamed tributary of the Mississippi River. The wetlands on the Site are part of a large contiguous wetland that extends north from the Site and is contiguous to and hydrologically connected to an unnamed tributary of the Mississippi River that flows northward and westward to the Mississippi River. By this surface water connection, the wetlands on the Site which are the subject of this action are approximately 6,500 linear feet from the Mississippi River. The subject wetlands are about 4,000 feet from the Mississippi River by direct measurement.

37. The Mississippi River is "currently used...used in the past, or...susceptible to use in interstate or foreign commerce" and, thus, is a navigable water of the United States as defined in 33 C.F.R. § 328.3(a)(1). The unnamed tributary is a water of the United States because it is a tributary to a water of the United States, namely the Mississippi River, under 33 C.F.R. § 328.3(a)(5).

38. The wetlands at the Site which are the subject of this action are abutting the unnamed tributary and have a

significant nexus to the Mississippi River and are therefore a water of the United States under 33 C.F.R. § 328.3(a)(7).

39. The Minnesota Department of Transportation ("MnDot") reconstructed an overpass for Trunk Highway 10 and County Road 33 in Benton County (the "TH10/CR33 project"). The TH10/CR33 project was about a mile from the Site.

40. MnDot contracted with Riley Brothers to remove and dispose of fill and other construction debris from the TH10/CR33 project site.

41. Henkemeyer, on behalf of himself and Henkemeyer Landfill, made arrangements with Riley Brothers for the material from the MnDOT project to be placed at the Henkemeyer Landfill at the Site. An employee and/or agent of Riley Brothers made the arrangements with Henkemeyer, helped select the disposal location, and asserted to MnDot that there were no wetlands in the disposal area.

42. Between May 15, 2003 and June 13, 2003, the specific times better known to the defendants, clay fill from the TH10/CR33 project was discharged into the wetlands at the Site. According to Henkemeyer's consultant, Gregory Smith at Widseth, Smith and Nolting, approximately 95,000 cubic yards of fill was discharged into approximately 6.7 acres of

wetlands at the Site. Earth-moving equipment, including scrapers and/or trucks, were used to place fill material into the wetlands at the site. The fill material was used as a separation layer so the landfill could be expanded.

43. No permit had been issued by the Corps to any person for this discharge.

44. On June 13, 2003, the Minnesota Department of Natural Resources ("MnDNR") issued a Cease and Desist Order to Henkemeyer.

45. On August 13, 2003, MnDNR issued a Restoration Order to Henkemeyer. The restoration work was to have been completed by September 17, 2003. On several subsequent occasions, MnDNR extended the deadline for completing the restoration work. The last deadline for completion of the restoration work was May 15, 2005.

46. On August 25, 2003, Smith submitted an application on behalf of Henkemeyer to the Benton County Department of Development for an after-the-fact Minnesota Wetland Conservation Act ("WCA") permit. In the August 2003 WCA application, Smith stated that 6.7 acres of wetlands had been filled by the disposal material. Henkemeyer certified that Smith was his authorized agent.

47. On October 28, 2003, Benton County denied the WCA application because it did not meet mitigation requirements. Benton County gave Henkemeyer until May 1, 2004 to submit a plan with adequate mitigation.

48. On May 1, 2004, Henkemeyer submitted a replacement application.

49. On May 20, 2004, Benton County deemed the replacement application incomplete, and on May 20, 2004, MnDNR extended the restoration order deadline to June 30, 2004.

50. On April 15, 2004, the Corps conducted a visit to the Site and confirmed the presence of an ongoing violation of the CWA.

51. On April 19, 2004, the Corps issued a Notice of Violation ("NOV") letter to Henkemeyer.

**CLAIM FOR RELIEF**

52. The United States hereby realleges the allegations set forth in paragraphs 1 through 51 above as if fully set forth herein.

53. From on or about May 15, 2003 through on or about June 13, 2003, one or more of the Defendants and/or persons acting on their behalf discharged dredged or fill material

into waters of the United States at the Site without a permit under CWA section 404.

54. The dredged or fill material that one or more of the Defendants and/or persons acting on their behalf caused to be discharged into the wetlands at the Site included, among other things, dirt, spoil, rock, and sand, all of which constituted "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6).

55. One or more of the Defendants and/or persons acting on their behalf used trucks, scrapers, and other earth-moving equipment to accomplish the discharges of the dredged or fill material into the wetlands at the Site. This equipment constituted "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

56. Defendants did not obtain a permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344.

57. One or more of the Defendants either owned, leased, or otherwise controlled the land on which each unauthorized

discharge of dredged or fill material into waters of the United States occurred.

58. One or more of the Defendants conducted, contracted for, supervised, and/or otherwise controlled the unauthorized activities at the Site as described hereinabove.

59. The Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States, including wetlands, at the Site.

60. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

61. Unless enjoined, Defendants are likely to allow dredged or fill material to remain in the Site in violation of CWA section 301, 33 U.S.C. § 1311.

**RELIEF REQUESTED**

WHEREFORE, the United States of America, prays that this Court issue an Order granting the following relief:

1. That the Defendants be enjoined permanently from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA;

2. That the Defendants, or any combination thereof, be enjoined to undertake measures, at Defendants' own expense and at the direction of the Corps, to effect complete restoration of the Site;

3. That the Defendants be assessed, pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), civil penalties for their violations of CWA section 301(a), 33 U.S.C. § 1311(a);

4. That the United States be awarded its costs and disbursements in this action; and

5. That this Court grant the United States of America such other relief as the Court may deem just and proper.

Dated: August 27, 2008

Frank J. Magill, Jr.  
United States Attorney

s/ Friedrich A.P. Siekert

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