



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

Ref: 8ENF-W

DEC 19 2007

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

#7005-1160-0005-3398-1144

#7005-1160-0005-3398-1151

Kenneth L. Schell
883 State Highway 52
Erie, CO 80516

and

Twin Peaks Excavating, Inc.
1500 Overlook Drive
Lafayette, CO 80026

Re: In the Matter of:
Kenneth L. Schell and Twin Peaks
Excavating, Inc., Findings of Violation and
Order for Compliance,
Docket No. CWA-08-2008-0004

Dear Mr. Schell:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you and Twin Peaks Excavating, Inc. are in violation of the Clean Water Act, as amended ("CWA"). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 C.F.R. § 328.3.

Specifically, Kenneth L. Schell and/or his agents, acting on behalf of himself, and Twin Peaks Excavating, Inc., discharged dredged and/or fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into Rock Creek and its adjacent wetlands occurred on property owned, leased, and/or otherwise controlled by the City of Lafayette, Colorado, located in Section 12, Township 1 South, Range 69 West, Boulder County, Colorado (the "Site").



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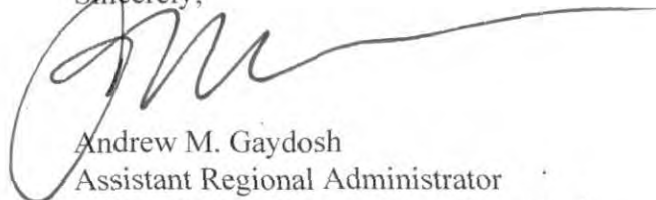
Enclosed is a Findings of Violation and Order for Compliance (“Order”) which specifies the nature of the violations and describes actions necessary in order for you and Twin Peaks Excavating, Inc. to achieve compliance with the CWA. EPA’s authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The Order requires you and Twin Peaks Excavating, Inc. to inform EPA in writing, within 5 days of receipt of the Order, of your and Twin Peaks Excavating, Inc.’s intent to comply with the Order.

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA, 33 U.S.C. § 1319, authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any non-compliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this Order does not preclude civil or criminal actions in U.S. District Court pursuant to section 309(b) or (c) of the CWA, 33 U.S.C. § 1319(b) or (c), or assessment of civil penalties pursuant to section 309(d) or (g) of the CWA, 33 U.S.C. § 1319(d) or (g), for the violations cited in the Order or for any other violations that you may have committed prior to or may commit after the issuance of the enclosed Order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (“SBREFA”). SBREFA does not eliminate your and Twin Peaks Excavating, Inc.’s responsibility to comply with the CWA or the Order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the Order carefully. If you have any questions, the most knowledgeable people on my staff are Thomas E. Sitz, Enforcement Attorney, at (303) 312-6918 and Kenneth Champagne, Enforcement Officer, at (303) 312-6608.

Sincerely,



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Enclosures:

1. Findings of Violation and Administrative Order for Compliance
2. SBREFA Information Sheet

cc: David L. Lagrone, U.S. Army Corps of Engineers, w/enclosures
Timothy T. Carey, U.S. Army Corps of Engineers, w/enclosures

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 DEC 19 PM 3:33

IN THE MATTER OF:)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
Kenneth L. Schell)	COMPLIANCE
883 State Highway 52)	
Erie, CO 80516)	Docket No. CWA-08-2008-0004
)	
and)	
)	
Twin Peaks Excavating, Inc.)	
1500 Overlook Drive)	
Lafayette, CO 80026)	
)	
Respondents.)	
_____)	

I. STATUTORY AUTHORITY

This Findings of Violation and Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by sections 308 and 309(a) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1318 and 1319(a). This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the following findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which prohibits the discharge of pollutants into waters of the United States except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

1. Respondent Kenneth L. Schell is an individual with a mailing address of 883 State Highway 52, Erie, CO, 80516, and is the registered agent, director, and officer of Twin Peaks Excavating, Inc.
2. Respondent Twin Peaks Excavating, Inc. is a State of Colorado corporation with a business address of 1500 Overlook Drive, Lafayette, CO 80026. Twin Peaks Excavating, Inc. is currently in good standing with the Colorado Secretary of State's Office.
3. At all relevant times, the City of Lafayette, Colorado owned, leased and/or otherwise controlled open space property containing Rock Creek and its adjacent wetlands located in Section 12, Township 1 South, Range 69 West, Boulder County, Colorado (the "Site").
4. Rock Creek is tributary to Coal Creek, which is tributary to Boulder Creek, which is tributary to St. Vrain Creek, which is tributary to the South Platte River. Boulder Creek and St. Vrain Creek are, and were at all relevant times, navigable waters. The South Platte River is, and was at all relevant times, navigable, interstate waters.
5. Sometime in March and/or April 2007, Respondents, using their own equipment, began excavating a new stream channel, filling adjacent wetlands with the sidecast materials, and filling the original channel of Rock Creek at the Site for the purpose of bank stabilization and erosion control. Respondents actions at the Site were performed without the City of Lafayette's permission or knowledge.
6. On or about April 9, 2007, the U.S. Army Corps of Engineers ("Corps") received a complaint from the City of Lafayette regarding the recent discharge of dredged and/or fill materials within the channel of Rock Creek and its adjacent wetlands at the Site.

7. On April 26, 2007, the Corps conducted an inspection at the Site as a follow-up to the April 9, 2007, complaint. The Corps found, and EPA through issuance of this Order finds Respondents and/or their agents discharged dredged and/or fill material into Rock Creek and its adjacent wetlands during bank stabilization and erosion control activities at the Site. The Corps estimated that approximately 150 feet of Rock Creek was realigned, resulting in the discharge of dredged and/or fill material without authorization.
8. By letter dated April 27, 2007, the Corps found, and EPA through issuance of this Order finds, that Respondents' actions, as described in paragraph 5 of Section II of this Order, required prior Corps authorization and that the required authorization had not been granted.
9. On April 27, 2007, the Corps referred this case to EPA for enforcement in accordance with the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act," dated January 19, 1989.
10. In a letter to the Corps, dated May 7, 2007, Respondent Kenneth L. Schell admitted to performing the bank stabilization and erosion control activities at the Site.
11. The activities described in paragraph 5 of Section II of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondents and/or by persons acting on their behalf.
12. Respondents are "persons" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. The discharged dredged and/or fill material referenced above is and was at all relevant times “dredged material” and/or “fill material” within the meaning of 33 C.F.R. § 323.2(c) and/or 33 C.F.R. § 323.2(e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
14. Rock Creek and its adjacent wetlands that were filled and disturbed by Respondents’ unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.
15. The vehicles and equipment described in paragraph 11 of Section II of this Order are and were at all relevant times each a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).
16. Rock Creek and its adjacent wetlands referenced in paragraphs 3 and 4 of Section II of this Order are and were at all relevant times “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a), and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
17. The placement of dredged and/or fill material into Rock Creek and its adjacent wetlands constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
18. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344.

19. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.
20. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
21. Respondents have not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged and/or fill material to any waters of the United States on the Site.
22. Respondents' discharges of dredged and/or fill material into waters of the United States at the Site violate section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by Respondents into waters of the United States without authorization by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
23. The removal of the dredged and/or fill material illegally discharged into waters of the United States as described in paragraph 5 of Section II of this Order and restoration of the impacted waters, including Rock Creek and its adjacent wetlands, to a condition that closely approximates their condition and function prior to the discharge of the dredged

and/or fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

24. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). Restoration is appropriate to address the actual and potential harm to aquatic and wildlife habitat, as well as other functions and values, caused by Respondents' unpermitted activities.
25. This Order was issued after consultation and coordination with the Corps' Omaha District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondents shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

2. Within five (5) calendar days of receipt of this Order, Respondent shall inform EPA in writing of its intent to fully comply with the Order. EPA requests that Respondents meet with EPA within fourteen (14) calendar days of issuance of this Order if Respondents have concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondents by EPA.
3. Upon EPA approval of the Restoration Plan required by paragraph 5 of Section III of this Order, Respondents shall remove all dredged and/or fill material that was discharged as a result of the violations identified in this Order and restore Rock Creek and its adjacent wetlands to their pre-impact condition and grade, unless otherwise approved by EPA in the Restoration Plan.
4. All dredged and/or fill material removal and restoration activities shall be conducted in accordance with an EPA-approved Restoration Plan prepared by a consultant experienced in stream and wetland restoration. The consultant also shall directly supervise all work performed pursuant to the EPA-approved Restoration Plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
5. Within sixty (60) calendar days of receipt of this Order, Respondent shall submit to EPA for review, comment, and approval a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, providing for the: (1) removal of all dredged and/or fill material that was discharged into Rock Creek and its adjacent

wetlands at the Site; and (2) restoration, to their pre-impact configuration and/or grade, of Rock Creek and its adjacent wetlands that were impacted as a result of Respondents' unauthorized discharges of dredged and/or fill material on the Site.

6. The Restoration Plan shall be prepared in accordance with "U.S. Environmental Protection Agency, Region 8 - Clean Water Act § 404 Enforcement: Removal/Restoration Plans and Habitat Mitigation/Monitoring Proposals," attached hereto as Exhibit A, and with the guidelines referenced in section 404(b)(1) of the CWA, 33 U.S.C. § 1344(b)(1), and set forth in 40 C.F.R. Part 230. In addition, the Restoration Plan shall include:
 - a. A detailed work plan and schedule for completion of all of the work and activities identified by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than six (6) months after EPA approves the Restoration Plan;
 - b. Locations and delineations of all wetlands and other waters of the United States included in the restoration. The delineations shall be performed in accordance with the procedures in the "Corps of Engineers Wetlands Delineation Manual, January 1987 - Final Report," including the procedures for atypical situations, and subsequent interpretive guidance published by the Corps;
 - c. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map (scale 1":100') of these locations;

- d. Grading, planting, and monitoring plans, measurable criteria for success of restoration or mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or restoration;
 - e. Detailed professional drawings of the restoration site(s), including plan and profile drawings with control elevations for current conditions and, if different, proposed conditions;
 - f. A description of all agreement(s) with the present owner(s) of the Site to access the property as required by paragraph 14 of Section III of this Order; and
 - g. A description of all costs to prepare and implement the Restoration Plan, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.
7. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondents shall, within thirty (30) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
8. Upon receiving EPA's written approval of the restoration plan, Respondents must make a timely and complete application for each permit necessary to implement the EPA-approved plan and for conducting restoration in accordance with the approved plan, including the schedule specified therein, with all granted permits, and with all applicable laws. Respondents must demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

9. All dredged and/or fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream and wetland restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receiving EPA's written approval of the restoration plan and prior to commencement of restoration activities.
10. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If any such permit is required, Respondents shall obtain such permit(s) and provide a copy or copies to EPA pursuant to paragraph 8 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

Timothy T. Carey
U.S. Army Corps of Engineers
Denver Regulatory Office
9307 South Wadsworth Ave.
Littleton, CO 80128-6901
Telephone: 303-979-4120
Facsimile: 303-979-0602

11. Respondents shall submit two (2) hard copies of the Restoration Plan, one (1) electronic copy of the Restoration Plan, all notifications, and related correspondence to:

Kenneth M. Champagne, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6608
Facsimile: 303-312-7518

A hard copy and electronic copy of the Restoration Plan, all notifications, and related correspondence also shall be provided to:

Thomas E. Sitz, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6918
Facsimile: 303-312-7202

A hard copy and electronic copy of the restoration plan also shall be provided to the Corps at the address noted in paragraph 10 of Section III of this Order.

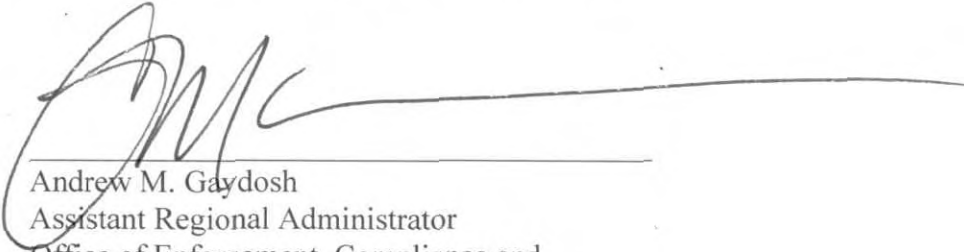
12. In addition to the notification requirements set forth in paragraph 11 of Section III of this Order, after issuance of any Corps authorization for the restoration work, Respondents shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.
13. All plans (including, but not limited to, the Restoration Plan), deliverables, reports, specifications, schedules, or attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA- approved plans, deliverables, reports, specifications, schedules, or attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.

14. Within sixty (60) calendar days of receipt of this Order, Respondents shall obtain access agreement(s) from the present owner(s) of the Site since the work required by this Order is on property not owned by Respondents. Respondents shall use their best efforts to obtain such access agreement(s) necessary to complete work required by this Order. Best efforts as used in this paragraph shall include, at a minimum, a certified letter from Respondents to the present owner(s) of such property requesting access agreement(s) to permit Respondents and its authorized representatives to access such property, and the payment of reasonable compensation in consideration of granting access. Any such access agreement(s) shall provide for access by EPA and its representatives. Respondents shall provide a copy of any access agreement(s) to EPA at the addresses noted in paragraph 11 of Section III of this Order. In the event that agreement(s) for access are not obtained within the time frame specified above, Respondents shall notify EPA in writing within fourteen (14) calendar days thereafter of both the efforts undertaken to obtain access and the failure to obtain access agreement(s). EPA may, at its discretion, assist Respondents in obtaining access. In the event EPA obtains access, Respondents shall complete the restoration work on such property in accordance with the EPA-approved plan.
15. Respondents shall allow, or use its best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the Colorado Department of Public Health and Environment, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;
 - b. To inspect and monitor compliance with this Order; and
 - c. To verify and evaluate data and other information submitted to EPA.
16. This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site(s), conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.
 17. Respondents' obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondents.
 18. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$32,500 per day for each violation of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA.
 19. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.
 20. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondents of their obligation to comply with any applicable Federal, state, or local law or regulation.

21. Failure by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondents to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 19th day of December, 2007.

A handwritten signature in black ink, appearing to read 'AMG', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice