



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8  
1595 WYNKOOP STREET  
DENVER, CO 80202-1129  
Phone 800-227-8917  
<http://www.epa.gov/region08>

DEC 22 2009

Ref: 8ENF-W

CERTIFIED MAIL # 7008 3230 0003 0730 0019  
RETURN RECEIPT REQUESTED

Richard P. Gard, Registered Agent  
Professional Home Design, Inc.  
202 South 2<sup>nd</sup> Street East  
Riverton, WY 82501

CERTIFIED MAIL # 7008 3230 0003 0730 0026  
RETURN RECEIPT REQUESTED

Michael F. Gard doing business as Gard Enterprises  
1225 West Monroe Ave.  
Riverton, WY 82501

CERTIFIED MAIL # 7008 3230 0003 0730 0033  
RETURN RECEIPT REQUESTED

Richard P. Gard doing business as Gard Enterprises  
1201 West Monroe Ave.  
Riverton, WY 82501

Re: Administrative Order for Compliance  
Docket No. **CWA-08-2010-0003**

Dear Messrs. Gard:

Based on a review of all available information, the United States Environmental Protection Agency (EPA) has determined that Professional Home Design, Inc., Michael F. Gard doing business as Gard Enterprises, and Richard P. Gard doing business as Gard Enterprises (Respondents) are in violation of the Clean Water Act (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, as defined by 33 C.F.R. § 328.3, include both surface waters and wetlands.

Specifically, Respondents and/or persons acting on their behalf have discharged dredged and fill material into waters of the United States without authorization under the CWA. These

discharges of pollutants to wetlands adjacent to the Wind River occurred in connection with the development of lots 21 and 22 of the River Park subdivision located approximately six miles east of Dubois, Wyoming, in the southeast quarter of the southwest quarter of section 24, Township 41 North, Range 106 West, Fremont County.

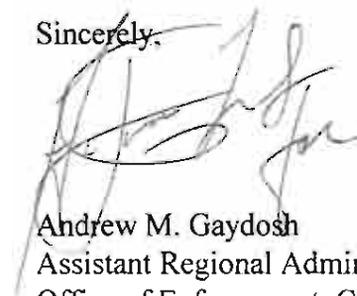
Enclosed is an Administrative Order for Compliance (Order) that specifies the nature of the violations and directs Respondents to submit a restoration or mitigation plan. EPA's authority for issuing the Order is provided by sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a). The Order requires Respondents to inform EPA in writing, within 14 days of receipt, of their intent to fully 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 civil judicial penalties for violating an order issued under section 309(a) of the CWA. The CWA authorizes a variety of possible enforcement actions for non-compliance with the CWA, including civil or criminal actions, administrative penalty actions, and, in some cases following a criminal conviction, debarment from Federal contracts and/or loans. Please be advised that the issuance of this Order does not preclude any civil lawsuit, criminal prosecution, or administrative penalty assessment for the violations cited in the Order or for any other CWA violations.

The Small Business Regulatory Enforcement and Fairness Act (SBREFA) may apply to you. Enclosed is a small business information sheet outlining compliance assistance resources available to small businesses and small governments, in case these are relevant. SBREFA does not eliminate Respondents' responsibility to comply with the CWA or the Order.

Please review the Order carefully. If you have any questions, the most knowledgeable people on my staff are Peggy Livingston, Enforcement Attorney, at 303-312-6858 and Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,



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

Enclosures

1. Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk  
Matthew A. Bilodeau, U.S. Army Corps of Engineers  
David L. Lagrone, U.S. Army Corps of Engineers  
Jeremy Zumberge, Wyoming Department of Environmental Quality

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2009 DEC 22 PM 3:12

IN THE MATTER OF: )  
)  
Professional Home Design, Inc., )  
Michael F. Gard doing business as )  
Gard Enterprises, and )  
Richard P. Gard doing business as )  
Gard Enterprises )  
)  
Respondents. )  
\_\_\_\_\_ )

ADMINISTRATIVE ORDER FOR COMPLIANCE  
FILED  
REGION VIII  
HEARING CLERK

Docket No. CWA-08-2010-0003

**I. STATUTORY AUTHORITY**

This 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 Professional Home Design, Inc. (PHD) is a corporation incorporated under the laws of the State of Wyoming. The address of the registered office for PHD is 202 South 2<sup>nd</sup> Street East, Riverton, WY 82501. Its registered agent at that address is Richard P. Gard.

2. Respondent Michael F. Gard, doing business as Gard Enterprises, is an individual. At all relevant times, he has been the president of PHD. Michael F. Gard resides at 1225 West Monroe Avenue in Riverton, Wyoming.
3. Respondent Richard P. Gard, doing business as Gard Enterprises, is an individual. At all relevant times, he has been the vice president of PHD. Richard P. Gard resides at 1201 West Monroe Avenue in Riverton, Wyoming.
4. Respondents are general contractors engaged in new construction and remodeling in the State of Wyoming.
5. At all relevant times, Respondents owned, controlled, managed, and/or operated property consisting of lots 21 and 22 of the River Park Subdivision (the Site) located in the southeast quarter of the southwest quarter of section 24, Township 41 North, Range 106 West, Fremont County, Wyoming.
6. The Fremont County assessor's office indicates the owner of record of the Site is Gard Enterprises.
7. The Wind River flows adjacent to the Site. The Wind River is and was at all relevant times a navigable-in-fact water. The Wind River is tributary to the Big Horn River, which is tributary to the Yellowstone River, which is tributary to the Missouri River. The Big Horn River, Yellowstone River, and Missouri River are, and were at all relevant times, navigable-in-fact, interstate waters. Furthermore, the United States Army Corps of Engineers (Corps) has determined that the Wind River is a traditional navigable water.
8. Between the first week of June 2008 and April 8, 2009, approximately 0.81 acre of wetlands was partially drained, excavated, and filled at the Site. The work was reportedly

done for the purpose of developing two lots for the future construction of two homes for Respondent Michael F. Gard and Respondent Richard P. Gard.

9. On April 2, 2009, the Corps received a report of a developer clearing and draining wetlands at the Site. The caller identified the contractor doing the work as PHD, Inc. The Corps had received a similar report from a different source the previous week.
10. On April 7, 2009, the Corps spoke with Respondent Michael F. Gard who told the Corps that work at the Site entailed draining and filling the property. Mr. Gard indicated that two pads had been constructed in preparation for building two cabins. The Corps told Mr. Gard that, based on recent discussions with local, state, and federal agencies, as well as information Mr. Gard provided, the work was likely being done in wetlands and could be in violation of the CWA. Mr. Gard was advised to discontinue work until the Corps could conduct a site inspection.
11. On April 22, 2009, the Corps inspected the Site and found that Respondents had discharged or allowed the discharge of dredged and fill material to 0.68 acre of wetlands adjacent to the Wind River referenced in paragraph 7 of Section II of this Order. Specifically, the Corps found that two trenches, each three to four feet deep and 60 feet long, had been cut in the wetlands in June 2008 to determine the groundwater level on the property, resulting in the discharge of sidecast material to the wetlands. In March 2009, four perforated drain pipes had been installed which involved the excavation and filling of two new trenches through the wetlands. Within the wetlands, offsite material was used to construct the building pad and access road, and additional material was stockpiled. These activities resulted in 0.68 acre of wetlands filled. Surface material excavated from

wetlands at the Site and used as base fill for the building pad and access road resulted in additional unauthorized impacts to another 0.13 acre of wetlands.

12. On May 8, 2009, via a certified mail, return receipt letter addressed to Mr. Michael Gard, Gard Enterprises, the Corps issued a cease and desist order directing “Gard Enterprises and any other parties responsible for these unauthorized activities . . . to cease and desist any further earth moving activities at the property in the vicinity of the Wind River.” The Corps’ letter indicated that the case had been referred to EPA.
13. The discharges described in paragraph 11 of Section II of this Order resulted in the direct elimination of at least 0.81 acre of wetlands and the dewatering of an unknown amount of additional wetlands adjacent to the Wind River. The wetlands provided various functions and values such as water quality improvement, wildlife habitat, groundwater recharge, flood attenuation, and aesthetics.
14. The discharges described in paragraph 11 of Section II of this Order were performed using common earthmoving vehicles and equipment, which were operated by or on behalf of Respondents.
15. Respondents are each a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
16. The discharged dredged and fill materials referenced in paragraph 11 of Section II of this Order are “dredged material” and “fill material” within the meaning of 33 CFR § 323.2(c) and 33 CFR § 323.2(e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

17. The vehicles and equipment referenced in paragraph 14 of Section II of this Order are each a “point source” as that term is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).
18. The Wind River, referenced in paragraph 7 of Section II of this Order, and its adjacent wetlands are “waters of the United States” as that term is defined in 33 CFR § 328.3(a) and therefore “navigable waters” as defined in section 502(7) of the CWA, 33 U.S.C. § 1362(7).
19. The placement of dredged and fill material into wetlands adjacent to the Wind River constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
20. 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.
21. 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.
22. According to 33 CFR § 323.3(a), a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States, except as provided by 33 CFR § 323.4.
23. Respondents are 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 or fill material to any waters of the United States at the Site.

24. Respondents' discharges of dredged and fill material 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).
25. Restoration and mitigation for the adverse impacts to, and the loss of the functions and values of, waters of the United States at the Site can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.
26. 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 and mitigation is appropriate to address the actual and potential harm to water quality, aquatic habitat, and wildlife habitat, as well as other functions and values, caused by Respondents' unpermitted activities.
27. 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 the discharge of dredged or fill material into waters of the United States.
2. Within 14 calendar days of receipt of this Order, each Respondent shall inform EPA in writing of that Respondent's intent to comply fully with this Order.
3. Upon EPA approval of the restoration or mitigation plan required by paragraph 5 of Section III of this Order, Respondents shall conduct restoration or mitigation activities, as more fully described below, for impacts to waters of the United States resulting from the unauthorized discharges of fill material at the Site.<sup>1</sup>
4. Respondents shall conduct all restoration or mitigation activities in accordance with an EPA-approved restoration or mitigation plan prepared by a consultant experienced in wetland restoration and mitigation. The consultant also shall directly supervise all work

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<sup>1</sup>“Restoration plan” and “restoration” shall refer to a plan and its specified activities that address paragraph 5.a of Section III of this Order. “Mitigation plan” and “mitigation” shall refer to a plan and its specified activities that address paragraph 5.b of Section III of this Order.

performed pursuant to the EPA-approved restoration or mitigation plan. Respondents shall submit a statement of the consultant's qualifications, including professional resume and business references, to EPA within 21 calendar days of receipt of this Order.

5. Within 60 calendar days of receipt of this Order, Respondents shall submit to EPA for review and comment a restoration or mitigation plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for restoration or mitigation of the impacts to the wetlands adjacent to the Wind River and to any other waters of the United States resulting from the unauthorized discharges of dredged or fill material at the Site. The restoration or mitigation plan shall address one of the following two alternatives to ensure that an aquatic resource equal in quality, function, and value to the existing impacted waters of the United States at the Site is made part of the landscape:
  - a. Removal of all unauthorized dredged and fill material, including drain pipes, in wetlands and any other illegally impacted waters of the United States at the Site and restoration of those areas to their pre-impact condition and grade.
  - b. Partial removal of unauthorized dredged and fill material, including drain pipes, in wetlands and any other illegally impacted waters of the United States at the Site and restoration of those areas to their pre-impact condition and grade. Under no circumstances will more than 0.5 acre of dredged or fill material be allowed to remain in the wetlands or any other waters of the United States at the Site. To compensate for the areal and temporal losses of wetlands and any other waters of the United States at the Site, mitigation activities shall be conducted to replace the quality, function, and value of the impacted aquatic resource. It is incumbent

upon Respondents to identify and propose appropriate mitigation for the impacts to waters of the United States that will remain at the Site.

6. The restoration or mitigation 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. In addition, the restoration or mitigation plan shall include:
  - a. A complete assessment of the impacts to the wetlands adjacent to the Wind River and any other impacted areas due to Respondents’ unauthorized discharges of dredged and fill material at the Site;
  - b. A detailed work plan and schedule for all of the work and activities to be accomplished, as specified in the restoration or mitigation plan, including the application for any required permits, providing for completion of all aspects of the restoration or mitigation work no later than 60 days after EPA approves the restoration or mitigation plan;
  - c. Locations of the Site’s existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, drains, road crossings, culverts, structures, and any other work, including a corresponding map 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, restoration, or mitigation activities;

- e. Detailed professional drawings of the restoration or mitigation site(s), including plan and profile drawings with control elevations for current conditions and, if different, proposed conditions; and
  - f. A description of all costs to complete the restoration or mitigation work, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.
7. EPA will review the restoration or mitigation plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the restoration or mitigation plan, Respondents shall, within 30 calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
8. All restoration or mitigation activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland restoration or mitigation. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within 21 calendar days of receiving EPA's written approval of the restoration or mitigation plan and prior to commencement of restoration or mitigation activities.
9. Respondents must make a timely application for each permit necessary to implement the EPA-approved plan and for conducting restoration or mitigation 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 calendar days of issuance of each permit.

10. This Order is not a permit or an authorization to discharge dredged or fill material, storm water, or any other pollutant into waters of the United States. Respondents shall consult with the Corps and the Wyoming Department of Environmental Quality (WDEQ) at the addresses and telephone numbers below to determine if any prior work at the Site or work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA or from the WDEQ under section 402 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 9 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers  
Wyoming Regulatory Office  
2232 Dell Range Boulevard, Suite 210  
Cheyenne, WY 82009-4942  
Telephone: 307-772-2300

Wyoming Department of Environmental Quality  
Water Quality Division  
122 West 25th St., Herschler Building  
Cheyenne, WY 82002  
Telephone: 307-777-7781

11. Respondents shall submit two copies of the restoration or mitigation plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop St.  
Denver, CO 80202-1129  
Telephone: 303-312-6359  
Facsimile: 303-312-7202

A copy of the restoration or mitigation plan, all notifications, and related correspondence shall also be provided to:

Peggy Livingston, 8ENF-L  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop St.  
Denver, CO 80202-1129  
Telephone: 303-312-6858  
Facsimile: 303-312-7202

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

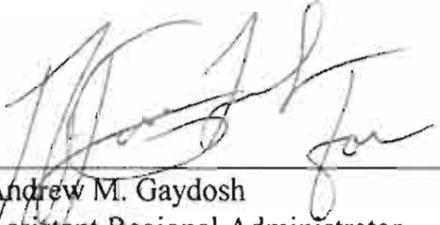
12. All plans (including, but not limited to, the restoration or mitigation plan), deliverables, reports, specifications, schedules, or attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved plans, deliverables, reports, specifications, schedules, or attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
13. Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, WDEQ, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the Wyoming Game and Fish Department, 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.
14. 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, 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.

15. This Order shall be effective upon the last date of receipt by Respondents.
16. 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 that occurred after March 15, 2004, through January 12, 2009, and \$37,500 per day for each violation thereafter 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.
17. 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.
18. 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.

19. 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 21<sup>st</sup> day of December, 2009.



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