



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION 8

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

2008 AUG 21 AM 9:33  
 FILED  
 EPA REGION VIII  
 HEARING CLERK

DOCKET NO.: CWA-08-2008-0019

IN THE MATTER OF: )

RANDY L. BROWNLEE and )  
 RITA BROWNLEE )

and )

BROWNLEE CONSTRUCTION, INC. )

RESPONDENTS )

FINAL ORDER

Pursuant to 40 C.F.R. §22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondents are hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondent of this Consent Agreement and Final Order.

SO ORDERED THIS 21<sup>st</sup> DAY OF August, 2008.

Elyana R. Sutin  
 Regional Judicial Officer



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

1595 Wynkoop Street  
DENVER, CO 80202-1129  
Phone 800-227-8917  
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JUL - 8 2008

Ref: 8ENF-W

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
**#7005-1160-0005-3398-1281**

Tim Tollefsrud, Director  
Division of Environmental Services  
South Dakota Department of  
Environment & Natural Resources  
Joe Foss Building  
523 East Capitol Avenue  
Pierre, SD 57501-3181

Re: Notice of Proposed Assessment of Class I  
Civil Penalty, Docket No. **CWA-08-2008-0019**

Dear Mr. Tollefsrud:

Enclosed is a copy of a Combined Complaint and Consent Agreement ("CCCA") which proposes assessment of a civil penalty of \$27,500 against Randy L. and Rita Brownlee and Brownlee Construction, Inc. ("Respondents") of Watertown, South Dakota. The United States Environmental Protection Agency ("EPA") is authorized to assess an administrative civil penalty against the Respondents pursuant to section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Respondents discharged dredged and/or fill material into wetlands adjacent to the Big Sioux River without a permit, in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which prohibits the discharge of a pollutant unless authorized by a permit issued under section 404 of the CWA, 33 U.S.C. § 1344. While the section 404 program is not a CWA authorized program in South Dakota, EPA is providing notice to you pursuant to CWA section 309(a), 33 U.S.C. § 1319(a) because the violations occurred in South Dakota. We are willing to provide further information on this proposed assessment upon request.

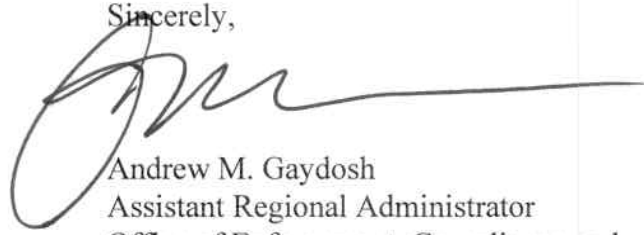


Printed on Recycled Paper

You or your staff may request a conference within thirty (30) days of receiving this letter. The conference may be in person or by telephone and may cover any matters relevant to the proposed assessment.

A copy of EPA procedures governing the administrative assessment of civil penalties under the CWA is enclosed for your reference. If you have any questions, the most knowledgeable person on my staff for legal issues is Jessie Goldfarb, Senior Enforcement Attorney, at (303) 312-6926. The most knowledgeable person on my staff for technical issues is Kenneth Champagne, Section 404 Enforcement Officer, who can be reached at (303) 312-6608.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew M. Gaydosh', with a long horizontal flourish extending to the right.

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

Enclosures:

1. Administrative Complaint
2. Administrative Penalty Procedures (40 C.F.R. part 22)
3. Certificate of Service

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF: )  
)  
Randy L. Brownlee and )  
Rita Brownlee )  
1520 Fifth Street )  
Watertown, SD 57201, )  
)  
and )  
)  
Brownlee Construction, Inc. )  
717 South Broadway )  
Watertown, SD 57201, )  
)  
)  
Respondents. )

COMBINED COMPLAINT AND CONSENT  
AGREEMENT

Docket No. CWA-08-2008-0019

Complainant, United States Environmental Protection Agency-  
Region 8 ("EPA"), and Respondents, Randy L. Brownlee, Rita Brownlee,  
and Brownlee Construction, Inc., by their undersigned representatives,  
hereby consent and agree as follows:

**I. PRELIMINARY STATEMENT**

1. This matter is subject to 40 C.F.R. Part 22. This Combined  
Complaint and Consent Agreement ("Consent Agreement") is entered into  
by the parties for the purpose of simultaneously commencing and  
concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and  
executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).

2. On September 10, 2007, EPA issued a Findings of Violations  
and Order for Compliance ("Order") to Respondents pursuant to Section  
309(a)(3) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(3),  
related to the violations described herein. Among other things,

the Order requires Respondents to perform restoration activities in accordance with the Restoration Plan they submitted to EPA for approval, which Plan was approved by EPA on March 12, 2008.

3. EPA has jurisdiction over this matter pursuant to Section 309(g) (1) (A) and (g) (2) (A) of the CWA, 33 U.S.C. § 1319(g) (1) (A) and (g) (2) (A).

4. For purposes of this settlement only, Respondents admit the jurisdictional allegations contained herein and neither admit nor deny the specific factual allegations or legal conclusions contained herein.

5. In any proceeding to enforce this Consent Agreement, Respondents waive their rights to a hearing before any tribunal to contest any issue of law or fact set forth in this Consent Agreement.

6. Complainant asserts that settlement of this matter is in the public interest, and Complainant and Respondents agree that entry of this Consent Agreement and its incorporation into a Final Order without further litigation and without adjudication of any issue of fact or law will avoid prolonged and complicated litigation between the parties.

7. This Consent Agreement, upon incorporation into a Final Order, applies to and is binding upon EPA and upon Respondents, and Respondents' officers, directors, agents, successors and assigns. Any change in ownership of the property containing wetlands adjacent to the Big Sioux River located in Section 5, Township 116 North, Range 52 West, Codington County, South Dakota (the "Site"), or corporate organization structure or status of Respondents, including,

but not limited to, any transfer of assets or real or personal property, shall not alter Respondents' responsibilities under this Consent Agreement.

8. This Consent Agreement contains all settlement terms agreed to by the parties.

## **II. GENERAL ALLEGATIONS**

9. Respondent Randy L. Brownlee is an individual with a mailing address of 1520 Fifth Street, Watertown, SD 57201, and is a director and officer of Brownlee Construction, Inc.

10. Respondent Rita Brownlee is an individual with a mailing address of 1520 Fifth Street, Watertown, SD 57201, and is a director and officer of Brownlee Construction, Inc.

11. Respondent Brownlee Construction, Inc. is a South Dakota corporation with a business address of 717 South Broadway, Watertown, SD 57201. Brownlee Construction, Inc. is currently in good standing with the South Dakota Secretary of State's Office.

12. At all relevant times, Respondents owned, leased and/or otherwise controlled the Site.

13. The Big Sioux River and the Missouri River are, and were at all relevant times, navigable, interstate waters.

14. On or about February 21, 2005, the U.S. Army Corps of Engineers (the "Corps") received a complaint from the City of Watertown, South Dakota, regarding a then-recent discharge of fill materials "in relatively close proximity to the Big Sioux River" at the Site.

15. On May 24, 2005, the Corps conducted an inspection, including a wetland delineation, at the Site as a follow-up to the February 21, 2005, complaint. The Corps found that Respondent Randy L. Brownlee and/or his agents discharged dredged and/or fill material into wetlands adjacent to and within the 100-year flood plain of the Big Sioux River, in order to utilize the Site for commercial use. The Corps estimated that 0.65 acres of wetlands had been filled with dredged and/or fill material without authorization.

16. By letter dated June 28, 2005, the Corps found that the actions of Respondent Randy L. Brownlee and/or his agents, as described in Paragraph 15, above, required prior Corps authorization and that the required authorization had not been granted. The Corps directed Respondent Randy L. Brownlee to "cease and desist" any further unauthorized work at the Site. Furthermore, the Corps directed Respondent Randy L. Brownlee, within 30 days of receipt of that letter, to remove the dredged and/or fill material that had been discharged at the Site, and to notify the Corps' South Dakota Regulatory Office when the restoration work had been completed.

17. On November 17, 2005, the Corps conducted an inspection at the Site to determine the status of the restoration. The Corps found that some dredged and/or fill material had been removed; however, this action had caused dredged and/or fill material to be pushed further into the wetland area resulting in additional fill impacts to the wetland. The Corps notified Respondent Randy L. Brownlee of this finding in a telephone conversation during which Mr. Brownlee indicated that he would complete the removal of the unauthorized dredged and/or fill material.

18. On May 5, 2006, the Corps telephoned Respondent Randy L. Brownlee to determine the status of the restoration. During that telephone call, Mr. Brownlee indicated that he had finished removing most of the dredged and/or fill material. The Corps informed Mr. Brownlee that it would conduct a follow-up inspection of the restoration.

19. On August 30, 2006, the Corps conducted a follow-up inspection at the Site to determine the status of the restoration. The Corps found that the unauthorized dredged and/or fill material had not been removed from the wetland area, and that therefore, restoration of the impacted waters of the United States had not been completed by Respondent Randy L. Brownlee.

20. On December 18, 2006, the Corps referred the case to EPA for enforcement after numerous unsuccessful attempts to obtain restoration from Respondent Randy L. Brownlee relative to the unauthorized impacts to waters of the United States.

21. The activities described in Paragraph 15, above, were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent Randy L. Brownlee and/or his agents, acting on behalf of himself and Respondents Rita Brownlee and Brownlee Construction, Inc.

22. Respondents are "persons" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

23. 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).

24. The wetlands adjacent to the Big Sioux River 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.

25. The vehicles and equipment described in Paragraph 21, above, 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).

26. The Big Sioux River and its adjacent wetlands referenced in Paragraphs 7, 12, and 13, above, 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).

27. The placement of dredged and/or fill material into the Big Sioux River and/or its adjacent wetlands constitutes the "discharge of pollutants" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

28. 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.

29. 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.

30. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

31. At all relevant times, Respondents were not authorized by a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged and/or fill material into waters of the United States on the Site.

### **III. DESCRIPTION OF VIOLATIONS**

32. Respondents' discharges of dredged and/or fill material into the wetlands at the Site violated 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, constituted a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remained in place without the required permits constituted an additional day of violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

### **IV. CIVIL PENALTY**

33. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and based in part on the nature of the violations and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is in the amount of TWENTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$27,500).

34. Within 30 calendar days of receipt of a fully-executed Consent Agreement and Final Order in this matter, Respondents shall pay a civil penalty in the amount of TWENTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$27,500) by remitting a cashier's or certified check for that amount, payable to "Treasurer, United States of America," to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000.

The payment shall reference the names and addresses of Respondents and the EPA Docket Number of this action. A copy of the transmittal of payment shall be sent simultaneously to:

Jessie Goldfarb (8ENF-L)  
Senior Enforcement Attorney  
U.S. EPA-Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

and

Tina Artemis (8RC)  
Regional Hearing Clerk  
U.S. EPA-Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129.

35. If Respondents fail to pay the amount specified in Paragraph 34 by the due date specified in that Paragraph, interest on the civil penalty of TWENTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$27,500) will be assessed at the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment charge of ONE HUNDRED DOLLARS (\$100) shall be imposed upon Respondents after the first 30 days that a payment, or any portion thereof, is overdue, with an additional charge of FIFTY DOLLARS (\$50) imposed for each

subsequent 30-day period until the payment due is received. In addition, a 6% per annum penalty shall be applied on any principal amount not paid within 90 days of the due date. Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

36. Respondents shall not deduct from their federal or state taxes penalties paid pursuant to this Consent Agreement.

**V. OTHER TERMS AND CONDITIONS**

37. Respondents shall comply with the Order referenced in Paragraph 2, above, and implement the Restoration Plan approved by EPA on March 12, 2008.

38. This Consent Agreement shall not relieve Respondents of their obligation to comply with all applicable provisions of federal, state, or local law.

39. Failure by Respondents to comply with any of the terms of this Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this Consent Agreement and for such other relief as may be appropriate.

40. Nothing in this Consent Agreement shall be construed as a waiver by Complainant of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondents' failure to perform pursuant to the terms of this Consent Agreement.

41. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to bind the parties to the terms and conditions of this Consent Agreement and to execute and legally bind that party to this Consent Agreement.

42. This Consent Agreement shall be subject to a public comment period of not less than 40 days, pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45. EPA may modify or withdraw its consent to this Consent Agreement if comments received disclose facts or considerations which indicate that the Consent Agreement is inappropriate, improper, or inadequate.

43. If comments received during the public comment period do not require modification of or withdrawal from this Consent Agreement by EPA, the parties agree to submit this Consent Agreement to the Regional Judicial Officer following closure of the public comment period, with a request that it be incorporated into a Final Order.

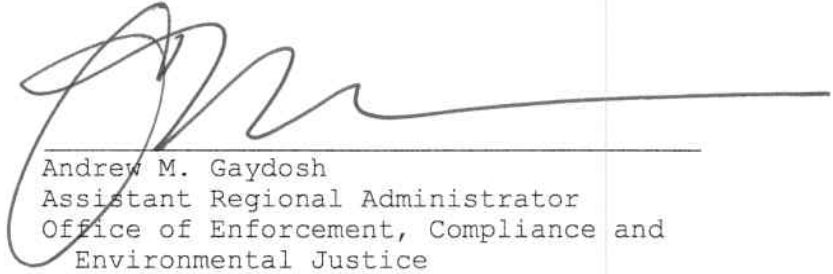
44. This Consent Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full, and final settlement of the civil penalty owed for violations alleged in this Consent Agreement.

45. This Consent Agreement resolves Respondents' liability for federal civil penalties under Section 309(d) and (g) of the CWA, 33 U.S.C. § 1319(d) and (g), for the alleged violations and facts contained in this Consent Agreement. This Consent Agreement shall not in any case affect EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

46. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this Consent Agreement.

**U.S. ENVIRONMENTAL PROTECTION AGENCY-  
REGION 8, Complainant.**

7/3/08  
Date

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

**RANDY L. BROWNLEE, RITA BROWNLEE, AND  
BROWNLEE CONSTRUCTION, INC., Respondents.**

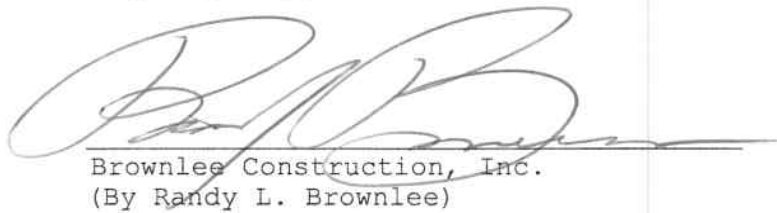
6-16-08  
Date

  
Randy L. Brownlee

6-16-08  
Date

  
Rita Brownlee

6-16-08  
Date

  
Brownlee Construction, Inc.  
(By Randy L. Brownlee)

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMBINED COMPLAINT AND CONSENT AGREEMENT/FINAL ORDER** in the matter of **RANDY L. BROWNLEE AND RITA BROWNLEE AND BROWNLEE CONSTRUCTION, INC.; DOCKET NO.: CWA-08-2008-0019** was filed with the Regional Hearing Clerk on August 21, 2008.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Jessie Goldfarb, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail certified/return receipt requested on August 20, 2008, to:

Randy L. Brownlee and  
Rita Brownlee  
1520 Fifth Street  
Watertown, SD 57201

and

Brownlee Construction, Inc.  
717 South Broadway  
Watertown, SD 57201

E-mailed to:

Michelle Angel  
U. S. Environmental Protection Agency  
Cincinnati Finance Center  
26 W. Martin Luther King Drive (MSD-0002)  
Cincinnati, OH 45268

August 21, 2008

  
Tina Artemis  
Regional Hearing Clerk

