



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

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED
#7004-1350-0001-5669-8582

Builders Aggregate, Inc. and
J J Concrete, LLC
c/o Larry L. French, Registered Agent
111 East Railroad Avenue
Fort Morgan, CO 80701

APR 16 2009

Re: Findings of Violation and Administrative
Order for Compliance,
Docket No. **CWA-08-2009-0011**

Dear Mr. French:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that Builders Aggregate, Inc. and J J Concrete, LLC (Respondents) are in violation of section 301 of the Clean Water Act, as amended (CWA), 33 U.S.C. § 1311. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344. Section 404 of the CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers (Corps) prior to the discharge of dredged or fill material into waters of the United States. Waters of the United States include both surface waters and wetlands as defined by 40 C.F.R. § 122.2 and 33 C.F.R. § 328.3.

Specifically, Respondents and/or persons acting on their behalf discharged dredged or fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into the South Platte River and its adjacent wetlands occurred on property owned, leased, and/or otherwise controlled by Respondents, located in Northwest ¼ of Section 31, Township 4 North, Range 57 West, Fort Morgan, Morgan County, Colorado.

Enclosed please find a document entitled "Findings of Violation and Administrative Order for Compliance" (Order), which specifies the nature of the violations and describes actions necessary in order for Respondents to achieve compliance with sections 301 and 404 of the



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CWA. As noted in paragraph 26 of the Order, within ten (10) days after your receipt of this Order, Respondents must inform EPA in writing of their intent to fully comply with the Order. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3).

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 a violation of 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 civil or criminal actions in U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 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 Respondents 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 responsibility to comply with the Act or the Order. 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 Wendy Silver, Senior Attorney, at 303-312-6637, and Kenneth Champagne, Section 404 Enforcement Officer, at 303-312-6608.

Sincerely,


for 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: James Miner, Builders Aggregate, Inc. and J J Concrete, LLC, w/enclosures
Eugene Megyesy, Jr., Dufford and Brown, P.C., w/enclosures
David LaGrone, U.S. Army Corps of Engineers, w/enclosures
Timothy T. Carey, U.S. Army Corps of Engineers, w/enclosures
Steve Gunderson, Director, CDPHE, w/enclosures
Tina Artemis, EPA, 8RC, w/enclosures



APR 16 2009

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY PH 3:24
REGION 8

IN THE MATTER OF)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
J J Concrete, LLC)	COMPLIANCE
915 West Beaver Avenue)	
Fort Morgan, CO 80701)	
)	Docket No. CWA-08-2009-0011
and)	
)	
Builder's Aggregate, Inc.)	
915 West Beaver Avenue)	
Fort Morgan, CO 80701)	
)	
Respondents.)	
_____)	

I. STATUTORY AUTHORITY

1. 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, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

2. Respondent J J Concrete, LLC (also known as Double J Concrete) is a Colorado corporation having a principal office address of 915 West Beaver Avenue, Fort Morgan,

Colorado 80701. J J Concrete, LLC's registered agent is Larry L. French, having a registered office address of 111 East Railroad Avenue, Fort Morgan, Colorado 80701.

3. Respondent Builder's Aggregate, Inc. is a Colorado corporation having a principal office address of 915 West Beaver Avenue, Fort Morgan, Colorado 80701. Builder's Aggregate, Inc.'s registered agent is Larry L. French, having a registered office address of 111 East Railroad Avenue, Fort Morgan, Colorado 80701.

4. At all relevant times, Respondents owned, controlled and/or operated property located in the Northwest ¼ of Section 31, Township 4 North, Range 57 West, Morgan County, Colorado (the Site). The South Platte River and its adjacent wetlands are located at the Site.

5. The South Platte River is tributary to the Missouri River. The South Platte River and the Missouri River are, and were at all relevant times, navigable, interstate waters.

6. Sometime in spring 2008, Respondents and/or persons acting on their behalf began discharging dredged or fill material, including, but not limited to, junk, concrete debris, sand, and gravel, into the South Platte River and its adjacent wetlands.

7. On June 26, 2008, the United States Army Corps of Engineers (Corps) conducted an inspection of the Site after receiving a complaint of impacts to the South Platte River and its adjacent wetlands. The Corps found, and EPA through issuance of this Order finds, that Respondents and/or persons acting on their behalf discharged dredged or fill material into the South Platte River and its adjacent wetlands at the Site. The Corps estimated that the Respondents' unauthorized activities resulted in the filling of approximately 2.0 acres of stream channel and adjacent wetlands.

8. In a letter to Respondents dated June 27, 2008, the Corps found, and EPA through issuance of this Order finds, that Respondents' activities, as described in paragraphs 6 and 7 of

this Order, required prior authorization from the Corps and that the required authorization had not been sought or granted. Further, the Corps directed Respondents to “cease and desist” any further unauthorized work at the Site.

9. On June 27, 2008, 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. The activities described in paragraphs 6 and 7 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.

11. Respondents are “persons” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. The discharged dredged or fill material referenced above is and was at all relevant times “dredged material” or “fill material” within the meaning of 33 C.F.R. § 323.2(c) 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).

13. The South Platte River and its adjacent wetlands 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.

14. The vehicles and equipment referenced in paragraph 10 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).

15. The South Platte River and its adjacent wetlands referenced 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).

16. The placement of dredged or fill material into the South Platte River 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).

17. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

18. 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.

19. 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.

20. 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 conduct any of the activities described in paragraphs 6 and 7 of this Order.

21. The activities conducted by Respondents and/or by persons acting on their behalf as described in paragraphs 6 and 7 of this Order violate section 301 of the CWA, 33 U.S.C.

§ 1311. Each discharge of pollutants from a point source by Respondents into waters of the United States without the required permits 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).

22. The removal of the dredged or fill material illegally discharged into waters of the United States at the Site and restoration of the impacted waters, including the South Platte River and its adjacent wetlands, to a condition that closely approximates their condition and function prior to the discharge of the dredged or fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

23. 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). The removal and restoration described in paragraph 22 of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondents' unpermitted activities.

24. This Order was issued after consultation and coordination with the Corps' Omaha District, Denver Regulatory Office.

III. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the 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:

25. 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.

26. Within ten (10) calendar days of receipt of this Order, Respondents shall inform EPA in writing of its intent to fully comply with the Order. If Respondents have concerns or questions about the requirements of the Order, EPA requests that Respondents schedule a meeting and/or conference call with EPA within seven (7) calendar days of receipt of this Order to discuss these concerns or questions. The scheduling of such a meeting and/or conference call 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.

27. Within twenty-one (21) calendar days of receipt of this Order, Respondents shall complete initial corrective measures designed to stabilize the Site prior to spring runoff. Specifically, Respondents shall remove the temporary stockpile of dredged materials located within the channel and on the north side of the South Platte River and dispose of these dredged materials at an upland location. The temporary stockpile of dredged materials shall be excavated to a level not to exceed the surrounding grade and elevation.

28. Upon EPA approval of the Restoration Plan required by paragraph 30 of this Order, Respondents shall remove all dredged or fill material, other than those addressed in

paragraph 27, that was discharged as a result of the violations identified in this Order and restore the impacted waters and wetlands at the Site to their pre-impact condition and grade, unless otherwise approved by EPA in the Restoration Plan.

29. All dredged or fill material removal and restoration activities, other than those addressed in paragraph 27, shall be conducted in accordance with the 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.

30. Within sixty (60) calendar days of receipt of this Order, Respondents shall submit to EPA for review, comment, and approval a Restoration Plan, prepared by the consultant referenced in paragraph 29 of this Order, providing for the: (1) removal of all dredged or fill material that was discharged into the waters and wetlands at the Site; and (2) restoration, to their pre-impact configuration and/or grade, of the waters and wetlands that were impacted as a result of Respondent's unauthorized discharges of dredged or fill material at the Site.

31. 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. 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;
- d. Detailed professional drawings of all of the work to be accomplished by the Restoration Plan, including plan and profile drawings with contour elevations; and
- e. A description of all costs to prepare and implement the Restoration Plan, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.

32. 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.

33. 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.

34. 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 33 of this Order prior to initiating any work that is to be performed pursuant to this Order.

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

35. 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:

Wendy Silver, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6637
Facsimile: 303-312-6953

A hard copy and electronic copy of the Restoration Plan also shall be provided to the Corps at the address noted in paragraph 34 of this Order.

36. In addition to the notification requirements set forth in paragraph 35 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.

37. 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.

38. If Respondents lease, sublease, or transfer control and/or ownership of any property, in whole or in part, where work is to be performed pursuant to the Restoration Plan before they have fulfilled their obligations under this Order, Respondents shall provide a copy of this Order and the EPA-approved Restoration Plan to the lessee, sublessee, or transferee not less than thirty (30) calendar days prior to the lease, sublease, or transfer. A lease, sublease, or transfer of such property interest shall not relieve Respondents of any responsibility in the Order unless EPA, Respondents, and the lessee, sublessee, or transferee agree in writing to allow the

lessee, sublessee, or transferee to assume such responsibility. Additionally, at least thirty (30) calendar days prior to such lease, sublease, or transfer, Respondents shall notify EPA regarding the details of the lease, sublease, or transfer at the addresses specified in paragraph 35 of this Order.

39. Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of EPA, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the Colorado Department of Public Health and Environment, or any of the agencies' contractors, 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.

40. 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.

41. Respondents' obligations under this Order are joint and several.

42. This Order shall be effective upon receipt by Respondents.

43. 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 which occurred before 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), including this Order. 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.


44. 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;

45. 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.

46. 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 16th day of April, 2009.



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