



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

SEP 24 2013

CERTIFIED MAIL #7009 3410 0000 2592 8727
RETURN RECEIPT REQUESTED

James and Kay Bianco
P.O. Box 469
1170 Jordan Road
Grand Lake, CO 80447

Re: Administrative Order for Compliance
Docket No. **CWA_08-2013-0032**

Dear Mr. and Mrs. Bianco:

Enclosed please find an Administrative Order for Compliance (Order), in which the U.S. Environmental Protection Agency (EPA) is directing you to submit a restoration plan for the East Inlet of Grand Lake and its adjacent wetlands. The Order contains the same requirements as in the proposed Administrative Order on Consent (Consent Order) that accompanied the EPA's August 1, 2013, letter to you.

The EPA recognizes, based on conversations with your consultant, Aleta S. Powers, and your attorney, Jason Robinson, that efforts are underway to develop a restoration plan. However, it is our understanding that you have not agreed to sign the Consent Order that would formalize your obligation to submit the plan. Consequently, to continue the progress you have made in developing a plan, and in the interest of moving this matter forward, the EPA is now issuing the enclosed Order.

I would encourage you, your consultant, and/or your attorney to continue discussions with the EPA concerning the development of the restoration plan. Please feel free to contact Monica Heimdal, Enforcement Officer, at 303-312-6359, and/or to ask your consultant to do so, as well as to ask your attorney to contact Peggy Livingston, Senior Enforcement Attorney, at 303-312-6858. Thank you for your cooperation.

Sincerely,

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

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

Enclosure

cc: Tina Artemis, EPA, Regional Hearing Clerk
Susan Bachini Nall, U.S. Army Corps of Engineers
Aleta S. Powers, ERO Resources Corporation
Jason Robinson, Fairfield and Woods, PC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:)

James and Kay Bianco)
P.O. Box 469)
1170 Jordan Road)
Grand Lake, CO 80447)

Respondents.)
_____)

ADMINISTRATIVE ORDER FOR
COMPLIANCE

Docket No. CWA-08-2013-0032

2013 SEP 24 PM 12:19
FILED
EPA REGION VIII
HEARING CLERK

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 section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 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. This 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. James and Kay Bianco (Respondents) are each an individual with an address of P.O. Box 469, Grand Lake, CO 80447. Respondents reside at 1170 Jordan Road in the Town of Grand Lake.
2. At all relevant times, Respondents have owned, controlled, managed, and/or operated property located in the northwest quarter of section 9, Township 3 North, Range 75 West, Grand County, Colorado (the Site). The Site includes wetlands that border the East Inlet to Grand Lake.
3. The East Inlet is a perennial tributary to Grand Lake, which is navigable-in-fact and a traditional navigable water.
4. Some time between early May and early June of 2011, Respondents or persons acting on their behalf constructed an earthen berm and placed rock riprap along the East Inlet. Respondents or persons acting on their behalf, in conjunction with disturbing and removing vegetation, also graded and filled wetlands adjacent to the East Inlet.
5. The U.S. Army Corps of Engineers (Corps) conducted an inspection of the Site on June 29, 2011, and found that Respondents or persons acting on their behalf had discharged or allowed the discharge of dredged and fill material into the East Inlet and the wetlands referenced in paragraphs 2-4 of Section II of this Order. Specifically, the Corps found that approximately seven truckloads of cobble and small boulder material (about 70 cubic yards) were discharged along approximately 120 linear feet of the north bank of the East Inlet, below its ordinary high water

mark. In addition, the Corps found that dredged or fill material had been discharged to approximately 0.17 acre of palustrine scrub-shrub wetlands due to land leveling and the construction of a dirt berm along the north bank of the East Inlet channel.

6. On July 1, 2011, the Corps completed a preliminary jurisdictional determination (JD) documenting that the East Inlet and its abutting wetlands at the Site are waters of the United States. Previously, on October 4, 2007, the Corps issued a memorandum for record that documents its determination that Grand Lake is navigable-in-fact and a traditional navigable water.
7. On July 18, 2011, via a certified mail, return receipt letter, the Corps issued a notice of violation to Respondents for the work performed at the Site and invited Respondents to provide any information that they felt should be considered.
8. On August 8, 2011, Respondents provided a response to the Corps' July 18, 2011, letter requesting that the work that had been done at the Site be authorized by an after-the-fact permit.
9. On September 28, 2011, the Corps referred this case to the 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. On April 8, 2013, the EPA sent Respondents a notice of potential violation of the CWA, offering Respondents the opportunity to negotiate the terms of an administrative order on consent (AOC) with the EPA that would include steps to come into compliance with the CWA. Respondents have not indicated an interest in entering into an AOC.
11. The discharges described in paragraph 5 of Section II of this Order resulted in restricting the East Inlet's access to its flood plain and additional adverse impacts to the East Inlet and its adjacent wetlands. The East Inlet and its adjacent wetlands provide several functions and values including water quality maintenance functions for Grand Lake, important aquatic and wildlife habitat, aquatic food chain support, flood storage, erosion protection, and aesthetics.
12. The discharges described in paragraph 5 of Section II of this Order were performed using common earthmoving vehicles and equipment, which were operated by or on behalf of Respondents.
13. Respondents are each a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
14. The discharged dredged and fill material referenced in paragraph 5 of Section II of this Order is "dredged material" and "fill material" within the meaning of 33 C.F.R. § 323.2(c) and 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).

15. The vehicles and equipment referenced in paragraph 12 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).
16. The East Inlet and its adjacent wetlands, referenced in paragraphs 2, 3, 4, 5, 6, and 11 of Section II of this Order, are "waters of the United States" as that term is defined in 33 C.F.R. § 328.3(a) and, therefore, "navigable waters" as defined in section 502(7) of the CWA, 33 U.S.C. § 1362(7).
17. The placement of dredged and fill material into the East Inlet 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. According to 33 C.F.R. § 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 C.F.R. § 323.4.
21. 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 and/or fill material to any waters of the United States on the Site.
22. 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).
23. Restoration and remediation for the adverse impacts to, and the loss of the functions and values of, waters of the United States on the Site 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 and remediation 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.

25. This Order was issued after consultation and coordination with the Corps' Sacramento District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to section 309(a) of the CWA, 33 U.S.C. § 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 discharges of dredged and 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. Respondents shall conduct restoration activities for impacts to waters of the United States resulting from the unauthorized discharges of dredged and fill material at the Site in accordance with the schedule and other requirements set forth in this Order.
3. Within ten calendar days of receipt of this Order, Respondents shall inform the EPA in writing of their intent to comply fully with this Order. If Respondents have concerns or questions about the requirements of this Order, the EPA requests that Respondents schedule a meeting and/or conference call with the EPA within seven 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 the EPA.
4. Within 14 calendar days of receipt of this Order, Respondents shall submit to the EPA the name and qualifications, including professional resume and business references, of a consultant experienced in stream and wetlands restoration who will prepare a restoration plan (Plan) and supervise all work performed pursuant to the Plan, once it is approved by the EPA.
5. Within 30 calendar days of receipt of this Order, Respondents shall submit the Plan to the EPA for review, comment, and approval. The Plan shall be prepared by the consultant referenced in paragraph 4 of Section III of this Order and shall provide for: (1) the removal of all dredged and fill material that was discharged into the East Inlet and its adjacent wetlands at the Site; and (2) the restoration, to their pre-impact condition and grade, of the East Inlet and its adjacent wetlands that were impacted as a result of Respondents' unauthorized discharges of dredged and fill material. The Plan shall be prepared in accordance with "U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans," attached hereto as Exhibit A. In addition, the Plan shall include:

- a. A detailed work plan and schedule for all of the work and activities to be accomplished, as specified in the Plan, including the application for any required permits, providing for completion of all aspects of the restoration and remediation work no later than 45 days after the EPA approves the Plan;
 - b. Grading, planting, and monitoring plans, measurable criteria for success of restoration and remediation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or restoration and remediation;
 - c. Detailed professional drawings of the restoration and remediation locations, including plan and profile drawings with control elevations for current conditions and proposed conditions; and
 - d. A description of all costs to complete the restoration and remediation work, including the costs of all consultations, permits, construction, monitoring, reporting, etc.
6. The EPA will review the Plan and approve it, approve it with modifications, or reject it with comments. If the EPA rejects the Plan, Respondents shall, within 15 calendar days of receipt of the EPA's rejection letter, submit a revised Plan that corrects the deficiencies identified by the EPA.
 7. Upon EPA approval of the Plan, Respondents shall conduct restoration and remediation activities for impacts to waters of the United States resulting from the unauthorized discharges of dredged and fill material at the Site.
 8. All restoration and remediation 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 the EPA within 14 calendar days of receiving the EPA's written approval of the Plan and prior to commencement of restoration and remediation activities.
 9. Respondents must make a timely application for each permit necessary to implement the EPA-approved Plan and for conducting restoration and remediation activities 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 the 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 Colorado Department of Public Health and Environment (CDPHE) at the addresses and telephone numbers 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 or from CDPHE 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 the 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
Colorado West Regulatory Branch
400 Rood Avenue, Room 224
Grand Junction, CO 81501
Telephone: 970-243-1199

Colorado Department of Public Health and Environment
Water Quality Control Division
4300 Cherry Creek Drive South
Denver, CO 80246-1530
Telephone: 303-692-3500

11. Respondents shall submit two copies of the 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

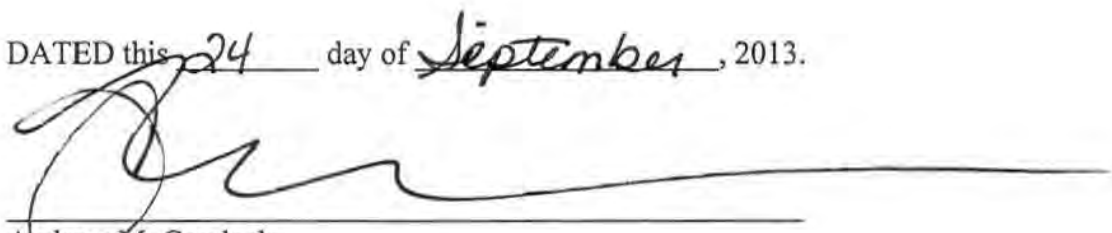
A copy of the Plan also shall be provided to the Corps at the address noted in paragraph 10 of Section III of this Order.

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 restoration and remediation 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 Plan), deliverables, reports, specifications, schedules, or attachments required by this Order are, upon approval by the EPA, incorporated into this Order. Any noncompliance 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. A lease, sublease, or transfer of the Site shall not relieve Respondents of any responsibility in this Order unless the 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 30 calendar days prior to such lease, sublease, or transfer, Respondents shall notify the EPA regarding the details of the lease, sublease, or transfer at the address specified in paragraph 11 of Section III of this Order.

15. Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of the EPA or its contractors, the Corps, CDPHE, the Colorado Division of Wildlife, the Natural Resources Conservation Service, and the U.S. Fish and Wildlife Service, upon proper presentation of credentials, to the Site and to all 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 the EPA.
16. This Order shall in no way limit or otherwise affect the 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.
17. This Order shall be effective upon the date of receipt by Respondents.
18. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as adjusted for inflation by 40 C.F.R. part 19, authorizes civil penalties of up to \$37,500 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 the 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 the 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 this Order.
20. Compliance with the terms and conditions of this Order shall not be construed to relieve Respondents of their obligation to comply with any applicable Federal, state, or local law or regulation.
21. Any 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.

22. Respondent may seek federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

DATED this 24 day of September, 2013.

A handwritten signature in black ink, appearing to read "Andrew M. Gaydosh", written over a horizontal line.

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

Exhibit A

U. S. ENVIRONMENTAL PROTECTION AGENCY - REGION VIII

SECTION 404 ENFORCEMENT:

GENERAL GUIDELINES FOR REMOVAL AND RESTORATION PLANS

The following guidelines serve as general specifications for preparing removal and restoration plans to remediate the unpermitted filling of wetlands. As environmental conditions vary at every site, precise specifications will depend upon the environmental conditions peculiar to the site in question. The size of the wetland area to be restored, its biological and physical characteristics, and the level of disturbance the wetland has experienced will further define the scope and complexity of the restoration plan. In most cases, the types of information listed below represent the minimum required to formulate an acceptable removal and restoration plan. When these guidelines are incorporated into an EPA Administrative Order, the recipient of the Order should obtain the approval of EPA's technical representative on the case before departing from the general specifications outlined below.

I. Existing Physical Conditions

- A. A surveyed site plan depicting property boundaries, streets, buildings, waterbodies (with ordinary high water line indicated), wetlands, FEMA 100-year floodplain (if applicable), areas of unpermitted fill, elevation contours, and other ground surface features at a scale no greater than 1 inch = 40 feet. This plan shall include a cross-section view of the site which shows soil depths, fill depths, and average depth to groundwater across the site.
- B. A narrative description of existing physical conditions, including the area of the site; area of unpermitted fill; existing wetlands (including the types of vegetation); the soil types present (including the types of unpermitted fill present); the hydrologic regime of the site; and other relevant information.

II. Proposed Physical Conditions

- A. Using the site plan described in I.A. as a base, show the exact areas where remedial activities will occur (e.g., removal of fill, replacing dredged material into ditches, etc.). Indicate proposed finished grades, expected ordinary high water elevations, the location of proposed plantings/seedings, and the location of all sediment and erosion control structures (e.g., hay bales, silt screens, etc.). This plan shall include a cross-section view of the site which shows proposed soil depths and average depth to groundwater across the site.
- B. Provide a narrative description of the remedial work to occur, including the methods and equipment to be employed; how the equipment will gain access to the site to perform the work; the location of the ultimate disposal site for any removed fill; how the work will progress across the site; a listing of the plant species to be seeded/planted at the site; the sources of the plant material (note: as a rule, transplanting of plant stock will not be permitted); the planting method(s) and scheme (i.e., physical layout of how plant material will be installed); any methods to be used to minimize adverse impacts while remedial work is underway; the expected hydrologic regime of the site in its restored condition; and other relevant information.
- C. Delineate the area(s) on the site to be restored by installation of flagging, sedimentation and erosion control structures, or other appropriate method; this delineation shall represent the limit of construction activities such that no work shall occur beyond these boundaries.

III. Actual Restored Physical Conditions

- A. Using the site plan described in I.A. as a base, show the actual physical conditions at the site at the completion of grading activities (i.e., an "as-built" plan), including actual finished grades and all pertinent ground surface features. This plan shall include a cross-section view of the site which shows actual soil depths and average depth to groundwater across the site. This as-built plan shall be prepared and submitted prior to planting/seedling activities.

IV. Monitoring/Measures of Success

- A. Normally, monitoring shall be performed midway through and near the end of the first and second growing seasons, then annually near the end of each successive growing season for the duration of the required monitoring period. Monitoring shall be performed for a period of three to five years, depending upon the scope and complexity of the remedial efforts required.
- B. A monitoring plan shall incorporate a simple statistical approach to assessing relative success or failure of restoration efforts (e.g., transects with sampling stations for measuring parameters such as percent areal cover in each vegetative stratum). A permanent photographic record shall be included as part of the monitoring plan.
- C. Depending upon the scope and complexity of the remedial efforts, general criteria to measure success shall be determined by EPA. These criteria shall be directly related to reestablishing the structural components of the aquatic ecosystem being restored. A general provision shall be included to allow for corrective action to be taken, at the direction of EPA, should monitoring show that criteria for success are not being met.
- D. A report shall be prepared and submitted after each monitoring event which describes the environmental conditions at the site and assesses relative success or failure of restoration efforts. This report shall include photographic evidence as well. This report shall identify any problems discovered and recommend appropriate corrective action to ensure the success of restoration.

V. Inspections

- A. The plan shall provide for inspections by EPA personnel after installation of all sedimentation and erosion control structures, after completion of grading activities, after completion of initial planting/seeding activities, and after monitoring indicates that the criteria for success have been attained.

VI. Schedule

- A. A comprehensive schedule integrating all removal, restoration, inspection, and monitoring activities as well as report/product submissions shall be included.