



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

MAY 14 2009

Ref: 8ENF-W

CERTIFIED MAIL #7008 1140 0004 5102 5923
RETURN RECEIPT REQUESTED

Cliff Ferebee
County Commissioner, Dunn County
205 Owens Street
P.O. Box 105
Manning, ND 58642-0105

CERTIFIED MAIL #7008 3230 0003 0730 5556
RETURN RECEIPT REQUESTED

Robert Kleemann
County Commissioner, Dunn County
205 Owens Street
P.O. Box 105
Manning, ND 58642-0105

CERTIFIED MAIL #7008 3230 0003 0730 5557
RETURN RECEIPT REQUESTED

Tim Steffan
County Commissioner, Dunn County
205 Owens Street
P.O. Box 105
Manning, ND 58642-0105

Re: Administrative Order for Compliance
Docket No. **CWA-08-2009-0013**

Dear Mr. Ferebee, Mr. Kleemann, and Mr. Steffan:

Based on a review of all available information, the United States Environmental Protection Agency (EPA) has determined that Dunn County (the County) is in violation of the Clean Water Act (CWA). The CWA requires that an authorizing permit be obtained from the



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United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 C.F.R. § 328.3.

Specifically, the County and/or persons acting on its behalf have discharged fill material into waters of the United States without authorization under the CWA. These discharges of pollutants to the Little Knife River occurred in connection with efforts to relocate a segment of the river channel and realign two roads on property located in sections 29 and 30, Township 144 North, Range 96 West, Dunn County, North Dakota.

Enclosed is an Administrative Order for Compliance (Order) that specifies the nature of the violations and directs the County to submit a mitigation plan. EPA's authority for issuing the Order is provided by section 309(a) of the CWA, 33 U.S.C. § 1319(a). The Order requires the County to inform EPA in writing, within 14 days of receipt, of its 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 the County's 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,



Eddie A. Sierra
Acting 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
Daniel E. Cimarosti, U.S. Army Corps of Engineers
David L. Lagrone, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 MAY 14 AM 11:39

IN THE MATTER OF:)
)
Dunn County, a Political Subdivision of)
the State of North Dakota)
205 Owens Street, P.O. Box 105)
Manning, ND 58642-0105)
)
Respondent.)
_____)

ADMINISTRATIVE ORDER FOR)
COMPLIANCE)

Docket No. CWA-08-2009-0013

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. Dunn County (Respondent) is a political subdivision of the State of North Dakota. The Respondent’s primary offices are located at 205 Owens Street, Manning, North Dakota.

2. At all relevant times, the Respondent owned, controlled, managed, and/or operated property located in sections 29 and 30, Township 144 North, Range 96 West, Dunn County, North Dakota (the Site). The Little Knife River flows through the Site.
3. Between July and September 2008, approximately 1300 feet of the Little Knife River at the Site were completely filled and rechannelized in conjunction with a county project to realign two rural highways at the intersection of 10th St. SW and 113th Ave. SW. The resulting rechannelized segment of the Little Knife River is at least 200 feet shorter than the portion of the Little Knife River that was filled.
4. The Little Knife River is a tributary to the Knife River. The Knife River flows into the Missouri River. The Missouri River is a navigable-in-fact, interstate water.
5. On April 26, 2007, Dunn County submitted a solicitation of views and comments (SOV) to the U.S. Army Corps of Engineers (Corps) regarding a proposed county highway improvement project, including a bridge replacement, located 1/4 - 1/2 mile upstream from the Site. The bridge crosses the Little Knife River.
6. On May 2, 2007, the Corps responded to Dunn County's SOV, stating that the proposed project was in a jurisdictional area and a Department of the Army permit would be required prior to commencing construction activities that would result in the discharge of material into waters of the United States.
7. On May 11, 2007, Dunn County submitted a permit application to the Corps to construct a temporary bypass to accommodate daily traffic during the construction of the county highway improvement project.

8. On June 5, 2007, the Corps issued a confirmation letter to Dunn County, stating that the construction of the temporary bypass was authorized by Department of the Army Nationwide Permit No. 14.
9. On February 27, 2008, Dunn County submitted a permit application for the bridge installation and removal of the temporary bypass.
10. On March 10, 2008, the Corps completed a jurisdictional determination (JD) for the Little Knife River at the site of the bridge and the temporary bypass. The JD documents that the Little Knife River is a water of the United States. That same day, the Corps issued a confirmation letter to Dunn County stating the proposed work described in the February 27, 2008, permit application was authorized by Department of the Army Nationwide Permit No. 14.
11. On September 17, 2008, while on their way to inspect the county highway improvement project, representatives of the Corps observed that the Little Knife River had been filled and rechannelized at the Site.
12. The Corps returned to the Site to conduct an inspection on September 22, 2008, and found that the Respondent had discharged or allowed the discharge of fill material into approximately 1300 feet of the Little Knife River referenced in paragraphs 2 - 5 and paragraphs 10 - 11 of Section II of this Order. During a September 25, 2008, telephone conversation, the Dunn County Road Supervisor informed the Corps that work at the Site had begun "a couple of months ago."

13. On September 25, 2008, via a certified mail, return receipt letter addressed to the Dunn County Road Supervisor, the Corps issued a notice of violation to the Respondent. The Corps' letter indicated that the case had been referred to EPA.
14. The Corps' North Dakota Regulatory Office computer database indicates that the Corps issued the Respondent 44 nationwide permits (NWPs), 6 individual permits, and one "No Permit Required" letter for various road projects from 1978 through 2005. This demonstrates the Respondent's knowledge of the Corps' permit requirements.
15. The discharge described in paragraph 12 of Section II of this Order resulted in the elimination of at least 200 linear feet of, and additional adverse impacts to, the Little Knife River. The Little Knife River provides various functions and values including aquatic and wildlife habitat, flood flow attenuation, and aesthetics.
16. The discharge described in paragraph 12 of Section II of this Order was performed using common earthmoving vehicles and equipment, which were operated by or on behalf of the Respondent.
17. The Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
18. The discharged fill material referenced in paragraph 12 of Section II of this Order is "fill material" within the meaning of 33 CFR § 323.2(e) and a "pollutant" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
19. The vehicles and equipment described in paragraph 16 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).

20. The Little Knife River referenced in paragraphs 2 - 5 and paragraphs 10 - 11 of Section II of this Order is a “water of the United States” as 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).
21. The placement of fill material into the Little Knife River constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
22. 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.
23. 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.
24. 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
25. The Respondent is not and never has 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.
26. The Respondent’s discharges of 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 the Respondent 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).

27. Mitigation 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.
28. 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). 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 the Respondent's unpermitted activities.
29. 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. The Respondent 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, the Respondent shall inform EPA in writing of the Respondent's intent to comply fully with this Order.
3. Upon EPA approval of the mitigation plan required by paragraph 5 of Section III of this Order, the Respondent shall conduct 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.
4. All mitigation activities shall be conducted in accordance with an EPA-approved mitigation plan prepared by a consultant experienced in stream mitigation and restoration. The consultant also shall directly supervise all work performed pursuant to the EPA-approved mitigation plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
5. Within sixty (60) calendar days of receipt of this Order, the Respondent shall submit to EPA for review and comment a mitigation plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for mitigation of the impacts to the Little Knife

River and any other illegally impacted areas at the Site resulting from the unauthorized discharges of fill material.

6. The mitigation 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 mitigation plan shall include:

- a. A complete assessment of the impacts to the Little Knife River and any other impacted areas due to the Respondent’s unauthorized discharges of 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 mitigation plan, including the application for any required permits, providing for completion of all aspects of the mitigation work no later than sixty (60) days after EPA approves the mitigation plan. At a minimum, the mitigation shall include the addition of meanders to the existing rechannelized segment of the Little Knife River in order to achieve a similar length, sinuosity, and grade as the channel segment that was filled. The mitigation also shall provide for a buffer on each side of the rechannelized segment to replace the wildlife habitat lost due to project construction and to reduce erosion, sedimentation, and the discharge of pollutants to the Little Knife River;
- c. Locations and delineations of any wetlands and other waters of the United States included in the mitigation. 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;

- d. Grading, planting, and monitoring plans, measurable criteria for success of mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or mitigation;
 - e. Detailed professional drawings of the 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 mitigation work, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.
7. EPA will review the mitigation plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the mitigation plan, the Respondent shall, within fifteen (15) calendar days of receipt of EPA’s rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
8. All 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 and stream mitigation and restoration. A statement of the equipment operator’s qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receiving EPA’s written approval of the mitigation plan and prior to commencement of mitigation activities.

9. The Respondent must make a timely application for each permit necessary to implement the EPA-approved plan and for conducting mitigation in accordance with the approved plan, including the schedule specified therein, with all granted permits, and with all applicable laws. The Respondent 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.
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. The Respondent shall consult with the Corps and the North Dakota Department of Health (NDDOH) 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 the NDDOH under section 402 of the CWA. If any such permit is required, the Respondent 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
North Dakota Regulatory Office
1513 South 12th Street
Bismarck, ND 58504
Telephone: 701-255-0015

North Dakota Department of Health
918 East Divide Avenue
Bismarck, ND 58501-1947
Telephone: 701-328-5242

11. The Respondent shall submit two (2) copies of the 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 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 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 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. The Respondent shall allow, or use its best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the NDDOH, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the North Dakota 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 receipt by the Respondent.
 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 the Respondent of its obligation to comply with any applicable Federal, state, or local law or regulation.
19. Failure by the Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject the Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 14 day of may, 2009.

Eddie A. Sierra

Eddie A. Sierra
Acting Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice