



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

DEC 29 2008

Ref: 8ENF-W

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED
#7005-1160-0005-3398-1366

John A. Porter
10 Creek Lane
Cody, Wyoming 82414

Re: Findings of Violation and Administrative
Order for Compliance,
Docket No. **CWA-08-2009-0003**

Dear Mr. Porter:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you are in violation of sections 301 and 404 of the Clean Water Act, as amended ("CWA"), 33 U.S.C. §§ 1311 and 1344. 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. See, 33 U.S.C. § 1311. 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, EPA has determined that you and/or persons acting on your behalf discharged dredged and/or fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into Sage Creek and its adjacent wetlands occurred on Lots 1 and 6 of the Porter Subdivision No. 1 owned, leased, and/or otherwise controlled by you, located in Northwest ¼ of Section 15, Township 52 North, Range 101 West, Park County, Wyoming (the "Site").

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 you to achieve compliance with sections 301 and 404 of the CWA. Pursuant to this Order, within twenty-one (21) days after your receipt of this Order, you must inform EPA in writing of your 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).



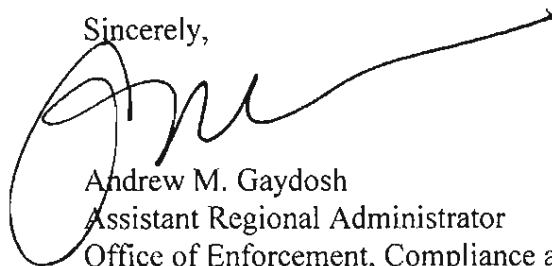
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The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA, 33 U.S.C. § 1319, authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that failure to comply with the requirements of the Order is a violation of that Order and may be enforced through the mechanisms referenced above. Please also 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 you 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, nor does it create any new rights or defenses under law. 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 Sheldon Muller, Enforcement Attorney, at 303-312-6916, and Kenneth Champagne, Section 404 Enforcement Officer, at 303-312-6608.

Sincerely,



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: David LaGrone, U.S. Army Corps of Engineers, w/enclosures
Matthew A. Bilodeau, U.S. Army Corps of Engineers, w/enclosures
John Wagner, Wyoming, WY DEQ, w/enclosures
Tina Artemis, EPA, 8RC, w/enclosures



bcc: Sheldon Muller, 8ENF-L
Ken Champagne, 8ENF-W
Richard Clark, 8EPR-EP
Brenda Cazier, 8ENF-PJ
Sandy Fells, 8OC
Reading file

cc addresses:

John Wagner, Administrator
Wyoming Department of Environmental Quality
Water Quality Division
122 West 25th Street
Herschler Building, 4th Floor West
Cheyenne, WY 82001

David L. LaGrone
Regulatory Enforcement Coordinator
U.S. Army Corps of Engineers, Omaha District
Ref: Corps File # NOW-2008-02063
1616 Capitol Ave., Suite 9000
Omaha, NE 68102-9000

Matthew Bilodeau, Program Manager
Wyoming Regulatory Office
U.S. Army Corps of Engineers
Ref: Corps File # NOW-2008-02063
2232 Dell Range Blvd., Suite 210
Cheyenne, Wyoming 82009-4942



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

20090820 12:01 PM

IN THE MATTER OF)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
John A. Porter)	COMPLIANCE
10 Creek Lane)	
Cody, Wyoming 82414)	Docket No. CWA-08-2009-0003
)	
Respondent.)	
_____)	

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 John A. Porter is an individual with a mailing address of 10 Creek Lane, Cody, Wyoming, 82414.

3. At all relevant times, Respondent owned, controlled and/or operated Lots 1 and 6 of the Porter Subdivision No. 1, which contain Sage Creek and its adjacent wetlands located in

Northwest 1/4 of Section 15, Township 52 North, Range 101 West, Park County, Wyoming (the “Site”).

4. Sage Creek is a perennial tributary to the Shoshone River, which is tributary to the Bighorn River. From the Site, Sage Creek flows approximately 9 river miles to the Shoshone River. The Shoshone River is, and was at all relevant times, a navigable water. The Big Horn River is, and was at all relevant times, a navigable, interstate water.

5. Beginning sometime in or around April 2008, Respondent and/or persons acting on his behalf, using his own equipment, rerouted a portion of Sage Creek at the Site, filled its adjacent wetlands with the sidecast materials, and filled the original Sage Creek channel at the Site for the purpose of bank stabilization and erosion control.

6. On July 8, 2008, the United States Army Corps of Engineers (“Corps”) conducted an inspection of the Site after receiving a complaint of impacts to Sage Creek and its adjacent wetlands at the Site. The Corps found, and EPA through issuance of this Order finds, that Respondent and/or persons acting on his behalf discharged dredged and/or fill material into Sage Creek and its adjacent wetlands during Respondent’s bank stabilization and erosion control activities at the Site. The Corps estimated that approximately 920 linear feet of the original stream channel and 1.2 acres of adjacent wetlands were filled during Respondent’s excavation of a new stream channel of approximately 410 feet.

7. In a letter to Respondent, dated August 8, 2008, the Corps found, and EPA through issuance of this Order finds, that Respondent’s activities, as described in paragraphs 5 and 6 of this Order, required prior authorization from the Corps and that the required authorization had not been sought or granted. Further, the Corps directed Respondent to “cease and desist” any further unauthorized work at the Site.

8. The activities described in paragraphs 5 and 6 of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent and/or by persons acting on his behalf.

9. Respondent is a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

10. The discharged dredged 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) 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).

11. Sage Creek and its adjacent wetlands filled and disturbed by Respondent’s unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

12. The vehicles and equipment described in paragraph 8 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).

13. Sage Creek 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).

14. The placement of dredged or fill material into Sage Creek 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).

15. 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.

16. 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.

17. 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.

18. 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 conduct any of the activities described in paragraphs 5 and 6 of this Order.

19. The activities conducted by Respondent and/or by persons acting on his behalf as described in paragraphs 5 and 6 of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent 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).

20. 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 Sage Creek 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.

21. 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 20 of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unpermitted activities.

22. This Order was issued after consultation and coordination with the Corps' Omaha District, Wyoming 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:

23. 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 a discharge of dredged or fill material into waters of the United States.

24. Within twenty-one (21) calendar days of receipt of this Order, Respondent shall inform EPA in writing of its intent to fully comply with the Order. If Respondent has concerns or questions about the requirements of the Order, EPA requests that Respondent schedule a meeting and/or conference call with EPA within fourteen (14) 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 Respondent's responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondent by EPA.

25. Upon EPA approval of the Restoration Plan required by paragraph 27 of this Order, Respondent shall remove all dredged or fill material 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.

26. All dredged or fill material removal and restoration activities shall be conducted in accordance with an 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-eight (28) calendar days of receipt of this Order.

27. Within sixty (60) calendar days of receipt of this Order, Respondent shall submit to EPA for review, comment, and approval a Restoration Plan, prepared by the consultant referenced in paragraph 26 of this Order, providing for the: (1) removal of all dredged and/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 and/or fill material at the Site.

28. 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. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map (scale 1":100') of these locations;
- d. Grading, planting, and monitoring plans, measurable criteria for success of restoration or mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or restoration;
- e. Detailed professional drawings of all of the work to be accomplished by the Restoration Plan, including plan and profile drawings with control elevations; and

f. A description of all costs to prepare and implement the Restoration Plan, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.

29. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondent shall, within thirty (30) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

30. Upon receiving EPA's written approval of the Restoration Plan, Respondent shall obtain all necessary permits to implement the EPA-approved plan and then commence all restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondent shall 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.

31. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent 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, Respondent shall obtain such permit(s) and provide a copy or copies to EPA pursuant to paragraphs 30 and 32 of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
Wyoming Regulatory Office
2230 Dell Range Boulevard, Suite 210
Cheyenne, WY 82009-4942
Telephone: 307-772-2300
Facsimile: 307-772-2920

32. Respondent 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:

Sheldon Muller, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6916
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 31 of this Order.

33. In addition to the notification requirements set forth in paragraph 32 of this Order, after issuance of any Corps authorization for the restoration work, Respondent shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

34. All plans (including, but not limited to, the Restoration Plan), deliverables, reports, specifications, schedules, and 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.

35. If Respondent leases, subleases, or transfers control and/or ownership of any property, in whole or in part, where work is to be performed pursuant to the Restoration Plan before he has fulfilled his obligations under this Order, Respondent 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 Respondent of any responsibility in the Order unless EPA, Respondent, 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, Respondent shall notify EPA regarding the details of the lease, sublease, or transfer at the addresses specified in paragraph 32 of this Order.

36. Respondent shall allow, or use his 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, the Wyoming Game and Fish Department, and the Wyoming Department of Environmental Quality, 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.

37. 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.

38. This Order shall be effective upon receipt by Respondent.

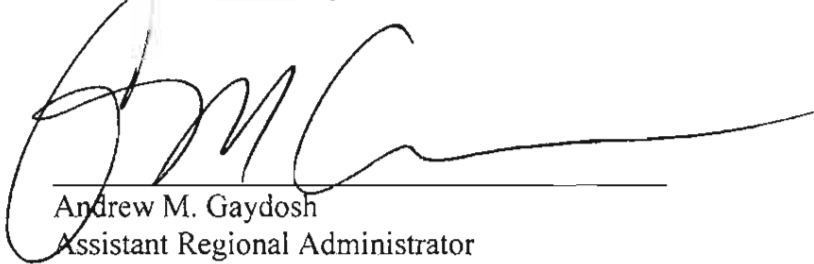
39. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$32,500 per day for each violation of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 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.

40. 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;

41. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondent of his obligation to comply with any applicable Federal, state, or local law or regulation.

42. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 23rd day of December, 2008.



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

EXHIBIT A