



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET

DENVER, CO 80202-1129

Phone 800-227-8917

<http://www.epa.gov/region08>

JUN - 5 2007

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Ref: 8ENF-L

Douglas Rohrer
13571 State Highway 200, RR #2
Fort Shaw, MT 59443

Ken Rohrer
345 Creekside Ln.
Helmville, MT 59843

Re: Findings of Violation and
Administrative Order for Compliance,
Docket No. **CWA-08-2007-0010**

Dear Messrs. Rohrer:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you and the Rohrer Family Limited Partnership are in violation of the Clean Water Act, as amended ("CWA" or the "Act"). The CWA requires that an authorizing permit be obtained from the 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, you or persons acting on your behalf have discharged dredged or fill material into waters of the United States without authorization under the Act. These discharges of pollutants to wetlands adjacent to Cottonwood Creek and Douglas Creek occurred at property owned by the Rohrer Family Limited Partnership and located in sections 28 and 33, Township 13 North, Range 11 West and section 5, Township 12 North, Range 11 West, in Powell County, Montana. Cottonwood Creek and Douglas Creek, and their adjacent wetlands, are part of a continuous tributary system that enters Nevada Creek. Nevada Creek flows into the Blackfoot River, which is tributary to the Clark Fork River.

Enclosed is an EPA Region 8 administrative order that specifies the nature of the violations and describes actions necessary in order for you and the Rohrer Family Limited



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Partnership to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the Act, 33 U.S.C. § 1319(a)(3). The order requires you to inform EPA in writing, within 14 days of receipt, of your 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 Act 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 non-compliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the 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 Act, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an EPA 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 enclosed 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 Wendy Silver, Senior Attorney, at 303-312-6637 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. Findings of Violation and Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk
John L. Arrigo, Montana Department of Environmental Quality
David L. Lagrone, U.S. Army Corps of Engineers
Allan Steinle, U.S. Army Corps of Engineers
John Wardell, EPA, Montana Operations

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 JUN -5 AM 10:43

EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)
)
DOUGLAS ROHRER)
13571 State Highway 200, RR #2)
Fort Shaw, MT 59443)
)
and)
)
KEN ROHRER)
345 Creekside Ln.)
Helmville, MT 59843)
)
and)
)
ROHRER FAMILY LIMITED)
PARTNERSHIP)
13571 State Highway 200, RR #2)
Fort Shaw, MT 59443)
)
Respondents.)
_____)

**FINDINGS OF VIOLATION AND
ADMINISTRATIVE ORDER FOR
COMPLIANCE**

Docket No. CWA-08-2007-0010

I. STATUTORY AUTHORITY

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” or “Act”), 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. This Order is based on the 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

1. Douglas Rohrer (“Respondent”) is an individual residing at 13571 State Highway 200, RR #2, Fort Shaw, Montana, 59443.
2. Ken Rohrer (“Respondent”) is an individual residing at 345 Creekside Ln., Helmville, Montana, 59843.
3. The Rohrer Family Limited Partnership (“Respondent”) is a limited partnership in good standing in the State of Montana. Its registered office is at 13571 State Highway 200, RR #2, Fort Shaw, Montana, 59443. Douglas Rohrer is its registered agent.
4. At all relevant times, Respondents owned, managed, operated, and/or otherwise controlled property containing wetlands adjacent to Cottonwood Creek and Douglas Creek located in sections 28 and 33, Township 13 North, Range 11 West, and section 5, Township 12 North, Range 11 West, in Powell County, Montana (the “Site”).
5. Cottonwood Creek and Douglas Creek are perennial tributaries to Nevada Creek, which is tributary to the Blackfoot River, which flows into the Clark Fork River, a navigable, interstate waterway.
6. In or about the fall of 2006, Respondents or persons acting on Respondents’ behalf constructed two major drainage ditches and three lateral ditches totaling approximately 7800 feet in length through wetlands adjacent to Cottonwood Creek and Douglas Creek. The excavated material was discharged along the length of the ditches, directly filling

approximately 6 acres of wetlands and indirectly impacting an unknown number of wetland acres through dewatering. The work involved:

- a. Construction of a drainage ditch, approximately 1668 feet long, in a wetland in section 5, Township 12 North, Range 11 West, extending north of the county road to Douglas Creek (the "Douglas Ditch"). The excavated ditch material was stockpiled beside the ditch covering an area approximately 40 feet wide, directly impacting 1.5 acres of wetlands with dredged or fill material; and
 - b. Construction of a second drainage ditch, approximately 3680 feet long, in wetlands in sections 28 and 33, Township 13 North, Range 11 West, between Cottonwood Creek and Douglas Creek (the "Cottonwood Ditch"). The excavated ditch material was stockpiled beside the ditch covering an area approximately 40 feet wide, directly impacting 3.4 acres of wetlands with dredged or fill material; and
 - c. Construction of three lateral ditches off of the Cottonwood Ditch, with the excavated ditch material stockpiled beside the ditch covering an area approximately 20 feet wide and 2462 long, directly impacting 1.1 acres of wetlands with dredged or fill material.
7. On December 12 and 20, 2006, in response to a complaint, the United States Army Corps of Engineers ("Corps") inspected the Site and confirmed that Respondents or persons acting on their behalf had discharged or allowed the discharge of dredged or fill material in wetlands as described in paragraph 6 of Section II of this Order.

8. The discharges described in paragraph 6 of Section II of this Order resulted in the direct elimination of approximately 6 acres of wetlands and the dewatering of an unknown amount of additional wetlands. The wetlands provided various functions and values such as water quality improvement, including nutrient and sediment filtration; aquatic and wildlife habitat; flood attenuation; and aesthetics.
9. The discharges described in paragraph 6 of Section II of this Order were performed using common earthmoving vehicles and equipment, which were operated by Respondents or persons acting on their behalf.
10. Respondents are each a “person” within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).
11. The discharged dredged or fill materials referenced in paragraph 6 of Section II of this Order are and were at all relevant times “dredged material” and “fill material” within the meaning of 33 C.F.R. § 323.2(c) and (e), respectively, and “pollutants” within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
12. The vehicles and equipment described in paragraph 9 of Section II 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. Cottonwood Creek, Douglas Creek, and their adjacent wetlands referenced in paragraph 6 of Section II of this Order 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 wetlands adjacent to Cottonwood Creek and Douglas Creek 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(a), 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 Act, 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. 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 paragraph 6 of Section II of this Order.
19. The activities conducted by Respondents and their agents as described in paragraph 6 of Section II 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) of the CWA, 33 U.S.C. § 1311(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 wetlands to a condition that closely approximates their conditions and functions prior to the discharge of 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 Section II of this Order are appropriate to alleviate actual and potential harm to water quality.
22. 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. 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 the discharge of dredged or fill material into waters of the United States.

2. Within 14 calendar days of receipt of this Order, each Respondent shall inform EPA in writing of his/its intent to fully comply with the Order.
3. Upon EPA approval of the restoration plan required by paragraph 5 of Section III of this Order, Respondents shall remove all dredged and fill materials that were discharged as a result of the violations identified in this Order and restore the impacted wetlands at the Site to their *pre-impact condition and grade*.
4. All dredged and fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in 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 21 calendar days of receipt of this Order.
5. Within 60 calendar days of receipt of this Order, Respondents shall submit to EPA for review and comment a restoration plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the discharged dredged or fill material from the impacted wetlands adjacent to Cottonwood Creek and Douglas Creek and any other impacted areas at the Site, replacing the dredged or fill material into the ditches from which it was excavated, and restoring all impacted areas to their *pre-impact condition and grade*.

6. The restoration 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. The restoration plan shall include:
- a. A complete assessment of the impacts to the wetlands adjacent to Cottonwood Creek and Douglas Creek and any other areas at the Site due to Respondents’ discharges of dredged or fill material;
 - b. A detailed work plan and schedule for all of the work to be accomplished, as specified in the restoration plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than 60 days after EPA approves the restoration plan;
 - 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 of these locations;
 - d. Grading, planting, and monitoring plans, measurable criteria for success of restoration, and provisions for proper disposal of any excess soils or other materials generated during removal and restoration; and
 - e. A description of all costs necessary to complete the work to be accomplished by the restoration plan, including the costs of consultations, permits, monitoring, and construction.
7. 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

30 calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

8. Upon receiving EPA's written approval of the restoration plan, Respondents 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. Respondents shall demonstrate that all necessary permits have been granted by providing copies of all such permits, and any amendments thereto, to EPA within 7 calendar days of issuance of each permit.
9. 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, 33 U.S.C. § 1344. If required, Respondents shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 8 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
10 West 15th Street, Suite 2200
Helena, MT 59626
Telephone: 406-441-1375
Facsimile: 406-441-1380

10. Respondents shall submit two copies of the restoration 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: 303-312-6953

A copy of the restoration plan, all notifications, and related correspondence also shall be provided to:

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

A copy of the restoration plan also shall be provided to the Corps at the address noted in paragraph 9 of Section III of this Order.

11. In addition to the notification requirements set forth in paragraph 10 of Section III of this Order, after issuance of any Corps authorization for restoration work, Respondents shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.
12. Any deliverables, plans, 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 deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
13. A lease, sublease, or transfer of the Site 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 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 address specified in paragraph 10 of Section III of this Order.

14. Respondents shall allow, or use their best efforts to allow, access by any authorized representative of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the Montana Department of Environmental Quality, and Montana Fish, Wildlife and Parks, 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.

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. Respondents' obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondents.
16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$32,500.00 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 Act, 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 Act. Issuance of this Order shall not be deemed 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.

17. 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. 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 31 day of May, 2007.



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