



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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

SEP 10 2007

Ref: 8ENF-L

CERTIFIED MAIL:

RETURN RECEIPT REQUESTED

#7005-1160-0005-3398-1090

Randy L. Brownlee,
Rita Brownlee, and
Brownlee Construction, Inc.
c/o Randy L. Brownlee
717 South Broadway
Watertown, SD 57201-4752

Re: In the Matter of:
Randy L. Brownlee,
Rita Brownlee, and
Brownlee Construction, Inc.,
Findings of Violation and
Order for Compliance,
Docket No. CWA-08-2007-0019

Dear Randy L. and Rita Brownlee:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you and Brownlee Construction, Inc. ("Brownlee Construction") are in violation of the Clean Water Act, as amended ("CWA"). 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, Randy L. Brownlee and/or his agents, acting on behalf of himself, Rita Brownlee, and Brownlee Construction, discharged dredged or fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into wetlands adjacent to the Big Sioux River occurred on property you and/or Brownlee Construction owned, leased, and/or otherwise controlled, located in Section 5, Township 116 North, Range 52 West, Codington County, South Dakota (the "Site").

Enclosed is a Findings of Violation and Order for Compliance ("Order") which specifies the nature of the violations and describes actions necessary in order for you and Brownlee Construction to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3).



The Order requires you and Brownlee Construction to inform EPA in writing, within 5 days of receipt of the Order, of your and Brownlee Construction's intent to 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 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 U.S. District Court pursuant to section 309(b) or (c) of the CWA, 33 U.S.C. § 1319(b) or (c), or assessment of civil penalties pursuant to section 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 and Brownlee Construction's responsibility to comply with the CWA 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 Jessie Goldfarb, Senior Enforcement Attorney, at (303) 312-6926 and Kenneth Champagne, Enforcement Officer, at (303) 312-6608.

Sincerely,

Michael T. Brownlee
for

Eddie A. Sierra
Deputy 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 L. Lagrone, U.S. Army Corps of Engineers, w/enclosures
Steven E. Naylor, U.S. Army Corps of Engineers, w/enclosures
Tina Artemis, EPA, Regional Hearing Clerk, w/enclosures

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

RECEIVED 10/11/07

IN THE MATTER OF:)
)
Randy L. Brownlee and)
Rita Brownlee)
1520 Fifth Street) FINDINGS OF VIOLATION AND
Watertown, SD 57201,) ADMINISTRATIVE ORDER FOR
) COMPLIANCE
and)
) Docket No. CWA-08-2007-0019
)
Brownlee Construction, Inc.)
717 South Broadway)
Watertown, SD 57201,)
)
)
Respondents.)

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"), 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. Respondent Randy L. Brownlee is an individual with a mailing address of 1520 Fifth Street, Watertown, SD 57201, and is a director and officer of Brownlee Construction, Inc.

2. Respondent Rita Brownlee is an individual with a mailing address of 1520 Fifth Street, Watertown, SD 57201, and is a director and officer of Brownlee Construction, Inc.
3. Respondent Brownlee Construction, Inc. is a South Dakota corporation with a business address of 717 South Broadway, Watertown, SD 57201. Brownlee Construction, Inc. is currently in good standing with the South Dakota Secretary of State's Office.
4. At all relevant times, Respondents owned, leased and/or otherwise controlled property containing wetlands adjacent to the Big Sioux River located in Section 5, Township 116 North, Range 52 West, Codington County, South Dakota (the "Site").
5. The Big Sioux River and the Missouri River are, and were at all relevant times, navigable, interstate waters.
6. On or about February 21, 2005, the U.S. Army Corps of Engineers (the "Corps") received a complaint from the City of Watertown, South Dakota, regarding a then-recent discharge of fill materials "in relatively close proximity to the Big Sioux River" at the Site.
7. On May 24, 2005, the Corps conducted an inspection, including a wetland delineation, at the Site as a follow-up to the February 21, 2005, complaint. The Corps found, and EPA through issuance of this Order finds, that Respondent Randy L. Brownlee and/or his agents discharged dredged and/or fill material into wetlands adjacent to and within the 100-year flood plain of the Big Sioux River, in order to utilize the Site for commercial use.

The Corps estimated that 0.65 acres of wetlands had been filled with dredged and/or fill material without authorization.

8. By letter dated June 28, 2005, the Corps found, and EPA through issuance of this Order finds, that the actions of Respondent Randy L. Brownlee and/or his agents, as described in paragraph 7 of Section II of this Order, required prior Corps authorization and that the required authorization had not been granted. The Corps directed Respondent Randy L. Brownlee to "cease and desist" any further unauthorized work at the Site. Furthermore, the Corps directed Respondent Randy L. Brownlee, within thirty (30) days of receipt of that letter, to remove the dredged and/or fill material that had been discharged at the Site, and to notify the Corps' South Dakota Regulatory Office when the restoration work had been completed.
9. On November 17, 2005, the Corps conducted an inspection at the Site to determine the status of the restoration. The Corps found, and EPA through issuance of this Order finds, that some dredged and/or fill material had been removed; however, this action had caused dredged and/or fill material to be pushed further into the wetland area resulting in additional fill impacts to the wetland. The Corps notified Respondent Randy L. Brownlee of this finding in a telephone conversation during which Mr. Brownlee indicated that he would complete the removal of the unauthorized dredged and/or fill material.
10. On May 5, 2006, the Corps telephoned Respondent Randy L. Brownlee to determine the status of the restoration. During that

telephone call, Mr. Brownlee indicated that he had finished removing most of the dredged and/or fill material. The Corps informed Mr. Brownlee that it would conduct a follow-up inspection of the restoration.

11. On August 30, 2006, the Corps conducted a follow-up inspection at the Site to determine the status of the restoration. The Corps found, and EPA through issuance of this Order finds, that the unauthorized dredged and/or fill material had not been removed from the wetland area, and that therefore, restoration of the impacted waters of the United States had not been completed by Respondent Randy L. Brownlee.
12. On December 18, 2006, the Corps referred the case to EPA for enforcement after numerous unsuccessful attempts to obtain restoration from Respondent Randy L. Brownlee relative to the unauthorized impacts to waters of the United States.
13. The activities described in paragraph 7 of Section II of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent Randy L. Brownlee and/or his agents, acting on behalf of himself and Respondents Rita Brownlee and Brownlee Construction, Inc.
14. Respondents are "persons" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
15. The discharged dredged and/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) and/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).
16. The wetlands adjacent to the Big Sioux River that were filled and disturbed by Respondents' unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.
 17. The vehicles and equipment described in paragraph 13 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).
 18. The Big Sioux River and its adjacent wetlands referenced in paragraphs 4 and 5 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).
 19. The placement of dredged and/or fill material into the Big Sioux River and/or its adjacent wetlands constitutes the "discharge of pollutants" within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
 20. 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.

21. 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.
22. 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.
23. 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 into waters of the United States on the Site.
24. Respondents' discharges of dredged and/or fill material into the wetlands 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).
25. The removal of the dredged and/or fill material illegally discharged into waters of the United States as described in paragraph 7 of Section II of this Order and restoration of the

impacted waters, including the wetlands adjacent to the Big Sioux River, to a condition that closely approximates their condition and function prior to the discharge of the dredged and/or fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

26. 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 25 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic and wildlife habitat, as well as other functions and values, caused by Respondents' unpermitted activities.
27. 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 and/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 and/or fill material into waters of the United States.

2. Within five (5) calendar days of receipt of this Order, Respondents shall inform EPA in writing of their intent to fully comply with the Order. EPA requests that Respondents meet with EPA within fourteen (14) calendar days of issuance of this Order if Respondents have concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondents by EPA.
3. Upon EPA approval of the Restoration Plan required by paragraph 6 of Section III of this Order, Respondents shall remove all dredged and/or fill material that was discharged as a result of the violations identified in this Order and restore the wetlands adjacent to the Big Sioux River at the Site to their pre-impact condition and grade, unless otherwise approved by EPA in the Restoration Plan.
4. All dredged and/or 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 included in the Restoration Plan required by paragraph 6 of Section III of this Order.

5. All dredged and/or fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be included in the Restoration Plan required by paragraph 6 of Section III of this Order.
6. Within sixty (60) calendar days of receipt of this Order, Respondents shall submit to EPA for review, comment, and approval a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, providing for the: (1) removal of all dredged and/or fill material that was discharged into the wetlands adjacent to the Big Sioux River at the Site; and (2) restoration, to their pre-impact configuration and/or grade, of all wetlands that were impacted as a result of Respondents' unauthorized discharges of dredged and/or fill material on the Site.
7. 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 the restoration 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 prepare and implement the Restoration Plan, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.
8. 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 fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
9. Respondents shall make a timely application for each permit necessary to implement the EPA-approved plan and for conducting restoration in accordance with the approved plan, including the schedule specified therein, with all granted permits, and with all applicable laws. Respondents 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.
10. This Order is not a permit or an authorization to place or discharge dredged and/or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If any such permit is required,

Respondents shall obtain such permit(s) and provide a copy or copies to EPA pursuant to paragraph 9 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

Steven Naylor
U.S. Army Corps of Engineers
South Dakota Regulatory Office
28563 Powerhouse Road, Room 118
Pierre, SD 57501
Telephone: 605-224-8531
Facsimile: 605-224-5945

12. Respondents shall submit two (2) copies of the Restoration Plan, all notifications, and related correspondence to:

Kenneth M. Champagne (8ENF-W)
U.S. EPA-Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6608
Facsimile: 303-312-7518.

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

Jessie Goldfarb (8ENF-L)
U.S. EPA-Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6926
Facsimile: 303-312-6953,

and

Steven Naylor
U.S. Army Corps of Engineers
South Dakota Regulatory Office
28563 Powerhouse Road, Room 118
Pierre, SD 57501
Telephone: 605-224-8531
Facsimile: 605-224-5945.

13. In addition to the notification requirements set forth in paragraphs 9 and 10 of Section III of this Order, after issuance

of any Corps authorization for the restoration work, Respondents shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

14. All plans (including, but not limited to, the Restoration Plan), deliverables, reports, specifications, schedules, or attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved plans, deliverables, reports, specifications, schedules, or attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
15. If Respondents lease, sublease, or transfer control and/or ownership of any property, in whole or in part, where work is to be performed pursuant to the Restoration Plan before they have fulfilled their obligations under this Order, Respondents shall provide a copy of this Order and the EPA-approved Restoration Plan to the lessee, sublessee, or transferee not less than thirty (30) calendar days prior to the lease, sublease, or transfer. A lease, sublease, or transfer of such property interest shall not relieve Respondents of any responsibility in the Order unless EPA, Respondents, and the lessee, sublessee, or transferee agree in writing to allow the lessee, sublessee, or transferee to assume such responsibility. Additionally, at least thirty (30) calendar days prior to such lease, sublease, or transfer, Respondents shall notify EPA regarding the details of the lease, sublease, or transfer at the addresses specified in paragraph 11 of Section III of this Order.

16. Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the South Dakota Department of Environment and Natural Resources, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, and the South Dakota Department of Game, Fish, 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.
17. 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(s), 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.
18. Respondents' obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondents.
19. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19, authorize civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 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.

20. 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.
21. 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.
22. 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 6th day of September, 2007.

for Michael T. Rivera
Eddie A. Sierra
Deputy Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice