



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

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

Ref: 8ENF-W

JUN 16 2008

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED

#7003-2260-0001-7779-7406

#7003-2260-0001-7779-7413

Harley E. Nesham, President
Gratech Company, Ltd.
8201 282 Street, NW
Berthold, ND 58718

Michael O'Connor
P.O. Box 542
Wolf Point, MT 59201

Re: Findings of Violation and Administrative
Order for Compliance,
Docket No. **CWA-08-2008-0014**

Dear Messrs. Nesham and O'Connor:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you are in violation of section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), for unpermitted discharges of pollutants into waters of the United States.

Specifically, you or persons acting on your behalf have discharged dredged and/or fill material and storm water into waters of the United States without authorization under the CWA. These discharges of pollutants into Tule Creek and its adjacent wetlands and unnamed tributaries occurred on property owned, leased, and/or otherwise controlled by Gratech Company, Ltd. and Michael O'Connor located in the East ½ of Section 10, Township 28 North, Range 48 East, in Roosevelt County, Montana (the "Site"). The Site is located within the boundaries of the Fort Peck Assiniboine and Sioux Tribes Reservation.

Enclosed is a document entitled "Findings of Violation and Administrative Order for Compliance" ("Order"). The Order relates to unauthorized discharges of dredged and fill material into wetlands and other waters of the United States and requires restoration of the waters impacted by these discharges. 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 to inform EPA in writing, within 10 days of receipt of the Order, of your intent to comply with the Order.

Section 309 of the CWA, 33 U.S.C. § 1319, authorizes civil judicial penalties for a violation of 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 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 responsibility to comply with the CWA or the Order. 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 Peggy Livingston, Enforcement Attorney, at (303) 312-6858 and Daren Vanlerberghe, Enforcement Officer, at (303) 312-6389.

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 L. Lagrone, U.S. Army Corps of Engineers, w/enclosures
Allan Steinle, U.S. Army Corps of Engineers, w/enclosures
Deb Madison, Fort Peck Assiniboine and Sioux Tribes, w/enclosures

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 JUN 15 11:01:16

IN THE MATTER OF:)
)
Gratech Company, Ltd.)
8201 282 Street, NW)
Berthold, ND 58718)
)
and)
)
Michael O'Connor)
P.O. Box 542)
Wolf Point, MT 59201)
)
Respondents.)
_____)

FINDINGS OF VIOLATION AND
ADMINISTRATIVE ORDER FOR
COMPLIANCE

Docket No. CWA-08-2008-0014

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 Gratech Company, Ltd. (“Gratech”) is a State of North Dakota corporation with a business address of 8201 282 Street NW, Berthold, ND 58718. Harley E. Nesham is the president and registered agent of Gratech. Gratech is authorized to conduct business in the State of Montana and is currently in good standing with the North Dakota and Montana Secretary of State Offices.
2. Respondent Michael O’Connor is an individual with a mailing address of P.O. Box 542, Wolf Point, MT 59201-0542.
3. At all relevant times, the Respondents owned, leased, managed, operated and/or otherwise controlled property containing Tule Creek, its adjacent wetlands, and an unnamed tributary to Tule Creek located in the East ½ Section 10, Township 28 North, Range 48 East, in Roosevelt County, Montana (the “Site”). The Site is located within the boundaries of the Fort Peck Assiniboine and Sioux Tribes Reservation (“Fort Peck”). Michael O’Connor is the Site landowner who leased the Site to Gratech for gravel extraction and processing.
4. On September 13, 2005, EPA sent a letter to Fort Peck requesting information on Fort Peck’s interest in the operations at the Site. In a letter to EPA dated September 14, 2005, Fort Peck indicated that the Site is not owned, managed, or controlled by the Tribal government.
5. Tule Creek is tributary to the Missouri River. The Missouri River is, and was at all relevant times, a navigable, interstate water.

6. In or about the summer of 2005, Respondents, or persons acting on behalf of the Respondents, performed the following unauthorized work:
- a. Installation of a road and, subsequently, a culvert, without best management practices in Tule Creek on the north end of the Site to allow access to transport material to the gravel processing plant. Installation of the road and culvert resulted in the discharge of dredged and/or fill material into Tule Creek;
 - b. Discharge of dredged and/or fill material into wetlands adjacent to the west side of Tule Creek for approximately 50 linear feet above the culvert;
 - c. Discharge of dredged and/or fill material into wetlands adjacent to the west side of Tule Creek for approximately 300 linear feet below the culvert;
 - d. Discharge of dredged and/or fill material into wetlands adjacent to the east side of Tule Creek for approximately 250 linear feet below the culvert;
 - e. Excavation and bulldozing of an area west of the culvert extending several hundred feet from Tule Creek to the northern Site boundary. The bulldozed area included a tributary to Tule Creek and an unknown amount of wetland acreage. The excavation and bulldozing operation resulted in the discharge of dredged and/or fill material into wetlands and the blocking of water flow into Tule Creek;
 - f. Discharge of dredged and/or fill material into an unknown amount of wetland acreage adjacent to Tule Creek in the middle of the Site in the vicinity of the gravel processing plant;

- g. Discharge of dredged and/or fill material in Tule Creek on the south end of the Site, altering approximately 300 feet of Tule Creek to facilitate water flows into two large pond areas;
 - h. Installation of a 150-foot long, 10-foot high dam on a side channel to Tule Creek on the southeast end of the Site. Installation of the dam impacted several hundred feet of the side channel and an unknown amount of wetland acreage with dredged and/or fill material; and
 - i. Excavation of several acres on the southwest end of the Site and construction of a man-made channel. The excavation and construction resulted in the discharge of dredged and/or fill material into Tule Creek and the diversion of several hundred feet of the natural channel of Tule Creek.
7. On August 18, 2005, the United States Army Corps of Engineers (“Corps”) issued a Cease and Desist Order for Violation of the CWA (“Cease and Desist Order”) to the Respondents. The Cease and Desist Order, based on a complaint sent to the Corps by the Fort Peck Office of Environmental Protection (“OEP”) that activities at the Site stopped the flow of water in Tule Creek, ordered the Respondents to cease and desist any further unauthorized work or development at the Site involving wetlands or other waters of the United States.
8. On August 29, 2005, the Corps, EPA, and the Fort Peck OEP inspected the Site as a follow-up to the August 18, 2005 Cease and Desist Order and Fort Peck OEP complaint. The Corps found that the Respondents and/or persons acting on their behalf had

discharged or allowed the discharge of dredged and/or fill material into wetlands and other waters of the United States as described in paragraph 6 of Section II of this Order.

9. According to the Corps, installation of the culvert in Tule Creek was done after the issuance of the Cease and Desist Order.
10. By letter and Notice of Violation of the CWA dated September 8, 2005, the Corps found, and EPA through issuance of this Order finds, that the Respondents' actions, as described in paragraph 6 of Section II of this Order, required prior Corps authorization and that the required authorization had not been granted.
11. On September 12, 2005, the Corps referred this case to EPA for enforcement in accordance with the "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement of the Section 404 Program of the Clean Water Act," dated January 19, 1989. EPA accepted the role as lead enforcement agency for this case on September 13, 2005.
12. On November 23, 2007, ultimately in response to a September 19, 2005 Request for Information from EPA, the Respondents submitted to EPA a wetlands delineation report prepared by Interstate Engineering, Inc., Sidney, Montana, and dated March 2007. According to the report, the field portion of the wetland delineation was completed on September 25, 2006. The March 2007 wetlands delineation report did not contain wetland determination data forms and did not include pre- and post-impact stream and wetlands acreage information.

13. The activities described in paragraph 6 of Section II of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondents and/or by persons acting on their behalf.
14. Each Respondents is a “person” 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 in paragraph 6 of Section II of this Order 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. Tule Creek and its adjacent wetlands and tributaries 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. Tule Creek and its 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).

19. The placement of dredged and/or fill material into Tule 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).
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. According to 33 CFR § 323.3(a), unless exempted pursuant to 33 CFR § 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 conduct any of the activities described in paragraph 6 of Section II of this Order.
24. Respondents’ discharges of dredged and/or fill material into waters of the United States 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 6 of Section II of this Order and restoration of the impacted waters, including Tule Creek and its adjacent wetlands and tributaries, 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). Restoration is appropriate to address the actual and potential harm to 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 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.
2. Within ten (10) calendar days of receipt of this Order, the Respondents shall inform EPA in writing of their intent to fully comply with the Order. If Respondents have concerns or questions about the requirements of the Order, EPA requests that each Respondent schedule a meeting and/or conference call with EPA within seven (7) calendar days of receipt of this Order to discuss these concerns or questions. The scheduling of such a meeting and/or conference call shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondents by EPA.
3. Upon EPA approval of the Restoration Plan required by paragraph 5 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 Tule Creek and its adjacent wetlands and tributaries 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 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-one (21) calendar days of receipt of this Order.

5. 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 4 of Section III of this Order, providing for the: (1) removal of all dredged and/or fill material that was discharged into Tule Creek and its adjacent wetlands and tributaries at the Site; and (2) restoration, to their pre-impact configuration and/or grade, of Tule Creek and its adjacent wetlands and tributaries that were impacted as a result of Respondents' unauthorized discharges of dredged and/or fill material on the Site.
6. 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 sixty (60) days 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. The delineations shall include pre- and post-impact stream and wetlands acreages and all wetland determination data forms;

- 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.
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 thirty (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 must make a timely and complete 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 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.
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 any such permit is required, Respondents shall obtain such permit(s) and provide a copy or copies 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.

Allan Steinle
U.S. Army Corps of Engineers
Helena Regulatory Office
10 West 15th Street, Suite 2200
Helena, MT 59626
Telephone: 404-441-1375
Facsimile: 404-441-1380

10. Respondents shall submit two (2) paper copies of the Restoration Plan, one (1) electronic copy of the Restoration Plan, all notifications, and related correspondence to:

Daren Vanlerberghe, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6389
Facsimile: 303-312-7202

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

Margaret J. (Peggy) Livingston, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: 303-312-6858
Facsimile: 303-312-7202

A paper copy and electronic 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.

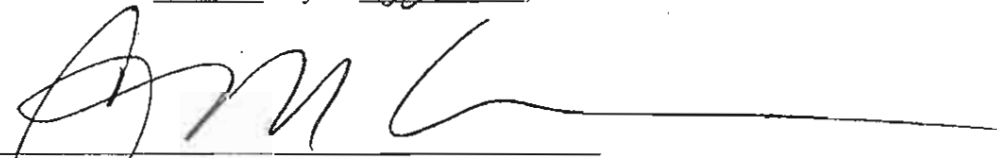
11. In addition to the notification requirements set forth in paragraph 10 of Section III of this Order, after issuance of any Corps authorization for the restoration work, Respondents shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.
12. 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.
13. 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 it

has fulfilled its obligations under this Order, the 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 the 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, the Respondents shall notify EPA regarding the details of the lease, sublease, or transfer at the addresses 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 representatives of EPA or its contractors, the Corps, the Fort Peck OEP, the U.S. Natural Resources Conservation Service, and the U.S. Fish and Wildlife Service, 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.
15. 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.

16. Respondents' obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondents.
17. 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). 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.
18. 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.
19. 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.
20. 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 11th day of June, 2008.



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