



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

AUG 11 2008

CERTIFIED MAIL:
RETURN RECEIPT REQUESTED
#7005-1160-0005-3398-1298

Albert Peterson, Superintendent
Hardin Public Schools
Route 1, Box 1001
Hardin, MT 59034-9707

Re: Findings of Violation and
Administrative Order for Compliance
Docket No. CWA-08-2008-0020

Dear Mr. Peterson:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that Hardin Public Schools is again 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, Hardin Public Schools, or persons acting on its behalf, has discharged dredged or fill material into waters of the United States without authorization under the Act. These discharges of pollutants into wetlands have occurred on your property at a site located in Section 23, Township 1 South, Range 33 East, Big Horn County, Montana. This location is approximately 200 yards from the site of wetlands that are the subject of a previous enforcement action by EPA that was commenced in 2004.

Enclosed is an EPA Region 8 administrative order that specifies the nature of the violations and describes actions necessary in order for you 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 10 days of receipt, of your intent to fully comply with the order.

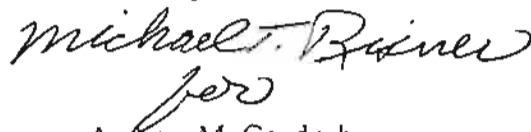


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The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the Act authorizes a variety of possible enforcement actions, including 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.

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 Kenneth Champagne, 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: Laurence R. Martin, Esq., Felt, Martin, Frazier & Jacobs, P.C. (certified mail #7005-1160-0005-3398-1304)
David L. Lagrone, U.S. Army Corps of Engineers
Allan Steinle, U.S. Army Corps of Engineers
Shannon Johnson, U.S. Army Corps of Engineers
John Arrigo, Montana, MT DEQ

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF:)
)
Hardin Public Schools)
Route 1, P.O. Box 1001)
Hardin, MT 59034-9707)
)
)
Respondent.)
_____)

FINDINGS OF VIOLATION AND
ADMINISTRATIVE ORDER FOR
COMPLIANCE

Docket No. CWA-08-2008-0020

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. Hardin Public Schools, hereafter “Respondent.” is a body corporate established under the laws of Montana with offices located in the City of Hardin, Montana.
3. At all relevant times, Respondent owned, controlled or operated property containing an unnamed tributary of Whitman Coulee and its adjacent wetlands (approximately 5 acres

of wetlands) located in Section 23, Township 1 South, Range 33 East, Hardin, Big Horn County, Montana, hereafter referred to as the "Site." Schools and athletic facilities for Elementary District No. 17-H and High School District No. 1 are located at the Site.

4. The unnamed tributary at the Site is tributary to Whitman Coulee, which is tributary to the Bighorn River, which is tributary to the Yellowstone River. The Bighorn River and Yellowstone River are, and were at all relevant times, navigable, interstate waters.
5. On or around June 15, 2004, Respondent discharged or caused to be discharged, without prior authorization from the United States Army Corps of Engineers ("Corps"), dredged or fill material into a wetland at the Site. Approximately 0.07 acre of fill was placed in the wetland, consisting of soil, asphalt, concrete, and ash from the school's coal fired boiler.
6. On September 24, 2004, EPA issued Respondent a Findings of Violation and Administrative Order for Compliance, Docket No. CWA-08-2004-0069, ("September 24, 2004, Order") for its unauthorized discharge of dredged or fill material into waters of the United States without authorization under section 404 of the CWA. The September 24, 2004, Order required Respondent to submit a plan for removing the discharged dredged or fill material from the wetlands at the Site adjacent to the unnamed tributary of Whitman Coulee and restoring these wetlands to their pre-impact configuration and/or grade. EPA's authority for such action is provided under section 309(a)(3) of the Act, 33 U.S.C. § 1319(a)(3).
7. On or about October 25, 2004, Respondent submitted a plan, which proposed removal of the unpermitted fill material from the wetlands, and restoration of the impacted wetlands

and adjoining property. On October 29, 2004, EPA conditionally approved Respondent's October 25, 2004, restoration plan. On or about April 1, 2005, Respondent removed the unauthorized fill material and the impacted wetlands were re-graded and re-seeded. Respondent's annual monitoring of the restored wetlands is ongoing.

8. Sometime in the fall of 2006 and March 2007, Western Municipal Construction, at the request of Respondent, hauled and dumped dredged or fill material at the Site in preparation for the construction of six tennis courts. Sometime between March 2007 and October 24, 2007, Respondent and/or persons acting on its behalf discharged dredged or fill material into wetlands during the construction of the tennis courts at the Site.
9. On November 5, 2007, the Corps conducted an inspection at the Site. The Corps found, and EPA through issuance of this Order finds, that Respondent and/or persons acting on its behalf discharged approximately 4,680 cubic feet of dredged or fill material into approximately 0.02 acres of wetlands adjacent to the unnamed tributary of Whitman Coulee at the Site. The impacted wetlands are located approximately 200 yards from the previously impacted wetlands, which were the subject of EPA's September 24, 2004, Order.
10. In a letter to Respondent, dated December 14, 2007, the Corps found, and EPA through issuance of this Order finds, that Respondent's activities, as described in paragraphs 8 and 9 of Section II of this Order, required prior authorization from the Corps and that the required authorization had not been sought or granted.
11. By letter dated December 28, 2007, 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.

12. On July 15, 2008, the Corps met with Respondent to discuss the unauthorized discharge of dredged or fill materials into wetlands, which occurred during the construction of the tennis courts at the Site. During this Site visit, the Corps observed a dump truck enter the Site with the intention of dumping a load of dredged or fill material; however, Respondent instructed the driver not to dump the load. Furthermore, the Corps found, and EPA through issuance of this Order finds, that Respondent and/or persons acting on its behalf discharged additional dredged or fill material into wetlands adjacent to the unnamed tributary of Whitman Coulee at the Site subsequent to the Corps’ December 14, 2007, violation letter. This additional dredged or fill material was discharged into the previously impacted wetlands, which were the subject of EPA’s September 24, 2004, Order.
13. The activities described in paragraphs 8, 9, and 12 of Section II of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent and/or by persons acting on its behalf.
14. Respondent is a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
15. The wetlands that were filled and disturbed by the actions of Respondent, as described in paragraphs 8, 9, and 12 of Section II of this Order, provides various functions and values, including wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood storage; and food chain support.

16. The discharged dredged or fill material described in paragraphs 8, 9, and 12 of Section II of this Order are and were at all relevant times “dredged material” or “fill material” within the meaning of 33 C.F.R. § 323.2(c) and 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).
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 impacted wetlands 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 or fill material into the wetlands as described in paragraphs 8, 9, and 12 of Section II of this Order 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, 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.
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 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. 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 8, 9, and 12 of Section II of this Order.
24. Respondent's activities described in paragraphs 8, 9, and 12 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 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).
25. Respondent's activities described in paragraphs 8, 9, and 12 of Section II of this Order violate the September 24, 2004, Order, and therefore constitute a violation of section 309 of the CWA, 33 U.S.C. § 1319.
26. 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 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, filling, revegetation, and best management practices.
27. 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 26 of Section II 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.

28. This Order was issued after consultation and coordination with the Corps' Omaha District, Helena Regulatory Office.

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. 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.
2. Within ten (10) 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 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 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.

3. Upon EPA approval of the Restoration Plan required by paragraph 5 of Section III 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 wetlands at the Site to their pre-impact condition and grade, unless otherwise approved by EPA in the Restoration Plan.
4. 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 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 or fill material that was discharged into wetlands at the Site; and (2) restoration to their pre-impact configuration and/or grade, of the wetlands that were impacted as a result of Respondent's unauthorized discharges of dredged 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 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. 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; and
 - d. 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, 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.
8. Upon receiving EPA's written approval of the Restoration Plan, Respondent 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. Respondent must demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

9. 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 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
Helena Regulatory Office
10 West 15th Street, Suite 2200
Helena, Montana 59626
Telephone: (406) 441-1375
Facsimile: (406) 441-1380

10. 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