



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 WYNKOOP STREET
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

SEP 27 2010

Ref: 8ENF-W

CERTIFIED MAIL #7008 3230 0003 0729 9931
RETURN RECEIPT REQUESTED

Harold F. Elam, Registered Agent
Elam Construction, Inc.
556 Struthers Avenue
Grand Junction, CO 81501

CERTIFIED MAIL #7008 3230 0003 0726 9903
RETURN RECEIPT REQUESTED

Scott R. and Sheila M. Brennisse
5801 Highway 394
Craig, CO 81625

CERTIFIED MAIL #7009 3410 0000 2591 9459
RETURN RECEIPT REQUESTED

Scott R. Brennisse, Registered Agent
4B Land & Livestock LLC
5801 Highway 394
Craig, CO 81625

Re: Findings of Violation and
Administrative Order for Compliance
Docket No. CWA-08-2010-0035

Dear Mr. Elam, Mr. Brennisse, and Ms. Brennisse:

Based on a review of all available information, the United States Environmental Protection Agency (EPA) has determined that Elam Construction, Inc., Scott and Sheila Brennisse, and 4B Land & Livestock LLC (Respondents) 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, Respondents discharged or allowed the discharge of dredged and fill material into waters of the United States without authorization under the CWA. These discharges of pollutants to wetlands adjacent to the Yampa River occurred in conjunction with gravel mining operations on property located in section 3, Township 6 North, Range 90 West, Moffat County, Colorado.

Enclosed is an EPA Region 8 administrative order that specifies the nature of the violations and describes actions necessary for Respondents to achieve compliance with the CWA. EPA's authority for such action is provided by § 309(a)(3) of the Act, 33 U.S.C. § 1319(a)(3). The order requires Respondents to inform EPA in writing, within 14 days of receipt, of their 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 civil judicial penalties for violating an order issued under § 309(a) of the CWA. The CWA authorizes a variety of possible enforcement actions for noncompliance with the CWA, including civil or criminal actions, administrative penalty actions, and, in some cases, debarment from Federal contracts and/or loans. Additionally, EPA may take an enforcement action if the enclosed order is violated. Please also be advised that the issuance of this order does not preclude any civil lawsuit, criminal prosecution, or administrative penalty assessment for the violations cited in the order or for any other CWA violations.

If your organizations are small entities, you may find the enclosed Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet useful. It contains information on compliance assistance resources and tools available to small entities. SBREFA does not eliminate the responsibility to comply with the order or the CWA.

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 Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,



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

Enclosures

1. Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk
Nathan Green, U.S. Army Corps of Engineers
Sue Bachini Nall, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 SEP 27 AM 9:44

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)
)
Elam Construction, Inc.)
556 Struthers Avenue)
Grand Junction, CO 81501)
)
Scott R. and Sheila M. Brennise)
5801 Highway 394)
Craig, CO 81625)
)
4B Land & Livestock LLC)
5801 Highway 394)
Craig, CO 81625)
)
Respondents.)
_____)

**ADMINISTRATIVE ORDER FOR
COMPLIANCE**

Docket No. CWA-08-2010-0035

I. STATUTORY AUTHORITY

This administrative order for compliance (order) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by §§ 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 § 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, § 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

1. Respondent Elam Construction, Inc. (Elam) is a corporation incorporated under the laws of the State of Colorado. The address of the registered office for Elam is 556 Struthers Avenue, Grand Junction, Colorado. Its registered agent at that address is Harold F. Elam.
2. Respondents Scott R. Brennise and Sheila M. Brennise are individuals residing at 5801 Highway 394, Craig, Colorado.
3. Respondent 4B Land & Livestock LLC (4B) is a corporation incorporated under the laws of the State of Colorado. The address of the registered office for 4B is 5801 Highway 394, Craig, Colorado. Its registered agent at that address is Scott R. Brennise.
4. At all relevant times, the Respondents owned, leased, controlled, managed, and/or operated property located in section 3, Township 6 North, Range 90 West, Moffat County, Colorado (the site). The Yampa River is adjacent to the site.
5. The Yampa River is a navigable-in-fact tributary to the Green River. The Green River is a navigable-in-fact, interstate water.
6. At some time between April 2009 and October 2009, the Respondents discharged or allowed the discharge of dredged and fill material to wetlands adjacent to the Yampa River at the site. The Respondents were reportedly attempting to mine gravel, through wetlands, without the placement of any fill, thereby avoiding regulation under § 404 of the CWA. However, during its October 26, 2009, inspection, the U.S. Army Corps of Engineers (Corps) observed that numerous piles of recently excavated material had been placed within the boundaries of delineated wetlands at the site. Fill material also had been discharged within a wetland at the site to create a berm for the purpose of keeping

flood flows out of the gravel pit interior. The area of adverse impacts to wetlands at the site is 0.78 acre.

7. On February 15, 2008, TMS Consulting, on behalf of one or more of the Respondents, provided a courtesy notification to the Corps of a proposed sand and gravel mining operation at the site and requested that the Corps provide comments, if it deemed necessary. The courtesy notification stated that no wetlands or other water resources would be affected by the site activities. Maps attached to the courtesy notification did not indicate any presence of wetlands within the areas to be mined.
8. On August 8, 2008, WestWater Engineering, on behalf of one or more of the Respondents, submitted a wetland delineation for the site to the Corps. A mining plan describing the methods of mining to be employed at the site was attached to the wetland delineation. According to the wetland delineation, approximately seven acres of wetlands were present within the project area at the site. The mining plan stated numerous times that there would be no fill, even temporary stockpiles, placed in a wetland or footprint of an excavated wetland at any time during the mining or reclamation process. WestWater Engineering's August 8, 2008, cover letter requested the Corps' concurrence that the activities at the site, as proposed in the mining plan, therefore would not require a CWA § 404 permit.
9. On August 29, 2008, the Corps completed an approved jurisdictional determination (JD) for the Yampa River and its adjacent wetlands at the site. The approved JD documented that 7.01 acres of wetlands existed in the review area, that the Yampa River is a

traditional navigable water, and that the Yampa River and its adjacent wetlands are part of the waters of the United States.

10. On February 3, 2009, the Corps issued two letters to Respondent Scott Brennise. WestWater Engineering received a copy of both letters. One letter contained the approved JD, a notification-of-appeal-process fact sheet, a request-for-appeal form, and instructions on how to file an appeal. No appeal of the approved JD was ever requested. In the other letter, the Corps stated its belief that it would not be possible "... to avoid any and all discharges of dredged or fill material within waters of the United States over the life of the project, because it is unlikely that the procedures outlined can be carried out with the requisite precision and care to prevent all error and accidental discharge. There is a high probability for discharges of dredged or fill material into the wetlands during operation, which would result in an unauthorized discharge." The Corps also indicated it would immediately forward the matter to EPA for enforcement should it become aware of any discharge of dredged or fill material into waters of the United States.
11. On October 26, 2009, the Corps conducted an inspection accompanied by an Elam employee in charge of mining operations at the site. The Corps observed that multiple piles of recently excavated shale material, as well as a portion of a berm created for the purpose of keeping flood flows out of the gravel pit interior, had been placed within an area that had been marked off by stakes as containing delineated wetlands and where no dredged or fill material was to be placed. The Corps determined the area of adverse impacts to wetlands was 0.78 acre.

12. On October 30, 2009, Elam submitted a letter and photographs to the Corps that documented that the unauthorized dredged and fill material that had been discharged to wetlands at the site had been removed and placed in a disposal area outside of the delineated wetlands. The letter indicated that the removal and disposal of the unauthorized dredged and fill material had been completed by the end of the day on October 26, 2009.
13. On November 12, 2009, via certified-mail, return-receipt letters addressed to Elam's property division manager and to Scott Brennise, the Corps issued a combined notice of violation and cease and desist order (combined NOV and C&D order) to the Respondents, characterizing the unauthorized work in waters of the United States as knowing and flagrant.
14. On December 8, 2009, Elam submitted a response to the Corps' combined NOV and C&D order, stating that Elam previously had committed to allow no temporary stockpiles at any time during mining activities in areas identified in the mining plan as no-fill zones. Elam stated that, due to internal miscommunications, material excavated from dewatering holes had been inadvertently placed next to the holes rather than immediately trucked out of the no-fill zone. Elam requested that the Corps provide detailed information regarding the specific locations of the alleged unauthorized discharges within the no-fill zone, including photographs depicting discharge locations within the wetland, if available.
15. On March 2, 2010, the Corps sent Elam a letter and photographs, which identified the specific locations of unauthorized dredged and fill material discharged within wetlands at the site. The Corps also indicated it was coordinating with other Federal and state

agencies to determine a lead enforcement agency, identified potential enforcement resolutions, and invited Elam to provide any additional information for the Corps' consideration by March 19, 2010.

16. On March 18, 2010, Elam submitted a letter to the Corps that again acknowledged placement of sidecast material within a no-fill zone. Elam stated that the exact locations of the fill piles in question were still unclear and agreed that placement of the dredged and fill material was not in accordance with the mining plan for the site. Elam indicated it had retained the services of WestWater Engineering to resolve the alleged violation and suggested the resolution include appropriate mitigation.
17. On March 19, 2010, a representative of WestWater Engineering contacted the Corps to request a meeting to discuss mitigation options to resolve the violations at the site. The Corps replied to WestWater Engineering April 1, 2010, indicating the matter was being referred to EPA.
18. On April 2, 2010, the Corps formally referred the matter of Respondents' alleged violations to EPA.
19. The Corps' computer database indicates that Elam has had significant experience with the Corps' CWA § 404 program since 1980, including receiving at least three prior permits and committing at least one known prior violation. This demonstrates Elam's knowledge of the Corps' permit requirements.
20. The discharges described in paragraphs 6 and 11 of section II of this order resulted in adverse impacts to 0.78 acre of wetlands. The wetlands adjacent to the Yampa River

provided various functions and values including aquatic and wildlife habitat, flood flow attenuation, and aesthetics.

21. The discharges described in paragraphs 6 and 11 of section II of this order were performed using common earthmoving vehicles and equipment, which were operated by or on behalf of the Respondents.

22. Each respondent is a "person" within the meaning of § 502(5) of the CWA, 33 U.S.C. § 1362(5).

23. The discharged dredged and fill materials referenced in paragraphs 6 and 11 of section II of this order are "dredged material" and "fill material" within the meaning of 33 CFR § 323.2(c) and (e), respectively, and "pollutants" within the meaning of § 502(6) of the CWA, 33 U.S.C. § 1362(6).

24. The vehicles and equipment described in paragraph 21 of section II of this order are each a "point source" as that term is defined in § 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. The wetlands adjacent to the Yampa River that are referenced in, among others, paragraphs 6, 8, and 9 of section II of this order are part of the "waters of the United States" as that term is defined in 33 CFR § 328.3(a) and therefore "navigable waters" as defined in § 502(7) of the CWA, 33 U.S.C. § 1362(7).

26. The placement of dredged and fill material into wetlands adjacent to the Yampa River constitutes the "discharge of pollutants" within the meaning of § 502(12) of the CWA, 33 U.S.C. § 1362(12).

27. 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, § 404 of the CWA, 33 U.S.C. § 1344.
28. 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.
29. According to 33 CFR § 323.3(a), a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States, except as provided by 33 CFR § 323.4.
30. The Respondents are not and never have been authorized by a permit issued pursuant to § 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged or fill material to any waters of the United States on the site.
31. The Respondents' discharges of dredged and fill material at the site violate § 301(a) of the CWA, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by the Respondents into waters of the United States without authorization by a permit issued pursuant to § 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of § 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 § 301(a) of the CWA, 33 U.S.C. § 1311(a).

32. Mitigation for the adverse impacts to, and the loss of the functions and values of, waters of the United States on the site can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.
33. 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 § 101(a) of the CWA, 33 U.S.C. § 1251(a). Mitigation is appropriate to address the actual and potential harm to water quality, aquatic habitat, and wildlife habitat, as well as other functions and values, caused by the Respondents' unpermitted activities.
34. This order was issued after consultation and coordination with the Corps' Sacramento District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to §§ 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. The Respondents shall immediately terminate all discharges of dredged and 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 § 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, the Respondents shall inform EPA in writing of their intent to comply fully with this order.
3. Upon EPA approval of the mitigation plan required by paragraph 5 of section III of this order, the Respondents shall conduct mitigation activities, as more fully described below, for impacts to waters of the United States resulting from the unauthorized discharges of dredged and fill material at the site. No less than three acres of mitigation shall be realized for each acre of impact (a 3:1 ratio).
4. All mitigation activities shall be conducted in accordance with an EPA-approved mitigation plan prepared by a consultant experienced in wetland mitigation and restoration. The consultant also shall directly supervise all work performed pursuant to the EPA-approved mitigation 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, the Respondents shall submit to EPA for review and comment a mitigation plan, prepared by the consultant referenced in paragraph 4 of section III of this order, for mitigation of the impacts to the wetlands adjacent to the Yampa River and to any other areas resulting from the unauthorized discharges of dredged and fill material at the site.
6. The mitigation 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. In addition, the mitigation plan shall include:

- a. A complete assessment of the impacts to the wetlands adjacent to the Yampa River and any other impacted areas due to the Respondents' unauthorized discharges of dredged and fill material at the site;
 - b. A detailed work plan and schedule for all of the work and activities to be accomplished, as specified in the mitigation plan, including the application for any required permits, providing for completion of all aspects of the mitigation work no later than 60 days after EPA approves the mitigation plan;
 - c. Locations and delineations of any wetlands and other waters of the United States included in the mitigation. 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 guidance published by the Corps;
 - d. Grading, planting, and monitoring plans, measurable criteria for success of mitigation, and provisions for proper disposal of any excess soils or other materials generated during construction and/or mitigation;
 - e. Detailed professional drawings of the mitigation 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 complete the mitigation work, including the costs of all consultations, permits, construction, monitoring, land acquisition, etc.
7. EPA will review the mitigation plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the mitigation plan, the Respondents shall.

within 15 calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects all deficiencies identified by EPA.

8. All mitigation activities conducted pursuant to this order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland mitigation and restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within 21 calendar days of receiving EPA's written approval of the mitigation plan and prior to commencement of mitigation activities.
9. The Respondents must make a timely application for each permit necessary to implement the EPA-approved plan and for conducting mitigation in accordance with the approved plan (including the schedule specified therein), with all granted permits, and with all applicable laws. The 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 calendar days of issuance of each permit.
10. This order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. The Respondents shall consult with the Corps at the following address and telephone number to determine if any work to be performed pursuant to this order requires a permit from the Corps under § 404 of the CWA. If any such permit is required, the 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.

U.S. Army Corps of Engineers
Colorado West Regulatory Branch
400 Rood Avenue, Room 142
Grand Junction, CO 81501-2563
Telephone: 970-243-1199
Facsimile: 970-241-2358

11. The Respondents shall submit two copies of the mitigation plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St.
Denver, CO 80202
Telephone: 303-312-6359
Facsimile: 303-312-7202

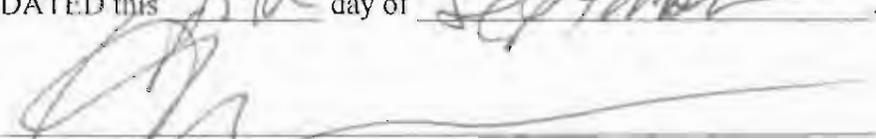
A copy of the mitigation plan also shall be provided to the Corps at the address noted in paragraph 10 of section III of this order.

12. All plans (including, but not limited to, the mitigation plan), deliverables, reports, specifications, schedules, or attachments required by this order are, upon approval by EPA, incorporated into this order. Any noncompliance 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. The Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the Colorado Department of Public Health and Environment, the Colorado Division of Wildlife, the 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.
14. 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. This order shall be effective upon receipt by the Respondents.
 16. 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 that occurred after March 15, 2004, through January 12, 2009, and \$37,500 per day for each violation thereafter of § 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under § 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, § 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, § 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA.
 17. 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 this order.
 18. Compliance with the terms and conditions of this order shall not be construed to relieve the Respondents of their obligation to comply with any applicable Federal, state, or local law or regulation.

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

DATED this 25th day of September, 2010.



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

Exhibit A

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 8

CLEAN WATER ACT § 404 ENFORCEMENT:
REMOVAL/RESTORATION PLANS
AND HABITAT MITIGATION/MONITORING PROPOSALS

INTRODUCTION

These guidelines are designed to assist respondents in the preparation of (1) removal and restoration plans and (2) habitat mitigation and monitoring plans associated with projects required under EPA administrative orders. They have been developed from the experiences of many cases and are intended to be merely guidelines. In the event of a conflict between an administrative order and these guidelines, the administrative order controls.

For answers to questions regarding the interpretation of these guidelines or of acceptable restoration and mitigation for a specific project, please contact the person at EPA Region 8 in the Technical Enforcement Program who is handling the case.

CLEAN WATER ACT § 404 ENFORCEMENT:

GENERAL GUIDELINES FOR DEVELOPMENT OF REMOVAL AND RESTORATION PLANS

I. GENERAL INFORMATION

The following guidelines serve as general specifications for preparing removal and restoration plans to remediate the unpermitted filling of wetlands. As environmental conditions vary from site to site, precise specifications will depend upon the environment conditions peculiar to the site in question. The size of the wetland area to be restored, its biological and physical characteristics, and the level of disturbance the wetland has experienced will further define the scope and complexity of the restoration plan. In most cases, the types of information listed below represent only the minimum required to formulate an acceptable removal and restoration plan.

When these guidelines are incorporated into an EPA administrative order, the recipient of the order should obtain the approval of EPA's technical representative on the case before departing from the general specifications outlined below.

II. RECOMMENDED REMOVAL AND RESTORATION PLAN FORMAT

The removal and restoration plan should be presented using the following six subsections when possible. An explanation of the kind of information that should be included in each subsection is provided.

I. Existing Physical Conditions

- A. A surveyed site plan depicting property boundaries, streets, buildings, waterbodies (with ordinary high water line indicated), wetlands, FEMA 100-year floodplain (if applicable), areas of unpermitted fill, elevation contours, and other ground surface features at a scale no greater than 1":40'. This plan shall include a cross-section view of the site which shows soil depths, fill depths, and average depth to groundwater across the site.
- B. A narrative description of existing physical conditions, including the area of the site; area of unpermitted fill; existing wetlands (including the types of vegetation); the soil types present (including the types of unpermitted fill present); the hydrologic regime of the site; and other relevant information.

2. Proposed Physical Conditions

- A. Using the site plan described in Subsection 1.A. as a base, show the exact areas where remedial activities will occur (e.g., removal of fill, replacing dredged material into ditches, etc.). Indicate proposed finished grades, expected ordinary high water elevations, the location of proposed plantings/seedings, and the location of all sediment and erosion control structures (e.g., hay bales, silt screens, etc.). This plan shall include a cross-section view of the site which shows proposed soil depths and average depth to groundwater across the site.
- B. Provide a narrative description of the remedial work to occur, including the methods and equipment to be employed; how access to the site to perform the work will be obtained; how equipment will be brought to the site; the location of the ultimate disposal site for any removed fill; how the work will progress across the site; a listing of the plant species to be seeded/planted at the site; the sources of the plant material [*note*: as a rule, transplanting of plant stock will not be permitted]; the planting method(s) and scheme (i.e., physical layout of the how plant material will be installed); any methods to be used to minimize adverse impacts while remedial work is underway; the expected hydrologic regime of the site in its restored condition; and other relevant information.
- C. Delineate the area(s) on the site to be restored by installation of flagging, sedimentation and erosion control structures, or other appropriate method. This delineation shall represent the limit of construction activities such that no work shall occur beyond those boundaries.

3. Actual Restored Physical Conditions

Using the site plan described in Subsection 1.A. as a base, show the actual physical conditions to exist at the site at the completion of grading activities (i.e., as "as-built" plan), including actual finished grades and all pertinent ground surface features. This plan shall include a cross-section view of the site which shows actual soil depths and average depth to groundwater across the site. This as-built plan shall be prepared and submitted prior to planting/seedling activities.

4. Monitoring/Measures of Success

- A. Normally, monitoring shall be performed midway through and near the end of the first and second growing seasons, then annually near the end of each successive growing season for the duration of the required

monitoring period. Monitoring shall be performed for a period of at least five years due to the scope and complexity of the remedial efforts required.

- B. A monitoring plan shall incorporate a simple statistical approach to assessing relative success or failure of restoration efforts (e.g., transects with sampling stations for measuring parameters such as percent areal cover in each vegetative stratum). A permanent photographic record shall be included as part of the monitoring plan.
- C. Depending upon the scope and complexity of the remedial efforts, general criteria to measure success shall be determined by EPA. These criteria shall be directly related to reestablishing the structural components of the aquatic ecosystem being restored. A general provision shall be included to allow for corrective action to be taken, at the direction of EPA, should monitoring show that criteria for success are not being met.
- D. A report shall be prepared and submitted after each monitoring event which describes the environmental conditions at the site and assesses relative success or failure of restoration efforts. This report shall include photographic evidence as well. This report shall identify any problems discovered and recommend appropriate corrective action to ensure the success of restoration.

5. Inspections

The plan shall provide for inspections by EPA personnel after installation of all sedimentation and erosion control structures, after completion of grading activities, after completion of initial planting/seeding activities, and after monitoring indicates that the criteria for success have been attained.

6. Schedule

A comprehensive schedule integrating all removal, restoration, inspection, and monitoring activities as well as report/product submissions shall be included.

CLEAN WATER ACT § 404 ENFORCEMENT:

GENERAL GUIDELINES FOR DEVELOPMENT OF HABITAT MITIGATION AND MONITORING PROPOSALS

I. GENERAL INFORMATION

Submission of a mitigation and monitoring proposal as described in these guidelines will not be a substitute for complete compliance with the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Mitigation under the Clean Water Act Section 404(b)(1) Guidelines dated November 7, 1989, which took effect on February 7, 1990. Therefore, mitigation proposals will only be considered if avoidance and minimization have been fully pursued.

Although all the individual components presented here may not be applicable to every project, a proposal should address each heading in the guidelines. Appendix A provides text and figure format guidelines.

II. PLACE OF MITIGATION AND MONITORING PROPOSAL IN CLEAN WATER ACT § 404 PERMIT PROCEDURE

1. Individual Permit

If a respondent is applying for an individual permit from the U.S. Army Corps of Engineers (the "Corps") and proposes mitigation, it is preferable that a preliminary mitigation and monitoring plan be submitted along with application materials. A detailed preliminary mitigation plan should generally not be completed until a final jurisdictional map has been accepted by EPA, and the area of fill to be mitigated for has been identified. The final mitigation plan will usually be submitted following the public comment period and Corps review of the preliminary plan.

2. Nationwide Permit

If a respondent is requesting confirmation of a project's qualification for a Corps nationwide permit and proposes mitigation, a detailed mitigation and monitoring plan must be submitted with the request for confirmation.

3. Final Submission

The final submission of all mitigation and monitoring plans must be in a *single* document. It must contain up-to-date versions of all materials, even if other versions were submitted earlier in the application process.

III. EPA/CORPS POLICY

In general, the goal of both EPA and the Corps is to permit no net loss of functions and values of wetland habitat. The replacement ratio of wetland acreage required to achieve this goal is typically *at least* 1:1, and is often higher. The attainment of replacement functions and values and an acreage replacement ratio are usually included in final success criteria associated with the completion of a respondent-permittee's mitigation responsibility.

V. SUMMARY OF RECOMMENDED MITIGATION AND MONITORING PROPOSAL FORMAT

The mitigation and monitoring proposal should be presented using the following nine subsections when possible. Detailed explanations of the kind of information that should be included in each subsection is provided in Section VI below.

1. PROJECT DESCRIPTION

- A. Location of Project
- B. Brief Summary of Overall Project
- C. Responsible Parties
- D. Jurisdictional Areas to be Filled
- E. Type(s), Functions, and Values of the Jurisdictional Areas

2. GOAL(S) OF MITIGATION

- A. Type(s) of Habitat to be Created
- B. Functions and Values of Habitat to be Created
- C. Time Lapse

3. FINAL SUCCESS CRITERIA

- A. Target Functions and Values
- B. Target Hydrological Regime
- C. Target Jurisdictional Acreage to be Created

4. PROPOSED MITIGATION SITE

- A. Location and Size of Mitigation Area
- B. Ownership Status
- C. Existing Functions and Values of Mitigation Area
- D. Present and Proposed Uses of Mitigation Area
- E. Jurisdictional Delineation (if applicable)
- F. Present and Proposed Uses of All Adjacent Areas
- G. Zoning

5. **IMPLEMENTATION PLAN**

- A. Rationale for Expecting Implementation Success
- B. Responsible Parties
- C. Site Preparation
- D. Planting Plan
- E. Schedule
- F. Irrigation Plan
- G. As-Built Conditions

6. **MAINTENANCE DURING MONITORING PERIOD**

- A. Maintenance Activities
- B. Responsible Parties
- C. Schedule

7. **MONITORING PLAN**

- A. Performance Criteria
- B. Monitoring Methods
- C. Annual Reports
- D. Schedule

8. **COMPLETION OF MITIGATION**

- A. Notification of Completion
- B. Corps Confirmation

9. **CONTINGENCY MEASURES**

- A. Initiating Procedures
- B. Alternative Locations for Contingency Mitigation
- C. Funding Mechanism
- D. Responsible Parties

VI. DETAILED RECOMMENDED MITIGATION AND MONITORING PROPOSAL FORMAT

Detailed information to be included in each subsection of the mitigation and monitoring proposal is presented below. The nine subsections should be preceded by a one-page summary of the report contents.

I. PROJECT DESCRIPTION

A. Location of Project

1. Describe
2. Provide:
 - a. Road map with site location clearly indicated
 - b. USGS quad map with project site outlines (clear photocopy is acceptable)

B. Brief Summary of Overall Project

In one or two paragraphs, describe the overall project (not just the jurisdictional area to be filled). Include type of development and project size.

C. Responsible Parties

Provide the name(s), title(s), address(es), and phone number(s) of the applicant(s)¹, including the contact person(s) if the applicant is a company, and of the preparer(s) of the mitigation plan.

D. Jurisdictional Areas to be Filled

Provide a full-size topo base map with verified Corps/EPA jurisdictional area(s) and area(s) of proposed fill outlines. (See Appendix A for map format information.)

E. Type(s), Functions, and Values of the Jurisdictional Areas

1. Type: e.g., seasonal wetland, vernal pool, freshwater marsh, playa, etc.
2. Functions and Values

Formal procedures to assess functions and values of wetlands have not yet been adopted. Therefore, to assist in evaluation of the project, a knowledgeable professional should provide a summary of the functions and values of the wetland to be filled. Any jurisdictional areas other than wetlands should also be assessed for functions and values. Examples of features to be addressed are:

¹ The "applicant" refers to the permit applicant, who will in most instances be the respondent.

Water Quality

- ground water
- recharge/discharge
- flood storage
- other

Habitat

- rare/threatened/endangered species
- known or probable wildlife use
- plant communities
- complete species list
- known or probable fish, shellfish, and aquatic vertebrate use
- other

Recreational Use

- non-consumptive (e.g., birdwatching, walking)
- consumptive (e.g., fishing, hunting)

2. GOAL(S) OF MITIGATION

This refers to the long-term goals, which may not be reached until some years after the applicant's mitigation responsibilities have been completed.

A. Type(s) of Habitat to be Created

If out-of-kind, present rationale. (Refer to Subsection 1.E.1 above.)

B. Functions and Values of Habitat to be Created

Identify, describe, and provide location of any local reference site if different from the wetland to be filled. (Refer to Subsection 1.E.2 above.)

C. Time Lapse

Describe how many years it is likely to take for the long-term goal habitat to develop.

3. FINAL SUCCESS CRITERIA

These are the criteria that are proposed by the applicant for Corps approval and are used to determine completion of permittee's mitigation responsibilities. Fulfillment of these criteria should indicate that the mitigation area is progressing well toward the habitat

type, functions, and values which constitute the long-term goal of this mitigation. For mitigation plantings, final success criteria will not be considered to have been met until a minimum of two years after all human support (e.g., irrigation, replanting, rodent control, and fertilization) has ceased. Major factors to be considered are:

A. Target Functions and Values

- wildlife species
- percentage vegetation cover and/or density
- approximate plant height criteria (shrubs and trees)
- plant and animal species diversity
- root development
- canopy stratification
- other quantifiable measures of success

B. Target Hydrological Regime

- source(s) of water
- discharge point(s)
- area(s) affected by seasonal flooding
- direction(s) of flow
- size (and map) of watershed

C. Target Jurisdictional Acreage To Be Created

Where applicable, a formal wetlands delineation must be submitted for Corps approval as a part of the final success criteria.

4. PROPOSED MITIGATION SITE

A. Location and Size of Mitigation Area

1. Describe location, including rationale for choice. If offsite, indicate distance from project site.
2. Provide the following maps:
 - a) full-size copy of USGS quad map with the mitigation location outlined
 - b) road map marked with the site location
 - c) base topo map with the proposed mitigation area outlined and acreage indicated. (See Appendix A for figure format information.)

B. Ownership Status

1. Indicate who presently owns the mitigation site. If any owner is different from the permit applicant(s), describe and explain the availability of the property. Describe and explain any easements or encroachments that the property carries. If any of the property is located on public land, describe and explain what arrangements, if any, have been discussed with the managing agency.
2. Indicate expected ownership of the mitigation area following completion of the mitigation project. Identify who will be responsible for long-term management and protection of the area. Describe and explain what if any long-term management plan has been prepared for the area. If an entity other than the applicant will assume management responsibilities following completion of the mitigation project, describe and explain any signed, written agreement that the manager will manage the area in conformance with goals of the mitigation. Include copies of any written plans or agreements.
3. Indicate what entity, if any, controls water flow to or from the site. Identify and describe the party who is to maintain water control structures. Describe and explain what arrangements have been made to guarantee appropriate water flow in the mitigation area during and after the establishment of the mitigation project.

C. Existing Functions and Values of Mitigation Area

(Refer to Section I.E. above.)

D. Present and Proposed Uses of Mitigation Area

- Briefly describe all known present and proposed uses of the mitigation area. Discuss non-native landscape plantings, pipelines, powerlines, roads, distance and location of nearest structures, if any, etc., on the property containing the mitigation site.

E. Jurisdictional Delineation (if applicable)

Describe any jurisdictional areas that are already present on the mitigation site. Provide a topo base map of the site with jurisdictional areas (and any proposed fill) indicated. Describe the probable future of the mitigation area as habitat if left undisturbed.

F. Present and Proposed Uses of All Adjacent Areas

Briefly describe all known present and proposed uses of all property sharing a common border with the property containing the mitigation.

G. Zoning

Give all present and proposed zoning designations for the mitigation site and adjoining properties, including city, county, BCDC, etc.

5. IMPLEMENTATION PLAN

A. Rationale for Expecting Implementation Success

May refer to previous relevant experience of applicant and/or implementation consultant or to other similar and successful mitigation projects. Include hydrology and soils information.

B. Responsible Parties

Provide the name(s), title(s), address(es), and phone numbers of the person(s) responsible for implementing the mitigation project.

C. Site Preparation

1. Describe plans for grading, hydrologic changes, water control structures, soil amendments, erosion control, bank stabilization, equipment and procedures to be used, site access control, etc., as applicable. Include a description of exotic vegetation control techniques, planting hole excavation methods (e.g., auguring, hand digging), and the size of the planting hole (e.g., twice size of container).
2. Provide base topo maps showing planned site preparation. (See Appendix A for figure format information.)
3. Provide representative cross-sections of the mitigation site with elevations and scale indicated.
4. Provide the name, title, address, and phone number of the person supervising or providing biological monitoring during grading activities.

D. Planting Plan

1. Briefly describe the planting plan and methods
2. Provide a table of species to be planted, including numbers, spacing, types of propagules, pot sizes, etc.
3. Indicate the source-locale of seeds, plant plugs, cuttings, etc.
4. Show planting and species locations on a base topo map. (See Appendix A for figure format information.)
5. If transplanting is to be done, describe the storage method and duration.
6. Describe any expected volunteer native revegetation that is included in mitigation planning.

E. Schedule

Provide a schedule in the form of a legible flow chart showing intended timing of site preparation and plantings.

F. Irrigation Plan

1. Describe irrigation method(s), estimated frequency, and amount during dry months.
2. Indicate water source(s) for the mitigation area.
3. Show the planned irrigation system and/or water flow on base topo (may be included on the planting plan map).

G. As-Built Conditions

The plan should specify that the applicant will:

1. Submit a report to EPA within 6 weeks of the completion of site preparation and planting, describing the as-built status of the mitigation project. If avoidance is incorporated into development project design, describe the as-built status of the development project, including any deviations from the original plan in the vicinity of, or that will affect, jurisdictional area(s). Submit

separate reports for grading and planting work if not completed within six weeks of each other.

2. Provide topo maps showing as-built contours of the mitigation area. Indicate the location of plantings and any other installations or structures.

6. MAINTENANCE DURING MONITORING PERIOD

A. Maintenance Activities

Describe planned maintenance activities, including irrigation system inspection, plant replacement, weeding, water structure inspection, fertilization, erosion control, herbivore protection, trash removal, and/or any other such activities.

B. Responsible Parties

Identify the persons/entities responsible for financing and carrying out maintenance activities, including names, titles, addresses, and phone numbers.

C. Schedule

Provide a table showing the schedule of maintenance inspections.

7. MONITORING PLAN

A. Performance Criteria

Provide yearly target criteria to be met, as appropriate, based on reasonably-paced progress toward final success criteria. (Refer to Section III.)

B. Monitoring Methods

1. Describe the monitoring methods. If using sampling methods, include sample sizes, statistical justification for sampling regime, and data analyses to be performed. If appropriate, include assessment of natural population growth by target species.
2. Provide samples of all proposed data sheets.

3. Photos shall be taken during each monitoring period. They shall be taken from the same vantage point and in the same direction every year, and shall reflect material discussed in the monitoring report. When percent cover estimates are made of herbaceous vegetation, photographs shall be taken of sampling quadrants.

C. Annual Reports

1. Annual reports shall be submitted which present monitoring results. They shall assess both attainment of yearly target criteria and progress toward final success criteria.
2. Annual reports shall include the following:
 - a. A list of names, titles, and companies of all persons who prepared the content of the annual report and participated in monitoring activities for that year.
 - b. A copy of any Corps permit attached. Special Conditions and any subsequent Letters of Modification shall be included as an appendix.
 - c. Analysis of all quantitative monitoring data.
 - d. Prints or good quality photocopies of all included monitoring photographs.
 - e. Maps identifying monitoring areas, transects, planting zones, etc., as appropriate. (See Appendix A for figure format information.)
3. Copies of all field data sheets shall be available for Corps review as needed.

D. Schedule

Since planting and/or site modification may not occur when planned, monitoring and performance criteria shall be tied to the actual implementation date rather than to predetermined years (e.g., the first annual report shall be delivered on (month, day) of the year following the first growing season after planting.)

8. COMPLETION OF MITIGATION

A. Notification of Completion

When the initial monitoring period is complete, and if the applicant believes that the final success criteria have been met, the applicant shall notify the Corps when the annual report that documents this completion is submitted. If it is appropriate here, a current jurisdictional delineation of the created wetland areas should be submitted with the report. (This delineation shall be accompanied by legible copies of all field data sheets.)

B. Corps Confirmation

Following receipt of the report, the Corps may require a site visit to confirm the completion of the mitigation effort and any jurisdictional delineation.

9. CONTINGENCY MEASURES

A. Initiating Procedures

If an annual performance criterion is not met for all or any portion of the mitigation project in any year, or if the final success criteria are not met, the permittee shall prepare an analysis of the cause(s) of failure and, if determined necessary by the Corps, propose remedial action for approval.

B. Alternative Locations for Contingency Mitigation

Indicate specific alternative mitigation locations that may be used in the event that mitigation cannot be successfully achieved at the intended mitigation site. Include current ownership information for any offsite alternative locations.

C. Funding Mechanism

Indicate what funds will be available to pay for planning, implementation, and monitoring of any contingency procedures that may be required to achieve mitigation goals.

D. Responsible Parties

List names, addresses, and phone numbers of persons/entities responsible for implementing and monitoring contingency procedures.

APPENDIX A – FORMAT INFORMATION

A. Text Format Notes for Mitigation/Monitoring Proposals, As-Built Reports, and Annual Reports.

1. The Corps file number and the date of the report should be included in title-page reading.
2. Include a distribution page listing names, titles, companies/agencies and addresses of all persons/agencies receiving a copy of the report.

B. List of Figures to be Submitted

(Page and section numbers in parentheses indicate location of figure request in annotated outline. For recommended figure formats, refer to Section (C) below.)

1. Mitigation and Monitoring Proposal
 - a. Jurisdictional Areas and Proposed Fill on Project Site (*p. 8, 1.D.*) (outlines and acreages indicated.).
 - b. Location and Size of Mitigation Area
 - U.S.G.S. quad map (*p. 10, 4.A.2*)
 - road map (*p. 10, 4.A.2*)
 - topo map (*p. 10, 4.A.2*)
 - c. Jurisdictional Areas and Any Proposed Fill on Mitigation Site (*p. 11, 4.E.*)
 - d. Mitigation Site Preparation (*p. 12, 5.C.2*)
(base topo map showing preparation plans)
 - e. Planting Plan (*p. 13, 5.D.4*)
 - plan view of base topo
 - representative cross-sections
 - f. Irrigation Plan (*p. 13, 5.F.3*) (may be on planting plan topot)

2. *As-Built Report (p. 14, 5.3.2)*

- a. Final site contours
- b. Plantings as installed

C. Figure Format Notes

- All maps and plans submitted shall be legible and include title, date of preparation, and date of submission.
- A legend shall be provided if symbols, patterns, or screens are used on the map or plan.
- If colors are used to indicate areas on the original map, color copies shall be included in all copies of the report submitted to the Corps.
- Indicate North and provide a scale and datum (if appropriate, i.e., tidal data).
- Scale and orientation shall be the same for all maps, except for detail sections.
- Base topo maps (i.e., for jurisdictional areas, location and size of mitigation areas, mitigation site preparation plans, planting plans, irrigation plans, and as-built reports) shall be full-size (1 inch = 100 feet or less, 1 inch = 200 feet for very large projects).
- USGS quad maps shall be full-size and full scale (may be photocopies, if clearly legible).

NOTE: Reduced copies of maps shall be bound with all documents to facilitate review by advisory agencies. For Corps review, at least two sets of full-sized copies shall accompany mitigation and monitoring proposal, and one set shall accompany each annual report.

D. Schedule

When submitting the mitigation and monitoring plan, the applicant shall indicate the month and date on which the yearly report will be delivered. If plan involves planting, this date should be made between growing seasons for the primary plants so that timely decisions can be made about any modifications to the plan.



Office of Enforcement and Compliance Assurance
INFORMATION SHEET

U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance resources such as workshops, training sessions, hotlines, websites, and guides to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance, and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Compliance Assistance Centers

(www.assistancecenters.net)

In partnership with industry, universities, and other federal and state agencies, EPA has established Compliance Assistance Centers that provide information targeted to industries with many small businesses.

Agriculture

(www.epa.gov/agriculture or 1-888-663-2155)

Automotive Recycling Industry

(www.ecarcenter.org)

Automotive Service and Repair

(www.ccar-greenlink.org or 1-888-GRN-LINK)

Chemical Industry

(www.chemalliance.org)

Construction Industry

(www.cicacenter.org or 1-734-995-4911)

Education

(www.campuserc.org)

Healthcare Industry

(www.hercenter.org or 1-734-995-4911)

Metal Finishing

(www.nmfrc.org or 1-734-995-4911)

Paints and Coatings

(www.paintcenter.org or 1-734-995-4911)

Printed Wiring Board Manufacturing

(www.pwbrc.org or 1-734-995-4911)

Printing

(www.pneac.org or 1-888-USPNEAC)

Transportation Industry

(www.transource.org)

Tribal Governments and Indian Country

(www.epa.gov/tribal/compliance or 202-564-2516)

US Border Environmental Issues

(www.bordercenter.org or 1-734-995-4911)

The Centers also provide State Resource Locators (www.envcap.org/statetools/index.cfm) for a wide range of topics to help you find important environmental compliance information specific to your state.

EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

EPA's Home Page

www.epa.gov

Small Business Gateway

www.epa.gov/smallbusiness

Compliance Assistance Home Page

www.epa.gov/compliance/assistance

Office of Enforcement and Compliance Assurance

www.epa.gov/compliance

Voluntary Partnership Programs

www.epa.gov/partners

