UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF Andrew Johnson [redacted] Fort Bridger, Wyoming 82933 Respondent.	)	FINDINGS OF VIOLATION AND ADMINISTRATIVE ORDER FOR COMPLIANCE Docket No. CWA-08-2014-0012

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 section 309(a) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a). This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. This Order is based on the 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

2. Andrew Johnson (Respondent) is an individual [redacted] Fort Bridger, Uinta County, Wyoming 82933.

3. At all relevant times, Respondent owned, controlled, leased and/or operated the property at [redacted] Fort Bridger, Wyoming in the [redacted] Uinta County, Wyoming (the Site). The Site includes a section of Six Mile Creek.

4. Six Mile Creek is a perennial tributary of the Blacks Fork River, which is a perennial tributary of the Green River. The Green River is, and was at all relevant times, a navigable, interstate water of the United States.

5. In or about the summer and early fall of 2012, Respondent or persons acting on his behalf began construction activities, without a CWA section 404 permit, within and adjacent to Six Mile Creek that resulted in the discharge of dredged and fill material to the creek below the ordinary high water mark.

6. On October 11, 2012, the United States Army Corps of Engineers (Corps) conducted an inspection of the Site and confirmed that Respondent or persons acting on his behalf had discharged or allowed the discharge of approximately 12 cubic yards of dredged and fill material below the ordinary high water mark of Six Mile Creek during construction of a dam. The work resulted in filling an approximately 40-foot reach of the creek and inundation of an approximately 745-foot reach.

7. On September 5, 2012, the Corps contacted Mr. Johnson by telephone to inquire about the dam construction activities at the Site and authorization for the work. The Corps also informed Respondent of the Corps' CWA regulatory authority and requested that Respondent send information about the dam construction project to the Corps. The Corps did not receive any such information from Respondent following that telephone conversation.

8. , On October 26, 2012, the Corps sent a letter to Respondent notifying him that a standard project-specific CWA permit would have been required prior to the dam construction activities, but that an application for such a permit was never received by the Corps and authorization was never granted. Therefore, the project was performed in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). The October 26, 2012, letter further ordered Respondent to cease and desist any further earth-moving activities at the Site.

9. On February 7, 2013, the Corps referred this case to the 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.

10. On May 30, 2013, the EPA performed an inspection of the Site and verified that an approximately 40-foot reach of Six Mile Creek had been filled during the construction of a dam, impacting approximately 785 feet of the Six Mile Creek channel. The dam was observed to be composed of sand, gravel, clay, and concrete blocks.

11. The activities described in paragraphs 5, 6, and 10, above, were performed using common earthmoving vehicles and equipment that were operated by Respondent and/or by persons acting on his behalf.

12. Respondent is a "person" as defined in section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. The material discharged into Six Mile Creek is and was at all relevant times "dredged material" and "fill material" as defined in 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), respectively, and "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

14. Six Mile Creek filled and disturbed by Respondent's unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, fish, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

15. The vehicles and equipment described in paragraph 11, above, are and were at all relevant times each a "point source" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. Six Mile Creek is and was at all relevant times a "waters of the United States" as defined in 33 C.F.R. § 328.3(a) and therefore "navigable waters" as defined in section 502(7) of the CWA, 33 U.S.C. § 1362(7).

17. The placement of dredged and fill material into Six Mile Creek constitutes the "discharge of pollutants" as defined in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

18. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

19. 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.

20. According to 33 C.F.R. § 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, unless an exemption pursuant to 33 C.F.R. § 323.4 applies.

21. 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 the activities described in paragraphs 5, 6, and 10 of this Order.

22. The activities conducted by Respondent and/or by persons acting on its behalf as described in paragraphs 5, 6, and 10, above, violate section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by Respondent into waters of the United States without the required 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 permit constitutes an additional day of violation of section 301(a) of the CWA.

23. 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 and mitigation are 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 Respondent's unpermitted activities.

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

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to section 309(a) of the CWA, 33 U.S.C. § 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:

25. 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.

26. Within ten (10) calendar days of receipt of this Order, Respondent shall inform the EPA in writing of his intent to comply fully with this Order. If Respondent has concerns or questions about the requirements of the Order, the EPA requests that he schedule a meeting and/or conference call with the 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 the EPA.

27. Respondent shall conduct restoration and mitigation activities for impacts to waters of the United States resulting from the unauthorized discharges of dredged or fill material at the Site in accordance with the schedule and other requirements set forth in paragraphs 28 to 36, below.

28. Within fourteen (14) calendar days of receipt of this Order, Respondent shall submit to the EPA the name and qualifications, including professional resume, of a consultant experienced in

stream and wetlands restoration who will prepare a restoration plan (Plan) and must directly supervise all work performed pursuant to the Plan, once it is approved by the EPA.

29. Within thirty (30) calendar days of receipt of this Order, Respondent shall submit to the EPA for review, comment, and approval a Plan, prepared by the consultant referenced in paragraph 28, for (1) the removal of all dredged or fill material that was discharged into the waters of the United States at the Site; and (2) the restoration, to their pre-impact condition and grade, of the waters of the United States that were impacted as a result of Respondent's unauthorized discharges of dredged or fill material at the Site.

30. The 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. The Plan shall include:

a. A complete assessment of the impacts to Six Mile Creek due to Respondent's unauthorized discharges of dredged or fill material at the Site;

b. A Site map at an appropriate scale showing the entire area of unauthorized disturbance. The Site map shall include existing undisturbed natural features that were not impacted (e.g., riparian and wetland areas, riffle and pool complexes) and clearly identify all unauthorized man-made disturbances, fills, channel excavations, road crossings, culverts, structures, and any other work.

c. A detailed work plan and schedule for all of the work and activities to be accomplished, as specified in the plan, including the application for any required permits, providing for completion of all aspects of the work no later than 60 days after the EPA approves the plan;

d. Grading, planting and monitoring plans, measurable criteria for success of restoration and provisions for proper disposal of any excess soils or other material generated during removal and restoration;

e. Detailed professional drawings of the restoration site, including plan and profile drawings with control elevations for current conditions and proposed conditions; and

f. A description of all costs to complete the restoration work, including the costs of all consultations, permits, construction, and monitoring, etc.

31. The EPA will review the Plan and approve it, approve it with modifications or reject it with comments. If the EPA rejects the Plan, Respondent shall, within thirty (30) calendar days of receipt of the EPA's rejection letter, submit a revised Plan that corrects the deficiencies identified by the EPA.

32. Upon receiving the EPA's written approval of the Plan, Respondent shall obtain all necessary permits to implement the Plan and then commence all restoration activities in accordance with the approved Plan, including the time frames specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing copies of all such permits, and any amendments thereto, to the EPA within seven calendar days of issuance of each permit.

33. All restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken under the direct, on-site supervision of the consultant retained pursuant to paragraph 28.

34. 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 the EPA pursuant to paragraph 32, above, prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
Wyoming Regulatory Office
2232 Del Range Boulevard, Suite 210
Cheyenne, WY 82009-4942

[redacted]

35. Respondent shall submit the Plan, all notifications under this Order, and related correspondence to:

Richard Clark, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
[redacted]

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

Wendy I. Silver, 8ENF-L
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129
[redacted]

A copy of the Plan also shall be provided to the Corps at the address noted in paragraph 34 above.

36. In addition to the notification requirements set forth in paragraph 35, after issuance of any Corps authorization for the restoration work, Respondent shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit(s).

37. The Plan and any other deliverables, reports, specifications, schedules, and attachments required by this Order are, upon approval by the EPA, incorporated into this Order. Any non-compliance with the Plan, deliverables, reports, specifications, schedules, permits, or attachments shall be deemed a failure to comply with this Order and shall be subject to EPA enforcement.

38. A lease, sublease or transfer of the Site shall not relieve Respondent of any responsibility in this Order unless the EPA, Respondent 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, Respondent shall notify the EPA regarding the details of the lease, sublease or transfer at the address specified in paragraph 35 of this Order.

39. Respondent shall allow, or use its best efforts to allow, access by any authorized representatives of the EPA, the Corps, the U.S. Fish and Wildlife Service, and the Wyoming Department of Game and Fish, or any of the agencies' contractors, 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 the EPA.

This Order shall in no way limit or otherwise affect the 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.

40. This Order shall be effective upon the date of receipt by Respondent.

41. Issuance of this Order shall not be deemed an election by the United States to forego any civil or criminal action to seek penalties, fines or other appropriate relief under the CWA for violations giving rise to the Order.

42. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), as adjusted for inflation by 40 C.F.R. part 19, authorizes civil penalties of up to $37,500 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 the EPA or her delegatee 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 the 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.

43. Compliance with the terms and conditions of this Order shall not be construed to relieve Respondent of his obligations to comply with any applicable federal, state or local law or regulation.

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

45. Respondent may seek federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

DATED this 28th day of January, 2014.

for Eddie A. Sierra

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