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

SEP - 4 2007

CERTIFIED MAIL #7004 1350 0001 5669 3068
CERTIFIED MAIL #7004 1350 0001 5669 3075
RETURN RECEIPT REQUESTED

Ref: 8ENF-W

Bob and Traci Burleson
31752 Avenida Evita
San Juan Capistrano, CA 92675-3402

Wayne Herling
1410 Victoria Glen
Escondido, CA 92025-7643

Re: Findings of Violation and
Administrative Order for Compliance
Docket No. **CWA-08-2007-0017**

Dear Mr. and Ms. Burleson and Mr. Herling:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that you 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, you or persons acting on your behalf have discharged dredged or fill material into waters of the United States without authorization under the Act. These discharges of pollutants to West Bridger Creek occurred at two adjacent properties–one owned by Bob and Traci Burleson and one owned by Wayne Herling–located in the southeast quarter of the southeast quarter of section 19, Township 2 South, Range 16 East in Sweet Grass County, Montana. West Bridger Creek is a tributary to Bridger Creek, which is a tributary to the Yellowstone River.

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).

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The order requires you to inform EPA in writing, within 14 days of receipt, of your 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 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 Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,

Michael T. Risner
for

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

Enclosure

cc: Tina Artemis, EPA, Regional Hearing Clerk
Jenny Chambers, Montana Department of Environmental Quality
David L. Lagrone, U.S. Army Corps of Engineers
Jim Olsen, Montana Fish, Wildlife & Parks
Allan Steinle, U.S. Army Corps of Engineers
John Wardell, EPA, Montana Operations
Coral Wilson, Sweet Grass Conservation District

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 SEP -4 AM 11:05

IN THE MATTER OF:	)	**FINDINGS OF VIOLATION AND ADMINISTRATIVE ORDER FOR COMPLIANCE**
Bob and Traci Burleson **31752 Avenida Evita** **San Juan Capistrano, CA 92675-3402**	)	**Docket No.** CWA-08-2007-0017
and	)	
Wayne Herling **1410 Victoria Glen** **Escondido, CA 92025-7643**	)	
Respondents.	)	

I. STATUTORY AUTHORITY

This Findings of Violation and Administrative Order for Compliance ("Order") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by sections 308 and 309(a) of the Clean Water Act ("CWA" or "Act"), 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. This Order is based on the 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

1. Bob and Traci Burleson are individuals residing at 31752 Avenida Evita, San Juan Capistrano, California 92675-3402. Wayne Herling is an individual residing at 1410 Victoria Glen, Escondido, California 92025-7643 (collectively, "Respondents").

2. At all relevant times, Respondents owned, managed, operated, and/or otherwise controlled property along West Bridger Creek located in the southeast quarter of the southeast quarter of section 19, Township 2 South, Range 16 East in Sweet Grass County, Montana (the "Site").

3. West Bridger Creek is a tributary to Bridger Creek, which is tributary to the Yellowstone River, a navigable, interstate waterway.

4. In or about the spring of 2005, Respondents or persons acting on Respondents' behalf began construction activities, without a permit, within and adjacent to West Bridger Creek that resulted in the discharge of dredged and fill material to the creek and the removal of riparian vegetation along the banks of the creek, leaving exposed soil. The work involved:

   a. construction of two ponds adjacent to West Bridger Creek. The ponds were constructed, in part, by building berms on the right descending bank of West Bridger Creek. The downstream pond, which was initially constructed in the early spring of 2005 and was washed out by flooding, was reconstructed in its same location by increasing the berm height to approximately five feet above the stream surface for the entire length of the pond. The berm extended upstream to the point where water is diverted from West Bridger Creek to the downstream pond. Both

berms encroached and sloughed into the creek and separate the creek from its floodplain for the entire lengths of the berms.

b. installation of two diversion structures in West Bridger Creek to divert water from the creek to the ponds. At times, the entire flow of West Bridger Creek has been diverted into the downstream pond with no water being released from the pond to the creek.

c. dredging gravel and natural stream bed material from West Bridger Creek to form a fishing/swimming hole and create a dam downstream from where the dredged material was excavated. The dam has the potential to impede fish passage.

d. installation of two culverts in West Bridger Creek. The downstream culvert has an elevation drop of approximately two feet from the outlet of the culvert to the natural streambed elevation impeding fish passage and potentially leading to scouring of the streambed during high flows.

e. placement of large landscaping boulders into the bank of West Bridger Creek.

5. On August 4, 2005, the United States Army Corps of Engineers ("Corps") inspected the Site and confirmed that Respondents or persons acting on their behalf had discharged or allowed the discharge of dredged and fill material to West Bridger Creek as described in paragraph 4 of Section II of this Order.

6. On August 15, 2005, the Corps issued a cease and desist order to Respondents notifying them that the work performed in West Bridger Creek on their respective properties was an apparent violation of the CWA and requiring them to cease any further unauthorized work. The Corps recommended that a plan be developed to remove all unauthorized fill

material placed in the stream and restore the creek channel and adjacent floodplain to a naturally functioning condition. The Corps further requested that any relevant information pertaining to the violation, and any future planned activities, be provided in writing.

7. On August 26, 2005, Respondents' attorney replied to the Corps' cease and desist order and indicated Respondents would immediately cease and desist any work in or near the streambed of West Bridger Creek. No additional information was provided.

8. On March 9, 2006, following an inspection the previous day, the Corps issued a second cease and desist order that included an order for initial corrective measures that required the removal of the downstream diversion structure in West Bridger Creek. Additional activities to address erosion also were required, including the installation of sedimentation barriers. The initial corrective measures were to be implemented no later than March 31, 2006. The cease and desist order also stated a detailed plan for the restoration and revegetation of the Site should be developed prior to March 31, 2006.

9. On March 23, 2006, a meeting was held among Repondents' attorney, Respondents' consultant, and the Corps. Respondents' representatives agreed that initial corrective measures to be implemented included placement of erosion control blankets on bare banks at the Site and the removal of both diversion structures. A letter written by Respondents' attorney to the Corps that same day states his understanding that the Corps thought "it is advisable for protection on the disturbed soil . . . to be installed immediately." No mention was made of removal of the two diversion structures.

10. On April 4, 2006, the Corps conducted an inspection at the Site and found that the initial corrective measures that were ordered on March 9, 2006, and were to be implemented no later than March 31, 2006, had not been completed.

11. On May 2, 2006, the Corps reiterated in a letter to Respondents' attorney the required initial corrective measures which were specified in the March 9, 2006, cease and desist order and which were subsequently explained to Respondents' representatives on site on April 4, 2006, and again in an email on April 26, 2006. Specifically, Respondents were ordered to remove the downstream diversion structure and fill material that had encroached on the stream and stabilize all loose fill material within 50 feet of the waterway to prevent sediment from entering the stream. Berms placed adjacent to and within West Bridger Creek were to "be pulled back sufficiently so that not only does the stream and its banks resemble their historic width, depth, and location but also that there is sufficient room on the top of the bank between the river and the berm so that the proper erosion control and sediment barriers can be installed." The Corps extended the completion date to May 15, 2006.

12. On June 14, 2006, the Corps issued a letter to Respondents' attorney summarizing the Corps' findings of a June 5, 2006, inspection conducted at the Site. The Corps found that not all the required initial corrective measures had been completed and additional fill material recently had been placed in West Bridger Creek.

13. The discharges described in paragraph 4 of Section II of this Order resulted in the discharge of dredged and fill material to West Bridger Creek at various locations along an approximately 1500-foot segment of stream. West Bridger Creek provides various

functions and values including aquatic and wildlife habitat, flood attenuation, groundwater recharge, and aesthetics.

14. The discharges described in paragraph 4 of Section II of this Order were performed using common earthmoving vehicles and equipment, which were operated by Respondents or persons acting on their behalf.

15. Respondents are each a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).

16. The discharged dredged and fill materials referenced in paragraph 4 of Section II of this Order are and were at all relevant times "dredged material" and "fill material" within the meaning of 33 C.F.R. § 323.2(c) and (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 14 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. West Bridger Creek referenced in paragraph 3 of Section II of this Order is and was 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 West Bridger Creek constitutes the "discharge of pollutants" within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

20. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits, 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 Act, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.

22. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

23. Respondents are not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraph 4 of Section II of this Order.

24. The activities conducted by Respondents and their agents as described in paragraph 4 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 Respondents 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) of the CWA, 33 U.S.C. § 1311(a).

25. The removal of the dredged and fill material illegally discharged into waters of the United States at the Site and restoration of the impacted areas of West Bridger Creek to a

condition that closely approximates the conditions and functions prior to the discharge of dredged and fill material can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

26. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 25 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality.

27. This Order was issued after consultation and coordination with the Corps' Omaha District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondents shall immediately terminate all unauthorized discharges of dredged 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 the discharge of dredged or fill material into waters of the United States.

2. Within 14 calendar days of receipt of this Order, each Respondent shall inform EPA in writing of his or her intent to fully comply with the Order.

3. Upon EPA approval of the restoration plan required by paragraph 5 of Section III of this Order, Respondents shall remove all dredged and fill materials that were discharged as a result of the violations identified in this Order and restore the impacted areas of West Bridger Creek to their pre-impact condition and grade.

4. All dredged and fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in stream 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 21 calendar days of receipt of this Order.

5. Within 60 calendar days of receipt of this Order, Respondents shall submit to EPA for review and comment a restoration plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the discharged dredged and fill material from West Bridger Creek and any other illegally impacted areas at the Site and restoring all impacted areas to their pre-impact condition and grade.

6. The restoration plan shall be prepared in accordance with "U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans," attached hereto as Exhibit A. The restoration plan shall include:

   a. A complete assessment of the impacts to West Bridger Creek due to Respondents' unauthorized discharges of dredged or fill material;

b. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map of these locations;

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

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

e. A description of all costs necessary to complete the work to be accomplished by the restoration plan, including the costs of consultations, permits, monitoring, and construction.

7. EPA will review the restoration plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the restoration plan, Respondents shall, within 30 calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

8. Upon receiving EPA's written approval of the restoration plan, Respondents shall obtain all necessary permits to implement the EPA-approved plan and then commence all restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondents shall demonstrate that all

necessary permits have been granted by providing copies of all such permits, and any amendments thereto, to EPA within 7 calendar days of issuance of each permit.

9. All restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream 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 restoration plan and prior to commencement of restoration activities.

10. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA, 33 U.S.C. § 1344. If required, Respondents shall obtain such permit(s) and provide a copy 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
10 West 15th Street, Suite 2200
Helena, MT 59626
Telephone: 406-441-1375
Facsimile: 406-441-1380

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

Monica Heimdal, 8ENF-W
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop St.
Denver, CO 80202-1129
Telephone: 303-312-6359
Facsimile: 303-312-6953

A copy of the restoration 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
Telephone: 303-312-6637
Facsimile: 303-312-6953

A copy of the restoration plan also shall be provided to the Corps at the address noted in paragraph 10 of Section III of this Order.

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

13. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.

14. A lease, sublease, or transfer of the Site shall not relieve Respondents of any responsibility in the Order unless EPA, Respondents, and the lessee, sublessee or

transferee agree in writing to allow the lessee, sublessee or transferee to assume such responsibility. Additionally, at least 30 calendar days prior to such lease, sublease, or transfer, Respondents shall notify EPA regarding the details of the lease, sublease, or transfer at the address specified in paragraph 11 of Section III of this Order.

15. Respondents shall allow, or use their best efforts to allow, access by any authorized representative of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the Montana Department of Environmental Quality, the Sweet Grass County Conservation District, and Montana Fish, Wildlife and Parks, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

    a. To inspect and monitor progress of the activities required by this Order;

    b. To inspect and monitor compliance with this Order, and

    c. To verify and evaluate data and other information submitted to EPA.

    This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the Site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

16. Respondents' obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondents.

17. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to $32,500.00 per day for each violation of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA

under section 309(a) of the Act, 33 U.S.C. § 1319(a), including this Order. Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the Act. 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.

18. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondents of their obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondents to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 4th day of September, 2007.

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