

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

Mr. Gary Powers)	Proceeding Under Section
)	309(a) of the Clean Water
)	Act, 33 U.S.C. § 1319(a)
Property Located At:)	
)	
Along Route 20, at approximately)	ORDER FOR COMPLIANCE
38.401286° N, -80.56485° W,)	Docket No. CWA-03-2021-0028DW
near Cowen, West Virginia 26206)	
)	
Respondent)	

I. STATUTORY AUTHORITY

1. This Order for Compliance (“Order”) is issued under the authority vested in the United States Environmental Protection Agency (“EPA”) by Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a) (“CWA” or “Act”). The Administrator has delegated this authority to the Regional Administrator of EPA Region III who in turn has re-delegated it to the Director of the Enforcement and Compliance Assurance Division.

II. ALLEGATIONS

2. Respondent, Mr. Gary Powers is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
3. Respondent is the owner and operator of the property (the “Site”) depicted on Exhibit A, along Route 20 at approximately 38.401286° N, -80.56485° W, near Cowen, Webster County, West Virginia.
4. The Site contains wetlands abutting a perennial unnamed tributary to Big Ditch Run. Big Ditch Run flows year-round and is a tributary to the Gauley River, a Traditional Navigable Water. Therefore, the area is "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).
5. Based on Site inspections conducted by representatives of the U.S. Army Corps of Engineers Huntington District (“USACE”) on September 25, 2017, and by representatives of the U.S. EPA Region III and the West Virginia Division of Natural Resources (“WVDNR”) on May 23, 2018 and June 4, 2019 and other information available to EPA, Respondent, or persons acting on behalf of Respondent, operated

equipment between 2016 and early 2017 which discharged dredged and/or fill material to waters of the United States located on the Site described in Paragraph 3, above, and further depicted on Exhibit A, attached hereto. Respondent's activities include the discharge of fill material into approximately 0.51 acres of wetlands.

6. The term "fill material" within the meaning of 40 C.F.R. § 232.2, includes any pollutant which replaces portions of "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose. The term "discharge of fill material" includes "[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States."
7. The equipment referenced in Paragraph 5, above, which has discharged dredged and/or fill material to "waters of the United States," constitutes a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
8. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits any person from discharging dredged and/or fill material from point sources to "waters of the United States" except in compliance with a permit issued by the Secretary of the Army under Section 404 of the Act, 33 U.S.C. § 1344.
9. At no time during the discharge of dredged and/or fill material to the waters of the United States located on the Site did the Respondent have a permit from the Secretary of the Army as required by Section 404 of the Act, 33 U.S.C. § 1344.
10. Respondent, by discharging dredged and/or fill material to the "waters of the United States" without authorization, has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

III. ORDER FOR COMPLIANCE

Therefore, the Respondent is hereby ORDERED, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), to do the following:

11. Cease and desist all discharges including the grading, plowing, leveling and ditching without a permit to waters of the United States at the Site.
12. Within one year of the effective date of this Order, the Respondent shall:
 - (a) Remove from the Site all fill material placed by Respondent;
 - (b) Place the removed fill material in a location that is not within waters of the United States;
 - (c) Take appropriate measures to de-compact the topsoil, if necessary, for effective vegetative growth; and
 - (d) Plant an appropriate wetland seed mix consisting of seeds native to West Virginia.

- (e) Prior to performing the tasks identified in subparagraphs 12(a) through 12(d), Respondent shall obtain all permits necessary to perform the work described herein required by local and/or West Virginia Department of Environmental Protection (WVDEP) regulations.
 - (f) Respondent shall comply with all applicable erosion and sediment control measures while performing the tasks identified in subparagraphs 12(a) through 12(d).
13. Within one year of the effective date of this Order, the Respondent shall submit a certification to EPA as set forth in Paragraph 17, including the language set forth in Paragraph 18, certifying that the work described in Paragraph 12 has been completed.
 14. For a period of five years following completion of the work described in Paragraph 12, Respondent shall monitor the Site twice per year and submit to EPA a monitoring report at the address listed in Paragraph 17. Each monitoring report shall be certified consistent with Paragraph 18 and will contain the following information:
 - (a) A description of the vegetation at the Site, including whether or not the planting undertaken pursuant to Paragraph 12 appears to be successful and an estimate of the percent of the Site surface that is covered with vegetation;
 - (b) Whether or not there is pooled water on the surface;
 - (c) A minimum of eight color photographs taken of the Site from the north, northeast, east, southeast, south, southwest, west, and northwest sides of the restored area; and
 - (d) A photograph of any area within the Site where it appears vegetation is covering less than 50% of the area.
 15. EPA will review each monitoring report to determine whether the restoration efforts undertaken by Respondent pursuant to Paragraph 12 have been successful. If, prior to termination of this Order, EPA determines based upon the information provided by the monitoring reports or upon any other information that the restoration efforts have not been successful, EPA may supplement this Order and direct Respondent to perform additional work to ensure success of the restoration. Respondent agrees to perform any additional work directed by EPA pursuant to this Paragraph.
 16. Respondent's failure to complete the work in a manner consistent with this Order shall be deemed a violation of this Order.
 17. Respondent shall send the certification described in Paragraph 13, the monitoring and status reports described in Paragraph 15 and all other correspondence both by mail and electronically to:

Katelyn Almeter
Enforcement & Compliance Assurance Division
United States Environmental Protection Agency
1650 Arch Street (3ED31)
Philadelphia, PA 19103-2029
almeter.katelyn@epa.gov

IV. GENERAL PROVISIONS

18. The following certification must accompany each submission by Respondent pursuant to this Information Requirement and must be signed by a Representative of Respondent authorized to sign on behalf of Respondent:

"I certify under penalty of law that this document and all attachments were prepared by me or under my direction or supervision. Based upon my personal knowledge or inquiry of the person or persons who prepared the submission the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Signed: _____

Title: _____

Date: _____

19. Respondent's compliance with the terms of this Order shall not relieve Respondent of his obligation to comply with all applicable provisions of the Clean Water Act or any other Federal, State or local law or regulation. Issuance of this Order is not an election by EPA to forego any civil or criminal action otherwise authorized by the Clean Water Act. EPA reserves the right to seek any remedy available under the law that it deems appropriate to the violations described herein. Compliance with this Order shall not be a defense to any action commenced pursuant to such authorities.
20. Respondent will allow EPA personnel on the Site for the purpose of inspecting work performed pursuant to this Order upon reasonable notice. EPA reserves all existing inspection authority otherwise available to EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.
21. Violation of the terms of this Order may result in further EPA enforcement action including, but not limited to, imposition of administrative penalties, pursuant to 33 U.S.C. § 1319(g) as modified by the Debt Collection Procedures Act of 1996 and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, and/or initiation of judicial proceedings that allow for civil penalties of up to \$53,484 per day for each day of violation that occurs, and/or for the criminal sanctions of imprisonment and fines of up to \$25,000 per day, 33 U.S.C. § 1319(c).

22. The undersigned representative of Respondent certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Order and to execute and legally bind the party.
23. The provisions of this Order shall apply to and be binding upon the Respondent and its officers, directors, employees, contractors, agents, trustees, successors and assigns of Respondent.
24. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

V. EFFECTIVE DATE

25. The Effective date of this Order shall be the date of receipt of the executed document.

ON BEHALF OF RESPONDENT.

Date: 2/3/21


Name: _____
Title:

SO ORDERED:

Date: _____

Karen Melvin, Director
Enforcement and Compliance Assurance Division
U.S. EPA, Region III

**Exhibit A –
Powers Site**

