



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

VIA UNITED PARCEL SERVICE
SIGNATURE REQUESTED

Mr. I.L. Morris, President
Waco Oil & Gas Company
P.O. Box 397
Glenville, West Virginia 26351

Re: EPA Docket No. CWA-03-2021-0017DW

ADMINISTRATIVE ORDER FOR COMPLIANCE

Dear Mr. Morris:

Enclosed is an Order for Compliance that requires Waco Oil & Gas Company to mitigate or restore for the unauthorized work in wetlands on the property it owns and operates located at approximately 1.25 miles southeast on Route 19 from the intersection of Route 19 and I-79 in Sutton, Braxton County, West Virginia. The Order requires restoration of the environmental harm which was caused by the unlawful discharge of fill material to waters of the United States.

Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), prohibits discharges to waters of the United States, including dredge or fill material, without a permit from the U.S. Army Corps of Engineers (Corps). Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), authorizes the U.S. Environmental Protection Agency (EPA) to issue an Administrative Compliance Order whenever any person is in violation of any condition or limitation which implements, *inter alia*, Section 301(a) of the CWA. Activities you have performed have resulted in discharges to jurisdictional waters of the United States without a permit. These activities constitute a violation of Section 404 of the CWA. These activities include unauthorized discharge of fill material at the Site associated with the construction of two flat pads and access road resulted in direct impacts to 2,059 linear feet of stream channels with relatively permanent flow and 0.19 acres of abutting wetlands. Additional secondary effects resulted in fill of downstream aquatic resources due to the failure to maintain and contain discharged material properly to prevent point and non-point sources of pollution.

You are entitled to assert a claim of business confidentiality covering any part or all of the information submitted in response to the Order, in a manner described at 40 C.F.R. § 2.203(b). Information subject to a claim of business confidentiality will be made available to the public only in accordance with 40 C.F.R. Part 2, Subpart B. Unless a claim of business confidentiality is asserted at the time the requested information is submitted, EPA may make this information available to the public without further notice to you.

If you have any questions regarding the Order, or wish to submit any written material you believe to be relevant to the agency's findings, please contact Ms. Katelyn Almeter, Enforcement and

Compliance Assurance Division, at (215) 814-2797, or your counsel may contact Aviva H. Reinfeld, the attorney assigned to this matter, at (215) 814-2632.

Sincerely,

Karen Melvin, Director
Enforcement and Compliance Assurance Division

Enclosures

cc: Jeremy Bandy, WVDEP (Jeremy.W.Bandy@wv.gov)
Michelle Staley, USACE (Michelle.M.Staley@usace.army.mil)
Roger Hanshaw, Bowles Rice LLP (rhanshaw@bowlesrice.com)
Marc Monteleone, Bowles Rice LLP (mmonteleone@bowlesrice.com)

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

In The Matter of:

Waco Oil and Gas Co., Inc.

Property Located At:

Morris Development Site
1.25 miles east on Route 19 from the
intersection of Route 19 and I-79,
Sutton, West Virginia 26601
38.6087°N, -80.7368°W

Respondent.

Proceeding Under Section 309(a) of the Clean
Water Act, 33 U.S.C. § 1319(a)

ORDER FOR COMPLIANCE
Docket. No. CWA-03-2021-0017DW

I. STATUTORY AUTHORITY

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 & Compliance Assurance Division.

II. ALLEGATIONS

1. Waco Oil and Gas Co., Inc. (“Respondent”) is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
2. Respondent is the owner and operator of the property located at coordinates 38.6087°N, -80.7368°W, approximately 1.25 miles east on Route 19 from the intersection of Route 19 and I-79 in Sutton, West Virginia 26601 (“the Site”), depicted in Exhibit A.
3. The Site contains unnamed tributaries to Bear Run, Cunningham Fork, and Buffalo Creek and wetlands abutting such tributaries. Unnamed tributaries on the Site contribute flow more than in direct response to precipitation and during typical year conditions to Cunningham Fork. Cunningham Fork contributes flow more than in direct response to precipitation and during typical year conditions to Buffalo Creek, which in turn contributes flow more than in direct response to precipitation and during typical year conditions to the Elk River, a Traditional Navigable Water. Other unnamed tributaries on the Site contribute flow more than in direct response to precipitation and during typical year conditions to Bear Run. Bear Run contributes flow more than in direct response to precipitation and during typical year conditions to the Little Birch River, which in turn contributes flow more than in direct response to precipitation and during typical year conditions to the Birch River, which in turn contributes flow more than in direct response to precipitation and during typical year conditions to the Elk River, a Traditional

Navigable Water. Therefore, the abutting wetlands and tributaries on the Site are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

4. Since on or about September 2016, Respondent, or persons acting on behalf of Respondent, has on an ongoing basis operated equipment which discharged dredged and/or fill material to waters of the United States at the Site, without authorization from the U.S. Army Corps of Engineers (“Corps”). Respondent’s unauthorized discharge of fill material at the Site associated with the construction of two flat pads and access road resulted in direct impacts and secondary effects to waters of the United States, including approximately 2,059 linear feet of stream channels with relatively permanent flow and approximately 0.19 acres of abutting wetland channels as depicted in Table 1 below, and secondary effects as a result of the fill of downstream aquatic resources. The streams are unnamed tributaries to Bear Run and Cunningham Fork. The streams and their abutting wetlands and shown in Exhibit B, attached herein.

Table 1: Impacts at the Site

| Aquatic Resource | Approximate Impact |
|-------------------------|---|
| Feature A | 1,600 linear feet of stream |
| Feature A1 | 299 linear feet of stream |
| Wetland Area 1 | 0.19 acres |
| Feature C1 | 10 linear feet of stream |
| Feature C2 | 80 linear feet of stream |
| Feature C3 | 50 linear feet of stream |
| Feature G | 20 linear feet of stream |
| Total Impacts | 2,059 linear feet of stream 0.19 acres of wetlands |

5. 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 “placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States.”
6. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits any person from discharging dredged and/or fill material from a point source to “waters of the United States” except in compliance with a permit issued by the Corps under Section 404 of the Act, 33 U.S.C. § 1344.
7. The equipment referenced in Paragraph 4 above, from which the dredged and/or fill material was discharged 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. At no time during the discharge of dredged and/or fill material into waters of the United States at the Site did the Respondent have a permit from the Corps as required by Section 404 of the Act, 33 U.S.C. § 1344.
9. 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, pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), EPA ORDERS the Respondent to do the following:

10. Cease and desist all unpermitted discharges to waters of the United States at the Site immediately, including filling, clearing and grading except in compliance with a CWA Section 404 or 402 permit or in accordance with the plans submitted and approved pursuant to this Order.
11. Within forty-five (45) days of the effective date of this Order, Respondent shall submit to EPA via e-mail a written certification signed by a corporate officer authorized to sign on behalf of Respondent and consistent with Paragraph 15 containing a certification by a professional engineer that Respondent has implemented temporary stabilization measures on the Site sufficient to prevent migration/erosion of soil or sediment-laden water into waters of the United States. Such stabilization measures shall be consistent with West Virginia's Erosion and Sediment Control BMP Manual (available at https://dep.wv.gov/WWE/Programs/stormwater/csw/Pages/ESC_BMP.aspx). Such certification shall describe all steps taken and the locations on the Site where such steps have been taken.
12. Complete the following restoration and mitigation activities:
 - a. Within thirty (30) days of the effective date of this Order, Respondent shall submit via e-mail to EPA for approval a detailed plan developed by a professional engineer or other qualified professional trained in wetland and stream restoration work to return the Site to compliance with the CWA. Such plan must include the following elements, and failure to include any of the following elements will be considered a violation of this Order:
 - i. Be designed to restore waters of the United States on the Site, including the unnamed tributaries and abutting wetlands described in Paragraphs 3 and 4 and depicted on Exhibit B, to approximate pre-disturbance original conditions consistent with the definition of restoration found in 40 C.F.R. § 230.92 or where restoration in full to approximate pre-disturbance original condition is not practicable, provide a written justification certified consistent with Paragraph 15 by a corporate officials authorized to sign on behalf of Respondent why such restoration in full cannot practicably be achieved.
 1. Where it is not practicable to achieve such restoration in full, the plan must describe all steps taken to minimize the amount of fill left in place and to achieve restoration to the maximum extent practicable.
 2. Where Respondent proposes to leave fill in place, Respondent shall seek appropriate authorization from the U.S. Army Corps of Engineers and comply with any permit issued by the Corps. Respondent shall submit to EPA copies of all communications with the Corps to obtain appropriate authorization.
 - ii. Include a schedule for implementation (that may be conditioned upon receipt of any required approvals or certifications for such work under West Virginia Law, for

which the Defendant shall make timely application and diligently pursue);

- iii. Include compensation for impacts to streams and wetlands using the West Virginia Stream and Wetland Valuation Metric (“WVSWVM”) to determine the appropriate amount of mitigation needed to offset permanent and temporal losses to aquatic resources. Such compensation shall be consistent with 40 C.F.R. §§ 230.91-.98;
 - iv. Ensure that restored areas are stabilized to avoid landslides or slips;
 - v. Utilize only native West Virginia species for planting;
 - vi. Achieve final site stabilization;
 - vii. Incorporate measurable, quantitative performance criteria consistent with pre-disturbance conditions utilizing an appropriate reference water; and
 - viii. Include a post-restoration monitoring plan for a period consistent with this paragraph and subparagraph (e) below.
 - b. After review of the restoration and mitigation plan, EPA will: a) approve the plan, in whole or in part; b) approve the plan upon specified conditions; c) modify the plan to cure any deficiencies; d) disapprove the plan, in whole or in part; or e) any combination of the above.
 - c. If EPA disapproves all or part of the restoration plan, Respondent shall, within thirty (30) days of receipt of EPA’s disapproval, correct the deficiencies and resubmit the plan for approval. EPA retains the right, if the plan is not approved as provided in this Order, to order restoration in accordance with a plan developed by EPA.
 - d. Upon approval of the restoration plan (either with or without conditions or modifications by EPA), Respondent shall implement the plan as approved or modified by EPA as provided below. All restoration work shall be completed within the schedule of work in the restoration plan to be approved by EPA.
 - e. Upon completion of the restoration activities, Respondent shall submit an As-Built Report and monitoring plan for EPA’s approval. Respondent shall monitor the restored area for a period of no less than five years to ensure achievement of performance criteria as referenced in subparagraph (a) above. Responsibility to complete the required restoration as set forth in the approved restoration plan will not be considered fulfilled until the Respondent has demonstrated project success and has received written verification of that success from EPA. Once all conditions in the restoration plan have been met and written verification has been provided, EPA will terminate the Order.
13. Respondent’s failure to implement temporary site stabilization consistent with Paragraph 11, to submit a restoration plan consistent with Paragraph 12, or to complete the work in a manner consistent with this Order including but not limited to Paragraph 10 shall be deemed a violation of this Order.
14. All correspondence and submissions related to this Order shall be sent via email to:

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

IV. GENERAL PROVISIONS

15. The following certification must accompany each submission by Respondent pursuant to this Order 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 under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, 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.

Signature: _____

Printed Name: _____

Title: _____

Date: _____

16. Respondent’s compliance with the terms of this Order shall not relieve Respondent of its 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.
17. 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).

18. 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.
19. 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.

V. OPPORTUNITY TO CONFER

20. Respondent is invited to confer with the Agency about the findings and conclusions reflected in this Order including the terms and conditions contained herein. Respondent's request for a conference must be confirmed in writing via e-mail within ten (10) days of receipt of this Order. Respondent must communicate with EPA representatives to schedule the conference no later than 20 days after receipt of this Order. If the requested conference is held, this Order shall become effective ten (10) days after the conference is held. If Respondent does not request a meeting within ten (10) days of receipt of this Order, Respondent waives its right to a conference, and this Order shall become effective ten (10) days from its receipt. Any request for a conference, or other inquiries concerning this Order, should be made in writing to: Katelyn Almeter at almeter.katelyn@epa.gov. If represented by counsel, Respondent's attorney may contact Aviva H. Reinfeld, Assistant Regional Counsel, at reinfeld.aviva@epa.gov.

VI. JUDICIAL REVIEW

21. Respondent may seek federal judicial review of this Compliance Order, issued under Section 309 of the CWA, 33 U.S.C. § 1319, pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section706&num=0&edition=prelim>, states the scope of such review.

VII. EFFECTIVE DATE

22. The effective date of this Order shall be ten (10) days from the date of receipt of this Order, or, if a conference is requested per Section V above, this Order shall become effective ten (10) days after the conference is held.

VII. NOTICE OF INTENT TO COMPLY

23. Within ten (10) days of the effective date of this Order, Respondent shall submit to EPA via e-mail a Notice of Intent to Comply with the Order. The Notice shall be submitted to:

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

IT IS SO ORDERED

Date: _____

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