



REGION 3

PHILADELPHIA, PA 19103

FILED
May 08, 2024
10:40 am
U.S. EPA REGION 3
HEARING CLERK

In the Matter of:	:	
	:	
Litman Excavating, Inc.	:	U.S. EPA Docket No. CWA-03-2024-0072DW
836 1st Street	:	
New Martinsville, West Virginia 26155	:	ADMINISTRATIVE ORDER
	:	ON CONSENT PURSUANT TO
Respondent.	:	SECTION 309(a) of the Clean Water Act,
	:	33 U.S.C. § 1319(a)
	:	
Route 2 Waste Site	:	
Near the intersection of State Route 2 and	:	
Burch Ridge Road, Moundsville,	:	
Marshall County, West Virginia, 26041	:	
(39.788626, -80.822652)	:	
Parcel ID: 25-05-0012-0023-0000	:	

I. STATUTORY AUTHORITY

1. This Administrative Order on Consent (“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. 33 U.S.C. § 1319(a) (“CWA” or “Act”). The Administrator has delegated this authority to the Regional Administrator of EPA Region 3 who in turn has re-delegated it to the Director of the Enforcement and Compliance Assurance Division.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 2. Litman Excavating, Inc. (“Litman” or “Respondent”) is an excavation company incorporated in 1998 in the State of West Virginia that provides excavating services in West Virginia, Ohio and Pennsylvania.
- 3. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
- 4. Respondent is the operator of a project at a property owned by CNX PCPC LLC located near the intersection of Route 2 and Burch Ridge Road in Moundsville, Marshall County, West Virginia 26041, 39.788626, -80.822652, (“Site”), identified in Attachment 1, attached herein.

5. The Site contains Coon Run, a relatively permanent tributary connected to the Ohio River, a Traditional Navigable Water. Coon Run constitutes “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
6. Respondent is using the Site to dispose of excess earth and waste material generated from a road widening construction project for a portion of West Virginia Route 2.
7. Respondent received the following permits prior to commencing work at the Site:
 - a. On March 15, 2021, the West Virginia Department of Environmental Protection (“WVDEP”) issued West Virginia National Pollutant Discharge Elimination System General Permit No. WV0115924 and Individual Permit # WVR1110 for Construction Stormwater Discharges; and
 - b. On April 1, 2021, the U.S. Army Corps of Engineers (“Corps”) issued Individual Permit No. LRP-2020-00452 (“Corps Permit”) pursuant to Section 404 of the CWA for impacts to certain wetlands on-Site.
8. The Corps Permit specified that a bridge spanning Coon Run (“Coon Run Bridge”) would not result in placement of fill below the Ordinary High Water Mark of the stream.
9. No permit, including the Corps Permit, authorized any discharge of dredge and/or fill material into Coon Run.
10. Respondent began work at the Site on April 8, 2021 and began creating several stockpiles at the Site.
11. Since on or about August 20, 2022 through January 2023, Respondent, or persons acting on behalf of Respondent, operated equipment which discharged or caused the discharge of dredged and/or fill material to waters of the United States at the Site, without authorization from the Corps. Respondent has impacted approximately 600 linear feet of Coon Run, depicted in Exhibit A, attached herein. The impacts include:
 - a. 500 linear feet of Coon Run impacted when Respondent directly placed two unauthorized 10-foot diameter, 500-foot long culverts on top of Coon Run and placed boulders surrounding the culverts;
 - b. Approximately 100 linear feet of secondary impacts to Coon Run related to alteration and impairment of flow due to placement of the two unauthorized culverts; and
 - c. Bridge footing for the Coon Run Bridge placed below the Ordinary High Water Mark of Coon Run.
12. On March 24, 2023, the Corps sent a Cease and Desist Letter ordering Respondent to cease and desist all work at the Site.
13. On October 25, 2023, EPA performed an inspection at the Site (“October Inspection”). EPA’s observations during the inspection included, but were not limited to:

- a. The left footer of the bridge over Coon Run was constructed, in part, below the Ordinary High Water Mark along the stream bank, and gravel bar deposits were in the streambed along the left side of Coon Run near the bridge;
 - b. The two 10-foot diameter, 500-foot long culverts were sitting on top of the streambed with flow obstructed underneath the culverts and scour pools at the outfalls of each culvert; Some water flowed underneath with minimal flow inside the culverts;
 - c. The integrity of the culverts appeared to be compromised; the culverts appeared misshapen and to be buckling;
 - d. Downstream deposition and bar formation on the left bank of Coon Run that appeared to have narrowed the natural stream channel and erosion along the right bank; and
 - e. Sediment accumulation filling the natural stream bed with fine sediment observed approximately 12 to 14 inches below the surface until reaching the natural stream bed.
14. On December 19, 2023, EPA provided Respondent with its Inspection Report from the October Inspection, and included a Bioassessment Report based on sampling taken at the October Inspection. The Bioassessment Report included the following conclusions:
 - a. Sampling results showing that macroinvertebrates were degraded at both the impacted site adjacent to the culvert and downstream of the culvert when compared to the upstream control site; and
 - b. The presence of the culvert is causing large taxonomic disparities despite the close longitudinal proximities of the sampling reaches, and that the culverts are fragmenting the habitat of the species present in Coon Run.
15. 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 U.S. Army Corps of Engineers under Section 404 of the Act, 33 U.S.C. § 1344.
16. 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,” within the meaning of 40 C.F.R. § 232.2, includes “placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States.”
17. The equipment referenced 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).

18. At no time relevant to this Order did Respondent have a permit to discharge dredged and/or fill material into Coon Run, a water of the United States, from the Corps as required by Section 404 of the Act, 33 U.S.C. § 1344.
19. 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, and Respondent CONSENTS, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), to do the following:

20. Cease and desist all discharges to waters of the United States at the Site, including filling, clearing and grading, except in compliance with a CWA 404 or 402 permit or in accordance with the plans submitted and approved pursuant to this Order.
21. Respondent shall retain the right to enter the Site until this Order is terminated by EPA, including the entire period of restoration and mitigation, and during the full length of the post-restoration monitoring period.
22. Complete the following restoration and mitigation activities:
 - a. **Restoration and Mitigation Plan:** By July 19, 2024, Respondent shall submit electronically to EPA a detailed, complete Restoration and Mitigation Plan (“Plan”) developed by a professional engineer or other qualified professional trained in wetland and stream restoration work to return the Site to pre-construction condition and compliance with the CWA. The Restoration and Mitigation Plan shall include the following elements, and subject to EPA approval:
 1. Removal of the fill material in Coon Run, including the two 10-foot diameter, 500-foot long culverts, bridge footing, rocks, and dirt;
 2. Be designed to restore Coon Run, the water of the United States referenced in this Order and depicted in Exhibit A, to approximate pre-disturbance original conditions consistent with the definition of “restoration” found in 40 C.F.R. § 230.92,
 3. Include a schedule for implementation with an end date of all construction activities, including plantings, for Coon Run Restoration on or before April 12, 2025 (that may be conditioned upon receipt of any required approvals or certifications for such work under Federal and/or State Law, for which the Respondent shall make timely application and

diligently pursue);

4. Include compensation for impacts to streams 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 based on the pre-disturbance condition of the aquatic resources. Such compensation shall be consistent with 40 C.F.R. §§ 230.91-.98;
 5. Utilize only native West Virginia species for planting;
 6. Achieve final site stabilization in compliance with applicable CWA 402 permits;
 7. Incorporate measurable, quantitative performance criteria consistent with pre-disturbance conditions utilizing an appropriate reference water; and
 8. Include a post-restoration monitoring plan for five (5) years following the completion of the restoration and mitigation on-Site.
- b. After review of the Restoration and Mitigation Plan, EPA will: 1) approve the plan, in whole or in part; 2) approve the plan upon specified conditions; 3) modify the plan to cure any deficiencies; 4) disapprove the plan, in whole or in part; or 5) any combination of the above.
- c. If EPA disapproves all or part of the Restoration and Mitigation Plan, Respondent shall, within thirty (30) calendar 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 and Mitigation Plan (either with or without conditions or modifications by EPA), Respondent shall implement the Plan as provided below. All restoration work shall be completed within the schedule of work in the Restoration and Mitigation Plan to be approved by EPA.

23. Complete the following post-restoration and mitigation activities:

- a. **Certification of Completion:** No later than thirty (30) calendar days after completion of the restoration activities, Respondent shall submit a certification to EPA, as set forth in Paragraph 29 (Certification), certifying that the work described in the approved Restoration and Mitigation Plan has been completed.

- b. **Certification of Permanent Stabilization:** No later than thirty (30) calendar days after completion of the restoration activities, Respondent shall submit to EPA a certification by a professional engineer that Respondent has implemented permanent stabilization measures on the Site sufficient to prevent migration/erosion of soil or sediment-laden water into waters of the United States and minimize the potential for landslides and/or slips. 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.
 1. When Respondent transmits the Certificate of Permanent Stabilization to EPA, Respondent shall include a written certification, as set forth in Paragraph 29 (Certification), below, signed by a corporate officer authorized to sign on behalf of the Defendant.
- a. **As-Built Report:** Within thirty (30) calendar days of completing restoration activities, Respondent shall submit to EPA electronically an as-built report with photographs documenting the as-built condition of the restoration activities at the Site.
- b. **Monitoring:** Respondent shall monitor the restored area at the Site for a period of no less than five (5) years to ensure the objective of restoration activities are achieved for impacted aquatic resources. Respondent shall conduct a monitoring event at the Site twice per year for the first three (3) years and once per year for the following two (2) years. Respondent shall submit an annual monitoring report to EPA with the results of the monitoring events by December 31st for each year of monitoring. Each monitoring report shall be certified consistent with Paragraph 29 (Certification) and shall contain the following information:
 1. A description of the vegetation at the Site, including an assessment of whether or not planting undertaken pursuant to the Restoration and Mitigation Plan appears to be successful and an estimate of the percent of the restored area surface that is covered with vegetation;
 2. A description of Coon Run and any areas of exposed or eroded bank;
 3. Photographs of the Site; and
 4. A description of the progress made toward meeting the performance criteria and identification of any adaptive management that has been

implemented to correct deficiencies in attainment of the performance criteria.

24. **Modification:** Any request to modify the terms of, or parties to, this Order shall be submitted, in writing, by the Respondent to EPA and shall be subject to review and approval by EPA, in its sole and unreviewable discretion. Respondent's submission of a written request for modification of this Order shall not relieve Respondent of any obligation under this Order and shall have no effect on EPA's statutory or regulatory authority to enforce the terms of this Order, in its sole and unreviewable discretion.
25. **Termination:** EPA will review each monitoring report to determine whether the restoration efforts undertaken by Respondent have been successful. Once Respondent has met all conditions in the approved Restoration and Mitigation Plan, Respondent shall submit a written verification to EPA. Upon review and confirmation of the written verification, EPA will terminate the Order.
26. Respondent's failure to complete the above-described compliance activities in a manner consistent with this Order shall be deemed a violation of this Order.
27. Respondent shall send all correspondence related to this Order electronically to:

Katelyn Almeter
Enforcement and Compliance Assurance Division
United States Environmental Protection Agency, Region 3
almeter.katelyn@epa.gov

and

R3_ORC_mailbox@epa.gov
[sent with subject line attn: Aviva Reinfeld, Dkt. No. CWA-03-2024-0072DW]

IV. GENERAL PROVISIONS

28. The intent of this Order is to address the violations described herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment.
29. Certification. 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 the Respondent:

"I certify that the information contained in or accompanying this submission is true, accurate, and complete. As to the identified portion(s) of this submission for which I cannot personally verify its truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment."

30. Respondent's compliance with the terms of this Order shall not relieve Respondent of any 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.
31. Respondent will ensure that EPA personnel are provided proper access on to 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.
32. 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.
33. 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.
34. 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 \$66,712 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).
35. Tax Identification. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of the tasks set forth in Section III (Order for Compliance) of this Order, above, is deemed restitution, remediation, or required to come into

compliance with the law.

36. Tax Reporting. Pursuant to 26 U.S.C. § 6050X and 26 C.F.R. § 1.6050X-1, EPA is required to send to the Internal Revenue Service (“IRS”) annually, a completed IRS Form 1098-F (“Fines, Penalties, and Other Amounts”) with respect to any court order or settlement agreement (including administrative settlements), that require a payor to pay an aggregate amount that EPA reasonably believes will be equal to, or in excess of, \$50,000 for the payor’s violation of any law or the investigation or inquiry into the payor’s potential violation of any law, including amounts paid for “restitution or remediation of property” or to come “into compliance with a law.” EPA is further required to furnish a written statement, which provides the same information provided to the IRS, to each payor (i.e., a copy of IRS Form 1098-F). Failure to comply with providing IRS Form W-9 or Tax Identification Number (“TIN”), as described below, may subject Respondent to a penalty, per 26 U.S.C. § 6723, 26 U.S.C. § 6724(d)(3), and 26 C.F.R. § 301.6723-1. In order to provide EPA with sufficient information to enable it to fulfill these obligations, EPA herein requires, and Respondent herein agrees, that:

- a. Respondent shall complete an IRS Form W-9 (“Request for Taxpayer Identification Number and Certification”), which is available at <https://www.irs.gov/pub/irs-pdf/fw9.pdf>;
- b. Respondent shall therein certify that its completed IRS Form W-9 includes Respondent’s correct TIN or that Respondent has applied and is waiting for issuance of a TIN;
- c. Respondent shall email its completed Form W-9 to EPA’s Cincinnati Finance Center at henderson.jessica@epa.gov, within 30 days after the Effective Date of this Order as defined below. EPA recommends encrypting IRS Form W-9 email correspondence; and
- d. In the event that Respondent has certified in its completed IRS Form W-9 that it has applied for a TIN and that TIN has not been issued to Respondent within 30 days after the Effective Date, then Respondent, using the same email address identified in the preceding sub-paragraph, shall further:
 1. Notify EPA’s Cincinnati Finance Center of this fact, via email, within 30 days after the 30 days after the Effective Date of this Order, as specified, below; and
 2. Provide EPA’s Cincinnati Finance Center with Respondent’s TIN, via email, within five (5) days of Respondent’s issuance and receipt of the TIN.

V. EFFECTIVE DATE

37. The effective date of this Order shall be the date of Respondent's receipt of the fully executed Order.

FOR THE RESPONDENT:

Date: 4/25/24

A handwritten signature in black ink, appearing to read "Robert Litman Pres.", written over a horizontal line.

Robert Litman, President
Litman Excavating, Inc.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

[Digital Signature and Date]

Karen Melvin, Director

Enforcement and Compliance Assurance Division

U.S. EPA, Region 3



Attachment 1 - Site Map Coon Run Site

Esri, CGIAR, USGS, Esri, HERE, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, Esri Community Maps Contributors, West Virginia GIS, © OpenStreetMap, Microsoft, Esri, HERE, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS, EPA, NPS, US Census Bureau, USDA

2023



Coordinate System: WGS 1984 Web Mercator Auxiliary Sphere

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3
Philadelphia, Pennsylvania 19103-2029**

In the Matter of: :
: :
Litman Excavating, Inc. : **U.S. EPA Docket No. CWA-03-2024-0072DW**
836 1st Street : :
New Martinsville, West Virginia 26155 : **ADMINISTRATIVE ORDER**
Respondent. : **ON CONSENT PURSUANT TO**
: **SECTION 309(a) of the Clean Water Act,**
Route 2 Waste Site : **33 U.S.C. § 1319(a)**
Near the intersection of Route 2 and : :
Burch Ridge Road in Moundsville, : :
Marshall County, West Virginia 26041 : :
(39.788626, -80.822652) : :
Parcel ID: 25-05-0012-0023-0000 :

CERTIFICATE OF SERVICE

I certify that the foregoing Administrative Order on Consent was filed with the EPA Region 3 Regional Hearing Clerk on the date that has been electronically stamped on the Administrative Order on Consent. I further certify that on the date set forth below, I caused to be served a true and correct copy of the foregoing Administrative Order on Consent to each of the following persons, in the manner specified below, at the following addresses:

Copies served via UPS and email to:

Mr. Bob Litman
Litman Excavating, Inc.
836 1st Street
New Martinsville, West Virginia 26155
blitman@litmanexcavating.com

Mr. Norman Daniels, Esq.
Daniels Law Firm, PLLC
P.O. Box 1433
Charleston, West Virginia 25325
Normdaniels@danielslawfirm.com

Copies served via email to:

Aviva H. Reinfeld, Esq.
Assistant Regional Counsel
U.S. EPA, Region 3
reinfeld.aviva@epa.gov

Katelyn Almeter
Enforcement & Compliance Assurance Division
U.S. EPA, Region 3
almeter.katelyn@epa.gov

[Digital Signature and Date]
Regional Hearing Clerk
U.S. Environmental Protection Agency,
Region 3