

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

1650 Arch Street

Philadelphia, Pennsylvania 19103-2029

RECEIVED

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REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

In the Matter of:

Devonian Gas Production, Inc.
P.O. Box 907
74 Viking Road
Jane Lew, West Virginia 26378

Respondent

Property identified as located at
The Cutright Impoundment
38.8498, -80.2335
Near Grand Camp Run Road/
County Route 34/2
French Creek, Upshur County

Site

Class II Proceeding Pursuant to
Section 309(g)(2)(B) of the Clean
Water Act, 33 U.S.C. § 1319(g)(2)(B)

EPA Docket No. CWA 03-2015-0108

**CONSENT AGREEMENT AND
FINAL ORDER**

I. STATUTORY AND REGULATORY BACKGROUND

1. Pursuant to Section 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency ("EPA") is authorized to assess administrative penalties against persons who violate Section 301(a) of the Act, *id.* § 1311(a). The Administrator has delegated this authority to the Regional Administrator of EPA Region III, who in turn has delegated this authority to the Director, Environmental Assessment and Innovation Division ("Complainant").
2. This Consent Agreement is entered into by the Complainant and Devonian Gas Production, Inc. ("Respondent") pursuant to Section 309(g) of the CWA and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits* ("Consolidated Rules"), 40 C.F.R. Part 22.
3. The Consolidated Rules, at 40 C.F.R. § 22.13(b) provide in pertinent part that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding simultaneously may be commenced and concluded by the

issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3). Pursuant thereto, this Consent Agreement and Final Order (“CAFO”) simultaneously commence and conclude this administrative proceeding against Respondent.

4. Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the assessment of administrative penalties against any person who violates any permit condition or limitation in an amount not to exceed \$10,000 per day for each day of violation, up to a total penalty amount of \$125,000.
5. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, and Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), any person who has violated Section 404 of the CWA, 33 U.S.C. § 1344, after January 12, 2009 is liable for an administrative penalty not to exceed \$16,000 per day for each day of violation up to a total penalty amount of \$177,500 for violations that occurred between January 12, 2009 and December 6, 2013.
6. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA is providing public notice and an opportunity to comment on the Consent Agreement prior to issuing the Final Order. In addition, pursuant to Section 309(g)(1)(B), EPA has consulted with the state of West Virginia Department of Environmental Protection (“WVDEP”) regarding this action, and will mail a copy of this document to the appropriate WVDEP official.
7. Section 404(a) of the Act, 33 U.S.C. § 1344, provides that the Secretary of the Army may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material (pollutant) into waters of the United States.
8. “Discharge of a pollutant” includes “any addition of any pollutant or combination of pollutants to waters of the United States from any point source.” 40 C.F.R. § 122.2.
9. The term “fill material” within the meaning of 40 C.F.R. § 232.2, includes any pollutant which replaces portions of the “waters of the United States” with dry land or which changes the bottom elevation of a water body for any purpose.
10. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued by the Secretary of the U.S. Army Corps of Engineers (“Corps”) under Section 404 of the Act, 33 U.S.C. § 1344.

III. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS AND CONCLUSIONS OF LAW

11. Respondent is an oil and gas exploration company incorporated in the state of West Virginia and therefore, a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
12. At all times relevant to this CAFO, on property owned by Boyd Cutright Respondent constructed the Cutright Impoundment located at 38.8498 degrees N, -80.2335 degrees W, near Grand Camp Run Road/County Route 34/2 in French Creek, Upshur County, West Virginia, as further identified on the attached map labeled as Exhibit “A”, (hereinafter “the Site” or “Cutright Site”), as that term is defined in 40 C.F.R. § 232.2.
13. The Site consists of an in-line freshwater impoundment constructed on Grand Camp Run and an unnamed tributary (UNT) to Grand Camp Run in Upshur County, West Virginia. Grand Camp Run flows miles to French Creek, then 6.3 miles to the Buckhannon River, 29.3 miles to the Tygart River, and then 50.8 miles to the Monongahela River. The Tygart River is a navigable-in-fact water 7.0 miles above its mouth to the Monongahela.
14. The waters on Site constitute “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2; 40 C.F.R. § 122.2.
15. On information and belief, commencing in approximately May of 2011 through July of 2011, Respondent, or persons acting on behalf of Respondent, constructed the in-line impoundment, using equipment which discharged dredged and/or fill material to waters of the United States located on the Site as described in Paragraph 13, above.
16. On January 8, 2013, representatives from the U.S. EPA and the U.S. Army Corps of Engineers (“Corps”), the West Virginia Department of Environmental Protection (“WVDEP”), and the U.S. Fish and Wildlife Service conducted a Clean Water Act Section 404 inspection at the Cutright Impoundment Site. Measurements using GIS indicated that the in-line impoundment, located at the confluence of Grand Camp Run and an UNT to Grand Camp Run, impounded both streams and was approximately one acre in size.
17. Construction of the of the in-line impoundment resulted in the placement of fill into approximately 1,138 linear feet (lf) of stream, including impacts as a result of direct fill/relocating of Grand Camp Run; impacts to Grand Camp Run as a result of impounding/backwater; and impacts to the unnamed tributary to Grand Camp Run due to impounding and backwater.
18. The equipment referenced in Paragraph 15 constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
19. Section 301(a) of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of dredged and/or fill material from a point source to waters of the United States except in compliance with

a permit issued by the Secretary of the Army pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

20. 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).

IV. GENERAL PROVISIONS

21. For the purpose of this proceeding, Respondent admits the jurisdictional allegations set forth in this CAFO.
22. Respondent neither admits nor denies the Allegations of Fact set forth in this CAFO.
23. Respondent waives any defenses it might have as to jurisdiction and venue, its right to contest the allegations through hearing or otherwise; and its right to appeal the proposed final order accompanying the Consent Agreement.
24. Respondent agrees not to contest EPA's jurisdiction to issue and enforce this CAFO.
25. Respondent hereby expressly waives its right to a hearing on any issue of law or fact in this matter and consents to issuance of this CAFO without adjudication.
26. Respondent shall bear its own costs and attorney fees.
27. The provisions of this CAFO shall be binding upon the Respondent, its officers, principals, directors, successors and assigns.
28. The parties agree that settlement of this matter prior to the initiation of litigation is in the public interest and that entry of this CAFO is the most appropriate means of resolving this matter.

V. CIVIL PENALTY

29. In full and final settlement of the Complainant's claims for civil penalties for the alleged violations identified herein, Respondent consents to the assessment of, and agrees to pay, in accordance with the terms set forth herein, the total administrative civil penalty of one hundred and sixteen thousand seven hundred and thirty-four dollars (\$116,734.00) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c).
30. The civil penalty amount set forth in Paragraph 29, above, is based on a number of factors, including the nature, circumstances, extent and gravity of the violation(s), Respondent's ability to pay, prior history of compliance, degree of culpability, economic benefit or savings resulting from the violations, and such other matters as justice may require pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g).

31. Respondent shall pay the civil penalty amount described in Paragraph 29, above, plus any interest, administrative fees, and late payment penalties owed, by either cashier's check, certified check, or electronic wire transfer, in the following manner:

- a. All payments by Respondent shall reference Respondent's name and address, and the Docket Number of this action;
- b. All checks shall be made payable to "United States Treasury";
- c. All payments made by check and sent by regular mail shall be addressed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contact: Heather Russell (513) 487-2044

- d. All payments made by check and sent by overnight delivery service shall be addressed for delivery to:

U.S. Bank
Government Lockbox 979077
U.S. EPA, Fines & Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314) 418-1028

- e. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

Cincinnati Finance
US EPA, MS-NWD
26 W. M.L. King Drive
Cincinnati, OH 45268-0001

- f. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street

New York, NY 10045

Field Tag 4200 of the Fedwire message should read:
“**D 68010727 Environmental Protection Agency**”

- g. All electronic payments made through the Automated Clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

US Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

Contact: John Schmid, (202) 874-7026
Remittance Express (REX): (866) 234-5681

- h. On-Line Payment Option:

WWW.PAY.GOV/paygov/

Enter **sfo 1.1** in the search field. Open and complete the form.

- i. Additional payment guidance is available at:

<http://www2.epa.gov/financial/makepayment>

- j. Payment shall reference Respondent's name and address, and the EPA Docket Number of this CAFO.

A copy of Respondent's check or a copy of Respondent's electronic fund transfer shall be sent simultaneously to:

Pamela J. Lazos
Senior Assistant Regional Counsel
U.S. EPA, Region III (3RC20)
1650 Arch Street
Philadelphia, PA 19103-2029

and

Ms. Lydia Guy
Regional Hearing Clerk

U.S. EPA, Region III (3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

32. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim, as more fully described below. Accordingly, Respondent's failure to make timely payment as specified herein shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.
33. Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a true and correct copy of this CAFO is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalty that is paid within thirty (30) calendar days after the date on which such interest begins to accrue. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).
34. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period a debt is overdue. 40 C.F.R. § 13.11(b). Pursuant to Appendix 2 of EPA's *Resources Management Directives - Cash Management*, Chapter 9, EPA will assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) days the penalty remains unpaid.
35. A late payment penalty of six percent per year will be assessed monthly on any portion of the civil penalty that remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).
36. The penalty specified in Paragraph 29 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

VI. APPLICABLE LAWS

37. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law and ordinance, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit. Nor does this CAFO constitute a waiver, suspension or modification of the requirements of the CWA, 33 U.S.C. §§ 1251 *et seq.*, or any regulations promulgated thereunder.

VII. RESERVATION OF RIGHTS

38. This CAFO resolves only the civil claims for the specific violations alleged 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. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under the Clean Water Act, 33 U.S.C. § 301 *et seq.*, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

39. Entry of this CAFO is a final settlement of all violations alleged in this CAFO. EPA shall have the right to institute a new and separate action to recover additional civil penalties for the claims made in this CAFO, if EPA obtains evidence that the information and/or representations of the Respondent are false, or, in any material respect, inaccurate. This right shall be in addition to all other rights and causes of action, civil or criminal, EPA may have under law or equity in such event.

VIII. FULL AND FINAL SATISFACTION

40. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant has under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for the violations alleged in this Consent Agreement. Compliance with the requirements and provisions of this CAFO shall not be a defense to any action commenced at any time for any other violation of the federal laws and/or regulations administered by EPA.

IX. PARTIES BOUND

41. This CAFO shall apply to and be binding upon the EPA and Respondent. 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 CAFO and to execute and legally bind that party to it.

X. EFFECTIVE DATE

42. Pursuant to 40 C.F.R. § 22.45(b), this CAFO shall be issued after a 40-day public notice period is concluded. This CAFO will become final and effective thirty (30) days after it is filed with the Regional Hearing Clerk, pursuant to Section 309(g)(5) of the Act, 33 U.S.C. § 1319(g)(5), or until a public comment process pursuant to 40 C.F.R. § 22.45(b) is concluded.

XI. ENTIRE AGREEMENT

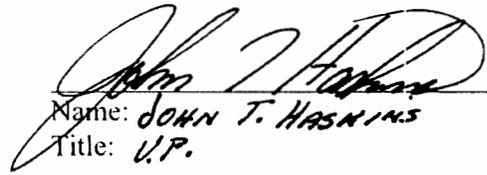
43. This CAFO constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties,

covenants, terms or conditions agreed upon between the parties other than those expressed in this CAFO.

FOR RESPONDENT, DEVONIAN GAS PRODUCTION, INC.

Date:

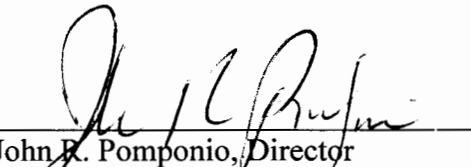
6/22/15


Name: JOHN T. HASKINS
Title: U.P.

FOR COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY

Date:

8/17/15



John E. Pomponio, Director
Environmental Protection and Innovation Division

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

In the Matter of:

Devonian Gas Production, Inc.
P.O. Box 907
74 Viking Road
Jane Lew, West Virginia 26378

Respondent

Property identified as located at
The Cutright Impoundment
38.8498, -80.2335
Near Grand Camp Run Road/
County Route 34/2
French Creek, Upshur County

Site

Class II Proceeding Pursuant to
Section 309(g)(2)(B) of the Clean
Water Act, 33 U.S.C. § 1319(g)(2)(B)

EPA Docket No. CWA 03-2015-0108

FINAL ORDER

The Complainant, Director, Environmental Assessment and Innovation Division, U.S. Environmental Protection Agency, Region III, and Respondent, Devonian Gas Production, Inc., have executed a document entitled "Consent Agreement and Final Order," which I hereby ratify as a Consent Agreement in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22 (the "Consolidated Rules"). The terms of the foregoing Consent Agreement are accepted by the undersigned and incorporated into this Final Order as if fully set forth at length herein.

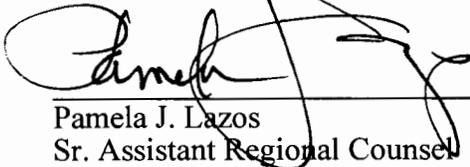
NOW, THEREFORE, PURSUANT TO Section 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319, and the Consolidated Rules, and based on the representations in the Consent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused to be sent a true and correct copy of the Consent Agreement and Final Order (CAFO) filed this day with the Regional Hearing Clerk, EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, to the following:

George Edward Arnold, President
John Haskins
Devonian Gas Production, Inc.
P.O. Box 907
74 Viking Road
Jane Lew, WV 26378

Mark Clark, Esq.
Spilman, Thomas and Battle, PLLC
300 Kanawha Boulevard, East
Post Office Box 273
Charleston, WV 25321



Pamela J. Lazos
Sr. Assistant Regional Counsel
U.S. EPA, Region III

8-17-15

Date

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

SUBJECT: Devonian Gas Production, Inc.,
EPA Docket No. CWA-03-2015-0108

FROM: John R. Tomponio, Director
Environmental Assessment and Innovation Division (3EA30)
Mary Coe, Acting Regional Counsel
Office of Regional Counsel (3RC00)

TO: Shawn M. Garvin
Regional Administrator (3RA00)

This transmittal memorandum summarizes the key issues associated with the issuance of a Consent Agreement and Final Order ("CAFO") issued to Devonian Gas Production, Inc. ("Respondent in settlement of violations of Section 301 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §1311, and authorized by Section 309(g) of the CWA, 33 U.S.C. §1319(g).

The Cutright Impoundment (the "Site"), an in-line freshwater impoundment constructed on Grand Camp Run and an unnamed tributary to Grand Camp Run is located near Grand Camp Run Road/County Route 34/2 in French Creek, Upshur County, West Virginia. Construction on the impoundment concluded in approximately July of 2011. Grand Camp Run flows to French Creek, the Buckhannon River, the Tygart River, and ultimately, the Monongahela River and is a navigable-in-fact water. As a result of the construction, Respondent, or persons acting on behalf of Respondent discharged dredged and/or fill material to waters of the U.S., resulting in the filling of approximately 1,138 lf of stream channel due to impounding and backwater.

EPA and Respondent have agreed to a quick settlement of this matter under 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) for a penalty of \$116,734.00 in settlement of the above violation which is in accordance with the CWA penalty settlement policy. This SCAFO simultaneously initiates and resolves the matter. Under an EPA Administrative Order for Compliance, Docket No. CWA-03-2013-0159DW ("AO"), Respondent will remove the impoundment and restore the area.

We recommend that you sign the attached SCAFO in settlement of this matter. Questions may be directed to Pamela J. Lazos, Senior Assistant Regional Counsel, at ext. 2658.



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Customer Service Hotline: 1-800-438-2474*