



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
SAM NUNN  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA GEORGIA 30303-8960

SEP 21 2010j

CERTIFIED MAIL 70091680000201412043  
RETURN RECEIPT REQUESTED

Mr. Donald Bowles  
Donald Bowles Coal No. 1, LLC  
P.O. Box 1999  
Madisonville, Kentucky 42431

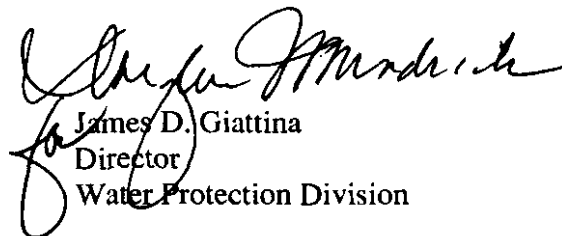
Re: Consent Agreement and Final Order  
Docket No. CWA-04-2010-5511(b)

Dear Mr. Bowles:

Enclosed is a copy of the Consent Agreement and Final Order (CAFO) that has been finalized by the U.S. Environmental Protection Agency and the Regional Administrator. Please make note of the provisions under Section V.

Thank you for your cooperation in settling this matter. Should you have any questions or concerns, please contact Mr. Mike Wylie of my staff at (404) 562-9409, or your attorney may contact Mr. Philip Mancusi-Ungaro, Attorney Advisor, at (404) 562-9519.

Sincerely,

  
James D. Giattina  
Director  
Water Protection Division

Enclosure

cc: U.S. Army Corps of Engineers, Newburgh, Indiana, Louisville  
Mr. Joe Blackburn, Office of Surface Mining  
Mr. Virgil Adams, U.S. Fish and Wildlife Service  
Mr. Bruce Scott, Mr. Carl Campbell, KY Department for Natural Resources  
Ms. Sandy Gruzski, KY Division of Water

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

HEARING CLERK

2010 SEP 21 PM 2:49

EPA REGION 4

IN THE MATTER OF: )  
 ) ADMINISTRATIVE  
Don Bowles Coal No. 1, LLC ) CONSENT AGREEMENT AND  
 ) FINAL PENALTY ORDER  
 )  
RESPONDENT ) Docket No.: CWA-04-2010-5511  
\_\_\_\_\_ )

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding under Section 309(g)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, published at 64 Fed. Reg. 40176 (July 23, 1999), codified at 40 Code of Federal Regulations (C.F.R.) Part 22 (Part 22).

2. The authority to take action under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), is vested in the Administrator of the United States Environmental Protection Agency (EPA). The Administrator has delegated this authority to the Regional Administrator Region 4, who in turn has redelegated this authority to the Director of the Water Protection Division of EPA Region 4 (Complainant).

**II. Statutory and Regulatory Background**

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states "[w]henever, on the basis of any information available - the Administrator finds that any person has violated [section 301 of the CWA, 33 U.S.C. § 1311], . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)]."

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states "[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful." Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (COE), to issue permits for the discharge of dredged or fill material into navigable waters.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a "discharge of pollutants" as "[a]ny addition of any pollutant to navigable waters from any point source . . . ."

6. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged.”

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

### **III. Allegations**

10. The term “Discharge Area” means the jurisdictional waters that have been impacted either through filling or dredging as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area is approximately 0.9 acres of jurisdictional wetlands and 2,554 linear feet of an unnamed tributary of Pond River, near the City of Graham in Muhlenberg County, Kentucky, located at approximately 37E 17' 35.64178" north latitude and 87E 22' 03.0082" west longitude. The Discharge Area is located on the Site.

11. The term “Site” means the parcel or parcels of land on which the Discharge Area is located. The Site is indicated on the enclosed Exhibits A and B.

12. Respondent, Don Bowles Coal No.1, LLC, at all times relevant to this Consent Agreement and Final Order, was the lessee and operator of the Site.

13. Don Bowles Coal No. 1, LLC, is a person within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Commencing on or about February 2005, Respondent, or those acting on behalf of Respondent, discharged dredged and/or fill material into wetlands and waters on the Site, using earth moving machinery associated with coal mining activities, without authorization under Section 404 of the CWA, and the discharged material has remained in those wetlands and waters to the present date.

15. Respondent impacted approximately 0.9 acres of wetlands and 2,554 linear feet of an unnamed tributary to the Pond River, a navigable water of the United States.

16. The discharged dredged and/or fill material, including rock and earthen material deposited at the Discharge Area, are “pollutants” as defined under the CWA § 502(6).

17. The earth moving machinery employed by Respondent to deposit the dredged and/or fill material at the Discharge Area are “point sources” as defined under the CWA § 502(14).

18. Respondent’s placement of the dredged and/or fill material at the Discharge Area constitutes a “discharge of pollutants” as defined under the CWA § 502(12).

19. At no time during the discharge of dredged and/or fill material at the Discharge Area from February 2005 to the present, did Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by the Respondent. Each discharge by Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

20. Each day the material discharged by Respondent remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

#### **IV. Stipulations and Findings**

21. Complainant and Respondent have conferred for the purpose of settlement under 40 C.F.R. Part 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. Part 22.13(b), this Administrative Consent Agreement and Final Penalty Order (CAFO) will simultaneously commence and conclude this matter.

22. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and the factual allegations set out above.

23. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

24. Respondent consents to the assessment of and agrees to pay the administrative penalty as set forth in this CAFO and consent to the other conditions set forth in this CAFO.

25. By signing this CAFO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

26. EPA reserves the right to assess and collect any and all civil penalties for any violation described in this Consent Agreement to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to EPA.

27. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of the CWA.

#### **V. Payment**

28. Under Section 309(g)(2)(A) OR (B) of the CWA, 33 U.S.C. § 1319(g)(2)(A) OR (B), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors, EPA has determined that forty thousand dollars (\$40,000) is an appropriate civil penalty to settle this action.

29. Respondent shall submit payment of the penalty specified in the preceding paragraph within 30 days of receiving written notice from EPA (to the address provided in Paragraph 41 below) of the effectiveness of this CAFO via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondents and the Docket Number of this CAFO. Such payment shall be submitted by U.S. Postal Service to:

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

For other payment options (Ex: Wire Transfers, Overnight Mail, ACH, and On Line) please refer to Attachment A.

30. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Ms. Mary E. Halback  
U.S. Environmental Protection Agency - Region 4  
Wetlands Enforcement Section  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

31. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

32. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CAFO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

## **VI. General Provisions**

33. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CAFO shall not be a defense to any actions subsequently commenced under federal laws and regulations administered by the EPA.

34. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any federal or state statute, regulation or permit.

35. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent of all claims for civil penalties under the CWA with respect to only those violations alleged in this CAFO. Except as otherwise set forth in this document, compliance with this CAFO shall resolve the allegations of violations contained in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of Respondent, or other liability resulting from violations that were not alleged in this CAFO. Other than as expressed in this document, Complainant does not waive any right

to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

36. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

37. This CAFO applies to and is binding upon Respondent and any officers, directors, employees, agents, successors and assigns of the Respondent.

38. The obligations of the Respondent under this CAFO are joint and several.

39. Any change in the legal status of Respondent including, but not limited to, any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CAFO.

40. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CAFO.

41. In accordance with 40 C.F.R. Part 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Phillip Mancusi-Ungaro  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303  
(404) 562-9519

For Respondent:

Timothy J. Hagerty  
Attorney at Law  
Frost Brown Todd LLC  
400 West Market Street, 32<sup>nd</sup> Floor  
Louisville, Kentucky 40202-3363

42. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

43. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

44. This CAFO in no way affects the rights of the Complainant as against any person or entity not a party to this CAFO.

**VII. Release by Respondent**

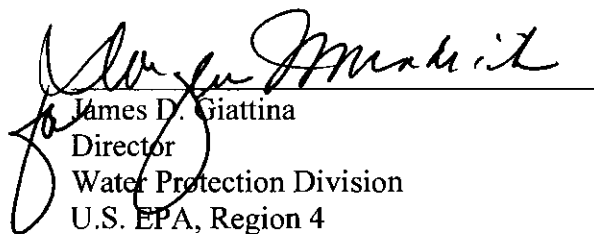
45. Respondent hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a taking of Respondent's property without compensation.

**VIII. Effective Date**

46. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

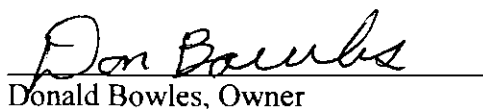
**AGREED AND CONSENTED TO:**

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

  
James D. Giattina  
Director  
Water Protection Division  
U.S. EPA, Region 4

Date: SEP 14 2010

For RESPONDENT: Don Bowles Coal No. 1, LLC

  
Donald Bowles, Owner

Date: 7/30/10



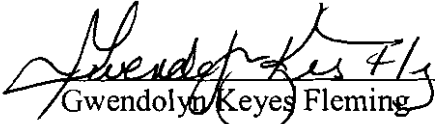
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
) ADMINISTRATIVE  
DONALD BOWLES COAL NO. 1, LLC ) CONSENT AGREEMENT AND  
) FINAL PENALTY ORDER  
)  
RESPONDENT ) Docket No.: CWA-04-2010-5511(b)  
\_\_\_\_\_)

**FINAL ORDER**

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondents are hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

  
\_\_\_\_\_  
Gwendolyn Keyes Fleming  
Regional Administrator  
U.S. EPA, Region 4

Date: 9/20/10

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of: **Docket No. CWA-04-2010-5511** on the parties listed below in the manner indicated:

EPA Internal Mail:

Mike Wylie  
U.S. EPA, Region 4  
Wetlands Enforcement Program  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

By hand-delivery:

Phillip Mancusi-Ungaro  
U.S. EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

By Certified mail,  
return receipt requested:

Timothy J. Hagerty  
Attorney at Law  
Frost Brown Todd LLC  
400 West Market Street, 32<sup>nd</sup> Floor  
Louisville, Kentucky 40202-3363

Dated: 9-21-10



Patricia Bullock  
Regional Hearing Clerk  
U. S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9511