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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

2014 SEP -3 PM 3: 17

Region III

1650 Arch Street

Philadelphia, Pennsylvania 19103-2029

REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

In The Matter of)	
)	
Dennis Powell)	Proceeding to Assess Class I Penalty
304 Stuart Street)	Under Section 309(g)(2)(A) of the Clean Water
West Union, West Virginia 26456)	
)	
Respondent)	Act, 33 U.S.C. § 1319(g)(2)(A)
)	
Property Located At:)	
)	Docket No. CWA-03-2014-0257
3,000 linear feet west of U.S. 50 and)	
County Route 15)	
West Union, West Virginia 26456)	CONSENT AGREEMENT AND
)	FINAL ORDER
)	

I. STATUTORY AUTHORITY

1. This Consent Agreement and Final Order ("CAFO") is entered into by the Director, Environmental Assessment and Innovation Division, United States Environmental Protection Agency, Region III ("Complainant"), and Respondent, Dennis Powell, pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), 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 ("Consolidated Rules")*, 40 C.F.R. Part 22. The authority to settle this matter has been delegated to the Director, Environmental Assessment and Innovation Division pursuant to delegation no. 2-51 (September 1, 2005). The parties have agreed to settlement of violations of the Clean Water Act by Respondent. This CAFO simultaneously commences and concludes this action pursuant to 40 C.F.R. § 22.13(b) and 22.18(b)(2) & (3).
2. Pursuant to Section 309(g) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, any person violating the CWA is liable for an administrative penalty under Section 309(g) of the Act, in an amount not to exceed \$11,000 per day for each day of violation, up to a total penalty amount of \$37,500.

II. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS and CONCLUSIONS OF LAW

3. Respondent, Dennis Powell, is the owner, lessee, and/or operator of the property located approximately 3,000 linear feet west of U.S. 50 and County Route 15 in West Union, West Virginia, and a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5). This area is identified as "the Site" on the attached map labeled Exhibit "A".
4. The Site includes portions of Buckeye Creek, which flows to Middle Island Creek and then to the Ohio River, a navigable-in-fact body of water. The Site contains "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
5. At various times between February 2009 and May 2011, Respondent, or persons acting on behalf of Respondent, operated equipment 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 discharged dredged and/or fill material into Buckeye Creek without authorization. Respondent's activities resulted in the straightening of approximately 500 linear feet of Buckeye Creek.
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 any portion of a water of the United States for any purpose.
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 the discharge of dredged and/or fill material by any person 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. On information and belief, at no time during the discharge of dredged and/or fill material to the "waters of the United States" located on the Site did 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. CONSENT AGREEMENT AND FINAL ORDER

11. Respondent neither admits nor denies the Findings of Fact and Conclusions of Law set forth in Section II, above, and waives any defenses it might have as to jurisdiction and venue.

12. Respondent admits the jurisdictional allegations in Section II and agrees not to contest EPA's jurisdiction to issue and enforce this CAFO.
13. Respondent hereby expressly waives its right to a hearing on any issue of law or fact in this matter pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and consent to issuance of this CAFO without adjudication.
14. Each party to this action shall bear its own costs and attorney fees.
15. The provisions of this CAFO shall be binding upon the Respondent, its officers, principals, directors, successors and assigns.
16. 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.
17. 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)(A), EPA has consulted with the State of West Virginia, Department of the Environment ("DEP") regarding this action, and will mail a copy of this document to the appropriate West Virginia official.
18. Based upon the foregoing and having taken into account 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), EPA HEREBY ORDERS AND Respondents HEREBY CONSENT to pay a civil penalty in the amount of seventeen thousand five hundred dollars (\$17,500) in full and final settlement of EPA's claims for civil penalties for the violations alleged herein.
19. Respondents shall pay an administrative civil penalty of seventeen thousand five hundred dollars (\$17,500) for the violations alleged in this CAFO within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c), by mailing a cashier's check or certified check for the penalty to "Treasurer, United States of America":

By regular mail:

Regional Hearing Clerk
U.S. EPA Region III
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

By overnight delivery:

U.S. Bank, Government Lock Box 979077

US EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
314-418-1028

By Wire Transfer:

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”

By Automated Clearinghouse (ACH):

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking
Physical location of US Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

Respondent shall send notice of such payment, including a copy of the check, to the Regional Hearing Clerk at the following address:

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

-and-

Pamela J. Lazos
Mail Code 3RC20
Office of Regional Counsel
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

20. Respondent shall send notice of such payment, including a copy of the check, to the Regional Hearing Clerk at the following address:

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

-and-

Pamela J. Lazos
Mail Code 3RC20
Office of Regional Counsel
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

21. 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.
22. The following notice concerns interest and late penalty charges that will accrue in the event that any portion of the civil penalty is not paid as directed:

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, Respondents' failure to make timely payment or to comply with the conditions in this CAFO shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of this CAFO is mailed or hand-delivered to Respondents. 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).

The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). A penalty charge of six percent per year will be assessed monthly on any portion of the civil penalty which 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).

23. This Consent Agreement and Final Order resolve only the civil claims for the specific violations alleged herein. EPA reserves the right to commence action against any person, including Respondents, 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.
24. Nothing in this CAFO shall be construed as prohibiting, altering or in any way eliminating the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violations of this CAFO or of the statutes and regulations upon which this CAFO is based or for Respondents' violation of any applicable provision of law.
25. The penalty specified above, represents civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.
26. 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 the EPA obtains evidence that the information and/or representations of the Respondents 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, the EPA may have under law or equity in such event.
27. The undersigned representatives of Respondent certify that they are 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.
28. All of the terms and conditions of this CAFO together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this CAFO, or one or more of its terms and conditions, is held invalid, or is not executed by all of the signatories in identical form, or is not approved in such identical form by the Regional Administrator or his designee, then the entire CAFO shall be null and void.

IV. EFFECTIVE DATE

29. Pursuant to 40 C.F.R. § 22.45, this CAFO shall be issued after a 40-day public notice period has concluded. This CAFO will become final thirty (30) days after issuance, 33 U.S.C. § 1319(g)(4), and will become effective on that same date, 40 C.F.R. § 22.31(b).

FOR RESPONDENT, DENNIS POWELL

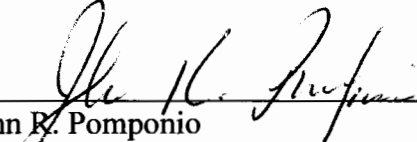
By: Dennis Powell

Name: DENNIS POWELL

Title: Owner

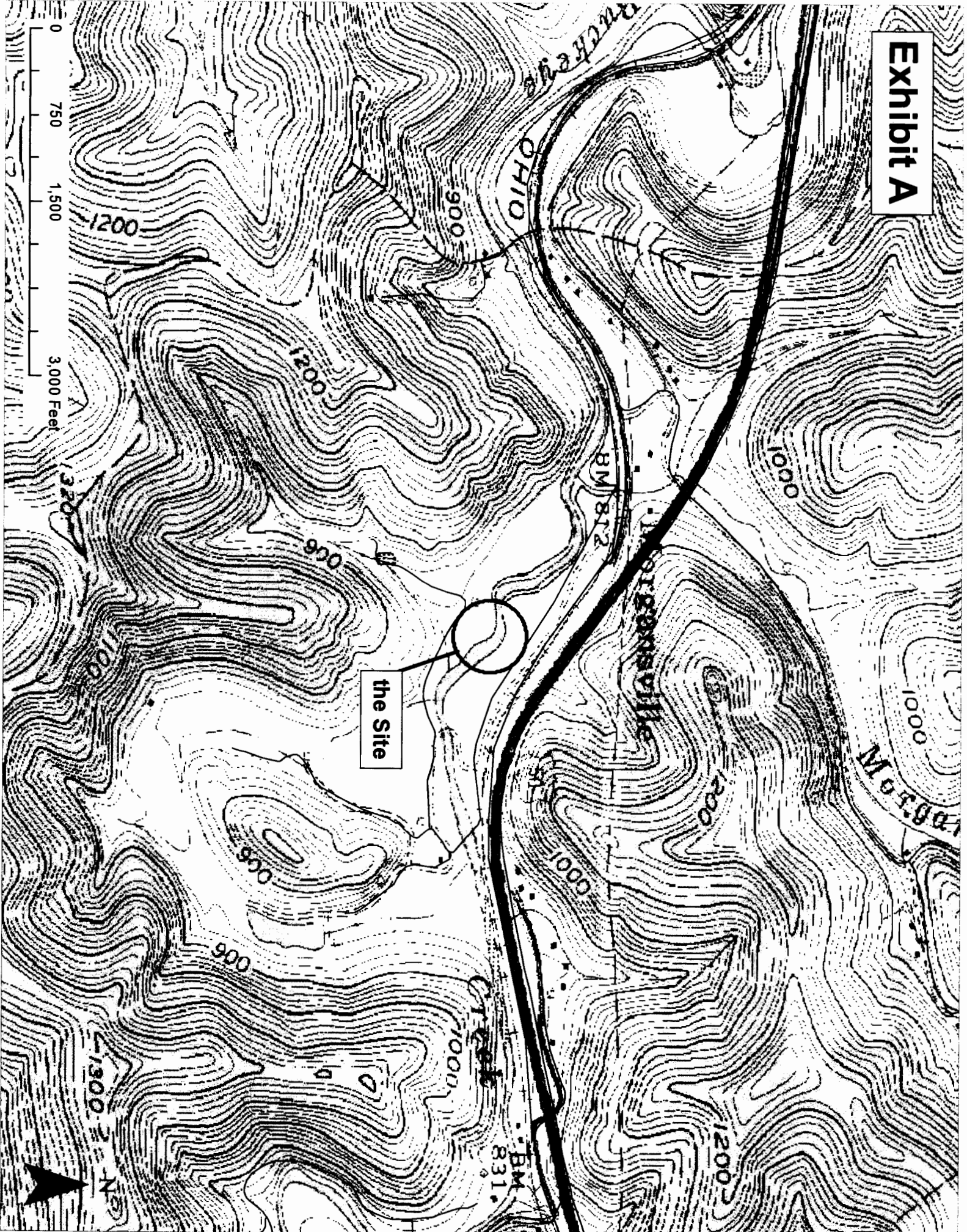
Date: 8/19/14

It is so ORDERED:



John R. Pomponio
Director, Environmental Assessment and Innovation Division

Exhibit A



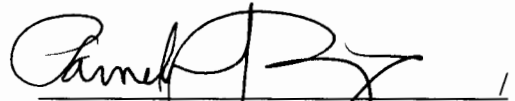
CERTIFICATE OF SERVICE

I, hereby certify that on this day, I filed with the Regional Hearing Clerk an original and one copy of the Consent Agreement and Final Order, EPA Docket No. CWA-03-2014-0257 with copies sent to the Respondent by Certified Mail, Return Receipt Requested, at the following addresses:

Leonard Knee, Esquire
Bowles Rice, Attorneys at Law
600 Quarrier Street
Charleston, WV 25301

Mr. Dennis Powell
304 Stuart Street
West Union, WV 26456

Date: 9/3/14 /



Pamela J. Lazos, Esq.
Senior Assistant Regional Counsel
US EPA Region III

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

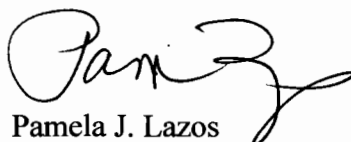
Ms. Lydia Guy
Regional Hearing Clerk
U.S. EPA Region III
1650 Arch St.
Philadelphia, PA 19103

Re: In the Matter of Mr. Dennis Powell
EPA Docket No. CWA-03-2014-0257

Dear Ms. Guy:

Enclosed for filing please find a Consent Agreement and Final Order settling violations pursuant to Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), for the unlawful discharge of a pollutant to waters of the U.S. in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Very truly yours,



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

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

Jeremy Bandy
Chief, Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th St., SE
Charleston, WV 25304

Re: In the Matter of Mr. Dennis Powell
EPA Docket No. CWA-03-2014-0257

Dear Mr. Bandy:

Enclosed please find a copy of Consent Agreement and Final Order which the U.S. Environmental Protection Agency, Region III (EPA) has issued to Mr. Dennis Powell, pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), in settlement of the unauthorized discharge of a pollutant to waters of the U.S.


Since the violations have occurred in West Virginia, EPA is providing you with an opportunity to confer with EPA officials regarding the proposed assessment. You may request an in-person or telephone conference within thirty (30) days of receipt of this letter. To request a conference or to make any other inquiries, call or write to:

Pamela Lazos (3RC20)
Sr. Asst. Regional Counsel
U.S. Environmental Protection
Agency – Region III
1650 Arch St.
Philadelphia, PA 19103-2029
215/814-2658

Todd Lutte (3EA30)
Wetlands Enforcement
U.S. Environmental Protection
Agency – Region III
1650 Arch St.
Philadelphia, PA 19103-2029
215/814-2099

Thank you for your attention to this matter.

Sincerely,


John R. Pomponio, Director
Environmental Assessment and Innovation Division