

Docket No. CWA-03-2021-0086

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 3
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

In The Matter of)	
)	
Mr. Gary Powers and Ms. Angie Powers,)	Proceeding to Assess Class II Penalty
)	Under Section 309(g) of the Clean Water
)	Act, 33 U.S.C. § 1319(g)
Respondents.)	
)	Docket No.: CWA-03-2021-0086
)	
Property Located at:)	
Along Route 20, at approximately)	ADMINISTRATIVE PENALTY
38.401286° N, -80.56485° W,)	COMPLAINT AND NOTICE OF
Near Cowen, Webster County)	OPPORTUNITY TO REQUEST
West Virginia 26206)	HEARING

I. STATUTORY AUTHORITY

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, 33 U.S.C. § 1311(a). The Administrator of EPA has delegated the authority propose penalties and issue administrative complaint under the CWA to the Regional Administrator of EPA, Region 3, who in turn has delegated this authority to the Director, Enforcement and Compliance Assurance Division (“Complainant”).
2. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the enclosed *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; Final Rule*, 40 C.F.R. Part 22 (hereinafter, Part 22 Procedural Rules), Complainant hereby proposes to assess a civil penalty in the amount of \$ 200,000 (Two-hundred thousand dollars) against Mr. Gary Powers and Ms. Angie Powers (collectively “Respondents”) for violation(s) of Section 301 of the CWA, 33 U.S.C. § 1311, specifically for discharging dredged and/or fill material in a water of the United States without a permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344.

II. STATUTORY AND REGULATORY BACKGROUND

3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of, *inter alia*, dredged and/or fill material from a point source into waters of the United States by any person except in compliance with a permit issued by the U.S. Army Corps of Engineers (“USACE”) pursuant to Section 404 of the Act, 33 U.S.C. § 1344

III. FACTUAL AND LEGAL ALLEGATIONS

4. Respondents, Mr. Gary Powers and Ms. Angie Powers are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
5. Respondents are the owners and operators of the property (the “Site”) depicted on Exhibit A, along Route 20 at approximately 38.401286° N, -80.56485° W, near Cowen, Webster County, West Virginia.
6. The Site contains wetlands abutting Long Glade Ditch, a perennial tributary to Big Ditch Run. Big Ditch Run flows year-round and is a tributary to the Gauley River, a Traditional Navigable Water. Therefore, the wetlands are “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).
7. Based on Site inspections conducted by representatives of the USACE, Huntington District on September 25, 2017, and by representatives of the U.S. EPA Region III, USACE, and the West Virginia Division of Natural Resources (“WVDNR”) on May 23, 2018 and June 4, 2019 and other information available to EPA, Respondents, or persons acting on behalf of Respondents, operated equipment during at least Spring and Summer 2016 which discharged dredged and/or fill material to waters of the United States located on the Site described in Paragraph 6, above, and further depicted on Exhibit A, attached hereto. Respondents’ activities include the discharge of fill material into approximately 0.51 acres of wetlands.
8. 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 “[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States.” *Id.*
9. The equipment referenced in Paragraph 7, 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).
10. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits any person from discharging dredged and/or fill material from point sources to “waters of the United States” except in compliance with a permit issued by the USACE under Section 404 of the Act, 33 U.S.C. § 1344.

11. Respondents, 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).
12. On March 2, 2021, EPA issued an Administrative Order for Compliance on Consent, Dkt. No. CWA-03-2021-0028DW (“AOC”) in which Respondents agreed to restore of the unauthorized discharge of fill material.
13. Work under the AOC is not completed.

IV. FINDINGS OF VIOLATIONS

Discharge without a Permit

14. The allegations in Paragraphs 1-13 are incorporated as if repeated and reasserted.
15. During the Spring and Summer of 2016, Respondents discharged or caused to be discharged fill material without authorization and have violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

V. PROPOSED CIVIL PENALTY

16. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, violations that are assessed penalties under Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), subject the violator to civil penalties in an amount not to exceed \$ 22,584 per day of violation, in an amount not to exceed \$282,293 per proceeding for violations that occurred after November 2, 2015.
17. Based upon the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Part 22 Procedural Rules, Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to the Respondents in the amount of **\$200,000 (Two-hundred thousand dollars)** for the violations alleged herein. This does not constitute a “demand” as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.
18. The proposed penalty was determined after taking into account the nature, circumstances, extent and gravity of the violation, Respondents’ prior compliance history, ability to pay the penalty, the degree of culpability for the cited violations, and any economic benefit or savings to Respondents because of the violations. 33 U.S.C. § 1319(g)(3). In addition, to the extent that facts or circumstances unknown to Complainant or EPA at the time of issuance of this Complaint become known after issuance of this Complaint, including but not limited to Respondents’

completion of all work described in the AOC, such facts or circumstances may also be considered as a basis for adjusting the proposed administrative penalty.

19. EPA may issue the Final Order Assessing Administrative Penalties after a thirty (30) day comment period unless Respondents either respond to the allegations in the Complaint and request a hearing according to the terms of Section VI, below, or pay the civil penalty in accordance with Section VIII herein (Quick Resolution).
20. If warranted, EPA may adjust the proposed civil penalty assessed in this Complaint. In so doing, the Agency will consider a number of factors in making this adjustment, including Respondents' ability to pay. However, the burden of raising the issue of an inability to pay and demonstrating this fact rests with the Respondents.
21. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, shall affect Respondents' continuing obligation to comply with the Clean Water Act, any other Federal or State laws, and/or with any separate Compliance Order issued under Section 309 of the Act, 33 U.S.C. § 1319, for the violations alleged herein.

VI. ANSWER TO COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST HEARING

22. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Respondents may request a hearing on the proposed civil penalty within thirty (30) days of receiving this Complaint in accordance with the procedures contained in 40 C.F.R. Part 22. At the hearing, Respondents may contest any material fact contained in Section III, above ("Findings of Violations") and the appropriateness of the penalty amount proposed in Section V ("Proposed Civil Penalty").
23. If Respondents wish to avoid being found in default, Respondents must file a written Answer to this Complaint and any request for hearing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region III, within thirty (30) days of service of this Complaint.
24. Any Answer must clearly and directly admit, deny, and/or explain each of the factual allegations contained in the Complaint with respect to which the Respondents have any knowledge, or clearly and directly state that the Respondents have no knowledge as to particular factual allegations in the Complaint. Where Respondents have no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The Answer shall also indicate the following:
 - a. Specific factual and legal circumstances or arguments which are alleged to constitute any grounds of defense;
 - b. Specific facts that Respondents dispute;

- c. Respondents' basis for opposing the proposed penalty; and
- d. Whether Respondents request a hearing.

Failure to admit, deny or explain any of the factual allegations in the Complaint constitutes admission of the such allegations.

25. Any Answer to this Complaint, and any Request for Hearing, must be filed within thirty (30) days of receiving this Complaint with the following:

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

-OR-

By electronic mail to r3_hearing_clerk@epa.gov.

Pursuant to the enclosed May 7, 2020 Standing Order: Designation of EPA Region III Part 22 Electronic Filing System and May 20, 2020 Standing Order: Order Authorizing Electronic Service of Certain Part 22 Documents, Respondents have the ability to file by electronic mail. If filing by electronic mail, the Answer must be filed consistent with the enclosed May 7, 2020 Standing Order: Designation of EPA Region III Part 22 Electronic Filing System and May 20, 2020 Standing Order: Order Authorizing Electronic Service of Certain Part 22 Documents.

26. Copies of the Answer and any Request for Hearing, along with any and all other documents filed in this action, shall also be sent by electronic mail to the following:

Stefania D. Shamet, Esq.
Senior Assistant Regional Counsel (3RC20)
U.S. Environmental Protection Agency, Region III
shamet.stefania@epa.gov

Ms. Shamet may be reached by telephone at (215) 814-2682.

27. Failure to file an Answer within thirty (30) days of service of this Complaint may result in issuance of a default order against Respondents. Default by the Respondents constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations. Upon issuance of a default order, the civil penalty proposed herein shall become due and payable without further proceedings thirty (30) days after the default becomes final. Respondents' failure to pay the entire penalty assessed by the default order by its due date will result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty

pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In addition, a default penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717.

28. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will begin to accrue on any unpaid amount if it is not paid within thirty (30) calendar days of Respondents' receipt of notice of filing of an approved copy of an Order assessing Administrative Penalties with the Regional Hearing Clerk. Interest will be assessed at a rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts, based on either actual or average cost incurred, will be charged on all debts. 40 C.F.R. § 13.11(b). In addition, a penalty will be assessed on any portion of the debt that remains delinquent more than ninety (90) calendar days after payment is due. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge of the debt be required, it will be assessed as of the first day payment is due pursuant to 4. C.F.R. § 102.13(e). Furthermore, pursuant to EPA Resources Management Directives System, Chapter 9, EPA will assess a \$15.00 handling charge for administrative costs on unpaid penalties for the first 30-day period after a payment is due and an additional \$15.00 for each subsequent 30 days the penalty remains unpaid.

VII. SETTLEMENT CONFERENCE

29. EPA encourages settlement of proceedings at any time after issuance of a Complaint if such settlement is consistent with the provisions and objectives of the CWA. Whether or not a hearing is requested, the Respondents may request a settlement conference to discuss the allegations of the Complaint and the amount of the proposed civil penalty. However, a request for a settlement conference does not relieve the Respondents of the responsibility to file a timely Answer to the Complaint.
30. If you wish to arrange a settlement conference or if you have any questions related to this proceeding, please contact the attorney assigned to this case, as indicated in Paragraph 26, following your receipt of this Complaint.
31. In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of Respondents' right to contest the allegations of the Complaint or to appeal the Final Order accompanying the Consent Agreement.

VIII. QUICK RESOLUTION

32. If Respondents do not contest the findings and assessments set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18 and this paragraph. No such payment may be made until ten (10) days after the close of the public comment period provided for under 40 C.F.R. § 22.45. If Respondents elect to resolve this action by paying the proposed penalty in full pursuant to 40 C.F.R. § 22.18, no answer need be filed, provided that Respondents file, within thirty (30) days after service of the Complaint, a statement pursuant to 40 C.F.R. § 22.18(a)(2) agreeing to pay the proposed penalty in full. Upon receipt of such a statement from Respondents, but no sooner than ten (10) days after close of the public comment period and subject to any comments received, Complainant will cause a final order to be issued. 40 C.F.R. 22.18(a)(3); 22.31. If Respondents file a statement pursuant to 40 C.F.R. § 22.18(a)(2), Respondents shall pay the penalty no sooner than ten (10) days after the close of the public comment period and no later than sixty (60) days after receipt of the Complaint.
33. If Respondents wish to file a statement pursuant to 40 C.F.R. § 22.18(a)(2), agreeing to pay the proposed penalty in full, such statement shall be filed with the following:

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

-OR-

By electronic mail to r3_hearing_clerk@epa.gov

and a copy shall be provided to:

Stefania D. Shamet, Esq.
Senior Assistant Regional Counsel (3RC20)
U.S. EPA, Region 3
shamet.stefania@epa.gov

Payment of the civil penalty amount, and any associated interest, administrative fees, and late payment penalties owed, shall be made by cashier's check, certified check, or electronic wire transfer in the following manner. All payments by Respondents shall reference Respondents' names and address, and the EPA Docket Number of this Complaint.

Payment by check to “United States Treasury”

- a. If sent via first-class mail, to:
U.S. Environmental Protection Agency
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

- b. If sent via Federal Express or common carrier:
U.S. Environmental Protection Agency
Government Lockbox 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

For additional information concerning other acceptable methods of payment of the civil penalty amount, see <https://www.epa.gov/financial/makepayment>

A copy of Respondents’ check or other documentation of payment of penalty using the method selected by Respondents for payment shall be sent to:

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

-OR-

By electronic mail to: r3_hearing_clerk@epa.gov

and to:

Stefania D. Shamet, Esq. (3RC20)
Senior Assistant Regional Counsel
U.S. EPA, Region III
shamet.stefania@epa.gov

Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents’ right to a hearing in this matter.

IX. PUBLIC PARTICIPATION

36. EPA is obligated, pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), to give members of the public notice of and an opportunity to comment on this proposed penalty assessment.

37. If Respondents request a hearing on this proposed penalty assessment, members of the public to whom EPA is obligated to give notice of this proposed action and a reasonable opportunity to comment pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), who have commented upon the proposed penalty assessment, will have an opportunity, pursuant to Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment.
38. If Respondents do not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comments on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. 33 U.S.C. § 1319(g)(4)(C). EPA will grant the petition and will hold a hearing if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

X. SEPARATION OF FUNCTIONS AND *EX PARTE* COMMUNICATIONS

37. The following Agency offices, and the staffs thereof, are designated as the trial staff to represent the Agency as a party in this case: the Region III Office of Regional Counsel, the Region III Enforcement and Compliance Assurance Division, the Office of the EPA Assistant Administrator for Enforcement and Compliance Assurance. From the date of this Complaint until the final agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, nor the Regional Judicial Officer, may have an *ex parte* communication with the trial staff on the merits of any issue involved in this proceeding. Please be advised that the Part 22 Procedural Rules prohibit any unilateral discussion or *ex parte* communication of the merits of a case with the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, or the Regional Judicial Officer after issuance of a Complaint.

Date: _____

Karen Melvin, Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection
Agency, Region 3