

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

FILED

Jan 14, 2025

2:56 pm

**U.S. EPA REGION 3
HEARING CLERK**

In the Matter of:

David Rapp
3542 Auto Road
Renick, WV 24966

Respondent.

Property Located At:

Approximately 37.943459° N, -80.319624° W;
on Pumpkin Center Road near the intersection
with Pineland Drive in Greenbrier County,
West Virginia

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: **U.S. EPA Docket No. CWA-03-2025-0023DW**
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: **ADMINISTRATIVE ORDER FOR COMPLIANCE**
: **PURSUANT TO SECTION 309(a) OF THE CLEAN**
: **WATER ACT, 33 U.S.C. § 1319(a)**

I. STATUTORY AUTHORITY

1. This Administrative Order for Compliance (“Order”) is issued under the authority vested in the United States Environmental Protection Agency (the “EPA”) by Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a) (“CWA” or “Act”). The Administrator has delegated this authority to the Regional Administrator of the 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. The CWA’s objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).
3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to navigable waters except as authorized under the CWA, including authorization under a permit issued under CWA 404, 33 U.S.C. § 1344, or by other CWA provisions not applicable here.
4. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the U.S. Army Corps of Engineers (“Corps”), to issue permits for the discharge of dredged and/or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

5. 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.
6. The term “discharge of fill material,” within the meaning of 40 C.F.R. § 232.2, includes “[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States.”
7. The term “point source,” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.
8. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.” Wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right (i.e., “adjacent wetlands”) are included in this definition. *See Sackett v. EPA*, 598 U.S. 651, 678 (2023).
9. The term “wetlands” means “areas that are inundated or saturated by surface or ground water 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.” 40 C.F.R. § 120.2 (2023).
10. “Waters of the United States” include, inter alia, “those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.” *Sackett*, 598 U.S. at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (cleaned up)). Relatively permanent waters “do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Rapanos*, 547 U.S. at 732 n.5, 733 n.5 (contrasting a seasonal river with a stream in which flow is “broken, fitful,” or “exist[s] only, or no longer than, a day”).
11. No person may discharge fill material into wetlands that are waters of the United States without a permit under Section 404(a) of the CWA, 33 U.S.C. § 1344(a).
12. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include “an individual [or] corporation.”
13. David Rapp (“Respondent”) is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Respondent is the owner and/or operator of the property located at Pumpkin Center Road near the intersection with Pineland Drive, at approximately 37.943459° N, - 80.319624° W, in Greenbrier County, West Virginia (the "Site"), depicted in Exhibit A (Site Map).
15. The Site contains eight unnamed relatively permanent tributaries connected to the Greenbrier River and one unnamed relatively permanent tributary connected to Laurel Run, a relatively permanent tributary connected to the Greenbrier River.
16. The Site contains wetlands that abut and have a continuous surface connection to the relatively permanent waters which are connected to Laurel Run and/or to the Greenbrier River.
17. Portions of the Greenbrier River, including locations at the confluence with Laurel Run and unnamed relatively permanent waters from the Site, have been identified as "[c]urrently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 40 C.F.R. § 120.2 (2023). The portions of the Greenbrier River at the confluence with Laurel Run and unnamed relatively permanent waters from the Site are "navigable waters," within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7), and are therefore "waters of the United States."
18. The Site also contains three stream crossings: one crossing, approximately 33 feet in length, located in an unnamed relatively permanent tributary connected to the Greenbrier River (at River Mile 70.09); and two crossings, approximately 190 feet and 60 feet in length, located in an unnamed relatively permanent tributary connected to the Greenbrier River (at River Mile 66.38).
19. On February 12, 2018, prior to conducting land clearing activities on the Site, Respondent submitted a request for a Preliminary Technical Determination for the presence of any wetlands across the entire Site to the U.S. Department of Agriculture's ("USDA") Farm Service Agency for compliance with the Food Security Act. The USDA's Natural Resources Conservation Service ("NRCS") completed such an assessment at the Site on April 2, 2018, and provided a written determination of its findings for compliance with the Food Security Act to Respondent, dated April 3, 2018. This determination informed Respondent that the entirety of the Site had been inspected and that the NRCS had not identified any areas on the Site that met the Food Security Act criteria for wetlands and that the entirety of the Site was designated as "Non-Wetland" for purposes of the Food Security Act.
20. The NRCS does not have jurisdiction pursuant to the CWA, and its findings for purposes of the Food Security Act are not applicable to the CWA.
21. Upon information and belief, since at least June 1, 2018, Respondent, or persons acting on behalf of Respondent, operated equipment that discharged dredged and/or fill

material to waters of the United States at the Site, including approximately 4,448 linear feet of relatively permanent tributaries and 0.74 acres of adjacent wetlands. The approximate locations of the alleged discharges are within those areas shown in Exhibit A (Site Map).

22. Prior to conducting land disturbing activities at the Site, Respondent did not contact the Corps for an Approved Jurisdictional Determination for CWA jurisdiction and Respondent did not receive any authorization from the Corps at any time prior to conducting any land disturbing activities at the Site.
23. On October 13, 2020, the West Virginia Department of Environmental Protection (“WVDEP”) issued a Notice of Violation for creating Conditions Not Allowable in State Waters by clearing and land disturbance operations.
24. The EPA, in conjunction with the Corps, conducted an inspection of the Site on April 6, 2021 and observed discharged fill material to waters of the United States at the Site, including approximately 4,448 linear feet of relatively permanent tributaries and 0.74 acres of adjacent wetlands.
25. On July 14, 2022, the Corps issued a Notice of Violation alleging violation of Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and § 1344, at the Site.
26. On November 1, 2023, the EPA issued to Respondent a Notice of Potential Violations and Opportunity to Confer letter alleging violation of Sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a) and § 1344, at the Site.
27. The EPA conducted another inspection on November 14, 2024, and observed additional fill material, including asphalt, placed in some of the impacted unnamed relatively permanent tributaries that was not present during the April 6, 2021 inspection.
28. Upon information and belief, at some time after April 6, 2021 and prior to November 14, 2024, Respondent, or persons acting on behalf of Respondent, operated equipment that discharged dredged and/or fill material, including asphalt, to waters of the United States at the Site, including approximately 4,448 linear feet of relatively permanent tributaries and 0.74 acres of adjacent wetlands.
29. The equipment from which the dredged and/or fill material was discharged to waters of the United States on the Site between June 1, 2018 and November 14, 2024, constitutes a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
30. The discharge of dredged and/or fill material since June 1, 2018 to waters of the United States on the Site, including approximately 4,448 linear feet of relatively permanent tributaries and 0.74 acres of adjacent wetlands, constitutes a “discharge of a pollutant”

within the meaning of Sections 502(12) and 502(16) of the CWA, 33 U.S.C. § 1362(12) and § 1362(16).

31. At no time during any alleged discharge of dredged and/or fill material to waters of the United States at the Site, including approximately 4,448 linear feet of relatively permanent tributaries and 0.74 acres of adjacent wetlands, mentioned above did Respondent have a permit from the Corps as required by Section 404 of the CWA, 33 U.S.C. § 1344.
32. Upon information and belief, since at least June 1, 2018, Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging dredged and/or fill material to the “waters of the United States” from a point source without authorization.

III. ORDER FOR COMPLIANCE

Therefore, Respondent is hereby ORDERED pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), to do the following:

33. 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 Section 404 or 402 permit, or in accordance with the plans submitted and approved pursuant to this Order.
34. Restoration Plan. Within 90 calendar days of the Effective Date of this Order, Respondent shall submit via email at the addresses listed in Paragraph 42 (Correspondence) a detailed “Restoration Plan” developed by a qualified professional trained in wetland and stream restoration work, for the EPA’s review and approval.

The Restoration Plan shall:

- a. Include a written description of the actions to be taken to remove the fill material, including asphalt, and restore the waters of the United States described above and depicted in Exhibit A (Site Map).
- b. Include a description of the proposal to return the impacted tributaries and wetlands to approximately original grade, extent, and condition.
- c. Account for permanent stabilization of the Site in a manner consistent with its use as intended.
- d. Include a planting plan to revegetate the wetlands and riparian buffers once the fill material is removed that utilizes species native to West Virginia and includes a seed mix and woody vegetation.
- e. Incorporate measurable, quantitative performance criteria for the: (i) growth

and presence of planted woody vegetation and saplings; and (ii) stabilization of any stream bed within the Restoration Areas consistent with pre-disturbance conditions, utilizing appropriate reference standard(s) and comparable locations located in the immediate local area.

- f. Include provisions for post-restoration monitoring with an adaptive management plan designed to document the progress toward attainment of the performance criteria for a period of time consistent with the monitoring period provided in Paragraph 39.
 - g. Include a written description demonstrating that the stream crossings described in Paragraph 18 were constructed and maintained in accordance with best management practices to assure: (i) that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired; (ii) that the reach of the waters of the United States is not reduced; and (iii) that any adverse effect on the aquatic environment will otherwise be minimized, including that any material discharged during the construction and maintenance of these crossings consists of suitable material free from toxic pollutants in toxic amounts.
 - h. Include a schedule for implementation of the Restoration Plan.
 - i. Comply with all applicable erosion and sediment control measures while performing the tasks identified in subparagraphs 34(a) to 34(f).
35. After review of the Restoration Plan specified in Paragraph 34, the EPA will either: (a) approve the Plan, in whole or in part; (b) approve the Plan upon specified conditions; (c) modify the Plan to correct any deficiencies; (d) disapprove the Plan, in whole or in part; or (e) any combination of the above.
36. If the EPA disapproves all or part of the Restoration Plan, Respondent shall, within 30 calendar days of receipt of the EPA's disapproval, correct the deficiencies and resubmit the Plan for approval. If the Plan is not approved as provided in this Order, the EPA retains the right to order restoration in accordance with a plan to be developed by the EPA pursuant to the requirements of Paragraph 34 of this Order.
37. Following the EPA's approval of the Restoration Plan (either with or without conditions or modifications required by the EPA), Respondent shall implement the restoration work identified in the Plan, as approved or modified by the EPA. All restoration work shall be completed consistent with the implementation schedule included in the Restoration Plan to be approved by the EPA.
38. No later than 30 calendar days after the completion of the restoration activities described in Paragraphs 34(a) through (f), Respondent shall submit a certification to the

EPA, which will include the language set forth in Paragraph 43 (Certification), certifying that the work described in the approved Restoration Plan has been completed.

39. Respondent shall monitor the Restoration Areas at the Site for a period of five (5) years to ensure the objective of restoring impacted aquatic resources. Respondent shall conduct monitoring events at the Site twice per year, once in the spring and once in the fall, and submit to the EPA a monitoring report at the addresses listed in Paragraph 42 (Correspondence), including the language set forth in Paragraph 43 (Certification), by December 15th of each monitoring year.
40. The EPA shall review each monitoring report and reasonably determine whether the restoration efforts undertaken by Respondent have been successful as determined by a comparison of the Restoration Areas to the reference standard specified in Paragraph 34(e).
41. Respondent's failure to complete the restoration work in a manner consistent with this Order and the approved Restoration Plan shall be deemed a violation of this Order.

IV. GENERAL PROVISIONS

42. Correspondence. All correspondence related to this Order shall be sent electronically to:

To the EPA:

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

Robert George
Enforcement Inspector
Enforcement and Compliance Assurance Division
U.S. EPA, Region 3
george.robert@epa.gov

and

R3_ORC_mailbox@epa.gov (attention Promy Tabassum)

43. Certification. The following certification must accompany each submission by Respondent pursuant to this Order and must be signed by a Representative of the Respondent authorized to sign on behalf of Respondent:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based upon my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signed: _____

Title: _____

Date: _____

44. Respondent's compliance with the terms of this Order shall not relieve Respondent of its obligation to comply with all applicable provisions of the CWA or any other federal, state, or local law or regulation. Issuance of this Order is not an election by the EPA to forego any civil or criminal action otherwise authorized by the CWA. The 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.
45. Violation of the terms of this Order may result in further EPA enforcement actions 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).
46. The provisions of this Order shall apply to and are binding upon Respondent and the officers, directors, employees, contractors, agents, trustees, successors, and assigns of Respondent.
47. Respondent shall permit EPA personnel to access the Site for the purpose of inspecting work performed pursuant to this Order upon reasonable notice. The EPA reserves all existing inspection authority otherwise available to the EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.

V. OPPORTUNITY TO CONFER

48. Respondent is invited to confer with the EPA about the findings and conclusions reflected in this Order including the terms and conditions contained herein. Respondent's request for a conference must be confirmed in writing via email within 10 calendar days of receipt of this Order. Any conference between Respondent and the EPA must occur no later than 20 calendar days after receipt of this Order. If the requested conference is held, this Order shall become effective 10 calendar days after the conference is held. If Respondent does not request a meeting within 10 calendar days of receipt of this Order, Respondent waives its right to a conference, and this Order shall become effective 10 calendar days from its receipt. Any request for a conference, or other inquiries concerning this Order, should be made in writing to: Katelyn Almeter at almeter.katelyn@epa.gov and Robert George at george.robert@epa.gov. Respondent's attorney may contact Promy Tabassum at tabassum.promy@epa.gov.

VI. JUDICIAL REVIEW

49. Respondent may seek federal judicial review of this Order, issued under Section 309 of the CWA, 33 U.S.C. § 1319, pursuant to Chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Section 706 of the APA states the scope of such review.

VII. EFFECTIVE DATE

50. The Effective Date of this Order shall be 10 calendar days from the date of receipt of this Order, or, if a conference is requested per Section V (Opportunity to Confer) above, this Order shall become effective 10 calendar days after the conference is held.

VIII. TERMINATION

51. The obligations of this Order shall terminate when the EPA determines that the Respondent has fully complied with the Order's terms and conditions and the EPA provides written notice of its determination to Respondent.
52. Respondent may submit to the EPA a Certification of Compliance and Request for Termination of this Order, including documentation to demonstrate that it has met all requirements of this Order. If, following review of any Certification of Compliance and Request for Termination of this Order, the EPA agrees that the Respondent has adequately complied with all requirements of this Order, the EPA shall provide written notification of termination of this Order, as described in the previous paragraph.

IX. NOTICE OF INTENT TO COMPLY

53. Within 10 calendar days of the Effective Date of this Order, Respondent shall submit to the EPA via email a Notice of Intent to Comply with the Order. The Notice shall be submitted to: Katelyn Almeter at almeter.katelyn@epa.gov and Robert George at george.robert@epa.gov.

X. TAX REPORTING

54. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code (“IRS”), 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of the activities in Section III (Order for Compliance) is restitution, remediation, or required to come into compliance with the law.

SO ORDERED.

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

[Digital Signature and Date]

Karen Melvin

Director

Enforcement and Compliance Assurance Division

U.S. EPA, Region 3

EXHIBIT A (SITE MAP)

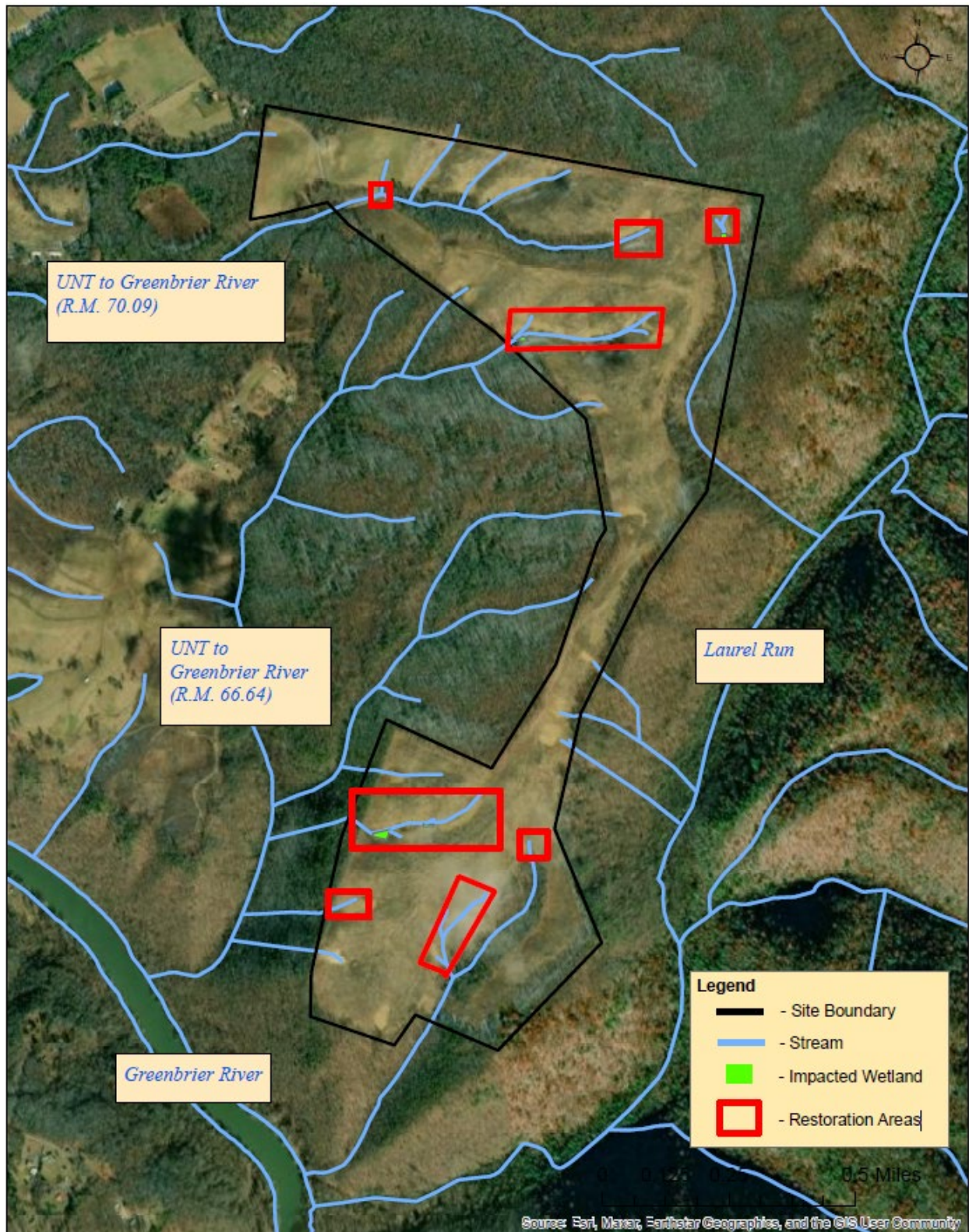


EXHIBIT B (RESTORATION AREAS)





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

In the Matter of:	:	
	:	
David Rapp	:	U.S. EPA Docket No. CWA-03-2025-0023DW
3542 Auto Road	:	
Renick, WV 24966	:	
	:	
Respondent.	:	ADMINISTRATIVE ORDER FOR COMPLAINEE
	:	PURSUANT TO SECTION 309(a) OF THE CLEAN
	:	WATER ACT, 33 U.S.C. § 1319(a)
Property Located At:	:	
	:	
Approximately 37.943459° N, -80.319624° W;	:	
on Pumpkin Center Road near the intersection :	:	
with Pineland Drive in Greenbrier County,	:	
West Virginia	:	

CERTIFICATE OF SERVICE

I certify that the foregoing Administrative Order for Compliance was filed with the EPA Region 3 Regional Hearing Clerk on the date that has been electronically stamped on the Administrative Order for Compliance. 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 for Compliance to each of the following persons, in the manner specified below, at the following addresses:

Copies served via UPS and email to:

David Rapp
3542 Auto Road
Renick, WV 24966
c/o brapp@whitefordlaw.com

Copies served via email to:

M. Trent Zivkovich, Esq.
Whiteford, Taylor & Preston LLP
7 Saint Paul Street, Suite 1500
Baltimore, MD 21202
tzivkovich@whitefordlaw.com

Robert George
Enforcement Inspector
U.S. EPA, Region 3
george.robert@epa.gov

Katelyn Almeter
Enforcement Inspector
U.S. EPA, Region 3
almeter.katelyn@epa.gov

Promy Tabassum, Esq.
Assistant Regional Counsel
U.S. EPA, Region 3
tabassum.promy@epa.gov

[Digital Signature and Date]
Regional Hearing Clerk
U.S. EPA, Region 3