

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

In the Matter of:

4H Farm, LLC
ELF, LLC
Trenton Energy, LLC

Respondents

Property Located At:
4H Farm
Ritchie County School Road
Ellenboro, Ritchie County,
West Virginia 26346
39.263°, -81.072°

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

Docket. No. CWA-03-2018-0090

**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 4H Farm, LLC, ELF, LLC, and Trenton Energy, LLC (“Respondents”), 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 commences and concludes this administrative proceeding against Respondents.

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. Respondents, 4H Farm, ELF, LLC, and Trenton Energy, LLC are corporations doing business in the state of West Virginia and therefore, are “persons” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 232.2.
12. At all times relevant to this CAFO, Respondent 4H Farm, LLC was and is the manager of the 4H Farm owned by the farmland and property investment company, ELF, LLC, located off of Ritchie County School Road, Ellenboro, Ritchie County, West Virginia

(the "Site"), as further identified on the attached map labeled as Exhibit "A", (hereinafter "the Site" or "4H Farm Site").

13. The Site is located north of the Trenton Energy Industrial complex that fronts US-50, and intersects an unnamed tributary to Hushers Run. The unnamed tributary flows south to Hushers Run, then to Bonds Creek, then to North Fork Hughes River, then to the Hughes River, then to the Little Kanawha River, then to the Ohio River. The unnamed tributaries on Site and associated tributaries leading to the Ohio are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2; 40 C.F.R. § 122.2.
14. On November 5, 2014, representatives from the U.S. EPA, the U.S. Army Corps of Engineers, Huntington District ("Corps"), the West Virginia Department of Environmental Protection ("WVDEP"), the West Virginia Division of Natural Resources, and the U.S. Fish and Wildlife Service conducted a Clean Water Act Section 404 inspection at the 4H Farm Site.
15. Upon information and belief, construction of the Site occurred in 2012. A flyover conducted by WVDEP in August 2012 revealed evidence of recent clearing. The Site is mixed-use with gravel pads/pipe lay down areas and cleared land with hay bales.
16. On information and belief, Respondents, or persons acting on behalf of Respondents, including employees of Trenton Energy, operated equipment which discharged dredged and/or fill material to waters of the United States located at the Site, specifically, by rerouting and/or placing rock channel protection into tributaries to Hushers Run, and impacting a total of 2,014.45 lf as follows: UNT 1 – 1,318.60; UNT 2 – 122.68; UNT 3 – 573.17.
17. The equipment referenced in Paragraph 16 constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
18. 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.
19. Respondents, by discharging dredged and/or fill material to the waters of the United States without authorization, have violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

IV. GENERAL PROVISIONS

20. For the purpose of this proceeding, Respondents admit the jurisdictional allegations set forth in this CAFO.

21. Except as provided in Paragraph 20, Respondents neither admit nor deny the Findings of Fact set forth in this CAFO.
22. Respondents waive 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.
23. Respondents agree not to contest EPA's jurisdiction to issue and enforce this CAFO.
24. Respondents hereby expressly waive their rights to a hearing on any issue of law or fact in this matter and consent to issuance of this CAFO without adjudication.
25. Respondents shall bear their own costs and attorney fees.
26. The provisions of this CAFO shall be binding upon the Respondents, its officers, principals, directors, successors and assigns.
27. 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

28. In consideration of a Respondents' ability to pay claim and Complainant's analysis thereto, and in full and final settlement of the Complainant's claims for civil penalties for the alleged violations identified herein, Respondents consent to the assessment of, and agrees to pay, in accordance with the terms set forth herein an administrative civil penalty of ten thousand dollars (\$10,000.00) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c).
29. The civil penalty amount set forth in Paragraph 28, above, is based on a number of factors, including the nature, circumstances, extent and gravity of the violation(s), Respondents' 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). However, the original number has been reduced based upon Respondents' inability to pay the full penalty.
30. Respondents shall pay the civil penalty amount described in Paragraph 28, 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 Respondents shall reference Respondents' 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 Respondents' name and address, and the EPA Docket Number of this CAFO.

A copy of Respondents' check or a copy of Respondents' 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

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

31. 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 as specified herein

shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

32. 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 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).
33. 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.
34. 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).
35. The penalty specified in Paragraph 28 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

VI. APPLICABLE LAWS

36. This CAFO shall not relieve Respondents of their obligations 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

37. This CAFO resolves 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. EPA reserves the right to seek and obtain appropriate relief if Complainant obtains evidence that the information provided and/or representations made by Respondents to EPA are false, or in any material respect, inaccurate. 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.

38. 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 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, EPA may have under law or equity in such event.

VIII. FULL AND FINAL SATISFACTION

39. 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

40. This CAFO shall apply to and be binding upon the EPA and Respondents. The undersigned representative of Respondents certify 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

41. 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

42. 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 RESPONDENTS, 4H Farms, LLC, Trenton Energy, LLC, and ELF, LLC

Date: 8-21-2018



Name: Gerald Hall
Title: Managing Partner

SO ORDERED

this _____ day of _____, 2018.

Jeffrey Lapp
Associate Division Director
Environmental Protection and Innovation Division

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1319(g)(2)

Docket. No. CWA-03-2018-0090

CERTIFICATE OF SERVICE

I certify that on _____, the original and one copy of the foregoing Consent Agreement and Final Order were filed with the EPA Region III Regional Hearing Clerk. I further certify that on the date set forth below, I served a true and correct copy of the same to each of the following persons, in the manner specified below, at the following addresses:

Copy served via Certified Mail, Return Receipt Requested, Postage Prepaid, to:

Hank Lawrence, Esq.
Steptoe and Johnson, PLLC
400 White Oaks Boulevard
Bridgeport, West Virginia 26330

Pamela J. Lazos
Sr. Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Date

Dated: _____.

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region III

TRACKING NUMBER(S): _____.