



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

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

DEC 02 2013

Mr. Michael Cannon, Counsel  
XTO Energy, Inc.  
810 Houston Street  
Fort Worth, Texas 76102

Re: In the Matter of XTO Energy, Inc., Docket No. CWA-03-2014-0035DW

Dear Mr. Cannon:

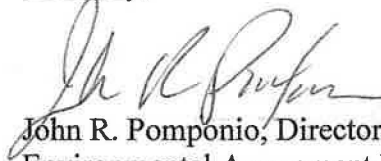
Please find enclosed an Administrative Compliance Order ("Order" or "AO"), Docket No. CWA-03-2014-0035DW, which the United States Environmental Protection Agency, Region III ("EPA"), is issuing to XTO Energy, Inc. ("Respondent" or "XTO"), for violations of Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), at the Fenn Well Pad in Marion County, West Virginia.

Section 301(a) of the CWA prohibits any person from discharging a pollutant from a point source to a water of the United States without specific authorization. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), authorizes EPA to issue an Administrative Compliance Order to any person who is in violation of Section 301(a) of the CWA. Upon information and belief, as well as information provided by XTO, EPA has determined that Respondent or persons acting on behalf of and/or at the direction of Respondent discharged dredged and/or fill material to waters of the United States without a permit issued by the U.S. Army Corps of Engineers as required by Section 404 of the CWA, 33 U.S.C. § 1344. The enclosed Order notifies Respondent of these violations and describes actions that will return the Site to compliance.

You are entitled to assert a claim of business confidentiality covering any part or all of the information submitted in response to the Order, in a manner described at 40 C.F.R. § 2.203(b). Information subject to a claim of business confidentiality will be made available to the public only in accordance with 40 C.F.R. Part 2, Subpart B. Unless a claim of business confidentiality is asserted at the time the requested information is submitted, EPA may make this information available to the public without further notice to you.

If you have any questions regarding the Order, or have information clearly demonstrating any errors in its Findings, please contact Stephanie Andreescu, Office of Environmental Programs, at (215) 814-2747. Your attorney may also contact Pamela Lazos, Senior Assistant Regional Counsel, at (215) 814-2658.

Sincerely,



John R. Pomponio, Director  
Environmental Assessment Innovation Division  
U.S. EPA Region III

Enclosure

cc: Mr. Jon Coleman – US Army Corps of Engineers  
Ms. Dana Adipietro, Esq. – US Army Corps of Engineers  
Mr. Michael Zeto – WV DEP EE  
Mr. Brad Swiger – WV DEP EE  
Mr. David Belcher – WV DEP OOG  
Ms. Jackie Thornton – WV DEP OOG  
Ms. Wilma Reip – WV DEP  
Mr. Clifford Brown – WV DNR  
Mr. Roger Anderson – WV DNR  
Ms. Lisa Bruderly, Esq. – Babst Calland



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REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

REGIONAL HEARING CLERK  
EPA REGION III, PHILA. PA

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RECEIVED

In The Matter of )  
)  
XTO Energy, Inc. )  
)  
Respondent )  
)  
)  
Property Located At: )  
Fenn Well Pad )  
39° 27' 24.39"N, 80° 19' 3.91"W )  
Marion County, West Virginia )  
\_\_\_\_\_ )

Proceeding Under Section  
309(a) of the Clean Water  
Act, 33 U.S.C. § 1319(a)

EPA Docket No. CWA-03-2014-0035DW

ORDER FOR COMPLIANCE

WHEREAS, a well pad slip occurred at the Fenn Well Pad Site, the construction of which impacted 130 linear feet ("lf") of streams and approximately 0.025 acres of wetlands;

WHEREAS, the Respondent seeks to stabilize the slips before additional impacts to waters of the U.S. occur;

WHEREAS, Respondent avers that the corrective action measures will not result in additional impacts to waters of the U.S., nor preclude the potential for full restoration of the impacted streams; and

WHEREAS, through this Administrative Order for Compliance, Respondent will prepare a restoration plan for the Site;

**I. STATUTORY AUTHORITY**

1. This Administrative Order for Compliance ("Order" or "AO") is issued under the authority vested in the United States Environmental Protection Agency ("EPA") by Section 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA, Region III who in turn has delegated it to the Director of the Environmental Assessment and Innovation Division.

2. This order is issued in accordance with the authority granted to EPA under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), and its stated objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

## II. FINDINGS OF FACT and CONCLUSIONS OF LAW

3. XTO Energy, Inc. ("Respondent" or "XTO") is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
4. 40 C.F.R. § 232.2 defines "discharge of fill material" to include "[p]lacement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States" and "the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction."
5. 40 C.F.R. § 232.2 defines "fill material" as "material placed in waters of the United States where the material has the effect of: 1) [r]eplacing any portion of a water of the United States with dry land; or 2) [c]hanging the bottom elevation of any portion of a water of the United States."
6. Fill material is a "pollutant" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
7. Section 301(a) of the CWA, 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 under Section 404 of the CWA, 33 U.S.C. § 1344.
8. The Fenn Well Pad is located at coordinates 39° 27' 24.39"N, 80° 19' 3.91"W, Marion County, West Virginia (the "Site").
9. The Site consists of a well pad and an access road located adjacent to Little Bingamon Creek and which impacted tributaries of Little Bingamon Creek.
10. The Little Bingamon Creek flows approximately 2.0 miles to the Bingamon Creek, then 1.44 miles to the West Fork River, all of which 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.
11. Respondent or persons acting on behalf of Respondent operated equipment which discharged dredged and/or fill material to waters of the United States located at the Site. Specifically, construction of the well pad and associated access road by Respondent impacted 130 lf of streams and approximately 0.025 acres of wetlands. Upon information and belief, the well pad has the potential to slip and cause additional impacts to downstream waters.

12. The discharge of dredged and/or fill material was caused by equipment which constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
13. At no time during the alleged 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 CWA, 33 U.S.C. § 1344.
14. 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" without authorization.

### **III. ORDER FOR COMPLIANCE**

Therefore, this 2nd day of December, 2013, the Respondent is hereby ORDERED, pursuant to Section 309(a) of the CWA, 33 U.S.C. 1319(a) to take the following actions in order to comply with the section or requirement of the CWA cited above:

15. Respondent shall utilize corrective action measures to stabilize the slip according to the Final Fenn Slip Repair Plan submitted on October 16, 2013.
16. Respondent has submitted a wetland and stream delineation of pre-disturbance conditions for EPA's review and approval. If EPA disapproves all or part of the delineation report, Respondent shall, within thirty (30) days of receipt of EPA's disapproval, correct the deficiencies and resubmit the delineation for approval. EPA retains the right, if the delineation is not approved as provided in this Order, to complete its own delineation. The delineation and associated report shall identify any and all areas at the Site which, prior to construction, were streams and/or wetlands, and will show the extent of the waters. The Respondent shall utilize a methodology for identifying wetlands and streams in disturbed and undisturbed areas consistent with methods generally accepted by EPA and the U.S. Army Corps of Engineers.
17. Respondent shall submit a detailed restoration plan for EPA's review and approval within 30 days of EPA's approval of the delineation. The plan must describe the actions that will be taken to remove the material from the regulated waters, stabilize the site, and return the Site to pre-disturbance grade and conditions.
18. After review of the plan submitted pursuant to Paragraphs 17, EPA will: a) approve the plan, in whole or in part; b) approve the plan with specified conditions; c) modify the plan to cure any deficiencies; d) disapprove the plan, in whole or in part; or e) any combination of the above. If EPA disapproves all or part of the plan, Respondent shall, within thirty (30) days of receipt of EPA's disapproval, correct the deficiencies and resubmit the plan for approval. EPA retains the right, if the restoration plan is not

approved as provided in this Order, to order compliance in accordance with a restoration plan developed by EPA.

19. Upon approval of the plan described in Paragraphs 17, above (either with or without conditions or modifications by EPA), Respondent shall implement the plan as approved or modified by EPA. All restoration work shall be completed within ninety (90) days of EPA's approval of the restoration plan.
20. Respondent shall not discharge any dredged or fill material into any waters of the United States except in compliance with a Section 404 permit.
21. The restoration plan and all other correspondence should be sent to:

Stephanie Andreescu  
Environmental Scientist  
United States Environmental Protection Agency  
1650 Arch Street (3EA30)  
Philadelphia, PA 19103-2029

#### IV. GENERAL PROVISIONS

22. The following certification must accompany each submission by Respondent pursuant to this Order and must be signed by a Representative of 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."*

23. Respondent's compliance with the terms of this Order shall not relieve Respondent of their obligation to comply with all applicable provisions of the CWA or any other Federal, State or local law or regulation.
24. Issuance of this Order is not an election by EPA to forego any civil or criminal action otherwise authorized by the CWA. EPA reserves the right to seek any remedy available under the law that it deems appropriate to address the violations described herein. Compliance with this Order shall not be a defense to any action commenced pursuant to such authorities. Failure to comply and/or respond to this Order, or providing misleading or false information, may subject you to civil and/or criminal sanctions pursuant to, 33 U.S.C. § 1319, and/or a civil judicial action initiated by the U.S. Department of Justice.

**V. OPPORTUNITY TO CONFER**

25. Respondent are invited to confer with the Agency about the findings and conclusions reflected in this Order and about the terms and conditions contained herein. Any such conference can be in person or by electronic means. Respondent may also submit any written material it believes to be relevant to the Agency's determinations. If such a conference is desired, Respondent should contact Stephanie Andreescu at (215) 814-2747.

**VI. JUDICIAL REVIEW**

26. Respondent may seek federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

**VII. NOTICE OF INTENT TO COMPLY**

27. Within ten (10) days of the effective date of this Order, Respondent shall submit to EPA a Notice of Intent to Comply with the Order. The Notice shall be submitted to:

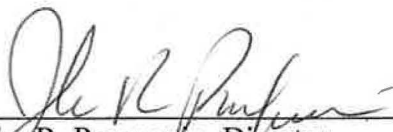
Stephanie Andreescu  
Environmental Scientist  
United States Environmental Protection Agency  
1650 Arch Street (3EA30)  
Philadelphia, PA 19103-2029

**VIII. EFFECTIVE DATE**

28. This Order will become effective thirty (30) days after receipt unless modified or withdrawn.

Date:

12/2/13

  
\_\_\_\_\_  
John R. Pomponio, Director  
Environmental Assessment Innovation Division  
U.S. EPA Region III

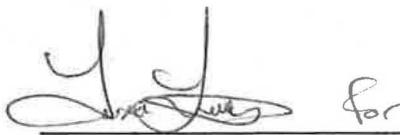
CERTIFICATE OF SERVICE

I certify that I caused to be sent the original Administrative Order for Compliance to the following by certified mail, return receipt requested, after filing the original with the Regional Hearing Clerk:

Mr. Michael Cannon, Counsel  
XTO Energy, Inc.  
810 Houston Street  
Fort Worth, Texas 76102

Ms. Lisa Bruderly, Esq.  
Babst Calland, Attorneys at Law  
Two Gateway Center  
Pittsburgh, PA 15222

Date: 12/02/13

 for  
\_\_\_\_\_  
Pamela J. Lazos  
Sr. Assistant Regional Counsel