



Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701–706.

### **Statutory and Regulatory Framework**

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of an NPDES permit.

7. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p) requires, in relevant part, that a discharge of stormwater associated with industrial activity comply with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.

9. Pursuant to Section 402(p) of the CWA, the EPA has promulgated regulations at 40 C.F.R. § 122.26 that set forth the NPDES permit requirements for stormwater discharges.

10. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

11. 40 C.F.R. § 122.26(b)(14) defines “stormwater discharge associated with industrial activity,” as “the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.”

12. Included in the categories of facilities considered to be engaging in “industrial activity” are facilities in Standard Industrial Classification (“SIC”) Code 2951. *See* 40 C.F.R. § 122.26(b)(14)(ii).

13. Herzog is located at 103 Roseport Road, Elwood, Kansas, (the “Facility” or the “Site”) and is authorized to discharge stormwater associated with industrial activities under Kansas Department of Health and Environment (“KDHE”) General Permit No. S-ISWA-2111-1-NPDES Permit No. KSR001020 (the “General Permit”). The Facility was first authorized under the General Permit on September 6, 2016. The current General Permit is effective through October 31, 2026.

14. KDHE is the state agency with the authority to administer the federal NPDES program in Kansas.

15. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), the EPA retains concurrent enforcement authority with authorized states for violations of the CWA.

### **EPA Allegations of Fact and Law**

16. Respondent is a corporation, so it is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

17. Respondent is and was the owner and operator of the Facility at all times relevant to this action.

18. The Facility is an approximately 38-acre property. It is located adjacent to the Missouri River, a navigable water, and from which it is separated by a levee.

19. The Facility includes a portion of property owned by Union Pacific Railroad, but on which Respondent operates its business.

20. The Facility's activities include, but are not limited to, asphalt heating and processing; storage of asphaltic cement, asphalt, asphalt intermediate products, equipment, waste, aggregate materials in stockpiles (including chat), and raw materials; and equipment maintenance (including grinding, welding, fueling, and lubrication, and mechanical servicing).

21. Since at least 2018, the Facility has reported under Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), otherwise known as the as the Toxics Release Inventory ("TRI") for the chemical lead.

22. The Facility discharges stormwater through eight or more outfalls to a series of connected ditches which all discharge to a culvert on its southeastern side, which discharges into the Missouri River.

23. The Site has "stormwater discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14) and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

24. The Missouri River is a navigable water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

25. The section of the Missouri River the facility discharges to is impaired within the meaning of section 303(d) of the CWA by *E. coli*.

26. Stormwater runoff from industrial activity at the Facility results in the addition of pollutants from a point source to navigable waters, and thus is the “discharge of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

27. Respondent’s discharge of pollutants, including discharges of stormwater associated with industrial activity as defined by 40 C.F.R. § 122.26(b)(14)(ii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

### *The EPA Inspection*

28. On June 9, 2022, EPA personnel acting under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), inspected the Site to determine Respondent’s compliance with its NPDES permit and the CWA.

29. During the inspection, the EPA inspector reviewed Respondent’s records and obtained copies of Respondent’s documents related to the General Permit, including but not limited to the Facility’s stormwater pollution prevention plan (“SWPPP”) and inspection records. The EPA inspector also toured the facility, observed discharge locations, and photographed various stormwater-related areas.

30. EPA electronically sent a Notice of Potential Findings (“NOPF”) related to the EPA inspection on or about June 10, 2022, which asked for a written response.

31. EPA electronically sent a copy of the inspection report to Respondent on or about June 13, 2022.

32. Herzog provided written responses to EPA in correspondence dated June 24, 2022 and July 26, 2022 with additional information related to the alleged findings in the NOPF and actions taken in response, including photo documentation.

### **EPA’s Allegations of Violation**

33. Part 2.1 of the General Permit requires Respondent to develop and implement a SWPPP to ensure the design, implementation, management, and maintenance of Best Management Practices (“BMPs”) in order to reduce the amount of pollutants in stormwater discharges associated with the industrial activities at the Facility.

34. Part 2.2 of the General Permit provides that implementation of the BMPs specified in the SWPPP are enforceable requirements of the Permit.

#### *Count 1: Failure to Develop and Implement a Comprehensive and Current SWPPP*

35. Part 2.4 of the General Permit sets forth minimum requirements for a SWPPP, including:

- a. a site map identifying all outfalls, outlined drainage areas, approximate acreage of each stormwater outfall, stormwater conveyances and area inlets for each outfall, the name of the first water body the discharge is directed to, the location of all significant materials exposed to precipitation or runoff, all storage tanks, loading/unloading areas, storage or disposal areas, short and long term material storage areas, stock piles, surface water bodies, and existing structural control measures to reduce pollutants in stormwater runoff (Part 2.4.2(b));
- b. identification of risk from pollutant sources, including a narrative description of the potential pollutant sources, their location(s) at the facility, and pollutant parameters of concern. (Part 2.4.2(e));
- c. descriptions of stormwater management controls and BMPs, including good housekeeping controls (Part 2.4.3);
- d. internal reporting procedures (Part 2.4.3(f));
- e. schedules for inspection and maintenance (Part 2.4.3(b) and (f)); and
- f. identification of unauthorized non-stormwater discharges directed to surface water or groundwater (Part 2.4.3(g)).
- g. updates no more than 90 days after a change in design, construction, operation or maintenance that has a significant effect on the potential for the discharge of pollutants to waters of the State; the KDHE, EPA, or permittee's inspections including the regular comprehensive site compliance evaluation required herein) indicate deficiencies in the SWP2 Plan or any BMP; or a visual inspection of contributing areas or a visual inspection of the stormwater discharges or monitoring of the stormwater discharges indicate the plan appears to be ineffective in eliminating or significantly minimizing pollutants from sources identified in the plan.

36. At the time of the inspection, Respondent's SWPPP failed to include the following information:

- a. on its site map: two additional observed outfalls, outlined drainage areas, approximate acreage of each stormwater outfall, the name of the Missouri River as the first water body the discharge is directed to, the location of all significant materials exposed to precipitation or runoff, all storage tanks, loading/unloading areas, storage or disposal areas, short and long term material-storage areas, stock piles, and existing structural control measures to reduce pollutants in stormwater runoff;
- b. identification of risk and narrative descriptions of all pollutant sources, including asphalt release agent, storage piles of chat, asphalt shingles, asphalt

grinding operations, and any chemical the facility is required to report pursuant to EPCRA Section 313;

c. descriptions of stormwater management controls and BMPs, including adequate housekeeping controls;

d. internal reporting procedures;

e. schedules for inspection and maintenance;

f. identification of unauthorized non-stormwater discharges, including process wastewater from the servicing of the boiler; and

g. updates upon finding of new information and deficiencies, including the discovery of deficiencies in stormwater quality from visual monitoring and outfall deficiencies-

37. Respondent's failure to include in its SWPPP the minimum requirements is a violation of the conditions and limitations of the NPDES General Permit and therefore a violation of the CWA.

*Count 2: Failure to Develop and Implement Adequate Control Measures*

38. Part 2.4.3 of the General Permit requires the Respondent to include in its SWPPP internal reporting procedures and maintenance activities. Additionally, Part 3.3.1 of the SWPPP states that all BMPs and industrial equipment require regular maintenance to function as intended. The SWPPP provides BMP maintenance logs and industrial equipment maintenance logs that may be utilized, if the facility has no other maintenance program, to describe procedures (1) to maintain any of the site's BMPs in effective operating condition, and (2) to maintain industrial equipment so that spills/leaks are avoided.

39. The Foreword of the SWPPP states that the SWPPP should be used during normal daily operations and also anytime new operations are performed such as construction of new facilities requiring land disturbance.

40. At the time of the inspection, Part 1.4 of the SWPPP stated that all outfalls must be clearly marked in the field.

41. At the time of the inspection, Part 3.2 of the SWPPP stated that the Respondent will provide trash containers and routinely pick up and dispose of trash containers for solid waste, periodically police the grounds of the facility to ensure that any blowing paper, trash, and litter are removed, and include a schedule for regular pickup and disposal of garbage. Part 3.2 also states that areas surrounding aboveground storage tanks

are inspected routinely for leaks and stains, and if petroleum leaks are noted, the oily materials will be removed and disposed of.

42. At the time of the inspection, Part 3.4 of the SWPPP stated that the facility will provide spill prevention, control and/or management to prevent any spills of pollutants from entering waters of the state. Secondary containment structures and systems used to implement this requirement will be constructed of materials compatible with the substances contained and will also prevent the contamination of groundwater.

43. At the time of the inspection, Part 3.5 of the SWPPP stated that the Respondent will monitor erosion and provide sediment and erosion control sufficient to prevent pollution and comply with effluent limitations established in the General Permit for any land disturbance activities.

44. At the time of the inspection, Part 3.6 of the SWPPP stated that the Respondent will implement BMPs to minimize and prevent the discharge of pollutants in stormwater.

45. At the time of the inspection, Respondent failed to implement internal reporting procedures or maintain maintenance logs.

46. At the time of the inspection, Respondent was not using the SWPPP during normal daily operations.

47. At the time of the inspection, none of the outfalls were marked in the field.

48. At the time of the inspection, the Site grounds had spills of asphalt oil, fuel, asphalt, emulsion, as well as trash and debris. Additionally, a part of the wall comprising secondary containment for pollutants was missing allowing for asphalt to escape.

49. At the time of the inspection, excess sediment was found in Outfalls 001 and 006, and stockpiles of reclaimed asphalt pavement and quartzite were located in close proximity to stormwater conveyances with no structural controls.

50. At the time of the inspection, Respondent failed to implement BMPs to prevent the release of asphalt release agent to stormwater.

51. Respondent's failure to develop and implement adequate control measures is a violation and the conditions and limitations of the General Permit, and therefore a violation of the CWA.

Count 3: Failure to Conduct or Document Visual Monitoring

52. Part 2.4.5(a) of the General Permit requires that the Respondent, at minimum once per year, perform and document a visual examination of stormwater discharge associated with industrial activity from each identified stormwater outfall. Visual

examination reports shall be maintained onsite. Each report shall include the date and time, name of the person performing examination, nature of discharge (runoff or snow melt), visual quality of the discharge (i.e., color, odor, clarity, floating solids, suspended solids, foam, oil sheen, and other indicators of stormwater pollution) and probable sources of any observed contamination.

53. Part 2.4 of the SWPPP states the General Permit requires an annual visual examination of stormwater quality but that sample collection and analysis is not required by the General Permit.

54. Respondent did not conduct or document annual visual monitoring in 2019, 2020, or 2021.

55. Respondent's failure to conduct or document annual visual monitoring is a violation of the conditions and limitations of the General Permit, and therefore a violation the CWA.

#### Count 4: Failure to Conduct or Document Inspections

56. Part 2.4.3(d) of the General Permit requires that the Respondent must conduct quarterly inspections. Records of inspections must be maintained on-site or in a readily accessible location for at least three years after the date of the inspection.

57. Part 3.3.1 of the SWPPP states that all BMPs and industrial equipment are inspected quarterly to ensure they are operating properly and do not negatively impact stormwater.

58. Respondent failed to conduct or document quarterly inspections for one quarter in 2021, for all quarters in 2020, and for two quarters in 2019.

59. Respondent's failure to conduct or document quarterly inspections is a violation of the conditions and limitations of the General Permit, and therefore a violation of the CWA.

#### Count 5: Failure to Conduct Annual Comprehensive Site Compliance Evaluations

60. Part 2.4.4 of the General Permit requires the Respondent to conduct a comprehensive site compliance evaluation at least once a year. The evaluation must include visual inspection of areas contributing to stormwater discharge associated with industrial activity, evaluation of measures to reduce pollutant loadings to determine whether they are adequate and properly implemented or whether additional control measures are needed, and a visual evaluation as to the availability of equipment to implement the plan. Respondent must keep a report on-site summarizing the evaluation.



61. Part 2.4 of the SWPPP states that the General Permit requires an annual comprehensive site compliance evaluation.

62. Respondent failed to conduct annual comprehensive site compliance evaluations in 2019 and 2020.

63. Respondent conducted an incomplete annual comprehensive site compliance evaluation in 2021.

64. Respondent's failure to conduct annual comprehensive site compliance evaluations is a violation of the conditions and limitations of the General Permit and therefore a violation of the CWA.

Count 6: Failure to Notify KDHE of Noncompliance

65. Part 4.10 of the General Permit states that the Respondent must provide notice to KDHE within five days if it does not comply with or will be unable to comply with any requirement or condition specified in the General Permit.

66. Part 5.3 of the SWPPP states that the Respondent must provide notice to KDHE within five days if it does not comply with or will be unable to comply with any requirement or condition specified in the General Permit.

67. Respondent failed to provide notice to KDHE of its failure to comply with requirements or conditions specified in the General Permit including failure to conduct visual monitoring, failure to conduct inspections, and failure to conduct annual comprehensive site compliance evaluations.

68. Respondent's failure to notify KDHE of its noncompliance with the SWPPP and the General Permit is a violation of the conditions and limitations of the General Permit and therefore a violation of the CWA.

**Order for Compliance**

69. Based on the Findings set forth above, and pursuant to of Section 309(a) of the CWA, 33 U.S.C. § 1319(a), the EPA hereby orders Respondent, and Respondent hereby agrees, to take the actions described below.

70. In accordance with this Order, Respondent shall take all necessary actions, including immediate interim measures, to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to ensure compliance with all the applicable requirements of the General Permit and its SWPPP, including, but not limited to:

- a. eliminate any unauthorized non-stormwater discharges;

- b. update its SWPPP to include all of the information required by the General Permit and submit the updated SWPPP to EPA;
- c. evaluate and implement effective structural and nonstructural control measures;
- d. conduct annual visual monitoring of stormwater quality;
- e. conduct quarterly inspections;
- f. conduct annual comprehensive site compliance evaluations; and
- g. notify KDHE of noncompliance and non-authorized discharges.

71. Respondent shall retain a qualified consultant or engineer to perform a study of the Site and prepare a plan to address the violations cited above. All persons under the direction and supervision of Respondent's consultant must possess all necessary professional licenses required by law. The selection of a consultant by Respondent must be submitted to EPA for approval.

72. Within 60 days of the Effective Date of this Order, the Respondent shall submit to the EPA and KDHE a written report describing the results of its consultant's study and its plan to comply with the General Permit and the CWA (hereinafter "60-Day Report"). At a minimum, the 60-Day Report shall include:

- a. a written description and photo documentation, if appropriate, of all actions taken to date to achieve compliance with the General Permit;
- b. a written description of how all structural and nonstructural controls were chosen, how they were designed, and their expected performance efficiency; and
- c. a Compliance Plan to achieve compliance with the General Permit to the extent the work is not already completed, including a milestone schedule to take corrective actions and a proposed schedule for EPA's approval to complete all work necessary as soon as possible but no later than one year of the effective date of this Order.

73. The EPA may, after review of any revised or updated SWPPP, visual stormwater examination reports, description of actions taken and plans to take corrective actions submitted by Respondent, provide written comments and suggestions regarding such submittals. Review and comment on the SWPPP or other submissions by the EPA does not relieve Respondent of the responsibility to comply with its Permit, the CWA, applicable State law, or this Order.

74. After review of the information submitted by Respondent pursuant to the above Paragraphs, the EPA may determine that additional information is needed and/or

additional corrective measures or deadlines are appropriate and may modify this Order as set forth in Paragraph 87, or EPA may initiate a separate enforcement action, as appropriate.

75. *Quarterly Progress Reports.* After submission of the 60-day Report required above and until approval of the Completion Report, Respondent shall submit quarterly progress reports to the EPA and KDHE describing the actions it has taken to ensure continued compliance with the terms of its Permit and progress in completing the work under this Order. Each report shall include, at a minimum:

- a. a description of implementation and/or revision of the SWPPP during the previous three (3) month period;
- b. a description of work and other actions taken to construct structural controls and/or implement other controls in the previous three (3) month period;
- c. inspection reports from quarterly inspections; and
- d. copies of all relevant documentation regarding the activities described pursuant to subparagraphs (a) and (b).

76. *Completion Report.* Once the work identified in the 60-day report, or the Compliance Plan, if required, has been completed, Respondent shall submit a completion report to the EPA and KDHE, which shall include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete (hereinafter the "Completion Report"). The Completion Report must be submitted within thirty (30) days after work has been completed and is subject to EPA approval.

#### Submittals

77. All submittals to EPA that are required of Respondent by this Order shall, where possible, be made by electronic submission to:

Caitlin Dix  
U.S. Environmental Protection Agency – Region 7  
*dix.caitlin@epa.gov*  
11201 Renner Boulevard  
Lenexa, KS 66219

78. All documents required to be submitted to KDHE pursuant to this Order shall be submitted by electronic mail to:

Tom Stiles  
Kansas Department of Health and the Environment  
*tom.stiles@ks.gov*

Shelly Shores-Miller  
Kansas Department of Health and the Environment  
*shelly.shores-miller@ks.gov*

79. Electronic submissions to the EPA will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically shall be submitted in hard copy to the mailing addresses provided above.

80. All submissions to the EPA pursuant to the requirements of this Order shall contain the following certification signed by an authorized official, as described in 40 CFR 122.22:

*I certify that Herzog Contracting Corp. has complied with all the applicable requirements of the Order for Compliance. I also 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 on 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.*

### **General Provisions**

#### **Effect of Compliance with the Terms of this Order for Compliance**

81. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

82. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d), or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

83. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state, and/or federal permits.

*Access and Requests for Information*

84. Nothing in this Order shall limit the EPA's right to obtain access to and/or to inspect the facility and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, and/or any other authority.

*Severability*

85. If any provision or authority of the Order or the application of the Order to Respondent is held by federal judicial authority to be invalid, the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

*Effective Date*

86. This Order shall be effective upon signature by the EPA. Any amendments shall become effective and enforceable on the date that the amendment is signed by all parties. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from the effective date.

### Modification

87. The EPA may subsequently amend this Order, upon written agreement with Respondent, in accordance with the EPA's authority under the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by the original Order. All deadlines for performance under this Order may be extended upon written approval by EPA, at its sole discretion, without formal amendment to the Order.

### Termination

88. This Order shall remain in effect until EPA approves, in writing, Respondent's Completion Report.

### Signatories

89. The undersigned for each party has the authority to bind each respective party to the terms and conditions of this Order. This Order may be signed in part and counterpart by each party.

### Electronic Service

90. Respondent consents to receiving the filed Administrative Order on Consent electronically at the following email address: [kphillips@herzog.com](mailto:kphillips@herzog.com).

**For Respondent, Herzog Contracting Corp.:**

Signature: *Kyle Phillips*

Date: 01.30.24

Name: Kyle Phillips

Title: Senior Vice President

**For Complainant, the U.S. Environmental Protection Agency, Region 7:**

**DAVID COZAD** Digitally signed by DAVID COZAD  
Date: 2024.02.12 15:27:19 -06'00'

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David Cozad  
Director  
Enforcement and Compliance Assurance Division

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Date

**KATHERINE KACSUR** Digitally signed by KATHERINE  
KACSUR  
Date: 2024.02.13 08:13:03 -06'00'

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Katherine Kacsur  
Attorney-Advisor  
Office of Regional Counsel

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Date



**Certificate of Service**

I certify that on the date noted below I delivered a true and correct copy of this Administrative Order on Consent by electronic mail, to:

Regional Hearing Clerk:

U.S. Environmental Protection Agency Region 7  
*R7\_Hearing\_Clerk\_Filings@epa.gov*

For Complainant:

Katherine Kacsur  
Office of Regional Counsel  
U.S. Environmental Protection Agency Region 7  
*kacsur.katherine@epa.gov*

Caitlin Dix  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency Region 7  
*dix.caitlin@epa.gov*

For Respondent:

Kyle Phillips, Senior Vice President  
Herzog Contracting Corp.  
600 S Riverside Road  
St. Joseph, MO 64507  
*kphillips@herzog.com*

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature