



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

OCT 16 2015

REPLY TO THE ATTENTION OF:

WW-16J

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

Mr. Gary Alkire  
Rosebud Mining Company  
301 S. Market Street  
Kittanning, Pennsylvania 16201

Re: In the Matter of Rosebud Mining Company  
Administrative Compliance Order on Consent: Docket No. **CWA-05-2016-0002**

Dear Mr. Turner:

Enclosed please find a copy of the signed Administrative Compliance Order on Consent (ACOC). Please ensure the actions described in paragraphs 22-31 under the Compliance Requirements subsection of the ACOC are carried out within the designated timeframes.

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Swenson".

Peter Swenson, Chief  
Watersheds and Wetlands Branch

Enclosures

Cc: Michael Fodse, Army Corps of Engineers, Pittsburgh District (via email)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5



IN THE MATTER OF:

Rosebud Mining Company  
301 S. Market Street  
Kittanning, Pennsylvania 16201

Respondent.

DOCKET NO. CWA-05-2016-0002

PROCEEDING UNDER CWA-05-2016-0002  
SECTION 309(a) OF THE  
CLEAN WATER ACT,  
33 U.S.C. § 1319(a).

**ADMINISTRATIVE COMPLIANCE ORDER ON CONSENT**

The United States Environmental Protection Agency (EPA) issues this Administrative Compliance Order to Rosebud Mining Company (Respondent) under authority of 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 the EPA, Region 5, who has duly redelegated this authority to the undersigned Director, Water Division, Region 5, EPA.

**REGULATORY BASIS**

1. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), states that: "Whenever, on the basis of any information available . . . the Administrator finds that any person is in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), the Administrator shall issue an order requiring such person to comply with such section . . . ."
2. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states: "Except as in compliance with [Section 404 of the CWA], the discharge of any pollutant by any person shall be unlawful."
3. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states: "The Secretary [of the Army] may issue permits. . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

4. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source. . . ."
5. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines a "pollutant" as "dredged spoil, solid waste . . . biological materials . . . rock, sand, cellar dirt . . . and agricultural waste discharged into water."
6. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as "the waters of the United States."
7. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] discrete fissure . . . from which pollutants are or may be discharged."

#### **GENERAL FINDINGS**

8. The Respondent in this action is:  
Rosebud Mining Company  
301 S. Market Street  
Kittanning, Pennsylvania 16201
9. The Respondent is a corporation organized under the laws of the State of Pennsylvania.
10. The property subject to this Order is a 196.2 acre parcel on County Road 53 in Sections 34 and 35 in Ross Township, and Sections 4 and 5 in Springfield Township, Jefferson County, Ohio (the Site). The Site contains several small streams and wetlands, including Streams #1 and #2, that drain into Yellow Creek. Rosebud Mining has a long-term lease on the Site.
11. Yellow Creek flows to the Ohio River, a traditional navigable water. Traditional navigable waters include waters designated by the U.S. Army Corps of Engineers as Section 10

waters under the Rivers and Harbors Act. The U.S. Army Corps of Engineers designated the Ohio River as a Section 10 water [Public Notice 00-54 dated October 3, 2000, Pittsburgh District].

12. Based upon the physical habitat and macroinvertebrate assessment conducted at the Site, both Stream #1 and Stream #2 are intermittent streams and have a significant nexus to the Ohio River.

13. Streams #1 and #2, which were filled and/or disturbed by the activities referenced in paragraph 14 below, are "waters of the United States" and therefore "navigable waters" as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

14. On September 20, 2010, the Respondent, while exploring the Site to determine its suitability for mining, cleared shrubs, tree litter, small trees and soil to level a path for a drill, using a D-7 bulldozer. The clearing resulted in the placement of fill material in approximately 20 linear feet of Stream #1 and 30 linear feet of Stream #2. The Respondent also placed a culvert in Stream #1 using a rubber-tired backhoe.

15. At all times relevant to this Order, Respondent has been a "person" within the meaning of the definition set forth in section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16. The machinery referenced in paragraph 14 constitute "point sources" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. The fill material referenced in paragraph 14 constitutes "pollutants" within the meaning of the definitions set forth in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

18. The addition of fill material in the streams referenced in paragraph 14 constitutes a "discharge of pollutants" within the meaning of the definition set forth in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

19. At no time from the first date of the activities described in paragraph 14 above until the date of this Order did the Respondent have a permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants referenced in paragraph 18.

20. Each discharge of pollutants into navigable waters without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

21. Each day the discharged material remains in the stream without the required permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of Section 301 of the CWA, 33 U.S.C. § 1311.

#### **COMPLIANCE REQUIREMENTS**

**BASED ON THE FOREGOING FINDINGS**, and pursuant to the authority under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), duly delegated to the undersigned, **IT IS HEREBY ORDERED:**

22. The Respondent shall refrain from further discharges of pollutants into waters on the Site, except in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, and the CWA, 33 U.S.C. §§ 1251-1387.

23. Within thirty (30) calendar days of the effective date of this Order on Consent, the Respondent must submit to EPA for approval a Restoration Plan to restore the streams identified in paragraphs 10 and 12 of this Order. EPA will approve the Restoration Plan or provide conditions for approval of the plan as provided in paragraph 25.

24. The Restoration Plan must be consistent with the general guidelines attached as Exhibit 1.

25. After review of the Restoration Plan that is required to be submitted pursuant to this Order, EPA shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

26. If the submission is approved pursuant to paragraph 25, Respondent shall take all actions mandated by the plan in accordance with the schedules and requirements of the Restoration Plan as approved. If the submission is conditionally approved or approved only in part, pursuant to paragraph 25, Respondent shall, upon written direction of EPA, take all actions required by the approved Restoration Plan that EPA determines is technically severable from any disapproved portions.

27. If the submission is disapproved in whole or in part pursuant to paragraph 25, Respondent shall, within fifteen (15) days or a longer time frame as specified in writing by EPA, correct all deficiencies in accordance with EPA's reasonable directions and resubmit the Restoration Plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding paragraphs. If the resubmission is approved in whole or in part, Respondent shall proceed in accordance with the preceding paragraph.

28. The requirements of the approved or modified Restoration Plan shall be incorporated into the requirements of this Order. Respondent must complete implementation of the Restoration Plan no later than four months after receipt of written approval of the Restoration Plan from EPA.

29. Within thirty (30) days of completing restoration activities, Respondent must submit to EPA a written Completion Report and certification that the company has restored Stream #1 and Stream #2 in accordance with the approved Restoration Plan. The Completion Report must

include: 1) before and after photographs of the stream channels at the Site; 2) a Site plan which shows the post-restoration physical conditions of the two streams; 3) a timeline of restoration activities; 4) a description of restoration activities and identification of any problems encountered during implementation; and 5) any additional information as specified by the Restoration Plan.

30. Respondent shall certify submissions provided under paragraphs 23 and 29 of this Order as true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

31. This Order, once signed by the Respondent under authorized signature, and all other submissions under this Order, should be sent to the following address:

Kerryann Weaver, Enforcement Officer  
U.S. Environmental Protection Agency (WW-16J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

#### **GENERAL PROVISIONS**

32. EPA does not waive any rights to use the information requested herein in an administrative, civil, or criminal action.

33. Neither the issuance of this Order by EPA nor compliance with its terms affects Respondent's ongoing obligation to comply with the CWA or any other federal, state, or local law or regulation, nor does it preclude further enforcement action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, for the violations cited herein.

34. EPA reserves all rights and remedies, legal and equitable, available to address any violation cited in this Order, any other violation of the CWA, and to enforce this Order.

35. Failure to comply with the terms of this Section 309(a) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should the EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if, after notice and opportunity for a hearing, the court determines that you have violated the Act and failed to comply with the terms of the Order. The court has the authority to impose separate civil penalties for violation of the Act as well as for violation of this Order.

36. Respondent admits the jurisdictional allegations in this Order.

37. Respondent waives 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, including any right of judicial review under Chapter 7 of the Administrative Procedures Act, 5 U.S.C. § 701-706.

38. Respondent agrees to the terms of this Order.

39. The terms of this Order bind Respondent, its successor and assigns.

40. Each person signing this Order certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

41. Each party agrees to bear its own costs and attorney's fees in this action.

42. This Order, along with its incorporated Exhibit, constitutes the entire agreement between the parties.

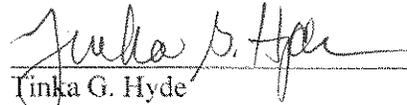
43. This Order is effective on the date of signature by the Director of the Water Division.

Date: 10/2/15



Mr. Gary Alkire  
Representing Rosebud Mining Company

Date: 10/15/15



Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection Agency  
Region 5

**EXHIBIT 1**

**GENERAL GUIDELINES FOR REMOVAL AND RESTORATION PLANS: STREAMS**

The following guidelines serve as general specification for preparing removal and restoration plans to remediate the unpermitted filling of streams. As environmental conditions vary at every site, precise specifications defining the scope and complexity of the restoration plan will depend upon the length and area of stream to be restored, its biological and physical characteristics, and the level of disturbance the stream has experienced among others. In most cases, the types of information listed below represent the minimum required to formulate an acceptable removal and restoration plan.

**I. Existing Physical Conditions**

- A. A surveyed site plan depicting property boundaries, and site features, including roads, ditches, culverts, tile systems, waterbodies (including streams and wetlands) and areas of unpermitted filling, excavation, or alteration of streams. Spot elevations are required at representative locations to discern normal undisturbed grades from fill elevations. The plan scale should be no greater than 1 inch = 40 feet.

**II. Proposed Physical Conditions**

- A. Using the site plan described in I.A. as a base, show the exact areas where remedial activities will occur (e.g., removal of fill from channel, replace dredge material into ditches/new channels, etc.). Provide drawings for post-restoration stream patterns, profiles and dimensions, cross-sectional views at regular intervals, any instream structures (e.g. riffle structures, bank stabilization features, etc) and the location of all erosion control features and BMPs used (e.g., silt fencing).
- B. Provide a narrative description of the remedial work to occur, including the methods and equipment to be employed; routes for equipment access; the location of the disposal site for any removed fill; the source of any dredged or fill material to be placed in waterbodies; how the work will progress across the site; and planting specifications (i.e., temporary stockpiling of fill removed, erosion control phasing, re-vegetation of stream riparian zone).
- C. Prior to the commencement of removal work, the construction work area must be defined. Delineate the site restoration areas by installation of flagging, erosion control structures, or other appropriate method; this delineation shall represent the limit of construction activities such that **no** work shall occur beyond these boundaries.

**III. As-Built Physical Conditions**

- A. Using the site plan described in I.A. as a base, show the actual physical conditions at the site at the completion of fill removal activities (i.e., an "as-built" plan),

including stream profile measurements and all pertinent ground surface and subsurface features. This as-built plan shall be prepared and submitted prior to planting/seeding activities are conducted in riparian areas. Describe any variances from the proposed physical conditions and the justification for them.

#### **IV. Monitoring/Measures of Success**

- A. Monitoring plans are required for a minimum of five years – longer for reforestation of stream riparian zones. Monitoring commences after the completion of all earth moving activities and annually for the duration of the required monitoring period. Monitoring frequency can be adjusted based on the complexity of the remedial efforts required and the recovery rate shown by the site.
- B. A monitoring plan shall incorporate a simple statistical approach to assessing measures of site restoration success for streams (e.g., stable channel which facilitates the passage of flood flows and low flows, channel length meets length proposed in plan, suitable sinuosity, etc). A permanent photographic record shall be included as part of the monitoring plan.
- C. Depending upon the scope and complexity of the restoration efforts, general criteria to measure success (i.e., performance standards) shall be determined by USEPA. The criteria defining success and its measurement shall be directly related to reestablishing the structural components of the aquatic ecosystem being restored. Commonly, performance standards are related to stream profile and dimension, establishment of instream structures, riparian buffer establishment, and support of aquatic life. A general provision shall be included to allow for corrective action to be taken, at the direction of USEPA, should monitoring show that criteria for success are not met.
- D. A report shall be prepared and submitted after each monitoring event(s) which describes the environmental conditions at the site and assesses relative success or failure of restoration efforts. This report shall include permanent and repeatable photographic stations that represent the site. As appropriate, this report may recommend corrective action to ensure the success of restoration.

#### **V. Inspections**

- A. The plan shall provide for inspection by USEPA personnel or their designated representative prior to, during or after the completion of earthmoving activity and prior to seeding/planting, after installation of erosion control structures, after planting, and during the monitoring period.

**VI. Schedule**

- A. A comprehensive schedule integrating all removal, restoration, inspection, and monitoring activities as well as report/product submissions shall be included.

CERTIFICATE OF SERVICE

I, Kerryann Weaver, hereby certify that an original of the Consent Agreement and Final Order  
( **CWA-05-2016-0002** ) was filed with the Regional Hearing Clerk on 10/16/15, and that a  
copy was served by United States Mail, Certified and Postage Prepaid, on the 10/16/15,  
upon the following:

Rosebud Mining Company  
301 S. Market Street  
Kittanning, Pennsylvania 16201

  
Kerryann Weaver  
U.S. Environmental Protection  
Agency - Region 5 (WW-16J)  
77 W. Jackson Blvd.  
Chicago, IL 60604