



6. The term “industrial activity” includes, among others, “construction activity including clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area. Construction activity also includes the disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more. . . .” 40 C.F.R. § 122.26(b)(14)(x).
7. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).
8. Owners and/or operators who discharge stormwater associated with construction activities to waters of the United States must comply with an NPDES permit.

**II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

9. At all times relevant to the allegations described in this Order, Kokosing Construction Company, Inc. (“Respondent”) was a corporation and as such was a “person” as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
10. At all times relevant to this Order, upon information and belief, Respondent was the “operator” of
  - a. A site known as “Corridor H - Section 1” (referred to as “H1 Site” in this Order), located along a section of land between Kerens, West Virginia and Parsons, West Virginia; and
  - b. A site known as "Corridor H - Section 2" (referred to as “H2 Site” in this Order), located along a section of land between US Route 219 and WV Route 72,as the term “operator” is described in federal regulations at 40 C.F.R. §§ 122.2. (Collectively, the H1 Site and H2 Site will be referred to as the “Sites”.)
11. At all times relevant to this Order, Respondent has been at engaged in “construction activity” at the Sites that “discharges” “stormwater” from “point sources” to the Ohio River Watershed, as those terms are described in federal regulations at 40 C.F.R. §§ 122.2 and 122.26. The construction activity at the Sites has disturbed or will disturb approximately 790 acres of land.
12. Storm water from the Sites discharges into the following streams that are identified as “Waters of the US” by EPA’s ArcGIS system:

Unnamed Tributaries of/and Panther Run  
Unnamed Tributaries of/and Laurel Run  
Unnamed Tributaries of/and Haddix Run  
Unnamed Tributaries of/and Fools Run  
Unnamed Tributaries of/and Lazy Run  
Unnamed Tributaries of/and Wilmoth Run

Unnamed Tributaries of/and Baldlick Fork

These tributaries flow into the Cheat River, then to the Monongahela River or directly into the Monongahela River, and then to the Ohio River. The Cheat River, the Monongahela River and the Ohio River are each traditionally navigable waters.

13. The Sites' approved Erosion and Sediment Control Plans describe the Sites as located in the Cheat River and Monongahela River Watersheds, which flow into the Ohio River. These water bodies are "waters of the United States" as that term is defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
14. EPA has authorized the West Virginia Department of Environmental Protection ("WVDEP") to administer the NPDES program in the state of West Virginia. WVDEP has EPA authorization to issue NPDES stormwater permits under Section 402(b) of the CWA, 33 U.S.C. § 1342(b).
15. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, WVDEP issued the General National Pollutant Discharge Elimination System, Water Pollution Control Permit, No. WV 0115924 ("Permit"), with an effective date of February 9, 2019, and an expiration date of February 9, 2024.
16. The Permit allows permittees to discharge stormwater associated with construction activities from the Sites, in compliance with the specified conditions and limitations in the Permit.
17. On April 15, 2020, Respondent submitted a Permit application for the construction of the H1 Site.
18. WVDEP approved Permit coverage for the H1 Site on November 6, 2020 (Permit No. WVR108594).
19. On August 18, 2020, Respondent submitted an application for the construction of the H2 Site.
20. WVDEP approved Permit coverage for the H2 Site on November 20, 2020 (Permit No. WVR110572).
21. WVDEP approved the initial Storm Water Pollution Prevention Plan ("SWPPP"), including the Erosion and Sediment Control Plan ("ESC Plan"), for the H1 Site on October 29, 2020.
22. WVDEP approved the ESC Plan, Modification No. 6, for the H1 Site on October 7, 2021.
23. WVDEP approved the initial SWPPP, including the ESC Plan (Construction Phase) for the H2 Site, on August 21, 2020.
24. Permit requirements that apply to all violations at the Sites are stated as follows:
  - Part I.B. of the Permit (Compliance Requirement), requires implementation of a Stormwater Pollution Prevention Plan ("SWPPP"). Part II.F. of the Permit (Installation

of Erosion and Sediment Controls), requires an Erosion and Sediment Control Plan to be implemented.

- The SWPPPs for the Sites contain ESC Plans for the Sites. The ESC Plans require controls (i.e., Best Management Practices (“BMPs”)) to be implemented.
  - Appendix B, I. of the General Permit (Operation and Maintenance), requires: “The permittee shall at all times properly operate and maintain all activities and BMPs which are installed or used by the permittee to achieve compliance with the terms and conditions of the permit.”
  - West Virginia’s “Erosion and Sediment Control Best Management Practice Manual” (2006), describes appropriate BMPs and includes, e.g., Pipe Slope Drains (Section 3.16), Silt Fences (Section 3.27), Water Bars (3.15, Temporary Diversion), Coir Curtains (Section 3.27).
25. On March 23, 2022, representatives of EPA, Region III conducted an inspection of the Sites (“Inspection”), where Respondent was conducting construction activities. Following this Inspection, the EPA representatives prepared an inspection report with attachments, dated May 5, 2022 (“Inspection Report”).
26. During the Inspection, the EPA representative observed the following conditions, which were subsequently identified as violations:

**COUNT 1 - PIPE SLOPE DRAINS**

27. Sheet 7.2 of the H1 Site ESC Plan, Modification 6, identifies a portion of the Site where "Pipe Slope Drains" must be installed.
28. Sheet 5.14 of the H1 Site ESC Plan (Construction Phase), Appendix H of the H1 Site SWPPP, provides the design specifications for installing Pipe Slope Drains at the H1 Site. Pipe slope drains are included as specified BMPs in West Virginia’s Erosion and Sediment Control Best Management Practice Manual (2006) (Section 3.16), and are generally used when a temporary or permanent stormwater conveyance is needed to move the water down a steep slope to avoid erosion.
29. Sheet 7.13 of H2 Site ESC Plan, Modification 1 (Construction Phase), identifies a portion of the Site where Pipe Slope Drains must be installed.
30. Sheet 6.18 of the H2 Site ESC Plan (Construction Phase), Appendix H of the H2 Site SWPPP provides the design specifications for installing Pipe Slope Drains at the H2 Site.
28. Observation 1 of Inspection Report, addressing the H1 Site, indicates that several Pipe Slope Drains did not have inlet and/or outlet protection, such as crushed stone or filter sock. Visual evidence is provided in Photos DSCN3163; DSCN3186; DSCN3189; DSCN3190 of Attachment E.1 – H1 Site Photo Log of the Inspection Report.

29. Observation 1 of Inspection Report, addressing the H2 Site, indicates that several Pipe Slope Drains did not have inlet and/or outlet protection, such as crushed stone or filter sock. Visual evidence is provided in Photos DSCN3210-DSCN3212, DSCN3226, DSCN3232 of Attachment E.2 – H2 Site Photo Log
30. Respondent failed to comply with Part I.B. of the Permit (Compliance Requirement) and Appendix B. of the Permit (Operation and Maintenance) at the H1 Site by not maintaining Pipe Slope Drains in accordance with the specifications on Sheet 5.14 of the ESC Plan (Construction Phase), Appendix H of the H1 Site SWPPP.
31. Respondent also failed to comply with Part I.B. of the Permit (Compliance Requirement) and Appendix B of the Permit (Operation and Maintenance) at the H2 Site by not maintaining Pipe Slope Drains in accordance with the specifications on Sheet 6.18 of the H2 ESC Plan (Construction Phase), Appendix H of the H2 Site SWPPP.

### **COUNT 2 - FENCING**

32. Sheets 7.1 and 7.2 of H1 Site ESC Plan, Modification 6, identify a portion of the H1 Site where "Smart Fence" must be installed.
33. Sheets 5.3 and 5.4 of the H1 Site ESC Plan (Construction Phase), Appendix H of the SWPPP, provide the detailed specifications for installing Smart Fence. "Smart Fence" is a type of filter fence. Filter fence is a BMP designed to prevent sediment entrained in sheet flow from migrating to surface waters. The design specifications for fencing controls require the fencing to be upright, incorporated into the ground, and for the fabric to not be torn.
34. Sheet 6.11 of H1 Site ESC Plan, Modification 6, provides the specifications for installing "Simplified Diversion Fence". Diversion fence is a BMP that can be used to direct stormwater runoff that is not associated with construction activity, away from or around disturbed soil surfaces in order to prevent erosion.
35. Sheet 7.10 of H2 Site ESC Plan, Modification 1 (Construction Phase), identifies a portion of the H2 Site where Smart Fence must be installed.
36. Sheet 6.21 of the H2 Site ESC Plan (Construction Phase), Attachment H of the SWPPP, provides the detailed specifications for installing Smart Fence.
37. Observation 2 of Inspection Report addressing the H1 Site indicates that fencing controls at multiple locations at the H1 Site were not being maintained. The fencing was torn and / or collapsing, as shown in Photos DSCN3165, DSCN3166, DSCN3168 through DSCN3173, DSCN76 &77, DSCN3180 and DSCN3183 of Attachment E.1 – H1 Site Photo Log of the Inspection Report.
38. Observation 2 of Inspection Report addressing the H2 Site indicates that fencing controls at multiple locations at the H2 Site were not being maintained. The fencing was torn and / or collapsing, as shown in Photo DSCN3193 Attachment E.2 – H2 Site Photo Log of the Inspection Report.

39. Respondent failed to comply with Part I.B. of the Permit (Compliance Requirement) and Appendix B. of the Permit (Operation and Maintenance) at the H1 Site by not maintaining Fencing Controls in accordance with the specifications on Sheets 5.3 and 5.4 of the H1 Site ESC Plan (Construction Phase), Appendix H of the SWPPP.
40. Respondent also failed to comply with Part I.B. of the Permit (Compliance Requirement) and Appendix B. of the Permit (Operation and Maintenance) at the H2 Site by not maintaining Fencing Controls in accordance with the specifications on Sheet 6.21 of the H2 Site ESC Plan, Attachment H of the SWPPP.

### **COUNT 3 - WATER BARS**

41. Sheet 7.13 of the H2 Site ESC Plan, Modification 1 (Construction Phase) identifies a portion of the H2 Site where "Water Bars" must be installed.
42. Sheet 6.23 of the H2 Site ESC Plan (Construction Phase), Attachment H of the SWPPP provides the design specifications for Water Bars. The design specifications for water bars require the bars to be constructed across slopes and along access roads for intercepting surface runoff and consist of a combination of a shallow ditch and small berm with the purpose of diverting the runoff to an additional BMP, such as Pipe Slope Drains.
43. Observation 3 of the Inspection Report for the Sites identified Water Bars in need of maintenance at the H2 Site. Water bars observed did not cross the entire access road as required by the Permit, and/or were structurally damaged and flattened by heavy equipment and road traffic. The Visual evidence of the noncompliance is provided in Photos DSCN3225, DSCN3226 DSCN3230 and DSCN3231 of Attachment E.2 – H2 Site Photo Log of of the Inspection Report.
44. Respondent failed to comply with its Permit by not maintaining Water Bars at the H2 Site in accordance with the specifications on Sheet 6.23 of the H2 Site ESC Plan (Construction Phase), Attachment H of the SWPPP.

### **COUNT 4 - COIR CURTAINS**

45. Sheet 7.35 of the H2 Site ESC Plan, Modification 2, (Clearing Phase) identifies a portion of the Site where "Coir Curtains" must be installed.
46. Sheet 6.12 of the H2 Site ESC Plan (Construction Phase), Attachment H of the SWPPP provides design specifications for Coir Curtains.
47. In Observation 4 of the Inspection Report addressing the H2 Site, the photographs identify that Coir Curtains were not being maintained at the H2 Site. At the time of the Inspection, as the curtains were collapsed. The visual evidence of the noncompliance is provided in Photos DSCN3242 and DSCN3243 of Attachment E.2 – H2 Site Photo Log of the Inspection Report.

48. Respondent failed to comply with its Permit by not maintaining Coir Curtains at the H2 Site in accordance with the specifications on Sheet 6.12 of the H2 Site ESC Plan (Construction Phase), Attachment H of the SWPPP.

### **CONCLUSION**

49. By violating the conditions of the Permit, as described in Counts 1 through 4, above, Respondent is in violation of Section 402 of the CWA, 33 U.S.C. § 1342.

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

AND NOW, pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), EPA hereby ORDERS Respondent to do the following:

50. Within **five (5) days** after receipt of this Order, Respondent shall respond to EPA by taking one of the following actions:
- a. If Respondent agrees to comply with the requirements in Paragraph 51, below, please notify EPA by email that the Respondent will comply with the terms of the Order; or
  - b. If Respondent requests to discuss the Order with EPA, Respondent may request a conference (or “Opportunity to Confer”). At the conference, the Respondent may present evidence bearing on the finding of violation, on the nature of the violation, on conclusions reflected in this Order, and on any efforts it may have taken or it proposes to take to achieve compliance. Any such conference can be by telephone or by other electronic means. The conference will be expected to occur within **ten (10) days** after receipt of this Order. To request a conference, Respondent must contact Chuck Schadel at (215) 814-5761, unless Respondent is represented by counsel. If represented by counsel, Respondent’s attorney must contact Natalie Katz, Senior Assistant Regional Counsel, at (215) 814-2615, to request a conference.
51. Within **fourteen (14) days** after the effective date of this Order, Respondent shall comply with all the terms and conditions of the Permit, including ensuring all site BMPs are properly maintained and adhering to the limits of disturbance in the Permit. To verify work has been completed, Respondent shall submit to EPA documentation of all activities it completed to comply with the Permit and correct items listed in Paragraphs 27 - 48. Documentation can include citing information provided to EPA previously in response to the inspection report, an inspection (conducted by an official party such as the county or state) documenting that the site is in compliance, or a description & photographs of activities conducted to achieve compliance. Along with this documentation, Respondent shall submit the following certification, which shall be signed by a responsible corporate officer, as defined in 40 C.F.R. § 122.22:

“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 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.”

52. Respondent shall take all actions necessary to correct the violations identified in this Order within the time period specified. However, if conditions are present that hinder Respondent’s efforts to timely address all the violations, Respondent may request an extension from EPA. The Respondent shall address all violations that do not require an extension within the time period specified. Respondent must submit a request for an extension to EPA as soon as the Respondent anticipates that a delay is likely, but no later than the deadline identified in this Order. The request shall include an explanation of why Respondent believes an extension is necessary and a proposed new deadline for correcting the remaining violations.
53. Respondent shall send all submissions to EPA, by electronic mail, to Chuck Schadel, U.S. EPA, Region III, 3ED32 at [schadel.chuck@epa.gov](mailto:schadel.chuck@epa.gov).

#### **IV. GENERAL PROVISIONS**

54. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. Further, EPA reserves any rights and remedies available to it under the CWA, the CWA regulations promulgated, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this Order. Issuance of this Order shall not be deemed an election by EPA to forego any administrative, civil, or criminal action to seek penalties, fines, or any other appropriate relief under the CWA for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited above. If EPA initiates such an action, Respondent will be subject to civil penalties of up to \$25,000 per day of violation, adjusted upward for inflation, pursuant to 33 U.S.C. § 1319 and the most recent Adjustment of Civil Monetary Penalties for Inflation, set forth at 40 C.F.R. Part 19.
55. Violation of the terms and conditions of this Order constitutes an additional violation of the CWA and may result in a civil action for injunctive relief and/or a penalty not to exceed \$25,000 per day of violation, adjusted upward for inflation, pursuant to 33 U.S.C. § 1319(b) and (d), and the most recent Adjustment of Civil Monetary Penalties for Inflation, set forth at 40 C.F.R. Part 19. In addition, Section 309 provides criminal sanctions for knowing or negligent violations of the CWA including imprisonment and fines of up to \$50,000 per day of violation.
56. EPA reserves all existing inspection authority otherwise available to EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.
57. This Order does not constitute a waiver or modification of the terms or conditions of any NPDES permit. Compliance with the terms and conditions of this Order does not relieve the

Respondent of its obligations to comply with any applicable Federal, state, or local law or regulation or any NPDES permit.

58. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 162-21(b)(2), performance of the tasks set forth in Paragraphs 50 through 53 of this Order, above, is deemed restitution, remediation, or required to come into compliance with the law.

#### **V. JUDICIAL REVIEW**

59. Respondent may seek federal judicial review of this Compliance Order, issued under Section 309 of the CWA, 33 U.S.C. § 1319, pursuant to the Administrative Procedure Act, 5 U.S.C. § 702.

#### **VI. EFFECTIVE DATE**

60. This ORDER is effective five days after receipt of the Order, or, if the Opportunity to Confer occurs as identified in Paragraph 50.b., above, upon five days of the date of the Opportunity to Confer.

#### **VII. TERMINATION**

61. Once Respondent has complied with the requirements of this Order and has documented such compliance as required by Paragraph 51, EPA shall provide Respondent with written notification of termination of this Order. EPA reserves the right to unilaterally terminate this Order in its unreviewable discretion.

KAREN  
MELVIN

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KAREN MELVIN  
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*[Digital Signature and Date]*

Karen Melvin, Director  
Enforcement and Compliance Assurance Division  
EPA, Region III

