

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

|                                   |   |   |
|-----------------------------------|---|---|
| In the Matter of:                 | : | ADMINISTRATIVE ORDER FOR<br>COMPLIANCE ON CONSENT |
| LPG Land & Dev. Corp.             | : |   |
| Mr. Paul Panson, Registered Agent | : | Docket No. CWA-03-2018-0076DN                     |
| 629 Fairchance Road               | : |   |
| P.O. Box 18034                    | : |   |
| Morgantown, West Virginia 26507,  | : |   |
| Respondent                        | : |   |
| Property located at               | : |   |
| Heavy Haul Road                   | : |   |
| Off of Fairchance Road (CR 857)   | : |   |
| Coordinates 39.6869, -79.8371     | : |   |
| Monongalia County, West Virginia  | : |   |

**I. STATUTORY AUTHORITY**

1. This Administrative Order for Compliance on Consent ("AOC") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (hereinafter "EPA") under Section 309(a) of the Clean Water Act ("CWA" or "the Act"), 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 this authority to the Director of the Water Protection Division of Region III ("Complainant").

**II. STATUTORY AND REGULATORY BACKGROUND**

2. 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 pursuant to the National Pollutant Discharge Elimination System ("NPDES") program under Section 402 of the Act, 33 U.S.C. § 1342.
3. Section 402 of the Act, 33 U.S.C. § 1342, provides that the Administrator of EPA may

- issue NPDES permits for the discharge of pollutants from point sources to waters of the United States, or may authorize states to issue such permits. The discharges are subject to specific terms and conditions as prescribed in the permit. The West Virginia Department of Environmental Protection (“WVDEP”) is authorized to issue NPDES permits for discharges within the geographic boundaries of West Virginia.
4. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.1 and 122.26 provide that facilities with storm water discharges associated with industrial activity are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).
  5. The term “industrial activity” includes, among others, construction activity. 40 C.F.R. 122.26(b)(14)(x). The regulations define “construction activity” as: “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.” *Id.*
  6. The term “industrial activity” also includes, among other things and under most circumstances, “small construction activity.” 40 C.F.R. § 122.26(b)(15)(i). The regulations define “small construction activity” as: “Construction activity including clearing, grading, and excavating that results in land disturbance of equal to or greater than one acre and less than five acres....” *Id.*
  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 storm water associated with construction activities to waters of the United States must do so only in compliance with a NPDES permit.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

9. LPG Land and Development Corporation (“Respondent” or “LPG”) neither admits nor denies the Findings of Fact and Conclusions of Law set forth herein. Respondent does not contest EPA’s authority to issue this Administrative Order for Compliance on Consent (“AOC”). Respondent admits that EPA has jurisdiction to issue this AOC.
10. Respondent is a person within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
11. At all times relevant to this AOC, Respondent has owned and/or operated the property located at the following coordinates: 39.6869, -79.8371 in Monongalia County, West

Virginia, that includes but is not limited to the Mon Fayette Industrial Park, and is depicted on Attachment 1 ("Site").

12. From at least 2011 to the present, Respondent and/or persons acting on behalf of Respondent, operated equipment which cleared, graded, and excavated approximately 18 acres at the Site, resulting in discharges of storm water associated with construction activities to Coles Run and unnamed tributaries to Coles Run. Coles Run and its tributaries are "waters of the United States" within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. 1362(7).
13. Prior to May 18, 2012, Respondent did not have an NPDES permit authorizing discharges of storm water associated with construction activity or small construction activity from the Site.
14. On May 18, 2012, WVDEP issued NPDES Permit No. WV0116599 to Respondent for discharges associated with construction activity or small construction activity from the Site.
15. During an inspection of the Site on May 11, 2016, EPA representatives observed an unstabilized, nearly 90-degree vertical cut into a hillside along the northwest boundary of the Site, depicted on Attachment 2 ("vertical cut"). The vertical cut was created by the clearing, grading, and/or excavating activities conducted by or on behalf of Respondent and described in Paragraph 12.
16. Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a) by discharging storm water associated with construction activity from the vertical cut at the Site to the "waters of the United States" without authorization and/or in violation of NPDES Permit No. WV0116599.

#### **IV. ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2018, Respondent is hereby ORDERED, pursuant to Section 309(a) of the Act, 33 U.S.C. § 1319(a), and Respondent does hereby consent to perform the following actions:

17. Within thirty (30) days of the effective date of this AOC, submit to EPA for approval a plan to stabilize the vertical cut along the northwest boundary of the Site described in Paragraph 13 ("vertical cut plan" or "plan"). Such vertical cut plan shall (1) be prepared by a professional engineer; (2) include measures to prevent further erosion from the vertical cut and to ensure that the vertical cut area is stabilized so as to prevent landslides or slips; (3) include provisions to ensure the safety of any person present below or on top of the cut; (4) include a schedule for implementation; (5) utilize only native West Virginia species for planting and avoiding invasive plants identified at the following url: <http://www.wvdnr.gov/wildlife/Handout%20Invasive%20Plants%20of%20WV%202009.pdf>; (6) incorporate quantitative performance measures; and (7) include a post-restoration



monitoring plan for a period of five years following completion of the work to be performed.

18. After review of the vertical cut plan, EPA will: (a) approve the vertical cut plan in whole or in part; (b) approve the vertical cut plan upon specified conditions; (c) modify the vertical cut plan to cure any deficiencies; (d) disapprove the vertical cut plan, in whole or in part, or (e) any combination of the above. EPA may consult with WVDEP regarding its review of the vertical cut plan.
19. If EPA disapproves all or part of the vertical cut plan, Respondent shall, within fourteen (14) days of receipt of EPA's disapproval, correct the deficiencies and resubmit the vertical cut plan for approval. EPA retains the right, if the vertical cut plan is not approved as provided in this AOC, to order restoration in accordance with a plan developed by EPA.
20. Upon approval of the vertical cut plan (either with or without conditions or modifications by EPA), Respondent shall implement the vertical cut plan as approved or modified by EPA. All work shall be completed within the timeframe set out in the approved plan or, if the plan does not include a timeframe, within ninety (90) days of EPA's approval of the plan.
21. Respondent shall retain at Respondent's expense an independent third-party professional engineer to evaluate Respondent's implementation of the plan approved and/or prepared by EPA pursuant to Paragraphs 18-21. Within 60 days of Respondent's completion of implementation of all plans approved and/or prepared by EPA pursuant to Paragraphs 18-21, the independent third-party professional engineer shall certify to EPA that he/she has completed his/her evaluation and whether Respondent has fully and appropriately implemented the plan approved and/or prepared by EPA pursuant to Paragraphs 18-21. The independent third-party professional engineer may not provide a draft or any advance notice (written or verbal) to Respondent of his/her evaluation prior to its submission to EPA.
22. For purposes of this AOC, an independent third-party professional engineer means an individual who has been licensed by the West Virginia State Board of Registration for Professional Engineers. Such professional engineer will be considered an independent third-party if such professional engineer: (1) has not been employed by Respondent in the calendar year preceding the effective date of this AOC; and (2) did not develop or participate in the development of any plan required by this AOC. Respondent agrees that Respondent will not employ directly or consult with the independent third-party professional engineer for a period of at least five years following the effective date of this AOC.

**V. GENERAL PROVISIONS**

23. Communications with and submissions to EPA pursuant to this AOC shall be sent to:
- Aryel Abramovitz  
US EPA, Region III  
Water Protection Division  
NPDES Enforcement Branch  
1650 Arch Street (3WP42)  
Phone: 215-814-2396  
Email: Abramovitz.aryel@epa.gov
24. EPA reserves all authorities available to it in the event that the certifications submitted by the independent third-party professional engineer pursuant to Paragraphs 22 and 23 indicate that the Respondent is not in full compliance with this AOC or EPA otherwise learns that Respondent is not in full compliance with this AOC.
25. The scope of this AOC is limited to ensuring that the vertical cut is stabilized in the near-term. EPA reserves the right to take additional administrative enforcement action or seek civil or criminal judicial relief regarding the vertical cut as well as other violations of the CWA, whether or not identified in this Order, by any person at the Site. This reservation of rights includes, but is not limited to, violations of the CWA associated with the construction and industrial activities described in Paragraph 12 of this Order.
26. Issuance of this AOC 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.
27. This AOC does not relieve the Respondent of its obligation to comply with all applicable provisions of federal, state or local law and ordinance. This AOC does not constitute a waiver, suspension or modification of the requirements of the CWA or of any issued permit.
28. Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondent may have with respect to any allegation of fact or law set forth in this AOC, including, but not limited to, any right of judicial review of an Order issued pursuant to Section 309 of the CWA under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.
29. 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.

30. The undersigned representative of Respondent certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this AOC, to execute the AOC, and to legally bind the party.
31. All of the terms and conditions of the AOC together compromise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this AOC, or one or more of its terms and conditions, is held invalid, or is not executed by all of the signatories in identical form, or is not approved in such identical form by the Regional Administrator or his designee, then the entire AOC shall be null and void.

**VI. JUDICIAL REVIEW**

32. Respondent hereby waives federal judicial review of this AOC, issued under Section 309 of the CWA, 33 U.S.C § 1319, pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706 states the scope of such review.

**VII. EFFECTIVE DATE**

33. This ORDER is effective upon receipt.

FOR RESPONDENT:

By:  \_\_\_\_\_

Date: \_\_\_\_\_

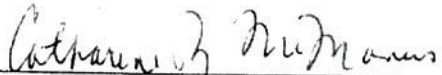
Name: Paul Panson

Title: President

*Matter of LPG Land & Dev. Corp., Dkt. No. CWA-03-2018-0076DN*

SO ORDERED.

Date: 4/5/2018

  
Catharine McManus, Acting Director  
Water Protection Division  
EPA, Region III