January 12, 2023

West Virgina Division of Highways
Attn: Mike Daley, District 4, District Engineer
2460 Murphys Run Road
Bridgeport, WV 26330

Dear Mr. Daley:

Enclosed is revised CONSENT ORDER NUMBER 9989. This action is based upon the investigation and recommendation of the West Virginia Department of Environmental Protection’s (WVDEP) Environmental Enforcement unit in response to West Virginia Division of Highways violating WV State Code at the facility located near Pentress, Monongalia County, West Virginia. This revision is based upon your submittal of an approvable Plan of Corrective Action (POCA). This administrative settlement is being offered on behalf of the director of the Division of Water and Waste Management.

Please review, sign and return the original copy of the revised ORDER to me within five (5) working days of receipt. Subsequently, WVDEP will initiate the public notice process.

Enclosure
cc: Katheryn Emery, P.E., Director, DWWM (via e-mail)
Harold D. Ward, Cabinet Secretary, WVDEP (via e-mail)
Scott G. Mandirola, Deputy Secretary for External Affairs, WVDEP (via e-mail)
Yogesh Patel, Assistant Director, DWWM/Permits (via e-mail)
Brad Wright, Assistant Chief Inspector, EE/WW (via e-mail)
David C. Simmons, Assistant Chief Inspector, EE (via e-mail)
Laura McGee, Environmental Resources Program Manager, EE (via e-mail)
Cindy Blugerman, Environmental Resources Specialist, EE (via e-mail)
Amaris Elliott, Environmental Resources Associate, EE (via e-mail)
Tim Casto, Environmental Inspector Supervisor, EE/WW (via e-mail)
Travis Hays, Environmental Inspector, EE/WW (via e-mail)
Shyrel Moellendick, MSSS, EE (via e-mail)
Allison Gieda, US EPA, Region III (via e-mail)
INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management (hereinafter “Director”), under the authority of West Virginia Code 22-11-1 et seq. to West Virginia Division of Highways (hereinafter “WVDOH”).

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. WVDOH is conducting land disturbance activity near Pentress, Monongalia County, West Virginia. The activity covers approximately a one-half acre area where a culvert collapsed.

2. On May 15, 2020, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility in response to a complaint. During the inspection, WVDEP personnel noted that erosion control blankets were not properly installed, silt fence was not properly trenched-in, and compost filter sock was not properly J-hooked. In addition, violations of the following sections of West Virginia State Code and Legislative Rules were observed and documented:

   a. 47CSR2 Section 3.2.b.-WVDOH caused conditions not allowable in waters of the State by creating sediment deposits on the bottom of Dunkard Creek
(39°42’24”N, 80°10’28”W). The sediment deposits resulted due to the aforementioned lack of properly installed erosion and sediment controls.

b. 22-11-8.b.(1)-WVDOH discharged pollutants from a land disturbance into Dunkard Creek (39°42’24”N, 80°10’28”W) without an authorized WV/NPDES permit.

As a result of the aforementioned violations, Notice of Violation (NOV) No. W20-31-036-TDH was issued to WVDOH.

3. On December 14, 2020, WVDEP personnel conducted an inspection of the facility. During the inspection, WVDEP personnel noted that perimeter erosion and sediment controls had been removed or were nonfunctional. In addition, violations of the following sections of West Virginia State Code and Legislative Rules were observed and documented:

   a. 47CSR2 Section 3.2.b.-WVDOH caused conditions not allowable in waters of the State by creating sediment deposits on the bottom of Dunkard Creek (39°42’24”N, 80°10’28”W). The sediment deposits resulted due to the aforementioned lack of properly installed erosion and sediment controls.
   
   b. 22-11-8.b.(1) -WVDOH discharged pollutants from a land disturbance into Dunkard Creek (39°42’24”N, 80°10’28”W) without an authorized WV/NPDES permit.

As a result of the aforementioned violations, NOV No. W20-31-090-TDH was issued to WVDOH.

4. On April 13, 2021, WVDEP personnel conducted an inspection of the facility. During the inspection, WVDEP personnel noted that perimeter erosion and sediment controls had been removed or were nonfunctional, and there was equipment in the stream. In addition, violations of the following sections of West Virginia State Code and Legislative Rules were observed and documented:

   a. 47CSR2 Sections 3.2.a and 3.2.b.-WVDOH caused conditions not allowable in waters of the State by creating distinctly visible settleable solids and sediment deposits on the bottom of Dunkard Creek (39°42’24”N, 80°10’28”W).
   
   b. 22-11-8.b.(1) -WVDOH discharged pollutants from a land disturbance into Dunkard Creek (39°42’24”N, 80°10’28”W) without an authorized WV/NPDES permit.

As a result of the aforementioned violations, NOV No. W21-31-034-TDH was issued to WVDOH.

5. On July 29, 2021, WVDOH submitted a plan of corrective action (POCA) that outlined action items and completion dates for how and when WVDOH would achieve compliance with all laws and rules. Subsequently, WVDEP personnel observed and documented that there were no continuing violations at the site. In consideration that WVDOH achieved and maintained compliance, the proposed POCA was ultimately approved by WVDEP personnel.
ORDER FOR COMPLIANCE

Now, therefore, in accordance with West Virginia State Code 22-11-1 et seq., it is hereby agreed between the parties, and ORDERED by the Director:

1. WVDOH shall immediately take all measures to initiate compliance with all pertinent laws and rules.

2. Upon the effective date of this Order, the aforementioned POCA and schedule, submitted July 29, 2021, shall be incorporated into and become part of this Order. Failure to adhere to the approved schedule is a violation of this Order.

3. Because of WVDOH’s West Virginia Code and Legislative Rule violations, WVDOH shall be assessed a civil administrative penalty of five thousand four hundred thirty dollars ($5,430) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of the effective date of this Order. Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. Payment shall include a reference to the Order No. and shall be mailed to:

Chief Inspector  
Environmental Enforcement - Mail Code #031328  
WV-DEP  
601 57th Street SE  
Charleston, WV 25304

OTHER PROVISIONS

1. WVDOH hereby waives its right to appeal this Order under the provisions of West Virginia State Code 22-11-21. Under this Order, WVDOH agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director’s jurisdiction regarding this Order. However, WVDOH does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding WVDOH other than proceedings, administrative or civil, to enforce this Order.

2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.

3. If any event occurs which causes delay in the achievement of the requirements of this Order, WVDOH shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after
WVDOH becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and WVDOH shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which WVDOH intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of WVDOH (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.

4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving WVDOH of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject WVDOH to additional penalties and injunctive relief in accordance with the applicable law.

5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.

6. This Order is binding on WVDOH, its successors and assigns.

7. This Order shall terminate upon WVDOH’s notification of full compliance with the “Order for Compliance” and verification of this notification by WVDEP.

Michael C. Daley, District 4, District Engineer  
West Virginia Division of Highways  
1/17/2023

Date

Katheryn Emery, P.E., Director  
Division of Water and Waste Management  
1/17/2023

Date
Curlex was not installed in accordance with manufacturer recommendations where the top should be trenched-in. Tenting was present.
Silt fence not trenched-in, bypasses present.
Silt fence not trenched-in, bypasses present.

Compost filter sock was not J-hooked to treat sediment laden water going through the bypass in the silt fence and entering the conveyance.
Conditions not allowable - sediment deposits on the bottom of Dunkard Creek (39°42'24" 80°10'28"W).
Perimeter controls were removed or were nonfunctional.
WVDOH (Route 7 Pentress)
Unpermitted
Complaint Investigation
Page 6 of 11

Perimeter controls were nonfunctional.
Conditions not allowable - sediment deposits on the bottom of Dunkard Creek (39°42'24" 80°10'28"W).

Conditions not allowable sediment deposits on bottom of UNT of Dunkard Creek (39°42'24" 80°10'28"W).
Active construction work taking place on site.
Trammed equipment up Days Run to install Jersey Barrier.

Trammed equipment in Days Run with fresh sediment deposits on bottom of UNT of Dunkards Creek (39°42'24"N, 80°10'28"W).
Sediment plume flowing into Dunkards Creek (39°42’24”N, 80°10’28”W).

Fresh sediment deposits on bottom of stream at confluence of UNT of Dunkards Creek and Dunkards Creek (39°42’24”N, 80°10’28”W).
Perimeter controls are down and nonfunctional or have been removed.
WVDOH Correction Actions

Correction Actions:

Completed Actions:

- Early May of 2020 installed silt fence, matting, and filter socks
- Mid-May 2020 corrected silt fence, matting, and filter socks
- January 2021 removed flood debris/deposits, corrected silt fence, matting, and filter socks
- Late April 2021 final grading of the site was completed. Seed, mulch, and matting were added, and perimeter controls were re-established
- May 17, 2021 reseeding of the site was completed.

Future Actions:

- 1000 pounds of Lime was purchased and will be added to amend the soil within the next 30 days
- 160 pounds of 19-19-19 fertilizer was purchased and will be added during the first 2 weeks of September when a rain event is approaching
- Additional seed will be added within the first 2 weeks of September and as needed until appropriate stabilization has occurred
- BMPs will be maintained until appropriate stabilization has occurred
## Base Penalty Calculation
(pursuant to 47CSR1-6.1)

### Responsible Party: WVDOH
### Receiving Stream: Dunkard Creek

### Treatment System Design Maximum Flow: MGD
### Treatment System Actual Average Flow: MGD (if known)

Enter FOF# and rate each finding as to Potential and Extent.

<table>
<thead>
<tr>
<th>1) Potential for Harm Factor</th>
<th>Factor Range</th>
<th>FOF#</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Amount of Pollutant Released</td>
<td>1 to 3</td>
<td>1 1 1</td>
</tr>
<tr>
<td>b) Toxicity of Pollutant</td>
<td>0 to 3</td>
<td>1 1 1</td>
</tr>
<tr>
<td>c) Sensitivity of the Environment</td>
<td>0 to 3</td>
<td>1 1 1</td>
</tr>
<tr>
<td>d) Length of Time</td>
<td>1 to 3</td>
<td>1 1 1</td>
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<tr>
<td>e) Actual Exposure and Effects thereon</td>
<td>0 to 3</td>
<td>1 1 1</td>
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</table>

<table>
<thead>
<tr>
<th>2) Extent of Deviation Factor</th>
<th>Factor Range</th>
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</thead>
<tbody>
<tr>
<td>Degree of Non-Compliance</td>
<td>1 to 3</td>
</tr>
</tbody>
</table>

**Potential for Harm Factors:**
1) c - Sensitivity of the Environment Potentially Affected (0 for "dead" stream)
1) d - Length of Time of Violation
1) e - Actual Human/Environmental Exposure and Resulting Effects thereon

**Examples/Guidance:**
*Note:* Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

- **Minor** = exceedance of permit limit by <=40% for Avg. Monthly or <=100% for Daily Max., exceed numeric WQ standard by <=100%, or report doesn't contain some minor information.

- **Moderate** = exceedance of permit limit by >= 41% and <= 300% for Avg. Monthly, >= 101% and <= 600% for Daily Max., exceed numeric WQ standard by >= 101% and <= 600% or report doesn't fully address intended subject matter.

- **Major** = exceedance of permit limit by >= 301% for Avg. Monthly, >= 601% for Daily Max., exceed numeric WQ standard by >= 601%, failure to submit a report, failure to obtain a permit, failure to report a spill, etc. Note that a facility in SNC should be rated as major for length of time and degree of non-compliance.

Narrative WQ standard violations - case-by-case.
Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.

<table>
<thead>
<tr>
<th>1)</th>
<th>Potential for Harm Factor</th>
<th>Factor Range</th>
<th>FOF#</th>
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<tbody>
<tr>
<td>a)</td>
<td>Amount of Pollutant Released</td>
<td>1 to 3</td>
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<td>b)</td>
<td>Toxicity of Pollutant</td>
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<td>c)</td>
<td>Sensitivity of the Environment</td>
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<td>d)</td>
<td>Length of Time</td>
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<td>e)</td>
<td>Actual Exposure and Effects thereon</td>
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<th>Average Potential for Harm Factor</th>
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<tr>
<th>2)</th>
<th>Extent of Deviation Factor</th>
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<tr>
<td></td>
<td>Degree of Non-Compliance</td>
<td>1 to 3</td>
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## Extent of Deviation from Requirement

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<th>Potential for Harm to Human Health or the Environment</th>
<th>Major</th>
<th>Moderate</th>
<th>Minor</th>
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<td>Major</td>
<td>$8,000 to $10,000</td>
<td>$6,000 to $8,000</td>
<td>$5,000 to $6,000</td>
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<td>Moderate</td>
<td>$4,000 to $5,000</td>
<td>$3,000 to $4,000</td>
<td>$2,000 to $3,000</td>
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<td>Minor</td>
<td>$1,500 to $2,000</td>
<td>$1,000 to $1,500</td>
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## FOF # | Potential for Harm | Extent of Deviation | Penalty | Multiple Factor | Base Penalty |
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</table>

**Total Base Penalty** $6,000
Penalty Adjustment Factors
(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor

6.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase
6.2.b.4 - Previous compliance/noncompliance history - 0% to 100% increase - based upon review of last three (3) years - Warning = maximum of 5% each, N.O.V. = maximum of 10% each, previous Order = maximum of 25% each - Consistent DMR violations for <1 year = 10% maximum, for >1 year but <2 years = 20% maximum, for >2 years but <3 years = 30% maximum, for >3 years = 40% maximum

6.2.b.6 - Economic benefits derived by the responsible party (increase to be determined)

6.2.b.7 - Public Interest (increase to be determined)

6.2.b.8 - Loss of enjoyment of the environment (increase to be determined)

6.2.b.9 - Staff investigative costs (increase to be determined)

6.2.b.10 - Other factors

**Size of Violator: 0 - 50% decrease**

**NOTE:** This factor is not available to discharges that are causing a water quality violation. This factor does not apply to a commercial or industrial facility that employs or is part of a corporation that employs more than 100 individuals.

<table>
<thead>
<tr>
<th>Avg. Daily WW Discharge Flow (gpd)</th>
<th>% Reduction Factor</th>
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<tbody>
<tr>
<td>&lt; 5,000</td>
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<tr>
<td>5,000 to 9,999</td>
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<tr>
<td>10,000 to 19,999</td>
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<td>20,000 to 29,999</td>
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<tr>
<td>30,000 to 39,999</td>
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<tr>
<td>40,000 to 99,999</td>
<td>5</td>
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<tr>
<td>&gt; 100,000</td>
<td>0</td>
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</tbody>
</table>

Additional Other factors to be determined for increases or decreases on a case-by-case basis.

Public Notice Costs (cost for newspaper advertisement)

6.2.b.2 - Good Faith - 10% decrease to 10% increase
6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease
6.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease
# Base Penalty Adjustments

(pursuant to 47CSR1-6.2)

<table>
<thead>
<tr>
<th>Penalty Adjustment Factor</th>
<th>% Increase</th>
<th>% Decrease</th>
<th>Base Penalty Adjustments</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2.b.1 - Willfulness and/or negligence -</td>
<td>10</td>
<td></td>
<td>$600</td>
</tr>
<tr>
<td>6.2.b.4 - Compliance/noncompliance history</td>
<td></td>
<td></td>
<td>$0</td>
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<tr>
<td>6.2.b.6 - Economic benefits - (flat monetary increase)</td>
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<tr>
<td>6.2.b.7 - Public Interest - (flat monetary increase)</td>
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<td>6.2.b.8 - Loss of enjoyment - (flat monetary increase)</td>
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<td>6.2.b.9 - Investigative costs - (flat monetary increase)</td>
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<td>6.2.b.10 - Other factors (size of violator)</td>
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<td>6.2.b.10 - Additional Other Factors - Increase (flat monetary increase)</td>
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<td>6.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease)</td>
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<td>6.2.b.2 - Good Faith - Decrease</td>
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<td>6.2.b.3 - Cooperation with the Secretary</td>
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<td>($600)</td>
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<tr>
<td>6.2.b.5 - Ability to Pay</td>
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**Penalty Adjustments**

($570)

**Penalty =**

$5,430

<table>
<thead>
<tr>
<th>Estimated Economic Benefit Item</th>
<th>Estimated Benefit ($)</th>
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<tr>
<td>Monitoring &amp; Reporting</td>
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</tr>
<tr>
<td>Installation &amp; Maintenance of Pollution Control Equipment</td>
<td></td>
</tr>
<tr>
<td>O&amp;M expenses and cost of equipment/materials needed for compliance</td>
<td></td>
</tr>
<tr>
<td>Permit Application or Modification</td>
<td></td>
</tr>
<tr>
<td>Competitive Advantage</td>
<td></td>
</tr>
</tbody>
</table>

**Estimated Economic Benefit**

$0

**Comments:** Economic benefit not warranted.