

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA, and
the STATE OF WEST VIRGINIA, by
and through the WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Plaintiffs,

v.

LPG LAND & DEVELOPMENT
CORPORATION,

Defendant.

Civil Action No. 1:21-cv-33 (Kleeh)

[Proposed] CONSENT DECREE

TABLE OF CONTENTS

I.	JURISDICTION AND VENUE	4
II.	APPLICABILITY	4
III.	DEFINITIONS.....	5
IV.	SCOPE AND EFFECT OF CONSENT DECREE; RESERVATION OF RIGHTS.....	7
V.	CIVIL PENALTIES.....	10
VI.	REQUIREMENTS FOR COMPLIANCE, MITIGATION, AND PRESERVATION.....	15
VII.	REPORTING REQUIREMENTS	20
VIII.	INFORMATION COLLECTION & RETENTION	23
IX.	DISPUTE RESOLUTION	25
X.	FORCE MAJEURE	28
XI.	STIPULATED PENALTIES	30
XII.	NOTICES.....	35
XIII.	EFFECTIVE DATE.....	38
XIV.	COSTS	38
XV.	PUBLIC COMMENT	38
XVI.	RETENTION OF JURISDICTION	39
XVII.	MODIFICATION	39
XVIII.	DISMISSAL OF STATE CASE AND WAIVER OF DEFENSES	40
XIX.	TERMINATION.....	40
XX.	SIGNATORIES/SERVICE.....	41
XXI.	INTEGRATION	42
XXII.	FINAL JUDGMENT	42
XXIII.	APPENDICES	42
XXIV.	26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION.....	43

WHEREAS, Plaintiffs the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), and the State of West Virginia, by and through the Department of Environmental Protection (“State”) (collectively, “Plaintiffs”) filed a Complaint in this action on March 9, 2021, alleging that Defendant LPG Land & Development Corporation (“LPG” or “Defendant”) violated Section 301 of the Clean Water Act (“CWA”), 33 U.S.C. § 1311, and the West Virginia Water Pollution Control Act (“WVWPCA”);

WHEREAS, the Complaint alleges that Defendant violated a State-issued administrative order of compliance (Administrative Order No. 7173), Sections 8 and 16 of the WVWPCA, W. Va. Code §§ 22-11-8, and 22-11-16, and the West Virginia Code of State Rules Sections 47-2-3.2, 47-2-3.2.a, 47-2-3.2.f, 47-10-3.1, 47-10-5.1 and 47-10-5.10.e, W. Va. Code R. §§ 47-2-3.2, 47-2-3.2.a, 47-2-3.2.f, 47-10-3.1, 47-10-5.1 and 47-10-5.10.e, (collectively “State Water Laws”), and that Defendant’s violations of the State Water Laws constitute a public nuisance under common law;

WHEREAS, the Complaint alleges that LPG violated the CWA by discharging dredged and/or fill material and/or controlling and directing the discharge of dredged and/or fill material into waters of the United States, without authorization pursuant to CWA Section 404, 33 U.S.C. § 1344; by discharging pollutants, including stormwater associated with construction activity, and chemical cleaning agents, solvents and/or grease products to waters of the United States without authorization pursuant to CWA Section 402, 33 U.S.C. § 1342, and in violation of a permit, once obtained, at the Mon Fayette Industrial Park (“the Site”) located in Morgantown, Monongalia County, West Virginia, as depicted in Appendix A;

WHEREAS, the Complaint further alleges that LPG violated State Water Laws at the Site by violating terms of its construction stormwater permit, failing to comply with Administrative

Order No. 7173, causing conditions not allowable in State waters, failing to obtain an industrial stormwater permit, violating and failing to modify a State-approved stormwater pollution plan, failing to properly operate and maintain all facilities and systems of treatment and control, failing to report monitoring of pollutants, and disturbing approximately 18 acres without first obtaining a construction stormwater permit, and that LPG's violation of the State Water Laws constitutes a public nuisance under common law;

WHEREAS, the Complaint seeks to (1) enjoin the discharge of pollutants to waters of the United States in violation of CWA Section 301, 33 U.S.C. § 1311, and State Water laws; (2) require Defendant to comply with the requirements of the CWA and its implementing regulations, the State Water Laws, Administrative Order No. 7173, and the terms of Defendant's permit issued under CWA Section 402 and the WVPWA; (3) require Defendant, at its own expense and at the direction of EPA in consultation with WVDEP, to restore and/or mitigate the impacts caused by the alleged unlawful activities; (4) require Defendant to pay civil penalties as provided in 33 U.S.C. § 1319(d) and W. Va. Code §§ 22-11-22 and 22-11-4; and (5) require Defendant to abate the public nuisance and pay appropriate damages for the nuisance;

WHEREAS, the State previously filed a lawsuit against Defendant in the Circuit Court of Monongalia County, West Virginia, titled *Scott G. Mandirola, Director Division of Water and Waste Management, West Virginia Department of Environmental Protection v. LPG Land & Development Corporation*, Civil Action No. 14-C-443 (W. Va. Cir. Ct. filed May 22, 2014) ("State Case"), and that lawsuit asserts claims that may overlap some of the claims asserted by the State in the Complaint;

WHEREAS, Defendant has not answered the complaint in the State Case and, based on agreement of the State and Defendant, the State Case is held in abeyance;

WHEREAS, during an inspection of the Site on May 9, 2016, EPA representatives observed an unstabilized, nearly 90-degree vertical cut into a hillside along the northwest boundary of the Site (“vertical cut”); and

WHEREAS, on April 5, 2018, EPA and LPG entered into an Administrative Order for Compliance on Consent, Dkt. No. CWA-03-2018-0076DN (attached hereto as Appendix B) (“Administrative Order on Consent”) that, among other things, directed LPG to submit and implement a plan to stabilize the vertical cut area, and on July 9, 2018, EPA conditionally approved the plan submitted by LPG pursuant to the Administrative Order on Consent;

WHEREAS, LPG has undertaken actions to come into compliance, including but not limited to, stabilizing the vertical cut area of the Site as directed by the Administrative Order on Consent, and obtaining a National Pollutant Discharge Elimination System (NPDES) permit for discharges associated with industrial storm water;

WHEREAS, the United States has reviewed financial information submitted by LPG and has determined that LPG has demonstrated a limited ability to pay a civil penalty in this matter; and

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the Parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the Parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b). This Court has supplemental jurisdiction over the State Water Law and nuisance claims asserted by the State pursuant to 28 U.S.C. § 1367.

2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1395(a), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), because the Defendant conducts business in this District, the Site is located in this District, and the causes of action alleged in the Complaint arose in this District. For purposes of this Consent Decree, or any action to enforce this Consent Decree, Defendant consents to the Court's jurisdiction over this Consent Decree and any such action and over Defendant and consents to venue in this judicial district.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309, 402, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319, 1342 and 1344, and Section 22 of the WPCA, and common law.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendant, its officers, directors, agents, employees, and servants, and its successors and assigns, whether or not such person or entity has notice of this Consent Decree.

5. Defendant shall provide a copy of this Consent Decree to all officers, directors, agents, and employees whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any person, firm, association, or corporation contracted to perform

work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. The transfer of ownership or other interest in the Site or a portion of the Site, whether in compliance with the procedures of this Paragraph or otherwise, shall not alter or relieve Defendant of its obligation to ensure that the terms of this Consent Decree are implemented. At least thirty (30) Days prior to such transfer, Defendant shall provide written notice and a true copy of this Consent Decree to the proposed transferee(s) and shall simultaneously provide written notice to EPA, the United States Attorney for the Northern District of West Virginia, the United States Department of Justice, and WVDEP at the addresses specified in Section XII, below, that such notice to the proposed transferee(s) has been given, together with a copy of the proposed written transfer agreement. As a condition to any such transfer, Defendant shall reserve all rights necessary to comply with the terms of this Consent Decree. Any attempt to transfer ownership or operation of the Site or a portion of the Site without complying with this Paragraph constitutes a violation of this Consent Decree.

7. In any action to enforce this Consent Decree against Defendant, Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors, or assigns, or of any person, firm, or corporation acting in concert or participation with Defendant, to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

8. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such

regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply.

“Complaint” shall mean the complaint filed by the United States and the State in this action;

“Consent Decree” or “Decree” shall mean this Consent Decree and all appendices attached hereto;

“Corps” shall mean the United States Army Corps of Engineers;

“Court” shall mean the United States District Court for the Northern District of West Virginia, except where the term is used in the phrase “the Circuit Court of Monongalia County, West Virginia;”

“Day” shall mean a calendar day unless expressly stated to be a business day. Other than for a period of violation, in computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until 11:59 pm Eastern Time on the next business day;

“Defendant” shall mean LPG Land & Development Corporation;

“EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

“Effective Date” shall have the definition provided in Section XIII;

“Interest” shall mean interest at the annual rate of 3.25%;

“LPG” shall mean LPG Land & Development Corporation;

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral;

“Parties” shall mean the United States, the State, and Defendant;

“Section” shall mean a portion of this Decree identified by a roman numeral, unless specifically referring to a portion of the CWA or State Water Laws;

“Site” shall mean the Mon Fayette Industrial Park located in Morgantown, Monongalia County, West Virginia, as depicted in Appendix A;

“State” shall mean the State of West Virginia, by and through the West Virginia Department of Environmental Protection;

“Stormwater Collection System” shall mean the system of conveyances that is used for collecting stormwater runoff on the Site and conveying such runoff to Coles Run or any tributary of Coles Run;

“United States” shall mean the United States of America, acting on behalf of EPA;

“West Virginia Interagency Review Team” or “IRT” shall mean the interagency group of federal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the Corps on the establishment and management of mitigation banks and the in-lieu fee program in West Virginia;

“WVDEP” shall mean the West Virginia Department of Environmental Protection.

IV. SCOPE AND EFFECT OF CONSENT DECREE; RESERVATION OF RIGHTS

9. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Complaint filed in this action.

10. It is the express purpose of this Consent Decree to further the objectives set forth in CWA Section 101(a), 33 U.S.C. §1251(a). All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from activities required by this Consent Decree shall have the objective of causing Defendant to achieve and maintain full compliance with, and to further the purpose of, the CWA.

11. Except as in accordance with this Consent Decree, Defendant and its agents, successors, and assigns are enjoined from further discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

12. The Parties acknowledge that Nationwide Permit 32, found at 82 Fed. Reg. 1860 (Jan. 6, 2017), authorizes any fill that was placed on the Site as alleged in the Complaint to remain in place, subject to the conditions provided in Nationwide Permit 32, West Virginia's Standard Conditions for CWA Section 401 certification of Nationwide Permit 32, and this Consent Decree. The Parties further acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by the Consent Decree shall be subject to the conditions of the Nationwide Permit, including but not limited to General Conditions 18 and 20, and this Consent Decree.

13. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers ("Corps") to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to Sections 402(d) and 404(c) of the CWA, 33 U.S.C. § 1342(d) & § 1344(c). Nothing in this Consent Decree shall limit the ability of the State to issue, modify, suspend, revoke, or deny any permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342, and W. Va. Code §§ 22-11-1 to 22-11-30.

14. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations and permits, including but not limited to any permit that may be required to address discharges of stormwater and/or chemical cleaning agents/surfactants; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States and the State do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the CWA, or with any other provisions of federal, state, or local laws, regulations, or permits.

15. Except as provided in Paragraphs 1, 2, and 3 of this Consent Decree, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

16. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, civil penalties, or other appropriate relief relating to the Site, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 9.

17. This Consent Decree does not limit or affect the rights of Defendant or of the United States or the State against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

18. The United States and the State reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 9. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the Site, whether related to the violations addressed in this Consent Decree or otherwise.

19. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

V. CIVIL PENALTIES

20. Defendant shall pay civil penalties totaling \$125,000.00 plus any accrued Interest, with half payable to the United States and half payable to the State, as specified in this Section V.

21. Defendant shall pay \$62,500.00 to the United States, together with Interest accruing from the date on which the Consent Decree is lodged with the Court. Defendant may choose to pay this civil penalty sooner than the timeframes described in this Paragraph, but must meet the following payment deadlines:

<u>Time after Effective Date</u>		<u>Amount Due to the United States</u>	<u>Total Amount Paid to the United States</u>
a.	30 days	\$10,000.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$10,000.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.

<u>Time after Effective Date</u>		<u>Amount Due to the United States</u>	<u>Total Amount Paid to the United States</u>
b.	1 year	An additional \$17,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$27,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.
c.	2 years	An additional \$17,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$45,000.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.
d.	3 years	An additional \$17,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$62,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.

22. Defendant shall make the above-referenced payment(s) in Paragraph 21 by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with instructions provided to Defendant by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the Northern District of West Virginia after the Effective Date. Defendant agrees to provide any additional information necessary or complete any additional documents necessary to effectuate payment by EFT. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to identify all payments to the United States required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to the following individuals on behalf of Defendant:

Paul Travis Panson, President

LPG Land & Development Corp.
629 Fairchance Road
Morgantown, WV 26508
304-594-9302
paulaptrucking@aol.com

Roger Cutright, Attorney
Cutright Law PLLC
256 High Street
P.O. Box 842
Morgantown, WV 26507
304-943-7933
rlcutright@cutrightlawwv.net

Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States Department of Justice, EPA, and the State in accordance with Section XII. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

23. At the time of payment(s) to the United States, Defendant shall send notice that payment has been made: (1) to EPA via email at CINWD_AcctsReceivable@epa.gov or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; (2) to the United States in accordance with Section XII; and (3) to EPA in accordance with Section XII. Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. LPG Land & Development Corporation*, Civil Action No. 1:21-cv-33 (Kleeh), and shall reference the CDCS Number and DOJ case numbers 90-5-1-1-20587 and 90-5-1-1-20587/1.

24. Defendant shall pay \$62,500.00 to the State, together with Interest accruing from the date on which the Consent Decree is lodged with the Court. Defendant may choose to pay this civil

penalty sooner than the timeframes described in this Paragraph, but must meet the following payment deadlines:

<u>Time after Effective Date</u>		<u>Amount Due to the State</u>	<u>Total Amount Paid to the State</u>
a.	30 days	\$10,000.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$10,000.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.
b.	1 year	An additional \$17,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$27,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.
c.	2 years	An additional \$17,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$45,000.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.
d.	3 years	An additional \$17,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.	\$62,500.00, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.

25. Defendant's payment(s) to the State shall be by certified or cashier's check to the West Virginia Department of Environmental Protection for deposit in WVDEP's Water Quality Management Fund. The payment shall be mailed to:

Chief Inspector
Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304

26. If Defendant fails to make any payment required under Section V of this Consent Decree by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid

amounts until the total amount due has been received. Interest required by this Paragraph shall be in addition to any stipulated penalties owed pursuant to Paragraph 69.

27. The amount of the civil penalty and structure of the payment obligation is based on financial information provided by LPG, which demonstrates that Defendant has a limited ability to pay a civil penalty. The Parties stipulate for the purposes specified in this Paragraph that, but for LPG's limited ability to pay, LPG's potential civil liability for penalties for the violations set forth in the Complaint could be substantially higher than agreed to in this Consent Decree. Therefore, in the event that LPG files or becomes subject to a petition for relief under the Bankruptcy Code, any payment obligation remaining under this Consent Decree becomes immediately due and payable, and Plaintiffs may assert, notwithstanding any other provision of the Consent Decree, a claim for the full amount of LPG's potential civil penalty liability. LPG reserves the right to oppose the claim on any ground other than that the amount of its liability is limited by the terms of this Consent Decree. The provisions of the Bankruptcy Code and applicable non-bankruptcy law shall then govern Plaintiffs' and Defendant's rights.

28. Penalty payments under this Decree pursuant to this Section V or Section XI (Stipulated Penalties) are penalties within the meaning of Section 162(f)(1) and Defendant shall not deduct any penalties paid under this Consent Decree pursuant to this Section V or Section XI (Stipulated Penalties) in calculating its federal or State income tax.

VI. CERTIFICATION OF FINANCIAL INFORMATION

29. Defendant certifies to the best of its knowledge and belief, after thorough inquiry, that:

- a. Defendant has submitted to the United States and the State financial information that fairly, accurately, and materially sets forth Defendant's financial circumstances;
- b. Defendant's financial circumstances have not materially changed between the time the Financial Information was submitted to the United States and the State and the date that Defendant signed this Consent Decree; and
- c. Defendant does not have any insurance policies that may cover any payment of a civil or administrative penalty relating to this matter.

VII. REQUIREMENTS FOR COMPLIANCE, MITIGATION, AND PRESERVATION

PROVISIONS RELATING TO CWA SECTION 404

30. In June 2018, EPA received from Defendants a report titled, "Wetland and Stream Delineation and WWSWVM Assessment Report for Coles Run and Adjoining Tributaries" (June 2018 Report), submitted on behalf of LPG by Century Engineering, Inc. Following comments provided by EPA, the June 2018 Report was revised in November 2018 and September 2019. Together, these three reports purport to calculate impacts (debits) to streams and wetlands at the Site using the West Virginia Stream and Wetlands Valuation Metric (WWSWVM), available at <https://www.lrh.usace.army.mil/Missions/Regulatory/Mitigation.aspx>. The difference in the values between the November 2018 and September 2019 reports derives from use of updated Stream Assessment Reaches as references for certain impacted streams.

31. For purposes of this Consent Decree, EPA and WVDEP accept a WWSWVM debit of 1,099 for impacts to streams and wetlands at the Site.

32. LPG shall compensate for the impacts through purchase of 1,099 WVSVM credits.

LPG may purchase credits only as specified below, from a mitigation bank or the State's in-lieu fee program over a period of time not to exceed fifteen (15) years after the Effective Date. LPG shall provide proof of the purchase of such credits no later than 30 days following each purchase.

LPG may purchase credits through a combination of the following:

- a. **Purchase of Mitigation Bank credits.** LPG may purchase credits from a Mitigation Bank established and operated pursuant to 40 C.F.R. § 230.91-.98 that has a primary service area that includes the impacted resources at the Site. In the event that there are no credits as described above available, LPG shall submit to EPA at the address in Paragraph 77.a documentation that credits are unavailable and seek permission from the West Virginia Interagency Review Team to purchase credits from a Mitigation Bank established and operated pursuant to 40 C.F.R. § 230.91-.98 that has a secondary service area that includes the impacted resources at the Site.
- b. **Purchase of in-lieu fee credits.** LPG may purchase credits through the State's in-lieu fee program.

33. LPG acknowledges that LPG is responsible for securing or causing to be secured any necessary approvals for the purchase of credits, including any approvals necessary from the West Virginia Interagency Review Team.

34. LPG may choose to purchase credits sooner than the timeframes described in this Paragraph, but must meet the following deadlines for the purchase of credits:

<u>Time after Effective Date</u>		<u>Credits Purchased</u>	<u>Total Credits Purchased</u>
a.	5 years	350	350
b.	10 years	An additional 400	750
c.	15 years	An additional 349	1,099

35. LPG agrees that the obligation to purchase mitigation credits pursuant to this Consent Decree constitutes steps necessary to return to compliance in lieu of removal of the unauthorized fill material at the Site. In the event that LPG files or becomes subject to a petition for relief under the Bankruptcy Code, LPG agrees and shall take the position that the obligations set forth in Paragraph 30-32 are administrative expenses necessary to preserve the estate and do not constitute claims within the meaning of the Bankruptcy Code 11 U.S.C. § 101(5).

36. No later than May 1, 2022, LPG shall certify to EPA that LPG has completed all work called for by the on-site enhancement plan submitted to EPA by LPG on March 17, 2021. LPG was notified of EPA's agreement to the March 17, 2021 on-site enhancement plan by email from Austin Saylor to Roger Cutright on April 15, 2021. The on-site enhancement plan shall offset impacts to approximately 477 linear feet of Waterway S002 above the vertical cut. Waterway S002 was identified as an intermittent stream with forested canopy in the June 2018 "Wetland and Stream Delineation and WVSWM Assessment Report, Coles Run and Adjoining Tributaries" prepared by Century Engineering, Inc., for LPG Land & Development Company, as revised by the November 2018 and September 2019 reports. *See* Paragraph 28. The certification shall be executed by an appropriate representative of LPG and shall contain the language set forth in Paragraph 45.

PROVISIONS RELATING TO CWA SECTION 402

37. LPG shall cease immediately and shall cause to cease immediately all unauthorized discharges of stormwater and/or chemical cleaning agents/surfactants through its Stormwater Collection System, including but not limited to, all discharges of pollutants associated with activities by LPG or other entity conducting operations at the Mon Fayette Industrial Park.

38. LPG shall comply with the terms and conditions set forth in the Administrative Order on Consent, Dkt. No. CWA-03-2018-0076DN, which is hereby incorporated by reference and attached hereto as Appendix B, except that the certification required by Paragraphs 21 and 22 of the Administrative Order on Consent may be performed by the engineer who designed the work.

39. Consistent with the June 2018 LPG Vertical Cut Stabilization Plan Narrative prepared by Century Engineering, Inc., and submitted pursuant to the Administrative Order on Consent (and attached hereto as Appendix D), LPG shall inspect, monthly and within 24 hours of any rain event exceeding one inch (1”) within a 24-hour period, the work performed pursuant to the Administrative Order on Consent, including the slope stabilization measures, diversion ditch, pipe slope drains, and check dams, to ensure that each functions as designed. LPG shall submit certification, including the language in Paragraph 45, of each such inspection to EPA within 30 Days of each inspection. The inspection and certification obligations specified in this Paragraph 37 shall remain in effect until termination of this Consent Decree.

40. No later than 30 Days after the Effective Date of this Decree, LPG shall certify to EPA that all areas of the Site are stabilized and that LPG has requested termination of its NPDES permits for Construction Stormwater. Such certification shall be signed by an appropriate representative of LPG and include the language in Paragraph 45.

41. LPG shall not engage in further earth movement at the Site, including but not limited to, clearing, grading and/or excavation, except pursuant to a NPDES Permit for discharges associated with construction activity. Any earth movement at the Site will be considered part of a common plan of development or sale and, for purposes of calculating the area disturbed, will be combined with the earth movement conducted at the Site and described in the Complaint.

42. NPDES Permit – Industrial Activities & Discharges of Chemical Cleaning Agents/Surfactants.

- a. No later than 90 Days after the Effective Date and annually thereafter for the duration of this Decree, LPG shall submit to EPA and the State identification by business name, Standard Industrial Classification (SIC) code, and North American Industry Classification System (NAICS) code for each tenant at the Mon Fayette Industrial Park.
- b. LPG shall at all times comply with all of the terms and conditions of NPDES Permit No. WV0111457 issued by WVDEP on May 19, 2020, and any subsequent revisions or renewals.
- c. LPG shall timely provide or shall ensure that any other entity conducting activities at the Mon Fayette Industrial Park timely provides all information and performs all tasks required to ensure compliance with NPDES Permit No. WV0111457 issued by WVDEP on May 19, 2020.
- d. LPG shall ensure that it maintains on site at the Mon Fayette Industrial Park a copy of NPDES Permit No. WV0111457 and any other NPDES permit issued by WVDEP for discharges from operations conducted on the Site.

- e. In any future lease or lease renewal, LPG shall condition tenancy at the Mon Fayette Industrial Park on compliance with all terms and conditions of NPDES Permit No. WV0111457 for the discharge of stormwater associated with industrial activity and with all terms and conditions of any permit that is issued to any tenant for discharges associated with operations at the Site.

VIII. REPORTING REQUIREMENTS

43. No later than 10 Days from the Effective Date, Defendant shall submit to EPA and the State for review a list of deadlines included in this Consent Decree. For any deliverable required by the Consent Decree, the list shall indicate whether EPA and/or State approval is required. The list shall be in substantially the same form as Appendix E, and shall be submitted in an electronic format (e.g., unlocked spreadsheet or similar format agreed to by the Parties). Within 10 Days of modification of any deadline under this Consent Decree, Defendant shall provide an updated list reflecting changes to the future schedule. In the event of conflict between the list generated pursuant to this Paragraph and the Consent Decree, the Consent Decree shall control.

44. Defendant shall submit the following reports:

- a. By July 31st and January 31st of each year until termination of this Decree pursuant to Section XIX, Defendant shall submit to EPA and WVDEP by email (using the contact information noted in Section XII) a semi-annual report for the preceding six months that shall include:
 - (1) A detailed summary of the status of all tasks required by Paragraph 5 and Section VI (Requirements for Compliance, Restoration, Mitigation, and Preservation) and, as applicable, Paragraph 6 and Section X (Force Majeure) of this Consent Decree;
 - (2) A summary of any problems relating to compliance with this Consent

Decree that Defendant has encountered in the reporting period or anticipates it will encounter in the next reporting period, together with implemented or proposed solutions;

- (3) A description of the status of or changes to any CWA-related permit for the Site, including all NPDES permits; and
- (4) With respect to EPA only, copies of reports submitted to State agencies pursuant to WVDEP's CWA Section 402 permitting authority.

b. If Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, Defendant shall notify the United States and the State of such violation and its likely duration, in writing, within ten (10) business days after Defendant first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time such notice is due, Defendant shall so state. Defendant shall investigate the cause of the violation and shall then submit an amendment to the notice, including a full explanation of the cause of the violation, within 30 Days after Defendant becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section X (Force Majeure).

45. Whenever any violation of this Consent Decree or of any applicable permits or any other event affecting Defendant's performance under this Decree, or the operation of the Site, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA and the State orally or by electronic transmission as soon as possible, but no later than 24 hours after Defendant first became aware of the violation or event. This procedure is in addition to the requirements set forth in Paragraph 42. For purposes of this Paragraph 43, the

term “immediate threat to the public health or welfare or the environment” should be broadly construed to mean any circumstance that may pose both an imminent and substantial risk of harm to the public health or welfare or the environment.

46. Except as specified, all reports shall be submitted to the persons designated in Section XII (Notices).

47. In all notices, documents, or reports submitted by Defendant pursuant to this Consent Decree, Defendant shall, by signature of a senior management official, certify such notices, documents, and reports as follows:

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 such information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than 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.

48. The certification requirement in Paragraph 45 does not apply to emergency or similar notifications where compliance would be impractical.

49. The requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the CWA or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

50. Any information provided pursuant to this Consent Decree may be used by the United States and the State in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

IX. INFORMATION COLLECTION & RETENTION

51. Until five years after termination of this Consent Decree, Defendant shall preserve and retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all records, documents, and other information (including documents, records, or other information in electronic form) now in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that relate in any manner to the performance of obligations in Section VI, regardless of any corporate or institutional retention policy or procedures to the contrary. At any time during this information-retention period, upon request by the United States or the State, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

52. At the conclusion of the information-retention period, Defendant shall notify the United States and the State at least ninety (90) Days prior to the destruction of any such records, documents, or information, and, upon request of the United States or the State, Defendant shall deliver any such records, documents, or information to EPA or the State, as applicable.

Defendant may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the United States and the State with the following:

(1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, reports, or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on grounds of privilege.

53. Defendant may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”). As to any information that Defendant seeks to protect as CBI, the Parties shall follow the existing federal and state procedures for handling CBI, as applicable. *See* 40 C.F.R. §§ 2.201-2.215 & 2.302; 32 C.F.R. §§ 286.12(d), 518.13(d); W. Va. Code § 29B-1-4; and WVDEP Communication Policy #10 (Information Requests).

54. Until termination of this Consent Decree, the United States, the State, and their authorized representatives and contractors shall have authority at all reasonable times to enter Defendant’s premises to:

- a. Monitor the activities required by this Consent Decree;
- b. Verify any data or information submitted to the United States;
- c. Obtain samples, documentary evidence, photographs, and similar data;
- d. Inspect and evaluate Defendant’s restoration and/or mitigation activities; and
- e. Inspect and review any records required to be kept under the terms and conditions of this Consent Decree, the CWA, and the State Water Laws.

55. Upon request, Defendant shall provide EPA and the State or their authorized representatives splits of any samples taken by Defendant. Upon request, EPA and the State shall provide Defendant splits of any samples taken by EPA or the State.

56. This Consent Decree in no way limits or otherwise affects the rights of the United States or the State to conduct inspections, to require monitoring, and to obtain information from Defendant as authorized by federal or state laws, regulations, or permits, nor does it limit or

affect any duty or obligation of the Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

X. DISPUTE RESOLUTION

57. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Consent Decree. Disputes arising out of WVDEP's or the Corps' processing of permit applications in connection with Defendant's implementation of the terms of Section VI and Appendix B of this Consent Decree shall not be subject to the dispute resolution procedures set forth in this Section IX.

58. Informal Dispute Resolution. Except as provided for in Paragraph 53, above, any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the Parties to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) Days beginning with written notice by one Party to the other Parties that a dispute exists, unless agreed to in writing by those Parties. If a dispute between the United States and/or WVDEP, on the one hand, and Defendant, on the other, cannot be resolved by informal negotiations, then the written position advanced by the United States with the concurrence of WVDEP and provided to Defendant shall be considered binding unless, within fourteen (14) Days after the end of the informal negotiations period, Defendant invokes formal dispute resolution procedures as set forth below.

59. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the 14-Day time period provided in the preceding Paragraph, by serving on the Plaintiffs a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant. Plaintiffs shall serve their Statement of Position within forty-five (45) Days of receipt of Defendant's Statement of Position. Plaintiffs' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Plaintiffs. Plaintiffs' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

60. Judicial Review. Defendant may seek judicial review of the dispute by filing with the Court and serving on Plaintiffs, in accordance with Section XII, a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) Days of receipt of Plaintiffs' Statement of Position pursuant to Paragraph 55. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree. Plaintiffs shall respond to Defendant's motion within forty-five (45) Days.

61. Standard of Review.

- a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 55 pertaining to the adequacy or appropriateness of plans; the adequacy or

appropriateness of procedures to implement plans, schedules, or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States or the State is arbitrary and capricious or otherwise not in accordance with law.

- b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 55, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of this Consent Decree and the CWA (as West Virginia law, as applicable).

62. If the United States or WVDEP believes that a dispute is not a good faith dispute, or that delay would pose or increase a threat of harm to the public or the environment, the United States or WVDEP may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) Day period for informal negotiations. Defendant shall respond to the motion and propose an alternate resolution within fourteen (14) Days. In resolving any such dispute, Defendant shall bear the burden of proving by a preponderance of the evidence that the United States' or WVDEP's position is not in accordance with the objectives of this Consent Decree, and that Defendant's position will achieve compliance with the terms and conditions of this Consent Decree and the CWA (and West Virginia law, as applicable).

63. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 73. If Defendant does not prevail on the disputed issue, stipulated penalties shall (subject to the discretion of the United States and the State, as specified in Paragraph 74) be assessed and paid as provided in Section XI.

XI. FORCE MAJEURE

64. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant’s contractors, that delays or prevents the performance of any obligation under this Consent Decree. To avail itself of this provision, Defendant must exercise best efforts to fulfill the obligation. The requirement that Defendant exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. “Force Majeure” does not include, *inter alia*, Defendant’s financial inability to perform any obligation under this Consent Decree, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease, or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state, or local permits, unless

Defendant has timely applied for such federal, state, or local permits and has provided all information required by the federal, state, or local authority in connection with such permit(s).

65. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice orally or by electronic transmission to EPA and the State in accordance with Section XII (Notices), within 72 hours of when Defendant first became aware that the event might cause a delay. Within seven Days thereafter, Defendant shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

66. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of

the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

67. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendant in writing of its decision.

68. If Defendant elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), it shall do so no later than 15 Days after receipt of EPA's notice under Paragraph 63. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 60 and 61. If Defendant carries this burden, the delay at issue shall not be a violation of the relevant obligation of this Consent Decree.

XII. STIPULATED PENALTIES

69. Defendant shall be liable for stipulated penalties to the United States and the State for violations of this Consent Decree as specified below, unless excused under Section X. A violation includes failing to perform any obligation required by the terms of this Consent Decree (including Appendix B), including any work plan or schedule approved under this Consent

Decree, according to all applicable requirements of this Consent Decree and within the specified time schedules established by or approved under this Consent Decree.

70. Late Payment of Civil Penalties. If Defendant fails to pay any civil penalty required to be paid under Section V (Civil Penalties) when due, whether to the United States or the State, or both, Defendant shall pay a stipulated penalty of \$5,000.00 per Day for each Day that the payment is late.

71. Except for late payment of civil penalties, addressed above in Paragraph 66, the following stipulated penalties shall apply for each violation of a requirement of this Consent Decree:

<u>Consent Decree Violation</u>		<u>Days of Non-Compliance</u>	<u>Stipulated Penalty</u>
a.	Failure by LPG to provide proof of the purchase of WWSWVM credits no later than 30 Days after LPG's purchase in accordance with Paragraph 30.	Days 1-30:	\$1,000 per Day
		Days 31-60:	\$2,000 per Day
		After Day 60:	\$3,000 per Day
b.	Failure by LPG to purchase WWSWVM credits by the deadlines specified in Paragraph 32.	Days 1-30:	\$1,000 per Day
		Days 31-60:	\$2,000 per Day
		After Day 60:	\$3,000 per Day
c.	Failure to certify completion of enhancement of onsite aquatic features pursuant to Paragraph 34.	Days 1-30:	\$1,000 per Day
		Days 31-60:	\$2,000 per Day
		After Day 60:	\$3,000 per Day
d.		Days 1-30:	\$3,000 per Day

<u>Consent Decree Violation</u>		<u>Days of Non-Compliance</u>	<u>Stipulated Penalty</u>
	Failure to comply with Administrative Order <i>Matter of LPG Land & Dev. Corp.</i> , Dkt. No. CWA-03-2018-0076DN, as required by Paragraph 36.	Days 31-60:	\$4,000 per Day
		After Day 60:	\$5,000 per Day
e.	Failure to timely perform inspections in accordance with Paragraph 37 or to provide documentation of such inspections to EPA.	Days 1-30:	\$1,000 per Day
		Days 31-60:	\$2,000 per Day
		After Day 60:	\$3,000 per Day
f.	Failure to comply with Paragraph 38.	Days 1-30:	\$1,000 per Day
		Days 31-60:	\$2,000 per Day
		After Day 60:	\$3,000 per Day
g.	Failure to comply with the terms and conditions of NPDES Permit No. WV0111457.	Days 1-30:	\$3,000 per Day
		Days 31-60:	\$4,000 per Day
		After Day 60:	\$5,000 per Day
h.	Failure to make any report or notice required by Section VII of this Consent Decree.	Days 1-30:	\$500 per Day
		Days 31-60:	\$1,000 per Day
		After Day 60:	\$1,500 per Day
i.	Unauthorized discharge of stormwater, chemical cleaning agents/surfactants, dredged and/or fill material, or any other discharge requiring a permit pursuant to 33 U.S.C. §1311.	Days 1-30:	\$5,000 per Day
		Days 31-60:	\$6,000 per Day
		After Day 60:	\$7,000 per Day
j.	Failure to comply with any other requirement set forth in this Consent Decree.	Days 1-30:	\$1,000 per Day
		Days 31-60:	\$2,000 per Day
		After Day 61:	\$3,000 per Day

72. Stipulated penalties shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

73. Unless otherwise disputed as set forth below, Defendant shall pay stipulated penalties to the United States and the State within thirty (30) Days of a written demand by either Plaintiff. Defendant shall pay fifty (50) percent of the total stipulated penalty amount due to the United States and fifty (50) percent to the State. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

74. Defendant shall make any payment to the United States in the manner set forth in Paragraph 22, except as otherwise provided in this Paragraph. Defendant shall send notice of payment to: (i) EPA via email to the U.S. EPA Cincinnati Finance Office at CINWD_AcctsReceivable@epa.gov; (ii) EPA via email to the U.S. EPA Regional Hearing Clerk at R3_Hearing_Clerk@epa.gov; (iii) the United States via email or regular mail in accordance with Section XII (Notices); and (iv) the State in accordance with Section XII (Notices). Such notice shall state that the payment is for stipulated penalties owed pursuant to the Consent Decree in *United States v. LPG Land & Development Corporation*, Civil Action No. 1:21-cv-33 (Kleeh) (N.D.W.V.); the Defendant's name, street/P.O. Box address, email address and telephone number; the Consolidated Debt Collection System ("CDCS") Number and DOJ case numbers 90-5-1-1-20587 and 90-5-1-1-20587/1; the amount of the payment; the method of payment; and an identification of the violation(s) for which the penalties are being paid. Defendant shall make any payment to the State in the manner set forth in Paragraph 24.

75. The United States or the State may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due to it under this Consent Decree.

76. Any dispute concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, shall be resolved pursuant to the Dispute Resolution provisions in Section IX and/or Force Majeure provisions in Section X, as applicable.

77. Stipulated penalties shall continue to accrue as provided in Paragraphs 67 and 68, during any Dispute Resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement of the Parties or by a decision of EPA or the State that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with Interest calculated pursuant to Paragraph 74, to the United States or the State within thirty (30) Days of the effective date of the agreement or the receipt of EPA's or the State's decision.
- b. If the dispute is appealed to the Court and the United States or the State prevails in whole or in part, Defendant shall pay accrued penalties determined by the Court to be owing, together with Interest calculated pursuant to Paragraph 74, within sixty (60) Days of receiving the Court's decision or order, except as provided in Paragraph 73.c below.
- c. If any party appeals the Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with Interest calculated pursuant to Paragraph 74, within fifteen (15) Days of receiving the final appellate court decision.

78. In the event that a stipulated penalty payment is due and not paid on time as demanded and consistent with the terms of the Consent Decree, Interest will be charged. The Interest shall be computed daily from the time the payment is due until the date the payment is made. The Interest shall also be compounded annually. Nothing in this Paragraph shall be construed to limit the United States or the State from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

79. The payment of penalties and Interest, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

80. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' or the State's exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section IV, Plaintiffs expressly reserve the right to seek any other relief they deem appropriate for Defendant's violation of this Consent Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

XIII. NOTICES

81. Unless otherwise specified in this Consent Decree, all notices, submissions, or communications required under this Consent Decree shall be made to the Parties through each of the following persons and addresses:

a. To EPA (by email only):

Stefania D. Shamet
Associate Regional Counsel

U.S. Environmental Protection Agency, Region III
R3_ORC_Mailbox@epa.gov

Miranda N. Cento
SDWA & Wetlands Section
U.S. Environmental Protection Agency
Region III
Cento.Miranda.N@epa.gov

Chuck Schadel
NPDES Section
U.S. Environmental Protection Agency, Region III
Schadel.Chuck@epa.gov

b. To the Corps:

Dana M. Adipietro
Assistant District Counsel (Environment and Regulatory)
U.S. Army Corps of Engineers, Pittsburgh District
1000 Liberty Avenue, 22nd Floor
Pittsburgh, PA 15222
Dana.m.adipietro@usace.army.mil

c. To the United States Department of Justice:

As to the United States by email:
eescdcopy.enrd@usdoj.gov
Thomas.Kolkin@usdoj.gov
Austin.Saylor@usdoj.gov
Sonya.Shea@usdoj.gov
Christopher.J.Prezioso@usdoj.gov
Re: DJ # 90-5-1-1-20587 & 90-5-1-1-20587/1

As to the United States by mail:
EES Case Management Unit
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-5-1-1-20587 & 90-5-1-1-20587/1

Chief, Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611

Washington, D.C. 20044-7611
Re: DJ # 90-5-1-1-20587 & 90-5-1-1-20587/1

Thomas P. Kolkin, Attorney
Austin Saylor, Attorney
Sonya J. Shea, Attorney
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Office of the United States Attorney
Northern District of West Virginia
P.O. Box 591
Wheeling, WV 26003

d. To the State:

Chief Inspector
Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, West Virginia 25304

Andrew F. Tarr, Attorney
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304
(304) 926-0460
Drew.F.Tarr@wv.gov

e. To Defendants:

Paul Travis Panson, President
LPG Land & Development Corp.
629 Fairchance Road
Morgantown, West Virginia 26508
304-594-9302
paulaptrucking@aol.com

Roger Cutright, Attorney
Cutright Law PLLC
256 High Street
P.O. Box 842

Morgantown, West Virginia 26507
304-943-7933
rlcutright@cutrightlawwv.net

82. Any Party may, by written notice to the other Parties, change its designated recipient or notice address provided above.

83. Notices submitted in accordance with this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XIV. EFFECTIVE DATE

84. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

XV. COSTS

85. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the State shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant, or in any action against Defendant for noncompliance with or enforcement of this Consent Decree.

XVI. PUBLIC COMMENT

86. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7 and W. Va. Code R. § 47-10-16.2.c. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree

is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

XVII. RETENTION OF JURISDICTION

87. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections IX (Dispute Resolution) and XVII (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVIII. MODIFICATION

88. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court. Non-material changes not requiring Court approval to be effective include, but are not limited to, extensions of deadlines in this Consent Decree of 120 Days or less, and any extensions of time provided by EPA pursuant to Paragraph 62 for performance of obligations affected by a force majeure event.

89. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 57, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XIX. DISMISSAL OF STATE CASE AND WAIVER OF DEFENSES

90. No later than seven (7) Days after the Effective Date, the State shall move for voluntary dismissal of its complaint in the Circuit Court for Monongalia County, titled *Scott G. Mandirola, Director Division of Water and Waste Management, West Virginia Department of Environmental Protection v. LPG Land & Development Corporation*, Civil Action No. 14-C-443 (W. Va. Cir. Ct. filed May 22, 2014), with each party to bear its own costs and attorneys' fees.

91. Defendant agrees to resolve in this single proceeding the State law and Federal law claims expressed in the Complaint. Defendant expressly waives any affirmative defense it may have, including but not limited to, any statute of limitations defense to the State's claims in the Complaint, any jurisdictional defense, and any other defense arising from the filing and/or voluntary dismissal by the State of the complaint pursuant to Paragraph 86 and assertion of the same or similar State law claims in this proceeding.

XX. TERMINATION

92. At least five years after the Effective Date and after Defendant has completed the requirements of Section VI (Requirements for Compliance, Restoration, Mitigation, and Preservation); has maintained continuous satisfactory compliance with this Consent Decree and any permit issued under the CWA; has complied with all other requirements of this Consent Decree; and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may serve upon the United States and the State a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

93. Following receipt by the United States and the State of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States, after consultation with the State, agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

94. If the United States, after consultation with the State, does not agree that the Consent Decree may be terminated, Defendant may invoke Dispute Resolution under Section IX. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until after service of its Request for Termination.

XXI. SIGNATORIES/SERVICE

95. Each undersigned representative of Defendant, the State, EPA, and the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

96. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons. Defendant need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree, or the United States withdraws from the Decree under Paragraph 82.

XXII. INTEGRATION

97. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, the Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XXIII. FINAL JUDGMENT

98. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the State, and Defendant.

XXIV. APPENDICES

99. The following Appendices are attached to and part of this Consent Decree:

“Appendix A” is a map depicting the locations of Coles Run, Tributary A, Tributary B, and Tributary C at the Site; and

“Appendix B” is the Administrative Order *Matter of LPG Land & Dev. Corp.*, Dkt. No. CWA-03-2018-0076DN.

“Appendix C” is the June 2018 “Wetland and Stream Delineation and WWSWVM Assessment Report, Coles Run and Adjoining Tributaries” prepared by Century Engineering, Inc., for LPG Land & Development Company.

“Appendix D” is the June 2018 LPG Vertical Cut Stabilization Plan Narrative prepared by Century Engineering, Inc., and submitted pursuant to the Administrative Order on Consent.

“Appendix E” is an Excel worksheet that provides the format for the deliverable list Defendant is required to provide pursuant to Paragraph 41.

XXV. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

100. For purposes of the identification requirement of 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)(iii)(A), performance of Paragraph 5 of Section II (Applicability); Paragraphs 28-40 of Section VI (Requirements for Compliance, Restoration, Mitigation, and Preservation), and related Appendix B; Paragraphs 42-45 of Section VII (Reporting Requirements); and Paragraphs 49-52 of Section VIII (Information Collection and Retention) are restitution or required to come into compliance with law.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2021.

United States District Judge

Signature page for the Consent Decree in *United States v. LPG Land & Development Corp.*

FOR THE UNITED STATES:

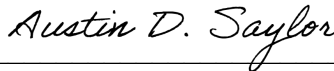
TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

Dated: July 30, 2021



THOMAS P. KOLKIN
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Dated: July 30, 2021




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Signature page for the Consent Decree in *United States v. LPG Land & Development Corp.*

FOR THE UNITED STATES:

RANDOLPH J. BERNARD
Acting United States Attorney
Northern District of West Virginia

Dated: August 2, 2021

A handwritten signature in blue ink, reading "Christopher J. Prezioso", is written over a horizontal line.

CHRISTOPHER PREZIOSO
Assistant United States Attorney
United States Attorney's Office
P.O. Box 591
Wheeling, WV 26003
304-234-0100

Signature page for the Consent Decree in *United States v. LPG Land & Development Corp.*

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE:**

Dated: July 30, 2021

LAWRENCE
STARFIELD

Digitally signed by
LAWRENCE STARFIELD
Date: 2021.07.30
17:04:08 -04'00'

LAWRENCE STARFIELD
Acting Assistant Administrator for Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency

Signature page for the Consent Decree in *United States v. LPG Land & Development Corp.*

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III:**

Dated: July 26, 2021

Esher, Diana

Digitally signed by Esher,
Diana
Date: 2021.07.26
19:47:08 -04'00'

DIANA ESHER
Acting Regional Administrator
U.S. Environmental Protection Agency, Region III

Dated: July 23, 2021

**DONNA
MASTRO**

Digitally signed by
DONNA MASTRO
Date: 2021.07.23
08:03:13 -04'00'

CECIL RODRIGUES
Regional Counsel
U.S. Environmental Protection Agency, Region III

Stefania D. Shamet
Associate Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street MC 3RC60
Philadelphia, PA 19103

Signature page for the Consent Decree in *United States v. LPG Land & Development Corp.*

FOR THE STATE:

Dated: 07/27/21



KATHERYN EMERY
Acting Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

Dated: 7/14/2021

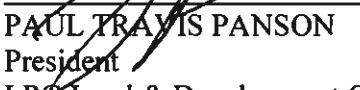


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Drew.F.Tarr@wv.gov

Signature page for the Consent Decree in *United States v. LPG Land & Development Corp.*

FOR DEFENDANT LPG LAND & DEVELOPMENT CORPORATION:

Dated: 7/1/21



PAUL TRAVIS PANSON
President
LPG Land & Development Corp.
68 Goodwin Hill Rd.
Morgantown, WV 26508