



33 U.S.C. § 1362(7)) and waters of the State, without authorization, that flow to the Elk River, a Traditional Navigable Water, at a property located approximately 1.25 miles east of the intersection of Route 19 and I-79 at 38.6087°N, -80.7368°W in Braxton County, Sutton, West Virginia 26601 (“Site”), as further depicted in Appendix A to this Consent Decree;

WHEREAS, the Complaint seeks: (1) to enjoin the discharge of pollutants into waters of the United States and waters of the State at or from the Site in violation of CWA Section 301(a), 33 U.S.C. § 1311(a), and Section 8 of the West Virginia WPCA, W. Va. Code § 22-11-8, and applicable regulations; (2) to require the Defendant, at its own expense and at the direction of EPA, to restore and/or mitigate the impacts caused by its allegedly unlawful activities; and (3) to require the Defendant to pay civil penalties as provided in 33 U.S.C. § 1319(d) and W. Va. Code § 22-11-22;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States’ civil claims against the Defendant under the CWA set forth in the Complaint regarding the Site, and the State’s claims under the West Virginia WPCA set forth in the Complaint regarding the Site;

WHEREAS, the Plaintiffs and the Defendant agree that settlement of this case is in the public interest, that settlement of this matter will avoid the costs and uncertainties of litigation, and that entry of this Consent Decree is the most appropriate means of resolving the claims against the Defendant in this case;

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the claims against the Defendant in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA, the West Virginia WPCA, and all other applicable federal law.

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 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 these actions and over the Parties pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d).

2. Venue is proper in the Northern District of West Virginia pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), 28 U.S.C. § 1391(b) and (c), and 28 U.S.C. § 1395(a), because the Defendant conducts business in this District, the Site is located in this District, and the causes of action alleged herein arose primarily in this District.

3. For the purposes of this Consent Decree, the Defendant agrees that the Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344, and Sections 8 and 22 of the West Virginia WPCA, W. Va. Code §§ 22-11-8 and 22-11-22.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon the Defendant, its officers, directors, agents, employees and servants, and its successors and assigns, and Plaintiffs and their representative officers, agents, and employees, whether or not such person or entity has notice of this Consent Decree. In any action to enforce this Consent Decree against the Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation (including, but not limited to, contractors of the Defendant) acting in concert or participation with the

Defendant, to take any actions necessary to comply with the provisions hereof, nor shall the Defendant alter its corporate structure or enter into any agreement with third parties for the purpose of directly or indirectly circumventing the requirements of this Consent Decree.

5. The Defendant is responsible for compliance with the CWA, the West Virginia WPCA, and this Consent Decree at the Site, and at any stream or wetland mitigation project to be completed or funded by the Defendant in accordance with the “Restoration, Mitigation and Preservation” subsection of Section V of this Consent Decree. The Defendant shall provide a copy of this Consent Decree to:

a. All of its officers, non-seasonal employees, and agents (other than administrative support staff) whose duties might reasonably include performing work to comply with the following sections of this Decree: Section V (Specific Provisions), Section VI (Notices and Other Submissions), and Section VII (Retention of Records and Right of Entry);

b. Any contracted person or entity retained to perform construction work that affects the obligations contained in this Consent Decree, to the extent that such person or entity has decision-making authority over the work performed;

c. Any environmental consultant or engineer retained to perform work that affects the obligations contained in the Consent Decree; and

d. Any lessees present on the Site, including but not limited to, UPS.

When providing copies of the Consent Decree as required by this Paragraph, the Defendant shall include a written statement advising all above-referenced officers, employees, agents, and contracted entities that they must comply with the relevant obligations contained in this Consent Decree. The Defendant shall ensure that the contractor complies with the Consent Decree. In addition, the Defendant shall post a copy of this Consent Decree in a conspicuous location at the

Site, and at Waco's Headquarters office to enable viewing by any individuals performing work that affects the obligations contained in this Consent Decree.

6. The transfer of ownership or other interest in the Site or in any stream or wetland mitigation project to be completed or funded by the Defendant in accordance with the "Restoration Mitigation and Preservation" subsection of Section V of this Consent Decree shall not alter or relieve the Defendant of its obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) days prior to the transfer of ownership or other interest in the areas of restoration/mitigation or in any stream or wetland mitigation project to be completed or funded by the Defendant in accordance with the "Restoration Mitigation and Preservation" subsection of Section V of this Consent Decree, the Defendant shall provide written notice and a true copy of this Consent Decree to its successors in interest to the Site and such areas of restoration/mitigation and shall contemporaneously notify the United States Department of Justice, EPA, the United States Army Corps of Engineers, Huntington District ("the Corps"), and the State at the addresses specified in Section XI, below, that such notice has been given. As a condition to any such transfer, the Defendant shall reserve all rights necessary to comply with the terms of this Consent Decree.

### III. DEFINITIONS

Terms used in this Consent Decree that are defined in the CWA, the West Virginia WPCA or in regulations promulgated pursuant to the CWA or the West Virginia WPCA shall have the meanings assigned to them in the statute or such regulations, unless otherwise provided in this Consent Decree. Whenever the term set forth below is used in this Consent Decree or Appendix B to the Consent Decree, the following definitions shall apply:

"Complaint" means the complaint filed by the United States in this action (Dkt. No. 1);

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

“Clean Water Act,” “CWA,” or “Act” means the federal Clean Water Act, 33 U.S.C. § 1251 et seq., and its implementing regulations;

“Date of Lodging” means the date this Consent Decree is filed for lodging with the Clerk of the Court for the United States District Court for the Northern District of West Virginia;

“Day” means a calendar day unless expressly stated to be a business day. In computing any period of time for a deadline under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period runs until the close of business of the next business day;

“Deed Restrictions” means deed restrictions substantially similar to the sample attached as Appendix C that are made and recorded with the deed recording office with the Braxton County Recorder of Deeds. The title, or other instrument conveying an interest in the subject parcel shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree. Upon recording of the Deed Restrictions, the Defendant shall give notice to the United States, EPA, and the Corps at the addresses in Section XI.

“Defendant” means Waco Oil & Gas Co., Inc.;

“DOJ” means the United States Department of Justice and any of its successor departments or agencies;

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

“Effective Date” means the definition provided in Section XII;

“Geotechnical Implementation Work” means work performed by the Defendant with the goal of achieving permanent stabilization at the Site and in accordance with Paragraph 33.

“Final Geotechnical Implementation Plan and Report Findings” means the plan and plan set (including engineering drawings) submitted by the Defendant to EPA on November 4, 2022 that describes the Geotechnical Implementation Work Defendant will complete.

“Impacted Areas” means (i) the tributary and wetland impacts as identified in the Unilateral Administrative Order dated February 9, 2021, Dkt. No. CWA-03-2021-0017DW (totaling 2,442 linear feet of stream impacts and 0.19 acres of wetlands impacts), as provided in Table 1, below:

**Table 1: Impacts at the Site confirmed as of September 12, 2023**

<b>Aquatic Resource</b>	<b>Approximate Impact</b>
Feature A	1,600 linear feet of stream
Feature A1	299 linear feet of stream
Wetland Area 1	0.19 acres
Feature C1	10 linear feet of stream
Feature C2	223 linear feet of stream
Feature C3	50 linear feet of stream
Feature G	70 linear feet of stream
Feature H	190 linear feet of stream
<b>Total Impacts</b>	<b>2,442 linear feet of stream 0.19 acres of wetlands</b>

“Paragraph” means a portion of this Decree identified by an Arabic numeral;

“Parties” means the United States, WVDEP, and Defendant;

“Section” means a portion of this Decree identified by a Roman numeral;

“Site” means the property located approximately 1.25 miles east of the intersection of Route 19 and I-79 in Braxton County, Sutton, West Virginia 26601, at coordinates 38.6087, -80.7368, Parcel ID 04-06-008Q-0009-0000, and as further depicted in Appendix A to this Consent Decree;

“Slip” and/or “Landslide” means the movement of a mass of rock, debris, or earth down a slope.

“United States” means the United States of America, acting on behalf of EPA.

“WVDEP” means the West Virginia Department of Environmental Protection and any of its successor departments or agencies.

#### IV. SCOPE OF CONSENT DECREE

7. This Consent Decree shall constitute a complete and final settlement of all civil claims and administrative claims for injunctive relief and civil penalties for the matters alleged in the Complaint against the Defendant under CWA Section 301, 33 U.S.C. § 1311, and under Sections 8 and 22 of the West Virginia WPCA, W. Va. Code §§ 22-11-8 and 22-11-22, concerning the Site.

8. It is the express purpose of the Parties in entering into this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251, and Section 2 of the West Virginia WPCA, W. Va. Code § 22-11-2. All plans, studies, construction, remedial maintenance, compliance programs, and any other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing the Defendant to achieve and maintain compliance with, and to further the purposes of, the CWA and the West Virginia WPCA.

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



10. The Parties acknowledge that Nationwide Permit 32, found at 86 Fed. Reg. 73,522 (Feb. 23, 2022), authorizes any fill that was placed as of the date of lodging of this Decree, 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 in the approved restoration and mitigation plan approved on July 11, 2023. Any such discharge of dredged or fill material necessary for work required pursuant to this Consent Decree shall be subject to the conditions of Nationwide Permit 32, West Virginia's Standard Conditions for CWA Section 401 certification of Nationwide Permit 32, and this Consent Decree.

11. The Parties acknowledge that the State of West Virginia's General National Pollutant Discharge Elimination System/Water Pollution Control Permit No. WV0115924 ("General Permit"), effective February 9, 2019, and with subsequent approved modifications, provides that "any establishment with discharges composed entirely of stormwater associated with construction activities disturbing one acre or greater of land area," and agreeing to be regulated under the terms of the General Permit, is granted coverage under the General Permit, to "allow stormwater discharges into the surface waters of the State of West Virginia." For any stormwater discharges associated with the work required to be performed pursuant to this Consent Decree, the Defendant agrees to be bound by and comply with the terms of the aforementioned General Permit and any subsequent versions of such permit.

12. 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 Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

13. This Consent Decree in no way affects or relieves the Defendant of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

14. This Consent Decree in no way affects the rights of the United States or the State as against any person not a party to this Consent Decree.

15. The United States and the State reserve any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

16. 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.

17. In any subsequent administrative or judicial proceeding initiated by the United States or the State of West Virginia for injunctive relief, civil penalties, or other appropriate relief relating to the Defendant, the 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 of West Virginia in the subsequent proceeding should have been brought in the instant case, except with respect to claims that have been specifically resolved as specified in Paragraph 7 of this Consent Decree.

18. 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.

V. SPECIFIC PROVISIONS

CIVIL PENALTIES

19. Defendant shall pay a civil penalty totaling \$825,000.00, with half of the total penalty (\$412,500) to be paid to the United States and half (\$412,500) to be paid to the State within 30 Days of the Effective Date of this Consent Decree.

20. Defendant shall make the above-referenced payment to the United States by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2023-V00182 and the DOJ case number 90-5-1-1-22046. Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the Northern District of West Virginia. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business Day.

21. Upon payment of the civil penalty required by this Consent Decree, the Defendant shall send, electronically, a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter stating that the payment is for the civil penalty owed pursuant to this Consent Decree in United States of America, et al. v. Waco Oil & Gas Co., Inc., and referencing the DOJ case number 90-5-1-1-22046, to the Department of Justice and EPA at the addresses set forth in Section XI of this Decree as well as to EPA Regional Hearing Clerk at [R3\\_Hearing\\_Clerk@epa.gov](mailto:R3_Hearing_Clerk@epa.gov). The Defendant shall also send a copy of the EFT form, transaction record, and transmittal letter by electronic mail to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov).

22. Defendant shall make the payment to the State, as required by Paragraph 19, above, by certified or cashier’s check, or by wire transfer in accordance with instructions

provided by WVDEP's Accounts Receivable unit, to the WVDEP for deposit in the WVDEP's Water Quality Management Fund. If paying by certified or cashier's check, the payment shall be mailed to:

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

23. At the time of payment to WVDEP, Defendant shall send notice that payment has been made to [gregory.l.null@wv.gov](mailto:gregory.l.null@wv.gov) and [kimberly.a.scott@wv.gov](mailto:kimberly.a.scott@wv.gov). Such notice shall state that payment is for the Civil Penalty owed pursuant to the Consent Decree in *United States and the State of West Virginia, by and through the West Virginia Department of Environmental Protection, v. Waco Oil & Gas Company, Inc.*, and shall reference the civil action and the DOJ case number 90-5-1-1-22046.

24. Penalty payments under this Consent Decree pursuant to this Section or Section X (Stipulated Penalties) are penalties within the meaning of Section 162(f)(1) of the Internal Revenue Code, 26 U.S.C. § 162(f)(1), and 26 C.F.R. § 1.162-21(a)(3)(i), and Defendant shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section X (Stipulated Penalties) in calculating its federal, state, or local income tax.

#### RESTORATION, MITIGATION AND PRESERVATION

25. The Defendant shall perform restoration and mitigation projects under the terms and conditions stated in Appendix B (Restoration and Mitigation Work Plan) appended hereto and incorporated herein by reference.

26. To ensure that all reasonable steps are taken to prevent disturbance at areas of restoration/mitigation, the Defendant shall, in accordance with the Milestone Schedule set out in

Table 1 of Appendix B,<sup>1</sup> make and record Deed Restriction(s) for all areas of on-Site restoration and off-Site mitigation set forth in any restoration and/or mitigation plans that EPA has approved or approves, in consultation with WVDEP, under this Consent Decree. The Deed Restriction(s) shall be made and recorded by the Defendant with the deed recording office with the Braxton County Recorder of Deeds. The Deed Restrictions shall be substantially similar to the sample attached as Appendix C, and shall provide that each deed, title, or other instrument conveying an interest in the subject parcel shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree. The Deed Restrictions shall include an attached map designating the area covered by the Deed Restrictions with a metes and bounds description. Areas covered by the Deed Restrictions shall restrict land-use in a manner consistent with limiting intrusions into wetlands, stream buffers, and streams. Upon recording of the Deed Restrictions, the Defendant shall give notice to the United States, EPA, and the Corps at the addresses in Section XI.

27. If the Deed Restriction(s) described in Paragraph 25 are found to be defective or unlawful, the United States may: (1) require the Defendant or its successors or assigns, to obtain the granting of a Deed Restriction for the subject parcel that complies with applicable law; or (2) require additional compensatory mitigation to offset the loss of permanent protection of a specific restoration/mitigation area in accordance with EPA and Corps regulations.

28. Upon completion of the restoration and mitigation projects set forth in Appendix B, including the 100% Complete Restoration Plan approved by EPA on July 11, 2023, and any other plans submitted pursuant to Appendix B, the Defendant shall not disturb soils, vegetation,

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<sup>1</sup> 90 Days after completion of construction at the restoration/mitigation areas.

and/or water resources in any manner whatsoever at any area of restoration/mitigation, except as identified in the approved restoration and/or mitigation plans, the Deed Restriction(s), or as otherwise approved by EPA.

NPDES PERMITTING AND GEOTECHNICAL WORK

29. The Defendant shall not engage in further land disturbance at the Site, including, but not limited to, clearing, grading and/or excavation, except pursuant to a National Pollutant Discharge Elimination System (“NPDES”) Permit for discharges associated with construction activity and in accordance with any the approved restoration and mitigation plans under Appendix B pursuant this Consent Decree. Any further land disturbance 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 prior land disturbance conducted at the Site as described in the Complaint.

30. The Defendant shall at all times comply with all of the terms and conditions of Registration No. WVR110828 issued by WVDEP under WV/NPDES General Permit No. WV011457 on February 28, 2022, and any subsequent revisions or renewals.

31. The Defendant shall ensure that it maintains on Site a copy of Registration No. WVR110828 and WV/NPDES General Permit No. WV011457 and any other NPDES permitting and registration documents issued by WVDEP for discharges from operations conducted at the Site.

32. In any future lease or lease renewal, the Defendant shall condition tenancy at the Site on compliance with all terms and conditions of NPDES Permits covering 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.

33. All Geotechnical Implementation Work must be consistent with any applicable NPDES permits. Geotechnical Implementation Work is intended to achieve permanent stabilization so as to prevent migration/erosion of soil or sediment-laden water into waters of the United States and minimize the potential for Landslides (defined below under “Slip” and/or “Landslide”) and must be consistent with West Virginia’s Erosion and Sediment Control Best Management Practices (“BMP”) Manual.

34. EPA and WVDEP reserve the authority to comment on plans for Geotechnical Implementation Work necessary to achieve Site stability but will not approve or disapprove of the specific engineering work that the Defendant proposes as necessary to stabilize the Site. Defendant shall afford EPA and WVDEP the opportunity to comment on engineering plans but does not intend to approve engineering drawings.

35. The Defendant submitted a Final Geotechnical Implementation Plan and Report Findings to EPA on November 4, 2022.

36. Geotechnical Implementation Work pursuant to the Final Geotechnical Implementation Plan and Report Findings shall be executed in accordance with the approved milestone schedule in Appendix B. Defendant shall submit to EPA and WVDEP a Certificate of Permanent Stabilization by January 31, 2025, as provided in the Milestone Deadlines table in Appendix B. The Certificate of Permanent Stabilization shall contain a certification by a professional engineer that the Defendant has achieved permanent stabilization on the Site sufficient to prevent migration/erosion of soil or sediment-laden water into waters of the United States or waters of the State and to minimize the potential for Landslides. Such stabilization measures shall be consistent with West Virginia’s Erosion and Sediment Control Best Management Practices (“BMP”) Manual. The engineer’s certification shall describe all steps

taken and the locations on the Site where such steps have been taken. When the Defendant transmits the Certificate of Permanent Stabilization to EPA, the Defendant shall include a written certification as set forth in Paragraph 46, below, signed by a corporate officer authorized to sign on behalf of the Defendant.

37. During the construction period of the work required under Appendix B, the Defendant shall inspect, monthly and within 24 hours of any rain event exceeding one inch within a 24-hour period, the work required under Appendix B, including slope stabilization measures, diversion ditches, pipe slope drains, and structures to ensure that all features function as designed. The Defendant shall submit certification (with the language in Paragraph 46) of each such inspection to EPA within 30 Days of each inspection. The inspection and certification obligations specified in this Paragraph shall remain in effect until WVDEP receives a Notice of Termination of the Defendant's NPDES Permit.

#### VI. NOTICE AND OTHER SUBMISSIONS

38. The Defendant shall notify EPA and WVDEP within 24 hours of discovering any new (or expansion of an existing) Slip or Landslide occurring at the Site, including the location of the Slip or Landslide, the estimated surface area of material that has moved, and the estimated extent of impacts to aquatic resources (if any).

39. Within five Days of each March 30, June 30, September 30, and December 31 of each year for the first two years following the Effective Date of this Consent Decree, the Defendant shall provide EPA and WVDEP with a written status report detailing Defendant's progress toward completing all tasks required by this Consent Decree, including incorporated appendices. From the third year following the Effective Date of the Consent Decree until the Consent Decree is terminated, the Defendant shall provide a written status report detailing the



Defendant's progress toward completing all tasks required by this Consent Decree annually within five Days of September 30 of each year. The Defendant shall send the status report electronically to the addresses specified in Section XI of this Consent Decree. The status reports covered by this Paragraph shall include:

- a. A detailed summary of the status of all tasks required by Section V (Specific Provisions) and Appendix B of this Consent Decree;
  - b. 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;
  - c. A description of the status of or changes to any CWA-related permit for the Site, including all NPDES permits; and
  - d. With respect to EPA only, copies of reports the Defendant submits to State agencies pursuant to WVDEP's CWA Section 402 permitting authority.
40. If a required task has been completed, the notice shall specify the date when it was completed. If the required task was completed after the scheduled time for such completion required by the Consent Decree, the notice shall explain the reasons for such delay.
41. The Defendant shall notify EPA and WVDEP of any change in work on-Site conducted or proposed by the Defendant that results or may result in additional impacts to aquatic resources. Such proposed changes will be subject to EPA approval, comment, or disapproval.
42. The Defendant shall provide EPA with 60 Days' notice prior to the leasing of any portion of the Site to UPS or any other entity, or prior to the extension of any existing lease, and provide EPA with the locations of any equipment or structures that the Defendant intends to

allow a lessee to place on Site, and shall certify that the intended lease will not interfere with or violate the terms of this Consent Decree. The Defendant shall not allow leasing on-Site to any entity on Impacted Areas or areas to be restored on-Site, and shall not lease the Site or any portion of the Site to any entity that may interfere with the restoration and/or mitigation work and milestone deadlines in Appendix B.

43. The Defendant shall notify EPA in writing in advance of any proposed major changes to Geotechnical Implementation Work. Such major changes include, but are not limited to, any changes that have the potential to temporarily or permanently impact waters of the United States, or result in any expansion of the footprint of the developed part of the Site.

44. Within 10 Days after the Effective Date, Defendant shall submit to EPA and WVDEP 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 WVDEP approval is required. The list shall be in substantially the same form as Appendix B 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 schedule. In the event of conflict between the list generated pursuant to this Paragraph and the Consent Decree, the Consent Decree shall control.

45. 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 WVDEP 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 the Defendant has taken, or will take, to prevent or minimize such violation. If the

Defendant cannot fully explain the cause of a violation at the time such notice is due, Defendant shall so state. In that circumstance, 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 IX (Force Majeure).

46. The Defendant shall certify the following documents:
  - a. Any changes to the restoration and mitigation plan;
  - b. Semiannual and annual status reports;
  - c. Restoration/mitigation completion and annual monitoring reports;
  - d. Request for termination;
  - e. Force majeure submissions;
  - f. Stipulated penalty submissions;
  - g. Notice of the extension of any leases to use any portion of the Site; and
  - h. Notice of recording of Deed Restrictions.

The Defendant shall, by signature of a senior management official or of a duly authorized representative of Defendant, certify 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 am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

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

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

VII. RETENTION OF RECORDS AND RIGHT OF ENTRY

48. During the term of this Consent Decree, and until five years after the termination of this Consent Decree, the Defendant shall preserve and retain the following records, documents, and information now in its possession or control or which come into its possession or control that relate in any manner to the performance of the tasks in this Consent Decree (including all Appendices), regardless of any corporate retention policy to the contrary, including:

- a. Draft and final restoration and/or mitigation plans submitted to EPA and supporting documentation;
- b. Status reports;
- c. All permits and supporting documentation;
- d. Correspondence between the Defendant and any/all of the Plaintiffs;
- e. Records regarding payment of the civil penalty and stipulated penalties (if any);
- f. Completion reports following restoration/mitigation;
- g. Recorded Deed Restrictions;
- h. Documents regarding the transfer of any Impacted Areas or restoration/mitigation areas;
- i. Motions for dispute resolution;

- j. Force majeure notifications and subsequent correspondence between the Defendant and any/all Plaintiffs;
- k. Restoration/mitigation monitoring records;
- l. Requests for termination and subsequent filings.

The Defendant shall also instruct its contractors and agents to preserve all non-identical copies of documents, records, and information identified in this Paragraph relating to the performance of the tasks in this Consent Decree (including Appendices) for a period of five years following the termination of this Consent Decree.

49. At the conclusion of the document retention period, the Defendant shall notify the United States and WVDEP at least 90 Days prior to the destruction of any such records or documents, and, upon request by the United States or WVDEP, the Defendant shall deliver any such records or documents to EPA or WVDEP, as applicable. The 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 the Defendant asserts such a privilege, it shall provide the United States or WVDEP, as applicable, 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 the 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 the Defendant. However, no final documents, report or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that it is privileged.

50. Inspections:

a. Until termination of this Consent Decree, the United States, WVDEP, and their authorized representatives and contractors shall have authority at all reasonable times to enter the Site and areas of restoration/mitigation to:

- (1) Monitor the activities required by this Consent Decree;
- (2) Verify any data or information submitted to the United States or WVDEP;
- (3) Obtain samples;
- (4) Inspect and evaluate restoration, mitigation and/or preservation activities conducted pursuant to this Consent Decree; and
- (5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

b. This Paragraph is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States or WVDEP to conduct inspections, to require monitoring and to obtain information from the Defendant as authorized by law.

VIII. DISPUTE RESOLUTION

51. 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. If the Defendant is aware, or reasonably should have been aware, of a dispute with respect to the meaning or requirements of this Consent Decree prior to an action by the United States and/or WVDEP to enforce any obligation of this Consent Decree against the Defendant, but the Defendant fails to seek resolution of such dispute under this Section prior to such action by the United States and/or WVDEP, then the Defendant

shall be precluded from raising the disputed issue as a defense to such action by the United States or WVDEP. Disputes arising out of WVDEP's or the Corps' processing of permit applications in connection with Defendant's implementation of the terms of Section V and Appendix B of this Consent Decree shall not be subject to the dispute resolution procedures set forth in this Section.

52. 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 30 Days beginning with written notice by one party to the other affected party or 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 the Defendant, on the other, cannot be resolved by informal negotiations, then the written position advanced by the United States following consultation with WVDEP shall be considered binding unless, within 14 Days after the end of the informal negotiations period, the Defendant files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States, in consultation with WVDEP, shall have 30 Days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the following standards of review shall apply:

- a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Paragraph pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA or WVDEP 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, the 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 this Paragraph, the Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

53. If the United States or WVDEP believes that a dispute is not a good faith dispute, or that a 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 30 Day period for informal negotiations. The Defendant shall have 14 Days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the standard of review terms set forth above in Paragraph 52 shall apply.

54. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of the Defendant under this Consent Decree, except as provided in Section X, below, regarding payment of stipulated penalties. If Defendant does not prevail on the disputed issue, stipulated penalties shall (subject to the discretion of the United States and WVDEP, as specified in Paragraph 63) be assessed and paid as provided in Section X.

#### IX. FORCE MAJEURE

55. “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 the 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 delay and any adverse affects 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, delays in supply chains, 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 any of the areas of restoration/mitigation, or failure to obtain federal, state, or local permits, unless the 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).

56. If the Defendant believes that a Force Majeure event has affected or will affect its ability to perform any action required under this Consent Decree, the Defendant shall notify the United States and WVDEP in writing, orally or by electronic transmission to EPA and WVDEP in accordance with Section VI (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 WVDEP:

- a. What specific action has been affected;
- b. The specific cause(s) of the delay and why it qualifies as a Force Majeure event;
- c. The length or estimated duration of the delay; and

- d. Any measures taken or planned by the Defendant to prevent or minimize the delay and a schedule for the implementation of such measures.

The Defendant may also provide to the United States and WVDEP any additional information that the Defendant deems appropriate to support its conclusion that a Force Majeure event has affected its ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question. 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.

57. If the United States, after a reasonable opportunity for consultation with WVDEP, determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event or by another timeframe agreed upon in writing by the Parties. 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. The United States will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

58. If the United States, after a reasonable opportunity for review and comment by WVDEP, does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, the United States will notify Defendant in writing of its decision.

59. If the Parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at

issue should be extended, the Defendant or the United States (in consultation with WVDEP) may seek a resolution of the dispute under the procedures in Section VIII of this Consent Decree.

60. If Defendant elects to invoke the dispute resolution procedures set forth in Section VIII (Dispute Resolution), it shall do so no later than 15 Days after receipt of the United States' notice under Paragraph 58. 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 55 and 56.

#### X. STIPULATED PENALTIES

61. If the Defendant fails to timely fulfill any requirement of the Consent Decree (including Appendix B) and such failure is not excused under the Force Majeure provisions or by agreement of the Parties, the Defendant shall pay a stipulated penalty to the United States and WVDEP for each violation of each requirement of this Consent Decree as follows:

- a. For Day 1 up to and including Day 30 of noncompliance: \$1,000/day;
- b. For Day 31 up to and including Day 60 of non-compliance: \$2,000/day;
- c. For Day 61 and beyond of noncompliance: \$3,000/day.

A violation includes failing to perform any obligation required by the terms of this Consent Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree or otherwise agreed to by the Parties. 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.

62. The Defendant shall pay any stipulated penalty within 30 Days of the date the Defendant receives a demand by either the United States or WVDEP. The Plaintiff making the demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff by electronic mail. The Defendant shall pay 50 percent of the total stipulated penalty amount to the United States and 50 percent to WVDEP.

63. The United States or WVDEP may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties that would otherwise be due to it under this Consent Decree.

64. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VIII and/or the Force Majeure provisions in Section IX shall be resolved upon motion to this Court as provided in Paragraphs 52 and 53 (Dispute Resolution).

65. The filing of a motion requesting that the Court resolve a dispute shall stay a Defendant's obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first Day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that the Defendant does not prevail on the disputed issue, stipulated penalties shall be paid by the Defendant as provided in this Section.

66. To the extent the Defendant demonstrates to the Court that a delay or other noncompliance was due to a Force Majeure event (as defined in Section IX, above) or otherwise

prevails on the disputed issue, the Court shall excuse the stipulated penalties for that delay or noncompliance.

67. In the event that a stipulated penalty payment is applicable and not made on time, the Defendant shall be liable for interest on such penalties in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. 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 right of the United States or WVDEP to seek any remedy otherwise provided by law for the Defendant's failure to pay any stipulated penalties.

68. Any payment of a stipulated penalty shall be paid to the United States by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account, referencing U.S.A.O. 2023-V00182, and the DOJ case number 90-5-1-1-22046. Payment shall be made in accordance with instructions provided to the Defendant by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of West Virginia. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business Day. Further, at the time of making the payment as set forth in this Paragraph, Defendant shall send, electronically, a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter stating that the payment is for stipulated penalties owed pursuant to this Consent Decree in United States of America, et al. v. Waco Oil & Gas Co., Inc., and referencing the DOJ case number 90-5-1-1-22046, to the Department of Justice and EPA at the addresses set forth in Section XI of this Decree and also to EPA Regional Hearing Clerk at [R3\\_Hearing\\_Clerk@epa.gov](mailto:R3_Hearing_Clerk@epa.gov). The Defendant shall also send a copy of the EFT

form, transaction record, and transmittal letter by electronic mail to

[acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov).

69. Any payment of a stipulated penalty to WVDEP shall be made by certified or cashier's check to the WVDEP for deposit in the WVDEP's Water Quality Management Fund, or by other method acceptable to the State. The payment shall be mailed to:

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

70. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' or WVDEP's exclusive remedy for violations of this Consent Decree, and shall be in addition to any other rights, remedies, or sanctions available to the United States or WVDEP for the Defendant's violation of this Consent Decree or applicable law. 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.

#### XI. ADDRESSES

71. All notices and communications required under this Consent Decree shall be made electronically to the Parties through each of the following persons and addresses:

a. TO THE UNITED STATES THROUGH:

THE ENVIRONMENTAL PROTECTION AGENCY:

Aviva H. Reinfeld  
Assistant Regional Counsel  
United States Environmental Protection Agency, Region III  
[reinfeld.aviva@epa.gov](mailto:reinfeld.aviva@epa.gov) and  
[R3\\_ORC\\_mailbox@epa.gov](mailto:R3_ORC_mailbox@epa.gov)

Katelyn Almeter  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency, Region III  
[almeter.katelyn@epa.gov](mailto:almeter.katelyn@epa.gov)

AND,

THE UNITED STATES DEPARTMENT OF JUSTICE:

Sarah Buckley  
Trial Attorney  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044  
[sarah.buckley@usdoj.gov](mailto:sarah.buckley@usdoj.gov)

b. TO THE CORPS:

Lee A. Robinette  
Chief Energy Resource Branch  
Regulatory Division  
United States Army Corps of Engineers, Huntington District  
502 8<sup>th</sup> Street  
Huntington, WV 25701  
[lee.a.robinette@usace.army.mil](mailto:lee.a.robinette@usace.army.mil)

c. TO THE STATE/WVDEP:

Jeremy W. Bandy  
Chief Inspector Environmental Enforcement  
West Virginia Department of Environmental Protection  
601 57th St.  
Charleston, WV 25304  
[jeremy.w.bandy@wv.gov](mailto:jeremy.w.bandy@wv.gov)

d. TO THE DEFENDANT:

I.L. Morris  
President  
Waco Oil & Gas Co., Inc.  
P.O. Box 397  
Glennville, West Virginia 26351

Steve Holloway  
Land Department Manager  
Waco Oil & Gas Co., Inc.  
P.O. Box 397  
Glennville, West Virginia 26351  
[steve.holloway@wacowv.com](mailto:steve.holloway@wacowv.com)

Roger Hanshaw, Esq.  
Bowels Rice LLP  
600 Quarrier Street  
Charleston, WV 25301  
[rhanshaw@bowlesrice.com](mailto:rhanshaw@bowlesrice.com)

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

XII. EFFECTIVE DATE

73. 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.

XIII. COSTS OF SUIT

74. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action, except that the United States and/or WVDEP shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to enforce this Consent Decree or to collect any portion of the civil penalty or any stipulated penalties due but not paid by the Defendant.



#### XIV. PUBLIC COMMENT

75. 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 the W. Va. Code R. § 47-10-16.2.c, which provide for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendant agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendant in writing that it no longer supports entry of the Consent Decree.

#### XV. CONTINUING JURISDICTION OF THE COURT

76. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any Party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

#### XVI. MODIFICATION

77. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any material modification of this Consent Decree shall be in writing, and shall not take effect unless signed by the United States, the State, and the Defendant and approved by the Court; provided, however, that schedules for the completion of tasks required by Paragraph 26 and Appendix B, revisions to plans submitted and approved pursuant to Appendix B, and the timeframes for transfer and/or recording of Deed Restriction(s) pursuant to Paragraphs 26–27 may be modified by written agreement of the United States, WVDEP, and the Defendant.

78. Any disputes concerning modification of this Decree shall be resolved pursuant to Section VIII (Dispute Resolution), provided, however, that 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).

#### XVII. TERMINATION

79. At least five years after the Effective Date and after Defendant has completed the requirements of Section V (Specific Provisions); 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.

80. 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.

81. 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 VIII. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 60 Days after service of its Request for Termination.

82. Irrespective of Paragraphs 79–80 above, termination of this Consent Decree does not affect the expiration of Defendant’s record retention obligations because, as provided in that Paragraph, those obligations expire five years after termination of this Consent Decree.

#### XVIII. SIGNATORIES/SERVICE

83. The Assistant Attorney General and his designee on behalf of the United States and the undersigned representatives of Defendant and the State of West Virginia certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

84. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. The 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.

#### XIX. INTEGRATION

85. 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.

XX. FINAL JUDGMENT

86. 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.

XXI. APPENDICES

87. The following appendices are attached to and part of this Consent Decree: Appendix A (Map of Impacted Areas), Appendix B (Restoration and Mitigation Work Plan), Appendix C (Model Deed Restriction) and Appendix D (EPA Unilateral Administrative Order).

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

88. 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. § 1.162-21(b)(2)(iii)(A), performance of Section II (Applicability); Section V (Specific Provisions), and related Appendix B; Section VI (Notice and Other Submissions); and Section VII (Retention of Records and Rights of Entry) are restitution or required to come into compliance with law.

IT IS SO ORDERED.

Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_ 202\_.

---

United States District Judge

**ON BEHALF OF THE DEFENDANT, WACO OIL & GAS COMPANY, INC.:**



---

I.L. MORRIS

President

WACO OIL & GAS COMPANY, INC.

P.O. Box 397

Glenville, West Virginia 26351

Dated: Sept. 13, 2023

**ON BEHALF OF THE UNITED STATES:**

**SARAH  
BUCKLEY**

Digitally signed by SARAH  
BUCKLEY  
Date: 2023.09.27 14:16:31  
-04'00'

Dated: \_\_\_\_\_

---

SARAH A. BUCKLEY  
ALBERT LIN  
Trial Attorneys  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044  
(202) 616-7554 (Buckley)  
(202) 514-2741 (Lin)

**ON BEHALF OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,  
REGION III:**

**ADAM ORTIZ** Digitally signed by ADAM ORTIZ  
Date: 2023.09.22 10:08:34 -04'00'

*[digitally signed and dated]*

ADAM ORTIZ  
Regional Administrator  
U.S. Environmental Protection Agency  
Region III  
Four Penn Center  
1600 John F. Kennedy Boulevard  
Philadelphia, PA 19103

**CECIL  
RODRIGUES** Digitally signed by CECIL  
RODRIGUES  
Date: 2023.09.19 14:15:36 -04'00'

*[digitally signed and dated]*

CECIL RODRIGUES  
Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
Four Penn Center  
1600 John F. Kennedy Boulevard  
Philadelphia, PA 19103

**AVIVA  
REINFELD** Digitally signed by AVIVA  
REINFELD  
Date: 2023.09.14 13:56:16  
-04'00'

*[digitally signed and dated]*

AVIVA H. REINFELD  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region III  
Four Penn Center  
1600 John F. Kennedy Boulevard  
Philadelphia, PA 19103



**ON BEHALF OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,  
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE:**

**ROSEMARIE  
KELLEY** Digitally signed by  
ROSEMARIE KELLEY  
Date: 2023.09.27  
13:00:02 -04'00'

---

*[digitally signed and dated]*  
ROSEMARIE KELLEY  
Director, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

**BENJAMIN  
BAHK** Digitally signed by  
BENJAMIN BAHK  
Date: 2023.09.26  
17:21:22 -04'00'

---

*[digitally signed and dated]*  
BENJAMIN BAHK  
Director, Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

**MELISSA  
RAACK** Digitally signed by  
MELISSA RAACK  
Date: 2023.09.25  
19:30:58 -04'00'

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*[digitally signed and dated]*  
MELISSA K. RAACK  
Attorney-Advisor, Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

**ON BEHALF OF THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION:**

  
\_\_\_\_\_  
KATHERYN EMERY

Director  
Division of Waste and Water Management  
West Virginia Department of Environmental Protection  
601 57th Street Southeast  
Charleston, WV 25304

Dated: 9/15/2023

  
\_\_\_\_\_  
BROOKE HIRST

Attorney  
West Virginia Department of Environmental Protection  
601 57th Street Southeast  
Charleston, WV 25304

Dated: 9/15/23

**Appendices:**

**Appendix A:** Map of Impacted Areas

**Appendix B:** Restoration and Mitigation Work Plan

**Appendix C:** Model Deed Restriction

**Appendix D:** EPA Unilateral Administrative Order

# Appendix A

# Appendix A – Site Map with Impact Areas



Legend:

Stream A Impact:	Stream C1 Impact:
Stream A1 Impact:	Stream C2 Impact:
Stream G Impact:	Stream C3 Impact:
Stream H Impact:	Wetland Impact:
National Hydrography Dataset:	

# Appendix B

## **Appendix B: Restoration and Mitigation Work Plan**

This “Restoration and Mitigation Work Plan” (or “Work Plan”) sets forth the elements of and procedures applicable to the restoration, stabilization, and mitigation work to be undertaken at the Site by Defendant pursuant to the Consent Decree entered into by the United States (on behalf of EPA) and the State of West Virginia (by and through WVDEP), and the Defendant. This Restoration and Mitigation Work Plan was approved by EPA on July 11, 2023, and is incorporated into the Consent Decree and the provisions and definitions set out in the Consent Decree apply herein.

### **1. Restoration and Mitigation Design Principles**

- a. The restoration elements of this Work Plan are designed (i) to restore the Impacted Areas on the Site to approximate pre-disturbance original conditions consistent with the definition of restoration found in 40 C.F.R. § 230.92, and (ii) to achieve permanent stabilization on Site (achieved, in part, through the Geotechnical Implementation Work), ensuring that restored areas are stabilized to avoid Landslides or Slips.
- b. The mitigation elements of this Work Plan include compensation for impacts to streams and wetlands using the West Virginia Stream and Wetland Valuation Metric (“WVSWVM”) to determine the appropriate amount of mitigation needed (if any) to offset permanent and temporal losses to aquatic resources.
- c. In implementing elements of this Work Plan, Defendant shall observe the following requirements:
  - i. All restoration and mitigation work will utilize only native West Virginia species for planting; and
  - ii. All elements of this Work Plan shall incorporate quantitative performance criteria.
- d. This Work Plan establishes a schedule for design and implementation deadlines set out in Table 1, below, which shall include a post-restoration monitoring plan in accordance with 40 C.F.R. § 230.96 for a period of ten years.

### **2. Monitoring Plan**

- a. A Defendant shall include a Monitoring Plan in the 100% Complete Restoration Plan that provides for 10 years of post-restoration monitoring that shall be consistent with the monitoring requirements laid out in the Compensatory Mitigation Rule (40 C.F.R. § 230.96).
- b. The performance criteria set forth in the 100% Complete Restoration Plan as approved by EPA shall be met before Defendant may discontinue its post-

restoration monitoring may be discontinued. At the end of 10 years, if Defendant has met the performance criteria, no further monitoring is required and EPA will release Defendant from any further obligation to with respect to the on-site restoration and off-site mitigation requirements.

- c. If the performance criteria are not met in year 10, Defendant shall develop an Adaptive Management Plan to correct the deficiency. Alternatively, if, after ten years of monitoring, restoration meeting performance criteria appears impracticable, Defendant may propose to EPA to purchase mitigation credits to cover the outstanding debit not achieved through its restoration and mitigation work per the process in Section 3, Off-Site Mitigation Plan, above.
- d. Review and Approval of Adaptive Management Plan. EPA, in consultation with WVDEP, shall review the Adaptive Management Plan and will approve the Plan, in whole or in part, based upon EPA's determination that the Plan is or is not in accordance with the objectives of the Consent Decree, the Clean Water Act, and the West Virginia WPCA, as applicable, and whether the Plan achieves the performance criteria established in the 100% Complete Restoration Plan, as approved by EPA.
  - i. *Conditional Approval.* EPA may conditionally approve the Adaptive Management Plan upon specified conditions. If EPA conditionally approves the Plan upon specified conditions, Defendant will provide written notice that it accepts the conditions, including, as applicable, submitting a revised Adaptive Management Plan, within 30 days of receiving EPA's conditional approval, subject to the Defendant's right to dispute resolution pursuant to Section VIII of the Consent Decree.
  - ii. *Disapproval.* If EPA disapproves all or part of the Adaptive Management Plan, the Defendant shall, within 60 days of receipt of EPA's disapproval, address the reasons for disapproval and resubmit the Adaptive Management Plan for approval. If EPA disapproves the Adaptive Management Plan resubmitted pursuant to this provision in whole or in part three times or more, EPA, in consultation with WVDEP, may itself provide an Adaptive Management Plan that corrects the identified deficiencies and may require implementation measures in accordance with that Plan, subject to the Defendant's right to dispute resolution pursuant to Section VIII of the Consent Decree.
- e. Upon approval of the Adaptive Management Plan, with, as applicable, conditions or modifications required by EPA and accepted by Defendant, the Adaptive Management Plan will be deemed incorporated into the Consent Decree.
- f. Upon EPA's approval of an Adaptive Management Plan, Defendant shall implement that Plan on a schedule approved by EPA, in consultation with WVDEP



### 3. Milestone Schedule

The following milestone deadlines in Table 1, below, shall apply, in accordance with EPA's July 11, 2023 approval of Defendant's 100% Restoration and Mitigation Plan.

All "features," "pads" and "slopes referenced in the Milestone Schedule in Table 1, below, reference items with the same names in Defendant's "Final Geotechnical Implementation Plan and Report Findings" submitted to EPA on November 4, 2022. This term is defined in the Consent Decree, and refers to the plan and plan set (including engineering drawings) that describes the Geotechnical Implementation Work Defendant will complete.

**Table 1: Milestone Schedule**

<b>Item</b>	<b>Milestone to be completed by Defendant</b>	<b>Deadline</b>
<b>1</b>	<b><i>100% Restoration and Mitigation Plan</i></b>	<i>Approved by EPA on July 11, 2023</i>
<b>2</b>	<b>Restore Slope 4 Landslide Areas and install related Erosion and Sediment Control ("E&amp;SC") Best Management Practices ("BMPs") measures</b>	August 15, 2023
<b>3</b>	<b>Restore Slopes 5, 6, 7, and 9; Restore Feature G &amp; H</b>	Complete item and notify EPA and WVDEP of completion within 120 days of entry of the Consent Decree
<b>4</b>	<b>Restore On-Site Sediment Traps</b>	Complete item and notify EPA and WVDEP of completion within 120 days of entry of the Consent Decree
<b>5</b>	<b>Restore "R009-Feature A" with Slope 1-3 Geotechnical Restoration</b>	Complete item and notify EPA and WVDEP of completion within 120 days of entry of the Consent Decree
<b>6</b>	<b>Restore Feature C</b>	Complete item and notify EPA and WVDEP of completion within 120 days of entry of the Consent Decree
<b>7</b>	<b>Complete Restoration and Mitigation (On-site and Off-site)</b>	December 31, 2024
<b>8</b>	<b>Submit Certificate of Permanent Stabilization per Paragraph 36 of the Consent Decree</b>	January 31, 2025
<b>9</b>	<b>Submit certification of completion of Restoration</b>	January 31, 2025
<b>10</b>	<b>Submit As-Built Survey &amp; Report and Monitoring Report</b>	March 31, 2025
<b>11</b>	<b>Submit a copy of Deed Restriction(s) recorded with Braxton County (using the sample in Appendix C to the Consent Decree) per Paragraph 25 of the Consent Decree</b>	March 31, 2025
<b>12</b>	<b>Commence 10 Year Monitoring Period</b> 1. Annual Monitoring Report - Year 1 2. Annual Monitoring Report - Year 2	December 31, 2025 December 31, 2026

	<b>3. Annual Monitoring Report - Year 3</b>	December 31, 2027
	<b>4. Annual Monitoring Report - Year 4</b>	December 31, 2028
	<b>5. Annual Monitoring Report - Year 5</b>	December 31, 2029
	<b>6. Annual Monitoring Report - Year 6</b>	December 31, 2030
	<b>7. Annual Monitoring Report - Year 7</b>	December 31, 2031
	<b>8. Annual Monitoring Report - Year 8</b>	December 31, 2032
	<b>9. Annual Monitoring Report - Year 9</b>	December 31, 2033
	<b>10. Annual Monitoring Report - Year 10</b>	December 31, 2034

# Appendix C

***SAMPLE DECLARATION OF DEED RESTRICTIONS FOR CONSERVATION***

THIS DECLARATION OF DEED RESTRICTIONS FOR CONSERVATION (“**Declaration**”) is made this \_\_\_ day of \_\_\_\_\_, 202X, by Waco Oil & Gas Company, Inc. (“**Grantor**”), having an address at [ADDRESS];

WITNESSETH:

**WHEREAS**, Grantor is the owner of certain real property located in \_\_\_\_\_ District, \_\_\_ County, West Virginia described in a deed of record in the Office of the Clerk of the County Commission of Braxton County, West Virginia (“**Clerk’s Office**”) in Deed Book \_\_\_ at Page \_\_\_ (“**Property**”); and

**WHEREAS**, Grantor, having the authority to do so, intends to record this Declaration in the Clerk’s Office in order to restrict subsequent disturbance and/or development of certain portions of the surface of the Property depicted on Exhibit A attached hereto (“**Conserved Areas**”) in perpetuity;

**WHEREAS**, the Conserved Areas possess open space and natural values of great importance to Grantor, the people of Braxton County, and the people of the State of West Virginia, and all current and future generations of mankind; and

**WHEREAS**, preservation of the Conserved Areas is consistent with the central objective of the Consent Decree in the matter of *United States of America and the State of West Virginia v. Waco Oil & Gas Company, Inc.* and

**WHEREAS**, Grantor agrees that the U.S. Environmental Protection Agency, and the U.S. Army Corps of Engineers, and their successor agencies (collectively “**Third Parties**”), are third-party beneficiaries under this Declaration, except that nothing herein creates a property estate, interest, or right in Third Parties or the United States of America with regard to the Conserved Areas;

**NOW THEREFORE**, Grantor hereby agrees that the Conserved Areas shall be subject in perpetuity to the following covenants and restrictions:

1. This Declaration shall be a burden upon and shall run with the Conserved Areas, shall apply to the surface of the Conserved Areas, and shall bind Grantor and its successors and assigns with respect to the Conserved Areas in perpetuity. Grantor shall record this Declaration in the Clerk’s Office within sixty (60) days of the date of this Declaration. Grantor shall provide Third Parties with proof of recordation and give notice of this Declaration to current record title holders of easements in the Conserved Areas within thirty (30) days of recording in the Clerk’s Office. To assure that the surface of Conservation Area, including its air space and subsurface, will be retained in perpetuity in its natural condition as provided herein and in the Restoration and Mitigation Plan, and to prevent any use of the Conservation Area that will impair or interfere with its natural resource functions and values; provided, however, that this Declaration does not prohibit Declarant from

developing or leasing oil and gas beneath the Conservation Area as long as the Conservation Area is not disturbed. Declarant intends that this Declaration will confine the use of the Conservation Area to such activities as are consistent with the purpose of this Declaration and the Restoration and Mitigation Plan.

2. The following activities are prohibited in the Conserved Areas, except as necessary for the control of alien, invasive, or noxious plant or animal species or as necessary to accomplish restoration and/or mitigation described in Paragraph 9:
  - a. Removal, excavation, dredging, or disturbance of the surface;
  - b. Dumping of, storage of, or filling with soil, rock, biological material, trash, ashes, garbage, waste, or other materials;
  - c. Draining, impounding, or impairing the flow or circulation, or reducing the reach of waters of the United States or waters of the State, or any other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, as amended;
  - d. Installation of structures;
  - e. Placement of pavement or other impervious materials;
  - f. Alteration of the existing pattern of vegetation through removal, destruction, or planting of vegetation;
  - g. Conversion of, or expansion into, any portion of the Conserved Areas for use of agricultural, horticultural, aquacultural, silvicultural, livestock production, or grazing activities. This prohibition also includes conversion from one type of these activities to another (e.g., from agricultural to silvicultural);
  - h. The use of fertilizers, herbicides, or pesticides;
  - i. Removal, clearing, pruning, or mowing of live vegetation, including trees, unless Grantor demonstrates that such removal will result in habitat enhancement or to prevent a safety hazard, and Grantor has received written approval of the West Virginia Department of Environmental Protection;
  - j. The use of the Conserved Areas to provide required open space for the development or subdivision of another property or to determine any other permissible residential, commercial, or agricultural uses of another property, or any legal or de facto division, subdivision, or portioning of the Conserved Areas;
  - k. Any other use of or activity in the Conserved Areas that is inconsistent with the purpose of this Declaration.

3. It is the purpose of this Declaration to assure that the Conserved Areas will be maintained as such and to prevent any unauthorized disturbance and/or development to the Conserved Areas.
4. Notwithstanding any provisions to the contrary, this Declaration is subject and subordinate to any existing and duly recorded rights with respect to the Conserved Areas. All structures, infrastructure, as well as all pre-existing easements or other duly recorded rights in the Conserved Areas identifiable through a title search extending to documents placed on record within twenty (20) years prior to the date of this Declaration shall be indicated on Exhibit "A", which is attached to this Declaration, and includes depictions sufficient to identify the boundaries of the Conserved Areas. Grantor certifies that to Grantor's actual knowledge, there are no previously granted easements existing in the Conserved Areas that interfere or conflict with the purpose of this Declaration.
5. All mortgages and deeds of trust granted or entered into after the date hereof affecting the Conserved Areas will be subordinate to this Declaration.
6. The Conserved Areas are subject to this Declaration. Each deed, title, or other instrument subsequently conveying an interest in the Conserved Areas shall contain a notice stating that the Conserved Areas are subject to this Declaration and shall reference the recorded location of this Declaration and incorporate this Declaration by reference.
7. Third Parties shall have the right to:
  - a. enter upon the Conserved Areas for the purpose of inspecting the Conserved Areas to determine compliance with the purposes and terms of this Declaration, or for any other purpose authorized by this Declaration or by the Consent Decree. When practicable, such entry shall be upon prior reasonable notice to the property owner. This right of entry is in addition to and does not limit any right of entry otherwise granted by Federal or State law;
  - b. take any and all action within the authority of Third Parties within the Conserved Areas necessary to address a situation that poses an immediate risk to health, life, property, or the environment; and
  - c. take any and all action within the authority of Third Parties within the Conserved Areas required by Federal or State law.
8. Grantor grants to Third Parties a discretionary right to enforce this Declaration. In the event of a breach of this Declaration by Grantor or another party, Third Parties shall notify Grantor of the breach. If Grantor fails to take corrective action within 60 days of such notice, Third Parties may undertake actions to effect such corrective action, including bringing a judicial action against any person(s) or entity(ies) violating or attempting to violate this Declaration; provided, however, that no violation of this Declaration shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing party shall be entitled to a complete restoration for any violation, as well as any other judicial remedy such as civil

penalties. The costs of breach, correction and/or restoration, including Third Parties' expenses, court costs, and attorney's fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach. Enforcement shall be at the discretion of Third Parties, and no omissions or delay in acting shall constitute a waiver of any enforcement right. These rights are in addition to, and shall not limit, enforcement rights available under other provisions of law or equity, under any applicable permit or certification, or under the Consent Decree.

9. Grantor, any Defendants to the Consent Decree, and/or their agent(s), employee(s), contractor(s), licensee(s), representative(s), and subcontractor(s), shall have the right to enter upon the Conserved Areas for the purpose of performing any work advisable, incidental, necessary, prudent, or required by a restoration or mitigation plan approved under the Consent Decree, including construction, planting, maintenance, monitoring, long-term management, or any other restoration, enhancement, or mitigation work specified therein, provided such work is conducted in accordance with such approved plan.
10. Grantor reserves to itself, its successors or assigns, all rights as owner of the Property, including the right to engage in all uses of the Conserved Areas not inconsistent with the purpose and terms of this Declaration.
11. Grantor shall provide the Defendants to the Consent Decree and Third Parties written notice of any transfer or change in ownership of, or of the execution of any subsequent easement affecting, any portion of the Conserved Areas, including but not limited to the name and address of the new owner at least thirty (30) days subsequent to the transfer or change in ownership or execution of such easement.
12. Grantor agrees that this Declaration shall be expressly referenced in any subsequent deed, subdivision deed, lease, sub-lease, or other legal instrument by which Grantor divests itself of any estate or interest in any portion of the Conserved Areas and that such reference shall expressly state that the Conserved Areas are burdened and encumbered by this Declaration. Notwithstanding the failure of Grantor to include the foregoing reference in any subsequent instrument, this Declaration shall run with the Conserved Areas and be binding upon Grantor's assigns and successors.
13. Notwithstanding anything contained herein to the contrary, any modification or termination of this Declaration shall require the prior written approval of Third Parties. Modifications to this Declaration must be in writing, and must be consistent with the conservation purposes of this Declaration. Grantor shall record any modification or termination of this Declaration in the Clerk's Office within sixty (60) days of executing such a modification or termination. Grantor shall provide the Defendants to the Consent Decree and Third Parties with proof of recordation within thirty (30) days of recording in the Clerk's Office.
14. For any modification accomplished under Paragraph 13 Grantor shall modify this Declaration by preparing and submitting to the Clerk's Office:
  - a. A revised plan and metes and bounds description for the area(s) to be preserved

under this Declaration (hereinafter the “**Modification Documents**”); and

- b. A Modified Declaration of Deed Restrictions that reflects the modifications to this original Declaration, the justification for the modification, and that also includes the deed book and page of the title deed for the property or properties subject to the modified Declaration set forth in the Modification Documents.
15. Grantor shall record the documents listed in Paragraph 14 above, in the same manner and place as this original Declaration was recorded.
  16. This Declaration does not and shall not be construed or deemed to dedicate the Conserved Areas for enjoyment or use by any party other than Grantor and shall not create or vest a property estate, interest, or right in any party other than Grantor.
  17. Miscellaneous.
    - a. The laws of the State of West Virginia shall govern the interpretation and performance of this Declaration.
    - b. If any provision of this Declaration or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Declaration, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.
    - c. Should there be more than one Grantor, the obligations imposed by this Declaration upon each Grantor shall be joint and several.
    - d. The covenants, terms, conditions and restrictions of this Declaration shall continue as a servitude running in perpetuity with the Conserved Areas.
    - e. The captions in this Declaration have been inserted solely for convenience of reference and are not a part of this Declaration and shall have no effect upon construction or interpretation.
    - f. The covenants, terms, conditions, restrictions and purposes imposed by this Declaration shall not only be binding upon Grantor while it owns the Conserved Areas but also upon its agents, personal representatives, executors, assigns and all other successors to it in interest, and shall continue as servitudes running in perpetuity with the Conserved Areas.
  18. Any notice, demand, request, consent, approval or communication under this Declaration shall be sent by electronic mail, certified mail, return receipt requested or reliable overnight courier, addressed as follows:



**To Grantor:**

[Add Point of Contact here]

**To Third Parties:**

TO WVDEP:

- (1) Jeremy Bandy  
Chief Inspector Environmental Enforcement  
West Virginia Department of Environmental Protection  
[Jeremy.W.Bandy@epa.gov](mailto:Jeremy.W.Bandy@epa.gov)

TO EPA:

- (1) Aviva Reinfeld  
Assistant Regional Counsel  
Office of Regional Counsel  
United States Environmental Protection Agency  
Region III  
[Reinfeld.Aviva@epa.gov](mailto:Reinfeld.Aviva@epa.gov)
- (2) Katelyn Almeter  
Clean Water Act, Section 404  
Enforcement & Compliance Assurance Division  
Environmental Protection Agency  
Region III  
[Almeter.Katelyn@epa.gov](mailto:Almeter.Katelyn@epa.gov)

TO THE CORPS:

- (1) Lee Robinette  
Chief Energy Resources Branch  
Regulatory Division  
U.S. Army Corps of Engineers, Huntington District  
[Lee.A.Robinette@usace.army.mil](mailto:Lee.A.Robinette@usace.army.mil)

19. A party may change the address or person to whom notices to it are required to be given by notice given in the manner above provided.

**IN WITNESS WHEREOF**, Grantor has set its hand and seal on the day and year first above written, and directs that this Declaration be recorded in the Clerk's Office.

Waco Oil & Gas Company, Inc.  
[ADDRESS]

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

SAMPLE

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Be it remembered that on this \_\_\_\_ day of \_\_\_\_\_, 202X, before me, the subscriber, a Notary Public, personally appeared: [NAME], in his/her capacity as \_\_\_\_\_ of Waco Oil & Gas Company, Inc. and he/she thereupon acknowledged that he/she signed the foregoing instrument in such capacity, and that said instrument is the voluntary act of deed of said [NAME].

\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
A Notary Public of \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

This instrument was prepared by: \_\_\_\_\_.

Subsequent to recording, this instrument is to be returned to:

**EXHIBIT A**

***[DEPICTION OF CONSERVED AREAS]***

SAMPLE

# Appendix D



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

02/09/2021

**VIA UNITED PARCEL SERVICE**  
**SIGNATURE REQUESTED**

Mr. I.L. Morris, President  
Waco Oil & Gas Company  
P.O. Box 397  
Glenville, West Virginia 26351

**Re: EPA Docket No. CWA-03-2021-0017DW**

ADMINISTRATIVE ORDER FOR COMPLIANCE

Dear Mr. Morris:

Enclosed is an Order for Compliance that requires Waco Oil & Gas Company to mitigate or restore for the unauthorized work in wetlands on the property it owns and operates located at approximately 1.25 miles southeast on Route 19 from the intersection of Route 19 and I-79 in Sutton, Braxton County, West Virginia. The Order requires restoration of the environmental harm which was caused by the unlawful discharge of fill material to waters of the United States.

Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), prohibits discharges to waters of the United States, including dredge or fill material, without a permit from the U.S. Army Corps of Engineers (Corps). Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), authorizes the U.S. Environmental Protection Agency (EPA) to issue an Administrative Compliance Order whenever any person is in violation of any condition or limitation which implements, *inter alia*, Section 301(a) of the CWA. Activities you have performed have resulted in discharges to jurisdictional waters of the United States without a permit. These activities constitute a violation of Section 404 of the CWA. These activities include unauthorized discharge of fill material at the Site associated with the construction of two flat pads and access road resulted in direct impacts to 2,059 linear feet of stream channels with relatively permanent flow and 0.19 acres of abutting wetlands. Additional secondary effects resulted in fill of downstream aquatic resources due to the failure to maintain and contain discharged material properly to prevent point and non-point sources of pollution.

You are entitled to assert a claim of business confidentiality covering any part or all of the information submitted in response to the Order, in a manner described at 40 C.F.R. § 2.203(b). Information subject to a claim of business confidentiality will be made available to the public only in accordance with 40 C.F.R. Part 2, Subpart B. Unless a claim of business confidentiality is asserted at the time the requested information is submitted, EPA may make this information available to the public without further notice to you.


If you have any questions regarding the Order, or wish to submit any written material you believe to be relevant to the agency's findings, please contact Ms. Katelyn Almeter, Enforcement and

EPA Docket # CWA-03-2021-0017DW

Compliance Assurance Division, at (215) 814-2797, or your counsel may contact Aviva H. Reinfeld, the attorney assigned to this matter, at (215) 814-2632.

Sincerely,

KAREN  
MELVIN

 Digitally signed by KAREN  
MELVIN  
Date: 2021.02.09 14:03:37  
-05'00'

Karen Melvin, Director  
Enforcement and Compliance Assurance Division

Enclosures

cc: Jeremy Bandy, WVDEP ([Jeremy.W.Bandy@wv.gov](mailto:Jeremy.W.Bandy@wv.gov))  
Michelle Staley, USACE ([Michelle.M.Staley@usace.army.mil](mailto:Michelle.M.Staley@usace.army.mil))  
Roger Hanshaw, Bowles Rice LLP ([rhanshaw@bowlesrice.com](mailto:rhanshaw@bowlesrice.com))  
Marc Monteleone, Bowles Rice LLP ([mmonteleone@bowlesrice.com](mailto:mmonteleone@bowlesrice.com))

BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

In The Matter of:

Waco Oil and Gas Co., Inc.

Property Located At:

Morris Development Site  
1.25 miles east on Route 19 from the  
intersection of Route 19 and I-79,  
Sutton, West Virginia 26601  
38.6087°N, -80.7368°W

Respondent.

Proceeding Under Section 309(a) of the Clean  
Water Act, 33 U.S.C. § 1319(a)

ORDER FOR COMPLIANCE  
Docket. No. CWA-03-2021-0017DW

## I. STATUTORY AUTHORITY

This Order for Compliance (“Order”) is issued under the authority vested in the United States Environmental Protection Agency (“EPA”) by Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a) (“CWA” or “Act”). The Administrator has delegated this authority to the Regional Administrator of EPA Region III who in turn has re-delegated it to the Director of the Enforcement & Compliance Assurance Division.

## II. ALLEGATIONS

1. Waco Oil and Gas Co., Inc. (“Respondent”) is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
2. Respondent is the owner and operator of the property located at coordinates 38.6087°N, -80.7368°W, approximately 1.25 miles east on Route 19 from the intersection of Route 19 and I-79 in Sutton, West Virginia 26601 (“the Site”), depicted in Exhibit A.
3. The Site contains unnamed tributaries to Bear Run, Cunningham Fork, and Buffalo Creek and wetlands abutting such tributaries. Unnamed tributaries on the Site contribute flow more than in direct response to precipitation and during typical year conditions to Cunningham Fork. Cunningham Fork contributes flow more than in direct response to precipitation and during typical year conditions to Buffalo Creek, which in turn contributes flow more than in direct response to precipitation and during typical year conditions to the Elk River, a Traditional Navigable Water. Other unnamed tributaries on the Site contribute flow more than in direct response to precipitation and during typical year conditions to Bear Run. Bear Run contributes flow more than in direct response to precipitation and during typical year conditions to the Little Birch River, which in turn contributes flow more than in direct response to precipitation and during typical year conditions to the Birch River, which in turn contributes flow more than in direct response to precipitation and during typical year conditions to the Elk River, a Traditional



Navigable Water. Therefore, the abutting wetlands and tributaries on the Site are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

4. Since on or about September 2016, Respondent, or persons acting on behalf of Respondent, has on an ongoing basis operated equipment which discharged dredged and/or fill material to waters of the United States at the Site, without authorization from the U.S. Army Corps of Engineers (“Corps”). Respondent’s unauthorized discharge of fill material at the Site associated with the construction of two flat pads and access road resulted in direct impacts and secondary effects to waters of the United States, including approximately 2,059 linear feet of stream channels with relatively permanent flow and approximately 0.19 acres of abutting wetland channels as depicted in Table 1 below, and secondary effects as a result of the fill of downstream aquatic resources. The streams are unnamed tributaries to Bear Run and Cunningham Fork. The streams and their abutting wetlands and shown in Exhibit B, attached herein.

**Table 1: Impacts at the Site**

<b>Aquatic Resource</b>	<b>Approximate Impact</b>
Feature A	1,600 linear feet of stream
Feature A1	299 linear feet of stream
Wetland Area 1	0.19 acres
Feature C1	10 linear feet of stream
Feature C2	80 linear feet of stream
Feature C3	50 linear feet of stream
Feature G	20 linear feet of stream
<b>Total Impacts</b>	<b>2,059 linear feet of stream 0.19 acres of wetlands</b>

5. The term “fill material” within the meaning of 40 C.F.R. § 232.2 includes any pollutant which replaces portions of “waters of the United States” with dry land or which changes the bottom elevation of a water body for any purpose. The term “discharge of fill material” includes “placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States.”
6. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits any person from discharging dredged and/or fill material from a point source to “waters of the United States” except in compliance with a permit issued by the Corps under Section 404 of the Act, 33 U.S.C. § 1344.
7. The equipment referenced in Paragraph 4 above, from which the dredged and/or fill material was discharged to “waters of the United States,” constitutes a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
8. At no time during the discharge of dredged and/or fill material into waters of the United States at the Site did the Respondent have a permit from the Corps as required by Section 404 of the Act, 33 U.S.C. § 1344.
9. Respondent, by discharging dredged and/or fill material to the “waters of the United States” without authorization, has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

### III. ORDER FOR COMPLIANCE

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

10. Cease and desist all unpermitted discharges to waters of the United States at the Site immediately, including filling, clearing and grading except in compliance with a CWA Section 404 or 402 permit or in accordance with the plans submitted and approved pursuant to this Order.
11. Within forty-five (45) days of the effective date of this Order, Respondent shall submit to EPA via e-mail a written certification signed by a corporate officer authorized to sign on behalf of Respondent and consistent with Paragraph 15 containing a certification by a professional engineer that Respondent has implemented temporary stabilization measures on the Site sufficient to prevent migration/erosion of soil or sediment-laden water into waters of the United States. Such stabilization measures shall be consistent with West Virginia's Erosion and Sediment Control BMP Manual (available at [https://dep.wv.gov/WWE/Programs/stormwater/csw/Pages/ESC\\_BMP.aspx](https://dep.wv.gov/WWE/Programs/stormwater/csw/Pages/ESC_BMP.aspx)). Such certification shall describe all steps taken and the locations on the Site where such steps have been taken.
12. Complete the following restoration and mitigation activities:
  - a. Within thirty (30) days of the effective date of this Order, Respondent shall submit via e-mail to EPA for approval a detailed plan developed by a professional engineer or other qualified professional trained in wetland and stream restoration work to return the Site to compliance with the CWA. Such plan must include the following elements, and failure to include any of the following elements will be considered a violation of this Order:
    - i. Be designed to restore waters of the United States on the Site, including the unnamed tributaries and abutting wetlands described in Paragraphs 3 and 4 and depicted on Exhibit B, to approximate pre-disturbance original conditions consistent with the definition of restoration found in 40 C.F.R. § 230.92 or where restoration in full to approximate pre-disturbance original condition is not practicable, provide a written justification certified consistent with Paragraph 15 by a corporate officials authorized to sign on behalf of Respondent why such restoration in full cannot practicably be achieved.
      1. Where it is not practicable to achieve such restoration in full, the plan must describe all steps taken to minimize the amount of fill left in place and to achieve restoration to the maximum extent practicable.
      2. Where Respondent proposes to leave fill in place, Respondent shall seek appropriate authorization from the U.S. Army Corps of Engineers and comply with any permit issued by the Corps. Respondent shall submit to EPA copies of all communications with the Corps to obtain appropriate authorization.
    - ii. Include a schedule for implementation (that may be conditioned upon receipt of any required approvals or certifications for such work under West Virginia Law, for

which the Defendant shall make timely application and diligently pursue);

- iii. Include compensation for impacts to streams and wetlands using the West Virginia Stream and Wetland Valuation Metric (“WVSWVM”) to determine the appropriate amount of mitigation needed to offset permanent and temporal losses to aquatic resources. Such compensation shall be consistent with 40 C.F.R. §§ 230.91-.98;
          - iv. Ensure that restored areas are stabilized to avoid landslides or slips;
          - v. Utilize only native West Virginia species for planting;
          - vi. Achieve final site stabilization;
          - vii. Incorporate measurable, quantitative performance criteria consistent with pre-disturbance conditions utilizing an appropriate reference water; and
          - viii. Include a post-restoration monitoring plan for a period consistent with this paragraph and subparagraph (e) below.
  - b. After review of the restoration and mitigation plan, EPA will: a) approve the plan, in whole or in part; b) approve the plan upon specified conditions; c) modify the plan to cure any deficiencies; d) disapprove the plan, in whole or in part; or e) any combination of the above.
  - c. If EPA disapproves all or part of the restoration plan, Respondent shall, within thirty (30) days of receipt of EPA’s disapproval, correct the deficiencies and resubmit the plan for approval. EPA retains the right, if the plan is not approved as provided in this Order, to order restoration in accordance with a plan developed by EPA.
  - d. Upon approval of the restoration plan (either with or without conditions or modifications by EPA), Respondent shall implement the plan as approved or modified by EPA as provided below. All restoration work shall be completed within the schedule of work in the restoration plan to be approved by EPA.
  - e. Upon completion of the restoration activities, Respondent shall submit an As-Built Report and monitoring plan for EPA’s approval. Respondent shall monitor the restored area for a period of no less than five years to ensure achievement of performance criteria as referenced in subparagraph (a) above. Responsibility to complete the required restoration as set forth in the approved restoration plan will not be considered fulfilled until the Respondent has demonstrated project success and has received written verification of that success from EPA. Once all conditions in the restoration plan have been met and written verification has been provided, EPA will terminate the Order.
13. Respondent’s failure to implement temporary site stabilization consistent with Paragraph 11, to submit a restoration plan consistent with Paragraph 12, or to complete the work in a manner consistent with this Order including but not limited to Paragraph 10 shall be deemed a violation of this Order.
14. All correspondence and submissions related to this Order shall be sent via email to:

EPA Docket # CWA-03-2021-0017DW

Katelyn Almeter  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency, Region III  
1650 Arch Street (Mailcode: 3ED31)  
Philadelphia, PA 19103-2029  
[almeter.katelyn@epa.gov](mailto:almeter.katelyn@epa.gov)

**IV. GENERAL PROVISIONS**

15. The following certification must accompany each submission by Respondent pursuant to this Order and must be signed by a Representative of Respondent authorized to sign on behalf of Respondent:

*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 upon my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

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

16. Respondent's compliance with the terms of this Order shall not relieve Respondent of its obligation to comply with all applicable provisions of the Clean Water Act or any other Federal, State or local law or regulation. Issuance of this Order is not an election by EPA to forego any civil or criminal action otherwise authorized by the Clean Water Act. EPA reserves the right to seek any remedy available under the law that it deems appropriate to the violations described herein. Compliance with this Order shall not be a defense to any action commenced pursuant to such authorities.
17. Violation of the terms of this Order may result in further EPA enforcement action including, but not limited to, imposition of administrative penalties, pursuant to 33 U.S.C. § 1319(g) as modified by the Debt Collection Procedures Act of 1996 and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, and/or initiation of judicial proceedings that allow for civil penalties of up to \$53,484 per day for each day of violation that occurs, and/or for the criminal sanctions of imprisonment and fines of up to \$25,000 per day, 33 U.S.C. § 1319(c).

EPA Docket # CWA-03-2021-0017DW

18. The provisions of this Order shall apply to and be binding upon the Respondent and its officers, directors, employees, contractors, agents, trustees, successors and assigns of Respondent.
19. Respondent will allow EPA personnel on the Site for the purpose of inspecting work performed pursuant to this Order upon reasonable notice. EPA reserves all existing inspection authority otherwise available to EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.

#### V. OPPORTUNITY TO CONFER

20. Respondent is invited to confer with the Agency about the findings and conclusions reflected in this Order including the terms and conditions contained herein. Respondent's request for a conference must be confirmed in writing via e-mail within ten (10) days of receipt of this Order. Respondent must communicate with EPA representatives to schedule the conference no later than 20 days after receipt of this Order. If the requested conference is held, this Order shall become effective ten (10) days after the conference is held. If Respondent does not request a meeting within ten (10) days of receipt of this Order, Respondent waives its right to a conference, and this Order shall become effective ten (10) days from its receipt. Any request for a conference, or other inquiries concerning this Order, should be made in writing to: Katelyn Almeter at [almeter.katelyn@epa.gov](mailto:almeter.katelyn@epa.gov). If represented by counsel, Respondent's attorney may contact Aviva H. Reinfeld, Assistant Regional Counsel, at [reinfeld.aviva@epa.gov](mailto:reinfeld.aviva@epa.gov).

#### VI. JUDICIAL REVIEW

21. Respondent may seek federal judicial review of this Compliance Order, issued under Section 309 of the CWA, 33 U.S.C. § 1319, pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section706&num=0&edition=prelim>, states the scope of such review.

#### VII. EFFECTIVE DATE

22. The effective date of this Order shall be ten (10) days from the date of receipt of this Order, or, if a conference is requested per Section V above, this Order shall become effective ten (10) days after the conference is held.

#### VII. NOTICE OF INTENT TO COMPLY

23. Within ten (10) days of the effective date of this Order, Respondent shall submit to EPA via e-mail a Notice of Intent to Comply with the Order. The Notice shall be submitted to:

Katelyn Almeter  
Enforcement and Compliance Assurance Division  
United States Environmental Protection Agency, Region III  
1650 Arch Street (Mailcode: 3ED31)  
Philadelphia, PA 19103-2029  
[almeter.katelyn@epa.gov](mailto:almeter.katelyn@epa.gov)

IT IS SO ORDERED

Date: 02/09/2021

KAREN  
 MELVIN  
 Digitally signed by KAREN  
 MELVIN  
 Date: 2021.02.09 14:04:25  
 -05'00"

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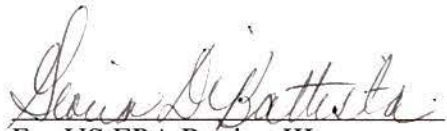
Karen Melvin, Director  
 Enforcement and Compliance Assurance Division  
 EPA, Region III

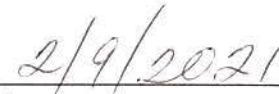
EPA Docket # CWA-03-2021-0017DW

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this Administrative Order for Compliance, the original of which has been filed with the Regional Hearing Clerk, U.S. EPA Region III, has been sent to the following via UPS, delivery confirmation requested:

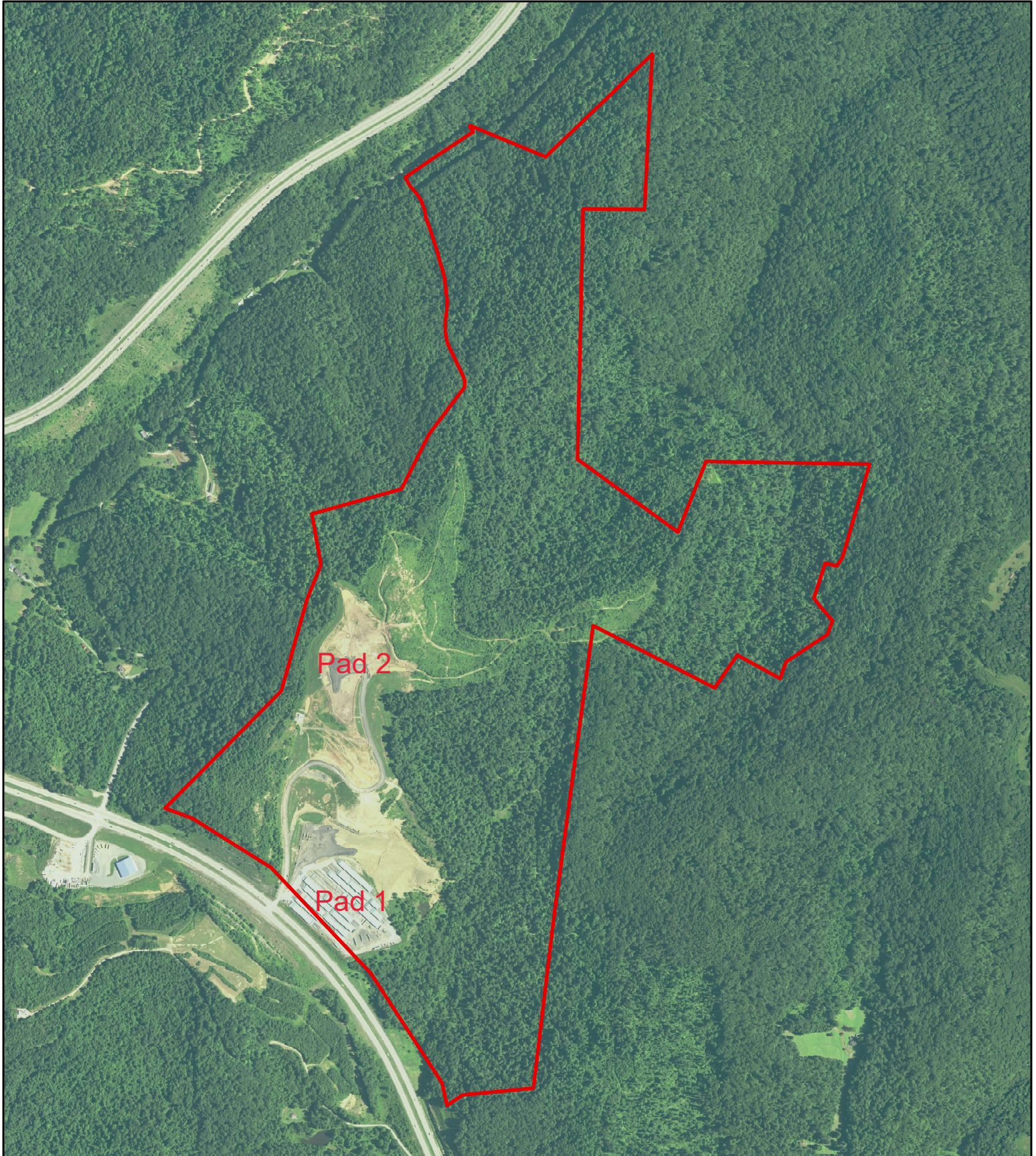
Mr. I.L. Morris, President  
Waco Oil & Gas Company  
P.O. Box 397  
Glennville, West Virginia 26351

  
For US EPA Region III

  
Date




# Exhibit A: Waco Route 19 Morris Development Site



## Legend

 Parcel Boundary

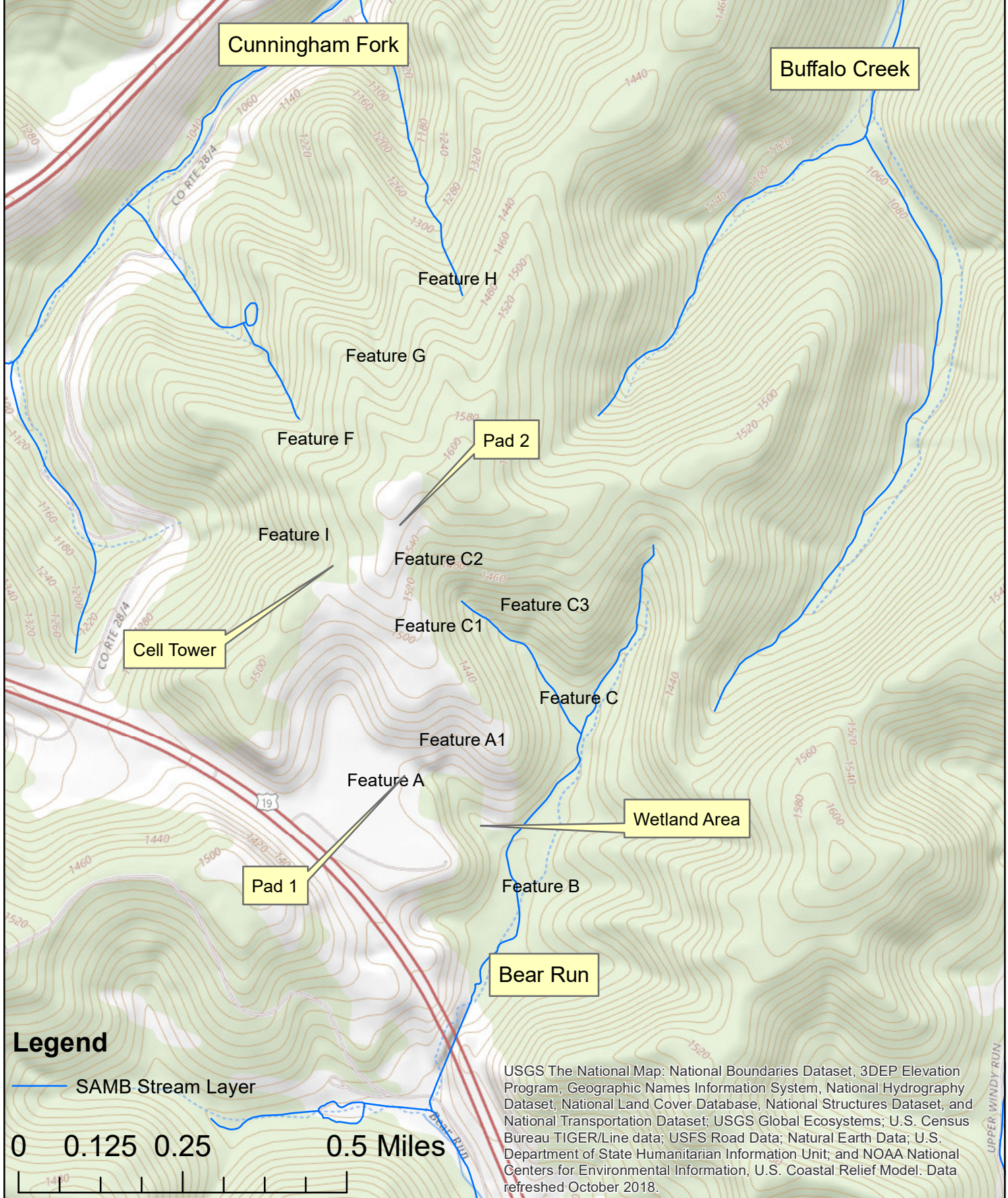


0 0.1 0.2 Miles  


West Virginia GIS Technical Center. Imagery - Aerial 1m Orthophotos (2018 NAIP) Color and Color Infrared: Braxton County. Morgantown, WV: West Virginia GIS Technical Center, 2019.  
West Virginia GIS Technical Center. Tax Maps - Surface and Mineral Parcels: Braxton County. Morgantown, WV: West Virginia GIS Technical Center, 2019.



# Exhibit B: Waco Oil & Gas Route 19 Morris Development With Select Labeled Streams (i.e. "Features"), Wetland Area, and Construction Pads



USGS The National Map: National Boundaries Dataset, 3DEP Elevation Program, Geographic Names Information System, National Hydrography Dataset, National Land Cover Database, National Structures Dataset, and National Transportation Dataset; USGS Global Ecosystems; U.S. Census Bureau TIGER/Line data; USFS Road Data; Natural Earth Data; U.S. Department of State Humanitarian Information Unit; and NOAA National Centers for Environmental Information, U.S. Coastal Relief Model. Data refreshed October 2018.





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

VIA E-MAIL

Roger G. Hanshaw, Esq.  
Bowles Rice LLP  
[rhanshaw@bowlesrice.com](mailto:rhanshaw@bowlesrice.com)

Marc Monteleone, Esq.  
Bowles Rice LLP  
[mmonteleone@bowlesrice.com](mailto:mmonteleone@bowlesrice.com)

Re: ***In the Matter of Waco Oil and Gas Co., Inc.,***  
**EPA Docket No. CWA-03-2021-0017DW**

Dear Mr. Hanshaw and Mr. Monteleone,

The letter acknowledges that on Tuesday, March 2, 2021, a conference took place between the U.S. Environmental Protection Agency (“EPA”) and Waco Oil & Gas Company in reference to the above captioned Administrative Order for Compliance (“Order”). Representatives from the West Virginia Department of Environmental Protection also attended.

Per Paragraph 20 of the Order, this conference took place within 20 days after receipt of the Order, and therefore the Order shall become effective 10 days after the conference was held, or **Friday, March 12, 2021**. Items described in Paragraphs 12 and 13 of the Order are due on Monday, April 26, 2021 and Monday, April 12, 2021, respectively.

Sincerely,

/s/ Aviva H. Reinfeld

Aviva H. Reinfeld  
Assistant Regional Counsel  
EPA Region III

cc: Regional Hearing Clerk, EPA ([R3\\_Hearing\\_Clerk@epa.gov](mailto:R3_Hearing_Clerk@epa.gov))  
Katelyn Almeter, EPA ECAD ([Almeter.katelyn@epa.gov](mailto:Almeter.katelyn@epa.gov))  
Jeremy Bandy, WVDEP ([Jeremy.W.Bandy@wv.gov](mailto:Jeremy.W.Bandy@wv.gov))  
Michelle Staley, USACE ([Michelle.M.Staley@usace.army.mil](mailto:Michelle.M.Staley@usace.army.mil))