

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT
DIVISION OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:

K&M Excavating, LLC
10010 West Highway 264
Bentonville, AR 72712

LIS No. 24-090
Permit Number: AR0052868
AFIN 04-01731

CONSENT ADMINISTRATIVE ORDER

This Consent Administrative Order ("Order") is issued pursuant to the authority of the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. § 8-4-101 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C. § 1311 *et seq.*, and the rules issued thereunder by Arkansas Pollution Control and Ecology Commission (APC&EC).

The issues herein having been settled by the agreement of K&M Excavating, LLC (Respondent) and the Division of Environmental Quality (DEQ), it is hereby agreed and stipulated that the following FINDINGS OF FACT and ORDER AND AGREEMENT be entered.

FINDINGS OF FACT

1. Respondent operates a rocky red clay fill material mining operation ("Facility") located at 9944 West Highway 264, Bentonville, Benton County, Arkansas.
2. Respondent discharges treated industrial stormwater to an unnamed tributary of Little Osage Creek, thence to Little Osage Creek, thence to Osage Creek, thence to the Illinois River, thence to the Arkansas River in Segment 3J of the Arkansas River Basin.
3. Respondent is regulated pursuant to the National Pollutant Discharge Elimination System (NPDES).

4. Pursuant to the federal Clean Water Act, 33 U.S.C. § 1311(a) *et seq.*, the NPDES program prohibits the discharge of pollutants except as in compliance with a permit issued under the NPDES program in accordance with 33 U.S.C. § 1342(a).

5. DEQ is authorized under the Arkansas Water and Air Pollution Control Act (“Act”) to issue NPDES permits in the state of Arkansas and to initiate an enforcement action for any violation of a NPDES permit.

6. Ark. Code Ann. § 8-4-217(a)(3) provides:

(a) It shall be unlawful for any person to:

...

(3) Violate any provisions of this chapter or of any rule or order adopted by the [APC&EC] under this chapter or of a permit issued under this chapter by the [DEQ].

7. Ark. Code Ann. § 8-4-103(c)(1)(A) authorizes DEQ to assess an administrative civil penalty not to exceed ten thousand dollars (\$10,000) per violation for any violation of any provision of the Act and any rule or permit issued pursuant to the Act.

8. Pursuant to Ark. Code Ann. § 8-4-103(c)(1)(B), “[e]ach day of a continuing violation may be deemed a separate violation for purposes of penalty assessment.”

9. DEQ issued NPDES Permit Number AR0052868 (“Permit”) to Respondent on December 17, 2018. The Permit became effective on January 1, 2019, and expired on December 31, 2023.

Compliance Inspection

10. On April 27, 2022, DEQ conducted a compliance evaluation inspection of the Facility, and DEQ’s inspector listed the violations found in an inspection report.

11. On December 14, 2022, DEQ notified Respondent of the inspection results via letter and requested a written response addressing each of the violations listed in the inspection report to be submitted by December 30, 2022.

12. On December 30, 2022, DEQ received Respondent's response to the violations cited in the inspection report.

13. On January 30, 2023, DEQ sent Respondent a letter stating that the information provided did not sufficiently address the violations. To date, Respondent has not responded to the remaining violations reported in the inspection report:

- a. Discharges not being monitored and reported in violation of Part I, Section A and Part III, Section C, Condition 2 of the Permit.
- b. The stormwater pond west levee was cut to increase drainage from the pond and the levee had not been repaired to restore to full capacity of the pond in violation of Part III, Section B, Condition 1 of the Permit.
- c. High levels of sediment observed in the stormwater pond in violation of Part III, Section B, Condition 1 of the Permit.
- d. Records of any flow monitoring activities not being recorded in violation of Part III, Section C, Condition 7 of the Permit.

14. Each of the four (4) unresolved violations listed above is a violation of the Permit and therefore is a violation of Ark. Code Ann. § 8-4-217(a)(3).

Permit Renewal Application

15. Part III, Section D, Condition 10 of the Permit requires Respondent to submit a complete permit renewal application at least 180 days prior to the expiration date of the Permit if the activity regulated by the Permit is to continue after the expiration date.

16. Respondent intends to operate this Facility beyond the expiration date of the current permit, December 31, 2023.

17. On January 5, 2023, March 31, 2023, and April 12, 2023, Respondent was notified that the Permit would expire on December 31, 2023, and that in order to continue the regulated activity, a complete renewal application must be submitted no later than July 4, 2023.

18. DEQ received a Permit renewal application from Respondent on July 19, 2023. On July 20, 2023, DEQ notified Respondent that the application was incomplete. DEQ requested that Respondent submit additional information.

19. On July 28, 2023, and August 4, 2023, Respondent submitted additional information for the permit renewal application.

20. On August 7, 2023, DEQ notified Respondent that the application was deemed administratively complete.

21. The complete Permit renewal application was not received by July 4, 2023. Failure to submit the complete Permit renewal application by July 4, 2023, is a violation of Part III, Section D, Condition 10 of the Permit and therefore is a violation of Ark. Code Ann. § 8-4-217(a)(3).

DMR Review

22. On March 26, 2024, DEQ conducted a review of certified Discharge Monitoring Reports (DMRs) submitted by Respondent in accordance with the Permit.

23. The review revealed that Respondent reported the following violations of the permitted effluent discharge limits detailed in Part I, Section A of the Permit from October 1, 2020 through February 29, 2024:

- e. Two (2) violations of Total Suspended Solids; and
- f. One (1) violation of Oil and Grease.

24. Each of the three (3) discharge limitation violations listed above constitutes a separate Permit violation for a total of three (3) separate violations of Ark. Code Ann. § 8-4-217(a)(3).

25. The review of the DMRs also revealed that Respondent failed to submit a Non-Compliance Report (NCR) for effluent violations reported during the May 2022 monitoring period. Failure to submit an NCR for each effluent violation is a violation of Part III, Section D, Condition 7 of the Permit and therefore is a violation of Ark. Code Ann. § 8-4-217(a)(3).

26. The review of the DMRs further revealed that Respondent failed to submit the DMRs by the due dates for the following six (6) monitoring periods:

- a. 2020: November;
- b. 2021: November;
- c. 2022: January, May, November; and
- d. 2023: April.

Failure to submit DMRs with the monitoring results obtained during the monitoring period no later than the 25th of the month following the completed monitoring period is a violation of Part III, Section C, Condition 5 of the Permit and therefore is a violation of Ark. Code Ann. § 8-4-217(a)(3).

ORDER AND AGREEMENT

WHEREFORE, the parties stipulate and agree as follows:

- 1. Respondent shall comply with the existing Permit until the effective date of the permit renewal.
- 2. On or before the effective date of this Order, Respondent shall provide an adequate written response to the April 27, 2022 compliance inspection.

3. Respondent shall submit NCRs in accordance with Part III, Section D, Condition 7 of the Permit.
4. Respondent shall submit all DMRs in accordance with Part III, Section C, Condition 5 of the Permit.
5. Within sixty (60) calendar days of the effective date of the renewal Permit, Respondent shall submit to DEQ, for review and approval, a Corrective Action Plan (CAP) to repair the levee. The CAP must be certified by a Professional Engineer licensed in the state of Arkansas and include a reasonable milestone schedule and final date of compliance not to exceed July 31, 2025. The approved CAP, milestone schedule, and final date of compliance shall be fully enforceable as terms of this Order.
6. On or before the fifteenth (15th) day of the month following the effective date of this Order, and each quarter thereafter for a period lasting until this Order is closed, Respondent shall submit quarterly progress reports detailing the progress that has been made towards repairing the levee and restoring the pond to full capacity. Respondent shall submit a final compliance report that includes a certification of compliance, within thirty (30) calendar days of the final compliance date in the approved CAP or by July 31, 2025, whichever occurs first.
7. Respondent shall take flow measurements in accordance with Part I, Section A of the Permit.
8. Beginning with the first monitoring period following the effective date of this Order and lasting for one (1) year, Respondent shall attach flow records to the corresponding DMRs via NetDMR, showing that flow has been measured at least twice a week for that monitoring period.

9. In compromise and full settlement of the violations specified in the Findings of Fact, Respondent agrees to pay a civil penalty Ten Thousand Eight Hundred Dollars (\$10,800.00), or one-half of the full civil penalty of Five Thousand Four Hundred Dollars (\$5400.00) if this Order is signed and returned to the Office of Water Quality Enforcement Branch, DEQ, 5301 Northshore Drive, North Little Rock, Arkansas, 72118-5317, within twenty (20) calendar days of receipt of this Order. Even if the conditions for receiving a reduced penalty of Ten Thousand Eight Hundred Dollars (\$10,800.00) have been met, failure to otherwise comply with this Order will result in the penalty reverting to the full civil penalty of Five Thousand Four Hundred Dollars (\$5400.00), and shall become due immediately and payable to DEQ. Payment is due within thirty (30) calendar days of the effective date of this Order. Payment of the penalty shall be made payable to the Division of Environmental Quality, and mailed to the attention of:

Division of Environmental Quality
Fiscal Division
5301 Northshore Drive
North Little Rock, AR 72118

In the event that Respondent fails to pay the civil penalty within the prescribed time, DEQ shall be entitled to attorneys' fees and costs of collection.

10. Failure to meet any requirement or deadline of this Order constitutes a violation of this Order. If Respondent should fail to meet any such requirements or deadlines, Respondent consents and agrees to pay on demand to DEQ stipulated penalties according to the following schedule:

- | | |
|---|-------------------|
| a. First day through fourteenth day: | \$100.00 per day |
| b. Fifteenth day through the thirtieth day: | \$500.00 per day |
| c. Each day beyond the thirtieth day: | \$1000.00 per day |

These stipulated penalties for delay in performance shall be in addition to any other remedies or sanctions that may be available to DEQ by reason of failure by Respondent to comply with the

requirements of this Order.

11. If any event, including but not limited to an act of nature, occurs that causes or may cause a delay in the achievement of compliance by Respondent with the requirements or deadlines of this Order, Respondent shall so notify DEQ, in writing, as soon as reasonably possible after it is apparent that a delay will result, but in no case after the due dates specified in this Order. The notification shall describe in detail the anticipated length of the delay, the precise cause of the delay, the measures being taken and to be taken to minimize the delay, and the timetable by which those measures will be implemented.

12. DEQ may grant an extension of any provision of this Order, provided that Respondent requests such an extension in writing and provided that the delay or anticipated delay has or will be caused by circumstances beyond the control of and without the fault of Respondent. The time for performance may be extended for a reasonable period but in no event longer than the period of delay resulting from such circumstances. The burden of proving that any delay is caused by circumstances beyond the control of and without the fault of Respondent and the length of the delay attributable to such circumstances shall rest with Respondent. Failure to notify DEQ promptly, as provided in the preceding paragraph of this Section, shall be grounds for a denial of an extension.

13. All requirements by the Order and Agreement are subject to approval by DEQ. Unless otherwise specified herein, in the event of any deficiencies, Respondent shall, within the timeframe specified by DEQ, submit any additional information or changes requested, or take additional actions specified by DEQ to correct any such deficiencies. Failure to respond adequately to such Notice of Deficiency within the timeframe specified in writing by DEQ constitutes a failure to meet the requirements established by this Order.

14. This Order is subject to public review and comment in accordance with Ark. Code Ann. § 8-4-103(d) and APC&EC Rule 8 and shall not be effective until thirty (30) calendar days after public notice is given. DEQ retains the right to rescind this Order based upon the comments received within the thirty (30) day public comment period. Notwithstanding the public notice requirements, the corrective actions necessary to achieve compliance shall be taken immediately. The publication of this Order shall occur on or about the 10th or 25th day of the month following the date this Order is executed. As provided by APC&EC Rule 8, this matter is subject to being reopened upon Commission initiative or in the event a petition to set aside this Order is granted by the Commission.

15. Nothing in this Order shall be construed as a waiver by DEQ of its enforcement authority over alleged violations not specifically addressed herein. Also, this Order does not exonerate Respondent from any past, present, or future conduct that is not expressly addressed herein, nor does it relieve Respondent of its responsibilities for obtaining any necessary permits.

16. By virtue of the signature appearing below, the individual represents that he or she is a Managing Member of Respondent, being duly authorized to execute and bind Respondent to the terms contained herein as attested by the secretary of said entity. Execution of this Order by an individual other than a Managing Member of Respondent shall be accompanied by a resolution granting signature authority to said individual as duly ratified by the governing body of the entity.

SO ORDERED THIS 13th DAY OF MAY, 2024.



CALEB J. OSBORNE, DIVISION OF ENVIRONMENTAL QUALITY, DIRECTOR
CHIEF ADMINISTRATOR, ENVIRONMENT

APPROVED AS TO FORM AND CONTENT:

K&M Excavating, LLC

BY: 
(Signature)

Kevin Cousins
(Typed or printed name)

TITLE: Owner

DATE: 5/10/24