



west virginia department of environmental protection

Division of Water and Waste Management
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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
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**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: CSX
Matthew Adkins
351 Thornton Rd., Suite 125
Lithia Springs, GA 30122

DATE: August 14, 2015

ORDER NO.: 8415

INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management (hereinafter "Director"), under the authority of West Virginia Code, Chapter 22, Article 11, Section 1 et seq. to CSX.

FINDINGS OF FACT

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

1. CSX operates a railroad system located in Jacksonburg, Wetzel County, West Virginia.
2. On April 20, 2015, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an investigation of a complaint claiming CSX was depositing slip material into South Fork of Fishing Creek. During the investigation, violations of the following sections of WV Legislative Rules were observed and documented:
 - a. 47CSR2 Section 3.2.b.-CSX caused conditions not allowable by creating deposits in waters of the State. Specifically, WVDEP personnel observed CSX side casting slip material into South Fork of Fishing Creek.
 - b. 47CSR11 Section 2.2.a.-CSX failed to immediately report a spill or accidental discharge of pollutants into the waters of the State to the Office of Water Resources' Emergency Notification Number. Specifically, CSX placed unstable material above the stream bank, which slipped into South Fork of Fishing Creek, blocking approximately two-thirds (2/3) of the stream channel.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. W-NW-TAM-042015-001 and W-NW-TAM-042015-002 were issued to CSX.

3. On April 27, 2015, WVDEP personnel conducted a flight inspection of the site. During the inspection, a violation of the following section of WV Legislative Rules was observed and documented:
 - a. 47CSR2 Section 3.2.a. -CSX caused conditions not allowable in waters of the State. Specifically, CSX operated heavy equipment in South Fork of Fishing Creek. CSX installed a containment boom and absorbent booms in South Fork of Fishing Creek. The Best Management Practices (BMPs) were not installed properly and were not functioning, allowing sediment laden water to bypass the controls. A visible plume of suspended solids was present downstream.

As a result of the aforementioned violation, NOV No. W-NW-TAM-042715-001 was issued to CSX.

4. On August 3, 2015, in correspondence to WVDEP personnel, CSX represented the following in regard to the aforementioned violations:
 - a. A landslide caused soil, rock, and woody debris to come to rest on CSX property, blocking the rail line and entering into South Fork of Fishing Creek. The landslide material did not originate from CSX property.
 - b. CSX coordinated and received approval from US Army Corps of Engineers, West Virginia Department of Natural Resources, and Wetzel County Emergency Management prior to initiating any [remedial] work in South Fork of Fishing Creek.
 - c. CSX contractors installed a fifty (50) foot long silt curtain with a four (4) foot skirt in South Fork of Fishing Creek prior to initiating [remedial] work. The silt curtain, as well as absorbent boom, were installed as Best Management Practices and were not intended to provide complete containment of all sediment laden water, given the task was to remove soil, rock, and debris from a flowing creek.
 - d. CSX contractors removed sixty (60) truckloads of soil, rock, and woody debris from South Fork of Fishing Creek and restored embankment as well as nearby residential properties that were accessed in order to remove material.
5. WVDEP personnel confirmed that CSX adequately remediated and stabilized South Fork of Fishing Creek subsequent to the aforementioned slip.

ORDER FOR COMPLIANCE

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

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

2. Within thirty (30) days of the effective date of this Order, CSX shall submit an approvable plan outlining actions that will be taken by CSX in response to future slips that cause or have the potential to cause conditions not allowable in waters of the State, as described in WV Legislative Rule 47CSR2. The plan of corrective action shall include, but not be limited to:
 - a. Provisions for providing immediate notification to the Office of Water Resources' Emergency Notification Number of all slips which cause or have the potential to cause conditions not allowable in waters of the State.
 - b. Provisions for obtaining all required permits from the appropriate authorities (ex. United States Army Corps of Engineers) to conduct all required site remediation activities after a slip has occurred.
 - c. A detailed description of Best Management Practices (BMPs) that will be utilized during remediation activities at sites where a slip has occurred.
 - d. Provision for providing WVDEP personnel with documentation of proper disposal of any slip material removed during site remediation activities.

The plan shall make reference to Order No. 8415 and shall be submitted to:

**WVDEP Environmental Inspector Supervisor
NW Regional Environmental Enforcement Office
2031 Pleasant Valley Road
Fairmont, WV 26554**

A copy of this plan shall be submitted to:

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

Upon approval, the plan shall be incorporated into and become part of this Order, as if fully set forth herein. Failure to submit an approvable plan or failure to adhere to the plan is a violation of this Order.

3. Because of CSX's Legislative Rule violations, CSX shall be assessed a civil administrative penalty of ten thousand five hundred thirty dollars (\$10,530) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of the effective date of this Order. Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall include a reference to the Order No. and shall be mailed to:**

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

OTHER PROVISIONS

1. CSX hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 11, Section 21 of the Code of West Virginia. Under this Order, CSX agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, CSX does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding CSX other than proceedings, administrative or civil, to enforce this Order.
2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.
3. If any event occurs which causes delay in the achievement of the requirements of this Order, CSX shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after CSX becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and CSX shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which CSX intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of CSX (i.e., force majeure), the time for performance hereunder shall be extended for a period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.
4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving CSX of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject CSX to additional penalties and injunctive relief in accordance with the applicable law.
5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
6. This Order is binding on CSX, its successors and assigns.

7. This Order shall terminate upon CSX's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Matthew Adkins
CSX

8-25-15

Date

Public Notice begin:

Date

Public Notice end:

Date

Scott G. Mandirola, Director
Division of Water and Waste Management

Date

revised March 2013

RECEIVED

AUG 28 2015

• ENVIRONMENTAL
• ENFORCEMENT



IMG_0372: CSX pushing side cast slip material into South Fork of Fishing Creek.



IMG_0381: CSX equipment with a load of material to side cast into slip material shown.



IMG_8701: Improperly installed BMPs.



IMG_8715: Visible plume of suspended solids downstream of site.



IMG_8697: Heavy equipment working in stream.

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: CSX **Receiving Stream:** South Fork of Fishing Creek

Treatment System Design Maximum Flow: N/A **MGD**

Treatment System Actual Average Flow: N/A **MGD** (if known)

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

1)	Potential for Harm Factor	Factor Range	FOF#											
			2a	2b	3a									
a)	Amount of Pollutant Released	1 to 3	3	1	3									
b)	Toxicity of Pollutant	0 to 3	1	0	1									
c)	Sensitivity of the Environment	0 to 3	1	0	1									
d)	Length of Time	1 to 3	1	1	1									
e)	Actual Exposure and Effects thereon	0 to 3	1	0	1									
Average Potential for Harm Factor			1.4	0.4	1.4	No								
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	3	3	3									

Potential for Harm Factors:

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

Examples/Guidance:

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

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

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

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

Narrative WQ standard violations - case-by-case.

Penalty Adjustment Factors

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor

6.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase

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

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

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

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

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

6.2.b.10 - Other factors

Size of Violator: 0 - 50% decrease

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

Avg. Daily WW Discharge Flow (gpd)	% Reduction Factor
< 5,000	50
5,000 to 9,999	40
10,000 to 19,999	30
20,000 to 29,999	20
30,000 to 39,999	10
40,000 to 99,999	5
> 100,000	0

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

Public Notice Costs (cost for newspaper advertisement)

6.2.b.2 - Good Faith - 10% decrease to 10% increase

6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease

6.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease

Base Penalty Adjustments

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
6.2.b.1 - Willfulness and/or negligence -	10		\$1,050
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)			\$0
6.2.b.7 - Public Interest - (flat monetary increase)			\$0
6.2.b.8 - Loss of enjoyment - (flat monetary increase)			\$0
6.2.b.9 - Investigative costs - (flat monetary increase)			\$0
6.2.b.10 - Other factors (size of violator)			\$0
6.2.b.10 - Additional Other Factors - Increase (flat monetary increase)			\$0
6.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease)			\$0
Public Notice Costs (flat monetary increase)	\$30		\$30
6.2.b.2 - Good Faith - Increase			\$0
6.2.b.2 - Good Faith - Decrease		10	(\$1,050)
6.2.b.3 - Cooperation with the Secretary			\$0
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$30
Penalty =			\$10,530

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	\$0
Comments: Economic benefit not warranted.	