



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0495
Fax: (304) 926-0463

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Mr. Ed Fischer
Grant County Commission
5 Highland Avenue
Petersburg, WV 26847

DATE: July 28, 2011

ORDER NO.: 7223

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 Grant County Commission.

FINDINGS OF FACT

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

1. Grant County Commission maintains the cross-sectional volume within the flood control dikes along the South Branch of the Potomac River in Petersburg, Grant County, WV. This is to meet US Corps of Engineers certification standards.
2. On February 14, 2011, West Virginia Department of Environmental Protection (WVDEP) personnel observed a very large sediment plume in the South Branch near the RT 220 bridge. Sediment plumes are conditions not allowed in state waters as defined by 47-2-3.2.a and 47-2-3.2.f of the West Virginia Legislative Rules.
3. The plume was created by an excavator sitting on a gravel bar located in the river. The excavator was removing the bar and river bottom material and loading it into dump trucks. The dump trucks traveled the length of the bar and crossed a ford that had been constructed between the river bank and the gravel bar. The dredged material was then hauled to the Grant County Industrial Park in Petersburg and dumped in a low area to be graded.

Promoting a healthy environment.

4. Total disturbed area in the stream is approximately five (5) acres. Total fill area is approximately two (2) acres. Construction activities disturbing greater than one (1) acres must obtain a permit from WVDEP, pursuant to 22-11-8 of the West Virginia Code.
5. WVDEP personnel asked the construction superintendent with Allegheny Investments for the required permits. He was unable to produce them. The engineering firm, Geary and Associates, was called. Geary and Associates representatives were able to produce a WV Department of Natural Resources (WVDNR) Right of Entry and a US Army Corps of Engineers 401 permit, but could not produce a WVDEP construction stormwater permit.
6. Work at this site began approximately February 1, 2011.
7. Notice of Violation (NOV) No. W-11-12-03-202 was issued for causing conditions not allowable in waters of the state. NOV No. W-11-12-04-202 was issued for failure to obtain a permit. Both violations were issued to the Grant County Commission on February 16, 2011 by certified mail.
8. A meeting was held between WVDEP and Grant County Commission on May 17, 2011 to discuss the terms of this Order. In the meeting, Grant County Commission indicated that it has obtained a permit for its facility.

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. Grant County Commission shall immediately take all measures to initiate compliance with all pertinent laws and rules and its permit.
2. Because of Grant County Commission's West Virginia Code and Legislative Rule and violations, Grant County Commission shall be assessed a civil administrative penalty of ten thousand six hundred eighty dollars (\$10,680) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of entry of this Order. Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall be mailed to:**

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

OTHER PROVISIONS

1. Grant County Commission 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, Grant County Commission 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, Grant County Commission 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 Grant County Commission 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, Grant County Commission 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 Grant County Commission becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and 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 Grant County Commission 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 Grant County Commission (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 Grant County Commission 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 Grant County Commission 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 Grant County Commission, its successors and assigns.

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



Ed Fischer
Grant County Commission

8-8-2011

Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date



Figure 1 on bridge looking downstream



Figure 2 on bridge looking upstream



Figure 3 attempt to divert flow



Figure 4 downstream from bridge



Figure 5 ford and access road



Figure 6 looking at access road from bridge



Figure 7 mud from access road on rt220



Figure 8 fill area at industrial park



Figure 9 fill area at industrial park



Figure 10 fill area at industrial park

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

Grant County Commission

Receiving Stream:

South Branch of the Potomac

Treatment System Design Maximum Flow: MGD

Treatment System Actual Average Flow: MGD (if known)

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

1)	Potential for Harm Factor	Factor Range	FOF#											
			2	4										
a)	Amount of Pollutant Released	1 to 3	3	1										
b)	Toxicity of Pollutant	0 to 3	1	0										
c)	Sensitivity of the Environment	0 to 3	2	0										
d)	Length of Time	1 to 3	2	2										
e)	Actual Exposure and Effects thereon	0 to 3	2	0										
Average Potential for Harm Factor			2	0.6	No									
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 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 -	20		\$1,360
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)	\$3,170		\$3,170
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	(\$680)
6.2.b.3 - Cooperation with the Secretary			\$0
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$3,880
Penalty =			\$10,680

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	\$2,000
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	\$1,170
Competitive Advantage	
Estimated Economic Benefit	\$3,170
Comments: no sediment controls used	