



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
www.dep.wv.gov

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

TO: Erik Olafson
MG&P Development Partnership
11235 West Point Drive
Knoxville, TN 37934

DATE: June 6, 2011

ORDER NO.: 7371

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 MG&P Development Partnership.

FINDINGS OF FACT

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

1. On May 21, 2009, West Virginia Department of Environmental Protection (WVDEP) was made aware of construction activity at Goff Mountain Road and Washington St. W. in Cross Lanes, Kanawha County, West Virginia by a citizen complaint of excessive and/or uncontrolled stormwater runoff from the site.
2. On May 27, 2009, WVDEP personnel inspected and document a land disturbance greater than one (1) acre associated with site preparation for the construction of a Walgreens.
3. MG&P Development Partnership operated this Walgreens construction facility.
4. Persons that discharge stormwater associated with construction activities disturbing one (1) acre or greater of land area must obtain a permit from the West Virginia Department of Environmental Protection (WVDEP), pursuant to § 22-11-8 of the State Code of West Virginia and as described in Title 47, Legislative Rules, Series 10, National Pollutant Discharge Elimination System (NPDES) Program) of the Code of State Rules.

Promoting a healthy environment.

5. MG&P Development Partnership did not apply for, nor was granted from WVDEP, a WV/ NPDES permit to discharge stormwater associated with these construction activities.
6. MG&P Development Partnership developed an engineered stormwater protection plan for this site but failed to implement it.
7. The site has subsequently been developed and is no longer in the construction phase.

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. Because of MG&P Development Partnership's West Virginia Code violations, MG&P Development Partnership shall be assessed a civil administrative penalty of six thousand six hundred ten dollars (\$6,610) 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. MG&P Development Partnership 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, MG&P Development Partnership 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, MG&P Development Partnership 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 MG&P Development Partnership 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, MG&P Development Partnership 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 MG&P Development Partnership 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 MG&P Development Partnership 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 MG&P Development Partnership (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 MG&P Development Partnership 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 MG&P Development Partnership 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 MG&P Development Partnership, its successors and assigns.
7. This Order shall terminate upon MG&P Development Partnership notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



~~Erik Olafson~~ Sam Mishu
MG&P Development Partnership

June 13, 2011

Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date



Figure 1 Walgreens site look down toward Washington St. W., Precast manholes are for storm sewer. 05/27/09



Figure 2 Walgreens looking toward Golf Mountain Road. 05/27/09



Figure 3 Walgreens front looking toward Golf Mountain Road. 05/27/09



Figure 4 Looking east. Green pipe is stubbed into a drain discovered during construction...it is not tied to uncompleted storm sewer in front of the retaining wall 05/27/09. Note non-spec sediment trap.



Figure 5 Looking east over Walgreens retaining wall. Green arrow shows end of old storm sewer pipe that was stubbed into.



Figure 6 Looking front to back 05/27/09



Figure 7 Looking front to back during rain event of 06/10/09. Photo provided by Sequoyah personnel.



Figure 8 Stubbed pipe during rain event of 06/10/09. Sediment laded water flows to Rocky Fork via pipe and then surface after pipe reached capacity and/or clogged with mud. Photo provided by Sequoyah personnel



Figure 10 06/27/09

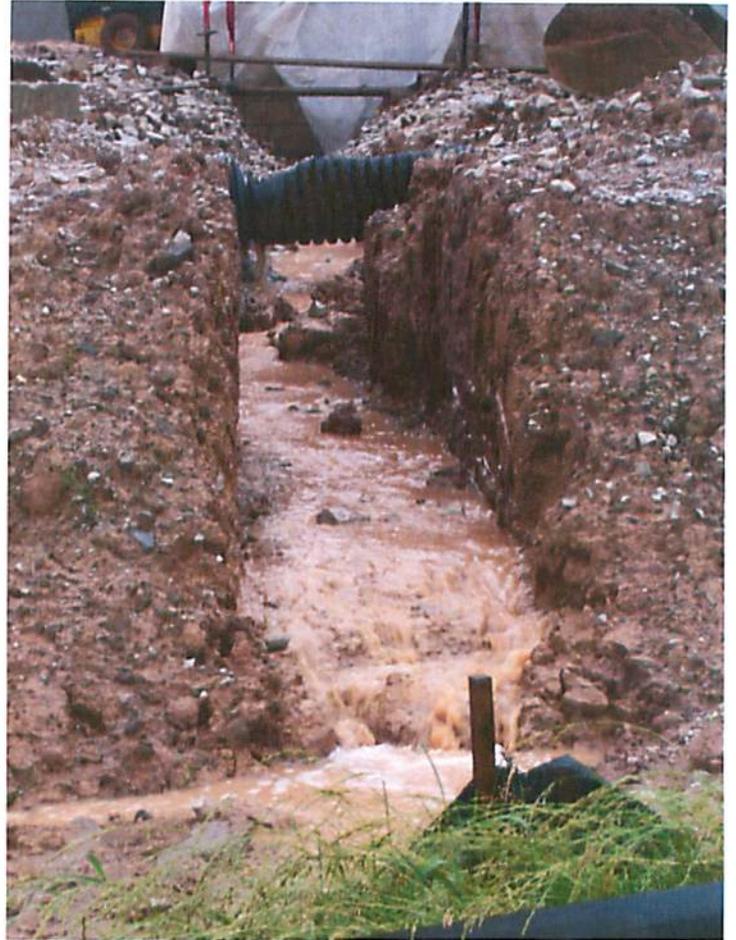


Figure 9 Ditch cut to channel water from jobsite. Photo provided by Sequoyah personnel. 06/10/09



Figure 11 Stormwater discharge 06/11/09

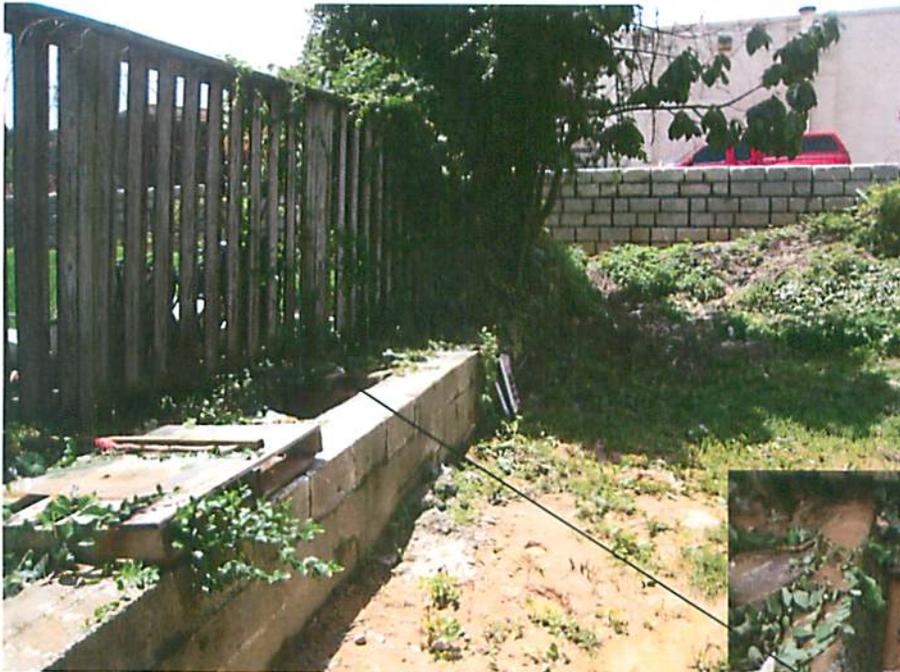


Figure 12 Apartment back yard 06/11/09



Figure 13 existing 12" RCP to road drain to Rocky Fork of the Pocatalico 06/11/09



Figure 14 8" PVC stubbed into existing 12" RCP 06/11/09

On site Stormwater plans showed stormwater piping to be connected into highway storm sewer on Washington St. W.



Figure 15 Apartment next to site on Washington Street W. 05/27/09



Figure 16 Looking through open door. 05/27/09



Figure 17 Mud from Walgreen site in old storm drain that pipe was stubbed into 6/11/09



Figure 18 Looking into old storm drain just before it goes to Rocky Fork of the Pocatalico

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: MG&P Development Partnership LLC Receiving Stream: Rocky Fork of Pocatalico River

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#											
			1											
a)	Amount of Pollutant Released	1 to 3	2											
b)	Toxicity of Pollutant	0 to 3	0											
c)	Sensitivity of the Environment	0 to 3	2											
d)	Length of Time	1 to 3	2											
e)	Actual Exposure and Effects thereon	0 to 3	2											
Average Potential for Harm Factor			1.6	No										
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 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 -	30		\$1,380
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)	\$600		\$600
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			\$0
6.2.b.3 - Cooperation with the Secretary			\$0
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$2,010
Penalty =			\$6,610

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	\$300
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	\$300
Competitive Advantage	
Estimated Economic Benefit	\$600
Comments:	Did not install sediment controls. Did not have to preform maintenance on non-existence stormwater controls.