



west virginia department of environmental protection

Environmental Enforcement
601 57th Street SE
Charleston, WV 25304
Telephone: (304) 926-0470 Fax: (304) 926-0488

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

July 25, 2011

Mountaineer Contractors, Inc.
Attn: Jason Workman
PO Box 606
Kingwood, WV 26537

CERTIFIED RETURN RECEIPT REQUESTED

**RE: Violation of Chapter 22, Article 11
of the WV State Code**

Dear Mr. Workman:

Enclosed is revised CONSENT ORDER NUMBER 7215 dated the 25th day of July, 2011. This action is based upon the investigation and recommendation of the West Virginia Department of Environmental Protection's (WVDEP) Environmental Enforcement unit in response to Mountaineer Contractors, Inc. violating Chapter 22, Article 11 of the WV State Code at its facility located near Bowden, Randolph County, West Virginia. This revision is based upon your recent meeting with David C. Simmons, Enforcement Hearing Officer. This administrative settlement is being offered on behalf of the director of the Division of Water and Waste Management.

Please review, sign and return the original copy of the revised ORDER to me within five (5) working days of receipt. Subsequently, WVDEP will initiate the public notice process.

Sincerely,

Michael A. Zeto
Chief Inspector

Enclosure

cc: Scott G. Mandirola, Director, DWWM (via e-mail)
Yogesh Patel, Asst. Director, DWWM/Permits
Joseph M. Hickman, Assistant Chief Inspector, EE/WW (via e-mail)
Jeremy Bandy, Assistant Chief Inspector, EE (via e-mail)
David C. Simmons, Enforcement Hearing Officer, EE (via e-mail)
Robin C. Dolly, Environmental Inspector Supervisor, EE/WW (via e-mail)
Matthew Alt, Environmental Inspector, EE/WW (via e-mail)
Shyrel Moellendick, MSSS, EE (via e-mail)
Jim Snyder, Attorney, Jackson & Kelly

Promoting a healthy environment.

ESF



west virginia department of environmental protection

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

TO: Mountaineer Contractors, Inc.
Attn: Jason Workman
PO Box 606
Kingwood, WV 26537

DATE: July 25, 2011

ORDER NO.: 7215

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 Mountaineer Contractors, Inc. (hereinafter "MCI").

FINDINGS OF FACT

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

1. MCI operates a construction site and associated land disturbance known as the Shavers Mountain Waste Area located near Bowden, Randolph County, West Virginia. MCI was issued WV/NPDES Water Pollution Control Permit No. WVR105013 on June 4, 2010.
2. On August 11, 2010, West Virginia Department of Environmental Protection (WVDEP) personnel visited the area and observed the following deficiencies:
 - a. Permittee has failed to implement the approved SWPPP by allowing water to leave the area without first going through an appropriate device to control sedimentation. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.ii.j.
 - b. Permittee has failed to fully implement the approved SWPPP by not maintaining all sediment and erosion control devices in use to achieve compliance with the conditions of the permit. This is a violation of the WV/NPDES general permit WV0115924 section D.1.

- c. Permittee has failed to fully implement the approved SWPPP by not stabilizing all ditches and diversions prior to becoming functional. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.i.d. Notice of violation I10-42-117-MJA was issued.
 - d. Permittee has allowed sedimentation into unnamed tributaries of Glady Fork, a tier 3 native trout stream. The discharge of solids into waters of the state is a violation of the West Virginia Legislative Rules Governing Waste Quality "Causing conditions not allowable in State waters" 47CSR2.3.2.a. Notice of violation I10-42-118-MJA was issued.
 - e. Permittee has failed to fully implement the approved SWPPP by not installing the required public notice sign. This is a violation of the WV/NPDES general permit WV0115924 section G.4.b.5.
 - f. Permittee has failed to fully implement the approved SWPPP by not maintaining records of inspections for all sediment and erosion control devices and keeping those records on site for review by the Director or the Director's representative. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.C.v. Notice of violation I10-42-119-MJA was issued.
3. On August 24, 2010, WVDEP personnel visited the area and observed the following deficiencies:
- a. Permittee has failed to fully implement the approved SWPPP by not installing the required public notice sign. This is a violation of the WV/NPDES general permit WV0115924 section G.4.b.5.
 - b. Permittee has failed to fully implement the approved SWPPP by not maintaining records of inspections for all sediment and erosion control devices and keeping those records on site for review by the Director or the Director's representative. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.C.v. Notice of violation I10-42-122-MJA was issued.
 - c. Permittee has failed to fully implement the approved SWPPP by not maintaining all sediment and erosion control devices in use to achieve compliance with the conditions of the permit. This is a violation of the WV/NPDES general permit WV0115924 section D.1.
 - d. Permittee has failed to fully implement the SWPPP by allowing sediment laden water to leave the site without first going an appropriate best management practice. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.ii.j. Notice of violation I10-42-123-MJA was issued.
 - e. Permittee has allowed sediment laden water to leave the site and create a visible plume in an unnamed tributary of Glady Fork, a tier 3 native trout stream. The discharge of solids into waters of the state is a violation of the West Virginia Legislative Rules Governing Waste Quality "Causing conditions not allowable in State waters" 47 CSR 2.3.2.a. Notice of violation I10-42-121-MJA was issued.

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4. On September 8, 2010, WVDEP personnel visited the area and observed the following deficiencies:
 - a. Permittee has failed to fully implement the approved SWPPP by not installing outlet markers at the discharge points of permitted project. This is a violation of the WV/NPDES general permit WV0115924 section C.15.
 - b. Permittee has failed to fully implement the approved SWPPP by not maintaining all sediment and erosion control devices in use to achieve compliance with the conditions of the permit. This is a violation of the WV/NPDES general permit WV0115924 section D.1. Notice of violation I10-42-134-MJA was issued.
 - c. Permittee has failed to fully implement the approved SWPPP by not re-seeding all areas where a uniform vegetative cover of 70% has not been achieved. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.i.c. Notice of violation I10-42-135-MJA was issued.
 - d. Permittee has failed to fully implement the approved SWPPP by not maintaining records of inspections for all sediment and erosion control devices and keeping those records on site for review by the Director or the Director's representative. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.C.v. Notice of violation I10-42-133-MJA was issued.

5. On October 14, 2010, WVDEP personnel visited the area and observed the following deficiencies:
 - a. Permittee has failed to fully implement the approved SWPPP by not installing the required public notice sign. This is a violation of the WV/NPDES general permit WV0115924 section G.4.b.5. Notice of violation I10-42-151-MJA was issued.
 - b. Permittee has failed to fully implement the approved SWPPP by not stabilizing all ditches and diversions prior to becoming functional. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.i.d. Notice of violation I10-42-152-MJA was issued.
 - c. Permittee has failed to fully implement the approved SWPPP by not re-seeding all areas where a uniform vegetative cover of 70% has not been achieved. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.i.c.
 - d. Permittee has failed to fully implement the approved SWPPP by not maintaining all sediment and erosion control devices in use to achieve compliance with the conditions of the permit. This is a violation of the WV/NPDES general permit WV0115924 section D.1. Notice of violation I10-42-150-MJA was issued.

6. On November 30, 2010, WVDEP personnel visited the area and observed the following deficiencies:
 - a. Permittee has failed to fully implement the approved SWPPP by not re-seeding all areas where a uniform vegetative cover of 70% has not been achieved. This is a violation of the WV/NPDES general permit WV0115924 section G.4.e.2.A.i.c.

ER #

- b. Permittee has failed to fully implement the approved SWPPP by not maintaining all sediment and erosion control devices in use to achieve compliance with the conditions of the permit. This is a violation of the WV/NPDES general permit WV0115924 section D.1. Notice of violation I10-42-040-206 was issued.
7. A meeting was held between WVDEP and MCI on April 6, 2011 to discuss the terms of this Order. In that meeting MCI contended that trouble with local landowners prevented it from correcting some of the violations listed in the Findings of Fact of this Order.

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. MCI shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit.
2. Within thirty (30) days of entry of this Order, MCI shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when MCI will achieve compliance with all terms and conditions of its WV/NPDES permit and/or pertinent laws and rules. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor
NE Regional Environmental Enforcement Office
HC63 Box 2545
Romney, WV 26757**

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

3. Because of MCI's Legislative Rule and permit violations, MCI shall be assessed a civil administrative penalty of forty-seven thousand eight hundred seventy dollars (\$47,870) 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:**

EJH

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

OTHER PROVISIONS

1. MCI 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, MCI 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, MCI 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 MCI 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, MCI 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 MCI 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 MCI 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 MCI (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 MCI 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 MCI to additional penalties and injunctive relief in accordance with the applicable law.

ELF Z

5. The provisions of this Order are severable and should a court or board of competent jurisdiction declares any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
6. This Order is binding on MCI, its successors and assigns.
7. This Order shall terminate upon MCI's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

Edward P. Boyle II, Secretary
~~Jason Workman~~ *Edward P. Boyle II, Secretary* _____ Date 8/11/11
E/P/II
Mountaineer Contractors, Inc.

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

Mountaineer Contractors, Inc.

Receiving Stream:

UT Glady Fork

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#												
			2a,3d	2b,3c,4b,5d,6b	2c,5b	2d,3e	2e,3a,5a	2f,3b,4d	4c,5c,6a						
a)	Amount of Pollutant Released	1 to 3	2	2	2	2	1	1	2						
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	0	1						
c)	Sensitivity of the Environment	0 to 3	3	3	3	3	1	0	3						
d)	Length of Time	1 to 3	1	1	1	1	1	1	1						
e)	Actual Exposure and Effects thereon	0 to 3	2	2	2	2	1	0	2						
Average Potential for Harm Factor			1.8	1.8	1.8	1.8	1	0.4	1.8	No	No	No	No	No	No
2)	Extent of Deviation Factor	Factor Range													
	Degree of Non-Compliance	1 to 3	2	2	2	2	1	2	2						

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 -			\$0
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	(\$5,980)
6.2.b.3 - Cooperation with the Secretary		10	(\$5,980)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			(\$11,930)
Penalty =			\$47,870

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:	