



west virginia department of environmental protection

Division of Water and Waste Management
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Joe Manchin III, 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: Robyn Smith
Nicewonder Contracting, Inc.
P.O. Box 40
Wharnccliffe, WV 25651

DATE: November 8, 2010

ORDER NO.: 7116

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 Nicewonder Contracting, Inc. (hereinafter "Nicewonder").

FINDINGS OF FACT

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

1. Nicewonder operates a land disturbance associated with construction activity, referred to as King Coal Highway Phase 2A located near Red Jacket, Mingo County, West Virginia. Nicewonder was issued WV/NPDES Water Pollution Control Permit No. WV0115924, General Permit Registration No. WVR103531 on March 26, 2008.
2. On March 31, 2010, West Virginia Department of Environmental Protection (WVDEP) personnel inspected the site and observed and documented the following deficiencies:
 - a) Permittee failed to properly operate and maintain all erosion control devices, including the silt fence along the receiving stream, in the area of the connector road. This is a violation of its WV/NPDES permit (Section D.1).
 - b) As a result of blasting operations taking place during this inspection, debris, including sediment and rock, was deposited in the receiving stream, causing deposits in waters of the State. The deposits caused distinctly visible settleable solids in the receiving stream. These are violations of Legislative Rule Title 47, Series 2, Section 3.2.b.

Promoting a healthy environment.

(47CSR2-3.2.b.) and 3.2.a., respectively, "Conditions Not Allowable in State Waters."

Notices of Violation I10-30-003-JCC through I10-30-005-JCC were issued.

3. On July 20, 2010, WVDEP personnel inspected the site and observed and documented the following deficiencies:
 - a) Permittee failed to operate and maintain all erosion control devices, including silt fence along the receiving stream, in the area of the connector road. This is a violation of its WV/NPDES permit (Section D.1).
 - b) Evidence of sediment laden water leaving the site without first going through a Best Management Practice (BMP) was observed, along the connector road construction, due to the lack of silt fence. This is a violation of its WV/NPDES permit (Section G.4.e.2.A.ii.j).
 - c) Sediment deposits were observed in the receiving stream, on the downstream end of the recently installed box culvert. This is a violation of 47CSR2-3.2.b. "Conditions Not Allowable in State Waters."

Notices of Violation I10-30-006-JCC through I10-30-008-JCC were issued.

4. On September 30, 2010, Nicewonder representatives met with agency personnel to discuss the draft 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. Nicewonder shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit.
2. Within fifteen (15) days of entry of this Order, Nicewonder shall submit for approval a proposed corrective action plan and schedule, outlining action items and completion dates for how and when Nicewonder will achieve compliance with all terms and conditions of its WV/NPDES permit and/or pertinent laws and rules. The corrective action plan shall be submitted to:

**Environmental Inspector Supervisor
SW Regional Environmental Enforcement Office
PO Box 662
Teays, WV 25569**

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

3. Because of Nicewonder's Legislative Rule and permit violations, Nicewonder shall be assessed a civil administrative penalty of nine thousand six hundred sixty dollars (\$9,660) 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. Nicewonder 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, Nicewonder 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, Nicewonder 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 Nicewonder 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, Nicewonder 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 Nicewonder 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 Nicewonder 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 Nicewonder (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 Nicewonder 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 Nicewonder 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 Nicewonder, its successors and assigns.
7. This Order shall terminate upon Nicewonder's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Robyn Smith
Nicewonder Contracting Inc.

11-19-10

Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date



- Material from a recent shot overwhelmed silt fence and impacted the receiving stream. This material has caused deposits in State Waters. 3-31-10



- Distinctly visible settleable solids observed in State Waters due to material from recent shot impacting the receiving stream. Silt fence shown in poor condition. 3-31-10



- Active portion of 2A, including the connector road.



- Silt fence has been removed along the receiving stream in the connector road area.



- Evidence of sediment laden water having left the site without first going through an appropriate BMP, due to the lack of silt fence along the receiving stream.



- Sediment deposits observed in the receiving stream below the recently installed box culvert.

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Nicewonder Contracting Inc. Receiving Stream: Tributary to Mate 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	3b	3c										
a)	Amount of Pollutant Released	1 to 3	1	2	1	1	1										
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1										
c)	Sensitivity of the Environment	0 to 3	1	1	1	1	1										
d)	Length of Time	1 to 3	1	1	1	1	1										
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	1										
Average Potential for Harm Factor			1	1.2	1	1	1	No									
2)	Extent of Deviation Factor	Factor Range															
	Degree of Non-Compliance	1 to 3	2	3	2	2	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.

		Extent of Deviation from Requirement		
		Major	Moderate	Minor
Potential for Harm to Human Health or the Environment	Major	\$8,000 to \$10,000	\$6,000 to \$8,000	\$5,000 to \$6,000
	Moderate	\$4,000 to \$5,000	\$3,000 to \$4,000	\$2,000 to \$3,000
	Minor	\$1,500 to \$2,000	\$1,000 to \$1,500	Up to \$1,000

FOF #	Potential for Harm	Extent of Deviation	Penalty	Multiple Factor	Base Penalty
2a	Minor	Moderate	\$1,500	1	\$1,500
2b	Moderate	Major	\$4,200	1	\$4,200
3a	Minor	Moderate	\$1,500	1	\$1,500
3b	Minor	Moderate	\$1,500	1	\$1,500
3c	Minor	Major	\$2,000	1	\$2,000
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
Total Base Penalty					\$10,700

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	10		\$1,070
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	(\$1,070)
6.2.b.3 - Cooperation with the Secretary		10	(\$1,070)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			(\$1,040)
Penalty =			\$9,660

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:	