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west virginia department of environmental protection

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Division of Water and Waste Management  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304  
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Earl Ray Tomblin, Governor  
Randy C. Huffman, Cabinet Secretary  
[www.dep.wv.gov](http://www.dep.wv.gov)

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

TO: Commercial Associates, Inc.  
Christopher B. Shultz  
767 E Washington St.  
Charles Town, WV 25414

DATE: October 17, 2014

ORDER NO.: 8104

**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 Commercial Associates, Inc. (hereinafter “Commercial Associates”).

**FINDINGS OF FACT**

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

**WVR102242 – Village at Samuel Station**

1. Commercial Associates operates a greater than eight (8) acre construction site known as "Village at Samuel Station," located near Charles Town, Jefferson County, West Virginia. Commercial Associates was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR102242, on October 6, 2006. On January 5, 2010, the WV/NPDES permit was voided due to non-payment of WV/NPDES Annual Permit and Groundwater Protection Fees. The WV/NPDES permit was administratively extended until June 30, 2013; however, Commercial Associates failed to reapply for the WV/NPDES permit.
2. On May 1, 2014, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the “Village at Samuel Station” construction site. During the inspection, violations of the following sections of WV State Code and WV Legislative Rules were observed and documented:

- a. 22-11-8 and 47CSR10 Section 3.1 - Commercial Associates operated a construction site without authorization pursuant to a WV/NPDES Construction Storm Water Permit.
- b. 47CSR2.Section 3.2.a – Commercial Associates caused conditions not allowable in waters of the State by creating distinctly visible floating, settleable, or suspended solids. Specifically, Commercial Associates allowed muddy water to leave the construction site.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. i14-19-067-203 and i14-19-077-203 were issued to Commercial Associates.

3. On May 29, 2014, WVDEP personnel conducted an inspection of the “Village at Samuel Station” construction site. During the inspection, violations of the following sections of WV State Code and WV Legislative Rules were observed and documented:
  - a. 22-11-8 and 47CSR10 Section 3.1 – Commercial Associates operated a construction site without authorization pursuant to a WV/NPDES Construction Storm Water Permit.

As a result of the aforementioned violations, NOV No. i14-19-078-203 was issued to Commercial Associates.

4. On July 17, 2014, WVDEP personnel received a Notice of Termination (NOT) from Commercial Associates for its WV/NPDES permit. The termination date reflected in the NOT was December 1, 2012. The NOT was not reviewed or approved by WVDEP personnel, due to the aforementioned unresolved violations and non-payment of past due WV/NPDES Annual Permit and Groundwater Protection Fees.
5. On August 19, 2014, Commercial Associates paid past due 2009, 2010, 2012, and 2013 WV/NPDES Annual Permit and Groundwater Protection Fees for the aforementioned WV/NPDES permit.
6. On September 24, 2014, John J. Thomas, the Village at Samuel Station builder, was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR107165, for regulated activities at the aforementioned site.
7. On October 6, 2014, WVDEP personnel performed a record review and determined that Commercial Associates owed 2014 WV/NPDES Annual Permit and Groundwater Protection Fees for WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR102242, in the amount of five hundred fifty dollars (\$550).

**WVR102152 – Elizabeth Station**

8. Commercial Associates was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR102152, on February 3, 2006 for eleven (11) acres of disturbance at the construction site known as “Elizabeth Station,” in Moorefield, Hardy County, West Virginia. On December 30, 2011, the WV/NPDES permit was voided due to non-payment of WV/NPDES Annual Permit and Groundwater Protection

Fees. The WV/NPDES permit was administratively extended until June 30, 2013; however, Commercial Associates failed to reapply for the WV/NPDES permit.

9. On June 19, 2014, WVDEP personnel conducted an inspection of the “Elizabeth Station” construction site. During the inspection, violations of the following sections of WV State Code and WV Legislative Rules were observed and documented:
  - a. 22-11-8 and 47CSR10 Section 3.1 – Commercial Associates operated a construction site without authorization pursuant to a WV/NPDES Construction Storm Water Permit.

As a result of the aforementioned violations, NOV No. I14-16-027-MJA was issued to Commercial Associates.

10. On August 18, 2014, Commercial Associates paid past due 2010, 2012, 2013, and 2014 WV/NPDES Annual Permit and Groundwater Protection Fees for the aforementioned WV/NPDES permit.
11. On September 23, 2014, WVDEP personnel and representatives of Commercial Associates met by telephone to discuss the terms and conditions 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. Commercial Associates shall immediately take all measures to initiate compliance with all pertinent laws and rules.
2. Within thirty (30) days of the effective dates of this Order, Commercial Associates shall pay all WV/NPDES Annual Permit and Groundwater Protection Fees for WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR102242, in the amount of five hundred fifty dollars (\$550).
3. Within thirty (30) days of the effective date of this Order, Commercial Associates shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Commercial Associates will achieve compliance with all pertinent laws and rules. The plan of corrective action shall include, but not be limited to, provisions for either re-applying for WV/NPDES permit coverage at the Elizabeth Station site OR adequately stabilizing the site and properly terminating the WV/NPDES permit. The plan of corrective action shall make reference to Order No. 8104. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor  
NE Regional Environmental Enforcement Office  
22288 Northwestern Pike  
Romney, WV 26757**

A copy of this plan shall be submitted to:

**Chief Inspector  
Environmental Enforcement - Mail Code #031328  
WVDEP  
601 57<sup>th</sup> 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.

4. Because of Commercial Associates' West Virginia Code and Legislative Rule violations, Commercial Associates shall be assessed a civil administrative penalty of eleven thousand five hundred seventy dollars (\$11,570) 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 57<sup>th</sup> Street SE  
Charleston, WV 25304**

#### **OTHER PROVISIONS**

1. Commercial Associates 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, Commercial Associates 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, Commercial Associates 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 Commercial Associates 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, Commercial Associates 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

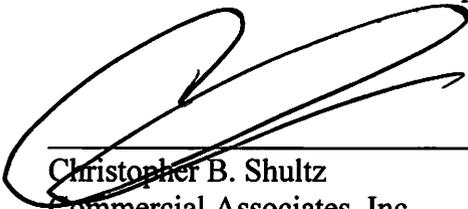
contributed to by the lack of sufficient funding. Within three (3) working days after Commercial Associates becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and Commercial Associates shall, within ten (10) working days of initial notification, submit a detailed 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 Commercial Associates 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 Commercial Associates (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 Commercial Associates 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 Commercial Associates 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 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 Commercial Associates, its successors and assigns.
7. This Order shall terminate upon Commercial Associates' notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

**RECEIVED**

JAN 20 2015

**ENVIRONMENTAL  
ENFORCEMENT**

  
 \_\_\_\_\_  
 Christopher B. Shultz  
 Commercial Associates, Inc.

12-15-14  
 \_\_\_\_\_  
 Date

Public Notice begin:

\_\_\_\_\_  
 Date

Public Notice end:

\_\_\_\_\_  
 Date

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

\_\_\_\_\_  
 Date



Muddy water leaving the construction site and entering the state road.



Construction activity with muddy water flowing toward the state road.



Erosion rills were evident on basin walls.



Side ditches on project were eroding badly.

## Base Penalty Calculation

(pursuant to 47CSR1-6.1)

**Responsible Party:** Commercial Associates, Inc. **Receiving Stream:** Unnamed Tributary of Evitts Run

**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	3a	9a									
a)	Amount of Pollutant Released	1 to 3	1	1	1									
b)	Toxicity of Pollutant	0 to 3	1	1	1									
c)	Sensitivity of the Environment	0 to 3	1	1	1									
d)	Length of Time	1 to 3	1	2	1									
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1									
<b>Average Potential for Harm Factor</b>			1	1.2	1	No								
2)	<b>Extent of Deviation Factor</b>	<b>Factor Range</b>												
	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		\$820
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)	\$3,340		\$3,340
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		10	(\$820)
6.2.b.5 - Ability to Pay			\$0
<b>Penalty Adjustments</b>			<b>\$3,370</b>
<b>Penalty =</b>			<b>\$11,570</b>

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	\$1,000
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	\$2,340
Competitive Advantage	
<b>Estimated Economic Benefit</b>	<b>\$3,340</b>
<b>Comments:</b>	Avoided costs of WV/NPDES permit application fees (\$1,170 x 2 sites) and pollution control equipment.