west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
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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: Mr. Donald Michels
Champion Agate Co., Inc.
c/o Judy Shanholtz
McNeer, Highland, McMunn, and Varner
BB & T Bank Building
PO Box Drawer 2040
Clarksburg, WV 26302

DATE: May 10, 2012

ORDER NO.: 7358

## 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 Champion Agate Co., Inc. (hereinafter "Champion Agate").

## FINDINGS OF FACT

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

1. Champion Agate operates an industrial facility located in Pennsboro, Ritchie County, West Virginia. Champion Agate/Glass was issued WV/NPDES Water Pollution Control Permit No. WV0111457, Registration No. WVG610747 on April 21, 1999. Said registration expired on September 30, 2009.

2. Establishments with discharges composed entirely of stormwater associated with industrial activities 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 Legislative Rule Title 47, Series 10.

3. WVDEP advised Champion Agate in mid-2009, early -2010, and January 2011 to reapply for permit registration coverage under the Multi-Sector General WV/NPDES Water Pollution Control Permit for Stormwater Discharges Associated with Industrial Activity.

4. Champion Agate failed to renew its WV/NPDES permit registration.

5. On May 9, 2012, Judy Shanholtz, a representative of Champion Agate, indicated that Champion Glass had been sold, and Champion Agate was currently the party responsible for compliance with the WV/NPDES permit requirements. Judy Shanholtz also stated that Champion Agate intended to submit its WV/NPDES permit registration application.

## 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. Champion Agate shall immediately take all measures to initiate compliance with all pertinent laws and rules.

2. Within forty-five (45) days of entry of this Order, Champion Agate shall submit an administratively complete application for permit coverage for the regulated activity. This application shall be submitted to:

**Permitting Section**
**DWWM**
**ATTN: Patrick D. Burch**
**601 57th Street**
**Charleston, WV 25304**

3. Because of Champion Agate's West Virginia Code violations, Champion Agate shall be assessed a civil administrative penalty of five thousand three hundred ten dollars ($5,310) 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. Champion Agate 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, Champion Agate 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, Champion Agate 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 Champion Agate 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, Champion Agate 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 Champion Agate 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 Champion Agate 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 Champion Agate (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 Champion Agate 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 Champion Agate 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 Champion Agate, its successors and assigns.

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

Donald Michels
Champion Agate Co., Inc.

5-14-2012
Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date

*revised January 2011*

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

Donald Michels
Champion Agate Co., Inc.

5-14-2012
Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date

*revised January 2011*

# Base Penalty Calculation

(pursuant to 47CSR1-6.1)

**Responsible Party:** Champion Agate **Receiving Stream:** UT of Bunnell Run

**Treatment System Design Maximum Flow:** 0.0041 **MGD**

**Treatment System Actual Average Flow:** **MGD** (if known)

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

| | | | FOF# | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1) | **Potential for Harm Factor** | **Factor Range** | 4 | | | | | | | | | | | | |
| a) | Amount of Pollutant Released | 1 to 3 | 1 | | | | | | | | | | | | |
| b) | Toxicity of Pollutant | 0 to 3 | 1 | | | | | | | | | | | | |
| c) | Sensitivity of the Environment | 0 to 3 | 1 | | | | | | | | | | | | |
| d) | Length of Time | 1 to 3 | 3 | | | | | | | | | | | | |
| e) | Actual Exposure and Effects thereon | 0 to 3 | 1 | | | | | | | | | | | | |
| | **Average Potential for Harm Factor** | | 1.4 | No | No | No | No | No | No | No | No | No | No | No | 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.

**Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.**

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

| | | 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 |
|---|---|---|---|---|---|
| 4 | Moderate | Major | $4,400 | 1 | $4,400 |
| 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 |
| 0 | FALSE | FALSE | FALSE | 1 | $0 |
| **Total Base Penalty** | | | | | $4,400 |

# 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 | | $880 |
| 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 | | | $0 |
| 6.2.b.3 - Cooperation with the Secretary | | | $0 |
| 6.2.b.5 - Ability to Pay | | | $0 |
| **Penalty Adjustments** | | | **$910** |
| **Penalty =** | | | **$5,310** |

| 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:**