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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

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

TO: The City of Elkins  
Mayor Duke Talbott  
401 Davis Avenue  
Elkins, WV 26241

DATE: July 23, 2012

ORDER NO.: 7498

**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 The City of Elkins (hereinafter "Elkins").

**FINDINGS OF FACT**

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

1. Elkins operates a waste water treatment plant and collection system located in Elkins, Randolph County, West Virginia. Elkins was issued WV/NPDES Water Pollution Control Permit No. WV0020028 on November 15, 2006.
2. On September 14, 2011, at approximately 10:35am, West Virginia Department of Environmental Protection (hereinafter "WVDEP") personnel investigated a complaint of dead fish in Woolwine Run, near the Colonial Court Service Center in Elkins. During this investigation, WVDEP personnel observed and documented the following:
  - a. Sludge/sewage deposits in Woolwine Run were caused by a recent break in a sewage collection line, located fifty (50) feet north of the intersection of Diamond and Weese Streets, at N38°55.335' and W079°50.370,' and at an elevation of 1929 feet. Elkins failed to give immediate notification to the Office of Water Resources Emergency Notification Number of the spill or accidental discharge of pollutants into waters of the State. Notice of Violation (NOV) No. NE11-42-001-

Promoting a healthy environment.

- 2135 was issued for this violation of West Virginia Legislative Rule 47CSR11-2.2.a.
- b. Sludge/sewage deposits in Woolwine Run were observed for 250 yards. Elkins allowed sewage to cause these deposits or sludge banks in waters of the State. NOV No. NE11-42-002-2135 was issued for this violation of West Virginia Legislative Rule 47CSR2-3.2.b.
  - c. In Woolwine Run, there were approximately twenty five (25) dead fish. Elkins allowed sewage to cause pollution in waters of the State, resulting in concentrations which were harmful, hazardous, or toxic to man, animal, or aquatic life. NOV No. NE11-42-003-2135 was issued for this violation of West Virginia Legislative Rule 47CSR2-3.2.e.
  - d. Lee Roy Whitmire, City of Elkins Collection System Supervisor, conveyed to WVDEP personnel that, on September 13, 2011, he and his employees had re-connected a separated sewage collection line and added "green" concrete to abate the separation that had occurred on September 12, 2011. WVDEP directed Mr. Whitmire to notify the Office of Water Resources Emergency Notification Number and to remove all sewage/sludge deposits in Woolwine Run.
  - e. On September 14, 2011, at 12:30pm, spill notification from Elkins was received by WVDEP, and remediation of the stream started at approximately 2:30pm.
3. On September 29, 2011, at 12:30pm, a spill notification was received from Elkins by the WVDEP. The bypass occurred at Outfall 008, on September 13, 2011, at 4:40am, and was due to pump station equipment malfunction. Failure to give immediate notification to the Office of Water Resources Emergency Notification Number for any spill or accidental discharge of pollutants into the waters of the State is a violation of West Virginia Legislative Rule 47CSR11-2.2.a.
  4. The violations reflected in this Order were not addressed by a recent consent decree entered into by Elkins, United States Environmental Protection Agency (USEPA), and WVDEP.
  5. On January 17, 2012, WVDEP personnel and representatives of the City of Elkins met to discuss the terms and conditions of this Order.
  6. On April 27, 2012, Elkins submitted financial documents to WVDEP. The provided information was used to perform an economic analysis which evaluated Elkins' ability to pay a civil administrative penalty.

### **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. Elkins shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit and pertinent laws and rules.

2. Within thirty (30) days of the effective date of this Order, Elkins shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Elkins will achieve compliance with all 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 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.

3. Because of Elkins' West Virginia Legislative Rule violations, Elkins shall be assessed a civil administrative penalty of two thousand five hundred dollars (\$2,500) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund in accordance with the following schedule:

Payment 1 in the amount of \$416.66 due on or before September 1, 2012.  
Payment 2 in the amount of \$416.66 due on or before October 1, 2012.  
Payment 3 in the amount of \$416.66 due on or before November 1, 2012.  
Payment 4 in the amount of \$416.66 due on or before December 1, 2012.  
Payment 5 in the amount of \$416.66 due on or before January 1, 2013.  
Payment 6 in the amount of \$416.70 due on or before February 1, 2013.

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 57<sup>th</sup> Street SE  
Charleston, WV 25304**

### **OTHER PROVISIONS**

1. Elkins 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, Elkins 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, Elkins 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 Elkins 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, Elkins 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 Elkins 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 Elkins 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 Elkins (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 Elkins 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 Elkins 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 Elkins, its successors and assigns.

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

Duke Talbott  
Mayor Duke Talbott  
The City of Elkins

25 Jul 12  
Date

Public Notice begin:

\_\_\_\_\_  
Date

Public Notice end:

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date



PHOTO 1: Woolwine Run with concrete and sewage deposits (09/14/11)



PHOTO 2: Repaired collection line with concrete and sewage deposits in Woolwine Run (09/14/11)



PHOTO 3: Woolwine Run with sewage deposits and concrete (09/14/11)



PHOTO 4: Sewage deposits and sludge banks in Woolwine Run (09/14/11)



PHOTO 5: Sewage deposits and sludge banks in Woolwine Run (09/14/11)



PHOTO 6: Woolwine Run at intersection of Diamond and Weese Streets, Elkins, WV (09/14/11)



PHOTO 7: Sewage deposits and sludge banks in Woolwine Run (09/14/11)



PHOTO 8: Dead fish in Woolwine Run (09/14/11)



PHOTO 9: Dead fish in Woolwine Run (09/14/11)



PHOTO 10: Dead fish in Woolwine Run (09/14/11)



PHOTO 11: Sewage deposits and sludge banks in Woolwine Run (09/14/11)

# Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

The City of Elkins WWTP

Receiving Stream:

Woolwine Run

Treatment System Design Maximum Flow: 2.49 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   | 2b  | 2c | 3   |    |    |    |    |    |    |    |    |    |    |
| a)                                       | Amount of Pollutant Released        | 1 to 3              | 1    | 2   | 2  | 1   |    |    |    |    |    |    |    |    |    |    |
| b)                                       | Toxicity of Pollutant               | 0 to 3              | 0    | 3   | 3  | 0   |    |    |    |    |    |    |    |    |    |    |
| c)                                       | Sensitivity of the Environment      | 0 to 3              | 0    | 1   | 1  | 0   |    |    |    |    |    |    |    |    |    |    |
| d)                                       | Length of Time                      | 1 to 3              | 1    | 1   | 1  | 3   |    |    |    |    |    |    |    |    |    |    |
| e)                                       | Actual Exposure and Effects thereon | 0 to 3              | 0    | 0   | 3  | 0   |    |    |    |    |    |    |    |    |    |    |
| <b>Average Potential for Harm Factor</b> |                                     |                     | 0.4  | 1.4 | 2  | 0.8 | No |
| 2)                                       | <b>Extent of Deviation Factor</b>   | <b>Factor Range</b> |      |     |    |     |    |    |    |    |    |    |    |    |    |    |
|  | Degree of Non-Compliance            | 1 to 3              | 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 -                                  | 30         |            | \$3,900                  |
| 6.2.b.4 - Compliance/noncompliance history                                 |            |            | \$0                      |
| 6.2.b.6 - Economic benefits -<br>(flat monetary increase)                  |            |            | \$0                      |
| 6.2.b.7 - Public Interest -<br>(flat monetary increase)                    |            |            | \$0                      |
| 6.2.b.8 - Loss of enjoyment -<br>(flat monetary increase)                  |            |            | \$0                      |
| 6.2.b.9 - Investigative costs -<br>(flat monetary increase)                |            |            | \$0                      |
| 6.2.b.10 - Other factors (size of violator)                                |            |            | \$0                      |
| 6.2.b.10 - Additional Other Factors -<br>Increase (flat monetary increase) |            |            | \$0                      |
| 6.2.b.10 - Additional Other Factors -<br>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         | (\$1,300)                |
| 6.2.b.3 - Cooperation with the Secretary                                   |            | 10         | (\$1,300)                |
| 6.2.b.5 - Ability to Pay   |            | 91         | (\$11,830)               |
| <b>Penalty Adjustments</b>   |            |            | <b>(\$10,500)</b>        |
| <b>Penalty =</b>   |            |            | <b>\$2,500</b>           |

| 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  |                        |
| <b>Estimated Economic Benefit</b>                                  | <b>\$0</b>             |
| <b>Comments:</b>   |                        |