



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

January 3, 2013

Death by Chocolate, LLC
Attn: Kevin Turner
943 Blackberry Hill
Rowlesburg, WV 26425

CERTIFIED RETURN RECEIPT REQUESTED

91 7199 9991 7031 5498 0135

Dear Kevin Turner:

West Virginia Department of Environmental Protection (WVDEP) is in receipt of your check, dated November 15, 2012, in the amount of \$25,140. Thank you for your payment, in full, of the civil administrative penalty associated with Revised Order No. 7713, dated October 18, 2012. To finalize the administrative process, however, WVDEP requests that you sign the enclosed Order. Should you agree to the terms and conditions of the Order, please return the signed Order to the address below within five (5) days of receipt of this correspondence:

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

If you have any questions regarding this matter, please contact me at (304) 926-0470.

Sincerely,

David C. Simmons
Enforcement Hearing Officer

Enclosure

cc: Michael A. Zeto, Chief Inspector, EE (via e-mail)
Joseph M. Hickman, Assistant Chief Inspector, EE/WW (via e-mail)
Jeremy Bandy, Assistant Chief Inspector, EE (via e-mail)
Laura McGee, Environmental Resources Specialist, EE (via e-mail)
Brad Swiger, Environmental Inspector Supervisor, EE/WW (via e-mail)
Tim W. Hodge, Environmental Inspector, EE/WW (via e-mail)
(3)

Promoting a healthy environment.



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0495
Fax: (304) 926-0463

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
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**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Death by Chocolate, LLC
Attn: Kevin Turner
943 Blackberry Hill
Rowlesburg, WV 26425

DATE: October 18, 2012

ORDER NO.: 7713

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 Death by Chocolate, LLC (hereinafter "DBC").

FINDINGS OF FACT

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

1. DBC operates a land disturbance known as Shiloh Residential Development located in Morgantown, Monongalia County, West Virginia. DBC was issued WV/NPDES Water Pollution Control Permit No. WV0115924 on November 16, 2011.
2. On December 2, 2011, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility. During the inspection, violations of the following sections of the terms and conditions of DBC's WV/NPDES permit were observed and documented:
 - a. G.4.e.2.-Failed to install many controls as detailed in the sequence of construction in the approved Storm Water Pollution Prevention Plan (SWPPP).
 - b. G.4.e.2.A.i.d.-Failed to stabilize diversions prior to becoming functional.

As a result of the aforementioned violations, two (2) warnings were issued to DBC.

3. On February 29, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV Legislative Rule and DBC's WV/NPDES permit were observed and documented:
- a. G.4.e.2.A.i.d.-Failed to stabilize diversions prior to becoming functional.
 - b. G.4.e.2.A.i.-Failed to install stabilization measures, such as seed and mulch, in portions of the site where construction activities have temporarily or permanently ceased for greater than seven (7) days and where construction activity will not resume within twenty-one (21) days.
 - c. G.4.e.2.A.ii.f.-Failed to protect fill slopes by failing to divert runoff to conveyance measures such as pipe slope drains or stable channels.
 - d. G.4.e.2.C.i.-Failed to dispose of all solid waste and construction/demolition material in accordance with WV State Code and WV Legislative Rule 33CSR1.
 - e. G.4.e.2.C.iii.-Failed to provide secondary fuel containment in accordance with WV State Code and WV Legislative Rule 47CSR58.
 - f. G.4.d.1.B.-Failed to maintain good housekeeping on site. The project was not clean and orderly.
 - g. B.-Failed to comply with the approved SWPPP. Specifically, sediment traps A and G were not in place, diversions to direct sediment-laden runoff to Sediment Traps B, C, D, E, and F were not installed, and super silt fence/silt fence were not installed on portions of the site as detailed in the erosion and sediment (E&S) site plan.
 - h. 47CSR2 Section 3.2.f.-Caused or contributed to conditions not allowable in State waters by allowing a distinctly visible plume in the receiving stream. The plume was observed for approximately 1.5 miles, originating at the DBC site, running along the entire length of the unnamed tributary of Whites Run, and leaving the site to the southeast and along Whites Run to Cheat Lake.
 - i. D.1.-Failed to at all times properly operate and maintain all facilities and systems of treatment and control. Specifically, stabilized diversions were not established to direct sediment-laden water to Sediment Traps B, C, D, E, and F for proper treatment, and silt fence was not properly maintained throughout the site.
 - j. G.4.e.2.A.ii.j.-Allowed sediment-laden water to leave the site without going through an appropriate device. Sediment-laden water was allowed to bypass sediment traps throughout the site.

As a result of the aforementioned violations, six (6) warnings and four (4) Notice of Violations (NOV Nos. W-NW-TWH-022912-001, W-NW-TWH-022912-002, W-NW-TWH-022912-003, and W-NW-TWH-022912-004) were issued to DBC.

4. On April 4, 2012, WVDEP issued Order No. 7580, requiring DBC to:
- a. Take measures to initiate compliance with all terms and conditions of its WV/NPDES permit and pertinent laws and rules.
 - b. Cease and Desist all further land development and construction activities.
 - c. Within twenty (20) days, submit a Plan of Corrective Action (POCA) to WVDEP for approval.
 - d. Immediately stabilize all idle areas or areas at final grade.
 - e. Immediately construct all sediment traps and related stabilized diversions in accordance with the approved specifications as set forth in the SWPPP.

5. On May 4, 2012, WVDEP personnel approved DBC's POCA and confirmed compliance with Order No. 7580.
6. On July 23, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of the terms and conditions of DBC's WV/NPDES permit were observed and documented:
 - a. G.4.e.2.A.ii.c.-Failed to provide and maintain proper inlet and outlet protection on sediment trapping structures.
 - b. G.4.e.2.D.i.-Failed to prevent sediment originating at the site from being deposited onto Route 857 and Stockett Road.
 - c. G.4.e.2.A.i.-Failed to provide temporary seed or mulch on portions of the site left idle for greater than seven (7) days.
 - d. G.4.e.2.A.i.c.-Failed to reseed portions of the site where seed and mulch has failed to germinate adequately (i.e. uniform perennial vegetative cover with a density of 70%) within thirty (30) days.
 - e. G.4.e.2.A.ii.j.-Allowed sediment-laden water to leave the site without going through an appropriate device. Sediment-laden water was observed leaving the site across Route 857 and flowing into an unnamed tributary of Whites Run.
 - f. D.1.-Failed to at all times properly operate and maintain all facilities and systems of treatment and control. Specifically, DBC failed to maintain controls on the disturbed portion of the site along Route 857. The sediment basin was full of sediment, and its outlet eroded away, contributing to deposits onto the highway.

As a result of the aforementioned violations, four (4) warnings and two (2) NOV's (Nos. W-NW-TWH-072312-001 and W-NW-TWH-072312-002) were issued to DBC.

7. On October 3, 2012, WVDEP personnel and representatives of DBC met to discuss the terms and conditions of this Order. During the meeting, it was agreed that the violations cited in this Order have been abated by DBC.

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. DBC shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit and pertinent laws and rules.
2. Because of DBC's Legislative Rule and permit violations, DBC shall be assessed a civil administrative penalty of twenty-five thousand one hundred forty dollars (\$25,140) 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 be mailed to:**

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

OTHER PROVISIONS

1. DBC 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, DBC 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, DBC 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 DBC 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, DBC 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 DBC 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 DBC 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 DBC (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 DBC 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 DBC 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 DBC, its successors and assigns.
7. This Order shall terminate upon DBC's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Kevin Turner
Death by Chocolate, LLC

Date 1/8/13

Public Notice begin:

Date

Public Notice end:

Date

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

Date

revised September 2011

RECEIVED

FEB 7 2013

ENVIRONMENTAL
ENFORCEMENT



Earth disturbing construction activities occurring with no controls in place.



Diversion along Old Cheat Road (CR 857) unstabilized and functional.



Large disturbance with few controls in place. [P2290152]



Roadside diversion & culvert below site that DOH has cleared on multiple occasions again full of sediment causing storm water to flow onto the highway during rain events. [P2290158]



Conditions Not Allowable in State waters: Visible plume into White's Run. [P2290197]



Conditions Not Allowable in State waters: Visible plume into White's Run. [P2290201]



Sediment-laden water leaving down slope toward the highway instead of being diverted to the proper treatment device, Sediment Trap B (upper left). [P2290228]



Sediment-laden water leaving down slope toward the highway instead of being diverted to the proper treatment device, Sediment Trap A (not installed). [P2290231]



Sediment Trap C not receiving any storm water runoff. The outlet has been installed on the inlet side of Sediment Trap C. [P2290240]



Sediment-laden water leaving down slope toward the highway instead of being diverted to the proper treatment device, Sediment Trap C (upper left with outlet on the wrong end). [P2290252]



Solid waste disposed of on site. [P2290224]



Uncontrolled storm water runoff drainages contributing to Sediment Trap C's bypass.
[P2290245]



Runoff contributing to deposits onto neighboring property and Sediment Trap C's bypass that is engineered to be diverted to Sediment Trap D via stabilized diversions. [P2290255]



Sediment Trap D not collecting any storm water runoff for treatment before leaving the site. [P2290260]



Sediment Trap F not collecting any storm water runoff for treatment before leaving the site.
[P2290262]



Super Silt Fence not installed as engineered on the approved erosion and sediment control plans.
[P2290266]



Poor ground water protection: Fuel tank with no secondary containment. [P2290271]



Poor ground water protection: Housekeeping (Pyroplex Red grease cylinders and fuel cans on the ground). [P2290276]



Sediment Trap G not installed allowing sediment-laden water to leave the site without first passing through the appropriate treatment device. [P2290279]



Large areas of disturbed soil left idle >7 days that was not re-disturbed within 21 days with no temporary seeding and mulching practices evident. [P2290286]



Sediment Trap E not collecting any storm water runoff for treatment before leaving the site. [P2290292]



Runoff not diverted to Sediment Trap E as engineered, allowed to bypass Sediment Trap B below, and leaving the site onto the highway. [P2290293]



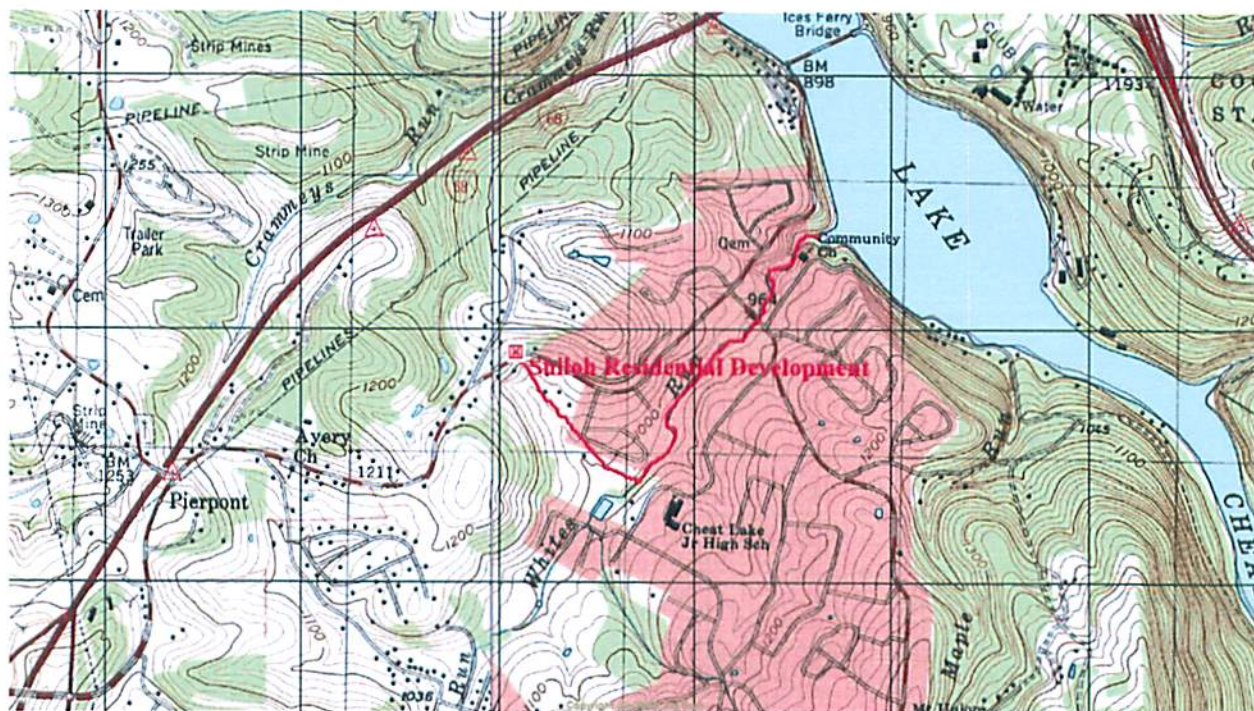
Runoff bypassing Sediment Traps E & B toward the highway. [P2290293]



Runoff bypassing Sediment Traps E & B entering the highway. [P22903303]



Sediment-laden water leaving the site without passing through an appropriate treatment device flowing through drainages toward White's Run. [P2290304]



Area map displaying the sediment-laden water plume leaving the site, entering White's Run, and emptying into Cheat Lake (1.5 miles). [Shiloh Res Dev & Plume]



Outlet of sediment basin eroding away onto Route 857.



Evidence of sediment-laden water leaving site and onto Route 857.



No controls in place along Route 857.



Evidence of sediment-laden water leaving site and onto Stockett Rd. with no controls in place.

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

Death by Chocolate, LLC

Receiving Stream:

Unnamed Tributary of Whites Run

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#													
			3g	3h	3i	3j	6e	6f								
a)	Amount of Pollutant Released	1 to 3	1	2	1	1	1	1								
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	1								
c)	Sensitivity of the Environment	0 to 3	1	1	1	1	1	1								
d)	Length of Time	1 to 3	1	1	1	1	2	2								
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	1	1								
Average Potential for Harm Factor			1	1.2	1	1	1.2	1.2	No	No	No	No	No	No	No	No
2)	Extent of Deviation Factor	Factor Range														
	Degree of Non-Compliance	1 to 3	3	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.

		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
3g	Minor	Major	\$2,000	1	\$2,000
3h	Moderate	Major	\$4,200	1	\$4,200
3i	Minor	Major	\$2,000	1	\$2,000
3j	Minor	Major	\$2,000	1	\$2,000
6e	Moderate	Major	\$4,200	1	\$4,200
6f	Moderate	Major	\$4,200	1	\$4,200
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
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
Total Base Penalty					\$18,600

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		\$3,720
6.2.b.4 - Compliance/noncompliance history	25		\$4,650
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		10	(\$1,860)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$6,540
Penalty =			\$25,140

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:	