



west virginia department of environmental protection

Environmental Enforcement
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Romney, WV 26757
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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**

Fort Ashby PSD
Mr. Daniel W. Linn, Chairman
P.O. Box 31
Fort Ashby, WV 26719

DATE: November 21, 2011

ORDER NO.: 7233

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 Fort Ashby Public Service District (hereinafter "Fort Ashby PSD").

FINDINGS OF FACT

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

1. Fort Ashby PSD operates flood control dam Patterson Creek #46 located on Painter Run, near Fort Ashby, Mineral County, West Virginia.
2. On November 17, 2010, at approximately 3:00 p.m. West Virginia Department of Environmental Protection (WVDEP) personnel responded to complaints of a large mussel kill.
3. Upon arrival at the lake, WVDEP personnel observed a large amount of water that had been drained from the lake.
4. Fisheries Biologists from the West Virginia Department of Natural Resources responded to the scene and conducted a fish kill survey. They reported finding a large number of different species of dead mussels, due to the mussels being unable to migrate ahead of the receding water levels.

Promoting a healthy environment.

5. WVDEP personnel accessed online data from the US Geological Survey which showed a slow drop in water level, less than one foot, from approximately July 1, 2010 to approximately September 7, 2010 which corresponded to a period of drought in the area. However, WVDEP personnel noted a dramatic drop of approximately three feet from approximately September 7, 2010 to approximately September 30, 2010, which consisted of a small increase of about a foot for about a day, then another substantial decrease of approximately 4.5 feet from approximately October 1, 2010 to approximately November 17, 2010. This was during a time of wet weather.
6. Investigation by WVDEP personnel did reveal that Fort Ashby PSD did use large amounts of water to flush leaves out of culverts and drop inlets, during those periods of heavy usage.
7. These draw downs of water from the dam were such a large quantity that it caused aquatic life (Mussels) to be exposed and stranded on dry land. This is a condition not allowable in State waters, a violation of West Virginia Legislative Rules, Title 47, Series 2, Section 3.2.i., specifically, any other condition, including radiological exposure, which adversely alters the integrity of waters of the state, including wetlands. No significant adverse impact to the chemical, physical, hydrological or biological components of the aquatic ecosystem shall be allowed.
8. On October 12, 2011, Fort Ashby PSD submitted correspondence to WVDEP, including a proposal for a Supplemental Environmental Project (SEP) that enlists the aid of local groups in an effort to remove debris around the perimeter of Fort Ashby Lake. Fort Ashby PSD also proposes to provide labor and trucks for debris disposal at the local transfer station. The SEP is an environmentally beneficial plan undertaken by Fort Ashby PSD to mitigate the penalty assessed in 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. Fort Ashby PSD shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit and all applicable laws and rules.
2. Within thirty (30) days of entry of this Order, Fort Ashby PSD shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Fort Ashby PSD will achieve compliance with all applicable laws and rules. The plan of corrective action shall be submitted to:

**Environmental Inspector Supervisor
NE Regional Environmental Enforcement Office
HC63 Box 2545
Romney, WV 26757**

OTHER PROVISIONS

1. Fort Ashby PSD 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, Fort Ashby PSD 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, Fort Ashby PSD 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 Fort Ashby PSD 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, Fort Ashby PSD 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 Fort Ashby PSD 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 Fort Ashby PSD 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 Fort Ashby PSD (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 Fort Ashby PSD 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 Fort Ashby PSD 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 Fort Ashby PSD, its successors and assigns.

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


~~Daniel W. Linn, Chairman~~
~~Fort Ashby PSD~~

Feb. 28, 2012
Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

Date

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 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. Within six (6) months of the effective date of this Order, Fort Ashby PSD shall complete the Supplemental Environmental Project (SEP) according to the plan proposed in its October 12, 2011 correspondence. The approved SEP proposal shall be incorporated into and become part of this Order, as if fully set forth herein.
4. Within sixty (60) days after completion of the SEP, Fort Ashby PSD shall submit an SEP Completion Report, listing expenditures and detailing all actions performed in regard to the SEP. The Report shall be mailed to the addresses contained within Order for Compliance No. 2. Failure to complete the SEP in accordance with the approved plan and schedule is a violation of this Order, and Fort Ashby PSD shall be required to pay the penalties stipulated in Order for Compliance No. 5.
5. Because of Fort Ashby PSD's Legislative Rule violations, Fort Ashby PSD shall be assessed a civil administrative penalty of five thousand thirty dollars (\$5,030). The full amount of the penalty shall be applied to the WVDEP approved Supplemental Environmental Project (SEP) proposed by Fort Ashby PSD on October 12, 2011. In the event that the SEP is not completed as proposed, the entire value placed upon the SEP shall become due and payable upon demand by WVDEP.

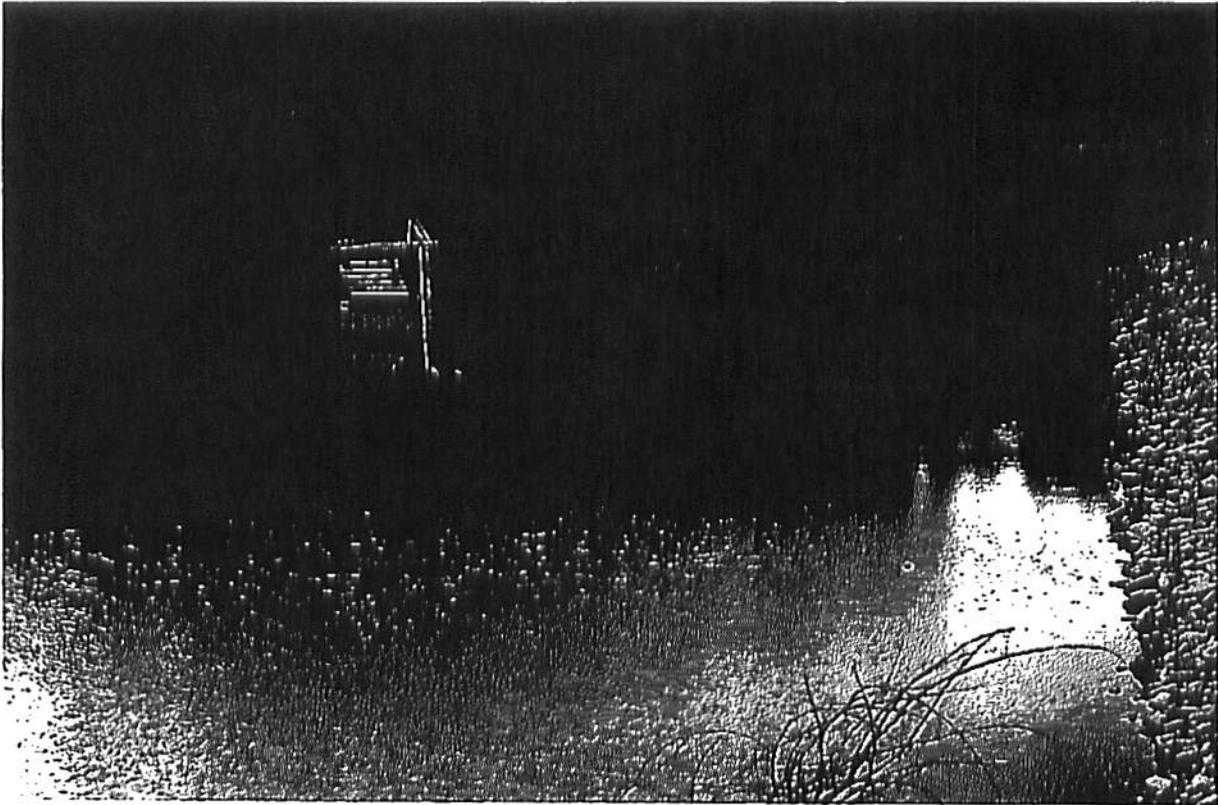
Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall be mailed to:**

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



Normal water level in lake





Water level at time of violation





Freshwater mussel kill





Large floater mussels







Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

Fort Ashby PSD

Receiving Stream:

Patterson Creek Dam # 46
Painter 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#											
			7											
a)	Amount of Pollutant Released	1 to 3	1											
b)	Toxicity of Pollutant	0 to 3	0											
c)	Sensitivity of the Environment	0 to 3	3											
d)	Length of Time	1 to 3	3											
e)	Actual Exposure and Effects thereon	0 to 3	3											
Average Potential for Harm Factor			2	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.

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			\$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			\$30
Penalty =			\$5,030

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:	