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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: Friend Construction, LLC  
Beverly Estates  
Rt. 3 Box 389  
Fairmont, WV 26554

DATE: August 17, 2012

ORDER NO.: 7666

**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 Friend Construction, LLC (hereinafter "Friend Construction").

**FINDINGS OF FACT**

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

1. Friend Construction operates a land disturbance known as Beverly Estates Site Development (Beverly Estates) located in Fairmont, Marion County, West Virginia. Friend Construction was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR101940, on December 5, 2007.
2. On May 6, 2008, 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 Friend Construction's permit were observed and documented:
  - a. G.4.e.2.C.vi –The Permittee failed to conduct weekly inspections of all sediment and erosion controls and record the results.
  - b. C.15 –The Permittee failed to install an outlet marker.
  - c. G.4.B.5 –The Permittee failed to install an entrance sign.

Promoting a healthy environment.

As a result of the aforementioned violations, a warning was issued to Friend Construction.

3. On February 24, 2009, WVDEP voided Friend Construction's WV/NPDES permit for non-payment of annual fees.
4. On April 17, 2009, WVDEP issued Order No. 6686 to Friend Construction for failure to pay annual WV/NPDES permit fees.
5. On July 10, 2009, WVDEP re-instated Friend Construction's WV/NPDES permit, because fees were paid.
6. On February 22, 2010, WVDEP voided Friend Construction's WV/NPDES permit for non-payment of annual fees.
7. On April 23, 2010, WVDEP issued Order No. 7024 to Friend Construction for failure to pay annual WV/NPDES permit fees.
8. On August 9, 2011, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV State Code and WV Legislative Rule were observed and documented:
  - a. 47CSR2 Section 3.2.b-Friend Construction caused conditions not allowable in waters of the State. Specifically, sediment deposits were observed on the bottom of the receiving stream.
  - b. 22-11-8-Friend Construction was operating without a WV/NPDES Permit for Storm Water Associated with Construction Activities.

As a result of the aforementioned violations, Notice of Violations (NOV) Nos. NW-JME-080911-001 and NW-JME-080911-002 were issued to Friend Construction.

9. On December 12, 2011, WVDEP issued Order No. 7506 to Friend Construction for failure to obtain the necessary WV/NPDES Permit for Storm Water Associated with Construction Activities.
10. On February 14, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, the following violation of WV State Code was observed and documented:
  - a. 22-11-16-Friend Construction failed to comply with Order Nos. 7024 and 7506 by failing to pay its permit fee and obtain a WV/NPDES Permit for Storm Water Associated with Construction Activities.

As a result of the aforementioned violation, NOV No. NW-JME-021412-003 was issued to Friend Construction.

11. On August 7, 2012, WVDEP personnel and a representative of Friend Construction met 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. Friend Construction shall immediately install and maintain necessary storm water and sediment/erosion control devices to prevent the release of sediment-laden water into waters of the State. All disturbed area shall be temporarily mulched until coverage under a valid WV/NPDES permit for Storm Water Associated with Construction Activities is obtained. Friend Construction shall contact WVDEP to arrange an inspection prior to restarting development activities. Environmental Enforcement may be contacted at:

**WVDEP Environmental Inspector Supervisor  
NW Regional Environmental Enforcement Office  
2031 Pleasant Valley Road  
Fairmont, WV 26554  
(304) 368-3960**

2. Within forty-five (45) days of the effective date of this Order, Friend Construction shall submit an administratively complete application for registration under the WV/NPDES permit for Storm Water Associated with Construction Activities.
3. Within twenty (20) days of the effective date of this Order, Friend Construction shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Friend Construction will achieve compliance with all pertinent laws and rules. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor  
NW Regional Environmental Enforcement Office  
2031 Pleasant Valley Road  
Fairmont, WV 26554**

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 Friend Construction's West Virginia Code and WV Legislative Rule violations, Friend Construction shall be assessed a civil administrative penalty of thirteen

thousand six hundred dollars (\$13,600) 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 57<sup>th</sup> Street SE  
Charleston, WV 25304**

### **OTHER PROVISIONS**

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

  
Friend Construction, LLC

5/31/13  
\_\_\_\_\_  
Date

Public Notice begin:

\_\_\_\_\_  
Date

Public Notice end:

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date

## Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Friend Construction Receiving Stream: UT of Tygart Valley River of Mon. River

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#											
			8a	8b	10a									
a)	Amount of Pollutant Released	1 to 3	2	1	1									
b)	Toxicity of Pollutant	0 to 3	1	0	0									
c)	Sensitivity of the Environment	0 to 3	1	0	0									
d)	Length of Time	1 to 3	1	3	3									
e)	Actual Exposure and Effects thereon	0 to 3	1	0	0									
<b>Average Potential for Harm Factor</b>			1.2	0.8	0.8	No								
2)	Extent of Deviation Factor	Factor Range												
	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.



		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
8a	Moderate	Major	\$4,200	1	\$4,200
8b	Minor	Major	\$1,900	1	\$1,900
10a	Minor	Major	\$1,900	1	\$1,900
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
<b>Total Base Penalty</b>					<b>\$8,000</b>

## 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 employs or is part of a corporation that employs 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		\$2,400
6.2.b.4 - Compliance/noncompliance history	25		\$2,000
6.2.b.6 - Economic benefits - (flat monetary increase)	\$1,170		\$1,170
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
<b>Penalty Adjustments</b>			<b>\$5,600</b>
<b>Penalty =</b>			<b>\$13,600</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	\$1,170
Competitive Advantage	
<b>Estimated Economic Benefit</b>	<b>\$1,170</b>
<b>Comments:</b>	