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

May 31, 2012

The Home City Ice Co.
Josh Spence, Manager
Route 3, Box 466
Milton, WV 25541

CERTIFIED RETURN RECEIPT REQUESTED
91 7199 9991 7030 8791 6317
RE: Violation of Chapter 22, Article 11 of the WV State Code

Dear Home City Ice:

Enclosed is DRAFT CONSENT ORDER NUMBER 7635 dated May 31, 2012. This action is based upon the investigation and recommendation of the West Virginia Department of Environmental Protection's (WVDEP) Environmental Enforcement unit in response to Home City Ice violating Chapter 22, Article 11 of the WV State Code at its facility located in Milton, Cabell County, West Virginia.

This Draft Consent Order is being offered pursuant to Chapter 22, Article 11, Section 22(b) of the West Virginia Code and Legislative Rule, Title 47, Series 1 (47CSR1).

Please review the terms and conditions of this Draft Consent Order and respond within ten (10) days of your receipt. You may accept these terms and conditions by signing and returning the original Consent Order to me at WVDEP, EE, 601 57th Street SE, Charleston, WV 25304. If you wish to meet and discuss this administrative proceeding, respond to David C. Simmons, Enforcement Hearing Officer, at the above address or call (304) 926-0470. Should you request a meeting, it will be scheduled within thirty (30) days of your receipt of the Draft Order, if possible.

Upon conclusion of this proceeding and your reaching agreement with the WVDEP on a resolution of the violation(s) contained in the Consent Order, the Consent Order will be subject to the public notice and comment requirements set forth in 47CSR1-7.1. This notice will identify the responsible party, the specific enforcement action to be taken, and the name and address where information on the proposed settlement can be obtained. The WVDEP will consider all comments received during the thirty (30) day comment period and the Consent Order may be subject to change. Should the proposed settlement be modified after the comment period, you have the option of choosing not to enter into the Consent Order.

Pursuant to 47CSR1-6.2, there are provisions to reduce the proposed civil penalty assessment for good faith, cooperation with the Secretary, ability to pay a civil penalty and other

factors deemed relevant. Should you desire to pursue these provisions, you should be prepared to present all necessary supportive information and/or documentation at the scheduled meeting. The WVDEP may request additional information at, or after, the scheduled meeting related to any of the factors considered in the penalty determination whether related to increasing or decreasing the penalty. Also, 47CSR1-6.2 requires the recovery of economic benefit derived from non-compliance. Therefore, you should be prepared to provide all necessary information and/or documentation to address this matter.

Failure to respond to this correspondence as required shall be considered as your refusal to participate in this process. Should you decline to participate, fail to reply, or fail to resolve the matter by consent, this offer will be withdrawn and alternative enforcement action will be pursued.

Sincerely,

Michael A. Zeto
Chief Inspector

Enclosure

cc: Scott G. Mandirola, Director, DWWM (via e-mail)
Yogesh Patel, Assistant Director, DWWM/Permits
Joseph M. Hickman, Assistant Chief Inspector, EE/WW (via e-mail)
Jeremy Bandy, Assistant Chief Inspector, EE (via e-mail)
David C. Simmons, Enforcement Hearing Officer, EE (via e-mail)
Laura McGee, Environmental Resources Specialist, EE (via e-mail)
Cynthia Musser, Environmental Inspector Supervisor, EE/WW (via e-mail)
Tomi M. Bergstrom, Environmental Inspector, EE/WW (via e-mail)
Shyrel Moellendick, MSSS, EE (via e-mail)
Lisa Trakis, US EPA, Region III (via e-mail)

revised September 2011

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
www.dep.wv.gov

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

TO: The Home City Ice Co.
Josh Spence, Manager
Route 3, Box 466
Milton, WV 25541

DATE: May 31, 2012

ORDER NO.: 7635

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 Home City Ice Co. (hereinafter "Home City Ice").

FINDINGS OF FACT

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

1. Home City Ice operates a wholesale ice manufacturing facility located in Cabell County, West Virginia. Home City Ice does not currently have WV/NPDES permit coverage, but has recently requested an application for a stormwater permit.

2. On May 8, 2012, in response to a complaint, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an investigation at the facility. During the investigation, it was determined that diesel fuel had leaked from a pump at the Home City Ice facility. The diesel fuel flowed downhill into waters of the State, as evidenced by a strong diesel odor and trail of dead grass leading to the stream (Figures 1.0 and 2.0). Violations of the following sections of WV Legislative Rules were observed and documented:

   a. 47CSR11 Section 2.2.a-Failing to give immediate notification to the Office of Water Resources' Emergency Notification Number after causing a spill or accidential discharge of pollutants into the waters of the State.

b. 47CSR11 Section 2.5.a-Failing to take any and all measures necessary to clean up, remove and otherwise render such a spill or discharge harmless to the waters of the State.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. I12-06-048-TMB and I12-06-050-TMB were issued to Home City Ice.

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. Home City Ice shall immediately take all measures to initiate compliance with all pertinent laws and rules.

2. Within ten (10) days of the effective date of this Order, Home City Ice shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Home City Ice will achieve compliance with all pertinent laws and rules. The plan of corrective action shall be submitted to:

WVDEP Environmental Inspector Supervisor
SW Regional Environmental Enforcement Office
PO Box 662
Teays, WV 25569

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. Because of Home City Ice's Legislative Rule violations, Home City Ice shall be assessed a civil administrative penalty of six thousand one hundred thirty dollars ($6,130) 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. Home City Ice 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, Home City Ice 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, Home City Ice 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 Home City Ice 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, Home City Ice 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 Home City Ice 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 Home City Ice 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 Home City Ice (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 Home City Ice 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 Home City Ice 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 Home City Ice, its successors and assigns.

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

~~Josh Spence, Manager~~ JOSEPH WHITAKER
The Home City Ice Co. SAFETY MANAGER

6-25-12
Date

Public Notice begin:

Date

Public Notice end:

Date

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

Date

revised September 2011

Figure 1.0 The dead grass shows the trail the diesel flowed (left). The diesel crossed the concrete barrier through cracks and tubes placed within the barrier to drain the parking lot (above).

Figure 2.0 The trail of the diesel leads to a stream below. Diesel odor was still present in the soil in all photographed areas.

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: The Home City Ice Co **Receiving Stream:** Unknown Tributary

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# 2.a	2.b											
a)	Amount of Pollutant Released	1 to 3	1	2											
b)	Toxicity of Pollutant	0 to 3	0	2											
c)	Sensitivity of the Environment	0 to 3	0	1											
d)	Length of Time	1 to 3	1	1											
e)	Actual Exposure and Effects thereon	0 to 3	0	1											
	Average Potential for Harm Factor		0.4	1.4	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	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
2.a	Minor	Major	$1,700	1	$1,700
2.b	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
Total Base Penalty					$6,100

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 =			**$6,130**

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:	