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west virginia department of environmental protection

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Environmental Enforcement  
601 57<sup>th</sup> 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

July 31, 2013

J.F. Allen Company  
PO Box 2049  
Buckhannon, WV 26201

**CERTIFIED RETURN RECEIPT REQUESTED**

91 7199 9991 7032 6249 3589

**RE: Violation of Chapter 22, Article 11  
of the WV State Code**

AND/OR

91 7199 9991 7032 6249 3596

West Virginia Department of Transportation  
Division of Highways  
Darrell Allen, Acting State Highway Engineer  
1900 Kanawha Blvd. Bldg. 5  
Room A-164  
Charleston, WV 25305

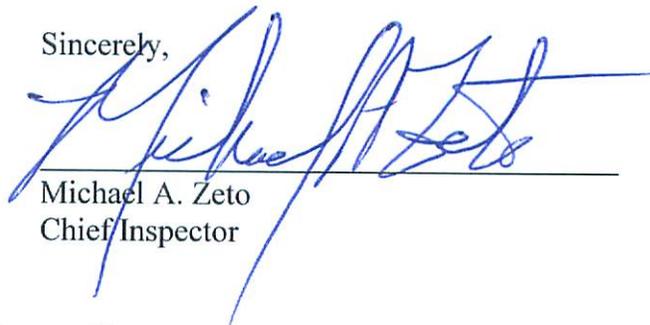
Enclosed is 2<sup>nd</sup> revised CONSENT ORDER NUMBER 7833 dated July 31, 2013. This action is based upon the investigation and recommendation of the West Virginia Department of Environmental Protection's (WVDEP) Environmental Enforcement unit in response to West Virginia Department of Transportation and/or J.F. Allen Company violating Chapter 22, Article 11 of the WV State Code at its facility located near Mount Hope, Raleigh County, West Virginia. This revision is based upon your recent meeting with David C. Simmons, Enforcement Hearing Officer, and the information submitted subsequent to that meeting.

After careful review and consideration of all information, WVDEP maintains that erosion and sediment control measures were required for the permitted area once the area was grubbed or shortly thereafter. This simply did not occur at this facility as required by the permit; therefore, WVDEP maintains the violations are valid and that the permittee and co-permittee are the responsible parties.

This administrative settlement is being offered on behalf of the director of the Division of Water and Waste Management. This revision contains violations that occurred while J.F. Allen Company and West Virginia Department of Transportation were co-permittees for this construction activity. Violations that occurred prior to the issuance of the permit to J.F. Allen Company have been removed from this Order and are being addressed in a separate Order issued solely to West Virginia Department of Transportation.

Please review, sign and return the original copy of the revised ORDER to me within five (5) working days of receipt. Subsequently, WVDEP will initiate the public notice process.

Sincerely,



Michael A. Zeto  
Chief Inspector

Enclosure

cc: Scott G. Mandirola, Director, DWWM (via e-mail)  
Yogesh Patel, Asst. Director, DWWM/Permits (via e-mail)  
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)  
Kevin Lilly, Environmental Inspector Supervisor, EE/WW (via e-mail)  
John Hendley, Environmental Inspector, EE/WW (via e-mail)  
Shyrel Moellendick, MSSS, EE (via e-mail)

*revised October 2012*



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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  
Phone: (304) 926-0495  
Fax: (304) 926-0463

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: J.F. Allen Company  
PO Box 2049  
Buckhannon, WV 26201

DATE: July 31, 2013

ORDER NO.: 7833

AND/OR

West Virginia Department of Transportation  
Division of Highways  
Darrell Allen, Acting State Highway Engineer  
1900 Kanawha Blvd. Bldg. 5  
Room A-164  
Charleston, WV 25305

**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 West Virginia Department of Transportation and/or J.F. Allen Company (hereinafter "WVDOT/J.F. Allen").

**FINDINGS OF FACT**

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

1. WVDOT/J.F. Allen is conducting land disturbance activity near Mount Hope, Raleigh County, West Virginia. West Virginia Department of Transportation was issued WV/NPDES Water Pollution Control Permit No. WV0116718 on May 23, 2012 to cover land disturbance activity at this site.

2. On August 29, 2012, per a request from West Virginia Department of Transportation, West Virginia Department of Environmental Protection (WVDEP) modified WV/NPDES Water Pollution Control Permit No. WV0116718 to list J.F. Allen Company as the permittee and West Virginia Department of Transportation as the co-permittee.
3. On September 10, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of the terms and conditions of WVDOT/J.F. Allen's WV/NPDES permit were observed and documented:
  - a. Section D.06.a.4 – WVDOT/J.F. Allen failed to stabilize diversions prior to becoming functional.
  - b. Section D.06.b.10 – WVDOT/J.F. Allen failed to prevent sediment laden water from leaving the site without going through an appropriate best management practice.

As a result of the aforementioned violations, Notice of Violation (NOV) No. I12-41-055-JHH was issued to WVDOT/J.F. Allen.

4. On January 7, 2013, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of the terms and conditions of WVDOT/J.F. Allen's WV/NPDES permit were observed and documented:
  - a. Section D.06.a – WVDOT/J.F. Allen failed to temporary seed and mulch all areas where construction activities had ceased for more than seven (7) days.
  - b. Section D.06.a.4 – WVDOT/J.F. Allen failed to stabilize diversions prior to becoming functional.
  - c. Section D.06.b.10 – WVDOT/J.F. Allen failed to prevent sediment laden water from leaving the site without going through an appropriate best management practice.

As a result of the aforementioned violations, NOV No. I13-10-1-JHH was issued to WVDOT/J.F. Allen.

5. On January 18, 2013, WVDEP personnel conducted a review of facility records from the time period of July 2012 through December 2012. During this review, the following violations of the terms and conditions of WVDOT/J.F. Allen's WV/NPDES permit were observed:
  - a. Section A - Two (2) exceedances of WVDOT/J.F. Allen's permit parameters were observed and documented (Table One). These exceedances can be further defined as:
    - i. Minor violation - One (1)
    - ii. Major violation - One (1)
6. On May 13, 2013, WVDEP personnel and representatives of WVDOT/J.F. Allen 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. WVDOT/J.F. Allen shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit.
2. Within twenty (20) days of the effective date of this Order, WVDOT/J.F. Allen shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when WVDOT/J.F. Allen will achieve compliance with all terms and conditions of its WV/NPDES permit. The plan of corrective action shall make reference to WV/NPDES Permit No. WV0116718, and Order No. 7833. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor  
SE Regional Environmental Enforcement Office  
254 Industrial Drive  
Oak Hill, WV 25901**

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 WVDOT/J.F. Allen's permit violations, WVDOT/J.F. Allen shall be assessed a civil administrative penalty of sixteen thousand ninety dollars (\$16,090) 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 include a reference to the Order No. and 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. WVDOT/J.F. Allen 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, WVDOT/J.F. Allen 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, WVDOT/J.F. Allen 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 WVDOT/J.F. Allen 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, WVDOT/J.F. Allen 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 WVDOT/J.F. Allen becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and WVDOT/J.F. Allen 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 WVDOT/J.F. Allen 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 WVDOT/J.F. Allen (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 WVDOT/J.F. Allen 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 WVDOT/J.F. Allen 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 WVDOT/J.F. Allen, its successors and assigns.

7. This Order shall terminate upon WVDOT/J.F. Allen's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

  
\_\_\_\_\_  
J.F. Allen Company

8/6/13  
\_\_\_\_\_  
Date

AND/OR

West Virginia Department of Transportation  
Darrell Allen, Acting State Highway Engineer

Public Notice begin:

\_\_\_\_\_  
Date

Public Notice end:

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date

*revised January 2013*

**RECEIVED**

AUG - 8 2013

ENVIRONMENTAL  
ENFORCEMENT

Table One:  
WV DOT/JF Allen DMR Exceedance Summary

Outlet 004 DMR Exceedances - MAX. DAILY - July 2012 through December 2012						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
11/12	Total Recoverable Iron	mg/L	1.5	1.53	2%	X	-	-

Outlet 002 DMR Exceedances - MAX. DAILY - July 2012 through December 2012						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
11/12	Total Recoverable Iron	mg/L	1.5	13.4	793%	-	-	X

Outlet 002 and 004 Totals						Degree of non-compliance		
						Min	Mod	Maj
						1	0	1



Gap in silt fence noted at fill area on north end of project.



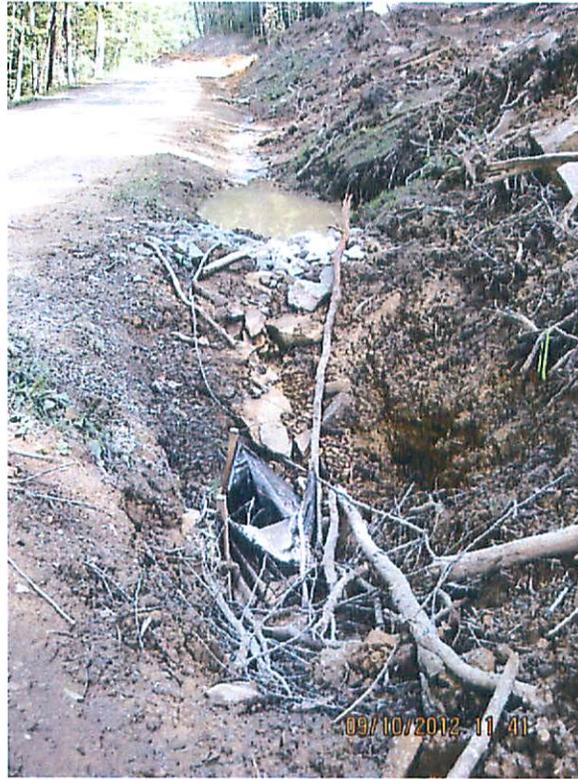
The stream does not have adequate protection at station #232.



No controls in place at culvert inlet at station # 228.



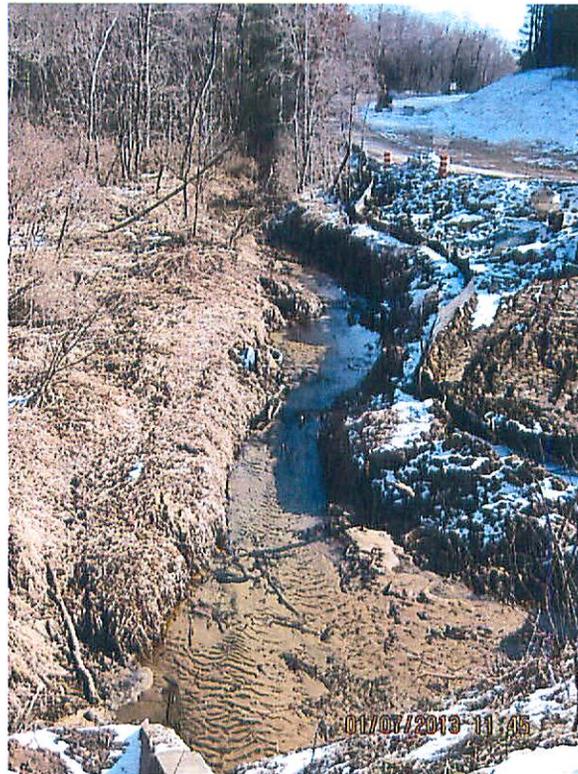
In multiple locations along existing roadway the diversions had not been stabilized prior to becoming functional.



Inadequate controls in place at culvert inlet at station # 217.



Inadequate controls and unstabilized diversion at culvert inlet at station # 204.



Large sediment deposits were noted in Mill Creek. It remains inconclusive as to the origin of this sediment due to the number of other projects taking place in this watershed.



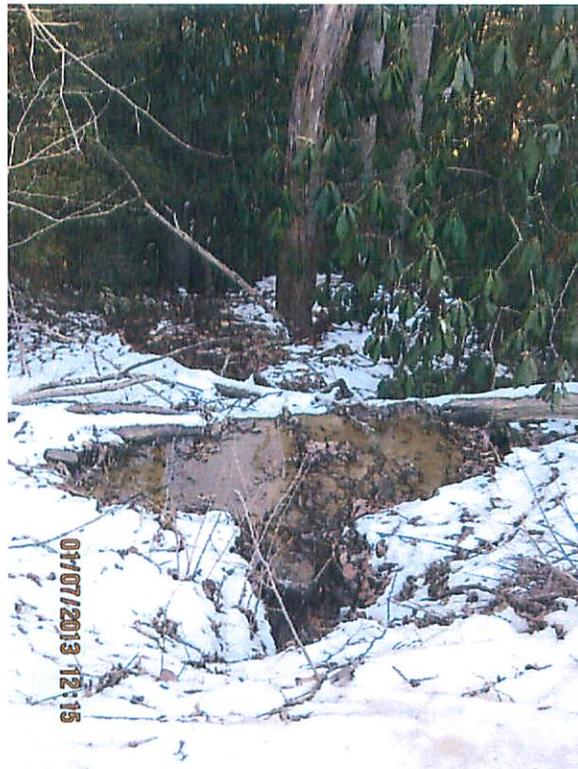
Unstabilized diversions along Rt. 61.



Unstabilized diversions along Rt. 61 discharge directly into silt fence adjacent to Mill Creek. Silt fence is not designed for concentrated flow and therefore is not an adequate control.



Unstabilized diversions along Rt. 61 discharge directly into silt fence adjacent to Mill Creek. Silt fence is not designed for concentrated flow and therefore is not an adequate control.



At station #122+5 there were inadequate/no controls in place, erosion on slope above inlet and sediment deposits at outlet.



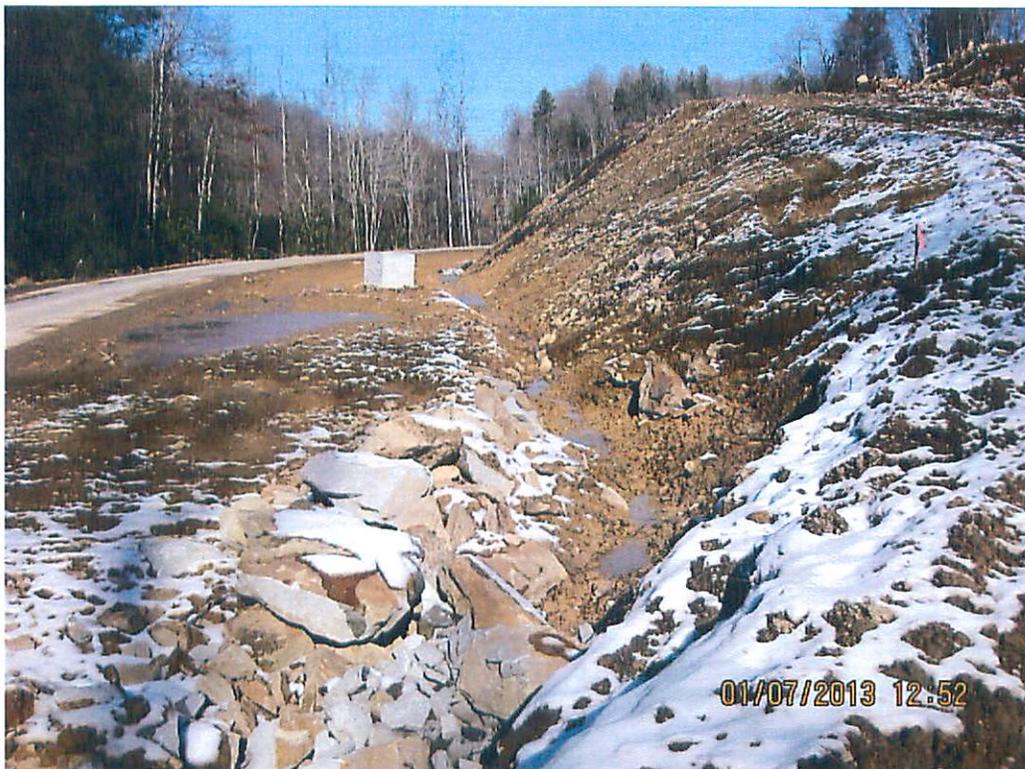
At Outfall H there were inadequate/no controls in place and erosion on the slopes above the inlet.



At station #137 there were inadequate/no controls in place and erosion on the slopes above the inlet.



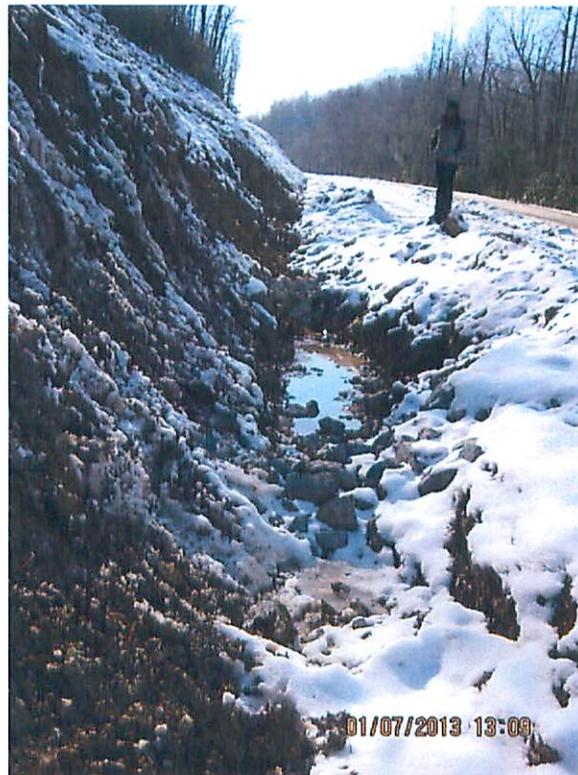
No diversion has been established for drainage area near station #164.



Diversions throughout entire site were not stabilized.



At the upper stream crossing, between station #164 and #182, there was not adequate stream protection (silt fence) in place.



At Station #182 there were inadequate/no controls in place.



At Outlet Y there were inadequate controls in place.

# Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: WV DOT/  
JF Allen Company Receiving Stream: Mill Creek

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#												
			3a	3b	4a	4b	4c	5ai	5aii						
a)	Amount of Pollutant Released	1 to 3	1	1	1	1	1	1	1						
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	1	1						
c)	Sensitivity of the Environment	0 to 3	1	1	1	1	1	1	1						
d)	Length of Time	1 to 3	1	1	2	2	2	1	1						
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	1	1	1						
<b>Average Potential for Harm Factor</b>			1	1	1.2	1.2	1.2	1	1	No	No	No	No	No	No
2)	<b>Extent of Deviation Factor</b>	<b>Factor Range</b>													
	Degree of Non-Compliance	1 to 3	1	1	2	2	2	1	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 -	20		\$2,920
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		10	(\$1,460)
6.2.b.5 - Ability to Pay			\$0
<b>Penalty Adjustments</b>			<b>\$1,490</b>
<b>Penalty =</b>			<b>\$16,090</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>	