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

February 2, 2012

Dietrich S. Fansler
Mayfield Estates #3
3120 Fairway Drive
Morgantown, WV 26508

91 7199 9991 7030 8787 2293
CERTIFIED RETURN RECEIPT REQUESTED

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

Dear Mr. Fansler:

Enclosed is revised CONSENT ORDER NUMBER 7508 dated February 2, 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 Mayfield Estates #3 violating Chapter 22, Article 11 of the WV State Code at its facility located in Morgantown, Monongalia County, West Virginia. This revision is based upon your recent meeting with David C. Simmons, Enforcement Hearing Officer. This administrative settlement is being offered on behalf of the director of the Division of Water and Waste Management.

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.

RECEIVED
FEB 13 2012
ENVIRONMENTAL ENFORCEMENT

Sincerely,

Michael A. Zeto
Chief Inspector

Enclosure

cc: Scott G. Mandirola, Director, DWWM (via e-mail)
Yogesh Patel, Asst. 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)
Brad Swiger, Environmental Inspector Supervisor, EE/WW (via e-mail)
Kirk Powroznik, Environmental Inspector, EE/WW (via e-mail)
Shyrel Moellendick, MSSS, EE (via e-mail)

revised September 2011

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revised September 2011

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Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
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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

TO: Dietrich S. Fansler
3120 Fairway Drive
Morgantown, WV 26508

DATE: February 2, 2012

ORDER NO.: 7508

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 Dietrich "Steve" Fansler (hereinafter, "D.S. Fansler").

FINDINGS OF FACT

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

1. D.S. Fansler operates a construction site identified as Mayfield Estates 3 on Tibbs Road in Morgantown, Monongalia County, West Virginia.

2. On July 8, 2011, West Virginia Department of Environmental Protection (WVDEP) personnel conducted a site visit at Mayfield Estates 3. During the site visit, WVDEP personnel observed and documented the following:

    a. D.S. Fansler caused a distinctly visible plume of settleable or floatable solids in the receiving stream by allowing untreated sediment laden water to enter into an unnamed tributary of Tibbs Run, a violation of WV Legislative Rule 47CSR2 Section 3.2.a.

    b. The construction site disturbance was greater than one (1) acre.

    c. There was no outlet marker sign or construction notice posted in a conspicuous place to identify the operator, developer or contact person.

d. There were no Best Management Practices (BMPs) in place to prevent sediment laden water from leaving the site.

3. On August 23, 2011, WVDEP personnel conducted a site visit of Mayfield 3. During the inspection WVDEP personnel spoke with D.S. Fansler to inquire about WV/NPDES permit coverage for Mayfield 3. D.S. Fansler stated that Mayfield 3 had a current permit and further stated he would obtain the registration number from his environmental consultant, Potesta & Associates, Inc.

4. On August 24, 2011, WVDEP personnel investigated permit coverage for Mayfield 3 and noted the following observations:

   a. WVDEP personnel contacted Potesta & Associates, Inc., and discovered it had not applied for WV/NPDES permit coverage for Mayfield 3 on behalf of or as an agent of D.S. Fansler.

   b. A file review for current and previous permits for and/or associated with D. S Fansler revealed that there was no WV/NPDES permit coverage for Mayfield 3. During the file review, WVDEP personnel discovered Notice of Violation (NOV) W-SF-10-27-06-01-MLR issued on October 27, 2006 to D.S. Fansler for operating without a WV/NPDES permit. Specifically, D.S. Fansler disturbed 1.45 acres of land near Pleasant Hills in Monongalia County without a valid permit, a violation of WV State Code 22-11-1 et.seq.

5. On August 25, 2011, WVDEP personnel conducted an inspection at Mayfield 3 and observed and documented the following violations:

   a. D.S. Fansler disturbed an area of land greater than one (1) acre for construction activities without a valid WV/NPDES Permit for Stormwater Associated with Construction Activities, a violation of WV State Code 22-11-8. NOV NW-KAP-082511-001 was issued.

   b. D.S. Fansler caused rock and sediment deposits on the bottom of the receiving stream, a violation of WV Legislative Rule 47CSR2 Section 3.2.b. NOV NW-KAP-082511-002 was issued.

6. On January 25, 2012, WVDEP personnel and D.S. Fansler 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. D.S. Fansler shall immediately take all measures to initiate compliance with all pertinent laws and rules.

2. Within fifteen (15) days of entry of this Order, D.S. Fansler shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when D.S. Fansler 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 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 twenty (20) days of entry of this Order, D.S. Fansler shall submit an administratively complete WV/NPDES Permit for Stormwater Associated with Construction Activities application to WVDEP. The permit application shall be submitted to:

Permitting Section – Mail Code #031326
WVDEP
601 57th Street SE
Charleston, WV 25304

4. Because of D.S. Fansler's West Virginia Code and Legislative Rule violations, D.S. Fansler shall be assessed a civil administrative penalty of four thousand eight hundred thirty dollars ($4,830). One thousand one hundred seventy dollars ($1,170) of the civil administrative penalty shall be held in abeyance for a period of twenty (20) days pending submittal of an administratively complete WV/NPDES Permit for Stormwater Associated with Construction Activities application, as described in Order For Compliance No. Three (3). The remaining three thousand six hundred sixty dollars ($3,660) of the civil administrative penalty shall be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of entry of this Order.

D.S. Fansler agrees to pay the one thousand one hundred seventy dollars ($1,170) held in abeyance within thirty (30) days of notice from WVDEP that D.S. Fansler has not submitted the required administratively complete WV/NPDES Permit application and has

subsequently failed to comply with the requirements of Order For Compliance No. Three (3).

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
WVDEP
601 57th Street SE
Charleston, WV 25304

OTHER PROVISIONS

1. D.S. Fansler 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, D.S. Fansler 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, D.S. Fansler 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 D.S. Fansler's 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, D.S. Fansler 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 D.S. Fansler 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 D.S. Fansler 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 D.S. Fansler (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 D.S. Fansler 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 D.S. Fansler 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 D.S. Fansler, its successors and assigns.

7. This Order shall terminate upon D.S. Fansler's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

Dietrich S. Fansler	2-10-12 Date

Public Notice begin: _____
Date

Public Notice end: _____
Date

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

revised January 2011

Photo1

Photo2

Photo3

Photo4

Photo5

Photo6

Photo7

Photo8

Photo9

Photo10

Photo11

Photo12

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Dietrich S. Fansler **Receiving Stream:** UT of Tibbs 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.

			FOF#												
1)	**Potential for Harm Factor**	**Factor Range**	**5a**	**5b**											
a)	Amount of Pollutant Released	1 to 3	1	1											
b)	Toxicity of Pollutant	0 to 3	0	0											
c)	Sensitivity of the Environment	0 to 3	0	1											
d)	Length of Time	1 to 3	2	2											
e)	Actual Exposure and Effects thereon	0 to 3	0	1											
	Average Potential for Harm Factor		0.6	1	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	2											

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
5a	Minor	Major	$1,800	1	$1,800
5b	Minor	Moderate	$1,500	1	$1,500
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					$3,300

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		$660
6.2.b.4 - Compliance/noncompliance history			$0
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		10	($330)
6.2.b.5 - Ability to Pay			$0
Penalty Adjustments			**$1,530**
Penalty =			**$4,830**

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	
Estimated Economic Benefit	**$1,170**

Comments: