



west virginia department of environmental protection

Division of Water and Waste Management
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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
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**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Ohio County Development Authority
Attn: Gregory Stewart, Secretary/Treasurer
Room 210 – City/County Building
1500 Chapline Street
Wheeling, WV 26003

DATE: April 19, 2012

ORDER NO.: 7511

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. Ohio County Development Authority (hereinafter “OCDA”).

FINDINGS OF FACT

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

1. OCDA operates a construction site with land and stream disturbance commonly known as Wheeling Water Supply Contract 13 (Elm Grove Pumping Station) and Contract 14 (Water Transmission) located in Wheeling, Ohio County, West Virginia. On September 14, 2010, OCDA was issued WV/NPDES General Water Pollution Control Permit for Stormwater Associated with Construction Activities (WV0115924), General Permit Registration No. WVR105008, with an expiration date of December 4, 2012. This permit is for 21.9 acres of disturbance.
2. On October 11, 2011, West Virginia Department of Environmental Protection (hereinafter, “WVDEP”) personnel conducted an inspection of the OCDA Wheeling Water Supply construction site and observed OCDA and/or its contractor and/or assigns working within Wheeling Creek. The following observations were documented:

Promoting a healthy environment.

- a. Conditions not allowable in State waters were caused by creating a distinctly visible brown plume of suspended solids, a violation of WV Legislative Rule 47CSR2 Section 3. These conditions were a result of failure to adhere to various permit conditions.

Notice of Violation (NOV) No. NW-TAM-101111-001 was issued for this violation of WV Legislative Rule.

- b. Silt fencing was not present at the entrance to the stream crossing and near stream banks, allowing sediment laden water to enter Wheeling Creek without first going through an appropriate Best Management Practice (BMP). This deficiency is a violation of the terms and conditions of the Permit, Section G.4.e.2.A.ii.j.
- c. The material used to divert flow of the stream was a mixture of sand, silt and sediment that had not been stabilized prior to becoming functional, a violation of terms and conditions of the Permit, Section G.4.e.2.A.i.d.
- d. The ingress/egress into Wheeling Creek for heavy equipment did not have sufficient stabilization or controls to reduce, eliminate or prevent the runoff of sediment into Wheeling Creek. This deficiency is a violation of the terms and conditions of the Permit, Section G.4.e.2.A.ii.
- e. Concrete barriers (aka Jersey barriers) wrapped in plastic were utilized as an unauthorized temporary work area. Specifically, the barriers were not constructed in a manner to contain sediment laden water in the work area, the plastic was inappropriately stabilized with sediment, several areas of the plastic were compromised allowing sediment laden water to escape into Wheeling Creek, and material used to divert flow of the stream was an unconsolidated mixture of sand, silt and sediment. All of these deficiencies are violations of the terms and conditions of the Permit, Section G.4.e.2.A.ii.
- f. The Stormwater Pollution Prevention Plan (SWPPP) and the Groundwater Protection Plan (GPP) was not available at the site for review, a violation of the terms and condition of the Permit, Section G.4.a.

NOV No. NW-TAM-101111-002 was issued for the multiple violations of the terms and conditions of OCDA's Permit.

3. On October 13, 2011, WVDEP personnel conducted an inspection of the OCDA Wheeling Water Supply construction site and observed the following violations of the terms and conditions of OCDA's Permit:
 - a. Silt fence was improperly placed and installed at the entrance to the stream crossing and near stream banks, a violation of Section G.4.e.2.A.ii.
 - b. The material used to divert flow of the stream was a mixture of sand, silt and sediment that had not been stabilized prior to becoming functional, a violation of Section G.4.e.2.A.i.d.

- c. The ingress/egress into Wheeling Creek for heavy equipment did not have sufficient stabilization or controls to reduce, eliminate or prevent the runoff of sediment into Wheeling Creek. This deficiency is a violation of Section G.4.e.2.A.ii.

NOV No. NW-TAM-101311-001 was issued for the multiple violations of the terms and conditions of OCDA's Permit.

- 4. On October 14, 2011, WVDEP personnel conducted an inspection of the OCDA Wheeling Water Supply construction site, and observed the following violations of the terms and conditions of OCDA's Permit:

- a. Silt fence was improperly placed and installed at the entrance to the stream crossing and near stream banks, a violation of Section G.4.e.2.A.ii.
- b. The ingress/egress into Wheeling Creek for heavy equipment did not have sufficient stabilization or controls to reduce, eliminate or prevent the runoff of sediment into Wheeling Creek. This deficiency is a violation of Section G.4.e.2.A.ii.

NOV No. NW-TAM-101411-001 was issued for the multiple violations of the terms and conditions of OCDA's Permit.

- 5. On October 31, 2011, WVDEP personnel conducted an inspection of the OCDA Wheeling Water Supply construction site, and the following observations were documented:

- a. OCDA worked within Middle Wheeling Creek and caused a distinctly visible brown plume of suspended solids to enter Middle Wheeling Creek and Wheeling Creek, a violation of WV Legislative Rule 47CSR2 Section 3. Notice of Violation No. NW-TAM-103111-001 was issued.
- b. Sediment laden water was pumped from the site without going through an appropriate best management practice. This deficiency is a violation of the terms and conditions of the Permit, Section G.4.e.2.A.ii.j. Notice of Violation No. NW-TAM-103111-002 was issued.

- 6. On November 1, 2011, WVDEP personnel conducted an inspection of the OCDA Wheeling Water Supply construction site, and the following observations were documented:

- a. OCDA worked within Middle Wheeling Creek and caused a distinctly visible brown plume of suspended solids to enter Middle Wheeling Creek and Wheeling Creek, a violation of WV Legislative Rule 47CSR2 Section 3. Notice of Violation No. NW-TAM-110111-001 was issued.

- b. OCDA did not have stone entrance drives, exit drives, or parking areas, a violations of the terms and conditions of the Permit, Section G.4.e.1.E. Notice of Violation No. NW-TAM-110111-002 was issued.
 - c. Sediment laden water was pumped from the site without going through an appropriate best management practice. This deficiency is a violation of the terms and conditions of the Permit, Section G.4.e.2.A.ii.j. Notice of Violation No. NW-TAM-110111-003 was issued.
7. On March 21, 2012, WVDEP and OCDA representatives met to discuss the terms of this Order. It was agreed that no further action is needed at the site, and a plan of corrective action does not need to be submitted by OCDA.
 8. According to OCDA, as described in correspondence to WVDEP, it awarded the Wheeling Water Supply Contract 13 and Contract 14 to Dave Sugar Excavating LLC, an independent contractor unaffiliated with OCDA. Under Contract 13 and Contract 14, Dave Sugar Excavating LLC was required to comply with all applicable laws, regulations, and permit requirements. This requirement included compliance with the WV/NPDES permit issued to OCDA for land and stream disturbance associated with construction activities under the aforementioned contracts. OCDA represents that the construction site and the work activities described in this Order were under the immediate control of Dave Sugar Excavating LLC and/or its assigns.

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. Because of OCDA's permit and legislative rule violations, OCDA shall be assessed a civil administrative penalty of twenty five thousand nine hundred fifty dollars (\$25,950) 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. OCDA 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, OCDA 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, OCDA 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 OCDA 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, OCDA 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 OCDA 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 OCDA 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 OCDA (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 OCDA 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 Sugar Excavating 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 OCDA, its successors and assigns.

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


Ohio County Development Authority
Secretary-Treasurer

April 30, 2012
Date

Public Notice begin:

Date

Public Notice end:

Date

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

Date

revised September 2011

RECEIVED

MAY 01 2012

ENVIRONMENTAL
ENFORCEMENT

Photo 1:

10/11/11

Heavy equipment in Wheeling Creek creating a plume of sediment laden water. Ingress is not stabilized.



Photo 2:

10/11/11

Heavy equipment removing sediment from ingress area without proper controls. This created a plume of sediment laden water in Wheeling Creek.



Photo 3:

10/11/11

Ingress for heavy equipment is not stabilized.



Photo 4:

10/11/11

An excavator entering Wheeling Creek is creating a plume of sediment laden water.



Photo 5:

10/11/11

*K-rails wrapped in plastic.
Plastic has been breached
allowing sediment laden water
to escape.*



Photo 6:

10/11/11

*Temporary fill used to divert the
flow. Fill is comprised of sand,
silt and sediment.*



Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Ohio County Development Authority Receiving Stream: Wheeling Creek

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#												
			2a	2b	2c	2d	2e	2f	6b						
a)	Amount of Pollutant Released	1 to 3	2	1	2	2	2	1	1						
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	1	1						
c)	Sensitivity of the Environment	0 to 3	2	1	2	2	2	1	1						
d)	Length of Time	1 to 3	1	1	1	1	1	1	1						
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	1	1	1						
Average Potential for Harm Factor			1.4	1	1.4	1.4	1.4	1	1	No	No	No	No	No	No
2)	Extent of Deviation Factor	Factor Range													
	Degree of Non-Compliance	1 to 3	3	2	3	3	2	2	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		\$4,320
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			\$4,350
Penalty =			\$25,950

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:	