



west virginia department of environmental protection

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: Performance Motor Sales Site
Attn. Patrick Darlington
224 Pennsylvania Ave.
Parsons, WV 26287

DATE: January 27, 2014

ORDER NO.: 8021

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 Performance Motor Sales Site (hereinafter "Performance").

FINDINGS OF FACT

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

1. Performance is conducting land disturbance activity near Elkins, in Randolph County, West Virginia. On July 20, 2012, Performance was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR106183 for one (1) acre of land disturbance activity.
2. On August 20, 2012, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility. During the inspection, violations of the following sections of Performance's WV/NPDES Permit (Registration No. WVR106183) were observed and documented:
 - a. G.4.e.2.C.v - The Permittee failed to maintain inspection and maintenance records on-site and available for review.
 - b. G.4.a - The Permittee failed to retain a copy of the Storm Water Pollution Prevention Plan (SWPPP) and/or Groundwater Pollution Plan (GPP) on site.

- c. G.4.e.2.A.ii.b - The Permittee failed to install a sediment basin that provides 3,600 cubic feet of storage volume per drainage acre.
- d. G.4.c - The Permittee failed to modify permit acreage to accurately reflect an increase in land disturbance. The project was greater than five (5) acres, but only permitted for one (1) acre.
- e. G.4.b.8 - The Permittee failed to display a public notice sign near the entrance to the construction site for the duration of the project.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. I12-42-050-MJA, I12-42-051-MJA, I12-42-052-MJA, I12-42-053-MJA, and I-13-42-054-MJA were issued to Performance.

- 3. On October 10, 2012, in response to the August 20, 2012 observation that Performance's WV/NPDES permit did not accurately reflect an increase in land disturbance activity at the aforementioned site, Performance was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR106255, for 6.2 acres.
- 4. On May 23, 2013, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of Performance's WV/NPDES Permit (Registration No. WVR106255) were observed and documented:
 - a. G.4.e.2.A.i.c - The Permittee failed to reseed and mulch all areas where the seed had failed to germinate adequately (uniform perennial vegetative cover with a density of 70%) within thirty (30) days after seeding and mulching.
 - b. C.15 - The Permittee failed to post an outlet marker at discharge points.
 - c. G.4.a - The Permittee failed to have its GPP and SWPPP available for review at the work site.
 - d. G.4.e.2.C.v - The Permittee failed to keep weekly erosion and sediment control inspection records on site for review.
 - e. G.4.e.2.A.ii.d - The Permittee failed to stabilize all diversions prior to becoming functional.

As a result of the aforementioned violations, NOV Nos. I-13-42-004-TPD, I-13-42-005-TPD, I-13-42-006-TPD, I-13-42-007-TPD, and I-13-42-008-TPD were issued to Performance.

- 5. On October 11, 2013, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of Performance's WV/NPDES Permit (Registration No. WVR106255) were observed and documented:
 - a. G.4.e.2.A.i.c - The Permittee failed to reseed and mulch all areas where the seed had failed to germinate adequately (uniform perennial vegetative cover with a density of 70%) within thirty (30) days after seeding and mulching.
 - b. G.4.a - The Permittee failed to have its SWPPP and GPP available for review at the work site.
 - c. G.4.e.2.A.ii.d - The Permittee failed to stabilize all diversions prior to becoming functional.

- d. G.4.e.2.C.v - The Permittee failed to keep weekly erosion and sediment control inspection records on site for review.
- e. G.4.e.1.E - The Permittee failed to stabilize the construction entrance and parking areas.

As a result of the aforementioned violations, NOV Nos. I-13-42-023-TPD, I-13-42-024-TPD, I-13-42-025-TPD, I-13-42-026-TPD, and I-13-42-028-TPD were issued to Performance.

6. On January 14, 2014, WVDEP personnel and a representative of Performance discussed, by telephone, 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. Performance shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit.
2. Within thirty (30) days of the effective date of this Order, Performance shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Performance 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. WV0115924, Registration Nos. WVR106255 and WVR106183, and Order No. 8021. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor
NE Regional Environmental Enforcement Office
22288 Northwestern Pike
Romney, WV 26757**

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 Performance's permit violations, Performance shall be assessed a civil administrative penalty of ten thousand thirty dollars (\$10,030) 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:**

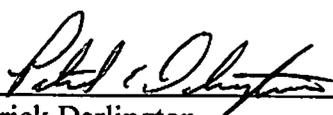
**Chief Inspector
Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304**

OTHER PROVISIONS

1. Performance 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, Performance 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, Performance 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 Performance 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, Performance 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 Performance becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and Performance 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 Performance 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 Performance (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 Performance 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 Performance 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 Performance, its successors and assigns.
7. This Order shall terminate upon Performance's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Patrick Darlington
Performance Motor Sales Site

11/28/14

Date

Public Notice begin:

Date

Public Notice end:

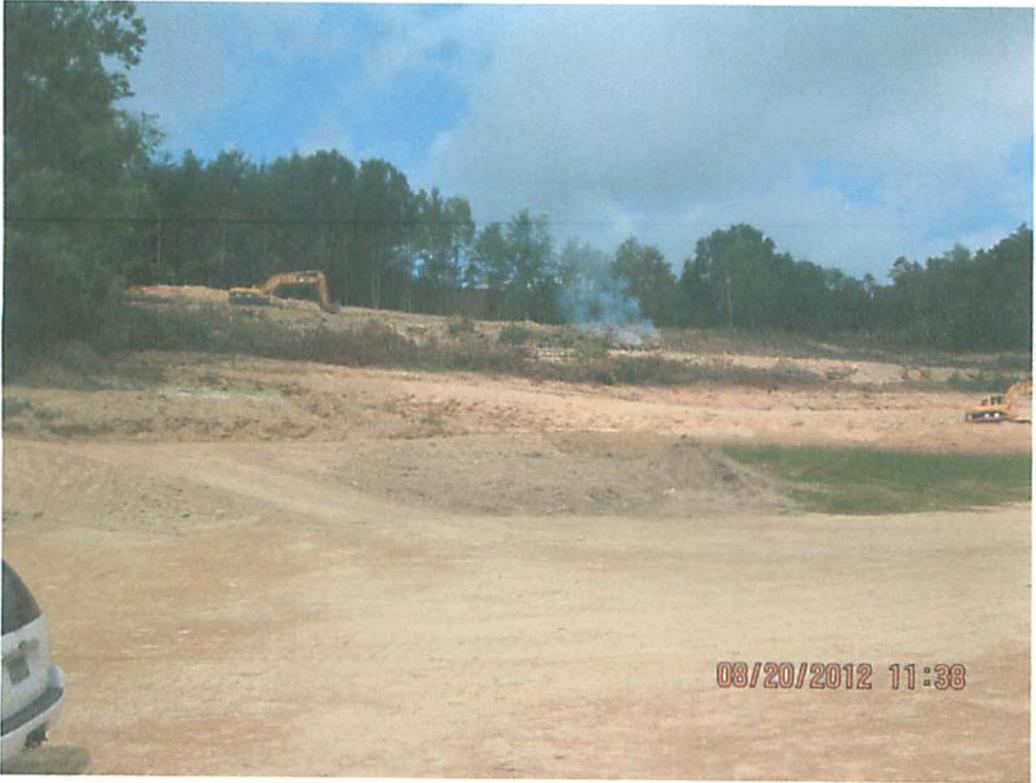
Date

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

Date



Area of disturbance measured at approximately five acres.





Installed basin does not provide adequate storage for project of this size. (5 acres)





10/11/2013 Erosion reels evident in multiple locations.





10/11/2013 Sedimentation near entrance to project.



10/11/2013 Unstable diversions and lack of seed and mulch.





10/11/2013- Front of site-No silt fence or stabilization measures.

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

Performance Motors Sales

Receiving Stream:

 Unnamed tributary of Kings Run
of Tygart River

 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	4a	4b	4c	4d	4e	5a	5b	5c
a)	Amount of Pollutant Released	1 to 3	1	1	1	1	1	1	1	1	1	1	1	1	1
b)	Toxicity of Pollutant	0 to 3	0	0	1	0	0	1	0	0	0	1	1	0	1
c)	Sensitivity of the Environment	0 to 3	0	0	1	0	0	1	0	0	0	1	1	0	1
d)	Length of Time	1 to 3	1	1	1	1	1	1	1	2	2	1	2	3	2
e)	Actual Exposure and Effects thereon	0 to 3	0	0	0	0	0	0	0	0	0	0	0	0	0
Average Potential for Harm Factor			0.4	0.4	0.8	0.4	0.4	0.8	0.4	0.6	0.6	0.8	1	0.8	1
2)	Extent of Deviation Factor	Factor Range													
	Degree of Non-Compliance	1 to 3	1	1	1	1	1	1	1	1	1	1	1	1	1

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 $\leq 40\%$ for Avg. Monthly or $\leq 100\%$ for Daily Max., exceed numeric WQ standard by $\leq 100\%$, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by $\geq 41\%$ and $\leq 300\%$ for Avg. Monthly, $\geq 101\%$ and $\leq 600\%$ for Daily Max., exceed numeric WQ standard by $\geq 101\%$ and \leq of 600% or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by $\geq 301\%$ for Avg. Monthly, $\geq 601\%$ for Daily Max., exceed numeric WQ standard by $\geq 601\%$, 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
2a	Minor	Minor	\$400	1	\$400
2b	Minor	Minor	\$400	1	\$400
2c	Minor	Minor	\$800	1	\$800
2d	Minor	Minor	\$400	1	\$400
2e	Minor	Minor	\$400	1	\$400
4a	Minor	Minor	\$800	1	\$800
4b	Minor	Minor	\$400	1	\$400
4c	Minor	Minor	\$600	1	\$600
4d	Minor	Minor	\$600	1	\$600
4e	Minor	Minor	\$800	1	\$800
5a	Minor	Minor	\$1,000	1	\$1,000
5b	Minor	Minor	\$800	1	\$800
5c	Minor	Minor	\$1,000	1	\$1,000
5d	Minor	Minor	\$800	1	\$800
5e	Minor	Minor	\$800	1	\$800
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					\$10,000

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 -	10		\$1,000
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		10	(\$1,000)
6.2.b.3 - Cooperation with the Secretary			\$0
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$30
Penalty =			\$10,030

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:	