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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

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

TO: Allen Bell  
Rabel Development, LLC  
5521 Ohio River Road  
Pt. Pleasant, WV 25550

DATE: January 10, 2013

ORDER NO.: 7738

**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 Rabel Development, LLC.

**FINDINGS OF FACT**

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

1. Rabel Development, LLC operates a land disturbance located near Alum Creek, Kanawha County, West Virginia. Rabel Development, LLC was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR105172, on October 1, 2010.
2. On November 9, 2010, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility. During the inspection, a violation of the following section of the terms and conditions of Rabel Development, LLC's WV/NPDES permit was observed and documented:
  - a. G.4.e.2.A.ii.g - Permittee eliminated a sediment trapping structure(s) prior to the contributing drainage area being stabilized.

As a result of the aforementioned violation, Notice of Violation (NOV) No. I10-20-012-JCC was issued to Rabel Development, LLC.

3. On September 12, 2011, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of Rabel Development, LLC's WV/NPDES permit were observed and documented:
  - a. D.1 - Permittee failed to operate and maintain all erosion control devices.
  - b. B - Permittee failed to comply with the General Permit and approved Storm Water Pollution Prevention Plan (SWPPP). Several erosion control devices were not in place as detailed by the SWPPP.
  - c. G.4.b.5.- Permittee failed to display a public notice sign near the entrance to the construction site for the duration of the project.
  - d. G.4.e.2.A.ii.j - Permittee allowed sediment-laden water to leave the site without going through an appropriate device.
  - e. G.4.e.2.C.i - Permittee openly burned solid waste on the permitted site.
  - f. G.4.e.2.D - Permittee failed to inspect all erosion control devices at least once every seven calendar days and within 24 hours after any storm event of greater than 0.5 inches of rain per 24-hour period.

As a result of the aforementioned violations, NOV Nos. I11-20-043-JCC through I11-20-048-JCC were issued to Rabel Development, LLC.

4. On May 3, 2012, WVDEP and Allen Bell, owner of Rabel Development, LLC, entered into Consent Order No. 7528. The Order required Allen Bell to immediately take all measures to initiate compliance with all terms and conditions of WV/NPDES Permit No. WVR105172 and pertinent laws and rules.
5. On May 23, 2012, WVDEP accepted Allen Bell's Plan of Corrective Action which was submitted to fulfill the requirement of Consent Order No. 7528.
6. On September 6, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV State Code, WV Legislative Rules, and Rabel Development, LLC's WV/NPDES permit were observed and documented:
  - a. 47CSR2 Section 3.2.a - Permittee caused conditions not allowable in waters of the State by causing or allowing distinctly visible settleable solids in the stream.
  - b. G.4.e.2.C.vi - Permittee failed to maintain inspection and maintenance records on-site and available for review.
  - c. D.1 - Permittee failed to operate and maintain all erosion control devices.
  - d. G.4.e.2.A.ii.j. - Permittee allowed sediment-laden water to leave the site without going through an appropriate device.
  - e. G.4.2.A.i.d. - Permittee failed to seed and stabilize all temporary diversions immediately and prior to becoming functional.
  - f. G.4.e.2.A.i.c. - Permittee failed to immediately reseed and mulch all areas where the seed has failed to germinate adequately (uniform perennial vegetative cover with a density of 70%) within 30 days after seeding and mulching.
  - g. 22-11-16 - Rabel Development, LLC failed to comply with Order No. 7528 and its approved Plan of Corrective Action and schedule. Specifically, Rabel Development, LLC failed to maintain and add sections of silt fence as necessary, seed and mulch as necessary, and adequately inspect all controls.

As a result of the aforementioned violations, NOV Nos. 112-20-187-GSR through 112-20-192-GSR were issued to Rabel Development, LLC.

7. A meeting was held between WVDEP and Rabel Development, LLC on December 6, 2012 to discuss the terms of this Order. In the meeting Rabel Development, LLC indicated that it had inspection and maintenance records on-site at the time of the inspection but was unable to provide them as requested due to an internal mis-communication.

### **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. Rabel Development, LLC shall immediately take all measures to initiate compliance with all terms and conditions of its WV/NPDES permit and pertinent laws and rules.
2. Within twenty (20) days of the effective date of this Order, Rabel Development, LLC shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Rabel Development, LLC will achieve compliance with all terms and conditions of its WV/NPDES permit and 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 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 Rabel Development, LLC's West Virginia Code, Legislative Rule and permit violations, Rabel Development, LLC shall be assessed a civil administrative penalty of twenty-five thousand two hundred seventy-five dollars (\$25,275) 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 57<sup>th</sup> Street SE  
Charleston, WV 25304**

**OTHER PROVISIONS**

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

  
\_\_\_\_\_  
Allen Bell  
Rabel Development, LLC

1-14-2013  
\_\_\_\_\_  
Date

Public Notice begin:

\_\_\_\_\_  
Date

Public Notice end:

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date

*revised September 2011*

**RECEIVED**

JAN 22 2013

ENVIRONMENTAL  
ENFORCEMENT



Another example of a diversion that has not been stabilized and lacks controls at exit to site



Silt fence that is not being maintained



Access road needs stabilized



Sediment basin needs to be cleaned



Sediment laden water entering Alum Creek from unnamed tributary below site



Sediment deposits in Alum Creek below ephemeral stream leading from site



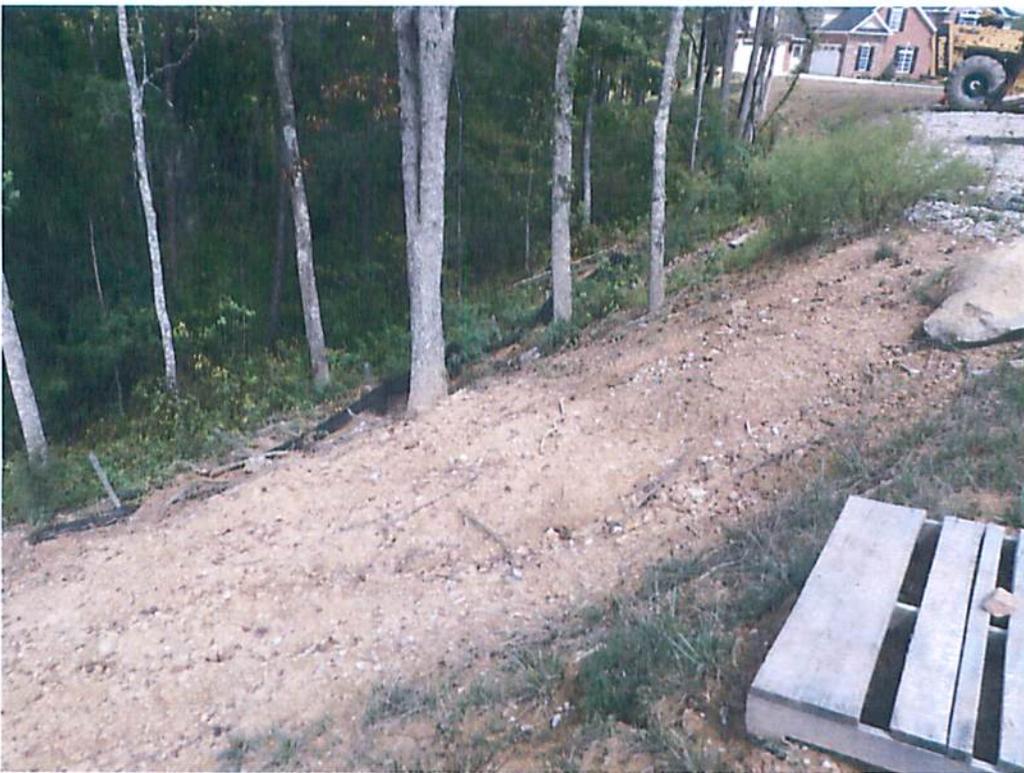
Sediment deposit in ephemeral stream below the site



Location at the beginning of ephemeral stream where sediments are leaving the site



Diversion leading down to ephemeral stream where sediments left the site  
Diversion lacks stabilization



One of several locations on the site where silt fence has not been maintained



Diversion leading to another ephemeral stream where stabilization is lacking



Location where silt fence is not trenched into the soil

## Base Penalty Calculation

(pursuant to 47CSRI-6.1)

Responsible Party:

Rabel Development, LLC

Receiving Stream:

Unnamed Tributary of Alum 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#													
			6a	6c	6d	6e	6f	6g								
a)	Amount of Pollutant Released	1 to 3	3	1	3	1	1	1								
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	1								
c)	Sensitivity of the Environment	0 to 3	1	1	1	1	1	1								
d)	Length of Time	1 to 3	1	2	2	1	1	1								
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	1	1								
<b>Average Potential for Harm Factor</b>			1.4	1.2	1.6	1	1	1	No							
2)	Extent of Deviation Factor	Factor Range														
	Degree of Non-Compliance	1 to 3	3	3	3	3	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 47CSRI-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		\$3,740
6.2.b.4 - Compliance/noncompliance history	25		\$4,675
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	(\$1,870)
6.2.b.5 - Ability to Pay			\$0
<b>Penalty Adjustments</b>			<b>\$6,575</b>
<b>Penalty =</b>			<b>\$25,275</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>	