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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  
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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: Timothy S. Ashley  
433 Alpine Road  
Mineral Wells, West Virginia 26150

DATE: April 7, 2014

ORDER NO.: 8061

**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 Timothy S. Ashley (hereinafter "Timothy Ashley").

**FINDINGS OF FACT**

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

1. Timothy Ashley is conducting land disturbance activity located near Mineral Wells, Wood County, West Virginia. Timothy Ashley was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR106823, on December 20, 2013.
2. On August 13, 2013, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV State Code and WV Legislative Rules were observed and documented:
  - a. 47CSR2 Section 3.2.b-The permittee caused conditions not allowable in waters of the State by creating sediment deposits on the bottom of the stream.
  - b. 22-11-8 and 47CSR10 Section 3.1-The permittee failed to obtain authorization pursuant to a WV/NPDES Permit to discharge into waters of the State.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. I12-54-259-GSR and I12-54-260-GSR were issued to Timothy Ashley.

3. On August 19, 2013, WVDEP issued Order No. 7893 requiring Timothy Ashley to Cease and Desist any further land development activity until a valid WV/NPDES permit for Storm Water Associated with Construction Activity was obtained for the site, to immediately install and maintain necessary storm water and sediment/erosion control devices, and to temporarily mulch the site until WV/NPDES permit coverage was obtained.
4. On September 6, 2013, WVDEP approved Timothy Ashley's Plan of Corrective Action, which was submitted to satisfy Order No. 7893, Order for Compliance No. Three (3).
5. On January 17, 2014, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV State Code and Timothy Ashley's WV/NPDES permit were observed and documented:
  - a. 22-11-1 et seq.-Timothy Ashley failed to comply with order No. 7893. Specifically, Timothy Ashley failed to comply with paragraph No. Four (4) of the Order for Compliance section, which required Timothy Ashley to immediately install and maintain necessary storm water and sediment/erosion control devices to prevent the release of sediment-laden water into waters of the State.
  - b. G.4.e.2.D-The Permittee failed to inspect erosion and sediment control devices at least once every seven (7) calendar days and within twenty-four (24) hours after any storm event of greater than 0.5 inches of rain per twenty-four (24) hour period.
  - c. D.1-The Permittee failed to operate and maintain all erosion control devices. Specifically silt fence in the area of the stream crossing was improperly operated and maintained.
  - d. C.15-The Permittee failed to post an outlet marker from all permitted outlets at the permitted site.
  - 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.
  - f. G.4.e.2.A.ii.j-The Permittee allowed sediment-laden water to leave the site without going through an appropriate device.
  - g. G.4.e.2.A.i.d-The Permittee failed to seed and stabilize all temporary diversions immediately and prior to becoming functional.
  - h. G.4.e.2.A.i-The Permittee failed to temporary seed and mulch all areas where construction activities had ceased for more than seven (7) days.
  - i. G.4.a-The Permittee failed to retain a copy of the Storm Water Pollution Prevention Plan (SWPPP) and/or Groundwater Protection Plan (GPP) on site.
  - j. B-The Permittee failed to comply with the approved SWPPP. Several erosion control devices were not in place as detailed by the SWPPP.

As a result of the aforementioned violations, NOV Nos. I14-54-001-GSR and I14-54-010-GSR were issued to Timothy Ashley.

**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. Timothy Ashley 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, Timothy Ashley shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Timothy Ashley will achieve compliance with all terms and conditions of its WV/NPDES permit and pertinent laws and rules. The plan of corrective action shall make reference to WV/NPDES Permit No. WV0115924, Registration No. WVR106823, and Order No. 8061. 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.

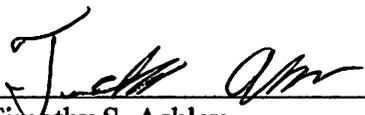
3. Because of Timothy Ashley's West Virginia Code, Legislative Rule and permit violations, Timothy Ashley shall be assessed a civil administrative penalty of nineteen thousand seven hundred fifteen dollars (\$19,715) to be paid to the West Virginia Department of Environmental Protection for deposit in 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. Timothy Ashley 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, Timothy Ashley 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, Timothy Ashley 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 Timothy Ashley 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, Timothy Ashley 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 Timothy Ashley becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and Timothy Ashley 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 Timothy Ashley 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 Timothy Ashley (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 Timothy Ashley 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 Timothy Ashley 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 Timothy Ashley, its successors and assigns.

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

  
\_\_\_\_\_  
Timothy S. Ashley

6/13/14  
\_\_\_\_\_  
Date

Public Notice begin:

\_\_\_\_\_  
Date

Public Notice end:

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date

*revised January 2013*

**RECEIVED**

JUN 23 2014

ENVIRONMENTAL  
ENFORCEMENT



(08/13/13) View of the unpermitted site



(08/13/13) Materials eroding from non-stabilized diversion



(08/13/13) Slip area beside non-stabilized diversion



(08/13/13) View of pond built in the waters of the State



(08/13/13) Fill of pond lacks riser pipe or stabilized overflow



(08/13/13)Stream below the pond



(01/17/14) Sediment basin has not been installed as shown in SWPPP



(01/17/14) Overflow from permanent pond has not been stabilized



(01/17/14) Silt fence has not been maintained



(01/17/14) Stream banks not stabilized, sediment deposits in stream, super silt fence not installed



(01/17/14) Area along diversion lacking stabilization



(01/17/14) Rock checks dams not installed in diversion as specified in SWPPP



(01/17/14) Area near front of building lacking stabilization



(01/17/14) Diversions lack stabilization



(01/17/14) Large erosion rill leading from upper section of site



(01/17/14) Area above permanent pond lacking stabilization



(01/17/14) View of site from permanent pond



(01/17/14) Super silt fence not installed to protect soil stockpile from stream

# Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Timothy S. Ashley Receiving Stream: Tributary of Little Kanawha River

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#												
			5a	5b	5c	5d	5e	5f	5g	5h	5i	5j			
a)	Amount of Pollutant Released	1 to 3	2	1	1	1	1	1	1	1	1	1			
b)	Toxicity of Pollutant	0 to 3	1	1	1	0	0	1	1	1	0	1			
c)	Sensitivity of the Environment	0 to 3	1	1	1	0	0	1	1	1	0	1			
d)	Length of Time	1 to 3	1	1	1	1	1	1	1	1	1	1			
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	0	0	1	1	1	0	1			
<b>Average Potential for Harm Factor</b>			1.2	1	1	0.4	0.4	1	1	1	0.4	1	No	No	No
2)	<b>Extent of Deviation Factor</b>	<b>Factor Range</b>													
	Degree of Non-Compliance	1 to 3	2	1	1	1	1	1	1	1	3	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.



		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	Moderate	Moderate	\$3,200	1	\$3,200
5b	Minor	Minor	\$1,000	1	\$1,000
5c	Minor	Minor	\$1,000	1	\$1,000
5d	Minor	Minor	\$400	1	\$400
5e	Minor	Minor	\$400	1	\$400
5f	Minor	Minor	\$1,000	1	\$1,000
5g	Minor	Minor	\$1,000	1	\$1,000
5h	Minor	Minor	\$1,000	1	\$1,000
5i	Minor	Major	\$1,700	1	\$1,700
5j	Minor	Major	\$2,000	1	\$2,000
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
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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
<b>Total Base Penalty</b>					<b>\$12,700</b>

## 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		\$2,540
6.2.b.4 - Compliance/noncompliance history	35		\$4,445
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
<b>Penalty Adjustments</b>			<b>\$7,015</b>
<b>Penalty =</b>			<b>\$19,715</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>	