



west virginia department of environmental protection

Division of Water and Waste Management
601 57th 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: Darrell Allen
Acting State Highway Engineer
WV Department of Transportation
Division of Highways
1900 Kanawha Blvd., Building 5, Room A-164
Charleston, WV 25305

DATE: May 1, 2013

ORDER NO.: 7788

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 WV Department of Transportation (hereinafter "WVDOT").

FINDINGS OF FACT

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

1. WVDOT operates a highway construction project and associated land disturbance located near Bowden, in Randolph County, West Virginia. WVDOT was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR104732, on January 22, 2010. The aforementioned project discharges into Taylor Run, a Tier 3 high quality trout stream.
2. On April 17, 2012, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WVDOT's WV/NPDES permit were observed and documented:
 - a. G.4.e.2.A.i.c - The Permittee failed to re-seed and mulch any and all areas where a uniform perennial grass cover with a minimum density of 70% had not been achieved.

- b. C.15 - The Permittee failed to post an outlet marker at all permitted outlets from the construction site.
- c. G.4.e.2.A.ii.c - The Permittee failed to provide proper inlet protection for all sediment control structures on project.
- d. G.4.e.2.A.i.d - The Permittee failed to stabilize all diversions that were conveying water on the project.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. I12-15-020-MJA, I12-15-021-MJA, and I12-15-022-MJA were issued to WVDOT.

- 3. On November 16, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV State Code and WVDOT's WV/NPDES permit were observed and documented:
 - a. C.15 - The Permittee failed to post an outlet marker at all permitted outlets from the construction site.
 - b. G.4.b.5 - The Permittee failed to post a public notice sign near the entrance to the site for the duration of the project.
 - c. G.4.e.2.C.vi - The Permittee failed to perform weekly inspections and/or inspections after significant rainfall of all erosion control devices.
 - d. G.4.a - The Permittee failed to keep a copy of the approved Storm Water Pollution Prevention Plan (SWPPP) and Groundwater Protection Plan (GPP) on site for review by WVDEP personnel.
 - e. D.1 - The Permittee failed to operate and maintain all erosion control devices. Specifically, WVDOT allowed a clean water diversion channel to breach and remain so over a long period of time. In addition, WVDOT failed to abate erosion at various inlets.
 - f. 22-11-1 et seq. - The Permittee failed to comply with a previous order issued by WVDEP to WVDOT. Consent Order No. 7186, dated January 17, 2012, required that WVDOT submit a Plan of Corrective Action (POCA) within thirty (30) days of entry of the Order. WVDOT failed to submit the required POCA.

As a result of the aforementioned violations, NOV Nos. I12-42-074-MJA, I12-42-071-MJA, I12-42-070-MJA, I12-42-069-MJA, and I12-42-073-MJA were issued to WVDOT.

- 4. On February 26, 2013, WVDEP personnel and representatives of WVDOT 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. WVDOT 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 thirty (30) days of the effective date of this Order, WVDOT shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when WVDOT 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. WVR104732, and Order No. 7788. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor
NE Regional Environmental Enforcement Office
HC63 Box 2545
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.

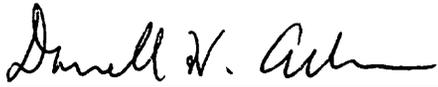
3. Because of WVDOT's West Virginia Code and permit violations, WVDOT shall be assessed a civil administrative penalty of seven thousand forty-five dollars (\$7,045) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) 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. WVDOT 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, WVDOT 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, WVDOT 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 WVDOT 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, WVDOT 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 WVDOT becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and WVDOT 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 WVDOT 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 WVDOT (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 WVDOT 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 WVDOT 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 WVDOT, its successors and assigns.

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



Darrell Allen, Acting State Highway Engineer
WV Department of Transportation

5-14-13

Date

Public Notice begin:

RECEIVED

MAY 16 2013

Date

Public Notice end:

ENVIRONMENTAL
ENFORCEMENT

Date

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

Date



Active slips on cut slope of project.





Erosion rills on cut slope of project.



Erosion above inlet at toe of slope.

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: WVDOT **Receiving Stream:** Taylor Run

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#											
			3d	3f										
a)	Amount of Pollutant Released	1 to 3	1	1										
b)	Toxicity of Pollutant	0 to 3	0	1										
c)	Sensitivity of the Environment	0 to 3	0	3										
d)	Length of Time	1 to 3	1	1										
e)	Actual Exposure and Effects thereon	0 to 3	0	1										
Average Potential for Harm Factor			0.4	1.4	No									
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	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.

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		\$610
6.2.b.4 - Compliance/noncompliance history	25		\$1,525
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	(\$610)
6.2.b.3 - Cooperation with the Secretary		10	(\$610)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$945
Penalty =			\$7,045

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:	



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • (304) 558-3505

Earl Ray Tomblin
Governor

Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways

May 14, 2013

Mr. Michael A. Zeto
Chief Inspector
Division of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304

RECEIVED

MAY 16 2013

ENVIRONMENTAL
ENFORCEMENT

Dear Mr. Zeto:

State Project S342-33-19.00, 00
Federal Project ERP-0033(323)D
Shavers Mountain Road
Randolph County - Consent Order No: 7788

Attached, for your information and use, is the original signed order for the above-subject project.

Should you have any questions, please contact Mr. Charles Riling, Special Projects and Environmental Monitor, at (304) 558-9761.

Very truly yours,

Darrell W. Allen, P. E.
Acting State Highway Engineer

DWA:Rb

Attachment