



west virginia department of environmental protection

Division of Water and Waste Management
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Charleston, WV 25304
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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
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**CONSENT ORDER
ISSUED UNDER THE
HAZARDOUS WASTE MANAGEMENT ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 18**

TO: WVDNR - Cass Scenic Railroad State Park
Brad Leslie, WVDNR-PRS-PE&M
324 4th Avenue
South Charleston, WV 25303-1228

DATE: February 6, 2014
ORDER NO.: HW-14-004

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 18, Section 1 et seq. to WVDNR - Cass Scenic Railroad State Park (hereinafter "Cass State Park").

FINDINGS OF FACT

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

1. Cass State Park operates a railroad located in Cass, Pocahontas County, West Virginia and has been assigned EPA ID No. WVD988798559.
2. On July 31, 2012, 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 Code of Federal Regulations was observed and documented:
 - a. 40CFR279.22(d) as referenced by 33CSR20 Section 14.1 – Cass State Park failed to properly respond to spillage of used oil at the Whittaker Station and Bald Knob areas of the facility.

As a result of the aforementioned violation, Notice of Violation (NOV) No. 3311040-30P was issued to Cass State Park.

3. On August 2, 2012, Cass State Park submitted a Plan of Corrective Action (POCA) outlining the following proposed remedial measures to address the above-cited violation:
 - a. Composite samples would be taken at the facility within three (3) months.
 - b. Sample results would be provided to WVDEP personnel.
 - c. If sample results were unsatisfactory, remediation plans, specs, and bidding documents would be produced within six (6) months.
 - d. If necessary, remediation of the site would be complete within one (1) year.

Upon review, WVDEP personnel determined that the POCA was not implemented.

4. On July 23, 2013, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following section of the Code of Federal Regulations was observed and documented:
 - a. 40CFR279.22(d) as referenced by 33CSR20 Section 14.1 – Cass State Park failed to properly respond to spillage of used oil at the Whittaker Station and Bald Knob areas of the facility.
5. On August 7, 2013, Cass State Park submitted a POCA outlining the following proposed remedial measures to address the above-cited violation:
 - a. Asphaltene would be removed from the track.
 - b. Petroleum Remediation Product (PRP) would be applied over areas of the track contaminated with oil.
 - c. Moisture would be monitored and added as needed to ensure adequate amounts for proper treatment effectiveness.
6. On September 23, 2013, WVDEP rejected the above-referenced POCA, because it did not include provisions for removal of contaminated material from the aforementioned areas. In the correspondence, WVDEP personnel requested an updated POCA that included the following information:
 - a. A written description regarding the method of contaminated ballast and soil removal.
 - b. Shipping documentation for verification of proper waste disposal.
 - c. Confirmation sampling for Total Petroleum Hydrocarbons (TPH) after excavation of contaminated areas.
 - d. A project completion date.
7. On January 8, 2014, WVDEP personnel and Cass State Park met to discuss the terms and conditions of this Order.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with Chapter 22, Article 18, Section 1 et seq. of the West Virginia Code, it is hereby agreed between the parties, and ORDERED by the Director:

1. Cass State Park shall immediately take all measures to initiate compliance with all pertinent laws and rules.
2. Within thirty (30) days of the effective date of this Order, Cass State Park shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for how and when Cass State Park will achieve compliance with all pertinent laws and rules. The plan of corrective action shall make reference to EPA ID No. WVD988798559 and Order No. HW-14-004. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor
Christopher M. Gatens
WVDEP/DWWM/EE/HW
601 57th Street SE
Charleston, WV 25304**

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 Cass State Park's Code of Federal Regulations violations, Cass State Park shall be assessed a civil administrative penalty of four thousand two hundred ninety-four dollars (\$4,294) to be paid to the West Virginia Department of Environmental Protection for deposit in the Hazardous Waste 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. Cass State Park hereby waives its right to appeal this Order under the provisions of Chapter 22, Article 18, Section 20 of the Code of West Virginia. Under this Order, Cass State Park 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, Cass State Park 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 Cass State Park in 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, Cass State Park 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 Cass State Park becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and Cass State Park 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 Cass State Park 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 Cass State Park (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 Cass State Park 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 Cass State Park 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 Cass State Park, its successors and assigns.

timetable by which Cass State Park 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 Cass State Park (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 Cass State Park 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 Cass State Park 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 Cass State Park, its successors and assigns.
7. This Order shall terminate upon Cass State Park's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Frank Jezioro, Director
WVDNR - Cass Scenic Railroad State Park

2-23-14

Date

Public Notice begin:

Date

Public Notice end:

Date

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

Date



7/31/2012 – Overview of used oil spillage along track at Whittaker Station from stopped locomotives.



7/31/2012 – Closer view of used oil spillage along track at Whittaker Station.



7/23/2013 – Overview of used oil spillage along track at Bald Knob from stopped locomotives.

Hazardous Waste Base Penalty Calculation

(pursuant to 33CSR27-6.1)

Responsible Party: WVDNR - Cass Scenic Railroad State Park EPA ID Number: WVD988798559

Generator Classification: CEG

Enter FOF# and rate each finding as to Potential and Extent.

1)	Potential for Harm Factor	Factor Range	FOF#											
			2a											
a)	Harm to RCRA Program	1 to 3	2											
b)	Probability of Exposure	0 to 3	3											
c)	Potential Seriousness of Contamination	1 to 3	2											
Average Potential for Harm Factor			2.3	No										
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	1											

Potential for Harm Factors

1a. - Harm to the RCRA Program

- All regulatory requirements are fundamental to the continued integrity of the RCRA Program
- Violations that undermine the statutory or regulatory purposes or procedures for implementing the RCRA program may have serious implications and merit substantial penalties. Examples include but are not limited to: failure to notify as a generator, failure to respond to an info request, failure to prepare or maintain a manifest, and operating / disposal without a permit

1b. - Probability of Exposure - factors to be considered include but are not limited to: evidence of a release, evidence of waste mismanagement, and adequacy of provisions for detecting and preventing a release

1c. - Potential Seriousness of Contamination - factors to consider include but are not limited to quantity and toxicity of wastes (potentially) released, likelihood or fact of transport by way of environmental media (e.g. air and groundwater), and existence, size and proximity of receptor populations (e.g. local residents, fish, wildlife) and sensitive environmental media (e.g. surface waters and aquifers.)

Note: Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Penalty Adjustment Factors

(pursuant to 33CSR27-6.2)

Penalty Adjustment Factors

6.2.b.1 - Good faith efforts to comply or lack of good faith - 10% decrease to 10% increase

6.2.b.2 - Degree of Willfulness and / or Negligence - 0% to 30% increase

6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease

6.2.b.4 - History of Non-Compliance - 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

6.2.b.5 - Ability to pay a civil administrative penalty - 0% to 100% decrease

6.2.b.6 - Economic Benefit of non-compliance

6.2.b.7 - Staff Investigative Costs

6.2.b.8 - Other relevant factors determined on a case-by-case basis

Base Penalty Adjustments

(pursuant to 33CSR27-6.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
6.2.b.1 - Good Faith - Increase			\$0
6.2.b.1 - Good Faith - Decrease		10	(\$533)
6.2.b.2 - Willfulness and/or negligence			\$0
6.2.b.3 - Cooperation with the Secretary		10	(\$533)
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.5 - Ability to Pay an Administrative Penalty			\$0
6.2.b.6 - Economic Benefit (flat monetary increase)	\$0		\$0
6.2.b.7 - Staff Investigative Costs (flat monetary increase)			\$0
6.2.b.8 - Additional Other Factors - Increase (flat monetary increase)			\$0
6.2.b.8 - Additional Other Factors - Decrease (flat monetary decrease)			\$0
Public Notice Cost (flat monetary increase)	\$30		\$30
Penalty Adjustments			(\$1,036)
Penalty =			\$4,294

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:	