



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

TO: West Virginia Department of Transportation
Division of Highways
Mr. Marvin Murphy
1900 Kanawha Blvd. Bldg. 5
Room A-164
Charleston, WV 25305

DATE: December 19, 2012

ORDER NO.: 7735

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 West Virginia Department of Transportation (hereinafter "WVDOT").

FINDINGS OF FACT

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

1. WVDOT operates a construction project, referred to as South Mineral Wells Interchange U354-14.7.4700, located near Mineral Wells, Wood County, West Virginia. WVDOT was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR104350, on May 11, 2009.
2. On June 7, 2011, 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 WVDOT's WV/NPDES permit was observed and documented:
 - a. Section C.15 - Permittee failed to post an outlet marker at all permitted outlets from the construction site.

Promoting a healthy environment.

As a result of the aforementioned violation, Notice of Violation (NOV) No. I11-54-008-JCC was issued to WVDOT.

3. On December 15, 2011, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of WV Legislative Rules and WVDOT'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. Section G.4.e.2.A.ii.j - Permittee allowed sediment-laden water to leave the site without going through an appropriate device.
 - c. Section D.1 - Permittee failed to operate and maintain all erosion control devices.

As a result of the aforementioned violations, NOV Nos. I11-54-041-JCC, I11-54-042-JCC, and I11-54-043-JCC, were issued to WVDOT.

4. On August 13, 2012, WVDEP personnel conducted an inspection of the facility. During the inspection, violations of the following sections of the terms and conditions of WVDOT's WV/NPDES permit were observed and documented:
 - a. Section G.4.e.2.D - Permittee failed to inspect all erosion control devices at least once every seven (7) calendar days.
 - b. Section G.4.e.2.C.v - Permittee failed to identify company personnel to inspect as set forth under G.4.e.2.D and establish a tracking procedure to ensure that adequate corrective actions had been taken in response to the deficiencies identified during an inspection. No records of inspections of the sediment control devices were documented and available for review from June 1, 2012 through August 13, 2012.
 - c. Section G.4.e.2.C.vi - Permittee failed to maintain inspection and maintenance records on-site and available for review.
 - d. Section G.4.e.2.A.ii.f - Permittee failed to protect fill slopes by using measures to divert runoff away from the fill slopes to conveyance measures such as pipe slope drains or stable channels.
 - e. Section G.4.e.2.C.ii - Permittee failed to make provisions to control fugitive dust.
 - f. Section D.1-Permittee failed to operate and maintain all erosion control devices.
 - g. Section G.4.e.2.A.i.d - Permittee failed to seed and stabilize all temporary diversions immediately and prior to becoming functional.
 - h. Section G.4.e.2.A.ii - Permittee failed to provide storm drain inlet protection for sediment control.
 - i. Section G.4.e.2.A.i.c - Permittee failed to immediately reseed and mulch all areas where the seed failed to germinate adequately (uniform perennial vegetative cover with a density of 70%) within thirty (30) days after seeding and mulching.

5. On December 6, 2012, WVDEP personnel and representatives of WVDOT met to discuss the terms and conditions of this Order. During the meeting, a plan of corrective action (POCA) was submitted, which included WVDOT's responses to the violations included in 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 a request by WVDEP personnel, WVDOT shall submit for approval a supplement to the proposed POCA, submitted on December 6, 2012. If requested, the POCA supplement shall outline 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 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 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 permit and WV Legislative Rule violations, WVDOT shall be assessed a civil administrative penalty of sixteen thousand fifteen dollars (\$16,015) 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 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 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.

for Stanell W. All
Mr. Marvin Murphy
West Virginia Department of Transportation
Division of Highways

1-7-13
Date

Public Notice begin:



JAN 10 2013

Date

Public Notice end:

ENVIRONMENTAL
ENFORCEMENT

Date

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

Date



Many drop inlets do not have protection from sediments



Many drop inlets that have protection are not being maintained



Stabilization issues exist at many diversions



Sediment laden water has been exiting the site in an area where the prior inspection indicated a diversion should be constructed to carry the water to an adjacent basin



Silt fence has not been maintained in some locations



Sediments cleaned from trap are being dewatered next to Tygart Creek



Fill slope protection was removed and erosion is occurring at bridge approach



Diversions have not been stabilized prior to becoming functional



Basin has been cut off from main flow; consequently sediment laden water has been leaving the site



Sediment basins need maintained



Evidence of erosion and sediments leaving site where water was diverted around the sediment basin



No protection exists adjacent to Tygart Creek beside the rock diversion



Areas are in need of stabilization where permanent vegetation has failed



Provisions have not been made for fugitive dust



Areas that have reached final grade have not been stabilized



Diversions which have not been stabilized show evidence of erosion

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: WV DOH Mineral Wells Exchange Receiving Stream: Tygart 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#												
			2a	3a	3b	3c	4a	4d	4f	4g	4h	4i			
a)	Amount of Pollutant Released	1 to 3	1	1	1	1	1	1	1	1	1	1			
b)	Toxicity of Pollutant	0 to 3	0	1	1	1	1	1	1	1	1	1			
c)	Sensitivity of the Environment	0 to 3	0	1	1	1	1	1	1	1	1	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	0	1	1	1	1	1	1	1	1	1			
Average Potential for Harm Factor			0.4	1	1	1	1	1	1	1	1	1	No	No	No
2)	Extent of Deviation Factor	Factor Range													
	Degree of Non-Compliance	1 to 3	1	3	2	2	1	2	2	2	2	2			

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
2a	Minor	Minor	\$400	1	\$400
3a	Minor	Major	\$2,000	1	\$2,000
3b	Minor	Moderate	\$1,500	1	\$1,500
3c	Minor	Moderate	\$1,500	1	\$1,500
4a	Minor	Minor	\$1,000	1	\$1,000
4d	Minor	Moderate	\$1,500	1	\$1,500
4f	Minor	Moderate	\$1,500	1	\$1,500
4g	Minor	Moderate	\$1,500	1	\$1,500
4h	Minor	Moderate	\$1,500	1	\$1,500
4i	Minor	Moderate	\$1,500	1	\$1,500
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
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					\$13,900

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		\$1,390
6.2.b.4 - Compliance/noncompliance history	25		\$3,475
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	(\$1,390)
6.2.b.3 - Cooperation with the Secretary		10	(\$1,390)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$2,115
Penalty =			\$16,015

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

January 9, 2013

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

Dear Mr. Zeto:

**South Mineral Wells Interchange
Consent Order No.7735
Wood County**

Please find attached the signed order for the above subject project for further processing.

Should you have any questions, please contact this office at (304) 558-2804.

Very truly yours,

A handwritten signature in black ink, appearing to read "Darrell W. Allen".

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

DWA:Rb

Attachments