west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0495
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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: West Virginia Department of Transportation
Division of Highways
Greg Bailey, State Highway Engineer
1900 Kanawha Blvd. Bldg 5
Room A-164
Charleston WV 25305

DATE: April 30, 2015

ORDER NO.: 8121

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 is conducting land disturbance activity known as Corridor H Sections 01 through 05 located near Davis, Tucker County, West Virginia. WVDOT was issued WV/NPDES Water Pollution Control Permit No. WV0116637 on November 16, 2011.

2. On January 7, 2014, West Virginia Department of Environmental Protection (WVDEP) and WVDOT entered into Consent Order No. 7886. The Order was issued in response to WVDOT's permit violations, creations of conditions not allowable in waters of the State, and Total Recoverable Iron exceedances at the aforementioned site. The Order required WVDOT to submit a proposed plan of corrective action to WVDEP outlining action items and completion dates for how and when WVDOT would achieve compliance with all terms and conditions of its WV/NPDES permit and pertinent laws and rules.

3. On March 12, 2014, WVDEP personnel conducted an inspection of the facility after receiving complaints regarding muddy water leaving the site. During the inspection, a

violation of the following section of WV Legislative Rules was observed and documented:

a. 47CSR2 Sections 3.2.b and f-WVDOT caused conditions not allowable in waters of the State by creating distinctly visible color and sediment deposits in the receiving stream.

As a result of the aforementioned violation, Notice of Violation (NOV) No. W-14-47-06-202 was issued to WVDOT.

4. On April 3, 2014, WVDEP personnel conducted an inspection of the facility after receiving a complaint on April 2, 2014 concerning water quality in Beaver Creek. The subsequent investigation revealed that a sediment basin on the project failed and released muddy water and sediment into Beaver Creek. A violation of the following section of WV Legislative Rules was observed and documented:

   a. 47CSR2 Section 3.2.a-WVDOT caused conditions not allowable in waters of the State by creating distinctly visible floating, settleable, or suspended solids in the receiving stream.

   As a result of the aforementioned violation, NOV No. I-14-47-13-MJA was issued to WVDOT.

5. On August 5, 2014, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following section of WV Legislative Rules was observed and documented:

   a. 47CSR2 Sections 3.2.a and b-WVDOT caused conditions not allowable in waters of the State by creating distinctly visible suspended solids and sediment deposits in Beaver Creek.

   As a result of the aforementioned violation, NOV No. W-14-47-25-202 was issued to WVDOT.

6. On August 14, 2014, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following section of WV Legislative Rules was observed and documented:

   a. 47CSR2 Sections 3.2.a and b-WVDOT caused conditions not allowable in waters of the State by creating distinctly visible suspended solids and sediment deposits in Beaver Creek.

   As a result of the aforementioned violation, NOV No. W-14-47-29-202 was issued to WVDOT.

7. On August 22, 2014, WVDEP personnel conducted a review of facility records from the time period of June 30, 2013 through July 31, 2014. During this review, the following violations of the terms and conditions of WVDOT's WV/NPDES permit were observed:

a. Section A – Fifteen (15) exceedances of WVDOT's permit parameters were observed and documented (Table 1). These exceedances can be further defined as:
   i. Minor violations-four (4)
   ii. Moderate violations-seven (7)
   iii. Major violations-four (4)

8. On September 4, 2014, WVDEP personnel conducted an inspection of the facility. During the inspection, a violation of the following section of WV Legislative Rules was observed and documented:

   a. 47CSR2 Sections 3.2.b and f-WVDOT caused conditions not allowable in waters of the State by creating a distinctly visible color and sediment deposits in Beaver Creek.

   As a result of the aforementioned violation, NOV No. W-14-47-32-202 was issued to WVDOT.

9. On January 14, 2015, WVDEP personnel and representatives of WVDOT met to discuss the terms and conditions of this Order.

10. On February 8, 2015, WVDEP personnel conducted a review of facility records from the time period of June 30, 2013 through December 31, 2014. During this review, the following violations of the terms and conditions of WVDOT's WV/NPDES permit were observed:

    a. Section A – Thirty (30) exceedances of WVDOT's permit parameters were observed and documented (Table 1). These exceedances can be further defined as:
       i. Minor violations-seven (7)
       ii. Moderate violations-nineteen (19)
       iii. Major violations-four (4)

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. WV0116637 and Order No. 8121.

The plan of corrective action shall be submitted to:

WVDEP Environmental Inspector Supervisor
NE Regional Environmental Enforcement Office
22288 Northwestern Pike
Romney, WV 26757-8005

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 Legislative Rules and permit violations, WVDOT shall be assessed a civil administrative penalty of seventy-four thousand one hundred five dollars ($74,105) 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.

Gregory Bailey

Greg Bailey, State Highway Engineer
West Virginia Department of Transportation

5-6-2015
Date

Public Notice begin:

Date

Public Notice end:

Date

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

Date

RECEIVED
MAY 06 2015
ENVIRONMENTAL
ENFORCEMENT

Table One: WVDOT DMR Exceedance Summary

Outlet 004 DMR Exceedances - MAX. DAILY - 06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
10/13/14	Iron, total recoverable	mg/l	1.5	**6.82**	355%	-	X	-
12/31/14	Iron, total recoverable	mg/l	1.5	**6.69**	346%	-	X	-

Outlet 007 DMR Exceedances - MAX. DAILY - 06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
8/31/13	Iron, total recoverable	mg/l	1.5	**7.31**	387%	-	X	-
12/31/14	Iron, total recoverable	mg/l	1.5	**3.73**	149%	-	X	-

Outlet 010 DMR Exceedances - MAX. DAILY - 06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
8/31/13	Iron, total recoverable	mg/l	1.5	**18.5**	1133%	-	-	X
11/30/13	Iron, total recoverable	mg/l	1.5	**4.74**	216%	-	X	-
01/31/14	Iron, total recoverable	mg/l	1.5	**2.18**	45%	X	-	-
3/31/14	Iron, total recoverable	mg/l	1.5	**1.53**	2%	X	-	-
04/30/14	Iron, total recoverable	mg/l	1.5	**1.74**	16%	X	-	-
5/31/14	Iron, total recoverable	mg/l	1.5	**7.49**	399%	-	X	-
8/31/14	Iron, total recoverable	mg/l	1.5	**2.32**	55%	X	-	-
9/30/14	Iron, total recoverable	mg/l	1.5	**1.8**	20%	X	-	-
10/31/14	Iron, total recoverable	mg/l	1.5	**4.6**	207%	-	X	-
12/31/14	Iron, total recoverable	mg/l	1.5	**3.66**	144%	-	X	-

Outlet 011 DMR Exceedances - MAX. DAILY - 06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
8/31/13	Iron, total recoverable	mg/l	1.5	**1.83**	22%	X	-	-

Outlet 012 DMR Exceedances - MAX. DAILY - 06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
1/31/14	Iron, total recoverable	mg/l	1.5	**3.09**	106%	-	X	-
04/30/14	Iron, total recoverable	mg/l	1.5	**5.29**	253%	-	X	-
5/31/14	Iron, total recoverable	mg/l	1.5	**3.18**	112%	-	X	-
10/31/14	Iron, total recoverable	mg/l	1.5	**5.91**	294%	-	X	-
12/31/14	Iron, total recoverable	mg/l	1.5	**4.06**	171%	-	X	-

Outlet 014 DMR Exceedances - MAX. DAILY -06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
05/31/14	Iron, total recoverable	mg/l	1.5	**12.6**	740%	-	-	X
06/30/14	Iron, total recoverable	mg/l	1.5	**4.38**	192%	-	X	-
08/31/14	Iron, total recoverable	mg/l	1.5	**6.59**	339%	-	X	-
9/30/14	Iron, total recoverable	mg/l	1.5	**4.14**	176%	-	X	-
10/31/14	Iron, total recoverable	mg/l	1.5	**4.98**	232%	-	X	-
12/31/14	Iron, total recoverable	mg/l	1.5	**4.88**	225%	-	X	-

Table One: WVDOT DMR Exceedance Summary

Outlet 015 DMR Exceedances - MAX. DAILY -06/30/13 through 12/31/14						Degree of non-compliance		
Date	Parameter	Units	Permitted max. daily	Reported max. daily	% Exceedance	Min	Mod	Maj
04/30/14	**Iron, total recoverable**	mg/l	1.5	**16.4**	993%	-	-	X
06/30/14	**Iron, total recoverable**	mg/l	1.5	**14.2**	847%	-	-	X
8/31/14	**Iron, total recoverable**	mg/l	1.5	**1.59**	6%	X	-	-
10/31/14	**Iron, total recoverable**	mg/l	1.5	**9.45**	530%	-	X	-

Totals	Degree of non-compliance		
	Min	Mod	Maj
	7	19	4

Photo Attachment
WVDOT
March 12, 2014

1 Beaver Creek entering Blackwater River on March 12, 2014

2 Muddy water leaving Corridor H on March 12, 2014

Photo Attachment
WVDOT
March 12, 2014

3 Muddy water discharging from pond toward Beaver Creek on March 12, 2014

4 Muddy water from above mentioned pond entering Beaver Creek on March 12, 2014

Photo Attachment
WVDOT
March 12, 2014

5 Beaver Creek on March 12, 2014

6 Muddy water discharging from pond 11 on March 12, 2014

Photo Attachment
WVDOT
April 3, 2014

Conditions not allowable in Beaver Creek.

Photo Attachment
WVDOT
April 3, 2014

Sediment in wetlands area adjacent to Beaver Creek.

Photo Attachment
WVDOT
April 3, 2014

Dam breach and resultant sediment deposits.

Photo Attachment
WVDOT
August 5 and 14, 2014

Figure 1: August 5, 2014 - Beaver Creek crossing under Rt 93 in Section 5

Figure 2: August 5, 2014 - Mud in ditch in Section 5

Photo Attachment
WVDOT
August 5 and 14, 2014

Figure 3: August 5, 2014 - Muddy water in ditch draining down hole in ditch bottom

Figure 4: August 5, 2014 - Muddy water entering Beaver Creek through the ground

Photo Attachment
WVDOT
August 5 and 14, 2014

Figure 5: August 14, 2014 - Beaver Creek at Davis, Camp 70 Bridge

Figure 6: August 14, 2014 - Mud entering Beaver Creek in Section 5

Photo Attachment
WVDOT
August 5 and 14, 2014

Figure 7: August 14, 2014 - Floc block in ditch bottom hole

Figure 8: August 14, 2014 - Pond 13 (Section 5) discharging sediment laden water

Photo Attachment
WVDOT
September 4, 2014

1 Beaver Creek in Section 4

2 Beaver Creek in Section 4 near Section 5

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: WVDOT **Receiving Stream:** Beaver 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#												
			3a	4a	5a	6a	7ai	7aii	7aiii	8a					
a)	Amount of Pollutant Released	1 to 3	2	2	2	2	1	1	1	2					
b)	Toxicity of Pollutant	0 to 3	1	1	1	1	1	1	1	1					
c)	Sensitivity of the Environment	0 to 3	1	1	1	1	1	1	1	1					
d)	Length of Time	1 to 3	1	1	1	1	1	1	1	1					
e)	Actual Exposure and Effects thereon	0 to 3	2	2	2	2	1	1	1	2					
	Average Potential for Harm Factor		1.4	1.4	1.4	1.4	1	1	1	1.4	No	No	No	No	No
2)	**Extent of Deviation Factor**	**Factor Range**													
	Degree of Non-Compliance	1 to 3	3	3	3	3	1	2	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.

Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.

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

		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
3a	Moderate	Major	$4,400	1	$4,400
4a	Moderate	Major	$4,400	1	$4,400
5a	Moderate	Major	$4,400	1	$4,400
6a	Moderate	Major	$4,400	1	$4,400
7ai	Minor	Minor	$1,000	4	$4,000
7aii	Minor	Moderate	$1,500	7	$10,500
7aiii	Minor	Major	$2,000	4	$8,000
8a	Moderate	Major	$4,400	1	$4,400
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					$44,500

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		$8,900
6.2.b.4 - Compliance/noncompliance history	25		$11,125
6.2.b.6 - Economic benefits - (flat monetary increase)	$14,000		$14,000
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	($4,450)
6.2.b.5 - Ability to Pay			$0
Penalty Adjustments			**$29,605**
Penalty =			**$74,105**

Estimated Economic Benefit Item	Estimated Benefit ($)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	$14,000
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	**$14,000**
Comments:	Avoided cost of initial installation and two (2) years of maintenance of pollution control equipment.