

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

SCOTT G. MANDIROLA, Director,  
Division of Water and Waste Management,  
West Virginia Department of Environmental  
Protection,

*Plaintiff,*

v.

Civil Action No. 09-C-98H

PPG INDUSTRIES, INC.,

*Defendant.*

**CONSENT ORDER**

Upon agreement to the terms herein by the parties, Scott Mandirola, Director of the Division of Water and Waste Management (hereinafter "Director") of the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and PPG Industries, Inc. (hereinafter "PPG"), the parties agree that it is their intent to resolve the violations of the West Virginia Water Pollution Control Act, West Virginia Code §§ 22-11-1, *et seq.*, listed in Attachment 1, through a Consent Order with civil penalties and other duties imposed as expressed herein. After consideration of public comments on this Consent Order, as proposed, and the parties' responses thereto, the Court enters this Consent Order.

**I. JURISDICTION AND VENUE**

This Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code § 22-11-22. Venue is proper in this Circuit Court pursuant to W. Va. Code § 22-11-22 because PPG is located and doing business in this judicial circuit and because the violations of the West Virginia Water Pollution Control Act (hereinafter "WPCA"), W. Va. Code §§ 22-11-1, *et*

*seq.*, and the rules promulgated pursuant to the WPCA that are the subject of this action occurred in this judicial circuit.

## II. APPLICATION OF CONSENT ORDER

This Consent Order applies to and is binding upon WVDEP and to PPG and its successors, as the permittee of West Virginia National Pollutant Discharge Elimination System (hereinafter “WV/NPDES”) Permit No. WV0004359.

## III. FINDINGS OF FACT

The Director filed a Complaint in the Circuit Court of Marshall County, West Virginia, against PPG as set forth above in the caption of this Consent Order, which alleges that PPG violated the WPCA through discharges of pollutants from its manufacturing facility in Natrium, Marshall County, West Virginia, which are covered by WV/NPDES Permit No. WV0004359 (hereinafter “Permit”).

A. The Permit was issued pursuant to the WVDEP’s authority under the WPCA and pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency under the federal Clean Water Act, 33 U.S.C. § 1342, for the issuance of NPDES permits.

B. PPG has reported the quality of its discharges and other information to the WVDEP pursuant to the terms and conditions of the Permit. This reporting has occurred through submittal of monthly Discharge Monitoring Reports (hereinafter “DMRs”) as prescribed by the Division of Water and Waste Management of the WVDEP.

C. The WVDEP has evaluated the DMRs, agency records regarding the Permit, and other related information and has completed an evaluation of PPG’s compliance record.

D. The parties have agreed that the civil penalties to be paid by PPG pursuant hereto satisfy all claims that may be asserted for civil penalties under the WPCA for the discharge of any pollutant regulated by the Permit from April 1, 2006 through October 31, 2009.

E. This Consent Order shall act as a bar, full accord, and satisfaction and have the effect of *res judicata* for any claim or cause of action brought or that may have been brought, including those seeking injunctive relief, for known violations during the period from April 1, 2006 through October 31, 2009 pursuant to 33 U.S.C. § 1365(a)(1)(A).

#### IV. ORDER FOR COMPLIANCE

Since the date that the Complaint was filed, PPG has completed the following activities leading up to the establishment of a corrective action plan as established by this Order:

##### A. Water Well

1. Completed bench scale testing and evaluation of three different technologies for the treatment of mercury in the water well.
2. Completed a feasibility analysis of each of the three different technologies.

##### B. Mercury Treatment Reliability

1. Installed and made operational a redundant acid addition pump.
2. Installed a recycle line on the caustic mercury holding tank.
3. Routed the caustic mercury holding tank discharge line to the mercury surge tank.
4. Improved containment for mercury-containing material in the mercury circuit north area and the hydrogen seal by installing paving and curbing to redirect mercury-contaminated water to the mercury treatment system so that it can be treated before being discharged into the sewer system.

5. Extended the discharge line from the mercury circuit sumps to the surge tank.
6. Installed an automatic shut-off valve on the outlet of the ponds.

C. **Chlorine Sewer**

1. Selected a contractor for lining the contaminated portion of the chlorine sewer.
2. As of the date of this Order, PPG has completed 100% of its contaminated sewer lining project.

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 Court that PPG shall engage in a corrective action plan as follows:

A. **Water Well**

1. By August 1, 2010, PPG shall complete a pilot plant testing for the chosen technology.
2. By December 31, 2010, PPG shall complete a detailed engineering plan for the chosen technology.
3. By July 31, 2011, the chosen technology capable of treating water to a level that ensures compliance with effluent limitations at PPG's outfalls shall be installed and operational.

B. **Mercury Treatment Reliability:** PPG shall change out the primary carbon absorbent by June 1 of each calendar year.

C. **Chlorine Sewer:** By June 30, 2010, PPG shall submit to WVDEP a report detailing the work that has been completed since the filing of the Complaint and the total cost of the sewer lining project.

V. CIVIL PENALTY

A. In settlement of the WVDEP's claims in its Complaint relating to reported violations of the WPCA and Permit and for relief under W. Va. Code § 22-11-22, PPG, without admitting liability for any alleged violations or agreeing to the appropriateness of the civil penalty expressed herein except in the context of this Consent Order, agrees for purposes of the settlement provided herein that it shall pay a total civil penalty of \$1,370,000, as described in Attachment 2 appended hereto, and set forth below.

B. PPG shall pay a total cash penalty of \$1,020,000 by certified or cashier's check to the WVDEP for deposit in the WVDEP's Water Quality Management Fund, payable in four quarterly installments as follows:

1. First installment of \$255,000 due by August 15, 2010;
2. Second installment of \$255,000 due by October 15, 2010;
3. Third installment of \$255,000 due by January 15, 2011;
4. Fourth and final installment of \$255,000 due by April 15, 2011.

C. Payments shall be mailed to the following address:

Michael Zeto, Chief Inspector  
West Virginia Department of Environmental Protection  
Environmental Enforcement  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

D. The remaining \$350,000 of the total civil penalty shall be satisfied by PPG by completing the Supplemental Environmental Projects (hereinafter "SEPs") described in Article VI below. The maximum allowable amount for a SEP shall not be construed to establish a dollar limitation on PPG's obligation to completely perform that SEP. PPG shall fully complete each SEP contemplated hereby without regard to cost. The maximum amount PPG may utilize as civil

penalties for completion of all SEPs shall not exceed \$350,000. For any SEP that PPG may complete for a lower cost than the maximum amount allowable for that SEP, PPG shall pay the difference between its cost and the maximum amount allowable by sending a certified or cashier's check to the WVDEP for deposit in the WVDEP's Water Quality Management Fund by May 31, 2013.

## VI. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

A. PPG may satisfy the remaining amount of the settlement-value civil penalty provided for in Article V by undertaking and completing one or more SEPs. A SEP is a project or activity which improves, protects, or reduces risks to public health or the environment at large, and that PPG is not required to undertake pursuant to either the Permit or any federal, state, or local law or regulation, or prior enforcement action against PPG.

B. As one of its SEPs, PPG shall make a three-year commitment to conduct household hazardous waste and/or electronic waste collection days. PPG shall commence this SEP no later than sixty (60) days following the entry of this Order and shall complete this SEP by April 30, 2013.

C. In addition, PPG shall propose one or more additional SEPs to satisfy the remaining amount of the settlement-value civil penalty. Within thirty (30) days after entry of this Consent Order, PPG shall submit for approval a written proposal to the Chief Inspector, Environmental Enforcement, of the additional SEP(s) it has selected. PPG shall commence any additional SEP(s) within thirty (30) days of receiving WVDEP's approval for the proposed SEP(s). Subject to WVDEP approval of the additional SEP(s), PPG shall complete the additional SEP(s) by April 30, 2013. In the event that WVDEP and PPG cannot agree upon additional SEPs, either party may submit the matter to this Court for resolution.

D. PPG shall maintain an accounting record for each SEP using generally accepted principles of accounting and shall provide a report of expenditures to WVDEP for each SEP at least quarterly or more frequently if so requested.

E. If completion of any SEP is prevented for reasons not due to PPG's fault or bad faith, then the parties agree they shall meet in good faith to negotiate an alternative SEP. In the event the parties are unable to negotiate an alternative SEP, the Court shall retain jurisdiction to resolve the remaining dispute. The parties further recognize that the obligation and cost for achieving compliance with PPG's Permit shall not be separated from, and shall remain with, PPG, and cannot be considered to fulfill PPG's SEP obligations under this Order.

#### VII. STIPULATED PENALTIES

A. In the event PPG violates any term or condition of its Permit, PPG shall be obligated to pay the following stipulated penalties to WVDEP:

1. For the violation of a daily maximum limit PPG shall pay \$1,000 per violation.
2. For the violation of a monthly average limit PPG shall pay:
  - a. \$3,000 per violation if the concentration is less than 300% of the permit limit;
  - b. \$6,000 per violation if the concentration is equal to or greater than 300% of the permit limit.

B. For failure to take or complete any step outlined in the corrective action plan set forth in Article IV herein or to submit any report as required by Article VIII herein, PPG shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the 1<sup>st</sup> through 15<sup>th</sup> day of noncompliance, PPG shall pay \$500 per day per violation;

- b. For the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance, PPG shall pay \$750 per day per violation;
- c. For any period of noncompliance after the 30<sup>th</sup> day, PPG shall pay \$1,000 per day per violation.

C. Stipulated penalties shall be payable within thirty (30) days of receipt of a written demand from the WVDEP. Such payments shall be made by certified or cashier's check payable to the West Virginia Department of Environmental Protection and delivered to the address specified in Article V for deposit in the Water Quality Management Fund.

D. The stipulated penalties provided herein are an enforcement action pertaining only to the requirements of this Consent Order and are in addition to other remedies and sanctions available to the WVDEP by reason of PPG's failure to comply with the requirements of the Consent Order, the WPCA, and/or its Permit. Any other provision of the Permit not described or set forth in this Consent Order or its attachments shall be sanctioned as provided by the WPCA or the regulations governing NPDES permits.

E. The schedule of stipulated penalties provided herein is effective from November 1, 2009 through July 1, 2011.

#### **VIII. QUARTERLY REPORTS**

A. From the date of entry of this Consent Order, PPG shall submit quarterly compliance reports to the WVDEP for activities described in Article IV (Order for Compliance) and Article VI (SEPs) until all remedial measures and SEPs described therein are completed. Each quarterly report shall be submitted to WVDEP within thirty (30) days from the final day of each quarter. The compliance reports shall indicate what has been accomplished since the submittal of the prior compliance report, whether PPG is on the schedule required by this Consent Order or, if not on

schedule, an explanation of why PPG is behind schedule, how far it is behind schedule, and what measures are being taken to get back on schedule.

B. In addition to the quarterly compliance reports, PPG shall submit a report to the WVDEP no later than July 1, 2012 describing the status of the actions PPG has taken or is taking to comply with the water quality criteria for mercury before the elimination of the mixing zone for mercury on the Ohio River, currently scheduled to expire on October 13, 2013. This report, as well as the quarterly compliance reports, shall be mailed to Michael Zeto, Chief Inspector, at the address specified in Article V.

#### **IX. FORCE MAJEURE**

A. If any event occurs that causes or may cause a violation of any provision of this Consent Order by PPG, PPG shall notify the WVDEP in writing within ten (10) days of the date on which it had knowledge or should have had knowledge that the event may or will cause a violation. Writing may include the use of electronic mail at an e-mail address provided for the Chief Inspector of the Division of Water and Waste Management. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and/or to be taken by PPG to minimize the violation, and the timetable by which those measures will be implemented. PPG will adopt all measures to avoid or minimize any such violation. PPG shall make all efforts to identify events that cause or may cause a violation of this Consent Order.

B. If the WVDEP agrees that any violation of this Consent Order is caused by circumstances reasonably beyond the control of PPG, PPG shall be excused as to that violation for the period of time the violation continues due to such circumstances. PPG's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event the WVDEP does not agree, then PPG may submit the matter to this Court for

resolution. The burden of proving that any delay was caused by circumstances reasonably beyond the control of PPG and the length of such delay shall rest with PPG. Failure by PPG to comply with the notice requirements in Article IX shall render Article IX void and of no force and effect as to the particular incident involved and shall constitute a waiver of PPG's rights under this provision to obtain an extension of its obligations based on that incident.

C. Compliance with any requirement of this Consent Order, by itself, shall not constitute compliance with any other requirement. PPG must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

D. Article IX shall not be applied to extend the deadline of July 1, 2012, by which PPG shall submit a report to the WVDEP describing the status of the actions PPG has taken or is taking to comply with the water quality criteria for mercury before the elimination of the mixing zone for mercury on the Ohio River.

**X. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION**

The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Order until the Order is terminated as set forth below. Additionally, should either party believe that the other has failed or is failing to comply with the terms of this Order, it may petition this Court for a resolution of the issue.

**XI. MODIFICATIONS**

Should any person seek to intervene in the proceeding before the Circuit Court of Marshall County and thereafter challenge this Consent Order upon entry as a final order and judgment, whether the challenge is in the form of any appeal to the Supreme Court of Appeals or a collateral challenge in the federal court of the Northern District of West Virginia, the parties agree that nothing herein prohibits PPG from seeking relief from the appropriate tribunal to stay its obligations

expressed herein until such time that any appeal or challenge is completed and not subject to further review. Provided, however, that PPG shall not be entitled to a stay or other relief from liability for the civil penalties for which Article V herein provides or the stipulated penalties for which Article VII herein provides.

## **XII. PERMITS AND OTHER LAWS AND REGULATIONS**

This Consent Order is not, and shall not be interpreted to be, a permit or modification of a permit under the WPCA, nor shall it relieve PPG of any other obligation imposed by the WPCA, its Permit, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve PPG of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Order. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

## **XIII. PUBLIC NOTICE**

The parties acknowledge and agree that final approval of this Consent Order is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. PPG shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Consent Order. The public shall have at least thirty (30) days in which to make any comments on this Consent Order and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Consent Order if warranted based on comments received during the period for public comments. If the WVDEP makes no changes in response to public comments, PPG consents to entry of this Consent Order without further notice. If for any reason this Court should decline to approve this Consent Order in the form presented, this agreement is voidable at the sole discretion of the WVDEP and the terms of the agreement may not be used as evidence in any litigation between the parties.

**XIV. EFFECTIVE DATE**

The effective date of this Consent Order shall be the date upon which it is entered by the Court as a final judgment and order.

**XV. TERMINATION**

Termination of this Consent Order shall be by order of the Court upon application by either party, provided that all of the following conditions have been met: (1) PPG has achieved complete compliance with all requirements of this Consent Order; (2) PPG has paid all civil and stipulated penalties required herein; (3) All motions and other proceedings concerning this Consent Order have been completed and are no longer subject to further judicial review and all relief resulting from such motions or other proceedings have been fully satisfied.

**XVI. SIGNATORIES AUTHORIZED**

Each of the signatories to this Consent Order certifies that she or he is fully authorized to enter into the terms and conditions of this Consent Order and to bind legally the party to the Consent Order so represented by her or him.

It is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
DAVID W. HUMMEL, JUDGE

We hereby consent to the entry of this Order:

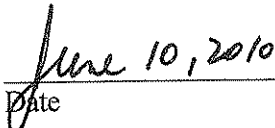
\_\_\_\_\_  
Scott G. Mandirola, Director, Division  
of Water and Waste Management  
West Virginia Department of Environmental Protection

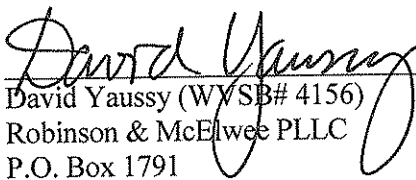
\_\_\_\_\_  
Date

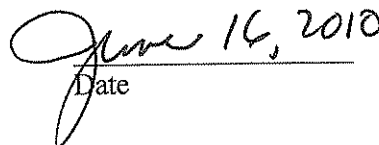
\_\_\_\_\_  
Jennifer L. Hughes (WVSB# 9676)  
Office of Legal Services  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304  
(304) 926-0499 x. 1702  
*Counsel for Plaintiff*

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
PPG INDUSTRIES, INC.  
By Michael McGarry

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
David Yaussy (WVSB# 4156)  
Robinson & McElwee PLLC  
P.O. Box 1791  
Charleston, WV 25326  
(304) 347-8330  
*Counsel for Defendant*

  
\_\_\_\_\_  
Date

### Attachment 1

<b>Outlet 004 DMR Exceedances - AVG. MONTHLY - April 2006 thru October 2009</b>				
<b>Date</b>	<b>Parameter</b>	<b>Units</b>	<b>Permitted avg. monthly</b>	<b>Reported avg. monthly</b>
Sept. 2006	Mercury, Total	µg/l	0.0120	0.0430
Dec. 2006	Mercury, Total	µg/l	0.0120	0.0186
Jan. 2007	Mercury, Total	µg/l	0.0120	0.0142
Feb. 2007	Mercury, Total	µg/l	0.0120	0.0266
Mar. 2007	Mercury, Total	µg/l	0.0120	0.0423
Apr. 2007	Mercury, Total	µg/l	0.0120	0.0686
Feb. 2008	Iron, Total Recoverable	mg/l	0.6200	1.4600
Mar. 2008	Iron, Total Recoverable	mg/l	0.6200	1.4000
Aug. 2008	Copper, Total Recoverable	mg/l	0.00574	0.0100
Aug. 2008	Iron, Total Recoverable	mg/l	0.6200	1.4640
Feb. 2009	Iron, Total Recoverable	mg/l	0.6200	1.0800

<b>Outlet 004 DMR Exceedances - MAX. DAILY - April 2006 thru October 2009</b>				
<b>Date</b>	<b>Parameter</b>	<b>Units</b>	<b>Permitted max. daily</b>	<b>Reported max. daily</b>
Sept. 2006	Mercury, Total	µg/l	0.0180	0.0430
Dec. 2006	Mercury, Total	µg/l	0.0180	0.0186
Feb. 2007	Mercury, Total	µg/l	0.0180	0.0266
Mar. 2007	Mercury, Total	µg/l	0.0180	0.0423
Apr. 2007	Mercury, Total	µg/l	0.0180	0.0686
Aug. 2008	Copper, Total Recoverable	mg/l	0.0170	0.0180
Aug. 2008	Iron, Total Recoverable	mg/l	2.1000	2.5100

Outlet 009 DMR Exceedances - AVG. MONTHLY - April 2006 thru October 2009				
Date	Parameter	Units	Permitted avg. monthly	Reported avg. monthly
July 2006	Chlorine, Total Residual	mg/l	0.0310	0.0970
July 2007	Mercury, Total	µg/l	0.0120	0.6940
Aug. 2007	Copper, Total Recoverable	mg/l	0.0170	0.0190
Sept. 2007	Flow	mgd	42.5000	49.2000
Jan. 2008	Mercury, Total	µg/l	0.1430	0.4930
Mar. 2008	Copper, Total Recoverable	mg/l	0.0170	0.0180
May 2008	Mercury, Total	µg/l	0.1430	0.1550
Dec. 2008	Mercury, Total	µg/l	0.1430	0.1690
Apr. 2009	Copper, Total Recoverable	mg/l	0.0170	0.0190
Apr. 2009	Mercury, Total	µg/l	0.1430	0.1560
Aug. 2009	Mercury, Total	µg/l	0.1430	0.2840
Oct. 2009	Mercury, Total	µg/l	0.3860	0.2840

Outlet 009 DMR Exceedances - MAX. DAILY - April 2006 thru October 2009				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
July 2006	Chlorine, Total Residual	mg/l	0.0630	1.9300
Apr. 2007	Chlorine, Total Residual	mg/l	0.0630	0.1020
July 2007	TSS	mg/l	100.0000	124.0000
July 2007	Mercury, Total	µg/l	0.0230	0.9450
July 2007	Mercury, Total	µg/l	0.0230	0.8550
July 2007	Mercury, Total	µg/l	0.0230	0.6430
July 2007	Mercury, Total	µg/l	0.0230	0.3420
Nov. 2007	Mercury, Total	µg/l	0.2650	0.3450
Jan. 2008	Mercury, Total	µg/l	0.2650	1.9820
Feb. 2008	TSS	mg/l	100.0000	804.0000
Apr. 2008	Sulfide, Total (as S)	mg/l	0.5000	1.1000
May 2008	Sulfide, Total (as S)	mg/l	0.5000	0.6000
May 2008	Mercury, Total	µg/l	0.2650	0.2830
Aug. 2008	Mercury, Total	µg/l	0.2650	0.5470
Oct. 2008	Chloride (as Cl)	mg/l	2,490.0000	2,775.0000
Dec. 2008	Mercury, Total	µg/l	0.2650	0.6080
Dec. 2008	Mercury, Total	µg/l	0.2650	0.3304
Dec. 2008	Mercury, Total	µg/l	0.2650	0.3996
Mar. 2009	Mercury, Total	µg/l	0.2650	0.5280
Apr. 2009	Copper, Total Recoverable	mg/l	0.0350	0.0470
Apr. 2009	Chloride (as Cl)	mg/l	2,490.0000	2,795.0000
Apr. 2009	Mercury, Total	µg/l	0.2650	0.2760
Aug. 2009	Mercury, Total	µg/l	0.2650	1.0080
Oct. 2009	Mercury, Total	µg/l	0.2650	0.9720

Outlet 011 DMR Exceedances - MAX. DAILY - April 2006 thru October 2009				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
Sept. 2006	TSS	mg/l	100.0000	119.0000

Outlet 012 DMR Exceedances - AVG. MONTHLY - April 2006 thru October 2009				
Date	Parameter	Units	Permitted avg. monthly	Reported avg. monthly
Aug. 2007	Aluminum, Total Recoverabl	mg/l	0.0579	0.1690

Outlet 012 DMR Exceedances - MAX. DAILY - April 2006 thru October 2009				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
Aug. 2007	Aluminum, Total Recoverabl	mg/l	0.1610	0.1690

Outlet 109 DMR Exceedances - MAX. DAILY - April 2006 thru October 2009				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
May 2008	TSS	mg/l	60.0000	120.0000

Attachment 2

**\$1,040,000**  
**+ \$330,000**  

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**\$1,370,000**

**Discharge violation penalty**  
**Economic benefit assessment**  
**Total Civil Penalty**

**\$1,020,000**  
**+ \$350,000**  

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**\$1,370,000**

**Cash penalty**  
**SEPs**  
**Total Civil Penalty**