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west virginia department of environmental protection

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Division of Water and Waste Management  
601 57<sup>th</sup> 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](http://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      DATE: April 11, 2011  
West Virginia Division of Highways  
Attn: Marvin Murphy, PE, State Highway Engineer  
1900 Kanawha Blvd, Building 5, Rum A-164      ORDER NO.: 7235  
Charleston, WV 25305

**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 site located on CR 16/69, McDowell County, West Virginia. WVDOT was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR103481 on December 13, 2007.
2. On March 10, 2011 West Virginia Department of Environmental Protection (WVDEP) personnel conducted an inspection of the facility. During the inspection the following violations of WV Legislative Rule and the terms and conditions of WVDOT's permit were observed and documented:
  - a. Permittee failed to seed and stabilize all temporary diversions prior to becoming functional (Section G.4.e.2.A.i.d.).
  - b. Permittee has failed to initiate stabilization measures on all areas where construction activities have permanently ceased for more than 7 days (Section G.4.e.2.A.i.).
  - c. Permittee failed to properly implement controls: improperly installed/maintained ditch checks and improper or lack of drop inlet protection (Section G.4.e.2.).

Promoting a healthy environment.

- d. Permittee has allowed sediment-laden water to leave the site without going through an appropriate device (Section G.4.e.2.A.ii.j).
- e. Permittee has caused conditions not allowable in State waters by allowing sediment deposits on the bottom of the stream (47CSR 2 Section 3.2.b).

**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.
2. Within twenty (20) days of entry 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/or pertinent laws and rules. The plan of corrective action shall be submitted to:

**WVDEP Environmental Inspector Supervisor  
SE Regional Environmental Enforcement Office  
254 Industrial Drive  
Oak Hill, WV 25901**

A copy of this plan shall be submitted to:

**Chief Inspector  
Environmental Enforcement - Mail Code #031328  
WVDEP  
601 57<sup>th</sup> 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 Legislative Rule and permit violations, WVDOT shall be assessed a civil administrative penalty of seven thousand two hundred thirty dollars (\$7,230) to be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund within thirty (30) days of entry 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 57<sup>th</sup> 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.

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Marvin Murphy  
West Virginia Department of Transportation

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Date

Public Notice begin: \_\_\_\_\_  
Date

Public Notice end: \_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date

*revised January 2011*