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west virginia department of environmental protection

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Division of Water and Waste Management  
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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: Mr. Marvin G. Murphy, P.E.  
State Highway Engineer  
West Virginia Department of Transportation  
Division of Highways  
1900 Kanawha Blvd., Bldg. 5  
Room A-164  
Charleston, WV 25303

DATE: January 21, 2011

ORDER NO.: 7148

**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 the West Virginia Department of Transportation, Division of Highways (hereinafter "WVDOH").

**FINDINGS OF FACT**

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

1. WVDOH operates a land disturbance associated with construction activity, referred to as Relocation of WV Rt. 892, located in Parkersburg, Wood County, West Virginia. WVDOH was issued WV/NPDES Water Pollution Control Permit No. WV0115924, General Permit Registration No. WVR100080 on February 6, 2003.
2. On December 1, 2008, the extended deadline to re-register for coverage under the new General Permit for Storm Water Associated with Construction Activities elapsed. All sites permitted prior to January 1, 2006, that are not completed, adequately stabilized, and terminated, must re-register for coverage under the new General Permit.
3. On June 10, 2009, West Virginia Department of Environmental Protection (WVDEP) personnel inspected the site and observed the following:

**Promoting a healthy environment.**

- a. All cut slopes throughout the site have eroded and are not adequately stabilized. The rock checks and sumps in the diversions are not being properly maintained. Additional stabilization measures are needed in the slip area, along the West/Northbound off ramp.
- b. As of December 1, 2008, the extended deadline to re-register for coverage under the new General Permit for Storm Water Associated with Construction Activities elapsed. The site is not adequately stabilized, a registration application under the new General Permit has not been submitted and approved, thus the site was discharging pollutants from a point source without authorization pursuant to a WV/NPDES permit, in violation of West Virginia Code Chapter 22, Article 11, Section 1 et seq. (22-11-1)

Notice of Violation I09-54-006-JCC was issued.

4. On November 10, 2009, WVDEP personnel inspected the site and observed the following:
  - a. All cut slopes throughout the site have eroded and are not adequately stabilized. The rock checks and sumps in the diversions were full of sediment.
  - b. The site continues to discharge pollutants from a point source without authorization pursuant to a WV/NPDES permit, in violation of 22-11-1. The site continues to lack adequate stabilization and a registration application under the new General Permit has still not been submitted and approved.

Notice of Violation I09-54-024-JCC was issued.

5. On April 5, 2010, WVDEP issued Order No. 6950 to the WVDOH regarding this project. Contained in this Order, under the Order for Compliance section, is the following:
  - a. WVDOH shall immediately take all measures to initiate compliance with all pertinent laws and rules.
  - b. Within 15 days of entry of this Order, WVDOH shall submit for approval a proposed corrective action plan and schedule, outlining how and when WVDOH will achieve compliance with all terms and conditions of the permit and/or pertinent laws and rules.
6. On April 20, 2010, WVDEP personnel inspected the site and observed the following:
  - a. All cut slopes throughout the site have eroded and are not adequately stabilized. The rock checks and sumps in the diversions are full of sediment and need cleaned out.
  - b. The site continues to discharge pollutants from a point source without authorization pursuant to a WV/NPDES permit, in violation of 22-11-1. The site continues to lack adequate stabilization and a registration application under the new General Permit has still not been submitted and approved.
  - c. WVDOH failed to comply with Order No. 6950 by failing to submit for approval a proposed corrective action plan and schedule outlining how and when WVDOH will achieve compliance with all terms and conditions of the permit and/or pertinent laws and rules.

Notices of Violation I10-54-014-JCC and I10-54-015-JCC were issued.

7. On October 5, 2010, WVDEP personnel inspected the site and observed the following:
  - a. Road construction at this site is complete.
  - b. All cut slopes throughout the site have eroded and are not adequately stabilized. Several ditch checks and sumps in the diversions are full of sediment and need cleaned out.
  - c. The site continues to discharge pollutants from a point source without authorization pursuant to a WV/NPDES permit, in violation of 22-11-1. The site continues to lack adequate stabilization and a registration application under the new General Permit has still not been submitted and approved.
  - d. WVDOH has still failed to comply with Order No. 6950 by failing to submit for approval a proposed corrective action plan and schedule outlining how and when WVDOH will achieve compliance with all terms and conditions of the permit and/or pertinent laws and rules.

Notices of Violation I10-54-018-JCC and I10-54-019-JCC were issued.

8. This relocation of WV Rt. 892 project is part of a larger project referred to as "Corridor D". The "Corridor D Project" includes multiple worksites, including, but not limited to a Roadway Cut Stabilization project along Route 47. At multiple sites within the "Corridor D Project" soil stabilization and sediment control continue to be a concern even after construction at the site is complete. As the "Corridor D Project" work continues, discussions have taken place between WVDOH and WVDEP personnel about the need for permanent sediment control structures at multiple locations as well as an Individual WV/NPDES permit to properly address point source discharges from these projects.
9. A meeting was held between WVDEP and WVDOH on January 11, 2011 to discuss the terms of 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. WVDOH shall immediately take all measures to initiate compliance with all pertinent laws and rules.
2. Within fifteen (15) days of entry of this Order, WVDOH shall submit for approval a proposed corrective action plan and schedule, outlining action items and completion dates for how and when WVDOH will achieve compliance with all terms and conditions of its WV/NPDES permit and/or pertinent laws and rules. The corrective action plan shall be submitted to:

**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 57<sup>th</sup> Street SE  
Charleston, WV 25304**

Upon approval, the corrective action plan and schedule shall be incorporated into and become part of this Order, as if fully set forth herein. Failure to submit an approvable corrective action plan and schedule or failure to adhere to the approved schedule is a violation of this Order.

3. Within thirty (30) days of entry of this Order, WVDOH shall submit for approval an application for an Individual WV/NPDES permit to address discharges from the Corridor D Project.
4. Within thirty (30) days of entry of this Order, WVDOH shall submit for approval a stabilization plan, as well as a maintenance plan for this site. This plan shall be submitted to:

**Construction Stormwater - Permitting Section  
DWWM  
601 57<sup>th</sup> Street  
Charleston, WV 25304**

5. Because of WVDOH's West Virginia Code violations, WVDOH shall be assessed a civil administrative penalty of fifteen thousand two hundred thirty dollars (\$15,230) 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**

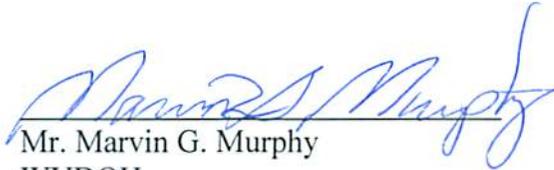
6. Beginning with the effective date of this Order, WVDOH shall be liable for stipulated penalties for violations of items one (1) through five (5) of the Order for Compliance of this Order. These stipulated penalties shall be effective until termination of this Order.

For everyday WVDOH fails to comply with all terms and conditions of this Order shall result in payment of a stipulated penalty of \$1,000 per day per violation. These penalties shall be due upon demand by the WVDEP. The payments shall be sent to the address in paragraph five (5) of this Order for Compliance.

### **OTHER PROVISIONS**

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

  
Mr. Marvin G. Murphy  
WVDOH

2-1-11  
Date

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

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

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

\_\_\_\_\_  
Date



- Sumps along on and off ramps need cleaned out. 4-20-10



- Slopes have eroded and lack adequate stabilization. 4-20-10



- Slopes have eroded and lack adequate stabilization. 4-20-10



- Slopes have eroded and lack adequate stabilization. 4-20-10



- Cut slopes not stabilized and several ditch checks and sumps need to be cleaned out.



- Several ditch checks and sumps are full and need to be cleaned out.



- Cut slopes are not adequately stabilized and have severely eroded.



- Several ditch checks and sumps are full and need to be cleaned out.



- Cut slopes are not adequately stabilized and have severely eroded.

## Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

WVDOH

Receiving Stream:

Ohio River

Treatment System Design Maximum Flow: N/A MGD

Treatment System Actual Average Flow: N/A MGD (if known)

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

1)	Potential for Harm Factor	Factor Range	FOF#													
			6b	6c	7b	7c										
a)	Amount of Pollutant Released	1 to 3	1	1	1	1										
b)	Toxicity of Pollutant	0 to 3	1	1	1	1										
c)	Sensitivity of the Environment	0 to 3	1	1	1	1										
d)	Length of Time	1 to 3	3	1	3	3										
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1										
<b>Average Potential for Harm Factor</b>			1.4	1	1.4	1.4	No									
2)	Extent of Deviation Factor	Factor Range														
	Degree of Non-Compliance	1 to 3	3	3	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.





## 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 -			\$0
6.2.b.4 - Compliance/noncompliance history			\$0
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			\$0
6.2.b.3 - Cooperation with the Secretary			\$0
6.2.b.5 - Ability to Pay			\$0
<b>Penalty Adjustments</b>			<b>\$30</b>
<b>Penalty =</b>			<b>\$15,230</b>

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	
<b>Estimated Economic Benefit</b>	<b>\$0</b>
<b>Comments:</b>	