



west virginia department of environmental protection

Division of Water and Waste Management
601 57th 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

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

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

DATE: January 26, 2012

ORDER NO.: 7487

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, Division of Highways (hereinafter "WVDOT").

FINDINGS OF FACT

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

1. WVDOT operates a land disturbance associated with construction activity, referred to as King Coal Highway Red Jacket Mountainview Paving located near Red Jacket, Mingo County, West Virginia. WVDOT was issued WV/NPDES Water Pollution Control Permit No. WV0115924, Registration No. WVR104797, on January 12, 2010.
2. On July 25, 2011, West Virginia Department of Environmental Protection (hereinafter "WVDEP") personnel responded to a citizen complaint. Upon investigation, it was discovered that a large stream blockage had occurred in Spice Branch, a tributary to Pigeon Creek. An unnamed tributary to Spice Branch was observed to be severely eroded, which resulted in a large amount of material being deposited in Spice Branch.

3. On August 11, 2011, WVDEP personnel continued investigating the severe erosion of the unnamed tributary to Spice Branch. Erosion was noted below Outlet 016 of the King Coal Highway Red Jacket Mountain View Paving project where the tributary's drainage begins. At least one drop inlet was observed to be completely buried, allowing more water drainage to the Outlet than design specifications allow. Starting near the new high school, approximately one (1) mile of side ditch and road drainage was draining to this point and into a dump rock gutter down the side of Fill No. Four (4), rather than through the appropriate stormwater drainage system on the opposite side of the road.
4. On September 12, 2011, WVDEP personnel inspected the King Coal Highway Red Jacket Mountain View Paving project and observed and documented the following violations:
 - a. The permittee failed to properly operate and maintain the following erosion control devices: silt fences, several sections of diversions that needed re-established, drop inlets that were buried in the median, and numerous drop inlet protections (including the drop inlets that were buried and uncovered since the August 11, 2011 investigation). These are violations of the WV/NPDES Permit Section D.1.
 - b. The permittee eliminated sediment trapping structures, including ditch checks throughout the site and sediment traps along the roadway, prior to the contributing drainage area being stabilized. This is a violation of the WV/NPDES Permit Section G.4.e.2.A.ii.g.
 - c. Because sediment traps were removed, and silt fences and ditch checks were lacking, the permittee allowed sediment laden water to leave the site without first going through an appropriate control. This is a violation of the WV/NPDES Permit Section G.4.e.2.A.ii.j.
 - d. The permittee failed to seed and stabilize all temporary diversions immediately and prior to becoming functional. This is a violation of the WV/NPDES Permit Section G.4.e.2.A.i.d.
 - e. The permittee caused conditions not allowable in State waters by creating sediment deposits on the bottom of the stream. This is a violation of WV Legislative Rule 47CSR2-3.2.b.
 - f. The permittee failed to convey stormwater runoff in a manner that protected both the site and receiving stream from post-construction erosion, specifically at Outlet 016. This is a violation of the WV/NPDES Permit Section G.2.

Notices of Violation I11-30-009-JCC through I11-30-014-JCC were issued.

5. On October 6, 2011, WVDEP personnel inspected the King Coal Highway Red Jacket Mountain View Paving project and observed and documented the following:
 - a. All sections of silt fence were properly installed and maintained. All sections of diversions were re-established and seeded and mulched. All drop inlets in the median were uncovered with proper protections installed.
 - b. As observed during the previous inspection, sediment traps and ditch checks were not installed. Alternate ditch checks were ordered and field approved, however

- they had not arrived at the time of this inspection. This is a violation of the WV/NPDES Permit Section G.4.e.2.A.ii.g.
- c. As observed during the previous inspection, the permittee caused conditions not allowable in State waters by creating large sediment deposits in Spice Branch. This is a violation of WV Legislative Rule 47CSR2-3.2.b.
 - d. Remnants of the previously noted violation, including large deposits in Spice Branch and severe erosion of the Spice Branch tributary, were observed. Because the drop inlets in the side ditch were re-opened between the August 11th investigation and the September 12th inspection, stormwater appeared to be draining to the correct outlet, rather than to Outlet 016. No additional scouring or erosion was noted.
6. On January 23, 2012, a meeting was held between WVDEP personnel and a representative of WVDOT 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. 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 mitigation plan and schedule, outlining action items and completion dates for how and when WVDOT will remediate the erosion to the unnamed tributary of Spice Branch, as well as remove the deposits and further remediate Spice Branch. Submittals under this paragraph shall be made the same as in Order for Compliance 2.
3. Because of WVDOT's Legislative Rule and permit violations, WVDOT shall be assessed a civil administrative penalty of twenty-six thousand one hundred sixty dollars (\$26,160) 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.


Mr. Marvin Murphy
WVDOT

2-21-12
Date

Public Notice begin:

Date

Public Notice end:

Date

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

Date

revised September 2011

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party:

WVDOH

Receiving Stream:

Spice Branch and Unnamed
Tributary of Spice Branch

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#											
			4a	4b	4c	4d	4e	4f	5b	5c				
a)	Amount of Pollutant Released	1 to 3	1	1	1	1	3	1	1	3				
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	2	2				
e)	Actual Exposure and Effects thereon	0 to 3	1	1	1	1	2	1	1	2				
	Average Potential for Harm Factor		1	1	1	1	1.6	1	1.2	1.8	No	No	No	No
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	2	2	2	2	3	2	2	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 $\leq 40\%$ for Avg. Monthly or $\leq 100\%$ for Daily Max., exceed numeric WQ standard by $\leq 100\%$, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by $\geq 41\%$ and $\leq 300\%$ for Avg. Monthly, $\geq 101\%$ and $\leq 600\%$ for Daily Max., exceed numeric WQ standard by $\geq 101\%$ and $\leq 600\%$ or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by $\geq 301\%$ for Avg. Monthly, $\geq 601\%$ for Daily Max., exceed numeric WQ standard by $\geq 601\%$, 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.

[illegible]

		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
4a	Minor	Moderate	\$1,500	1	\$1,500
4b	Minor	Moderate	\$1,500	1	\$1,500
4c	Minor	Moderate	\$1,500	1	\$1,500
4d	Minor	Moderate	\$1,500	1	\$1,500
4e	Moderate	Major	\$4,600	1	\$4,600
4f	Minor	Moderate	\$1,500	1	\$1,500
5b	Moderate	Moderate	\$3,200	1	\$3,200
5c	Moderate	Major	\$4,800	1	\$4,800
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
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
Total Base Penalty					\$20,100

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		\$4,020
6.2.b.4 - Compliance/noncompliance history	10		\$2,010
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
Penalty Adjustments			\$6,060
Penalty =			\$26,160

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:	



- Large amount of material shown completely blocking Spice Branch. Material is approximately 10-12 feet tall and 30-40 yards in length. The remnants of the AEP access road that crosses Spice Branch can be seen in the upper right.



- View facing downstream at the bottom of the deposit/blockage. No flow in Spice Branch. Large amount of deposits downstream for several hundred yards.



- Severely eroded unnamed tributary to Spice Branch, shown from the mouth, where it meets Spice Branch and blockage occurred. Stream has eroded down to bedrock in several places, causing all the rock and sediment shown to deposit in Spice Branch.



- Spice Branch shown flowing from under the trees into the mud, which is the upper portion of the blockage. Stream was approximately 2ft wide at this point and maybe a couple inches in depth. It does not reappear below the blockage.



- Another view of the scoured unnamed tributary to Spice Branch. Just above the log on the right was evidence where this stream jumped its banks and into the AEP access road, which is just on the other side of the trees.



- View looking upstream on the unnamed tributary to Spice Branch, approximately 100-150 yards upstream of its confluence with Spice Branch. What's left of the existing AEP access road can be seen in the upper left. The bottom left portion of the photo shows where the road has collapsed, leaving an approximately 20ft sheer cliff in the unnamed tributary of Spice Branch.



- View looking down the unnamed tributary of Spice Branch, from the location shown in the above photo. The sheer cliff can be seen where the AEP access road crossed the tributary and collapsed. The severe erosion and scouring can be seen down this tributary.



- Scouring evident below Outlet 016 discharge point.



- View of Outlet 016, including both surface runoff from side ditch, as well as the small pipe from the median drains in the area. 3-5 median drains are supposed to drain to this point, through this pipe.



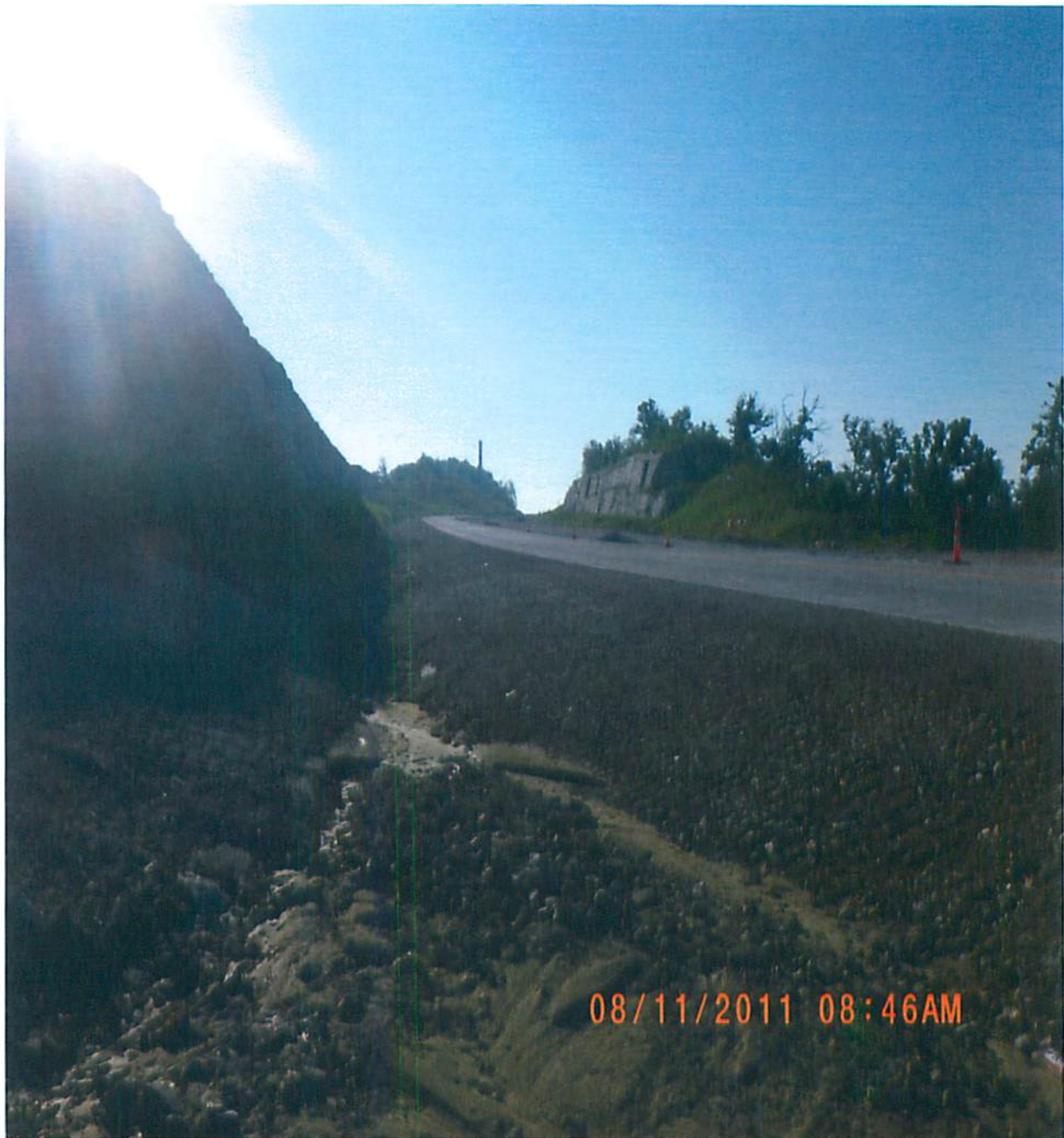
- Eastern drainage shown. Ditch line is not stabilized, not ditch checks, all leading toward Outlet 016.



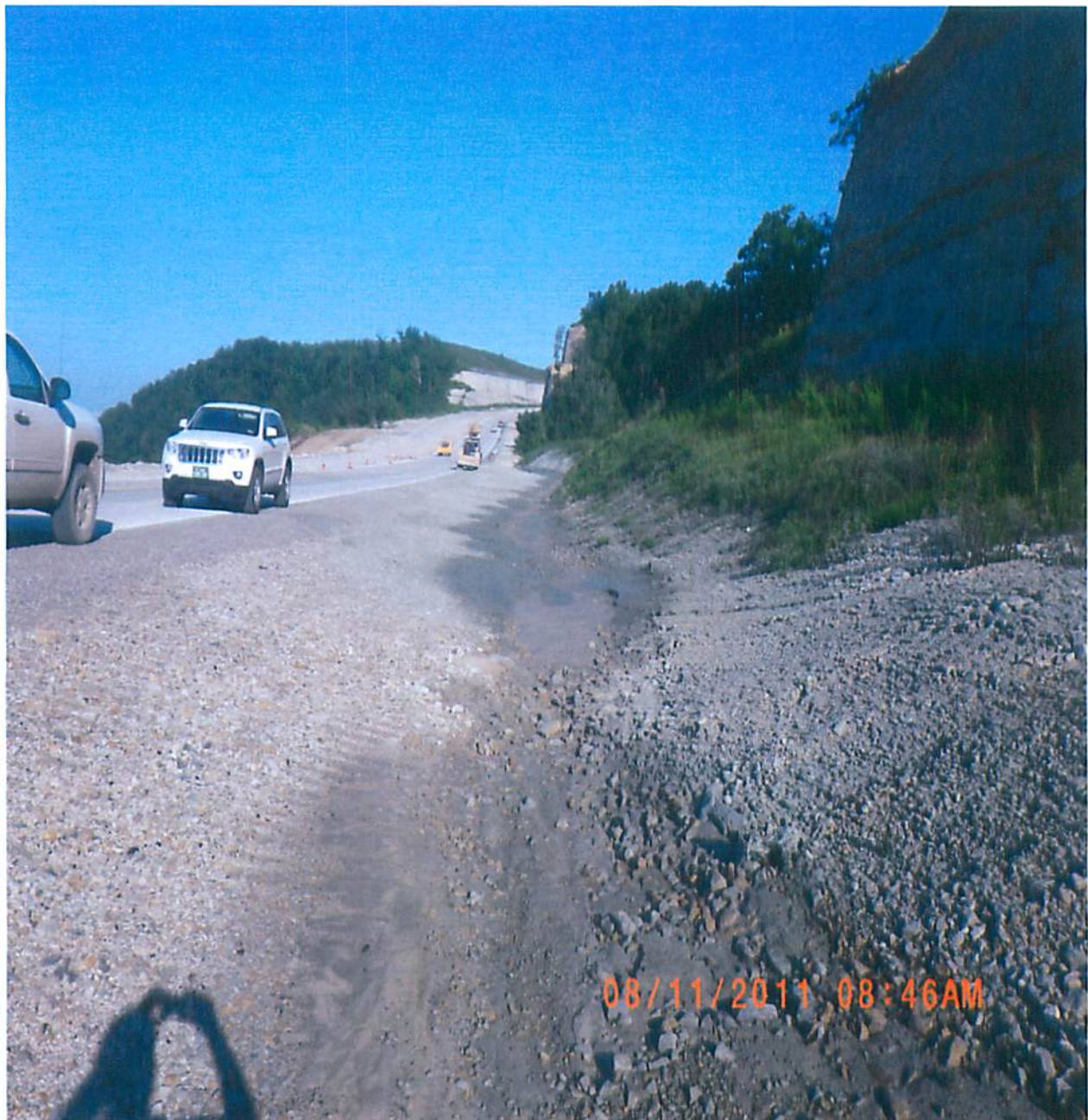
- Location of drop inlet that is buried. Runoff bypassing this inlet and flowing to Outlet 016, rather than into the inlet and across the road to the DRG down Fill #4.



- DRG on the east side of Fill #4, with the concrete wingwall shown on the edge of the grass line, which is where the median and side ditch drainage is supposed to discharge.



- View from the buried drop inlet showing another $\frac{1}{2}$ mile of drainage coming towards it, which then goes toward Outlet 016.



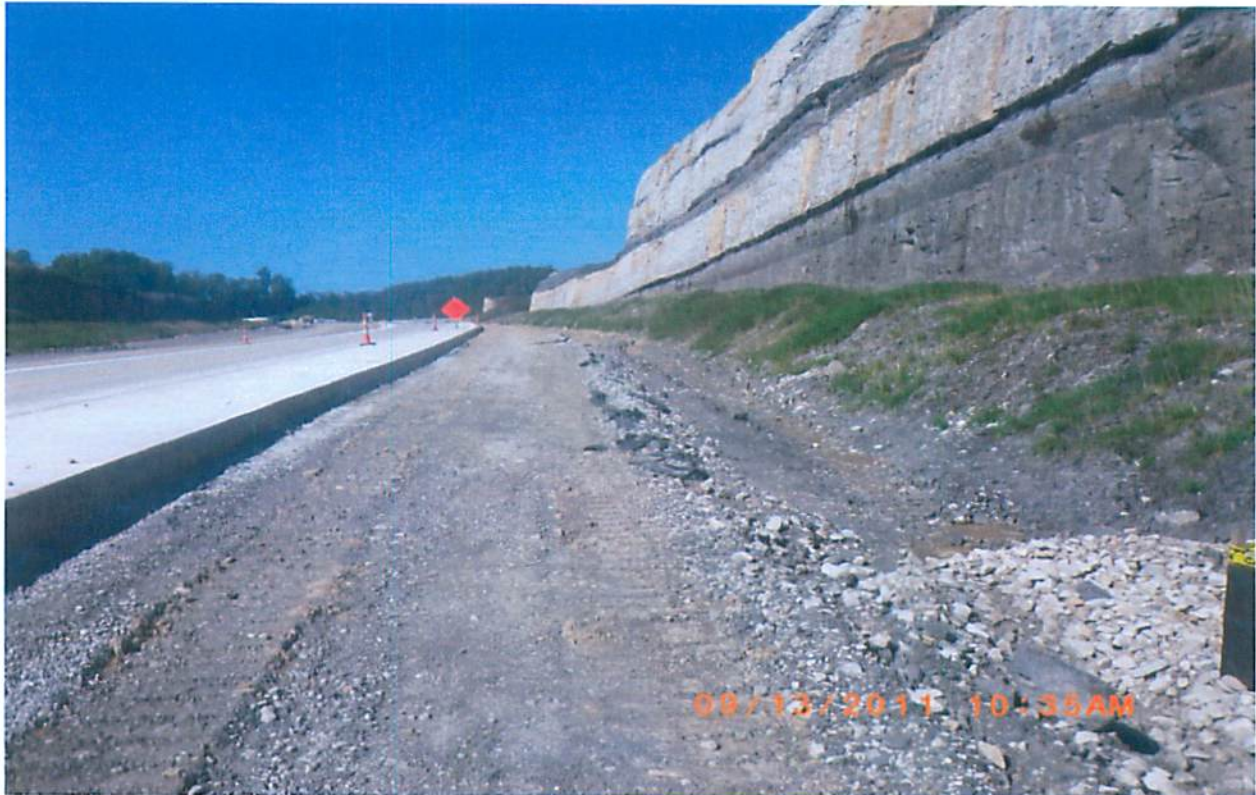
- View from the buried drop inlet, showing drainage toward Outlet 016, which is approximately located near the vehicle in the foreground. No ditch checks, ditch not stabilized, only recently hydroseeded.



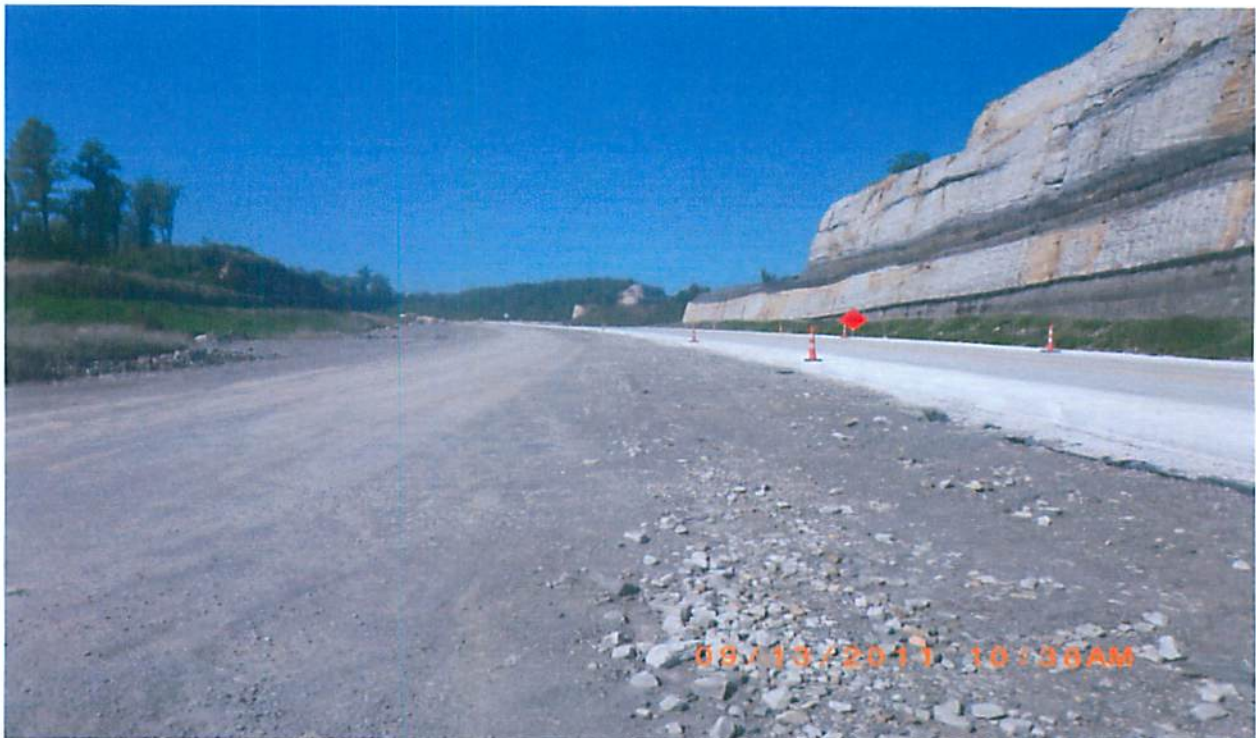
- Another drop inlet, shown with the orange DI protection over it, that has not been maintained. This DI is uphill of the buried one and evidence shown of water bypassing this DI, heading towards the buried one and then to Outlet 016. Sediment build up of around 8 inches on this DI protection.



- View from the above photo, showing the uphill drainage coming toward this drop inlet that isn't being properly maintained. Un-stabilized ditch, no ditch checks, with a total of $\frac{3}{4}$ of a mile of drainage going to Outlet 016.



- Ditch lines have not been stabilized prior to becoming functional and ditch checks have been prematurely removed.



- Numerous drop inlets in the median have been buried, which does not allow water to drain where it is designed to go.



- Numerous silt boxes have not been properly clamped to the drop inlet grates.



- Silt fence needs re-installed and maintained near Sta. 2026+00.



- Silt fence needs re-installed and maintained near Sta. 1997+00.



- Median drop inlets continue to be buried from the Horsepen connector end to a point near the new high school.



- Sediment traps need re-installed, including across from Sta. 1977+00.



- Silt fence needs re-installed and maintained near Sta. 1968+00.



- Breach in the berm across from Sta. 1968+00 needs repaired.



- Portions of ditch line needs established and stabilized, with check re-installed, near Sta. 1956+00 and 1938+00.



- Several drop inlets in the side ditch leading uphill of Outlet 016 have been uncovered and proper protections installed.



- Silt fence across from Sta. 1691+00 needs to be properly maintained.



- Ditch line above the sediment basin that is being left in place, near Sta. 1627+00, needs to be properly stabilized and ditch checks installed.



- Silt fence across from Sta. 1627+00 needs to be properly maintained.



- Ditchlines have been re-established and seeded, however ditch checks have yet been installed.



- Deposits again noted in Spice Branch.