

Philadelphia, Pennsylvania 19103-2029

Proceeding to Assess Class I Administrative Penalty Under Section 309(g) of the Clean Water Act

Docket No. CWA-03-2015-0190

CONSENT AGREEMENT AND FINAL ORDER

I. STATUTORY AND REGULATORY BACKGROUND

1. Pursuant to Section 309(g) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (“EPA”) is authorized to assess administrative penalties against persons who violate Section 301(a) of the Act, *id.* § 1311(a). The Administrator has delegated this authority to the Regional Administrator of EPA Region III, who in turn has delegated this authority to the Director, Water Protection Division (“Complainant”).

2. This Consent Agreement is entered into by the Complainant and the Borough of Clarks Summit ("Respondent"), pursuant to Section 309(g) of the CWA and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

3. The Consolidated Rules, at 40 C.F.R. § 22.13(b) provide in pertinent part that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding simultaneously may be commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3). Pursuant thereto, this Consent Agreement and Final Order (“CAFO”) simultaneously commence and conclude this administrative proceeding against Respondent.

4. Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), authorizes the assessment of administrative penalties against any person who violates any

NPDES permit condition or limitation in an amount not to exceed \$10,000 per day for each day of violation, up to a total penalty amount of \$125,000.

5. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, and Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), any person who has violated any NPDES permit condition or limitation after January 12, 2009 is liable for an administrative penalty not to exceed \$16,000 per day for each day of violation up to a total penalty amount of \$177,500 for violations that occurred between January 12, 2009 and December 6, 2013, and \$187,500 per proceeding for violations that occurred after December 6, 2013.

6. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA is providing public notice and an opportunity to comment on the Consent Agreement prior to issuing the Final Order. In addition, pursuant to Section 309(g)(1)(A), EPA has consulted with the Pennsylvania Department of Environmental Protection ("PADEP") regarding this action, and will mail a copy of this document to the appropriate PADEP official.

7. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued pursuant to the National Pollutant Discharge Elimination System ("NPDES") program under Section 402 of the Act, 33 U.S.C. § 1342.

8. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. The discharges are subject to specific terms and conditions as prescribed in the permit. Section 402(b) of the Act provides for the authorization of state programs to issue NPDES permits.

9. "Discharge of a pollutant" includes "any addition of any pollutant or combination of pollutants to waters of the United States from any point source." 40 C.F.R. § 122.2.

10. "Storm water" is defined as "storm water runoff, snow melt runoff and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

11. The term "municipal separate storm sewer system" ("MS4") includes, "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States." 40 C.F.R. § 122.26(b)(8)(i).

12. The term “small municipal separate storm sewer system” or “small MS4” means “all separate storm sewers that are: (i) Owned or operated by the United States, a State, city, town, borough . . . or other public body (created by or pursuant to State law) having jurisdiction over disposal of . . . storm water. . . .; [and] (ii) Not defined as ‘large’ or ‘medium’ municipal separate storm sewer systems.” 40 C.F.R. § 122.26(b)(16).

13. Small MS4s are regulated pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p) and the regulations promulgated thereunder. Pursuant to 40 C.F.R. § 122.26(a)(9)(i), small MS4s require an NPDES permit if they are required to be regulated pursuant to 40 C.F.R. § 122.32.

II. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS AND CONCLUSIONS OF LAW

14. The Borough of Clarks Summit, Pennsylvania (“Respondent”) is a “municipality” within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

15. The Borough of Clarks Summit, is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

16. At all times relevant to this Order, Respondent has owned and/or operated a MS4 as that term is defined in 40 C.F.R. § 122.26(b)(8).

17. Respondent’s MS4 is located within the geographic boundaries of Clarks Summit, Lackawanna County, Pennsylvania.

18. The Borough of Clarks Summit encompasses a total area of approximately 1.59 square miles. According to the 2010 Census, its population is estimated at 5,116 people.

19. The Borough of Clarks Summit MS4 is a “small MS4” within the meaning of 40 C.F.R. § 122.26(b)(16).

20. Respondent’s MS4 discharges stormwater to Ackerly Creek and Leggetts Creek and their associated tributaries. Ackerly Creek and Leggetts Creek are “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

21. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Commonwealth of Pennsylvania to issue NPDES permits in 1978. In 1991, EPA authorized the Pennsylvania Department of Environmental Protection (PADEP) to issue General NPDES Permits.

22. On March 16, 2013, PADEP issued an NPDES Stormwater Discharges From Small Municipal Separate Storm Sewer Systems (MS4s) General Permit (PAG-13)(the 2013 small MS4 Permit) that authorized the discharge of stormwater from small MS4s, generally defined as MS4s located in an incorporated place with a population less than 100,000. See 40 C.F.R § 122.26(b). The 2013 small MS4 Permit expires on March 15, 2018. In order to be eligible for general permit coverage, a regulated MS4 had to submit a Notice of Intent (NOI) to PADEP.

23. The Borough of Clarks Summit submitted a NOI to PADEP and obtained coverage under the 2013 small MS4 Permit on April 22, 2013.

24. The 2013 small MS4 Permit, Part A.2.b., "Effluent Limitations and Other Requirements for PAG-13" required permittees to implement a Stormwater Management Program (SWMP) as set forth in Appendix A of the permit to reduce the discharge of pollutants from small MS4s. The SWMP shall include Best Management Practices (BMPs) to comply with the following six Minimum Control Measures(MCMs): (1) Public Education and Outreach on Stormwater Impacts; (2) Public Involvement/Participation; (3) Illicit Discharge Detection and Elimination, (4) Construction Site Stormwater Runoff Control; (5) Post-Construction Stormwater Management in New and Re-Development Activities; and (6) Pollution Prevention / Good Housekeeping for Municipal Operations.

25. The 2013 small MS4 Permit, Part A.2.c., required Permittees to implement the SWMP as set forth in Appendix A of the permit in its entirety. Any permittee that chose not to use the SWMP in Appendix A was required to submit an individual NPDES MS4 Permit application that contains a proposed written SWP that meets the regulatory requirements.

26. Respondent did not submit an individual NPDES MS4 permit application and, therefore, is required to comply with the SWMP requirements set forth in Appendix A of the 2013 small MS4 Permit.

27. The 2013 small MS4 Permit, Part B.1.a, requires permittees to "comply with all terms and conditions of this General Permit."

28. On June 25 and 26, 2014, duly-authorized EPA representatives and their contractors conducted an inspection of Respondent's MS4 program ("the 2014 MS4 Inspection").

29. On August 18, 2014 EPA prepared a final Clean Water Act Compliance Inspection Report for the Borough of Clarks Summit, Pennsylvania (EPA's Inspection Report).

30. Clarks Summit received a copy of EPA's Inspection Report. Clarks Summit prepared and submitted a response to EPA on September 15, 2014.

31. Based upon the 2014 MS4 Inspection, EPA representatives identified the following violations of the 2013 small MS4 Permit and the CWA as described below.

Count I: Failure to Ensure Proper Operation and Maintenance of Post Construction Best Management Practices

32. Appendix A of the 2013 small MS4 Permit, MCM #5: Post-Construction Stormwater Management in New and Re-Development, BMP #6 requires the permittee to “Ensure adequate operation and maintenance of all post-construction stormwater management BMPs installed at all qualifying development or redevelopment projects (including those owned or operated by the permittee).” All permittees were required to develop an inventory of post construction stormwater management BMPs (facilities) within their jurisdiction installed after March 10, 2003.

33. At the time of the 2014 MS4 Inspection, Respondent had one post construction BMP facility subject to the permit. That post construction BMP facility was the CareGivers America facility located at 718 South State Street in Clarks Summit, Pennsylvania.

34. During the 2014 MS4 Inspection, the EPA inspectors and Respondent’s representatives visited the CareGivers America facility. At that visit, Respondent’s Borough Engineer observed that the developers had not installed the approved BMP according to the plan submitted to Clarks Summit as part of the construction plans for the facility. That plan included a BMP which required a cap on the end of a storm drain inlet pipe to have a circular orifice cut into it to allow water to enter the pipe. EPA inspectors observed that the cap was completely sealed and the BMP was not operating according to the plan specifications. Immediately following the 2014 MS4 Inspection, the Borough Engineer corrected the BMP deficiency.

35. Respondent’s failure to ensure the proper operation and maintenance of all post construction BMPs within its jurisdiction is a violation of the 2013 small MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count II: Failure to Develop, Implement and Maintain a Written Operation and Maintenance Program for Municipal Operations

36. Appendix A of the 2013 small MS4 permit, MCM #6: Pollution Prevention/Good Housekeeping for Municipal Operations, BMP #2 requires the permittee to “Develop, implement and maintain a written operation and maintenance (O&M) program for all municipal operations and facilities that could contribute to the discharge of pollutants from the regulated small MS4s...”

37. At the time of the 2014 MS4 Inspection, Clark Summit representatives informed the EPA Inspection Team that the Borough had recently completed an *Operation and Maintenance Program Manual* (dated March 17, 2014) but had not yet fully implemented it nor

documented any self-inspection and maintenance procedures performed. Borough representatives provided the EPA Inspection Team with a copy of the recently completed manual. After a brief review of the manual, the EPA Inspection Team observed it did not contain the Borough's list of facilities and activities that have the potential for generating stormwater runoff to the regulated small MS4. During a specific visit to Respondent's Department of Public Works (DPW) facility, the EPA inspectors observed the following:

- a. The salt storage appeared to be exceeding the limits of the storage shed. The EPA Inspection Team observed evidence of salt runoff from the storage shed. The Borough's O&M manual contains protocols for storing materials such as road salt, which include the following practices: "Do not 'overload' storage areas; provide ample room for access and inspections; sweep loading areas after use; and consider berms or similar to channel runoff to containment or treatment devices."
- b. Floor drains within the vehicle maintenance garage at the DPW facility drained to the stormwater system.
- c. The lid to the trash dumpster at the DPW vehicle maintenance facility was open. The Borough's O&M manual states that dumpster lids should be kept closed.
- d. Borough representatives stated vehicle washing occurred in an outdoor area at the front of the maintenance yard lot. Any wash water from that activity would drain to the drainage ditch at the back of the property. Respondent's O&M manual requires Respondent to "Construct berms and identify delineation of wash area to assure containment of wash water."

38. Respondent's failure to implement its Operation and Maintenance program at its municipal facilities is a violation of the 2013 small MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count III: Failure to Develop and Implement a Municipal Employee Stormwater Training Program

39. Appendix A of the 2013 small MS4 permit, MCM #6: Pollution Prevention/Good Housekeeping for Municipal Operations, BMP #3 requires the permittee to "Develop and implement an employee training program that addresses appropriate topics to further the goal of preventing or reducing the discharge of pollutants from municipal operations to your regulated small MS4s."

40. The Borough's MS4 required annual report to PADEP for March 10, 2012 through April 21, 2013 states, "Training not performed during reporting period." During onsite discussions as part of the 2013 MS4 Inspection, Borough representatives stated that Department of Public Works staff receive contractor-supplied training every Monday; however, that training does not address stormwater issues. EPA did not receive any record of any written employee

stormwater training program during the inspection. Respondent's September 15, 2014 response to EPA's August 18, 2014 inspection report stated that Clarks Summit was in the process of developing a stormwater training manual for its municipal employees. The Borough's current municipal employees have been long term employees and have undertaken the required training multiple times during their Borough employment.

41. Respondent's failure to develop and implement a stormwater training program for its employees is a violation of the 2013 small MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. GENERAL PROVISIONS

42. For the purpose of this proceeding, Respondent admits the jurisdictional allegations set forth in this CAFO.

43. Respondent neither admits nor denies the Allegations of Fact set forth in this CAFO.

44. Respondent waives any defenses it might have as to jurisdiction and venue, its right to contest the allegations through hearing or otherwise; and its right to appeal the proposed final order accompanying the Consent Agreement.

45. Respondent agrees not to contest EPA's jurisdiction to issue and enforce this CAFO.

46. Respondent hereby expressly waives its right to a hearing on any issue of law or fact in this matter and consents to issuance of this CAFO without adjudication.

47. Respondent shall bear its own costs and attorney fees.

48. The provisions of this CAFO shall be binding upon the Respondent, its officers, principals, directors, successors and assigns.

49. The parties agree that settlement of this matter prior to the initiation of litigation is in the public interest and that entry of this CAFO is the most appropriate means of resolving this matter.

IV. CIVIL PENALTY

50. In full and final settlement of the Complainant's claims for civil penalties for the alleged violations identified herein, Respondent consents to the assessment of, and agrees to pay, in accordance with the terms set forth herein, the total administrative civil penalty of six thousand dollars (\$6,000) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c).

51. The civil penalty amount set forth in Paragraph 50, above, is based on a number of factors, including the nature, circumstances, extent and gravity of the violation(s), Respondent's ability to pay, prior history of compliance, degree of culpability, economic benefit or savings resulting from the violations, and such other matters as justice may require pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g).

52. Respondent shall pay the civil penalty amount described in Paragraph 50, above, plus any interest, administrative fees, and late payment penalties owed, in accordance with Paragraphs 52 through 56 below, by either cashier's check, certified check, or electronic wire transfer, in the following manner:

- a. All payments by Respondent shall reference Respondent's name and address, and the Docket Number of this action;
- b. All checks shall be made payable to **"United States Treasury"**;
- c. All payments made by check and sent by regular mail shall be addressed to:

U.S. Environmental Protection Agency
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Primary Contact: Craig Steffen, (513) 487-2091
Secondary Contact: Molly Williams, (513) 487-2076

- d. All payments made by check and sent by overnight delivery service shall be addressed for delivery to:

U.S. Environmental Protection Agency
Cincinnati Finance Center
P.O. Box 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Primary Contact: Craig Steffen, (513) 487-2091
Secondary Contact: Molly Williams, (513) 487-2076

- e. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

Cincinnati Finance
US EPA, MS-NWD
26 W. M.L. King Drive
Cincinnati, OH 45268-0001

- f. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

- g. All electronic payments made through the Automated Clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

US Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

Contact: John Schmid, (202) 874-7026
Remittance Express (REX): (866) 234-5681

h. On-Line Payment Option:

WWW.PAY.GOV/paygov/

Enter **sfo 1.1** in the search field. Open and complete the form.

i. Additional payment guidance is available at:

<http://www2.epa.gov/financial/makepayment>

j. Payment by Respondent shall reference Respondent's name and address, and the EPA Docket Number of this CAFO.

A copy of Respondent's check or a copy of Respondent's electronic fund transfer shall be sent simultaneously to:

Robert J. Smolski
Senior Assistant Regional Counsel
U.S. EPA, Region III (3RC20)
1650 Arch Street
Philadelphia, PA 19103-2029

and

Ms. Lydia Guy
Regional Hearing Clerk
U.S. EPA, Region III (3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

53. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim, as more fully described below. Accordingly, Respondent's failure to make timely payment as specified herein shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

54. Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a true and correct copy of this CAFO is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalty that is paid within thirty (30) calendar days after the date on which such interest begins to accrue. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

55. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period a debt is overdue. 40 C.F.R. § 13.11(b). Pursuant to Appendix 2 of EPA's *Resources Management Directives - Cash Management*, Chapter 9, EPA will assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the first thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) days the penalty remains unpaid.

56. A late payment penalty of six percent per year will be assessed monthly on any portion of the civil penalty that remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

57. The penalty specified in Paragraph 50 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

V. APPLICABLE LAWS

58. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law and ordinance, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit. Nor does this CAFO constitute a waiver, suspension or modification of the requirements of the CWA, 33 U.S.C. §§ 1251 *et seq.*, or any regulations promulgated thereunder.

VI. RESERVATION OF RIGHTS

59. This CAFO resolves only the civil claims for the specific violations alleged herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present and imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it under the Clean Water Act, 33 U.S.C. § 301 *et seq.*, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

60. Entry of this CAFO is a final settlement of all violations alleged in this CAFO. EPA shall have the right to institute a new and separate action to recover additional civil penalties for the claims made in this CAFO, if EPA obtains evidence that the information and/or representations of the Respondent are false, or, in any material respect, inaccurate. This right shall be in addition to

all other rights and causes of action, civil or criminal, EPA may have under law or equity in such event.

VII. FULL AND FINAL SATISFACTION

61. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant has under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for the violations alleged in this CA. Compliance with the requirements and provisions of this CAFO shall not be a defense to any action commenced at any time for any other violation of the federal laws and/or regulations administered by EPA.

VIII. PARTIES BOUND

62. This CAFO shall apply to and be binding upon the EPA and Respondent. The undersigned representative of Respondent certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

IX. EFFECTIVE DATE

63. Pursuant to 40 C.F.R. § 22.45(b), this CAFO shall be issued after a 40-day public notice period is concluded. This CAFO will become final and effective thirty (30) days after it is filed with the Regional Hearing Clerk, pursuant to Section 309(g)(5) of the Act, 33 U.S.C. § 1319(g)(5), or until a public comment process pursuant to 40 C.F.R. § 22.45(b) is concluded.

X. ENTIRE AGREEMENT

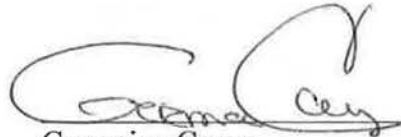
64. This CAFO constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this CAFO.

XI. FINAL ORDER

FOR RESPONDENT,

BOROUGH of CLARKS SUMMIT:

Date: August 25, 2015



Germaine Carey
Council President

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION III

SO ORDERED, pursuant to 33 U.S.C. 1319(g), and 40 C.F.R. Part 22,

this _____ day of _____, 2015

Date: _____

Jon M. Capacasa, Director
Water Protection Division