

Philadelphia, Pennsylvania 19103-2029

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

Docket No. CWA-03-2016-0166

CONSENT AGREEMENT AND FINAL ORDER

I. STATUTORY AND REGULATORY AUTHORITY

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 West Virginia Department of Highways ("Respondent" or "DOH")), pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), 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

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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 West Virginia Department of Environmental Protection (“WVDEP”) regarding this action, and will mail a copy of this document to the appropriate WVDEP 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 or may authorize states to issue such permits pursuant to Section 402(i) of the Act, 33 U.S.C. § 1342(i). The discharges are subject to specific terms and conditions as prescribed in the NPDES permit.
9. Federal regulations promulgated pursuant to the CWA define the phrase “waters of the United States” to include, among other things, (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) all interstate waters; (iii) all other waters such as intrastate lakes, rivers and streams, including intermittent streams, the use, degradation, or destruction of which would or could affect interstate commerce; (iv) tributaries of waters of the United States, and (v) all waters adjacent to these waters. 40 C.F.R. § 122.2.
10. “Pollutant” as defined at Section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2 means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials . . . heat,

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wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

11. “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.
12. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines the term “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body”.
13. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).
14. 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).

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

15. The West Virginia Department of Transportation, Division of Highways (“Respondent” or “DOH”) is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
16. Respondent owns and operates an MS4 located throughout the State of West Virginia.
17. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the State of West Virginia, through the West Virginia Department of Environmental Protection (“WVDEP”), to issue NPDES permits throughout West Virginia in 1982.
18. On June 22, 2009, WVDEP issued DOH a National Pollution Discharge Elimination System Permit, WV0116025, Stormwater Discharges from small Municipal Separate Storm Sewer Systems (the “MS4 Permit”), which regulates discharges from DOH’s MS4. The MS4 Permit had an effective date of July 22, 2009 and had an expiration date of July 22, 2014.
19. As part of its application for an MS4 permit, DOH submitted a site registration application for a Storm Water Management Program (the “SWMP”), which would be incorporated into the MS4 Permit once approved by WVDEP.

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20. DOH's SWMP was approved by WVDEP on November 9, 2012 and was incorporated into the MS4 Permit.
21. According to DOH's SWMP, DOH maintained an MS4 area of approximately 167,000 acres across the State within the urban areas of Beckley, Charleston, Cumberland, Hagerstown, Morgantown, Parkersburg, Weirton and Wheeling.
22. Respondent's MS4 discharges storm water to the Kanawha and Ohio Rivers and their respective watersheds. These 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.
23. From May 12 through 16, 2014 duly-authorized EPA representatives and their contractors conducted an inspection of Respondent's MS4 program ("the 2014 MS4 Inspection").
24. During the 2014 MS4 Inspection, EPA representatives identified a number of observations and violations of the 2009 Permit and the CWA as described below.
25. EPA prepared a report of the 2014 MS4 Inspection, dated August 22, 2014 ("the 2014 Inspection Report"). A copy of the 2014 Inspection Report was provided to the DOH via e-mail on December 23, 2015. DOH provided EPA with comments on the 2014 Inspection Report on February 19, 2016.
26. WVDOH staff explained that WVDOH's procedures include routine inspections of WVDOH construction sites as dictated by the nature of each project. Inspections are conducted by WVDOH staff and/or third parties or the general contractor in accordance with contract terms and as an agent of. Further, WVDOH's response to the 2014 Inspection Report stated that "...we are implementing additional regular (a minimum of once a month) inspections to be performed by the District Environmental Coordinator for all WVDOH construction projects within our MS4 area" as a supplement to the procedures required by the permit..

Count I: Failure to Submit an Annual Stormwater Management Report

27. Part II.B.9 of the MS4 Permit requires, "An annual report prescribed in Part IV.D of this permit shall be submitted to DWWM [WVDEP Division of Water and Waste Management] each year on the anniversary of the SWMP approval."
28. At the time of inspection, DOH had not submitted an MS4 program annual stormwater management report to WVDEP. DOH's 2013 annual report was required to be submitted to WVDEP by November 9, 2013, one year after WVDEP's approval of the SWMP. The DOH MS4 Coordinator explained, at the time of the 2014 MS4 Inspection, that the 2013 report had not yet been submitted to WVDEP.
29. Respondent's failure to submit an annual stormwater management report is a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count II: Failure to Update Post Construction Stormwater Best Management Practices Inventory

30. Part II.C.b.5.a.ii.D of the MS4 Permit requires DOH to develop a system designed to inventory and track storm water management practices deployed at new development and redevelopment projects. The database or tracking system shall include information on both public and private sector projects that are within the jurisdiction of the permittee. In addition to the standard information required for all projects, the tracking system shall also include: 1. source control stormwater management practices; 2. treatment control stormwater management practices; 3. latitude and longitude coordinates of stormwater BMP controls using a global positioning system; 4. digital photographs of stormwater management practice controls; 5. maintenance requirements of stormwater management practice; and 6. inspection information.
31. DOH staff explained that, prior to the onsite inspection, DOH maintained records regarding stormwater management practices deployed at each project location in the respective district office and maintained a central summary listing of all projects statewide. DOH provided the EPA Inspection Team with a Microsoft® Excel spreadsheet which included a summary list of 16 post-construction BMPs. The list identified the DOH district the BMPs were located in and provided a location either with county, latitude/longitude, and/or a narrative description. The summary list did not include some of the additional information which is required by Part II.C.b.5.a.ii.D. of the MS4 Permit. The list of 16 post construction BMPs had not been updated to include two DOH-owned post-construction BMPs the EPA Inspection Team visited in DOH District 4 during the 2014 MS4 Inspection.
32. Respondent's failure to inventory and track all of the required additional information for new development and redevelopment projects within the MS4 area is a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311

Count III: Failure to Develop Pollution Prevention and Good Housekeeping Procedures

33. Part II.C.b.6.b of the MS4 Permit requires the DOH to implement policies and procedures to reduce the discharge of pollutants in storm water runoff from all lands owned or maintained by DOH and subject to the MS4 Permit. These procedures are required to address pollution prevention and good housekeeping procedures for DOH maintenance operations.

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34. During the 2014 MS4 Inspection, EPA visited five DOH facilities, made several observations regarding the municipal operations at the five facilities, and found deficiencies in DOH's implementation of pollution prevention and good housekeeping procedures at the five DOH facilities.
35. At the North Charleston Maintenance Facility in DOH District #1, an unlabeled rusting metal drum was left in an outdoor area exposed to the elements and full waste dumpsters were left uncovered and their contents were exposed to the elements.
36. At the Cabell County Headquarters Maintenance Facility two 55-gallon drums of chemicals were stored outside a maintenance shed outside of secondary containment or overhead coverage with their bung caps removed, several small containers of fluid were stored on a pallet outside without coverage or containment, and filled dumpsters were left uncovered. WVDOH stated that all deficiencies in implementation were promptly rectified and additional training was employed to inhibit future deficiencies.
37. Respondent's failure to implement its pollution prevention and good housekeeping procedures at DOH maintenance operations is a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. GENERAL PROVISIONS

38. For the purpose of this proceeding, Respondent admits the jurisdictional allegations set forth in this CAFO.
39. Respondent neither admits nor denies the Findings of Fact set forth in this CAFO.
40. 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.
41. Respondent agrees not to contest EPA's jurisdiction to issue and enforce this CAFO.
42. 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.
43. Respondent shall bear its own costs and attorney fees.
44. The provisions of this CAFO shall be binding upon the Respondent, its officers, principals, directors, successors and assigns.

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45. 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

46. 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 twenty three thousand dollars (\$23,000) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c).
47. The civil penalty amount set forth in Paragraph 46, 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).
48. Respondent shall pay the civil penalty amount described in Paragraph 46, above, plus any interest, administrative fees, and late payment penalties owed, in accordance with Paragraphs 48 through 50, 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

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- 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

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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://www.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:

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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

49. 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.

50. 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).
51. 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.
52. 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).
53. The penalty specified in Paragraph 46 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

V. APPLICABLE LAWS

54. 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

55. 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.

56. 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

57. 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 CAFO. 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

58. This CAFO shall apply to and be binding upon the EPA, Respondent, and Respondent's officers, employees, agents, successors and assigns. 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

59. 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

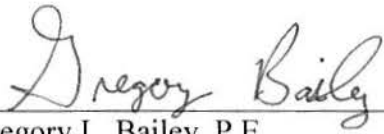
60. This CAFO constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this CAFO.

XI. FINAL ORDER

FOR RESPONDENT,

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS

Date: 8-12-2016



Gregory L. Bailey, P.E.
State Highway Engineer

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

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

this _____ day of _____, 2016

Date: _____

Jon M. Capacasa, Director
Water Protection Division