

Philadelphia, Pennsylvania 19103-2029

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

Docket No. CWA-03-2016-0197

CONSENT AGREEMENT AND FINAL ORDER

I. STATUTORY AND REGULATORY AUTHORITY

2. This Consent Agreement is entered into by the Complainant and the City of Rehoboth Beach, Delaware ("Rehoboth Beach" or "Respondent"), 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 Consent Agreement and Final Order (“CAFO”) simultaneously commences and concludes this administrative proceeding against Respondent.

Docket No. CWA-03-2016-0197

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 Delaware Department of Natural Resources and Environmental Control (“DNREC”) regarding this action, and will mail a copy of this document to the appropriate DNREC 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(b) of the Act, 33 U.S.C. § 1342(b). The discharges are subject to specific terms and conditions as prescribed in the NPDES permit.

9. Federal regulations promulgated pursuant to the CWA define “waters of the United States” at 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, 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.

Docket No. CWA-03-2016-0197

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. Section 402(a)(2) of the CWA directs the Administrator to prescribe conditions and limitations, including effluent limitations, for NPDES permits to ensure compliance with the requirements of the CWA. 33 U.S.C. § 1342(a)(2); see also 33 U.S.C. § 1311. Effluent limitations, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11), are restrictions on quantity, rate, and concentration of chemical, physical, biological, and other constituents which are discharged from point sources.

14. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the State of Delaware to issue NPDES permits within Delaware on April 1, 1974.

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

15. The City of Rehoboth Beach, Delaware (“Rehoboth Beach” or “Respondent”) is a “municipality” within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

16. Rehoboth Beach is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

17. At all times relevant to this Order, Respondent has owned and/or operated a municipal wastewater treatment facility (“Facility”), located at 229 Rehoboth Avenue, Rehoboth Beach, Delaware.

18. Respondent’s Facility discharges from Point Source 001 to the Rehoboth segment of the Lewes and Rehoboth Canal, which meets the definition of “waters of the United States” within the meaning of “navigable waters” in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

19. On September 21, 2005 DNREC issued NPDES Permit No. DE0020028, with an effective date of October 1, 2005 and an expiration date of September 30, 2010 (the NPDES Permit) to the City of Rehoboth Beach. The NPDES permit authorized Rehoboth Beach to discharge from the Facility through outfall 001, in accordance with all the terms and conditions of the NPDES permit. The NPDES permit has been administratively extended and remains in effect to date.

Count 1: Failure to Sample and Report for Dissolved Oxygen

20. Part I.B.1. (Outfall 001-Effluent Limitations and Monitoring Requirements) of Rehoboth Beach's NPDES Permit requires that the permittee sample for dissolved oxygen on a daily basis. Part I.D.2. of the NPDES permit requires that monitoring results obtained during the previous one month shall be summarized for each month and reported on an EPA Discharge Monitoring Report (DMR) Form no later than the twenty eighth day of the month following the completed reporting period.

21. Based on DMRs submitted by Rehoboth Beach in 2013, Rehoboth Beach failed to take the required dissolved oxygen samples for six days in January 2013, ten days in February 2013, seven days in March 2013, three days in April 2013, two days in May 2013 and five days in June 2013. In addition, for each of these months, Rehoboth Beach failed to correctly report the results of each required daily sample on its DMRs for each day Rehoboth Beach failed to sample for dissolved oxygen.

22. Each day listed above that Respondent failed to take the required daily sample of dissolved oxygen is a violation of the NPDES Permit and Section 301 of the Act, 33 U.S.C. § 1311.

23. Respondent's failure to correctly report the required daily sampling results listed above on the applicable monthly DMR is a violation of the NPDES Permit and Section 301 of the Act, 33 U.S.C. § 1311.

.Count 2: Failure to Sample and Report for Enterococcus

24. Part I.B.1. (Outfall 001-Effluent Limitations and Monitoring Requirements) of Rehoboth Beach's NPDES Permit requires that the permittee sample for enterococcus three times per week. Part I.D.2. of the NPDES permit requires that monitoring results obtained during the previous one month shall be summarized for each month and reported on an EPA Discharge Monitoring Report (DMR) Form no later than the twenty eighth day of the month following the completed reporting period.

25. Based on DMRs submitted by Rehoboth Beach in 2013, Rehoboth Beach failed to take the required weekly number of samples for enterococcus on one occasion in January 2013. In addition, Rehoboth Beach failed to correctly report the results of each weekly sample on its DMR for the occasion that Rehoboth Beach failed to sample for enterococcus in January 2013. In addition, based on DMRs submitted by Rehoboth Beach in 2013 as well as other data provided by Rehoboth Beach, Rehoboth Beach failed to correctly report enterococcus samples

taken in February, 2013 on the applicable DMR. Rehoboth Beach asserts that it submitted a corrected DMR for the February, 2013 samples that were taken, but not reported, once it became aware of the reporting issue.

26. Each occasion listed above that Respondent failed to take the required weekly samples for enterococcus and each occasion that Respondent failed to correctly report the required weekly sampling results on the applicable DMR is a violation of the NPDES Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count 3: Failure to Sample and Report for Total Phosphorus

27. Part I. B.1. (Outfall 001-Effluent Limitations and Monitoring Requirements) of Rehoboth Beach's NPDES Permit requires that the permittee sample for total phosphorus three times per week. Part I. D.2. of the NPDES permit requires that monitoring results obtained during the previous one month shall be summarized for each month and reported on an EPA Discharge Monitoring Report (DMR) Form no later than the twenty eighth day of the month following the completed reporting period. Part III.A.10. (Special Conditions) of the NPDES Permit requires that the twelve month moving cumulative discharge load for calculating the interim nutrient permit levels, which are referenced in the effluent limits table in Part I.B.1. of the permit, for total phosphorus shall be computed by adding monthly discharge loads for the most current twelve months of operation.

28. Based on DMRs submitted by Rehoboth Beach in 2013, Rehoboth Beach failed to take the required weekly number of samples for total phosphorus on one occasion in January 2013 and failed to report the results of required weekly samples for one occasion in January 2013. For February 2013, Rehoboth Beach's reported value for total phosphorus was not supported by any laboratory data submitted by the permittee. For June 2013, examination of Rehoboth Beach's laboratory data for total phosphorus, showed that the results were not transferred to the DMRs, resulting in inaccurate reporting of the cumulative discharge load for total phosphorus, which is referenced in the effluent limits table in Part I.B.1. of the permit, calculated as the 12 -month moving cumulative average through June 2013.

29. Each occasion that Respondent failed to take the required weekly samples for total phosphorus and each occasion that Respondent failed to correctly report the required weekly sampling results on its DMRs is a violation of the NPDES Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count 4: Failure to Report for Total Nitrogen

30. Part I. B.1. (Outfall 001-Effluent Limitations and Monitoring Requirements) of Rehoboth Beach's NPDES Permit requires that the permittee sample for total nitrogen three times per week. Part I. D.2. of the NPDES permit requires that monitoring results obtained during the previous one month shall be summarized for each month and reported on an EPA

Docket No. CWA-03-2016-0197

Discharge Monitoring Report (DMR) Form no later than the twenty eighth day of the month following the completed reporting period. Part III.A.10. (Special Conditions) of the NPDES Permit requires that the twelve month moving cumulative discharge load for calculating the interim nutrient permit levels, which are referenced in the effluent limits table in Part I.B.1. of the permit, for total nitrogen shall be computed by adding monthly discharge loads for the most current twelve months of operation.

31. Based on DMRs submitted by Rehoboth Beach in 2013, Rehoboth Beach failed to correctly report the results of each required sample for total nitrogen on one occasion in January and on three occasions in February. For June 2013, examination of Rehoboth Beach's laboratory data for total nitrogen showed that the results were not transferred to the DMRs, resulting in inaccurate reporting of the cumulative discharge load for total nitrogen, which is referenced in the effluent limits table in Part I.B.1. of the permit, calculated as the 12-month moving cumulative average through June 2013. Rehoboth beach asserts that it submitted a corrected DMR for the January, 2013 and February, 2013 samples that were taken, but not reported, once it became aware of the reporting issue.

32. Each occasion that Respondent failed to correctly report the required weekly sampling results on its DMRs is a violation of the NPDES permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count 5: Failure to Report for Total Suspended Solids

33. Part I.B.1. (Outfall 001-Effluent Limitations and Monitoring Requirements) of Rehoboth Beach's NPDES Permit requires that the permittee sample for total suspended solids three times per week. Part I.D.2. of the NPDES permit requires that monitoring results obtained during the previous one month shall be summarized for each month and reported on an EPA Discharge Monitoring Report (DMR) Form no later than the twenty eighth day of the month following the completed reporting period.

34. Based on DMRs submitted by Rehoboth Beach in 2013, Rehoboth Beach failed to correctly report the results of each required sample for total suspended solids on one occasion during March 2013.

35. The occasion that Respondent failed to correctly report the required weekly sampling results on its DMR is a violation of the NPDES Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count 6: Failure to Sample and Report for pH

36. Part I.B.1. (Outfall 001-Effluent Limitations and Monitoring Requirements) of Rehoboth Beach's NPDES Permit requires that the permittee sample for pH on a daily basis. Part I.D.2. of the NPDES permit requires that monitoring results obtained during the previous one month shall be summarized for each month and reported on an EPA Discharge Monitoring

Report (DMR) Form no later than the twenty eighth day of the month following the completed reporting period.

37. Based on DMRs submitted by Rehoboth Beach in 2013, Rehoboth Beach failed to take the required pH samples for one day in February 2013. In addition, for February 2013, Rehoboth Beach failed to correctly report the results of each required daily sample for pH on its DMR.

38. The day that Respondent failed to take the required daily sample of pH and the occasion that Respondent failed to correctly report the daily sampling results on its DMR is a violation of the NPDES Permit and Section 301 of the Act, 33 U.S.C. § 1311

III. GENERAL PROVISIONS

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

40. Respondent neither admits nor denies the Findings of Fact and conclusions of law set forth in this CAFO.

41. Unless EPA has notified Respondent that it no longer supports entry of the CAFO as executed by the Respondent, Respondent waives its right to contest the allegations through hearing or otherwise; and its right to appeal the proposed final order accompanying the Consent Agreement.

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

43. Unless EPA has notified Respondent that it no longer supports entry of the CAFO as executed by the Respondent, 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.

44. EPA and Respondent shall each bear their own costs and attorney fees.

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

46. 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

47. 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 two thousand six hundred dollars (\$22,600) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c).

48. The civil penalty amount set forth in Paragraph 47, 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).

49. Respondent shall pay the civil penalty amount described in Paragraph 47, above, plus any interest, in accordance with Paragraphs 49 through 52, below, by either cashier's check, certified check, or electronic wire transfer, in one of the following methods below:

- 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

Docket No. CWA-03-2016-0197

- 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

Docket No. CWA-03-2016-0197

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://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 or other evidence of payment shall be sent 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

50. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest on outstanding debts owed to the United States. Accordingly, Respondent's failure to make timely payment as specified herein shall result in the assessment of interest.

51. 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).

52. The penalty specified in Paragraph 47 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

V. APPLICABLE LAWS

53. 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

54. This CAFO resolves only the administrative and 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.

55. 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

56. 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

57. 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

58. 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 after a public notice and comment process pursuant to 40 C.F.R. § 22.45(b) and (c) is concluded.

X. ENTIRE AGREEMENT

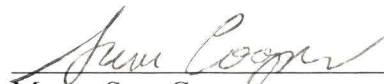
59. This CAFO constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this CAFO.

XI. FINAL ORDER

FOR RESPONDENT,

CITY OF REHOBOTH BEACH

Date: 9/22/16


Mayor Sam Cooper

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 _____, 2016

Date: _____

Jon M. Capacasa, Director
Water Protection Division