

**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

In the Matter of:

**CONSENT AGREEMENT AND
FINAL ORDER**

City of Wilkes-Barre
40 East Market Street
Wilkes-Barre, Pennsylvania 18711

Docket No. CWA-03-2017-0017

Respondent.

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 City of Wilkes-Barre, Pennsylvania (Wilkes-Barre or 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 may simultaneously 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.

4. Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A), 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 \$25,000.

5. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, and Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), any person who has violated any NPDES permit condition or limitation between January 12, 2009 up to and through the present 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 \$37,500.

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 any pollutant from a point source to the 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, 33 U.S.C. § 1342(b) provides that the Administrator may authorize a state to issue NPDES permit.

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.” *Id.* § 122.26(b)(13).

11. Section 402(p) of the CWA, 33 U.S.C. § 1342(p) and 40 C.F.R. § 122.2 and 122.26 provide that, with some exceptions not relevant here, storm water discharges are “point sources” subject to NPDES permitting requirements under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

12. The term “municipal separate storm sewer system” or “MS4” includes, *inter alia*, “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains): (i) 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).

13. 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).

14. 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 regulated pursuant to 40 C.F.R. § 122.32. Among other things, a small MS4 requires a permit if it is located in an urbanized area as determined by the latest Decennial Census of the Bureau of the Census. See 40 C.F.R. §122.32(a)(1).

15. 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 Commonwealth to issue General NPDES Permits.

16. Pursuant to Section 402(i) of the CWA, 33 U.S.C. §1342(i), EPA retains its authority to take enforcement action within the Commonwealth for NPDES permit violations.

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

17. In December 2002 PADEP issued the “NPDES Stormwater Discharges from Small Municipal Separate Storm Sewer Systems General Permit”, which became effective in 2003 (2003 PAG-13). By letter dated January 6, 2003 PADEP notified the City of the need to submit a notice of intent (NOI) to be covered under the 2003 PAG-13 by no later than March 10, 2003. The City failed to do so and on September 5, 2003, PADEP issued a Notice of Violation to the City for its failure to submit an NOI. On May 10, 2004 the City submitted an NOI for coverage under the 2003 PAG-13. PADEP approved coverage and assigned the City a 2003 PAG-13 specific coverage number of 2272.

18. On December 2, 2002, PADEP published a guidance document entitled “Municipal Separate Storm Sewer System (MS4) Stormwater Management Program Protocol,” 3900-PM-WM0100h (Dec. 2, 2002) (Protocol) including specific best management practices.

19. The 2003 PAG-13, Part A.2, required permittees to, within the permit term, implement a Stormwater Management Program (SWMP) meeting the following Minimum Control Measures (MCMs”): (1) Public Education and Outreach on Stormwater Impacts, (2)

Public Participation and Involvement, (3) Illicit Discharge Detection and Elimination, (4) Construction Site Runoff Control, (5) Post-Construction Stormwater Management in New Development and Redevelopment, and (6) Pollution Prevention and Good Housekeeping for Municipal Operations and Maintenance.

20. The 2003 PAG-13, Part A.3., required Permittees to either: (a) implement the Protocol; or (b) develop and implement their own stormwater management program. In its May 10, 2004 NOI the City indicated that it would implement the Protocol. Therefore, the Protocol and its underlying requirements were incorporated into the 2003 PAG-13 coverage for the City's MS4.

21. The 2003 PAG-13, Part B.3.a, required permittees to "comply with all terms and conditions of this Permit."

22. The 2003 PAG-13 expired on March 9, 2008, and was administratively extended, until PADEP issued a revised PAG-13, which became effective on March 10, 2013 (2013 PAG-13).

23. The City submitted an NOI for coverage under the 2013 PAG-13 on September 12, 2012, indicating on the form that it was a reissuance of permit coverage and noting its prior permit number of PAG-13 2272.

24. The 2013 PAG-13 includes substantially the same requirements as the 2003 PAG-13, but incorporates the MCM implementation measures previously included in the Protocol into the permit itself (See Appendix A, 2013 PAG-13). There are specified requirements for renewal permittees for continued implementation of their SWMP.

25. The 2013 PAG-13 adds a requirement for any permittee located in and discharging to watersheds draining to the Chesapeake Bay to develop, submit to PADEP for approval and implement a Chesapeake Bay Pollutant Reduction Plan.

26. Respondent is a "municipality" within the meaning of Section 502(4) of the Act, 33 U.S.C. § 1362(4).

27. Respondent is therefore a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

28. At all times relevant to this CAFO, Respondent owned and/or operated a regulated small MS4, located in the City of Wilkes-Barre, Luzerne County, Pennsylvania (Wilkes-Barre MS4).

29. Pursuant to 40 C.F.R. § 122.32(a)(1), the Wilkes-Barre MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census, and accordingly requires an NPDES permit.

30. Therefore, the Wilkes-Barre MS4 is a “small MS4” within the meaning of 40 C.F.R. § 122.26(b)(16).

31. The Wilkes-Barre MS4 discharges stormwater to Soloman Creek, Laurel Run, Mill Creek, Spring Run, the Susquehanna River and their associated tributaries.

32. Soloman Creek, Laurel Run, Mill Creek, Spring Run, the Susquehanna River and their associated tributaries, to which storm water flows and, at all times relevant to this Order, has flowed from the Wilkes-Barre MS4, are each a "water of the United States" as that term is defined at 40 C.F.R. § 122.2.

33. The 2003 PAG-13 authorized and the 2013 PAG-13 (collectively PAG-13) authorizes discharges of storm water from the Wilkes-Barre MS4, but only in accordance with the conditions of the Permit.

34. On July 31 and August 1, 2014, EPA and its duly-authorized representatives conducted an inspection and assessment of the City’s SWMP (Inspection).

35. In November 17, 2014 EPA sent the City a report of the Inspection (Inspection Report). The Inspection Report identified deficiencies in the City’s SWMP regarding implementation of five of the six MCMs: MCM #1 - Public Education and Outreach; MCM# 3- Illicit Discharge Detection and Elimination; MCM #4 – Construction Site Stormwater Runoff Control; MCM #5 - Post-Construction Stormwater Management in New and Redevelopment Activities; and MCM #6 - Pollution Prevention/Good Housekeeping for Municipal Operations.

36. By letter dated December 30, 2014 the City submitted to EPA a response to the Inspection Report, along with supplemental information and documents related to compliance with the PAG-13 Permits.

37. Based upon the 2014 facility inspection, EPA representatives identified the following violations of the 2009 General Permit and the CWA as described below.

III. FINDINGS OF VIOLATION

38. At the time of the Inspection the Respondent had not developed and implemented a SWMP for the Wilkes-Barre MS4. Specifically the Respondent had failed to fully develop and implement MCMs #1, #3, #4, #5 and #6 and failed to develop, submit to PADEP for approval an implement a Chesapeake Bay Pollutant Reduction Plan.

39. Respondents failure to fully develop and implement a SWMP in accordance with the PAG-13 Permits violates the Permits and Section 301 of the Act, 33 U.S.C. § 1311.

IV. CIVIL PENALTY

40. 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 five thousand dollars (\$25,000) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c).

41. The civil penalty amount set forth in Paragraph 40 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).

42. Respondent shall pay the civil penalty amount described in Paragraph 40, above, plus any interest, administrative fees, and late payment penalties owed, in accordance with the instructions set forth 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://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:

Deane H. Bartlett
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

43. 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.

44. 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).

45. 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.

46. 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).

47. The penalty specified in Paragraph 40 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

IV. GENERAL PROVISIONS

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

49. Respondent neither admits nor denies the Findings of Fact set forth in this CAFO.

50. 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.

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

52. 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.

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 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 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

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.

X. ENTIRE AGREEMENT

58. 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.

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.

FOR RESPONDENT:

Date: _____
Insert name and title

XI. FINAL ORDER

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

this _____ day of _____, 2016

Jon M. Capacasa, Director
Water Protection Division
U.S.EPA Region III