

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

IN THE MATTER OF:

Pennsylvania,
Department of Transportation
Keystone Building
400 North Street
Harrisburg, PA 17120

Docket No. CWA-03-2018-0038DN

**ADMINISTRATIVE ORDER FOR
COMPLIANCE ON CONSENT**

Proceeding under Section 309 of the Clean
Water Act, 33 U.S.C. § 1319

I. STATUTORY AUTHORITY

1. This Administrative Order for Compliance on Consent ("AOCC" or "Order"), EPA Docket No. CWA 03-2018-0008DN, is issued to the Pennsylvania Department of Transportation, Pennsylvania ("PennDOT"), under the authority vested in the United States Environmental Protection Agency ("EPA") by Section 309(a) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA Region III who in turn has delegated it to the Director of the Water Protection Division.

II. STATUTORY AND REGULATORY BACKGROUND

2. Section 309 of the Act, 33 U.S.C. § 1319(a), provides, *inter alia*, that whenever on the basis of any information available to him the Administrator finds that any person is in violation of any permit condition or limitation implementing certain CWA sections in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342, he shall issue an Order requiring such person to comply with such section or requirement.
3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except in compliance sections 301, 302, 306, 307, 318, 402, and 404 of the Act.
4. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the National Pollutant Discharge Elimination System ("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, 33 U.S.C. § 1342(b), provides for the authorization of state programs to issue NPDES permits.

5. 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.
6. 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 of Pennsylvania for NPDES permit violations.
7. PennDOT, or "Respondent", is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
8. "Discharge of a pollutant" means "[a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'." 40 C.F.R. § 122.2 *See also* 33 U.S.C. § 1362(12).
9. "Storm water" is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).
10. Discharges of stormwater associated with construction activity (construction sites) are regulated pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p) and the regulations promulgated thereunder.
11. Regulations implementing Pennsylvania's NPDES permitting program can be found in 25 Pa. Code Chapters 92a and 102. 25 Pa. Code § 102.5(a) provides in relevant part:

Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under general NPDES for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity

III. FINDINGS OF FACT AND JURISDICTIONAL ALLEGATIONS

9. : Respondent is an executive department of the Commonwealth of Pennsylvania, a "State" and therefore a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
10. 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 applicable Permit. Section 402(b) of the Act, 33 U.S. C. §1342(b), provides that the Administrator may authorize a state to issue an NPDES permit.

11. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Pennsylvania Department of the Environment ("PA DEP") to issue NPDES permits in 1978, and to issue general NPDES permits in 1991.
12. Pursuant to its authorization to issue general NPDES permits, PA DEP first issued its General Permit for Stormwater Discharges Associated with Construction Activities (PAG-02) ("PAG-02") on October 10, 1992.
13. Regulations implementing Pennsylvania's NPDES permitting program can be found in 25 Pa. Code Chapters 92a and 102. 25 Pa. Code § 102.5(a) provides in relevant part

Other than agricultural plowing or tilling activities, animal heavy use areas, timber harvesting or road maintenance activities, a person proposing an earth disturbance activity that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, or earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves equal to or greater than 1 acre (0.4 hectare) of earth disturbance, shall obtain an individual NPDES Permit or coverage under general NPDES for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity.

14. PennDOT has obtained coverage from PA DEP for construction stormwater discharges at numerous highway project sites since PA DEP first issued the PAG-02. Permit coverage for a highway project site extends for a 5-year time period, unless otherwise extended.
15. PennDOT has additionally applied for and been granted permit coverage under individual permits ("Individual Permits") issued by PA DEP for construction stormwater discharges at numerous highway project sites that do not qualify for coverage under the PAG-02.
16. At all times relevant to this Order, PennDOT was required to obtain coverage under the PAG-02 or an Individual Permit for any construction stormwater discharges from highway project sites that involved equal to or greater than 1 acre of earth disturbance, excluding road maintenance activity.
17. Attachment A, incorporated herein by reference, contains a non-exclusive list of highway project sites where PennDOT obtained coverage under the PAG-02 or an Individual Permit.
18. According to PennDOT, it retains contractors to construct its highway projects and requires these contractors to become co-permittees under the PAG-02 or Individual Permit coverage for the project. Furthermore, PennDOT asserts that its agreements with its contractors impose responsibility for complying with the permit terms and conditions on the contractors, including the responsibility to fully implement the required Best Management Practices ("BMPs").

19. 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 of Pennsylvania for NPDES permit violations.
20. PA DEP has delegated authority to certain Pennsylvania County Conservation Districts (CCDs) to implement portions of the state's construction stormwater program.
21. EPA and the CCDs have performed inspections of certain PennDOT facilities subject to permit coverage under either the PAG-02 or the individual permits described above, and in Attachment A, on multiple dates since at least 2011. Following some of these inspections, EPA and the CCDs issued inspection reports that identified apparent violations of the PAG-02, the individual permits described above, and the CWA, as described in detail in Attachment A and summarized below.
22. EPA submitted two formal information requests to PennDOT, pursuant to section 308 of the CWA, 33 U.S.C. §1342(i), and PennDOT provided responses to those requests to EPA.
23. EPA sent a letter to PennDOT on March 31, 2016 inviting PennDOT to meet with EPA to confer and resolve PennDOT's potential violations of the Clean Water Act. PennDOT and EPA met on May 24, 2016, June 30, 2016, August 5, 2016 and November 21, 2016.
24. As a result of the information known to EPA from sources including its inspections, the CCD inspection reports, PennDOT's responses to EPA's section 308 inquiries and the information provided to EPA by PennDOT during the meetings described above, EPA concludes that PennDOT violated the terms and conditions of its permit coverages and the CWA by failing to perform self-inspections and recordkeeping and by failing to fully implement BMPs at multiple highway construction sites.

IV. CONCLUSIONS OF LAW (VIOLATIONS)

Failure to perform self-inspections and recordkeeping

25. Part A.2.a of the PAG-02, entitled "Visual Inspections" requires that the Respondent perform self-inspections, at least weekly and after each measurable precipitation event and document each inspection. Specifically, Part A.2.a in the most current version of the PAG-02 states that:

The permittee and co-permittee(s) must ensure that visual site inspections are conducted and documented weekly, and within 24 hours after each measurable stormwater event throughout the duration of construction and until the receipt and acknowledgement of the NOT by the Department or authorized conservation district. The visual site inspections and reports shall be completed on a form developed by the Department and conducted by qualified personnel, trained and experienced in erosion and sediment control, to ascertain that E&S, PCSM and PPC BMPs are properly constructed and maintained to effectively minimize pollution to the waters of the Commonwealth. A written report of each inspection shall be kept and include at a minimum:

(1) A summary of site conditions, E&S and PCSM BMPs, implementation and maintenance and compliance actions; and

(2) The date, time, name and signature of the person conducting the inspection.

26. Self-inspection and reporting requirements, substantially equivalent to those set forth in Part A.2.a of the contemporaneous version of the PAG-02 are contained in the Individual Permits, identified in Attachment A.
27. As set forth in Paragraph 24 above, and elaborated herein, EPA concludes that the self-inspection and record keeping requirements of the PAG-02 and the applicable Individual Permits, as described in Attachment A, were not fully satisfied, on at least 191 occasions, as summarized below:

Montgomery County, SR 202, Section 65N. Respondent failed to develop/maintain records of inspections on at least 50 occasions during the time period of March of 2012-October of 2013, including the following dates: 3/6/12; 4/20/12; 5/14/12 (report completed late); 5/31/12 (report completed late); and 10/1/12; 10/24/12. Moreover, six reports prepared by PennDOT were undated and unsigned. Additionally, according to PennDOT's 308 response, the site was active until 10/31/13. PennDOT provided no self-inspection reports for the time period from 12/1/12 through 10/31/13.

Pike County, SR 201. Respondent failed to develop/maintain records of inspections on 15 occasions during the time period of January of 2012-October of 2012, on or about the following dates: 1/16/12; 2/10/12; 2/17/12; 3/21/12; 6/22/12; 7/6/12; 8/13/12; 9/20/12; 9/28/12; 10/1/12; 10/4/12; 10/12/12; 10/19/12; 10/25/12; and 10/31/12.

Washington County, I70, Section Y20. Respondent failed to develop/maintain records of inspections on 49 occasions during the time period of January of 2012-December of 2013, on or about the following dates: 1/12/12; 1/19/12; 3/14/12; 3/26/12; 4/ 2/12; 5/3/12; 5/25/12; 6/4/12; 6/13/12; 7/6/12; 7/23/12; 7/30/12; 9/3/12; 9/6/12; 9/10/12; 9/20/12; 11/14/12; 12/6/12; 12/12/12; 12/19/12; 1/17/13; 1/30/13; 2/6/13; 3/7/13; 3/20/13; 4/18/13; 4/26/13; 5/9/13; 5/27/13; 5/30/13; 6/27/13; 7/2/13; 7/12/13; 7/29/13; 8/21/13; 9/20/13; 10/8/13; 10/18/13; 10/25/13; 11/1/13; 11/8/13; 11/15/13; 11/19/13; 11/28/13; 12/6/13; 12/13/13; 12/16/13; 12/23/13; and 12/31/13.

Berks County, SR 183 & SR 222. Respondent failed to develop/maintain records of inspections on 17 occasions during the time period of January 2012-August 2013 on or about the following dates: 1/23/12; 5/7/12; 5/28/12; 7/6/12; 7/13/12; 7/25/12; 8/7/12; 8/16/12; 12/11/12; 12/31/12; 2/12/13; 3/18/13; 6/12/13; 7/15/13; 8/9/13; 8/14/13 and 8/30/13.

Lehigh County, SR 2045, Section 01B. Respondent failed to develop/maintain records of inspections on 9 occasions during the time period of February 2012 to October 2012 on or about the following dates: 2/11/12; 5/3/12; 7/3/12; 9/13/12; 9/20/12; 9/23/12; 10/4/12; 10/9/12; and 10/18/12.

Lehigh County, RT 309, Section 7S. Respondent failed to develop/maintain records of inspections on 12 occasions during the time period of January of 2013-July of 2013 on or about the following dates: 1/14/13; 1/17/13; 2/11/13; 2/21/13; 3/14/13; 3/20/13; 4/15/13; 4/22/13; 5/1/13; 5/30/13; 6/12/13; and 7/3/13.

Lehigh County, SR 145 & RT 22. Respondent failed to develop/maintain records of inspections on 23 occasions during the time period of June of 2012 – February of 2013 on or about the following dates: 6/22/12; 7/5/12; 8/2/12; 8/16/12; 8/31/12; 9/5/12; 9/28/12; 10/4/12; 10/12/12; 10/19/12; 10/26/12; 11/2/12; 11/9/12; 11/16/12; 11/23/12; 11/30/12; 12/7/12; 12/14/12; 1/13/13; 1/18/13; 2/1/13; 2/8/13 and 2/15/13.

Montgomery County, SR 202, Section 711. Respondent failed to develop/maintain records of inspections on 16 occasions during the time period of January of 2012 to November of 2012 on or about the following dates: 1/6/12; 1/25/12; 3/5/12; 3/23/12; 5/4/12; 5/14/12; 7/17/12; 7/30/12; 8/2/12; 8/16/12; 9/6/12; 9/10/12; 9/20/12; 10/1/12; 10/24/12; and 11/15/12.

28. The failure to perform self-inspections and/or recordkeeping are violations of Part A.2.a of PAG-02 and the relevant sections of the Individual Permits, and are therefore violations of Sections 301 and 402 of the CWA.

Failure to implement BMPs

29. Part A.1.b of the most current version of PAG-02, entitled “Applicable Effluent Limitations” requires that:

Activities covered under this permit must comply with applicable effluent limitations established in 25 Pa. Code Chapters 91, 92a, 93, 96, 102, and 105 and any applicable federal law or regulation, including the effluent guidelines for construction at 40 CFR Part 450.

30. 40 CFR Section 450.21, requires that regulated construction-related point sources implement erosion and sediment controls, soil stabilization, dewatering, and pollution prevention activities.
31. 25 Pa. Code Section 102.4 requires the installation and maintenance of BMPs, including inlet protection, silt socks, stormwater management basins, maintaining the limits of disturbance, the containment of concrete wash water and rock entrance controls.
32. 25 Pa. Code Section 102.22 requires site stabilization activities.
33. Applicable Effluent Limitations, similar to those set forth in Part A.1.b are contained in the Individual Permits described in paragraph 14, above, and in the permits specifically identified in Attachment A.

34. As set forth in Paragraph 24 above, and elaborated herein, EPA concludes that the BMP requirements set forth in the Applicable Effluent Limitations, as required by PAG02 and the applicable Individual Permits, were not fully satisfied. While PennDOT contracted with others to fully implement the BMPs required by the permits as described in paragraph 18 above, EPA concludes that PennDOT nonetheless remained obligated to implement the BMPs and is liable for the failure of the BMPs to be fully implemented. As summarized below, and described more fully in Attachment A, EPA concludes that the Applicable Effluent Limitations were violated on at least 18 occasions:

Washington County, I70/I79 on or about: 10/11/13; 11/20/13; and 5/6/14;
Washington County, SR 519 on or about: 3/2/15; 3/19/15; 6/25/15; and 3/3/16;
Lehigh County, RT 309, Section 07S, on or about: 7/29/13; 5/19/15;
Luzerne County, Airport Beltway, on or about: 3/6/13;
Lehigh County, RT 22 and SR 145, on or about: 2/13/13; 2/21/13; 6/28/13; 11/27/13; 5/1/14; and 5/19/14;
Armstrong County, Theater Road, on or about: 5/4/15; and 5/28/15.

35. These failures to fully comply with the Applicable Effluent Limitations are violations of Part A.1.b of PAG-02 and the relevant sections of the Individual Permits, and are therefore violations of Sections 301 and 402 of the CWA.

V. COMPLIANCE ORDER

Therefore, this _____ day of _____, 2017, PennDOT is hereby ORDERED, pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), and consents to conduct the following activities:

36. PennDOT shall comply with the Compliance Management Program identified in Attachment B to this AOCC.
37. In order to mitigate environmental damages that might have occurred as a result PennDOT's non-compliance with the terms of PAG 02 cited above, PennDOT has agreed to undertake an environmentally beneficial project within the Codorus Creek Watershed which is impaired due to sediment. This beneficial project would not otherwise be required for PennDOT construction projects. The project will include BMP siting, design, permitting, acquisition of property interests, construction, and twenty additional years of post-construction maintenance. PennDOT shall make no less than \$750,000 available for this project. PennDOT has begun its process for procuring a contractor in anticipation of the entry of this Order. If not already awarded, PennDOT will award a contract for the project no later than 30 days after the Effective Date and commence implementation according to the schedule described in Attachment C. PennDOT may submit to EPA a request for an extension of time. The request must contain a paragraph explaining the need for the time extension and the amount of additional time needed. EPA will respond within ten days of the receipt of PennDOT's request.

38. All notices and submissions required under this AOCC shall be sent either via mail or electronically to:

Mr. Chuck Schadel
NPDES Enforcement Branch (3WP42)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
schadel.chuck@epa.gov

39. All submissions provided pursuant to this Order shall be signed by PennDOT and shall include the following certification pursuant to 40 C.F.R. section 122.22:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

VI. GENERAL PROVISIONS

40. PennDOT waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review of this Order which PennDOT may have with respect to any issue of fact or law set forth in this Order.
41. Issuance of this Order shall not be deemed an election by EPA to forego any administrative, civil, or criminal action to seek penalties, fines, or any other appropriate relief under the Act for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited.
42. This AOCC addresses only the violations described herein. EPA reserves the right to commence action against any person, including PennDOT, in response to any condition not described herein that EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment.
43. This Order does not constitute a waiver or modification of the terms or conditions of any NPDES permit. Compliance with the terms and conditions of this Order does not relieve PennDOT of its obligations to comply with any applicable federal, state, or local law or regulation.
44. EPA reserves any rights and remedies available to it under the CWA, 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 Order.

45. Violations of the terms of this Order may result in further EPA enforcement action for violations of this Order, and may subject PennDOT to the imposition of administrative and/or civil penalties pursuant to 33 U.S.C. § 1319.
46. EPA reserves all existing authority otherwise available to EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.
47. The undersigned representative of PennDOT certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this AOCC and to execute and legally bind that party to it.
48. All of the terms and conditions of this AOCC together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this AOCC, or one or more of its terms and conditions, is held invalid, or is not executed by all of the signatories in identical form, or is not approved in such identical form by the Regional Administrator or his designee, then the entire AOCC shall be null and void.
49. PennDOT neither admits nor denies the findings of fact and conclusions of law contained or referenced in this AOCC.
50. PennDOT admits the jurisdictional allegations contained in this AOCC and agrees not to contest EPA's jurisdiction to issue and enforce the terms of this AOCC.

VII. EFFECTIVE DATE

51. This Order will become effective upon PennDOT's receipt of a fully-executed copy of this Order unless modified or withdrawn.

VIII. TERMINATION

52. This Order shall terminate five (5) calendar years after the electronic tracking system for Stormwater Compliance Data is implemented.

FOR THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

By:



Name: George W. McAuley, P.E.

Title: Deputy Secretary for Highway Administration

6/20/18

Date:

SO ORDERED:

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

By:

Dominique Luekenhoff

Name:

Title: Acting Director, Water Protection Division
U.S. EPA, Region III

Date:
