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COUNTY OF HENRICO

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May 10, 2011

BY OVERNIGHT COURIER

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Re: Henrico County's Answer to Administrative Penalty Complaint, Docket No.
CWA-03-2011-0139

To whom it may concern:

Enclosed for filing in the above-referenced matter is the County of Henrico's Answer to the Administrative Penalty Complaint in the above-referenced matter. I have also enclosed a copy for the Hearing Officer.

Thank you for your assistance in this matter.

Yours truly,

Benjamin A. Thorp

Enclosure

cc: Pamela J. Lazos, Esq.

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

In the Matter of:)	Proceeding to Assess Class II
)	Administrative Penalty Under
)	Section 309(g) of the Clean Water Act
Henrico County, Virginia)	
4301 East Parham Road)	Docket No. CWA-03-2011-0139
Henrico, Virginia 23228)	
)	ANSWER TO ADMINISTRATIVE
Respondent)	PENALTY COMPLAINT AND
)	REQUEST FOR HEARING
)	

Respondent, County of Henrico, Virginia ("County"), by counsel, for its Answer to the Administrative Penalty Complaint ("Complaint"), states as follows:

I. STATUTORY AUTHORITY

1. In response to the allegations in paragraph 1 of the Complaint, the County states that the cited provisions of the United States Code speak for themselves. The County denies any allegations in the Complaint that are inconsistent with those provisions. Regarding the allegations related to delegations of authority within the Environmental Protection Agency ("EPA"), the County is without information sufficient to admit or deny those allegations, and so denies same.

2. The County admits the allegations of paragraph 2 of the Complaint.

II. FACTUAL AND LEGAL ALLEGATIONS

3. The County admits the allegations of paragraph 3 of the Complaint.
4. The County admits the allegations of paragraph 4 of the Complaint.
5. The County admits the allegations of paragraph 5 of the Complaint.
6. The County admits that its geographical area encompasses 244 square

miles and that it is located in central Virginia. The County further admits that it is generally bordered by the James River, the Tuckahoe Creek and the Chickahominy River. The County denies that these three water bodies comprise the entirety of the County's borders. The County's border with the City of Richmond, a completely separate political entity, is not completely coexistent with any body of water. Neither are the County's borders with Goochland and New Kent Counties completely coexistent with any body of water. The County further denies that all stormwater from the County drains to a "water of the United States," as that term is defined pursuant to Section 502(7) of the Clean Water Act (the "CWA"), 33 U.S.C. § 1362(7), and the regulations implementing that portion of the CWA, 40 C.F.R. § 122.2.

7. The County admits the allegations of paragraph 7 of the Complaint.
8. The County admits the allegations of paragraph 8 of the Complaint.
9. The County admits that paragraph 9 of the Complaint accurately quotes a selected part of the definition of "discharge of a pollutant" provided in 40 C.F.R. § 122.2.
10. The County admits that paragraph 10 of the Complaint accurately quotes a selected part of the definition of "storm water" provided in 40 C.F.R. § 122.26(b)(13).

11. The County admits that paragraph 11 of the Complaint accurately quotes a selected part of the definition of “municipal separate storm sewer system” provided in 40 C.F.R. § 122.26(b)(8)(i).

12. The County admits the allegations of paragraph 12 of the Complaint.

13. The County admits the allegations of paragraph 13 of the Complaint.

14. The County admits the allegations of paragraph 14 of the Complaint.

15. The County admits the allegations of paragraph 15 of the Complaint.

III. FINDINGS OF VIOLATION

Illicit Discharge Detection and Elimination

16. In response to the allegations in paragraph 16 of the Complaint, the County states that the provisions of the County’s MS4 permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

17. In response to the allegations in paragraph 17 of the Complaint, the County states that the provisions of the County’s MS4 permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

18. In response to the allegations in paragraph 18 of the Complaint, the County the County states that the provisions of the County’s MS4 permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

19. The County denies the allegations of paragraph 19 of the Complaint. The County has not discontinued its inlet inspection efforts. In calendar year 2007, County VPDES staff and County Standing Water Initiative (“SWI”) staff inspected 133 MS4 outfalls and 906 inlets and other MS4 components. In calendar year 2008, 410 outfalls

were inspected by County VPDES staff. 130 outfalls and other MS4 components were inspected in 2008 by County SWI staff during their mosquito surveillance operations. In calendar year 2009, 149 outfalls were inspected by County VPDES staff. 106 inlets and other MS4 components were inspected in 2009 by County SWI staff during their mosquito surveillance operations. In calendar year 2010, 80 outfalls and approximately 50 inlets were inspected by County VPDES staff. 177 inlets and other MS4 components were inspected by County SWI staff during their mosquito surveillance operations. The SWI staff has been trained to notify the VPDES staff of any suspected illicit discharges identified during their operations.

20. The County denies the allegations of paragraph 20 of the Complaint. Field screening continues to be part of the County's MS4 program. The County's current field screening procedure is different than what was in place at the time the Permit was issued; it has evolved with the various revisions to the County's Master Plan and in response to EPA's 2005 audit.

21. In response to the allegations in paragraph 21 of the Complaint, the County states that the provisions of the County's MS4 permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

22. The County denies the allegations of paragraph 22 of the Complaint. The County has an effective and compliant process and system for identifying and conducting routine maintenance of outfalls. This system includes inspections of outfalls conducted by County VPDES staff in accordance with the County's field screening procedure. Where discharges of pollutants are suspected, County VPDES Staff investigate and pursue resolution of the suspected discharge. Additionally, the outfalls identified as

needing routine maintenance (significant accumulation of sediment or debris, significant amount of trash, structures in need of structural repair, etc.) by County VPDES Staff are forwarded to the County's Road Maintenance Division of Public Works. The County's Road Maintenance Division performs the required maintenance activity and documents details of the maintenance activity in their work order system. The County's Road Maintenance Division notifies the County's VPDES Staff of those outfalls that are maintained.

23. The County denies the allegations of paragraph 23 of the Complaint. The County's permit does not specify requirements for the "summary of maintenance activities on structural BMPs." The County's records and reports, including its electronic databases, satisfy its permit requirement for a summary of maintenance activities.

24. In response to the allegations in paragraph 24 of the Complaint, the County states that the provisions of the County's MS4 permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

25. The County admits the allegations of paragraph 25 of the Complaint. The County's inspection and record-keeping deficiencies are partially attributable to the vacancy of several County positions with monitoring and enforcement authority because of a County-wide hiring freeze implemented in response to the historic economic downturn that began in 2008-09.

26. The County admits the allegations of paragraph 26 of the Complaint. The County's inspection and record-keeping deficiencies are partially attributable to the vacancy of several County positions with monitoring and enforcement authority because

of a County-wide hiring freeze implemented in response to the historic economic downturn that began in 2008-09.

27. The County admits the allegations of paragraph 27 of the Complaint. The County's inspection and record-keeping deficiencies are partially attributable to the vacancy of several County positions with monitoring and enforcement authority because of a County-wide hiring freeze implemented in response to the historic economic downturn that began in 2008-09.

28. The County admits the allegations of paragraph 28 of the Complaint. The County's inspection and record-keeping deficiencies are partially attributable to the vacancy of several County positions with monitoring and enforcement authority because of a County-wide hiring freeze implemented in response to the historic economic downturn that began in 2008-09.

Industrial and Commercial Facilities

29. In response to the allegations in paragraph 29 of the Complaint, the County the County states that the provisions of the County's MS4 permit speak for themselves, and denies any allegations that are inconsistent with those provisions. Virginia is a Dillon Rule state, meaning that localities are not permitted to take any actions, including enacting ordinances, unless the Virginia General Assembly has expressly authorized such actions, or such action is necessarily implied by the General Assembly's express grant of authority. Prior to July 1, 2011, the County only had authority to inspect industrial facilities if it had ample evidence of a violation. The 2011

Virginia General Assembly passed legislation, H. 1739, which empowered localities with the right to enter and inspect industrial facilities that connect to its MS4 system.

30. The County admits the allegations of paragraph 30 of the Complaint, insofar as paragraph 30 accurately quotes the County's Storm Water Management Master Plan (the "Plan"). However, the County denies that it has the authority described in the Plan. Prior to July 1, 2011, the County only had authority to inspect industrial facilities if it had ample evidence of a violation. The 2011 Virginia General Assembly passed legislation, H. 1739, which empowered localities with the right to enter and inspect industrial facilities that connect to its MS4 system. Furthermore, the language quoted from the Plan includes an error: the "or" after the phrase "NPDES permit" should be an "and."

31. In response to the allegations in paragraph 31 of the Complaint, the County states that the provisions of the County's ordinances speak for themselves, and denies any allegations that are inconsistent with those provisions.

32. In response to the allegations in paragraph 32 of the Complaint, the County states that the provisions of the County's permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

33. The County denies the allegations of paragraph 33 of the Complaint, insofar as they imply the County has failed to establish any legal authority that it is permitted to establish under Virginia law. Virginia is a Dillon Rule state, meaning that localities are not permitted to take any actions, including enacting ordinances, unless the Virginia General Assembly has expressly authorized such actions, or such action is necessarily implied by the General Assembly's express grant of authority. Prior to July

1, 2011, the County only had authority to inspect industrial facilities if it had ample evidence of a violation. The 2011 Virginia General Assembly passed legislation, H. 1739, which empowered localities with the right to enter and inspect industrial facilities that connect to its MS4 system.

34. In response to the allegations in paragraph 34 of the Complaint, the County states that the provisions of the County's ordinances speak for themselves, and denies any allegations that are inconsistent with those provisions. The County denies that its own ordinances are capable of conferring any authority to the County unless that authority has first been expressly granted by the Virginia General Assembly, or is the necessary implication of such expressly granted authority.

35. The County denies the allegations of paragraph 35 of the Complaint. The County inspection of industrial facilities complies with its MS4 permit. Section I.B.4 of the permit does not require inspection of individual industrial facilities. Nevertheless, the County inspects individual industrial facilities regardless of whether a violation is suspected or actually occurs. These individual industrial inspections are undertaken to maximum extent practicable and consistent with state law. The sites subject to these individual inspections are identified in the County's annual reports and are based on the four categories of sites listed in the permit: municipal landfills, hazardous waste facilities, section 313 industrial sites and other sites determined by the County. Other sites are inspected when a violation is suspected based on MS4 screening activities, based on citizen complaints or reports from other County staff.

36. In response to the allegations in paragraph 36 of the Complaint, the County states that the provisions of the County's permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

37. The County denies the allegations of paragraph 37 of the Complaint. The County's inspection of industrial and commercial facilities complies with its permit requirements. The County inspects industrial and commercial facilities to the maximum extent practicable and consistent with state law. Furthermore, based on EPA's own studies that concluded that a highly significant proportion of sewer overflows are caused by FOG, the County implemented a Fats, Oils and Grease ("FOG") program prior to EPA's inspection. In 2010, the County's FOG program inspected approximately 350 sites. The County has also prioritized the field screening of the MS4 in the areas where automobile service centers and dry cleaning operations exist. Furthermore, the County inspected the eleven industrial sites subject to annual inspections.

38. The County denies the allegations of paragraph 38 of the Complaint. The County does have a program to monitor and control pollutants in storm water discharges from the two municipal landfills located in the County, the sixteen hazardous waste facilities locate in the County, the five section 313 industrial sites located in the County and other sites determined to be contributors of significant pollutant loadings, including nineteen industrial sites and approximately 300 fats, oils and grease generating sites.

39. The County denies the allegations of paragraph 39 of the Complaint. The two deficiencies noted in the audit summary dated July, 2010 regarding the April 20, 2010 inspection of the Powhatan Ready Mix plant are erroneous. The first finding is related to sediment at an outfall. The area was specifically addressed in the County's

inspection report and notations were made that the outfall area was free of sediment and that the receiving stream was in good condition with clear water. The second finding involves the location of the onsite spill kits. As indicated in section E of the inspection report, the spill kits were discussed with the plant manager while inside the facility, who agreed that they should be located near the fuel tank. EPA also made note of this later during the inspection. EPA's audit summary also noted deficiencies for the County's alleged failure to document and address issues at industrial sites, even when the issues were located on portions of the industrial sites that does not drain to the County's MS4 system. The County's MS4 staff has no authority, nor does it have any legal obligation under the CWA, to inspect portions of industrial sites that do not drain to the County's MS4 system.

40. The County denies the allegations of paragraph 40 of the Complaint. The County does have a program to monitor and control pollutants in storm water discharges from the two municipal landfills located in the County, the sixteen hazardous waste facilities located in the County, the five section 313 industrial sites located in the County and other sites determined to be contributors of significant pollutant loadings, including nineteen industrial sites and approximately 300 fats, oils and grease generating sites.

41. In response to the allegations in paragraph 41 of the Complaint, the County states that the provisions of the County's permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

42. The County denies the allegations of paragraph 42 of the Complaint. Double wall tanks are an EPA-approved form of secondary containment for above ground storage tanks ("ASTs"). All of the County's ASTs are double walled, except for

those single walled tanks that are placed inside a bermed area that could contain 110% of the contents from the largest AST in the bermed area. Also, each of these double walled tanks has a manual interstitial monitoring tube that allows for manual “sticking” to determine the presence of oil in the interstitial space. Central Automotive Maintenance (“CAM”) has an approved SPCC plan that was developed and certified by a licensed engineer in the Commonwealth of Virginia attesting to the fact that the plan complies with applicable laws and regulations for above ground storage tanks used by CAM.

The EPA inspection report asserts that certain empty 55 gallon drums constitute a violation. However, the drums documented in EPA’s inspection report and photograph log are completely empty drums, clearly marked “Auction” and are used by the County to help mark off areas with yellow tape during our surplus vehicle auctions.

The EPA inspection report also asserts that another drum constitutes a violation. However, based on the associated photograph log documenting this alleged violation, this drum has actually been converted into a barbeque grill and is not covered by any relevant federal or state laws or regulations.

The uncovered dumpster noted in EPA’s inspection report and associated photo log is used only for the storage of scrap metal, and therefore does not need to be covered. The two containers to the right of the dumpster are provided by the County’s solid waste vendor and have covered tops that can be opened to fill the container from the top, or they can be filled from the side through a sliding door. The oil stains on the parking lots are left over from vehicle spills or drips that have been cleaned up over the years

43. The County denies the allegations of paragraph 43 of the Complaint for the reasons stated above.

Construction Sites - BMPs

44. In response to the allegations in paragraph 44 of the Complaint, the County states that the provisions of the County's permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

45. The County denies the allegation of paragraph 45 of the Complaint. The Virginia Storm Water Management General Permit ("VSWMGP") is a permit issued by the Commonwealth of Virginia pursuant to state law. Compliance with the Virginia Storm Water Management statutes, regulations and general permit is not within EPA's jurisdiction, nor required by the terms of the County's MS4 permit.

46. The County denies the allegations of paragraph 46 of the Complaint.

47. In response to the allegations in paragraph 47 of the Complaint, the County states that the provisions of the Virginia's Erosion and Sediment Control ("E&S") regulations speak for themselves, and denies any allegations that are inconsistent with those provisions. The County also denies that strict compliance with these E&S regulations is required by the County's MS4 permit.

48. The County denies the allegations of paragraph 48 of the Complaint. The County maintains records documenting the type of erosion and sediment control inspections it performs. Furthermore, compliance with the Virginia E&S regulations is enforced by the Commonwealth of Virginia. The County complies with Virginia E&S laws and regulations. Strict compliance with the E&S regulations is not required by the County's MS4 permit.

49. The County denies the allegations of paragraph 49 of the Complaint.

Continuing Education

50. In response to the allegations in paragraph 50 of the Complaint, the County states that the provisions of the County's permit speak for themselves, and denies any allegations that are inconsistent with those provisions.

51. The County denies the allegations of paragraph 51 of the Complaint. Training such as the Site Contractor Workshop provided in 2002 was replaced by the Commonwealth of Virginia's Responsible Land Disturber training and certification requirements and more specific training at the local level. During the preconstruction meeting held for each project disturbing 2,500 square feet or more of land, training is provided by the County to the site operator and contractors prior to the County authorizing land disturbance at the site. This training is specific to the requirements for the construction site. Furthermore, formal training is not required by the County's permit.

52. The County denies the allegations of paragraph 52 of the Complaint for the reasons stated above.

IV. PROPOSED CIVIL PENALTY

53. In response to the allegations in paragraph 53 of the Complaint, the County states that the referenced statute and regulations speak for themselves, and denies any allegations that are inconsistent with those provisions.

54. In response to the allegations in paragraph 54 of the Complaint, the County states that the referenced statute and regulations speak for themselves, and denies any allegations that are inconsistent with those provisions.

55. In response to the allegations in paragraph 55 of the Complaint, the County states that the referenced statute and regulations speak for themselves, and denies any allegations that are inconsistent with those provisions.

56. In response to the allegations of paragraph 56 of the Complaint, the County incorporates by reference its previous responses set forth above with respect to the “violations alleged herein.” Additionally, the County states that the statutes and rules cited in paragraph 56 speak for themselves, and denies any allegations that are inconsistent with those provisions. The County admits that EPA proposes to issue a Final Order assessing penalties in the amount of \$164,300, but denies that such a penalty is appropriate in this case.

57. In response to the first sentence of paragraph 57 of the Complaint, the County is without sufficient knowledge to admit or deny the allegation, and therefore denies the allegation. In further response, the County states that the referenced statute speaks for itself, and denies any allegations that are inconsistent with that statute.

58. In response to the allegations set forth in paragraph 58 of the Complaint, the County states that this paragraph alleges legal conclusions to which no response is required. To the extent any response is required, the County denies the allegations.

59. In response to the allegations set forth in paragraph 59 of the Complaint, the County states that this paragraph alleges legal conclusions to which no response is required. To the extent any response is required, the County denies the allegations.

60. In response to the allegations set forth in paragraph 60 of the Complaint, the County states that this paragraph alleges legal conclusions to which no response is required. To the extent any response is required, the County denies the allegations.

V. ANSWER TO COMPLAINT AND OPPORTUNITY TO REQUEST HEARING

61-73. The County states that paragraphs 61 through 73 of the Complaint relate to various legal requirements pertaining to the processing of this administrative proceeding and, as such, require no response. Any factual allegations are denied. In further response, the County states that the referenced statutes and regulations speaks for themselves, and denies any allegations that are inconsistent with those statutes and regulations.

VI. QUICK RESOLUTION

74-80. The County states that paragraphs 74 through 80 of the Complaint relate to various legal requirements pertaining to the processing of this administrative proceeding or to the mechanism for "Quick Resolution" and, as such, require no response. The County has elected not to resolve this proceeding by paying the stated penalty. Any factual allegations are denied. In further response, the County states that the referenced statutes and regulations speaks for themselves, and denies any allegations that are inconsistent with those statutes and regulations.

VII. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

81. In response to the allegations of paragraph 80 of the Complaint, the County states that the referenced rules speak for themselves, and denies any allegations that are inconsistent with the referenced rules.

VIII. COUNTY'S ADDITIONAL RESPONSES AND AFFIRMATIVE DEFENSES

82. The County denies all allegations of the Complaint which it has not expressly admitted.

83. The County raises the defenses of estoppel and the County's compliance with applicable Commonwealth of Virginia laws and regulations.

IX. REQUEST FOR A HEARING AND SETTLEMENT CONFERENCE

84. The County requests a hearing on the issues raised by the Complaint and this Answer, including the proposed penalty assessment.

85. The County requests a settlement conference regarding the issues raised by the Complaint and this Answer, including the proposed penalty assessment. The County is also interested in discussing and exploring with EPA options for a Supplemental Environmental Project or Projects to offset any penalty or settlement amount.

Respectfully Submitted,

COUNTY OF HENRICO, VIRGINIA

By: 

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Henrico, Virginia 23273-0775
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Counsel for Henrico County, Virginia

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2011, I caused the original and one true copy of the foregoing document to be filed the next day by overnight courier with the Regional Hearing Clerk (3RC00), U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029 and, further, that on that same day I also caused a true copy of the foregoing document to be served by overnight courier on Pamela J. Lazos (3RC20), U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029.


Counsel