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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

1650 Arch Street

Philadelphia, Pennsylvania 19103-2029

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REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

In the Matter of:	:	Proceeding to Assess Class II
	:	Administrative Penalty Under
	:	Section 309(g) of the Clean Water Act
	:	
New Castle County, Delaware	:	Docket No. CWA-03-2014-0226
	:	
	:	CONSENT AGREEMENT
	:	AND FINAL ORDER
Respondent.	:	
	:	

I. PRELIMINARY STATEMENT and STATUTORY AUTHORITY

1. This Consent Agreement is entered into by the Director, Water Protection Division, United States Environmental Protection Agency, Region III ("Complainant") and New Castle County, Delaware ("New Castle County" or "Respondent") pursuant to Section 309(g) of the Clean Water Act, 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. The parties having agreed to settlement of alleged violations of the Clean Water Act by Respondent, this Consent Agreement and Final Order (CAFO) simultaneously commences and concludes this action pursuant to 40 C.F.R. § 22.13(b) and 22.18(b)(2) and (3).

2. 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 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.

3. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (effective January 12, 2009), 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 occurring after January 12, 2009 up to a total penalty amount of \$177,500.

**II. EPA FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS, and
CONCLUSIONS OF LAW**

4. New Castle County Delaware is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

5. At all times relevant to this CAFO, Respondent has owned and/or operated a municipal separate storm sewer system (“MS4”) as that term is defined in 40 C.F.R. § 122.26(b)(8).

6. Respondent’s MS4 is located within the geographic boundaries of New Castle County.

7. New Castle County encompasses a total area of approximately 272,826 acres. According to the County, its population is estimated at 546,076 people.

8. Stormwater from New Castle County drains into the numerous creeks and small tributaries of the Delaware Bay, Chesapeake Bay and Piedmont watersheds, which are considered “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.

9. 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.

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 pollutants from point sources to waters of the United States. The discharges are subject to specific terms and conditions as prescribed in the permit.

11. “Discharge of a pollutant” includes “any addition of any pollutant or combination of pollutants to waters of the United States from any point source.” 40 C.F.R. § 122.2.

12. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).

13. The term “municipal separate storm sewer system” (MS4) includes, “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the

CWA that discharges to waters of the United States designed or used for collecting or conveying stormwater, which is not a combined sewer, and which is not a part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.” 40 C.F.R. § 122.26(b)(8).

14. An NPDES permit is required for discharges from an MS4 if the county had a population of 100,000 or more when MS4s were designated by EPA in 1990, Section 402(p)(2)(C) of the Act, 33 U.S.C. § 1342(p)(2)(C); 40 C.F.R. § 122.26(a).

15. Respondent has a population of at least 100,000 people.

16. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Delaware Department of Natural Resources and Environmental Control (DNREC) to issue NPDES permits on April 1, 1974.

17. DNREC issued to Respondent and to co-permittees (Delaware Department of Transportation, the Village of Arden, Delaware, the Village of Ardentown, Delaware, the Village of Ardencroft, Delaware, the Town of Bellefonte, Delaware, the City of Delaware City, Delaware, the Town of Elsemere, Delaware, the Town of Middletown, Delaware, the Town of Newport, Delaware, the City of New Castle, Delaware, the Town of Odessa, Delaware, the Town of Townsend, Delaware, and the City of Wilmington, Delaware) an NPDES MS4 Discharge Permit No. DE 0051071 which became effective on May 1, 2001 (the 2001 MS4 Permit).

18. The expiration date of the MS4 Permit was May 1, 2006. The County timely applied for a new permit. However, the MS4 Permit was administratively extended until NPDES MS4 Discharge Permit No. DE 0051071 was reissued with an effective date of May 7, 2013 (2013 MS4 Permit).

19. An NPDES permit is also required for discharges of storm water associated with industrial activity, as well as for stormwater discharges which DNREC or EPA determine to be a significant contributor of pollutants or that contributes to a violation of a water quality standard. Section 402(p)(2) of the Act, 33 U.S.C. § 1342(p)(2); 40 C.F.R. § 122.26(a).

20. On April 17 and 18, 2013, a compliance inspection team comprised of EPA and authorized representatives of EPA inspected Respondent's MS4 program (the MS4 Inspection).

21. In August 2013, EPA issued the New Castle County Department of Special Services Municipal Separate Storm Sewer System (MS4) Program Inspection Report (Inspection Report), which included, in addition to general information regarding the County's MS4 program and history, seven observations regarding the County's MS4 Program related to the requirements of the 2001 MS4 Permit. The Inspection Report also included seven appendices (exhibit log, photo log, document log, etc.).

22. New Castle County received a copy of the Inspection Report which was sent by mail on September 18, 2013. New Castle County prepared and submitted a response to EPA on

October 23, 2013.

23. Based upon the MS4 Inspection and New Castle County's response, EPA has identified two violations, among the seven observations, which it has concluded were violations of the 2001 MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

24. Part II.A.8. of the MS4 Permit requires, as part of New Castle County's SWPP&MP, that "The co-permittees shall implement a program to identify, monitor, and control pollutants in storm water discharges to the [MS4] from the following "high risk" industrial or commercial facilities: municipal and hazardous waste landfills; industrial facilities that discharge, with or without pretreatment, to the [New Castle County] sanitary sewer system; ... and any other industrial or commercial discharge the co-permittees determine are contributing a substantial pollutant load to the [MS4]."

25. Part II.A.8.e of the MS4 Permit requires, as part of the industrial and high risk program, "procedures for maintaining a list of all industrial storm water sources discharging to the [MS4] and updating such a list as necessary to keep it current." According to New Castle County's "Industrial and High Risk Facilities Inspection & Monitoring Program" updated in 2003, New Castle County was responsible for inspecting 27 high risk facilities, including 15 pretreatment facilities, four landfills, and eight Toxic Release Inventory facilities, as part of its 2001 Memorandum of Agreement with DNREC.

26. The County reports on its activities related to the industrial and high risk program, including providing an inventory of facilities inspected, to DNREC. The County began reporting activities, including providing an inventory of facilities inspected, and coordinating responsibilities with DNREC beginning with the 2001 Annual Report. The County believed itself to be in compliance with the terms of its 2001 MS4 Permit.

27. During the MS4 Inspection, no formal documentation was provided to show that New Castle County is developing an up to date inventory of potential facilities on an annual basis. Subsequent to the MS4 Inspection, the County provided additional information primarily in the form of correspondence with DNREC regarding the sharing of responsibilities for the industrial program.

28. Part II.A.9.c of the MS4 Permit requires the co-permittees to perform "enforcement of control measures" for construction site runoff.

29. During the April 17, 2013 inspection of Claymont Library, a county-owned construction site, the EPA inspection team observed a recently addressed stabilization issue on the site. The EPA inspection team observed straw spread on the morning of April 17, 2013 over two rill erosion scars on the interior slope of sediment basin #4. This stabilization issue was first noted as a maintenance item on a January 31, 2013 inspection report, approximately two and a half months prior to straw spreading.

30. Based upon the MS4 inspection, EPA has concluded that Respondent's failures

to: 1) maintain an accurate list of "High Risk" facilities and 2) take appropriate and timely enforcement measures at a New Castle County owned construction site violated the 2001 MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. CONSENT AGREEMENT AND FINAL ORDER

31. For the purpose of this proceeding, Respondent admits the jurisdictional allegations set forth in this CAFO. By entering into this Order, the County does not admit any liability for the civil claims alleged herein.

32. For the purpose of this proceeding, Respondent neither admits nor denies the Findings of Fact and Conclusions of Law set forth in this CAFO.

33. Unless EPA has notified the County that it no longer supports entry of the CAFO as executed by the County, Respondent agrees not to oppose entry of this CAFO, or to challenge any provision of the CAFO; and agrees to waive its right to appeal the proposed final order accompanying the consent agreement.

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

35. Unless EPA has notified the County that it no longer supports entry of the CAFO as executed by the County, Respondent hereby expressly waives its right to a hearing on any issue of law or fact in this matter pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and consents to issuance of this CAFO without adjudication.

36. Each party to this action shall bear its own costs and attorney fees.

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

38. 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. By entering into this Order, the County does not admit any liability for the civil claims alleged herein.

39. NCC has made significant progress in all aspects of its NPDES program. This settlement is intended to encourage continued improvements commensurate with the goals of a quality assurance audit.

40. 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 DNREC regarding this action, and will mail a copy of this document to the appropriate DNREC official.

41. Based upon the foregoing and having taken into account 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), EPA HEREBY ORDERS AND Respondent HEREBY CONSENTS to pay a civil penalty in the amount of seventeen thousand four hundred dollars (\$17,400) in full and final settlement of EPA's claims for civil penalties for the violations alleged herein.

42. Respondent shall pay the total administrative civil penalty of seventeen thousand four hundred dollars (\$17,400) within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c). Payment shall be made by one of the following methods set forth below.

Payment by check to "United States Treasury":

By regular mail:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contact Eric Volck (513-487-2105)

By overnight delivery:

U.S. Bank
Government Lock Box 979077
US EPA, Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

Contact: Eric Volck (513-487-2105)

By Wire Transfer:

Federal Reserve Bank of New Lancaster
ABA = 021030004
Account = 68010727
SWIFT Address = FRNYUS33

33 Liberty Street
New Lancaster, NY 10045
(Field Tag 4200 of the wire transfer message should read:
D 68010727 Environmental Protection Agency)

By Automated Clearinghouse (ACH) Transfers for receiving U. S. currency (also known as REX or remittance express):

PNC Bank
ABA = 051036706
Environmental Protection Agency
Account Number: 310006
CTX Format
Transaction Code 22 - checking
808 17th Street, NW
Washington, D.C. 20074

Contact for ACH: John Schmid (202-874-7026)

On-Line Payments:

The On-Line Payment Option, available through the Dept. of Treasury, can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

Additional payment guidance is available at:

http://www.epa.gov/ocfo/finservices/make_a_payment.htm

Respondent shall send notice of such payment, including a copy of the check if payment is made by check, to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk (3RC00)
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

-and-

Robert J. Smolski
Mail Code 3RC20
Office of Regional Counsel

U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

43. 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.

44. The following notice concerns interest and late penalty charges that will accrue in the event that any portion of the civil penalty is not paid as directed:

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 payments as required herein or to comply with the conditions in this CAFO shall result in the assessment of late payment charges including interest.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a 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 it is due. 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. This Consent Agreement and Order resolve 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 an 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.

46. Nothing in this CAFO shall be construed as prohibiting, altering or in any way eliminating the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this CAFO is based or for Respondent's violation of any applicable provision of law.

47. The penalty specified in Paragraph 41 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

48. 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.

49. 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.

50. All of the terms and conditions of this CAFO 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 CAFO, 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 CAFO shall be null and void.

51. This CAFO does not limit or affect the rights of EPA or New Castle County against any third parties, not party to this CAFO.

IV. EFFECTIVE DATE

Pursuant to 40 C.F.R. § 22.45, this CAFO shall be issued after a 40-day public notice period is concluded. This CAFO will become final and effective 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).

FOR RESPONDENT, NEW CASTLE COUNTY:

Date: 8.4.14


By: TP Gordon

Name: Thomas P. Gordon

Title: County Executive

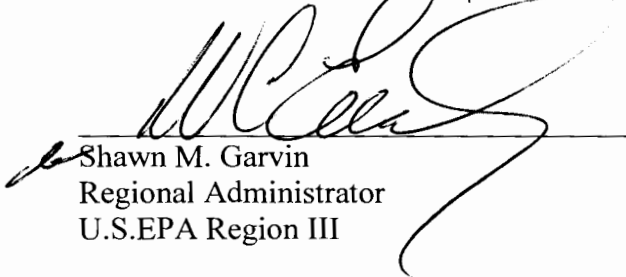
FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 8/15/2014


Jon M. Capocasa, Director
Water Protection Division

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

this 22ND day of September, 2014


Shawn M. Garvin
Regional Administrator
U.S.EPA Region III

CERTIFICATE OF SERVICE

I certify that on this date I caused to be sent by certified mail, return receipt requested, a copy of this "Consent Agreement and Final Order" to the following persons:

Mary Ann Dougherty, Esquire
Assistant County Attorney
New Castle County
Department of Special Services
188-A Old Churchmans Road
New Castle, Delaware 19720

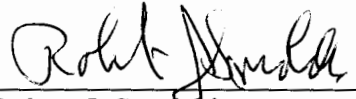
and the original and a copy delivered by hand to:

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

Additionally, I caused to be sent by first class mail a copy of this "Consent Agreement and Final Order" to the following persons:

Bryan Ashby
Program Manager II
Surface Water Discharge Section
Division of Water
Delaware Department of Natural Resources and Environmental Control
89 Kings Highway
Dover, Delaware 19901

Date: September 23, 2014


Robert J. Smolski
Senior Assistant Regional Counsel