

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

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EPA REGION III, PHILA. PA

In the Matter of:

Delaware Department of Transportation
Dover, DE

Respondent.

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

Docket No. CWA-03-2014-0233

**CONSENT AGREEMENT
AND FINAL ORDER**

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 the Delaware Department of Transportation ("DelDOT" 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 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. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS, and CONCLUSIONS OF LAW

4. DeIDOT, or "Respondent", 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 Complaint, 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 DeIDOT's MS4 drains to 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. § 232.2; 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.” 40 C.F.R. § 122.26(b)(8)(i).

14. An NPDES permit is required for discharges from an MS4 serving a population of 100,000 or more, 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’s MS4 serves 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 an NPDES MS4 Discharge Permit No. DE 0051071 which became effective on May 1, 2001 (hereinafter the “MS4 Permit”).

18. The expiration date of the MS4 Permit was May 1, 2006. DelDOT 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.

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), 40 C.F.R. § 122.21.

20. On April 18 and 19, 2013, a compliance inspection team comprised of EPA and authorized representatives of EPA inspected Respondent’s MS4 program (the “MS4 Inspection”) in New Castle County.

21. In August 2013, EPA issued Delaware Department of Transportation Municipal Separate Storm Sewer System (MS4) Program Inspection Report (Inspection Report), which included, in addition to general information regarding the DelDOT’s MS4 program and history, ten observations regarding the DelDOT’s MS4 Program related to the requirements of MS4 Permit (DE 0051071, effective May 1, 2001). The Inspection Report also included seven appendices (exhibit log, photo log, document log, etc.).

22. DelDOT received a copy of the Inspection Report which was sent by mail on September 11, 2013. DelDOT prepared and submitted a response to EPA on September 30, 2013.

23. Based upon the MS4 Inspection, EPA identified several categories of violations, among the ten observations, which it has concluded were violations of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

24. Part II. of the MS4 permit requires DelDOT to develop a comprehensive storm

water pollution prevention and management program (SWPP&MP) which shall be implemented in accordance with 402(p)(3)(B) of the CWA and the federal NPDES storm water regulations in 40 CFR Part 122.26.

25. Part II.A.3 of the MS4 Permit requires that DelDOT “shall operate and maintain public streets, roads, and highways, in such a manner to reduce, to the maximum extent practicable, the discharge of pollutants. This includes implementing programs... to reduce contaminated storm runoff (i.e., manage and minimize any transport of pollutants) associated with road repair and maintenance activities (i.e., practices to address spill prevention, material management and good housekeeping).” Section XII.A. of the SWPP&MP requires DelDOT to “Develop SWPPPs for all maintenance facilities as per General Permit for Industrial Activities and... Update Pollution Prevention Plans (PPPs) as necessary, including updated site maps.”

26. The EPA inspection team inspected several DelDOT maintenance facilities as part of the MS4 Inspection. SWPPPs were present at all of the maintenance facilities inspected and the inspection team noted that the SWPPPs for the Middletown, Odessa, Bear and Talley maintenance facilities had last been updated in 2003 even though several changes were made to these facilities and personnel identified in the SWPPP often no longer worked within the maintenance facilities.

27. After the MS4 Inspection, DelDOT submitted updated SWPPPs for the Middletown, Odessa, Bear and Talley maintenance facilities to DNREC on December 20, 2013.

28. Part II.A.3 of the MS4 Permit requires that DelDOT “shall operate and maintain public streets, roads, and highways, in such a manner to reduce, to the maximum extent practicable, the discharge of pollutants. This includes implementing programs... to reduce contaminated storm runoff (i.e., manage and minimize any transport of pollutants) associated with road repair and maintenance activities (i.e., practices to address spill prevention, material management and good housekeeping).”

29. In 2005, DNREC approved DelDOT’s treatment train for its vehicle wash facilities at several DelDOT maintenance yards. At the Kiamensi maintenance yard, washwater is intended to be treated for pollutants associated with oil via a storm drain inlet insert. However, during the MS4 Inspection, the EPA inspectors found that both washwater and stormwater could easily circumvent the storm water drain inlet insert (See photograph 22, Appendix 5) and discharge untreated washwater into the stormwater pond and eventually surface waters.

30. DelDOT proposes to reinstall the metal strip in the throat of the catch basin at the Kiamensi maintenance yard by August 31, 2014. In addition, DelDOT will revise its current “Statewide Vehicle Wash Water Practices for DelDOT Maintenance Yards” by May 2015, and submit that revision to DNREC for approval following its revision.

31. Part II.A.3 of the MS4 Permit requires that DelDOT “shall operate and maintain

public streets, roads, and highways, in such a manner to reduce, to the maximum extent practicable, the discharge of pollutants. This includes implementing programs... to reduce contaminated storm runoff (i.e., manage and minimize any transport of pollutants) associated with road repair and maintenance activities (i.e., practices to address spill prevention, material management and good housekeeping).” Appendix H of the SWPP&MP, Salt Management Plan for Maintenance Yards states in Section 2.2 “Solid salt stockpiles must not be exposed to rain or snow.”

32. During the MS4 Inspection of the salt storage barn at the Middletown facility the inspectors found salt spilling from the main door and onto a partially paved apron (See Photograph 32 in Appendix 5) which was not under cover and therefore exposed to rain and snow.

33. DelDOT proposes to install a physical barrier at the salt storage barn at the Middletown facility to prevent salt from exiting the main door, with installation to be completed by August 31, 2014.

34. II.A.9.c of the MS4 Permit requires DelDOT to conduct a “prioritized inspection of construction sites and enforcement of control measures.” Section VII.A of the SWPP&MP requires the “installation and maintenance of all BMPs during construction activities.”

35. Construction site inspection reports reviewed by the EPA inspection team indicate that many of the deficiencies identified in construction site inspections took approximately a month or more to be resolved, and recurred repeatedly throughout the life of the construction site.

36. Based upon the MS4 Inspection, EPA has concluded that Respondent’s failures to: 1) ensure that all practicable measures to reduce pollutants from maintenance facilities were taken; 2) update SWPPPs at its maintenance facilities when necessary; 3) ensure the proper operation of treatment facilities; and 4) ensure timely enforcement of control measures; violate the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. CONSENT AGREEMENT AND FINAL ORDER

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

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

39. 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.

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

41. 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.

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

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

44. 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.

45. DelDOT has made significant progress in all aspects of its NPDES program since the MS4 Inspection. This settlement is intended to encourage continued improvements commensurate with the goals of a quality assurance audit.

46. 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.

47. 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 thirty two thousand five hundred dollars (\$32,500) in full and final settlement of EPA's claims for civil penalties for the violations alleged herein.

48. Respondent shall pay the total administrative civil penalty of thirty two thousand five hundred dollars (\$32,500) 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

49. 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.

50. 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, penalties, and/or administrative costs of handling delinquent debts.

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).

51. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). A penalty charge of six percent per year will be assessed monthly on any portion of the civil penalty which 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).

52. This Consent Agreement and Order resolve 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.

53. 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 violations 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.

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

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 the 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, the EPA may have under law or equity in such event.

56. 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.

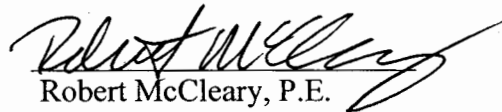
57. All of the terms and conditions of this CAFO together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this CAFO, or one or more of its terms and conditions, is held invalid, or is not executed by all of the 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.

IV. EFFECTIVE DATE

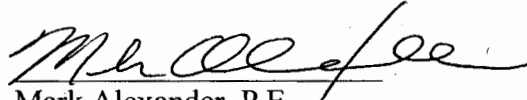
Pursuant to 40 C.F.R. § 22.45, this CAFO shall be issued after a 40-day public notice period is concluded. This CAFO will become final and effective 30 days after it is filed with the Regional Hearing Clerk, pursuant to Section 309(g)(5) of the Act, 33 U.S.C. § 1319(g)(5).

FOR RESPONDENT, DELAWARE DEPARTMENT OF TRANSPORTATION:

Date: 8/01/14

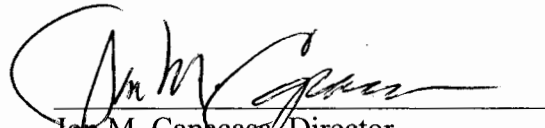

Robert McCleary, P.E.
Chief Engineer

Date: 8/15/14


Mark Alexander, P.E.
Director of Maintenance and
Operations

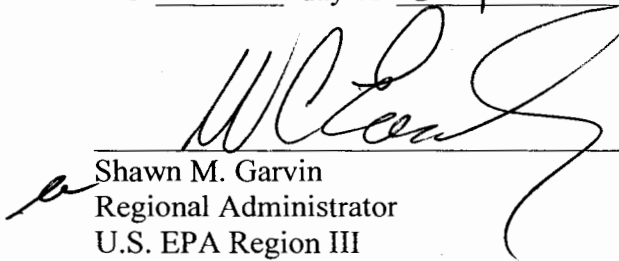
FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 8/15/2014


Jon M. Capacasa, 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

Delaware Department of Transportation
Docket No. CWA-03-2014-0233

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:

Frederick H. Schranck, Esquire
Deputy Attorney General
Delaware Department of Transportation
Legal Office
800 Bay Road
P.O. Box 778
Dover, Delaware 19903

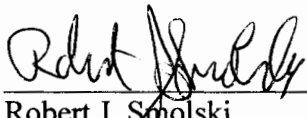
and the original and a copy delivered by hand to:

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 II Manager
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