

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

FILED

Nov 21, 2023

10:48 am

U.S. EPA REGION 8
HEARING CLERK

<p>IN THE MATTER OF:</p> <p>Yellowstone County, Montana,</p> <p>Respondent</p>	<p>Docket No. CWA-08-2024-0001</p> <p>ADMINISTRATIVE ORDER FOR COMPLIANCE</p> <p>Section 309(a)(3) of the Clean Water Act, 33 U.S.C. § 1319(a)(3)</p>
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INTRODUCTION

1. This Administrative Order for Compliance (Order) is issued pursuant to section 309(a) of the Clean Water Act (Act), 33 U.S.C. § 1319(a). This authority has been properly delegated to the undersigned official. The respondent in this order is Yellowstone County, Montana (County).

STATUTORY AND REGULATORY BACKGROUND

The NPDES Program

2. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters, except as in compliance with other sections of the Act.
3. The Act defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).
4. The Act defines “pollutant” to include “sewage . . . chemical wastes, biological materials . . . and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).
5. The Act defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

6. The Act defines “point source” to include any “discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure [or] container . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).
7. The Act defines “navigable waters” to include “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
8. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA and states with EPA authorization may permit persons to discharge pollutants into navigable waters, subject to specific terms and conditions.
9. The State of Montana is a state approved under Section 402(b) of the Act to administer the NPDES program. Permits the State of Montana issues in this capacity are sometimes known as MPDES permits.
10. Pursuant to Section 402(i) of the Act, 33 U.S.C. §1342(i), the EPA retains authority to take enforcement action under section 309 of the Act, 33 U.S.C. § 1319, for violations in Montana.

The Municipal Separate Storm Sewer Program

11. The term “storm water” is defined as storm water runoff, snow melt runoff and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13).
12. Storm water runoff occurs when rain or snowmelt flows over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground. The runoff picks up pollutants such as trash, chemicals, oils, and dirt/sediment.
13. The EPA and Montana NPDES and MPDES permitting programs, respectively, regulate storm water discharges from various sources, including municipal separate storm sewer systems.

14. The EPA and Montana programs referenced above are designed to prevent storm water runoff from washing harmful pollutants into local surface waters.
15. The term “municipal separate storm sewer” is defined in 40 C.F.R. § 122.26(b)(8). In summary, this term includes a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains):
 - (1) owned or operated by a State . . . or other public body such as a sewer district, flood control district or drainage district, or similar entity . . . that discharges to waters of the United States;
 - (2) designed or used for collecting or conveying storm water;
 - (3) which is not a combined sewer; and
 - (4) which is not part of a Publicly Owned Treatment Works as defined at 40 C.F.R. § 122.2.
16. The term “MS4” is defined as a municipal separate storm sewer system. 40 C.F.R. § 122.26(b)(19).
17. Discharges of storm water from MS4s may be authorized by NPDES permits. 33 U.S.C. § 1342(p); 40 C.F.R. §§ 122.26.
18. Pursuant to section 402(p) of the Act, EPA promulgated regulations applying to storm water discharges by small MS4s.
19. An operator of a small MS4s is regulated by the EPA’s storm water program if the small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. 40 C.F.R. § 122.32(a)(1).

20. The EPA has listed Yellowstone County as an operator of a small MS4 subject to the requirements of 40 C.F.R. § 122.32-122.36. 64 Fed. Reg. 68722, 68822 (December 8, 1999).
21. Under Montana regulations adopted in 2003, Yellowstone County has been designated as a small MS4 subject to the state’s MS4 permitting requirements under the MPDES permitting program. ARM §§ 17.30.1102(23)(a)(i) and 17.30.1105.

FINDINGS OF FACT AND LAW

The following findings apply at all times relevant to this matter, unless otherwise stated.

The County’s MS4

22. The County is a “municipality” as defined by section 502(4) of the Act, 33 U.S.C. § 1362(4), and a “person” as defined by section 502(5) of the Act, 33 U.S.C. § 1362(5).
23. The County owns and operates an MS4 (the County’s MS4), which includes storm water conveyances, storm drain outlets, storm drain detention ponds.
24. The County’s MS4 is a “small MS4” as defined by 40 C.F.R. § 122.26(a)(17).
25. The County’s MS4 discharges pollutants in storm water into the Yellowstone River.
26. The Yellowstone River is a traditional navigable water.
27. The Yellowstone River is a “navigable water” as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7).
28. The County’s MS4 discharges pollutants in storm water into multiple conduits leading to the Yellowstone River.
29. The County’s MS4 discharges pollutants in storm water into Canyon Creek.
30. Canyon Creek is a relatively permanent tributary of the Yellowstone River.
31. Canyon Creek is a “navigable water” as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7).

32. The County's MS4 discharges pollutants in storm water into Alkali Creek.
33. Alkali Creek is a relatively permanent tributary of the Yellowstone River.
34. Alkali Creek is a "navigable water" as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7).
35. The County's MS4 discharges pollutants in storm water into Five Mile Creek.
36. Five Mile Creek is a relatively permanent tributary of the Yellowstone River.
37. Five Mile Creek is a "navigable water" as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7).
38. Montana has listed the Yellowstone River and Canyon Creek as being in need of total maximum daily loads (sometimes referred to as being "impaired" waterbodies) pursuant to section 303(d) of the Act, 33 U.S.C. § 1313(d).

The County's Permit Coverage

39. On November 30, 2016, and effective January 1, 2017, the State of Montana Department of Environmental Quality (MDEQ) issued MPDES Permit Number MT R040000 (the 2017 MS4 General Permit).
40. On May 16, 2017, the County submitted a "Permittee Reapplication Form" for the 2017 MS4 General Permit.
41. On May 23, 2017, MDEQ authorized the County to discharge storm water to state waters under the 2017 MS4 General Permit. The County was assigned authorization number MTR040010.
42. The 2017 MS4 General Permit by its terms expired on December 31, 2021.
43. On February 14, 2022 and effective April 1, 2022, MDEQ issued MPDES Permit Number MTR040000 (the 2022 MS4 General Permit).

44. Despite receiving reminders from MDEQ to apply for coverage under the 2022 MS4 General Permit, the County has not done so.
45. Since 2017, the County has not applied to MDEQ or the EPA for any Montana Water Quality Act or Clean Water Act permit authorizing discharges of storm water from the County's MS4.
46. Since at least April 1, 2022, on multiple occasions, the County's MS4 has discharged pollutants in storm water into navigable waters without a Clean Water Act or Montana Water Quality Act permit, in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).
47. MDEQ has requested the EPA's assistance in securing the County's compliance with the Clean Water Act and the Montana Water Quality Act.

ORDER

Based on the foregoing findings and pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), it is hereby ORDERED that:

48. No later than 10 business days after the effective date of this Order (see Paragraph 63, below), the County shall submit to the EPA written notice of the County's intent to comply with the requirements of this Order.
49. No later than 30 days after the effective date of this Order, the County shall either (a) cease all discharges of storm water from the County's MS4 to all navigable waters, or (b) apply to MDEQ for authorization to discharge storm water from the County's MS4, either under 2022 MS4 General Permit or an individual permit under the Montana Water Quality Act.
50. If the County takes the position that state or local law does not allow it to enact an ordinance or other regulatory mechanism to implement any element of any minimum control measure in the 2022 MS4 General Permit, the County shall submit a written statement to MDEQ (a) specifying

each such element the County claims it cannot implement, (b) providing a supporting rationale, and (c) describing the County's policies and procedures intended to help achieve the goals of the relevant minimum control measure (e.g., detecting and eliminating illicit discharges to the County's MS4, reducing pollutants in storm water runoff from construction activities to the County's MS4, and addressing storm water runoff from new development and redevelopment projects to the County's MS4). The County shall also provide a copy to the EPA (see paragraph 56, below).

51. Upon obtaining coverage under the 2022 MS4 General Permit or any other storm water discharge permit issued by MDEQ, the County shall comply with all requirements of the relevant permit.
52. At the EPA's sole discretion, the EPA may extend deadlines required by this Order or change the identity of the EPA notification recipient in Paragraph 56, below, with written notice to the County but without further formal amendment of this Order. All other modifications to this Order may be made only by written agreement of the parties.
53. The County shall provide the EPA notification recipient named in Paragraph 56, below, with a copy of each written communication provided to MDEQ.
54. The time periods in this Order are calendar days unless otherwise specified. If any due date specified in this Order falls on a weekend or federal holiday, the relevant deadline shall be the first business day following that date.
55. All notices and reports required by the Order to be given to the EPA shall be sent via email to the following recipient. If any email is not a feasible manner of providing notifications,

Respondent shall contact the following individual by telephone to make alternative arrangements.

Lisa-kay Prideaux
NPDES Enforcement Officer
U.S. EPA Region 8
Prideaux.lisakay@epa.gov
Telephone: (406) 457-5022

56. All reports and information required by this Order shall include the following certification statement, signed and dated by an individual meeting the definition in 40 C.F.R. § 122.22(a)(3) of a ranking elected official:

I hereby 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 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 or imprisonment for knowing violations.

57. Any failure to comply with the requirements of this Order shall constitute a violation of this Order and may subject the County to penalties as provided under section 309 of the Act, 33 U.S.C. § 1319.
58. This Order is not a permit and does not constitute a waiver or modification of the terms and conditions of any MPDES permit.
59. This Order does not constitute a waiver or election by the EPA to forego any civil or criminal action to seek penalties, fines, or other relief as it may deem appropriate under the Act. Section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$64,618 (as adjusted for inflation by 40 C.F.R. part 19) per day for each violation of the Act. Section 309(c) of the Act,

33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the Act.

- 60. Compliance with the terms and conditions of this Order shall not be construed to relieve the County of its obligation to comply with any applicable federal, state, or local law or regulation.
- 61. This Order constitutes final agency action. The County may seek federal judicial review of this Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, states the scope of such review.
- 62. This Order shall be effective immediately upon receipt by any County Commissioner (see Certificate of Service, below).

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

Date: _____

By: _____

Suzanne J. Bohan, Director
Enforcement and Compliance Assurance Division
Region 8, U.S. EPA
1595 Wynkoop Street
Denver, Colorado 80202
(303) 312-6925

CERTIFICATE OF SERVICE

I certify that the foregoing Administrative Order for Compliance was sent or delivered on this day as follows by email to R8_Hearing_Clerk@epa.gov and to the following:

Steve Williams
Chief In-House Counsel
Yellowstone County, Montana
By email to swilliams@yellowstonecountymt.gov

John Oslund, Commissioner
Yellowstone County Board of Commissioners, District 1
P.O. Box 35000
Billings, Montana 59107
By certified mail, return receipt requested (no. _____)

Mark Morse, Commissioner
Yellowstone County Board of Commissioners, District 2
P.O. Box 35000
Billings, Montana 59107
By certified mail, return receipt requested (no. _____)

Donald Jones, Commissioner
Yellowstone County Board of Commissioners, District 3
P.O. Box 35000
Billings, Montana 59107
By certified mail, return receipt requested (no. _____)

By: _____ Date: _____