

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION III
 Four Penn Center – 1600 John F. Kennedy Blvd.
 Philadelphia, Pennsylvania 19103-2852**

In the Matter of:	:	
	:	
Board of County Commissioners	:	U.S. EPA Docket No. CWA-03-2022-0117DN
for Washington County	:	
Administration Complex	:	
100 West Washington Street, Suite 2400	:	ADMINISTRATIVE ORDER
Hagerstown, MD 21740	:	ON CONSENT
	:	PURSUANT TO 33 U.S.C. § 1319(a)
Washington County, Maryland	:	
Respondent.	:	
	:	
WASHINGTON COUNTY, MD,	:	
MUNICIPAL SEPARATE STORM	:	
SEWER SYSTEM	:	
Facility	:	

I. PRELIMINARY STATEMENT

1. The United States Environmental Protection Agency (EPA) has made the following findings of fact and issues this Administrative Order on Consent (AOC) pursuant to the authority vested in the Administrator of EPA under Section 309(a) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(a). The Administrator delegated this authority to the Regional Administrator of EPA Region III, who further delegated it to the Director of the Enforcement & Compliance Assurance Division, EPA Region III.

2. Section 309(a) of the CWA, 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 sections of the CWA, in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, he shall issue an order requiring such person to comply with such section or requirement.

3. EPA has jurisdiction over the above-captioned matter, as described in Paragraphs 1 and 2, above.

4. Washington County, Maryland (Respondent) has agreed to the issuance of this AOC.

5. EPA has consulted with the State of Maryland Department of Environment (MDE) regarding this action and, subsequent to the Effective Date, EPA will mail a copy of this fully executed AOC to the appropriate MDE representative.

II. STATUTORY AND REGULATORY BACKGROUND

6. Section 301(a) of the CWA, 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 CWA, 33 U.S.C. § 1342.
7. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of EPA, or a state upon approval by 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.
8. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), EPA authorized MDE to issue NPDES permits in the State of Maryland.
9. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.2 and 122.26 provide that, with some exceptions not relevant here, storm water discharges are "point sources" subject to NPDES permitting requirements under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).
10. 40 C.F.R. § 122.2 states, in relevant part: "Discharge of a pollutant means: a) any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source,'... This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works."
11. 40 C.F.R. § 122.26(b)(13) defines the term "Storm water" as "storm water runoff, snow melt runoff, and surface runoff and drainage."
12. 40 C.F.R. § 122.26(b)(8)(i) defines the term "municipal separate storm sewer [system]" or "MS4" as a system, inter alia, "[o]wned 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."
13. 40 C.F.R. § 122.26(b)(16) defines the term "small municipal separate storm sewer system" as "all separate storm sewers that are: (i) Owned or operated by the United States, a State, city, town, borough ... or other public body (created by or pursuant to State law) having jurisdiction over disposal of ... storm water..."; and "(ii) Not defined as 'large' or 'medium' municipal separate storm sewer systems... ."
14. 40 C.F.R. § 122.26(b)(17) defines the term "Small MS4" as "a small municipal separate storm sewer system."

15. Small MS4s are regulated pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p) and the regulations promulgated thereunder.
16. Pursuant to 40 C.F.R. § 122.26(a)(9)(i), small MS4s require a NPDES permit if they are required to be regulated pursuant to 40 C.F.R. § 122.32.
17. 40 C.F.R. § 122.32(a)(l) states: “(a) Unless you qualify for a waiver under paragraph (c) of this section, you are regulated if you operate a small MS4, including but not limited to systems operated by federal, State, Tribal, and local governments, including State departments of transportation; and: (1) Your small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. (If your small MS4 is not located entirely within an urbanized area, only the portion that is within the urbanized area is regulated).”
18. 40 C.F.R. § 122.34(a) provides: "General requirements. For any permit issued to a regulated small MS4, the NPDES permitting authority must include permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. Terms and conditions that satisfy the requirements of this section must be expressed in clear, specific, and measurable terms. Such terms and conditions may include narrative, numeric, or other types of requirements (e.g., implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements, adaptive management requirements, schedules for implementation and maintenance, and frequency of actions)."
19. Pursuant to its authority under the CWA and the NPDES program approval, MDE approved coverage to Respondent for discharges from the County's small MS4 (the MS4) under General NPDES Water Pollution Control Permit No. 13-IM-5500 (a.k.a. NPDES Permit No. MDR055500), effective October 21, 2018, through October 20, 2023 (the MS4 Permit).

III. GENERAL PROVISIONS

20. For the purpose of this proceeding only, Respondent admits each jurisdictional allegation set forth in this AOC.
21. Except as provided in Paragraph 20, above, Respondent neither admits nor denies the specific factual allegations set forth below in Section IV (FINDINGS OF FACT AND CONCLUSIONS OF LAW) of this AOC.
22. Respondent agrees not to contest the jurisdiction of EPA with respect to the execution or enforcement of this AOC.
23. The provisions of this AOC shall apply to and be binding upon the Respondent and its officers, directors, employees, contractors, agents, trustees, successors and assigns of the Respondent.
24. Respondent shall bear its own costs and attorney's fees in connection with this proceeding

and associated with the implementation or enforcement of this AOC, including any costs related to resolution of any dispute arising regarding this AOC.

25. Issuance of this AOC is intended to address the violations described 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. EPA also reserves any existing rights and remedies available to it under the CWA, 33 U.S.C. §1311, et seq., the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction. Further, EPA reserves any rights and remedies available to it under the CWA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this AOC, following the Effective Date, as defined below.
26. This AOC does not constitute a waiver or modification of the terms or conditions of any permit issued to Respondent. Nothing in this AOC shall relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local laws and regulations, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on the validity of any federal, state or local permit. This AOC does not constitute a waiver, suspension or modification of the requirements of the Act, 33 U.S.C. §§ 1251 et seq., or any regulations promulgated thereunder.
27. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this AOC, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
28. EPA reserves all existing inspection 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.
29. 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 AOC and to execute and legally bind the party.
30. By signing this AOC, Respondent acknowledges that this AOC may be available to the public and represents that, to the best of Respondent's knowledge and belief, this AOC does not contain any confidential business information or personally identifiable information from Respondent.
31. Respondent certifies that any information or representation it has supplied or made to EPA concerning this matter was, at the time of submission, true, accurate, and complete and that there has been no material change regarding the truthfulness, accuracy or completeness of such information or representation. EPA shall have the right to institute further actions to recover appropriate relief if EPA obtains evidence that any information provided and/or representations made by Respondent to the EPA regarding matters relevant to this AOC are false or, in any material respect, inaccurate. This right shall be in addition to all other

rights and causes of action that EPA may have, civil or criminal, under law or equity in such event. Respondent and its officers, directors and agents are aware that the submission of false or misleading information to the United States government may subject a person to separate civil and/or criminal liability.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

32. Respondent is a "municipality" within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4).
33. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.
34. At all times relevant herein, upon information and belief, Respondent has owned or operated, and continues to own and operate, a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) that discharges to waters of the United States.
35. At all times relevant herein, upon information and belief, Respondent owned or operated, and continues to own or operate, "municipal separate storm sewers" and a "municipal separate storm sewer system" or "MS4", which also meets the definitions of "small municipal separate storm sewer system" and "small MS4", as those terms are defined at 40 C.F.R. § 122.26(b)(8)(i), (16), (17) and (18), located in Washington County, Maryland.
36. At all times, relevant to this AOC, the Respondent has discharged stormwater from the small MS4 to the permitted MS4 area, which is located within the Antietam Creek, Marsh Run, Conococheague Creek, and Potomac River watersheds.
37. The Antietam Creek, Marsh Run, Conococheague Creek, and Potomac River are "water[s] of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
38. On July 21-23, 2020, representatives of EPA Region III, MDE and EPA contractors from Eastern Research Group Inc. (collectively the Audit Team), conducted an inspection and audit of the small MS4 (hereinafter, the Audit) to assess compliance with the MS4 Permit. By email dated August 20, 2020, EPA issued an Audit Report (the MS4 Audit Report), dated August 20, 2020, to the County.
39. On October 8, 2020, EPA conducted a site visit and inspection of the MS4 and the MS4 program which Respondent implements related to the MS4 Permit (the Inspection). By email dated November 30, 2020, EPA issued an Inspection Report, dated November 30, 2020, (the Inspection Report) to the Permittee.
40. On September 2, 2021, EPA sent a Notice of Potential Violations and Opportunity to Confer letter (NOPVOC letter) to the Respondent, summarizing certain alleged violations of the CWA and the MS4 Permit observed during the Audit or the Inspection.

41. By email dated November 19, 2021, Respondent responded to the NOPVOC letter and, subsequent thereto, entered into negotiations with EPA.

Count I
Failure to Implement Permit Requirements Relating to Stormwater Management Ordinance

42. Part IV (Minimum Control Measure (MCM)), Section E (Post Construction Stormwater Management), Subsection 1 (Part IV.E.1.) of the MS4 Permit requires the Permittee to: “Adopt an MDE approved stormwater management ordinance that provides plan review and approval processes, and inspection and enforcement procedures that ensure proper construction and maintenance of BMPs (Best Management Practices) in accordance with COMAR 26.17.02. Subsequently, any proposed amendments to the ordinance must be submitted to MDE for review and approval.”
43. Subsequent to MDE approval on October 19, 2010, Respondent adopted the Washington County Stormwater Management, Grading, Soil Erosion and Sediment Control Ordinance (Revision 1 effective February 26, 2013) (the Ordinance).
44. Sections 3.18 (Post Construction Maintenance) and 3.19 (Enforcement) of the Ordinance provide the Permittee authority to inspect, require maintenance and, as necessary, perform required maintenance of deficient post-construction stormwater infrastructure.
45. From May 2018 through February 2020, two micro bioretention BMPs installed, as a post-construction stormwater control BMP, at the Boonsboro Dollar General store, located at 2 Beales Ct, Boonsboro, MD 21713, failed an initial inspection and numerous subsequent inspections due to issues associated with liner installation. Representatives of Respondent informed EPA that a corrective action plan to address such post-construction BMP deficiencies had not been requested by Respondent and, additionally, Respondent had not implemented such corrective actions in light of owner inaction. As of July 23, 2020, no action had been undertaken to repair such post-construction BMP deficiencies at such location.
46. Since at least May 2018, Respondent has failed to inspect, require maintenance and, as necessary, perform required maintenance of deficient post-construction stormwater infrastructure to ensure proper construction and maintenance post-construction stormwater infrastructure.
47. Since at least May 2018, Respondent has failed to comply with Part IV.E.1. by failing to ensure proper construction and maintenance of post-construction stormwater management BMPs in accordance with the MS4 Permit.
48. Based on the above assertions and allegations in Paragraphs 1 through 47, above, by failing to comply with Part IV.E.1. of the MS4 Permit, Respondent failed to comply with the terms and conditions of the MS4 Permit and, therefore, has violated Section 301 of the CWA, 33 U.S.C. § 1311.

V. COMPLIANCE ORDER

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

49. No later than thirty calendar days following the end of each calendar quarter, Respondent shall submit to EPA for review a Post-Construction Stormwater Management (PCSM) BMP Progress Report (PCSM BMP Progress Report), which meets the requirements set forth in this AOC.
50. Each PCSM BMP Progress Report shall include, at a minimum, the following information:
 - a. For each PCSM BMP inspection that was conducted during the previous calendar quarter, the following information shall be included:
 - i. The address, or GPS, location of the PCSM BMP which was inspected;
 - ii. The date of such PCSM BMP inspection;
 - iii. The name and contact information of the person responsible for conducting such PCSM BMP;
 - iv. A description of any PCSM BMP deficiency that was observed at such location;
 - v. A summary description of any PCSM BMP corrective action undertaken during or subsequent to such inspection, including photographs documenting such corrective action completion;
 - vi. The date on which any such PCSM BMP corrective action was completed or the deadline by which such PCSM BMP corrective action is scheduled to be performed; and
 - vii. A summary of each formal enforcement action which has been initiated related to completion of such PCSM BMP corrective action.
 - b. For each PCSM BMP that was not inspected during the previous calendar quarter, the following information shall be included:
 - i. The address, or GPS, location of each such PCSM BMP;
 - ii. The date of the most recent previous inspection;
 - iii. The date of completion of any previous corrective action;
 - iv. A summary of any corrective action that is required to be completed and has not been completed; and
 - v. The deadline for any corrective action that is required to be completed.
51. The first PCSM BMP Progress Report shall be submitted no later than the last business day of the month following the calendar quarter in which the Effective Date of this AOC occurs. Respondent shall continue to submit such PCSM BMP Progress Reports for a minimum of twenty-four (24) months following the Effective Date of this AOC.

VI. PROCEDURES FOR SUBMISSIONS

- 52. All documents required to be submitted by this AOC and any Request for Termination shall be accompanied by a certification signed by a responsible officer, as defined in 40 CFR § 122.22(d), that reads as follows:

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.

Signature _____

Name _____

Title _____

Date _____

- 53. Respondent may assert a business confidentiality claim covering part or all of the information which this AOC requires it to submit to EPA, but only to the extent and only in the manner described in Part 2 Subpart B of Title 40 of the C.F.R. EPA will disclose information submitted under a confidentiality claim only as provided in Part 2 Subpart B of Title 40 of the C.F.R. If, at the time any information is submitted to EPA, the Respondent submitting such information does not assert a confidentiality claim, EPA may make the submitted information available to the public without further notice to Respondent.
- 54. Unless otherwise directed in writing, Respondent shall submit any submission or written communication, including any accompanying data, relating to this AOC in widely recognized electronic format, via email to: Mr. Peter Gold, Enforcement Officer, NPDES Enforcement Section, Enforcement and Compliance Assurance Division, U.S. EPA, Region III, at Gold.Peter@epa.gov.

VII. CERTIFICATION OF COMPLIANCE AND REQUEST FOR TERMINATION OF AOC

- 55. Upon Respondent’s determination that Respondent has completed all tasks required pursuant to this AOC and no earlier than twenty-four (24) calendar months following the Effective Date of this AOC, Respondent shall submit to EPA a Certification of Compliance and Request for Termination of this AOC. Such certification and request shall include:

- a. a certification that Respondent has maintained compliance with this AOC for the term of this AOC; and
 - b. all necessary documentation, including photo documentation as appropriate, to support a finding that Respondent has complied with Section V (Compliance Order) of this AOC.
56. If, following review of any Certification of Compliance and Request for Termination of this AOC, EPA agrees that Respondent has adequately complied with all requirements of this AOC, then EPA may, in its unreviewable discretion, provide written notification of termination of this AOC.

VIII. AOC MODIFICATIONS

57. Any request to modify the terms of, or parties to, this AOC shall be submitted, in writing, by Respondent to EPA and shall be subject to review and approval by EPA, in its sole and unreviewable discretion. Respondent's submission of a written request for modification of this AOC shall not relieve Respondent of any obligation under this AOC and shall have no effect on EPA's statutory or regulatory authority to enforce the terms of this AOC, in its sole and unreviewable discretion.

IX. EFFECTIVE DATE

58. This AOC will become effective upon the Sewer Authority's receipt of a fully-executed copy of this AOC.

FOR BOARD OF COUNTY COMMISSIONERS FOR WASHINGTON COUNTY,
MARYLAND:

Date: _____

By: _____

Jeffrey A. Cline
President
Board of County Commissioners
for Washington County, Maryland

Attested to:

Date: _____

By: _____

Krista L. Hart
County Clerk
Washington County, Maryland

IT IS SO ORDERED:

Karen Melvin, Director
Enforcement and Compliance Assurance Division,
EPA Region III

Counsel for EPA, Region III:

Kathleen Root, Esq.
Sr. Assistant Regional Counsel
Office of Regional Counsel, EPA Region III

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION III

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CERTIFICATE OF SERVICE

On [DATE], the foregoing **ADMINISTRATIVE ORDER ON CONSENT**, EPA Docket No. CWA-03-2022-0117DN, was filed with the EPA Region III Regional Hearing Clerk. I certify that on the date below, I served a true and correct copy of the foregoing to each of the following persons, in the manner specified below, at the following addresses:

A copy of the Administrative Order on Consent and this Certificate of Service was served via **Overnight Delivery Via UPS, Signature Required** to:

Jeffrey A. Cline, President
Board of County Commissioners
Washington County Maryland
100 West Washington Street
Room 1101
Hagerstown, MD 21740

TRACKING NUMBER: _____

A copy of this Certificate of Service was served via Electronic Transmission to each person listed below:

Kathleen Root, Esq.
Sr. Assistant Regional Counsel
Office of Regional Counsel, EPA, Region III
root.kathleen@epa.gov

Peter Gold
Environmental Scientist
Enforcement and Compliance Assurance Division
EPA, Region III
gold.peter@epa.gov

Dated: _____

Regional Hearing Clerk
Office of Regional Counsel, EPA, Region III