

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

In the Matter of:

Henrico County, Virginia
4301 East Parham Road
Henrico, Virginia 23228

Respondents

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

Docket No. CWA-03-2011-0139

COMPLAINANT'S PREHEARING EXCHANGE

The Complainant hereby submits the required Prehearing Exchange. This Prehearing Exchange conforms to the requirements set forth in 40 C.F.R. § 22.19(a) and the Prehearing Order issued June 6, 2011. Complainant reserves the right to supplement this filing upon review of Respondent's Prehearing Exchange.

1. Required Materials

A. List of witnesses

Complainant expects to call some or all of the following witnesses to testify at the hearing of this matter. Complainant anticipates that it may be appropriate to present the testimony of certain witnesses in written or affidavit form. Consequently, Complainant reserves the right to seek leave of the Court to present in written or affidavit form all or part of the testimony of some or all of the witnesses described below. In addition, Complainant anticipates that the parties may be able to stipulate that the exhibits are what they purport to be. In the event that the parties are unable to so stipulate, Complainant reserves the right to present the testimony of appropriate records custodians or other witnesses, live or in written or affidavit form, for the sole purpose of establishing that certain documents are what they purport to be.

Expert Witnesses:

Peter Stokely:

Mr. Stokely is a member of EPA's Office of Civil Enforcement. Mr. Stokely specializes in aerial photographic interpretation. He will testify about the implications of *Rapanos v. United States* in establishing a connection to a water of the United States. Mr. Stokely will interpret and analyze pertinent aerial photography and GIS mapping situating Henrico County amidst the James River, Tuckahoe Creek, and the Chickahominy River. Mr. Stokely will testify about the connection of Respondent's MS4 to a water of the United States.

OECA Penalty Person:

Expert & Fact Witness:

Andrew Dinsmore:

Mr. Dinsmore is the EPA's stormwater team leader. Mr. Dinsmore will testify about EPA's Section 402 National Pollutant Discharge Elimination System ("NPDES") permit program, how it works from a programmatic standpoint, and how inspections are generally conducted. This will include a discussion of the enforcement mechanism EPA implements from inspection through resolution. Mr. Dinsmore will also testify about Municipal Separate Storm Sewer Systems (MS4s), the objectives of the MS4 program, and the regulations which govern the MS4s. Mr. Dinsmore will offer a description of the interplay between the Virginia Department of Conservation and Recreation ("VDCR") and Respondent, and how each administers and enforces the pertinent provisions of the Clean Water Act. Included in this overview of the regulatory regime may be explanations of Respondent's Stormwater Management Master Plan ("SWMMP"), the Virginia Erosion and Sediment Control Regulations, and the pertinent chapters of the Henrico County Code. Mr. Dinsmore will also explain the terms of the Respondent's VPDES Permit VA0088617, (the "MS4 Permit") and discuss which measures are required for compliance.

Mr. Dinsmore will also testify about his direct involvement in the Henrico County MS4 Audit. Mr. Dinsmore participated in a general audit of Respondent's records and inspection logs which took place on April 19-20, 2010. Additionally, Mr. Dinsmore previewed the compliance and enforcement procedures in place and the application of those protocols to the MS4 system. Mr. Dinsmore will testify about violations of the MS4 Permit discovered during the audit.

Mr. Dinsmore will testify about construction and post-construction best management practices as required by the MS4 permit. Mr. Dinsmore will testify about his inspection of the relevant databases, his interviews with county personnel, and any observed violations of the MS4 Permit. This will include discussion of Respondent's monitoring and compliance measures. Additionally, Mr. Dinsmore will testify about his field inspections, including a site visit to West Area Middle School, and any observed violations of the MS4 Permit. Mr. Dinsmore will also

offer testimony on the status of Respondent's continuing education program for construction site operators.

Mr. Dinsmore was closely involved in the audit of Respondent's MS4, the drafting of the Henrico County Municipal Separate Sewer System Inspection Report (hereinafter the "Inspection Report") (CX 1), and any enforcement actions taken to date. Accordingly, Mr. Dinsmore possesses first-hand knowledge of any document submitted or referenced in this pre-hearing exchange and may testify to its content or validity.

Fact Witnesses:

i. Non-Hostile Witnesses

Allison Graham:

Ms. Graham will testify about her direct participation in Respondent's MS4 Audit. Ms. Graham participated in a general audit of Respondent's stormwater records, inspection logs, and databases. Ms. Graham will testify about any contrasts between the inspection records and the databases, and any violations of the MS4 permit discovered during this review.

Ms. Graham will also testify about her observations regarding unauthorized discharges and runoff from industrial and commercial facilities. As part of the MS4 audit, Ms. Graham visited three private industrial and commercial facilities: 1) The Powhatan Ready Mix site; 2) the Alfa Laval site; and the 3) Ennis Paints site. Additionally, Ms. Graham visited two municipal sites operated by Respondent including the Henrico County Central Automotive Maintenance Garage and the County Salt Storage Area. Ms. Graham will testify about the observed stormwater practices at these respective sites and the site's connection to the MS4 system.

Ms. Graham was closely involved in the inspection of Respondent's MS4, the drafting of the Inspection Report, and any enforcement actions taken to date. Accordingly, Ms. Graham possesses first-hand knowledge of any document submitted or referenced in this pre-hearing exchange and may testify to its content or validity.

Chris Menen:

Mr. Menen is an EPA enforcement officer in the NPDES Program, Region III. Mr. Menen was closely involved in the drafting of the Inspection Report and the enforcement actions taken to date. Mr. Menen analyzed the inspection report and contrasted it against the MS4 permit to identify any violations. He will testify about the nature and extent of any violations and the application of the EPA's penalty policy to those findings.

Kavya Katsuri

Ms. Katsuri is an environmental engineer with Eastern Research Group. Ms. Katsuri participated in the audit of Respondent's MS4 as an authorized representative of EPA. Ms.

Katsuri will testify about her inspection of Respondent's records, including any inspection logs or databases, and any procedures in place to address stormwater. Ms. Katsuri will place a particular emphasis on unauthorized discharges and runoff from commercial and industrial sites. Ms. Katsuri inspected three private facilities: 1) the Powhatan Ready Mix site; 2) the Alfa Laval site; and 3) the Ennis Paints site. Additionally, Ms. Katsuri visited two municipal sites operated by Respondent including the Henrico County Central Automotive Maintenance Garage and the County Salt Storage Area. Ms. Katsuri will testify about the observed stormwater practices at these respective sites and the site's connection to the MS4 system.

Ms. Katsuri was closely involved in the audit of Respondent's MS4 and the drafting of the Inspection Report. Accordingly, Ms. Katsuri possesses first-hand knowledge of the Inspection Report and any document referenced therein, and may testify to its content or validity.

Scott Coulson

Mr. Coulson is a water resource planner with PG Environmental Consulting. Mr. Coulson participated in the audit of Respondent's MS4 as an authorized representative of the EPA. Mr. Coulson will testify about his inspection of Respondent's records, including any inspection logs or databases, and any procedures in place to address stormwater. Mr. Coulson will place a particular emphasis on runoff from construction sites, source control measures, best management practices, and structural control measures. Mr. Coulson participated in a site visit to the West Area Middle School construction site, a live construction site. Mr. Coulson will testify about the observed stormwater practices at the site and the site's connection to the MS4.

Mr. Coulson was closely involved in the inspection of Respondent's MS4 and the drafting of the Inspection Report. Accordingly, Mr. Coulson possesses first-hand knowledge of the Inspection Report and any document referenced therein, and may testify to its content or validity.

ii. Potentially Hostile Witnesses¹

Mr. Chris Winstead, Assistant Director, Department of Public Works

Mr. Jeff Perry, Engineering & Environmental Services Division Manager, Department of Public Works

Mr. Scott Jackson, Environmental Engineer, Department of Public Works

Mr. Mike Hackett, Senior Environmental Inspector, Department of Public Works

Ms. Olivia Hall, Environmental Inspector, Department of Public Works

Mr. Keith White, Senior Engineer, Department of Public Works

¹ While EPA may elect to call witnesses who participated in the audit of respondent's MS4, it cannot speculate as to the scope or content of their "expected testimony" because they are potentially hostile. Accordingly, no narrative descriptions can be produced.

Mr. John Fowler, Environmental Engineer, Department of Public Works

Mr. Butch Jones, Deputy Fire Marshal, Department of Fire

Mr. Doug Fritz, MS4 Program Manager, Virginia Department Conservation and Recreation

Henrico's Dry Weather Inspector (name to be supplied)

B. Documents and Exhibits:

Exhibit #	Document Description
CX 1	Henrico County Municipal Separate Storm Sewer System (MS4) Inspection Report (Narrative only)
CX 2	City of Henrico Permit (VPDES Permit VA0088617)
CX 3	Henrico County Environmental Ordinance, Article VII, Stormwater Management
CX 4	Henrico County Field Screening Standard Operating Procedure (Henrico County)
CX 5	Blank Outfall Inspection Report
CX 6	MS4 Inspection Report Photograph Log
CX 7	Selected Entries, Henrico County Outfall Inspection Database
CX 8	Dry Weather Stormwater Inspection Report, SWO-0058 (January 4, 2007)
CX 9	Dry Weather Stormwater Inspection Follow-Up Documentation, SWO-0058 (April 26, 2010)
CX10	Dry Weather Stormwater Inspection Report, SWO-0101
CX 11	List of Facilities Subject to Stormwater Inspections
CX 12	Springfield Landfill Report (July 25, 2007)
CX 13	Charles City Road Public Use Area Inspection Report (July, 25, 2007)
CX 14	Powhatan Ready-Mix Concrete Inspection Report (April 20, 2010)
CX 15	Alfa Laval Inspection Report (April 20, 2010)
CX 16	Ennis Paints Inspection Report (April 20, 2010)
CX 17	Ennis Paints Inspection Report (March 3, 2010)
CX 18	The Virginia Erosion and Sediment Control Regulations, 4VAC50-30-20 (Purpose)
CX 19	County Erosion and Sediment Control Inspection Report for the Dominion West End Site Renovations construction site (December 29, 2009)
CX20	County Erosion and Sediment Control Inspection Report and Notice to Comply, West Area Middle School No. 1 construction site (April 20, 2010)
CX 21	Advertisement and Syllabus, Henrico County Site Contractor Workshop (Conducted November 7, 2002).
CX 22	Dominion West End Inspection Log
CX 23	West End Area Middle School Inspection Log
CX 24	Active Construction Site list (Public & Private)
CX 25	Stormwater Management Master Plan, County of Henrico (SWMP)
CX 26	MS4 Program Compliance Inspection, Records Request (April 19-20, 2010)

CX 27	Dun and Bradstreet Business Information Report, Henrico County
CX 28	Penalty Calculation Packet, Henrico County
CX 29	Notice of Intent to Assess Administrative Penalty and Opportunity for Public Comment
CX 30	Tentative Agenda MS4 Inspection Program
CX 31	Andrew Dinsmore Notes, Henrico County MS4 Audit
CX 32	Allison Graham's Notes, Henrico County MS4 Audit
CX 33	Andrew Dinsmore Resume
CX 34	Witness Credentials
CX 35	Peter Stokely Resume

Map Index:

CX 36	Henrico County 303(d) Rivers & Streams Map
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C. Hearing Location

Section 22.19(D) of the Consolidated Rules of Practice lists Washington, D.C. as an appropriate location for the hearing. EPA respectfully requests the hearing be held in Washington, D.C. to avoid the imposition of disproportionate travel burden or expense on either party. EPA does not anticipate requiring more than four days for the hearing. No translation services are required.

2. Additional Materials

A. Factual and/or legal basis for allegations in paragraphs: 6, 19, 20, 22-23, 30, 33, 35, 37, 39, 42, 45, 48, and 51 of the Complaint

¶6: Respondent applied for and received authorization to discharge under the VPDES permit program and the Virginia State Water Control Law. This permission is made express in VPDES Permit No. VA0088617. The permit authorizes Respondent to discharge into a water of the United States. In its application and continued operation under the MS4 Permit, Respondent admits that its MS4 discharges into a water of the United States.

Further, EPA is preparing USGS maps which establish the connection of Respondent's MS4 to a water of United States. This finding is augmented by Respondent's own outfall maps which establish a connection between the MS4 and a water of the United States. Respondent is obligated to disclose its outfall maps as part of its prehearing exchange (*see* Prehearing Order, 3.b.). Should Respondent fail to disclose its outfall maps, EPA will seek these maps pursuant to 40 C.F.R. § 22.19(e)(2) for use at the hearing.

In addition, Complainant reserves the right to supplement its prehearing response with additional maps that will be prepared and submitted in a timely fashion pursuant to 40 C.F.R. §§ 22.19(f) and 22.22(a).

Supporting Documents: CX 2, CX36

¶19: During the EPA inspection of Respondent's MS4, EPA interviewed Respondent's dry weather screening inspector.² The inspector informed EPA that Respondent no longer inspected inlets due to inadequate staffing and budget constraints. The inspector included the efforts of the mosquito control staff in his assessment. At the inspection, EPA also learned that outfall inspections declined from 1,200 annual inspections in 2007, to 150 annual inspections in 2009. This reduction in outfall inspections was also attributed to a shortage of resources. Respondent's Answer denies the allegation, yet Respondent's Answer admits that the number of inspections of inlets and outfalls in fact decreased to 130 (plus 177 mosquito control inspections) in 2009, a 75% reduction in inspections. The permit requires that the "permittee shall continue the implementation of the current field screening procedures for identifying unauthorized non-storm water discharges and improper disposal into the storm water system." See, I.A.1.b.(2). The MS4 permit requires outfall inspection levels to remain constant. The 75% reduction in field screening inspections is a violation of Respondent's permit.

Supporting Documents: CX 1, CX 32, Respondent's Answer to Complaint

¶ 20: Respondent's dry weather screening inspector told EPA inspectors that Respondent discontinued inlet inspection due to inadequate resources. The inspector also stated that outfall inspections declined from 1,200 annual inspections in 2007, to 150 annual inspections in 2009. This inspector attributed this reduction in outfall inspections to a shortage of funds. The MS4 Permit requires outfall inspection levels to remain constant. Even accounting for the mosquito control inspections, the numbers have dropped significantly. Despite the County's response that the inspection program has "evolved," the fact remains that the number of inspections is significantly reduced.

The Permit requires Respondent to prioritize inspections of industrial and commercial sites. However, Respondent is not inspecting identified industrial and commercial sites with the regularity required by part I.A.1.c.(1) permit. Additionally, Respondent failed to inspect certain classes of industrial and commercial facilities, including automobile maintenance facilities and laundries, despite recognition that these facilities are potential sources of contaminated stormwater runoff.

While there are many potential industrial and commercial sites to inspect in Henrico County, Respondent identified only 11 to inspect annually. Only three of these self-identified sites were consistently inspected between 2007 and 2009. The remaining eight sites were missing inspections in two out of the three years.

Supporting Documents: CX 1, CX 25, CX 5-CX 11, CX 32

² EPA will conduct additional investigation to ascertain the name of this individual.

¶ 22: EPA inspectors reviewed Respondent's outfall inspection database. Examination of these records revealed that even after outfall inspections conducted by the Road Maintenance Division identified potential illicit discharges, no follow-up documentation was present. Additionally, EPA uncovered numerous discrepancies between Respondent's inspection reports and databases. Further, the existing outfall inspection database provides no way to document any follow-up action taken by the Road Maintenance Division or any other entity, following the identification of an illicit discharge, resulting in inconsistencies between Respondent's outfall inspection database and the inspection reports. Further, inspection of Respondent's outfall inspection databases revealed that not all known outfalls have been visually identified.

Respondent's system is deficient in failing to provide the necessary crossover information between the County's VPDES staff and the County's Road Maintenance Division.

Supporting Documents: CX-1, CX 7-CX 10, Respondent's database (to be supplied). In addition, Complainant reserves the right to supplement its prehearing response with information from Respondent, specifically, any databases used at the facility. Such information will be prepared and submitted in a timely fashion pursuant to 40 C.F.R. §§ 22.19(f) and 22.22(a).

¶ 23: See, paragraph 22, above. In addition, the MS4 Permit explicitly requires the "Annual Report" to include "a summary of the maintenance activities performed on structural BMPs...." This requires Respondent to maintain records of maintenance activities. Respondent has failed to produce the appropriate records of maintenance activities performed on structural BMP's in the requisite data base.

Supporting Documents: CX 1, CX2, CX 31, Respondent's database (to be supplied). Complainant reserves the right to supplement its prehearing response with information from Respondent, specifically, any databases used at the facility. Such information will be prepared and submitted in a timely fashion pursuant to 40 C.F.R. §§ 22.19(f) and 22.22(a).

¶30: Complainant states that the provisions of the Respondent's SWMMP, submitted and implemented by Respondent pursuant to the MS4 Permit, speak for themselves.

Supporting Documents: CX 2, CX 25, CX 3

¶ 33: The text of the Henrico County Code, Chapter 10 – Environment, Article VII, Section 10-198 confers legal authority on Respondent consistent with that required by all applicants seeking permits for large MS4s pursuant to 40 C.F.R. § 122.26(d)(1)(ii). An applicant is explicitly required to have sufficient legal authority to prevent the contribution of pollutants from industrial activity. Section 402 of the CWA, 33 U.S.C. § 1342, the same section which controls delegation of the NPDES programs to the states, specifically, Section 402(i), states "[n]othing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title." Section 1319 is EPA's enforcement authority. To argue that EPA does not have jurisdiction to enforce this matter contradicts the statute.

Further, Respondent is obligated by Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311 to prevent the discharge of any pollutant from a point source into a water of the United States unless in compliance with the terms of its permit. Respondent's MS4 is a point source which discharges into a water of the United States. Therefore, Respondent is required by law to prevent pollutants from entering its MS4 and later being discharged into a water of the U.S. except to the extent the permit allows. Failure to have sufficient means to police the enforcement of this basic permit requirement is a violation of the permit.

Supporting Documents: CX 2, CX 3, CX 32

¶ 35: Section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p) requires a permit for stormwater discharges from MS4s serving a population of 250,000 or more. Respondent is obligated by Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311 to prevent the discharge of any pollutant into a water of the United States except in compliance with the terms of this permit. The permit compels Respondent to "control discharges to and from those portions of the municipal separate storm system over which it has jurisdiction." This includes discharges from industrial facilities.

Henrico County is not inspecting identified industrial and commercial sites with the regularity required by the SWMMP or the MS4 Permit. The Permit requires that "the permittee shall continue the implementation of the field screening procedures." *Permit* at I.A.1.b.(2) For example, in 2010, Henrico only inspected 11 facilities out of all the facilities in the County.³ In particular, Henrico County failed to inspect certain classes of industrial and commercial facilities, including automobile maintenance facilities and laundries, despite recognition that these facilities are potential sources of contaminated stormwater runoff. Additionally, Henrico failed to have an inspection schedule for these facilities in place.

Site inspections of five of the eleven industrial facilities inspected, including Powhatan Ready Mix, Alfa Laval, Ennis Paint, Henrico County Central Automotive Maintenance Garage, and the County Salt Storage Area revealed violations of Respondent's VPDES permit.

Supporting Documents: CX 1, CX 2, CX 14-CX17, CX 25

¶ 37: See 35, above. While there are many potential industrial and commercial sites to inspect in Henrico County, Respondent identified only 11 to inspect annually. Only three of these self-identified sites were consistently inspected between 2007 and 2009. The remaining eight sites were missing inspections in two out of the three years.

Supporting Documents: CX 1, CX 2, CX 14-CX 17

³ Further investigation is necessary to identify the complete universe of industrial facilities in Henrico County. By contrast, Henrico did approximately 350 fats, oils and grease (FOG) inspections that same year.

¶ 39: EPA inspectors accompanied the Henrico County stormwater inspector to three different industrial sites: a) Powhatan Ready Mix; b) Alfa Laval; and c) Ennis Paints. EPA inspectors observed that the industrial inspector failed to notice potential illicit discharges to Respondent's MS4 at all three locations. The Inspector failed to document uncovered piles of sand and stone at Powhatan or rust from uncovered metal flowing into the storm drain at Alfa Laval, failed to follow up after observing flow from vehicle washing found on Site at the Ennis Paints plant, and failed to require a SWPPP which would have prevented paint from the facility from reaching the stormwater BMP during a wet weather event.

Supporting Documents: CX 1, CX 14-CX 17

¶ 42: Complainant states that findings of EPA inspectors and the accompanying pictures confirming these findings speak for themselves. In light of Respondent's Answer to the Complaint, additional investigation is necessary to identify the contents of the drums and the origin of the oil spill. Complainant will supplement this prehearing exchange when the investigation has been completed.

Supporting Documents: CX 1, CX 6

¶ 45: Respondent is obligated to comply with the terms of the permit. The permit requires the "implementation and maintenance of structural and non-structural best management practices to reduce pollutants in stormwater runoff from construction sites." EPA inspectors visited the Henrico County Public School, a live construction site. Inspectors observed solid waste, oil product, construction chemicals, and construction wash water at the site. Inspectors documented through photographic evidence a direct connection between solid waste runoff and a storm drain inlet to Respondents MS4. There was no concrete washout area at the site.

Section 402, 33 U.S.C. § 1342, the same section which controls delegation of the NPDES programs to the states, specifically, Section 402(i), states "[n]othing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title." Section 1319 is EPA's enforcement authority. To argue that EPA does not have jurisdiction to enforce this matter contradicts the statute.

Supporting Documents: CX 1, CX 2, CX 6, CX 20

¶ 48: Respondent is required by the MS4 permit to continue to enforce Chapter 10 of the Henrico County Code. Chapter 10 requires inspections which comply with the Virginia Erosion and Sediment Control Regulations 94VAC50-30-060B. These regulations require erosion and sediment control inspections classified by the time of the inspection (initial installation, two-week period, post-storm event, project completion etc.). Respondent's erosion and sediment control inspection reports do not distinguish the reports based on the required categories. Further, the county storm inspector indicated that erosion and sediment control inspections do not take account of recent weather events. Failure to maintain the appropriate records is a violation of the Permit.

Supporting Documents: CX 1, CX 3, CX 18-CX 20

¶ 51: Part 1.A.1.d(2) of the permit requires Respondent "to continue the implementation of the education and training program for construction site operators." Respondent's senior environmental inspector confirmed that a formal education program for construction site operators had not been held during the current MS4 permit term.

Supporting Documents: CX 1, CX 21

A. Copy of all document or records referenced in paragraphs 25, 27, 37, and 45 of the Complaint

¶ 25: please see CX 7-CX 9

¶ 27: please see CX 7

¶ 37: please see CX 11-17

¶ 45: Complainant will request a map of the school from Respondent

B. Copy of report, notes, other pertinent documentation resulting from Inspection

Please see: CX 1, CX 32, CX 33

C. Pertinent provisions of Henrico County Code (URL):

Please see: CX 3 or

<http://www.co.henrico.va.us/countyattorney/pdfs/Chpt010Environment.pdf>

D. Copy of the permit or pertinent sections:

Please see: CX 2

E. Statement of Public Notice:

Please see: CX 29

F. Penalty Documentation:

Please see: CX 28

Date: 9/30/11



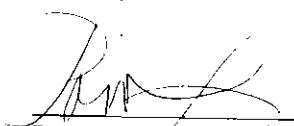
Pamela J. Lazos
Sr. Asst. Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that I caused to be sent on this date, a true and correct copy of Complainant's Prehearing Exchange by regular mail and by electronic mail, the original of which was filed with the Regional Hearing Clerk, USEPA Region III, 1650 Arch Street, Philadelphia, PA 19103, to the following:

Benjamin A. Thorpe, Esq.
County of Henrico
4301 East Parham Road
Henrico, VA 23228-2572

Date: 9/30/11



Pamela J. Lazos
Sr. Asst. Regional Counsel