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ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

Antrim Township
10655 Antrim Church Road
Greencastle, PA 17225-9577

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Docket No. CWA-03-2009-0265DN

Petition for Review

PETITION FOR REVIEW

NOW COMES, Antrim Township, by and through its special counsel, Reager & Adler, P.C., and petitions for review of the FINDINGS OF VIOLATION, ORDER FOR COMPLIANCE AND INFORMATION REQUEST, Docket No. CWA-03-2009-0265DN, which was issued to Antrim Township on September 30, 2009. The FINDINGS OF VIOLATION, ORDER FOR COMPLIANCE AND INFORMATION REQUEST is attached hereto as Exhibit A.

Antrim Township appeals because the Director of the Water Protection Division of Region III had no authority to issue the FINDINGS OF VIOLATION, ORDER FOR COMPLIANCE AND INFORMATION REQUEST since Antrim Township does not have a municipal storm sewer system. Alternatively, Antrim Township appeals because the FINDINGS OF VIOLATION, ORDER FOR COMPLIANCE AND INFORMATION REQUEST are based

on findings of fact or conclusion of law which are clearly erroneous. Specifically, Antrim Township appeals the following findings:

9. That Antrim Township is a small MS4 within the meaning of 40 CFR 122.26(b)(16).
13. That Antrim Township owned and/or operated an MS4.
21. That Antrim Township discharged pollutants contained in storm water associated with an MS4, in violation of a NPDES Permit and the Clean Water Act, 33 U.S.C. § 1311.

FACTUAL BACKGROUND

Antrim Township does not have a municipal storm sewer system. All of the storm water runoff within Antrim Township is infiltrated onsite and there is not one single point source discharge within the Township. Further, Antrim Township does not contribute to the pollution loads of any MS4. Nevertheless, under the guidance of the Pennsylvania Department of Environmental Protection, Antrim Township obtained a NPDES General Permit number 133705 on May 12, 2005 and adopted the MS4 model stormwater ordinance on December 12, 2006. As the Antrim Township officials attempted to comply with the Permit requirements by preparing the MS4 Annual Report it became obvious that the Antrim Township should not have obtained the NPDES Permit. Realizing that Antrim Township was exempt, Antrim Township officials began gathering the necessary documents to apply for the exemption and/or request a waiver. Antrim Township officials spoke with Kirit Shaw of the Pennsylvania Department of Environmental Protection (DEP) who informed them that a Notice of Intent (NOI) must accompany the exemption documents, but the new NOI form was currently under review and the old NOI form would not be accepted.

ARGUMENT

The Clean Water Act prohibits the “discharge of any pollutant” by any person into navigable waters, except as in compliance with the Act. *See* 33 U.S.C. § 1311(a). To comply with the Clean Water Act, dischargers typically obtain permits through the National Pollutant Discharge Elimination System (NPDES) permit program. The term “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *See* 33 U.S.C. § 1362(12). The Administrator of the EPA or authorized representative, which in this case is apparently the Director of the Water Protection Division, EPA Region III, has the statutory authority to determine whether the owner or operator of a point source is in violation of any effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance. *See* 33 U.S.C. § 1318 - 19. If there is no “point source” there is no discharge of a pollutant” and no authority to make a finding of a violation.

The term “point source” is defined as “any discernible confined and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system,..” *See* 33 U.S.C. § 1367. Courts have interpreted the term “point source” broadly to include stormwater collected and channeled by pipes and culverts. *See Discoll v. Adams*, 181 F.3d 1285 11th Cir. 1999); *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff’d sub nom. NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

Here, Antrim Township does not have a “point source” as that term is defined by the Clean Water Act. Antrim Township does not have a municipal storm sewer system. All of the runoff from the developed areas within the Township infiltrates onsite and all of the road runoff flows into stormwater basins that infiltrate. All of the pipes, ditches and channels owned by

Antrim Township flow into retention basins. In the event of a storm significant enough to overflow the retention basins, the water would sheet flow across the ground and still there would be no "point source" of discharge. Since Antrim Township does not have a "point source" it does not "discharge any pollutant" as that term is defined by the Clean Water Act. Because Antrim Township does not discharge any pollutant, it is not a discharger required to comply with the NPDES permit program. Further, without a "point source" of discharge the Regional Administrator has no authority to make a finding of a violation.

CONCLUSION

Antrim Township should not be required to maintain an NPDES permit because it does not discharge any pollutant into navigable waters from any point source.

Although Antrim Township asserts that it should not have to maintain an NPDES permit, in a good faith effort to comply with the Order under Appeal, Antrim Township did submit the annual reports for 2007/2008 and 2008/2009 along with Antrim Township Ordinance 305 and the required certification pursuant to the Order.

Respectfully submitted

REAGER & ADLER, PC

By: 

Linus E. Fenicle, Esquire
PA Atty. I.D. #20944
Wayne S. Martin, Esquire
PA Atty. I.D. #208078
2331 Market Street
Camp Hill, PA 17011
(717) 763-1383

Date: October 29, 2009

EXHIBIT A



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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO.

SEP 30 2009

Township Manager
Antrim Township
10655 Antrim Church Road
Greencastle, PA 17225-9577

RECEIVED

BY: _____

Re: Administrative Order and Information Request
Docket No. CWA-03-2009-0265DN

Dear Township Manager:

Through consultation with the Pennsylvania Department of Environmental Protection (PADEP), the United States Environmental Protection Agency (USEPA) has determined that Antrim Township ("Respondent"), has violated its Pennsylvania National Pollutant Discharge Elimination System Stormwater Discharges From Small Municipal Separate Storm Sewer Systems Permit, (Permit) and various provisions of the Clean Water Act, by not submitting all Annual Reports required by your permit to the PADEP.


The enclosed document is entitled "Findings of Violation and Order for Compliance and Information request" (Order and Request) and issued this date pursuant to Section 309(a) and 308 of the Clean Water Act, ("the Act") as amended, 33 U.S.C. Section 1319(a).

The USEPA encourages you to read the contents of the enclosed Order and Request, and communicate to each responsible official, agent or employee the actions that each such person must take to ensure compliance with its terms. Failure to comply with the terms of the Order and Request may result in the USEPA taking further enforcement actions, including a civil suit for penalties and injunctive relief, or a criminal prosecution as appropriate.

Respondent may be required to disclose to the Securities and Exchange Commission ("SEC") the existence of certain administrative or judicial proceedings taken against the Respondent company under Federal, State or local environmental laws. Please see the attached "Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings" for more information about this requirement and to aid you in determining whether your company is subject to it.

Both the PADEP and USEPA encourage the Respondent to review its entire MS4 program for compliance with the Permit and immediately correct any deficiencies. If you require any information or assistance regarding this Order and Request, please contact Chuck Schadel of my staff at (215) 814-5761.

Sincerely,



Jon M. Capacasa, Director
Water Protection Division

Enclosures

cc: Scott Williamson, SC PADEP
Ken Murin, HQ PADEP



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

REGIONAL HEADING OFFICE
EPA REGION III PHILADELPHIA

2009 SEP 30 PM 5:09

RECEIVED

IN THE MATTER OF :

Antrim Township
10655 Antrim Church Road
Greencastle, PA 17225-9577

Docket No. CWA-03-2009-0265DN
FINDINGS OF VIOLATION,
ORDER FOR COMPLIANCE
AND
INFORMATION REQUEST

Respondent

I. STATUTORY AUTHORITY

1. This Order for Compliance and Request for Information ("Order and Request") is issued under the authority vested in the Administrator of the Environmental Protection Agency (hereinafter "EPA") under Section 308 of the Clean Water Act (CWA or Act), 33 U.S.C. 1318 and Section 309(a) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. Section 1319(a). The Administrator has delegated this authority to the Regional Administrator of Region III, who in turn has delegated it to the Director of the Water Protection Division of Region III.

II. STATUTORY AND REGULATORY BACKGROUND

2. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutants (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.
3. EPA is authorized under Section 308 of the Federal Water Pollution Control Act ("Clean Water Act" or "the Act"), 33 U.S.C. § 1318, to require owners and operators of point sources to establish records and make such reports as may be necessary to carry out the purpose of the Act, including but not limited to:
 - (a) Developing or assisting in the development of any effluent limitation, or other limitation, prohibition, effluent standard, pretreatment standard, or standard of performance under the Clean Water Act;
 - (b) Determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance;

- (c) Any requirement under Section 308 of the Clean Water Act; and
 - (d) Carrying out Sections 305, 311, 402, 404, and 504 of the Clean Water Act.
-
- 4. 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.
 - 5. "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.
 - 6. "Storm water" is defined as "storm water runoff, snow melt runoff and surface runoff and drainage." *Id.* § 122.26(b)(13).
 - 7. 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).
 - 8. Pursuant to 40 CFR 122.26(a)(9)(i), small MS4s require an NPDES permit if they are required to be regulated pursuant to 40 CFR 122.32.
 - 9. Antrim Township is a small MS4 within the meaning of 40 CFR 122.26(b)(16).
 - 10. Antrim Township is a small MS4 located in an urbanized areas as determined by the latest Decennial Census by the Bureau of the Census, and accordingly requires an NPDES permit pursuant to 40 CFR part 122.32(a)(1).
 - 11. Pursuant to section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized Commonwealth of Pennsylvania ("PA") to issue NPDES permits in 1978. In 1991, EPA authorized PA to issue General NPDES Permits.

III. EPA FINDINGS AND ALLEGATIONS

- 12. Antrim Township, PA (Respondent) is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

13. Respondent, at all times relevant to this Order, has owned and/or operated an MS4, located in the vicinity of Antrim, PA, known as the ("MS4").
14. An unnamed tributary of the Conocheague Creek, an unnamed tributary of Marsh Run, Marsh Run, and the West Branch, to which storm water flows and, at all times relevant to this Order, have flowed from the MS4, are each a "water of the United States" as that term is defined at 40 C.F.R. § 122.2.
15. Respondent signed and submitted a notice of intent ("NOI") for coverage under the General NPDES Permit for Stormwater Discharges Associated with Construction Activities ("Permit") to the Pennsylvania Department of Environmental Protection (PADEP) on January 28, 2005.
16. On May 12, 2005 the PADEP issued the Stormwater Discharges From Small MS4s PAG133705 ("Permit").
17. The Permit authorizes discharges of storm water from the MS4 to an unnamed tributary of the Conocheague Creek, an unnamed tributary of Marsh Run, Marsh Run, and the West Branch, but only in accordance with the conditions of the Permit.
18. The Permit, Part C, 2. Annual Report, requires the Respondent, among other things, to submit annual reports to DEP on stormwater management activities performed during the permit year.
19. On June 9, 2009 USEPA personnel conducted a review of MS4 annual reports at the PADEP office in Harrisburg, PA. No annual report was available for Antrim Township for the period 2008/2009, 2006/2007, 2005/2006, 2004/2005, 2003/2004.

III. VIOLATIONS

20. Respondent had failed to comply with the Permit by not submitting to PADEP a complete MS4 annual report for the periods 2008/2009, 2006/2007, 2005/2006, 2004/2005, 2003/2004.

IV. CONCLUSION OF LAW

21. By failing to comply with it's Permit, the Respondent discharged pollutants contained in storm water associated with an MS4, in violation of the Permit and section 301 of the CWA, 33 U.S.C §1311.

V. ORDER AND REQUEST

AND NOW, this 30 day of SEP, 2009, Respondent is hereby ORDERED AND REQUESTED, pursuant to Section 309(a) of the Act, 33 U.S.C. Section 1319(a) and Section 308 of the Act, 33 U.S.C. 1318, to do the following:

22. Within thirty (30) days of the effective date of this Order and Request, Respondent shall:

- a. Submit a complete annual report for periods 2008/2009, 2006/2007, 2005/2006, 2004/2005, 2003/2004 to:

Chuck Schadel, Enforcement Officer
U.S. EPA, Region III, (3WP42)
1650 Arch Street
Philadelphia, PA 19103-2029
(215) 814-5761

And

Scott R. Williamson, Environmental Group Manager
Department of Environmental Protection
Southcentral Regional Office
909 Elmerton Ave
Harrisburg, PA 17110

- b. Provide the ordinances that were developed to comply with the Minimum Control Measure for Post-Construction Site Runoff Control
- c. Provide certification, signed by a responsible corporate officer, as defined in 40 CFR § 122.22, that reads as follows: *"I certify that the information contained in or accompanying this submission is true, accurate, and complete. As to the identified portion(s) of this submission for which I cannot personally verify its truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is 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."*


VI. GENERAL PROVISIONS

23. Issuance of this Order and Request shall not be deemed an election by EPA to forego any administrative, civil, or criminal action to seek penalties, fines, or any other appropriate relief under the Act for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited. Failure to comply and/or respond to this Order and Request, or providing misleading or false information, may subject you to civil and/or criminal sanctions pursuant to, 33 U.S.C. § 1319, and/or a civil judicial action initiated by the U.S. Department of Justice. If EPA initiates such an action, Respondent may be subject to civil penalties of up to \$37,500 per day of violation pursuant to 33 U.S.C. § 1319 and 40 C.F.R. Part 19.
24. If a criminal judicial action is initiated, and Respondent is convicted of a criminal offense under Section 309 of the Act, Respondent may be subject to a monetary fine and/or imprisonment, and may become ineligible for certain contracts, grants, or loans under Section 508 of the Act.
25. Respondent shall permit EPA or its authorized representative to inspect any site at reasonable times to confirm that Respondent is in compliance with this Order and Request, and with any applicable permit. EPA reserves all existing inspection authority.
26. This Order and Request does not constitute a waiver or modification of the terms or conditions of any NPDES permit. Compliance with the terms and conditions of this Order and Request does not relieve the Respondent of its obligations to comply with any applicable federal, state, or local law or regulation.
27. Violation of the terms and conditions of this Order and Request constitutes an additional violation of the Act, and may result in a civil action for injunctive relief and/or a penalty not to exceed \$37,500 per day of such violation, pursuant to Sections 309(b) and (d) of the Act, 33 U.S.C. Section 1319(b) and (d). In addition, Section 309 provides criminal sanctions for knowing or negligent violations of the Act including imprisonment and fines of up to \$50,000 per day of violation.

VII. EFFECTIVE DATE

This ORDER AND REQUEST is effective upon receipt.

Date: SEP 30 2009



Jon M. Capacasa, Director
Water Protection Division
EPA, Region III

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2009, true copies of the Petition and Exhibits were served upon Jon M. Capacasa of United States Environmental Protection Agency Region III as follows:

Jon M. Capacasa, Director
Water Protection Division
United States Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Attn: Scott R. Williamson
Pennsylvania Department of Environmental Protection
Southcentral Regional Office
909 Elmerton Avenue
Harrisburg, PA 17110

Attn: Chuck Schadel
U.S. E.P.A., Region III, (3WP42)
1650 Arch Street
Philadelphia, PA 19103-2029


Jessica Shull