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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

1650 Arch Street

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EPA REGION III, PHILA. PA

In the Matter of:	:	Proceeding to Assess Class II Administrative Penalty Under Section 309(g) of the Clean Water Act
City of Lynchburg	:	Docket No. CWA-03-2013-0126
Respondent	:	<b>CONSENT AGREEMENT AND FINAL ORDER</b>

**I. PRELIMINARY STATEMENT and STATUTORY AUTHORITY**

1. This Consent Agreement and Final Order (CAFO) is entered into by the Director, Water Protection Division, United States Environmental Protection Agency, Region III (Complainant) and the City of Lynchburg (Lynchburg, City, or Respondent) pursuant to Section 309(g) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22. The parties having agreed to settle alleged violations of the Clean Water Act by Respondent, this 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 the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (effective March 15, 2004), any person who has violated any NPDES permit condition or limitation after March 15, 2004 is liable for an administrative penalty not to exceed \$11,000 per day for each day of violation occurring after March 15, 2004 up to a total penalty amount of \$157,500.

3. Pursuant to the subsequent 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 AND CONCLUSIONS OF LAW**

4. 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.

5. 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 or may authorize states to issue such permits. The discharges are subject to specific terms and conditions as prescribed in the permit.

6. Section 402(p) of the Act, 33 U.S.C. §1342(p) provides that both discharges from a municipal separate storm sewer system (MS4) and discharges associated with industrial activity may be subject to NPDES permitting requirements.

7. Pursuant to Section 402(b) of the Act, 33 U.S.C. §1342(b), EPA authorized the Commonwealth of Virginia (Commonwealth or Virginia) NPDES program on March 31, 1975. The Virginia Department of Environmental Quality (VADEQ) was authorized to issue general NPDES permits on April 20, 1991. On December 30, 2004, EPA approved the Commonwealth's request to transfer the issuance of general and individual permits for construction and MS4 storm water discharges from VADEQ to the Virginia Department of Conservation and Recreation (VADCR).

8. Pursuant to Section 402(i) of the Act, 33 U.S.C. § 1342(i), EPA retains its authority to take enforcement action in Virginia for NPDES permit violations.

9. The term "municipal separate storm sewer system" or "MS4" is defined in part, as, "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains): (i) 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).

10. The term "small municipal separate storm sewer system" or "small MS4" means "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." 40 C.F.R. § 122.26(b)(16) and (17).

11. Pursuant to 40 C.F.R. §122.26(a)(9)(i)(A), small MS4s require an NPDES permit if they are required to be regulated pursuant to 40 C.F.R. § 122.32.

12. Pursuant to 40 C.F.R. §122.32(a)(1), the Commonwealth of Virginia has determined that Lynchburg is a small MS4 located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census, and accordingly requires an NPDES permit.

13. Therefore, Lynchburg is a “small MS4” within the meaning of 40 C.F.R. § 122.26(b)(16).

14. The City’s MS4 is covered under the General Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems, General Permit No. VAR04, effective July 9, 2008. Lynchburg’s permit registration number is VAR040008 (MS4 Permit).

15. On March 5 and 6, 2012 representatives of EPA conducted an inspection of Lynchburg’s MS4 program implementation.

16. On November 2, 2012, EPA issued the City of Lynchburg, Virginia Municipal Separate Storm Sewer System (MS4) Program Inspection Report (Inspection Report), which included, in addition to general information regarding the City’s MS4 program and history, fourteen (14) observations regarding the City’s MS4 Program related to the requirements of the current MS4 Permit (VAR04, effective July 9, 2008). The Inspection Report also included 8 attachments (exhibit log, photo log, document log, etc.).

17. The City received a copy of the Inspection Report by electronic mail dated February 7, 2013. The City prepared and submitted a response to EPA on March 25, 2013.

18. Based upon the March 5 and 6, 2012 inspection, EPA identified three categories of violations, among the fourteen (14) observations, which it has concluded were a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

19. Section II.B.4.a of the MS4 Permit states that “the operator shall develop, implement, and enforce procedures to reduce pollutants in any stormwater runoff to the regulated small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or equal to or greater than 2,500 square feet in all areas of the jurisdictions designated as subject to the Chesapeake Bay Preservation Area Designation and Management Regulations adopted pursuant to the Chesapeake Bay Preservation Act.”

20. Section II.B.5.b(4) of the MS4 Permit requires Lynchburg to require “adequate long-term operation and maintenance by the owner of structural stormwater management facilities through requiring the owner to develop a recorded inspection schedule and maintenance agreement to the extent allowable under state, tribal or local law or other legal mechanism. The operator shall additionally develop, through the maintenance agreement or other method, a mechanism for enforcement of maintenance responsibilities by the operator if they are neglected by the owner”.

21. Section II.B.5.b.(5) of the Permit requires Lynchburg to “conduct site inspection[s] and enforcement measures [of post construction Best Management Practices (BMPs)] consistent with the Virginia Stormwater Management Act and attendant regulations.” At the time of the inspection, the City had not developed a program or procedure for verifying the accuracy of BMP inspection records submitted to the City by private BMP owners and the City did not have a guidance document or procedure for enforcement to ensure adequate long-term operation and maintenance of post-construction BMPs in the City.

22. Section II.B.6 of the MS4 Permit requires the City “develop and implement an operation and maintenance program consistent with the MS4 Program Plan that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations...The operator shall identify, implement, evaluate and modify, as necessary, BMPs to meet the following pollution prevention/good housekeeping for municipal operations measurable goals: a. Operation and maintenance programs including activities, schedules, and inspection procedures shall include provisions and controls to reduce pollutant discharges into the regulated small MS4 and receiving surface waters; b. Illicit discharges shall be eliminated from storage yards, fleet or maintenance shops, outdoor storage areas, rest areas, waste transfer stations, and other municipal facilities; c. Waste materials shall be disposed of properly; d. Materials that are soluble or erodible shall be protected from exposure to precipitation; e. Materials, including but not limited to fertilizers and pesticides, that have the potential to pollute receiving surface waters shall be applied according to manufacturer's recommendations; and f. For state agencies with lands where nutrients are applied, nutrient management plans shall be developed and implemented in accordance with the requirements of §10.1-104.4 of the Code of Virginia.”

### **III. EPA FINDINGS OF VIOLATION**

23. EPA observed a number of stormwater control deficiencies at the private construction projects it visited during the March 5 and 6, 2012 inspection. These deficiencies included, among others, inadequate inlet protections at multiple inlets, and sediment tracking observed on the roadway adjacent to a site's construction entrance.

24. At the time of the inspection, Lynchburg had not established maintenance agreements for 2 privately owned post-construction structural stormwater management facilities (also known as post-construction BMPs) within the City.

25. At the time of the inspection, the City had not developed a program or procedure for verifying the accuracy of BMP inspection records submitted to the City by private BMP owners and the City did not have a guidance document to ensure adequate long-term operation and maintenance of post-construction BMPs in the City.

26. At the time of the inspection, EPA observed several stormwater control measure deficiencies at the municipally-owned sites it visited during the March 5 and 6, 2012 inspection. These deficiencies included not establishing inspection schedules or utilizing drip pans to prevent vehicle fluids from contacting stormwater during rain events, and not protecting storm

drain inlets downgradient from storage and unloading areas from pollutant exposure.

27. Based upon the inspection, EPA has concluded that Respondent's failure to 1) identify and implement, evaluate and modify as necessary, BMPs to eliminate illicit discharges from public works yards, storage yards, fleet or maintenance shops, and outdoor storage areas; 2) develop, implement, and enforce procedures to reduce pollutants in any stormwater runoff to the regulated small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre or equal to or greater than 2,500 square feet; 3) and ensure the adequate long-term operation and maintenance of structural stormwater management facilities by the owners through requiring development of a recorded inspection schedules and maintenance agreements to the extent allowable under state, tribal or local law or other legal mechanism, violates the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

#### **IV. CONSENT AGREEMENT AND FINAL ORDER**

28. Respondent admits the jurisdictional allegations set forth in this CAFO.

29. For the purpose of this proceeding, Respondent neither admits nor denies the Findings of Fact and Conclusions of Law set forth in Section II, above, and waives any defenses it might have as to jurisdiction, its right to contest the allegations through hearing or otherwise; and its right to appeal the proposed final order accompanying the consent agreement.

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

31. Respondent hereby expressly waives its right to a hearing on any issue of law or fact set forth in this CAFO pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and consents to issuance of this CAFO without adjudication.

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

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

34. 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.

35. 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 the Commonwealth of Virginia regarding this action, and will mail a copy of this document to the appropriate Virginia official.

36. Based upon the foregoing and having taken into account the nature, circumstances, extent and gravity of the violations, 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 dollars (\$32,000)** in full and final settlement of EPA's claims for civil penalties for the violations alleged herein.

37. Respondent shall pay the total administrative civil penalty in Paragraph 36 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 17<sup>th</sup> 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](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 Smolski, Esquire  
Mail Code 3RC20  
Office of Regional Counsel  
U.S. EPA Region III  
1650 Arch Street

Philadelphia, PA 19103-2029

38. 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 other issue not included in this CAFO 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.

39. 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).

40. 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).

41. This Consent Agreement and the accompanying Final Order resolve only the administrative and 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 an 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.



42. 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.

43. The penalty specified in Paragraph 36, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

44. 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.

45. 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.

46. 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.

**V. EFFECTIVE DATE**

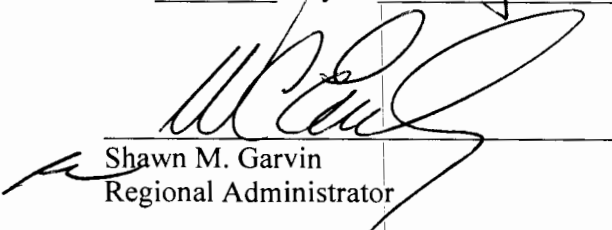
Pursuant to 40 C.F.R. § 22.45, this CAFO shall be issued after a 40-day public notice period was concluded. This CAFO will become final and effective 30 days after issuance, 33 U.S.C. § 1319(g)(4), and will become effective on that same date, 40 C.F.R. § 22.31(b).

FOR RESPONDENT, CITY OF LYNCHBURG:

Date: 8/12/13  
By: L. Kimball Payne  
Name: L. KIMBALL PAYNE, III  
Title: City Manager

SO ORDERED, pursuant to 33 U.S.C. 1319(g), and 40 C.F.R. Part 22,

this TH day of August, 2013

  
Shawn M. Garvin  
Regional Administrator

City of Lynchburg,  
Docket No. CWA-03-2013-0126

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:

Timothy Mitchell, P.E.  
Director  
Department of Water Resources  
City of Lynchburg, Virginia  
525 Taylor Street  
Lynchburg, Virginia 24501

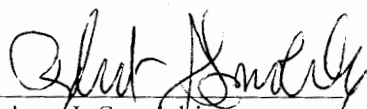
and a copy delivered by hand to:

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:

Ginny Snead, P.E.  
Virginia Department of Environmental Quality  
629 East Main Street  
P.O. Box 1105  
Richmond, Virginia 23218

Date: August 12, 2013

  
Robert J. Smolski  
Senior Assistant Regional Counsel