



REGION 3

PHILADELPHIA, PA 19103

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U.S. EPA REGION 3
HEARING CLERK

In the Matter of:
West Virginia Department of Transportation:
Division of Highways
1900 Kanawha Boulevard, East
Building 5, Room 148
Charleston, West Virginia 25305-0430
Respondent
West Virginia Division of Highways
Municipal Separate Storm Sewer System
Facility

EPA Docket No. CWA-03-2024-0113DN
Administrative Order on Consent
Pursuant to 33 U.S.C. § 1319(a)

I. STATUTORY AUTHORITY AND JURISDICTION

- 1. The United States Environmental Protection Agency ("EPA") makes the following findings of fact and conclusions of law, below, and issues this Administrative Order on Consent ("Order") pursuant to the authority vested in the EPA Administrator 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 3, who further delegated it to the Director, Enforcement and Compliance Assurance Division, EPA Region 3.
2. Section 309(a) of the Act, 33 U.S.C. § 1319(a), provides, among other things, that whenever on the basis of any information available, the Administrator finds that any person is in violation of Section 301 of the Act, 33 U.S.C. § 1311, or any permit condition or limitation implementing certain CWA sections in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342, the Administrator shall issue an order requiring such person to comply with such section or requirement.

3. The EPA has jurisdiction over the above-captioned matter, as described in Paragraphs 1 and 2 above.
4. The West Virginia Division of Highways, Respondent, has agreed to the issuance of this Order.
5. The EPA has consulted with the West Virginia Department of Environmental Protection (“WVDEP”) regarding this action and, subsequent to the Effective Date, the EPA will provide a copy of this fully executed Order to the appropriate WVDEP 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 from a point source into waters of the United States except in compliance with, among other things, a permit issued pursuant to the National Pollutant Discharge Elimination System (“NPDES”) program under Section 402 of the Act, 33 U.S.C. § 1342.
7. 40 C.F.R. § 122.2 defines “the discharge of a pollutant” as: “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.”
8. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. Sections 122.2 and 122.26 provide that, with some exceptions not relevant here, stormwater discharges are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).
9. 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.”
10. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of the EPA, or a state upon approval by the EPA, may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States, to ensure compliance with the requirements of the CWA. The discharges are subject to specific terms and conditions, as prescribed in the permit. *See also* 33 U.S.C. § 1311.
11. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), the EPA authorized the WVDEP to issue NPDES permits in West Virginia on March 31, 1975.

12. Pursuant to 40 C.F.R. § 122.26(a)(9)(i), with some exceptions not relevant here, small municipal separate storm sewer systems (“MS4”s) require a NPDES permit.
13. 40 C.F.R. § 122.26(b)(8)(i) defines the term “municipal separate storm sewer [system]” or “MS4” as a system of conveyances “[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.”
14. 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... .”
15. Under 40 C.F.R. § 122.34(a), “[f]or 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).”
16. Pursuant to its authority under the CWA and the NPDES program approval, WVDEP elected to issue an Individual Permit for Discharges from Small Municipal Separate Storm Sewer Systems (NPDES Permit No. WV0116025, Permit Registration No. WVR030004, hereinafter referred to as “MS4 Permit”) to Respondent on August 11, 2014. The MS4 Permit was originally set to expire on August 11, 2019, but has since been administratively extended.

III. GENERAL PROVISIONS

17. For the purpose of this proceeding only, Respondent admits each jurisdictional allegation set forth in this Order.
18. Respondent agrees not to contest the jurisdiction of the EPA with respect to the execution or enforcement of this Order.

19. The provisions of this Order shall apply to and be binding upon the Respondent and its officers, directors, employees, contractors, agents, trustees, successors and assigns of the Respondent.
20. Respondent shall bear its own costs and attorney's fees in connection with this proceeding and associated with the implementation or enforcement of this Order, including any costs related to resolution of any dispute arising regarding this Order.
21. Issuance of this Order is intended to address the violations described herein. The EPA reserves the right to commence action against any person, including Respondent, in response to any condition which the EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. The EPA also reserves any existing rights and remedies available to it under the CWA, 33 U.S.C. §§ 1251 – 1389, the regulations promulgated thereunder, and any other federal laws or regulations for which the EPA has jurisdiction.
22. This Order does not constitute a waiver or modification of the terms or conditions of any permit issued to Respondent. Nothing in this Order shall relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local laws and regulations, nor shall it restrict the 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 Order does not constitute a waiver, suspension or modification of the requirements of the Act, 33 U.S.C. §§ 1251 – 1389, or any regulations promulgated thereunder.
23. 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 Order, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
24. The EPA reserves all existing inspection authority otherwise available to the EPA pursuant to Section 308 of the CWA, 33 U.S.C. § 1318, or pursuant to any other statute or law.
25. 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 Order and to execute and legally bind the Respondent.
26. By signing this Order, Respondent acknowledges that this Order may be available to the public and represents that, to the best of Respondent's knowledge and belief, this Order does not contain any confidential business information or personally identifiable information from Respondent.
27. Respondent certifies that any information or representation it has supplied or made to

the 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. The EPA shall have the right to institute further actions to recover appropriate relief if the EPA obtains evidence that any information provided and/or representations made by Respondent to the EPA, regarding matters relevant to this Order, are false or, in any material respect, inaccurate. This right shall be in addition to all other rights and causes of action that the 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.

28. Notwithstanding any other provisions of this Order, no action or decision by the EPA, including, without limitation, decisions of the Chief, Water Branch, Enforcement & Compliance Assurance Division (“ECAD”), or Director, ECAD, EPA, Region 3, shall constitute a final agency action giving rise to any right to judicial review prior to the EPA's initiation of judicial action to compel either, or both, Respondent’s compliance with, or otherwise enforce, this Order.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

29. Respondent is a “municipality” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4).
30. 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.
31. 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), i.e., the MS4, that discharges to waters of the United States.
32. At all times relevant herein, upon information and belief, Respondent owned or operated, and continues to own or operate, the MS4, which meets the definition of: a) “municipal separate storm sewer”; and b) a “municipal separate storm sewer system” or c) “MS4”; and, d) “small municipal separate storm sewer system” or e) “small MS4”, as those terms are defined at 40 C.F.R. § 122.26(b)(8), (16), (17), (18) and (19).
33. The Ohio River, Kanawha River, Little Kanawha River, Elk River, Monongahela River, Potomac River, Opequon Creek, and other tributaries to the Ohio River are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

34. At all times, relevant to this Order, the Respondent has discharged stormwater into the MS4, which discharges into waters of the United States, including the Ohio River, Kanawha River, Little Kanawha River, Elk River, Monongahela River, Potomac River, Opequon Creek, and other tributaries to the Ohio River.
35. Representatives from the EPA Region 3 performed an offsite compliance review with Respondent's representatives on June 2, 2022, along with a series of onsite compliance inspections at the Respondent's permitted facilities on June 14, 15, 28, and 29, 2022. By email dated August 23, 2022, the EPA issued an Inspection Report, dated August 19, 2022, (the "MS4 Inspection Report") to the Respondent.
36. The EPA received Respondent's follow-up correspondence to the MS4 Inspection Report on October 14, 2022.
37. On November 15, 2023, the 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 EPA's offsite compliance review and subsequent inspections.

COUNT 1

**Failure to Maintain an Ordinance or Other Regulatory Mechanism
for Illicit Discharge Detection and Elimination**

38. The allegations in the preceding paragraphs are incorporated by reference.
39. Subsections II(C)(7)(c)(1), (11), (12), and (17) of the MS4 Permit require that Respondent develop, implement, assess, and enforce a program designed to prohibit improper disposal, detect and remove illicit connections, and eliminate illicit discharges to the storm sewer system through an ordinance or other regulatory mechanism. These MS4 Permit sections further provide that the regulatory mechanism must include escalating enforcement procedures and that Respondent's development and implementation of this mechanism shall constitute a measurable and enforceable goal under the MS4 program.
40. Based on EPA's offsite review conducted on June 2, 2022 and concurrent assessment of the Respondent's Stormwater Management Plan ("SWMP"), Respondent has elected to rely on Chapter 17 of the West Virginia State code related to issuance of encroachment permits as opposed to developing any ordinance or regulatory mechanism designed to address illicit discharge detection and elimination.
41. By failing to develop an ordinance or other regulatory mechanism for illicit discharge detection and elimination, Respondent violated subsections II(C)(7)(c)(1), (11), (12), and (17) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 2

Failure to Develop a Response Procedure for Spills

42. The allegations in the preceding paragraphs are incorporated herein by reference.
43. Subsection II(C)(7)(c)(5) of the MS4 Permit requires that Respondent incorporate a response procedure for spills into Respondent's SWMP that are not otherwise under the purview of another responding authority.
44. Based on EPA's offsite review conducted on June 2, 2022 and concurrent assessment of the Respondent's SWMP, the Respondent has failed to develop a defined spill response procedure and incorporate that procedure into Respondent's SWMP.
45. By failing to develop and incorporate a defined spill response procedure into its SWMP, Respondent violated subsection II(C)(7)(c)(5) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 3

Failure to Develop and Update MS4 System Map

46. The allegations in the preceding paragraphs are incorporated herein by reference.
47. Subsections II(C)(7)(c)(6) and (9) of the MS4 Permit require that Respondent develop a map of its MS4 within one year of its SWMP approval, that said map receive an annual update, and that Respondent includes certain information on the map such as the location and type of all MS4 stormwater conveyances in addition to the location of waters designated as impaired under CWA Section 303(d), 33 U.S.C. § 1313(d).
48. Based on EPA's offsite review conducted on June 2, 2022, assessment of Respondent's SWMP, and review of mapping information provided by Respondent, the MS4 map prepared by Respondent fails to display necessary information such as the location and type of all MS4 stormwater conveyances in addition to the location of waters designated as impaired under CWA Section 303(d), 33 U.S.C. § 1313(d).
49. By failing to develop and update a MS4 map with required information, Respondent violated subsections II(C)(7)(c)(6) and (9) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 4

Failure to Document and Inventory Priority Areas

50. The allegations in the preceding paragraphs are incorporated herein by reference.

51. Subsection II(C)(7)(c)(18) of the MS4 Permit requires that Respondent document priority areas prone to illicit discharges, prepare an inventory of these areas, and record specific areas subject to prior complaints.
52. Based on EPA's offsite review conducted on June 2, 2022, assessment of Respondent's SWMP, and review of mapping information provided by the SWMP, Respondent has not adequately documented locations of priority areas, maintained an inventory of these locations, or compiled a record of locations subject to complaint.
53. By failing to adequately document and inventory priority areas prone to illicit discharges, Respondent violated subsection II(C)(7)(c)(18) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 5

Failure to Conduct Annual Field Assessments

54. The allegations in the preceding paragraphs are incorporated herein by reference.
55. Subsection II(C)(7)(c)(20) of the MS4 Permit requires that the Respondent conduct a minimum of one annual field assessment targeted at evaluating multiple elements of Respondent's stormwater system.
56. Based on EPA's offsite review conducted on June 2, 2022 and additional information Respondent provided, Respondent did not conduct any field assessments in the year 2021 and, to date, has not inspected 100% of the inlets and outlets within Respondent's MS4.
57. By failing to conduct an annual assessment in 2021, Respondent violated subsection II(C)(7)(c)(20) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 6

Failure to Develop Procedures for Investigating, Containing, and Reporting Illicit Discharges

58. The allegations in the preceding paragraphs are incorporated herein by reference.
59. Subsections II(C)(7)(c)(22) and (23) of the MS4 Permit require that Respondent must prepare a SWMP that includes procedures for characterizing potential public or environmental threats posed by illicit discharges in addition to procedures for evaluating and containing discharges that must be immediately contained. The referenced MS4 Permit sections further state that procedures should include a system for investigating potential pollution within fifteen days, immediately investigating

emergency cases, and referring severe or urgent, imminent water quality impairments to the Director of WVDEP.

60. Based on EPA's offsite review conducted on June 2, 2022 and concurrent assessment of Respondent's SWMP, Respondent has elected to rely on Chapter 17 of the West Virginia State code related to issuance of encroachment permits as opposed to incorporating defined procedures for investigating, identifying, reporting, and containing illicit discharges into its SWMP.
61. By failing to develop procedures for investigating, identifying, reporting, and containing illicit discharges for incorporation into its SWMP, Respondent violated subsections II(C)(7)(c)(22) and (23) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 7

Failure to Provide Annual Training

62. The allegations in the preceding paragraphs are incorporated herein by reference.
63. Subsection II(C)(7)(c)(30) of the MS4 Permit requires that Respondent provide annual training to municipal field staff responsible for identification, investigation, termination, cleanup, and reporting of illicit discharges.
64. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent does not offer a programmatic training curriculum to municipal field staff consistent with the requirements of the MS4 Permit, and instead relies on individual District facilities to independently ensure employees receive training. Furthermore, information likewise indicated that Respondent failed to conduct any training in the year 2020.
65. By failing to conduct annual training in 2020, Respondent violated subsection II(C)(7)(c)(30) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 8

Failure to Maintain System for Tracking and Reporting Spills and Discharges

66. The allegations in the preceding paragraphs are incorporated herein by reference.
67. Subsection II(C)(7)(c)(32) of the MS4 Permit requires that Respondent maintain a system for tracking, summarizing, and reporting the number and type of spills and discharges throughout its MS4 on an annual basis.
68. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts

1, 4, and 5, and information Respondent provided, Respondent has not developed a comprehensive spill and discharge tracking system and is instead relying on individual Districts to independently maintain spill logs.

69. By failing to develop a system for tracking, summarizing, and reporting the number and type of spills and discharges throughout its MS4 on an annual basis, Respondent violated subsection II(C)(7)(c)(32) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 9

Failure to Develop and Update Ordinances or Other Regulatory Mechanisms for Addressing Construction Site Stormwater

70. The allegations in the preceding paragraphs are incorporated herein by reference.
71. Subsection II(C)(7)(d)(4) of the MS4 Permit requires that Respondent review and update ordinances or other regulatory mechanisms for addressing stormwater runoff from construction sites on an annual basis.
72. Based on EPA's offsite review conducted on June 2, 2022 and additional information Respondent provided, Respondent has not developed or implemented an ordinance or regulatory mechanism directed at stormwater runoff from construction sites. EPA observed that Respondent is instead relying on contract provisions which do not provide authority adequate to address noncompliance with stormwater runoff directives and specifications.
73. By failing to develop and update ordinances or other regulatory mechanisms for addressing stormwater runoff from construction sites on an annual basis, Respondent violated subsection II(C)(7)(d)(4) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 10

Failure to Ensure Construction Site Operators Maintain Erosion Control, Sediment Control, and Pollution Prevention BMPs

74. The allegations in the preceding paragraphs are incorporated herein by reference.
75. Subsection II(C)(7)(d)(5) of the MS4 Permit requires that Respondent implement erosion control, sediment control, and pollution prevention BMPs and ensure that construction site operators maintain these BMPs in accordance with West Virginia's BMP directives and guidance.
76. Based on EPA's onsite inspections in Districts 1, 4, and 5, EPA officials observed various instances of inadequate BMP implementation by construction site operators at the

Tabler Station-Apple Harvest, Inwood Bypass Phase II, RHL Boulevard Connector, and Mileground to Airport Road, construction sites. These instances included the following:

a. Tabler Station-Apple Harvest

- i. The EPA Inspection Team observed several sections of perimeter silt fencing that had holes and gaps in between sections.
- ii. There was a section of the silt fence in which gravel had reached over ½ the height of the fence.
- iii. There was a section of the silt fence installed incorrectly. Specifically, the stakes were installed on the inside of the silt fence rather than the downside of the expected flow.
- iv. The EPA Inspection Team observed leaking fluid from a parked dump truck.

b. Inwood Bypass Phase II

- i. The EPA Inspection Team observed check dams and riprap overtaken with straw and sediment.
- ii. A filter sock located in a ditch was not staked or otherwise secured to the ground.
- iii. The EPA Inspection Team observed that the construction project that was in Phase II at the time of the inspection appeared to be out of sequence. Pond A (i.e., "SWM Facility A") appeared to be under construction and undergoing excavating operations at the time of the inspection, yet the project sequencing charts provided by the Department appeared to show that Pond A was required to be constructed during Phase I, Stage Two. Specifically, the sequencing chart directs the project to, "EXCAVATE AND GRADE SWM FACILITY A".

c. RHL Boulevard Connector

- i. The EPA Inspection Team observed the stabilized construction entrance to be overladen with sediment.
- ii. The slope on the east side of the site appeared to have erosion channels. Erosion channels also were present on a slope in proximity to Davis Creek.
- iii. A rock channel in proximity to Pond 1 appeared to have a sloped area that was causing the channel to short circuit.
- iv. A bridge being constructed over Davis Creek appeared to have multiple areas where filter socks were punctured and/or overtaken. The slope above this area appeared to have erosion present.

d. Mileground to Airport Road

- i. Filter socks along Mileground Road appeared to be in need of maintenance.

- ii. An erosion channel was present along Tramore Lane.
 - iii. The pond in proximity to Outlet 01 appeared to have erosion channels forming above the inlet pipe.
 - iv. A stockpile was present by the pond by Outlet 01 that did not appear to have controls.
77. By failing to implement erosion control, sediment control, and pollution prevention BMPs and ensure that construction site operators maintain these BMPs, Respondent violated subsections II(C)(7)(d)(5) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 11

**Failure to Develop Educational and Training Measures for
Construction Site Operators**

78. The allegations in the preceding paragraphs are incorporated herein by reference.
79. Subsection II(C)(7)(d)(7) of the MS4 Permit requires that Respondent incorporate into its SWMP educational and training measures for construction site operators that include information on preparation of stormwater pollution prevention plans for construction site discharges.
80. Based on EPA's offsite review conducted on June 2, 2022, assessment of Respondent's SWMP, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent has not developed adequate educational and training measures for construction site operators. Onsite inspections conducted by EPA confirmed varying levels of compliance at construction sites in the Respondent's individual Districts due to inconsistent training.
81. By failing to develop educational and training measures for construction site operators that include information on preparation of stormwater pollution prevention plans for construction site discharges, Respondent violated subsection II(C)(7)(d)(7) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 12

Failure to Develop and Implement Construction Site Run-Off Program

82. The allegations in the preceding paragraphs are incorporated herein by reference.
83. Subsection II(C)(7)(d)(9) of the MS4 Permit requires that Respondent prepare a construction site run-off program with provisions that include procedures for inspecting permitted sites during construction to verify proper installation and maintenance of

erosion and sediment controls.

84. Based on EPA's offsite review conducted on June 2, 2022, assessment of Respondent's SWMP, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent has not developed a construction site run-off program that includes necessary procedures for site inspection. Specifically, the Permittee did not have procedures for inspecting permitted sites during construction to verify proper installation and maintenance of erosion and sediment controls. Further, WVDOH did not have standardized inspection forms for documenting construction site inspections in the various WVDOH districts.
85. By failing to develop and implement a construction site run-off program with necessary inspection procedures, Respondent violated subsection II(C)(7)(d)(9) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 13

Failure to Enforce Submission of As-Built Certifications

86. The allegations in the preceding paragraphs are incorporated herein by reference.
87. Subsection II(C)(7)(e)(16)(m)(iv) of the MS4 Permit requires that Respondent maintain a requirement for submittal of as-built certifications within ninety-days of completion of development and redevelopment projects disturbing greater than or equal to one acre.
88. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent is not enforcing a submittal of as-built certifications despite this requirement appearing in both the MS4 Permit and Respondent's SWMP.
89. By failing to require submission of as-built certifications, Respondent violated subsection II(C)(7)(e)(16)(m)(iv) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 14

Failure to Require Development of Maintenance Agreements and Plans

90. The allegations in the preceding paragraphs are incorporated herein by reference.
91. Subsection II(C)(7)(e)(16)(n) of the MS4 Permit provides that Respondent shall require that developments subject to long-term stormwater controls develop a maintenance agreement and plan for approved stormwater management practices.
92. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts

1, 4, and 5, and information Respondent provided, Respondent is not consistently ensuring that maintenance plans are developed for post-construction BMPs. Specifically, information requests from EPA revealed that six post-construction BMPs in District 5 were unable to produce maintenance plans.

93. By failing to require that developments subject to long-term stormwater controls develop a maintenance agreement and plan for approved stormwater management practices, Respondent violated subsection II(C)(7)(e)(16)(n) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 15

Failure to Require Verification of Maintenance

94. The allegations in the preceding paragraphs are incorporated herein by reference.
95. Subsections II(C)(7)(e)(16)(o) and (p) of the MS4 Permit provide that Respondent shall require property owners or operators submit verification of maintenance for approved stormwater management practices.
96. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent is not consistently enforcing verification requirements for maintenance at post-construction BMPs. Specifically, EPA officials observed that one post-construction BMP in District 5 owned by the City of Martinsburg did not maintain a record of maintenance activities.
97. By failing to require that require property owners or operators submit verification of maintenance for approved stormwater management practices, Respondent violated subsections II(C)(7)(e)(16)(o) and (p) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 16

Failure to Maintain Tracking System for Stormwater Management Practices

98. The allegations in the preceding paragraphs are incorporated herein by reference.
99. Subsection II(C)(7)(e)(16)(r) of the MS4 Permit requires that the Respondent maintain a system to track stormwater management practices at new development and redevelopment projects. The section further requires that the tracking system include certain information for all projects such as digital photographs of stormwater management practice controls, maintenance requirements of stormwater management practices, and inspection details.
100. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts

1, 4, and 5, and information Respondent provided, Respondent is not collecting all required project information pursuant to its tracking system. Specifically, EPA officials reviewed Respondent's inventory of 50 post-construction BMPs across the state of West Virginia and observed that Respondent's inventory did not appear to include information such as digital photographs of stormwater management practice controls, maintenance requirements of stormwater management practices, and inspection information.

101. By failing to maintain a system to track stormwater management practices at new development and redevelopment projects, Respondent violated subsection II(C)(7)(e)(16)(r) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 17

Failure to Maintain Inspection Calendar and Inspection Reports

102. The allegations in the preceding paragraphs are incorporated herein by reference.
103. Subsection II(C)(7)(e)(16)(s) of the MS4 Permit requires that the Respondent develop an inspection calendar for all stormwater BMPs and that inspection reports contain certain basic information regarding the facility and details of the inspection.
104. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent is carrying out inspections of stormwater BMPs, but has not developed an inspection calendar and is not consistently collecting all required information within inspection reports.
105. By failing to develop an inspection calendar for all stormwater BMPs and ensure that inspection reports contain certain basic information regarding facilities and details of inspections, Respondent violated subsection II(C)(7)(e)(16)(s) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 18

Failure to Prepare Sufficient Annual Reports for Stormwater BMPs

106. The allegations in the preceding paragraphs are incorporated herein by reference.
107. Subsection II(C)(7)(e)(17)(u) of the MS4 Permit requires that the Respondent prepare an Annual Report that summarizes compliance with requirements for post construction controls by compiling certain information such as the number and type of stormwater BMPs approved, the number of stormwater BMPs that required maintenance, and whether any enforcement actions occurred.

108. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent did not prepare an Annual Report in 2021 with required information regarding the number and type of stormwater BMPs approved, a list of BMPs requiring maintenance, and the number of enforcement actions initiated.
109. By failing to prepare an Annual Report in 2021 with required information regarding the number and type of stormwater BMPs approved, a list of BMPs requiring maintenance, and the number of enforcement actions initiated, Respondent violated subsection II(C)(7)(e)(17)(u) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 19

Failure to Enforce Stormwater Runoff Program for New and Re-Development

110. The allegations in the preceding paragraphs are incorporated herein by reference.
111. Subsections II(C)(7)(e)(1) and (6) of the MS4 Permit require that the Respondent implement, assess, and enforce a program targeted at reducing pollutants in stormwater runoff from new development and redevelopment activities. The sections further require that the program must ensure controls will increase groundwater recharge of stormwater runoff, protect water quality, and reduce the discharge of pollutants.
112. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, various post construction BMPs within Respondent's MS4 suffered from deficient maintenance which impeded the efficacy of the controls and demonstrated that Respondent is not effectively enforcing a program for reducing pollutants in stormwater runoff from new development and redevelopment activities
113. By failing to enforce a program targeted at reducing pollutants in stormwater runoff from new development and redevelopment activities, Respondent violated subsections II(C)(7)(e)(1) and (6) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 20

Failure to Retain Maintenance Records for Municipal Facilities

114. The allegations in the preceding paragraphs are incorporated herein by reference.
115. Subsection II(C)(7)(f)(6) of the MS4 Permit requires that the Respondent retain maintenance records for all municipal facilities.

116. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent could produce no formal tracking system or records for District 5's municipal facilities subject to the Permit.
117. By failing to retain maintenance records for municipal facilities subject to the Permit, Respondent violated subsection II(C)(7)(f)(6) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

COUNT 21

Failure to Develop and Implement a Benchmark Plan

118. The allegations in the preceding paragraphs are incorporated herein by reference.
119. Subsection II(C)(7)(f)(16) of the MS4 Permit requires that the Respondent incorporate a benchmark plan into its SWMP for stormwater discharged from facilities or locations of municipal industrial activities. The section further requires that the plan shall provide for review of the SWMP within thirty days where benchmark levels are exceeded to determine if alternative, more effective BMPs should be implemented.
120. Based on EPA's offsite review conducted on June 2, 2022, onsite inspections in Districts 1, 4, and 5, and information Respondent provided, Respondent has not incorporated a benchmark plan into its SWMP.
121. By failing incorporate a benchmark plan into its SWMP for stormwater discharged from facilities or locations of municipal industrial activities, Respondent violated subsection II(C)(7)(f)(16) of the MS4 Permit, issued under Section 402 of the CWA, 33 U.S.C. § 1342, and Section 301 of the CWA, 33 U.S.C. § 1311.

V. ORDER

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

122. Within one (1) year of the Effective Date, the Respondent shall:
123. Develop a regulatory mechanism or ordinance that will give the Respondent authority to prohibit and eliminate illicit discharges to the storm sewer system (Minimum Control Measure ("MCM") 3) and to address stormwater runoff from construction sites (MCM 4). The regulatory mechanism or ordinance shall include escalating enforcement procedures.
 - a. If the Respondent implements a regulatory mechanism in lieu of an ordinance, the regulatory mechanism shall include references to state codes that give the

Respondent authority to implement the Illicit Discharge Detection and Elimination (“IDDE”) program and construction stormwater runoff program.

b. Submit a copy of the regulatory mechanism or ordinance to EPA.

124. Create a mapping system containing the following, and submit a copy of the mapping system to EPA:

a. The following location information:

- i. The location of all known storm sewer outfalls,
- ii. Known connections authorized since map was last updated,
- iii. Receiving waters,

b. An inventory of priority areas (or “hotspots”) likely to have illicit discharges.

c. An inventory of field assessments of outfalls to be attached as meta data or an additional layer to each outfall.

d. A district wide tracking system and inventory for spills or illicit discharges. This inventory should also include a listing of complaints from citizens and employees regarding spills or illicit discharges.

e. A tracking system for all stormwater BMPs which includes the following elements:

- i. Structural stormwater BMPs owned, operated or maintained by the permittee and private BMPs in the Permittee’s MS4. Include both public and private sector projects that are within the permittee’s jurisdiction.
- ii. Latitude and longitude coordinates of stormwater BMP controls.
- iii. Digital photographs of stormwater management practice controls
- iv. Maintenance requirements of stormwater management practices (frequency of required maintenance and inspections)
- v. History of enforcement actions
- vi. Inspection information, including:
 - 1. Facility type,
 - 2. Inspection date,
 - 3. Name and signature of inspector,
 - 4. GIS location and nearest street address,
 - 5. Management practice ownership information (name, address, phone number, fax, and email),
 - 6. A description of the stormwater BMP condition including the quality of: vegetation and soils; inlet and outlet channels and structures; embankments, slopes, and safety benches; spillways, weirs, and other control structures; and sediment and debris accumulation in storage and forebay areas as well as in and around inlet and outlet structures,
 - 7. Photographic documentation of all critical stormwater BMP components, and

8. Specific maintenance items or violations that need to be corrected by the owner/operator along with deadlines and reinspection dates.”
 - f. An inventory of construction sites and municipal yards in the respondent’s MS4. Construction sites can be removed once construction activity has ceased, and any permanent BMPs as a result of the construction should be added to the map.
 - g. An annual review of the mapping data, which would require that all data included in the mapping software be verified for accuracy and completeness. This should include a review of all items required by this Order such as inventories and metadata to verify these items are being uploaded as necessary.
125. Create an MS4 Manual that includes the following, and submit a copy of the MS4 Manual to EPA:
- a. For MCM 3, IDDE:
 - i. Create a district-wide Spill Response Plan and Spill Prevention Control Plan that outlines the requirements to prevent, respond to, and eliminate spills.
 - ii. Create a written procedure for conducting annual assessments of outfalls, which should include annual frequencies of inspections and recordkeeping requirements.
 - iii. Create a written procedure for the following:
 1. Evaluating illicit discharges, including sampling and upstream investigations for identifying the source of discharges.
 2. Containing and removing illicit discharges.
 - iv. Create a district-wide training program that includes trainings for any staff that may come into contact with illicit discharges.
 1. Training records will be kept by WVDOH’s HQ for all participants of trainings.
 - b. For MCM 4, Controlling Runoff from Construction Sites:
 - i. Create a district-wide construction stormwater oversight program, which will include the following:
 1. A training program for staff implementing construction stormwater oversight. The program will include a component on how these staff should provide training to construction site operators to ensure they are aware of all the MS4 permit requirements.
 - a. As part of the training program, develop resources for staff to distribute to construction site operators to assist them with the development of Stormwater Pollution Prevention Plans (“SWPPPs”).
 2. A plan review process by the permittee.

3. Written procedures for inspecting permitted construction sites during construction, including frequency of inspections (including a routine frequency and after rain events).
 4. An enforcement strategy to respond to issues of non-compliance.
 - c. For MCM 5, Controlling Runoff from New Development and Redevelopment:
 - i. Require the submittal of as-built certifications within 90 days of the completion of projects for all new development and redevelopment disturbing greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale.
 - ii. Develop maintenance plans for BMPs, to include referencing as-built certifications, required maintenance items, frequency of maintenance and inspections, and recordkeeping of activities performed.
 1. If a BMP is owned or maintained by a private entity, require maintenance plans to be submitted as well as records of maintenance performed.
 - iii. Develop a formal inspection calendar for post-construction BMPs.
 - d. For MCM 6, Pollution Prevention and Good Housekeeping for Municipal Operations:
 - i. Track inspections and keep maintenance records for municipal facilities.
 - ii. Develop a benchmark monitoring plan which details procedures for implementing corrective and/or preventative actions if an exceedance occurs of any benchmark limit in the permit.
 - iii. Develop a district wide training program on how to ensure municipal facilities are maintained, including inspections, maintenance, SWPPP updates and modifications, benchmark monitoring exceedance corrective actions, and sampling.
 - e. Any items identified in the MS4 Manual that pertain to requirements of the SWMP should be incorporated or referenced in any future revisions of the Respondent's SWMP.
126. Upon submittal of the deliverables in Paragraphs 124 and 125, Respondent will begin submitting annual reports for a period of two (2) years from the date of those deliverables being submitted. These annual reports should include the following:
 - a. The MS4 Annual Report submitted to WVDEP;
 - b. annual mapping updates, to include a report of the items being tracked in the mapping software and identified in this Order;
 - c. annual reporting of field assessments, to include the number of outfall screenings conducted and verification of those activities;
 - d. and annual training documentation, to include verification that staff received the district wide training required by this Order.

VI. PROCEDURES FOR SUBMISSIONS

127. All documents required to be submitted by this Order and any Request for Termination shall be accompanied by a certification signed by a responsible officer, as defined in 40 C.F.R. § 122.22(a), 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 _____

Printed Name _____

Title _____

Date _____

128. Any submission or communication relating to this Order shall be submitted (via electronic transmission) to:

Michael Greenwald
Enforcement and Compliance Assurance Division
U.S. EPA, Region 3
Philadelphia, PA 19103
greenwald.michael@epa.gov

and

Office of Regional Counsel (3RC00)
U.S. EPA, Region 3
Philadelphia, PA 19103
R3_ORC_mailbox@epa.gov

129. For each submission required pursuant to this Order, EPA will review the submission. If EPA comments on a submission, Respondent agrees to respond in writing via email within 30 calendar days.

130. Respondent may assert a business confidentiality claim covering part or all of the information which this Order 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. The 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. Information which is effluent data or a standard or limitation is not eligible for confidential treatment pursuant to 40 C.F.R. § 2.302(e). If Respondent does not assert a confidentiality claim, EPA may make the submitted information available to the public without further notice to Respondent.

VII. CERTIFICATION OF COMPLIANCE AND TERMINATION

131. Upon Respondent's determination that Respondent has completed all tasks required pursuant to this Order and no earlier than three (3) years following the Effective Date of this Order, Respondent shall submit to EPA a Certification of Compliance and Request for Termination of this Order. Such certification and request shall include:
- a. a certification that Respondent has maintained compliance with this Order for the term of this Order; and
 - b. all necessary documentation, including photo documentation as appropriate, to support a finding that Respondent has complied with Section V of this Order.
132. If, following review of any Certification of Compliance and Request for Termination of this Order, the EPA determines that any requirement has not been completed and implemented in accordance with this Order, the EPA will notify Respondent in writing, provide a written summary of deficiencies, and require Respondent to modify its actions as appropriate to correct such deficiencies. If so required, EPA may also require Respondent to submit a revised Certification of Compliance and Request for Termination of this Order.
133. If, following review of any Certification of Compliance and Request for Termination of this Order, EPA agrees that Respondent has adequately complied with all requirements of this Order, then EPA may, in its unreviewable discretion, provide written notification of termination of this Order.
134. EPA, at all times, reserves the right to unilaterally terminate this Order in its unreviewable discretion.
135. EPA shall provide Respondent with written notification of termination of this Order.

VIII. ORDER MODIFICATIONS

136. Any request to modify the terms of, or parties to, this Order 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 Order shall not relieve Respondent of any obligation under this Order and shall have no effect on EPA's statutory or regulatory authority to enforce the terms of this Order, in its sole and unreviewable discretion.

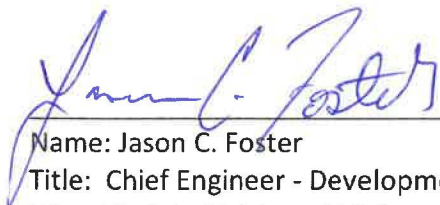
IX. EFFECTIVE DATE

137. This Order is effective after receipt by Respondent, or Respondent's counsel, of a fully executed copy of this Order.

SO ORDERED:

Karen Melvin
[Digitally signed and dated]
Director, Enforcement and Compliance Assurance Division
U.S. EPA Region 3

AGREED TO FOR THE RESPONDENT



Name: Jason C. Foster
Title: Chief Engineer - Development
West Virginia Division of Highways



REGION 3

PHILADELPHIA, PA 19103

In the Matter of:	:	
	:	
	:	
West Virginia Department of Transportation:	:	EPA Docket No.
Division of Highways	:	
1900 Kanawha Boulevard, East	:	
Building 5, Room 148	:	Administrative Order on Consent
Charleston, West Virginia 25305-0430	:	Pursuant to 33 U.S.C. § 1319(a)
	:	
Respondent	:	
	:	
West Virginia Division of Highways	:	
Municipal Separate Storm	:	
Sewer System	:	
	:	
Facility	:	
	:	
	:	
	:	

CERTIFICATE OF SERVICE

I certify that the foregoing Administrative Order on Consent was filed with the EPA Region 3 Regional Hearing Clerk on the date that has been electronically stamped on the Administrative Order on Consent. I further certify that on the date set forth below, I caused to be served a true and correct copy of the foregoing Administrative Order on Consent to each of the following persons, in the manner specified below, at the following addresses:

Copies served via email and UPS to:

Jason C. Foster
West Virginia Division of Highways
1900 Kanawha Boulevard, East
Building 5, Room 148
Charleston, West Virginia 25305-0430

Copies served via email to:

Office of Regional Counsel (3RC00)
U.S. EPA, Region 3
R3_ORC_mailbox@epa.gov

Michael Greenwald
Environmental Scientist
U.S. EPA, Region 3
greenwald.michael@epa.gov

[Digital Signature and Date]
Regional Hearing Clerk, 3RC00
U.S. Environmental Protection Agency,
Region 3