

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BLVD.
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2017-0217
The Nebraska Department of)	
Transportation)	FINDINGS OF VIOLATION AND
)	ORDER FOR COMPLIANCE
Respondent)	ON CONSENT
)	
Proceedings under Section 309(a) of the)	
Clean Water Act, 33 U.S.C. § 1319(a))	
_____)	

Preliminary Statement

1. This Administrative Order for Compliance on Consent Order on Consent” or “Order”) is issued by the United States Environmental Protection Agency (“EPA”) pursuant to the authority vested in the Administrator of the EPA by Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3), as amended. This authority has been delegated by the EPA to the Regional Administrator of the EPA, Region 7, and further delegated to the Director of Region 7’s Water, Wetlands, and Pesticides Division.

2. Respondent is the Nebraska Department of Transportation (formerly “the Nebraska Department of Roads,” hereafter “Respondent” or “NDOT”), a political subdivision of the state of the Nebraska, and established under the laws of that State. Respondent is the owner and/or operator of a Municipal Separate Storm Sewer System (“MS4”) within the state of Nebraska.

3. The EPA, together with NDOT (hereafter “the Parties”), enter into this Section 309(a)(3) Order in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”

4. It is the Parties’ intent through entering into this Order to address NDOT’s alleged violations of its MS4 National Pollutant Discharge Elimination System (“NPDES”) permit. As set forth in this Order on Consent, the Parties have amicably reached agreement regarding the timeframes for NDOT to attain compliance with the CWA and its NPDES permit.

5. By entering into this Order on Consent, Respondent (1) consents to and agrees not to contest the EPA’s authority or jurisdiction to issue and enforce this Section 309(a) Order, (2) agrees to undertake all actions required by the terms and conditions of this Order, and (3) consents to be bound by the requirements set forth herein. Respondent neither admits nor denies

the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondent admits the jurisdictional allegations herein. Respondent also 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 on Consent, including any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge any pollutant from a point source to waters of the United States, except, *inter alia*, with the authorization of, and in compliance with, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. “Person” is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5), to include any individual, corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

8. “Discharge of a pollutant” is defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12), in part, to include any addition of any pollutant to navigable waters from any point source.

9. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include any discernable, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, or rolling stock from which pollutants are or may be discharged.

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as the “waters of the United States,” and which include tributaries to waters of the United States as defined by 40 C.F.R. § 122.2.

11. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of the EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. Any such discharge is subject to all applicable requirements of the CWA, and regulations promulgated thereunder, as expressed in the specific terms and conditions prescribed in the applicable permit.

12. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for various categories of stormwater discharges. Section 402(p)(2) requires permits for five categories of stormwater discharges. Section 402(p)(6) of the CWA requires permitting for additional categories of stormwater discharges based on the results of studies conducted pursuant to Section 402(p)(5).

13. Pursuant to Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), the EPA promulgated regulations (“Phase II stormwater regulations”) in 40 C.F.R. Part 122, setting forth

the additional categories of stormwater discharges to be permitted and the requirements of the Phase II program.

14. 40 C.F.R. § 122.26(a)(9)(i)(A) requires that on or after October 1, 1994, operators of small MS4s regulated pursuant to 40 C.F.R. § 122.32 are required to obtain an NPDES permit for discharges composed entirely of stormwater.

15. 40 C.F.R. § 122.26(b)(8) defines “municipal separate storm sewer,” in pertinent part, as a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

- a. 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, stormwater, or other wastes that discharges to waters of the United States;
- b. Designed or used for collecting or conveying stormwater;
- c. Which is not a combined sewer; and
- d. Which is not part of a Publicly Owned Treatment Works as defined at 40 C.F.R. § 122.2.

16. 40 C.F.R. § 122.26(b)(16) defines “small municipal separate storm sewer system,” in pertinent part, as all separate storm sewers that are:

- a. Owned or operated by the United States, 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, stormwater, or other wastes;
- b. Not defined as “large” or “medium” MS4s pursuant to §§ 122.26(b)(4) and (b)(7), or designated as a MS4 under § 122.26(a)(1)(v); and
- c. Includes systems similar to MS4s in municipalities, such as highways and other thoroughfares.

17. 40 C.F.R. § 122.32(a) provides that a small MS4 is regulated if:

- a. The small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census; or
- b. The MS4 is designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(3) and (b)(4), or is based upon a petition under § 122.26(f).

18. The Nebraska Department of Environmental Quality (“NDEQ”) is the agency with the authority to administer the federal NPDES program in Nebraska pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

Findings of Fact

19. Respondent is a political subdivision of the state of Nebraska chartered under the laws of that State, and as such, is a “person” as that term is defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2.

20. Respondent operates a stormwater drainage system consisting of conveyances which include roads with drainage systems, catch basins, curbs, gutters, ditches, manmade channels, and storm drains, and as such, operates a “municipal separate storm sewer” as that term is defined in 40 C.F.R. § 122.26(b)(8).

21. At all times relevant to this Order, Respondent owned and/or operated a “small municipal separate storm sewer system,” as defined by 40 C.F.R. § 122.26(b)(4)(i).

22. Respondent’s small MS4 is located along the state highway system in the “urbanized areas” of the state of Nebraska, as defined by the latest Decennial Census. Nebraska Revised Statute § 39-1302(37) defines the state highway system to include rights-of-way, connecting links, drainage facilities, and the bridges, appurtenances, easements, and structures used in conjunction with such roads, streets, and highways for which the department is the primary authority. At all times relevant to this Order, therefore, Respondent’s small MS4 is subject to regulation.

23. Respondent’s small MS4 is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

24. Respondent discharged pollutants from its small MS4 into “navigable waters” as defined by Section 502(7) of the CWA, 33 U.S.C § 1362(7).

25. Discharges from Respondent’s small MS4 result in the addition of pollutants from a point source to navigable waters, and thus are the “discharge of a pollutant” as defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

26. Respondent’s discharges from a small MS4 require a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342 and 40 C.F.R. § 122.32.

27. NDEQ issued NPDES Permit No. NE0134015 to NDOT in 2007 for discharges from property or locations owned by NDOT within all regulated MS4s designated by the Director of NDEQ in accordance with NDEQ Title 119, Chapter 10-002.02 within the state of Nebraska and which expired on December 31, 2012. Prior to expiration, NDOT requested an extension, and NDEQ reissued the Phase II MS4 Permit on January 1, 2013. The current permit (hereafter referred to as “the MS4 Permit” or “the Permit”) has an expiration date of December 31, 2017. On March 30, 2017, NDOT notified NDEQ of its intent to reapply for permit coverage in 2017.

28. On October 26-30, 2015, on behalf of the EPA, PG Environmental conducted an audit of Respondent's MS4 ("MS4 Audit") under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its MS4 permit and the CWA.

29. PG Environmental summarized its findings in an audit report transmitted to the EPA on February 24, 2016 ("MS4 Audit Report"). This MS4 Audit Report was transmitted to Respondent on September 19, 2016.

30. As part of the MS4 Audit, NDOT provided documents to the EPA related to NDOT's implementation of its MS4 program, including its Storm Water Management Plan ("SWMP").

31. Part 3.1.5 of the MS4 Permit requires that implementation of the SWMP shall reduce pollutants in stormwater runoff to the Maximum Extent Practicable, protect water quality and satisfy appropriate water quality requirements of the Clean Water Act by including management practices, control techniques and system design, and engineering methods for each of the six Minimum Control Measures ("MCMs") in the SWMP, as required by 40 C.F.R. § 122.34.

Allegations of Violation

32. The facts stated above are herein incorporated.

Count 1

Failure to Fully Develop and Implement Adequate Good Housekeeping and Pollution Prevention Measures

33. Part 3.4.5.3.1 of the MS4 Permit states that NDOT must develop and maintain Facility Runoff Control Plans ("FRCPs") for "high priority" facilities to control the contribution of pollution in stormwater runoff. Each FRCP must identify stormwater control measures, inspection frequency and visual monitoring procedures. All pollution prevention measures implemented at high priority facilities must be visually inspected at a frequency listed in the SWMP to ensure they are working properly. All high priority facilities and their FRCPs must include provisions for general good housekeeping practices.

34. At the time of the MS4 Audit, NDOT owned and operated 21 maintenance facilities. The MS4 Audit inspected eight of these facilities, all which were designated "high priority." Based on review of the MS4 Audit and other documents, NDOT had housekeeping deficiencies at all eight facilities that were inspected during the MS4 Audit. These alleged deficiencies include, but are not limited to:

- a. Evidence of salt brine precipitate being released outdoors, including white-colored residue and dead vegetation extending from buildings towards stormwater outlets (Dakota City and Lincoln Salt Valley Maintenance Facilities);

- b. Evidence of vehicles being washed outside and up gradient of a storm drain inlet (South Sioux City Maintenance Facility);
- c. Petroleum product observed leaking from vehicles and other equipment near storm drain inlets (South Sioux City and Omaha – 108th Street Maintenance Facilities);
- d. Material stockpiles stored outdoors without any containment measures and with evidence of accumulated sediment in an adjacent open culvert (Lincoln Superior and Omaha – 108th Street Maintenance Facilities);
- e. Large storage tanks for salt brine lacking adequate protections to reduce the risk of discharging pollutants (Lincoln Superior and Dakota City Maintenance Facilities);
- f. Used oil containers with open or missing valves on secondary containment (Lincoln Salt Valley and Omaha – 108th Street Maintenance Facilities);
- g. Improper storage of hazardous and non-hazardous waste such as automotive vehicle batteries being stored on a wooden pallet outdoors without cover and used oil engine filters stored in a deteriorated metal recycling bin (Lincoln Superior, Lincoln Operations Hill Campus, and Omaha – 25th Street Maintenance Facilities); and
- h. Any unauthorized discharges of pollutants to waters of the United States resulting from these deficiencies.

35. Part 3.4.5.4.1 of the Permit requires that NDOT must: (1) inspect and clean NDOT-owned catch basins; (2) visually monitor NDOT-owned open channels and other drainage structures for debris; (3) include the removal of trash and debris from open channels and other drainage structures as soon as practicable and document drainage structure maintenance activity in a log that is to be made available for review by the permitting authority upon request; and (4) develop a procedure to dewater and dispose of materials extracted from catch basins so that water removed during the catch basin cleaning process and waste material will not reenter the MS4.

36. At the time of the MS4 Audit, NDOT had failed to develop and implement a formal program to routinely inspect and clean NDOT-owned catch basins, to visually monitor NDOT-owned open channels and other drainage structures, to develop a maintenance program, and to develop standard operating procedures. In addition, NDOT was not tracking the number or location of catch basins, open channels and other drainage structures inspected and cleaned, or the amount of trash and debris removed.

37. NDOT's 2013 Annual Report to NDEQ states that in 2014 and 2015, NDOT would set up a maintenance program for treatment best management practices ("BMPs"), open channels, and catch basins. The 2014-2015 Annual Report states that activities scheduled for 2016 and 2017 include developing "standard operating procedures for catch basin/inlet cleaning." However, at the time of the MS4 Audit, the scheduled activities described in NDOT's Annual Reports had not yet been developed or implemented, as described below.

38. Based on the EPA's review of the MS4 Audit:

- a. At the Lincoln Superior and Norfolk Alaska Avenue Maintenance Facilities, staff were not conducting any catch basin cleaning;
- b. At the Lincoln Salt Valley Maintenance Facility, staff were conducting catch basin cleaning on a reactive basis via complaints and drive-by inspections, but there was not a formal schedule for catch basin cleaning; and
- c. At the Omaha 25th Street and 108th Street Maintenance Facilities, staff conducted some proactive catch basin cleaning, but the majority was conducted on a reactive basis.

39. Chapter 4 of NDOT's Maintenance Manual has written guidelines for drainage structure maintenance and litter pick-up; however, the guidelines do not specify the location, frequency, or procedures for dewatering and disposing of materials extracted from catch basins. During the MS4 Audit, NDOT representatives stated that NDOT does not have written procedures for dewatering and disposal of waste from catch basin cleaning, and that NDOT staff typically use a "sewer jetter" to clean catch basins, which pushes trash and debris through the catch basin rather than removing it from the system. At the time of the MS4 Audit, NDOT had not yet developed procedures to dewater and dispose of materials extracted from catch basins to prevent collected material from reentering the MS4.

40. Part 3.4.5.4.3 of the Permit requires NDOT to (1) sweep NDOT-owned roadways and parking lots; (2) provide procedures to dewater and dispose of street sweeper waste material to ensure that water and material will not re-enter the MS4; and (3) include a description of the street sweeping program within the SWMP.

41. NDOT's 2012 and 2013 Annual Reports both state that in the following year, NDOT will "finalize highway and facility maintenance road and parking lot street sweeping BMPs." NDOT's 2014-2015 Annual Report states that suggested updates to address BMPs for sweeper operation, storage, and material handling "remain recommendations" and the "[t]ime and materials provided for these activities are not summarized by the agency and no method currently exists to distinguish efforts of maintenance within and outside the MS4 boundaries." The 2014-2015 Annual Report goes on to say that "NDOT does not maintain the means to report on the amount of sweeping conducted within the MS4 boundary." Under scheduled activities for 2016 and 2017, the 2014-2015 Annual Report states that NDOT will develop standard operating procedures for street sweeping.

42. BMP 3 of MCM 6 in NDOT's SWMP states that NDOT will "[d]evelop and implement a highway and parking lot sweeping policy to address location, frequency, equipment, method of material dewatering and disposal practices." Under the implementation schedule for that BMP, the SWMP states that highway and parking lot sweeping practices are to be developed and included in the NDOT Maintenance Manual. However, the Maintenance Manual does not list roadway and parking lot sweeping as a distinct activity. Instead, it is included under "Unspecified Roadway and Shoulder Maintenance," the guidelines for which only state that sweeping is "routine" and "[n]ormally scheduled January through December."

43. During the MS4 Audit, the District 1 Highway Maintenance Superintendent stated that bridges are swept twice per year, but roadways are not swept and the district does not document sweeping when it is done. The District 2 Operations and Maintenance Manager and the Highway Maintenance Superintendent stated that District 2 documents sweeping only by crew cards and does not maintain a formal schedule.

44. Part 3.4.5.5 of the Permit requires NDOT to provide an employee training program for the Target Audience involved in implementing pollution prevention and good housekeeping practices. NDOT must also identify and track all personnel requiring training, maintain training records, and describe the training program and Target Audience in the SWMP.

45. Based on the EPA's review of the MS4 Audit and other documents, good housekeeping and pollution prevention training were not consistently provided to all operations staff and were not consistently documented. According to NDOT representatives at the time of the MS4 Audit, NDOT required initial training for new hires. Good housekeeping and pollution prevention training provided after the time of hire, however, was mostly informal, inconsistent and undocumented.

46. NDOT's failure to fully develop and implement adequate good housekeeping and pollution prevention measures, and the unauthorized discharges of pollutants associated with this failure, are violations of the MS4 Permit and, as such, are violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Count 2

Failure to Fully Develop and Implement an Adequate Construction Stormwater Program

47. Under Parts 3.4.3.1 and 3.4.3.1.1 of the Permit, NDOT must provide a program which requires operators of Construction Activity to "design, install, and maintain effective erosion controls and sediment controls to minimize the discharge of pollutants." Under Part 3.4.3.1.4 of the Permit, NDOT must provide a program which requires operators of Construction Activity to "design, install, implement, and maintain effective pollution prevention measures to minimize the discharge of pollutants from all sources found on the construction sites that pose a threat to water quality."

48. Eight construction sites were inspected as part of the MS4 Audit. Four of these construction sites were found to have deficiencies in erosion and sediment controls and/or pollution prevention measures that resulted in pollutants, including sediment, being discharged from the sites to waters of the United States. The four construction sites found to have deficiencies include: Northwest 56th – US 77 South Interchange (Project No. 862); 126th – 96th Street, Omaha (Project No. 1189); Platteview Intersection (Project No. 124); and North of Center Street – Pacific Street Northbound (Project No. 1190). The deficiencies include, but are not limited to:

- a. At the Northwest 56th – US 77 Interchange construction site, the MS4 Audit found two containers containing an unknown petroleum product and silt fences that had fallen down in more than one area of the site;
- b. At the 126th – 96th Street, Omaha construction site, the MS4 Audit found evidence of previous erosion on slopes that lacked adequate vegetative cover, and erosion and sediment control BMPs that had not been properly maintained, including fiber rolls that were torn, deteriorated, undercut by previous erosion, and no longer staked into the ground surface;
- c. At the Platteville Intersection construction site, the MS4 Audit found evidence of previous erosion on slopes that lacked an adequate vegetative cover and accumulated sediment in the drainage conveyance channel below the previously eroded slopes; and
- d. At the North of Center Street – Pacific Street Northbound construction site, the MS4 Audit found areas of the drainage channel slope that lacked adequate vegetative cover and exhibited evidence of erosion. Slope protection netting along the length of the drainage channel was observed to be deteriorated with areas of accumulated sediment and erosion. In addition, fiber roll BMPs were found to be torn, deteriorated, and/or no longer staked to the ground surface, and a culvert outlet was observed without any velocity dissipation devices. Erosion and undercutting were observed throughout the drainage channel.

49. Part 3.4.3.4 of the Permit requires NDOT to inspect construction activities according to NDOT procedures at a frequency documented in the SWMP.

50. BMP 2 of MCM 4 in the SWMP requires NDOT to conduct construction site stormwater inspections every 14 days and within 24 hours of rain events of 0.5 inches or greater, and to conduct at least one Compliance Oversight Inspection for each active NPDES-permitted project annually.

51. Based on the MS4 Audit and other findings, NDOT was not inspecting all construction sites at a frequency in accordance with the SWMP. At the time of the MS4 Audit:

- a. The last inspection at the 126th – 96th Street, Omaha site (Project No. 1189) was on May 25, 2015, five months prior to the MS4 Audit;
- b. The last inspection conducted at the Platteview Intersection site (Project No. 124) was on July 30, 2014, approximately 15 months prior to the MS4 Audit;
- c. The last inspection at the North of Center Street – Pacific Street site (Project No. 1190) was on May 15, 2015, five months prior to the MS4 Audit.

52. Part 3.4.3.6.1 of the Permit requires NDOT to provide educational materials to operators of construction activity at a frequency outlined in the SWMP.

53. At the time of the MS4 Audit, NDOT's SWMP did not identify a frequency for providing educational materials to construction site contractors.

54. NDOT's failure to fully develop and implement an adequate construction program, and the unauthorized discharges of pollutants associated with this failure, are violations of the MS4 Permit and, as such, are violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Count 3
Failure to Fully Develop and Implement an Adequate
Illicit Discharge Detection and Elimination Program

55. Part 3.4.2.1.1 of the MS4 Permit requires NDOT to provide an Illicit Discharge Detection and Elimination ("IDDE") program to detect, investigate, and eliminate non-stormwater discharges, including illegal dumping into its system for the MS4. NDOT's screening and source assessment procedures must identify the minimum staff, equipment, and the discharge evaluation process used in illicit discharge screening and source assessment procedures (Part 3.4.2.1.1.2.2 of the Permit). In addition, NDOT's program must include the procedures, staff, and equipment required for investigating and tracing the source of all identified illicit discharges in its IDDE program (Part 3.4.2.1.1.3 of the Permit).

56. NDOT developed a plan ("IDDE Plan") to implement its IDDE program in 2013. NDOT's SWMP and IDDE Plan, however, do not contain screening and source assessment procedures that identify the minimum staff and equipment used. For example, in Section 5.0 of NDOT's IDDE Plan, NDOT states that "outfalls designated as high priority will be monitored annually," but does not specify the minimum staff and equipment needed to implement this requirement. Similarly, while NDOT's IDDE Plan does contain some broad procedures for investigating and tracing the source of illicit discharges, these procedures do not include details about the specific staff and equipment required by NDOT to implement these procedures.

57. Part 3.4.1.1.3.1 of the Permit requires NDOT to report immediately to NDEQ the occurrence of any dry weather flows believed to be an immediate threat to human health or the environment.

58. The EPA's review of NDOT's SWMP, IDDE Plan, and other supporting documentation, found no mention of the requirement that NDOT report immediately to NDEQ any dry weather flows believed to be an immediate threat to human health or the environment. In the case of spills, Attachment 4 to the IDDE Plan states that when a spill occurs within NDOT's MS4, it is the responsibility of the party responsible for the spill to notify NDEQ of the spill, and that NDOT does not have to inform the responsible party of their obligations. Attachment 4 does require NDOT's Operations Division to notify NDEQ of any spills to ensure a spill was reported by the responsible party, but no time requirement for this notification is given.

59. Part 3.4.2.1.1.3 of the Permit requires that NDOT's IDDE program include procedures, staff, and equipment required for investigating and tracing the source of all identified illicit discharges. Part 3.4.2.1.1.3.2 of the Permit requires NDOT to document all investigations to track at a minimum the date(s) illicit discharges are observed, the results of the investigation, any follow-up of the investigation and the date the investigation is closed.

60. Based on the EPA's review of the MS4 Audit, emergency discharge response activities are conducted at the district level and may be tracked in NDOT's District Incident Response Knowledgebase ("DIRK") database. However, the use of DIRK is not mandatory, thus illicit discharges and any follow-up investigation may go unrecorded.

61. Part 3.3.4 of the Permit requires NDOT to track instances of non-compliance in hard-copy files or electronically. For each violation, the enforcement case documentation must include documentation of, at a minimum, the following:

- a. Name of owner/operator of facility or site of violation;
- b. Location of stormwater source;
- c. Description of violation;
- d. Required schedule for returning to compliance;
- e. Description of enforcement response used;
- f. Accompanying documentation of enforcement response;
- g. Any referrals to adjacent MS4s or different agencies; and
- h. Date violation was resolved.

62. Table 1 of NDOT's 2013 annual report indicates that it is tracking some illicit discharges in the DIRK database, but "DIRK incidents are underreported by a large margin across all categories including spills." The annual report for 2013 reported 30 spill incidents that were recorded in DIRK. Of the spills occurring in MS4 areas, DIRK notifications were sent out to the illicit discharge program for only three of the six spills recorded that year. The annual report for 2014-2015 reported that 16 of 28 spills documented throughout the state were recorded in DIRK. Of the 28 spills reported, 17 included estimates on the quantity released. Other than spills, NDOT's annual reports stated that it had tracked a total of two illicit discharges within its MS4 between 2013 and 2016. In addition, NDOT has failed to demonstrate that it is documenting all of the information required by Part 3.3.4 of the Permit for instances of non-compliance in DIRK or any other form.

63. Part 3.4.2.1.2 of the Permit requires NDOT to notify the operator of an adjacent MS4 of an observed illicit discharge that originates in that MS4 within 48 hours of discovery.

64. Section 6.2.1 of NDOT's IDDE Plan states that when NDOT employees observe illicit discharges on land maintained by an adjacent MS4, NDOT will notify the adjacent MS4 representative, but the IDDE Plan does not have any time requirement or procedures for notification.

65. Part 3.4.2.2.1 of the Permit requires NDOT to "promote, publicize, and facilitate public reporting of illicit discharges or water quality impacts associated with discharges into or from MS4s through a central contact point, including phone numbers for complaints and spill reporting, and publicize to the Target Audience." According to Part 3.4.3.1.1.2 of the Permit, the Target Audience is defined by NDOT in its SWMP.

66. Section 6.1.1 of the IDDE Plan states that NDOT maintains a phone and web service for public reporting of illicit discharges called “Nebraska 511,” which is a general service maintained by NDOT and the State Patrol used to report road conditions. The IDDE Plan also states that the public can call NDOT’s main switchboard during regular business hours or a District Office.

67. The EPA’s review of the MS4 Audit and other documentation found that Nebraska 511 is advertised as a hotline for travelers to gather information on roadway conditions in Nebraska. The hotline, and its public webpage, do not provide information indicating that the public can use the hotline to report illegal discharges. In addition, NDOT does not advertise its main switchboard or webpage as a place to report illicit discharges. There is no information on NDOT’s website that informs individuals how to report an illicit discharge. Instead, NDOT’s “Contact Us” webpage states that, “incidents of an emergent nature (medical, suspicious or criminal activity, highway emergencies, etc.) should be reported by dialing 911 or your local law enforcement agency.” These findings indicate that NDOT is not adequately promoting, publicizing, and facilitating public reporting of illicit discharges or water quality impacts associated with discharges.

68. During the MS4 Audit, NDOT representatives stated that NDOT’s primary method for gathering public reporting of illicit discharges is via NDOT’s website, which sends the report via email to NDOT’s operation call center, which then directs the report to the appropriate NDOT staff based on the information received. NDOT’s Environmental Program Manager stated during the MS4 Audit, however, that NDOT had not yet received any public complaints regarding illicit discharges or illicit connections.

69. Parts 3.4.2.3.1 and 3.4.2.3.2 of the Permit require NDOT to provide a training program, including a training schedule, for those working within the MS4 boundary who, as part of their normal job responsibilities, may come into contact with or otherwise observe an illicit discharge or connection. The program must include training on the identification of illicit discharges or connections, and training on the proper procedures for reporting and responding to illicit discharges or connections. NDOT must document and maintain records of the training provided and the staff trained.

70. At the time of the MS4 Audit, NDOT had not provided training on illicit discharges to all NDOT employees that might come into contact with or observe an illicit discharge or connection. Discussions with various NDOT representatives during the MS4 Audit, along with a review of available records, indicate that operations staff did not receive ongoing, formal IDDE training beyond initial training, and that the content of training was primarily focused on pollution prevention and good housekeeping. According to NDOT representatives during the MS4 Audit, construction staff did not receive any IDDE training. In addition, NDOT’s SWMP does not state that illicit discharge training is mandatory, or provide a training schedule.

71. NDOT’s failure to fully develop and implement an adequate IDDE program is a violation of its MS4 Permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 4
Failure to Update the SWMP

72. Part 3.1 of NDOT's MS4 Permit requires NDOT to provide an SWMP to NDEQ for review and approval. Requirements for the contents of the SWMP are set forth in Part 3 of the MS4 Permit.

73. Part 3.1.4 of the Permit requires NDOT to keep its SWMP up to date during the term of the Permit. Where NDOT determines modifications are needed to address any procedural, protocol, or programmatic change, such changes must be made as soon as practicable, but no later than 90 days after the modification occurs.

74. At the time of the MS4 Audit, NDOT's SWMP and supporting documents had not been updated or revised since it was approved by NDEQ on December 20, 2012, despite the fact that procedural and programmatic modifications had occurred since that time. For example, Section 7.2.5 of the IDDE Plan listed a website that "includes information related to the MS4 Permit and water quality" that no longer works. The 2013 Annual Report stated that the IDDE Plan was to be updated with inspection priorities, reporting forms, and contact information, but at the time of the MS4 Audit, the IDDE Plan was still dated 2013 and had not been revised since that time. In addition, the 2013 Annual Report stated that NDOT was updating its construction stormwater Enforcement Response Plan, but at the time of the MS4 Audit, the Enforcement Response Plan was still water-marked as "draft" and had not been revised since it was first developed. NDOT's failure to complete all written procedures required by the Permit is a failure to fully develop and implement a SWMP.

75. NDOT's failure to update its SWMP as required by its MS4 Permit, is a violation of its MS4 Permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Reasonable Time to Achieve Compliance

76. Pursuant to Section 309(a)(5)(A) of the CWA, 33 U.S.C. § 1319(a)(5)(A), and having taken into account the seriousness of the violations and good faiths efforts to comply with applicable requirements, the EPA finds that one hundred and eighty (180) days is a reasonable time for Respondent to revise its SWMP and fully implement its MS4 program to comply with the terms and conditions addressed by its MS4 Permit, subject to an extension of no greater than sixty (60) days. Requests for extension must be received by the EPA within the initial 180-day period.

Order for Compliance

77. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of Section 309(a) of the CWA, 33 U.S.C. § 1319(a), the EPA hereby ORDERS, and NDOT hereby CONSENTS, to take the actions described below.

78. In accordance with this Order, NDOT shall take appropriate actions, including the actions specified in this Order, to correct the deficiencies and eliminate and prevent recurrence of the violations cited above to comply with the CWA and all of the applicable requirements of its MS4 Permit.

79. Within one hundred eighty (180) days of the effective date of this Order, NDOT shall provide to the EPA and NDEQ a revised SWMP, including revised BMPs, measurable goals, procedures, and a detailed implementation plan and schedule to fully implement all provisions set forth therein. NDOT may request, and the EPA may grant, an extension of time of up to sixty (60) additional days, if needed. EPA will review and may provide comments on the revised SWMP.

80. NDOT shall submit to the EPA an annual report by December 1st of every year, until this Order terminates pursuant to Paragraph 89, documenting activities and progress in each of the program areas of its MS4 program.

Submissions

81. All documents required to be submitted to the EPA pursuant to this Order shall, whenever possible, be submitted electronically to:

sans.cynthia@epa.gov

Documents that cannot be submitted electronically to the EPA shall be submitted to:

Cynthia Sans, or her successor
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

82. All documents required to be submitted to NDEQ pursuant to this Order shall be submitted to:

Steven Goans, Deputy Director
Water Management Division
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509-8922.

83. All submissions by NDOT to the EPA pursuant to the requirements of this Order shall contain the following certification signed by an authorized official, as identified in 40 C.F.R. BMP § 122.22(b):

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.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

84. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319. Respondent's payment of the entire civil penalty pursuant to the terms of the Complaint and Consent Agreement/Final Order, CWA-07-2017-0218, and compliance with the terms of that Order, shall resolve all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in that Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

85. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. Except as specifically provided in Paragraph 84, the EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d), or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d), or (g), for any violation cited in this Order. Except as specifically provided in Paragraph 84, issuance of this Order shall not be deemed an election by the EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

86. Nothing in this Order shall limit the EPA's right to obtain access to, and/or to inspect, Respondent's facilities, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

87. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judiciary authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Effective Date

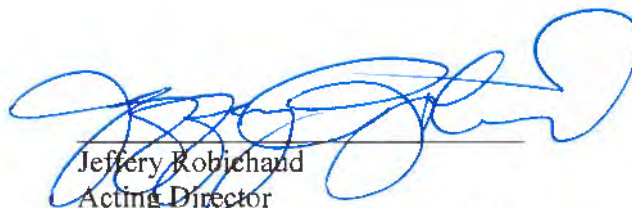
88. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

Termination

89. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA. Upon successful completion of all compliance activities identified in this Order, Respondent may request in writing, and the EPA may grant, that the EPA terminate this Order pursuant to the applicable provisions of this Order. Termination of this Order shall not be unreasonably withheld by the EPA upon Respondent's demonstration that all compliance activities identified in this Order have been completed.

For the Complainant, United States Environmental Protection Agency, Region 7:

Issued this 6TH day of SEPTEMBER, 2017.



Jeffery Robichaud
Acting Director
Water, Wetlands, and Pesticides Division



Katherine Reitz
Attorney Advisor
Office of Regional Counsel

For the Respondent, Nebraska Department of Transportation:



Signature

8-31-17

Date

Kyle Schneeweis

Name

Director

Title

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance on Consent to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Blvd., Lenexa Kansas 66219.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance on Consent by first class certified mail, return receipt requested, to:

Kyle Schneweis, Director
Nebraska Department of Transportation
1500 Highway 2
P.O. Box 94759
Lincoln, Nebraska 68509

and via first class mail to:

Mr. Steven Goans, Deputy Director
Water Management Division
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509-8922.

9/12/2017
Date

[Handwritten Signature]
Signature

Steven F. Goans
Name