

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

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In the Matter of:

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

City of Portsmouth, Virginia
801 Crawford Street
Portsmouth, Virginia 23704

Docket No. CWA-03-2014-0240

**CONSENT AGREEMENT
AND FINAL ORDER**

Respondent.

I. PRELIMINARY STATEMENT and STATUTORY AUTHORITY

1. This Consent Agreement is entered into by the Director, Water Protection Division, United States Environmental Protection Agency, Region III (“EPA”, “Agency”, or “Complainant”) and the City of Portsmouth, Virginia (“Portsmouth” or “Respondent”) pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22. The parties have agreed to settlement of violations of the Clean Water Act (“CWA” or “Act”) by Respondent. This Consent Agreement and Final Order (“CAFO”) concludes this action pursuant to 40 C.F.R. §§ 22.18 and 22.31.

2. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Administrator of the EPA is authorized to assess administrative penalties against persons who violate Section 301(a) of the Act, 33 U.S.C. § 1311(a). The Administrator of the EPA has delegated this authority to the Regional Administrator of EPA, Region III, who in turn has delegated this authority to the Water Protection Division Director.

3. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (28 U.S.C. § 2461), and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, violations that are assessed penalties under Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), subject the violator to civil penalties in an amount not to exceed \$177,500 per proceeding for violations that occurred between January 12, 2009 and December 6, 2013 and \$187,500 per proceeding for violations that occurred after December 6, 2013.

II. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS, and CONCLUSIONS OF LAW

4. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued pursuant to the National Pollutant Discharge Elimination System (“NPDES”) program under Section 402 of the Act, 33 U.S.C. § 1342.

5. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States or may authorize states to issue such permits. The discharges are subject to specific terms and conditions as prescribed in the permit.

6. Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. §§ 122.2 and 122.26 provide that, with some exceptions not relevant here, storm water discharges are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).

7. Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

8. “Discharge of a pollutant” includes “any addition of any pollutant or combination of pollutants to waters of the United States from any point source.” 40 C.F.R. § 122.2.

9. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).

10. The term “municipal separate storm sewer system” (“MS4”) includes, “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.” 40 C.F.R. § 122.26(b)(8)(i).

11. An NPDES permit is required for discharges from an MS4 serving a population of 100,000 or more, Section 402(p)(2)(D) of the Act, 33 U.S.C. § 1342(p) 92)(D); 40 C.F.R. § 122.26(a), 40 C.F.R. § 122.21.

12. At all times relevant to this CAFO, Respondent has owned and/or operated an MS4 as that term is defined in 40 C.F.R. § 122.26(b)(8).
13. Respondent's MS4 is located within the geographic boundaries of the City of Portsmouth.
14. The City of Portsmouth encompasses a total area of approximately 30 square miles.
15. Stormwater from the City of Portsmouth MS4 discharges to a number of water bodies, including the James River and the Elizabeth River, which are considered "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7); 40 C.F.R. § 232.2; 40 C.F.R. § 122.2.
16. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the Commonwealth of Virginia to issue NPDES permits on March 31, 1975.
17. The Virginia Department of Environmental Quality ("VDEQ") issued to Respondent an NPDES MS4 Discharge Permit No. VA 0088668 which became effective on March 8, 2001 (hereinafter the "MS4 Permit").
18. At the time the MS4 Permit was issued, Respondent's MS4 served a population of at least 100,000 people.
19. The expiration date of the MS4 Permit was March 8, 2006; however, the MS4 Permit has been administratively extended pending a final decision on the renewal application.
20. On June 4-5, 2012, a compliance inspection team composed of EPA staff and authorized representatives of EPA inspected Respondent's MS4 program ("the MS4 Inspection").
21. EPA prepared the City of Portsmouth MS4 Program Inspection Report ("the Inspection Report"), which included, in addition to general information regarding Respondent's MS4 program and history, multiple observations regarding Respondent's MS4 Program related to the requirements of the MS4 Permit.
22. Respondent received a copy of the Inspection Report, to which it prepared and submitted a response to EPA on August 9, 2013.

III. FINDINGS OF VIOLATION

Count 1: Failure to Eliminate Unauthorized Stormwater Discharges

23. Part I.A.1.b of the MS4 Permit requires the Respondent to implement a program “to detect and remove, or to notify a discharger to apply for a separate VPDES permit for, unauthorized non-storm water discharges and/or improper disposal into the [MS4].”

24. Part I.A.1.b(3) of the MS4 Permit requires, as part of the program required in Part I.A.1.b of the MS4 Permit, that the Respondent “shall act as expeditiously as possible to require a discharger to eliminate unauthorized non-storm water discharges except discharges identified in Part I.B.4 of this permit, or, if appropriate, to notify the discharger to apply to the Department of Environmental Quality for a Virginia Pollutant Discharge Elimination System (VPDES) permit for the discharge. . . . The [Respondent] shall require immediate cessation of improper disposal practices upon identification of responsible parties.”

25. Part I.B.4 of the MS4 Permit requires that the Respondent “shall effectively prohibit non-storm water discharges into the [MS4]. . . .”

26. A review of documentation provided by the Respondent shows multiple dry weather discharges (i.e., non-stormwater discharges not identified in Part I.B.4 of the MS4 Permit) in 2011, but no enforcement or other action taken by Respondent to eliminate those dry weather (i.e., non-stormwater) discharges.

27. Respondent’s failure to eliminate these dry weather (i.e., non-stormwater) discharges constitutes a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count 2: Failure to Provide Adequate Staffing

28. Part I.A. of the MS4 Permit requires the Respondent to “implement, to the maximum extent practicable, the provisions of the SWMP required under this Part as a condition of the permit. All applicable components of the [MS4] Phase I VPDES Permit Application submitted in accordance with 40 CFR 122.26, and all approved modifications are hereby incorporated by reference into the SWMP.”

29. Part I.B.6 of the MS4 Permit states that “to the maximum extent practicable, subject to annual appropriations, the [Respondent] shall provide adequate finances, staff, equipment, and support capabilities to implement all parts of the [SWMP] required by Part I.A. of this permit. Where programs operated by entities other than the [Respondent] are included in the [Respondent’s] [SWMP], the [Respondent] shall, to the maximum extent practicable, ensure that such programs remain operational for the term of the permit. However, the [Respondent] shall not be responsible for operating or financing the program in the future if the current operators cease the activity.”

30. Part II.Q of the MS4 Permit requires that the Respondent “shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the [Respondent] to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes . . . adequate staffing . . .”

31. As stated in the Inspection Report, the person at the Public Schools Operations Center who was responsible for stormwater management had left the position in December 2011 and no employee had been identified to fill the position until June 5, 2012. In addition, that new employee had no storm water-related training.

32. Respondent’s failure to provide adequate staffing from December 2011 to June 2012 and to ensure that the Public Schools Operations Center remained operational constitutes a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

IV. CONSENT AGREEMENT AND FINAL ORDER

33. Respondent admits the Findings of Fact, Jurisdictional Allegations, and Conclusions of Law set forth in Section II, above.

34. Respondent neither admits nor denies EPA’s Findings of Violation set forth in Section III, above.

35. Respondent agrees not to contest EPA’s jurisdiction to issue and enforce this CAFO.

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

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

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

39. The parties agree that settlement of this matter is in the public interest and that entry of this CAFO is the most appropriate means of resolving this matter.

40. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA is providing public notice and an opportunity to comment on the Consent Agreement prior to issuing the Final Order. In addition, pursuant to Section 309(g)(1)(A), EPA has

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

41. Based upon the foregoing and having taken into account the nature, circumstances, extent and gravity of the violation(s), Respondent's ability to pay, prior history of compliance, degree of culpability, economic benefit or savings resulting from the violations, and such other matters as justice may require pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. § 1319(g), EPA HEREBY ORDERS AND Respondent HEREBY CONSENTS to pay a civil penalty in the amount of **twenty-five thousand dollars (\$25,000)** in full and final settlement of EPA's claims for civil penalties for the violations alleged herein.

42. Respondent shall pay the total administrative civil penalty of **twenty-five thousand dollars (\$25,000)** within thirty (30) days of the effective date of this CAFO pursuant to 40 C.F.R. § 22.31(c). Payment shall be made by one of the following methods set forth below.

All payments by Respondent shall reference Respondent's name and address and the Docket Number of this action, i.e., CWA-03-2014-0240.

Payment by check to "United States Treasury":

By regular mail:

U.S. EPA Region III
Cincinnati Finance Center
Box 979077
St. Louis, MO 63197-9000
Contact: 513-487-2091

By overnight delivery:

U.S. Environmental Protection Agency
Government Lock Box 979077
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101
Contact: 314-418-1028

By Wire Transfer:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727

SWIFT Address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the wire transfer message should read:
D 68010727 Environmental Protection Agency)

By Automated Clearinghouse (ACH) Transfers for receiving U. S. currency (also known as REX or remittance express):

US Treasury REX / Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

Contacts for ACH:
John Schmid (202-874-7026)
Jesse White (301-887-6548)
Remittance Express (REX): 1-866-234-5681

On-Line Payments:

WWW.PAY.GOV
Enter sfo 1.1 in the search field
Open form and complete required fields.

Additional payment guidance is available at:
http://www.epa.gov/ocfo/finservices/make_a_payment.htm

Respondent shall send notice of such payment, including a copy of the check if payment is made by check, to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk (3RC00)
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

-and-

Kelly Gable
Mail Code 3RC20
Office of Regional Counsel
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

43. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law and ordinance, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit. Nor does this CAFO constitute a waiver, suspension or modification of the requirements of the CWA, 33 U.S.C. §§ 1251 *et seq.*, or any regulations promulgated thereunder.

44. The following notice concerns interest and late penalty charges that will accrue in the event that any portion of the civil penalty is not paid as directed:

Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the costs of processing and handling a delinquent claim, as more fully described below. Accordingly, Respondent's failure to make timely payments as required herein or to comply with the conditions in this CAFO shall result in the assessment of late payment charges including interest, penalties, and/or administrative costs of handling delinquent debts.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of this CAFO is mailed or hand-delivered to Respondent. However, EPA will not seek to recover interest on any amount of the civil penalty that is paid within thirty (30) calendar days after the date on which it is due. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

45. The costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). A penalty charge of six percent per year will be assessed monthly on any portion of the civil penalty which remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

46. This CAFO resolves only the civil claims for the specific violations alleged herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present and imminent and substantial endangerment to the public health, public welfare, or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the Consolidated Rules of Practice. Further, EPA reserves any rights and remedies available to it

under the Clean Water Act, 33 U.S.C. § 301 *et seq.*, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Administrative Law Judge pursuant to the Order of Designation dated November 3, 2014.

47. The penalty specified in Paragraph 41 shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

48. Entry of this CAFO is a final settlement of all violations alleged in this CAFO. EPA shall have the right to institute a new and separate action to recover additional civil penalties for the claims made in this CAFO if the EPA obtains evidence that the information and/or representations of the Respondent are false, or, in any material respect, inaccurate. This right shall be in addition to all other rights and causes of action, civil or criminal, the EPA may have under law or equity in such event.

49. The undersigned representative of Respondent certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

50. All of the terms and conditions of this CAFO together comprise one agreement, and each of the terms and conditions is in consideration of all of the other terms and conditions. In the event that this CAFO, or one or more of its terms and conditions, is held invalid, or is not executed by all of the signatories in identical form, or is not approved in such identical form by the Regional Administrator or his designee, then the entire CAFO shall be null and void.

V. PUBLIC NOTICE AND EFFECTIVE DATE

51. This CAFO will become final and effective thirty (30) days after issuance. Payment of the civil penalty assessed in this CAFO is due thirty (30) days after the effective date.

FOR RESPONDENT, CITY OF PORTSMOUTH:

Date: December 10, 2014

By: John L. Rowe, Jr.

Name: John L. Rowe, Jr.

Title: City Manager

In re: City of Portsmouth
EPA Docket No.: CWA-03-2014-0240

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 12/17/14



Jon M. Capacasa, Director
Water Protection Division

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

this 17th day of December, 2014



Shawn M. Garvin
Regional Administrator
U.S. EPA Region III

CERTIFICATE OF SERVICE

I hereby certify that, on this day, I caused to be filed with the Regional Hearing Clerk, EPA Region III, the original and one copy of the Consent Agreement and Final Order in the matter of *In re: City of Portsmouth, Virginia* (Docket No. CWA-03-2014-0240).

I also hereby certify that, on this day, I caused a copy of the Consent Agreement and Final Order to be sent to the following individuals by the manner indicated:

Via electronic mail and first-class mail:

Jeffrey S. Miller, Esquire
Assistant City Attorney
Office of the City Attorney
City of Portsmouth, Virginia
801 Crawford Street, 6th Floor
Portsmouth, VA 23704
millerj@portsmouthva.gov

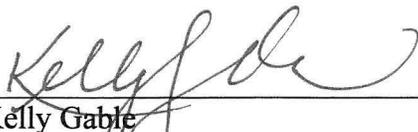
Via first-class mail and facsimile:

Judge Susan L. Biro
Chief Administrative Law Judge
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001
Fax No.: 202-565-0044

Via first-class mail and facsimile:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001
Fax No.: 202-564-1206

Date: December 17, 2014



Kelly Gable
Assistant Regional Counsel
US EPA Region III