

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
Ft. Lincoln Retail, LLC, : Administrative Penalty Under
: Section 309(g) of the Clean Water Act
: a/k/a Fort Lincoln Retail, LLC, : Docket No. CWA-03-2015-0037
: :
Respondent. : **ADMINISTRATIVE PENALTY**
: **COMPLAINT**
: **AND NOTICE OF OPPORTUNITY TO**
: **REQUEST HEARING**

I. STATUTORY AUTHORITY

1. Pursuant to Section 309(g) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(g), the Administrator of the United States Environmental Protection Agency (“EPA” or “the Agency”) 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 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 (“Complainant”).

2. Pursuant to Section 309 of the Act, 33 U.S.C. § 1319, and in accordance with the enclosed *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, Complainant hereby proposes to assess a civil penalty in the amount of \$177,500 (one hundred seventy-seven thousand, five hundred dollars) against Ft. Lincoln Retail, LLC, also known as Fort Lincoln Retail, LLC (“Respondent”), for violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

II. FACTUAL AND LEGAL ALLEGATIONS

3. 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.

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

5. 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, storm water discharges are “point sources” subject to NPDES permitting requirements under Section 402(a) of the Act, 33 U.S.C. § 1342(a).

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

7. Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

8. Respondent is a joint venture entity among: Trammell Crow Company; CSG Urban Partners, LLC; and Fort Lincoln New Town Corporation.

9. “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.

10. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA issued a revised Construction General Permit (“CGP”) effective February 16, 2012 (hereinafter, “the Permit” or “2012 CGP”). The Permit authorizes discharges of storm water associated with construction activities, but only in accordance with the conditions of the Permit.

11. The Permit requires an applicant for coverage under the Permit to submit to EPA a complete and accurate Notice of Intent (“NOI”) for coverage prior to commencing construction activities. 2012 CGP at Part 1.4.

12. The Permit requires that for existing projects an NOI for coverage under the 2012 CGP must be submitted no later than May 16, 2012. 2012 CGP at Part 1.4.2, Table 1.

13. On or about May 16, 2012, Respondent (through its agent or representative) submitted an NOI for coverage under the Permit for a construction site known as Shops at Dakota Crossing, located at 3301 Fort Lincoln Drive, NE, Washington, D.C. (hereinafter, “the Site”).

14. As required by Part 7.1.1 of the Permit, Respondent had prepared a Stormwater Pollution Prevention Plan (“SWPPP”) on August 3, 2011, which it maintains at the Site.

15. EPA determined that the Site was eligible for coverage under the Permit, effective June 13, 2012, and assigned Respondent the Facility Permit Tracking Number DCR12A010.

16. Clearing, grading, excavating, and related activities began at the Site on December 19, 2011.

17. The clearing, grading, excavating, and related activities at the Site constitute “industrial activity” within the meaning of Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26(b)(14)(x).

18. The Site discharges pollutants to the Anacostia River via the Washington, D.C. municipal separate storm sewer system (“DC MS4”).

19. The Anacostia River is considered a “water of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

20. On September 20, 2012, representatives of EPA Region III and EPA contractors from Environmental Resource Group (“the Inspection Team”) conducted an inspection at the Site (hereinafter, “the Inspection”).

21. During the Inspection, the Inspection Team reviewed Respondent’s SWPPP and Sediment and Erosion Control Plan.

22. The Inspection Team prepared an inspection report from the Inspection (“the Inspection Report”), which included multiple observations regarding Respondent’s compliance with the requirements of the Permit and a list of documents provided by Respondent either before or after the Inspection.

23. Respondent received a copy of the Inspection Report on March 22, 2013.

24. On June 2, 2014, EPA sent Information Requirements pursuant to Section 308 of the Act, 33 U.S.C. § 1318, to the following entities: CSG Urban Partners LLC; Harvey-Cleary Builders; SACO, Inc.; and Trammell Crow Company.

25. In June and July 2014, EPA received information as a result of the Information Requirements.

III. FINDINGS OF VIOLATION

Count 1: Unauthorized Discharge of Non-Stormwater Routed to Areas of Exposed Soil

26. The Permit authorizes certain discharges “provided that appropriate stormwater controls are designed, installed, and maintained”. 2012 CGP at Part 1.3.

27. The Permit provides a specific list of those authorized discharges, which includes non-stormwater discharges from construction activity such as “[p]otable water including

uncontaminated water line flushings” “provided that, . . . , these discharges are not routed to areas of exposed soil on [the Site] . . .”. 2012 CGP at Part 1.3(d)(vi).

28. The Inspection Team observed water from water line flushings discharging from the Site:

- a. The water line flushing was not contained and flowed downhill over unstabilized slopes near the secondary construction exit point on South Dakota Avenue NE.
- b. Pallets were placed over the water flow path and used by Site personnel to cross the wet sediment and flow.
- c. The turbid water discharged from the Site onto South Dakota Avenue NE and into three storm sewer inlets along South Dakota Avenue NE.

29. Based upon the information described in this Complaint, Respondent discharged unauthorized sediment-laden non-stormwater to areas of exposed soil and then to the Anacostia River via the DC MS4 in violation of Part 1.3 of the Permit.

30. Respondent’s unauthorized discharges constitute violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 2: Failure to Post Notice of NPDES Permit Coverage

31. The Permit requires that the permittee “post a sign or other notice conspicuously at a safe, publicly accessible location in close proximity to the project site. At a minimum, the notice must include the NPDES Permit tracking number and a contact name and phone number for obtaining additional project information. The notice must be located so that it is visible from the public road that is nearest to the active part of the construction site, and it must use a font large enough to be readily viewed from a public right-of-way.” 2012 CGP at Part 1.5.

32. At the time of the Inspection, the Inspection Team did not observe any sign or notice that was posted conspicuously at a safe, publicly accessible location in close proximity to the Site, much less one that met the requirements of the Permit.

33. Based upon the information described in this Complaint, Respondent failed to post a sign or other notice conspicuously at a safe, publicly accessible location in close proximity to the project site that contained the information required by the 2012 CGP.

34. Respondent’s failure to post a sign or other notice conspicuously at a safe, publicly accessible location in close proximity to the Site that contained the information required by the Permit constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 3: Failure to Maintain Erosion and Sediment Controls

35. The Permit requires the permittee to “design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities”. 2012 CGP at Part 2.1. The Permit further states that “[t]o meet this requirement, [the permittee] must comply with the following provisions.” Id.

36. Specifically regarding maintenance, the Permit requires the permittee to “ensure that all erosion and sediment controls remain in effective operating condition during permit coverage and are protected from activities that would reduce their effectiveness,” 2012 CGP at Part 2.1.1.4, and requires the “remov[al of] sediment before it has accumulated to one-half of the above-ground height of any perimeter control.” 2012 CGP at Part 2.1.2.2(b).

37. At the time of the Inspection, the Inspection Team observed a number of failures to maintain erosion and sediment controls, including:

- i. Sediment was present outside of the super silt fence at the Site;
- ii. One section of super silt fence had separated from the support posts;
- iii. Sediment had accumulated against the super silt fence near the new construction exit point on Fort Lincoln Drive NE; and
- iv. Approximately sixteen (16) feet of super silt fence had been knocked down.

38. Based upon the information described in this Complaint, Respondent failed to ensure that all erosion and sediment controls remained in effective operating condition during permit coverage and were protected from activities that would reduce their effectiveness.

39. Respondent’s failure to ensure that all erosion and sediment controls remained in effective operating condition during permit coverage and were protected from activities that would reduce their effectiveness constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 4: Failure to Install Sediment Controls Along Perimeter

40. The Permit requires the permittee to “design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities”. 2012 CGP at Part 2.1. The Permit further states that “[t]o meet this requirement, [the permittee] must comply with the following provisions.” Id.

41. Specifically regarding installation, the Permit requires the permittee to “install sediment controls along those perimeter areas of [the Site] that will receive stormwater from earth-disturbing activities”. 2012 CGP at Part 2.1.2.2.

42. The Inspection Team observed no perimeter controls located along approximately 580 feet of Fort Lincoln Drive NE near Sediment Basin #2. Sediment was present on the sidewalk as well as outside of the security fence.

43. Based upon the information described in this Complaint, Respondent failed to install sediment controls along those perimeter areas of the Site that were to receive stormwater from earth-disturbing activities.

44. Respondent’s failure to install sediment controls along those perimeter areas of the Site that were to receive stormwater from earth-disturbing activities constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 5: Failure to Minimize the Track-out of Sediment
from Vehicles Exiting the Construction Site

45. The Permit requires the permittee to “minimize the track-out of sediment onto off-site streets, other paved areas, and sidewalks from vehicles exiting [the Site]”. 2012 CGP at Part 2.1.2.3.

46. At the time of the Inspection, the Inspection Team observed that sediment trackout was present on the road adjacent to all three construction exit points and that stone in the main construction exit point was compacted, filled with sediment, or missing in areas.

47. Based upon the information described in this Complaint, Respondent failed to minimize the track-out of sediment onto off-site streets, other paved areas, and sidewalks from vehicles exiting the Site.

48. Respondent’s failure to minimize the track-out of sediment onto off-site streets, other paved areas, and sidewalks from vehicles exiting the Site constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 6: Failure to Control Discharges from Stockpiled Sediment or Soil

49. The Permit requires the permittee to comply with, *inter alia*, the following requirements for “any stockpiles or land clearing debris composed, in whole or in part, of sediment or soil”: “(a) Locate the piles outside of any natural buffers established under Part 2.1.2.1a and physically separated from other stormwater controls implemented in accordance with Part 2.1;

[and] (b) Protect from contact with stormwater (including run-on) using a temporary perimeter sediment barrier”. 2012 CGP at Part 2.1.2.4.

50. At the time of the Inspection, the Inspection Team observed two large unstabilized, uncovered stockpiles located near the center of the Site; no temporary perimeter sediment barriers were visible around either stockpile. The Inspection Team observed erosion on the southwest and northwest facing slopes of one stockpile.

51. Based upon the information described in this Complaint, Respondent failed to protect stockpiles or land clearing debris composed, in whole or in part, of sediment or soil from contact with stormwater using a temporary perimeter sediment barrier.

52. Respondent’s failure to protect stockpiles or land clearing debris composed, in whole or in part, of sediment or soil from contact with stormwater using a temporary perimeter sediment barrier constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 7: Failure to Protect Storm Drain Inlets

53. The Permit requires that if the permittee “discharge[s] to any storm drain inlet that carries stormwater flow from [the Site] directly to a surface water (and it is not first directed to a sediment basin, sediment trap, or similarly effective control), and [the permittee has] authority to access the storm drain inlet,” it must: (a) “Install inlet protection measures that remove sediment from [the] discharge prior to entry into the storm drain inlet”; and (b) “Clean, or remove and replace, the protection measures as sediment accumulates, the filter becomes clogged, and/or performance is compromised”. 2012 CGP at Part 2.1.2.9.

54. The Inspection Team observed three existing yard drains on-Site; of those, Respondent’s Sediment and Erosion Control Plans required inlet protection around the yard drain located near the corner of South Dakota Avenue NE and New York Avenue NE.

a. This drain was surrounded by straw bales which were covered in sediment and vegetation.

b. Sediment was present up to the top of the inlet and the inlet protection (i.e., the straw bales).

55. Based upon the information described in this Complaint, Respondent discharged to storm drain inlets that carried stormwater flow from the Site directly to a surface water (and it was not first directed to a sediment basin, sediment trap, or similarly effective control), and Respondent had authority to access the storm drain inlet; however, Respondent failed to clean, or remove and replace, the protection measures as sediment accumulated the filter became clogged, and/or performance was compromised.

56. Respondent's failure to comply with certain Permit requirements to protect storm drain inlets constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 8: Failure to Prevent Erosion and Maintain Sediment Basins

57. The Permit requires that if the permittee installs a sediment basin, it must comply with certain design and maintenance requirements, including that the permittee "[p]revent erosion of (1) the sediment basin using stabilization controls (e.g., erosion control blankets), and (2) the inlet and outlet using erosion controls and velocity dissipation devices." 2012 CGP at Part 2.1.3.2(a)(iii).

58. The Permit also requires that the permittee "[k]eep [the sediment basins] in effective operating condition and remove accumulated sediment to maintain at least ½ of the design capacity of the sediment basin at all times." 2012 CGP at Part 2.1.3.2(b).

59. At the time of the Inspection, the Inspection Team observed no stabilization controls on Sediment Basin #2, an ineffective velocity dissipation device, and extensive rill erosion.

60. At the time of the Inspection, the Inspection Team also observed that a section of the embankment of Sediment Basin #2 had been cut and removed; the cut was approximately 34 feet long, eight feet deep, and 14 to 19 feet wide. A gully, between two and three feet deep, was present in the bottom of the cut.

61. Based upon the information described in this Complaint, Respondent installed a sediment basin but failed to, *inter alia*, prevent erosion of the sediment basin inlets using erosion controls and velocity dissipation devices, and to keep the sediment basins in effective operating condition.

62. Respondent's failure to comply with the Permit requirements to prevent erosion and maintain sediment basins constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 9: Unauthorized Discharge of Accumulated Stormwater through Ineffectively Managed Controls

63. The Permit prohibits the permittee "from discharging ground water or accumulated stormwater that is removed from excavations, trenches, foundations, vaults, or other similar points of accumulation, unless such waters are first effectively managed by appropriate controls." 2012 CGP at Part 2.1.3.4. "Appropriate controls" include: "sediment basins or sediment traps, sediment

socks, dewatering tanks, tube settlers, weir tanks, or filtration systems (e.g., bag or sand filters) that are designed to remove sediment.” 2012 CGP at Part 2.1.3.4 footnote 14.

64. At the time of the Inspection, the Inspection Team observed water from Sediment Basin #1 being pumped into a filtration device that discharged to a yard drain, which was not installed according to Respondent’s Sediment and Erosion Control Plan. The key component of the filtration device was a perforated pipe lined with a filter fabric that was meant to remove sediment; water flowed through the filter fabric and perforated pipe prior to exiting the filtration device and flowing into the yard drain. The Inspection Team observed that the filter fabric was located away from the perforated pipe and water throughout the device was turbid.

65. Based upon the information described in this Complaint, Respondent discharged accumulated stormwater that was removed from excavations, trenches, foundations, vaults, or other similar points of accumulation without first effectively managing such water by appropriate controls.

66. Respondent’s unauthorized discharge of accumulated stormwater that was removed from excavations, trenches, foundations, vaults, or other similar points of accumulation without first effectively managing such water by appropriate controls constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 10: Failure to Initiate Soil Stabilization Measures

67. The Permit requires the permittee to “initiate soil stabilization measures immediately whenever earth-disturbing activities have permanently or temporarily ceased on any portion of the site.” 2012 CGP at Part 2.2.1.1.

68. At the time of the Inspection, the Inspection Team observed a partially stabilized area located along South Dakota Avenue NE that included both slightly-sloped areas and steep slopes; grass and straw was present on some sections.

- a. A berm had been constructed at the top of the slope but had not been stabilized.
- b. Approximately 900 feet of the slightly-sloped area was unstabilized and rill erosion was present; the rill deepened and widened as it approached the yard drain.
- c. The erosion scars on the steep slopes were approximately 20 feet long.

69. Based upon the information described in this Complaint, Respondent failed to initiate soil stabilization measures immediately following several instances when earth-disturbing activities had permanently or temporarily ceased on portions of the Site.

70. Respondent's failure to initiate soil stabilization measures immediately following several instances when earth-disturbing activities permanently or temporarily ceased on portions of the Site constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 11: Failure to Eliminate the Discharge of Water from the Washout and Cleanout of Concrete

71. The Permit requires the permittee "[t]o comply with the prohibition in Parts 2.3.1.1 and 2.3.1.2, . . . provide an effective means of eliminating the discharge of water from the washout and cleanout of stucco, paint, concrete, form release oils, curing compounds, and other construction materials. To comply with this requirement, you must: (a) [d]irect all washwater into a leak-proof container or leak-proof pit . . . designed so that no overflows can occur due to inadequate sizing or precipitation" . . . and (c) [l]ocate any washout or cleanout activities as far away as possible from surface waters and stormwater inlets or conveyances, and, to the extent practicable, designate areas to be used for these activities and conduct such activities only in these areas." 2012 CGP at Part 2.3.3.4.

72. At the time of the Inspection, the Inspection Team observed a construction site worker washing out a cement truck into an area of ponded water near the new construction exit point. The area of ponded water was not lined or otherwise leak-proof and had not been designated as a concrete washout area; in fact, no concrete washout areas were designated in the SWPPP.

73. Based upon the information described in this Complaint, Respondent failed to provide an effective means of eliminating the discharge of water from the washout and cleanout of concrete by, *inter alia*, directing all washwater into a leak-proof container or leak-proof pit, failed to designate areas to be used for this activity, and failed to conduct such activity only in these areas.

74. Respondent's failure to provide an effective means of eliminating the discharge of water from the washout and cleanout of concrete, failure to designate areas to be used for this activity, and failure to conduct such activity only in these areas, constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 12: Failure to Conduct and/or Document Site Inspections

75. The Permit requires the permittee to conduct Site inspections at least once every seven (7) calendar days; or once every fourteen (14) calendar days and within twenty-four (24) hours of the occurrence of a storm event of 0.25 inches or greater. 2012 CGP at Part 4.1.2. "To determine if a storm event of 0.25 inches or greater has occurred on your site, you must either keep a properly maintained rain gauge on your site, or obtain the storm event information from a weather station that is representative of your location." 2012 CGP at Part 4.1.2.2.

76. Based on a review of Respondent's Site self-inspection reports, from at least June 13, 2012 to September 20, 2012, Respondent repeatedly failed to conduct inspections every 7 calendar days, or every 14 calendar days and within 24 hours of any runoff producing stormwater event.

77. In addition, at the time of the Inspection, the Inspection Team observed that Respondent had failed to maintain its rain gauge, which was damaged and no longer functional.

78. Based upon the information described in this Complaint, Respondent failed to conduct Site inspections at least once every seven (7) calendar days; or once every fourteen (14) calendar days and within twenty-four (24) hours of the occurrence of a storm event of 0.25 inches or greater.

79. Respondent's failure to conduct Site inspections at least once every 7 calendar days, or once every 14 calendar days and within 24 hours of the occurrence of a storm event of 0.25 inches or greater, constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 13: Failure to Complete Corrective Action Reports

80. The Permit requires the permittee to "complete a corrective action report, which includes the applicable information in Parts 5.4.1 and 5.4.2", for each corrective action taken in accordance with Part 5 of the Permit. 2012 CGP at Part 5.

81. At the end of the Inspection, the Inspection Team requested copies of all corrective action reports for the Site from at least June 13, 2012 to September 20, 2012. Respondent provided a Corrective Action Log for corrective actions taken the day of the Inspection (September 20, 2012) but had no corrective action reports from June 13, 2012 to September 20, 2012 to provide.

82. Based upon the information described in this Complaint, Respondent failed to complete a corrective action report for corrective actions taken in accordance with Part 5 of the Permit.

83. Respondent's failure to complete a corrective action report for each corrective action taken in accordance with Part 5 of the Permit constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 14: Failure to Maintain Copies of Corrective Action Reports

84. The Permit requires the permittee “to keep a current copy of all corrective action reports at the site or at an easily accessible location, so that it can be made available at the time of an onsite inspection or upon request by EPA”. 2012 CGP at Part 5.4.4. See also 2012 CGP at Part 5.4.

85. At the end of the Inspection, the Inspection Team requested copies of all corrective action reports for the Site from at least June 13, 2012 to September 20, 2012. Respondent provided a Corrective Action Log for corrective actions taken the day of the Inspection (September 20, 2012) but had no corrective action reports from June 13, 2012 to September 20, 2012 to provide.

86. Based upon the information described in this Complaint, Respondent failed to complete a corrective action report for corrective actions taken in accordance with Part 5 of the Permit.

87. Respondent’s failure to maintain copies of corrective action reports and provide them to EPA upon request constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

Count 15: Failure to Maintain Records of Modifications to the SWPPP

88. The Permit requires the permittee “to maintain records showing the dates of all SWPPP modifications. The records must include the name of the person authorizing each change and a brief summary of all changes”. 2012 CGP at Part 7.4.3.

89. The Inspection Team observed several erosion and sediment control items present on Site that were not listed as modifications to the SWPPP shown on the Sediment & Erosion Control Plans, including: two large stockpiles located on-Site, an excavated area being used as a sediment trap, a berm constructed near the edge of the Site in order to prevent the perimeter silt fence from being overwhelmed, inlet protection around a yard drain near the new construction exit point, a cut in the embankment of Sediment Basin #2, and a filtration device installed near Sediment Basin #1.

90. Based upon the information described in this Complaint, Respondent modified its SWPPP during its period of Permit coverage; however, Respondent failed to maintain records showing the required information regarding those SWPPP modifications.

91. Respondent’s failure to maintain records showing the dates of all SWPPP modifications, the name(s) of the person(s) authorizing each change, and a brief summary of those changes constitutes violations of the Permit and Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342.

IV. PROPOSED CIVIL PENALTY

92. 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 after January 12, 2009 and through December 6, 2013.

93. Based upon the foregoing allegations, pursuant to the authority of Section 309(g)(2)(B) of the CWA, and in accordance with the enclosed “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; Final Rule”, 40 C.F.R. Part 22, Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to the Respondent in the amount of \$177,500 (one hundred seventy-seven thousand five hundred dollars) for the violations alleged herein. This does not constitute a “demand” as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.

94. The proposed penalty was determined after taking into account the nature, circumstances, extent, and gravity of the violations, Respondent’s prior compliance history, ability to pay the penalty, degree of culpability for the cited violations, and any economic benefit or savings to Respondent because of the violations. 33 U.S.C. § 1319(g)(3). To the extent that facts or circumstances unknown to Complainant at the time of issuance of this Complaint become known after issuance of this Complaint, such facts or circumstances may also be considered as a basis for adjusting the proposed administrative penalty.

95. If warranted, EPA may adjust the proposed civil penalty assessed in this Complaint. In so doing, the Agency will consider any number of factors in making this adjustment, including Respondent’s ability to pay. However, the burden of raising the issue of an inability to pay and demonstrating this fact rests with the Respondent.

96. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, shall affect Respondent’s continuing obligation to comply with the CWA, any other Federal or State laws, and/or with any separate Compliance Order issued under Section 309 of the Act, 33 U.S.C. § 1319, for the violations alleged herein.

V. SETTLEMENT CONFERENCE

97. EPA encourages settlement of proceedings at any time after issuance of a Complaint if such settlement is consistent with the provisions and objectives of the CWA. Whether or not a hearing is requested, the Respondent may request a settlement conference to discuss the allegations of the Complaint and the amount of the proposed civil penalty. However, a request for a settlement

conference does not relieve the Respondent of the responsibility to file a timely Answer to the Complaint.

98. If Respondent wishes to arrange a settlement conference or if Respondent has any questions related to this proceeding, Respondent may contact the attorney assigned to this case, as indicated in Section VI, following Respondent's receipt of this Complaint.

99. In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Complaint or to appeal the Final Order accompanying the Consent Agreement.

**VI. ANSWER TO COMPLAINT AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

100. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Respondent may request a hearing on the proposed civil penalty within thirty (30) days of receiving this Complaint in accordance with the procedures contained in 40 C.F.R. Part 22. At the hearing, Respondent may contest any material fact contained in Section III, above ("Findings of Violations"), and the appropriateness of the penalty amount proposed in Section IV ("Proposed Civil Penalty").

101. If Respondent requests a hearing on this proposed penalty assessment, members of the public to whom EPA is obligated to give notice of this proposed action and a reasonable opportunity to comment pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), who have commented upon the proposed penalty assessment, will have an opportunity, pursuant to Section 309(g)(4)(B) of the Act, 33 U.S.C. § 1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment.

102. If Respondent does not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comments on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. 33 U.S.C. § 1319(g)(4)(C). EPA will grant the petition and will hold a hearing if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

103. Hearing procedures are described in the "*Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits*," 40 C.F.R. Part 22, a copy of which is enclosed.

104. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which the Respondent has any knowledge, or clearly state the Respondent has no knowledge as to particular factual allegations in the Complaint. Where Respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The Answer must also state the following:

- a. the specific factual and legal circumstances or arguments which are alleged to constitute any grounds of defense;
- b. the facts that Respondent disputes;
- c. the basis for opposing any proposed relief; and
- d. whether a hearing is requested.

Failure to admit, deny, or explain any material factual allegations in the Complaint constitutes admission of such allegations.

105. The Answer and any request for hearing must be filed within thirty (30) days of service of this Complaint with the following:

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

106. A copy of the Answer and any request for hearing and any subsequent documents filed in this action shall also be sent to the following:

Kelly Gable
Assistant Regional Counsel (Mail Code 3RC20)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
gable.kelly@epa.gov

Ms. Gable may be reached by telephone at (215) 814-2471 and by facsimile at (215) 814-2603.

107. Failure to file an Answer within thirty (30) days of service of this Complaint may result in issuance of a default order against Respondent. Default by the Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Upon issuance of a default order, the civil penalty proposed herein shall become due and payable without further proceedings thirty (30) days after the default order becomes final. Respondent's failure to pay the entire penalty assessed by the default order by its due date will result in a civil action to collect the assessed

penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9). In addition, a default penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717.

108. Pursuant to 31 U.S.C. Section 3717 and 40 C.F.R. Section 13.11, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on any unpaid amount if it is not paid within thirty (30) calendar days of Respondent's receipt of notice of filing of an approved copy of an Order assessing Administrative Penalties with the Regional Hearing Clerk. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. Section 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts, based on either actual or average cost incurred, will be charged on all debts. 40 C.F.R. § 13.11(b). In addition, a penalty will be assessed on any portion of the debt that remains delinquent more than ninety (90) calendar days after payment is due. 40 C.F.R. § 13.11(c). Should assessment of the penalty charge of the debt be required, it will be assessed as of the first day payment is due pursuant to 4 C.F.R. Section 102.13(e). Furthermore, pursuant to Chapter 9 of EPA's Resource Management Directive System policy on cash management (RMDS No. 2540-09), EPA will assess a \$15.00 handling charge for administrative costs on unpaid penalties for the first 30-day period after a payment is due and an additional \$15.00 for each subsequent 30 days the penalty remains unpaid.

VII. QUICK RESOLUTION

109. If Respondent does not contest the findings and assessments set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 C.F.R. Section 22.18 and this paragraph. No such payment may be made until ten (10) days after the close of the public comment period provided for under 40 C.F.R. Section 22.45. If Respondent elects to resolve this action by paying the proposed penalty in full pursuant to 40 C.F.R. Section 22.18, no Answer need be filed, provided that Respondent files, within thirty (30) days after service of the Complaint, a statement pursuant to 40 C.F.R. Section 22.19(a)(2) agreeing to pay the proposed penalty in full. Upon receipt of such a statement from Respondent, but no sooner than ten (10) days after close of the public comment period and subject to any comments received, Complainant will cause a final order to be issued. 40 C.F.R. §§ 22.19(a)(3) and 22.31. If Respondent files a statement pursuant to 40 C.F.R. Section 22.18(a)(2), Respondent shall pay the penalty no sooner than ten (10) days after the close of the public comment period and no later than sixty (60) days after receipt of the Complaint.

110. If Respondent wishes to file a statement pursuant to 40 C.F.R. Section 22.18(a)(2), agreeing to pay the proposed penalty in full, such statement shall be filed with the following:

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

and a copy shall be provided to:

Kelly Gable, Esq.
Assistant Regional Counsel (3RC20)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

111. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing in this matter.

112. Payment of the penalty shall be made by one of the following methods below. Payment by Respondent shall reference Respondent's name and address, and the EPA Docket Number of this Complaint.

a. Payment by check to "United States Treasury":

i. If sent via first-class mail, to:

U.S. Environmental Protection Agency
Cincinnati Finance Center
P. O. Box 979077
St. Louis, MO 63197-9000

ii. If sent via UPS, Federal Express, or Overnight Mail, to:

U.S. Environmental Protection Agency
Government Lockbox 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
314-418-1028

b. Via wire transfer, sent to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Attn: "D 68010727 Environmental Protection Agency"

c. Via ACH (Automated Clearing House) for receiving U.S. currency, sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking

Contact REX (Remittance Express): 866-234-5681
Finance Center Contacts:
Craig Steffen: 513-487-2091; steffen.craig@epa.gov
Molly Williams: 513-487-2076; williams.molly@epa.gov

113. Copies of the check and/or proof of payment via wire transfer or ACH shall be mailed at the same time payment is made to:

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

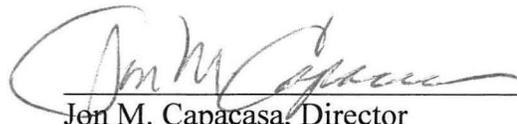
and to

Kelly Gable (3RC20)
Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029.

VIII. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

114. The following Agency offices, and the staffs thereof, are designated as the trial staff to represent the Agency as a party in this case: the Region III Office of Regional Counsel, the Region III Water Protection Division, the Office of the EPA Assistant Administrator for the Office of Water, and the EPA Assistant Administrator for Enforcement and Compliance Assurance. From the date of this Complaint until the final agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, nor the Regional Judicial Officer, may have an *ex parte* communication with the trial staff on the merits of any issue involved in this proceeding. Please be advised that the Consolidated Rules of Practice, 40 C.F.R. Part 22, prohibit any unilateral discussion or *ex parte* communication of the merits of a case with the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, or the Regional Judicial Officer after issuance of a Complaint.

Date: 4/29/15



Jen M. Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency, Region III

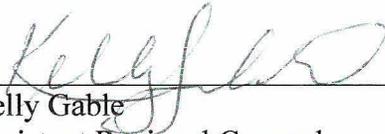
CERTIFICATE OF SERVICE

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 Administrative Penalty Complaint and Notice of Opportunity to Request Hearing in the above-captioned case.

I further certify that I caused a copy of the same to be sent to the following individual by Certified Mail, return receipt requested:

Adam C. Weers
Ft. Lincoln Retail, LLC
1055 Thomas Jefferson Street NW
Suite 600
Washington, DC 20007

Date: April 29, 2015



Kelly Gable
Assistant Regional Counsel
US EPA Region III