

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

In the Matter of:

City of Philadelphia, Water Department
1101 Market Street, 5th Floor
Philadelphia, PA 19107

Respondent

:
:
: Proceeding to Assess Class I Penalty
: Under Section 309(g)(2)(A) of the
: Clean Water Act, 33 U.S.C. § 1319(g)(2)(A)

:
: Docket No. CWA-03-2017-0147

:
: **CONSENT AGREEMENT AND**
: **FINAL ORDER**

I. STATUTORY AND REGULATORY 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”) is authorized to assess administrative penalties against “persons” who violate Section 301(a) of the Act, 33 U.S.C. § 1311(a). The Administrator has delegated this authority to the Regional Administrator of EPA Region III, who in turn has delegated this authority to the Director, Water Protection Division (Complainant).

2. This Consent Agreement is entered into by the Complainant and the City of Philadelphia (“The City” or “Respondent”), pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

3. Pursuant to 40 C.F.R. § 22.13(b), the Consolidated Rules provide in pertinent part that, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3). Pursuant thereto, this Consent Agreement and Final Order (CAFO) simultaneously commences and concludes this administrative proceeding against Respondent.

4. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the Administrator of EPA is authorized to assess administrative penalties against any person who violates any NPDES permit condition or limitation in an amount not to exceed \$10,000 per day for each day of violation, up to a total penalty amount of \$125,000.

5. Pursuant to the 2016 Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (effective December 6, 2013), any person who has violated any NPDES permit condition or limitation after December 6, 2013 is liable for an administrative penalty not to exceed \$16,000 per day for each day of violation up to a total penalty amount of \$187,500.

II FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

8. 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 any pollutant from a point source to the waters of the United States. The discharges are subject to specific terms and conditions as prescribed in the applicable Permit. Section 402(b) of the Act, 33 U.S.C. § 1342(b), provides that the Administrator may authorize a state to issue an NPDES permit.

9. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), on July 1, 1978, EPA authorized the Pennsylvania Department of Environmental Protection ("PADEP") to issue NPDES permits within the Commonwealth of Pennsylvania.

10. In September 1995, PADEP issued NPDES Municipal Separate Storm Sewer System Permit ("MS4") Permit No. PA-0054172 ("the Permit") to the City of Philadelphia. The current Permit was issued on September 30, 2005 and expired on September 30, 2010.

11. The City submitted a permit renewal application on March 29, 2010, 180 days prior to the expiration and coverage was automatically administratively extended per PADEP regulations.

12. Pursuant to Section 402(i) of the CWA, 33 U.S.C. § 1342(i), EPA retains its authority to take enforcement action within the State of Pennsylvania for NPDES permit violations.

13. At all times relevant to this CAFO, Respondent owned and/or operated a municipal separate storm sewer system (MS4) as that term is defined in 40 C.F.R. § 122.26(b)(8) (hereinafter, "the City's MS4").

14. The City's MS4 is located within Philadelphia, PA.

15. The City's MS4 is a "Phase I MS4" as defined in EPA's 1990 regulations, requiring medium and large cities or certain counties with populations of 100,000 or more to obtain NPDES permit coverage for their stormwater discharges.

16. The City's MS4 discharges stormwater to the Schuylkill River, Delaware River, Cobbs Creek, Tacony Creek, Wissahickon Creek, Pennypack Creek, and Poquessing Creek which all meet the definition of 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.

17. From June 16, 2015 to August 26, 2015, EPA representatives performed several inspections of the City's MS4 Program, issued records requests, and met with representatives of the City during which EPA representatives observed multiple violations of the Permit as described in Section III below.

III. VIOLATIONS

Count I

Failure to Perform Routine Screening of Outfalls

18. Part I.F.2 Step 3.a.i of the Permit states, "The City shall continue to operate the Defective Lateral Program. The City shall continue to perform screening, property testing and abatement of cross connections to the MS4 system as described in the 'Framework for Screening, Finding and Abating Stormwater Pollution' document."

19. Part B of the Defective Lateral Program states, "As a part of the Stormwater Permit, all stormwater outfalls are to be sampled and tested for fecal presence and fluoride levels once every five years. In addition, the priority outfalls of the watersheds where the current detection and abatement efforts are concentrated are to be sampled on a quarterly basis."

20. Part I.F.2 Step 3.a.iv of the Permit states, "During the permit cycle, the City shall revisit each of the City's 434 permitted stormwater outfalls and inspect them for dry weather flow. If flow is observed, the outfall shall be sampled in accordance with the sampling plan."

21. Paragraph 3 of the Cover Page of the Permit states that if "...the Department is unable, through no fault of the permittee, to reissue the permit before the expiration date below, the terms and conditions of this permit, including submission of the Discharge Monitoring Reports (DMRs), will be automatically continued and will remain fully effective and enforceable pending the grant or denial of the application for permit renewal."

22. EPA's inspection revealed that the City had failed to comply with the requirements of the Permit as they had not inspected all of their outfalls for dry weather flows since 2010. Further, the City indicated that they had only sampled 42 of their 433 outfalls for fecal presence and fluoride levels since 2010. The City indicated in their response to the findings herein that they have inspected an additional 178 outfalls.

23. Respondent's failure to comply with the Permit requirements for screening of outfalls and sampling procedures violates both the Permit and the CWA.

Count II

Failure to Update the List of Priority Outfalls

24. Part I.F.2 Step 3.a.i. of the Permit states, "The City shall continue to operate the Defective Lateral Program. The City shall continue to perform screening, property testing and abatement of cross connections to the MS4 system as described in the 'Framework for Screening, Finding and Abating Stormwater Pollution' document."

25. Part I.F.2 Step 3.a.iv. of the Permit states, "During this permit cycle, the City shall revisit each of the City's 434 permitted stormwater outfalls and inspect them for dry weather flow. If flow is observed, the outfall shall be sampled in accordance with sampling plan. Based on sampling results, the City may amend its list of priority outfalls. Results of all samples will be reported to the Department on a quarterly basis and summarized in the annual report."

26. The City stated in their response to the Inspection Report that they were not performing inspections and sampling of outfalls since 2010.

27. Respondent's failure to comply with the Permit requirements for amending its list of priority outfalls violates both the Permit and the CWA.

Count III

Failure to Generate a List of Municipal and Industrial Point Source Discharges

28. Part I.F.2. Step 1.c. of the Permit states, "The City shall generate and update a list of municipal and industrial point source discharges in the basin. The Department's e-FACTS/e-NOTICE and records management system (RMS) can be used as a source for discharges. Initial annual and seasonal estimates of non-point source pollution will be generated from available land use information and inventoried by sub-watershed, municipality, and county."

29. The City's FY'14 Annual Report, provided to EPA, contains a list of 50 industrial dischargers located in MS4 areas. On May 29, 2015, EPA generated a list of over 2,200 industrial facilities with active SIC codes within the City based on the requirements of 40 CFR Part 122.26(b)(14). Further, the City provided to EPA on July 7, 2015, a list of municipal sources in response to EPA's inspection; however, the list did not appear to have been in use by the City for MS4 program implementation purposes prior to EPA's inspection.

30. Respondent's failure to comply with the Permit requirements for generating and updating lists of potential point source discharges violates both the Permit and the CWA.

Count IV
Failure to Verify the Inspections of Industries that are Superfund Amendment and
Reauthorization Act Title III Facilities.

31. Part I.F.4.b.i. of the Permit states, “The City shall conduct inspections at industries that are Superfund Amendments and Reauthorization Act (SARA) Title III facilities, facilities with an individual NPDES permit for discharges to the MS4, and additional facilities that could provide additional information to the City about the impact of industrial discharges on municipal separate storm sewer system discharges. Inspections will be carried out by City personnel on at least an annual basis. Inspections will include an on-site visual inspection, verification of the PPC Plan kept on site, verification of permit requirements, proper operation and maintenance of BMPs, and a review of DMRs for compliance with the terms and conditions of the NPDES storm water permit.”

32. The City indicated in their response to the Inspection Report that they cannot verify the completion of all inspections as the inspections are handled by a separate City department.

33. Respondent’s failure to comply with the Permit requirements for verifying of inspections of SARA facilities violates both the Permit and the CWA.

Count V
Failure to Operate & Maintain all Municipal Facilities

34. Part II.I.f of the Permit states, “The permittee shall design and build and, at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances), including BMPs such as PPC Plans, E&S Plans, and any storm water pollution prevention or management plans, which are installed or used by the permittee to achieve compliance with the conditions of this permit. BMPs shall be designed, implemented, and maintained to minimize or eliminate storm water runoff to the maximum extent practicable. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.”

35. The EPA inspection team inspected five municipal facilities on July 22, 2015 and three municipal facilities on August 7, 2015 and identified operation & maintenance issues at all of these facilities including, but not limited to: Lack of sediment traps, staining, lack of secondary containment, trash and debris in drains, leaking drums, and empty spill kits.

36. Respondent’s failure to comply with the Permit requirements for operation and maintenance of municipal facilities violates both the Permit and the CWA.

Count VI

Failure to Adequately Implement Procedures for Site Enforcement

37. Part I.F.5.a of the Permit requires the City to "...implement an enforce a program to reduce pollution in any storm water runoff to the MS4 from construction activities that result in a land disturbance greater than or equal to 1 acre..." and to "implement procedures for site inspections and enforcement of control measures."

38. At the time of inspection, the City did not have a procedure to elevate an enforcement action when a construction site received more than one Notice of Violation ("NOV") and a site continued to relapse into non-compliance thereafter.

39. Respondent's failure to comply with the Permit requirements to enforce a program to reduce pollution in and from construction activities violates both the Permit and the CWA.

Count VII

Failure to Adequately Implement Procedures for Site Inspections

40. Part I.F.5.a of the Permit requires the City to "...implement an enforce a program to reduce pollution in any storm water runoff to the MS4 from construction activities that result in a land disturbance greater than or equal to 1 acre..." and to "implement procedures for site inspections and enforcement of control measures."

41. At a July 22, 2015 construction site visit at 4701 League Island Boulevard, the EPA inspection team identified concrete washout issues that were not identified in previous inspection reports submitted by the City. At the William Penn charter School project site, the EPA inspection team observed plywood best management practices ("BMPs") being utilized, that were not identified in previous inspection reports submitted by the City.

42. Respondent's failure to comply with the Permit requirements to enforce a program to implement procedures for documenting appropriate or failing BMPs violates both the Permit and the CWA.

IV. CIVIL PENALTIES

43. 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 **thirty five thousand dollars (\$35,000)** in full and final settlement of EPA's claims for penalties for the violations alleged herein.

44. Respondent shall pay the total administrative civil penalty of **thirty five thousand dollars (\$35,000)** 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, CWA-03-2017-0147.

Payment by check to "United States Treasury":

By regular mail:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
Box 979077
St. Louis, MO 63197-9000

Contact: 513-487-2091

By overnight delivery:

U.S. Bank
Government Lock Box 979077
US EPA, Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

Contact: 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

Contact for ACH: John Schmid (202-874-7026)
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-

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

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

46. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11(a), EPA is entitled to assess interest on outstanding debts owed to the United States. 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 interest.

Interest on the civil penalty assessed in this CAFO will begin to accrue on the date that a copy of the fully-executed 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).

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

V. GENERAL PROVISIONS

48. For the purpose of this proceeding, Respondent admits the jurisdictional allegations set forth in this CAFO.

49. For the purposes of this proceeding, the Respondent neither admits nor denies the factual allegations and conclusions of law set forth in this Consent Agreement and Final Order.

50. Respondent waives any defenses it might have as to jurisdiction and venue, its right to contest the allegations through hearing or otherwise; and its right to appeal the proposed final order accompanying the Consent Agreement.

51. Respondent shall bear its own costs and attorney fees.

52. The parties agree that settlement of this matter prior to the initiation of litigation is in the public interest and that entry of this CAFO is the most appropriate means of resolving this matter.

VI. PUBLIC NOTICE AND EFFECTIVE DATE

53. Pursuant to 40 C.F.R. § 22.45(b), this CAFO shall be issued after a 40-day public notice period is concluded and following execution by an authorized representative of EPA, and filing with the Regional Hearing Clerk. This CAFO will become final and effective thirty (30) days after it is filed with the Regional Hearing Clerk, pursuant to Section 309(g)(5) of the Act, 33 U.S.C. § 1319(g)(5), or after a public comment process pursuant to 40 C.F.R. § 22.45(b), is concluded, whichever occurs later.

54. 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)(B), EPA has consulted with the PADEP regarding this action, and will mail a copy of this document to the appropriate PADEP official.

VII. APPLICABLE LAWS

55. 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.

VIII. RESERVATION OF RIGHTS

56. 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 the Consolidated Rules of Practice, 40 C.F.R. § 22.18(c). Further, EPA reserves any rights and remedies available to it under the Clean Water Act, 33 U.S.C. §§ 301 *et seq.*, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO, following its filing with the Regional Hearing Clerk.

57. 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 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, EPA may have under law or equity in such event.

IX. FULL AND FINAL SATISFACTION

58. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant has under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for the violations alleged in this CAFO. Compliance with the requirements and provisions of this CAFO shall not be a defense to any action commenced at any time for any other violation of the federal laws and/or regulations administered by EPA.

X. PARTIES BOUND

59. This CAFO shall apply to and be binding upon the Respondent, and Respondent's officers, employees, agents, successors and assigns. 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.

XI. ENTIRE AGREEMENT

60. This CAFO constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this CAFO.

XII. NON-SEVERABILITY

61. 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.

FOR RESPONDENT, CITY OF PHILADELPHIA

Date: 6/1/17


David A. Katz
Deputy Water Commissioner, Compliance

APPROVED AS TO FORM
SOZI PEDRO TULANTE, CITY SOLICITOR

Date: 6/1/17


Divisional Deputy City Solicitor

XIII. FINAL ORDER

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

_____ day of _____, 2017.

Dominique Lueckenhoff, Acting Director
Water Protection Division
U.S. EPA Region III