

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

IN THE MATTER OF) Docket No. CWA-07-2017-0218
)
The Nebraska Department of)
Transportation)
)
Respondent) COMPLAINT AND
) CONSENT AGREEMENT /
) FINAL ORDER
)
Proceedings under Section 309(g))
of the Clean Water Act,)
33 U.S.C. § 1319(g))
_____)

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, 33 U.S.C. § 1319(g), and in accordance with the United States Environmental Protection Agency's ("EPA") 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 ("Consolidated Rules of Practice").

2. This Complaint and Consent Agreement / Final Order ("CA/FO") alleges that the Nebraska Department of Transportation violated Section 301 of the CWA, U.S.C. § 1311, and a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator of the EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands, and Pesticides Division of the EPA, Region 7 ("Complainant").

4. The Nebraska Department of Transportation (formerly "the Nebraska Department of Roads," hereafter "Respondent" or "NDOT") is and was, at all relevant times, a political subdivision of the state of Nebraska 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, and in particular, a "small municipal separate storm sewer system," as defined by 40 C.F.R. § 122.26(b)(4)(i).

Statutory and Regulatory Framework

5. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. *See* Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

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, a National Pollutant Discharge Elimination System ("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 at 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) of the CWA.

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 MS4 systems 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.

19. Section 309(g) of the CWA provides for the assessment of civil penalties for violations of conditions or limitations in a permit issued pursuant to Section 402 of the CWA.

EPA's Factual Allegations

20. 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.

21. 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).

22. 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).

23. 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.

24. Respondent's small MS4 is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. 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).

26. 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).

27. 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.

28. 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.

29. On October 26-30, 2015, PG Environmental, on behalf of the EPA, 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.

30. 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.

31. 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").

32. 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

33. The allegations stated above are herein incorporated.

Count 1

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

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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 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.

40. 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.

41. 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.

42. 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.

43. 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.”

44. 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.

45. 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.

46. 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.

47. 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

48. 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.”

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

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

55. 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

56. 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).

57. 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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.

70. 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.

71. 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.

72. 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

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

74. 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.

75. 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.

76. 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.

CONSENT AGREEMENT

77. Respondent and the EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order.

78. Respondent admits the jurisdictional allegations of this Consent Agreement/Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

79. Respondent neither admits nor denies the factual allegations contained in this Complaint and Consent Agreement/Final Order.

80. Respondent waives any right to contest the allegations set forth in this Consent Agreement/Final Order and its right to appeal this Consent Agreement/Final Order.

81. Respondent and the EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees incurred as a result of this action.

82. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes, regulations, and applicable permits.

83. The undersigned representative(s) of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Complaint and Consent Agreement/Final Order and to execute and legally bind Respondent to it.

Penalty Payment

84. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement/Final Order, Respondent shall pay a civil penalty of **Forty-five Thousand Dollars (\$45,000)** pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to be paid in full no later than thirty (30) days after the effective date of this Consent Agreement/Final Order as set forth below.

85. The payment of penalties must reference docket number "CWA-07-2017-0218" and be remitted using one of the payment methods specified in Appendix A of this Order.

86. Copies of the check, or verification of another payment method for the penalty payment remitted as directed above, shall be mailed to:

Regional Hearing Clerk
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to:

Katherine Reitz
Attorney Advisor
U.S. Environmental Protection Agency – Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

87. Respondent agrees that no portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

88. Respondent understands that, pursuant to 40 C.F.R. § 13.18, interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interests.

Effect of Settlement and Reservation of Rights

89. Respondent's payment of the entire civil penalty pursuant to this Consent Agreement/Final Order resolves all civil and administrative claims pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for alleged violations identified in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

90. Notwithstanding any other provision of this Consent Agreement/Final Order, the EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

91. Respondent has consented to an Administrative Order for Compliance on Consent, CWA-07-2017-0217, and certifies that it is in compliance with the terms of that Order.

92. The effect of settlement is conditional upon the accuracy of the Respondent's representations to the EPA.

93. This Consent Agreement/Final Order shall apply to and be binding upon Respondent, its agents, successors, and assigns. Respondent shall ensure that its directors, officers, employees, contractors, consultants, firms, or other persons or entities acting under or for them, with respect to matters included herein, comply with the terms of this Consent Agreement/Final Order.

94. With respect to matters not addressed in this Consent Agreement/Final Order, the EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties, and damages.

General Provisions

95. The Parties acknowledge that this Consent Agreement/Final Order is subject to public notice and comment requirements pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4) and 40 C.F.R. § 22.45.

96. The State of Nebraska has been provided an opportunity to consult with Complainant regarding this matter in accordance with the requirements of 40 C.F.R. § 22.38(b) and Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

97. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

98. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

99. Pursuant to 40 C.F.R. § 22.31(b), this Consent Agreement/Final Order shall be effective on the date the Final Order is filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Jeffery Robichaud
Acting Director
Water, Wetlands, and Pesticides Division

Date

Katherine Reitz
Attorney Advisor

Date

**RESPONDENT:
THE NEBRASKA DEPARTMENT OF TRANSPORTATION**



Signature

8-31-17

Date

Kyle Schneeweis

Name

Director

Title

FINAL ORDER

Pursuant to 40 C.F.R. 22.18(b)-(c) of the EPA's Consolidated Rules of Practice, the foregoing Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borromeo
Regional Judicial Officer

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy emailed to Attorney for Complainant:

reitz.katherine@epa.gov

Copy by First Class Mail to Respondent:

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

Copy via mail to:

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

Dated: _____

Lisa Haugen
Hearing Clerk, Region 7

**APPENDIX A
PENALTY PAYMENT INFORMATION**

Further information regarding making payments to the U.S. Environmental Protection Agency may be found at:

<http://www.epa.gov/financial/makeapayment>

Cashier's or Certified Check: If payment is being made by cashier's or certified check, submit the check, including the name and docket number of this case, payable to "Treasurer, United States of America":

By U.S. Postal Service:

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

By Common Carrier (Fedex, DHL, UPS):

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

Online Payment: Online payment is available through the Department of Treasury and can be accessed using the information below.

www.pay.gov

Enter "SFO 1.1" (without quotation marks) in the SEARCH field. The first search result should be titled "EPA Miscellaneous Payments – Cincinnati Finance Center," SFO Form Number 1.1. Click on the red button that says, "Continue to the form."

Complete the required fields and pay with a bank account (ACH) or debit/credit card. Keep a copy of the confirmation page for your records.

Wire Transfers: If payment is being made by wire transfer, the wire transfer must indicate the name and docket number of this case and be sent to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read: “D 68010727 Environmental Protection Agency”

Automated Clearing House (ACH) or Remittance Express (REX): If using ACH or REX, payments must indicate the name and docket number of the case and can be made through the U.S. Treasury using the following information:

U.S. Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format
Transaction Code 22 – checking
Physical location of U.S. Treasury Facility:
5700 Rivertech Court
Riverdale, MD 20737
U.S. Treasury Contact Information:
John Schmid: 202-874-7026
Remittance Express (REX): 1-866-234-5681

Payment Tips: To ensure proper processing please include the following information on your payment:

- Company/remitter’s name (as it appears on the EPA document)
- Complete address, including city, state, zip
- Name and phone number of remitter’s point of contact
- EPA docket number
- EPA contact name and phone number, if available
- Reason for payment

Note: It is important to direct payment to the appropriate EPA finance center to ensure your remittance is credited to the proper account. Each finance center has its own unique agency location code, and each U.S. depository has a unique bank routing number.