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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
THE CITY OF LEAVENWORTH, ) Docket No. CWA-07-2015-0023  
KANSAS )  
 )  
Respondent ) FINDINGS OF VIOLATION AND  
 ) ADMINISTRATIVE ORDER FOR  
 ) COMPLIANCE ON CONSENT  
 )  
Proceedings under Section 309(a)(3) of the )  
Clean Water Act, 33 U.S.C. § 1319(a)(3) )  
 )

**Preliminary Statement**

1. The following Findings of Violation and Order for Compliance (“Order”) are made and issued pursuant to Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). This Authority has been delegated by the Administrator of the U.S. Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA Region 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.
2. Respondent is the City of Leavenworth, Kansas (“Respondent” or “the City”), a municipality chartered under the laws of the State of Kansas. Respondent is the owner and/or operator of the Municipal Separate Storm Sewer System (“MS4”), located within the corporate boundary of the City of Leavenworth, Leavenworth County, Kansas.
3. The EPA, together with the City enter into this Section 309(a)(3) Order for the purpose of carrying out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
4. It is the Parties’ intent through entering into this Order to address noncompliance by the City in violation of its MS4 National Pollutant Discharge Elimination System (“NPDES”) permit. As set forth in this Order on Consent, the Parties have amicably reached agreement regarding the timeframes for the City to attain compliance with the CWA and its NPDES permit.
5. By entering into this Order, Respondent (1) consents to and agrees not to contest the EPA’s authority or jurisdiction to issue and enforce this Section 309(a) Order on Consent, (2)

agrees to undertake all actions required by the terms and conditions of this Order on Consent, and (3) consents to be bound by the requirements set forth herein. Respondent neither admits nor denies the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondent admits the jurisdictional allegations herein. For purposes of this Order, Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

6. Respondent neither admits nor denies the factual allegations set forth in this Order.

### **Statutory and Regulatory Framework**

7. 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 NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

8. Section 402(a) of the CWA, 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. 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.

9. 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 (5) categories of stormwater discharges. Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), requires permitting for additional categories of stormwater discharges based on the results of studies conducted pursuant to Section 402(p)(5) of the CWA, 33 U.S.C. § 1342(p)(5).

10. Pursuant to Section 402(p)(6) of the CWA, 33 U.S.C. § 1342(p)(6), EPA promulgated regulations ("Phase II stormwater regulations") at 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.

11. 40 C.F.R. § 122.26(a)(9)(i)(A) states that on or after October 1, 1994, for discharges composed entirely of stormwater . . . operators shall be required to obtain a NPDES permit . . . if the discharge is from a small municipal separate storm sewer system ("MS4") required to be regulated pursuant to 40 C.F.R. § 122.32.

12. 40 C.F.R. § 122.26(b)(8) defines "municipal separate storm sewer" 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): (i) owned or operated

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by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States; (ii) designed or used for collecting or conveying storm water; (iii) which is not a combined sewer; and (iv) which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

13. 40 C.F.R. § 122.26(b)(16) defines “small municipal separate storm sewer system,” in 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 . . . having jurisdiction over disposal of sewage, industrial wastes, stormwater, or other wastes [ . . . ];
- b. not defined as “large” or “medium” municipal separate storm sewer systems pursuant to paragraphs (b)(4) and (b)(7), or designated under paragraph (a)(1)(v) of this section.

14. 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).

15. The Kansas Department of Health and Environment (“KDHE”) is the agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

### **Factual Background**

16. Respondent is a municipality chartered under the laws of the State of Kansas, 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.

17. Respondent operates a stormwater drainage system consisting of, among other things, drain inlets, storm sewers, and outfalls, and as such is a “municipal separate storm sewer” as that term is defined in 40 C.F.R. § 122.26(b)(8). At all times relevant to this Order, Respondent owned and/or operated a MS4, which does not meet the criteria to be a large or medium MS4, and thus is the owner and/or operator of a “small municipal separate storm sewer system,” as defined by 40 C.F.R. § 122.26(b)(4)(i).

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18. Respondent's small MS4 is located in the Leavenworth, Kansas "urbanized area" as defined by the 2000 Census, and therefore, at all times relevant to this Order, Respondent's small MS4 is subject to regulation.

19. Respondent's small MS4 is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14). Respondent discharged pollutants into "navigable waters" as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

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

21. 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.

22. KDHE issued a Final Permit on October 1, 2004, for discharges from Leavenworth's small MS4 under the NPDES, Permit No. KSR044011 (hereinafter "2004 Permit"). This 2004 Permit expired on September 30, 2009. KDHE administratively extended the permit until a new permit was reissued on February 1, 2014, which will expire January 31, 2019 ("Current Permit").

23. On March 6, 2003, the City developed a Stormwater Management Plan which they submitted to KDHE.

24. On or about December 10-13, 2013, EPA performed an inspection of the City's MS4 under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the adequacy of the City's MS4 in accordance with the CWA.

### **Findings of Violation**

25. The facts stated in Paragraphs 16 through 24 above are herein incorporated.

#### **Failure to Implement an Adequate Stormwater Management Program (SWMP)**

26. Part II of the City's 2004 Permit requires the City to develop a Stormwater Management Program document. The SWMP document shall address each of the program areas control measures and any Best Management Practices ("BMPs") which shall be implemented to ameliorate the discharge of Total Maximum Daily Loads ("TMDL") regulated parameters. The SWMP document will be modified if the permittee and/or KDHE determines such modifications are needed to achieve the goals of the program. The SWMP shall be evaluated annually and modifications, if necessary submitted with the annual report required in Part V.B. of the 2004 Permit. The SWMP shall include BMPs for the six (6) minimum controls. The six (6) minimum control measures and the requirements imposed by the 2004 Permit include Public Education and Outreach, Public Involvement and Participation, Illicit Discharge Detection and Elimination,

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Construction Site Stormwater Runoff Control, Post-Construction Stormwater Management in the New Development and Redevelopment Projects, and Pollution Prevention/Good Housekeeping for Municipal Operations.

27. Part 1.A. of the City's Current Permit requires the City to continue to implement, and enforce the current SWMP until an updated SWMP is implemented. Part 1.B. requires the City to update its current SWMP document to include any additional requirements of the Current Permit. The updated SWMP is to be designed to:

- b. reduce the discharge of pollutants from the MS4 to the Maximum Extent Practicable;
- c. continue to implement the six minimum controls as outlined in Paragraph 27 above;
- d. satisfy the requirements of the Current Permit, the CWA, and Kansas surface water quality statutes and regulations.

28. Part IV.A.4.d of the City's 2004 Permit requires the City, in its Construction Site Stormwater Runoff Control program, to develop and implement "procedures for site plan review which incorporate consideration of potential water quality impacts." The City's 2003 SWMP, as described in Paragraph 25, also requires pre-construction site plan review.

29. The EPA inspection referenced in Paragraph 24 above found that the City does not conduct adequate site plan reviews including how water quality is being impacted by construction activities.

30. Part IV.A.4.f. of the City's 2004 Permit requires the City to develop and implement procedures for site inspection and enforcement of control measures at construction sites within the City. The City's 2003 SWMP also requires site-inspection and enforcement of control measures.

31. The EPA inspection referenced in Paragraph 24 above found that the City does not conduct inspection activity that would adequately inspect sites to ensure BMPs are being implemented to prevent offsite migration of sediment.

32. Part IV.A.5.b of the City's 2004 Permit requires the City, as part of its post-construction program, to develop and implement "strategies which include a combination of structural and/or non-structural BMPs appropriate for the municipality." The City's 2003 SWMP also requires BMPs as appropriate.

33. The EPA inspection referenced in Paragraph 24 above documented that the City failed to have uniform procedures to evaluate/recommend post-construction management procedures for public and private projects in the City.

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34. Part IV.A.5.d of the City's 2004 Permit requires the City, as part of its post-construction program, to "ensure adequate long-term operation and maintenance of BMPs." The City's 2003 SWMP also requires adequate long-term operation and maintenance of BMPs.

35. The EPA inspection referenced in Paragraph 24 above documented that the City had not yet fully developed and implemented a plan for long-term operation and maintenance of post-construction stormwater BMPs.

36. The City's failure to implement an adequate SWMP, specifically implement an adequate construction site management program and post-construction stormwater management program is a violation of the City's Permit, issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

### **Order for Compliance**

37. Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a), Respondent is hereby ORDERED to take the actions described below.

38. Within one (1) year of the effective date of this Order, the City shall fully implement measures necessary to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of its MS4 permit.

39. Within thirty (30) days of the full implementation of the measures described above, the City shall provide EPA and KDHE a written description of the actions the City has taken to correct the deficiencies and eliminate and prevent recurrence of the violations cited above.

### **Submissions**

40. All documents, including certifications, required to be submitted to EPA by this Order, shall be submitted by electronic mail to:

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

Electronic submissions will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically shall be submitted in hard-copy as provided in this Paragraph. Hard copy documents are deemed submitted on the date of postmark.

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41. All documents required to be submitted to KDHE pursuant to this Order shall be submitted by mail to:

Mr. Mike Tate, Director, or his successor  
Bureau of Water  
Kansas Department of Health and Environment  
1000 SW Jackson Street, Suite 420  
Topeka, Kansas 66612-1367.

### **General Provisions**

#### **Effect of Compliance with the Terms of this Order for Compliance**

42. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

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

#### **Access and Requests for Information**

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

#### **Severability**

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

#### **Effective Date**

46. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by EPA.

#### **Termination**



47. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 16<sup>th</sup> day of December, 2015.



Karen Flournoy  
Director  
Water, Wetlands and Pesticides Division



Melissa A.C. Bagley  
Assistant Regional Counsel  
Office of Regional Counsel





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CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 661219.

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

The Honorable Mark Preisinger  
Mayor, City of Leavenworth  
100 N. 5<sup>th</sup> Street  
Leavenworth, Kansas 66048,

and via first class mail to:

Mr. Mike Tate, Director  
Kansas Department of Health and Environment  
Bureau of Water  
1000 SW Jackson Street, Suite 420  
Topeka, Kansas 66612-1367.

12/21/15

Date

Kathy Robinson

Signature