



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

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**NOTICE OF ADMINISTRATIVE PENALTY ASSESSMENT
AND SECRETARY'S ORDER**

Pursuant to 7 Del. C. § 6005

Order No. 2022-W-0018

***PERSONALLY SERVED BY
AN ENVIRONMENTAL CRIMES
UNIT OFFICER***

Issued To:

Kevin Williams
Director of Public Works
City of Rehoboth Beach
229 Rehoboth Avenue
P.O. Box 1163
Rehoboth Beach, DE 19971

Dear Mr. Williams:

This is to notify the City of Rehoboth Beach (Respondent) that the Secretary of the Department of Natural Resources and Environmental Control (Department) has found that Respondent has violated 7 Del. C. § 6003, 7 Del. Admin. C. § 7201 *et seq.* Delaware's *Regulations Governing the Control of Water Pollution* (Water Pollution Regulations), and National Pollutant Discharge Elimination System (NPDES) Permit No. DE 0020028. Accordingly, the Department is issuing this Notice of Administrative Penalty Assessment and Secretary's Order (Secretary's Order).

BACKGROUND

The Department is responsible for the administration of the NPDES program and enforcement of the NPDES permits in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, and Chapter 60 of Title 7 of the Delaware Code. Pursuant to this authority, the Department has promulgated the Water Pollution Regulations.

Respondent maintains and operates a series of collection systems for the purposes of collecting, pumping, and treating wastewater from homes and businesses throughout the Rehoboth Beach area. The Department issued NPDES Permit No. DE 0020028 (NPDES Permit) to Respondent, effective July 1, 2017, authorizing the discharge of effluent from Respondent's Wastewater Treatment Plant in Rehoboth Beach, DE (the "Facility"). Through this Wastewater Treatment Plant, Outfall 001 discharges to the Atlantic Ocean via an ocean outfall pipe.

Pursuant to 7 *Del. C.* § 6005, Respondent is hereby notified that by discharging pollutants onto the ground and into surface waters, Respondent is in violation of sections 3.2.1, 3.2.3, and 3.2.4 of the Water Pollution Regulations. In addition, Respondent's failure to comply with specific requirements of its NPDES Permit is a violation(s), as detailed below.

FINDINGS OF FACT

Between the hours of 8:00 p.m. on October 29, 2021 and 2:00 a.m. on October 30, 2021, Respondent's Facility had an overflow of the Oxidation Ditch (OD) during a heavy rain and wind event. The level in the OD began to rise as expected during these types of heavy rain events. As the water level in the OD rose to very high levels, it began to flow out of two disconnected and out-of-use influent pipes that had been cut as part of Respondent's ongoing upgrade of the Facility. Respondent did not ensure that these pipes were capped after being cut to prevent wastewater from discharging if the OD overflowed.

Respondent estimated the overflow total to be between 10,000 and 15,000 gallons of wastewater. Approximately 4,000 gallons were recovered via vacuum truck on the morning of October 30, 2021. The remaining wastewater flowed via overland flow to the surrounding wetlands. This wastewater was unable to be recovered. At the direction of Department staff, Respondent applied lime to the affected area in the afternoon of October 30, 2021, and again on October 31, 2021.

Respondent is in the process of upgrading the Facility's headworks treatment building. As part of this upgrade, flow is diverted from the typical influent pipes. The old influent pipes that are disconnected as part of the construction were not capped off. Under regular circumstances, during a heavy rain event, as the water level in the OD rose, the flow would have gone into the overflow pipe and the Facility operators would have been alerted from high level alarms to divert flow to the empty OD where it could be held until the high influent flow subsided. The decision to not cap the pipes was made because of a miscalculation of the elevation difference between the overflow pipe and the uncapped influent pipes. The incorrect calculation had the existing overflow pipe at a lower elevation than the influent piping. This elevation determination of the piping was incorrect, and Respondent should have capped off the cut influent pipes.

The operator on call that visited the site between 9:00 and 10:00 p.m. on October 29, 2021 and at 2:00 a.m. on October 30, 2021 did not observe the overflow, however he also did not conduct a walk-through of that specific area of the Facility. Other areas of the Facility were physically checked during his visits, but no issues were observed at the clarifiers or at the effluent leaving the Facility, and all high-level alarms from the pump stations had cleared. On October 30, 2021, at approximately 9:00 a.m., after the operator had returned for his normal daily schedule, he observed evidence that an overflow had occurred and began calling for additional operators to assist. By this time, there was no active overflow occurring. DNREC Division of Water staff and the Emergency Hotline were called on October 30, 2021 shortly after the overflow had been discovered. Division of Water staff attempted to reach out to the Facility on October 31, 2021, to obtain details on the overflow and to ensure that Respondent was employing appropriate cleanup and sampling methods; however, no one responded on behalf of

Respondent. Furthermore, Respondent did not provide any further communication to the Department regarding this overflow until Division of Water staff went to the Facility on November 1, 2021. During the November 1st visit, Division of Water staff directed Respondent to begin downstream sampling of the event to assess any water quality impacts of the overflow. Under Part II.A.4. of its NPDES Permit, Respondent should have immediately initiated the sampling protocol on October 30, 2021, upon discovering the overflow and continued sampling for several days thereafter as a best management practice in instances of an overflow from the Facility.

STATUTORY AND REGULATORY VIOLATIONS

1. *7 Del. C. § 6003(a)(2)* states:

“No person shall, without first having obtained a permit from the Secretary, undertake any activity in any way which may cause or contribute to discharge of a pollutant into any surface or ground water.”

2. *7 Del. Admin. C. § 7201-3.2.1* states, in part:

“No person shall undertake any activity that causes or contributes to the discharge of a pollutant to any surface water or groundwater.”

3. *7 Del. Admin. C. § 7201-3.3.3* states:

“No person shall discharge any pollutant from a point source into surface or ground water, directly or indirectly, except as authorized pursuant to a permit granted under these regulations, unless such discharge is specifically exempted from such permit regulations.”

7 Del. Admin. C. § 7201-3.2.4 states, in part:

“No person shall discharge liquid waste from an existing septic system or other system where such liquid waste flows to the surface of the ground or into surface water.”

NPDES PERMIT VIOLATIONS

Respondent's failure to meet the requirements of NPDES Permit No. DE 0020028 is a direct violation as cited below:

1. NPDES Permit No. DE 0020028, Part II A.3 (Facilities Operation) list specific requirements for maintaining in good order and operating as efficiently as possible all collection and treatment facilities and systems (and related appurtenances) installed or used by the permittee to achieve compliance with the terms and conditions of the permit.
2. NPDES Permit No. DE 0020028, Part II A.4 (Adverse Impact) states "The permittee shall take all reasonable steps to minimize any adverse impact to State waters resulting from noncompliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and extent of the noncomplying discharge."

CONCLUSIONS

Based on the foregoing facts, the Department has determined that Respondent violated 7 *Del. C. § 6003(a)(2)*, 7 *Del. Admin. C. §§ 7201- 3.2.1, 3.2.3, and 3.2.4*, and Parts II A.3 and II A.4 of NPDES Permit No. DE 0020028.

ASSESSMENT OF PENALTY AND COSTS

Pursuant to 7 *Del. C.* § 6005(b)(3), the Secretary may impose an administrative penalty of not more than \$10,000.00 for each day of violation detailed in this Order. In assessing the administrative penalty, 7 *Del. C.* § 6005(b)(3) instructs the Secretary to consider the following factors: (1) the nature, circumstances, extent and gravity of the violation, or violations; (2) the ability of the violator to pay; (3) any prior history of such violations; (4) the degree of culpability; (5) the economic benefit or savings (if any) resulting from the violation; and (6) such other matters as justice may require.

Having considered these factors, the Secretary is assessing an administrative penalty of \$10,000.00 for the violations identified in this Assessment and Order.

1) The Nature, Circumstances, Extent and Gravity of the Violation, or Violations:

The nature, circumstances, extent, and gravity of the violations are significant. The overflow resulted in approximately 5,000 to 10,000 gallons of partially treated wastewater reaching the wetland area and ultimately releasing to Rehoboth Bay. The violations could have been prevented with better oversight of the upgrade project and having the influent pipes capped after they were cut. In addition, the operator could have mitigated the release sooner had a visual inspection of that area of the Facility been performed during the overnight walk-through.

2) Respondent's Ability to Pay:

The record contains no information that Respondent does not have the ability to pay the administrative penalty assessed. Furthermore, the size and nature of Respondent's operations indicates that Respondent has the ability to pay the administrative penalty assessed and the penalty amount is sufficient to deter Respondent from committing similar violations in the future.

3) Prior History of Violations:

While Respondent has prior instances of environmental violations, the penalty assessment was not increased based on those prior violations.

4) Degree of Culpability:

While the weather was a contributing factor to the event, Respondent's degree of culpability is significant, as Respondent could have taken multiple actions to prevent these violations from occurring. Respondent should have been more knowledgeable of its current infrastructure and design of the Facility, primarily due to the ongoing upgrades at the Facility.

The violations occurred due to a miscalculation of the height difference of the overflow pipe and the disconnected influent pipes. Had the influent pipes been capped, which should have been a standard precaution employed, it is unlikely that these violations would have occurred. Furthermore, had Respondent employed reasonable oversight measures, such as a more thorough walk through of the Facility during a significant weather event, the overflow could have been discovered sooner, likely resulting in a decreased volume of unauthorized discharge into the wetlands.

In addition, although Respondent properly notified the Department of the release upon discovery, Respondent failed to maintain effective communication with the Division of Water to provide details of the upset and assure proper cleanup and sampling protocols were underway. This resulted in unnecessary delay in implementation of instream sampling to gauge if water quality impacts had occurred.

Thus, the penalty amount assessed is appropriate in view of Respondent's culpability for these violations.

5) Economic Benefit or Savings Resulting from the Violation(s):

With respect to the economic benefit, Respondent did not incur any meaningful economic benefit from these violations, and thus the penalty assessment was not increased based upon any economic benefit or savings.

6) Such Other Matters as Justice May Require:

Lastly, considering such other matters as justice may require, the penalty assessed is proportional to the violations and calculated so as to deter Respondent, and those similarly situated, from engaging in future violations.

SECRETARY'S ORDER ASSESSING ADMINISTRATIVE PENALTY AND COSTS

Pursuant to 7 *Del. C.* § 6005(b)(3), this is written notice to Respondent that on the basis of its findings, the Department is assessing Respondent an administrative penalty of **\$10,000.00** for the violations identified in this Secretary's Order.

Respondent shall remit a check payable to the State of Delaware in the amount of **\$10,000.00** within thirty (30) days of receipt of this Secretary's Order, to William J. Kassab, Deputy Attorney General, c/o Emily Gabriellini, 102 W. Water Street, Dover, Delaware 19901.

PUBLIC HEARING AND APPEAL RIGHTS

This Secretary's Order affects Respondent's legal rights and is effective and final upon receipt by Respondent. Pursuant to Section 6008 of Title 7 of the Delaware Code, any person whose interest is substantially affected by this action of the Secretary may appeal to the Environmental Appeals Board within **20 days** of the receipt of the Secretary's Order. In the alternative, Respondent may, pursuant to 7 *Del. C.* § 6005(b)(3), request a public hearing on the Secretary's Order within **30 days** of receipt of the Order. A public hearing pursuant to 7 *Del. C.* § 6005(b)(3) would be conducted pursuant to 7 *Del. C.* § 6006, and the Secretary's order following the hearing would be subject to appeal, pursuant to 7 *Del. C.* § 6008, by any person substantially affected.

Respondent is further advised that the above assessed administrative penalty shall be due and owing within 30 days of Respondent's receipt of this Assessment and Order. In the event of nonpayment of the administrative penalty assessed above, and after Respondent has exhausted all legal appeals, if any, a civil action may be brought by the Secretary in Superior Court for collection of the administrative penalty, including interest, attorneys' fees and costs, and the validity, amount and appropriateness of such administrative penalty and/or costs shall **not** be subject to review pursuant to 7 *Del. C.* § 6005(b)(3).

To request a public hearing pursuant to 7 *Del. C.* § 6005(b)(3), please submit your request, in writing, to:

Department of Natural Resources and Environmental Control
Office of the Secretary
89 Kings Highway
Dover, DE 19901
Ph: (302) 739-9000

To submit an appeal to the Environmental Appeals Board pursuant to 7 *Del. C.* § 6008, you must file your written statement of appeal and submit a check, made payable to: "Environmental Appeals Board," for the \$50.00 filing fee, to:

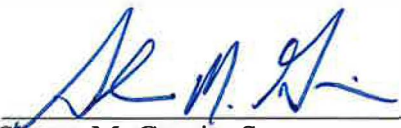
Department of Natural Resources and Environmental Control
Office of the Secretary
Attn: Assistant to the Environmental Appeals Board
89 Kings Highway
Dover, DE 19901
Ph: (302) 739-9000

For additional information on filing an appeal with the Environmental Appeals Board and what information you must include in your written statement of appeal, please refer to the Environmental Appeals Board Regulations, codified at 7 *Del. Admin. C.* § 105.

The Department, to the extent necessary, reserves the right to take additional enforcement actions regarding these and other violations by Respondent, including but not limited to one or more of the following: an action under 7 Del. C. § 6005(b)(1) seeking penalties for past violations, an action under 7 Del. C. § 6005(b)(2) seeking penalties for continuing violations, an action in the Court of Chancery pursuant to 7 Del. C. § 6005(b)(2) seeking a temporary restraining order or an injunction, and the imposition of civil penalties and recovery of the Department's costs and attorney's fees pursuant to 7 Del. C. §§ 6005(b)(3) and (c)(1). Nothing in this document shall be deemed to estop, or in any way preclude any additional enforcement action for these or any other violations, including administrative and civil penalties for each day of violation, or an action for the recovery of Department costs expended in abating these violations.

If you have any questions, please contact, or have your attorney contact William J. Kassab, Deputy Attorney General, at 302-395-2600.

DATE: 9/15/22


Shawn M. Garvin, Secretary
Department of Natural Resources and
Environmental Control

cc: William J. Kassab, Deputy Attorney General
Steven Smailor, Director, DNREC Division of Water
Nicole L. Smith, Program Manager I, Division of Water

WAIVER OF STATUTORY RIGHT TO A HEARING

The City of Rehoboth Beach hereby waives its right to a hearing and its opportunity to appeal or contest this Assessment and Order, and agrees to the following:

1. The City of Rehoboth Beach will pay the administrative penalty in the amount of **\$10,000.00** by sending a check payable to the State of Delaware within 30 days of receipt of this Assessment and Order. The check shall be directed to William J. Kassab, Deputy Attorney General, c/o Emily Gabriellini, 102 W. Water Street, Dover, Delaware 19901;
2. The City of Rehoboth Beach further agrees to abide by all the terms and conditions of this Assessment and Order.

City of Rehoboth Beach

Date: _____

By: _____
(Signature)

Title: _____

Name: _____
(Print)