



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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CONCILIATION ORDER BY CONSENT
SECRETARY'S ORDER No. 2016-W-0036

Issued Pursuant to 7Del. C. §6005(b)(2)

Issued to: Mr. Andrew Jakubowitch- Public Works Director
Kent County Levy Court
555 Bay Road Dover, DE 19901
Dear Mr. Jakubowitch:

This Conciliation Order by Consent and Secretary's Order ("Order") reflects the mutual effort by Kent County Levy Court ("Kent County") and the Secretary of the Department of Natural Resources and Environmental Control ("Secretary or DNREC") (collectively the "Parties") to attain compliance with 7 Del. C. Chapter 60 by Conciliation pursuant to 7 Del. C. §6005(b)(2).

SECTION I : BACKGROUND

WHEREAS, Kent County operates a Regional Wastewater Treatment Facility ("WWTF") located in Milford, Delaware; and

WHEREAS, DNREC is responsible for the administration of the National Pollutant Discharge Elimination System (NPDES) program in accordance with 33 U.S.C. §§1251 *et seq.* and 7 Del. C. Chapter 60; and

WHEREAS, pursuant to this authority, DNREC issued NPDES Permit DE 0020338 ("Permit"), effective November 1, 2006, to Kent County, authorizing the discharge of treated effluent from the Kent County's WWTF through its Outfall 001 to The Gut, a tributary of the Murderkill River; and

WHEREAS, pursuant to Part I.B.1 of the Permit, Kent County is required to monitor its discharge by collecting samples of said discharge and analyzing them for a number of pollutant parameters as more fully specified in the Permit, summarizing this data in a monthly Discharge Monitoring Report (DMR) regularly submitted to DNREC; and

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WHEREAS, beginning with calendar year 2007 and continuing to the present, Kent County submitted DMRs, "5-Day Letters", and non-compliance letters to DNREC reporting effluent limitation and permit violations, more fully delineated in Exhibit A, attached hereto and incorporated by reference herein; and

WHEREAS, these incidents appear to be the direct result of improper operation, equipment failures, process overloads, and various other circumstances as described in the reports as submitted to DNREC; and

WHEREAS, as a result of these reported incidents, Notice of Violation (NOV) W-11-SWD-02 was delivered to Kent County on March 22, 2011. Additionally, NOV W-13-SWD-02 was delivered to Kent County on October 17, 2013; and

WHEREAS, during the period calendar year 2007 through the present, Kent County reported numerous Sanitary Sewer Overflows (SSO) that resulted in the discharge of untreated sewage to the ground and, in several cases, to the storm sewer and/or surface waters (Note: in one case, an excess of one million gallons was directly discharged into Cypress Branch, a tributary of the St. Jones River); and

WHEREAS, in view of the incidents delineated *supra* and pursuant to 7 Del. C. §6005(b)(3), DNREC has drafted a Notice of Administrative Penalty Assessment and Secretary's Order assessing an administrative penalty of Eighty-Seven Thousand Fifty Dollars (\$87,050) for the incidents described herein, and further, pursuant to 7 Del. C. §6005 (c), assessing an amount of Eleven Thousand, Nine Hundred Seventy Three Dollars (\$11,973) to cover DNREC abatement expenses; and

WHEREAS, both DNREC and Kent County agree that the resolution of these compliance issues without further protracted formal enforcement actions is in the best interest of the Parties and can be effectively accomplished *via* this Order designed to comprehensively address permitting issues on a facility-wide basis in a systematic manner and additionally providing DNREC with enforceable assurances that the necessary actions will be timely undertaken and completed.

SECTION II: CONCILIATION

NOW THEREFORE, Kent County and DNREC jointly execute this Order to effectuate the purposes and actions delineated herein, and pursuant to 7 Del. C. §6005(b)(2), it is Ordered and Agreed as follows:

1. Pursuant to 7 Del. C. §6005(b)(3), DNREC is assessing Kent County an administrative penalty of **\$87,050** due and payable within sixty (60) days of the effective date of this Order. Further, pursuant to 7 Del. C. §6005(c)(1), Kent County shall reimburse DNREC for its abatement expenses in the amount of **\$11,973**. In the alternative, Kent County may elect to offset the administrative penalty by undertaking an appropriate Environmental Improvement Project (EIP) addressing environmental issues affecting the facility. If Kent County so elects, any such activity is expressly contingent upon the submission of a final project proposal to DNREC, in a manner that results in such project being reviewed and approved by DNREC and ready for commencement of activities **no later than** 60 days from the effective date of this Order. At a minimum, this final project packet shall include sufficient documentation describing its environmental benefit, detailing expenses to be incurred in the development and implementation of the project, and stipulating a proactive completion timeline. The successful completion of the project, subject to the approval of DNREC, shall result in the direct offset not to exceed 75% of the Administrative Penalty Assessment (an amount not to exceed \$65,288), leaving a remaining balance of not less than \$21,762, plus DNREC abatement expenses in the amount of \$11,973. Kent County shall remit these payments in two checks payable to the State of Delaware, and mailed to: Delaware Department of Justice, Attn: Mr. Ralph K. Durstein III, Esquire, 102 W. Water Street, Dover, Delaware, 19901. In the event that Kent County fails to commence an approved EIP **no later than** 60 days from the effective date of this Order, the entire Administrative Penalty assessment of \$87,050 and abatement expenses of \$11,973 shall become immediately due and payable.

2. Notwithstanding any express stipulation in this Order to the contrary, if any event occurs that causes or may cause a delay or have a materially adverse effect on Kent County's ability to perform in compliance with this Order, and such event is beyond Kent County's reasonable control and is not the product or result of Kent County's negligence (*Force Majeure* Event), Kent County shall notify DNREC, in writing, within fifteen (15) calendar days of when Kent County first knew of the event or should have known of the event by the exercise of due diligence. In this written notice, Kent County shall provide sufficient evidence to support this claim. Unanticipated or increased costs or expenses associated with the performance of Kent County's obligations as described herein shall **not** constitute a *Force Majeure* Event. DNREC shall respond to Kent County, in writing, regarding its claim of delay or impediment to performance within fifteen (15) calendar days of receipt of notice of claim. Assessment of the effect, if any, of the enumerated factors on Kent County's ability to comply with the terms of this Order shall be in the sole discretion of

DNREC, and DNREC retains full discretion to extend or modify the terms of this Order, or not, as it sees fit.

3. In the event Kent County fails to meet the deadlines or fails to complete any project described or authorized herein, DNREC reserves the right to commence any administrative, civil and/or criminal remedies against Kent County pursuant to 7 *Del. C.* §6005.
4. When Kent County believes that it has completed all of the activities in compliance with the requirements of this Order, then Kent County shall so certify to DNREC, in writing, including a delineation of the actual expenses incurred in the completion of project activities described herein. Within sixty (60) days after the receipt of Kent County's certification, DNREC shall provide a written response to Kent County indicating partial or complete concurrence. If DNREC determines that concurrence is complete, this Order will be deemed satisfied; if concurrence is partial, DNREC will identify the outstanding activities that require satisfaction. Either notice will be in writing.
5. By accepting the stipulations contained herein and executing this Order, Kent County formally acknowledges that it has read and understands this Conciliation Order by Consent and voluntarily waives its right to a hearing and to appeal or contest this Order and further agrees to perform each of the actions listed in this Order pursuant to the schedule set forth herein.
6. Miscellaneous Provisions:
 - a. Binding on Successors: It is the intention of the parties that this Order shall be binding upon and enforceable against the Parties and their successors, heirs, executors, administrators and assigns.
 - b. Severability: In the event that any provision (section, paragraph, or portions thereof) of this Order shall be held invalid or unenforceable for any reason, it shall not in any way invalidate, affect, or impair the remaining provision(s) (sections, paragraphs, or portions thereof) of this Order, and to this end, the provisions of this Order are hereby declared to be severable.
 - c. Construction: The agreement shall be construed according to the intent of the parties to resolve the pending violations and to prevent future violations and harm to the environment. No provision(s) or paragraph(s) of this Order shall be construed based on authorship.

- d. **Compliance with Law:** Nothing in this Order shall relieve Kent County of its obligation to comply with all applicable federal, state or local laws or regulations.
- e. **Good Faith:** The Parties agree to act in good faith and to cooperate fully with each other in carrying out the intent of this Order, provided that nothing in this Order shall be construed to restrict DNREC's regulatory and permitting judgment and discretion, and nothing in this Order shall be construed to require DNREC to pay or appropriate any monies or expend any funds.
- f. **Notices:** Any notices in regard to this Order shall be in writing and sent to: Department of Natural Resources and Environmental Control, Division of Water, Surface Water Discharges Section, ATTN: Mr. Glenn F. Davis, Environmental Program Manager I, 89 Kings Highway, Dover, Delaware, 19901, with a copy sent to: Delaware Department of Justice, ATTN: Mr. Ralph K. Durstein, III, Esquire, 102 West Water Street, Dover, Delaware, 19901.
- g. **Entire Understanding:** This Order constitutes the entire agreement and settlement between the Parties. The Parties acknowledge that this Order may not be amended except in writing executed by both Parties.
- h. **No Third Party Rights:** The Parties to this Order expressly intend that this Order shall create no right(s) in any person or entity not a party to this Order.
- i. **This Order becomes effective on the date of execution by the Secretary of DNREC.**

Date: 9/11/16

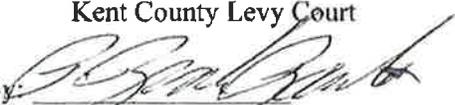


David S. Small, Secretary
Department of Natural Resources
And Environmental Control

Agreed and Accepted:

Date: 9/28/16

Kent County Levy Court

By: 
Name: P. Brooks Banta
Title: President

**CONCILIATION ORDER BY CONSENT
SECRETARY'S ORDER NO.**

EXHIBIT A

Outfall 001 Violations

A. The permit limit of 30 mg/l for the daily maximum concentration of Total Suspended Solids (TSS) was exceeded on the following days during CY 2007 through May 2015:

- January 2 - 10, 2007 (9-days) – TSS max daily concentrations reported between 32.0 mg/l and 49.0 mg/l
- March 16, 2007 (1-day) – TSS max daily concentration reported as 245.8 mg/l
- April 15, 2009 (1-day) – TSS max daily concentration reported as 164 mg/l
- January 25, 2010 (1-day) – TSS max daily concentration reported as 60.0 mg/l
- February 22, 2010 (1-day) – TSS max daily concentration reported as 42.4 mg/l
- February 23, 2010 (1-day) – TSS max daily concentration reported as 286.0 mg/l
- February 24, 2010 (1-day) – TSS max daily concentration reported as 35.2 mg/l
- March 13, 2010 (1-day) – TSS max daily concentration reported as 211.0 mg/l
- April 27, 2010 (1-day) – TSS max daily concentration reported as 81.0 mg/l
- May 3, 2010 (1-day) – TSS max daily concentration reported as 80.0 mg/l
- May 4, 2010 (1-day) – TSS max daily concentration reported as 36.0 mg/l
- May 19, 2010 (1-day) – TSS max daily concentration reported as 77.0 mg/l
- December 24, 2010 (1-day) – TSS max daily concentration reported as 38.0 mg/l
- December 27, 2010 (1-day) – TSS max daily concentration reported as 38.0 mg/l
- December 28, 2010 (1-day) – TSS max daily concentration reported as 36.4 mg/l
- December 29, 2010 (1-day) – TSS max daily concentration reported as 500.0 mg/l
- December 30, 2010 (1-day) – TSS max daily concentration reported as 46.0 mg/l
- January 12, 2011 (1-day) – TSS max daily concentration reported as 46.2 mg/l
- March 8, 2013 (1-day) – TSS max daily concentrations reported 74.0 mg/l
- May 21 – 23, 2014 (3-days) – TSS max daily concentrations reported between 37 mg/l and 44 mg/l
- February 24, 2016 (1-day) – TSS max daily concentration reported as 38.8 mg/l

B. The permit limit of 4,080 lbs/day for the daily maximum loading of Total Suspended Solids (TSS) was exceeded on the following days during CY 2007 through May 2015:

- January 8, 2007 (1-day) – TSS max daily loading reported as 5,662 lbs/day
- March 16, 2007 (1-day) – TSS max daily loading reported as 13,707 lbs/day
- April 15, 2009 (1-day) – TSS max daily loading reported as 20,763 lbs/day
- December 9, 2009 (1-day) – TSS max daily loading reported as 5,664 lbs/day
- January 25, 2010 (1-day) – TSS max daily loading reported as 9,958 lbs/day
- February 22, 2010 (1-day) – TSS max daily loading reported as 6,785 lbs/day
- February 23, 2010 (1-day) – TSS max daily loading reported as 57,579 lbs/day
- February 24, 2010 (1-day) – TSS max daily loading reported as 6,596 lbs/day

- March 13, 2010 (1-day) – TSS max daily loading reported as 45,524 lbs/day
- April 27, 2010 (1-day) – TSS max daily loading reported as 11,282 lbs/day
- May 3, 2010 (1-day) – TSS max daily loading reported as 10,675 lbs/day
- May 4, 2010 (1-day) – TSS max daily loading reported as 4,803 lbs/day
- May 19, 2010 (1-day) – TSS max daily loading reported as 11,109 lbs/day
- December 24, 2010 (1-day) – TSS max daily loading reported as 5,483 lbs/day
- December 27, 2010 (1-day) – TSS max daily loading reported as 4,112 lbs/day
- December 28, 2010 (1-day) – TSS max daily loading reported as 4,189 lbs/day
- December 29, 2010 (1-day) – TSS max daily loading reported as 73,809 lbs/day
- December 30, 2010 (1-day) – TSS max daily loading reported as 5,678 lbs/day
- January 12, 2011 (1-day) – TSS max daily loading reported as 6,357 lbs/day
- March 8, 2013 (1-day) – TSS max daily loading reported as 8,905 lbs/day
- May 21 – 23, 2014 (3-days) – TSS max daily loading reported between 4,416 lbs/day and 5,174 lbs/day
- February 24, 2016 (1-day) – TSS max daily loading reported as 5,326 lbs/day

C. The permit limit of 20 mg/l for the monthly average concentration for Total Suspended Solids (TSS) was exceeded for the following months:

- January, 2007 – TSS monthly average concentration reported as 22.7 mg/l
- December, 2010 – TSS monthly average concentration reported as 39.5 mg/l

D. The permit limit of 93.7 mg/l for the daily maximum loading of Total Phosphorus (TP) was exceeded on the following days during CY 2007 through May 2015:

- May 2, 2011 – May 23, 2011 (21 days) – TP daily maximum was reported at 142.05 lbs/day to 199.81 lbs/day
- September 14, 2012 (1 day) – TP was reported at 104.4 lbs/day
- May 19 – 25, 2014 (7-days) – TP was reported at 180.4 lbs/day

E. The permit limit of 62.5 lbs/day for the average daily loading of Total Phosphorus (TP) was exceeded for the following months during CY 2007 through May 2015:

- May, 2011 – TP average daily loading was reported at 77 lbs/day
- May, 2014 – TP average daily loading was reported at 81.3 lbs/day

F. The permit limit of 27.6 mg/l for the daily maximum concentration of Biochemical Oxygen Demand (BOD₅) was exceeded on the following days during CY 2007 through May 2015:

- March 16, 2007 (1-day) – BOD₅ max daily concentration reported as >33 mg/l
- April 15, 2009 (1-day) – BOD₅ max daily concentration reported as 77.0 mg/l
- March 13, 2010 (1-day) – BOD₅ max daily concentration reported as 98.4 mg/l
- May 3, 2010 (1-day) – BOD₅ max daily concentration reported as 69.5 mg/l

- May 19, 2010 (1-day) – BOD₅ max daily concentration reported as 37.9 mg/l
- December 9, 2010 (1-day) – BOD₅ max daily concentration reported as 32.2 mg/l
- December 24, 2010 (1-day) – BOD₅ max daily concentration reported as 31.9 mg/l
- December 29, 2010 (1-day) – BOD₅ max daily concentration reported as 185.0 mg/l
- December 30, 2010 (1-day) – BOD₅ max daily concentration reported as 49.0 mg/l
- January 2, 2011 (1-day) – BOD₅ max daily concentration reported as 30.5 mg/l
- January 12, 2011 (1-day) – BOD₅ max daily concentration reported as 38.7 mg/l

G. The permit limit of 3,753 lbs/day for the daily maximum loading of Biochemical Oxygen Demand (BOD₅) was exceeded on the following days during CY 2007 through May 2015:

- March 16, 2007 (1-day) – BOD₅ max daily loading reported as >4,744 lbs/day
- April 15, 2009 (1-day) – BOD₅ max daily loading reported as 9,748.3 lbs/day
- January 25, 2010 (1-day) - BOD₅ max daily loading reported as 4,165 lbs/day
- March 13, 2010 (1-day) – BOD₅ max daily loading reported as 21,230 lbs/day
- May 3, 2010 (1-day) – BOD₅ max daily loading reported as 9,563 lbs/day
- May 19, 2010 (1-day) – BOD₅ max daily loading reported as 5,468 lbs/day
- December 24, 2010 (1-day) – BOD₅ max daily loading reported as 4,603 lbs/day
- December 29, 2010 (1-day) – BOD₅ max daily loading reported as 27,309 lbs/day
- December 30, 2010 (1-day) – BOD₅ max daily loading reported as 6,048 lbs/day
- January 12, 2011 (1-day) – BOD₅ max daily loading reported as 5,325 lbs/day

H. The permit limit of 18.4 lbs/day for the monthly average concentration of Biochemical Oxygen Demand (BOD₅) was exceeded during the following month:

- December, 2010 – BOD₅ monthly average concentration reported as 21.5 mg/l

I. The permit limit of “non-detectable” for the daily maximum concentration for Total Residual Chlorine (TRC) was exceeded on the following day:

- March 24, 2007 – TRC maximum concentration reported as 0.93 mg/l

J. The permit limit of 33 col/100 ml for the monthly geometric mean for Enterococcus was exceeded during the following months in CY 2007 through May 2015:

- May, 2010 – Enterococcus geometric mean reported as 43 col/100ml
- December, 2010 – Enterococcus geometric mean reported as 36 col/100ml
- January, 2011 – Enterococcus geometric mean reported as 65 col/100ml
- June, 2011 – Enterococcus geometric mean reported as 50.2 col/100ml
- July, 2013 – Enterococcus geometric mean reported as 81 col/100ml
- August, 2013 – Enterococcus geometric mean reported as 38 col/100ml
- July, 2015 – Enterococcus geometric mean reported as 45 col/100ml
- February, 2016 – Enterococcus geometric mean reported as 35 col/100 ml

K. The permit limit of 274,115 lbs. for the 12-month Cumulative total for Total Nitrogen (TN) was exceeded for the following months:

- May, 2011 – Cumulative Total for TN was reported at 388,124 lbs.
- June, 2011 – Cumulative Total for TN was reported at 356,489 lbs.
- July, 2011 – Cumulative Total for TN was reported at 342,461 lbs.
- August, 2011 – Cumulative Total for TN was reported at 332,142 lbs.
- September, 2011 – Cumulative Total for TN was reported at 319,011 lbs.
- October, 2011 – Cumulative Total for TN was reported at 317,580 lbs.
- November, 2011 – Cumulative Total for TN was reported at 309,856 lbs.
- December, 2011 – Cumulative Total for TN was reported at 274,466 lbs.

L. The permit limit 751 lbs/day for the average daily loading of Total Nitrogen (TN) was exceeded for the following month:

- August, 2013 – TN average daily loading was reported at 908 lbs/day
- September, 2013 – TN average daily loading was reported at 844 lbs/day

M. The permit requirement that the monthly Discharge Monitoring Report (DMR) be postmarked by no later than the 28th day following the completion of any particular month was exceeded for the following reporting month:

- The July, 2012 DMR was not postmarked until September 28, 2012 and was not received at DNREC until October 1, 2012.

Additional Statutory and Regulatory Violations:

Sanitary Sewer Overflows (SSO)

During the period CY 2007 through May 2015, the Respondent reported numerous Sanitary Sewer Overflows (SSO) that resulted in untreated sewage discharges to the ground and in several cases, to the storm sewer and/or surface waters. In one (1) case, an excess of one million gallons was discharged directly to Cypress Branch (a tributary of St. Jones River).

- August 14, 2011 – SSO at Carter Road – 5,000 gals. (ground)
- December 7, 2011 – SSO at Pump Station 3 – 11,250 gals. (Mirror Lake)
- December 15, 2011 – SSO at Pump Station 2 – 7,000 gals. (ground)
- December 18, 2011 – SSO at Pump Station 1 – 8,000 gals. (ground)
- August 10, 2012 – SSO at Pump Station 14 – 1,000 gals. (Moore's Lake)
- September 3, 2012 – SSO at Pump Station 3 – 15,000 gals. (St. Jones River)
- October 16, 2012 – SSO at Pump Station 16 – 500 gals. (ground)
- November 28, 2012 – SSO at Rt. 12, ½ mile West of Frederica – 15,000 gals. Pumped into side stream surface waters
- January 21, 2013 – SSO at Kits Hummock Road Force Main – 1,000 gals. (ground)
- May 2, 2013 – SSO at Pump Station 20 – 1,500 gals. (ground)

- May 21, 2013 – SSO at Pump Station 4 – 4,000 gals.(ground/some surface water)
- June 11,2013 – SSO at 706 Peachtree Run – 40,000 gals (ground)
- June 16, 2013 – SSO at Clapham Road – 61,200 gals to corn field and 1.16 Mgals into Cypress Branch. Kent County Levy Court maintains and operates a series of collection systems for the purposes of collecting, pumping, and treating wastewater from homes and businesses throughout Kent County. One such portion of the permitted collection system is a 36-inch diameter forcemain that runs along Clapham Road (AKA Alternate Route 13); this forcemain delivers sewage to the Kent County Wastewater Treatment Facility. A portion of this forcemain is located along Clapham Road about ½ mile north of Little Heaven., and is the section involved in the violations.

On Sunday, June 16, 2013, at 2:32 PM, DNREC received a report from Kent County Public Works of sewage exiting an air release valve (associated with the 36-inch forcemain) on the south shoulder of Clapham road (1/2 mile north of Little Heaven and near Sophers Row). Leakage from this air release valve resulted in a Sanitary Sewer Overflow spilling approximately 61,200 gallons of untreated wastewater into the adjacent corn field, and approximately 2,000 gallons onto the roadside swale (much of which was recovered with pump trucks). To facilitate repair of the air release valve, flow thru this section of the forcemain had to be diverted. This action resulted in increased flow to Pump Station No. 4 (Locust Grove Road) and ultimately resulted in PS 4 intermittently being diverted over the emergency weir and causing approximately 1.16 million gallons of untreated sewage to be discharged directly into Cypress Branch (from late Sunday afternoon 6/16 to mid-morning on Monday, 6/17)

- August 28, 2013 – SSO at Pump Station 3 – 20,000 gals. (ground)
- October 13, 2013 – SSO at Pump Station 20D – 70 gals. (ground)
- December 19, 2013 – SSO at Pump Station 24 – 2,000 gals. (ground)
- June 23, 2014 – SSO at Pump Station 8 – 3,000 gals. (ground)
- July 10, 2014 – SSO at Pump Station 1 – 56,000 gals. (Mill Creek)
- July 16, 2014 – SSO at Force Main break at Rt. 13 & Rustic Lane - <1,000 gals. (into storm drain and surrounding ground)
- August 12, 2014 – SSO at Pump Station 2 – 1,000 gals. (ground)
- January 22, 2015 – SSO at Pump Station 2 & 6 – 40,000 gals. to 50,000 gals. total (ground)
- June 3, 2015 – Grease Trap Material Spill at WWTP – 1,000 gals.
- November 8, 2015 – SSO at entrance to Postlethwait Middle School – 300 gals. (ground)
- May 6, 2016 – SSO at 1777 South State Street (Moore's Lake Area) – Pump Station LS3 – 57,526 gals. (into small pond across from Moore's Lake).
- May 15, 2016 – SSO at Pump Station 4 – 137,000 gals.