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16 **IN THE UNITED STATES DISTRICT COURT**
 17 **FOR THE DISTRICT OF NEVADA**

18 UNITED STATES OF AMERICA)
 19 and)
 20 STATE OF NEVADA, DEPT. OF)
 CONSERVATION AND NATURAL)
 21 RESOURCES, DIVISION OF)
 ENVIRONMENTAL PROTECTION)
 22)
 23 Plaintiffs,)
 24)
 v.)
 25)
 26 NEVADA DEPARTMENT OF)
 TRANSPORTATION,)
 27)
 Defendant.)

CASE NO. 3:16-cv-453

COMPLAINT

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1 **COMPLAINT**

2 The United States of America, by the authority of the Attorney General of the United
3 States, and through the undersigned attorneys, acting at the request of the United States
4 Environmental Protection Agency (EPA), and the State of Nevada, Department of Conservation
5 and Natural Resources, Division of Environmental Protection (NDEP), by and through their
6 undersigned counsel file this complaint and allege as follows:
7

8 **STATEMENT OF THE CASE**

9 This is an action brought against State of Nevada Department of Transportation (NDOT),
10 pursuant to Sections 309(b) and (d) of the Clean Water Act (CWA), 33 U.S.C. §§ 1319 (b) and
11 (d) and Nev. Rev. Stat. §§ 445A.695 and 445A.700. The United States and the NDEP allege that
12 NDOT has violated and continues to violate the CWA by discharging pollutants to waters of the
13 United States in violation of the National Pollutant Discharge Elimination System (NPDES)
14 Permit for Discharges from NDOT’s Municipal Separate Storm Sewer System (MS4)
15 (hereinafter, NDOT’s MS4 Permit), throughout the state of Nevada. The United States and the
16 State of Nevada seek injunctive relief and civil penalties.
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19 **JURISDICTION AND VENUE**

20 1. This Court has jurisdiction over the subject matter of this action and over the Defendants
21 pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the Clean Water Act
22 (CWA), 33 U.S.C. § 1319(b) and supplemental jurisdiction over State law claims under 28
23 U.S.C. § 1367(a).
24

25 2. Venue is proper in the District of Nevada pursuant to 28 U.S.C. §§ 1391 and 1395, and
26 Section 309(b) of the CWA, 33 U.S.C. § 1319(b), because it is the judicial district in which
27 NDOT does business, in which the facilities and stormwater conveyances are located, and in
28

1 which the violations occurred.

2 3. Authority to bring this action is vested with the Attorney General of the United States,
3 pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519 and with
4 the Nevada Attorney General's Office pursuant to Nevada Revised Statute (NRS) 445A.670.
5

6 4. The United States has provided notice of the commencement of this action to the State
7 via NDEP pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

8 **THE DEFENDANT**

9 5. NDOT is an agency of the State of Nevada and a “person” within the meaning of Section
10 502(5) of the CWA, 33 U.S.C. § 1362(5). NDOT is separately amenable to suit under the CWA.
11

12 6. NDOT owns, operates, and maintains a separate storm water sewer system that serves
13 roads, streets, and highways throughout the State of Nevada.

14 **LEGAL BACKGROUND: THE CLEAN WATER ACT**

15 7. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), provides that “the discharge of any
16 pollutant by any person shall be unlawful,” except in compliance with, inter alia, Section 402 of
17 the CWA, 33 U.S.C. § 1342.
18

19 8. The Act defines the term “person” to include a State or political subdivision of a State.
20 CWA Section 502(5), 33 U.S.C. § 1362(5).

21 9. The term “discharge of a pollutant” includes “any addition of any pollutant to navigable
22 waters from any point source.” 33 U.S.C. § 1362(12). The term “pollutant” includes, inter alia,
23 solid waste, sewage, garbage, wrecked or discarded equipment, rock, sand, cellar dirt, and
24 industrial, municipal, and agricultural waste. 33 U.S.C. § 1362(6). “Point sources” include “any
25 discernible, confined and discrete conveyance, including but not limited to any . . . ditch,
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1 channel, tunnel, conduit, [or] discrete fissure . . . from which pollutants are or may be
2 discharged.” 33 U.S.C. § 1362(14).

3 10. Section 402(a) of the CWA creates the National Pollution Discharge Elimination System,
4 and provides that the Administrator of the EPA, or delegated States, may issue permits which
5 authorize the discharge of any pollutant directly into navigable waters of the United States, but
6 only in compliance with applicable requirements of the CWA, and/or such other conditions as
7 the Administrator determines are necessary to carry out the provisions of the CWA. 33 U.S.C. §
8 1342(a).
9

10 11. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as
11 “waters of the United States, including the territorial seas.” “Waters of the United States” have
12 been further defined to include, inter alia, waters which are currently used, were used in the past,
13 or may be susceptible to use in interstate or foreign commerce (hereinafter “traditional navigable
14 waters”) and tributaries of such waters. 40 C.F.R. § 122.2.
15

16 12. Section 402(b) of the CWA authorizes states to administer the NPDES program, with
17 approval of the Administrator of the EPA. 33 U.S.C. § 1342(b).
18

19 13. Section 402(p)(2) of the CWA, 33 U.S.C. § 1342(p)(2), establishes that “a discharge from
20 a municipal separate storm sewer system [MS4]” serving a population of at least 100,000
21 (medium and large MS4s) requires an NPDES permit issued under Section 402 of the CWA for
22 stormwater discharges.
23

24 14. Regulations governing the stormwater program are set out at 40 C.F.R. §§ 122, 123, and
25 124. EPA’s stormwater regulations, like the CWA itself, require operators of regulated MS4s to
26 obtain an NPDES permit authorizing discharges from the MS4. 40 C.F.R. § 122.26(d).
27
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1 15. Pursuant to 402(p)(6), EPA promulgated regulations providing that discharges from small
2 municipal separate storm sewer systems are regulated if they are located within an urbanized
3 area, as defined by the latest Decennial Census. 40 C.F.R. § 122.32(a)(1).

4
5 16. 40 C.F.R. section 122.26(b)(18) defines a “municipal separate storm sewer system to
6 mean:

7 a conveyance or system of conveyances (including roads with drainage systems,
8 municipal streets, catch basins, curbs, gutters, ditches, man-made channels or
9 storm drains): (i) owned or operated by a State. . . .; (ii) designed or used for
10 carrying stormwater; (iii) which is not part of a Publicly Owned Treatment
11 Works. . . .

12 17. A “large municipal separate storm sewer system” (Large MS4) is defined at 40 C.F.R. §
13 122.26(b)(4), and means in pertinent part, “all municipal separate storm sewers that are ...
14 located in counties [with unincorporated urbanized areas with a population of 250,000 or more
15 according to the 1990 Decennial Census] except municipal separate storm sewers that are located
16 in the incorporated places, townships, or towns within such counties” A “medium municipal
17 separate storm sewer system” (Medium MS4) is similarly defined, with a population threshold of
18 100,000. 40 C.F.R. § 122.26(b)(7).

19 18. Pursuant to 40 C.F.R. Section 122.26(b)(16), “small municipal separate storm sewer
20 systems” (Small MS4s) are all separate storm sewers that are:

21 [o]wned or operated by the United States, a State, city, town, borough . . . or
22 other public body (created by or pursuant to State law) having jurisdiction
23 over disposal of . . . stormwater. . . . [;] (ii) [n]ot defined as “large or medium”
24 municipal separate storm sewer systems[;] [and] (iii) . . . includes systems
25 similar to separate storm sewer systems in municipalities, such as systems at
26 military bases, large hospital or prison complexes, and highways and other
27 thoroughfares....

28 19. Under the Act, permits for discharges from all MS4s must require, among other things,
“controls to reduce the discharge of pollutants to the maximum extent practicable, including

1 management practices, control techniques, and system, design and engineering methods, and
2 such other provisions as the Administrator or the State determines appropriate for the control of
3 such pollutants.” CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B).

4
5 20. Section 309 of the CWA authorizes EPA to commence a civil action for a permanent or
6 temporary injunction when any person is in violation of the CWA or a permit, 33 U.S.C. §
7 1319(b), and provides that any person who violates the CWA or a permit shall be subject to a
8 civil penalty not to exceed \$32,500 per day for each violation occurring after March 15, 2004
9 through January 12, 2009, and not to exceed \$37,500 per day for each violation occurring after
10 January 12, 2009. 33 U.S.C. § 1319(d).

11
12 21. NRS 445A.300 to 445A.730 is the Nevada Water Pollution Control Law. NRS
13 445A.300. NRS 445A.465(1)(a) makes it unlawful for any person to discharge a pollutant from a
14 point source into any waters of the State, except as authorized by a permit.

15 22. A “person” is defined to include “the State or any agency or institution thereof”
16 NRS 445A.390. “Discharge” is defined as “any addition of a pollutant or pollutants to water.”
17 NRS 445A.345. “Pollutant” is defined as “dredged soil, solid waste, incinerator residue, sewage,
18 garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,
19 heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and
20 agricultural waste discharged into water. NRS 445A.400(1). A “point source” is defined as “any
21 discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,
22 channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal
23 feeding operation, or vessel or other floating craft, from which pollutants are or may be
24 discharged.” NRS 445A.395.
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1 23. NPDES permits issued by NDEP must “specify average and maximum daily quantitative
2 limitations for the level of pollutants in the authorized discharge in terms of mass, except
3 quantitative limitations that are not appropriately expressed in terms of mass, including, without
4 limitation, pH, temperature and radiation.” NAC 445A.243(4).
5

6 24. NRS 445A.675 to 445A.705, inclusive, authorizes NDEP to commence a civil action for
7 injunctive relief, damages, and a civil penalty not to exceed \$25,00 for each day of the violation
8 when any person is engaged or about to engage in a violation of NRS 445A.300 to 445A.730,
9 inclusive, or any permit issued pursuant to those provisions.
10

11 GENERAL ALLEGATIONS

12 25. NDOT’s roadways throughout the state of Nevada are “municipal separate storm sewer
13 systems” within the meaning of 40 C.F.R. § 122.26(b)(8) and NDOT is required to obtain and
14 comply with a municipal storm water system permit for the discharge of stormwater from such
15 roadways.
16

17 26. The Nevada Division of Environmental Protection (NDEP) has been authorized by EPA
18 to administer the NPDES program for the State of Nevada pursuant to Section 402(b) of the
19 CWA, 33 U.S.C. § 1342(b).
20

21 27. The NDEP, upon request from NDOT, first issued a system-wide MS4 permit (Permit
22 Number NV0023329) to NDOT on February 24, 2004, permitting discharges from NDOT’s MS4
23 throughout the State of Nevada. NDOT’s statewide MS4 permit was reissued in July 2010,
24 hereinafter referred to as the MS4 Permit.

25 28. The MS4 Permit sets forth conditions for the discharge of stormwater, including but not
26 limited to the development and implementation of a stormwater management program as well as
27
28

1 monitoring and reporting. The permit also prohibits the discharge of non-stormwater discharges,
2 with limited exceptions.

3 29. NDOT owns, operates and maintains roads, streets, and highways throughout the State of
4 Nevada. NDOT also owns, operates, and maintains a separate storm water sewer system that
5 serves roads, streets, and highways throughout the State of Nevada.
6

7 30. The streets and separate storm water sewer system identified in Paragraph 25 above, are
8 an MS4 within the meaning of 40 C.F.R. § 122.26(b)(18).

9 31. Stormwater discharges from NDOT's MS4 through a system of pipes and ditches. These
10 pipes and ditches are "point sources" as defined by Section 507(14) of the Act, 33 U.S.C. §
11 1362(14) and NRS 445A.395.
12

13 32. Stormwater discharges from NDOT's MS4 contain "pollutants" within the meaning of
14 Section 502(6) of the CWA, 33 U.S.C. § 1362(6) and NRS 445A.400(1), including but not
15 limited sediment, oils, metals, and nutrients.
16

17 33. Stormwater from NDOT's MS4 discharges to, among others, Lake Tahoe, Carson River,
18 Truckee River, Pyramid Lake, Alum Creek, Galena Creek, and Lake Las Vegas. These water
19 bodies are "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. §
20 1362 (7) and "waters of the United States" as defined by the regulations at 40 C.F.R. §122.2 and
21 "waters of the State" as defined by NAC 445A.114.
22

23 34. Many of the water bodies receiving stormwater discharges from NDOT's MS4, such as
24 Lake Tahoe, Alum Creek, and Galena Creek, among others, are impaired by pollutants and have
25 been listed as impaired by Nevada pursuant to Section 303(d) of the CWA. 33 U.S.C. § 1313(d).

26 35. Part II of the MS4 Permit requires NDOT to assess and control discharges into impaired
27 waters.
28

1 36. Part III.A of the MS4 Permit required the submittal and implementation of a Stormwater
2 Management Plan containing various program components. The initial Stormwater Management
3 Plan was required to be developed by February 23, 2005 and fully implemented by February 23,
4 2009.

5
6 37. Part III.C of the MS4 Permit requires NDOT to develop maps of the MS4, including
7 major outfalls discharging to waters of the United States.

8 38. Part III.F of the MS4 Permit requires NDOT to train all employees identified in the
9 permit within one year of permit issuance.

10
11 39. Part III.G and III. H. of the MS4 Permit requires NDOT develop and implement a
12 program to control all construction with the right-of-way, including exercising control over
13 contractors.

14 40. Part III.J of the MS4 Permit requires NDOT to develop and implement a program to
15 detect and eliminate illicit discharges into the MS4, and stop improper disposal into the MS4.
16 The Permit requires field screening of MS4 outfalls and the creation of a system to track illicit
17 discharges.

18
19 41. Part III.K of the MS4 Permit requires NDOT to develop a list of industrial facilities, defined
20 by 40 C.F.R. § 122.26(b)(14), under its control. The Permit also requires NDOT to develop and
21 implement a program to monitor and control discharges from specific facilities.

22
23 42. Parts III.L through III.S of the MS4 Permit require NDOT to develop and implement a
24 program to control runoff from its maintenance activities, including the development of site-
25 specific plans for each maintenance facility and a program for cleaning and maintaining the
26 storm drain system.

1 43. Part IV of the MS4 Permit requires NDOT to develop and implement a monitoring
2 recordkeeping and reporting program that includes an annual report.

3 44. EPA conducted an audit to determine NDOT's compliance with the MS4 Permit in
4 August 2011. EPA documented violations of the provisions set forth in Paragraphs 35-43 in an
5 audit report which has been shared with NDOT.
6

7 **FIRST CLAIM FOR RELIEF**
8 **MS4 PERMIT VIOLATIONS**

9 45. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 44 of
10 this Complaint.

11 46. On numerous occasions between at least February 2005 and the present, NDOT
12 discharged stormwater while failing to comply with the requirements of the MS4 Permit by
13 failing to timely develop and/or implement various program components to reduce pollutants to
14 the maximum extent practicable as documented by EPA.
15

16 47. Upon information and belief, the types of violations alleged in this First Claim for Relief
17 are ongoing, and will continue unless and until NDOT is ordered to take all steps necessary to
18 come into compliance with the terms of the MS4 Permit.
19

20 48. Pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), NDOT is
21 liable for injunctive relief and civil penalties of up to \$37,500 per day for each violation of any
22 condition or limitation of an NPDES Permit. See 40 C.F.R. § 19.4. Pursuant to NRS 445A.695
23 and 700(1), NDOT is liable for injunctive relief and civil penalties up to \$25,000 per day for
24 each violation of Nevada's Water Pollution Control Law.
25

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs, the United States of America and the NDEP, request that this
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Court:

1 1. Issue an injunction pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and
2 NRS 445A.695 of the Nevada Water Pollution Control Law, requiring Defendant to achieve
3 permanent and consistent compliance with the Clean Water Act.

4
5 2. Assess, pursuant to Section 309(d) of the CWA, 33 U.S.C. §1319(d), a civil penalty
6 not to exceed \$37,500 per day for each violation occurring within five years of the filing of this
7 complaint, and pursuant to NRS 445A.700(1), assess a civil penalty of not more than \$25,000 for
8 each day of the violation of the Nevada Water Pollution Control Law occurring within five years
9 of the filing of this complaint.

10
11 3. Award Plaintiffs their costs and disbursements in this action; and

12 4. Grant such other relief as the Court deems appropriate.

13 Respectfully submitted,

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15 
16 JOHN C. CRUDEN
17 Assistant Attorney General
18 Environment & Natural Resources Division
19 U.S. Department of Justice

15 DATED: _____

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1 For the Nevada Division of Environmental Protection:

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4 DATED: 7/28/16

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