

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

2012 OCT 29 AM 10:29

IN THE MATTER OF	)	Docket No. CWA-07-2012-0019
	)	
The City of Iola, Kansas	)	
Respondent	)	
	)	
NPDES Permit No. KS0099414	)	COMPLAINT AND
	)	CONSENT AGREEMENT/
Proceedings under Section 309(a)(3)	)	FINAL ORDER
of the Clean Water Act, 33 U.S.C.	)	
§ 1319(a)(3)	)	
_____	)	

**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 (CWA), 33 U.S.C. § 1319(g), and in accordance with the United States Environmental Protection Agency's (EPA's) 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 serves as notice that the EPA has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. §§ 1311 and 1317, 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 EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA Region 7 (Complainant).

4. Respondent is the City of Iola, Kansas (hereafter, City or Respondent), a municipality organized and authorized to operate under the laws of the State of Kansas.

## Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Sections 307 and 402 of the CWA, 33 U.S.C. §§ 1317 and 1342. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section. Section 307 provides for the promulgation of regulations establishing pretreatment standards for introduction of pollutants into publicly owned treatment works (POTW), as defined at 40 CFR § 403.3(k).

6. The Kansas Department of Health and Environment (KDHE) is the state agency with the authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the implementing regulations, and a Memorandum of Understanding between the EPA and the KDHE. The KDHE is not approved to administer a state authorized Pretreatment program in Kansas pursuant to Section 402 of the CWA and its implementing regulations. Consequently, in Kansas, the EPA remains the Approval Authority as defined by 40 C.F.R. § 403.3(c).

7. The City's Pretreatment Program was approved by the EPA on or about July 1, 1987. Respondent's approved Pretreatment Program sets forth procedures for implementing requirements for regulating industrial discharges to Respondent's POTW, and specifically incorporates the requirements set forth at 40 C.F.R. 403.8. On or around January 2, 1991, the EPA approved Respondent's Enforcement Response Plan (ERP) as a modification to the Respondent's Pretreatment Program.

8. Requirements for the development and implementation of a Pretreatment program by a POTW are set forth at 40 C.F.R. § 403.8. This regulation requires POTWs with a Pretreatment program to identify "significant industrial users," and imposes additional compliance requirements on the POTW for such users. 40 C.F.R. § 403.5(c) states that each POTW developing a POTW Pretreatment Program pursuant to 40 C.F.R. § 403.8 shall develop and enforce specific limits to implement the prohibitions listed in paragraphs 40 C.F.R. §§ 403.5(a)(1) and (b), and that each POTW with an approved pretreatment program shall continue to develop these limits as necessary and to effectively enforce such limits.

9. A "Significant Industrial User" (SIU) is defined by 40 C.F.R. § 403.3(t)(ii) as a contributing industry that has (1) a flow of 25,000 gallons or more per average workday, or (2) has an average daily flow or load greater than five percent (5%) of the flow or load carried by the POTW, or (3) has significant impact on the POTW or the quality of the POTW's effluent.

10. The City is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

11. The City owns and operates a Publicly Owned Treatment Works (POTW), as defined by 40 CFR § 403.3(q), that receives and treats wastewater from various domestic, commercial and industrial sources.

12. The City's POTW discharges to the Neosho River.

13. The POTW is a “point source” that “discharges pollutants” into “navigable waters” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

14. The City’s discharge of pollutants from the POTW is subject to the provisions of the CWA, 33 U.S.C. § 1251, et seq., requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

15. During all times relevant to this Order, the “Industrial Users” of the Iola Kansas POTW, as defined by 33 U.S.C. § 1362(18), have discharged non-domestic “pollutants,” as defined by 33 U.S.C. § 1362(6), into the City’s POTW.

#### Factual Background

16. On or about September 1, 2005, the KDHE) reissued NPDES Permit No. KS0099414 to the City, pursuant to Section 402 of the Act, 33 U.S.C. § 1342 (2005 NPDES permit). On or about April 1, 2008, KDHE reissued the City’s NPDES permit (2008 NPDES permit). The City’s 2008 NPDES Permit expires on March 31, 2013.

17. The City’s 2005 and 2008 NPDES permits contain (Paragraph C- PRETREATMENT PROGRAM), the requirement that the City “implement and administer the Pretreatment Program in accordance with the General Pretreatment Regulations 40 C.F.R. Part 403.”

18. The City’s September 2005 NPDES permit states the City was not able to meet its permit limits for BOD and TSS, and the permit established a compliance schedule for the City to submit a plan for improvements to the POTW to the KDHE by January 1, 2006; and required all planned improvements to the POTW to be completed by October 1, 2006.

19. By administrative order dated January 1, 2006, the KDHE found the City was in non-compliance with requirements of the effective NDPEs permit and extended the compliance deadlines for completion of the upgrade to the POTW until October 1, 2007.

20. Sampling conducted by the City’s consultant in February 2006 confirmed that Russell Stover Candies, Inc (RSC), was discharging process water over 25,000 gallons per day, and was contributing over 47% loadings of BOD and 53% of loadings of TSS to the POTW. RSC is therefore an SIU as defined by 40 C.F.R 403.3(t)(ii).

21. The City’s 2008 NPDES permit again extended the compliance schedule to upgrade the POTW, requiring completion of the upgrade by June 1, 2008. The City ultimately completed the upgrade to the POTW prior to June 2008.

22. Between 2003 and 2009, studies by the City and sampling of loadings from RSC document ongoing “slug” discharges by RSC to the POTW.

23. Prior to January 1, 2007, as the approved pretreatment Control Authority, the City had issued “categorical” pretreatment permits to the following industrial users that discharged wastewater to the City’s POTW:

- a. Gates Rubber Company
- b. Haldex Brake Systems
- c. Precision Pump

24. Effective January 1, 2007, the City issued RSC its first “pretreatment permit” as a “significant industrial user” of the POTW, although RSC had been operating since 1997. RSC’s permit required semiannual reporting of discharges to the POTW, but did not establish limits for RSC for either BOD or TSS.

25. On or about June 17, 2008, the EPA performed a Pretreatment Program Audit of the City’s pretreatment implementation activities. During the Audit, the EPA identified numerous program deficiencies, including the City’s failure to develop limits for RSC. The EPA also determined during its audit that the City personnel were not familiar with the City’s approved ERP and that City personnel were not trained or qualified to determine and report the compliance status of its SIUs. The EPA’s audit also documented discharges of wastewater from RSC to the POTW with a pH of less than 5.0 standard units (s.u.), in violation of the specific prohibition of 40 C.F.R. § 403.5(b) and the City’s Sewer Use Ordinance.

26. On January 1, 2009, the City reissued RSC’s permit, but again without limits for either BOD or TSS.

27. In order to further investigate the City’s implementation of its Pretreatment program, the EPA issued the City a Request for Information, pursuant to the authority of Section 308 of the Act, 33 U.S.C. 1318. On July 28, 2009, the EPA issued the City a second Request for Information.

28. On July 29, 2009, the EPA issued an administrative compliance order to RSC that required RSC to take measures to cease discharge of low pH wastewater in violation of 40 C.F.R. § 403.5(b) (< 5.0 .S.U.), and to conduct additional monitoring of its discharges to the POTW, and to provide the results of this monitoring and additional information to the EPA.

29. On March 11, 2011, the EPA issued an administrative compliance order to the City that required the City take measures to comply with requirements of 40 C.F.R. Part 403, its Approved Pretreatment Program and its NPDES permit.

## **II. Findings of Violations**

### **Violations of Requirement to Implement Pretreatment Program**

30. The City’s violations of the requirement of the City’s 2008 NPDES to implement Respondent’s approved Pretreatment Program and the General Pretreatment Regulations of 40 C.F.R. Part 403 include, but are not limited to, the following:

- a. The City failed to investigate instances of noncompliance with Pretreatment Standards and Requirements. The City failed to determine if any of its SIUs were in significant noncompliance, and the EPA’s 2008 Audit found that RSC was in significant noncompliance due to discharges of wastewater to the POTW with a

pH of less than 5.0 (See, 40 C.F.R § 403.5(b) and 40 C.F.R § 403.8(f)(vii)(A) through (G));

- b. The City failed to provide sufficient qualified personnel to carry out implementation of the Pretreatment program. The EPA's 2008 Audit determined that the City's personnel were not familiar with the City's approved ERP, and were trained or qualified to determine and enforce compliance status of SIUs (See, 40 C.F.R. § 403.8(f)(3));
- c. The City failed to investigate instances of non-compliance and undertake appropriate enforcement actions for any violations committed by its SIUs, (including RSC)(See, 40 C.F.R. § 403.8(1)(2)(vii), and 40 C.F.R. Part 403.8(f)(5)); and
- d. The City failed to develop local limits to prevent "interference" and/or "pass through" or demonstrate that local limits were not necessary, and the City's failure to determine whether a "slug" control plan was required for RSC (See, 40 C.F.R § 403.5(c), 40 C.F.R § 403.8(f)(4), and 40 C.F.R. § 403.8(f)(2)(vi).)

31. Respondent's violations identified in Paragraph 30, subparagraphs a through d, above, are violations of the requirement of NPDES Permit No. No. KS0099414 to implement its Approved Pretreatment Program, and as such are violations of Sections 301(a) and 307(d) of the CWA, 33 U.S.C. §§ 1311(a) and 1317(d), and regulations promulgated thereunder at 40 C.F.R. Part 403.

32. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent for the violations of the CWA identified above, the amount of which is set forth in paragraph 41, below.

### CONSENT AGREEMENT

33. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the nature of the violations, Respondent's agreement to perform a Supplemental Environmental Project (SEP)(See Paragraphs 45 to 54, below) and other relevant factors, the EPA has determined that an appropriate civil penalty to settle this action is Twelve Thousand Dollars (\$12,000).

34. 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. Respondent admits the jurisdictional allegations of this Complaint and 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.

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

36. Respondent waives any right to contest the allegations and its right to appeal this Consent Agreement and the accompanying proposed Final Order.

37. Respondent and Complainant each agree to resolve the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees.

38. This Consent Agreement/Final Order addresses all civil administrative claims for CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to other violations of the CWA or any other applicable law.

39. Respondent certifies by signing this Consent Agreement/Final Order that Respondent is presently in compliance with all requirements of the CWA and the Approved Pretreatment Program under its NPDES Permit.

40. Nothing contained in this Compliance with this Consent Agreement/Final Order shall relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

41. Respondent agrees to pay a mitigated civil penalty of Twelve Thousand Dollars (\$12,000).

42. The effect of settlement described in Paragraph 38 above is conditioned upon the accuracy of the Respondent's representations to the EPA, memorialized in Paragraphs 39.

43. The penalty payment made by Respondent pursuant to this Complaint and Consent Agreement/Final Order is payment of a civil penalty and shall not be deductible for purposes of federal taxes.

44. Each signatory to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Complaint and Consent Agreement/Final Order.

#### Supplemental Environmental Project (SEP)

45. In settlement of this matter, Respondent shall complete the following SEP, which the parties agree is intended to secure environmental and/or public health protection and improvements.

- a. Project Description: Respondent shall purchase and install 1 Variable Frequency Drive (VFD) Pump for its High Service Pumps at the POTW/Water Treatment Plant. The project is further described in Appendix A of this Consent Agreement and Final Order;
- b. SEP Cost: the total expenditure for the SEP shall be not less than \$40,000 (Agreed on Amount);
- c. Completion Date: all work on the project shall be completed and the VFD will be placed into active service by no later than June 30, 2013, unless Respondent

submits a written request with substantiation to the EPA by no later than May 31, 2013, for an extension of time to complete the SEP. Such extension request shall propose a date for project completion for EPA's approval. Unless and until EPA approves an alternate Completion Date, Respondent shall remain obligated to complete the SEP by June 30, 2013.

46. Within thirty (30) days of the SEP Completion Date, as identified in Paragraph 45.c. above, Respondent shall submit a SEP Completion Report to EPA, with a copy to the Kansas Department of Health and Environment, as identified below.

- a. The SEP Completion Report shall contain the following:
  - i. A detailed description of the SEP as implemented;
  - ii. Itemized costs, documented by copies of records such as purchase orders, receipts or canceled checks; and
  - iii. The following certification signed by Respondent or its authorized representative"

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

- b. The SEP Completion Report and all other submittals regarding the SEP shall be sent to:

Paul Marshall  
WWPD/WENF  
U.S. Environmental Protection Agency  
Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

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

- c. Respondent agrees that failure to submit the SEP Completion Report required by subsections a) and b) above shall be deemed a violation of this Consent Agreement and Order and Respondent shall become liable for stipulated penalties pursuant to Paragraph 49 below.

47. Respondent agrees that EPA may inspect the facility at any time in order to confirm that

the SEP is being undertaken in conformity with the representations made herein.

48. Respondent shall continuously maintain, use and/or operate the systems installed as the SEP for not less than two (2) year following its installation.

49. Stipulated Penalties for Failure to Complete SEP/Failure to Spend Agreed-on Amount:

- a. In the event that Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in Paragraph 45, above, and/or to the extent that the actual expenditures for the SEP do not equal or exceed the SEP Cost described in Paragraph 45.b., above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:
  - i. Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed satisfactorily pursuant to this Consent Agreement and Order, Respondent shall pay a stipulated penalty to the United States in the amount of \$12,000;
  - ii. If the SEP is completed in accordance with Paragraph 45, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States in the amount of \$6,000.
  - iii. Respondent shall not be liable for stipulated penalties if:
    1. the SEP is not completed in accordance with Paragraph 45, but the Complainant determines that the Respondent: (1) made good faith and timely efforts to complete the project; and (2) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP; or
    2. the SEP is completed in accordance with Paragraph 45, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project.
- b. Respondent shall pay a stipulated penalty in the amount of \$100 for each day:
  - i. it fails to submit the SEP Completion Report after the due date specified in Paragraph 46 above, until the report is submitted; and
  - ii. it fails to submit any other report required by Paragraphs 45 or 46 above, after the report was originally due until the report is submitted.
- c. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.
- d. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Interest and late charges shall be paid as stated in Paragraph 53, below. Method of payment shall be in accordance with the provisions of Paragraphs 1 and 2 of the Final Order, below.



50. Respondent certifies that it is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certify / certifies that Respondent has have not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

51. Respondent further certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to the EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

52. Any public statement, oral or written, in print, film or other media, made by Respondent making reference to the SEP shall include the following language: *"This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."*

53. Respondent understands that its failure to timely pay any portion of the civil penalty described in Paragraph 1 of the Final Order below or any portion of a stipulated penalty as stated in Paragraph 49 above may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full. A late payment handling charge of \$15 will be imposed after thirty (30) days and an additional \$15 will be charge for each subsequent thirty (30) day period. Additionally, as provided by 31 U.S.C. § 3717(e)(2), a penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

54. Respondent consent that neither the civil penalty payment made nor any costs or expenditures incurred by Respondent in performing the SEP pursuant to this Complaint and Consent Agreement/Final Order will be deducted for purposes of federal taxes.

### **FINAL ORDER**

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and based upon information contained in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a mitigated civil penalty of Twelve Thousand Dollars (\$12,000) within thirty (30) days of the effective date of this Final Order. Payment shall identify the Respondent by name and docket number and shall be made by certified or cashier's check made payable to "Treasurer, United States of America," and remitted to:

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

Copies of the check shall be mailed to:

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency  
901 North 5th Street  
Kansas City, Kansas 66101

and

Howard Bunch  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency  
901 North 5th Street  
Kansas City, Kansas 66101

2. Should the civil penalty not be paid as provided above, interest 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 interest thereon.

3. Respondent and Complainant shall pay their own costs and attorneys' fees incurred as a result of this action.

4. EPA reserves the right to enforce the terms of this Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.


5. With respect to matters not addressed in this 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, monetary penalties and for punitive damages.


6. This Final Order shall be effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

7. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

FOR COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

8/28/2012  
Date

  
Karen A. Flournoy  
Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
Region 7

  
Howard C. Bunch  
Senior Assistant Regional Counsel  
Office of Regional Counsel  
Region 7

FOR RESPONDENT:  
CITY OF IOLA, KANSAS

August 7, 2012  
Date

William A. Shirley  
Signature

Name: William A. Shirley

Title: Mayor

IT IS SO ORDERED.

Oct. 29, 2012  
Date

Karina Bonomeo  
~~Robert L. Patrick~~ KARINA BORROMEIO  
Regional Judicial Officer

IN THE MATTER OF The City of Iola, Kansas, Respondent  
Docket No. CWA-07-2012-0019

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 hand delivered to  
Attorney for Complainant:

Howard Bunch  
Assistant Regional Counsel  
Region 7  
United States Environmental Protection Agency  
11201 Renner Blvd.  
Lenexa, Kansas 66219

Copy by First Class Mail to:

William Shirley  
2 W. Jackson Ave.  
P.O. Box 308  
Iola, Kansas 66749

Dated: 10/31/12



Kathy Robinson  
Hearing Clerk, Region 7