



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.11  
2008 NOV 19 AM 10:15  
REGIONAL HEARING  
CLERK

**EXPRESS MAIL**

November 18, 2008

James J. Periconi, Esq.  
Periconi, LLC  
708 Third Avenue 17th Floor  
New York, New York 10017

RE: In the Matter of Tropicana Products, Inc.  
Docket No. CWA-02-2008-3403

Dear Jim:

Enclosed is a Consent Agreement and Final Order (CA/FO) in the above-referenced matter. This CA/FO was fully executed on November 13, 2008.

Please note that the penalty of \$80,000 is required to be paid in full and received by EPA at the address identified in the payment section of the CA/FO no later than forty-five calendar days after November 13, 2008.

Please do not hesitate to contact me should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Diane".

Diane T. Gomes  
Assistant Regional Counsel

Enclosure

cc: Karen Maples  
Regional Hearing Clerk (w/enclosures)

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 Broadway  
New York, New York 10007**

**U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2008 NOV 19 AM 10:15  
REGIONAL HEARINGS  
CLERK**

-----X  
:  
IN THE MATTER OF :  
:  
Tropicana Products, Inc. :  
:  
:  
Proceeding pursuant to §309(g) of the :  
Clean Water Act, 33 U.S.C. §1319(g) :  
:  
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**Docket No. CWA-02-2008-3403**  
**Consent Agreement  
and  
Final Order**  
for Assessment of a Class II  
Civil Penalty under Section 309(g)  
of the Clean Water Act

**I. Preliminary Statement**

1. This administrative proceeding for the assessment of a civil penalty is instituted pursuant to Section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. §1319(g).
2. The following Order is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by the Act, as amended, 33 U.S.C. §1251 *et seq.*, and in particular Section 309(g) of the Act, 33 U.S.C. §1319(g). This authority has been duly delegated by the Administrator to the Regional Administrator of Region 2 of EPA. The authority to enter into the Consent Agreement has been duly re-delegated to the undersigned Director of the Division of Enforcement and Compliance Assistance of Region 2 of EPA.
3. This Consent Agreement and Final Order is issued in accordance with 40 CFR §22.13(b) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("CROP"), which sets forth procedures for simultaneous commencement and conclusion of administrative civil penalty assessment proceedings through issuance of a consent agreement and final order pursuant to 40 CFR §22.18(b)(2) and (3).

## **II. Findings of Fact and Conclusions of Law**

1. Tropicana Manufacturing Company, Inc., a corporation organized under the laws of the State of Delaware, owns the Facility that is operated by Tropicana Products, Inc. ("Respondent"), which is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5).
2. Respondent operates a facility located at 7-02 154<sup>th</sup> Street, Whitestone, New York (the "Facility") where it distributes Tropicana and related company products via independent truck services at this terminal distribution facility.
3. Respondent has discharged storm water associated with industrial activity from this facility via the Facility's storm drain system into the East River, a navigable water of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. §1362(7), since, at least, 1970. Storm water is a "pollutant" within the meaning of Section 502(6) of the Act, 33 U.S.C. §1362(6).
4. Section 301(a) of the Act, 33 U.S.C. §1311(a), provides, in part, that the discharge of any pollutants by any person from a point source to a navigable water of the United States shall be unlawful except in accordance with the terms and conditions of a duly issued permit.
5. Section 308 of the Act, 33 U.S.C. §1318, provides, in relevant part, that the Administrator of EPA may require the owner or operator of any point source to, among other things: maintain such records; make such reports; install, use and monitor such equipment; sample such effluents; and provide such other information as may reasonably be required in order to carry out Section 402 of the Act, 33 U.S.C. § 1342.
6. Section 402 of the Act, 33 U.S.C. §1342, authorizes the Administrator of EPA to issue a NPDES permit for the discharge of any pollutant, or combination of pollutants subject to certain requirements of the Act and conditions which the Administrator determines are necessary. Additionally, under the authority granted to the New York State Department of Environmental Conservation ("NYSDEC") by the EPA under Section 402(b) of the Act, 33 U.S.C. §1342(b), a State Pollutant Discharge Elimination System ("SPDES") permit is required to be issued to facilities in New York State by the NYSDEC for the discharge of pollutants from a point source to a navigable water of the United States.
7. Section 402(p) of the CWA, 33 U.S.C. §1342(p) sets forth the requirements for the discharges of storm water.
8. The terms "Industrial Storm Water Permit", "Multi Sector General Storm Water Permit" or "MSGP" mean the SPDES Multi-Sector General Permit, Permit for Storm Water Discharges Associated with Industrial Activity, general permit number GP-0-06-002, and/or the previous such general permit GP-98-03. The current MSGP, GP-0-06-002, was issued by the NYSDEC, pursuant to Section 402 of the CWA, became effective on March 28, 2007, and will expire on March 27, 2012. The previous MSGP, GP-98-03, became effective on November 1, 1998 and expired on November 1, 2003, but was administratively extended by the NYSDEC until the

issuance of the current MSGP.

9. The Administrator of EPA has promulgated regulations, 40 CFR§122.26(a)(1)(ii) and §122.26(b)(14), which require operators to obtain a NPDES permit for storm water discharges associated with industrial activity. The regulations at 40 CFR§122.26(b)(14) establish requirements for storm water discharges associated with industrial activity.
10. Respondent is subject to the National Pollutant Discharge Elimination System (“NPDES”) requirements pursuant to Section 402 of the Act, 33 U.S.C. §1342, and Section 301(a) of the Act, 33 U.S.C. §1311(a), in that it has conducted industrial activity under SIC Code 4231 and 4222 and therefore is regulated under 40 CFR §122.26 and the NYSDEC MSGP.
11. The SPDES MSGP and regulations for storm water discharges at 40 CFR§122.26(b)(14) apply to this facility.
12. Operators regulated under 40 CFR§122.26(b)(14) must seek MSGP coverage by filing a Notice of Intent or Termination (“NOIT”) form under the terms and conditions of the MSGP GP-0-06-002 (or previous MSGP, GP-98-03), or if all of the conditions of No Exposure certification apply, it must be submitted in accordance with 40 CFR§122.26.
13. EPA conducted a compliance evaluation inspection of the Facility on July 19, 2007 to determine compliance with the CWA requirements cited above.
14. During an inspection of the Facility by EPA on July 19, 2007, the following information was obtained from facility personnel and inspection findings:
  - a) Respondent is primarily involved in the distribution and warehousing of Tropicana and related company products.
  - b) Storm water from the Facility was being discharged through the piped convergence system to the East River via six (6) outfall pipes.
  - c) Respondent, and any predecessor corporate entities owned by Respondent, have discharged storm water from its facility since, on or about, 1970.
  - d) Visual inspection indicates that general housekeeping and the implementation of Best Management Practices to minimize storm water contamination from vehicles, equipment storage and any other substances on site must be initiated.
  - e) The discharge of storm water directly to a navigable water of the United States (East River) is noted.
  - f) Respondent failed to obtain a SPDES General Permit for Storm Water Discharges Associated with Industrial Activity including submittal of a NOIT and a SWPPP for the discharges noted in b., c. and e. above.

15. Based upon Paragraphs 1-14 above, Respondent has violated federal NPDES requirements in violation of the Act and its implementing regulations pursuant to §301, §308 and §402 of the CWA.
17. Under Section 309(g)(2)(A) of the Act, 33 U.S.C. §1319(g)(2)(A), Respondent is liable for the administrative assessment of civil penalties in an amount not to exceed \$11,000 per violation up to a maximum of \$157,500.

### **III. Consent Agreement**

Based upon the foregoing, and pursuant to Section 309(g) of the Act, 33 U.S.C. §1319(g), and the CROP (40 C.F.R. §§ 22.13 and 22.18), it is hereby agreed by and between the parties, and Respondent voluntarily and knowingly agrees as follows:

#### **Jurisdiction**

1. For the purpose of this proceeding, Respondent a) admits the jurisdictional allegations of the Findings of Fact and Conclusions of Law as applied to the Site; and b) neither admits nor denies the specific factual allegations contained in the Findings of Fact.

#### **Terms of Agreement**

2. Based upon the foregoing Finding of Facts and Conclusions of Law, and having taken into account the nature, circumstances, extent and gravity of the violations, Respondent's prior compliance history, degree of culpability and the economic benefit or savings accruing to Respondent by virtue of the violation, and Respondent's ability to pay the proposed penalty, and pursuant to the authority of Section 309(g), EPA has determined an appropriate civil penalty of \$80,000.

#### **Payment of Civil Penalty**

3. Respondent shall pay, by cashier's or certified check, a civil penalty in the amount of **eighty thousand dollars (\$80,000)** payable to the "Treasurer, United States of America". The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Such check shall be mailed to:

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

Respondent shall also send copies of such payment to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
290 Broadway - 16th Floor  
New York, New York 10007

and to:

Diane T. Gomes  
Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007.

4. Payment must be received at the above address on or before forty-five (45) calendar days after the date of signature of the Final Order at the end of this document (the date by which payment must be received shall hereafter be referred to as the "due date").
  - a) Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection of the assessed penalty as well as, but not limited to, interest and attorney's fees.
  - b) Further, if the payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of Treasury pursuant to the Debt Collection Act, 31 U.S.C. §3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of \$15.00 will be assessed for each 30 day period (or any portion thereof) following the due date in which the balance remains unpaid.
  - c) In addition, pursuant to Section 309(g)(9) of the Act, 33 U.S.C. §1319(g)(9), if payment is not received by the due date, a quarterly nonpayment penalty will be imposed for each calendar quarter during which such nonpayment persists. The quarterly nonpayment penalty is 20% of the aggregate amount of penalties and quarterly nonpayment penalties which are unpaid as of the beginning of such quarter. Respondent also may be required to pay attorneys fees and costs for collection proceedings in connection with nonpayment.
5. The penalty specified in Paragraph 3, above, shall represent a civil penalty assessed by EPA and shall not be deductible from Respondent's federal or state taxes.

#### **IV. General Provisions**

6. This Consent Agreement is being voluntarily and knowingly entered into by the parties in full and final settlement of the civil liabilities that might have attached as a result of the allegations contained in the Findings of Fact, above. Respondent has read the Consent Agreement, understands its terms, finds it to be reasonable and consents to its issuance and its terms. Respondent consents to the issuance of the accompanying Final Order. Respondent agrees that all terms of settlement are set forth herein.
7. Respondent explicitly and knowingly consents to the assessment of the civil penalty as set forth in this Consent Agreement and agrees to pay the penalty in accordance with the terms of this Consent Agreement. In any action to recover the penalty amount, the validity, amount, and appropriateness of this penalty, including any stipulated penalty, and of this Consent Agreement shall not be subject to review.
8. This Consent Agreement and Order shall not 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.
9. Respondent knowingly and explicitly waives its right under Section 309(g)(2) and (8) of the Act, 33 U.S.C. §1319(g)(2) and (8), to receive a Complaint in this matter or to request or to seek any Hearing on or Judicial Review of this Consent Agreement or the Findings of Fact and Conclusions of Law set forth herein, or on the accompanying Final Order.
10. Respondent waives any right it may have pursuant to 40 C.F.R. §22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.
11. Issuance of this Consent Agreement and Final Order does not constitute a waiver by EPA of its right to enforce the substantive legal requirements underlying this penalty assessment, either administratively or judicially, pursuant to Sections 309(a), (b), and (c) of the Act, 33 U.S.C. §1319(a), (b) and (c). Pursuant to Section 309(g)(7) of the Act, 33 U.S.C. §1319(g)(7), issuance or compliance with this Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable requirements of the Act, of regulations promulgated thereunder and of any legal order or permit issued thereunder.
12. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement and all the terms and conditions set forth in this Consent Agreement.

13. The provisions of this Consent Agreement and Final Order shall be binding upon the Respondent, its officers, directors, agents, servants, authorized representatives and successors or assigns.
14. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this Consent Agreement and Final Order.
15. Respondent consents to service upon Respondent by a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk.

FOR RESPONDENT:

Sal J. Tufano

DATE: 8/27/08

[Printed Name and Title]

SAL Tufano  
Vice President, Tropicana

FOR COMPLAINANT:

Dore LaPosta

DATE: 8/28/08

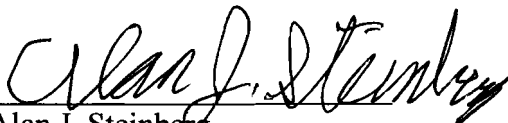
Dore LaPosta  
Director  
Division of Enforcement and  
Compliance Assistance  
United States Environmental  
Protection Agency - Region 2  
290 Broadway  
New York, New York 10007-1866



#### **IV. Final Order**

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, New York.

DATE: 11-13-08

  
Alan J. Steinberg  
Regional Administrator  
United States Environmental  
Protection Agency-Region 2  
290 Broadway  
New York, New York 10007

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

**In The Matter of**

**Tropicana Products, Inc.,**

Respondent.

**DOCKET NO. CWA-02-2008-3403**

Proceeding pursuant to Section 309(g) of  
the Clean Water Act, 33 U.S.C. §1319(g)

**CERTIFICATE OF SERVICE**

I certify that, on the date noted below, I served the foregoing fully executed Consent Agreement and Final Order, bearing the above-referenced docket number, in the following manner.

Copy by Express Mail: James J. Periconi, Esq.  
Periconi, LLC  
708 Third Avenue 17th Floor  
New York, New York 10017

Original and One Copy  
By Internal Mail (pouch): Regional Hearing Clerk  
U.S. Environmental Protection Agency  
290 Broadway, 16<sup>th</sup> floor  
New York, New York 10007-1866

Date: NOV 19 2008

  
\_\_\_\_\_  
Ana Madera, Secretary