

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF:)	
)	Docket No. CWA-07-2012-0060
)	
Tortilla King, Inc.)	
249 23 rd Avenue)	
P.O. Box 763)	
Moundridge, Kansas 67107)	CONSENT AGREEMENT AND
)	FINAL ORDER
Respondent,)	
)	
Proceeding under Section 309(a)(3))	
of the Clean Water Act,)	
33 U.S.C. § 1319(g))	
)	

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (“EPA”) and Tortilla King, Inc. (“Respondent”) have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order (“CA/FO”). Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) 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, 40 C.F.R. Part 22 (“Consolidated Rules”).

ALLEGATIONS

Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO serves as notice that EPA has reason to believe that Respondent violated Section 307 of the CWA, 33 U.S.C. § 1317, and regulations promulgated thereunder, by discharging pollutants that caused interference and/or pass through at the City’s Publically Owned Treatment Works (“POTW”).

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), provides that if EPA determines that any person has violated certain requirements of the CWA, including Section 307, EPA may, after consultation with the state in which the violation occurs, assess a civil penalty for such violation. The state of Kansas has been notified of this action in accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

4. The Kansas Department of Health and Environment (“KDHE”) is the state agency authorized to administer the federal National Pollutant Discharge Elimination System (“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 EPA and KDHE.

5. 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, EPA is the approval authority as defined by 40 C.F.R. § 403.3(c).

6. In assessing a penalty under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the provisions of Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), require that EPA must consider various factors, including the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings, if any, and such other matters as justice may require.

7. Based upon the facts alleged in the CA/FO and upon those factors which the Complainant must consider pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the Complainant and Respondent agree to the payment of a civil penalty pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1311(g)(2)(B), for the alleged violations of the CWA contained in this CA/FO.

Parties

8. The Complainant is the Director of the Water, Wetlands and Pesticides Division, who has been duly delegated the authority to bring this action. The authority to execute this CA/FO is provided to the Regional Administrators by EPA Delegation No. 2-52-A. The Regional Administrator, EPA, Region 7, has delegated this authority to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7, by EPA Delegation No. R7-2-052-A.

9. Respondent is Tortilla King, Inc. (“Tortilla King”), a corporation registered to do business in the state of Kansas.

Statutory and Regulatory Framework

10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, except in compliance with, *inter alia*, Sections 307 and 402 of the CWA, 33 U.S.C. §§ 1317 and 1342.

11. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that Section.

12. Section 307 of the CWA, 33 U.S.C. § 1317, provides for the promulgation of regulations establishing pretreatment standards for introduction of pollutants into publicly owned treatment works (POTW).

13. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

14. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6) to include, *inter alia*, biological materials and agricultural waste discharged to water.

15. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14) to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

16. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

17. Pursuant to Section 307(b) of the CWA, 33 U.S.C. § 1317(b), EPA promulgated regulations at 40 C.F.R. Part 403 establishing the General Pretreatment Regulations. These regulations are designed to control pollutants which may pass through or interfere with the treatment processes of POTWs or that may contaminate sewage sludge.

18. The General Pretreatment Regulations at 40 C.F.R. § 403.3(k) and (p) set forth definitions for interference and pass through, respectively. Specifically:

- a. “Interference” is defined, in pertinent part, as a discharge of pollutants, which, alone or in conjunction with a discharge or discharges from other sources, inhibits or disrupts the POTW, its processes or operations, and which therefore is a cause of a violation of any requirement of a POTW’s NPDES permit.
- b. “Pass through” is defined, in pertinent part, as a discharge which exits a POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of a POTW’s NPDES permit.

19. Pursuant to 40 C.F.R. § 403.5(a), users are prohibited from introducing pollutants into a POTW which cause “pass through” or “interference.”

EPA's Findings of Fact

20. Tortilla King (Respondent), is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

21. At all times relevant, Respondent was, and still is, the owner and/or operator of a food processing facility located at 249 23rd Avenue, Moundridge, Kansas 67107.

22. The city of Moundridge, Kansas (hereafter “City”) owns and operates a POTW in McPherson County, Kansas. The City’s POTW includes a wastewater treatment plant and sewage collection system, which receive wastewater from various domestic and non-domestic sources, including wastewater discharged from Respondent’s facility.

23. The City’s POTW is a “point source” that “discharges pollutants” into Black Kettle Creek, as these terms are defined by Section 502(14) and (12) of the CWA, respectively, 33 U.S.C. § 1362(14) and (12).

24. Black Kettle Creek is considered a “navigable water” of the United States, as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

25. On or about February 1, 2007, NPDES Permit No. KS0021008 was issued to the City by KDHE pursuant to Section 402 of the CWA, 33 U.S.C. § 1342 (hereafter “NPDES permit”).

26. The NPDES permit contained limitations for discharges of effluent from the City’s POTW to Black Kettle Creek.

27. The NPDES permit contained POTW discharge limits for, among other pollutants, total suspended solids (“TSS”) and biological oxygen demand (“BOD”), expressed as concentration limits.

28. Respondent discharges process wastewater from the Facility into the City’s POTW, and therefore is an “industrial user,” as defined by 40 C.F.R. § 403.3(j).

29. Tortilla King consumes an average of approximately 36,000 gallons per workday of potable water, the majority of which is discharged to the City’s POTW. As such, Respondent is a Significant Industrial User (“SIU”) as defined by 40 C.F.R. § 403.3(v)(ii).

30. The Respondent’s process wastewater is a “pollutant” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

31. Respondent is subject to the General Pretreatment Regulations at 40 C.F.R. Part 403.

32. The City's POTW serves approximately 2,000 persons and has an estimated design treatment capacity of 320 LB/D of BOD. Based on 2008 sampling data, Tortilla King's calendar daily average BOD effluent represents approximately 56 percent of the City's overall BOD capacity.

33. According to Discharge Monitoring Reports obtained by EPA, the City exceeded its NPDES permit limits for BOD and TSS between October 2011 and July 2012, including but not limited to exceedances outlined in the following table.

Table 1: BOD and TSS Exceedences for Moundridge POTW (in mg/l)

Date	BOD Exceedence (Weekly Average: 45 mg/l)	BOD Exceedence (Monthly Average: 30 mg/l)	TSS Exceedence (Weekly Average: 120 mg/l)	TSS Exceedence (Monthly Average: 80 mg/l)
10.5.11	46.7		180	
10.12.11			130	
10.14.11	81.3		920	
10.26.11			143	
10.11		52.53		343.25
11.4.11	56.4		147	
11.9.11	53.2		145	
11.16.11	62.2		153	
11.30.11	48.6			
11.11		55.1		140.75
12.7.11			142	
12.21.11			127	
12.11		31.95		199.88
1.11.12			122	
1.11				122
2.1.12			134	
2.3.12			150	
2.15.12			158	
2.12		32.66		147
3.12		38		
4.18.12	48.4			
4.12		48.4		107
5.12		37.2		190
6.12.12	61		112	
6.12		61		112
7.18.12			143	
7.12				143

Findings of Violation

Interference and Pass Through Violations

34. The facts stated in paragraphs 20 through 33, above, are hereby incorporated by reference.

35. Pursuant to 40 C.F.R. Part 403, Respondent is prohibited from discharging pollutants that cause interference or pass through at the City of Moundridge's POTW.

36. According to the City's Discharge Monitoring Reports, Tortilla King's discharges, alone or in conjunction with discharges from other sources, have caused interference and/or pass through as defined by the General Pretreatment Regulations, 40 C.F.R. § 403.5(a)(1).

37. Respondent's discharges resulting in interference and/or pass through to the City POTW are violations of the General Pretreatment Regulations, 40 C.F.R. § 403.5(a)(1), and as such, are violations of Sections 301(a) and 307(d) of the CWA, 33 U.S.C. §§ 1311(a) and 1317(d).

CONSENT AGREEMENT

38. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

39. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

40. Respondent neither admits nor denies the factual allegations set forth above.

41. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order portion of this CA/FO.

42. This CA/FO addresses all civil and administrative claims for the CWA violations including those identified in Paragraphs 36 and 37 above. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this CA/FO. Respondent reserves the right to defend against such actions on any basis in law or fact.

43. EPA approved a Compliance Schedule dated March 21, 2012, via letter dated April 19, 2012. The completion of the upgraded wastewater treatment facility is expected to be completed by January 15, 2013. At that time, Respondent expects to attain compliance with Sections 301 and 307 of the CWA, and all regulations promulgated thereunder.

44. The effect of settlement described in paragraph 42 is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in paragraph 43 of this CA/FO.

45. Respondent and Complainant each agree to bear their own costs and attorney's fees.

46. Nothing contained in this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

Penalty

47. Respondent consents to the issuance of the Final Order and consents to the payment of a mitigated civil penalty of Fifty Thousand Four Hundred and Ninety Eight dollars and Thirty Four cents (\$50,498.34).

48. Respondent shall submit payment of the penalty in three installments. The first payment of \$16,832.78 is due within thirty (30) days of the effective date of this CA/FO. The second payment of \$16,832.78 is due no later than November 30, 2013. The third payment of \$16,832.78 is due no later than November 30, 2014. Payments of the penalty shall be by cashier or certified check made payable to "United States Treasury." The check must include the docket number CWA-07-2012-0060 and the name of the case. The check must be remitted to:

U.S. EPA Region 7
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letter and the check shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and

Chris Muehlberger
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

49. Respondent's failure to pay any portion of the civil penalty in accordance with the provisions of this CA/FO may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

50. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

51. The undersigned representative of Respondent certifies that he is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

52. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer. Upon signature of the Regional Judicial Officer, Complainant will submit a fully executed copy of this CA/FO to Respondent at the above-listed address.

Parties Bound

53. The Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

For the Respondent:

Feb 6, 2013
Date

Juan Guardia-C
Name (Print) Juan Guardiola
Title President

For the United States Environmental Protection Agency - Region 7

2.13.13
Date

Chris Muehlberger
Chris Muehlberger
Assistant Regional Counsel

2-13-13
Date

Karen A. Flournoy
Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.

March 28, 2013

Date

Karina Borromeo

KARINA BORROMEO
Regional Judicial Officer

IN THE MATTER OF Tortilla King, Inc., Respondent
Docket No. CWA-07-2012-0060

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 emailed to Attorney for Complainant:

muehlberger.christopher@epa.gov

Copy by emailed to Attorney for Respondent:

bbarrientos@stinson.com

Dated: 3/28/13



Kathy Robinson
Hearing Clerk, Region 7