

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7

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11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF: )

) Docket No. CWA-07-2014-0025

CITY OF HAYS, KANSAS, )

) COMPLAINT AND  
) CONSENT AGREEMENT/  
) FINAL ORDER

Respondent, )

Proceedings under Section 309(g) of the )  
Clean Water Act, 33 U.S.C. § 1319(g) )  
\_\_\_\_\_ )

**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) 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 EPA has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311, 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 the EPA. The Administrator has delegated this authority to the Regional Administrator of 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 Hays, Kansas (hereafter “Respondent” or “the City”), a political subdivision of the State of Kansas and a “municipality” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4), which owns and operates a publicly owned treatment works (POTW) that treats domestic, commercial, and industrial wastewater.

#### Statutory and Regulatory Framework

5. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, and industrial and municipal waste discharged into water.

9. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” 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, or vessel or other floating craft, from which pollutants are or may be discharged.”

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 122.2, and which include tributaries to waters of the United States.

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 National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

12. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. § 122.1, an NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

13. 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, implementing regulations, and a Memorandum of Understanding between EPA and KDHE dated May 23, 1973, as amended. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of NPDES permits.

14. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the issuance of a penalty against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

15. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16. At all relevant times, Respondent has owned and operated the wastewater treatment facility and its associated sewer collection and transmission systems, which receive and treat wastewater from residential, commercial, and industrial connections within the City of Hays, Kansas.

17. Respondent’s wastewater treatment facility described in Paragraph 16 is a “point source” as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).

18. Respondent’s wastewater treatment facility causes the “discharge of pollutants” as defined by the CWA Section 502(12), 33 U.S.C. § 1362(12).

19. Respondent’s wastewater treatment facility discharges pollutants via an outfall into Big Creek via Chetolah Creek, each of which is a “navigable water” as defined by CWA Section 502(7), 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

20. Respondent is therefore subject to the provisions of the CWA, 33 U.S.C. § 1251 *et seq.*, and as such Respondent’s discharge of pollutants requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. KDHE issued NPDES Permit No. KS0036684 to Respondent for discharges from its wastewater outfall into Big Creek via Chetolah Creek. The permit became effective October 1, 2010, and will expire February 28, 2014.

22. Section A, the Effluent Limitations and Monitoring Requirements section of Respondent’s NPDES permit, authorizes discharges from the specified outfalls as limited by the listed effluent limitations, including the following:

a. Ammonia as Nitrogen

- i. effluent limitations for Outfall 001A1 - a monthly average concentration limitation ranging from 4.1 to 12.6 milligrams per Liter (mg/L), depending on the month
- ii. monitoring frequency - twice monthly

- b. 5-day Biochemical Oxygen Demand (BOD<sub>5</sub>)
  - i. effluent limitations for Outfall 001A1 - for November through March, a weekly average concentration limitation of 40 mg/L and a monthly average concentration limitation of 25 mg/L; for April through October, a weekly average concentration limitation of 30 mg/L and a monthly average concentration limitation of 20 mg/L
  - ii. monitoring frequency - twice monthly
- c. Total Suspended Solids (TSS)
  - i. effluent limitations for Outfall 001A1 - a weekly average concentration limitation of 45 mg/L, and a monthly average concentration limitation of 30 mg/L
  - ii. monitoring frequency - twice monthly
- d. *Escherichia coli* (*E. coli*)
  - i. effluent limitations for Outfall 001A1 - for April through October, a monthly geometric average of 262 colonies/100 milliliters (ml); for November through March, a monthly geometric average of 2,358 colonies/100 ml
  - ii. monitoring frequency - twice monthly.

23. Section C, the Supplemental Conditions for Golf Course, Park and Ballfield Irrigation section of Respondent's NPDES permit, specifies certain management and monitoring requirements for treated water from wastewater treatment facility that will be utilized for irrigation purposes. Paragraph 1 of this section specifies a minimum daily average concentration limit for total residual chlorine in the irrigation water of 2.5 mg/L, and a minimum allowable concentration limit for total residual chlorine of 1.0 mg/L.

24. On April 15-18, 2013, an EPA representative performed a Compliance Sampling Inspection (hereafter "the EPA inspection") of Respondent's facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its NPDES permit and the CWA. During the EPA inspection, the inspector collected wastewater samples from Outfall 001A1, observed the wastewater treatment facility, and reviewed Respondent's self-monitoring records. The inspector issued a Notice of Potential NPDES Permit Violations at the end of the inspection, and EPA sent the report documenting the findings of the inspection to Respondent on or about August 5, 2013.

### ALLEGATIONS

25. The facts stated in Paragraphs 15 through 24, above, are herein incorporated.

26. Based on observations documented during the EPA inspection and review of available information, EPA alleges that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by violating the terms and conditions of its NPDES permit, in at least the following ways:

#### Count I - Failure to Comply with Effluent Limitations

27. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its NPDES permit, by exceeding the ammonia monthly average concentration limit during the months of June, July, August, September, and December 2011; and January, February, March, and June 2012.

28. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its NPDES permit, by exceeding the BOD<sub>5</sub> weekly average during the months of June 2011, January 2012 and June 2012; and by exceeding the monthly average concentration limit during the months of June and July 2011, and January and June 2012.

29. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its NPDES permit, by exceeding the TSS weekly and monthly average concentration limits during the month of June 2011.

30. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its NPDES permit, by exceeding the applicable *E. coli* limit during the months of August 2011 and January, April and May 2012.

#### Count II - Failure to Comply with Irrigation Disinfection Limits

31. Respondent violated Section C of its NPDES permit, titled "Supplemental Conditions for Golf Course, Park and Ballfield Irrigation," by failing to meet the minimum total residual chlorine concentration in the Reclaimed Water Basin to be used for irrigation of public use areas during the months of September 2010, February 2011, and September 2011.

32. Respondent's violations of the terms and conditions of its NPDES permit, as described in Paragraphs 27 through 31, above, are violations of Section 301(a), 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and implementing regulations.

33. 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 43 below.

**CONSENT AGREEMENT**

34. Respondent and EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order.

35. Respondent admits the jurisdictional allegations set forth in this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement/Final Order.

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

37. Respondent waives any right to contest the allegations set forth above, and its right to appeal the proposed Final Order portion of the Consent Agreement/Final Order.

38. 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.

39. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

40. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

41. Respondent certifies by signing this Consent Agreement/Final Order that, to the best of its knowledge, Respondent is in compliance with all requirements of the CWA and its NPDES permit.

42. The effect of settlement is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 41 of this Consent Agreement/Final Order.

43. Respondent consents to the issuance of the Final Order hereinafter recited and agrees to pay a mitigated civil penalty in the amount of \$18,000.

44. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Allegations.

Reservation of Rights

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

46. With respect to matters not addressed in this Consent Agreement/Final Order, 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 punitive damages.

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 civil penalty of Eighteen Thousand dollars (\$18,000) within thirty calendar days of the effective date of this Final Order. Respondent shall pay the penalty by cashier's or certified check made payable to "Treasurer, United States of America," and shall deliver the check with a transmittal that identifies the case name and docket number CWA-07-2014-0025 to:

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

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

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

and to:

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

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

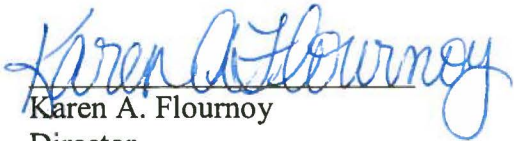
5. This Final Order shall apply to and be binding upon Respondent, his agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this Consent Agreement/Final Order.

6. This Final Order shall become 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 Complaint and Consent Agreement/Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.




COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY



Karen A. Flourmoy  
Director  
Water, Wetlands and Pesticides Division

06-10-14  
Date

  
Erin Weekley  
Assistant Regional Counsel

6/9/2014  
Date

RESPONDENT:  
CITY OF HAYS, KANSAS

April 10 2014  
Date

Henry Schwaller, IV  
Name

H. Schwaller, IV  
Signature

Mayor  
Title

IT IS SO ORDERED.

6-17-14  
Date

Karina Borromeo  
Karina Borromeo  
Regional Judicial Officer  
U.S. Environmental Protection Agency  
Region 7

**CERTIFICATE OF SERVICE**

I certify that on the date below, I hand delivered the original and one true copy of this Complaint and Consent Agreement/Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. I further certify that on the date below I sent by certified mail, return receipt requested, a true and correct copy of the original Complaint and Consent Agreement/Final Order to the following:

The Honorable Kent Steward  
Mayor of Hays  
P.O. Box 490  
Hays, Kansas 67601.

In addition, I certify that I sent by first class mail a true and correct copy of the original Complaint and Consent Agreement/Final Order to:

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

Dated this 17<sup>th</sup> day of June, 2014.

  
Name \_\_\_\_\_