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ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
REGIONAL HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )

Cornhusker Energy Lexington, LLC )  
1111 East Industry Drive, )  
Lexington, Nebraska 68850 )

Respondent )

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

Docket No. CWA-07-2010-0014

CONSENT AGREEMENT/  
FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 (Complainant) and Cornhusker Energy Lexington, LLC (Respondent) have agreed to a settlement of this action before the filing of a complaint, and 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 (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

ALLEGATIONS

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 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.

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 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 Cornhusker Energy Lexington, LLC, is a limited liability corporation organized under the laws of the State of Nebraska.

### Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits 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. Section 402 provides that pollutants may be discharged into navigable waters of the United States 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).

6. 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 the introduction of pollutants into POTWs which may pass through or interfere with the treatment processes of such treatment works or which may contaminate sewage sludge.

7. The General Pretreatment Regulations at 40 C.F.R. § 403.3(i) and (n) 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 other sources, inhibits or disrupts the treatment processes or operations of a POTW, and which therefore is a cause of a violation of any requirement of a POTW's NPDES permit; and
- b. "Pass through" is defined, in pertinent part, as a discharge of pollutants which exits a POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with other sources, is a cause of a violation of any requirement of a POTW's NPDES permit.

8. Pursuant to 40 C.F.R. § 403.5(a), users are prohibited from introducing pollutants into a POTW which result in the "pass through" of pollutants through the POTW, or "interference" with the operations of the POTW.

9. The Nebraska Department of Environmental Quality ("NDEQ") is the state agency with the authority to administer the federal NPDES program. EPA authorized the State of Nebraska (Nebraska) to administer the NPDES program pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), in June of 1974, and later authorized Nebraska to administer the Pretreatment Program in September of 1984, pursuant to Section 307 of the CWA, 33 U.S.C. § 1917. EPA retains concurrent enforcement authority under Section 309 of the CWA, 33 U.S.C. § 1319.

#### Factual Background

10. Cornhusker Energy Lexington, LLC ("Respondent"), is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and is registered to do business in the state of Nebraska.

11. At all times relevant, Respondent was, and still is, the owner and/or operator of a dry mill ethanol plant located at 1111 East Industry Drive, Lexington, Nebraska 68850 (the "facility").

12. The City of Lexington, Nebraska (hereafter "City") owns and operates a POTW in Dawson County, Nebraska. 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.

13. The City's POTW is a "point source" that "discharges pollutants" into Spring Creek, a tributary of the Platte River, as these terms are defined by Section 502(14) and (12) of the CWA, respectively, 33 U.S.C. § 1362(14) and (12).

14. Spring Creek and the Platte River are considered "navigable waters" of the United States, as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

15. On or about October 1, 2004, NDEQ issued the City NPDES permit number NE0042668 pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

16. The City's NPDES Permit contains limitations for discharges of effluent from the City's POTW to Spring Creek, a tributary of the Platte River. The City's NPDES Permit contains POTW discharge limits for Carbonaceous Biochemical Oxygen Demand (CBOD), among other pollutants.

17. 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(h).

18. The Respondent's process wastewater contains "pollutants" as defined by Section 502(6) of the CWA, including, but not limited to, ethanol and ethanol by-products.

19. The Respondent discharges pollutants to the City's POTW. On or about November 16, 2005, the NDEQ issued the Respondent the Nebraska Pretreatment Program (NPP) permit number NE0134279 pursuant to provisions of the CWA, 33 U.S.C. § 1317.

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

21. On or about February 26-28, 2008, EPA performed an inspection of the City's POTW (hereinafter "the February 2008 inspection"), under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

#### Findings of Violation

##### Count I - Interference and Pass Through Violations

22. The facts stated in Paragraphs 10 through 21, above, are hereby incorporated by reference.

23. Pursuant to 40 C.F.R. Part 403, Respondent shall not discharge pollutants which cause interference or pass through at the City's treatment facility.

24. Section IV, Part B of Respondent's NPP Permit prohibits discharges to the City's treatment facility that interfere with the operation of the City's treatment facility or cause interference or process upset.

25. On or about May 15, 2006, Respondent discharged a large quantity or a slug load of ethanol to the POTW. This discharge of ethanol was toxic to the activated sludge in the City's pretreatment system and biotowers. This discharge resulted in an upset to the City's treatment facility and resulted in violations of the City's NPDES permit for Carbonaceous Biochemical Oxygen Demand in May 2006.

26. Based on observations documented during the EPA February 2008 inspection and a review of NDEQ Inspection Reports, EPA finds that Respondent discharged pollutants in May 2006 which caused interference and/or pass through at the City's treatment facility.

27. On or about January 14, 2008, Respondent discharged approximately two thousand gallons of caustic wastewater to the City's treatment facility. This discharge caused a die off of activated sludge at the City's treatment facility.

28. Based on observations documented during the February 2008 inspection and review of the NDEQ Inspection Reports, EPA finds that Respondent discharged pollutants in January 2008 which interfered with the operation of the POTW and/or caused interference or process upset.

29. Respondent, as a discharger to the POTW, alone or in conjunction with other industrial users, caused the pass through of pollutants and/or interference with the POTW's treatment processes and operations.

30. The occasion of pass through and/or interference by Respondent, as described above, is a violation of the Respondent's NPP Permit and the General Pretreatment Regulations at 40 C.F.R. § 403.5(a)(1), and Sections 301(a) and 307(d) of the CWA, 33 U.S.C. §§ 1311(a) and 1317(d).

#### CONSENT AGREEMENT

31. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited above in the amount of \$5,200.

32. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

33. Respondent admits the jurisdictional allegations of this CAFO 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 CAFO.

34. Respondent neither admits nor denies the factual allegations and legal conclusions asserted by EPA in the Factual Background and Findings of Violation sections set forth above.

35. 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 CAFO.

36. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

37. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

38. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

39. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

40. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 307 of the CWA, 33 U.S.C. §§ 1311 and 1317.

41. The effect of settlement described in Paragraph 39 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 40 above, of this CAFO.

42. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a penalty of \$5,200, plus interest, as set forth in Paragraph 1 of the Final Order.

43. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

#### FINAL ORDER

#### **Payment Procedures**

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CAFO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Five Thousand Two Hundred Dollars (\$5,200) plus interest of Eighty-Four Dollars and Ninety-Two Cents (\$84.92), for a total payment of Five Thousand Two Hundred and Eighty-Four Dollars and Ninety-Two Cents (\$5,284.92). The total civil penalty of Five Thousand Two Hundred and Eighty-Four Dollars and Ninety-Two Cents (\$5,284.92) shall be paid in twelve installment payments. The first payment of Four Hundred and Forty Dollars and Forty-One Cents (\$440.41) is due within thirty (30) days of the effective date of this CAFO. The second payment of Four Hundred and Forty Dollars and Forty-One Cents (\$440.41) is due within sixty (60) days of the effective date of this CAFO. Respondent shall make the third through twelfth installment payments of Four Hundred and Forty Dollars and Forty-One Cents (\$440.41) every thirty (30) days thereafter. These installment payments shall result in the total payment of Five Thousand Two Hundred Dollars (\$5,200), plus interest, to be paid in full no later than 365 days after the effective date of this CAFO.

2. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the above schedule will automatically accelerate the debt which will become due and owing in full, immediately. Interest on any late payment 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 any 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.

3. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2010-0014.

Copies of the check shall be mailed to:

Kristen Nazar  
Assistant Regional Counsel  
U.S. Environmental Protection Agency -- Region 7  
901 North 5th Street  
Kansas City, Kansas 66101

and to

Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

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

### **Parties Bound**

5. This Final Order portion of this CAFO 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 CAFO.

### **General Provisions**

6. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of the Final Order portion of this CAFO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CAFO.

8. This 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) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

9. Respondent and Complainant shall bear their respective costs and attorney's fees.

10. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY,

3-18-10  
Date

  
\_\_\_\_\_  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

3/18/10  
Date

  
\_\_\_\_\_  
Kristen Nazar  
Assistant Regional Counsel

RESPONDENT:  
CORNHUSKER ENERGY LEXINGTON, LLC

12-22-09

Date

Tyde Roubough

Name (Print) Tyde Roubough

Title CEO

IT IS SO ORDERED. This Final Order shall become effective immediately.



Robert Patrick  
Regional Judicial Officer

March 31, 2010  
Date

IN THE MATTER OF Cornhusker Energy Lexington, LLC, Respondent  
Docket No. CWA-07-2010-0014

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order and Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to  
Attorney for Complainant:

Kristen Nazar  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Michael S. Mostek  
Koley Jessen P.C., L.L.O.  
One Pacific Place  
1125 South 103 Street, Suite 800  
Omaha, Nebraska 68124

Dated: 3/31/10



Kathy Robinson  
Kathy Robinson  
Hearing Clerk, Region 7