

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

Russell Stover Candies, Inc.)
1995 Marshmallow Lane)
Iola, Kansas 66749)

Respondent)

Proceeding under Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))

Docket No. CWA-07-2009-0099

FINDINGS OF VIOLATION
AND ORDER FOR COMPLIANCE

I. Statutory Authority

1. The FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), by Section 309(a)(3) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1319(a)(3). As an element of this ORDER, provision of information is required pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318. These authorities have been delegated by the Administrator to the Regional Administrator, EPA Region 7, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA Region 7.

2. Section 301(a) of the Act, 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 Act, 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").

3. Pursuant to Section 307(b) of the CWA, 33 U.S.C. § 1317(b), EPA promulgated regulations codified at 40 C.F.R. Part 403, entitled the General Pretreatment Regulations. These regulations control the introduction of pollutants by industrial users into POTWs which may pass through or interfere with treatment processes of such treatment works or which may contaminate sewage sludge.

4. 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 EPA and KDHE.

5. KDHE is not approved to administer a state authorized Pretreatment program in Kansas pursuant to Sections 307 and 402 of the CWA and its implementing regulations. Consequently, in Kansas, EPA remains the Approval Authority as defined by 40 C.F.R. § 403.3(c).

6. On or around July 1, 1987, EPA Region 7 approved the local Pretreatment program developed by the City of Iola (hereafter “City”). The City has been required to implement its approved Pretreatment Program and the General Pretreatment Regulations, 40 C.F.R. Part 403 as a condition of its NPDES permits, including NPDES permit number KSKS0032123 issued on September 27, 2001, and reissued on August 10, 2005, and NPDES permit number KS0099414 issued on March 24, 2008.

7. A “Significant Industrial User” or “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.

II. General Factual Allegations

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

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

10. The Neosho River is considered “navigable waters” of the United States, as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

11. On or about August 10, 2005, NPDES Permit No. KS0032123 was issued to the City by the KDHE pursuant to Section 402 of the Act, 33 U.S.C. § 1342 (hereafter “2005 NPDES permit”). The effective date of the 2005 permit was September 1, 2005, and the expiration date is December 31, 2008.

12. On or about March 24, 2008, NPDES Permit No. KS0032123 was issued to the City by the KDHE pursuant to Section 402 of the Act, 33 U.S.C. § 1342 (hereafter "2008 NPDES permit"). The effective date of the 2008 permit was April 1, 2008, and the expiration date is March 31, 2013.

13. Section C of both the 2005 and 2008 NPDES Permits contains a requirement to implement the General Pretreatment Regulations and its approved Pretreatment Program.

14. Respondent is incorporated under the laws of the State of Missouri and licenced to do business in the State of Kansas.

15. At all times relevant, Respondent has owned and/or operated a confectionary processing Facility located at 1995 Marshmallow Lane, Iola, Kansas 66749 ("the Facility"), as Russell Stover Candies, Inc. (hereafter "Russell Stover or Respondent").

16. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

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. Russell Stover consumes an average of 60,000 gallons per day of potable water, of which about 48,000 gallons per day are discharged to the City's POTW.

19. Respondent is a SIU as defined by 40 C.F.R. 403.3(t)(ii).

20. The Respondent's process wastewater is a "pollutant" as defined by Section 502(6) of the CWA.

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

22. Pursuant to implementation of the Pretreatment program, the City issued Respondent an Industrial Wastewater Discharge Permit on or around January 1, 2006, identified as discharge Permit Number 004 ("Permit 004"). Respondent's Permit 004 was reissued on or around January 1, 2008, and expires on December 31, 2009.

23. Both the 2006 and 2008 Permit 004 issued to Respondent include, at Part 2, B.2, a monitoring requirement and limitation for pH. The permit limitation prohibits the discharge of any wastewater from Respondent to the POTW with a pH less than 5 s.u.

24. The General Pretreatment Regulations establishes a National Pretreatment Standard for pH at 40 C.F.R. 403.5(b)(2), with the specific prohibition that no pollutant shall be discharged that causes "structural damage to the POTW, but in no case Discharges with pH

lower than 5.0.”

III. Findings of Violation

25. The facts stated above are hereby incorporated by reference.

26. On or about June 17, 2008, EPA performed a Pretreatment audit of the City’s Pretreatment Program. The inspector reviewed, among other things, records maintained by the City regarding monitoring for IUs and the POTW.

27. EPA’s inspector observed that City records indicated that Russell Stover routinely discharged wastewater having a pH below 5.0 s.u.

28. Further review of records obtained from the City of Respondent’s discharges show that Respondent routinely discharged wastes having a pH less than 5.0. Specifically, the following dates and pH values were measured and reported by Russell Stover pursuant to the reporting requirements of Permit 004 .

Wastewater Discharges Having a pH Less Than 5.0 s.u.

Date	s.u.	Date	s.u.	Date	s.u.
February 8, 2006	4.4	February 20, 2007	3.6	February 19, 2008	4.8
February 13, 2006	4.7	February 21, 2007	4.2	February 20, 2008	4.4
February 15, 2006	4.3	February 22, 2007	3.2	February 21, 2008	4.3
February 16, 2006	4.1	February 23, 2007	4.4	February 22, 2008	4.6
February 17, 2006	4	August 21, 2007	3.7	February 23, 2008	4.77
February 18, 2006	4.5	August 22, 2007	4.1	February 23, 2008	4.2
February 20, 2006	4.2	August 23, 2007	4.3	August 13, 2008	3.7
February 21, 2006	3.8	August 24, 2007	4.6	August 14, 2008	4
		August 25, 2007	3	August 15, 2008	4.1
		August 26, 2007	3.8	August 16, 2008	4
		August 27, 2007	4.6	August 17, 2008	4.1
				August 18, 2008	4.3
				August 19, 2008	3.94
				August 19, 2008	3.4

29. Respondent violated the General Pretreatment Regulations, 40 C.F.R. 403.5(b)(2), Sections 301(a) and 307(d) of the CWA, 33 U.S.C. §§ 1311(a) and 1317(d) , and Respondent’s Permit 004 for discharging wastewater having a pH less than 5.0 s.u., on at least the dates identified in Paragraph 28 above.

IV. Order for Compliance

30. Based on the foregoing Findings of Violation , and pursuant to the authority of Section 309(a)(3) of the Act, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED AS FOLLOWS:

31. Within forty-eight (48) hours of receipt of this Order, Respondent shall submit to EPA

a written description of immediate interim measures to be taken by Respondent to cease discharging wastewater having a pH less than 5.0 s.u. the POTW. Respondent shall perform such interim measures until such time as the Compliance Plan required by Paragraph 33, below, can be developed, approved by EPA, and implemented by Respondent.

32. Within forty-eight (48) hours of receipt of this Order, Respondent shall begin sampling its wastewater discharge to the City at the sampling location specified in Permit 004, for:

- a. pH: if a continuous pH meter is present, continuously; otherwise, by daily grab sample;
- b. BOD and TSS: weekly, using composite sampling methods; and
- c. Flow: daily.

33. Within fifteen (15) days of receipt of this Order, Respondent shall provide to EPA a proposed Compliance Plan, for EPA's review and approval, that shall describe in detail how Respondent will treat its wastewater so that it no longer discharges an effluent having a pH less than 5.0 s.u., as described in the Findings set forth above. At a minimum, the proposed Compliance Plan shall include:

- a. A description of any process changes Respondent proposes to undertake at the Russell Stover Facility;
- b. A description of the wastewater treatment system that will be installed, or modifications Respondent proposes to undertake to an already existing system, at the Russell Stover Facility;
- c. A schedule for implementation of the proposed actions; and
- d. Submission of cost information relating to any proposed action or actions that have already been implemented to treat Respondent's wastewater for pH.

34. Within thirty (30) days of receipt of this Order, Respondent shall provide to EPA the following information:

- a. Provide a copy of any and all information and data for effluent samples of any pollutant taken of Respondent's discharge since June 1, 2004, whether taken by the City, Respondent, or submitted to the City by a third party;
- b. Provide a copy of any and all flow measurements of Respondent's discharge of wastewater to the POTW since June 1, 2004;
- c. For the period between June 1, 2004, and the present, state whether any representatives

of Respondent have participated in any discussions with the City and/or KDHE regarding the impact of Respondent's wastewater on the POTW (e.g. pH effects on the collection system, BOD/TSS effects on the treatment plant), and/or the impact of Respondent's wastewater on the ability of the POTW to comply with its NPDES permit. If such discussions occurred, provide the date and participants in such discussions;

d. Provide a copy of any and all documentation of communications between the City of Iola and Respondent (including meeting notes or memorandum) that discuss or relate to any discussions of any actual or potential adverse effects that Respondent Russell Stover's wastewater discharge had, or is having, on the POTW;

e. Provide a copy of any and all past and present studies, reports, memoranda, correspondence, or other documentation that describes or relates to the actual or any considered treatment of Respondent's effluent, or the POTW's influent and/or effluent;

f. For the period between June 1, 2004 and the present, provide a copy of any invoices, bills, or claims, and a summary by month of any and all such fees (or surcharges), levied against Respondent by the City for the treatment of Respondent's wastewater and provide an explanation of the basis for the calculations behind such fees (or surcharges);

g. Provide a copy of any and all past and/or present agreements between the City and Respondent related to the treatment of wastewater or inspection sampling and analysis;

h. For each year between June 1, 2004, and the present, provide a summary of monthly production, by general product type, at Respondent's Russell Stover.

i. For the period between June 1, 2004, and the present, provide a detailed description of any and all expansions of the production capacity at Respondent's Russell Stover, Iola Facility;

j. Provide copies of all reports submitted to the City pursuant to the reporting requirements of Part 2, E. Reporting Requirements, of Respondent's Pretreatment Permit 004; and

k. If Respondent has paid for any repairs to the City's collection system, or reimbursed the City for repair costs, provide all correspondence (including emails), memos, studies, and records of costs or reimbursements associated with repair of the collection system.

35. Periodic Reports on activities required by this Order are to be submitted to EPA every two months on the 15th day of the month following the completed reporting period until termination of this Order. The first report is due on or before September 15, 2009, and shall cover the time period from the effective date of this Order through August 31, 2009. All bi-monthly Periodic Reports shall contain the following information:

- a. A table clearly showing all effluent sample results, date taken, and wastewater flow;
- b. Copies of the analytical results for all sampling required pursuant to this Order;
- c. A written summary of all other activities undertaken in compliance with this Order; and
- d. A written statement of whether Respondent is in compliance with Permit 004.

Certification

36. All submissions made by Respondent to EPA and KDHE pursuant to the requirements of this Order shall contain the following certification signed by an authorized official, as described at 40 CFR § 122.2:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing submissions of false information.

Confidential Business Information

37. The information required herein must be submitted notwithstanding any claim you may have concerning confidentiality. If you wish to assert a claim of confidentiality concerning information submitted in response to this letter, you may do so pursuant to the provisions of 33 U.S.C. § 1318 and 18 U.S.C. § 1905. EPA will consider and process such a request pursuant to said statutes and EPA regulations at 40 C.F.R. Part 2, Subpart B.

EPA Review and Approval of Required Submittals

38. EPA will review all proposed submittals requiring EPA approval, and notify Respondent in writing of EPA's approval, disapproval or modification of the submittal, or any part thereof. Within thirty (30) days of receipt of EPA's comments pertaining to any submittal, Respondent shall amend such submittal, addressing all of EPA's comments, and resubmit same to EPA. If EPA disapproves the revised submittal, it may modify and approve the same in accordance with its comments. In the event of such modification, EPA will notify Respondent of the modification. Upon receipt of EPA's approval or notice of modification, Respondent shall commence work and implement any approved submittal in accordance with the schedule and provisions contained therein. EPA approved submittals shall be deemed incorporated into and part of this Order.

39. All documents required for submittal to EPA shall be hand delivered or sent by certified mail, return receipt requested, to the following:

Mr. Paul Marshall
Pretreatment Coordinator
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, KS 66101.

V. General Provisions

Effect of Compliance with the Terms of This Order for Compliance

40. Compliance with the terms of this Order for Compliance shall not relieve Respondent of liability for, or preclude EPA from initiating, an enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

41. Respondent shall comply with all other applicable laws, regulations, standards, and requirements contained in any applicable local, State and Federal pretreatment laws, regulations, standards, and requirements including any such laws, regulations, standards, or requirements that may become effective during the term of this Order.

42. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 et. seq., all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Section 309 of the Act, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

Access and Requests for Information

43. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

44. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.


Effective Date


45. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

Termination

46. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.

ISSUED this 28th day of July, 2009.


for William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101


Patricia Gillispie Miller
Senior Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Order for Compliance Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to:

Ms. Cheryl Dillow
Manager
Russell Stover Candies, Inc.
1995 Marshmallow Lane
Iola, Kansas 66749

The Corporation Company, Inc.
513 South Kansas Avenue
Topeka, Kansas 66603

Karl Mueldener
Bureau of Water
Kansas Department of Health and Environment
Curtis State Office Building
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367

7/30/09

Date

Kimberly