

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

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
THE CITY OF MCCOOK, NEBRASKA) Docket No. CWA-07-2011-0072
)
Respondent) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
)
Proceedings under Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))
_____)

I. Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (Order) 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 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. The City of McCook, Nebraska, (hereafter Respondent or City) owns and operates a publicly owned treatment works (POTW) that treats municipal and industrial wastewater. As defined by 40 C.F.R. § 403.3(q), a POTW includes, but is not limited to, devices and systems for the storage and treatment of municipal sewage and sewers, pipes and other conveyances of wastewater.

3. The Nebraska Department of Environmental Quality (NDEQ) is the agency within the State of Nebraska that has been authorized to administer the federal National Pollutant Discharge Elimination System (NPDES) program pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and its implementing regulations. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

II. Statutory and Regulatory Framework

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that Section.

5. 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.

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

III. Findings of Fact

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

8. The City owns and operates a POTW which receives and treats wastewater from various domestic, commercial and industrial sources.

9. The City’s POTW discharges to the Republican River.

10. The City’s POTW is a “point source” that “discharges pollutants” to a “navigable water” of the United States, as those terms are defined by Section 502(7) of the CWA, 33 U.S.C. § 1362.

11. City’s discharge of pollutants from its POTW requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

12. On or about February 1, 2005, the NDEQ issued to the City NPDES permit No. NE0021504 (hereafter, NPDES permit) for discharges from its POTW into the Republican River. The NPDES permit expired January 31, 2010; under state law, the permit was administratively extended until such time as a new permit was issued. The NPDES permit was reissued, effective July 1, 2010 (hereafter, 2010 NPDES permit), with an expiration date of June 30, 2015.

13. On or about July 6, 1998, the NDEQ issued NPDES permit No. NER000768 to the City for Industrial Stormwater Discharges (hereafter, Stormwater General Permit), which authorizes stormwater discharges for the City’s Wastewater Treatment Plant. The NDEQ issued an Administrative Extension of the Stormwater General Permit on or about August 28, 2002.

14. Part III – Discharge Limitations and Monitoring Requirements, of the City’s NPDES permit establishes permit limitations and monitoring requirements for various pollutant parameters, including the following:

- a) *Compliance with Mass Limitations* for carbonaceous biochemical oxygen demand (CBOD) and total suspended solids (TSS) effluent sampling, as listed in Table 1, CBOD and TSS influent sampling, as listed in Part IV, Table 7, and Ammonia as N, as listed in Tables 4, 5 and 6, is to be calculated using flow(s) of the day(s) that the monitoring is conducted. Appendix A of the NPDES permit, Section C – Monitoring and Records, Paragraph 1 – Representative Sampling, requires that samples and measures taken be representative of the discharge.

- b) *24-hour composite sampling* is required for CBOD and TSS effluent sampling, as listed in Table 1, CBOD and TSS influent sampling, as listed in Part IV, Table 7, Effluent Metals, as listed in Table 2, and Ammonia as N, as listed in Tables 4, 5 and 6. In addition, Appendix A of the NPDES permit, Section C – Monitoring and Records, Paragraph 1 – Representative Sampling, requires composite samples to be collected as flow-proportional composite samples, unless time-composite sampling is approved by NDEQ.
- c) *Calculation of the Geometric Mean* to determine compliance with the effluent limits for Fecal Coliform colonies, as identified in Table 3.
- d) *Whole Effluent Toxicity (WET)* daily maximum limitation during all aquatic life seasons of 1.64 chronic toxicity units (TUc) for *Ceriodaphnia sp.*

15. Part IV – Monitoring and Reporting Requirements for Untreated Influent Wastewater, of the City's NPDES permit requires the City to monitor untreated influent wastewater flow on a daily basis to calculate and report CBOD and TSS influent wastewater treatment plant mass loadings.

16. Appendix A – Standards Conditions that Apply to NPDES and NPP Permits, Section C – Monitoring and Records, Paragraphs 1.d. and 3, of the City's NPDES permit requires that all sample preservation techniques and test procedures used for monitoring conform to the methods adopted in NDEQ, Title 121, Chapter 8, which incorporates by reference 40 C.F.R. Part 136, the EPA's codified sampling, analysis and sample preservation methods established pursuant to the CWA. The NPDES permit, through incorporation of the standard methods listed in 40 C.F.R. Part 136, includes, but is not limited to, the following provisions for sampling, preservation, analysis and reporting:

- a) *Fecal Coliform*: 40 C.F.R. 136.3, Table IA;
- b) *Aquatic Toxicity*: 40 C.F.R. § 136.3, Table 1A;
- c) *Ammonia as N*: 40 C.F.R. § 136.3, Table 1B;
- d) *CBOD*: 40 C.F.R. § 136.3, Table 1B; and
- e) *TSS (Residue – non-filterable)*: 40 C.F.R. § 136.3, Table IB.

17. Section D – Stormwater Pollution Prevention Plan, Paragraph 2.d. – Spill Prevention and Response Practices, of the City's Stormwater General Permit requires that the permittee take measures to prevent spills and to prevent any spills that might occur from impacting waters of the State.

18. On or about May 17 through 20, 2010, the EPA performed an inspection of the City's POTW (the EPA Inspection) under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). Included in the inspection was observation of the City's POTW and review of the City's Discharge Monitoring Reports (DMRs).

19. During the time of the EPA Inspection, the inspector collected wastewater samples from Outfall 001, reviewed the City's records related to the NPDES permit and the Stormwater General Permit, observed the POTW and the receiving stream to which Outfall 001 discharges, reviewed the City's compliance with the terms of its Stormwater General Permit, and documented his findings.

20. At the conclusion of the inspection, the EPA's inspector provided a Notice of Potential NPDES Permits Violations to the operator of the POTW.

21. By correspondence dated, May 26, 2010, the City provided the EPA a response to the Notice of Potential NPDES Permits Violations.

22. The City's 2010 NPDES permit includes provisions consistent with the requirements included in the City's 2005 NPDES permit, as set forth in Paragraphs 14 through 16 above, although some of the section and paragraph numbering has changed.

IV. Findings of Violations

23. The facts stated in aforementioned Paragraphs 7 through 22 are herein incorporated.

POTW NPDES Permit Violations

24. The EPA Inspection documented that the Respondent used a monthly average effluent flow measurement to calculate CBOD, TSS, and Ammonia as N mass results for influent and effluent pollutant loadings, rather than using the actual influent or effluent flow measurement, as appropriate, on the date of the sampling event, as required by Parts III and IV of the NPDES permit.

25. The EPA Inspection documented that the Respondent used 24-hour time-based composite sample collection rather than 24-hour flow-based composite sample collection, as required by Parts III and IV of the NPDES permit.

26. The EPA Inspection documented that the Respondent used an arithmetic mean, rather than a geometric mean, to calculate compliance results for Fecal Coliform colonies, as required by Part III of the NPDES permit.

27. The Respondent exceeded its effluent limitations for Chronic Toxicity, measured using *Ceriodaphnia sp.*, as required by Part III of the NPDES permit, during at least the following months:

- a) June, September and December 2007;
- b) September and October 2008; and
- c) September 2009.

28. The EPA Inspection documented that the Respondent did not measure and report daily untreated influent wastewater flow, as required by Part IV of the NPDES permit.

29. The EPA Inspection documented that the Respondent and/or its contract laboratory failed to comply with the procedures for sample collection, sample preservation and/or sample analysis required by its NPDES permit, as follows:

- a) **Fecal Coliform:** Respondent failed to ensure samples were properly cooled/preserved during sampling event; failed to follow the applicable quality control procedures for the test method chosen by the City; failed to use the correct equipment to perform the analysis required by the test method chosen by the City; and failed to specify the test method used to perform the analysis when the results were reported.
- b) **Ammonia as N:** Respondent failed to ensure samples were properly cooled/preserved during sampling event; and failed to ensure its contract laboratory followed the applicable test method and accurately reported the analytical results.
- c) **CBOD:** Respondent failed to ensure samples were properly cooled/preserved during sampling event; and failed to follow the applicable quality control procedures for the test method.
- d) **TSS:** Respondent failed to ensure samples were properly cooled/preserved during sampling event; and failed to follow the applicable quality control procedures for the test method.

30. Respondent's failure to comply with the NPDES permit terms and conditions, as described above, are violations of City's NPDES permit, and as such, are violations of Sections 301(a) and 402 of the CWA, 33 U.S.C. § 1311(a) and § 1342, and implementing regulations of the CWA.

Stormwater General Permit Violations

31. The EPA Inspection documented that the Respondent stored chemicals in at least one area on the POTW grounds in a location where the containers would come into contact with stormwater without any type of secondary container system in place, in violation of the requirements of Respondent's Stormwater General Permit.

32. The Respondent's failure to comply with the requirements of its Stormwater General Permit is a violation of the Stormwater General Permit, and as such, is a violation of Sections 301(a) and 402 of the CWA, 33 U.S.C. § 1311(a) and § 1342, and implementing regulations of the CWA.

V. Order For Compliance

Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED to take the actions described below.

33. Within thirty (30) days of the effective date of this Order, Respondent shall take all actions necessary to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of its NPDES permit, including but not limited to ensuring that all influent and effluent sampling is representative of and in compliance with Respondent's 2010 NPDES permit.

34. Within forty-five (45) days of the effective date of this Order, the Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein, including:

- a) an acknowledgement of receipt of this Order;
- b) a list of key City personnel, including a contact person for purposes of communications regarding this Order, and information regarding any consultant(s) retained by the City to address the requirements of this Order;
- c) a description of all activities initiated to date to achieve compliance with the current NPDES permit limitations and to ensure all sampling and analysis is in compliance with NPDES permit requirements; and
- d) an explanation of how corrective measures will be implemented in the future and why such actions are anticipated to be sufficient to prevent recurrence of the violations identified in the Order or similar violations.

35. In the event that Respondent believes correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall include in its report to be submitted pursuant to Paragraph 34, above, a comprehensive written Plan for the correction of any remaining violations. Such Plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the remaining violations. The Plan shall include a detailed Schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

36. If applicable, the EPA will review the Plan and Schedule submitted by Respondent pursuant to Paragraph 35. After consultation with the NDEQ, the EPA shall approve the Schedule or require modification and resubmission of a portion or all of the Plan and/or Schedule pursuant to Paragraph 37, below. Upon approval, the Schedule shall be deemed incorporated into and become enforceable under this Order. Review and comment on the Plan and approval of the Schedule by the EPA does not relieve Respondent of the responsibility to comply with its NPDES permit, Stormwater General Permit, the CWA, applicable state law, or this Order.

37. If required by the EPA pursuant to Paragraph 36, above, the Respondent shall within forty-five (45) days of receipt of any written comments from EPA regarding the Plan and/or Schedule, make modifications and changes to it as directed by EPA, and resubmit the Plan and/or Schedule to the EPA, with a copy to the NDEQ. Upon request, the EPA may grant, in writing, a longer period of time for resubmission of such documents.

Reporting

38. Beginning October 28, 2011, Respondent shall submit to EPA on a quarterly basis (October 28, January 28, April 28 and July 28), until Respondent is notified by the EPA that the reporting may cease or this Order is terminated pursuant to Paragraph 47, below, the following information:

- a) a description of activities completed under this Order within the quarterly reporting period, including, if applicable, a report of activities to implement the provisions of the approved Plan;
- b) a copy of DMRs submitted to the NDEQ within the quarterly reporting period; and
- c) a copy of chain of custody and bench sheets for influent and effluent monitoring, and any supporting documentation.

Certification

39. All submissions made by Respondent to the EPA pursuant to the requirements of this Order shall contain the following certification signed by an authorized official, as described at 40 C.F.R. § 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.

Submissions

40. All documents required to be submitted to the EPA by this Order, shall be submitted by mail to:

Cynthia Sans (WWPD-WENF)
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101

41. A copy of documents required to be submitted to the NDEQ by this Order, shall be submitted by mail to:

Steve Goans
Permits and Compliance
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
PO Box 98922
Lincoln, Nebraska 68509-8922.

VI. General Provisions

Effect of Compliance with the Terms of this Order for Compliance

42. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from, initiating an administrative or judicial 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.

43. 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. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the Act, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by the 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

44. Nothing in this Order shall limit the 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

45. 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

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

Termination

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

Issued this 19th day of July, 2011.


for Karen A. Flourney
Acting Director
Water, Wetlands and Pesticides Division


Patricia Gillispie Miller
Senior Counsel
Office of Regional Counsel

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 Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

The Honorable Dennis Berry
City of McCook
812 West 13th Street
McCook, Nebraska 69001

and

Patrick Rice, Assistant Director
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
Lincoln, Nebraska 68509-8922

JUL 21 2011

Date

