

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 Broadway
New York, NY 10007-1866

IN THE MATTER OF:

Saputo Dairy Foods USA, LLC
40236 State Highway 10
Delhi, New York 13753

Respondent

Proceeding pursuant to Section
309(g) of the Clean Water Act, 33
U.S.C. § 1319(g)

CONSENT AGREEMENT
AND
FINAL ORDER

DOCKET NO. CWA-02-2023-3402

CONSENT AGREEMENT AND FINAL ORDER

Complainant, United States Environmental Protection Agency, Region 2 (“EPA” or “Complainant”), and Respondent, Saputo Dairy Foods USA, LLC (“Respondent” or “Saputo”), by their undersigned representatives, hereby consent and agree as follows:

I. PRELIMINARY STATEMENT

1. This is a civil administrative proceeding for the assessment of a civil penalty instituted pursuant to Section 309(g) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g).
2. The following Findings of Fact are made, and Order issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by the CWA, 33 U.S.C. § 1251 *et. seq.*, which authority has been duly delegated to the Regional Administrator of Region 2, EPA and since further re-delegated to the Director, Division of Enforcement and Compliance Assistance, Region 2, EPA.
3. EPA is initiating and concluding this proceeding for the assessment of a civil penalty, pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.13(b) 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” (CROP), which sets forth procedures for simultaneous commencement and conclusion of administrative civil penalty assessment proceedings through issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18 (b)(2) and (3).
4. As set forth below, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), Complainant alleges that Respondent is liable for numerous violations of the Clean Water Act, in the operation of its dairy product manufacturing facility in the City of Delhi, New York, by

repeatedly causing or contributing to the passthrough of pollutants to the West Branch of the Delaware River and to interference with the treatment processes and operations at the Village of Delhi Wastewater Treatment Plant (“WWTP”). Complainant further alleges that Respondent violated the CWA by repeatedly discharging cooling water to the West Branch of the Delaware River at temperatures in excess of the limit set in Respondent’s New York State Pollutant Discharge Elimination System Permit (“SPDES Permit”). Therefore, Complainant alleges that Respondent has violated Section 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, and is proposing to assess a civil penalty.

5. Complainant and Respondent agree that settlement of this matter is in the public interest, and that entry of this Agreement and its incorporation into a Final Order without further litigation and without adjudication of any issue of fact or law, will avoid prolonged and potentially complicated litigation between the parties.

6. For the purposes of this settlement only, Respondent admits the jurisdictional allegations contained herein and neither admits nor denies Complainant's allegations of violations contained herein.

7. As to Complainant, Respondent waives any and all claims for relief and otherwise available rights to administrative or judicial review of any issue of law or fact, or any other provision, set forth in this Agreement, including, but not limited to, any right of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-708. As to any other party, Respondent reserves all rights and defenses regarding any issue of law or fact set forth in this Agreement.

8. Upon incorporation into a Final Order by the EPA Regional Judicial Officer, this Agreement applies to, and is binding upon, Complainant, and upon Respondent and Respondent's officers, directors, agents, successors, and assigns. Any change in ownership or corporate organization, structure, or status of Respondent including, but not limited to any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Agreement, unless Complainant, Respondent and the transferee agree in writing to allow the transferee to assume such responsibilities.

9. This Agreement contains all settlement terms agreed to by the parties.

II. APPLICABLE LAW

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge any pollutant from a point source to waters of the United States, except, among other things, with the authorization of, and in compliance with, a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

2. Section 402 of the CWA, 33 U.S.C. § 1342, authorizes the Administrator of the EPA to issue NPDES permits for the discharge of any pollutant, or combination of pollutants, subject to certain requirements of the CWA and conditions which the Administrator determines are necessary.

3. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), the New York State Department of Environmental Conservation (“NYSDEC”) is authorized to issue State Pollutant Discharge Elimination System (“SPDES”) permits for discharges of pollutants to waters of the United States that occur in New York State. The EPA maintains concurrent enforcement authority with New York for any violations of the CWA and/or permits issued thereunder. *See* 33 U.S.C. § 1342(i).
4. Sections 307(b) and 402(b)(8) of the CWA, 33 U.S.C. §§ 1317(b) and 1342(b)(8) establish the National Pretreatment Program (“NPP”) to regulate discharges from industries to Publicly Owned Treatment Works (“POTW”) as a component of the NPDES permitting program. The NPP requires non-domestic dischargers to treat or control pollutants in their wastewater before discharging it to a POTW.
5. Pursuant to 40 C.F.R. § 403.3(c), the term “Approval Authority” means the EPA Regional Administrator in any state without an approved pretreatment program.
6. Pursuant to 40 C.F.R. § 403.3(f), the Approval Authority is also the “Control Authority” where there is neither an approved state pretreatment program nor an approved POTW pretreatment program under 40 C.F.R. § 403.11.
7. Pursuant to 40 C.F.R. § 403.3(q), a POTW is a treatment works, as defined by Section 212 of the Act, 33 U.S.C. § 1292, which is owned by a State or municipality, and includes, among other things, any devices and any systems that, at a minimum, store, treat, or dispose of municipal waste or industrial wastes, including waste in combined storm water and sanitary sewer systems.
8. Section 307(b) of the CWA, 33 U.S.C. § 1317(b), requires the Administrator to promulgate federal standards for the pretreatment of wastewater discharged to POTWs. The relevant regulatory requirements governing pretreatment are set forth at 40 C.F.R. Part 403.
9. “Owner or operator” is defined in Section 306(a)(4) of the CWA, 33 U.S.C. § 1316(a)(4), as any person who owns, leases, operates, controls, or supervises a source.
10. “Person” is defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), to include any individual, corporation, partnership, association, or municipality.
11. The term “source”, as defined in Section 306(a)(3) of the CWA, 33 U.S.C. § 1316(a)(3), means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.
12. “Discharge of a pollutant” is defined by Section 502(12) of the CWA, 33 U.S.C. § 1362(12), to include any addition of any pollutant to navigable waters from any point source.
13. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include among other things, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge and industrial, municipal, and agricultural waste discharged to water.

14. Section 307(d) of the CWA, 33 U.S.C. § 1317(d), makes it unlawful for the owner or operator of any facility that introduces pollutants into a treatment works to operate such facility in violation of any applicable pretreatment standards, general or categorical, which are promulgated by the Administrator.

15. Pursuant to Section 307 of the CWA, 33 U.S.C. § 1317, the Administrator promulgated the “General Pretreatment Regulations for Existing and New Sources of Pollution” (General Pretreatment Regulations) at 40 C.F.R. Part 403.

16. The term “Indirect Discharge” or “Discharge,” as defined in 40 C.F.R. § 403.3(i), means the introduction of pollutants into a POTW from any non-domestic source regulated under Section 307(b), (c) or (d) of the Act.

17. The term “Industrial User” (“IU”) or “User,” as defined in 40 C.F.R. § 403.3(j), means a source of Indirect Discharge.

18. Pursuant to Section 308(a) of the Act, 33 U.S.C. § 1318(a), whenever reasonably necessary to carry out the objectives of the Act, the Administrator may require the owner or operator of any point source, including an IU, to establish and maintain records; install, use, and maintain monitoring equipment; make reports; sample effluents; and provide other information.

19. Pursuant to 40 C.F.R. § 403.5(a)(1), a “[u]ser may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference. These general prohibitions and the specific prohibitions in paragraph (b) of this section apply to each User introducing pollutants into a POTW whether or not the User is subject to other National Pretreatment Standards or any national, State, or local Pretreatment Requirements.”

20. “Pass Through” as defined in 40 C.F.R. § 403.3(p), is a Discharge which exits the 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 the POTW’s NPDES permit (including an increase in the magnitude or duration of a violation).

21. “Interference” as defined in 40 C.F.R. § 403.3(k), includes any discharge which, alone, or in conjunction with a discharge or discharges from other sources, inhibits or disrupts the POTW or its treatment processes or operations and is a cause of a violation of any requirement of a POTW’s NPDES permit.

22. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the Administrator, upon a finding that any person has violated, among other things, Section 301(a) of the Act, or has violated any permit condition or limitation implementing such section in a permit issued under Section 402 of the Act, to assess a civil penalty, and Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), as adjusted by 40 C.F.R. § 19.4, authorizes the assessment of a penalty of up to \$23,989 per day for each violation, with a maximum penalty of \$299,857.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Saputo Dairy Foods USA, LLC (aka Morning Star Foods) (“Respondent”), is a corporation, and

is therefore a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

2. Respondent owns or operates a facility (“Facility”) located at 40236 State Highway 10, Delhi, NY 13753, where it performs, among other things, dairy products manufacturing operations.

3. The Facility discharges non-contact cooling water into the West Branch of the Delaware River pursuant to SPDES permit NY0068292, which sets a maximum temperature limit of 75 degrees for those discharges.

4. The Facility introduces wastewater containing effluent from its manufacturing processes into the Village of Delhi Wastewater Treatment Plant (“Delhi WWTP”).

5. The Facility’s process wastewater contains numerous pollutants, within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6), including total suspended solids, phosphorous, and ammonia.

6. The Delhi WWTP a publicly owned treatment works (“POTW”) under 40 C.F.R. § 403.3(q).

7. The Delhi WWTP does not have an approved pretreatment program and the State of New York is not approved to operate a State pretreatment program in New York. Therefore, pursuant to 40 C.F.R. §§ 403.3(c) and (f), EPA is the pretreatment “Control Authority” for the Saputo Facility.

8. The Facility is an "IU" or “User” within the meaning of 40 C.F.R. § 403.3(j).

9. The Facility is subject to the General Pretreatment Regulations, since it is a New or Existing Source regulated under Section 307 of the Act, 33 U.S.C. § 1317, which discharges into a POTW.

10. On June 26, 2019, EPA performed a Reconnaissance Inspection at Saputo’s facility, located at 40236 State Highway 10, in Delhi, New York (“Facility”).

11. On February 13, 2020, EPA issued Saputo a Request for Information (“RFI”), to which Saputo responded on March 31, 2020.

12. Based on the information obtained by EPA from the inspection, Saputo’s RFI response, and sampling data, Saputo discharged excessive concentrations of TSS, phosphorous, and ammonia to the Delhi WWTP on dozens of occasions from 2016-2019 and again in June-August of 2020, which caused or contributed to the Pass Through of pollutants to the West Branch of the Delaware River and to Interference with the treatment processes and operations at the Delhi WWTP. Also, based on Respondent’s own reporting, Respondent discharged water to the West Branch of the Delaware River at temperatures that exceeded the limits in the Facility’s SPDES permit on numerous occasions.

13. Therefore, based upon the above findings, Respondent has violated 40 C.F.R. § 403.5(a)(1) by introducing pollutants that caused pass through and interference at the Delhi WWTP and has also violated CWA §§ 301 and 402 by discharging water to the West Branch of the Delaware River at temperatures exceeding the permitted limit.

IV. CIVIL PENALTY

1. Upon consideration of the factors in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3) and Respondent's efforts to come into compliance, Complainant has determined that a civil penalty of **TWO HUNDRED TWENTY-FIVE THOUSAND DOLLARS (\$225,000)** is appropriate to settle this matter.
2. Respondent consents to the issuance of this Agreement, and consents, for the purposes of settlement, to the payment of the civil penalty cited in the foregoing paragraph.
3. Respondent shall pay the full penalty amount within thirty (30) calendar days of its receipt of the Final Order issued by the EPA Regional Judicial Officer adopting this Agreement. If the due date for payment falls on a weekend or legal federal holiday, the due date is the next business day. Payment must be received by 11:00 a.m. Eastern Time to be considered received that day.
4. Respondent shall pay the penalty using a method provided on the website: <https://www.epa.gov/financial/makepayment>, and shall identify such payment(s) with "Docket No. CWA-02-2020-3028."
5. Respondent shall send a copy of the check or other record of payment, immediately following payment, to the following by email or mail:

Christopher Saporita, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
saporita.chris@epa.gov
290 Broadway, 16th Floor
New York, NY 10007

and

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
maples.karen@epa.gov
290 Broadway, 16th Floor
New York, NY 10007

6. In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date (on the 1st late day, 30 days of interest will have accrued), at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717 and will continue to accrue until payment in full is received.
7. In addition, a handling charge of fifteen dollars (\$15) shall be assessed on the 31st day from the due date of any payment, and for each subsequent thirty-day period that the debt, or any portion

thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date. Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

8. Respondent shall not claim the penalty as a federal or other tax deduction or credit.

9. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection.

V. OTHER TERMS AND CONDITIONS

1. Failure by Respondent to comply with any of the terms of this Agreement shall constitute a breach of the Agreement and may result in referral of the matter to the United States Department of Justice for enforcement of the Agreement and for such other relief as may be appropriate.

2. Nothing in this Agreement shall be construed as a waiver by Complainant of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of the Agreement.

3. Each undersigned representative of the parties to this Agreement certifies that he or she is fully authorized by the party represented to bind that party to the terms and conditions of this Agreement and to execute and legally bind that party to this Agreement.

4. Upon execution by the parties, this Agreement shall be subject to a public comment period of not less than thirty (30) days, pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A) and 40 C.F.R. § 22.45. EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations indicating that the Agreement is inappropriate, improper, or inadequate.

5. If comments received during the public comment period do not require modification or withdrawal by EPA from this Agreement, the parties agree to submit this Agreement to the Regional Judicial Officer ten (10) days after closure of the public comment period, with a request that it be incorporated into a Final Order.

6. This Agreement, upon incorporation into a final order by the Regional Judicial Officer, and full satisfaction by the parties, shall be a complete, full, and final settlement of the civil penalty owed for violations alleged in this Agreement.

7. This Agreement resolves Respondent's liability for federal civil or administrative penalties under Sections 309(d) and 309(g) of the Act, 33 U.S.C. §§ 1319(d) and (g), for the violations alleged in this Agreement. This Agreement shall not in any case affect EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law whether or not alleged in this Agreement. This Agreement shall not affect Respondent's right to assert any defense in any action by EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

8. Each party shall bear its own costs and attorney's fees in connection with all issues associated with this Agreement.

9. Respondent consents to service upon it by delivery of a copy of this Agreement by an EPA employee other than the Regional Hearing Clerk.

FOR COMPLAINANT, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
REGION 2:

For

DORE LAPOSTA
Director, Enforcement and Compliance Assurance Division
United States Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007

02/01/2023

Date

FOR RESPONDENT, SAPUTO:

Sh M. D/R
Signature

1/31/23
Date

Steven M. Douglas
Print name

SVP Operations
Title

FINAL ORDER

Pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3) of EPA's Consolidated Rules of Practice, the following Combined Complaint and Consent Agreement ("Agreement"), resolving the above matter, is hereby approved and incorporated by reference into this Final Order. Respondent is hereby **ORDERED** to comply with all of the terms of the Agreement, effective immediately upon receipt by Respondent of this Agreement and Final Order.

SO ORDERED

Helen Ferrara
Regional Judicial Officer
United States Environmental Protection Agency, Region 2