

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)

) Docket No. CWA-07-2009-0024

Cornhusker Energy Lexington, LLC,)

) FINDINGS OF VIOLATION

Respondent.)

) AND ORDER FOR COMPLIANCE

Proceeding under Section 309(a)(3))

of the Clean Water Act,)

33 U.S.C. § 1319(a)(3))

I. STATUTORY AUTHORITY

1. The 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 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 Act, 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.

4. 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.

5. 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.

6. The Nebraska Department of Environmental Quality ("NDEQ") is the state agency with the authority to administer the federal NPDES program. EPA authorized 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.

II. General Factual Allegations

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

8. 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").

9. 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.

10. 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).

11. 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).

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

13. 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 pH levels before 5.0 standards units (s.u.) and any contaminant or substance in sufficient amount to cause pass through or interference.

14. 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).

15. 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.

16. The Respondent discharges pollutants to the City of Lexington Nebraska’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.

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

18. On or about February 26-28, 2008, EPA performed an inspection of the City’s POTW (hereinafter “the February 2008 inspection”).

III. Findings of Violation

Count I - Interference and Pass Through Violations

19. The facts stated in Paragraphs 7 through 18, above, are hereby incorporated by reference.

20. 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.

21. 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.

22. Based on observations documented during the EPA February 2008 inspection and 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.

23. Section IV, Part B of Respondent's NPDES 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.

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

25. 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.

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

27. The occasions of pass through and/or interference by Respondent, as described above, are violations 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).

IV. Order for Compliance

28. 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:

29. Within thirty (30) calendar days of receipt of this Order, Respondent shall provide EPA, with a copy to NDEQ, a written Compliance Plan, for EPA's review and approval, describing in detail how Respondent will no longer cause pass through and/or interference at the POTW as described in the Findings of Violation noted herein and come into compliance with its NPP Permit and 40 C.F.R. Part 403. At a minimum, the proposal shall include:

- a. A description of any process changes Respondent has taken or proposes to undertake at the facility to reduce loadings in the wastewater discharged to the POTW;

- b. A description of wastewater treatment modifications Respondent has taken or proposes to undertake at the facility to reduce loadings in the wastewater discharged to the POTW;
- c. A schedule for implementation of the proposed action(s); and
- d. Submission of cost information relating to any completed or proposed actions.

30. This Compliance Plan may be implemented independently by Respondent or in conjunction with the City and other Industrial Users of the City's POTW.

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

Mr. Robert Bryant
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101

32. All documents required for submittal to NDEQ shall be hand sent to the following:

Mr. Steve Goans
Nebraska Department of Environmental Quality
Suite 400, The Atrium
1200 "N" Street
P.O. Box 98922
Lincoln, Nebraska 68509-8922

Approval of Submissions and Incorporation into the Order for Compliance

33. Upon receipt, EPA will review all documents submitted by Respondent pursuant to Paragraph 29 or 30, and approve such submittals or require modification and resubmittal of a portion or all of the documents pursuant to Paragraph 34, below. Upon approval by EPA, documents submitted under Paragraph 29 or 30, above, or resubmitted pursuant to Paragraph 34 below, shall be deemed incorporated into and become enforceable under this Order for Compliance, or at EPA's discretion, shall be incorporated into, and become enforceable under, a separate order issued under the authority of the CWA.

Modification and Resubmission of Documents

34. If required by EPA pursuant to Paragraph 33, above, Respondent shall, within fifteen (15) days of receipt of any written comments from EPA regarding the documents submitted by Respondent pursuant to this Order for Compliance, make modifications and changes to such documents as directed by EPA, and resubmit the documents to EPA. The parties may agree, in writing, to a longer period of time for resubmission of such documents.

Certification

35. All submissions made by Respondent to EPA pursuant to the requirements of this Order for Compliance shall contain the following certification signed by an authorized official, as described at 40 CFR 122.22:

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.

V. General Provisions

Effect of Compliance with the Terms of This Order for Compliance

36. Compliance with the terms of this Order 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.

37. 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.

38. 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

39. 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

40. 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.

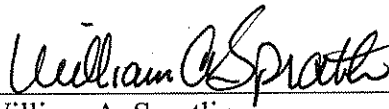
Effective Date

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

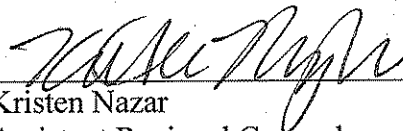
Termination

42. 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 all of the requirements of this Order have been met.

Issued this 23rd day of July, 2009.



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



Kristen Nazar
Assistant Regional 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 to the 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:

Mr. Tydd Rohrbough
Chief Executive Officer
Cornhusker Energy Lexington, LLC
1111 E. Industry Drive
Lexington, Nebraska 68850

Mr. Steve Goans
Nebraska Department of Environmental Quality
Suite 400, The Atrium
1200 "N" Street
P.O. Box 98922
Lincoln, Nebraska 68509-8922

7/29/09

Date

