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HEARINGS CLERK
EPA -- REGION 10

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:)	
)	DOCKET NO. CWA-10-2007-0070
)	
Magic Valley Produce, Inc.)	
)	CONSENT AGREEMENT
)	AND FINAL ORDER
)	
)	
Respondent.)	
_____)	

I. AUTHORITY

1.1. This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g). The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA, Region 10.

1.2. Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA hereby issues, and Respondent Magic Valley Produce hereby agrees to the issuance of the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of

this CAFO becomes final.

2.2. A concise statement of the factual basis for alleging violations of the Act, together with specific references to the provisions of the Act and implementing regulations Respondent is alleged to have violated, appears in Part III of this CAFO.

III. ALLEGATIONS

3.1. Respondent owns and operates a potato processing facility located at 322 N. Main Street, Paul, Idaho ("the Facility").

3.2. Respondent is a corporation organized under the laws of the State of Idaho. Respondent is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).

3.3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

3.4. NPDES Permit No. ID-002665-4 ("the Permit") was issued to Respondent on November 6, 2003, and expires on November 6, 2008. Respondent discharged waste water to the Snake River via the Main Drain until approximately May 12, 2006, when it ceased discharging to the Main Drain.

3.5. At all times relative to this action, the facility discharged to the Main Drain and the Snake River, which are "navigable waters," as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), "waters of the United States" as defined in 40 C.F.R. section 122.2. In the alternative, the Main Drain is a conveyance to the Snake River.

3.6. Respondent discharged waste water from its Facility to the Main Drain. These discharges contain "pollutants" within the meaning of Section 502(6) and (12) of the Act, 33 U.S.C. § 1362(6) and (12).

3.7. Respondent's facility, which was under Respondent's control at all times relevant to this action, discharged pollutants from its outfall ("the Outfall"). The Outfall is considered a "point source" within the meaning of § 502(14) of the Act, 33 U.S.C. § 1362(14).

3.8. Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess administrative penalties against any person who violates Section 301 or 308 of the Act, 33 U.S.C. § 1311, 1318.

3.9. Section I of the Permit limits the pollutants that Respondent may discharge to the Main Drain. These limitations include restrictions on total suspended solids ("TSS") and pH.

3.10. Section I of the Permit also sets forth monitoring requirements for TSS, pH and other pollutants from both the outfall to the Main Drain and background samples from the Main Drain.

3.11. From November 6, 2003, to January 19, 2006, the Permit required Respondent to collect 115 TSS samples, 805 pH samples, 27 total phosphorous samples, nine BOD samples, nine TKN samples, nine total ammonia samples, nine nitrate-nitrite samples, nine E. coli samples, and 805 flow samples from its discharge to the Main Drain.

3.12. From November 6, 2003 to January 19, 2006, Respondent collected only three TSS samples, three pH samples, three total phosphorous samples, three BOD samples, three TKN samples, three total ammonia samples, three nitrate-nitrite samples, zero E. coli samples,

and zero flows samples.

3.13. From November 6, 2003, to January 19, 2006, the Permit required Respondent to collect nine background samples for TSS, pH, total phosphorous, TKN, total ammonia, nitrate-nitrite, nitrite and E. coli. The Permit required 115 flow measurements during that time frame.

3.14. From November 6, 2003 to January 19, 2006, Respondent collected only two background samples each for the following parameters: TSS, pH, total phosphorous, TKN, total ammonia, nitrate-nitrite, and nitrite. During this time period Respondent collected zero samples for E. coli and flow.

3.15. Between November 6, 2003 and January 19, 2006, Respondent failed to collect at least 1,953 samples required by the Permit. Between January 20, 2006 and May 12, 2006, when Respondent ceased discharging to the Main Drain, Respondent failed to collect additional samples required by the permit.

3.16. Section I of the Permit sets forth an effluent limit of 44 mg/l daily maximum for TSS. Respondent exceeded that limit on January 20, 2004 (482 mg/l), June 4, 2004 (2,852 mg/l) and on April 6, 2005 (742 mg/l).

3.17. Section III.B of the Permit requires Respondent to submit a monthly discharge monitoring report ("DMR") to EPA.

3.18. Between November 6, 2003 and January 19, 2006, Respondent failed to submit 27 DMRs as required by the Permit. Between January 20, 2006 and May 12, 2006, when Respondent ceased discharging to the Main Drain, Respondent failed to submit additional DMRs required by the permit.

3.19. Each day that Respondent violates a requirement of the Permit constitutes a separate day of violation of Section 301 of the Act, 33 U.S.C. § 1311. Pursuant to Section 309(g), 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for each day during which the violation continues.

IV. CONSENT AGREEMENT

The parties to this action hereby stipulate as follows:

4.1. Respondent admits the jurisdictional allegations contained in Part III of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in Part III of this CAFO.

4.3. Pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), the nature, circumstances, extent, and gravity of the alleged violations, Respondent's good faith efforts to resolve issues at its waste water treatment plant, Respondent's economic benefit of noncompliance and ability to pay the proposed penalty, and other relevant factors, EPA has determined that an appropriate penalty to settle this action is in the amount of SIXTY THOUSAND DOLLARS (\$60,000). Respondent shall pay \$60,000 within 30 days of the entry of this CAFO or Respondent shall pay \$20,000 within 30 days of the entry of this CAFO with the remainder of the penalty paid according to the following schedule. No later than September 28, 2007, Respondent shall pay \$21,850. No later than March 31, 2008, Respondent shall make a final payment \$20,925.

4.4. Respondent consents to the issuance of the Final Order recited herein, to payment

of the civil penalty cited in the foregoing paragraph within thirty (30) days of the effective date of the Final Order.

4.5. Payment under this CAFO shall be made by cashier's check or certified check, payable to the order of "United States Treasury" and shall be delivered to the following address:

Mellon Bank
EPA Region 10
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251.

Respondent shall note on the check the title and docket number of this case.

4.6. Respondent shall serve photocopies of the check described above on the Regional Hearing Clerk and EPA at the following two addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

U.S. Environmental Protection Agency
1200 Sixth Ave.
Seattle, Washington 98101
Attn: Chae Park

4.7. Should Respondent fail to pay the penalty assessed by this CAFO in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Should such a failure to pay occur, Respondent may be subject to a civil action to collect the assessed penalty under the Clean Water Act. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.8. Should Respondent fail to pay the penalty assessed by this CAFO in full by its due date, Respondent shall also be responsible for payment of the following amounts:

a. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order contained herein, provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order contained herein.

b. Attorney Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), should Respondent fail to pay on a timely basis the amount of the penalty assessed by the Final Order contained herein, Respondent shall pay (in addition to any assessed penalty and interest) attorney fees, costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.9. The penalties described in Paragraph 4.3 of this CAFO shall represent civil penalties assessed by EPA.

4.10. Except as described in Paragraph 4.8 of this CAFO, each party shall bear its own costs in bringing or defending this action.

4.11. Respondent expressly waives any right to contest the allegations and to appeal the Final Order contained herein.

4.12. The provisions of this CAFO shall bind Respondent and its agents, servants, employees, successors, and assigns.

STIPULATED AND AGREED:

MAGIC VALLEY PRODUCE, INC.



Peter C. Delis
President
Magic Valley Produce, Inc.

Dated:

3-5-07

U.S. ENVIRONMENTAL PROTECTION AGENCY



Mark A. Ryan
Assistant Regional Counsel
For Complainant

Dated:

3/11/07

V. FINAL ORDER

5.1. The terms of the foregoing Consent Agreement are hereby ratified and incorporated by reference into this Final Order. Respondent is hereby ordered to comply with the foregoing terms of settlement.


5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act for the particular violations alleged in the Consent Agreement above. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations and permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Idaho Department of Environmental Quality has been given an opportunity to consult with EPA regarding the assessment of an administrative penalty against Respondent.

5.4. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), EPA has published public notice to inform the public of its intent to assess an administrative penalty against Respondent and to invite public comment in accordance with 40 C.F.R. § 22.45. More than 40 days have elapsed since the issuance of this public notice, and EPA has received no petitions to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 8th day of May, 2007.


Richard G. McAllister
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

I certify that the foregoing "Consent Agreement and Final Order" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Carol Kennedy, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

A true and correct copy, by certified mail, return receipt requested:

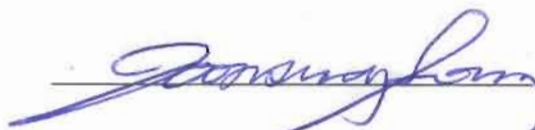
Peter C. Delis, President
Magic Valley Produce, Inc.
322 N. Main Street
P.O. Box 730
Paul, Idaho 83347

A true and correct copy:

Bruce Smith
Moore, Smith, Buxton & Turcke
950 W. Bannock, Suite 520
Banner Bank Building
Boise, Idaho 83702

Dated:

May 15, 2007



U.S. EPA Region 10