

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5TH STREET

KANSAS CITY, KANSAS 66101

08 FEB 29 PM 3:16

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

Orval Kent Food Company, Inc.)
100 N. Youngman Rd.)
Baxter Springs, Kansas 66713)

Respondent)

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

Docket No. CWA-07-2008-0048

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 VII, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA Region VII.

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, titled 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 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. A "Significant Industrial User" 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.

7. 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.

8. KDHE is not approved to administer a state authorized Pretreatment program in Kansas pursuant to Section 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).

II. General Factual Allegations

9. Respondent is incorporated and doing business in the State of Kansas.

10. Respondent does business as Orval Kent Food Company, Inc. (hereafter "Orval Kent").

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

12. At all times relevant, Respondent was, and still is, the owner and/or operator of a food processing facility located at 100 N. Youngman Rd., Baxter Springs, Kansas 66713.

13. The City of Baxter Springs, Kansas (hereafter "City") owns and operates a publically owned treatment works ("POTW") in Cherokee County, Kansas. 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.

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

15. The Spring River is considered "navigable waters" of the United States, as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

16. On or about March 1, 2006, NPDES Permit No. KS0045934 was issued to the City by the KDHE pursuant to Section 402 of the Act, 33 U.S.C. § 1342 (hereafter "NPDES permit").

17. The NPDES Permit contained limitations for discharges of effluent from the City's POTW to the Spring River.

18. The NPDES Permit contained POTW discharge limits for, among other pollutants, total suspended solids (TSS), and biochemical oxygen demand (BOD), expressed as concentration limits.

19. 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).

20. Orval Kent consumes an average of 180,000 gallons per day of potable water, the majority of which is discharged to the Baxter Springs POTW. It is the only industrial user discharging to the POTW in excess of 25,000 gallons of wastewater per day.

21. Respondent is a Significant Industrial User (SIU) as defined by 40 C.F.R. 403.3(t)(ii).

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

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

24. On or about August 20-23, 2007, EPA performed an inspection of the City of Baxter Springs' POTW. The EPA's inspector observed that the plant was operating poorly during the inspection, with a condition of almost no dissolved oxygen in the aeration cells of the treatment plant. This condition resulted in inadequate treatment and excessive odors.

25. On or about August 20-23, 2007, EPA sampled the effluent of Orval Kent in an attempt to determine the load it puts on the Baxter Springs POTW. In addition, records were obtained of sampling that the City of Baxter Springs had performed on the Orval Kent effluent in July and early August, 2007. Table 1, below, shows the concentration and estimated loadings (in lbs. per day) of TSS and BOD discharged by Orval Kent to the Baxter Springs POTW.

Table 1: Concentration (mg/l) and Loading (lbs/day) from Orval Kent
July, August 2007

Date	TSS (mg/l)	TSS (lbs/day)	BOD (mg/l)	BOD (lbs/day)
July 5, 2007	876	1184	NA	NA
July 6, 2007	812	1,097	1,180	1,594
July 9, 2007	1,800	2,432	4,100	5,539
July 10, 2007	1,510	2,040	3,280	4,432
July 11, 2007	1,270	1,716	1,650	2,229
July 12, 2007	688	930	1,140	1,540
July 16, 2007	844	1,140	978	1,321
July 17, 2007	484	654	501	677
July 18, 2007	552	746	814	1,100
July 19, 2007	3,960	5,350	3,060	4,134
July 25, 2007	318	430	574	776
July 26, 2007	1,060	1,432	1,040	1,405
August 2, 2007	3,000	4,053	5,120	6,918
August 9, 2007	728	984	1,240	1,675
August 21, 2007*	830	1,121	2,540	3,432
August 22, 2007*	2,100	2,837	2,510	3,391
August 23, 2007*	880	1,189	2,100	2,837
Averages:	1,302	1,759	1,989	2,688

* Samples taken by EPA. The load is based on estimating that 90% of the water consumed by Orval Kent is discharged to the city's wastewater treatment plant (162,000 gallons per day discharged).

26. On average, Orval Kent discharges 1,759 lbs/day TSS and 2,688 lbs/day BOD to the city of Baxter Springs' POTW for treatment.

27. The NPDES permit issued by KDHE on or around February 24, 2006, describes the Baxter Springs POTW as having the ability to treat the wastes from the equivalent of 6,000 persons. Standard engineering factors for per capita BOD loadings range from 0.17 to 0.20 lbs/person/day. Standard engineering factors for per capita TSS loadings range from 0.20 to 0.22 lbs/person/day. Based on the highest engineering factors, the Baxter Springs POTW is rated to treat 1,200 lbs/day BOD and 1,320 lbs/day TSS.

28. The population of Baxter Springs is approximately 4,700 persons. Using the standard engineering factors of paragraph 27, above, the load on the Baxter Springs POTW from the citizens ("domestic loadings") is 940 lbs/day BOD and 1034 lbs/day TSS. The BOD and TSS contributions from the citizens of Baxter Springs do not exceed the design capacity of the Baxter Springs wastewater treatment plant.

29. Based on the combination of domestic loadings and loadings from Orval Kent, the Baxter Springs POTW treats an estimated average of 2,793 lbs/day of TSS (1759+1034) and 3,628 lbs/day of BOD (2,698+940).

30. Based on available information, during 2007, the loadings of BOD and TSS directed to the Baxter Springs' POTW exceeded the design capacity of the POTW to treat these pollutants, as described in Table 2, below:

Table 2: Load Analysis, City of Baxter Springs

BOD, Design Load, lbs/d	1,200	TSS, Design Load, lbs/d	1,320
Actual avg. daily BOD load, lbs/d	3,628	Actual avg. daily TSS load, lbs/d	2,793
excess lbs BOD per day	2,428	excess lbs TSS per day	1,473
% Overloaded, BOD	202%	% Overloaded, TSS	112%

31. During the period when Orval Kent's loadings exceeded the design capacity of the POTW, the POTW violated its NPDES permit (No. KS0045934) limitations for BOD and TSS, as described in Table 3, below:

Table 3: Recent Numerical NPDES Permit Violations (KS0045934)

Period	Limits, Biochemical Oxygen Demand (BOD)	
	45 mg/l Weekly Average	30 mg/l Monthly Average
May, 2006		30.3
Week containing July 19, 2006	47.9	
July, 2006		35.7
October, 2006		31
December, 2006		37.6
January, 2007		36.7
Week containing April 25, 2007	56.0	
April, 2007		39.9
Period	Limits, Total Suspended Solids (TSS)	
	120 mg/l Weekly Average	80 mg/l Monthly Average
Weekly avg. in January, 2007	200	
January, 2007		119.5
July, 2007		96

III. Findings of Violation

Count I

Interference and Pass Through Violations

32. The facts stated in Paragraphs 9 through 31, above, are hereby incorporated by reference.
33. Pursuant to 40 C.F.R. Part 403, Respondent is prohibited from discharging pollutants which cause interference or process upset at the City's POTW.
34. The loadings of BOD and TSS discharged from the Orval Kent facility to the POTW exceed the POTW's design treatment capacities, and these loadings have caused and/or contributed to the City of Baxter Springs' violations of its NPDES permit (No. KS0045934).
35. Orval Kent has, alone or in conjunction with discharges from other sources, caused interference and/or pass through as defined by the General Pretreatment Regulations, 40 C.F.R. 403.3(i) and (n), respectively, for BOD and TSS.
36. Orval Kent is in violation of the General Pretreatment Regulations, 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), by causing interference and/or pass through of BOD and TSS of the Baxter Springs' POTW's NPDES permit (No. KS0045934).

IV. Order for Compliance

37. 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:
38. Within three (3) business days of receipt of this Order, Respondent shall provide EPA a written description of the immediate interim measures that Respondent shall take to address the pass through and interference caused by Respondent's discharge of wastewater to the POTW. Respondent shall perform such interim measures, and any other interim measures that may be directed by EPA, until such time as the Compliance Plan required by Paragraph 40, below, can be developed, approved by EPA, and implemented by Respondent.
39. Within fifteen (15) calendar days of receipt of this Order, Respondent shall provide EPA a proposed Monitoring Plan to EPA for review and approval that is designed to accurately determine the loadings from the Respondent's facility to the POTW. At a minimum, the proposed Monitoring Plan shall include:
- a. The location where samples of Respondent's wastewater shall be taken;
 - b. The frequency of sampling of Respondent's wastewater;

- c. A description of how the proposed sampling will be representative of fluctuations in Respondent's production and/or quality of the wastewater;
- d. The sampling methods which will be utilized to determine the concentration and mass of pollutants in Respondent's wastewater; and
- e. The method by which wastewater flow rates will be measured.

40. Within fifteen (15) calendar days of receipt of this Order, Respondent shall provide the EPA a proposed Compliance Plan, for EPA's review and approval, that shall describe in detail how Respondent will no longer cause pass through and interference at the POTW, as described in the Findings set forth above, and how Respondent shall come into compliance with 40 C.F.R. Part 403. At a minimum, the proposed Compliance Plan shall include the following:

- a. A description of any process changes Respondent proposes to undertake at the Orval Kent facility to reduce loadings in the wastewater discharged to the POTW;
- b. A description of wastewater treatment installations or modifications Respondent proposes to undertake at the Orval Kent facility to reduce loadings in the wastewater discharged to the POTW,
- c. A description of any modifications and/or additions to the POTW that will improve the ability of the POTW to treat Respondent's wastewater;
- d. A schedule for implementation of the proposed action(s); and
- e. A detailed description of cost estimates relating to performance of any proposed interim action(s).

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

- a. Provide a copy of any and all effluent samples taken of Respondent Orval Kent's discharge since January 1, 2003, whether taken by the City of Baxter Springs, Orval Kent or submitted to the City by a third party;
- b. Provide a copy of any and all flow measurements of Respondent Orval Kent's discharge of wastewater to the POTW since January 1, 2003;
- c. For the period between January 1, 2003, and the present, state whether any representatives of Respondent have participated in any discussions with the City of Baxter Spring regarding the impact of Respondent's wastewater on the POTW, 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 Baxter Springs and Respondent Orval Kent (including meeting notes or memorandum) that discuss or relate to any discussions of any actual or potential adverse effects that Respondent Orval Kent's wastewater discharge had, or is having, on the POTW;

e. For the period between January 2003 and the present, 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 Orval Kent's effluent, or the POTW's influent and/or effluent;

g. For the period between January 1, 2003, and the present, provide a summary by month of any and all fees (or surcharges) levied against Respondent Orval Kent by the City of Baxter Springs for the treatment of Respondent's wastewater and provide an explanation of the basis for the calculations behind such fees (or surcharges);

h. Provide a copy of any and all past and/or present agreements between the City of Baxter Springs and Respondent Orval Kent for the treatment of wastewater;

i. For each year between January 1, 2003, and the present, provide a summary of monthly production, by general product type, at Respondent's Orval Kent; and

j. For the period between January 1, 2003, and the present, provide a description of any and all expansions of the production capacity at Respondent's Orval Kent, Baxter Springs Facility.

42. Beginning with the month following the effective date of this Order, Respondent shall submit to EPA bi-monthly (every other month) progress reports, which shall be submitted for each month on or before the tenth day of the month following the reporting period. At a minimum, the bi-monthly progress reports shall the following information:

a. A table clearly showing the 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 summary of any discharges to the POTW which had the potential to cause the pass through of pollutants and/or interference of the POTW's treatment processes and operations.

EPA Review and Approval of Required Submittals

43. EPA will review all proposed submittals requiring EPA approval (Monitoring Plan and Compliance Plan), 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 the same to EPA. If EPA disapproves the revised submittal, it may unilaterally modify and approve the same in accordance with its comments. In the event of such modification, EPA will notify Respondent of the modification(s). Upon receipt of EPA's approval or notice of modification(s) and approval, Respondent shall commence work and implement any approved submittal (Monitoring Plan and Compliance Plan) in accordance with the schedule and provisions contained therein. All EPA approved submittals shall be deemed incorporated into and enforceable as part of this Order.

44. All documents required for submittal to EPA (including the Monitoring Plan and Compliance Plan and other documents required to be submitted pursuant to this Order) 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

45. 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.

46. 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.

47. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 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 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

48. 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

49. 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.

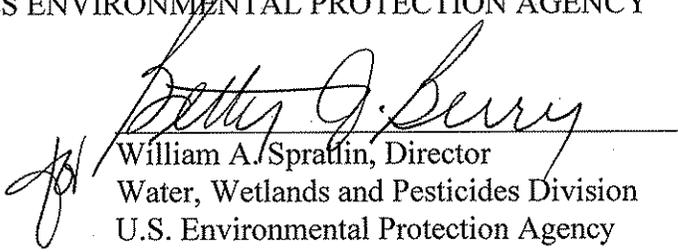
Effective Date

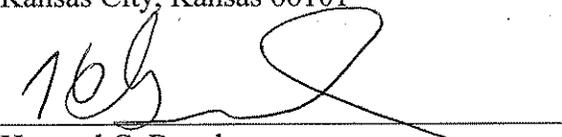
50. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

Termination

51. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY


William A. Sprafin, Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, Kansas 66101


Howard C. Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, Kansas 66101