

2. This CA/FO serves as notice that EPA has reason to believe that Respondent violated Section 307 of the CWA, 33 U.S.C. § 1317, and regulations promulgated thereunder, by discharging pollutants that caused interference and/or pass through at the City's Publically Owned Treatment Works ("POTW").

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), provides that if EPA determines that any person has violated certain requirements of the CWA, including Section 307, EPA may, after consultation with the state in which the violation occurs, assess a civil penalty for such violation. The state of Kansas has been notified of this action in accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

4. The Kansas Department of Health and Environment ("KDHE") is the state agency authorized to administer the federal National Pollutant Discharge Elimination System ("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.

5. 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, EPA is the approval authority as defined by 40 C.F.R. § 403.3(c).

6. In assessing a penalty under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), the provisions of Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), require that EPA must consider various factors, including the nature, extent, and gravity of the violation, the degree of culpability, economic benefit, or savings resulting from the violation, and such other factors as justice may require.

7. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes an administrative civil penalty of not more than \$10,000 per day for violations of certain provisions of the CWA, including Section 307, U.S.C. § 1317. This figure has been adjusted upward for inflation pursuant to the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, so that penalties of up to \$11,000 per day during which the violation continues, not to exceed \$137,500, are now authorized for violations that occur between January 30, 1997, and March 15, 2004, and penalties of up to \$11,000 per day for each day during which the violation continues, not to exceed \$157,500, may be assessed for violations of the CWA occurring after March 15, 2004. Based upon the facts alleged in the CA/FO and upon those factors which the Complainant must consider pursuant to Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the Complainant and Respondent agree to the payment of a civil penalty pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1311(g)(2)(B), for the alleged violations of the CWA contained in this CA/FO.

Parties

8. The Complainant is the Director of the Water, Wetlands and Pesticides Division, who has been duly delegated the authority to bring this action. The authority to execute this CA/FO is provided to the Regional Administrators by EPA Delegation No. 2-52-A. The Regional Administrator, EPA, Region 7, has delegated this authority to the Director of the Water, Wetlands and Pesticides Division of EPA, Regional 7, by EPA Delegation No. R7-2-052-A.

9. Respondent is Tortilla King, Inc. ("Tortilla King"), a corporation incorporated and registered to do business in the state of Kansas.

Statutory and Regulatory Framework

10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the 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 CWA, 33 U.S.C. §§ 1317 and 1342.

11. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that Section.

12. Section 307 of the CWA, 33 U.S.C. § 1317, provides for the promulgation of regulations establishing pretreatment standards for introduction of pollutants into publicly owned treatment works (POTW).

13. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."

14. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6) to include, *inter alia*, biological materials and agricultural waste discharged to water.

15. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14) to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged."

16. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

17. Pursuant to Section 307(b) of the CWA, 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 that may pass through or interfere with the treatment processes of such treatment works or that may contaminate sewage sludge.

18. The General Pretreatment Regulations at 40 C.F.R. § 403.3(k) and (p) 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.

19. 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.

Factual Background

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

21. At all times relevant, Respondent was, and still is, the owner and/or operator of a food processing facility located at 249 23rd Avenue, Moundridge, Kansas 67107.

22. The City of Moundridge, Kansas (hereafter "City") owns and operates a POTW in McPherson County, Kansas ("POTW"). 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.

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

24. The Black Kettle Creek is considered a "navigable water" of the United States, as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

25. On or about February 1, 2007, NPDES Permit No. KS0021008 was issued to the City by KDHE pursuant to Section 402 of the CWA, 33 U.S.C. § 1342 (hereafter "NPDES permit").

26. The NPDES permit contained limitations for discharges of effluent from the City's POTW to Black Kettle Creek.

27. The NPDES permit contained POTW discharge limits for, among other pollutants, total suspended solids ("TSS") and biological oxygen demand ("BOD"), expressed as concentration limits.

28. 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(j).

29. Tortilla King consumes an average of 36,000 gallons per workday of potable water, the majority of which is discharged to the City's POTW. As such, Respondent is a Significant Industrial User ("SIU") as defined by 40 C.F.R. § 403.3(v)(ii).

30. The Respondent's process wastewater is a "pollutant" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

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

32. On or about March 17-20, 2008, representatives from EPA inspected the Tortilla King facility. The EPA inspectors found high levels of BOD and TSS in the facility's effluent. They also identified significant amounts of oil and grease in the effluent, which the City identified as causing obstruction problems in the City's sewer line.

33. Based on sampling EPA conducted on or about March 17-20, 2008, Tortilla King's calendar daily average BOD effluent represents approximately 56 percent of the City's overall BOD capacity. Based on Discharge Monitoring Reports ("DMR") provided by the City to KDHE, the City has violated its NPDES monthly average permit limits four times for BOD and one time for TSS in the past five years.

Findings of Violation

Interference and Pass Through Violations

34. The facts stated in paragraphs 20 through 33, above, are hereby incorporated by reference.

35. Pursuant to 40 C.F.R. Part 403, Respondent is prohibited from discharging pollutants that cause interference or pass through at the City's POTW.

36. During the EPA inspection identified in paragraphs 32 and 33, inspectors observed that Tortilla King's discharges, alone or in conjunction with discharges from other sources, have caused interference and/or pass through as defined by the General Pretreatment Regulations, 40 C.F.R. § 403.5(a)(1), for BOD.

37. Information obtained during the EPA inspection identified in paragraphs 32 and 33 revealed that Tortilla King has introduced solid or viscous pollutants in amounts which have caused obstruction to the flow in the POTW resulting in interference, as prohibited by the General Pretreatment Regulations, 40 C.F.R. § 403.5(b)(3).

38. The violations identified in paragraphs 36 and 37 are violations of the General Pretreatment Regulations, 40 C.F.R. § 403.5(a)(1), and as such, are violations of Sections 301(a) and 307(d) of the CWA, 33 U.S.C. §§ 1311(a) and 1317(d).

CONSENT AGREEMENT

39. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

40. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

41. Respondent neither admits nor denies the factual allegations set forth above.

42. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order portion of this CA/FO.

43. This CA/FO addresses all civil and administrative claims for the CWA violations identified above, existing through the effective date of this CA/FO. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this CA/FO. Respondent reserves the right to defend against such actions on any basis in law or fact.

44. Respondent certifies by the signing of this CA/FO that Respondent's facility is scheduled to be in compliance with all requirements of Sections 301 and 307 of the CWA, and all regulations promulgated thereunder, pursuant to the terms of EPA's Administrative Compliance Order, docket number CWA-07-2008-0085.

45. The effect of settlement described in paragraph 43 is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in paragraph 44 of this CA/FO.

46. Respondent and Complainant each agree to bear their own costs and attorney's fees.

47. Nothing contained in this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

Penalty

48. Respondent consents to the issuance of the Final Order and consents to the payment of a mitigated civil penalty of Nine Thousand Nine Hundred Dollars (\$9,900).

49. Respondent shall submit payment of the penalty within thirty (30) days of the effective date of this CA/FO. Payment of the penalty shall be by cashier or certified check made payable to "United States Treasury." The check must include the docket number and the name of the case. The check must be remitted to:

U.S. EPA Region 7
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

Copies of the transmittal letter and the check shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Chris Muehlberger
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

50. Respondent's failure to pay any portion of the civil penalty in accordance with the provisions of this CA/FO may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

51. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

52. The undersigned representative of Respondent certifies that he/she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

53. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

Parties Bound

54. The Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

For the Respondent:

6/30/2009
Date

Juan Guardiola
Name (Print) Juan Guardiola
Title President

For the United States Environmental Protection Agency - Region 7

7.9.09
Date

Chris Muehlberger
Chris Muehlberger
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

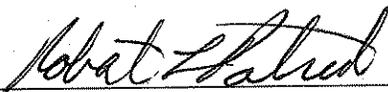
7/10/09
Date

William A. Spratlin
William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

Date: September 18, 2009

IN THE MATTER OF Tortilla King, Inc., Respondent
Docket No. CWA-07-2009-0086

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Chris Muehlberger
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Juan Guardiola, President
Tortilla King, Inc.
249 23rd Avenue
P.O. Box 763
Moundridge, Kansas 67107

Dated: 9/22/09



Kathy Robinson
Hearing Clerk, Region 7