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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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HEARINGS CLERK
EPA--REGION 10

In the Matter of:)
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)
)
City of Toppenish)
Toppenish, Washington)
)
Respondent.)
DOCKET NO. CWA-10-2011-0020

**CONSENT AGREEMENT AND
FINAL ORDER**

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B).

1.2. 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, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to CWA Section 309(g)(1) and (g)(2)(B), 33 U.S.C. § 1319(g)(1) and (g)(2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and the City of Toppenish, Washington (“Respondent”) agrees to 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 effective.

2.2. Part III of this CAFO contains a concise statement of the factual and legal bases for the alleged violations of the CWA.

III. ALLEGATIONS

3.1. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutants by any person” except as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” “Navigable waters” are defined as “waters of the United States.” 33 U.S.C. § 1362(7).

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

3.3. Respondent owns and operates a wastewater treatment facility (“Facility”) located in Toppenish, Washington.

3.4. NPDES Permit WA-0026123 (“Permit”) was issued to Respondent on November 19, 2003. The Permit became effective on November 25, 2003, and expired on November 25, 2008. It is currently administratively extended.

3.5. The Facility, which was under Respondent’s control at all times relevant to this action, discharges pollutants from Outfall 001, which is located at latitude 46° 22’ 67” North and longitude 120° 13’ 24” West. Outfall 001 is a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

3.6. The Facility discharges domestic wastewater containing pollutants into Toppenish Drain. The Toppenish Drain is a “navigable water” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and a “waters of the United States” within the meaning of 40 C.F.R. § 122.2.

3.7. Section I.A of the Permit establishes effluent limitations for the discharge from Outfall 001 and includes limits for Total Ammonia as N (“ammonia”), Copper and Zinc.

3.8. Section II.B of the Permit requires Respondent to summarize monitoring results for the Facility each month in a Discharge Monitoring Report (“DMR”).

3.9. Respondent’s DMRs from June 2008 to May 2010 indicate that the Facility had 1,806 violations of the effluent limitations set forth in the Permit. Exceedance of a monthly average effluent limit is counted as one violation for each day of the month in which the exceedance occurred. An exceedance of a daily maximum effluent limit is counted as one violation.

3.10. Section I.A. of the Permit contains a daily maximum loading effluent limit for Copper of 0.15 lbs/day. Between June 2008 and May 2010, Respondent violated the daily maximum loading effluent limit for Copper two times, constituting two violations. The violations are as follows:

Month of Violation	Number of Violation
June 2008	1
June 2009	1

3.11. Section I.A. of the Permit contains a daily maximum concentration effluent limit for Copper of 9.4 ug/l. Between June 2008 and May 2010, Respondent violated the daily maximum concentration effluent limit for Copper four times, constituting four violations. The violations are as follows:

Month of Violation	Number of Violations
June 2008	1
February 2009	1
May 2009	1
June 2009	1

3.12. Section I.A. of the Permit contains an average monthly loading effluent limit for Copper of 0.1 lbs/day. Between June 2008 and May 2010, Respondent violated the average monthly loading effluent limit for Copper two times, constituting 61 violations. The violations are as follows:

Month of Violation	Number of Violations
December 2008	31
June 2009	30

3.13. Section I.A. of the Permit contains an average monthly concentration effluent limit for Copper of 6.5 ug/l. Between June 2008 and May 2010, Respondent violated the average monthly concentration effluent limit for Copper two times, constituting 61 violations. The violations are as follows:

Month of Violation	Number of Violations
December 2008	31
June 2009	30

3.14. Section I.A. of the Permit contains a daily maximum loading effluent limit for Ammonia of 32.3 lbs/day. Between June 2008 and May 2010, Respondent violated the daily maximum loading effluent limit for ammonia 75 times, constituting 75 violations. The violations are as follows:

Month of Violation	Number of Violations
June 2008	1
September 2008	1
October 2008	1
November 2008	1
December 2008	4
January 2009	3

Month of Violation	Number of Violations
February 2009	3
March 2009	4
April 2009	4
May 2009	4
June 2009	4
July 2009	5
August 2009	4
September 2009	5
October 2009	4
November 2009	4
December 2009	5
January 2010	4
February 2010	4
March 2010	5
April 2010	4
May 2010	1

3.15. Section I.A. of the Permit contains a daily maximum concentration effluent limit for Ammonia of 2.04 mg/l. Between June 2008 and May 2010, Respondent violated the daily maximum concentration effluent limit for ammonia 84 times, constituting 84 violations. The violations are as follows:

Month of Violation	Number of Violations
June 2008	3
August 2008	1
September 2008	1
October 2008	3
November 2008	3
December 2008	5
January 2009	3
February 2009	4
March 2009	4

Month of Violation	Number of Violations
April 2009	4
May 2009	4
June 2009	4
July 2009	5
August 2009	4
September 2009	5
October 2009	4
November 2009	4
December 2009	5
January 2010	4
February 2010	4
March 2010	5
April 2010	4
May 2010	1

3.16. Section I.A. of the Permit contains an average monthly loading effluent limit for Ammonia of 19.5 lbs/day. Between June 2008 and May 2010, Respondent violated the average monthly loading effluent limit for ammonia 24 times, constituting 730 violations. The violations are as follows:

Month of Violation	Number of Violations
June 2008	30
July 2008	31
August 2008	31
September 2008	30
October 2008	31
November 2008	30
December 2008	31
January 2009	31
February 2009	28
March 2009	31
April 2009	30

Month of Violation	Number of Violations
May 2009	31
June 2009	30
July 2009	31
August 2009	31
September 2009	30
October 2009	31
November 2009	30
December 2009	31
January 2010	31
February 2010	28
March 2010	31
April 2010	30
May 2010	31

3.17. Section I.A. of the Permit contains an average monthly concentration effluent limit for Ammonia of 1.23 mg/l. Between June 2008 and May 2010, Respondent violated the average monthly concentration effluent limit for ammonia 24 times, constituting 730 violations. The violations are as follows:

Month of Violation	Number of Violations
June 2008	30
July 2008	31
August 2008	31
September 2008	30
October 2008	31
November 2008	30
December 2008	31
January 2009	31
February 2009	28
March 2009	31
April 2009	30
May 2009	31

Month of Violation	Number of Violations
June 2009	30
July 2009	31
August 2009	31
September 2009	30
October 2009	31
November 2009	30
December 2009	31
January 2010	31
February 2010	28
March 2010	31
April 2010	30
May 2010	31

3.18. Section I.A. of the Permit contains an average monthly concentration effluent limit for Zinc of 45.9 ug/l. Between June 2008 and May 2010, Respondent violated the average monthly concentration effluent limit for Zinc two times, constituting 61 violations. The violations are as follows:

Month of Violation	Number of Violations
December 2008	31
June 2009	30

3.19. Under Section 309(g)(1) of the CWA, 33 U.S.C § 1319(g)(1), EPA may assess an administrative penalty when EPA finds that “any person . . . has violated section 1311 . . . or has violated any permit condition or limitations . . . in a permit issued” pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Consequently, under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondent is liable for the administrative assessment of civil penalties for violations at the Facility in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum amount of \$177,500.

IV. CONSENT AGREEMENT

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. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondent's economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$134,500.

4.4. Respondent agrees to pay the total civil penalty set forth in Paragraph 4.3 within 30 days of the effective date of the Final Order.

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

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must serve photocopies of the check described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, MS ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Office of Compliance and Enforcement
Attn: Chae Park
U.S. Environmental Protection Agency
Region 10, MS OCE-133
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

4.7. If Respondent fails to pay the penalty assessed by this CAFO in accordance with the payment schedule set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. 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 a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, 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.

4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent must pay (in addition to any assessed penalty and interest) attorneys fees and 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 20% of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this CAFO and to bind Respondent to this document.

4.10. Except as described in Subparagraph 4.7.2, above, 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 waives any right to appeal the Final Order set forth in Part V.


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

4.13. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA.

DATED:

FOR RESPONDENT:

1/24/11

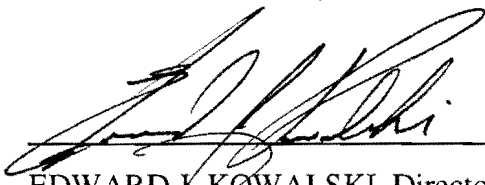
Signature: 
Print Name: WILLIAM C. MURPHY

Title: City Manager

DATED:

FOR COMPLAINANT:

3/16/2011


EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with these terms of settlement.


5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. 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 promulgated or permits issued thereunder.

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

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondent. More than 40 days have elapsed since the issuance of this public notice, and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 21st day of March, 2011.



THOMAS M. JAHNKE
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: City of Toppenish, Idaho DOCKET NO.: CWA-10-2011-0020** was filed with the Regional Hearing Clerk on *March 22*, 2011.

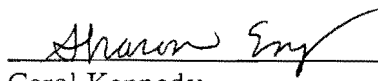
On *March 22*, 2011 the undersigned certifies that a true and correct copy of the document was delivered to:

Stephanie Mairs, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on _____, to:

William Murphy, City Manager
City of Toppenish
21 West First Avenue
Toppenish, WA 98948

DATED this *22nd* day of *March* 2011.



for Carol Kennedy
Regional Hearing Clerk
EPA Region 10