

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket No. CWA-07-2018-0031
David City, Nebraska)	
)	
Respondent)	FINDINGS OF VIOLATION AND
)	ORDER FOR COMPLIANCE ON
)	CONSENT
Proceedings under Section 309(a)(3) of the)	
Clean Water Act, 33 U.S.C. § 1319(a)(3))	
_____)	

Preliminary Statement

1. The following Findings of Violation and Administrative Order for Compliance on Consent (“Order on Consent”) are made and issued pursuant to Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). This Authority has been delegated by the Administrator of the U.S. Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA, Region 7 and further delegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.
2. Respondent is the city of David City, Nebraska (“Respondent” or “the City”) and was at all relevant times a municipality organized under the laws of the state of Nebraska.
3. EPA, together with the Respondent enter into this Section 309(a)(3) Order for the purpose of carrying out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
4. It is the Parties’ intent through entering into this Order to address Respondent’s alleged noncompliance with the CWA and violation of its National Pollutant Discharge Elimination System (“NPDES”) permit. As set forth in this Order on Consent, the Parties have amicably reached agreement regarding the timeframes for Respondent to attain compliance with the CWA and its NPDES permit.
5. By entering into this Order on Consent, Respondent (1) consents to and agrees not to contest the EPA’s authority or jurisdiction to issue and enforce this Section 309(a) Order on Consent, (2) agrees to undertake all actions required by the terms and conditions of this Order on Consent, and (3) consents to be bound by the requirements set forth herein. Respondent neither admits nor denies the specific factual allegations or Findings of Violation in this Order on Consent, except that Respondent admits the jurisdictional allegations herein. Respondent also

waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order on Consent, including any right of judicial review under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, provides that pollutants may be discharged in accordance with the terms of an NPDES permit issued pursuant to that Section.

7. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. Part 122.1, an NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

8. As defined by 40 C.F.R. § 403.3(q), a Publicly Owned Treatment Works (“POTW”) includes, but is not limited to, devices and systems for storage and treatment of municipal sewage and sewers, pipes and other conveyances of wastewater.

9. The Nebraska Department of Environmental Quality (“NDEQ”) is the state agency in Nebraska with the authority to administer the federal NPDES program, pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and applicable implementing regulations. EPA retains concurrent enforcement authority with authorized state programs for violations of the CWA.

EPA’s General Allegations

10. Respondent is a “person,” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

11. Respondent is the owner and/or operator of a POTW in David City, Nebraska, that includes a wastewater treatment plant (“WWTP”), consisting of two sequencing batch reactors (“SBRs”) and a five-cell controlled discharge lagoon system, and a sewage collection system, which receives wastewater from various domestic and non-domestic sources, including wastewater discharged from an egg processing facility owned by Henningsen Foods, Inc.

12. The POTW discharges through Outfall 001 to Keysor Creek, an undesignated tributary to the North Fork of the Big Blue River.

13. The POTW is a “point source” that “discharges pollutants” to “navigable waters” of the United States, as these terms are defined by Section 502(14), (12) and (7) of the CWA, 33 U.S.C. § 1362(14), (12) and (7), respectively.

14. On July 1, 2010, the NDEQ issued NPDES permit number NE0021199 to the City pursuant to Section 402 of the CWA, 33 U.S.C. § 1342 (“2010 NPDES Permit”). On April 1, 2016, the NDEQ issued NPDES permit number NE0021199 to the City, which removed the

mass limits for BOD and TSS and revised the ammonia limits for Outfall 001 by including interim and final ammonia limits and a compliance schedule (“2016 NPDES Permit”).

15. Part I of the City’s 2010 NPDES Permit contains limitations for discharges of effluent from the City’s POTW through Outfall 001 to Keysor Creek, as summarized below.

Parameter	Units	Discharge Limits		Monitoring Frequency
		Monthly Average	7-Day Average	
Biochemical Oxygen Demand (“BOD”)	kg/day	49.6	73.6	Monthly
	mg/L	30.0	45.0	
Total Suspended Solids (“TSS”)	kg/day	147	221	Monthly
	mg/L	80.0	120.0	
		Monthly Average	Daily Maximum	
Spring Ammonia	mg/L	12.5	25.2	Monthly
	kg/day	5.47	10.97	
Summer Ammonia	mg/L	4.8	9.7	Monthly
	kg/day	5.36	10.75	
Winter Ammonia	mg/L	11.8	23.6	Monthly
	kg/day	10.3	20.13	
Acute Toxicity <i>Ceriodaphnia sp</i> <i>Pimephales promelas</i>	TUa	Report	1.0	Once/permit
		Daily Minimum	Daily Maximum	
pH	S.U.	6.5	9.0	Monthly

16. Part I of the City’s 2016 NPDES Permit contains limitations for discharges of effluent from the City’s POTW through Outfall 001 to Keysor Creek, as summarized below.

Parameter	Units	Discharge Limits		Monitoring Frequency
		Monthly Average	7-Day Average	
Biochemical Oxygen Demand (“BOD”)	mg/L	30.0	45.0	Monthly
Total Suspended Solids (“TSS”)	mg/L	80.0	120.0	Monthly
		Monthly Average	Daily Maximum	
Interim Spring Ammonia (March 1 – May 31)	mg/L	4.13	8.28	Monthly
	kg/day	5.47	10.97	
Interim Summer Ammonia (June 1 – Oct. 31)	mg/L	4.05	8.12	Monthly
	kg/day	5.36	10.75	
Interim Winter Ammonia (Nov. 1 – Feb. 28)	mg/L	7.81	15.7	Monthly
	kg/day	10.03	20.13	

Acute Toxicity <i>Ceriodaphnia sp</i> <i>Pimephales promelas</i>	TUa	Report	1.0	Once/permit
		Daily Minimum	Daily Maximum	
pH	S.U.	6.5	9.0	Monthly

17. Part IV of Respondent’s NPDES Permit requires samples to be taken annually at the head-works of the WWTP prior to the treatment system for flow, BOD, TSS and pH.

18. Paragraph 14 of Appendix A of Respondent’s NPDES Permit requires that monitoring results be reported at intervals specified on Discharge Monitoring Reports (“DMRs”) submitted to NDEQ quarterly. Paragraph 14.d.iii provides that if the permittee monitors any pollutant more frequently than required by the permit using specified test procedures, the results of such monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

19. Part V of Respondent’s NPDES Permit contains a compliance schedule for the construction of upgrades to the WWTP necessary to meet ammonia limits from Outfall 001.

20. The City and Henningsen entered into a Sewer Participation Service Agreement and Permit (“City-Henningsen contract”) on March 13, 1997 and again, most recently, on October 1, 2016 regarding the allocation of costs of the POTW based on usage of the treatment facility. The City-Henningsen contract contains daily maximum loading limits for BOD, TSS, and Total Kjeldahl Nitrogen (“TKN”), and flow discharged from Henningsen’s facility to the POTW, violation of which potentially subjects Henningsen to a surcharge. The 2016 City-Henningsen contract also includes an incident charge for violations of pH limits.

21. On October 31 through November 3, 2016, EPA performed a Compliance Sampling Inspection of the City’s WWTP (“Inspection”) and an Industrial User and Compliance Sampling Inspection at Henningsen’s facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

22. During the Inspection, the EPA inspector reviewed documents, including DMRs and other monitoring data collected for the time period January 2014 to September 2016, observed the City’s POTW, sampling stations, and Henningsen’s facility, and collected effluent samples.

23. The City provided information to the inspector by letter dated November 7, 2016, following the Inspection.

24. A copy of the Inspection Report was sent to the City on or about February 8, 2017.

25. On or about April 7, 2017, EPA issued a request for information to the City pursuant to the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), requiring submittal of information regarding, among other things, reports made to the City Council concerning the operation of the POTW, communications between the City and Henningsen, and plans to address compliance with the POTW’s NPDES Permit. The City submitted its response to the information

request by letter and Statement of Certification dated April 27, 2017 (“City’s Information Request Response”).

26. On or about April 7, 2017 EPA also issued a request for information to Henningsen pursuant to the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), requiring submittal of information regarding, among other things, discharge monitoring reports, communications between the City and Henningsen, and plans to address compliance with Henningsen’s NPDES/NPP permit. Henningsen submitted its response to the information request by letter and Statement of Certification dated May 5, 2017 (“Henningsen’s Information Request Response”).

27. Information from the Inspection, the City’s submission following the Inspection, the City’s Information Request Response, and Henningsen’s Information Request Response indicate, in part, that Respondent:

- a. Has been aware since at least January 2008, based on an engineering evaluation of the POTW by Olsson Associates, that the Henningsen facility’s discharge significantly impacts the ability of the WWTP to operate within design parameters, that discharges from the Henningsen facility can, at times, overload the WWTP and cause treatment process upset, interference, and pass through, and that upgrades to the City’s WWTP are necessary to comply with the City’s NPDES permit;
- b. Informed Henningsen by letter dated September 25, 2014 that there would be no surcharge for exceeding discharge limits in the City-Henningsen contract;
- c. Informed Henningsen by letter in September 2015 that the City’s WWTP has been overloaded, the WWTP’s sequencing batch reactors (“SBRs”) needed to get back on track, and the City would be enforcing the City-Henningsen contract going forward; and
- d. Has been working with one or more consultants to consider improvements to its WWTP and/or collection system to achieve compliance with the City’s NPDES permit.

EPA’s Findings

Count 1

Failure to Comply with Effluent Limitations

28. The facts stated in Paragraphs 1 through 27 above are re-alleged and incorporated herein by reference.

29. Part I of the Respondent’s NPDES permit establishes discharge limits and monitoring requirements for Outfall 001, as described in Paragraphs 15 and 16, above.

30. The City’s POTW effluent failed the whole effluent toxicity test in June 2015.

31. The City’s POTW effluent discharged through Outfall 001 exceeded the ammonia as nitrogen and BOD limits of its 2010 NPDES permit on multiple occasions in 2014 and 2015

including, but not limited to, the following:

- a. Ammonia as nitrogen:
 - i. Monthly average loading: June 2014, July 2014, October 2014, February 2015, March 2015, April 2015, May 2015, June 2015, December 2015;
 - ii. Daily maximum loading: June 2014, October 2014, February 2015, May 2015, June 2015, December 2015;
 - iii. Monthly average concentration: June 2014, July 2014, October 2014, December 2014, February 2015, March 2015, April 2015, May 2015, June 2015, July 2015;
 - iv. Daily maximum concentration: February 2015, March 2015, April 2015, May 2015, June 2015, July 2015;
- b. BOD:
 - i. Monthly average loading: February 2015;
 - ii. Monthly average concentration: February 2015, March 2015, April 2015;

32. Further, the City's POTW effluent discharged through Outfall 001 exceeded the ammonia as nitrogen, BOD, TSS and pH limits of its 2016 NPDES permit on multiple occasions in 2016 and 2017, including, but not limited to, the following:

- a. Ammonia as nitrogen:
 - i. Monthly average loading: May 2016, June 2016, September 2017;
 - ii. Daily maximum loading: June 2016, September 2017;
 - iii. Monthly average concentration: June 2016, September 2017;
- b. BOD:
 - i. Monthly average concentration: May 2017;
 - ii. 7-day average concentration: May 2017;
- c. TSS:
 - i. Monthly average concentration: May 2017, August 2017;
 - ii. 7-day average concentration: May 2017;
- d. pH
 - i. Daily Maximum: May 2017.

33. Each failure to comply with effluent limitations is a violation of the terms and conditions of Respondent's NPDES permit and, as such, is a violation of Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

Count 2

Failure to Submit Monitoring Data

34. The facts stated in Paragraphs 1 through 33 above are re-alleged and incorporated herein by reference.

35. Standard Condition 14.d.iii of Respondent's NPDES Permit requires that if the permittee monitors any pollutant more frequently than required by the permit using certain test procedures, the results of such monitoring shall be included in the calculation and reporting of

the data and submitted in the DMR.

36. The City has collected 24-hour composite samples of the WWTP influent since at least April 2015, as well as daily 24-composite samples and/or individual hourly samples at Henningsen's outfalls that discharge to the POTW. Certain samples of Henningsen's discharges that appeared high strength were analyzed further.

37. During the Inspection, the inspector obtained a copy of the spreadsheet maintained by the City that contained the WWTP influent and Henningsen monitoring data for April 2015 to October 2016. A review of this data and the DMRs submitted by the City found that the City reports one annual sample of the WWTP influent but not the additional influent monitoring data on its DMRs.

38. The failure to report additional monitoring data is a violation of the terms and conditions of Respondent's NPDES permit and, as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342(p).

**Count 3
Unauthorized Discharges and Bypasses**

39. The facts stated in Paragraphs 1 through 38 above are re-alleged and incorporated herein by reference.

40. Respondent's NPDES Permit authorizes the discharge of pollutants only from specified outfalls, identified in the NPDES Permit as Outfalls 001, 002, and 004, to a specified water of the United States, subject to the limitations and conditions set forth in the NPDES Permit.

41. Standard Condition 15 of Respondent's NPDES Permit states that any bypass is prohibited unless it is unavoidable to prevent loss of life, personal injury, or severe property damage; there are no feasible alternatives to the bypass; and notices are submitted as required by this section of the permit.

42. On May 12 and 13, 2016, the City discharged untreated wastewater from manholes and/or other locations within the City's collection system, also known as SSOs, and bypassed 1.75 million gallons of untreated or partially treated wastewater from the City's WWTP into Keysor Creek.

43. The discharge of pollutants from any location other than a permitted outfall constitutes a violation of the conditions of Respondent's NPDES Permit and Sections 301(a) and 402(p) of the CWA, 33 U.S.C. §§ 1311(a), 1342(p).

**Count 4
Failure to Properly Operate and Maintain the POTW**

44. The facts stated in Paragraphs 1 through 43 above are re-alleged and incorporated herein by reference.

45. Paragraph 7 of Appendix A of Respondent's NPDES Permit requires that the City "at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes effective performance based on designed facility removals, effective management, adequate operator staffing and training, adequate process controls, adequate funding that reflects proper user fee schedules, adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit."

46. During the Inspection, the inspector reviewed the daily flow and rain data for the WWTP for January 2016 to September 2016 and found that the WWTP's 24-hour design flow was exceeded on 32 days and the WWTP's daily maximum flow was exceeded on 16 days during this time period, mostly in April and May 2016 when there was approximately 15 inches of rain and when the SSOs and bypass described above in Paragraph 42 occurred, indicating a significant inflow and infiltration problem in the collection system.

47. In noncompliance reports submitted to NDEQ, the City has indicated that inflow and infiltration problems in the collection system have contributed to exceedances of effluent limits in its NPDES Permit, including the following: in the report received by NDEQ on July 18, 2016, the City stated that on May 12, 2016, the cause of noncompliance with the ammonia loading limit in its NPDES Permit was storm flows; in the report received by NDEQ on July 24, 2017, the City stated that on May 8, 2017, the cause of noncompliance with the TSS concentration limit was spring turnover coupled with heavy flows and rain and the cause of noncompliance with the BOD concentration limit was extremely short SBR cycles to allow for high storm flows.

Reasonable Time to Achieve Compliance

48. Pursuant to Section 309(a)(5)(A) of the CWA, 33 U.S.C. § 1319(a)(5)(A), and having taken into account the seriousness of the violations, the EPA finds that three (3) years is a reasonable time for Respondent to achieve compliance with its Permit.

Order for Compliance on Consent

49. Based on the EPA Findings set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), the EPA hereby ORDERS the Respondent, and the Respondent hereby AGREES, to take the actions described below.

50. In accordance with this Order, the Respondent shall immediately cease all discharges, except discharges in compliance with its NPDES Permit, and shall take all necessary actions to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of its NPDES Permit.

51. *Compliance Plan.* By no later than sixty (60) days after the effective date of this Order, the City shall submit to the EPA, with a copy to the NDEQ, a comprehensive written plan (the "Compliance Plan") for achieving compliance with the City's NPDES Permit no later than December 31, 2020.

- a. The Compliance Plan shall describe in detail the actions to be taken or work to be completed, and how such actions or work will enable the City to achieve compliance with the effluent limitations prescribed by the City's NPDES Permit.
- b. The Compliance Plan shall include a proposed sequential milestone schedule for completing the proposed actions/work. All such actions/work shall be completed as expeditiously as possible, with a final completion date of no later than December 31, 2020.
- c. The EPA will promptly review, and may provide comments on, the City's Compliance Plan.

52. *Compliance Plan Completion.* Within thirty (30) days of completion of the final scheduled corrective action, the City shall submit a written certification to the EPA, with a copy to the NDEQ, that it has completed all actions required pursuant to this Order on Consent and achieved compliance with its NPDES Permit.

53. The EPA will promptly review submittals from Respondent. If, after review of Respondent's submittals pursuant to this Order on Consent, the EPA determines that additional corrective measures or alternative deadlines are appropriate, the EPA may seek to modify this Order on Consent pursuant to the provisions of Paragraph 64 below, or terminate this Order on Consent and initiate a separate enforcement action, as appropriate.

Reports/Submissions

54. *Reporting to EPA:* In addition to the submittals required by Paragraphs 51 and 52 above, the City shall submit to EPA, semi-annual reports describing the actions the City has taken to comply with the terms of this Order. These reports are due every April 1 and October 1 until termination of this Order pursuant to Paragraph 65 below; the first report is due October 1, 2018. Each report shall include, at a minimum:

- a. Monthly Discharge Monitoring Reports. The City shall include copies of reports submitted to NDEQ;
- b. Compliance Progress. Each report shall include a detailed update on the progress of the compliance measures, including a description of activities completed, those

scheduled for the next reporting period, and milestones met during the reporting period.

55. *Submittals.* All documents required to be submitted to EPA by this Order, including the certification statement in Paragraph 58 below, shall be submitted by electronic mail to:

bruno.jodi@epa.gov

Jodi Bruno, or her successor
U.S. Environmental Protection Agency – Region 7
Water, Wetlands and Pesticides Division
11201 Renner Boulevard
Lenexa, Kansas 66219.

56. Electronic submissions to the EPA will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically to the EPA shall be submitted in hard-copy to the address provided above.

57. All documents required to be submitted pursuant to this Order shall also be submitted by mail to NDEQ to the address provided below:

Steve Goans
Water Quality Division
Nebraska Department of Environmental Quality
P.O. Box 98922
Lincoln, Nebraska 68509-8922

58. Each submission requirement of this Order shall contain the following certification signed by an authorized official, as described at 40 C.F.R. § 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 violations.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

59. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from, initiating an administrative or judicial 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.

60. 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. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d), or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by the EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

61. Nothing in this Order shall limit the 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

62. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judiciary 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

63. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date this Order is signed by the EPA.

Modification

64. At the EPA's sole discretion, extensions of the compliance schedule/deadlines required by this Order may be made by the EPA by written notice to Respondent, without further formal amendment to the Order. The EPA's consent for a requested extension will not be unreasonably withheld. All other modifications to this Order may only be made by mutual agreement of the Parties, pursuant to a written amendment signed by each Party.

Termination


65. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA.

For the Complainant, U.S. Environmental Protection Agency:

Issued this 4TH day of May, 2018.

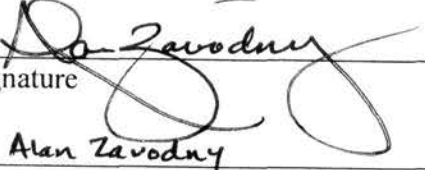


Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division



Shane E. C. McCain
Assistant Regional Counsel
Office of Regional Counsel

For the Respondent, David City:


Signature

4/18/2018
Date

Alan Zavodny
Name

Mayor
Title

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 Administrative Order for Compliance on Consent to the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance on Consent by first class certified mail, return receipt requested, to:

The Honorable Alan Zavodny
Mayor, David City
557 North 4th Street
David City, Nebraska 68632

and via first class mail to:

Steve Goans
Water Quality Division
Nebraska Department of Environmental Quality
P.O. Box 98922
Lincoln, Nebraska 68509-8922

5/8/18
Date

Shane McLean
Signature