

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Western Sugar Cooperative) CONSENT AGREEMENT
) AND FINAL ORDER
Respondent)
) Docket No. CWA-07-2010-0135
)
Proceeding under Section 309(a)(3))
Of the Clean Water Act,)
33 U.S.C. §1319(a)(3))
_____)

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency (EPA), Region 7 ("Complainant") and Western Sugar Cooperative, ("Respondent") have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

FACTUAL ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order ("CAFO") serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and § 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7 ("Complainant").

4. Respondent is Western Sugar Cooperative, ("Respondent") which owns and operates a sugar beet processing facility located in Scottsbluff County, Nebraska.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a "point source" into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.

7. To implement Section 402 of the CWA, 33 U.S.C. § 1342, EPA promulgated regulations codified in 40 C.F.R., including Parts 122 and 136.

8. The Nebraska Department of Environmental Quality ("NDEQ") is the agency within the State of Nebraska that has been authorized to administer the federal NPDES program pursuant to Section 402 of the CWA and its implementing regulations. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of NPDES permits.

Factual Background

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

10. Respondent owns and operates a sugar beet processing facility located in Scottsbluff County, Nebraska ("facility").

11. Respondent's facility is a "point source" that "discharges pollutants" into "navigable waters" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

12. Respondent's discharge of pollutants from its facility requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

13. On April 1, 2006, NDEQ issued Respondent NPDES Permit No. NE0111686 (hereafter "NPDES permit") for discharges from its facility to the North Platte River. This permit will expire on March 31, 2011.

14. Respondent's NPDES Permit, Part II, Section C sets forth limits for Outfall 001 Seasonal Fecal Coliform Discharge Limitations and Monitoring Requirements.

15. Part II, C of Respondent's NPDES permit establishes a daily maximum limit for Fecal Coliform of 400 colony forming units /100 mL(CFU/100mL).

16. Respondent's NPDES permit also requires Respondent to file Discharge Monitoring Reports ("DMRs") with the NDEQ on a quarterly basis that summarize Respondent's sampling and analysis results for all pollutants regulated by the NPDES permit.

17. On or about October 2, 2008, an EPA representative performed an inspection of Respondent's facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

Findings of Violation

18. The facts stated in Paragraphs 9 through 17 above are herein incorporated.

19. A review of Respondent's DMRs revealed that Respondent's discharge exceeded the maximum permitted limits for Fecal Coliform as follows:

<u>Month</u>	<u>Limit</u>	<u>Reported Value (Maximum Value)</u>
December 2007	400 CFU/100mL	3200 CFU/100mL
January 2008	400 CFU/100mL	17,000 CFU/100mL
February 2008	400 CFU/100mL	2320 CFU/100mL
May 2008	400 CFU/100mL	2500 CFU/100mL
July 2008	400 CFU/100mL	4,050 CFU/100mL
August 2008	400 CFU/100mL	20,000 CFU/100mL
November 2008	400 CFU/100mL	1,200 CFU/100mL
December 2008	400 CFU/100mL	2,200 CFU/100mL
January 2009	400 CFU/100mL	550 CFU/100mL
March 2009	400 CFU/100mL	485 CFU/100mL
April 2009	400 CFU/100mL	6,600 CFU/100mL
October 2009	400 CFU/100mL	805 CFU/100mL
December 2009	400 CFU/100mL	1,000 CFU/100mL
January 2010	400 CFU/100mL	515 CFU/100mL

20. Each discharge of pollutants as identified in paragraph 19 above is a violation of the terms and conditions of the NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and as such, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

21. Based on the foregoing Findings of Violation, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent for the violations cited above, in the amount of One Hundred Fifty-Nine Thousand Seven Hundred and Fifty Dollars (\$159,750).

CONSENT AGREEMENT

22. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

23. Respondent admits the jurisdictional allegations of this CAFO 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 CAFO.

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

25. 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 CAFO.

26. Respondent and Complainant agree to conciliate the matters set forth in this CAFO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

27. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CAFO and to execute and legally bind Respondent to it.

28. Nothing contained in the Final Order portion of this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

29. This CAFO addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any future violations of the CWA or any other applicable law.

30. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent's facility is in compliance with Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

31. The effect of settlement described in paragraph 29 above is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 30 above, of this CAFO.

32. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project ("SEP"), which the parties agree is intended to secure

significant environmental and/or public health benefits. Respondent shall install a non-contact water condenser operation at a cost of no less than of Three Hundred and Fifty Thousand Dollars, (\$350,000), in accordance with the Respondent's SEP Work Plan (attached hereto as Attachment A and incorporated by reference).

33. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations. The total expenditure for the SEP shall be not less than \$350,000 and the SEP shall be completed in accordance with the following schedule:

- (i) Respondent shall finalize the design of the SEP, to be implemented in accordance with Attachment A, no later than January 1, 2011;
- (ii) Respondent shall award a contract for construction of the SEP project, as described in Attachment A, no later than May 1, 2011; and
- (iii) The SEP project, as described in Attachment A, shall be installed and operational no later than November 1, 2011.

34. Within thirty (30) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA, with a copy to the state agency identified below. The SEP Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented;
- (ii) Itemized costs, documented by copies of purchase orders, receipts, or canceled checks; and
- (iii) The following certification signed by Respondent / Respondents or, if Respondent is a corporation, an officer of the corporation:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

All reports shall be directed to the following:

Raju Kakarlapudi
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

35. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

36. Respondent agrees to the payment of stipulated penalties as follows: In the event the Respondent fails to comply with any of the terms or provisions of this Consent Agreement relating to the performance of the SEP, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- a. Except as provided in subparagraph (b) and (c) of this paragraph, if the SEP is not completed satisfactorily and timely pursuant to the agreement paragraphs 32 and 33 of this CAFO, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of One Hundred and Fifteen Thousand Five Hundred Dollars (\$115,500).
- b. If Respondent fails to timely and completely submit the SEP Completion Report required by paragraph 34, Respondent shall be liable and shall pay a stipulated penalty in the amount of Two Hundred and Fifty Dollars (\$250) for each day after the report is due, until the report is submitted.
- c. If the SEP is not completed in accordance with paragraph 32 of this CAFO, but EPA determines that the Respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.

37. Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of completion of the activity.

38. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 1 of the Final Order portion of this CAFO.

39. Respondent certifies that it is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

40. Any public statement, oral or written, in print, film or other media, made by

Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

41. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in paragraph 1 of the Final Order below or any portion of a stipulated penalty as stated in paragraph 36 above may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full.

42. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this CAFO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Fifty-Six Thousand Seven Hundred and Thirty-Six Dollars (\$56,736) to be paid in full no later than 30 days after the effective date of this CAFO. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2010-0135.

Copies of the check shall be mailed to:

Kristen Nazar
Assistant Regional Counsel
U.S. Environmental Protection Agency -- Region 7
901 North 5th Street
Kansas City, Kansas 66101

and to

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

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

Parties Bound

3. This Final Order portion of this CAFO 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 CAFO.

General Provisions

4. Notwithstanding any other provision of this CAFO, EPA reserves the right to enforce the terms of the Final Order portion of this CAFO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

5. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CAFO.

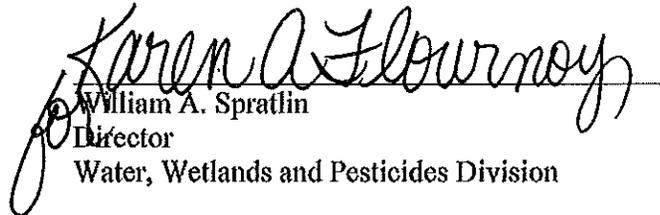
6. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

7. Respondent and Complainant shall bear their respective costs and attorney's fees.

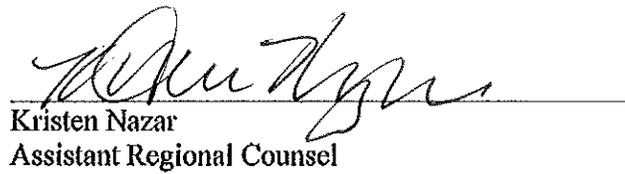
8. The headings in this CAFO are for convenience of reference only and shall not affect interpretation of this CAFO.

**COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY**

9/29/10
Date

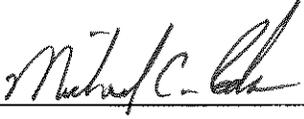

William A. Spratlin
Director
Water, Wetlands and Pesticides Division

9/29/2010
Date


Kristen Nazar
Assistant Regional Counsel

**RESPONDENT:
WESTERN SUGAR COOPERATIVE**

8/20/10
Date



Name (Print) Michael C. Rodgers

Title Vice President + Chief Financial Officer

IT IS SO ORDERED. This Final Order shall become effective immediately.



Robert Patrick
Regional Judicial Officer



Date

Attachment A

Western Sugar currently uses a number of 1920s-era barometric condensers at its Scottsbluff facility. The barometric condensers use cold supply water, from Winter's Creek, to generate a vacuum during various evaporation processes. The disadvantage of using the barometric condensers is that any organic material that is volatile in the sugar solution can be transferred to the cooling water and there is a direct contact path for the sugar solution to contaminate the water during an upset condition such as a high level or the sudden loss of vacuum. In addition, the barometric condensers do not reach sufficient temperature to ensure temperature treatment of fecal coliform.

Western Sugar is proposing to install a non-contact condenser water operation that will reduce the risk of fecal coliform contamination. The first phase of the project - the one that Western Sugar is proposing as a SEP - involves the installation of two plate and frame condensers that will use raw juice as the cold water source. Because the new condensers will use raw juice as the cold-water source - instead of water from Winter's Creek - the volume of water used (and discharged) by the Scottsbluff facility will be significantly reduced. In addition, the condensers will enable the facility to reduce its energy usage because condensed vapors will heat the raw juice as it passes through the condensers. Western Sugar currently uses steam generated by coal-fired boilers to heat raw juice at the Scottsbluff facility. The proposed SEP will provide a water usage reduction estimated at 500 gpm and energy efficiency improvement estimated at 8,000 lb/hr steam during sugar beet slicing season and will also provide non-contact condensers for sugar beet slicing and juice run seasons reducing the potential for upset loads due to pan carry over to the water discharge system.

The two new condensers, along with a barometric condenser for vapor control, raw juice pump station, and related piping will replace existing barometric condensers for the evaporator system, high raw continuous pan, and four low raw pans used during the sugar beet processing season. It is estimated that the SEP will cost at least \$350,000. An attached condenser flow diagram demonstrates the proposed layout for the sugar beet processing season.

IN THE MATTER OF Western Sugar Cooperative, Respondent
Docket No. CWA-07-2010-0135

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:

Kristen Nazar
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Ben L. Pfefferle, III
Baker & Hoestetler LLP
65 E. State Street
Suite 2100
Columbus, Ohio 43215

Dated: 9/30/10



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7