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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	Docket No. CWA-07-2013-0038
	)	
CITY OF CANEY, KANSAS,	)	
	)	
	)	COMPLAINT AND
	)	CONSENT AGREEMENT/
	)	FINAL ORDER
Respondent,	)	
	)	
Proceedings under Section 309(g) of the	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
	)	

COMPLAINT

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 United States Environmental Protection Agency's (EPA) Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).

2. This Complaint and Consent Agreement/Final Order serves as notice that EPA has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311, and a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 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 the EPA. The Administrator has delegated this authority to the Regional Administrator of 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 the City of Caney, Kansas (hereafter "Respondent" or "the City"), a political subdivision of the State of Kansas and a "municipality" within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4), which owns and operates a publicly owned treatment works (POTW) that treats domestic, commercial, and industrial wastewater.

Statutory and Regulatory Framework

5. The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. The CWA 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.

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, and industrial and municipal waste discharged into water.

9. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" 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, or vessel or other floating craft, from which pollutants are or may be discharged."

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as the "waters of the United States," which are defined at 40 C.F.R. § 122.2 to include all interstate waters.

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 National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

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

13. 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, implementing regulations, and a Memorandum of Understanding between EPA and KDHE dated May 23, 1973, as amended. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of NPDES permits.

14. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes the issuance of a penalty against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Background

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

16. At all relevant times, Respondent has owned and operated wastewater treatment facility and its associated sewer collection and transmission systems, which receive and treat wastewater from residential, commercial, and industrial connections within the City of Caney, Kansas.

17. Respondent's wastewater treatment facility described in Paragraph 16 is a "point source" as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).

18. Respondent's wastewater treatment facility causes the "discharge of pollutants" as defined by the CWA Section 502(12), 33 U.S.C. § 1362(12).

19. Respondent's wastewater treatment facility discharges pollutants via outfalls into the Little Caney River, which is a "navigable water" as defined by CWA Section 502(7), 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2.

20. Respondent is therefore subject to the provisions of the CWA, 33 U.S.C. § 1251 *et seq.*, and as such Respondent's discharge of pollutants requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

21. KDHE issued NPDES Permit No. KS0027481 to Respondent for discharges from its wastewater outfalls into the Little Caney River. The permit (hereafter "2008 NPDES permit") became effective April 1, 2008, and expired September 30, 2011. The 2008 NPDES permit was administratively extended until KDHE issued a new permit which became effective October 2, 2012, and which will expire on December 31, 2016 (hereafter "2012 NPDES permit").

22. Section A, the Effluent Limitations and Monitoring Requirements section of Respondent's 2008 NPDES permit, requires Respondent to monitor flow at Outfall 001A1 by meter on weekdays and report this data.

23. Section B, the Standard Conditions section of Respondent's 2008 NPDES permit, requires Respondent to comply with the attached Standard Conditions for Kansas Water Pollution Control and NPDES Permits effective August 1, 1996 (hereinafter "Standard Conditions"). Paragraph 8 of the Standard Conditions, titled "Facilities Operation," requires that Respondent shall at all times maintain in good working order and efficiently and effectively operate all treatment, collection, control systems or facilities, to achieve compliance with the terms of this permit.

24. Paragraph 5 of the Standard Conditions section of Respondent's 2008 NPDES permit, titled "Records Retention," requires that all records and information resulting from the monitoring activities required by the permit, including all records of analyses and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation, shall be retained for a minimum of three years.

25. Section A, the Effluent Limitations and Monitoring Requirements section of Respondent's 2008 NPDES permit, authorizes discharges from the specified outfalls as limited by the listed effluent limitations, including the following:

a. biochemical oxygen demand (BOD_5)

   i. effluent limitations for Outfall 001A1 – a monthly average concentration limitation of 30 milligrams per Liter (mg/L), and compliance with a removal efficiency of 85%

   ii. monitoring frequency - once monthly

b. total suspended solids (TSS)

   i. effluent limitations for Outfall 001A1 – a monthly average concentration limitation of 30 mg/L; a weekly average concentration limitation of 45 mg/L; and compliance with a removal efficiency of 85%

   ii. monitoring frequency - once monthly

c. *Escherichia coli* (*E. coli*)

   i. effluent limitations for Outfall 001A1 - for April through October, a monthly geometric average of 160 colonies/100 milliliters (ml); for November through March, a monthly geometric average of 2,358 colonies/100 ml

   ii. monitoring frequency - once monthly.

26. The relevant permit requirements and limitations described in Paragraphs 22 through 25 remained the same in the City's 2012 NPDES permit, with the exceptions of the Standard Condition for Facilities Operation, which is now Paragraph 6 in the 2012 NPDES permit but which remains substantively the same; the Standard Condition for Records Retention, which is now Paragraph 15 in the 2012 NPDES permit but which remains substantively the same; and the *E. coli* limit which is now a monthly geometric average of 427 colonies/100 ml for April through October and 3,843 colonies/100 ml for November through March.

27. On August 21 through 23, 2012, an EPA representative performed a Compliance Sampling Inspection (hereafter "the EPA inspection") of Respondent's facility under the

authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate Respondent's compliance with its NPDES permit and the CWA. During the EPA inspection, the inspector collected wastewater samples from Outfall 001A1, observed the wastewater treatment facility, and reviewed Respondent's self-monitoring records. The inspector issued a Notice of Potential NPDES Permit Violations at the end of the inspection, and EPA sent the report documenting the findings of the inspection to Respondent on or about December 11, 2012.

28. On March 4, 2013, EPA received a response from the City to a request for information (hereafter "EPA Information Request") issued by EPA to the City on February 12, 2013, under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a).

ALLEGATIONS

29. The facts stated in Paragraphs 15 through 28 above are herein incorporated.

30. Based on observations documented during the EPA inspection and review of available information, EPA alleges that Respondent violated Section 301(a) of the act, 33 U.S.C. § 1311(a), by violating the terms and conditions of its NPDES permit, in at least the following ways:

Count I - Failure to Monitor Flow

31. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its 2008 NPDES permit, by failing to monitor flow at Outfall 001A1 by meter each weekday. Respondent's flow meter was not operational at the time of the EPA inspection referenced in Paragraph 27, above, and Respondent was estimating and reporting effluent flow volume based on influent pump timers.

Count II - Failure to Maintain Facility in Good Working Order

32. Respondent violated Paragraph 8 of the Standard Conditions of its 2008 NPDES permit requiring that Respondent shall at all times maintain in good working order and efficiently and effectively operate all treatment, collection, control systems or facilities, as evidenced by the following observations noted during the EPA inspection referenced in Paragraph 27, above, and which contributed to noncompliance with the terms of the permit:

a. nonfunctional influent and effluent flow meters;

b. the overflow weir on the oxidation ditch, the overflow weirs on both clarifiers, and the concrete channels in the ultraviolet (UV) disinfection system needed to be thoroughly cleaned;

c. the display indicator was flashing on the south UV disinfection system control box, indicating it was not working properly, and several of the UV bulb indicator function lights were not operational;

d. the valves on the sand drying beds were broken; and

e. effluent flow through the two UV system channels was disproportionate, which can affect the efficiency of the UV system.

These observations would also violate the facilities operation provision of Respondent's 2012 NPDES permit.

Count III - Failure to Retain Records

33. Respondent violated Paragraph 5 of the Standard Conditions of its 2008 NPDES permit requiring that Respondent retain certain records and information related to monitoring activities for a minimum of three years. The EPA inspection referenced in Paragraph 27, above, revealed that the operator does not keep any operational testing records for the wastewater treatment facility. This practice would also violate the recordkeeping provision of Respondent's 2012 NPDES permit.

Count IV - Failure to Comply with Effluent Limitations

34. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its 2008 NPDES permit, by failing to meet the BOD_5 monthly average concentration limit during the month of January 2010; and by failing to achieve the permit's 85% removal efficiency requirement for BOD during the months of January 2010 and March 2012.

35. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its 2008 NPDES permit, by failing to meet the TSS monthly average concentration limit during the months of January 2010 and March 2012; by failing to meet the TSS weekly average concentration limit during the month of March 2012; and by failing to achieve the permit's 85% removal efficiency requirement for TSS during the months of January, May, June, and September 2010, May, November, and December 2011, and March, May, and July 2012.

36. Respondent violated Section A, the Effluent Limitations and Monitoring Requirements section of its 2008 NPDES permit, by failing to meet the applicable *E. coli* limit during the months of January and September 2010, and February 2012. The exceedances during these months would also violate the *E. coli* limits in Respondent's 2012 NPDES permit.

37. Respondent's violations of the terms and conditions of its 2008 NPDES permit, as described in Paragraphs 31 through 36, above, are violations of Section 301(a), 33 U.S.C. § 1311(a), and a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and implementing regulations.

38. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is proposed that a civil penalty be assessed against Respondent for the violations of the CWA identified above, the amount of which is set forth in Paragraph 48 below.

CONSENT AGREEMENT

39. Respondent and EPA agree to the terms of this Consent Agreement/Final Order and Respondent agrees to comply with the terms of the Final Order.

40. Respondent admits the jurisdictional allegations set forth in this Complaint and Consent Agreement/Final Order and agrees not to contest EPA's jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement/Final Order.

41. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Complaint and Consent Agreement/Final Order.

42. Respondent waives any right to contest the allegations set forth in this Consent Agreement/Final Order and its right to appeal this Consent Agreement and the accompanying Final Order.

43. Respondent and Complainant each agree to resolve the matters set forth in this Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees.

44. Nothing contained in this Consent Agreement/Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

45. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.

46. Respondent certifies by signing this Consent Agreement/Final Order that, to the best of its knowledge, Respondent is in compliance with all requirements of the CWA and its NPDES permit.

47. The effect of settlement is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 46 of this Consent Agreement/Final Order.

48. Respondent consents to the issuance of the Final Order hereinafter recited and agrees to pay a mitigated civil penalty in the amount of $9,100.

49. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Allegations.

Reservation of Rights

50. EPA reserves the right to enforce the terms of this Consent Agreement/Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

51. With respect to matters not addressed in this Consent Agreement/Final Order, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and based upon information contained in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Nine Thousand One Hundred Dollars ($9,100), plus accrued interest on the outstanding balance, according to the payment schedule set forth below:

   a. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before November 15, 2013;

   b. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before February 15, 2014;

   c. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before May 15, 2014;

   d. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before August 15, 2014;

   e. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before November 15, 2014;

   f. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before February 15, 2015;

   g. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before May 15, 2015; and

   h. One Thousand, One Hundred Forty-Eight Dollars and Forty-Four Cents ($1,148.44) on or before August 15, 2015.

2. Respondent, at its discretion, may accelerate payment of the penalty.

3. Respondent shall pay the penalty by cashier's or certified check made payable to "Treasurer, United States of America," and shall deliver the check with a transmittal that identifies the case name and docket number CWA-07-2013-0038 to:

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

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

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to:

Erin Weekley
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

4. Should the civil penalty not be paid as provided above, 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. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest thereon.

5. Respondent and Complainant shall pay their own costs and attorneys' fees incurred as a result of this action.

6. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

7. This Final Order shall apply to and be binding upon Respondent, his agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this Consent Agreement/Final Order.

8. This Final Order shall become effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

9. This executed Complaint and Consent Agreement/Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

Karen A. Flournoy — 11-5-13
Karen A. Flournoy — Date
Director
Water, Wetlands and Pesticides Division

Erin Weekley — 11-5-2013
Erin Weekley — Date
Assistant Regional Counsel

RESPONDENT:
CITY OF CANEY, KANSAS

9/16/13
Date

Carol S. McClure
Name

Carol S. McClure
Signature

Mayor
Title

IT IS SO ORDERED.

Nov. 14, 2013
Date

Karina Borromeo
Karina Borromeo
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

CERTIFICATE OF SERVICE

I certify that on the date below, I hand delivered the original and one true copy of this Complaint and Consent Agreement/Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. I further certify that on the date below I sent by certified mail, return receipt requested, a true and correct copy of the original Complaint and Consent Agreement/Final Order to the following:

The Honorable Carol McClure
Mayor of Caney
P.O. Box 129
Caney, Kansas 67333.

In addition, I certify that I sent by first class mail a true and correct copy of the original Complaint and Consent Agreement/Final Order to:

Paul M. Kritz
Hall, Levy, DeVore, Bell, Ott & Kritz, P.A.
815 Union - P.O. Box 9
Coffeyville, Kansas 67337

and

Michael B. Tate
Director, Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

Dated this 14th day of November, 2013.

Kathy Robinson
Name