

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>TH</sup> STREET  
KANSAS CITY, KANSAS 66101

09 FEB 13 AM 9:49

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )

Tortilla King, Inc. )  
249 23<sup>rd</sup> Avenue )  
P.O. Box 763 )  
Moundridge, Kansas 67107 )

Respondent )

Proceeding under Section 309(a)(3) )  
of the Clean Water Act, )  
33 U.S.C. § 1319(a)(3) )

Docket No. CWA-07-2008-0085

FINDINGS OF VIOLATION  
AND ORDER FOR COMPLIANCE

Statutory Authority

1. The FINDINGS OF VIOLATION are made and ORDER FOR COMPLIANCE is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), by Section 309(a)(3) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1319(a)(3). As an element of this ORDER, provision of information is required pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318. These authorities have been delegated by the Administrator to the Regional Administrator, EPA, Region 7, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA, Region 7.

2. Section 301(a) of the Act, 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 Act, 33 U.S.C. §§ 1317 and 1342. Section 402 provides that pollutants may be discharged into navigable waters of the United States only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that section. Section 307 provides for the promulgation of regulations establishing pretreatment standards for introduction of pollutants into publicly owned treatment works ("POTW").

3. Pursuant to Section 307(b) of the CWA, 33 U.S.C. § 1317(b), EPA promulgated regulations codified at 40 C.F.R. Part 403, entitled the General Pretreatment Regulations. These regulations control the introduction of pollutants by industrial users into POTWs which may pass through or interfere with treatment processes of such treatment works or which may contaminate sewage sludge.

4. 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.

5. 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.

6. Pursuant to 40 C.F.R. § 403.5(b)(3), users are prohibited from introducing solid or viscous pollutants into a POTW in amounts which will cause obstruction to the flow in the POTW resulting in interference.

7. Pursuant to 40 C.F.R. § 403.5(b)(4), users are prohibited from introducing any pollutant, including oxygen demanding pollutants (such as biochemical oxygen demand ("BOD")) released in a discharge at a flow rate and/or pollutant concentration which will cause interference with the POTW.

8. A "Significant Industrial User" is defined by 40 C.F.R. § 403.3(v)(ii) as a contributing industry that has (1) a flow of 25,000 gallons or more per average workday, or (2) has an average daily flow or load greater than five percent (5%) of the flow or load carried by the POTW or (3) has significant impact on the POTW or the quality of the POTW's effluent.

9. 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, the implementing regulations, and a Memorandum of Understanding between EPA and KDHE.

10. 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).

#### **General Factual Allegations**

11. Respondent is incorporated and doing business in the State of Kansas.

12. Respondent does business as Tortilla King, Inc. (hereafter "Tortilla King").

13. Respondent is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
14. At all times relevant, Respondent was, and still is, the owner and/or operator of a food processing facility located at 249 23<sup>rd</sup> Avenue, Moundridge, Kansas 67107.
15. 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.
16. 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).
17. 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).
18. On or about February 1, 2007, NPDES Permit No. KS0021008 was issued to the City by KDHE pursuant to Section 402 of the Act, 33 U.S.C. § 1342 (hereafter "NPDES permit").
19. The NPDES Permit contained limitations for discharges of effluent from the City's POTW to Black Kettle Creek.
20. The NPDES Permit contained POTW discharge limits for, among other pollutants, total suspended solids ("TSS"), and BOD, expressed as concentration limits.
21. 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).
22. Tortilla King consumes an average of 36,000 gallons per workday of potable water, the majority of which is discharged to the Moundridge POTW. As such, Respondent is a Significant Industrial User ("SIU") as defined by 40 C.F.R. 403.3(v)(ii).
23. The Respondent's process wastewater is a "pollutant" as defined by Section 502(6) of the CWA.
24. Respondent is subject to the General Pretreatment Regulations at 40 C.F.R. Part 403.
25. On or about February 23, 2006, representatives from KDHE inspected the Tortilla King facility in response to public odor complaints concerning the Moundridge POTW stabilization lagoons. The KDHE inspection report noted high levels of BOD and TSS in the facility's effluent. Additionally, the inspectors reported significant amounts of oil and grease, which they identified as the cause of the odor and ongoing disruptions to the City's POTW. KDHE provided recommendations to Tortilla King to address the facility's deficiencies, including:

- Developing standard operating procedure to prevent the discharge of fryer oil to the sewer, and
- Upgrading grease interceptors to reduce the discharge of oil and grease and providing information to the City and KDHE on the size and design of the grease interceptors and sewer lines.

26. On or about March 17-20, 2008 representatives from EPA inspected the Tortilla King facility. The EPA inspectors identified the same deficiencies as the KDHE inspectors and noted that Tortilla King had failed to implement the above mentioned KDHE recommendations.

27. Information obtained at the EPA inspection revealed that Tortilla King discharges approximately 28,000 gallons of wastewater to the City’s POTW from its facility each production day.

28. During the EPA inspection, the City’s Wastewater Superintendent stated that Tortilla King routinely discharges large amounts of fats, oil, and grease to the POTW. It was further stated by the City that these substances have caused obstruction problems in the City’s sewer line.

29. On or about March 17-20, 2008, EPA sampled the effluent of Tortilla King in an attempt to determine the load Tortilla King discharges to the Moundridge POTW. Table 1 below shows the estimated load, in lbs per day, of TSS, BOD, and Oil and Grease (“O & G”) discharged by Tortilla King to the Moundridge POTW from EPA’s March 2008 sampling:

Table 1: Loading (lbs/day)  
Effluent from Tortilla King  
Samples taken by EPA, March 18 – 20, 2008

Sample	BOD LB/D	TSS LB/D	O & G LB/D
03/18/08	243	97	16
03/18-19	226	221	190
03/19-20	319	204	326/ 157
Production Day Average:	263 lb/d	174 lb/d	149 lb/d
Calendar Day Average:	180 lb/d	119 lb/d	102 lb/d

30. The City’s POTW serves approximately 2,000 persons and has an estimated design treatment capacity of 320 LB/D of BOD. Based on the above sampling data, Tortilla King’s calendar daily average BOD effluent represents approximately 56 percent of the City’s overall BOD capacity.

31. In March 2008, the City and EPA sampled the effluent at the City's POTW. Table 2 below shows the sampling results for BOD. Based on the sampling data, the City violated its monthly average permit limit of 30 mg/l for BOD.

Table 2: Sampling Results for BOD (mg/l)  
Effluent from Moundridge POTW  
Samples taken by the City, March 11, 2008 and EPA, March 18 – 20, 2008

3/11/08 (City) BOD mg/l	3/18/08 (EPA) BOD mg/l	3/19/08 (EPA) BOD mg/l	3/20/08 (EPA) BOD mg/l	Monthly average mg/l
33.4	37.9	41.5	37.7	37.6

32. Based on Discharge Monitoring Reports 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, as described below:

Pollutant	Violation Month, Year	Monthly Average, mg/l
BOD	March 2006	31.0
BOD	May 2007	33.8
BOD	March 2008	39.0
BOD	May 2008	32.7
TSS	August 2007	108

**Findings of Violation**

**Count I**

**Interference and Pass Through Violations**

33. The facts stated in paragraphs 11 through 32, above, are hereby incorporated by reference.

34. Pursuant to 40 C.F.R. Part 403, Respondent is prohibited from discharging pollutants which cause interference or process upset at the City's POTW.

35. During at least March 2008, discharges from Tortilla King, 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.

36. Tortilla King has introduced solid or viscous pollutants in amounts which will cause 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).

37. The violations identified in paragraphs 35 and 36 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).

### **Order for Compliance**

38. Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(a)(3) of the Act, 33 U.S.C. § 1319(a)(3), Respondent is hereby ORDERED AS FOLLOWS:

39. Within fifteen (15) calendar days of receipt of this Order, Respondent shall describe in writing to EPA interim measures to be taken to immediately reduce loadings to the POTW. Unless EPA provides additional comments to Respondent's interim measures plan, Respondent shall perform such interim measures until such time as the Compliance Plan required by paragraph 41, below, can be developed, approved by EPA, and implemented by Respondent.

40. Within thirty (30) calendar days of receipt of this Order, Respondent shall provide EPA a proposed Monitoring Plan to EPA for review and approval that is designed to accurately determine the loadings from the Respondent's facility to the POTW. At a minimum, the proposed Monitoring Plan shall include:

- a. The location where samples of Respondent's wastewater shall be taken;
- b. The frequency of sampling of Respondent's wastewater;
- c. A description of how the proposed sampling will be representative of fluctuations in Respondent's production and/or quality of the wastewater;
- d. The sampling methods which will be utilized to determine the concentration and mass of pollutants in Respondent's wastewater; and
- e. The method by which wastewater flow rates will be measured.

41. Within thirty (30) calendar days of receipt of this Order, Respondent shall provide EPA a proposed Compliance Plan, for EPA's review and approval, that shall describe in detail how Respondent intends to manage its loadings to the POTW to eliminate pass through and interference, and how Respondent shall come into compliance with 40 C.F.R. Part 403. At a minimum, the proposed Compliance Plan shall include:

- a. A description of any process changes Respondent proposes to undertake at the Tortilla King facility, including coordination with the City's POTW, to reduce loadings in the wastewater discharged to the POTW;
- b. A description of wastewater treatment installations or modifications Respondent proposes to undertake at the Tortilla King facility to reduce loadings in the wastewater discharged to the POTW, including those recommended by KDHE in paragraph 25 above.

- c. A schedule for implementation of the proposed action(s); and
- d. Submission of cost information relating to any proposed action(s).

42. Immediately upon approval of the Monitoring Plan as described in paragraph 40, Respondent shall submit to EPA and the City monthly progress reports, which shall be submitted for each month on or before the tenth day of the month following the reporting period. The monthly progress reports shall the following information:

- a. A table clearly showing the sample results, date taken, and wastewater flow;
- b. Copies of the analytical results for all sampling required pursuant to this Order; and
- c. A written summary of all other activities undertaken in compliance with this Order.

#### **EPA Review and Approval of Required Submittals**

43. EPA will review all proposed submittals requiring EPA approval (Monitoring Plan and Compliance Plan), and notify Respondent in writing of EPA's approval, disapproval, or modification of the submittal, or any part thereof. Within thirty (30) days of receipt of EPA's comments pertaining to any submittal, Respondent shall amend such submittal, addressing all of EPA's comments, and resubmit same to EPA. If EPA disapproves the revised submittal, it may modify and approve the same in accordance with its comments. In the event of such modification, EPA will notify Respondent of the modification(s). Upon receipt of EPA's approval or notice of modification(s), Respondent shall commence work and implement any approved submittal in accordance with the schedule and provisions contained therein. EPA approved submittals shall be deemed incorporated into and enforceable as part of this Order.

44. All documents required for submittal to EPA (including the Monitoring Plan and Compliance Plan and other documents required to be submitted pursuant to this Order) shall be hand delivered or sent by certified mail, return receipt requested, to the following:

Mr. Robert Bryant  
Water Enforcement Branch  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

45. Each submittal to EPA pursuant to the requirements of this Order shall include a written statement by Respondent signed by a principal executive officer or a ranking elected official, or by a duly authorized representative of that person, that contains the following certification:

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.

## **V. General Provisions**

### **Effect of Compliance with the Terms of This Order for Compliance**

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

47. Respondent shall comply with all other applicable laws, regulations, standards, and requirements contained in any applicable local, State and Federal pretreatment laws, regulations, standards, and requirements including any such laws, regulations, standards, or requirements that may become effective during the term of this Order.

48. 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. EPA retains the right to seek any and all remedies available under Section 309 of the Act, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

### **Access and Requests for Information**

49. Nothing in this Order shall limit 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**

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

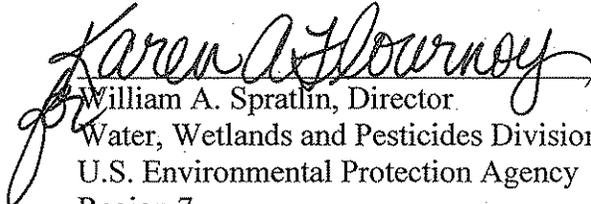
### **Effective Date**

51. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

### **Termination**

52. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA. Such notice shall not be given until all of the requirements of this Order have been met.

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

  
William A. Spratlin, Director  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

  
Chris Muehlberger  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

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 Order for Compliance Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to:

Juan T. Guardiola,  
Registered Agent  
Tortilla King, Inc.  
249 23<sup>rd</sup> Avenue  
Moundridge, Kansas 67107

\_\_\_\_\_  
Date