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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

75 Hawthorne Street
San Francisco, California 94105

In re the Matter of:) Docket No.: CWA-09-2010-0001
)
)
Tony's Fine Foods,) **CONSENT AGREEMENT AND**
) **PROPOSED FINAL ORDER**
)
Respondent.) Proceedings Under Section 309(g)(2)(A) of the
) Clean Water Act, as amended, 33 U.S.C.
) § 1319(g)(2)(A)
)
)
_____)

CONSENT AGREEMENT

Preliminary Statements

1. This is a class I civil administrative penalty proceeding under section 309(g) of the Clean Water Act ("CWA" or "the Act), 33 U.S.C. § 1319(g), and 40 CFR Part 22, "Consolidated Rules of the Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" for the assessment of a penalty against Respondent for discharging pollutants into

CONSENT AGREEMENT AND
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waters of the United States without the requisite permit in violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

2. The United States Environmental Protection Agency, Region 9 (“EPA” or “Complainant), initiates this proceeding against Tony’s Fine Foods (“Respondent”) for alleged violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a). Complainant and Respondent are hereinafter collectively referred to as “the Parties.”

3. This Consent Agreement and Final Order (“CA/FO”) simultaneously commences and concludes this penalty proceeding, as authorized by 40 CFR § 22.13(b).

4. The Parties agree that settlement of this matter is consistent with the Act’s objectives, in the public interest, and the most appropriate means of resolving this matter.

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties to this Stipulation and Order, it is hereby AGREED, STIPULATED, and ORDERED:

General Provisions

5. EPA has jurisdiction over the subject matter of this action. The Consent Agreement contains the elements of a complaint required by 40 CFR §§ 22.14(a)(1)-(3) and (8).

6. For purposes of this proceeding, Respondent admits the jurisdictional allegations herein, and agrees not to contest EPA’s jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this CA/FO.

7. Respondent neither admits nor denies the factual allegations set forth herein.

8. Respondent agrees not to contest the terms and conditions set forth in this CA/FO in this or subsequent proceedings, and agrees not to appeal the Final Order set forth below.

9. Respondent explicitly waives its right to a hearing on any issue of fact or law set forth herein.

10. This CA/FO, inclusive of all exhibits and attachments, is the entire agreement between the Parties to resolve EPA's civil penalty claim against Respondent for the specific CWA violations alleged herein. Full compliance with this CA/FO shall constitute full settlement only of Respondent's federal civil penalty liability for the CWA violations specifically alleged herein.

11. This CA/FO is not a permit and it does not constitute a waiver, suspension, or modification of the requirements of any federal, tribal, state, or local permit, statute, ordinance, regulation, or order, including but not limited to any CWA requirements, permits, or orders.

12. Respondent certifies by signing this CA/FO that, to the best of its knowledge, it is in compliance with the requirements of Section 301 of the Act, 33 U.S.C. § 1311.

13. Except as set forth in Paragraphs 37 and 38, the Parties agree to bear their own costs and attorneys' fees.

14. This CA/FO shall in no way affect the right of EPA or the United States against any third party or the right of any third party against Respondent. This CA/FO does not create any right in or grant any cause of action to any third party.

15. This CA/FO shall apply to and be binding upon Respondent, successors, and assigns. Changes in ownership, including but not limited to any transfer of assets or real or personal property, shall not alter Respondent's obligations under this CA/FO.

16. This Consent Agreement may be executed and transmitted by facsimile, email or other electronic means, and in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument. If any portion of this Consent Agreement is determined to be unenforceable by a competent court or tribunal, it is the Parties' intent that the remaining portions shall remain in full force and effect.

17. Each signatory to this CA/FO certifies he or she is fully authorized to enter into and bind the party for whom it is signing to the terms of the CA/FO.

Statutory and Regulatory Framework

18. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source by any person into a water of the United States unless it complies with the Act, including Section 402, 33 U.S.C. § 1342.

19. Section 402 of the Act, 33 U.S.C. § 1342, establishes the National Pollutant Discharge Elimination System (“NPDES”) program. Under Section 402 of the Act, 33 U.S.C. § 1342, EPA and states with EPA-approved NPDES programs are authorized to issue permits governing the discharge of pollutants from regulated sources.

General Allegations

20. “Person” includes any corporation. CWA Section 502(5), 33 U.S.C. § 1362(5).

21. “Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” CWA Section 502(12), 33 U.S.C. § 1362(12).

22. “Pollutant” includes “chemical wastes.” CWA Section 502(6), 33 U.S.C. § 1362(6).

23. “Point source” means “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” CWA Section 502(14), 33 U.S.C. § 1362(14).

24. “Navigable waters” means “the waters of the United States,” CWA Section 502(7), 33 U.S.C. § 1362(7), which is further defined under EPA’s implementing regulations to include all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and their tributaries. 40 CFR § 122.2.

Findings of Violation

Discharge Without an NPDES Permit

25. The facts stated in paragraphs 1 through 24 are re-alleged and incorporated herein.

26. Respondent is a California corporation, and a “person” under Section 502(5) of the Act, 33 U.S.C. § 1362(5).

27. On January 9, 2009, Respondent discharged an estimated 179 pounds of ammonia into a

storm drain located in Engine Room #3 of Respondent's California Cold Logistics cold storage warehouse at 700 Jones Street, in Yuba City, California 95991 (the "Facility").

28. The storm drain in Engine Room #3 of the Facility discharges through a Yuba City storm drain that discharges to the Gilsizer Slough.

29. The Gilsizer Slough is a natural drainage channel tributary to the Sutter Bypass, a floodwater bypass from the Sacramento River. The Sutter Bypass flows to the Feather River. Each is a "Water of the United States" under CWA Section 502(7), 33 U.S.C. § 1362(7), and 49 CFR 122.2.

30. The ammonia discharged by Respondent is a "pollutant" under CWA Section 502(6), 33 U.S.C. § 1362(6).

31. The storm drain is a "point source" under CWA Section 502(14), 33 U.S.C. § 1362(14).

32. Respondent did not apply for or receive NPDES permit authorization to discharge ammonia into any waters of the United States.

33. By discharging ammonia into waters of the United States without an NPDES permit, Respondent violated CWA Section 301(a), 33 U.S.C. § 1311(a).

Penalty

34. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$25,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 CFR Part 19, the administrative assessment of civil penalties may not exceed \$16,000 per day for each day during which the violation continues, up to a maximum Class I civil penalty of \$37,500. *See also* 73 Fed. Reg. 75340 (December 11, 2008) (2008 Penalty Inflation Rule).

35. Respondent consents to the assessment of and agrees to pay a civil penalty of **ELEVEN THOUSAND DOLLARS (\$11,000)**. The penalty was calculated based on the nature,

circumstances, extent and gravity of the violations, Respondent's ability to pay, its prior history of violations, its degree of culpability, and any economic benefit or savings accruing to Respondent as a result of the violations.

36. Payment of the civil penalty shall be made within thirty (30) days of the effective date of the CA/FO. The date by which payment must be received by the United States shall be the "due date" for the payment. Respondent shall make the payment in accordance with any of the acceptable methods of payment listed in Exhibit A, "EPA Region 9 Collection Information," which is incorporated by reference as part of this CA/FO. Concurrent with payment of the penalty, Respondent shall provide written notice of payment, referencing the title and docket number of this case and attaching a photocopy of the penalty payment, via mail to:

Steve Armsey Regional Hearing Clerk U.S. EPA Region 9 (ORC-1) 75 Hawthorne Street San Francisco, California 94105	and	Fatima Ty CWA Compliance Office U.S. EPA Region 9 (WTR-7) 75 Hawthorne Street San Francisco, California 94105
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37. If the penalty is not paid when due, interest shall accrue on any overdue amount from the first date after the due date through the date of payment, at the interest rate established by the Secretary of the Treasury under 31 U.S.C. § 3717. In addition, a late payment handling charge of fifteen dollars (\$15.00) will be assessed for each thirty (30) day period (or any portion thereof) following the due date during which time the balance remains unpaid. Payment of any interest and late handling charges shall be made in accordance with paragraph 36 above.

38. Failure by Respondent to pay the full penalty when due entitles EPA and the United States to bring a civil action to recover the amount assessed. In such an action, Respondent shall pay (in addition to any assessed penalty, interest, and monthly handling charges) attorney fees, cost for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), the quarterly nonpayment penalty shall equal twenty percent (20%) of the

aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of that quarter.

39. The civil penalty and any interest, late handling fees, or late penalty payments provided for in the CA/FO shall not be deducted from Respondent's or any affiliated entity's taxes.

40. EPA has consulted with the State of California pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 CFR § 22.38, in regards to this matter.

Effective and Termination Dates

41. This CA/FO shall take effect on the date the Final Order is filed with the Regional Hearing Clerk, and shall terminate when Respondent has fully complied with its terms.

Public Notice

42. EPA's consent to this Consent Agreement is subject to the requirements of Section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), and 40 CFR § 22.45(b), that EPA provide public notice of and a reasonable opportunity for comment on the Consent Agreement and proposed Final Order. EPA reserves the right to withdraw the Consent Agreement and proposed Final Order in response to public comments that petition EPA to set aside the Consent Agreement and proposed Final Order on the basis that material evidence was not considered. 40 CFR § 22.45(c)(4). In such case, Respondent's obligations under this document shall terminate, and EPA may pursue any and all enforcement options as provided by law. If no comment is received during the comment period regarding the Consent Agreement, EPA shall file the Final Order.

CONSENTING PARTIES:

For Respondent Tony's Fine Foods:

BY: **ORIGINAL SIGNED**
Karl Berger
President

DATE: **DATED 11/4/09**

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PROPOSED FINAL ORDER
TONY'S FINE FOODS

For Complainant U.S. Environmental Protection Agency, Region 9:

BY: ORIGINAL SIGNED
Alexis Strauss, Director
Water Division

DATE: DATED 12/21/09

NANCY MARVEL
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United States Environmental Protection Agency, Region 9

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REGION 9**

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Tony's Fine Foods,)	[PROPOSED]
)	FINAL ORDER
Respondent.)	
)	Proceedings Under Section 309(g)(2)(A) of the
)	Clean Water Act, as amended, 33 U.S.C.
)	§ 1319(g)(2)(A)
)	

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Order. Respondent Tony's Fine Foods is hereby ordered to comply with the Consent Agreement.

Steven Jawgiel
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 9

DATE:

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PROPOSED FINAL ORDER
TONY'S FINE FOODS

ATTACHMENT A

EPA REGION 9 COLLECTION INFORMATION:

ELECTRONIC FUNDS TRANSFERS

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
“D 68010727 Environmental Protection Agency “

CHECK PAYMENTS

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

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: 314-418-4087

CERTIFICATE OF SERVICE

In the Matter of Tony's Fine Foods
EPA Docket No. CWA-09-2010-

I hereby certify that the original of the foregoing Consent Agreement and Proposed Final Order was filed with the Regional Hearing Clerk, Region 9, and that a copy was sent, certified mail, return receipt requested, to:

Karl Berger
Tony's Fine Foods
3575 Reed Ave.
P.O. Box 1501
West Sacramento, CA 95605-1501
(916) 374-4000 - Office
(916) 372-0727 - Facsimile

Date

Steve Armsey
Regional Hearing Clerk
U.S. EPA, Region 9