

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

BEFORE THE ADMINISTRATOR

In the Matter of

Herzog Contracting Corp.,

Respondent

Proceedings under Section 311(b)(6)(B)(i)
of the Clean Water Act, 33 U.S.C.
§ 1321(b)(6)(B)(i)

)
) Docket No. CWA-07-2024-0018
)
) COMPLAINT AND
) CONSENT AGREEMENT /
) FINAL ORDER
)
)
)
)
)
)

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6), as amended by the Oil Pollution Act of 1990, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

2. Complainant, the United States Environmental Protection Agency Region 7 (EPA), and Respondent, Herzog Contracting Corporation, 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 Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. The authority to act under Section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(i), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 311(b)(6) to the Director of the Enforcement and Compliance Assurance Division (Complainant).

4. This Complaint and Consent Agreement/Final Order (CAFO) serves as notice that the EPA has reason to believe that Respondent has violated Section 311 of the CWA, 33 U.S.C. § 1321, and regulations promulgated thereunder.

Statutory and Regulatory Framework

5. The objective of the CWA, 33 U.S.C. § 1251 *et seq.*, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

6. Sections 311(b)(3) and (4) of the CWA, 33 U.S.C. §§ 1321(b)(3) and (4), prohibit the discharge of oil or hazardous substances into or upon the navigable waters of the United States or

adjoining shorelines in such quantities as have been determined may be harmful to the public health or welfare of the United States.

7. Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), and 40 C.F.R. § 112.2 define “oil” as “oil of any kind or in any form, including, but not limited to, petroleum [or] fuel oil”

8. Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), authorizes the EPA to promulgate a regulation to define what discharges of oil may be harmful to the public health or welfare or environment of the United States.

9. 40 C.F.R. § 110.3 defines discharges of oil that the Administrator has determined may be harmful to the public health or welfare or the environment of the United States to include discharges of oil that: (a) violate applicable water quality standards, or (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

10. Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), provides in part that the President shall issue regulations establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities, and to contain such discharges.

11. To implement Section 311(j)(1)(C), the EPA promulgated regulations to prevent oil pollution at 40 C.F.R. Part 112 that set forth the requirements for the preparation and implementation of Spill Prevention, Control, and Countermeasure (SPCC) Plans. The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities with an aboveground storage capacity of 1,320 gallons or greater who are engaged in gathering, storing, transferring, distributing, using, or consuming oil or oil products which, due to their locations, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.

EPA’s General Allegations

12. Respondent is and was at all relevant times a corporation organized under the laws of Missouri and authorized to conduct business in the state of Kansas.

13. Respondent, a corporation, is a “person” within the meaning of Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

14. At all times relevant to this action, Respondent was the owner and/or operator, within the meaning of Section 311(a)(6) of the CWA and 40 C.F.R. § 112.2, of the asphalt plant located at 103 Roseport Road, Elwood, Kansas, 66090 (the “Facility”).

15. The Facility, which has a total storage capacity of 5,271,545 gallons, stores oil, used oil, diesel fuel, #5 burner fuel, heat transfer oil, and liquid asphalt cement.

16. A discharge from the Facility would flow approximately 600 feet to the Missouri River via a drainage ditch on the perimeter of the facility or via Outfall #001 at the facility, then through a ditch.

17. The Missouri River is a navigable water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

18. Respondent is engaged in storing, processing, using or consuming oil or oil products located at the Facility.

19. The Facility is a “non-transportation-related” facility within the meaning of 40 C.F.R. § 112 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

20. The Facility is an onshore facility within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

21. The Facility is a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water or its adjoining shorelines in a harmful quantity and, therefore, is an SPCC-regulated facility pursuant to Section 311(j)(1)(C) of the CWA, Executive Order 12777 and 40 C.F.R. § 112.1.

22. The Facility has an SPCC plan. The current version of the SPCC plan was last revised in February 2024.

23. On June 10, 2021, representatives of the EPA inspected the Facility to determine its compliance with the SPCC regulations of 40 C.F.R. Part 112 and obtained information about the Facility.

24. The EPA inspection identified the following:

a. Respondent failed to amend its SPCC plan within six months of a change in the facility design, construction, operation, or maintenance that materially affected its potential for a discharge, in violation of 40 C.F.R. § 112.5(a);

b. Respondent failed to complete a review and evaluation of the SPCC plan at least once every five years, to amend the plan within six months of the review to include more effective prevention and control technology field-proven at the time of the review to significantly reduce the likelihood of a discharge, in violation of 40 C.F.R. § 112.5(b);

c. Respondent failed to have a Professional Engineer certify technical amendments to its SPCC plan, in violation of 40 C.F.R. § 112.5(c);

d. The facility diagram in Respondent’s SPCC plan did not include the location and contents of each fixed oil storage container, the storage area where mobile or portable containers were located, and either the type of oil and storage capacity for each mobile or portable container or an estimate of the potential number of mobile or portable

containers, the types of oil, and anticipated storage capacities, in violation of 40 C.F.R. § 112.7(a)(3);

e. Respondent failed to include the information and procedures to enable a person reporting a discharge that are required by 40 C.F.R. § 112.7(a)(4), in violation of that section;

f. Respondent failed to list all the most likely scenarios of a reasonable potential for equipment failure, including a prediction of the direction, rate of flow, and total quantity of oil which could be discharged from the facility as a result of each type of major equipment failure, in violation of 40 C.F.R. § 112.7(b);

g. Respondent failed to provide appropriate secondary containment and/or diversionary structures or equipment to prevent a discharge, in violation of 40 C.F.R. § 112.7(c);

h. Respondent failed to document all inspections and tests required by Part 112 in accordance with written procedures that it or the certifying engineer developed for the Facility, in violation of 40 C.F.R. § 112.7(e);

i. Respondent failed to design facility drainage systems from undiked areas with a potential for a discharge to flow into ponds, lagoons, or catchment basins designed to retain oil or return it to the Facility, in violation of 40 C.F.R. § 112.8(b)(3);

j. Respondent failed to conduct an impracticability determination in the SPCC plan to exempt Tanks 5-10 from the obligation to provide a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard to contain precipitation, as set forth in 40 C.F.R. § 112.8(c)(2), in violation of 40 C.F.R. § 112.7(d);

k. Respondent failed to document tests or inspections of each aboveground container for integrity in accordance with industry standards on a regular schedule and after making material repairs, in violation of 40 C.F.R. § 112.8(c)(6); and

l. After determining pursuant to 40 C.F.R. § 112.20(a)(2) that the Facility could not, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, Respondent failed to complete and maintain at the facility the certification form contained in appendix C to Part 112, in violation of 40 C.F.R. § 112.20(e).

25. After determining pursuant to 40 C.F.R. § 112.20(a)(2) that the Facility could not, because of its location, reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, Respondent failed to complete and maintain at the facility the certification form contained in appendix C to Part 112, in violation of 40 C.F.R. § 112.20(e).

26. On June 9, 2021, a representative of the EPA reviewed the SPCC plan.

27. The EPA's findings about the facility and its SPCC plan were documented in an inspection report. The EPA transmitted a copy of this inspection report to Respondent on July 21, 2021.

EPA's Allegations of Violation

Failure to Fully Prepare and Implement an SPCC Plan

28. The factual allegations above are incorporated herein.
29. 40 C.F.R. § 112.3 requires Respondent to fully prepare and implement an SPCC plan.
30. Respondent failed to fully prepare and implement an SPCC plan at the Facility as required by 40 C.F.R. 112.3.
31. Respondent's failure to fully prepare and implement an SPCC Plan is a violation of 40 C.F.R. §§ 112.3 and 112.7.

Consent Agreement

General Provisions

32. Respondent and the EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of this CAFO.
33. 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 any portion of this CAFO.
34. Respondent and Complainant agree to bear their own costs and attorney's fees incurred as a result of this action.
35. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a civil penalty of \$53,463, as set forth in the Penalty section below.
36. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.
37. Respondent neither admits nor denies the factual allegations asserted above by the EPA.
38. Respondent certifies by the signing of this CAFO that Respondent is in compliance with all requirements of CWA Section 311.
39. The effect of settlement is conditional upon the accuracy of Respondent's representations to the EPA in this CAFO.
40. The Effective Date of this CAFO is the date on which the Final Order is filed with the Regional Hearing Clerk.

41. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.

Reservation of Rights

42. This CAFO addresses all civil and administrative claims for the CWA violations alleged above. With respect to matters not addressed in this CAFO, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

43. Nothing contained in 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.

44. Notwithstanding any other provision of this CAFO, the EPA reserves the right to enforce the terms of this CAFO by initiating a judicial or administrative action pursuant to Section 311 of the CWA, 33 U.S.C. § 1321, and to seek penalties against Respondent or to seek any other remedy allowed by law.

Penalty

45. Respondent agrees to pay a civil penalty of **Fifty-Three Thousand, Four Hundred and Sixty Three Dollars (\$53,463)** pursuant to the authority of Section 311 of the CWA, 33 U.S.C. § 1321, within thirty (30) days of the Effective Date of this CAFO.

46. The payment of penalties must reference docket number CWA-07-2024-0018 and be remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

47. Copies of the checks or verification of another payment method for the penalty payments remitted shall be emailed to:

Katherine Kacsur
Attorney Advisor
U.S. Environmental Protection Agency Region 7
kacsur.katherine@epa.gov

and

Regional Hearing Clerk
U.S. Environmental Protection Agency Region 7
r7_hearing_clerk_filings@epa.gov.

48. 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.

49. Respondent understands that its failure to timely pay any portion of the civil penalty described in herein may result in the commencement of a civil action in the United States District Court for the District of Kansas to recover the full remaining balance, along with penalties and accumulated interest.

50. 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.

Signatories

51. The undersigned for each party has the authority to bind each respective party to the terms and conditions of this CAFO. The CAFO may be signed in part and counterpart by each party.

Parties Bound

52. 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.

Definitions

53. Terms used in this order that are defined in the CWA or EPA regulations promulgated under the CWA have the meanings assigned to them in the CWA or those regulations, unless otherwise provided in this Order.


Executed Agreement Filed

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

Electronic Service

55. Respondent consents to receiving the filed Consent Agreement/Final Order electronically at the following email address: SStotts@Polsinelli.com.

For the Respondent, Herzog Contracting Corp.:

Signature: 

Date: 2/22/24

Name: Kyle Phillips

Title: Sr. Vice-President

For the Complainant, U.S. Environmental Protection Agency, Region 7:

David Cozad
Director
Enforcement and Compliance Assurance Division

Katherine Kacsur
Attorney-Advisor
Office of Regional Counsel

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borrromeo
Regional Judicial Officer

Certificate of Service

I certify that on the date noted below I delivered a true and correct copy of this Consent Agreement and Final Order by electronic mail, to:

For Complainant:

Katherine Kacsur
Office of Regional Counsel
U.S. Environmental Protection Agency Region 7
kacsur.katherine@epa.gov

Mark Aaron
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency Region 7
aaron.mark@epa.gov

For Respondent:

Stacy J. Stotts
Polsinelli PC
1201 Walnut St # 2900
Kansas City, Missouri 64106
SStotts@Polsinelli.com

Date

Signature