RECEIVED

05 FEB -7 PM 3:47

HEARINGS CLERK
EPA--REGION 10

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
Seattle, Washington

IN THE MATTER OF:	)	
	)	
THE OESER COMPANY	)	
Bellingham, Washington	)	Docket No. RCRA-10-2003-0151
Respondent	)	
	)	
	)	

CONSENT AGREEMENT AND FINAL ORDER

Complainant, the United States Environmental Protection Agency ("EPA"), having filed the Complaint herein on September 22, 2003, ("the Complaint") against the Respondent, The Oeser Company, the Parties herein; and

Complainant and Respondent having agreed that settlement of this matter is in the public interest, and that entry of this Consent Agreement and Final Order ("CAFO") without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties, it is hereby Ordered and Adjudged as follows:

I. PRELIMINARY STATEMENT

1. EPA initiated this proceeding for the assessment of a civil penalty and requiring compliance, pursuant to Section 3008 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. § 6928, and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, Title 40 C.F.R. Part 22 ("Consolidated Rules of Practice").

2. The Complaint alleged that Respondent's violations of the Act subjected Respondent to civil penalties.

3. The Complaint is incorporated herein by reference.

4. The complete factual and jurisdictional basis for proposing the assessment of a civil penalty is set forth in the CAFO.

5. On November 24, 2003, Respondent filed its Answer and Request for Hearing.

6. In addition to the violations alleged in the Complaint, EPA again inspected Respondent's Bellingham, Washington facility on November 9, 2004. Based on that inspection, EPA alleges these additional violations:

a. Respondent failed to comply with the container management requirements and drip pad management requirements which are conditions for accumulation of dangerous waste for 90 days or less and for satellite accumulation as set forth in WAC 173-303-200 and, therefore, Respondent treated and stored dangerous waste without a permit or interim status in violation of WAC 173-303-170(3) and -800. The conditions Respondent failed to meet include the following:

i. Respondent, as a generator of listed dangerous waste F032 wood preservative, stored and treated such listed dangerous waste in twelve (12) 55 gallon containers in the secondary containment area of the tank farm. Respondent had not labeled these containers with the words "hazardous waste" or "dangerous waste", with the accumulation start date, nor with the major risks; and Respondent had not logged inspections of these containers in accordance with the conditions set forth at WAC 173-303-630.

ii. Cables that had listed dangerous waste F032 wood preservative on them were placed in open metal containers after treatment of the wood. Rainwater had fallen into the open metal containers mixing with the wood preservative, thus the rainwater contained F032 listed dangerous waste. Respondent had not labeled these containers with an accumulation start date, the words "hazardous waste" or "dangerous waste", nor the major risks; and Respondent had not kept the containers closed in accordance with the conditions set forth at WAC 173-303-630.

iii. One container of F032 listed dangerous waste in the Storage Building was not in secondary containment in accordance with the condition set forth in WAC 173-303-200(1)(b).

iv. The two wood frames that comprise the satellite accumulation areas were labeled with the words "Hazardous Waste", however, the yellow overpack containers in the wood frames were not labeled with the words "hazardous waste" or "dangerous waste" in accordance with the condition set forth in WAC 173-303-200(2).

v. Respondent did not maintain records in accordance with the condition set forth in WAC 173-303-200(1)(b)(iii) regarding removal of all wastes from the drip pad and associated collection system at least once every ninety (90) days, nor did Respondent maintain documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal.

vi. Respondent failed to meet the condition set forth in WAC 173-303-340(1)(b) which requires a facility to be equipped with a telephone or hand-held two-way radio capable of summoning emergency assistance from local police departments, fire departments, or state or local emergency response teams. Respondent also failed to meet the condition set forth in 173-303-340(2) because personnel do not have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee.

b. Respondent had hung chains over a short wall of a tank. These chains are used to hold charges of wood together when the wood is treated in the retort. EPA's inspector observed preservative drippage from the chains running down the outside of the wall of the tank over which the chains were hung. Thus, Respondent disposed of F032 listed hazardous waste at its facility without a permit or interim status in violation the regulation at WAC 173-303-800 and Section 3005 of RCRA, 42 U.S.C. § 6925.

c. With regard to the contents of the open metal containers, the drippage from the chains, and the contents of the twelve (12) containers, the Respondent failed to determine that it generated a dangerous waste as required by WAC 173-303-070.

d. Respondent failed to label a container of used oil in the maintenance shop with the word "used oil" as required by WAC 173-303-515(6) and to store the used oil in a closed container as required by WAC 173-303-515(6)(a).

II. TERMS OF SETTLEMENT

7. This Consent Agreement and Final Order shall apply to and be binding upon Respondent, its officers, directors, servants, employees, agents, successors and assigns, including, but not limited to, subsequent purchasers.

8. Respondent stipulates that EPA has jurisdiction over the subject matter alleged in the Complaint and that the Complaint states a claim upon which relief can be granted against Respondent. Respondent waives any defenses it might have as to jurisdiction and venue, and consents to the terms of this Consent Agreement and Order.

9. Respondent admits all the allegations set forth in the Complaint, except for the nonjurisdictional allegations contained in the following counts and paragraphs, which Respondent neither admits nor denies: the allegations in Complaint Counts I, II, and IV-VII; the allegations in Complaint paragraphs 2.80 through 2.89, 2.121 through 2.133, 2.177 through 2.180, 2.182, 2.193, 2.195, 2.197, 2.205 and 2.206; and the allegations in paragraph 6 above.

10. Respondent hereby waives its right to a judicial or administrative hearing on any issue of law or fact set forth in the Complaint.

11. Respondent consents to the issuance of the Final Order hereinafter recited and consents for the purposes of settlement to the payment of the civil penalty cited in the following paragraph and to performance of the compliance tasks identified in paragraph 19.

12. Pursuant to Section 3008 of RCRA, the nature of the violations, and other relevant factors, including Respondent's proven inability to pay the proposed penalty, EPA has determined that an appropriate civil penalty to settle this action is in the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

13. Respondent consents to the issuance of the Final Order recited herein, to payment of the civil penalty cited in the foregoing paragraph according to the following schedule: one-third of

$25,000 ($8,333.34) within thirty (30) days of the date the CAFO is mailed to the Respondent; one-third of $25,000 plus interest at 1% ($8,500.00) within one (1) year of the date the CAFO is mailed to the Respondent; and one-third of $25,000 plus interest at 1% ($8,416.67) within two (2) years of the date the CAFO is mailed to the Respondent. Respondent may pay any portion of the civil penalty earlier than the payment schedule set forth in this paragraph. For each payment due, Respondent shall submit a cashier's or certified check, to the order of the "Treasurer, United States of America," in the correct amount, to:

Mellon Client Services Center
EPA Region 10
500 Ross Street
P.O. Box 360903
Pittsburgh, PA 15251-6903

A transmittal letter giving Respondent's name, complete address, and this case docket number must accompany the payment. A copy of the check and of the accompanying transmittal letter shall be delivered or mailed to the Regional Hearing Clerk and to Jennifer G. MacDonald and Cheryl Williams at the at the following address:

U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington 98101.

Interest and late charges shall be paid as specified in paragraph 15 herein.

14. The penalty specified in paragraph 12, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of federal taxes.

15. 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. In the event that Respondent fails to make timely payment of the assessed penalty, Respondent shall pay the following amounts:

a. Interest. Any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the date a conformed copy of this CAFO is mailed to Respondent; provided, however, that no interest shall be

payable on any portion of the assessed penalty that is paid within thirty (30) days of the date a conformed copy of this CAFO is mailed to Respondent.

b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of $15 shall be paid if any portion of the assessed penalty is more than thirty (30) days past due.

c. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the assessed penalty that is more than ninety (90) days past due, which nonpayment penalty shall be calculated from the date that a conformed copy of this CAFO is mailed to Respondent.

16. In accordance with Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), and the regulations governing the Adjustment of Civil Penalties for Inflation, 40 C.F.R. Part 19, promulgated pursuant to the Debt Collection Improvement Act of 1996, violation of any portion of this CAFO shall subject Respondent to a civil penalty of up to $32,500 per day, per violation.

17. Unless otherwise specified, any communications with EPA regarding this CAFO shall be in writing and directed to Jennifer G. MacDonald, Assistant Regional Counsel, and Cheryl Williams, RCRA Compliance Officer at the following address:

U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington 98101.

18. All actions required pursuant to this CAFO shall be undertaken in accordance with all applicable local, state, and federal laws and regulations.

19. All work to be performed by Respondent pursuant to this CAFO shall be under the direction and supervision of qualified personnel. The Respondent shall provide a copy of this CAFO to all contractors, subcontractors, laboratories, and consultants retained to conduct or monitor any portion of the work performed pursuant to this CAFO. Respondent shall provide a copy of this CAFO to any successor in interest prior to any transfer of ownership or operation of the facility. Respondent shall take the following actions within the time periods specified:

a. Respondent shall immediately make dangerous waste determinations in accordance with WAC 173-303-070.

b. Respondent shall immediately cease disposing of dangerous waste at the Facility;

c. Respondent shall immediately cease storage and treatment of dangerous waste except in accordance with a permit or the conditions for accumulation of dangerous waste found at WAC 173-303-200, WAC 173-303-675, WAC 173-303-300 through 360, including but not limited to the following conditions:

i. In accordance with WAC 173-303-200(1)(b)(iii)(A), Respondent maintains at the facility a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

ii. In accordance with WAC 173-303-200(1)(b)(iii)(A), Respondent maintains at the facility documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal;

iii. In accordance with WAC 173-303-675(4)(j), Respondent operates and maintains all drip pads in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment;

iv. In accordance with WAC 173-303-675(4)(k), after removing treated wood from the treatment vessel, Respondent holds treated wood on the drip pad until drippage has ceased and maintains records sufficient to document that all treated wood is held on the drip pad following treatment until drippage has ceased.

v. In accordance with WAC 173-303-675(1)(c), Respondent either complies with the drip pad requirements in the storage yard or maintains and complies with a written contingency plan that describes how Respondent will respond immediately to the discharge of infrequent and incidental drippage. The written contingency plan must describe how Respondent will: (a) clean up the drippage; (b) document the cleanup of the drippage; (c) retain documents regarding the cleanup for three years; and (d) manage the contaminated media in a manner consistent with federal regulations;

vi. WAC 173-303-330 (Personnel training);

vii. WAC 173-303-340 (Preparedness and prevention);

viii. WAC 173-303-350 (Contingency plan and emergency procedures);

ix. WAC 173-303-360 (Emergencies); and

x. WAC 173-303-380 (Facility record keeping);

d. Respondent shall immediately manage used oil in accordance with WAC 173-303-515.

e. Within thirty (30) days after the effective date of this CAFO, Respondent must submit to EPA and the Washington State Department of Ecology ("Ecology") a closure plan in accordance with 40 C.F.R. Part 265, Subpart G, as incorporated into the Washington Administrative Code at WAC 173-303-400(3), for the areas subject to closure as a result of the violations alleged in the Complaint and this CAFO, except for the three (3) drip pads. Upon approval by Ecology of the closure plan, Respondent shall implement the closure plan as approved. In the event that Respondent, EPA or Ecology determine that the hazardous waste management area addressed by this closure plan must be closed as a landfill, subject to the requirements of 40 C.F.R. §§ 265.117 through 265.120, within ninety (90) days of such determination, Respondent must:

i. Submit to EPA and Ecology a post-closure plan in accordance with 40 C.F.R. § 265.118, as incorporated into the Washington Administrative Code at WAC 173-303-400(3);

ii. Otherwise comply with the post-closure requirements for landfills 40 C.F.R. §§ 265.117 through 265.120, as incorporated into the Washington Administrative Code at WAC 173-303-400(3); and,

iv. Establish and maintain financial assurance for post-closure in accordance with 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3).

f. Within sixty (60) days of completion of the closure activities in the areas addressed in the closure plan, Respondent must submit to both EPA and Ecology certification of closure as required by the appropriate state and federal regulations.

g. Within ninety (90) days of the effective date of this CAFO, Respondent shall prepare and, thereafter, maintain a closure plan and contingent post-closure plan and cost estimates for the three (3) drip pads at the facility (drip pad closure plan) in accordance with WAC 173-303-675(6), and shall otherwise comply with WAC 173-303-675(6).

h. Within 180 days of the effective date of this CAFO, Respondent shall establish financial assurance in an amount at least equal to twenty-five percent (25%) of the cost estimate for closure of all three (3) of the drip pads. Within one (1) year of the effective date of this CAFO, Respondent shall establish additional financial assurance such that the total financial assurance established at that time is an amount at least equal to fifty percent (50%) of the cost estimate for closure of all three (3) of the drip pads. Within two (2) years of the effective date of this CAFO, Respondent shall establish additional financial assurance such that the total financial assurance established at that time is an amount at least equal to one hundred percent (100%) of the cost estimate for closure of all three (3) of the drip pads. Such financial assurance must be established and maintained in accordance with 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3). If Respondent closes one or two of the drip pads in accordance with WAC 173-303-675(6) while financial assurance obligations remain under this paragraph 19.h., Respondent may revise its cost estimate for financial assurance purposes accordingly. If Respondent closes all three drip pads in accordance with WAC 173-303-675(6) while financial assurance obligations remain under this paragraph 19.h., the obligations under this paragraph shall cease to apply.

i. Respondent shall comply with the drip pad design, operation, maintenance, and inspection requirements in WAC 173-303-675 for each of the three (3) drip pads until the drip pads are closed in accordance with a closure plan approved by Ecology.

j. EPA and its authorized representatives shall have access to Respondent's facility in accordance with 42 U.S.C. § 6927(a) to monitor Respondent's implementation of and compliance with the terms of this Agreement.

20. Attached to this Complaint is a Certification, which must be executed by Respondent and returned to EPA to the personnel and at the address set forth in paragraph 17 within fourteen (14) days after full compliance with paragraph 19.a. through d. of this CAFO.

21. Respondent and Complainant shall each bear its own costs and attorney fees.

22. This CAFO constitutes a settlement by EPA of all claims pursuant to RCRA for the violations alleged in this CAFO. Nothing in this CAFO is intended to nor shall be construed to

operate in any way to resolve any criminal liability of Respondent. Compliance with this CAFO shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations for violations not alleged in this CAFO, and it is the responsibility of Respondent to comply with such laws and regulations.

23. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

24. Nothing in this CAFO shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this CAFO is based, or for Respondent's violation of any applicable provision of law.

25. Nothing in this CAFO shall constitute or be construed to be a release from any claim in law or equity against any person or entity for any liability arising out of or in any way relating to the generation, storage, treatment, handling, transportation, disposal, or release of any hazardous waste, hazardous constituent, hazardous substance pollutant or contaminant at or from the facility.

26. EPA reserves the right to take any enforcement action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, RCRA, or any other available legal authority, including without limitation, actions to compel compliance with this CAFO, for monetary penalties, and for punitive damages.

27. The undersigned representative of Respondent certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Consent Agreement and to execute and legally bind Respondent to the terms of this Consent Agreement.

FOR RESPONDENT THE OESER COMPANY:

Dated: 1/18/05

(signature)

Kirk A. Lilley
Preston Gates & Ellis LLP
Attorneys for The Oeser Co.
(print or type name and title)

FOR COMPLAINANT U.S. ENVIRONMENTAL PROTECTION AGENCY:

Dated: 1-24-05

Michael A. Bussell, Director
Office of Compliance and Enforcement

Dated: 1/18/05

Jennifer G. MacDonald
Assistant Regional Counsel

IV. FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Order. The Respondent is hereby ordered to comply with the terms of this above Consent Agreement effective immediately.

DATED this 7th day of February, 2005

Ronald A. Kreizenbeck
Acting Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
THE OESER COMPANY	)	EPA Docket No. RCRA-10-2003-0151
Bellingham, Washington	)	
	)	
EPA ID # WAD 00895 7243	)	
	)	CERTIFICATION
Respondent	)	

_____ certifies under penalty of perjury that the following statements are true, accurate and correct:

1. I am _____ of the above-captioned Respondent, The Oeser Company.

2. Each and every one of the requirements contained paragraph 19.a. through d. in the Consent Agreement and Final Order issued on _____ to the above named Respondent has been fully and timely complied with.

EXECUTED this _____ day of _____, 200 .

_____
(signature)

_____
(print or type name and title)

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached CONSENT AGREEMENT AND FINAL ORDER in **In the Matter of: The Oeser Company, DOCKET NO.: RCRA-10-2003-00151** was filed with the Regional Hearing Clerk on February 07, 2005.

On February 07, 2005 the undersigned certifies that a true and correct copy of the document was delivered to:

Jennifer MacDonald
US Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail to be delivered by first class mail to:

Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail, by certified mail, return receipt requested to:

Mr. C.M. Secrist, President
The Oeser Company
730 Marine Drive
Bellingham, WA 98225

Mr. Kirk Lilley
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158

DATED this 7th day of February 2005.

Carol Kennedy
Regional Hearings Clerk
EPA Region 10