

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

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In the Matter of :
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 :
Marshall Brothers, Inc., E & V :
Energy Corp., Erie Enterprises, LLC :
& Marshall Family Associates, LLC :
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Respondents :
 :
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Proceeding Under Section 9006 of :
the Solid Waste Disposal Act, as :
amended. :
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CONSENT AGREEMENT/ FINAL ORDER
Docket No. RCRA-02-2016-7503

U.S. Environmental Protection Agency
REGIONAL HEADQUARTERS
CHIEF
2017 MAR 29 PM 2:40

PRELIMINARY STATEMENT

This is a civil administrative proceeding instituted pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. §6901 et seq. (hereinafter referred to as the “Act” or “RCRA”) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (hereinafter “CROP”). The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, Region 2, United States Environmental Protection Agency (“EPA” or “Complainant”), issued a “Complaint, Compliance Order and Notice of Opportunity for Hearing” on or about September 27, 2016 to the Respondents Marshall Brothers, Inc., E & V Energy Corp., Erie Enterprises, LLC & Marshall Family Associates, LLC (hereinafter “Respondents”). The Complaint alleged violations of the Act and the federal underground storage tank regulations promulgated at 40 C.F.R. Part 280.

Section 9006 of RCRA, 42 U.S.C. § 6991(e), authorizes the Administrator to enforce violations of the Act and the regulations promulgated pursuant to it. Each Respondent has been the owner and/or operator of at least one or more “underground storage tanks” (“USTs”) that are located at sixteen (16) facilities in New York State.

Based on EPA inspections and Respondents’ responses to an EPA Notice of Violation (“NOV”) and two Information Request Letters (“IRL”), EPA determined that prior to February 10, 2016 the Respondents did not have required insurance coverage for third party bodily injury and therefore they did not demonstrate compliance with federal regulatory financial responsibility requirements (40 CFR Part 280, subpart H) for the UST systems at Respondents’ facilities in New York State.

The Complainant and the Respondents have reached an amicable resolution of this matter and agree to enter into this Consent Agreement and Final Order (“CA/FO”) pursuant to 40 C.F.R. subsections 22.18(b)(2)&(3) of the CROP and agree that settlement of this matter upon

the terms set forth in this CA/FO is an appropriate means of resolving this case without further litigation.

No adjudicated findings of fact or conclusions of law have been made. Respondents neither admit nor deny the EPA Findings of Fact and Conclusions of Law set forth below.

EPA FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondents are Marshall Brothers, Inc., E & V Energy Corp., Erie Enterprises, LLC and Marshall Family Associates, LLC.
2. Each Respondent is a “person” within the meaning of Section 9001(5) of the Act, 42 U.S.C. § 6991(5), and 40 C.F.R. § 280.12.
3. Each Respondent was and remains the “owner” and/or “operator” of at least one or more underground storage tanks (“USTs”) or “UST system,” as those terms are defined in Section 9001 of the Act, 42 U.S.C. § 6991, and in 40 C.F.R. § 280.12 that, when considered together, are located at sixteen (16) facilities in the State of New York.
4. Pursuant to 40 C.F.R. § 280.12, EPA is the “implementing agency” responsible for enforcing the requirements of the Act and the regulations promulgated pursuant thereto which are the subject of this case.
5. Pursuant to Sections 2002, 9002, and 9003 of the Act, 42 U.S.C. §§ 6912, 6991a, and 6991b, EPA promulgated rules setting forth requirements applicable to owners and operators of UST systems, codified at 40 C.F.R. Part 280. These rules include requirements related to financial responsibility.
6. Forty C.F.R. § 280.12 defines an “underground storage tank or UST” as “any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.”
7. Pursuant to 40 C.F.R. § 280.93 owners and operators of UST systems are required to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and for property damage caused by accidental releases arising from the operation of USTs that they own or operate.
8. Pursuant to 40 C.F.R. § 280.111, owners or operators of USTs are required to maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility for an UST and must maintain such evidence at the UST site or the owner’s or operator’s place of work.
9. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on or about September 11, 2015,

an authorized representative of EPA inspected six (6) of Respondents' facilities which have underground storage tanks in the State of New York to determine their compliance with the Act and 40 C.F.R Part 280.

10. Pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, EPA sent an Information Request Letter ("IRL"), dated November 5, 2015, to Respondents Marshall Brothers, Inc. and E & V Energy Corporation, in order to determine their compliance with the Act and 40 C.F.R. Part 280.
11. On or about December 4, 2015, the Respondents submitted a response to EPA's IRL.
12. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d and 40 C.F.R. Section 280.34, EPA sent a Notice of Violation (NOV) and IRL, dated April 13, 2016, to Respondents Marshall Brothers, Inc. and E & V Energy Corporation.
13. On or about April 18, 2016, the Respondents submitted a response to the April 13, 2016 NOV and IRL. The response acknowledged that none of the Respondents had insurance coverage for third party bodily injury prior to February 10, 2016 for USTs located at sixteen facilities (identified in paragraph 112 of the Complaint) located in New York State.
14. Based on EPA's UST inspections and Respondents' replies to the IRLs and NOV, EPA has alleged that each of the Respondents failed to comply with federal regulatory financial responsibility requirements as per the requirements of 40 C.F.R. Section 280.93(a) for USTs owned and/or operated at the Respondents' sixteen facilities identified in paragraph 112 of the Complaint.
15. Respondents Marshall Brothers, Inc. and E & V Energy Co., obtained insurance on February 10, 2016 for third party bodily injury for the USTs owned and/or operated by the Respondents at the sixteen facilities (identified in paragraph 112 of the Complaint) located in New York State and continued to maintain such third party bodily injury insurance for USTs they still own or operate. (The Respondents have removed the USTs at two of the sixteen facilities. The two facilities where the USTs have been removed are identified as follows: Freeway Grocery, 64 West Church Street, Adams, NY and North Victory Pit Stop, 15057 NY Route 104, Martville, NY).

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991(e), and 40 C.F.R. § 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, it is hereby agreed by and between Complainant and the Respondents and voluntarily and knowingly accepted by the Respondents, that the Respondents, for purposes of this Consent Agreement: (a) admit that EPA has jurisdiction over this matter as stated in the Complaint; (b)

neither admit nor deny specific factual allegations alleged in the Complaint; (c) consent to the assessment of the civil penalty as set forth below; (d) consent to the issuance of the Final Order incorporating this Consent Agreement; and (e) waive their right to contest or appeal that Final Order.

It is further hereby agreed by and between Complainant and the Respondents, and voluntarily and knowingly accepted by the Respondents, that the Respondents shall comply with the following terms and conditions:

1. Commencing on the effective date of the Order, Respondents shall hereinafter maintain compliance at its facilities with all regulations applicable to owners and operators of USTs as set forth at 40 C.F.R. Part 280 including but not limited to complying with the financial responsibility requirements for its UST systems at all of their facilities, as required.
2. Respondents hereby certify, at the time of their signatures to this document, that, to the best of their knowledge and belief, they are in compliance with all of the financial responsibility requirements of 40 C.F.R. § 280.93 (a).
3. This CA/FO is not intended, and shall not be construed, to waive, extinguish or otherwise affect Respondents' obligation to comply with all applicable federal, state and local laws and regulations relating to the technical standards and corrective action requirements for owners and operators of USTs.
4. Nothing in this document is intended nor shall it be construed, to waive, prejudice or otherwise affect the right of EPA, or the United States, from pursuing any appropriate remedy, sanction or penalty prescribed by law against Respondents for having made any material misrepresentations or for having provided materially false information in any document.
5. Respondents are each jointly and severally liable for the payment of the civil penalty in paragraph 6 below.
6. Respondents shall pay a civil penalty to EPA in the total amount of SEVENTY THOUSAND DOLLARS (\$70,000). Such payment shall be made by cashier's or certified check or by Electronic Fund Transfer (EFT). If the payment is made by check, then the check shall be made payable to the "Treasurer, United States of America," and shall be mailed to:

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

7. The check shall be identified with a notation thereon listing the following: " IN THE MATTER OF MARSHALL BROTHERS, INC, et al. and shall bear the Docket Number RCRA-02-2016-7503. Payment of the penalty must be received at the above address on or before thirty (30) calendar days after the date of the Regional Administrator's signature on the Final Order, which is located at the end of this CA/FO (the date by which payment must be received shall hereafter be referred to as the "Due Date").

If Respondents choose to make the payment by EFT, then they shall provide the following information to its remitter bank:

- 1) Amount of Payment (\$70,000.00)
- 2) SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045.
- 3) Account Code for Federal Reserve Bank of New York receiving payment: 68010727.
- 4) Federal Reserve Bank of New York ABA routing number: 021030004.
- 5) Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency."
- 6) Name of Respondent: Marshall Brothers, Inc. et al
- 7) Case Number: RCRA-02-2016-7503

Such EFT must be received on or before thirty (30) calendar days after the date of the Regional Administrator's signature on the Final Order.

- a. Failure to pay the amount in full within the time period set forth above may result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection or other appropriate action.
 - b. Furthermore, if payment is not made on or before the Due Date, interest for said payment shall be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the overdue amount from the Due Date said payment was to have been made through the date said payment has been received. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty (30) calendar day period or any portion thereof, following the date the payment was to have been made, in which payment of the amount remains in arrears. In addition, a 6% per annum penalty will be applied to any principal amount that has not been received by the EPA within ninety (90) calendar days of the date for which the payment was required hereto to have been made.
 - c. The civil penalties provided for herein are penalties within the meaning of Title 26, Section 162(f) of the United States Code, 26 U.S.C. § 162(f), and are not deductible expenditures for purposes of federal or state taxes.
8. Any responses, documentation, and other communications submitted in connection with this Consent Agreement shall be sent to:

Ton Moy, Environmental Engineer
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency, Region 2
290 Broadway, 21st Floor
New York, N.Y. 10007-1866

Bruce Aber, Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Rom 1635
New York, N.Y. 10007-1866

9. EPA shall address any written communications concerning the CA/FO (including any correspondence related to payment of the penalty) to Respondents at the following address:

Gary S. Bowitch, Esq.
Bowitch & Coffey, LLC
Attorneys At Law
17 Elk Street
Albany, NY 12207
bowitch@bcalbany.com

Case Marshall
Marshall Brothers, Inc.
P.O. Box 1226
Weedsport, NY 13166

10. Full payment of the penalty described in paragraph 6, above, shall only resolve Respondents' liability for federal civil penalties for the violation(s) and the facts alleged in the Complaint in this matter. Full payment of this penalty shall not in any case affect the right of EPA or the United States, on behalf of EPA, from pursuing appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
11. Respondents have read the Consent Agreement, understand its terms, find it to be reasonable and consent to the issuance and its terms. Respondents consent to the issuance of the accompanying Final Order. Respondents agree that all the terms of the settlement are set forth herein.
12. Respondents explicitly and knowingly consent to the assessment of the civil penalty as set forth in this Consent Agreement and agree to pay the civil penalty in accordance with the terms of the Consent Agreement.

13. The provisions of this Consent Agreement shall be binding upon both Complainant and the Respondents and their authorized representatives and successors or assigns.
14. The Respondents explicitly and knowingly waive their right to request or to seek any Hearing on the Complaint or on this Consent Agreement or on the Findings of Fact and Conclusions of Law, or on the accompanying Final Order.
15. Respondents agree not to contest the validity or any term of this CA/FO in any action brought: a) by the United States, including EPA, to enforce this CA/FO; or b) to enforce a judgment relating to this CA/FO.
16. Respondents waive their right to appeal this Consent Agreement and the accompanying Final Order.
17. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any criminal or civil action or other administrative proceeding, but Respondents agree not to contest the terms of this Consent Agreement and Final Order in an action or proceeding to enforce or seek compliance with this Consent Agreement and its accompanying Final Order.
18. This Consent Agreement and Final Order does not relieve Respondents of their obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state or local permit. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondents' obligation to comply with applicable provisions of the Act and the regulations promulgated thereunder.
19. Nothing in this Consent Agreement and Final Order shall be construed as a release from any other action under any law and/or regulation administered by EPA.
20. The provisions of this Consent Agreement and final Order shall be binding upon both EPA and the Respondents, their officers, agents, authorized representatives and successors or assigns.
21. Any failure by Respondents to perform fully any requirement herein will be considered a violation of this CA/FO, and may subject Respondents to a civil action by the United States to enforce the provisions of this CA/FO.
22. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement and Final Order and all the terms and conditions set forth in this Consent Agreement and Final Order.
23. Respondents consent to the service of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk.

24. Pursuant to 40 CFR Section 22.13(b), the effective date of this Consent Agreement and Final Order shall be the date when it is filed with the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2.
25. Each party hereto agrees to bear its own costs and fees in this matter.

RESPONDENT: MARSHALL BROTHERS, INC,

BY: [Signature]
(signature)
NAME CASE A. MARSHALL
(Please Print)
TITLE: V.P.
DATE: 3/21/17

RESPONDENT: E & V ENERGY CORP.

BY: [Signature]
(signature)
NAME CASE A. MARSHALL
(Please Print)
TITLE: V.P.
DATE: 3/21/17


RESPONDENT: ERIE ENTERPRISES, LLC

BY: [Signature]
(signature)
NAME CASE A. MARSHALL
(Please Print)
TITLE: MEMBER
DATE: 3/21/17

RESPONDENT: MARSHALL FAMILY ASSOCIATES, LLC

BY: [Signature]
(signature)
NAME CASE A. MARSHALL
(Please Print)
TITLE: MEMBER
DATE: 3/21/17

**COMPLAINANT: United States Environmental Protection Agency
Region 2**


BY: 
Kathleen Anderson, Acting Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection
Agency - Region 2
290 Broadway
New York, N.Y. 10007-1866

DATE: **MAR 24 2017**

In the Matter of Marshall Brothers, Inc., et al.
Docket No. RCRA-02-2016-7503

FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Consent Agreement, entered into by the Complainant and the Respondents, is hereby approved, incorporated herein, and issued as an Order pursuant to Section 9006 of the Act and 40 C.F.R. § 22.18(b)(3). The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA, Region 2, New York, New York.



Catherine McCabe
Acting Regional Administrator
U.S. Environmental Protection
Agency – Region 2
290 Broadway
New York, New York 10007-1866

DATE: March 27, 2017

**In the Matter of Marshall Brothers, et al.,
Docket No. RCRA-02-2016-7503**

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed CONSENT AGREEMENT and FINAL ORDER, bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and One Copy
by Hand:

Office of Regional Hearing Clerk
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by Certified Mail,
Return Receipt Requested:

Gary Bowich Esq
Attorney for Respondents
17 Elk Street
Albany, NY 12207
bowitch@bcalbany.com

Case Marshall
Marshall Brothers, Inc.
P.O. Box 1226
Weedsport, NY 13166

Dated: **March 29** 2017
New York, New York

A handwritten signature in dark ink, appearing to read "Gary Bowich", written over a horizontal line.