

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
2019 OCT -9 AM 7: 31

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

In the Matter of:

John Otte Oil & Propane, Inc.
Otte Agricultural Products, Inc.

Respondent

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Docket No. CAA-07-2019-0259

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and John Otte Oil & Propane, Inc. and Otte Agricultural Products, Inc. (Respondents) 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 Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d). Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), the Administrator and the Attorney General jointly determined that this matter, in which the first date of alleged violation occurred more than twelve months prior to the initiation of the administrative action, was appropriate for administrative penalty action.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondents have violated the Chemical Accident Prevention Provisions in 40 C.F.R. Part 68, promulgated pursuant to Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and that Respondents are therefore in violation of Section 112(r) of the CAA, 42 U.S.C. § 7412(r). Furthermore, this Consent Agreement and Final Order serves as notice pursuant to Section 113(d)(2)(A) of the CAA, 42 U.S.C. § 7413(d)(2)(A), of the EPA's intent to issue an order assessing penalties for these violations.

Parties

3. Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Director of the Enforcement and Compliance Assurance Division, EPA, Region 7.

4. Respondents are John Otte Oil & Propane, Inc. and Otte Agricultural Products, Inc. corporations doing business in the state of Nebraska.

Statutory and Regulatory Background

5. On November 15, 1990, the President signed into law the CAA Amendments of 1990. The Amendments added Section 112(r) to Title I of the CAA, 42 U.S.C. § 7412(r), which requires the Administrator of the EPA to, among other things, promulgate regulations in order to prevent accidental releases of certain regulated substances. Section 112(r)(3), 42 U.S.C. § 7412(r)(3), mandates that the Administrator promulgate a list of regulated substances, with threshold quantities, and defines the stationary sources that will be subject to the chemical accident prevention regulations mandated by Section 112(r)(7). Specifically, Section 112(r)(7), 42 U.S.C. § 7412(r)(7), requires the Administrator to promulgate regulations that address release prevention, detection, and correction requirements for these listed regulated substances.

6. On June 20, 1996, the EPA promulgated a final rule known as the Risk Management Program, 40 C.F.R. Part 68, which implements Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7). This rule requires owners and operators of stationary sources to develop and implement a risk management program that includes a hazard assessment, a prevention program and an emergency response program.

7. The regulations at 40 C.F.R. Part 68 set forth the requirements of a risk management program that must be established at each stationary source. The risk management program is described in a Risk Management Plan (“RMP”) that must be submitted to the EPA.

8. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), and 40 C.F.R. § 68.150, an RMP must be submitted for all covered processes by the owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process no later than the latter of June 21, 1999, or the date on which a regulated substance is first present above the threshold quantity in a process.

9. The regulations at 40 C.F.R. § 68.10 set forth how the Chemical Accident Prevention Provisions apply to covered processes. Pursuant to 40 C.F.R. § 68.10(g), a covered process is subject to Program 2 requirements if the process does not meet the eligibility requirements of either Program 1 or Program 3, as described in 40 C.F.R. § 68.10(f) and (h), respectively.

10. Pursuant to Section 113(d)(2)(B) of the CAA, 42 U.S.C. § 7413(d)(2)(B), the Administrator may compromise, modify, or remit, with or without conditions, any administrative penalty which may be imposed under Section 113(d).

11. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), states that the Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000 per day of violation whenever, on the basis of any available information, the Administrator finds that such person has violated or is violating any requirement or prohibition of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and its implementing regulations. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil

Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$47,357 for violations that occur after November 2, 2015, and are assessed after February 6, 2019.

Definitions

12. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines “person” to include any individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency department, or instrumentality of the United States and any officer, agent, or employee thereof.

13. Section 112(r)(2)(C) of the CAA, 42 U.S.C. § 7412(r)(2)(c), and the regulations at 40 C.F.R. § 68.3 define “stationary source,” in part, as any buildings, structures, equipment, installations or substance-emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur.

14. The regulations at 40 C.F.R. § 68.3 define “regulated substance” as any substance listed pursuant to Section 112(r)(3) of the CAA, as amended, in 40 C.F.R. § 68.130.

15. The regulations at 40 C.F.R. § 68.3 define “threshold quantity” as the quantity specified for regulated substances pursuant to Section 112(r)(5) of the CAA, as amended, listed in 40 C.F.R. § 68.130 and determined to be present at a stationary source as specified in 40 C.F.R. § 68.115.

16. The regulations at 40 C.F.R. § 68.3 define “process” as any activity involving a regulated substance including any use, storage, manufacturing, handling or on-site movement of such substances, or combination of these activities. For the purposes of this definition, any group of vessels that are interconnected, or separate vessels that are located such that a regulated substance could be involved in a potential release, shall be considered a single process.

General Factual Allegations

17. Respondents are, and were at all times relevant to this CAFO, each a “person” as defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

18. Until approximately January 2, 2018, John Otte Oil & Propane, Inc. owned and/or operated a facility that stores and sells anhydrous ammonia and propane located at 14th & Agnew Road, Davey, Nebraska (the Facility). From January 2, 2018 to approximately September 6, 2019, Otte Agricultural Products, Inc. owned and/or operated the part of the Facility using the anhydrous ammonia process.

19. At all times relevant to this CAFO, Respondents have been the owner and/or operator of a facility that is a “stationary source” pursuant to 40 C.F.R. § 68.3.

20. Anhydrous ammonia is a “regulated substance” pursuant to 40 C.F.R. § 68.3. The threshold quantity for anhydrous ammonia, as listed in 40 C.F.R. § 68.130, is 10,000 pounds.

21. On or about May 16, 2018, representatives of the EPA conducted an inspection of the Facility to determine compliance with Section 112(r) of the CAA and 40 C.F.R. Part 68.

22. Information gathered during the EPA inspection revealed that Respondents had greater than 10,000 pounds of anhydrous ammonia in a process at the Facility.

23. From the time Respondents first had onsite greater than 10,000 pounds of anhydrous ammonia in a process, Respondents were subject to the requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and 40 C.F.R. Part 68 because they were an owner and operator of a stationary source that had more than a threshold quantity of a regulated substance in a process.

24. From the time Respondents first had onsite greater than 10,000 pounds of anhydrous ammonia in a process, Respondents were subject to Program 2 prevention program requirements because pursuant to 40 C.F.R. § 68.10(g), the process does not meet the eligibility requirements of either Program 1 or Program 3, as described in 40 C.F.R. § 68.10(f) and (h), respectively.

25. From the time Respondents first had onsite greater than 10,000 pounds of anhydrous ammonia in a process, Respondents were required under Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), to submit an RMP pursuant to 40 C.F.R. § 68.12(a) and comply with the Program 2 requirements provided at 40 C.F.R. § 68.12(c) and detailed in Subpart C.

Allegations of Violation

26. Complainant hereby states and alleges that Respondents have violated the CAA and federal regulations promulgated thereunder as follows:

Count 1

27. The facts stated in Paragraphs 17 through 25 above are herein incorporated.

28. The regulation at 40 C.F.R. § 68.36(a) requires the owner or operator of a stationary source subject to the Risk Management Program at 40 C.F.R. Part 68 to review and update the offsite consequences analyses at least once every five years.

29. The regulation at 40 C.F.R. § 68.39 requires the owner or operator of a stationary source subject to the Risk Management Program to maintain the following records on the offsite consequence analyses: for worst case scenarios, a description of the vessel and substance selected as worst case, the assumptions and parameters used and the rationale for the selection; for alternative release scenarios, a description of scenarios identified, assumptions and parameters used and the rationale for the selection of specific parameters; documentation of the estimated quantity released, release rate, and duration of release; methodology used to determine distance to endpoints; and data used to estimate population and environmental receptors

potentially affected.

30. The EPA inspection revealed that Respondents failed to review and update the off-site consequence analyses at least once every five years, as required by 40 C.F.R. § 68.36(a), and failed to maintain the records documenting the rationale for the selections made in developing the worst case release scenario and alternative release scenarios, and the data used to estimate population and environmental receptors potentially affected, as required by 40 C.F.R. § 68.39.

31. Respondents' failure to review and update the off-site consequence analyses and maintain records on the offsite consequence analyses pursuant to the requirements of 40 C.F.R. §§ 68.36(a) and 68.39, as required by 40 C.F.R. § 68.12(c)(2), are violations of Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7).

Count 2

32. The facts stated in Paragraphs 17 through 25 above are herein incorporated.

33. The regulation at 40 C.F.R. § 68.12(c)(3) requires the owner or operator of a stationary source with a process subject to Program 2 to implement the Program 2 prevention requirements of 40 C.F.R. §§ 68.48 through 68.60.

34. The EPA inspection revealed that Respondents failed to implement the Program 2 prevention requirements of 40 C.F.R. §§ 68.48 through 68.60, as required by 40 C.F.R. § 68.12(c)(3). Specifically:

- (a) Respondents failed to ensure that the process is designed in compliance with recognized and generally accepted good engineering practices as required by 40 C.F.R. § 68.48(b), including the failure to have an adequate bulkhead and vehicle barriers around the ammonia storage vessel, and the storage of inappropriate flammable material under and around the storage vessel.
- (b) Respondents failed to perform or cause to be performed inspections and tests on process equipment that follow recognized and good engineering practices at a frequency consistent with applicable manufacturers' recommendations or industry standards or codes, as required by 40 C.F.R. § 68.56(d).
- (c) Respondents failed to certify that they have evaluated compliance the provisions of the Program 2 prevention requirements at least every three years to verify that the procedures and practices developed under the rule are adequate and are being followed, and develop a report of the audit findings, as required by 40 C.F.R. § 68.58.

35. Respondents' failures to comply with Program 2 prevention requirements of 40 C.F.R. §§ 68.48 through 68.60, as required by 40 C.F.R. § 68.12(c)(3), violate Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7).

Count 3

36. The facts stated in Paragraphs 17 through 25 above are herein incorporated.

37. The regulation at 40 C.F.R. § 68.90(b)(1) requires the owner or operator of a stationary source subject to the Risk Management Program at 40 C.F.R. Part 68 whose employees will not respond to accidental releases of regulated toxic substances to include the stationary source in the community emergency response plan developed under 42 U.S.C. § 11003.

38. The EPA inspection revealed that Respondents failed to include the Facility in the community emergency response plan, as required by 40 C.F.R. § 68.90(b)(1).

39. Respondents' failure to include the Facility in the community emergency response plan, as required by 40 C.F.R. § 68.90(b)(1), violates Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7).

Count 4

40. The facts stated in Paragraphs 17 through 25 above are herein incorporated.

41. The regulation at 40 C.F.R. § 68.190(b)(1) requires the owner or operator of a stationary source subject to the Risk Management Program at 40 C.F.R. Part 68 to revise and update the RMP at least once every five years from the date of its initial submission or most recent update required by 40 C.F.R. § 68.190(b)(2) through (b)(7), whichever is later.

42. Respondents first submitted a RMP on March 22, 2011. Respondents submitted a revised RMP on May 15, 2018, after EPA's inspection.

43. Respondents' failure to revise and update the RMP for the Facility at least once every five years, as required by 40 C.F.R. § 68.190(b)(1), violates Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7).

CONSENT AGREEMENT

44. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondents:

- (a) admit the jurisdictional allegations set forth herein;
- (b) neither admit nor deny the specific factual allegations stated herein;
- (c) consent to the assessment of a civil penalty, as stated herein;

- (d) consent to the issuance of any specified compliance or corrective action order;
- (e) consent to any conditions specified herein;
- (f) consent to any stated Permit Action;
- (g) waive any right to contest the allegations set forth herein; and
- (h) waive their right to appeal the Final Order accompanying this Consent Agreement.

45. Respondents consent to the issuance of this Consent Agreement and Final Order and consent for the purposes of settlement to the payment of the civil penalty specified herein.

46. Respondents and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

Penalty Payment

47. Respondents agree that, in settlement of the claims alleged herein, Respondents shall pay a mitigated civil penalty of \$21,476 based on a substantiated ability to pay claim.

48. Respondents shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondents by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

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

49. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219; and

Kasey Barton, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

50. Respondents understand that their failure to timely pay any portion of the civil penalty may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

Conditions

51. In compromise of the civil penalty that otherwise may be imposed herein, Respondents and EPA have agreed to the following condition: Respondent shall complete all compliance actions identified in the *Risk Management Program Compliance Assistance Scope of Work and Timeline for Completion* agreed to by the parties by September 30, 2019.

Effect of Settlement and Reservation of Rights

52. Full payment of the penalty proposed and performance of the conditions in this Consent Agreement shall only resolve Respondents' liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the CAA or any other applicable law.

53. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondents' representations to the EPA, as memorialized in paragraph directly below.

54. Respondents certify by the signing of this Consent Agreement that they are in compliance with all requirements of the CAA and its implementing regulations.

55. Full payment of the penalty proposed and performance of the conditions in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondents' obligation to comply with all applicable provisions of the CAA and regulations promulgated thereunder.

56. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

57. By signing this Consent Agreement, the undersigned representatives of Respondents certify that they are fully authorized to execute and enter into the terms and conditions of this Consent Agreement and have the legal capacity to bind the party they represent to this Consent Agreement.

58. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

59. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

60. This Consent Agreement and Final Order shall apply to and be binding upon Respondents and Respondents' agents, successors and/or assigns. Respondents shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondents with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

RESPONDENTS:

JOHN OTTE OIL & PROPANE, INC.

Date: 10-2-19

Jessica Schwarting
Signature

Jessica Schwarting
Name

Office manager / co-owner
Title

OTTE AGRICULTURAL PRODUCTS, INC.

Date: 10-2-19

Jessica Schwarting
Signature

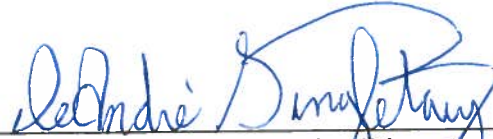
Jessica Schwarting
Name

Office manager / co-owner
Title

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 10/3/2019



DeAndré Singletary, Acting Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 7

Date: 10/4/2019



Kasey Barton
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7

FINAL ORDER

Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), 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.

Respondents are 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.

Karina Borromeo
Karina Borromeo
Regional Judicial Officer

Oct. 8, 2019
Date

CERTIFICATE OF SERVICE

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

barton.kasey@epa.gov

Copy via Email to Respondents:

jake@otteoil.com
jessica@otteoil.com

AND

Copy via Certified Mail, Return Receipt Requested to Respondent:

Mr. John Otte
3435 Maple Street
Davey, Nebraska 68336

Dated this 9th day of October, 2019.

Erin Beck

Signed
for Lisa Haugen
Regional Hearing Clerk