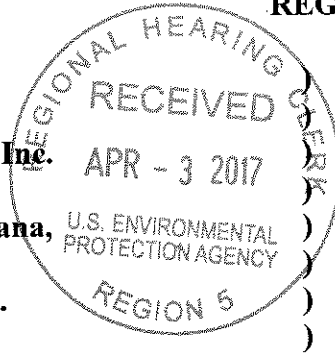


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

Asphalt Cutbacks, Inc.
3000 Gary Avenue
East Chicago, Indiana,

Respondent.



Docket No. CWA-05-2017-0007

Proceeding to Assess a Class II Civil Penalty
under Section 311(b)(6)(B)(ii) of the Clean
Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 311(b)(6)(B)(ii) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990, and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. § 22.13(b) and 22.18(b)(2) and (3).

2. The Complainant is, by lawful delegation, the Acting Director of the Superfund Division, United States Environmental Protection Agency, Region 5 (EPA).

3. The Respondent is Asphalt Cutbacks, Inc. (Respondent or AC), a corporation doing business in the State of Indiana.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO, including its right to request a hearing under Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. § 22.15(c), its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, any right to contest the allegations in this CAFO, and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President of the United States shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore facilities . . . and to contain such discharges”

10. Section 311(j)(5)(A)(i) and (C)(iv) of the Act, 33 U.S.C. § 1321(j)(5)(A)(i) and (C)(iv), states that the President shall issue regulations requiring the owner or operator of “an onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or upon the navigable waters of the United States

[or] adjoining shorelines” to “submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such discharge, of oil.”

11. Initially by Executive Order 11,548 (July 20, 1970), 35 Fed. Reg. 11,677 (July 22, 1970), and most recently by Section 2(b)(1) of Executive Order 12,777 (Oct. 18, 1991), 56 Fed. Reg. 54,757 (Oct. 22, 1991), the President delegated to the EPA his authority under Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), to issue the regulations referenced in the preceding paragraph for non-transportation-related onshore facilities.

12. EPA subsequently promulgated regulations, codified at 40 C.F.R. Part 112, Subparts A, B, C, and D, also known as the Spill Prevention, Control, and Countermeasure (SPCC) and Facility Response Plan regulations, pursuant to its authorities under the Act, 33 U.S.C. § 1251 *et seq.*

13. 40 C.F.R. § 112.3 states, in part, that the owner or operator of an SPCC-regulated facility must prepare and implement a written SPCC plan (SPCC Plan or Plan) in accordance with 40 C.F.R. § 112.7 and any other applicable section of 40 C.F.R. Part 112.

14. 40 C.F.R. § 112.7(c)(1) requires that appropriate containment, diversionary structures, or equipment be provided to prevent a discharge as described in 40 C.F.R. § 112.1(b).

15. 40 C.F.R. § 112.7(h)(1) requires owners or operators of facilities with tank car and tank truck loading/unloading racks to use a quick drainage system for racks where rack drainage does not flow into a catchment basin or treatment facility designed to handle discharges, and requires that any containment system be designed to hold at least the maximum capacity of any single compartment of a tank car or tank truck loaded or unloaded at the facility.

16. 40 C.F.R. § 112.8(c)(2) requires the owner or operator of an onshore facility to construct all bulk storage tank installations so that a secondary means of containment for the

entire capacity of the largest single container and sufficient freeboard for precipitation are provided, and that diked areas are sufficiently impervious to contain discharged oil.

17. 40 C.F.R. § 112.8(c)(6) requires, among other things, that the owner or operator of an onshore facility test each above ground container for integrity on a regular schedule, and whenever material repairs are made.

18. Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii) and 40 C.F.R. § 19.4 authorize EPA to assess a civil penalty for violations of the SPCC regulations promulgated pursuant to Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), of up to \$16,000 per day for violations that occurred from December 6, 2013 through August 1, 2016, up to a maximum of \$187,500.

Factual Allegations and Alleged Violations

19. Respondent is a corporation with a place of business located at 3000 Gary Avenue, East Chicago, Indiana. Respondent is a person within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

20. Respondent is the owner and operator, within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of an onshore bulk oil storage facility located on the Respondent's place of business (Facility).

21. Oil from the Facility, in the event of a discharge, could reasonably be expected to flow and/or discharge to the Grand Calumet River, its shorelines, or adjacent wetlands.

22. The Facility has above-ground storage capacity greater than 1,320 gallons of oil in containers each with a shell capacity of at least 55 gallons.

23. The Grand Calumet River is a navigable water of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

24. Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products located at the Facility.

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

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

27. 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 of the United States or its adjoining shorelines in a harmful quantity, and is therefore subject to the SPCC regulations at 40 C.F.R. Part 112, Subparts A and B.

28. AC's operations commenced at the Facility in 1990.

29. On July 30, 2014, EPA inspected the Facility. At the time of the EPA inspection, the Facility had not prepared or implemented an SPCC Plan. In March 2016, EPA issued a Notice of Violation (NOV) to Respondent alleging violations of certain SPCC regulations.

30. 40 C.F.R. § 112.3 requires that the owner or operator of an SPCC-regulated facility prepare and implement a written SPCC plan in accordance with 40 C.F.R. § 112.7 and any other applicable section of 40 C.F.R. Part 112. At the time of the EPA inspection, AC had not prepared or implemented an SPCC Plan for the Facility, in violation of 40 C.F.R. § 112.3.

31. 40 C.F.R. § 112.7(c)(1) requires that appropriate containment, diversionary structures, or equipment be provided to prevent a discharge as described in 40 C.F.R. § 112.1(b). At the time of the EPA inspection, AC had not provided adequate containment for its various

bulk storage tanks, mobile/portable containers, and loading racks, in violation of 40 C.F.R. § 112.7(c)(1).

32. 40 C.F.R. § 112.7(h)(1) requires owners or operators of facilities with tank car and tank truck loading/unloading racks to use a quick drainage system for racks where rack drainage does not flow into a catchment basin or treatment facility designed to handle discharges, and requires that any containment system be designed to hold at least the maximum capacity of any single compartment of a tank car or tank truck loaded or unloaded at the facility. At the time of the EPA inspection, AC had not provided adequate containment for its loading racks, in violation of 40 C.F.R. § 112.7(h)(1).

33. 40 C.F.R. § 112.8(c)(2) requires the owner or operator of an onshore facility to construct all bulk storage tank installations so that a secondary means of containment for the entire capacity of the largest single container and sufficient freeboard for precipitation are provided, and that diked areas are sufficiently impervious to contain discharged oil. At the time of the EPA inspection, AC had not provided adequate secondary containment for each of its bulk storage tanks in use at the Facility, in violation of 40 C.F.R. §§ 112.8(c)(2) and 112.8(a).

34. 40 C.F.R. § 112.8(c)(6) requires, among other things, that the owner or operator of an onshore facility test each above ground container for integrity on a regular schedule, and whenever material repairs are made. At the time of the EPA inspection, AC did not test or maintain records for each above ground container at the Facility for integrity on a regular schedule, in violation of 40 C.F.R. § 112.8(c)(6).

Civil Penalty

35. Based on an analysis of the factors set forth in Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), and in the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (August 1998), taking into account the facts of this case and information submitted by Respondent, Complainant has determined that an appropriate civil penalty to settle this action is \$12,490. Respondent agrees to pay this amount as a civil penalty.

36. Within 30 days after the effective date of this CAFO, Respondent shall pay the \$12,490 by cashier's or certified check, or by electronic funds transfer (EFT). If paying by check, Respondent shall submit a cashier's or certified check, payable to "Environmental Protection Agency," and bearing the notation "OSLTF – 311" and the case name and docket number of this case. If the Respondent sends payment by check, the payment shall be addressed to:

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

If paying by EFT, Respondent shall transfer \$12,490 to:

Federal Reserve Bank of NY
ABA 021030004
Account 68010727
33 Liberty Street
New York, New York 10045

Field Tag 4200 of the EFT message shall read "D 68010727 Environmental Protection Agency." The comment or description field of the electronic funds transfer must state Respondent's name and the docket number of this CAFO.

37. This civil penalty is not deductible for federal tax purposes.

38. The Respondent shall submit copies of the check (or, in the case of an EFT transfer, copies of the EFT confirmation) to the following persons:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

Joseph Ulfig, P.E. (SC-5J)
Chemical Emergency Preparedness
and Prevention Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

Kevin Chow
Associate Regional Counsel (C-14J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

39. Failure by Respondent to timely pay this civil penalty may subject Respondent to a civil action to collect any unpaid portion of the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty pursuant to Section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H). In any such collection action, the validity, amount and appropriateness of the penalty agreed to herein shall not be subject to review.

Supplemental Environmental Project

40. Respondent must complete a supplemental environmental project (SEP) designed to protect human health and the environment by reducing the Facility's potential for an oil spill.

41. Respondent must install the following equipment at the Facility:

- a. Radar tank gauging systems at Tanks 19, 20, 21, 22, 23, 24, 25, and 26, including gauge heads, antennas, and ground level displays;
- b. An electronic inventory management system (EIMS) used to consolidate product information from each tank and deliver tank gauging, inventory

control and overfill protection, and alarm condition management for the entire tank field. The EIMS will be equipped with a field interface unit that will be configured to provide alarm sounds audible to operators both indoors and outdoors, and will be able to stop material transfer operations prior to a tank and/or tank truck overfill based on preset alarm conditions; and

- c. A touch panel tank monitor for the truck loading rack area that works with the EIMS to deliver continuous level information, alarm conditions, and tank status for the tanks referenced in Paragraph 41.a above.

42. Respondent must have engineering design and construction specifications completed for these projects within 60 days of the effective date of this CAFO.

43. Respondent must place a down payment for the purchase of raw materials and installation of this equipment with its vendor(s) no later than 90 days after the effective date of this CAFO.

44. Respondent must install, calibrate, conduct training of staff, and begin operation of this equipment no later than 240 days after the effective date of this CAFO.

45. Respondent must spend at least \$122,495 to complete the SEP and operate all components installed pursuant to the SEP for at least 5 years.

46. If Respondent ceases operation of any components installed pursuant to the SEP within 5 years of commencing operations, Respondent must notify EPA of that fact in writing by sending a report to Mr. Ulfig and Mr. Chow at the addresses specified in Paragraph 38, above.

47. Respondent certifies that it is not required to perform or develop the activities described in this SEP by any law, regulation, grant, order, or agreement, or as injunctive relief as of the date it signs this CAFO. Respondent further certifies that it has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

48. Respondent further certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP.

Respondent also certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of the signing of this CAFO (unless the project was barred from funding as statutorily ineligible). For purposes of this certification, the term “open federal financial assistance transaction” refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose performance period has not expired.

49. EPA may inspect the Facility at any time to monitor Respondent’s compliance with this CAFO’s SEP requirements.

50. Respondent must submit a SEP completion report to EPA within 60 days after beginning operation of the equipment, as described in paragraph 44. This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Itemized cost of goods and services used to complete the SEP, documented by copies of invoices, purchase orders, or canceled checks that specifically identify and itemize the individual costs of the goods and services;
- c. Certification that Respondent has completed the SEP in compliance with this CAFO; and
- d. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions, if feasible).

51. Respondent must submit all notices and reports required by this CAFO by first class mail to Mr. Joseph Ulfig, at the address provided in paragraph 38 above.

52. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its

officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

53. Following receipt of the SEP completion report described in paragraph 50 above,

EPA must notify Respondent in writing that:

- a. It has satisfactorily completed the SEP and the SEP report;
- b. There are deficiencies in the SEP as completed or in the SEP report, and EPA will give Respondent 30 days to correct the deficiencies. The parties may agree in writing to extend this 30 day period; or
- c. It has not satisfactorily completed the SEP, and EPA will seek stipulated penalties under paragraph 55 below.

54. If EPA exercises the option under paragraph 53.b above, Respondent may object in writing to the deficiency notice within 10 days of receiving the notice. The parties will have 30 days from EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, EPA will give Respondent a written decision on its objection. Respondent will comply with any requirement that EPA imposes in its decision. If Respondent does not complete the SEP as required by EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 55 below.

55. If Respondent violates any requirement of this CAFO relating to the SEP,

Respondent must pay stipulated penalties to the United States as follows:

- a. If Respondent does not complete the SEP satisfactorily according to the requirements of this CAFO, or halts or abandons work on the SEP, Respondent must pay an additional civil penalty of \$37,469. The penalty will accrue as of the date for completing the SEP or the date performance ceases, whichever is earlier.

- b. If Respondent does not complete the SEP satisfactorily according to the requirements of this CAFO, but EPA determines that Respondent made good faith and timely efforts to complete the SEP and certifies, with supporting documents, that it has spent at least 90 percent of the amount set forth in paragraph 45 above, Respondent will not be liable for any stipulated penalty under subparagraph a. above.
- c. If Respondent completes the SEP satisfactorily according to the requirements of this CAFO, but spends less than 90 percent of the amount set forth in paragraph 45 above, Respondent must pay an additional civil penalty in the amount of the difference between the amount set forth in paragraph 45 above and the amount that Respondent spent to complete the SEP.
- d. If Respondent fails to comply with the schedule in paragraphs 42 to 44 above for implementing the SEP, or fails to submit timely the SEP completion report required by paragraph 50, Respondent must pay stipulated penalties for each failure to meet an applicable milestone, as follows:

<u>Penalty per violation per day</u>	<u>Period of violation</u>
\$ 250	1st through 20th day
\$ 500	21st through 30th day
\$ 750	31st day and beyond

These penalties will accrue from the date Respondent was required to meet each milestone until it achieves compliance with the milestone.

56. EPA's determination of whether Respondent satisfactorily completed the SEP and whether Respondent made good faith and timely efforts to complete the SEP will bind Respondent.

57. Respondent must pay any stipulated penalties within 15 days of receiving EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraph 36, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

58. Any public statement that Respondent makes referring to the SEP must include the following language, "Asphalt Cutbacks, Inc. undertook this project under the settlement of

the United States Environmental Protection Agency's enforcement action against Asphalt Cutbacks, Inc. for violations of Section 311 of the Clean Water Act, 33 U.S.C. § 1321, and 40 C.F.R. Part 112."

59. If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:

- a. Respondent must notify EPA in writing within 10 days after learning of an event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay, and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.
- b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.
- c. If EPA does not agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, EPA will notify Respondent in writing of its decision, and any delays in completing the SEP will not be excused.
- d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased cost for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

General Provisions

60. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in this CAFO and the NOV.

61. This CAFO does not affect the rights of the Administrator or the United States to pursue applicable injunctive or other equitable relief or criminal sanctions for any other violations of law not alleged in this CAFO or in the NOV.

62. This CAFO does not affect Respondent's responsibility to comply with the Act, the SPCC Rules of 40 C.F.R. Part 112, and any other applicable federal, state and local laws.

63. Compliance with this CAFO shall not be a defense to any action subsequently commenced pursuant to federal laws and regulations administered by the EPA.

64. Respondent certifies that it has addressed the violations alleged in the NOV, and is now in compliance with Section 311 of the Act, 33 U.S.C. § 1321 and its implementing regulations.

65. Respondent does not admit any liability to EPA arising out of matters alleged in this CAFO and the NOV.

66. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31 and the August 1998 CWA Penalty Policy.

67. The CAFO shall be binding upon Respondent and Respondent's officers, directors, agents, servants, employees, and successors or assigns.

68. The CAFO does not constitute a waiver, suspension, or modification of the requirements of Section 311 of the Act, 33 U.S.C. § 1321, or any regulations promulgated thereunder.

69. If Respondent fails to comply with this CAFO, Respondent waives any rights it may possess in law or equity to challenge the authority of the EPA to bring a civil action in the appropriate United States District Court to compel compliance with this CAFO and/or seek an additional penalty for non-compliance with the CAFO.

70. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this CAFO.

71. EPA has provided a thirty (30) day opportunity for public notice and comment on this proposed CAFO pursuant to Section 311(b)(6)(C)(i) of the Act, 33 U.S.C. § 1321(b)(6)(C)(i), and 40 C.F.R. § 22.45(b).

72. Complainant reserves the right, pursuant to 40 C.F.R. § 22.45(c)(4)(iii), to withdraw this CAFO within 15 days of receipt of a Commenter's petition requesting, pursuant to 40 C.F.R. § 22.45(c)(4)(ii), that the Regional Administrator set aside the CAFO on the basis of material evidence not considered.

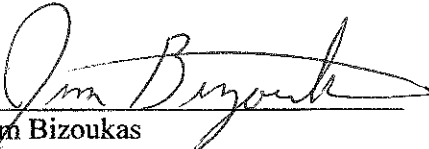
73. The undersigned representative of each Party to this CAFO certifies that he or she is duly authorized by the Party he or she represents to enter into the terms and bind that Party to them.

74. This CAFO shall become effective on the date it is filed with the Regional Hearing Clerk, Region 5.

**Consent Agreement and Final Order
In the Matter of: Asphalt Cutbacks, Inc.**

Asphalt Cutbacks, Inc., Respondent

Date: 3/23/17



Jim Bizoukas
Director of Operations
Asphalt Cutbacks, Inc.

**Consent Agreement and Final Order
In the Matter of: Asphalt Cutbacks, Inc.**

U.S. Environmental Protection Agency, Complainant

Date: 3/30/2017



Margaret M. Guerriero
Acting Director
Superfund Division
U.S. Environmental Protection Agency
Region 5

In the Matter of: Asphalt Cutbacks, Inc.

Docket No.: CWA-05-2017-0007

FINAL ORDER

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Date: _____

Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5