

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TX

FILED
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REGIONAL HEARING CLERK
EPA REGION VI

IN THE MATTER OF:

WHOLE FOODS MARKET ROCKY
MOUNTAIN/SOUTHWEST LP

RESPONDENT

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Consent Agreement and Final Order
USEPA Docket No. RCRA-06-2016-0908

CONSENT AGREEMENT AND FINAL ORDER

I.

PRELIMINARY STATEMENT

1. This Consent Agreement and Final Order (“CAFO”) is entered into by the United States Environmental Protection Agency, Region 6 (“EPA” or “Complainant”) and Respondent, Whole Foods Market Rocky Mountain/Southwest LP, (“Whole Foods” or “Respondent”) and concerns two (2) facilities.
2. The two (2) facilities (the “Facilities”) covered by this CAFOs are:
 - A. The facility located at 501 Bowman Road, Little Rock, Arkansas 72211; and
 - B. The facility located at 3425 N. College Ave, Fayetteville, Arkansas 72703.
3. Notice of this action has been given to the State of Arkansas, under Section 3008(a)(2) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6928(a)(2).
4. For the purpose of these proceedings, Respondent admits the jurisdictional allegations herein; however, Respondent neither admits nor denies the specific factual allegations and alleged violations contained in this CAFO.

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5. Respondent explicitly waives its right to appeal the proposed final order contained in this CAFO. Respondent does not waive any claims or defenses Respondent has to the interpretation of the CAFO or its terms.
6. The CAFO resolves only those violations which are alleged herein.
7. This CAFO covers the period of April 1, 2010 through the effective date of the CAFO, and the period set forth in Section IV, Compliance Order, Paragraph 39.
8. Respondent consents to the issuance of the CAFO hereinafter recited, consents to the assessment and payment of the stated civil penalty in the amount and by the method set out in this CAFO, and consents to the specific stated compliance order set forth in Section IV, Compliance Order, Paragraph 39.
9. For purposes of this CAFO, where no differences exist, citations to 40 Code of Federal Regulations ("C.F.R.") Parts 260, 261, 262, and 273 is a citation to the corresponding Arkansas Administrative Code sections in the Arkansas Pollution Control Ecology Commission's Regulation No. 23 since the relevant sections in Regulation No. 23 mirror the corresponding federal regulations.

II. JURISDICTION

10. This CAFO is issued by the EPA pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928, as amended by the Hazardous and Solid Waste Amendments of 1984 and is simultaneously commenced and concluded through the issuance of this CAFO under 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).
11. Respondent agrees to undertake and complete all actions required by the terms and conditions of this CAFO. In any action by the EPA or the United States to enforce the terms of this CAFO, Respondent agrees not to contest the authority or jurisdiction of the EPA to

issue or enforce this CAFO, and agrees not to contest the validity of this CAFO or its terms or conditions.

III.

FACTUAL ALLEGATIONS AND ALLEGED VIOLATIONS

12. Respondent is a Texas limited partnership, authorized to do business on January 16, 2008 in the State of Arkansas.
13. Respondent is a “person” within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.
14. Whole Foods owns and/or operates the Facilities identified in Paragraph 2.
15. On June 11, 2014, the New Mexico Environment Department, Hazardous Waste Bureau, (“NMED”) conducted an inspection at a Whole Foods’ facility in the State of New Mexico (“Inspection”).
16. On August 26, 2014 the NMED referred the matter to the EPA for further investigation and enforcement.
17. During the period of August 2014 through August 2015, EPA conducted a RCRA investigation and record review of Whole Foods’ activities as a generator of hazardous waste in the state of Arkansas, including the issuance of a RCRA information request dated August 18, 2015 (“Investigation”).
18. On November 24, 2015, Whole Foods provided the EPA with a response to the RCRA 3007 information request.
19. From the Investigation, EPA concluded that in general Whole Foods has customer returns and expired products that are “solid waste” within the meaning of 40 C.F.R. § 261.2.
20. From the Investigation, EPA concluded that Whole Foods, at a minimum, generated hazardous waste having the:

- A. Characteristic of ignitability (D001) and corrosivity (D002); and
 - B. Characteristic of toxicity (D007, D010, D009, and D011).
21. From the Investigation, EPA did not identify any spills, leaks or releases at or from the Facilities.
22. The Facilities are each a “facility” within the meaning of 40 C.F.R. § 260.10.
23. EPA concluded that the Facilities have some or all the waste streams listed in Paragraph 20.
24. The waste streams identified in Paragraph 20 are “hazardous waste” as provided in 40 C.F.R. §§ 261.3, 261.21, 261.22 and 261.24.
25. From the Investigation, EPA concluded that Whole Foods failed to make a sufficient hazardous waste determination of its solid waste streams as is required by 40 C.F.R. § 262.11(c).
26. From the Investigation, EPA concluded that Whole Foods has insufficient records for its hazardous waste determination as is required by 40 C.F.R. § 262.40(c).
27. From the Investigation, EPA concluded that Whole Foods is a “small quantity handler of universal waste” as this term is defined in 40 C.F.R. § 273.9.
28. From the Investigation, EPA concluded that Whole Foods has violated one or more of the universal waste requirements set forth at 40 C.F.R. §§ 273.13 through 273.16.
29. Whole Foods is a “generator” of “hazardous waste” as those terms are defined in 40 C.F.R. § 260.10.
30. As a generator of hazardous waste, Whole Foods is subject to Sections 3002 and 3010 of RCRA, 42 U.S.C. §§ 6922 and 6930, and 40 C.F.R. Part 262.

Claim i. Failure to make Hazardous Waste Determinations

31. The allegations in Paragraphs 1-30 are realleged and incorporated herein by reference.
32. Pursuant to 40 C.F.R. § 262.11(c), a person who generates a solid waste, as defined in 40 C.F.R. § 261.2, must determine if the waste is hazardous either by applying the required test method or by applying its knowledge of the hazardous characteristic of the waste in light of the materials or the processes used.
33. For the relevant periods of this CAFO, Respondent failed to make a hazardous waste determination on all its waste streams at the Facilities.
34. Respondent violated the requirements of RCRA and the regulations promulgated at 40 C.F.R. § 262.11(c) by failing to make the requisite hazardous waste determination on all its solid waste streams generated by Respondent at the Facilities.

Claim ii. Failure to Comply with the Universal Waste Requirements

35. The allegations in Paragraphs 1-34 are realleged and incorporated herein by reference.
36. Pursuant to 40 C.F.R. § 273.10, a small handler of universal waste must comply with 40 C.F.R. §§ 273.13 through 273.16.
37. During the Investigation, EPA concluded that Whole Foods has not complied with all requirements set forth at 40 C.F.R. §§ 273.13 through 273.16.
38. During the period of 2010 through 2015, Whole Foods handled universal waste in violation of 40 C.F.R. §§ 273.13 through 273.16.

IV.
COMPLIANCE ORDER

39. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is hereby ordered to take the following actions, and within one hundred and eighty (180) calendar

days of the effective date of this Order, Respondent shall provide in writing the following to EPA:

- A. Respondent shall certify that it has assessed all its solid waste streams at each Facility to determine the accurate waste codes and has developed and implemented standard operating procedures ("SOPs") for each Facility to ensure that Whole Foods is operating in compliance with RCRA and the regulations promulgated thereunder, including, but not limited to, procedures for: (a) making hazardous waste determinations; (b) managing hazardous wastes; (c) reporting, transporting, and disposing of hazardous waste; (d) preparing its manifests; and (e) meeting the requirements of the land disposal restrictions. The Respondent's SOPs for each Facility shall also ensure that Whole Foods is operating in compliance with the universal waste rules set forth at 40 C.F.R. §§ 273.13 through 273.16;
- B. Respondent shall certify that it has accurately and adequately complied with its RCRA Section 3010 Notification, where applicable, for each Facility and within the prescribed time period, pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930; and
- C. Respondent shall provide, with its certification, a copy of Respondent's SOPs as described in subparagraph A above, which EPA shall maintain as business confidential records.

40. In all instances in which this CAFO requires written submission to EPA, the submittal made by Respondent shall be signed by an owner or officer of Whole Foods and shall include the following certification:

"I certify under the penalty of law that this document and all its attachments were prepared by me or under my direct supervision in accordance with a system designed to

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assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

Copies of all documents required by this CAFO shall be sent to the following:

U.S. Environmental Protection Agency
Compliance Assurance and Enforcement Division
Waste Enforcement Branch
Waste Compliance III Section (6EN-H3)
1445 Ross Avenue
Dallas, TX 75202-2733
Attn: Gabriel Salinas

In the alternative, documents required by this CAFO may be sent to Gabriel Salinas via email at Salinas.Gabriel@epa.gov.

V.
TERMS OF SETTLEMENT

i. Penalty Provisions

41. Pursuant to the authority granted in Section 3008 of RCRA, 42 U.S.C. § 6928, and upon consideration of the entire record herein, including the above referenced Factual Allegations and Alleged Violations, which are hereby adopted and made a part hereof, upon the seriousness of the alleged violations, and Respondent’s good faith efforts to comply with the applicable regulations, it is ordered that Respondent be assessed a civil penalty of One Hundred and One Thousand Nine Hundred and Seventy Dollars (\$101, 970).
42. The penalty shall be paid within thirty (30) calendar days of the effective date of this CAFO and made payable to the Treasurer United States.

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43. The following are Respondent's options for transmitting the penalties:

Regular Mail, U.S. Postal Mail (including certified mail) or U.S. Postal Service Express

Mail, the check should be remitted to:

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

Overnight Mail (non-U.S. Postal Service), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
US EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GI.
St. Louis, MO 63101
314-418-1028

Wire Transfer:

Federal Reserve Bank of New York
ABA: 021030004
Account No. 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

The case name and docket number (In the Matter of Whole Foods Market Rocky

Mountain/Southwest LP, (Docket No. RCRA-06-2016-0908)) shall be clearly

documented on or within Respondent's chosen method of payment to ensure proper
credit.

44. The Respondent shall send a simultaneous notice of such payment to the following:

Lorena S. Vaughn
Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

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Mark Potts, Chief
Waste Enforcement Branch (6EN-H)
Compliance Assurance and Enforcement Division
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733
Attention: Gabriel Salinas

Adherence to this request will ensure proper credit is given when penalties are received by EPA.

45. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue on the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid within thirty (30) calendar days of the civil penalty's due date and will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). EPA will also assess a \$15.00 administrative handling charge for administrative costs on unpaid penalties for the thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period the penalty remains unpaid. In addition, a penalty charge of up to six percent per year will be assessed monthly on any portion of the debt which remains delinquent more than ninety (90) days. 40 C.F.R. § 13.11(b). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

ii. Cost

46. Each party shall bear its own costs and attorney's fees. Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under the Equal Access to Justice Act (5 U.S.C. § 504), as amended by the Small Business Regulatory Enforcement Fairness Act (P.L. 104-121), and any regulations promulgated pursuant to those Acts.

iii. Termination and Satisfaction

47. When Respondent believes that it has complied with all the requirements of this CAFO, including compliance with the Compliance Order and payment of the civil penalty, Respondent shall so certify in writing and in accordance with the certification language set forth in Section IV (Compliance Order), Paragraph 40. Unless EPA objects in writing within sixty (60) days of EPA's receipt of Respondent's certification, then this CAFO is terminated on the basis of Respondent's certification.

48. This CAFO resolves the claims set forth in Section III, Factual Allegations and Alleged Violations, and Whole Foods, and its officers, directors, employee, and affiliated entities are released from civil liabilities as provided in 40 C.F.R. §§ 22.18(c) and 22.31 upon the termination of this CAFO.

iv. Effective Date of Settlement

49. This CAFO shall become effective upon filing with the Regional Hearing Clerk.

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**THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS CONSENT
AGREEMENT AND FINAL ORDER:**

FOR THE RESPONDENT:

Date: 9-12-16


Whole Foods Market Rocky
Mountain/Southwest LP

FOR THE COMPLAINANT:

Date: 9.19.16


John Blevins
Director
Compliance Assurance and
Enforcement Division

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FINAL ORDER

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing CAFO is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged herein. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. The Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the CAFO. Pursuant to 40 C.F.R. § 22.31(b) this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Date: 9/19/16



Thomas Rucki
Regional Judicial Officer

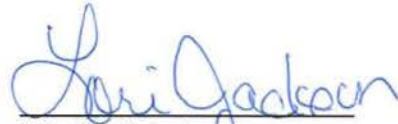
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CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of Sept, 2016, the original of the foregoing Consent Agreement and Final Order was hand delivered to the Regional Hearing Clerk, U.S. EPA - Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and that a true and correct copy of the CAFO was sent to the following by the method identified below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Whole Foods Market Rocky Mountain/Southwest LP
c/o Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703


Ms. Lori Jackson
Paralegal