



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUN 11 2012

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

James Dykema, President
Dykema Excavators, Incorporated
1730 Three Mile Road, N.E.
Grand Rapids, Michigan 49505

Dear Mr. Dykema:

Enclosed is a file-stamped Consent Agreement and Final Order (CAFO) which resolves EPA's September 13, 2011 Notice and Finding of Violation against Dykema Excavators, Incorporated, Docket No. CAA-05-2012-0030. As indicated by the filing stamp on its first page, we filed the CAFO with the Regional Hearing Clerk on JUN 14 2012.

Pursuant to paragraph 73 of the CAFO, Dykema Excavators, Incorporated must pay \$20,310 of the civil penalty within 30 days of the date CAFO was filed. Your check must display the case name Dykema Excavators, Incorporated, the docket number, CAA-05-2012-0030, and the billing document number, 2751203A032.

Please direct any questions regarding this case to Susan Tennenbaum, 312-886-0273.

Sincerely yours,

A handwritten signature in cursive script that reads "Sara Breneman".

Sara Breneman, Chief
Air Enforcement and Compliance Branch (MI/WI)

Enclosure

Cc: Heidi Hollenbach, District Supervisor, Grand Rapids District Office, MDEQ
Tom Hess, Chief, Air Quality Division, MDEQ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:) Docket No. CAA-05-2012-0030
)
Dykema Excavators, Incorporated) Proceeding to Assess a Civil Penalty
Grand Rapids, Michigan) Under Section 113(d) of the Clean Air Act
) 42 U.S.C. § 7413(d)
)
)
Respondent.)

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Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d), and Sections 22.1(a)(2), 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. Part 22.
2. Complainant is the Director of the Air and Radiation Division, U.S. Environmental Protection Agency, Region 5.
3. Respondent is Dykema Excavators, Inc., a corporation doing business in Michigan.
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). 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 entry of this CAFO and the assessment of the specified civil penalty, and agrees to comply with 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 the CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA for approval a State Implementation Plan (SIP) that provides for the implementation, maintenance, and enforcement of the National Ambient Air Quality Standards (NAAQS). Pursuant to Section 113(a) and (b) of the Act, 42 U.S.C. § 7413(a) and (b), upon EPA approval, SIP requirements are federally enforceable under Section 113.

10. On May 6, 1980, EPA approved Michigan Rule 336.1201 as part of the federally enforceable Michigan SIP. 45 *Fed. Reg.* 29790 (May 6, 1980).

11. R 336.1201 of the Michigan SIP states, "a person shall not install, construct, reconstruct, relocate, or alter any process, fuel-burning, or refuse-burning equipment, or control equipment pertaining thereto, which may be a source of an air contaminant, until a permit is issued by the commission. This shall be known as a permit to install and shall cover construction, reconstruction, relocation, and alteration of equipment where such is involved."

12. "Process" means an action, operation, or a series of actions or operations that emits or has the potential to emit an air contaminant. "Process equipment" means "all equipment, devices, and auxiliary components, including air pollution control equipment, stacks, and other emission points, used in a process. R336.1116(n), General Provisions Definitions, which is part of the federally enforceable SIP for Michigan. 57 *Fed. Reg.* 24752 (June 11, 1992).

13. The Michigan SIP defines “air contaminant” as “a dust, fume, gas, mist, odor, smoke, vapor any combination thereof.” R 336.1101(c) 57 *Fed. Reg.* 24752 (June 11, 1992).

14. “Particulate matter” means “any air contaminant existing as a finely divided liquid or solid, other than uncombined water, as measured by a reference test specified in R336.2004(5) or by an equivalent or alternative method.” R336.1116(b). 57 *Fed. Reg.* 24752 (June 11, 1992).

15. On November 17, 1975, under Section 111(b) of the Act, 42 U.S.C. § 7411(b), EPA promulgated the NSPS General Provisions at 40 C.F.R. Part 60, Subpart A. 40 *Fed. Reg.* 53346 (Nov.17, 1975). The rule was then amended at 55 *Fed. Reg.* 51382 (Dec. 13, 1990), 59 *Fed. Reg.* 12427 (March 16, 1994) and 62 *Fed. Reg.* 52641 (Oct. 8, 1997). 40 C.F.R. Part 60, Subpart A, applies to the owner or operator of any stationary source which contains an affected facility, the construction or modification of which is commenced after the date of publication in this part of any standard.

16. On August 1, 1985, EPA promulgated the “Standards of Performance for Nonmetallic Mineral Processing Plants,” codified at 40 C.F.R. Part 60, Subpart OOO, 51 *Fed. Reg.* 31337 (Aug. 1, 1985), as amended at 54 *Fed. Reg.* 6680 (June 9, 1997).

17. A “stationary source” under the NSPS means “any building, structure, facility, or installation which emits or may emit any air pollutant.” 40 C.F.R. § 60.2.

18. An “affected facility” under the NSPS means, with reference to a stationary source, any apparatus to which a standard is applicable. 40 C.F.R. § 60.2.

19. Subpart OOO applies to the following affected facilities, which commenced construction, reconstruction, or modification after August 31, 1983, in fixed or portable nonmetallic mineral processing plants: each crusher, grinding mill, screening operation, bucket elevator, belt

conveyor, bagging operation, storage bin, enclosed truck or railcar loading station.

40 C.F.R. § 60.670.

20. An “owner or operator” under the NSPS means any person who owns, leases, operates, controls, or supervises an affected facility or a stationary source of which an affected facility is a part. 40 C.F.R. § 60.2.

21. “Startup” under the NSPS means “the setting in operation of an affected facility for any purpose.” 40 C.F.R. § 60.2.

22. The NSPS, at 40 C.F.R. § 60.7(a)(3) and at 40 C.F.R. § 60.676(i), requires owners or operators subject to the NSPS to furnish to the Administrator a written notification of the actual date of initial startup of an affected facility, postmarked within 15 days after such date. 40 C.F.R. § 60.676(i)(2) states that for portable aggregate processing plants, the notification shall include both the home office and the current address or location of the portable plant.

23. Under 40 C.F.R. § 60.4 and 40 C.F.R. § 60.676(k), the written notifications described in Paragraph 22, above, are to be submitted to the Michigan Department of Environmental Quality (MDEQ), as the state which has been delegated authority according to 40 C.F.R. § 60.4(b).

24. Section 113(d)(1) limits the Administrator’s authority to matters where the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action, except where the Administrator and Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

25. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violations alleged in this CAFO.

Factual Allegations and Alleged Violations for Dykema Excavators

26. At all times relevant to this Order, Dykema was the owner and/or operator of a portable nonmetallic mineral processing plant (facility) headquartered in Grand Rapids, Michigan.

27. The facility commenced construction and operation after August 31, 1983, and is therefore subject to the NSPS General Provisions at 40 C.F.R. Part 60, Subpart A, and the Standards of Performance for Nonmetallic Mineral Processing Plants, codified at 40 C.F.R. Part 60, Subpart OOO.

28. Dykema's portable nonmetallic mineral processing plant is a "portable aggregate processing plant" within the meaning of 40 C.F.R. § 60.676(i)(2).

29. Dykema is a "person," as that term is defined in R 336.1116(g), General Provisions Definitions, which is part of the federally enforceable SIP for Michigan.

30. Dykema's portable nonmetallic mineral processing equipment is "process equipment," as that term is defined in R 336.1116(n).

31. Each of the stationary sources at Dykema's portable nonmetallic mineral processing plant emits or may emit particulate matter (PM), an air contaminant under the Michigan SIP and a criteria pollutant under the Act. 69 *Fed. Reg.* 63111 (October 29, 2004).

32. Dykema's portable nonmetallic mineral process is a "process" subject to R 336.1201 of the Michigan SIP.

33. MDEQ issued to Dykema a Permit to Install, Permit Number 290-00, on September 7, 2000. On August 24, 2011 the permit was reissued as Permit Number 73-11.

34. Since 2005, Dykema has relocated its portable nonmetallic mineral processing plant among the three locations listed below:

- a. Plant 16; 1405 Taylor Road, Jenison, Michigan
- b. Plant 18; 3800 Seven-Mile Road, Belmont, Michigan
- c. Georgia Pacific, 1709 Butterworth Street, Grand Rapids, Michigan

35. On January 1, 2005, Dykema's nonmetallic mineral processing plant was located at Plant 16. Since that time, it relocated to the locations listed below on the dates listed:

- a. Plant 18; May 9, 2005
- b. Georgia Pacific; October 24, 2005
- c. Plant 18; May 12, 2006
- d. Georgia Pacific; November 6, 2006
- e. Plant 18; May 4, 2007
- f. Georgia Pacific; September 10, 2008
- g. Plant 18; June 25, 2009
- h. Georgia Pacific; September 21, 2009
- i. Plant 18; May 24, 2010

36. Each relocation constituted a "startup" as defined in 40 C.F.R. §§ 60.2 and 60.676(i)(2), requiring written notification to the Administrator of EPA or the MDEQ.

37. Each relocation of Dykema's nonmetallic mineral processing plant required a Permit to Install under Michigan SIP R 336.1201.

38. Dykema violated the NSPS at 40 C.F.R. §§ 60.7(a)(3) and 60.676(i) because the company did not provide MDEQ a notification of the date of initial startup after each relocation of the nonmetallic mineral processing plant, listed in Paragraph 35, above. Each failure to notify MDEQ of the date of initial startup of an affected facility is a separate violation of 40 C.F.R. §§ 60.7(a)(3) and 60.676(i). The violation began on the installation dated listed above and lasted until Permit to Install applications were received by the Michigan Department of Environmental Quality on October 27, 2010.

39. Dykema violated the Michigan SIP at Rule 336.1201 because the company did not submit an application for a Permit to Install to MDEQ before initial startup after each relocation of the nonmetallic mineral processing plant, listed in Paragraph 35, above. Each failure to submit a Permit to Install application is a separate violation of the Michigan SIP at Rule 336.1201. The violation began on the installation dated listed above and lasted until Permit to Install applications were received by the Michigan Department of Environmental Quality on October 27, 2010.

40. Dykema Excavators was notified of these violations in a Notice of Violation/Finding of Violation issued by EPA on September 13, 2011.

Civil Penalty

41. In consideration of Respondent's cooperation during the settlement process, and its agreement to perform a supplemental environment project (SEP) as described below, Complainant agrees to mitigate the proposed penalty of \$81,239 to \$20,310.

42. Based on analysis of the factors specified in Section 113(e) of the Act, 42 U.S.C. § 7413(e), the facts of this case and cooperation, Complainant has determined that an appropriate civil penalty to settle this action is \$20,310.

43. Within 30 days after the effective date of this CAFO, Respondent must pay a \$20,310 civil penalty by sending a cashier's or certified check payable to the "Treasurer, United States of America," by regular U.S. Postal Service mail to:

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

or by express mail to:

U.S. Bank
Government Lockbox 979077 U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

The check must note the case name, docket number of this CAFO and the billing document number.

44. A transmittal letter stating Respondent's name, complete address, the case docket number, and the billing document number must accompany the payment. Respondent must send a copy of the check and transmittal letter to the following three addresses:

Attn: Regional Hearing Clerk, (E-19J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Attn: Compliance Tracker, (AE-17J)
Air Enforcement and Compliance Assurance Branch
Air and Radiation Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Susan Tennenbaum, (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

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

46. If Respondent does not pay timely the civil penalty, EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and the United States' enforcement expenses for the collection action under Section 113(d)(5) of

the Act, 42 U.S.C. § 7413(d)(5). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

47. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue according to Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). This nonpayment penalty will be 10 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter.

Supplemental Environmental Project

48. Respondent must complete a supplemental environmental project (SEP) designed to protect the public health by reducing NO_x emissions caused through burning diesel fuel at the facility's generator.

49. Dykema shall complete a SEP that entails the complete elimination of its use of a diesel generator at its 1709 Butterworth Street, Grand Rapids, Michigan location by carrying out a conversion of the plant power source from diesel fuel to electrical energy. This will require an upfront payment to the electric utility for transmission costs and to the electric company hired by Dykema for the design, engineering and installation of all conversion equipment required for the plant. Additionally, Dykema must perform site preparation work for this project.

50. Dykema shall complete this SEP by September 26, 2012.

51. The SEP shall be operated, as in the normal course of business, during the lifetime of the facility.

52. Respondent must spend at least \$80,000 to convert the Dykema plant to operate on electric power.

53. Respondent certifies that it is not required to perform or develop the 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.

54. EPA may inspect the facility at any time to monitor Respondent's compliance with this CAFO's SEP requirements.

55. Respondent must submit a SEP completion report to EPA by November 31, 2012.

This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Description of any operating problems and the actions taken to correct the problems;
- c. 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 cost of the goods and services;
- d. Certification that Respondent has completed the SEP in compliance with this CAFO; and
- e. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions, if feasible).

56. By November 30, 2013, Respondent must submit a status report of the operation of the converted Grand Rapids plant.

57. Respondent must submit all notices and reports required by this CAFO by first class mail to the Compliance Tracker in the Air Enforcement and Compliance Assurance Branch at the address provided in paragraph 44, above.

58. 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.

59. Following receipt of the SEP completion report described in paragraph 55, 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; or
- c. It has not satisfactorily completed the SEP or the SEP report and EPA will seek stipulated penalties under paragraph 60.

60. If EPA exercises option 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 60, below.

61. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

- a. Except as provided in subparagraph b, below, if Respondent did not complete the SEP satisfactorily according to the requirements of this CAFO, including the schedule in paragraph 50, Respondent must pay a penalty of \$30,000.

- b. If Respondent did not complete the SEP satisfactorily, but EPA determines that Respondent made good faith and timely efforts to complete the SEP and certified, with supporting documents, that it spent at least 90 percent of the amount set forth in paragraph 52, Respondent will not be liable for any stipulated penalty under subparagraph a, above.
- c. If Respondent completed the SEP satisfactorily, but spent less than 90 percent of the amount set forth in paragraph 52, Respondent must pay a penalty of \$6,000.
- d. If Respondent did not submit timely the SEP completion report required by paragraph 55, Respondent must pay penalties in the following amounts for each day after the report was due until it submits the report:

<u>Penalty per violation per day</u>	<u>Period of violation</u>
\$100	1 st through 14 th day
\$200	15 th through 30 th day
\$500	31 st day and beyond

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

63. 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 43, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

64. Any public statement that Respondent makes referring to the SEP must include the following language, "Dykema undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against Dykema for violations of the New Source Performance Standard for Non-Metallic Mineral Processing Plants and the Michigan State Implementation Plan."

65. 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 costs 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.

66. For federal income tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any cost or expenditures incurred in performing the SEP.

General Provisions

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

68. The effect of the settlement described in paragraphs 41 – 66, above, is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 49 of this CAFO and Respondent's letter dated March 19, 2012.

69. The CAFO does not affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

70. This CAFO does not affect Respondent's responsibility to comply with the Act and other applicable federal, state, and local laws. Except as provided in paragraph 64, above,

compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by Complainant.

71. Respondent certifies that it is complying fully with 40 C.F.R. §§ 60.670 through 60.676, and Rule 336.1201 of the Michigan SIP.

72. This CAFO constitutes an “enforcement response” as that term is used in EPA’s *Clean Air Act Stationary Source Civil Penalty Policy* to determine Respondent’s “full compliance history” under Section 113(e) of the Act, 42 U.S.C. § 7413(e).

73. The terms of this CAFO bind Respondent, its successors, and assigns.

74. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

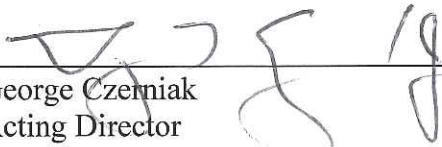
75. Each party agrees to bear its own costs and attorneys’ fees in this action.

76. This CAFO constitutes the entire agreement between the parties.

United States Environmental Protection Agency, Complainant

6/6/17

Date



George Czerniak
Acting Director
Air and Radiation Division
U.S. Environmental Protection
Agency, Region 5

CONSENT AGREEMENT AND FINAL ORDER

In the Matter of:

Dykema Excavators, Inc.

Docket No. CAA-05-2012-0030

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.

June 11, 2012
Date



Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency, Region 5

In the Matter of:
Dykema Excavators, Incorporated
Docket No. CAA-05-2012-0030

Certificate of Service

Luella Shaffner,

I, ~~Tracy Jamison~~, certify that I filed the original and one copy of the Consent Agreement and Final Order in this matter with the Regional Hearing Clerk (E-13J), United States Environmental Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that mailed by Certified Mail, Receipt No. _____, the second original to Respondent, addressed as follows:

Joel Dykema, Environmental Manager
Dykema Excavators, Incorporated
1730 Three Mile Road, N.E.
Grand Rapids, Michigan 49505

and that I delivered a correct copy by intra-office mail, addressed as follows:

Heidi Hollenbach, District Supervisor
Grand Rapids District Office
Michigan Department of Environmental Quality
State Office Building, 5th Floor
350 Ottawa Avenue NW, Unit 10
Grand Rapids, Michigan 49503-2341

Tom Hess, Chief
Michigan Department of Natural Resources and Environment
Air Quality Division
P.O. Box 30260
Lansing, Michigan 48909

John Breslin, Acting Regional Judicial Officer (C-14J)
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

On this 14 day of June, 2012.

Luella Shaffner

Tracy Jamison
Office Automation Assistant
Planning and Administration Section

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