



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2013 APR -4 AM 11:11

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DENVER, CO 80202-1129
Phone 800-227-8917
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FILED
EPA REGION VIII
HEARING CLERK

DOCKET NO.: CAA-08-2013-0009

IN THE MATTER OF:

ABE – SOUTH DAKOTA, LLC.
694 West Park Avenue
Huron, South Dakota 57350

RESPONDENT

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FINAL ORDER

Pursuant to 40 C.F.R. §22.13(b) and 22.18, of EPA’s Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondent is hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondent of this Consent Agreement and Final Order.

SO ORDERED THIS 4th DAY OF April, 2013.

Elyana R. Sutin
Regional Judicial Officer

UNITED STATES
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IN THE MATTER OF:)
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ABE – South Dakota, LLC)
694 West Park Avenue)
Huron, South Dakota 57350)
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Respondent)
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**COMBINED COMPLAINT AND
CONSENT AGREEMENT**

DOCKET NO. : CAA-08-2013-0009

1. This civil administrative enforcement action is issued to ABE – South Dakota, LLC (Respondent) pursuant to section 113(a)(3)(B) of the Clean Air Act (CAA), 42 U.S.C. § 7413(a)(3)(B), for alleged violations of the implementing regulations associated with the “Prevention of Accidental Releases” requirements of section 112(r) of the CAA, 42 U.S.C. § 7412(r). This proceeding is subject to the Environmental Protection Agency’s (EPA) *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits* (Rules of Practice), 40 C.F.R. part 22. Pursuant to section 113(d)(1)(C) of the CAA, 42 U.S.C. § 7413(d)(1)(C), the Department of Justice and the EPA have jointly determined that this matter is appropriate for handling as an administrative penalty action.
2. The undersigned EPA official has been properly delegated the authority to issue this action.
3. 40 C.F.R. § 22.13(b) provides that where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a Combined Complaint and Consent Agreement (CCCA).

4. The parties agree that the settling of this action and refraining from the adjudication of any issue of fact or law, with regard to the issues herein, is in their interest and in the public interest.

5. Respondent consents to the terms of this CCCA, including the assessment of the civil penalty specified below.

JURISDICTION AND WAIVER OF RIGHT TO HEARING

6. Respondent admits the jurisdictional allegations in this CCCA and neither admits nor denies all remaining allegations herein.

7. Respondent waives any and all claims for relief, and otherwise available rights to judicial or administrative review or other remedies which the Respondent may have, with respect to any issue of fact or law or any terms and conditions set forth in this CCCA, including any right of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.

STATUTORY AND REGULATORY FRAMEWORK

8. Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), authorizes the Administrator to promulgate regulations regarding the prevention and detection of accidental releases of designated chemicals. Section 112(r)(7)(B) of the CAA, 42 U.S.C. § 7412(r)(7)(B), requires the Administrator to promulgate regulations requiring the owners or operators of stationary sources where a regulated substance is present above a threshold quantity to prepare a risk management plan (RMP) to prevent or minimize risks of accidental releases of those designated substances. The regulations promulgated by EPA pursuant to CAA § 112(r)(7), are set forth in 40 C.F.R. part 68.

9. Under 40 C.F.R. § 68.3, the following definitions apply:
 - a. “Stationary source” means “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.”
 - b. “Regulated substance” means “any substance listed (pursuant to section 112(r)(3) of the Clean Air Act, as amended) in 40 C.F.R. § 68.130.” Threshold quantities for the regulated substances are included in 40 C.F.R. § 68.130.
10. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines the term “person” to include in relevant part, an individual, corporation, or partnership.
11. Respondent is a Corporation and therefore a person and subject to regulation under section 112(r) of the CAA, 42 U.S.C. §7412(r)(7).
12. Respondent is the owner and/or operator of an ethanol production facility, a stationary source, located at 694 West Park Avenue, Huron, South Dakota (the Facility).
13. The Facility uses, handles and/or stores more than a threshold quantity of the regulated substance ammonia (CAS # 7664-41-7) and a regulated flammable mixture (CAS # 00-11-11).
14. Pursuant to section 112(r) of the CAA, 42 U.S.C. § 7412(r)(7), the Respondent is required to prepare and implement a risk management program to and prevent or minimize accidental releases of regulated substances.

SPECIFIC ALLEGATIONS

15. On January 24, 2012, authorized representatives of the EPA conducted an inspection of the Respondent’s facility located at 694 West Park Avenue, Huron, South Dakota, with the

consent of the Respondent, to determine compliance with CAA section 112(r)(7). During the inspection, the EPA representatives observed alleged violations of the CAA section 112(r)(7). The alleged violations are described in paragraphs 16 - 27.

16. 40 C.F.R. § 68.65 provides that the owner or operator shall compile and maintain up-to-date written process safety information related to the regulated substances in the process, information related to the technology of the process, and information pertaining to the equipment in the process. The following required process safety information was not available during the EPA inspection:

- a. Documentation of safe upper and lower limits for such items as temperatures, pressures, flows, or compositions. This is a violation of 40 C.F.R. § 68.65(c)(1)(iv).
- b. Documentation of an evaluation of the consequences of deviation. This is a violation of 40 C.F.R. § 68.65(c)(1)(v).
- c. Documentation of the materials of construction for the equipment in the process. This is a violation of 40 C.F.R. 68.65(d)(1)(i).
- d. Documentation pertaining to the relief system design and design basis. This is a violation of 40 C.F.R. 68.65(d)(1)(iv).

17. 40 C.F.R. § 68.67 provides that the owner or operator shall perform an initial process hazard analysis (PHA) on processes covered by this part. The 2009 PHA did not include the following information:

- a. An analysis of a past incident that occurred in 2008 that may have had potential for catastrophic consequences. This is a violation of 40 C.F.R. § 68.67(c)(2).
- b. Documentation addressing engineering and administrative controls applicable to hazards and interrelationships. This is a violation of 40 C.F.R. § 68.67(c)(3).

- c. Information on consequences of failure of engineering and administrative controls. This is a violation of 40 C.F.R. § 68.67(c)(4).
- d. Information addressing stationary source siting. This is a violation of 40 C.F.R. § 68.67(c)(5).
- e. An evaluation of a range of the possible safety and health effects of failure of controls. This is a violation of 40 C.F.R. § 68.67(c)(7).
- f. A system to promptly address the team's findings and recommendations; assure that the recommendations are resolved in a timely manner and documented; document what actions are to be taken; complete actions as soon as possible; and a written schedule of when these actions are to be completed. This is a violation of 40 C.F.R. § 68.67(e).
- g. Documentation of past PHA's and updates or revalidations for each process covered, as well as the resolution of recommendations for the life of the process. This is a violation of 40 C.F.R. § 68.67(g).

18. 40 C.F.R. § 68.69 provides that the owner or operator shall develop and implement written operating procedures that provide clear instructions for safely conducting activities involved in each covered process consistent with the process safety information. The operating procedures did not include the following required information:

- a. The consequences of deviation were not addressed in operating procedures written prior to 2010. This is a violation of 40 C.F.R. § 68.69(a)(2)(i).
- b. The steps required to avoid deviations were not included in operating procedures written prior to 2010. This is a violation of 40 C.F.R. § 68.69(a)(2)(ii).

- c. Annual certifications on operating procedures were not completed. This is a violation of 40 C.F.R. § 68.69(c).

- 19. 40 C.F.R. § 68.73 provides that the operator or owner shall establish a written program to maintain the on-going mechanical integrity of process equipment. The established mechanical integrity program did not include the following required elements:
 - a. All process vessels were not tested and inspected in accordance with generally accepted good engineering practices. This is a violation of 40 C.F.R. § 68.73(d)(2).
 - b. Deficiencies in equipment operating outside acceptable limits were not corrected. This is a violation of 40 C.F.R. § 68.73(e).

- 20. 40 C.F.R. § 68.75 provides that the operator or owner shall establish and implement written procedures to manage changes to process chemicals, equipment, and procedures. The procedures to manage changes did not include the following required elements:
 - a. Prior to 2012, the facility did not inform employees and contractors of changes to process chemicals, equipment, and procedures. This is a violation of 40 C.F.R. § 68.75(c).
 - b. Process information was not updated after a change to process chemicals, equipment, and procedures. This is a violation of 40 C.F.R. § 68.75(d).

- 21. 40 C.F.R. § 68.77 provides that the operator or owner shall perform a pre-start up review if a facility modifies an existing source when a modification is significant enough to require a change in process safety information.
 - a. The facility did not perform a pre-start up safety review after modifying the plant. This is a violation of 40 C.F.R. § 68.77.

22. 40 C.F.R. § 68.79(d) provides that the operator or owner shall promptly determine and document an appropriate response to each of the findings of the compliance audit and document that deficiencies have been corrected.

- a. Respondent did not document that all findings in the 2009 compliance audit had been corrected. This is a violation of 40 C.F.R. § 68.79(d).

23. 40 C.F.R. 68.81 provides that the owner or operator shall investigate each incident that resulted in, or could reasonably have resulted in a catastrophic release of a regulated substance. The owner or operator shall prepare a report at the conclusion of every incident investigation. For an incident that occurred at the facility in 2008, Respondent did not include the following required information:

- a. A description of the incident was not included. This is a violation of 40 C.F.R. § 68.81(d)(3).
- b. Factors that contributed to the incident were not included. This is a violation of 40 C.F.R. § 68.81(d)(4).
- c. Recommendations resulting from the investigation were not included. This is a violation of 40 C.F.R. § 68.81(d)(5).

24. 40 C.F.R. § 68.83 provides that the owner or operator shall develop and maintain a written plan of action regarding the implementation of the employee participation required by this section. The employee participation program did not contain the following required elements:

- a. There was no requirement that the facility consults with employees regarding PHA conduct and development or development of other elements of process safety management. This is a violation of 40 C.F.R. § 68.83(b).

- b. There was no requirement that employees and their representatives have access to PHA's and other information required to be developed by 40 C.F.R. § 68. This is a violation of 40 C.F.R. § 68.83(c).
25. 40 C.F.R. § 68.160(b)(7) provides that the owner or operator shall assign the correct program level to its covered process.
- a. Respondent assigned the incorrect program level to its covered process on the RMP registration form. This is a violation of 40 C.F.R. § 68.160(b)(7).
26. 40 C.F.R. 68.195(a) provides that if the owner or operator experienced an accidental release that met the five-year accident history reporting criteria subsequent to April 9, 2004, the owner or operator shall update the five-year accident history within six months of the release or by the time the RMP was updated as required at 68.190.
- a. Respondent did not update the five-year accident history within six months after an incident that occurred in 2008. This is a violation of 40 C.F.R. 68.195(a).
27. 40 C.F.R. 68.195(b) provides that if the emergency contact information required at 40 C.F.R. 68.160(b)(6) has changed since June 21, 2004, the owner or operator shall submit corrected information within thirty days of the change.
- a. Respondent did not update the emergency contact information required at 40 C.F.R. § 68.160(b)(6) after the information changed in 2010. This is a violation of 40 C.F.R. § 68.195(b)

PENALTY

28. Section 113(d)(1)(B) of the Act, 42 U.S.C. § 7413(d)(1)(B), and 40 C.F.R. part 19 authorize the assessment of a civil penalty of up to \$37,500 per day of violation for each violation of the implementing regulations associated with the "Prevention of Accidental

Releases” requirements of 42 U.S.C. § 7412r. To determine the amount of the civil penalty to be assessed pursuant to section 113(e)(1) of the Act, 42 U.S.C. § 7413(e)(1), EPA took into account, in addition to such other factors as justice may require, the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violations as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violations, the economic benefit of noncompliance, and the seriousness of the violations.

29. Respondent consents and agrees to pay a civil penalty in the amount of **sixty-five thousand one hundred dollars (\$65,100)**.

30. Attachment A (Collection Information) provides terms for payment including the assessment of fees and interest charges for late payments.

CERTIFICATION OF COMPLIANCE

31. On or before one hundred and eighty days (180) after the date of the Final Order approving this CCCA, Respondent shall submit to EPA a Certification of Compliance, establishing Respondent’s completion of the items described in subparagraphs a-k below. In the Certification of Compliance Respondent shall demonstrate:

- a. Process safety information is current and available in accordance with 40 C.F.R. § 68.65 and includes documentation of safe upper and lower limits for temperatures, pressures, flows, or compositions, an evaluation of the consequences of deviation, documentation of the materials of construction for the equipment in the process, and documentation pertaining to the relief system design and design basis.

- b. The most recent PHA is completed in accordance with C.F.R. § 68.67 and includes a review of any incident that had a likely potential for catastrophic consequences, engineering and administrative controls applicable to hazards, consequences of failure of engineering and administrative controls, stationary source siting, an evaluation of a range of the possible safety and health effects of failure of controls, and a system to promptly address the team's findings and recommendations.
- c. Operating procedures are developed and implemented in accordance with 40 C.F.R. § 68.69 and include the consequences of deviation, steps required to avoid deviations, and an annual certification process to ensure that the operating procedures are current and that procedures have been reviewed as often as necessary.
- d. The mechanical integrity program is operated in accordance with 40 C.F.R. § 68.73 and includes a written procedure for testing process equipment following recognized and generally accepted good engineering practices for inspections and testing procedures, and a system for correcting deficiencies in equipment that were outside acceptable limits.
- e. The system to manage changes in the covered processes are documented and implemented in accordance with 40 C.F.R. § 68.75 and includes a system for informing and training employees involved in operating a process and maintenance, and contract employees, whose job tasks would be affected by a change in the process, regarding the change prior to start-up of the process or affected parts of the process, and a system for updating process safety information if a change resulted in a change in the process safety information.

- f. Pre-start up reviews are performed and documented in accordance with 40 C.F.R. § 68.77.
 - g. Compliance audits are conducted in accordance with 40 C.F.R. § 68.79 and include documenting all findings have been resolved in a timely manner.
 - h. Incident investigations are conducted in accordance with 40 C.F.R. § 68.81 and include a final report with an incident description, factors that contributed to the incident, and recommendations resulting from the investigation.
 - i. The employee participation program is implemented in accordance with 40 C.F.R. § 68.83 and includes steps for consulting with employees and their representatives on the conduct and development of process hazards analyses and on the development of the other elements of process safety management and, providing to employees and their representatives access to process hazard analyses and to all other information required to be developed under 40 C.F.R. part 68.
 - j. The risk management program is registered in accordance with 40 C.F.R. § 68.160 and includes the correct program level.
 - k. The risk management program submission is updated in accordance with 40 C.F.R. 68.195 and includes timely updates of the accident history and emergency contact information.
32. The Certification of Compliance shall contain the date, printed name, and signature of the Respondent's representative, as well as the following statement:

I certify that I am authorized to verify the completion of work on behalf of ABE – South Dakota, LLC. I certify under penalty of perjury that the foregoing is true and correct. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

33. The Certification of Compliance shall be mailed or emailed to the following contact and address:

U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
ATTN: David Cobb, 8ENF-AT
E-mail: cobb.david@epa.gov

OTHER TERMS

34. This CCCA contains all terms of the settlement agreed to by the parties.

35. This CCCA, upon incorporation into a final order, applies to and is binding upon EPA, Respondent, and Respondent's successors or assigns.

36. Nothing in this CCCA shall relieve Respondent of the duty to comply with the CAA and its implementing regulations.

37. Failure of Respondent to comply with any terms of this CCCA shall constitute a breach and may result in referral of the matter to the U.S. Department of Justice for enforcement of this agreement and such other relief as may be appropriate.

38. Any change in ownership or corporate status of Respondent, including, but not limited to, any transfer of assets or real or personal property, shall not alter Respondent's responsibilities under this agreement.

39. Nothing in the CCCA shall be construed as a waiver by the United States of its authority to seek costs or any appropriate penalty associated with any action instituted as a result of Respondent's failure to perform pursuant to the terms of this CCCA.

40. The undersigned representative of the Respondent certifies that he or she is fully authorized to enter into and legally bind the Respondent to the terms and conditions of the CCCA.

41. The parties agree to submit this CCCA to the Regional Judicial Officer, with a request that it be incorporated into a final order.
42. Each party shall bear its own costs and attorney fees in connection with this administrative matter.
43. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.
44. This CCCA, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete and full civil settlement of the specific violations alleged in this CCCA.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,

Complainant

Date: April 1, 2013

By: Eddie A. Serra
for Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

ABE – South Dakota, LLC

Representative of Respondent

Date: March 20, 2013

By: [Signature]
Title: CEO

COLLECTION INFORMATION

Payment shall be due on or before **30 calendar days** after the date of the Final Order issued by the Regional Judicial Officer who adopts this agreement. If the due date falls on a weekend or legal Federal holiday, then the due date is the next business day. Payments must be received by 11:00 a.m. Eastern Standard Time to be considered as received that day.

In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received. (That is, on the 1st late day, 30 days of interest accrues.)

In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 61st day from the date of the Final Order, and each subsequent thirty-day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (that is, the 121st day from the date the Final Order is signed). Payments are first applied to handling charges, 6% penalty interest, and late interest; then any balance is applied to the outstanding principal amount.

The payment shall be made by remitting a cashier's or certified check, including the name and docket number of this case, for the amount, payable to "Treasurer, United States of America," (or be paid by one of the other methods listed below) and sent as follows:

CHECK PAYMENTS:

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

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental
Protection Agency "

OVERNIGHT MAIL:

US Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required fields.

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMBINED COMPLAINT AND CONSENT AGREEMENT and FINAL ORDER** in the matter of **ABE – SOUTH DAKOTA, LLC.; DOCKET NO.: CAA-08-2013-0009**. The documents were filed with the Regional Hearing Clerk on April 4, 2013.

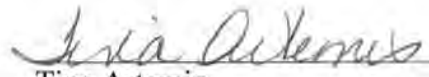
Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Marc Weiner, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were resent and placed in the United States mail certified/return receipt on April 4, 2013 to:

Grant Johanson, Vice President of Operations
ABE SD, LLC.
8000 Norman Center Drive, Suite 610
Bloomington, Minnesota 55437

And emailed to:

Kim White
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

April 4, 2013


Tina Artemis
Paralegal/Regional Hearing Clerk

