

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TX

FILED  
2016 SEP 19 PM 3:34  
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-06-2016-0905

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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 four (4) facilities.
2. The four (4) facilities (the “Facilities”) covered by this CAFO are:
  - A. The facility located at 5815 Wyoming Blvd., NE, Albuquerque, New Mexico 87109;
  - B. The facility located at 753 Cerrillos Rd., Santa Fe, New Mexico 87505;
  - C. The facility located at 2103 Carlisle Blvd., NE Albuquerque, New Mexico 87110; and
  - D. The facility located at 1090 S. Saint Francis Drive, Santa Fe, New Mexico 87505.

3. Notice of this action has been given to the state of New Mexico, 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 in this CAFO.
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 the Code of Federal Regulations ("C.F.R.") Parts 260, 261, 262, and 273 is a citation to the corresponding New Mexico Administrative Code ("NMAC") sections at Title 20, Chapter 4, Part 1 since the relevant sections in the NMAC incorporate by reference 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 ("HSWA") 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 June 22, 1999 in New Mexico.
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’s activities as a generator of hazardous waste in the State of New Mexico, including the issuance of a RCRA information request dated August 18, 2015 (“Investigation”).

18. On November 24, 2015, Whole Foods provided 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 for 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 Facility 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 record 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 NMAC 20.4.1.1001 and 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.

**All Four (4) Facilities**

**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 identified in this CAFO.
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 identified in this CAFO.

**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 NMAC 20.4.1.1001 and 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 NMAC 20.4.1.1001 and 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. Respondent’s SOPs for each Facility shall also ensure that Whole Foods is operating in compliance with the universal waste rules set forth at NMAC 20.4.1.1001 and at 40 C.F.R. §§ 273.13 through 273.16;

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- 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 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 (6FN-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](mailto: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 Four Hundred and Seven Thousand Eight Hundred and Eighty Dollars (\$407,880.00).

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.

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-GL  
St. Louis, MO 63101  
314-418-1028



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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-06-2016-0905)) 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

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

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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, employees, 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:**

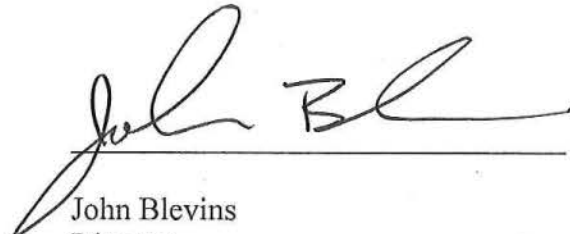
FOR THE RESPONDENT:

Date: 9/12/16

  
Whole Foods Market Rocky  
Mountain/Southwest LP

FOR THE COMPLAINANT:

Date: 9.19.16  
RCRA-06-2016-0905

  
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

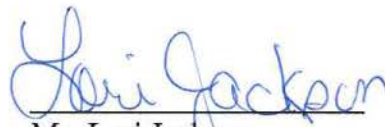
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**CERTIFICATE OF SERVICE**

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