



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

SEP - 4 2012

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John Minton
Vice-President of Operations
Nestle Professional Vitality
1821 South Kilbourn
Chicago, Illinois 60623

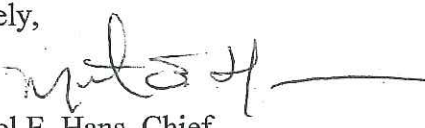
Re: Nestle Professional Vitality, Chicago, Illinois, Consent Agreement and Final Order
Docket No. **CAA-05-2012-0047**

Dear Mr. Minton:

Enclosed please find a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The U. S. Environmental Protection Agency has filed the other original CAFO with the Regional Hearing Clerk on **September 4, 2012**. Please pay the civil penalty in the amount of \$ 15,000 in the manner prescribed in paragraphs 45-47 and reference your check with the number BD 2751203A048 and the docket number **CAA-05-2012-0047**.

Please feel free to contact Silvia Palomo at (312)353-2172 if you have any questions regarding the enclosed documents. Please direct any legal questions to Mary McAuliffe at (312)886-6237. Thank you for your assistance in resolving this matter.

Sincerely,


Michael E. Hans, Chief
Chemical Emergency
Preparedness & Prevention Section

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:) Docket No. CAA-05-2012-0047
)
Vitality Foodservice, Inc. d/b/a)
Nestle Professional Vitality) Proceeding to Assess a Civil Penalty under
1821 South Kilbourn) Section 113(d) of the Clean Air Act,
Chicago, Illinois 60623) 42 U.S.C. § 7413(d)
)
Respondent.)

RECEIVED
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Consent Agreement and Final Order

Preliminary Statement

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

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, for violations of Section 112(r) of the Act, 42 U.S.C. § 7412(r), and the implementing regulations.
2. Complainant is the Director of the Superfund Division, United States Environmental Protection Agency (EPA), Region 5, Chicago, Illinois.
3. The Respondent is Vitality Foodservice, Inc. d/b/a Nestle Professional Vitality, a company doing business in the State of Illinois.
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. In accordance with Section 112(r) of the Act, on June 20, 1996, EPA promulgated regulations to prevent accidental releases of regulated substances and minimize the consequences of those releases that do occur. These regulations, known as the Risk Management Program regulations, are codified at 40 C.F.R. Part 68.

10. The Risk Management Program regulations apply to all stationary sources with processes that contain more than a threshold quantity of a regulated substance. The List of Regulated Toxic Substances and Threshold Quantities for Accidental Release Prevention is codified at 40 C.F.R. § 68.130.

11. Anhydrous ammonia is a “regulated substance,” as that term is defined in Section 112(r)(3) of the Act and 40 C.F.R. § 68.3. 40 C.F.R. § 68.130, Table 1.

12. The “threshold quantity” (as that term is defined in 40 C.F.R. § 68.3) for anhydrous ammonia is 10,000 pounds in a process. 40 C.F.R. § 68.130, Table 1.

13. The Risk Management Program regulations require that the owner or operator of a facility subject to the regulations develop and implement a Risk Management Plan (RMP) for preventing accidental releases to the air and minimizing the consequences of releases that do

occur. 40 C.F.R. § 68.12.

14. A facility's RMP must, among other things, describe the stationary source and regulated substances handled at the facility. 40 C.F.R. § 68.155(b).

15. A facility's RMP must be submitted no later than: June 21, 1999; three years after the date on which the regulated substance is first listed under 40 C.F.R. § 68.130; or the date on which a regulated substance is first present in more than a threshold quantity in a process, whichever is later. 40 C.F.R. §§ 68.10(a), 68.150.

16. A facility's RMP must be reviewed and updated once every five years from the date of the initial submission or most recent update required by § 68.190(b)(2) through (b)(7), whichever is later, and submitted to EPA. 40 C.F.R. § 68.190(b)(1).

17. A facility's emergency contact information in its RMP must be revised within a month of any change in the emergency contact information. 40 C.F.R. § 68.195(b).

18. The processes subject to these requirements are divided into three tiers of eligibility: Programs 1, 2, and 3. 40 C.F.R. § 68.10.

19. Program 3 applies to all processes which do not meet the requirements of 40 C.F.R. § 68.10(b) and are subject to the OSHA Process Safety Management (PSM) standard set forth at 29 C.F.R. § 1910.119. 40 C.F.R. § 68.10(d).

20. The owner or operator of a stationary source with a process subject to Program 3 requirements, shall implement the prevention requirements of 40 C.F.R. §§ 68.65 through 68.87.

21. The Administrator of EPA (the Administrator) may assess a civil penalty of up to \$32,500 per day of violation, up to a total of \$270,000 for violations that occurred from March 15, 2004 through January 12, 2009; and may assess a civil penalty of up to \$37,500 per day of violation up to \$295,000 for violations that occurred after January 12, 2009, pursuant to Section

113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), and 40 C.F.R. Part 19.

22. 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.

23. 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 complaint.

Complainant's Factual Allegations and Allegations of Violations

24. The Respondent is a Delaware corporation with a plant located at 1821 South Kilbourn Avenue, Chicago, Illinois 60623 (the Facility). At the Facility, the Respondent is engaged in the business of blending and packaging of a variety of natural fruit drinks in consumer-sized packages.

25. The Respondent is a "person," as that term is defined at Section 302(e) of the Act, 42 U.S.C. § 7602(e).

26. The Respondent operates a closed-loop refrigeration system which utilizes anhydrous ammonia as a refrigerant.

27. The Facility is a "stationary source" as that term is defined at 40 C.F.R. § 68.3.

28. For purposes of the requirements at 40 C.F.R. Part 68, the Respondent is the "owner or operator" of the Facility as that term is defined at § 112(a)(9) of the Act.

29. The Respondent uses and stores approximately 18,000 lbs. of anhydrous ammonia in the refrigeration system.

30. The Respondent reported in its RMP the refrigeration system as a “process” as defined at 40 C.F.R. § 68.3.

31. Anhydrous ammonia is a “regulated substance” under § 112(r)(3) of the Act.

32. The Facility is subject to the “Program 3” eligibility requirements because the process: a.) does not meet the requirements of 40 C.F.R. § 68.10(b), because the distance to a toxic or flammable endpoint for a worst-case release assessment conducted under Subpart B and 40 C.F.R. § 68.25 is greater than the distance to any public receptor; and b.) is subject to the OSHA process safety management standard set forth at 29 C.F.R. § 1910.119 and 40 C.F.R. § 68.10(d) because the process involves anhydrous ammonia above the threshold quantity of 10,000 pounds.

33. On May 9, 2008, a representative from EPA conducted an inspection at the Facility under the authority of Section 114(a) of the Act, 42 U.S.C. § 7414(a). The purpose of the inspection was to determine whether the Respondent was complying at the Facility with Section 112(r) of the Act and the regulations at 40 C.F.R. Part 68.

34. Based on the inspection conducted by EPA, Complainant alleges that the Facility failed to comply with the Risk Management Program regulations at 40 C.F.R. Part 68 for Program 3 requirements as set forth below in Paragraphs 35 through 40.

35. Complainant alleges that Respondent failed to revise the emergency contact information in its RMP within a month of any change in the emergency contact information, as required by 40 C.F.R. § 68.195(b).

36. Complainant alleges that Respondent failed to timely update and adequately revalidate the process hazard analysis for the refrigeration system, in accordance with 40 C.F.R. § 68.67(f).

37. Complainant alleges that Respondent failed to include in its operating procedures the operating limits, as required by 40 C.F.R. § 68.69(a)(2).

38. Complainant alleges that Respondent failed to adequately implement the written procedures to maintain the on-going integrity of the process equipment, as required by 40 C.F.R. § 68.73(b).

39. Complainant alleges that Respondent failed to promptly address all the findings of the Compliance Audit, as required under 40 C.F.R. § 68.79(d).

40. Complainant alleges that Respondent failed to prepare an incident investigation report at the conclusion of its investigation, as required by 40 C.F.R. § 68.81(d).

41. The above-described violations of the RMP regulations are violations of Section 112(r)(7)(E) of the Act.

42. Section 112(r)(7)(E) of the Act, 42 U.S.C. § 7412(r)(7)(E), provides that after the effective date of any regulation or requirement promulgated pursuant to Section 112(r) of the Act, it shall be unlawful for any person to operate any stationary source in violation of such regulation or requirement.

43. Accordingly, the above-described violations of 40 C.F.R. Part 68 and Section 112(r) of the Act are subject to the assessment of a civil penalty under Section 113(d) of the Act, 42 U.S.C. § 7413(d).

44. Respondent is now in compliance with the requirements identified in Paragraphs 35 through 40.

Civil Penalty

45. 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 other factors such as cooperation, prompt return to

compliance, Complainant has determined that an appropriate civil penalty to settle this action is \$15,000.

46. Within 30 days after the effective date of this CAFO, Respondent must pay a \$15,000 civil penalty by sending a cashier's or certified check, by regular U.S. Postal Service mail, payable to the "Treasurer, United States of America," to:

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

The check must note "Vitality Foodservice, Inc.," the docket number of this CAFO and the billing document number.

47. 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:

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

Silvia Palomo, (SC-5J)
Chemical Emergency Preparedness and Prevention Section
Superfund Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

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

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

49. 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.

50. 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

51. Project Summary. Respondent will affect a fleet, fleets, or portion thereof, of diesel buses, either school, intra-city, or inter-city buses, or diesel vehicles contracted for public use, located within a 50-mile radius of the North Lawndale, Illinois community, as a Supplemental Environmental Project (SEP).

52. Project Detail. Respondent will spend a minimum of \$50,000 to affect the fleet, or portion thereof of diesel school buses contracted for public use. Respondent may utilize a third party to assist in the implementation of the SEP. Such third party may assess administrative costs not to exceed 10% of the total project value (i.e., not to exceed \$5,000). Such third party costs shall be considered as Project Costs for purposes of the \$50,000 commitment. The project

is selected by Respondent based on a project application previously submitted to EPA or the State of Illinois pursuant to one of several grant or funding programs under which interested parties can seek assistance in performing clean diesel actions. The project costs will be calculated using a methodology similar to that used by EPA in calculating the cost of other diesel retrofit applications (using EPA's Diesel Emissions Quantifier, located at <http://cfpub.epa.gov/quantifier/>) and will include Respondent's oversight costs.

53. In coordination with Complainant, Respondent has selected for its proposed SEP the Illinois Central School Bus – Chicago Central Location (ICSB), based on ICSB's submission of a grant application to the Illinois Environmental Protection Agency's Illinois Clean Diesel Grant Program. This SEP complies with the geographic radius for the North Lawndale, Illinois community, utilizes one of the anti-idling technologies currently verified by EPA for diesel retrofits, as shown at <http://epa.gov/cleandiesel/verification/verif-list.htm>, or the California Air Resources Board (CARB) verification list at <http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm>, or EPA's SmartWay idle reduction verification list at <http://www.epa.gov/smartway/technology/index.htm>, and results in the reduction of diesel particulate emissions.

54. If for any reason, the selected project becomes unavailable for satisfaction of Respondent's SEP obligations, Respondent will work with EPA to identify and select an alternative qualifying project that satisfies the technology specifications for approved anti-idling diesel retrofit projects, and which has a service area within a 50-mile radius of the North Lawndale, Illinois community.

55. Once approved, Respondent will ensure completion of the clean diesel actions. Confirmation will be obtained from the fund recipients or the entities undertaking the actions,

confirming that one or more of the verified technologies was installed on the selected fleet or fleets, or portions thereof.

56. Project Timeline. Respondent will endeavor to secure completion of the selected projects, to wit, the installation of retrofits totaling \$50,000, within 150 days of the effective date of this CAFO. If the project requires more time to implement (for example, due to the need for equipment testing), EPA will provide additional time to extend the timeframe.

57. Respondent must submit a SEP completion report to EPA within 30 days after completion of installation of diesel retrofits, by no later than 180 days of the effective date of this CAFO, unless an extension of time is provided by EPA. This report shall 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 cancelled 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).

58. At the time it certifies completion of the SEP, Respondent will also provide the following certification:

Respondent certifies under penalty of law that it would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project, if the Agency were precluded by law from accepting a diesel emissions reduction Supplemental Environmental Project.

59. Project Costs. Respondent will spend \$50,000 for this project.

60. Project Completion Criteria. This project will be deemed to be complete for the purposes of this CAFO if EPA- and/or CARB-verified diesel reduction equipment is installed on the buses or other vehicles in the projects selected pursuant to Paragraphs 51 through 59, above.

61. Respondent must submit all notices and reports required by this CAFO by first class mail to Silvia Palomo, Chemical and Emergency Preparedness and Prevention Section, and Mary McAuliffe, Office of Regional Counsel, at the addresses provided in Paragraph 47, above.

62. 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.

63. Following receipt of the SEP completion report described in Paragraph 57, 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 65.

64. 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 consistent with this Consent Agreement. If

Respondent does not complete the SEP as required by EPA's decision, Respondent will pay stipulated penalties to the United States under Paragraph 65, below.

65. 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 56, Respondent must pay a penalty of \$45,000.
- 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 59, 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 59, Respondent must pay a penalty of \$10,000.
- d. If Respondent did not submit timely the SEP completion report as required by Paragraphs 57 and 58, 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>
\$250	1 st through 14 th day
\$400	15 th through 30 th day
\$500	31 st day and beyond

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

67. 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 46, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

68. Any public statement that Respondent makes referring to the SEP must include the following language: “Vitality Foodservice, Inc. undertook this project under the settlement of the United States Environmental Protection Agency’s enforcement action against Vitality Foodservice, Inc. for violations of the Clean Air Act.”

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

General Provisions

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

71. 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.

72. 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 70, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by Complainant.

73. Respondent certifies that it is complying fully with 40 C.F.R. Part 68.

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

75. 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.

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

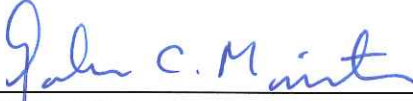
77. This CAFO constitutes the entire agreement between the parties.

78. The effective date of this CAFO is the date when this CAFO is filed with the Regional Hearing Clerk’s office.

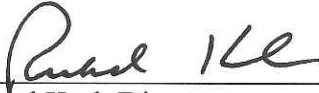
CONSENT AGREEMENT AND FINAL ORDER

**In the Matter of Vitality Foodservice, Inc.
Docket No.**

Vitality Foodservice, Inc., Respondent

Date: 8/13/12 By: 
John Minton
Vice President, Operations

United States Environmental Protection Agency, Complainant


Date: 8-28-12 By: 
Richard Karl, Director
Superfund Division

CONSENT AGREEMENT AND FINAL ORDER
Vitality Foodservice, Inc., Docket No. CAA-05-2012-0047

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.

8-29-12
Date



Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency

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SEP 04 2012
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of: Nestle Professional Vitality
Docket No. CAA-05-2012-0047


Certificate of Service

I, Silvia Palomo, certify that I filed the original and a copy of the Consent Agreement and Final Order (CAFO) with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 5, and mailed a second original CAFO by first-class, postage prepaid, certified mail, return receipt requested, to Respondent by placing it in the custody of the United States Postal Service addressed as follows:

Mr. John Minton
Vice-President of Operations
Nestle Professional Vitality
1821 South Kilbourn
Chicago, Illinois 60623



on the 4th day of September, 2012



Silvia Palomo
U.S. Environmental Protection Agency
Region 5