

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

-----X
)
In the Matter of:) Docket No. CAA-02- 2013-1220'
)
)
City of North Tonawanda) CONSENT AGREEMENT AND
Wastewater Treatment Facility) FINAL ORDER
)
North Tonawanda, New York)
)
)
Respondent.)
-----X

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2013 DEC 10 A 11: 05
REGIONAL HEARING
CLERK

PRELIMINARY STATEMENT

1. This Consent Agreement and Final Order ("CA/FO") is issued pursuant to Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d). The Complainant in this action is the Director of the Emergency and Remedial Response Division of the United States Environmental Protection Agency ("EPA"), Region 2, who has been delegated the authority to institute this action. Respondent is the City of North Tonawanda ("Respondent").

2. EPA and the U.S. Department of Justice have determined, pursuant to Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), that EPA may pursue this matter through administrative enforcement action.

3. Pursuant to Section 22.13 of the revised Consolidated Rules of Practice, 40 Code of Federal Regulations ("C.F.R.") § 22.13(b), where parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CA/FO pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3).

4. It has been agreed by the parties that settling this matter by entering into this CA/FO pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3) is an appropriate means of resolving specified claims against Respondent without litigation.

STATUTORY BACKGROUND

5. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), provides for the assessment of penalties for violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r).

6. Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), requires the Administrator to promulgate release prevention, detection, and correction requirements regarding regulated substances in order to prevent accidental releases of regulated substances. EPA promulgated

regulations in 40 C.F.R. Part 68 to implement Section 112(r)(7) of the CAA, which set forth the requirements of risk management programs that must be established and implemented at stationary sources subject to this section of the CAA. The regulations at 40 C.F.R. Part 68, Subparts A through G, require owners and operators of stationary sources to, among other things, develop and implement: (a) a management system to oversee the implementation of the risk management program elements; and (b) a risk management program that includes, but is not limited to, a hazard assessment, a prevention program, and an emergency response program. Pursuant to 40 C.F.R. Part 68, Subparts A and G, the risk management program for a stationary source that is subject to these requirements is to be described in a risk management plan ("RMP") that must be submitted to EPA.

7. Sections 112(r)(3) and (5) of the CAA, 42 U.S.C. §§ 7412(r)(3) and (5), require the Administrator to promulgate a list of regulated substances, with threshold quantities. EPA promulgated a regulation known as the List Rule, at 40 C.F.R. Part 68, Subpart F, which implements Section 112(r)(3) and (5) of the CAA, and which lists the regulated substances and their threshold quantities.

8. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. §7412(r)(7), and 40 C.F.R. §§ 68.10(a), 68.12, and 68.150, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process shall comply with the requirements of 40 C.F.R. Part 68 (including, but not limited to, submission of an RMP to EPA), no later than June 21, 1999, or three years after the date on which such regulated substance is first listed under 40 C.F.R. § 68.130, or the date on which the regulated substance is first present in a process above the threshold quantity, whichever is latest.

9. The regulations set forth at 40 C.F.R. Part 68 separate the covered processes into three categories, designated as Program 1, Program 2, and Program 3. A covered process is subject to Program 3 requirements, as per 40 C.F.R. § 68.10(d), if the process: (a) does not meet one or more of the Program 1 eligibility requirements set forth in 40 C.F.R. § 68.10(b); and (b) if either one of the following conditions is met: the process is listed in one of the specific North American Industry Classification System (generally referred to as "NAICS") codes found at 40 C.F.R. § 68.10(d)(1) or the process is subject to the United States Occupational Safety and Health Administration process safety management standard set forth in 29 C.F.R. § 1910.119. As required by 40 C.F.R. § 68.10(c), a facility must register its RMP-covered process as a Program 2 process if it does not meet the requirements of either Program 1 or Program 3.

10. The regulations set forth at 40 C.F.R. § 68.12(d) require that the owner or operator of a stationary source with a Program 3 process undertake certain tasks, including, but not limited to, development and implementation of a management system (pursuant to 40 C.F.R. § 68.15), the implementation of prevention program requirements, which include mechanical integrity (pursuant to 40 C.F.R. §§ 68.65-68.87), the development and implementation of an emergency response program (pursuant to 40 C.F.R. §§ 68.90-68.95), and the submission of additional information on prevention program elements regarding Program 3 processes (pursuant to 40 C.F.R. § 68.175).

FINDINGS OF FACT

11. Respondent is the owner and/or operator of a facility located at 830 River Road, North Tonawanda, New York (the "Facility").
12. Chlorine is present in the process at the Facility.
13. In June 1999, an initial RMP was submitted to EPA for the Facility. In August 2004 an updated RMP was submitted to EPA for the Facility, which identified the process chemical as chlorine, specified a quantity of 18,000 pounds, and identified this process as subject to Program 3 Level requirements.
14. On December 11, 2008, EPA conducted an inspection ("Inspection") at the Facility to determine compliance with Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and the applicable regulations listed in 40 C.F.R. Part 68.
15. In August 2009, an updated RMP was submitted to EPA for the Facility, which identified the process chemical as chlorine, specified a quantity of 32,000 pounds, and identified this process as subject to Program 3 requirements.
16. On September 30, 2010, Complainant issued a compliance order to Respondent, Index No. CAA-02-2010-1012 ("the Order"), pursuant to Section 113 of the CAA regarding the Facility. The Order required Respondent to perform certain activities at the Facility to come into compliance with the requirements of Section 112(r) of the CAA and 40 C.F.R. Part 68.
17. Respondent performed work at the Facility pursuant to the Order and submitted a final report required by the Order to EPA. By letter to EPA dated April 7, 2011, Respondent certified it is in compliance with Section 112(r) of the CAA.
18. On September 11, 2012, November 2, 2012 and December 16, 2012, Respondent submitted financial information to EPA in support of its claim that it cannot afford to pay a penalty in this matter.

EPA CONCLUSIONS OF LAW

19. Respondent is, and at all times referred to herein was, a "person" within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

20. The Facility is a "stationary source" as that term is defined at 42 U.S.C. §7412(r)(2)(c) and 40 C.F.R. § 68.3.
21. Chlorine is a regulated substance pursuant to Section 112(r)(2) and (3) of the CAA and 40 C.F.R. § 68.3.

22. The threshold quantity for chlorine, as listed in 40 C.F.R. § 68.130, Table 1, is 2,500 pounds.

23. Chlorine was present at the Facility in quantities exceeding the threshold quantity listed in 40 C.F.R. § 68.130.

24. At the time of the Inspection, and as detailed in the Order, EPA identified violations of the regulations at 40 C.F.R. Part 68 at the Facility, including violations of process safety information requirements; process hazard analysis requirements; operating procedures requirements; mechanical integrity requirements; training requirements; and compliance audit requirements.

25. Respondent's failure to fully comply with the requirements of 40 C.F.R. Part 68 regarding the Facility constitutes violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r). Respondent is therefore subject to the assessment of penalties under Section 113(d) of the CAA, 42 U.S.C. § 7413(d).

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 113(d) of the CAA and the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" (40 C.F.R. Part 22), it is hereby agreed by and between Complainant and Respondent, as follows:

26. For the purpose of this proceeding and in the interest of an expeditious resolution of this matter, pursuant to 40 C.F.R. § 22.18(b)(2), Respondent (a) admits the jurisdictional basis for this matter, (b) admits the Findings of Fact set forth above, (c) consents to the assessment of the civil penalty set forth below, (d) consents to the issuance of the attached Final Order, and (e) waives its right to contest the allegations and its right to appeal the attached Final Order.

27. Respondent neither admits nor denies the EPA Conclusions of Law set forth above.

28. Respondent hereby certifies that it is now in compliance with all applicable requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and the regulations at 40 C.F.R. Part 68 at the Facility.

29. ~~Based upon a review of the financial information submitted to EPA by Respondent, it was determined that Respondent has a limited ability to pay a penalty.~~

30. Respondent agrees to pay a civil penalty in the total amount of fifteen thousand dollars (\$15,000.00) as described below. Respondent shall pay the total amount in two payments. The first payment of ten thousand dollars (\$10,000.00) is due within sixty (60) days from the date of filing of the attached Final Order with the Regional Hearing Clerk. At the time

of such payment, Respondent shall also pay interest at a rate of 1% on such payment from the date of filing of the attached Final Order, which has been calculated to be twelve dollars and fifty cents (\$12.50). The second payment of five thousand dollars (\$5000) is due within one hundred and twenty (120) days from the date of filing of the attached Final Order with the Regional Hearing Clerk. At the time of such payment Respondent shall also pay interest at the rate of 1% on such payment from the date of filing of the attached Final Order, which has been calculated to be four dollars and seventeen cents (\$4.17). Dates for payment of the penalty are hereinafter referred to as the "due date(s)". Such payments shall be made by cashier's or certified checks or by Electronic Fund Transfer ("EFT").

If the payments are made by check, then the checks shall be made payable to the "Treasurer, United States of America" and shall be mailed to:

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

The checks shall be identified with a notation listing the following: "In the Matter of City of North Tonawanda" and shall bear thereon "Docket Number CAA-02-2013-1220." If the payments are made by check, Respondent shall simultaneously furnish proof that such payments have been made to:

Argie Cirillo
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, New York 10007-1866

and

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866.

If Respondent chooses to make the payments by EFT, then Respondent shall provide the following information to its remitter bank:

- a. Amount of Payment:
- b. SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045
- c. Account Code for Federal Reserve Bank of New York receiving payment:
68010727

- d. Federal Reserve Bank of New York ABA routing number: 021030004
- e. Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"
- f. Name of Respondent: City of North Tonawanda
- g. Case Number: CAA-02-2013-1220

If the payments are made by EFT, Respondent shall simultaneously send a letter with each payment to Ms. Cirillo and the Regional Hearing Clerk at their addresses above, which reference the date of the EFT, the payment amount, the name of the case, the case number, and Respondent's name and address.

31. If Respondent fails to make full and complete payment of the civil penalty that it is required to pay by this CA/FO, this case may be referred by EPA to the United States Department of Justice and/or the United States Department of the Treasury for collection. In such an action, pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), and 31 U.S.C. § 3717, Respondent shall pay the following amounts:

- a. Interest. If Respondent fails to make either payment, or makes partial payment, any unpaid portion of the civil penalty shall bear interest at the rate established pursuant to 31 U.S.C. § 3717 and 26 U.S.C. § 6621 from the payment due dates.
- b. Handling Charges. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of fifteen dollars (\$15.00) shall be paid if any portion of the civil penalty is more than thirty (30) days past the applicable payment due date.
- c. Attorney Fees, Collection Costs, Nonpayment of Penalty. If Respondent fails to make either payment of the civil penalty required by this CA/FO on time, pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), in addition to such assessed penalty and interest and handling assessments, Respondent shall also pay the United States' enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings, and a quarterly non-payment penalty for each calendar quarter during which such a failure to pay persists. Such non-payment penalty shall be ten percent (10%) of the aggregate amount of Respondent's outstanding penalties and non-payment penalties accrued from the beginning of such quarter.

32. The penalties specified in Paragraph 30 above shall represent civil penalties assessed by EPA and shall not be deductible for purposes of state or federal taxes.

33. This Consent Agreement is being voluntarily and knowingly entered into by the parties in full settlement of Respondent's alleged violations of the CAA set forth above in the Findings of Fact and Conclusions of Law.

34. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. This CA/FO shall not affect the right of the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.

35. This CA/FO and any provision herein is not intended to be an admission of liability in any adjudicatory or administrative proceeding except in an action, suit, or proceeding to enforce this CA/FO or any of its terms and conditions.

36. Respondent explicitly waives any right to request a hearing and/or contest any allegations in this Consent Agreement and explicitly waives any right to appeal the attached Final Order.

37. Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with, or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer, where the purpose of such discussion, memorandum, or communication is to recommend that such official accept this Consent Agreement and issue the attached Final Order.

38. Each party hereto shall bear its own costs and attorneys' fees in the action resolved by this CA/FO.

39. This CA/FO shall be binding on Respondent and its successors and assignees.

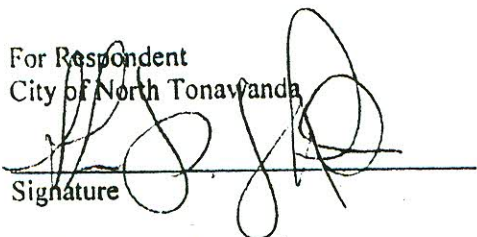
40. Each of the undersigned representatives to this CA/FO certifies that he or she is duly authorized by the party whom he or she represents to enter into the terms and conditions of the CA/FO and to bind that party to it.

41. Respondent consents to service upon Respondent of a copy of this CA/FO by any EPA employee, in lieu of service made by the EPA Region 2 Regional Hearing Clerk.

**In the Matter of City of North Tonawanda
Docket Number CAA-02-2013-1220**

For Respondent
City of North Tonawanda

Signature



Date: 10/17/13

Shawn P. Nickerson


Name (Printed or Typed)

City Attorney

Title (Printed or Typed)

Re: In the Matter of City of North Tonawanda
Docket Number CAA-02-2013-1220

For Complainant
U.S. Environmental Protection Agency, Region 2


Walter Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2

Date: 11/19/13

**In the Matter of City of North Tonawanda
Docket Number CAA-02-2013-1220**

FINAL ORDER

The Regional Judicial Officer of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Consent Agreement, entered into by the Complainant and Respondent to this matter, is hereby approved, incorporated herein, and issued as a Final Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, New York, New York.



Helen Ferrara
Regional Judicial Officer
U.S. Environmental Protection
Agency – Region 2
290 Broadway
New York, New York 10007-1866

Date: Nov 19, 2013

In the Matter of City of North Tonawanda
Docket Number CAA-02-2013-1220

CERTIFICATE OF SERVICE

This is to certify that I have this day caused (or am causing) to be sent the foregoing fully executed Consent Agreement and Final Order, bearing Docket Number CAA-02-2013-1220 in the following manner to the respective addressees below:

Original and One Copy

By Hand:

Office of Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th Floor
New York, New York 10007

Copy by Certified Mail,
Return Receipt Requested

Shawn P. Nickerson, Esq.
City Attorney
City of North Tonawanda
Office of City Attorney
City Hall
216 Payne Avenue
North Tonawanda, New York 14120-5489

Dated:
New York, New York

11/19/13