

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV



IN THE MATTER OF:)
)
Sherman Dixie Concrete)
Industries, Inc.)
Respondent.)
_____)

Docket Numbers: EPCRA-04-2014-2022(b)
EPCRA-05-2014-0020

CONSENT AGREEMENT AND FINAL ORDER

I. Nature of the Action

1. This is a civil penalty proceeding pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045, and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. Part 22. Complainant is collectively the Director of the Air, Pesticides and Toxics Management Division, Region IV, United States Environmental Protection Agency (EPA), the Director of the Land and Chemicals Division and the Chief of the Enforcement and Compliance Assurance Branch, Superfund Division, United States Environmental Protection Agency, Region V. Respondent is Sherman Dixie Concrete Industries, Inc.

2. The authority to take action under Section 325 of EPCRA, 42 U.S.C. § 11045, is vested in the Administrator of EPA. The Administrator of EPA has delegated this authority under EPCRA to the Regional Administrators by EPA Delegation 22-3-A, dated May 11, 1994. The Regional Administrator, Region IV, has redelegated this authority to the Director, Air, Pesticides and Toxics Management Division, by EPA Region IV Delegation 22-3-A, dated November 8, 1994. Pursuant to that delegation, the Director of the Air, Pesticides and Toxics Management Division has the authority to commence an enforcement action as the Complainant in this matter.

3. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Consent Agreement and Final Order (CAFO) will simultaneously commence and conclude this matter.

II. Preliminary Statements

4. Respondent is Sherman Dixie Concrete Industries, Inc. (Sherman Dixie), a corporation doing business in the States of Alabama, Indiana, Ohio, Tennessee and the Commonwealth of Kentucky.

5. Respondent is a "person" as defined in Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

6. Respondent owns and operates a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

7. Respondent owns and operates, and at the time of the violations alleged herein, owned and operated facilities located at 9415 Hwy. 157, Cullman, Alabama, 35057 ("Cullman Facility"); 1213 Stanley Avenue, Evansville, Indiana, 47711 ("Evansville Facility"); 1504 North Gettysburg Avenue, Dayton, Ohio, 45427 ("Dayton Facility"); 3641 Central Pike, Hermitage, Tennessee, 37076 ("Hermitage Facility"); 213 Downs Boulevard, Franklin, Tennessee, 37422 ("Franklin Facility"); 6209 Old Rutledge Pike, Knoxville, Tennessee, 37914 ("Knoxville Facility"); 310 Steel Drive, Elizabethtown, Kentucky, 42701 ("Elizabethtown Facility"); 759 Phillips Lane, Lexington, Kentucky, 40504 ("Lexington Facility"); and 3950 Cromwell Road, Chattanooga, Tennessee, 37064 ("Chattanooga Facility").

III. EPA's Allegations of Violations

Violations of Section 313 of EPCRA

8. Section 313 of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. §§ 372.22 and 372.30, require the owner or operator of a facility that: (a) has 10 or more full-time employees; (b) is in a Standard Industrial Classification (SIC) major group or industry listed in 40 C.F.R. § 372.23(a) (for which the corresponding North American Industry Classification System subsector and industry codes are listed in 40 C.F.R. §§ 372.23(b) and 372.23(c)); and (c) manufactured, processed, or otherwise used a toxic chemical listed in Section 313(c) and 40 C.F.R. § 372.65, in excess of an applicable threshold quantity established under EPCRA Section 313(f) and set forth in 40 C.F.R. § 372.25, during the calendar year, to complete and submit a toxic chemical release inventory reporting Form R (EPA Form 9350-1) to the Administrator of EPA and to the State in which the facility is located, by July 1 for the preceding calendar year for each toxic chemical known by the owner or operator to be manufactured, processed, or otherwise used in quantities exceeding the established threshold quantity during the preceding calendar year.

9. As set forth under Section 313(f) of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. § 372.28, the reporting threshold amount for lead and mercury manufactured, processed, or otherwise used at a facility is 100 pounds and 10 pounds per calendar year, respectively.

10. Each of Respondent's facilities identified in paragraphs 14 and 15 has 10 or more full-time employees, as defined at 40 C.F.R. § 372.3 at its facility.

11. Each of Respondents facilities identified in paragraphs 14 and 15 is classified under SIC code 3272 and NAICS Code 327332.

12. Each of Respondents facilities identified in paragraphs 14 and 15 is classified in a covered SIC code as described at 40 C.F.R. § 372.22 and in a covered NAICS code as described at 40 C.F.R. § 372.23.

13. Lead and mercury are toxic chemicals referenced at Section 313(c) of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. § 372.65.

14. Respondent processed lead, a toxic chemical referenced at Section 313(c) of EPCRA, 42 U.S.C. § 11023 and 40 C.F.R. § 372.65, and listed under 40 C.F.R. § 372.65, in excess of the 100 pound threshold quantity established under Section 313(f) of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. § 372.28, at the Cullman Facility and Knoxville Facility during calendar year 2008, the Chattanooga Facility during calendar years 2009 and 2008, the Evansville Facility and Dayton Facility during calendar years 2010 and 2008, and the Hermitage Facility, Franklin Facility, Elizabethtown Facility, and Lexington Facility during calendar years 2010, 2009, and 2008.

15. Respondent processed mercury, a toxic chemical referenced at Section 313(c) of EPCRA, 42 U.S.C. § 11023 and 40 C.F.R. § 372.65, and listed under 40 C.F.R. § 372.65, in excess of the 10 pound threshold quantity established under Section 313(f) of EPCRA, 42 U.S.C. § 11023, and 40 C.F.R. § 372.28, at the Franklin Facility during calendar year 2008.

16. Respondent failed to submit a Form R for lead and mercury to the Administrator of EPA and to the officials designated by the Governor of the States Alabama, Indiana, Ohio, Tennessee and the Commonwealth of Kentucky by July 1 of the reporting year.

17. Respondent violated the reporting requirements of Section 313(f) of EPCRA, 42 U.S.C. § 11023, at its facilities for calendar years 2010, 2009, and 2008, reporting years 2011, 2010, and 2009 respectively, and is therefore subject to the assessment of penalties under Section 325(c) of EPCRA, 42 U.S.C. § 11045.

18. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$37,500 for each violation of Section 313 that occurred after January 12, 2009. Each day a violation of Section 313 continues constitutes a separate violation. Civil penalties under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), may be assessed by an Administrative Order.

Violations of Section 312 of EPCRA

19. Section 312 of EPCRA, 42 U.S.C. § 11022, and the regulations found at 40 C.F.R. Part 370, provide that the owner or operator of a facility that is required to prepare or have available a Material Safety Data Sheet (MSDS) for hazardous chemicals under the Occupational Safety and Health Act of 1970 (OSHA) and regulations promulgated under that Act, shall submit to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the fire department with jurisdiction over the facility, by March 1, 1988, and on or before March 1 annually thereafter, a completed emergency and hazardous chemical inventory form (Tier I or Tier II) as described in 40 C.F.R. Part 370, containing the information required by that part for hazardous chemicals present at the facility at any one time in the calendar year in amounts equal to or greater than 10,000 pounds and containing the information required by that part for extremely hazardous substances (EHS)

present at the facility at any one time in amounts equal to or greater than the threshold planning quantity (TPQ) or 500 pounds, whichever is less.

20. At some time during the calendar years of 2010, 2009, 2008, fly ash was present at each facility identified in paragraph 7 in an amount equal to or greater than 10,000 pounds.

21. Fly ash is a "hazardous chemical" as defined under Section 329(5) of EPCRA, 42 U.S.C. § 11049(5), for which Respondent is required to prepare or have available a MSDS under OSHA at its facilities.

22. EPA alleges that for each of the facilities identified in paragraph 7, Respondent failed to submit a completed Emergency and Hazardous Chemical Inventory Form for fly ash to the SERC, the LEPC, and fire department with jurisdiction over the respective facility for calendar years 2010, 2009, and 2008, by March 1 of the following calendar year.

23. EPA alleges that Respondent violated the reporting requirements of Section 312 of EPCRA, 42 U.S.C. § 11022, at its facilities identified in paragraph 7 for calendar years 2010, 2009, and 2008, and is therefore subject to the assessment of penalties under Section 325 of EPCRA, 42 U.S.C. § 11045.

24. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$37,500 for each violation of Section 312 that occurred on or after January 12, 2009. Each day a violation of Section 312 continues constitutes a separate violation. Civil penalties under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), may be assessed by Administrative Order.

IV. Consent Agreement

25. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above but neither admits nor denies the factual allegations set out above.

26. Respondent waives any right to contest the allegations and its right to appeal the proposed final order accompanying the Consent Agreement.

27. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CAFO.

28. Respondent certifies that as of the date of its execution of this CAFO, it is in compliance with all relevant requirements of EPCRA at the facility.

29. Compliance with the CAFO shall resolve the allegations of violations contained herein. This CAFO shall not otherwise affect any liability of Respondent to the United States other than as expressed herein. Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

30. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public's interest and that this CAFO is consistent with the applicable requirements of EPCRA.

V. Final Order

31. Respondent shall pay a civil penalty of EIGHTY THOUSAND THREE HUNDRED SEVENTY FOUR DOLLARS (\$80,374), for the violations alleged in Section III. Payment shall be paid within thirty (30) days of the effective date of this CAFO.

32. Respondent shall pay the penalty by forwarding a cashier's or certified check, payable to: "Treasurer, United States of America," to the following address:

BY MAIL

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

BY OVERNIGHT

U.S. Bank
Government Lockbox 979077 US
EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101
(314) 418-1028

The check shall reference on its face the name and the Docket Number of the CAFO.

33. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. EPA, Region IV
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Erika White
U.S. EPA, Region IV
Air, Pesticides & Toxics Management Division
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Saundi Wilson
U.S. EPA, Region IV
Office of Environmental Accountability
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Regional Hearing Clerk, (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

James Entzminger, (SC-5J)
Chemical Emergency Preparedness
and Prevention Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

David Star (LC-8J)
Pesticides & Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Jeffery M. Trevino , (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

34. For the purposes of state and federal income taxes, Respondent shall not be entitled, and agrees not to attempt, to claim a deduction for any civil penalty payment made pursuant to this CAFO. Any attempt by Respondent to deduct any such payments shall constitute a violation of this CAFO.

VI. Supplemental Environmental Project

35. Respondent shall undertake and complete, in accordance with the approved SEP in this matter attached hereto as Exhibit 1, the following Pollution Reduction project within 90 days of the effective date of this CAFO. Sherman Dixie shall expend THREE HUNDRED TWENTY SEVEN THOUSAND FOUR HUNDRED SEVENTY THREE DOLLARS (\$327,473) for the paving of several large unpaved areas at the Chattanooga, Elizabethtown, Franklin, Hermitage, and Lexington facilities as stated in the attached SEP proposal. Respondent shall provide EPA with engineered design information, stamped and approved by a Professional Engineer, at least 14 days before commencing construction, for EPA's review for consistency with this CAFO. In order to receive credit for the SEP, Respondent must fully and timely complete the SEP project. If Respondent does not fully and timely complete the project, Respondent shall be required to pay a stipulated penalty pursuant to Paragraph 37.

36. Respondent agrees to the following language concerning the SEP:

“Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term “open federal financial assistance transaction” refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose financial performance period has not yet expired.”

37. If Respondent fails to timely and fully complete any part of the SEP, including failure to spend the minimum amount of THREE HUNDRED TWENTY SEVEN THOUSAND FOUR HUNDRED SEVENTY THREE DOLLARS (\$327,473), Respondent shall pay to the United States a stipulated penalty of the difference between \$327,473 the actual SEP expenditure.

38. Respondent agrees that EPA may conduct an inspection at any time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.

39. No later than thirty (30) calendar days after the completion of the project, Respondent shall submit to EPA a SEP Completion Report. The Report shall be sent to the EPCRA Enforcement Section, to the attention of Erika White at the address provided above. The Report shall include the following:

(a) an affidavit from an authorized company official, attesting that the SEP has been completed or explaining in detail any failure to complete it; and

(b) copies of appropriate documentation, including invoices and receipts, showing a total expenditure THREE HUNDRED TWENTY SEVEN THOUSAND FOUR HUNDRED SEVENTY THREE DOLLARS (\$327,473), or greater, was spent for the paving of several large unpaved areas at the Chattanooga, Elizabethtown, Franklin, Hermitage, and Lexington Facilities described in paragraph 35.

Upon request, Respondent shall send EPA any additional documentation requested by EPA.

40. If Respondent fails to timely submit a SEP Completion Report as required by this CAFO, Respondent shall pay to the United States a stipulated penalty of \$100 for each calendar day that the report is late.

41. For Federal Income Tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

42. Respondent certifies that, as of the date this CAFO is signed, it is not required to

perform any part of the SEP by any federal, state or local law, regulation, permit or order, or by any agreement or grant. Respondent further certifies that, as of this date, it has not received and is not negotiating to receive, credit for any part of the SEP in any other enforcement action of any kind.

43. Any public statement, oral or written, by Respondent making any reference to the SEP shall include the following language:

"This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of Sections 312 and 313 of the Emergency Planning and Community Right-to-Know Act of 1986."

44. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty from the effective date of this CAFO if the penalty is not paid by the date required. Interest will be assessed at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717. A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorney fees. In addition, a penalty charge will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due.

45. Complainant and Respondent shall bear their own costs and attorney fees in this matter.

46. This CAFO shall be binding upon the Respondent, its successors and assigns.

47. The following individual is authorized to receive service for EPA in this proceeding:

Caron B. Falconer
U.S. EPA, Region IV
Air, Pesticides & Toxic Management Division
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-8451

48. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized by the party represented to enter into this CAFO and legally bind that party to it.

THIS SECTION INTENTIONALLY LEFT BLANK

VI. Effective Date

49. The effective date of this CAFO shall be the date upon which the CAFO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

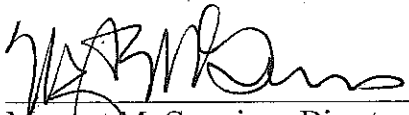
Sherman Dixie Industries, Inc.


By: _____ Date: _____
Pete DeLay
President


U.S. Environmental Protection Agency

By: _____ Date: _____
Beverly H. Banister, Director
Air, Pesticides & Toxics Management Division
U.S. EPA Region IV

AGREED AND CONSENTED TO:

By:  Date: 9/9/2014
Margret M. Guerriero, Director
Land and Chemicals Division
U.S. EPA Region V

By:  Date: 9/18/14
Sharon Jaffess, Chief MICHAEL S. HANS, ACTING CHIEF
Enforcement and Compliance Assurance Branch
U.S. EPA Region V

By:  Date: 9/8/2014
for Richard C. Karl, Director
Superfund Division
U.S. EPA Region V

In the Matter of: Sherman Dixie Concrete Industries, Inc.
Docket Numbers: EPCRA-04-2014-2022(b)
EPCRA-05-2014-

The effective date of the foregoing Consent Agreement and Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk for the U.S. EPA, Region IV.

APPROVED AND SO ORDERED this _____ day of _____ 2014.

Susan B. Schub
Regional Judicial Officer

In the Matter of: Sherman Dixie Concrete Industries, Inc.
Docket Numbers: EPCRA-04-2014-2022(b)
EPCRA-05-2014-

The effective date of the foregoing Consent Agreement and Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk for the U.S. EPA, Region V.

APPROVED AND SO ORDERED this 11th day of September 2014.



Susan Hedman
Regional Administrator
United States Environmental Protection Agency
Region V

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Consent Agreement and Final Order, in the Matter of Sherman Dixie Industries, Inc., Docket Numbers: EPCRA-04-2014-2022(b) and EPCRA-05-2014-_____, on the parties listed below in the manner indicated:

Caron B. Falconer (Via EPA's internal mail)
U.S. EPA, Region IV
Air, Pesticides & Toxics Management Division
61 Forsyth Street
Atlanta, GA 30303

Ellen Rouch (Via EPA's internal mail)
U.S. EPA, Region IV
Office of Environmental Accountability
61 Forsyth Street
Atlanta, GA 30303

Mr. Gary Rikard (Via Certified Mail - Return Receipt Requested)
Butler, Snow, O'Mara, Stevens,
& Cannada, PLLC
Crescent Center
6075 Poplar Avenue
5th Floor
Memphis, Tennessee 37209

Date: _____

Patricia A. Bullock, Regional Hearing Clerk
United States Environmental
Protection Agency, Region IV
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, GA 30303
(404) 562-9511