



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET

DENVER, CO 80202-1129

Phone 800-227-8917

http://www.epa.gov/region08

2013 APR -4 AM 11:12

FILED
EPA REGION VIII
HEARING CLERK

DOCKET NO.: CAA-08-2013-0008

IN THE MATTER OF:

ABE – SOUTH DAKOTA, LLC.

38469 133rd Street
Aberdeen, SD 57401

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 4 DAY OF April, 2013.

Elyana R. Sutin
Regional Judicial Officer

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF:)
)
ABE – South Dakota, LLC)
38469 133rd Street)
Aberdeen, South Dakota 57401)
)
Respondent)
)

**COMBINED COMPLAINT AND
CONSENT AGREEMENT**

DOCKET NO.: CAA-2013-0008

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 38469 133rd Street, Aberdeen, South Dakota (the Facility).

13. Anhydrous ammonia (CAS # 7664-41-7) and a flammable mixture (butane and pentane) (CAS # 00-11-11) are regulated substances and are present at the Facility in amounts greater than the threshold quantities.

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 RMP to detect and prevent or minimize accidental releases of such substances.

SPECIFIC ALLEGATIONS

15. On January 24, 2012, authorized representatives of the EPA conducted an inspection of the Respondent’s facility located at 38469 133rd Street, Aberdeen, 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 - 23.

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, including documentation ensuring that the process is designed in compliance with recognized and generally accepted good engineering practices [40 C.F.R. § 68.65(d)(2)].

- a. Respondent did not have proper labeling on the ammonia pressure vessel, proper safety equipment on hand for handling ammonia, and proper signage in accordance with recognized and generally accepted good engineering practices. This is a violation of 40 C.F.R. § 68.65(d)(2).

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 PHA's reviewed during the EPA inspection did not include the following required information:

- a. An evaluation of the hazards of the process. This is a violation of 40 C.F.R. 68.67(c)(1).
- b. Identification of any previous incident which had a likely potential for catastrophic consequences. This is a violation of 40 C.F.R. § 68.67(c)(2).
- c. Documentation addressing engineering and administrative controls applicable to hazards and interrelationships. This is a violation of 40 C.F.R. § 68.67(c)(3).
- d. Information on consequences of failure of engineering and administrative controls. This is a violation of 40 C.F.R. § 68.67(c)(4).
- e. Information addressing stationary source siting. This is a violation of 40 C.F.R. § 68.67(c)(5).
- f. 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).

- g. 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).
- h. 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. This is a violation of 40 C.F.R. § 68.69(a)(2)(i).
- b. The steps required to avoid deviations were not included. 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. Testing and inspections on process vessels did not follow recognized and generally accepted good engineering practices. This is a violation of 40 C.F.R. § 68.73(d)(2).

- b. All process vessels were not tested and inspected at a frequency in accordance with generally accepted good engineering practices. This is a violation of 40 C.F.R. § 68.73(d)(3).
 - c. Deficiencies in equipment operating outside acceptable limits were not corrected and documented. 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.
- a. Respondent did have a program to manage changes in place at the time of the EPA inspection but the program was not properly implemented (not informing employees and contractors involved in the operation of a process and maintenance of new changes in the process, whose job tasks would be affected by a change in the process). This is a violation of 40 C.F.R. § 68.75(c).
21. 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 appropriately responded to and corrected. This is a violation of 40 C.F.R. § 68.79(d).
22. 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).
23. 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

24. 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.

25. Respondent consents and agrees to pay a civil penalty in the amount of **forty-six thousand and two hundred dollars (\$46,200)**.

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

CERTIFICATION OF COMPLIANCE

27. 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-h 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. Compliance audits are conducted in accordance with 40 C.F.R. § 68.79 and include documenting that all findings have been resolved in a timely manner.
- g. The risk management program is registered in accordance with 40 C.F.R. § 68.160 and includes the correct program level.
- h. 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.

28. 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.

29. 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

30. This CCCA contains all terms of the settlement agreed to by the parties.
31. This CCCA, upon incorporation into a final order, applies to and is binding upon EPA, Respondent, and Respondent's successors or assigns.
32. Nothing in this CCCA shall relieve Respondent of the duty to comply with the CAA and its implementing regulations.
33. 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.
34. 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.
35. 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.
36. The undersigned representative of 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.
37. The parties agree to submit this CCCA to the Regional Judicial Officer, with a request that it be incorporated into a final order.
38. Each party shall bear its own costs and attorney fees in connection with this administrative matter.
39. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

40. 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. Sierra
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-08-2013-0008**. 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

