

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2012 DEC -5 PM 3: 02

FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF:	)	COMBINED COMPLAINT AND
	)	CONSENT AGREEMENT
Malpaso Trucking, Inc.	)	
1507 Beechcraft Street	)	Docket No. CWA-08-2013-0006
Rawlins, WY 82301	)	
	)	Simultaneous Commencement and
	)	Conclusion of a Proceeding Pursuant to
Respondent	)	Section 311(b)(6) of the Clean Water Act
<hr/>	)	and 40 C.F.R. § 22.13(b)

Complainant, United States Environmental Protection Agency, Region 8 (EPA), and Respondent, Malpaso Trucking, Inc., by their undersigned representatives, hereby consent and agree as follows:

**I. STATUTORY AUTHORITY**

1. This Combined Complaint and Consent Agreement (Agreement) is issued pursuant to section 311(b)(6) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6), and 40 C.F.R. § 22.13(b). Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), authorizes the Administrator of the United States Environmental Protection Agency (EPA) to assess civil penalties for violations of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), which authority has been properly delegated to the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region 8. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, governs such proceedings. 40 C.F.R. § 22.13(b) provides that a proceeding subject to the Consolidated Rules may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3).

## **II. PARTIES BOUND**

2. This Agreement shall apply to and be binding upon Complainant and shall be binding upon the Respondent, its officers, directors, agents, successors, and assigns. Any change in the ownership or legal status of Malpaso Trucking, Inc. or the business organization, structure or status of Malpaso Trucking, Inc., including, but not limited to, any transfer of assets or real or personal property, shall not alter its responsibilities under this Agreement.

## **III. STATEMENT OF PARTIES**

3. Respondent stipulates to EPA's jurisdiction and venue over the matters contained in this Agreement; however, Respondent neither admits nor denies the specific factual allegations contained herein.

4. Respondent waives its right to a hearing before any tribunal to contest any issue of law or fact set forth in this Agreement, and waives its right to appeal the Final Order.

5. The signatories to this Agreement certify that they are authorized to execute and legally bind the parties they represent to this Agreement.

6. This Agreement contains all terms of the settlement agreed to by the parties.

7. Complainant and Respondent agree that settlement of this matter is in the public interest, and that execution of this Agreement and issuance of a final order without further litigation and without adjudication of any issue of fact or law is the most appropriate means of resolving this matter.

## **IV. STATUTORY AND REGULATORY FRAMEWORK**

8. The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

9. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), in pertinent part, prohibits the discharge of any oil or hazardous substances into or upon the navigable waters of the United

States or their adjoining shorelines in such quantities as may be harmful as determined by the President.

10. The term “discharge” is defined in section 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2), to include, in pertinent part, “any spilling, leaking, pumping, pouring, emitting, emptying or dumping . . . .”

11. The term “oil” is defined in section 311(a)(1) of the Act, in pertinent part, as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge . . . .” 33 U.S.C. § 1321(a)(1).

12. The term “navigable waters” is defined in section 502(7) of the Act as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

13. The term “navigable waters,” as further defined in 40 C.F.R. § 110.1, “means the waters of the United States, including the territorial seas,” and includes, *inter alia*: “(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (b) Interstate waters, including interstate wetlands; . . . ; (e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and (f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section . . . .”

14. In accordance with section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), the President, through a delegation to EPA, has determined, by regulation, those quantities of oil the discharge of which may be harmful to the public health or welfare or the environment of the United States. Exec. Order No. 11735, 38 Fed. Reg. 21243 (Aug. 3, 1973), and Executive Order 12777, 56 Fed. Reg. 54757 (October 22, 1991). 40 C.F.R. § 110.3 defines discharges of oil in such quantities as may be harmful to include discharges of oil that: “(a) Violate applicable water quality standards; or (b) Cause a film or sheen upon or discoloration of the surface of the water

or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.”

15. The term “sheen” is defined in 40 C.F.R. § 110.1 as an “iridescent appearance on the surface of the water.”

16. The term “sludge” is defined in 40 C.F.R. § 110.1 as “an aggregate of oil or oil and other matter of any kind in any form other than dredged spoil having a combined specific gravity equivalent to or greater than water.”

17. Pursuant to section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), any owner, operator, or person in charge of any vessel, onshore facility or offshore facility from which oil is discharged in violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), may be assessed a class I or class II civil penalty.

18. The term “owner or operator” is defined in section 311(a)(6) of the Act in pertinent part as “in the case of an onshore facility, . . . any person owning or operating such onshore facility . . . .” 33 U.S.C. § 1321(a)(6).

19. According to section 311(a)(7) of the Act, “‘person’ includes an individual, firm, corporation, association, and a partnership.” 33 U.S.C. § 1321(a)(7).

20. The term “onshore facility” is defined in section 311(a)(10) of the Act as “any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.” 33 U.S.C. § 1321(a)(10).

## V. GENERAL ALLEGATIONS

21. Respondent is and was at all relevant times a corporation organized under the laws of Wyoming. Respondent’s office is located at 1507 Beechcraft St., Rawlins, WY, 82301. Respondent’s mailing address is P.O. Box 1954, Rawlins, WY, 82301.

22. The president and registered agent of Malpaso Trucking, Inc., is Hector M. Ochoa. The address of Respondent's registered agent, on file with the Wyoming Secretary of State, is 1507 Beechcraft St., Rawlins, WY, 82301.

23. Respondent is and was at all times relevant to the Agreement a "person" within the meaning of section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7).

24. At all relevant times, Respondent owned and operated a tanker trailer with vehicle identification number K40027.

25. At all relevant times, Respondent owned and operated a 1997 Peterbilt Model No. 379 Tractor with vehicle identification number 1XP5DB9X7VD440219.

26. The tanker trailer and truck tractor referenced in Paragraphs 24-25 were at all relevant times "onshore facilities" within the meaning of section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10).

27. The Cache la Poudre River is a traditional navigable water that originates in north-central Colorado. The Cache la Poudre River flows approximately 126 miles from its source into the South Platte River near Greeley, Colorado.

28. The Cache la Poudre River is and was at all relevant times a "navigable water" within the meaning of 40 C.F.R. § 110.1, and section 502(7) of the Act, 33 U.S.C. § 1362(7).

## **VI. SPECIFIC ALLEGATIONS**

29. On August 25, 2009, the truck tractor referenced in Paragraph 25 pulling the tanker trailer referenced in Paragraph 24 rolled off the north side of Colorado Highway 14 into the Cache la Poudre River near mile marker 114. The tanker trailer was filled with approximately 5,700 gallons of liquid asphalt oil being transported to a road construction site near Cameron Pass, approximately 40 miles west of where the semi-tractor and tanker trailer rolled off the highway.

30. The tanker trailer referenced in Paragraph 29 ruptured, releasing at least one-half of its contents into the Cache la Poudre River, impacting both the Cache la Poudre River and its adjoining shorelines, causing a film or sheen upon or discoloration of the surface of the Cache la Poudre River and/or its adjoining shorelines and/or causing a sludge or emulsion to be deposited beneath the surface of the Cache la Poudre River and/or upon its adjoining shorelines.

31. The film or sheen upon or discoloration of the surface of the Cache la Poudre River and/or its adjoining shorelines and/or the sludge or emulsion deposited beneath the surface of the Cache la Poudre River and/or upon its adjoining shorelines referenced in Paragraph 30 continued for several days.

## **VII. VIOLATION**

### **Violation of Section 311(b)(3)**

32. Paragraphs 1 through 31 of this Agreement are re-alleged and incorporated herein by reference.

33. The release of liquid asphalt referenced in Paragraph 30 was at all relevant times a “discharge” within the meaning of section 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2).

34. The discharged liquid asphalt referenced in Paragraph 30 was at all relevant times “oil” within the meaning of section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

35. The oil that was discharged into the Cache la Poudre River and upon its adjoining shorelines in the form of liquid asphalt referenced in Paragraph 30 was discharged in “quantities as may be harmful” within the meaning of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3.

36. Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. Part 19 authorize the assessment of a Class II civil penalty of up to \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500, for violations of

section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), occurring after January 12, 2009.

#### **VIII. PAYMENT OF CIVIL PENALTY**

37. Respondent consents and agrees to pay a civil penalty in the amount of SIXTY TWO THOUSAND DOLLARS (\$62,000) in twenty-four (24) payments, in the manner described below in this Paragraph.

a. Payment of TWO THOUSAND FIVE HUNDRED EIGHTY-THREE AND THIRTY-THREE/HUNDREDTHS DOLLARS (\$2,583.33) is due within thirty (30) calendar days from the date written on the Final Order issued by the Regional Judicial Officer that incorporates this Consent Agreement.

b. Twenty-two (22) payments of TWO THOUSAND FIVE HUNDRED EIGHTY-THREE AND THIRTY-THREE/HUNDREDTHS DOLLARS (\$2,583.33) are due beginning on the first day of the second month following the date written on the Final Order issued by the Regional Judicial Officer that incorporates this Consent Agreement, and continuing for twenty-one (21) consecutive months with each payment due on the first day of each successive month.

c. Payment of TWO THOUSAND FIVE HUNDRED EIGHTY-THREE AND FORTY-ONE/HUNDREDTHS DOLLARS (\$2,583.41) is due on the first day of the month following the final payment of the twenty-two payments required pursuant to sub-paragraph b of this Paragraph.

d. If the due date of any of the twenty-four payments falls on a weekend or legal federal holiday, 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.

e. Payments shall be made by any of the methods set forth in Appendix 1 to this Agreement.

f. At the same time that each payment is made, notice that the payment has been made shall be provided to:

Donna Inman  
Enforcement Specialist  
Technical Enforcement Program (8ENF-UFO)  
U.S. EPA Region 8  
1595 Wynkoop  
Denver, CO 80202-1129

Tina Artemis  
Regional Hearing Clerk (8RC)  
U.S. EPA Region 8  
1595 Wynkoop  
Denver, CO 80202-1129

If a payment is made by cashiers or certified check, the notice shall include a copy of the check. If a payment is made in any other manner, the notice shall include documentation demonstrating that the payment was made.

g. In the event a payment is not received by the specified due date, interest on the late payment shall accrue 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 (e.g., on the 1<sup>st</sup> late day for the first payment, 30 days of interest accrues).

h. In addition, a handling charge of fifteen dollars (\$15) shall be assessed on the 31<sup>st</sup> day from the date of the Final Order, and each subsequent 30-day period that the initial payment, or any portion thereof, remains unpaid, and a handling charge of fifteen dollars (\$15) shall be assessed on the 1<sup>st</sup> day after the due date of each subsequent payment, and each subsequent 30-day period that any such payment, 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 (e.g., the 121st day from the date the Final Order is signed). Payments are first applied to handling charges, 6% penalty interest, late interest, and any balance is then applied to the outstanding principal amount. Further, Respondent shall be subject to the fees, costs, and nonpayment penalty set forth in section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H).

i. If any of the twenty-four civil penalty payments required by Subparagraphs a, b, and c of this Paragraph 37 are not paid within the time specified, EPA, in its sole, unreviewable discretion, may elect to accelerate any remaining payments, such that the remaining payment(s) will be due within thirty (30) calendar days of Respondent's receipt of notice of such acceleration from EPA. The provisions of Subparagraphs d, e, f, g, h, and j of this Paragraph 37 shall apply to such accelerated payment.

j. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

38. The civil penalty set forth in paragraph 37 of this Agreement was determined by Complainant after taking into account all factors identified in section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), i.e., the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

#### **IX. PUBLIC NOTICE**

39. As required by section 311(6)(C)(i) of the Act, 33 U.S.C. § 1321(6)(C)(i), and 40 C.F.R. § 22.45, Complainant will provide public notice and a reasonable opportunity to

comment on the penalty that Respondent has agreed to pay in this matter. Complainant may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that the Agreement is inappropriate, improper, or inadequate.

40. If comments received during the public comment period do not require modification or withdrawal by Complainant from this Agreement, the parties agree to submit this Agreement to the Regional Judicial Officer for Region 8 following the close of the public comment period specified in 40 C.F.R. § 22.45, with a request that it be incorporated into a final order.

#### **X. OTHER TERMS AND CONDITIONS**

41. Failure by Respondent to comply with any of the terms of this Agreement shall constitute a breach of the agreement and may result in referral of the matter to the United States Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

42. Nothing in this Agreement shall be construed as a waiver by Complainant or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this Agreement.

43. This Agreement, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the civil penalty owed for violations alleged in this Agreement.

44. This Agreement resolves Respondent's liability for Federal civil penalties under section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6) for the alleged violations contained in this Agreement. This Agreement shall not in any case affect Complainant's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law

whether or not alleged in this Agreement. This Agreement shall not affect Respondent's right to assert any defense in any action by Complainant to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

45. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this Agreement.

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8**  
Complainant

December 5, 2012  
Date

Eddie A. Serria  
for Andrew M. Gaydosh  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and  
Environmental Justice

In the Matter of Malpaso Trucking, Inc., Docket No.

**MALPASO TRUCKING, INC.**  
Respondent

11/26/12  
Date

Hector M. Ochoa  
Hector M. Ochoa  
President

**Combined Complaint and Consent Agreement - Appendix 1**

The following are acceptable payment methods for the civil penalty required to be paid pursuant to the Agreement.

1. If payment is being made by cashier's or certified check, submit the check, including the name and docket number of this case, payable to "Treasurer, United States of America," to:

Regular Mail:

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

Federal Express, Airborne, or other commercial carrier:

US Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101

Contact: Natalie Pearson  
314-418-4087

2. Wire Transfers:

Wire transfers must indicate the name and docket number of this case and be sent directly to the Federal Reserve Bank in New York City with the following information:

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 "

3. ACH (also known as REX or remittance express):

ACH payments must indicate the name and docket number of this case and be paid in accordance with the following information:

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

4. 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](http://www.pay.gov)

Enter "sfo 1.1" (without the quotation marks) in the "Search Public Forms" field.

Click on the first link to open the form, complete required fields, and then click on "Submit Data" button at bottom of form.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8  
1595 Wynkoop Street; Denver, CO 80202-1129**

**PUBLIC NOTICE AND OPPORTUNITY TO COMMENT ON CLEAN WATER ACT SETTLEMENT**

**Action:** EPA is providing notice of a Combined Complaint and Consent Agreement with penalty assessment and the opportunity for public comment on the proposed administrative penalty assessment against Malpaso Trucking, Inc. for discharges of oil into waters of the U.S.

**Summary:** EPA is authorized in Class II proceedings under Section 311(b)(6) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6), to issue orders assessing civil penalties for violations of the CWA and implementing regulations, after providing the person subject to the penalty notice and opportunity for a hearing, and after providing the public with notice of the proposed penalty, opportunity to submit written comments and to participate in a Class II penalty proceeding (hearing), if any. The deadline for submitting public comment is thirty (30) calendar days after issuance of this notice.

On December 05, 2012, EPA filed a Combined Complaint and Consent Agreement pursuant to Section 311(b)(6)(B)(ii) of the Act. Pursuant to Section 311(b)(6)(C) of the CWA, EPA hereby notifies the public of this proposed penalty assessment:

In the matter of: Malpaso Trucking, Inc.  
1507 Beechcraft Street  
Rawlins, WY

EPA Docket Number: **CWA-08-2013-0006**

Proposed penalty in the Complaint: \$62,000.00

Alleged violations: Discharge of at least 3,000 gallons of asphaltic oil into the Cache La Poudre River, in Larimer County, Colorado, in violation of section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

Written comments on the Combined Complaint and Consent Agreement are encouraged and will be accepted at the address listed below for a period of thirty (30) calendar days after the publication of this notice. Written comments submitted by the public as well as information submitted by Malpaso Trucking, Inc. will be available for public review, subject to the provisions of law restricting the disclosure of confidential information. Any person submitting written comments has a right to participate in a hearing, if one is held. The Combined Complaint and Consent Agreement is available for review between 9:00 a.m. and 4:00 p.m. at the address listed below and on the internet at: <http://yosemite.epa.gov/oa/rhc/epaadmin.nsf>.

Submit written comments to: Tina Artemis  
Regional Hearing Clerk (8RC);  
EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129  
Telephone: (303) 312-6765.

**FOR FURTHER INFORMATION:** Persons wishing to receive a copy of the Combined Complaint and Consent Agreement, or other documents in this proceeding (such as the regulations in 40 C.F.R. part 22, which establish procedures for hearings), or to comment upon the proposed penalty assessment, or any other aspect of the matter, should contact the Regional Hearing Clerk identified above. No action will be taken by EPA to finalize a settlement in this matter until thirty (30) calendar days after this public notice.