

**U. S. ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219**

**BEFORE THE ADMINISTRATOR**

**In the Matter of:** )  
 )  
 **The Western Sugar Cooperative,** ) **Docket No. CAA-07-2020-0174**  
 **Corporation,** )  
 )  
 **Respondent.** )

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**CONSENT AGREEMENT AND FINAL ORDER**

**Preliminary Statement**

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and The Western Sugar Cooperative, Corporation (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

**Jurisdiction**

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d) and Section 325(c)(1) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045(c)(1). Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), the Administrator and the Attorney General jointly determined that this matter, in which the first date of alleged violation occurred more than twelve months prior to the initiation of the administrative action, was appropriate for administrative penalty action.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent has violated the Chemical Accident Prevention Provisions in 40 C.F.R. Part 68, promulgated pursuant to Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and that Respondent is therefore in violation of Section 112(r) of the CAA, 42 U.S.C. § 7412(r). Furthermore, this Consent Agreement and Final Order serves as notice pursuant to Section 113(d)(2)(A) of the CAA, 42 U.S.C. § 7413(d)(2)(A), of the EPA’s intent to issue an order assessing penalties for these violations.

## **Parties**

3. Complainant is the Chief of the Chemical Branch, Enforcement and Compliance Assurance Division, EPA, Region 7, as duly delegated by the Administrator of EPA.

4. Respondent is The Western Sugar Cooperative, Corporation, a corporation doing business in the state of Nebraska.

## **Statutory and Regulatory Background**

### CAA

5. On November 15, 1990, the President signed into law the CAA Amendments of 1990. The Amendments added Section 112(r) to Title I of the CAA, 42 U.S.C. § 7412(r), which requires the Administrator of the EPA to, among other things, promulgate regulations in order to prevent accidental releases of certain regulated substances. Section 112(r)(3), 42 U.S.C. § 7412(r)(3), mandates that the Administrator promulgate a list of regulated substances, with threshold quantities, and defines the stationary sources that will be subject to the chemical accident prevention regulations mandated by Section 112(r)(7). Specifically, Section 112(r)(7), 42 U.S.C. § 7412(r)(7), requires the Administrator to promulgate regulations that address release prevention, detection, and correction requirements for these listed regulated substances.

6. On June 20, 1996, the EPA promulgated a final rule known as the Risk Management Program, 40 C.F.R. Part 68, which implements Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7). This rule requires owners and operators of stationary sources to develop and implement a risk management program that includes a hazard assessment, a prevention program and an emergency response program.

7. The regulations at 40 C.F.R. Part 68 set forth the requirements of a risk management program that must be established at each stationary source. The risk management program is described in a Risk Management Plan (“RMP”) that must be submitted to the EPA.

8. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), and 40 C.F.R. § 68.150, an RMP must be submitted for all covered processes by the owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process no later than the latter of June 21, 1999, or the date on which a regulated substance is first present above the threshold quantity in a process.

9. The regulations at 40 C.F.R. § 68.10 set forth how the Chemical Accident Prevention Provisions apply to covered processes. Pursuant to 40 C.F.R. § 68.10(i), a covered process is subject to Program 3 requirements if the process does not meet the eligibility requirements of Program 1, as described in 40 C.F.R. § 68.10(g), and it either falls under a specified North American Industry Classification System code or is subject to the OSHA process safety management standard, 29 C.F.R. § 1910.119.

10. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), states that the Administrator may issue an administrative order against any person assessing a civil administrative penalty of

up to \$25,000 per day of violation whenever, on the basis of any available information, the Administrator finds that such person has violated or is violating any requirement or prohibition of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and its implementing regulations. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$37,500 for violations that occurred before November 2, 2015, and to \$48,192 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 13, 2020.

### EPCRA

11. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), assists state commissions, local committees, and fire departments in planning for emergencies and makes information on chemical presence and hazards available to the public. A delay in reporting could result in harm to human health and the environment.

12. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370 require the owner or operator of a facility, which is required by the OSHA to prepare or have available a material safety data sheet (MSDS) or safety data sheet (SDS) for a hazardous chemical, to prepare and submit to the state emergency response commission (SERC), community emergency coordinator for the local emergency planning committee (LEPC) and fire department with jurisdiction over the facility annually by March 1, an emergency and hazardous chemical inventory form (“Tier I” or “Tier II” as described in 40 C.F.R. Part 370) for the previous calendar year. The form must contain the information required by Section 312(d) of EPCRA, covering all hazardous chemicals present at the facility at any one time during the preceding year in amounts equal to or exceeding 10,000 pounds and all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity designated by U.S. EPA at 40 C.F.R. Part 355, Appendices A and B, whichever is lower.

13. Under 29 C.F.R. § 1910.1200(b)(1), all employers are required to provide information to their employees about the hazardous chemicals to which they are exposed including, but not limited to, MSDS or SDS.

14. Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), authorizes the Administrator to assess a civil penalty of up to \$25,000 for each EPCRA Section 312 violation. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19 increased the statutory maximum penalty to \$58,328 per day of violation for each violation that occurred after November 2, 2015 and for which penalties are assessed on or after January 13, 2020.

## Definitions

### CAA

15. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines “person” to include any individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency department, or instrumentality of the United States and any officer, agent, or employee thereof.

16. Section 112(r)(2)(C) of the CAA, 42 U.S.C. § 7412(r)(2)(C), and the regulations at 40 C.F.R. § 68.3 define “stationary source,” in part, as 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.

17. The regulations at 40 C.F.R. § 68.3 define “regulated substance” as any substance listed pursuant to Section 112(r)(3) of the CAA, as amended, in 40 C.F.R. § 68.130.

18. The regulations at 40 C.F.R. § 68.3 define “threshold quantity” as the quantity specified for regulated substances pursuant to Section 112(r)(5) of the CAA, as amended, listed in 40 C.F.R. § 68.130 and determined to be present at a stationary source as specified in 40 C.F.R. § 68.115.

19. The regulations at 40 C.F.R. § 68.3 define “process” as any activity involving a regulated substance including any use, storage, manufacturing, handling or on-site movement of such substances, or combination of these activities. For the purposes of this definition, any group of vessels that are interconnected, or separate vessels that are located such that a regulated substance could be involved in a potential release, shall be considered a single process.

### EPCRA

20. Section 329(3) of EPCRA, 42 U.S.C. § 11049(3), defines “extremely hazardous substance” as a substance on the list described in Section 302 of EPCRA, which is codified in 40 C.F.R. Part 355.

21. Section 329(4) of EPCRA, 42 U.S.C. § 11049(3), defines “facility” as all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person.

22. Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), defines “person” as any individual, trust, firm, joint stock company, corporation, partnership, association, State, municipality, commission, political subdivision of a State, or interstate body.

23. Under 29 C.F.R. § 1910.1200(c), a hazardous chemical is any chemical which is classified as a physical or health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified.

### General Factual Allegations

24. Respondent is, and at all times referred to herein was, a “person” as defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

25. Respondent owns and operates a beet sugar manufacturing facility located at 2100 East Overland Drive, Scottsbluff, Nebraska (the Facility).

26. Respondent’s Facility consists of buildings, equipment, structures and other stationary items which are located on a single site or on contiguous or adjacent sites and are owned or operated by the same person, and therefore, is a “facility” as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

27. Respondent is the owner and operator of a facility that is a “stationary source” pursuant to 40 C.F.R. § 68.3.

28. Anhydrous sulfur dioxide, Chemical Abstract Service No. 7446-09-5, is an “extremely hazardous substance” according to Section 302(a)(2) of EPCRA, 42 U.S.C. § 11002(a)(2). For purposes of EPCRA reporting requirements, anhydrous sulfur dioxide has a minimum threshold level of 500 pounds, as listed in 40 C.F.R. Part 355, Appendix A.

29. Anhydrous sulfur dioxide is a “regulated substance” pursuant to 40 C.F.R. § 68.3. For purposes of the Risk Management Program, the threshold quantity of anhydrous sulfur dioxide, as listed in 40 C.F.R. § 68.130, is 5,000 pounds.

30. On April 9, 2019, EPA sent to Respondent a Show Cause Letter, requesting information about the company’s compliance with the Risk Management Program at 40 C.F.R. Part 68. On May 9, 2019, Respondent submitted a response to EPA’s Show Cause Letter.

31. Information gathered during EPA’s review of Respondent’s EPCRA emergency and hazardous chemical inventory forms (also known as “Tier II Forms”) and response to the Show Cause Letter revealed that Respondent had greater than 5,000 pounds of anhydrous sulfur dioxide in a process at its Facility from at least 2014 to February 28, 2019.

32. During at least one period of time during calendar year 2017, anhydrous sulfur dioxide was present at the Facility in an amount greater than 500 pounds, the minimum threshold level for purposes of EPCRA reporting requirements.

33. OSHA required Respondent to prepare, or have available, an MSDS or SDS for anhydrous sulfur dioxide.

34. From the time Respondent first had onsite greater than 5,000 pounds of anhydrous sulfur dioxide in a process until February 28, 2019, Respondent was subject to the requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and 40 C.F.R. Part 68 because it was an owner and operator of a stationary source that had more than a threshold quantity of a regulated substance in a process.

35. From the time Respondent first had onsite greater than 5,000 pounds of anhydrous sulfur dioxide in a process, Respondent was subject to the Program 3 prevention program requirements because, pursuant to 40 C.F.R. § 68.10(h), the covered process at its Facility did not meet the eligibility requirements of Program 1 and was subject to the OSHA process safety management standard, 29 C.F.R. § 1910.119.

36. From the time Respondent first had onsite greater than 5,000 pounds of anhydrous sulfur dioxide in a process, Respondent was required under Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), to submit a Risk Management Plan pursuant to 40 C.F.R. § 68.12(a) and comply with the Program 3 requirements provided at 40 C.F.R. § 68.12(d) and detailed in Subpart D.

### **Allegations of Violation**

37. Complainant hereby states and alleges that Respondent has violated the CAA and EPCRA and federal regulations promulgated thereunder as follows:

#### **Count 1**

38. The facts stated in Paragraphs 24 through 36 above are herein incorporated.

39. Respondent was required to submit to the SERC, LEPC, and local fire department on or before March 1, 2018, a completed emergency and hazardous chemical inventory form including anhydrous sulfur dioxide for calendar year 2017.

40. Respondent submitted to the SERC, LEPC and Fire Department a completed emergency and hazardous chemical inventory form including anhydrous sulfur dioxide on February 22, 2019 for calendar year 2017.

41. Each day that Respondent failed to submit to the SERC, LEPC, and Fire Department a completed emergency and hazardous chemical inventory form including anhydrous sulfur dioxide by March 1, 2018, for calendar year 2017 constitutes a separate violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a).

#### **Count 2**

42. The facts stated in Paragraphs 24 through 36 above are herein incorporated.

43. The regulation at 40 C.F.R. § 68.12(a) requires the owner or operator of a stationary source subject to the Risk Management Program, 40 C.F.R. Part 68, to submit a single Risk Management Plan (RMP) as provided in 40 C.F.R. §§ 68.150 to 68.185. Pursuant to 40 C.F.R. § 68.160, the owner or operator shall complete a single registration form that provides, *inter alia*, the Program level of each covered process and whether the stationary source is subject to 29 C.F.R. § 1910.119. Additionally, pursuant 40 C.F.R. § 68.175(a), the owner or operator is required to provide the information identified at 40 C.F.R. § 68.175(b) through (p) for each Program 3 process.

44. From at least 2014 through February 28, 2019, Respondent failed to submit an RMP pursuant to the requirements of 40 C.F.R. §§ 68.150 to 68.185, as required by 40 C.F.R. § 68.12(a). Specifically:

- (a) Respondent failed to complete a registration form pursuant to 40 C.F.R. § 68.160(a) that includes the information required by 40 C.F.R. § 68.160(b), including the Program level of the process and whether the stationary source is subject to 29 C.F.R. § 1910.119; and
- (b) Respondent failed to provide the Program 3 prevention information (stated at 40 C.F.R. § 68.175(b) through (p)), as required by 40 C.F.R. § 68.175(a).

45. Respondent's failure to submit an RMP pursuant to the requirements of 40 C.F.R. §§ 68.150 to 68.185, as required by 40 C.F.R. § 68.12(a), is a violation of Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7).

### **CONSENT AGREEMENT**

46. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;
- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

47. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein.

48. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

49. Respondent consents to receiving the filed Consent Agreement and Final Order electronically at the following email address: *sdm@mattsonricketts.com*.

### **Penalty Payment**

50. EPA has considered the appropriateness of the penalty pursuant to Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), and has determined that based on substantiated ability to pay information, the appropriate penalty for the violations is \$71,978.10 to be paid in two installments. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of \$71,620, plus interest of \$358.10 over a period of seven months for a total payment of \$71,978.10. The first payment of \$35,810 must be received at the address below within thirty days of the effective date of the Final Order. The second payment of \$36,168.10 shall be paid six months after the previous payment. Each penalty payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

51. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk  
*R7\_Hearing\_Clerk\_Filings@epa.gov*; and

Kasey Barton  
Office of Regional Counsel  
*barton.kasey@epa.gov*.

52. Respondent understands that its failure to timely pay any portion of the civil penalty may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).



### **Effect of Settlement and Reservation of Rights**

53. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the CAA, EPCRA or any other applicable law.

54. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to the EPA, as memorialized in paragraph directly below.

55. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of the CAA and EPCRA and their implementing regulations.

56. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of the CAA and regulations promulgated thereunder.

57. This Consent Agreement and Final Order constitutes an "enforcement response" as that term is used in EPA's *Clean Air Act Combined Enforcement Response Policy for Clean Air Act Sections 112(r)(1), 112(r)(7) and 40 C.F.R. Part 68* to determine Respondent's "full compliance history" under Section 113(e) of the CAA, 42 U.S.C. § 7413(e).

58. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

### **General Provisions**

59. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

60. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

61. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

62. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

**RESPONDENT:  
THE WESTERN SUGAR COOPERATIVE, CORPORATION**

Date: Sept. 11, 2020

  
Signature

RODNEY PERRY  
Name

President / CEO  
Title

**COMPLAINANT:**  
**U.S. ENVIRONMENTAL PROTECTION AGENCY**

Date: \_\_\_\_\_

\_\_\_\_\_  
Candace Bednar  
Chemical Branch Chief  
Enforcement and Compliance Assurance Division

Date: \_\_\_\_\_

\_\_\_\_\_  
Kasey Barton  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 7

**FINAL ORDER**

Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

\_\_\_\_\_  
Karina Borromeo  
Regional Judicial Officer

\_\_\_\_\_  
Date

**CERTIFICATE OF SERVICE**

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy via Email to Complainant:

Kasey Barton  
*barton.kasey@epa.gov*

Amber Whisnant  
*whisnant.amber@epa.gov*

Copy via Email to Attorney for Respondent:

Stephen D. Mossman, Esq.  
*sdm@mattsonricketts.com*

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Signed