

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AM 10: 27
REGION 7

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

Bayer CropScience LP)
8400 Hawthorn Road)
Kansas City, Missouri)

Respondent.)

Docket No. CAA-07-2010-0020

ADMINISTRATIVE ORDER ON CONSENT

This Administrative Order on Consent (Consent Order) is entered into voluntarily by the United States Environmental Protection Agency, Region 7 (EPA) and by the Respondent, Bayer CropScience LP (Respondent), pursuant to Section 113(a)(3)(B) of the Clean Air Act (CAA), 42 U.S.C. 7413(a)(3)(B), as amended. Under the terms of this Consent Order, Respondent agrees to retain an independent third party consultant to complete an incident root cause analysis, as detailed in Paragraph 36 below, and to provide the documentation specified in Paragraph 37 below.

I. Statutory and Regulatory Background

1. 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 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 the Administrator to promulgate a list of regulated substances, with threshold quantities, and defines the stationary sources that will be subject to the accident prevention regulations mandated by Section 112(r)(7). Specifically, Section 112(r)(7) requires the Administrator to promulgate regulations that address release prevention, detection and correction requirements for these listed regulated substances, 42 U.S.C. § 7412(r)(7).

2. On June 20, 1996, EPA promulgated a final rule known as the Risk Management Program, 40 C.F.R. Part 68, which implements Section 112(r)(7), 42 U.S.C. § 7412(r)(7), of the CAA. These regulations require 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.

3. 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 EPA.

4. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), and 40 C.F.R. § 68.150, the RMP must be submitted for all covered processes, by an 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.

5. Section 113(a)(3) of the CAA, 42 U.S.C. § 7413(a)(3), grants the Administrator the authority to make a finding of violation of a requirement or prohibition of Title I, and upon such a finding, to issue an order requiring a person to comply with such requirement or prohibition.

II. Definitions

6. The regulations at 40 C.F.R. § 68.3 define “stationary source” 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.

7. 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, Tables 1, 2, 3, and 4, and determined to be present at a stationary source as specified in 40 C.F.R. § 68.115.

8. 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, Tables 1, 2, 3, and 4.

9. 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.

10. As used herein, the term “day” shall mean calendar day.

III. EPA’s Factual Background

11. The Respondent is Bayer CropScience LP. Respondent owns a facility located at 8400 Hawthorn Road, Kansas City, Missouri, that produces crop protection chemicals (Respondent’s Facility). Respondent is a limited partnership organized under the laws of Delaware, authorized to do business in the state of Missouri.

12. At all times relevant to this Consent Order, Respondent processed, handled or stored ethyl mercaptan, vinyl chloride, phosphorus trichloride, formaldehyde, 2-Methyl-1-butene, carbon disulfide, chlorine, and hydrogen chloride at its facility.

13. EPA inspected Respondent's Facility on August 30, 2007 (EPA Inspection), to determine compliance with Section 112(r) of the CAA and 40 C.F.R. Part 68. Information collected as a result of this inspection revealed that Respondent had greater than the RMP threshold quantity of ethyl mercaptan, vinyl chloride, phosphorus trichloride, formaldehyde, 2-Methyl-1-butene, carbon disulfide, chlorine, and hydrogen chloride handled or stored at its facility at the time of the EPA inspection.

IV. EPA's Conclusions of Law

14. 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).

15. Respondent's Facility is a "stationary source" pursuant to 40 C.F.R. § 68.3.

16. Ethyl mercaptan is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for ethyl mercaptan, as listed in 40 C.F.R. § 68.130, Table 3, is 10,000 pounds.

17. Vinyl chloride is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for vinyl chloride, as listed in 40 C.F.R. § 68.130, Table 3, is 10,000 pounds.

18. Phosphorus trichloride is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for phosphorus trichloride, as listed in 40 C.F.R. § 68.130, Table 1, is 15,000 pounds.

19. Formaldehyde is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for formaldehyde, as listed in 40 C.F.R. § 68.130, Table 1, is 15,000 pounds.

20. 2-Methyl-1-butene is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for 2-Methyl-1-butene, as listed in 40 C.F.R. § 68.130, Table 3, is 10,000 pounds.

21. Carbon disulfide is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for carbon disulfide, as listed in 40 C.F.R. § 68.130, Table 1, is 20,000 pounds.

22. Chlorine is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for chlorine, as listed in 40 C.F.R. § 68.130, Table 1, is 2,500 pounds.

23. Hydrogen chloride is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for hydrogen chloride, as listed in 40 C.F.R. § 68.130, Table 1, is 5,000 pounds.

V. Alleged Violations

24. EPA alleges that Respondent has violated the CAA and federal regulations, promulgated pursuant to the CAA, as follows:

25. Records collected during the EPA Inspection showed that Respondent exceeded the threshold quantity for the eight substances listed above at the time of the EPA Inspection, August 30, 2007.

26. Respondent's Facility is subject to the requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and 40 C.F.R. Part 68, Subparts A through H, because it had more than a threshold quantity of a regulated substance in a process.

27. Respondent was required under Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and 40 C.F.R. Part 68, to develop and implement a risk management program that fulfills the requirements of 40 C.F.R. Part 68, Subparts A through H, which includes a hazard assessment, a prevention program and an emergency response program.

28. The EPA inspection revealed that Respondent's Facility had not satisfied the requirements of 40 C.F.R. Part 68 as follows:

- i. Annual certifications of Standard Operating Procedures in some instances were not made, in violation of 40 C.F.R. 68.69(c);
- ii. Maintenance employee training lacked documentation of process overview, in violation of 40 C.F.R. 68.73(c);
- iii. There was no historic certification of the Subpart D (Prevention Program) Compliance Evaluation, in violation of 40 C.F.R. 68.79(a);
- iv. Documentation of Incident Investigations resolutions/corrective actions was inadequate, because even though Respondent noted that corrective action was taken, the specific corrective actions taken in response were not identified, in violation of 40 C.F.R. 68.81(e);
- v. The Emergency Response Plan, although it did include adequate procedures for Missouri entities, did not include adequate procedures for informing Kansas emergency response agencies with regard to accidental releases, in violation of 40 C.F.R. 68.95(a)(1)(i);
- vi. The Emergency Response Plan did not adequately cross-reference first-aid and emergency medical treatment for exposures;
- vii. The documentation for the delegation of responsibility for RMP implementation was not up-to-date, in violation of 40 C.F.R. 68.15(a),(c);
- viii. Additional worst-case release scenarios for flammable substances (i.e. vinyl chloride, ethyl mercaptan), or unique public receptors, although prepared by Respondent, were not provided, in violation of 40 C.F.R. 68.25(a)(2)(iii);

- ix. Quantities of regulated substances in disengaged railcars were not included in maximum process quantities, in violation of Subpart G, specifically 40 C.F.R. 68.160(a)(7);
- x. The resolution and documentation of Process Hazard Analysis findings and recommendations, as well as the corresponding documentation, was inadequate, in violation of 40 C.F.R. 68.67(e); and
- xi. The facility did not maintain documentation of partial pressure measurements or estimates for hydrazine, as required by 40 C.F.R. 68.115(b)(1).

29. Respondent's failure to comply with 40 C.F.R. Part 68, as set forth above, are all violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r).

VI. Order on Consent

30. For purposes of this Consent Order, Respondent admits the jurisdictional allegations set forth above.

31. Respondent does not admit the factual allegations, EPA's determinations of alleged violations, and any legal conclusions set forth herein.

32. EPA and Respondent agree that this Consent Order has been negotiated in good faith to avoid costly and protracted litigation and that any actions undertaken by Respondent hereunder do not constitute an admission of any liability by Respondent.

33. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above.

34. This Consent Order along with a corresponding Consent Agreement and Final Order (CAFO) resolve the alleged violations set forth above. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees.

35. Based upon the foregoing, EPA hereby ORDERS and Respondent CONSENTS to the requirements set forth hereafter in this Consent Order.

36. For purposes of this Consent Order, Respondent has voluntarily agreed to complete an incident root cause analysis (Consultant Root Cause Analysis), as follows:

- i. Respondent will hire an independent third-party consultant (Consultant) to complete the work required in Subparagraphs iv through xi below. The Consultant will have expertise in EPA's Risk Management Program, incident/accident investigations and root cause analysis.
- ii. Respondent has proposed that the work described herein will be conducted by the firm of ABSG Consulting. Based upon information provided by

Respondent, Respondent and EPA have agreed that ABSG Consulting will be the Consultant contracted to carry out the work pursuant to this Consent Order.

- iii. If, after the effective date of this Consent Order, Respondent chooses to hire a different Consultant to undertake the work, Respondent will give reasonable notice of such decision to EPA and request approval of the different Consultant. As to any Consultant hired, and except as provided herein, Respondent will remain obligated to comply with all the requirements of this Consent Order and to meet timeframes established by this Consent Order. If Respondent chooses to hire a different Consultant or if due to events beyond Respondent's control, Respondent is unable to comply with the timeframes hereunder, Respondent may request an extension of time. EPA will consider and approve such request unless EPA makes a determination that such request was not made in good faith or was made for the purpose of delaying the completion of the work.
- iv. The Consultant, with the cooperation of Respondent, will initially review all incidents involving chemicals at Respondent's Facility over the last five years. The Consultant will then conduct and document an independent root cause analysis of any incident which meets any of the following three criteria (hereinafter Incidents Subject to Consultant Root Cause Analysis):
 - (1) incidents involving RMP regulated substances from RMP covered processes which resulted in, or could reasonably have resulted in, a "catastrophic release" as defined in 40 C.F.R. § 68.3;
 - (2) incidents involving RMP regulated substances from RMP covered processes that resulted in an "accidental release" as defined in 40 C.F.R. § 68.3 that resulted in death, injuries, or significant property damage on site, or known offsite deaths, injuries, evacuations, sheltering in place, property damage, or environmental damage; or
 - (3) incidents involving extremely hazardous substances released into the ambient air that resulted in, or could have reasonably resulted in, death, serious injury, or significant property damage as a result of short-term exposure to the extremely hazardous substance.
- v. For purposes of the Incidents Subject to Consultant Root Cause Analysis, "extremely hazardous substances" are those substances which may as the result of short-term exposures associated with releases to the air cause death, serious injury or substantial property damage due to toxicity, reactivity, flammability, volatility, or corrosivity. Reference sources that the Consultant may use to establish that a substance is an extremely hazardous substance due to its toxicity, reactivity, flammability, volatility, or corrosivity include: EPA's Toxic Substances Control Act Inventory, National Institute of Occupational Safety and Health, Occupational Safety and Health Administration, American Conference of Governmental Industrial Hygienists, Agency for Toxic Substances Disease Registry,

Centers for Disease Control, and the National Fire Protection Association. For purposes of the Incidents Subject to Consultant Root Cause Analysis: "Significant property damage" means property damage causing more than \$25,000 in damage; "Serious injury" means a day away from work injury (i.e., lost time injury) or with respect to a third-party non-employee/contractor an injury that involves a hospital admission beyond observation and release; and "injury" shall be defined by 40 C.F.R. 68.3. The analysis will focus on the root causes of the incidents.

- vi. The Consultant's analysis shall also include, but not be limited to, the incidents/accidents that occurred at Respondent's Facility on the following dates: July 28, 2007, October 30, 2007, December 24, 2008 and November 8, 2009.
- vii. For Incidents Subject to Consultant Root Cause Analysis where Respondent has already conducted an investigation, the Consultant will independently review the investigation report prepared by the Respondent to determine, consistent with industry standards, if the analysis was adequate and cause(s) of each incident correctly identified. The Consultant will conduct their own investigation if the Consultant determines that the Respondent's investigation did not identify all root causes, was not adequate, or did not provide Consultant with information sufficient to complete the requirements of Subparagraph ix below. The Consultant shall conduct and document a new root cause analysis for any Incidents Subject to Consultant Root Cause Analysis for which Respondent did not conduct an investigation involving a root cause analysis. Any new root cause analysis will use existing evidence and will be supplemented, to the extent practical, with additional information.
- viii. The Consultant shall have reasonable access to all personnel at Respondent's Facility, all information generated during the investigation, and all corporate information relevant to its investigation of Respondent's Facility.
- ix. The Consultant will develop recommendations to address potential areas for improvement discovered during the review of Incidents Subject to Consultant Root Cause Analysis, such as potential areas for improvement in process, administration, training, operation, maintenance, and staffing. The Consultant's recommendations shall be based upon recognized industry standards and generally accepted good engineering practices and shall consider technological and economic feasibility.
- x. The Consultant will generate a report regarding the Incidents Subject to Consultant Root Cause Analysis, including the analysis conducted, potential areas for improvement, if any, and recommendations (Consultant's Report).

- xi. Within nine (9) months of the effective date of this Consent Order, the Consultant will submit a draft version of the Consultant's Report to EPA and Respondent for EPA's and Respondent's review. EPA and Respondent shall have forty-five (45) days to submit comments to the Consultant on this draft Consultant's Report. The Consultant shall review and consider EPA's and Respondent's comments and issue a Final Consultant's Report. The Consultant shall issue the Final Consultant's Report no later than one year following the effective date of this Consent Order, unless otherwise extended by EPA based on the provisions allowing for such schedule modification under this Consent Order. The Final Report shall include, at a minimum, the list of Incidents Subject to Root Cause Analysis, the analysis conducted regarding these incidents, potential areas for improvement, if any, and recommendations developed in accordance with Subparagraph ix.
- xii. The recommendations, opinions, conclusions, and findings, contained in the Consultant's Report shall not be used as an admission against Respondent or as evidence in any administrative or judicial action by any party, including the United States. However, to the extent that the Consultant's Report identifies underlying facts that might indicate a statutory or regulatory deficiency, EPA reserves its right to take action to require correction of the deficiency and nothing in this Consent Order, including this subparagraph, shall affect EPA's authority under the Clean Air Act or other applicable law. In good faith, EPA shall informally notify Respondent of the need to correct such potential statutory or regulatory deficiency as soon as practicable, so that Respondent may take action to correct the deficiency as soon as practicable. EPA shall consider Respondent's voluntary agreement to the preparation of the Consultant's Report, prompt disclosure of potential deficiencies, if any, and any good faith efforts to correct such potential deficiency in determining any potential EPA enforcement response and any potential penalty assessed. Respondent does not admit and reserves all rights and defenses it has with respect to any underlying facts identified by the Consultant, as well as the Consultant's recommendations, opinions, conclusions, or findings.
- xiii. In accordance with Paragraph 40 herein and the requirements of 40 C.F.R. Part 2, Subpart B, the Consultant's Report, and all work undertaken by the Consultant and all versions and copies of the Consultant's Report, may qualify for protection as confidential business information and be protected in accordance with applicable law. Respondent shall have the right to claim as confidential business information any documents, or portions thereof, reviewed and utilized by the Consultant, including but not limited to the Consultant's Report.

37. Twelve (12) months from the effective date of this Consent Order, Respondent shall provide the OSHA 300 log for the eleven (11) months following the date of this Consent Order and Respondent's facility log of incident investigations, for incident investigations required by

40 C.F.R. § 68.81, initiated during the eleven (11) months following the date of this Consent Order for EPA's review.

38. The information required to be submitted to EPA by Respondent under this Consent Order shall contain the following certification signed by an officer of the Respondent:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment. (Signature)

39. The submissions required to be submitted to EPA under this Consent Order shall be sent to:

Christine Hoard
Chemical Risk Information Branch
United States Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

40. All documents submitted by Respondent and the Consultant to EPA in the course of implementing this Consent Order shall be available to the public unless identified as confidential business information by Respondent pursuant to 40 C.F.R. Part 2, Subpart B, and determined by EPA to merit treatment as confidential business information in accordance with applicable law. Nothing in this paragraph limits Respondent's right to assert, or EPA's obligation to protect, confidential business information claims, including such claims for RMP-related submittals under 40 C.F.R. § 68.151, or for information and documents required to be submitted to EPA pursuant to this Consent Order.

41. Respondent and EPA agree to make reasonable efforts to contact representatives of the other party to facilitate compliance with the requirements hereunder and to utilize informal communications, whenever appropriate, to minimize the possibility of dispute resolution or litigation in connection with this Consent Order by contacting the representatives of the other party regarding schedules, deadlines, status of work, clarification of, and the meaning of communications, reports, or comments.

42. Respondent and EPA shall attempt to resolve any disagreements concerning this Consent Order expeditiously and informally. Any dispute that arises regarding the implementation of this Consent Order shall be the subject of informal negotiations between the Respondent and EPA. The period for informal negotiations shall be thirty (30) days from the time the dispute arises and notice is received by certified mail of the parties' dispute. The informal negotiation period may be extended if both Respondent and EPA concur. Respondent shall have the right to elevate the dispute to the Branch Chief of the Region 7 Chemical Risk Information Branch. Any agreement reached by the Respondent and EPA shall be in writing and shall be incorporated into and become an enforceable part of this Consent Order. In the event

that Respondent and EPA cannot resolve a dispute by informal negotiations, Respondent and EPA reserve their legal rights and defenses with respect to the disputed matters.

VII. Stipulated Penalties

43. Respondent shall be liable for stipulated penalties in the amounts set forth in Subparagraph (a) for failure to comply with the requirements of this Consent Order.

- a) The following stipulated penalties shall accrue per violation per day for failure to comply with the requirements of Paragraph 36 and 37 of this Consent Order:

<u>Penalty per Violation per Day</u>	<u>Period of Noncompliance</u>
\$100	1st through 30th day
\$150	31st day and beyond

44. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through completion of the activity.

45. The payment of penalties shall not alter in any way Respondent's obligation to comply with the provisions of this Consent Order.

46. All penalties accruing under this section shall be due and payable to the United States within thirty (30) days of Respondent's receipt from EPA of a demand for payment of penalties. All payments to the United States under this section shall be paid by certified or cashier's check made payable to "Treasurer, United States of America" and remitted to:

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

47. Failure to pay any portion of the stipulated penalties on the date upon which they are due will result in the accrual of interest on the unpaid portion of the stipulated penalties at the rate of three percent (3%) per annum.

VIII. Potential Liability

48. Section 113(a)(3)(B) of the CAA grants EPA the authority to issue an Order to Comply to any person found in violation of Section 112(r) of the CAA and the regulations promulgated pursuant thereto.

49. Failure to comply with any of the provisions of this Order may result in an enforcement action under Section 113 of the CAA, 42 U.S.C. § 7413. Under Section 113(a) of the CAA, the Administrator is authorized to address such a violation as follows:

- a) Issue an administrative penalty order assessing a civil penalty not to exceed \$37,500 per day of violation;
- b) Bring a civil action for permanent or temporary injunction, or to recover a penalty not to exceed \$37,500 per day of violation, or both; or
- c) Request the Attorney General to commence a criminal action pursuant to Section 113(c) of the CAA.

50. Issuance of this Consent Order does not preclude the State of Missouri or EPA from assessing penalties or taking any other action authorized under the CAA. This Order does not affect the obligation of Respondent to comply with all federal, state, and local statutes, regulations and permits.

IX. Modification, Notice, Authority to Bind and Effective Date

51. Upon written agreement by the parties, the EPA and Respondent may modify any requirement of this Consent Order. With respect to the timeframes and the schedules identified herein, the EPA may extend the schedule and timeframes in writing or orally. Any oral modification shall be promptly memorialized in writing by EPA with the effective date being the date the EPA orally granted the schedule extension.

52. All notices or other communications required or permitted to be given hereunder shall be sent by certified mail or overnight express and addressed as follows:

As to EPA:

Christine Hoard
Chemical Risk Information Branch
United States Environmental Protection Agency, Region 7
901 North Fifth Street
Kansas City, Kansas 66101

As to Respondent:

Paul Nagy, Head of Site Industrial Operations
Bayer CropScience LP, Hawthorn Plant
8400 Hawthorn Road, PO Box 4913
Kansas City, Missouri 64120.

53. This Consent Order is binding on the Parties signing below.

54. This Consent Order shall become effective ten (10) calendar days after it is signed by the Director of the Air & Waste Management Division, EPA.

55. This Order shall terminate one year from the effective date of this Order.

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

By Becky Weber
Becky Weber
Director
Air & Waste Management Division

Date: 8/13/10

**RESPONDENT:
BAYER CROPSCIENCE LP**

By 

Title PAUL E. NAGY
HEAD OF KANSAS CITY SITE

Date 08/09/2010

IN THE MATTER OF Bayer CropScience LP, Respondent
Docket No. CAA-07-2010-0020

CERTIFICATE OF SERVICE

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

Copy hand delivered to
Attorney for Complainant:

Kristen Nazar
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Mr. Andrew Brought
Spencer Fane Britt & Browne
1000 Walnut Street
Kansas City, Missouri 64106-2140

Dated: 8/17/10


Kathy Robinson
Hearing Clerk, Region 7