

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Tanco Kansas City, LLC)
)
Kansas City, Kansas)
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)
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Respondent.)
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_____)

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket Nos. CWA-07-2010-0095
EPCRA-07-2010-0003

The United States Environmental Protection Agency (“EPA”), Region 7 (“Complainant”) and Tanco Kansas City, LLC (“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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

A. FINDINGS OF VIOLATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 311 of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1321, and Section 325(c) of the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11045(c), and in accordance with 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.

2. This Consent Agreement and Final Order (“CA/FO”) serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Sections 311(j) of the CWA, 33 U.S.C. § 1321(j), and regulations promulgated

thereunder at 40 C.F.R. Part 112 for the requirements for Spill Prevention Control and Countermeasure Plans (“SPCC”) and Facility Response Plans (“FRP”). Additionally, Respondent has failed to file required “Tier II” hazardous chemical inventory forms to the proper authorities, in violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20 and 370.25.

Parties

3. The authority to take action under Sections 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), and Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Air and Waste Management Division of EPA, Region 7 (Complainant).

4. Respondent Tanco Kansas City LLC is a limited liability corporation registered and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

Section 311 of the CWA

5. Section 311(j) of the CWA, 33 U.S.C. § 1321(j), provides for the regulation of onshore facilities to prevent or contain discharges of oil. Section 311(j) of the CWA, 33 U.S.C. § 1321(j), provides in part that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.”

6. To implement Section 311(j), 33 U.S.C. § 1321(j), EPA promulgated regulations to prevent oil pollution. These regulations, codified at 40 C.F.R. Part 112, set forth the requirements for the preparation and implementation of Spill Prevention Control and Countermeasure Plans (“SPCC Plans”).

7. The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products, which due to their locations, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.

8. Sections 311(j)(5) of the CWA, 33 U.S.C. § 1321(j)(5), provides that the President

shall issue regulations requiring the owner or operator of “an onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or upon the navigable waters [or] adjoining shorelines” to “submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil.”

9. Under the authority of Section 311(j)(5) of the CWA, Subparts A and D of 40 C.F.R. Part 112 (“the Facility Response Plan” or “FRP regulations”) require FRP-regulated facilities to prepare a Facility Response Plan as specified in 40 C.F.R. § 112.20(h), and to develop and implement a facility response training program and a drill/exercise program that satisfies the requirements of the regulations (40 C.F.R. § 112.21(a)).

Section 312 of EPCRA

10. Under Section 312(a) of EPCRA and 40 C.F.R. §§ 370.20 and 370.25, any facility which is required to prepare or have available a Material Safety Data Sheet (“MSDS”) for a hazardous chemical under the Occupational Safety and Health Act (“OSHA”) of 1970 must prepare and submit an emergency and hazardous chemical inventory form (Tier I or Tier II form or its state equivalent) to the Local Emergency Planning Committee (“LEPC”), the State Emergency Response Commission (“SERC”), and the local fire department. The Tier I or Tier II form must be submitted annually on or before March 1 and is required to contain information with respect to the preceding calendar year.

Factual Background

11. Respondent is a person within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 CFR § 112.2, and Section 329(7) of EPCRA, 42 U.S.C. § 11049(7); and 40 C.F.R. §§ 112.2 and 370.2.

SPCC and FRP

12. Between 2006 and the present, Respondent was at all relevant times the “owner or operator,” within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6) and 40 C.F.R. § 112.2, of a bulk terminal storage facility addressed at 10520 Wolcott Drive, Kansas City, Kansas 66109 (the “Tanco facility,” or “Facility”).

13. The Tanco facility is directly adjacent to Island Creek which flows directly into the Missouri River.

14. The Facility has a documented storage capacity of 7,424,320 gallons, including an

estimated 6,100,000 gallons in tank capacity used for the storage of liquid asphalt, with the remaining capacity divided between storage of sulfuric acid and calcium chloride. Product released from a spill at the facility could reach Island Creek and the Missouri River.

15. Island Creek and the Missouri River are each navigable waters of the United States within the meaning of 40 C.F.R. § 112.2.

16. Respondent's Facility is an "onshore facility" within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2, and is a "facility" as that term is defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 370.2.

17. Respondent's Facility is a "non-transportation-related facility" as defined by Appendix A to 40 C.F.R. Part 112, as incorporated by reference within 40 C.F.R. § 112.2.

18. Asphalt is a form of oil as defined by Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1) and 40 C.F.R. § 112.2.

19. As the owner and operator of a non-transportation-related facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, Respondent is subject to Section 311(j)(5) of the Act and the SPCC and FRP regulations at 40 C.F.R. Part 112.

20. On May 12, 2009, the EPA conducted a SPCC inspection of the facility. During EPA's May 2009 inspection, EPA reviewed Appendix F of the facility's SPCC plan which stated that the facility has over 1,000,000 gallons of storage capacity and a "discharge from the facility could cause injury to fish and wildlife and sensitive environments."

21. Based on the potential impact of discharges of a release from the facility, the Tanco facility has been designated by EPA since August 1993 as a facility that could reasonably be expected to cause "significant and substantial" harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, as defined at 40 C.F.R. 112.20(b)(2).

22. During EPA's inspection, EPA documented the following observations of Respondent's non-compliance with SPCC requirements at the facility:

- a. Respondent's SPCC Plan failed to have secondary containment and diversionary structures designed to contain a discharge of the capacity of the largest container plus precipitation, as required by 40 C.F.R. 112.8(c)(2), and 112.12(c)(2);
- b. Respondent's SPCC Plan failed to designate a person as accountable for discharge prevention, as required by 40 C.F.R. 112.7(f)(2);

- c. Respondent's SPCC Plan failed to describe management approval of the Plan, as required by 40 C.F.R. 112.7(a)(4);
- d. Respondent's SPCC Plan failed to include procedures to report discharges, as required by 40 C.F.R. 112.7(a)(5);
- e. Respondent failed to maintain records for personnel training, as required by 40 C.F.R. 112.7(f)(2) and (3);
- f. Respondent failed to have physical barriers and/or warning signs installed at the loading/unloading rack area, as required by 40 C.F.R. 112.7(h)(2);
- g. Respondent failed to conduct integrity testing and/or "brittle fracture evaluation" of tanks after repairs/alterations of such tanks, as required by 40 C.F.R. 112.71(i) and 112.8(c)(6);
- h. Respondent's SPCC Plan failed to include date facility began operations, as required by 40 C.F.R. 112.3;
- i. Respondent's failed to have SPCC plan prepared and fully implemented before beginning operations, as required by 40 C.F.R. 112.3(b) and (c);
- j. Respondent's SPCC Plan failed to state reasons for any deviations from the rule requirements, as required by 40 C.F.R. 112.7(a)(2);
- k. Respondent failed to have appropriate containment and/or diversionary structures to prevent discharge before cleanup occurs, as required by 40 C.F.R. 112.7(c);
- l. Respondent failed to conduct annual discharge prevention briefings, as required by 40 C.F.R. 112.7(f)(3), and
- m. Respondent failed to have each bulk storage tank equipped with a liquid level sensing alarm, as required by 40 C.F.R. 112.12(c)(8).

23. During EPA's inspection, EPA documented the following observations of Respondent's non-compliance with FRP requirements at the facility:

- a. Respondent failed to have an approved FRP, amended and submitted to EPA for approval to reflect Tanco ownership and operation of the facility, as required by 40 C.F.R. 112.20(d)(1).
- b. Respondent failed to have documentation of effective contracts for Oil Spill Removal Organizations (OSRO), as required by 40 C.F.R. Part 112, Appendix E, Section 5.8.

- c. Respondent's facility manager stated Respondent had failed conduct annual spill response drills, as required by 40 C.F.R. 112.21.

24. On or about, January 5, 2010, Respondent submitted an amended FRP to EPA for approval. On or about January 29, 2010, EPA provided comments to Respondent on the amended FRP. On or about April 14, 2010, Respondent submitted a revised FRP to EPA, and thereafter, Respondent and EPA have continued to work on finalizing revisions to the amended FRP. Tanco has also conducted an FRP exercise.

EPCRA

25. During the period from 2006 through 2009, Respondent stored sulfuric acid, a hazardous chemical, as defined in 40 C.F.R. § 370.2

26. For the 2006, 2007, 2008, and 2009 calendar years, Respondent stored sulfuric acid at the facility in quantities that exceeded the minimum threshold level (1,000 pounds), as specified in 40 C.F. R. § 370.20.

27. At all relevant times between 2006 and 2009, Respondent was required, pursuant to OSHA, to prepare or have available MSDS for the sulfuric acid stored onsite.

28. Respondent failed to file the required Tier II reports required for calendar years 2006, 2007 and 2008 by March 1 of the following year, as required by Section 312(a) of EPCRA and 40 C.F.R. §§ 370.20 and 370.25.

29. In a Tier II report filed by Respondent on or about March 2, 2010, (for calendar year 2009), Respondent states that during 2009 the facility had a quantity of 2,122,972 pounds of sulfuric acid, an extremely hazardous substance, stored on-site.

Violations

Count 1:

Violations of SPCC Requirements

30. The facts stated in paragraphs A.11 though A.24, above, are hereby incorporated by reference.

31. Respondent's failures to comply with the SPCC requirements cited in Paragraph 22, above, are violations of 40 C.F.R. Part 112 and Section 311(j) of the CWA.

**Count 2:
Violations of FRP Requirements**

32. The facts stated in paragraphs A.11 through A.24, above, are hereby incorporated by reference.

33. Respondent's failures to comply with the FRP requirements cited in Paragraph 23, above, are violations of 40 C.F.R. 112.20 and 112.21 and Section 311(j)(5) of the CWA.

**Count 3:
Violations of EPCRA Requirements**

34. The facts stated in paragraphs A.25 through A.29, above, are hereby incorporated by reference.

35. Respondent's failures to comply with the EPCRA "Tier II" reporting requirements cited in Paragraph 28, above, are violations of Section 312(a) of EPCRA and 40 C.F.R. §§ 370.20 and 370.25.

Relief

36. Based on the foregoing Findings of Violation, and pursuant to Section 311(g) of the CWA, 33 U.S.C. § 1311(g), and Section 325 of EPCRA, EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent, for the violations cited above, in the amount of \$97,845, plus interest.

B. CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of this CA/FO.

2. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this CA/FO.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CA/FO.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal this CA/FO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and agree to each bear their own costs and attorney's fees incurred as a result of this action.

6. This CA/FO addresses all civil and administrative claims for the CWA and EPCRA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

7. Nothing contained in this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

8. The undersigned representative of the Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind the Respondent to the terms contained herein.

9. Respondent Tanco Kansas City, LLC, certifies, that as of the date that it executes this CA/FO, it has taken steps to address the violations cited in Counts 1 and 2, above, by submittal of an amended FRP to EPA; by entering into an administrative order on consent with EPA that establishes a compliance schedule for integrity testing and upgrades to its bulk storage containers and a schedule to investigate and complete upgrades to secondary containment, and that Tanco is otherwise in compliance with the cited SPCC and FRP requirements of 40 C.F.R. 112 and Section 311(j) of the CWA, 33 U.S.C. § 1321, and the cited EPCRA requirements of Section 312(a) of EPCRA and 40 C.F.R. §§ 370.20 and 370.25.

10. The effect of settlement described in Paragraph B.6, above, is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph B.9, above, of this CA/FO.

11. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay an EPCRA penalty of \$4,500, and a CWA penalty of \$93,345 (plus interest), as set forth in Paragraphs C.1 to C.3 of the Final Order.

12. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

C. FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 311 of the CWA, 33 U.S.C. § 1321, and Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and according to terms of this CA/FO, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a total mitigated civil penalty of Ninety Seven Thousand, Eight Hundred and Forty Five Dollars (\$97,845), plus interest, according to the terms and schedule below. Due to the fact that Respondent will incur significant expense in the construction of upgrades of its facility required to achieve CWA compliance, EPA permits Respondent to pay the CWA penalty on an installment schedule. The payments shall be made by Respondent as follows:

a. Within thirty (30) days of the effective date of this Final Order, Respondent shall pay an EPCRA penalty of \$4,500. This payment shall reference the EPCRA Docket No. (EPCRA-07-2010-0003) and shall be made by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency - Region 7
Fines and Penalties
P.O. Box 979077
St. Louis, Missouri 63197-9000.

b. Within thirty (30) days of the effective date of the Final Order, Respondent also shall pay an initial CWA penalty installment of \$23,336.25. This payment shall reference the CWA Docket No. (CWA-07-2010-0095) and shall be made by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency - Region 7
Fines and Penalties
P.O. Box 979077
St. Louis, Missouri 63197-9000.

c. The remainder of the CWA penalty shall be paid in three additional quarterly payments of \$23,453.03 according to the instructions in Paragraph C.1.b, above. These additional three payments shall be made no later than 120, 240 and 360 calendar days of the first CWA penalty payment.

d. Respondent agrees that interest shall accrue on the outstanding balance at the rate determined by the Secretary of the Treasury (currently one percent per annum for the period January 1, 2010, through December 31, 2010), compounded daily. The penalty amounts set forth in Paragraph C.1.b, above, include the amount of pre-calculated interest over the term of the specified payment schedule.

d. Respondent agrees that a failure to submit any of the required payments by the respective due date will result in the entire remaining balance becoming immediately due and payable, along with any costs, handling charges, penalties, and accumulated interest.

e. The parties agree that Respondent shall not be subject to a penalty for early payment of the penalty.

2. Copies of the each payment check shall be mailed to:

Howard C. Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

4. This CA/FO shall apply to and be binding upon Respondents 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 CA/FO.

General Provisions

5. This CA/FO shall resolve EPA's claims for penalties for the violations alleged herein. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 311 of the CWA, 33 U.S.C. § 1321, and to seek penalties against Respondent, or to seek any other remedy allowed by law for violations not resolved by this CA/FO.

6. Complainant reserves the right to take enforcement action against Respondent for any past or future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

7. This Order shall be entered and become effective after the conclusion of the period of public notice and comment required pursuant to Section 311(g)(4) of the CWA, 33

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U.S.C. § 1321(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

8. Respondent and Complainant shall each bear their respective costs and attorney's fees.

9. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

For the Respondent Tanco Kansas City, LLC.:

Alvin Middendorf August 04, 2010
Printed Name: Alvin Middendorf Date
Title: Manager

For the Complainant:
The United States Environmental Protection Agency

Howard C. Bunch 8/4/2010
Howard C. Bunch Date
Sr. Assistant Regional Counsel

Becky Weber 8/6/2010
Becky Weber Date
Director
Air, Waste Management Division

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IT IS SO ORDERED. This Final Order shall become effective immediately.



Robert Patrick
Regional Judicial Officer

Sept. 21, 2010
Date

IN THE MATTER OF Tanco Kansas City, LLC, Respondent
Docket Nos. CWA-07-2010-0095 and epcra-07-2010-0003

CERTIFICATE OF SERVICE

I certify 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 hand delivered to
Attorney for Complainant:

Howard C. Bunch
Sr. 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:

Robert J. Brundage
Newman, Comley & Ruth, P.C.
601 Monroe St., Suite 301
P.O. Box 537
Jefferson City, Missouri 65102-0537

and:

Tanco Kansas City, LLC
10520 Wolcott Drive
Kansas City, Kansas 66109

Dated: 9/22/10


Kathy Robinson
Hearing Clerk, Region 7