

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 TRAINING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
NEDAK ETHANOL, LLC) Docket No. CAA-07-2011-0015
)
Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (EPA) and NEDAK Ethanol, LLC (Respondent) have agreed to a settlement of this action before 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), 22.18(b)(2).

FACTUAL ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 113(d) of the CAA (CAA), 42 U.S.C. § 7413(d). 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, where the first date of alleged violation occurred more than 12 months prior to the initiation of the administrative action, was appropriate for administrative penalty action.

2. This Consent Agreement and Final Order (CAFO) serves as notice that EPA has reason to believe that Respondent has violated the provisions governing Chemical Accident Prevention, and specifically the requirement to implement a Risk Management Plan (RMP) as required by 40 C.F.R. Part 68 and 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 CAFO serves as notice pursuant to Section 113(d)(2)(A) of the Act, 42 U.S.C. § 7413(d)(2)(A), of EPA's intent to issue an order assessing penalties for this violation.

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region 7, is the Director, Air and Waste Management Division, EPA, Region 7.

4. The Respondent is NEDAK Ethanol, LLC, located at 87590 Hillcrest Road Atkinson, Nebraska 68713. The primary activity at Respondent's facility is the production of ethanol.

Statutory and Regulatory Requirements

5. On November 15, 1990, the President signed into law the CAA Amendments of 1990. The Amendments added Section 112(r) to 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).

6. 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.

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 RMP that must be submitted to 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, the RMP must be submitted 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.

9. 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 the CAA referenced therein, including Section 112(r)(7). Section 113(d) of the CAA, 42 U.S.C. § 7413(d), as amended by the Debt Collection Improvement Act of 1996, authorizes the United States assess civil administrative penalties of not more than \$27,500 per day for each violation that occurs after January 30, 1997 through March 15, 2004, and \$32,500 per day for

each violation that occurs after March 15, 2004. For each violation of Section 112(r) of the CAA that occurs after January 12, 2009, penalties of up to \$37,500 per day are now authorized.

Definitions

10. 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.

11. 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, Table 1, and determined to be present at a stationary source as specified in 40 C.F.R. § 68.115.

12. The regulations at 40 C.F.R. § 68.115(b)(2) define how “concentrations of a regulated flammable substance if mixture” shall be treated for purposes of determining whether a threshold quantity is present at the stationary source. The entire weight of a mixture shall be treated as a regulated substance, unless the owner or operator can demonstrate that the mixture itself does not have a National Fire Protection Association (NFPA) rating of 4.

13. 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.

14. 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.

Alleged Violations

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

16. 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).

17. Respondent’s facility located at 87590 Hillcrest Road, Atkinson, Nebraska 68713, is a “stationary source” pursuant to 40 C.F.R. § 68.3.

18. Respondent’s denaturant process contains a mixture containing pentane and/or butane, with a NFPA rating of 4, as specified in 40 C.F.R. § 68.115(b)(2).

19. Pentane is a regulated substance pursuant to 40 C.F.R. § 68.3. The threshold quantity for pentane, as listed in 40 C.F.R. § 68.130, Table 1, is 10,000 pounds.

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

21. On or about April 21, 2010, EPA conducted an inspection of Respondent’s facility to determine compliance with Section 112(r) of the CAA and 40 C.F.R. Part 68.

22. Records collected during the inspection showed that Respondent has exceeded the threshold quantity for pentane and butane, as both substances were contained in a mixture with a NFPA rating of 4. Therefore, the entire weight of the mixture shall be treated as a regulated substance, pursuant to 40 C.F.R. § 68.115(b)(2).

23. Respondent 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, Subpart G, because it is an owner and operator of a stationary source that had more than a threshold quantity of a regulated substance in a process.

24. 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.

25. Records collected during the inspection showed that Respondent failed to file a RMP, in violation of the requirements of 40 C.F.R. Part 68.

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

CONSENT AGREEMENT

27. Respondent and EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of the Final Order portion of this CAFO.

28. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

29. Respondent neither admits nor denies the factual allegations set forth above.

30. 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 the Final Order portion of this CAFO.

31. 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 incurred as a result of this action.

32. This CAFO addresses all civil and administrative claims for the CAA violations identified above. Complainant reserves the right to take enforcement action with respect to any other violations of the CAA or other applicable law.

33. Respondent certifies by the signing of this CAFO that to the best of its knowledge, Respondent's facility is in compliance with all requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and all regulations promulgated thereunder.

34. The effect of settlement described in paragraph 32 is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 33, above, of this CAFO.

35. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project ("SEP"), which the parties agree is intended to secure significant environmental and/or public health benefits. Respondent shall purchase several radios for the Atkinson Fire Department and install ammonia leak detection and combustibles sensors at their facility, at a cost of no less than Seventeen Thousand Nine Hundred Dollars (\$17,900), in accordance with the Respondent's SEP Work Plan (attached hereto as Attachment A and incorporated by reference).

36. The total expenditure for the SEP shall be no less than \$17,900 and the SEP shall be completed no later than 180 days from effective date of the Final Order. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

37. Within thirty (30) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA, with a copy to the state agency identified below. The SEP Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented; and
- (ii) Itemized costs, documented by copies of purchase orders, receipts, or canceled checks.
- (iii) All reports shall be directed to the following:

George Hess
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

38. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, “acceptable documentation” includes invoices, purchase orders or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

39. Respondent agrees to the payment of stipulated penalties as follows: In the event the Respondent fails to comply with any of the terms or provisions of this Consent Agreement relating to the performance of the SEP as set forth in paragraphs 35 and 36 of this CAFO and/or to the extent that the actual expenditures of the SEP does not equal or exceed the cost of the SEP described in paragraphs 35 and 36 of this CAFO, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- a. Except as provided in subparagraph (ii) and (iii) of this paragraph, if the SEP is not completed satisfactorily and timely pursuant to the agreement set forth in

paragraph 36 of this CAFO, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of Twenty-One Thousand Four Hundred and Eighty (\$21,480), minus any documented expenditures determined by EPA to be acceptable for the SEP, for a total equal to 120% of the projected costs of the SEP.

- b. If Respondent fails to timely and completely submit the SEP Completion Report required by paragraph 37, Respondent shall be liable and shall pay a stipulated penalty in the amount of Two Hundred and Fifty Dollars (\$250).
- c. If the SEP is not completed in accordance with paragraph 36 of this CAFO, but EPA determines that the Respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.

40. Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

41. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 1 of the Final Order portion of this CAFO.

42. Respondent certifies that it is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant or as injunctive relief in this or any other case or to comply with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

43. Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP. Respondent further certifies that, to the best of its knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For the purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee or other mechanism for providing federal financial assistance whose performance period has not yet expired.

44. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

45. Any public statement, oral or written, in print, film or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

46. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Respondent understands that its failure to timely pay any portion of the civil penalty described in paragraph 1 of the Final Order below or any portion of a stipulated penalty as stated in paragraph 36 above 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 accrue thereon at the applicable

statutory rate on the unpaid balance until such civil or stipulated penalty and any accrued interest are paid in full.

47. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of the civil penalty as set forth in the Final Order.

48. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of the CAFO and to legally bind Respondent to it.

FINAL ORDER

Pursuant to the provisions of the CAA, 42 U.S.C. § 7401 *et seq.*, and based upon the information set forth in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Three Thousand Six Hundred Dollars (\$3,600) which shall be due within 30 days of entry of this Final Order. Payment shall be by cashier's or certified check made payable to the "United States Treasury" and shall be remitted to:

United State Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, Missouri 63197-9000.

The payment shall reference docket number CAA-07-2011-0015.

2. Copies of the checks should be sent to:

Regional Hearing Clerk
United States Environmental Protection Agency - Region 7
901 N. Fifth Street
Kansas City, Kansas 66101

and to:

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

3. Respondent and Complainant shall bear their own costs and attorneys' fees incurred as a result of this matter.

COMPLAINANT:
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date 8/12/11

By Becky Weber
Becky Weber
Director
Air and Waste Management Division

Date 8/5/2011

By Kristen Nazar
Kristen Nazar
Assistant Regional Counsel
Office of Regional Counsel

RESPONDENT:
NEDAK ETHANOL, LLC

By 
Title Pres + Ben M. M.
Date 7-2-11

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

Date Aug. 19, 2011 By Karina Borromeo
Karina Borromeo
Regional Judicial Officer



July 13, 2011

Ms. Kristen Nazar
Assistant Regional Counsel
U.S. EPA, Region 7
901 North 5th Street
Kansas City, Kansas 66101

Re: NEDAK Ethanol LLC, Atkinson, Nebraska
CAFO – Supplemental Environmental Project

Dear Ms. Nazar:

Thank you for allowing NEDAK the opportunity to submit a Supplemental Environmental Project (SEP) proposal in connection with the Consent Agreement and Final Order (CAFO) in Docket No. CAA-07-2011-0015. NEDAK's SEP proposal consists of two components, as detailed below.

A. Radios – Atkinson Fire Department

NEDAK proposes to purchase several radios for the Atkinson Fire Department which will enable it to more effectively communicate during emergency response operations. Six of the radios will be special headsets to be deployed in combination with self-contained breathing apparatuses. These headsets cost approximately \$1,200.00 each. In addition, NEDAK will purchase five handheld radios at a cost of approximately \$300.00 per radio. The total for all radios purchased will be approximately \$8,700.00. It is anticipated that the radios will be purchased within 30 days after the entry of the CAFO.

B. Ammonia Leak Detection and Combustibles Sensors – NEDAK

NEDAK proposes to purchase and install an ammonia leak detection sensor in the ammonia storage room and a LEL (low explosionlevel) sensor for combustible gases. The sensors would be connected to a controller which would have the ability to sound an alarm and to provide a continuous readout of levels so the operators could see if there are any leaks before they enter the storage room.

The estimated cost to purchase and install the sensing and alarm system is \$9,200.00. Of this sum, NEDAK proposes to allocate \$6,400.00 to the SEP. NEDAK anticipates that the sensing and alarm system will be completed within 180 days after the entry of the CAFO.

Ms. Kristen Nazar

July 13, 2011

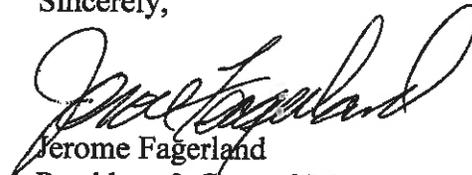
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To reach the CAFO settlement sum of \$14,400.00, NEDAK proposes to pay \$3,600.00 (25% of \$14,400.00) directly to the EPA and receive credits of \$6,960.00 for the radio purchases (80% of \$8,700.00 = \$6,960.00) and \$3,840.00 for the chemical sensing and alarm system (60% of \$6,400.00 = \$3,840.00).

Please review our SEP proposal and advise if it is acceptable to the EPA. If it is acceptable, NEDAK's understanding is that this letter will become an attachment to the CAFO and will serve as a memorilization of NEDAK's SEP obligation.

I look forward to hearing from you.

Sincerely,



Jerome Fagerland
President & General Manager
Nedak Ethanol, LLC

IN THE MATTER OF NEDAK ETHANOL, LLC, Respondent
Docket No. CAA-07-2011-0015

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:

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. Jerome Fagerland
Registered Agent
NEDAK Ethanol LLC
87590 Hillcrest Road
Atkinson, Nebraska 68713

Dated: 8/22/11



Kathy Robinson
Hearing Clerk, Region 7