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ENVIRONMENTAL PROTECTION AGENCY REGION VII
REGIONAL HEARING CLERK

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
Ag Processing Inc a cooperative)	ADMINISTRATIVE ORDER ON
Mason City, Iowa)	CONSENT
)	
)	
)	
)	
Respondent.)	Docket No. CWA-07-2011-0101

1. This Order is issued pursuant to the authority vested in the U. S. Environmental Protection Agency ("EPA") by Sections 311(c), (e) and (m) of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1321(c), (e) and (m), and Section 308 of the CWA, 33 U.S.C. § 1318. This Order pertains to a substantial threat of a discharge of oil from the Ag Processing Inc a cooperative, ("AGP" or "Respondent") facility located in Mason City, Iowa ("Mason City facility," or "Facility"). Respondent is engaged in storing, processing, and distributing "oil" or oil products at the Facility.
2. EPA has notified the State of Iowa of this action pursuant to Section 311(e)(1)(B) of the CWA, 33 U.S.C. § 1321(e)(1)(B).

PARTIES

3. The authority to take action under Sections 311(c) and (e) of the CWA, 33 U.S.C. § 1321(c) and (e) 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 the authority to the Directors of the Superfund and Air and Waste Management Divisions of EPA, Region 7 (Complainants).
4. Respondent, AGP, is a corporation registered and authorized to conduct business in the State of Iowa.

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. 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.

7. 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.”

8. 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)).

9. Section 311(c) of the CWA provides authority, delegated to EPA, to “direct ... private actions to remove the discharge or to mitigate or prevent the threat of the discharge...” of oil. Section 311(e) of the CWA also provides authority, delegated to EPA, to issue “administrative orders that may be necessary to protect the public health and welfare.”

EPA'S FINDINGS OF FACT

10. 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 1605 19th Street SW, Mason City, Iowa 50401 ("Facility").

11. The Mason City facility is less than 300 feet from a perennial stream named Cheslea Creek that flows through two small lakes and then into Willow Creek and the Winnebago River.

12. The Mason City facility has a documented storage capacity of approximately 5.6 million gallons of soybean oil and/or fuel oil. EPA has determined that product released from a spill at the Facility could reach Cheslea Creek, the two lakes, Willow Creek and the Winnebago River. The Facility has an SPCC Plan and secondary containment.

13. On or about January 6, 2009, EPA conducted an inspection of the Mason City facility and determined the Facility was subject to the FRP regulations at 40 C.F.R. Part 112, due to a documented storage capacity of over 1 million gallons and the potential to harm wildlife and sensitive environments.

14. To date, AGP has not submitted a FRP for the Mason City facility to EPA, as required by 40 C.F.R. Part 112(h); or developed or implemented a facility response training program and a drill/exercise program that satisfies the requirements of the regulations (40 C.F.R. § 112.21(a)).

15. Additionally, Respondent owns and operates a facility in Emmetsburg, Iowa. Respondent's Emmetsburg facility also has a documented oil storage capacity of over 13.5 million gallons and is in close proximity to navigable waters (Dry Ditch and Cylinder Creek).

EPA's CONCLUSIONS OF LAW

16. 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.

17. Cheslea Creek, the intervening waters and the Winnebago River are each navigable waters of the United States within the meaning of 40 C.F.R. § 112.2.

18. Respondent's Mason City 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.

19. Respondent's Mason City 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.

20. Soybean oil and #2 fuel oil are forms 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.

21. The Mason City facility is 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 CWA and FRP regulations at 40 C.F.R. Part 112.

22. A discharge of oil, as defined in Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), and 40 C.F.R. § 112.2, from the Mason City facility into navigable waters of the United States would be in violation of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

23. A potential discharge from the Facility poses an imminent and substantial threat to public health or welfare of the United States, including fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources under the jurisdiction and control of the United States.

24. The actions required by this Order are necessary to protect the public health and welfare of the United States, including fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources under the jurisdiction and control of the United States.

25. The actions required by this Order are in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") and are authorized by EPA pursuant to the authority granted in Section 311(c) and (e) of the CWA, 33 U.S.C. § 1321(c) and (e).

ORDER

26. Based upon the Findings of Fact and Conclusions of Law set forth above, and pursuant to the authority of Sections 308, 311(c), (e) and (m) of the CWA; 33 U.S.C. §§1318 and 1321(c), (e) and (m); EPA hereby ORDERS and Respondent hereby agrees to take the following actions and provide the following information in accordance with the schedules, terms and conditions of this Order:

- a. Within 30 days of the Effective Date of this Order, Respondent shall submit an FRP for the Mason City facility to EPA for EPA's review. EPA will review and may provide Respondent comments on the submittal. In the event that EPA determines that the Mason City facility is a facility that may pose a "significant and substantial" risk as specified by the criteria set forth at 40 C.F.R. § 112.20(f)(3), EPA will notify Respondent and the Mason City FRP will be subject

to EPA approval and revision by Respondent, as specified at 40 C.F.R. §§ 112.20(b), (c) and (d);

- b. Within 60 days of the Effective Date of this Order, Respondent shall complete a revised Certification of Substantial Harm for its Emmetsburg, Iowa facility, in accordance with the requirements of 40 C.F.R. Part 112, and shall submit the revised Certification to EPA for review and approval;
- c. In the event that the revised Certification of Substantial Harm (as approved by EPA) for Respondent's Emmetsburg, Iowa facility determines that the Emmetsburg facility is subject to the FRP requirements of 40 C.F.R. Part 112, Respondent shall submit an FRP for the Emmetsburg facility to EPA for review within 30 days of receipt of written notice of this determination from EPA. EPA will review and may provide Respondent comments on the submittal. In the event that EPA determines that the Emmetsburg facility is a facility that may pose a "significant and substantial" risk, as specified by the criteria set forth at 40 C.F.R. § 112.20(f)(3), EPA will notify Respondent and the Emmetsburg FRP will be subject to EPA approval and revision by Respondent, as specified at 40 C.F.R. §§ 112.20(b), (c) and (d); and
- d. For a period of two years from the Effective Date of this Order, on or before the annual anniversary date of this Order, Respondent shall submit an Annual Report to EPA that summarizes the results of all FRP drill exercises conducted during the prior year at both the Emmetsburg and Mason City facilities, pursuant to 40 C.F.R. Part 112.

SUBMITTALS

27. All submittals required by Respondent pursuant to Paragraph 26, above, shall be submitted to Mr. Paul Doherty: address - U.S. EPA, Region 7, SPFD, 901 N. 5th Street, Kansas City, Kansas 66101; telephone (913) 551-7924; e-mail, doherty.paul@epa.gov.

EPA'S REVIEW AND APPROVAL

28. After review of the revised Substantial Harm Certification required for the Emmetsburg facility pursuant to Paragraph 26 of this Order, EPA will: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies and approve the modified version; (d) disapprove, in whole or in part, the submission, directing that Respondents modify and

resubmit the submission; or (e) any combination of the above. However, EPA will not modify a submission without first providing Respondent at least one notice of deficiency and an opportunity to cure within 10 days. The parties agree to work in good faith to resolve any disagreements regarding EPA's proposed modifications.

MODIFICATIONS

29. If Respondent seeks permission to deviate from the requirements and schedules set forth in this Order, Respondent shall submit a written request to EPA for approval, outlining the proposed modification and its basis. Such written request may be submitted by fax to Ms. Higbee at 913-551-9028. Such written request must also be mailed to:

Ms. Paula Higbee
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

30. Approval of non-material modifications (including dates for submittals) to any portion of this Order may be made in writing under signature of the Branch Chief, Storage Tank Oil Pollution Branch; Air and Waste Management Division, Region 7.

PENALTIES FOR NONCOMPLIANCE

31. Violation of or failure to comply with the provisions of the foregoing Order, as listed in paragraph 26, may subject Respondent to civil penalties of up to \$32,500 per day of violation or an amount up to three times the costs incurred by the Oil Spill Liability Trust Fund pursuant to Section 311(b)(7) of the CWA, 33 U.S.C. § 1321(b)(7) and 40 C.F.R. Part 19.

32. If any event delays or prevents, or is expected to delay or prevent, the performance or completion of the actions required by this Administrative Order on Consent, Respondent shall notify Ms. Higbee at EPA at 913-551-7028 within 24 hours of becoming aware of such event and shall notify EPA in writing not more than 10 days after the event or Respondent's knowledge of the event, whichever is earlier. The notice shall describe in detail the expected length of delay or non-completion, the cause(s) of the delay or non-completion, the measures taken or planned to be taken by Respondent to prevent or minimize the delay or non-completion, and the timetable for implementing these measures.

33. A "force majeure event" is defined as an event arising from circumstances entirely beyond Respondent's control that delays or prevents the performance or completion of actions required by this Administrative Order on Consent, despite Respondent's best efforts to avoid or minimize such delay or non-completion. Force majeure events shall not include unexpected or increased costs, changed financial circumstances, change of ownership of Respondent, or financial inability of Respondent to meet any requirement of the Administrative Order on Consent.

34. If EPA determines that the actual or expected delay in performing the actions required by this Administrative Order on Consent or the actual or expected non-completion of the actions required by this Administrative Order on Consent, has been or will be caused by a force majeure, the time for performance or completion of the actions shall be extended for a period no longer than the delay resulting from the event. EPA will provide any extension in writing to Respondent.

35. If EPA does not agree that the actual or expected delay in performing the actions required by this Administrative Order on Consent, or the actual or expected non-completion of the actions required by this Administrative Order on Consent, has been or will be caused by a force majeure event, EPA will notify Respondent in writing of its decision, and any delays in the performance or completion of the upgrades and/or corrective actions shall not be excused.

36. Nothing in this Order shall be construed to relieve Respondent of the requirements of the CWA or any other applicable requirements under federal, state or local law. EPA reserves the right to take, direct, or order all actions as necessary as authorized by law for any violation of this Order, and for future or past violations of the CWA.

EFFECTIVE DATE

37. This Order shall be effective upon receipt by the Respondent of a fully executed copy.

SIGNATORIES

38. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Order. Respondent agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Order.

39. The undersigned representative of the Respondent is fully authorized to bind Respondent to the terms and conditions of this Order.

For the Respondent Ag Processing Inc a cooperative:


Printed Name: MIKE ORTOGNINI
Title: SR V.P. OF OPERATIONS

Date 10/26/11

**IN THE MATTER OF
Ag Processing Inc a cooperative, Mason City, Iowa
ADMINISTRATIVE ORDER ON CONSENT
Docket No. CWA-07-2011-0101**

For the United States Environmental Protection Agency:



Howard C. Bunch
Sr. Assistant Regional Counsel



Date



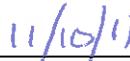
Becky Weber
Director
Air and Waste Management Division



Date



Cecilia Tapia
Director
Superfund Division



Date

IN THE MATTER OF Ag Processing Inc a cooperative, Respondent
Docket No. CWA-07-2011-0101

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:

Howard Bunch
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:

Kelly Jorgensen
Ag Processing-a Cooperative
12700 West Dodge Road
Omaha, Nebraska 68154-2154

Dated: 11/16/11



Kathy Robinson
Hearing Clerk, Region 7