

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)	
)	
Penny's Concrete, Inc.)	CONSENT AGREEMENT
Plant #2)	AND FINAL ORDER
23400 West 82 nd Street)	
Shawnee Mission, Kansas 66227)	
)	
Respondent.)	Docket No. CWA-07-2008-0070
_____)	

The U.S. Environmental Protection Agency, Region VII ("EPA" or "Complainant"), and Penny's Concrete, Inc. (Respondent) have agreed to a settlement of this action before filing a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b), 22.18(b)(2), and 22.18(b)(3) 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), and 22.18(b)(3).

Stipulations

Jurisdiction

1. This is an administrative action for the assessment of Class I civil penalty instituted pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, (Administrative Proceedings Not Governed by Section 554 of the Administrative Procedures Act) 40 C.F.R. Part 22, Subpart I.

2. This Consent Agreement and Final Order serves as notice that 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.

Parties

3. The Respondent is Penny's Concrete, Inc., a concrete supply company, located at 23400 West 82nd Street, Shawnee, Kansas.

4. The authority to take action under Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), 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" or "EPA").

Statutory and Regulatory Framework

5. Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore . . . facilities, and to contain such discharges"

6. Initially by Executive Order 11548 (July 20, 1970), 35 Fed. Reg. 11677 (July 22, 1970), and most recently by Section 2(b)(1) of Executive Order 12777 (October 18, 1991), 56 Fed. Reg. 54757 (October 22, 1991), the President delegated to EPA his Section 311(j)(1)(C) authority to issue the regulations referenced in the preceding Paragraph for non-transportation-related onshore facilities.

7. EPA subsequently promulgated the Spill Prevention Control and Countermeasure (SPCC) regulations pursuant to these delegated statutory authorities, and pursuant to its authorities under the CWA, 33 U.S.C. § 1251 *et seq.*, which established certain procedures, methods and requirements upon each owner and operator of a non-transportation-related onshore facility if such facility, due to its location, could reasonably be expected to discharge oil into or upon the navigable waters of the United States and their adjoining shorelines in such quantity as EPA has determined in 40 C.F.R. § 110.3 may be harmful to the public health or welfare or the environment of the United States ("harmful quantity").

8. In promulgating 40 C.F.R. § 110.3, which implements Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), EPA has determined that discharges of harmful quantities include oil discharges that cause either (1) a violation of applicable water quality standards, or (2) a film, sheen upon, or discoloration of the surface of the water or adjoining shorelines, or (3) a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

Factual Background

9. Respondent is a corporation organized under the laws of Kansas. 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 C.F.R. § 112.2.

10. Respondent is the owner/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 the Penny's Concrete Plant #2 located at 23400 West 82nd Street, Shawnee, Kansas.

11. The facility has an aggregate above-ground storage capacity greater than 41,000 gallons of oil in containers.

12. Respondent's facility is located near Clear Creek which drains into the Kansas River. Clear Creek and its tributaries are navigable waters of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of CWA, 33 U.S.C. § 1362(7).

13. Respondent is engaged in storing, processing, using or consuming oil or oil products located at the facility.

14. The facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

15. The 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.

16. The facility is therefore a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity ("an SPCC-regulated facility").

17. Pursuant to Section 311(j)(1)(C) of the CWA, E.O. 12777, and 40 C.F.R. § 112.1. Respondent, as the owner and/or operator of an SPCC-regulated facility, is subject to the SPCC regulations.

18. On or about August 6, 2006, Respondent discharged on-road diesel fuel that originated from a 40,000 gallon above-ground storage tank. It was estimated that the total amount of fuel discharged was approximately 20,000 to 24,000 gallons.

19. On or about August 10, 2006, EPA conducted an inspection at Respondent's facility.

Findings of Violation

20. Complainant hereby incorporates the allegations contained in paragraphs 1 through 19 above, as if fully set forth herein.

21. 40 C.F.R. § 112.3 requires that the owner or operator of a SPCC-regulated facility must prepare and implement a SPCC plan that is in accordance with the requirements of 40 C.F.R. § 112.7 and any other applicable section of the SPCC regulations.

22. At the time of the August 2006 inspection, Respondent had failed to prepare and implement a SPCC Plan.

23. Respondent's failure to prepare and implement a SPCC plan for the facility in accordance with the requirements of 40 C.F.R. Part 112, as described in Paragraph 21, violated 40 C.F.R. § 112.3.

24. In accordance with Section 311(b)(6)(A)(ii) of CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), EPA may assess a civil penalty to any owner or operator in charge of any onshore facility who fails to comply with any regulation issued under Section 311(j) of CWA, 33 U.S.C. § 1321(j).

25. Pursuant to Section 311(b)(6)(A)(ii) of CWA, 33 U.S.C. § 1321(b)(6)(A)(ii) Respondent is assessed a civil penalty as specified in paragraph 1 of the Final Order for its failure to comply with 40 C.F.R. § 112.3.

CONSENT AGREEMENT

It is hereby agreed and accepted by the parties, that:

1. This Consent Agreement and Final Order is being entered into by the parties in full settlement of and release from all CWA civil penalties that might have attached as a result of allegations made in paragraphs above 21 through 25, above. Respondent has read the Consent Agreement, finds it reasonable, consents to its issuance and will comply with the terms of the Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

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 the Final Order accompanying this Consent Agreement.

5. Respondent certifies by signing this Consent Agreement and Final Order that, to the best of its knowledge, it is presently in compliance with the CWA and all regulations promulgated thereunder.

6. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by EPA. Nothing contained in this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

7. Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

8. Each party shall bear its own costs and attorneys' fees in the action resolved by this Consent Agreement and Final Order.

9. Each signatory of this Agreement certifies that he or she is fully authorized to enter into the terms of this Consent Agreement and Final Order.

10. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a civil penalty as specified in paragraph 1 of the Final Order. Payment of this civil penalty shall resolve all civil and administrative claims for all violations of the CWA alleged in this document.

11. The effect of the settlement described in Paragraph 10 above is conditioned upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 5 above.

12. This Consent Agreement and Final Order shall be effective upon entry of the Final Order by the Regional Judicial Officer for EPA Region VII. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

13. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, 901 North 5th Street, Kansas City, Kansas, 66101.

FINAL ORDER

Pursuant to the authority of Section 311 of the CWA, 33 U.S.C. § 1321, and according to the terms of this Consent Agreement and Final Order, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Thirty Thousand Dollars (\$30,000) within thirty (30) days of the entry of this Final Order. Payment shall be by cashier's or certified check made payable to the "Environmental Protection Agency – OSLTF-311" and remitted to:

U.S. EPA
Fines and Penalties
P.O. Box 979077
St. Louis, MO 63197-9000.

2. The Respondent shall reference the Docket Number CWA-07-2008-0070 and **In the Matter of Penny's Concrete, Inc.** on the check. A copy of each check shall also be mailed to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region VII
901 North 5th Street
Kansas City, Kansas 66101

and

Demetra O. Salisbury
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, KS 66101.

3. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

A. Parties Bound

1. This Final Order portion of 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.

B. General Provisions

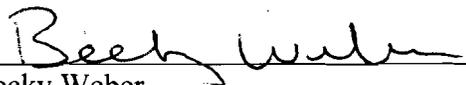
1. Notwithstanding any other provision of this Consent Agreement and Final Order, EPA reserves the right to enforce the terms of the Final Order portion of this Consent Agreement and Final Order by initiating a judicial or administrative action under Section 311 of the CWA, 33 U.S.C. § 1321, and to seek penalties against Respondent or to seek any other remedy allowed by law.

2. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this Consent Agreement and Final Order.

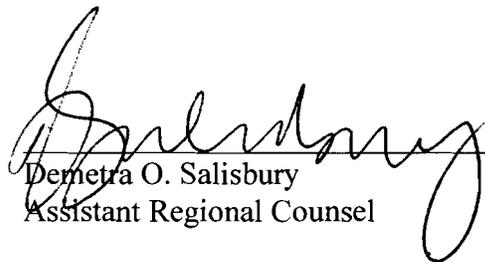
3. The headings in this Consent Agreement and Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement and Final Order.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

9/19/08
Date


Becky Weber
Director
Air and Waste Management Division

9/23/08
Date


Demetra O. Salisbury
Assistant Regional Counsel

RESPONDENT:
Penny's Concrete, Inc.

9/16/08
Date



Printed Name David F. Hoover

Title President

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



Robert Patrick
Regional Judicial Officer

Date September 24, 2008

IN THE MATTER OF Penny's Concrete, Inc., Respondent
Docket No. CWA-07-2008-0070

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:

Demetra O. Salisbury
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Original by Certified Mail Return Receipt to:

David F. Hoover, President
Penny's Concrete, Inc.
Plant #2
23400 West 82nd Street
Shawnee Mission, Kansas 66227

Dated: 9/24/08



Kathy Robinson
Hearing Clerk, Region 7