

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2016 JUL 21 PM 2:21

IN THE MATTER OF:)
)
Cobra Oil & Gas Corporation)
)
Respondent.)
_____)

FILED
COMPLAINT CASE VIII
CONSENT AGREEMENT
RECORDING CLERK
Docket No. CWA-08-2016-0009
Simultaneous Commencement and
Conclusion of a Proceeding Pursuant to
Section 311(b)(6)(B)(i) of the Clean Water
Act and 40 C.F.R. § 22.13(b)

Complainant, United States Environmental Protection Agency, Region 8, and Respondent, Cobra Oil & Gas Corporation, by their undersigned representatives, hereby consent and agree as follows:

I. STATUTORY AUTHORITY

1. This Combined Complaint and Consent Agreement (Agreement) is issued pursuant to section 311(b)(6) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6), and 40 C.F.R. § 22.13(b). Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), authorizes the Administrator of the EPA to issue a complaint that assesses civil penalties for violations of section 311(b)(3) and (j) of the Act, 33 U.S.C. § 1321(b)(3) and (j), which authority has been properly delegated to the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region 8. 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. Part 22, governs such proceedings. According to 40 C.F.R. § 22.13(b), a proceeding subject to the Consolidated Rules may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3).

II. PARTIES BOUND

2. This Agreement shall apply to and be binding upon the EPA and shall be binding upon the Respondent, its officers, directors, agents, successors, and assigns. Any change in the ownership or legal status of Respondent or the business organization, structure or status of Respondent, including, but not limited to, any transfer of assets or real or personal property, shall not alter its responsibilities under this Agreement.

III. STATEMENT OF PARTIES

3. For the purposes of settlement only, Respondent admits the jurisdictional allegations contained in paragraph 1 of this Agreement and neither admits nor denies EPA's allegations contained in paragraphs 10 through 48 of this Agreement.
4. The Parties agree that the date stamped on this Agreement shall be the date the complaint is filed.
5. Respondent waives its right to a hearing in this matter before any tribunal to contest any issue of law or fact set forth in this Agreement, and waives its right to appeal a final order (Final Order) approving this settlement.
6. The signatories to this Agreement certify that they are authorized to execute and legally bind the parties they represent to this Agreement.
7. This Agreement contains all terms of the settlement agreed to by the parties.
8. The EPA and Respondent agree that settlement of this matter is in the public interest, and that execution of this Agreement and issuance of the Final Order without further litigation and without adjudication of any issue of fact or law is the most appropriate means of resolving this matter.

IV. STATUTORY AND REGULATORY FRAMEWORK

9. The objective of the Act is to “restore and to maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C. § 1251(a).
10. Section 311(j)(1)(C) of the Act, 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” 33 U.S.C. § 1321(j)(1)(C).
11. Pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), the implementing regulations for oil pollution prevention are found at 40 C.F.R. part 112.
12. 40 C.F.R. § 112.3 requires that the owner or operator of a Spill Prevention Control and Countermeasures (SPCC)-regulated facility must prepare a written SPCC plan in accordance with 40 C.F.R. §§ 112.7 and 112.8 and any other applicable section of 40 C.F.R. part 112.
13. 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 Paragraph 11 for non-transportation-related onshore facilities.
14. EPA subsequently promulgated the SPCC regulations pursuant to these delegated statutory authorities and pursuant to its authorities under the Act, 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 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”).

15. For purposes of sections 311(b)(3) and (b)(4) of the Act, 33 U.S.C. §§ 1321(b)(3) and (b)(4), discharges of oil into or upon the navigable waters or adjoining shorelines of the United States in such quantities that have been determined may be harmful to the public health or welfare or the environment of the United States are defined in 40 C.F.R. § 110.3 to include discharges of oil that violate applicable water quality standards; or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; and/or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.
16. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), in pertinent part, “prohibits the discharge of any oil or hazardous substances into or upon the navigable waters of the United States or their adjoining shorelines in such quantities as may be harmful as determined by the President.”
17. The term “discharge” is defined in section 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2), to include, in pertinent part, “any spilling, leaking, pumping, pouring, emitting, emptying or dumping”
18. The term “oil” is defined in section 311(a)(1) of the Act, as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.” 33 U.S.C. § 1321(a)(1).
19. The term “navigable waters” is defined in section 502(7) of the Act as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).
20. The term “navigable waters,” as further defined in 40 C.F.R. § 110.1, “means the waters of the United States, including the territorial seas,” and includes, *inter alia*: “(a) All waters that

are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (b) Interstate waters, including interstate wetlands; (c) All other waters such as interstate lakes, rivers, streams, . . . ; (d) All impoundments of waters otherwise defined as navigable waters...; (e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and (f) Wetlands adjacent to waters identified in paragraphs (a) through (e)...”¹

21. In accordance with section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), the President, through a delegation to EPA, has determined, by regulation, those quantities of oil the discharge of which may be harmful to the public health or welfare or the environment of the United States. Exec. Order No. 11735, 38 Fed. Reg. 21243 (Aug. 3, 1973), and Executive Order 12777, 56 Fed. Reg. 54757 (October 22, 1991). Pursuant to section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), any owner, operator, or person in charge of any vessel, onshore facility or offshore facility from which oil is discharged in violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), may be assessed a class I or class II civil penalty.
22. The term “owner or operator” is defined in section 311(a)(6) of the Act in pertinent part as “in the case of an onshore facility, . . . any person owning or operating such onshore facility” 33 U.S.C. § 1321(a)(6).
23. According to section 311(a)(7) of the Act, “person” includes an individual, firm, corporation, association, and a partnership. 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

¹ On June 29, 2015, EPA and the U.S. Army Corps of Engineers published a final rule defining and clarifying the scope of waters protected under the Act and therein amended the definition of “navigable waters” specified in 40 C.F.R. § 110.1 (*see* 80 Fed. Reg. 37054). The rule and its amendments were effective on August 28, 2015; however, on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the rule nationwide pending further action of the court. The referenced definition is that which was in effect prior to August 27, 2015.

24. The term “onshore facility” is defined in section 311(a)(10) of the Act as any facility of any kind located in, on, or under, any land within the United States other than submerged land. 33 U.S.C. § 1321(a)(10).
25. 40 C.F.R. § 112.3 requires that the owner or operator of an SPCC-regulated facility prepare and implement a written SPCC plan in accordance with 40 C.F.R. §§ 112.7, 112.9, and 112.10.

V. GENERAL ALLEGATIONS

26. Respondent is and was at all times relevant to this Agreement a Texas corporation licensed to do business in North Dakota.
27. The registered agent of Cobra Oil and Gas Corporation is CT Corporation System. The address of Respondent’s registered agent on file with the North Dakota Secretary of State is 314 E. Thayer Ave., Bismarck, North Dakota 58501-4018.
28. Respondent is and was at all times relevant to this Agreement a “person” within the meaning of section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7).
29. Respondent is engaged in some or all of the following: drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products at the NERU 1605 production facility (Facility).
30. Respondent owns and operates the Facility which is located in Billings County, North Dakota.
31. The Facility has an aggregate above-ground storage capacity of approximately 84,000 gallons of oil and is greater than 1,320 gallons of oil in containers each with a shell capacity of at least 55 gallons.

32. The Respondent's Facility is located less than one-half mile (.41) from an unnamed drainage that flows approximately 1.88 miles to Magpie Creek, a tributary to the Little Missouri River, a navigable water of the United States.
33. The Facility is an onshore facility within the meaning of section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.
34. The Facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112.2 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.
35. The Facility is 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 and is therefore "an SPCC-regulated facility."
36. In accordance with 40 C.F.R. § 112.2, "[t]ransportation-related and non-transportation related, as applied to an onshore or offshore facility, are defined in the Memorandum of Understanding between the Secretary of Transportation and the Administrator of [EPA] dated November 24, 1971(appendix A of this part)."
37. Section II(1)(G) of Part 112, Appendix A defines a "non-transportation-related onshore facility" as "[i]ndustrial, commercial, agricultural or public facilities which use and store oil."

VI. VIOLATIONS

COUNT 1

38. 40 C.F.R. § 112.3 requires that the owner or operator of an SPCC-regulated facility must prepare and implement a written SPCC plan in accordance with 40 C.F.R. §§ 112.7, 112.9, and 112.10.
39. On or about October 6, 2014, Respondent's predecessor, Whiting Oil and Gas Corporation, submitted the SPCC plan for the Facility.

40. EPA reviewed the SPCC plan and noted deficiencies regarding compliance with the requirements in 40 C.F.R. sections 112.7(a)(5)-discharge procedures; 112.7(c)-secondary containment for loading and unloading areas; and 112.9(c)(2)-discharges from undiked areas.
41. Respondent's failure to adequately prepare and implement such an SPCC plan for the Facility violated 40 C.F.R. § 112.3.

COUNT 2

42. On or about June 8, 2011, a release from a flowline that transports crude oil from NERU 1605 to NERU 0904 resulted in the loss of an estimated 36 barrels (1,512 gallons) of crude oil at the Facility which flowed to an unnamed drainage.
43. The crude oil that was released from the flowline was discharged into an unnamed drainage that flows to Magpie Creek, a tributary to the Little Missouri River and the adjoining shorelines, a navigable water of the United States.
44. The crude oil was discharged in "quantities as may be harmful" within the meaning of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3.
45. The oil that was discharged into the tributary that flows to Magpie Creek, which flows to the Little Missouri River and the adjoining shorelines, was discharged in "quantities as may be harmful" within the meaning of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3.
46. Respondent's discharge of the oil into the unnamed drainage, which flows to Magpie Creek and its adjoining shorelines, constitutes a violation of section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i).
47. In approximately December 2011, Respondent removed the 1800-foot segment of flowline and replaced it with a 3-inch steel HP-flexpipe and installed a 6-inch poly-pipe which subsequently passed a 500 pounds per square inch pressure test with no identifiable leaks.

48. Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. part 19 authorize the assessment of a Class I civil penalty not to exceed \$16,000 per violation up to a maximum civil penalty of \$37,500 for violations of section 311(b)(3) and (j) of the Act, 33 U.S.C. § 1321(b)(3) and (j), occurring after January 12, 2009.

VI. PAYMENT OF CIVIL PENALTY

49. For settlement purposes of this matter only, Respondent consents to the issuance of a final order and the payment of a civil penalty in the amount of twenty three thousand seven hundred and ninety dollars (\$23,790).

50. The EPA proposes this penalty amount after considering the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. §1321(b)(8): the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

51. Respondent consents and agrees to pay a civil penalty in the amount of twenty three thousand seven hundred and ninety dollars (\$23,790) within 30 calendar days from the date written on the Final Order, issued by the Regional Judicial Officer that adopts this Agreement.

52. If the due date of the payment falls on a weekend or legal federal holiday, the due date is the next business day. Payments must be received by 11:00 a.m. Eastern Time to be considered as received that day.

53. Payments shall be made by any of the methods set forth in Appendix 1 to this Agreement.

54. Within 10 calendar days of submitting payment, notice that the payment has been made shall be provided to: Dennis Jaramillo (8ENF-UFO) and Missy Haniewicz (8RC)

Environmental Scientist
U.S. EPA Region 8
1595 Wynkoop
Denver, CO 80202-1129

Regional Hearing Clerk
U.S. EPA Region 8
1595 Wynkoop
Denver, CO 80202-1129

55. If payment is made by check, the notice shall include a copy of the check. If payment is made in any other manner, the notice shall include documentation demonstrating that the payment was made.

56. In the event payment is not received by the specified due date, interest on the late payment shall accrue from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received (e.g., on the 1st late day for the first payment, 30 days of interest accrues).

57. In addition, a handling charge of fifteen dollars (\$15) shall be assessed on the 31st day from the date of the Final Order, and each subsequent 30-day period that the initial payment, or any portion thereof, remains unpaid, and a handling charge of fifteen dollars (\$15) shall be assessed on the 1st day after the due date of each subsequent payment, and each subsequent 30-day period that any such payment, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (e.g., the 121st day from the date the Final Order is signed). Payments are first applied to handling charges, 6% penalty interest, late interest, and any balance is then applied to the outstanding principal amount. Further,

Respondent shall be subject to the fees, costs, and nonpayment penalty set forth in section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H).

58. Respondent agrees that the civil penalty assessed herein shall not be claimed as a federal or other tax deduction or credit.

VII. OTHER TERMS AND CONDITIONS

59. Failure by Respondent to comply with any of the terms of this Agreement shall constitute a breach of this Agreement and may result in referral of the matter to the United States Department of Justice for enforcement of this Agreement and for such other relief as may be appropriate.

60. Nothing in this Agreement shall be construed as a waiver by Complainant or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this Agreement.

61. This Agreement, upon incorporation into a final order by the Regional Judicial Officer and full payment of the penalty (\$23,790), shall resolve Respondent's liability for civil penalties for the violations alleged in this Agreement.

62. This Agreement shall not in any case affect the EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law whether or not alleged in this Agreement.

63. This Agreement shall not affect Respondent's right to assert any defense in any action by the EPA to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

64. Except as otherwise specified in this Agreement, Respondent reserves all of its rights, remedies, and defenses in any future proceedings. This Agreement shall not be construed to

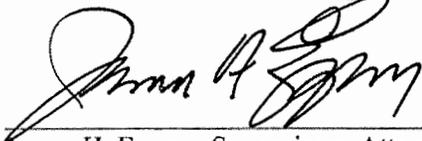
create rights in, or grant any cause of action to, any third party not a party to this Agreement.

65. The parties agree to submit this Agreement to the appropriate EPA regional judicial officer, with a request that it be incorporated into a Final Order.

66. Each party shall bear its own costs and attorney fees in connection with all issues associated with this Agreement.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**
Office of Enforcement, Compliance, and
Environmental Justice, Complainant

Date: 7/20/16

By: 
James H. Eppers, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice
U.S. EPA Region 8
Denver, Colorado 80202-1129

Date: 7/20/16

By: 
Stephanie DeJong, Acting Supervisor
OPA Enforcement Program
Office of Enforcement, Compliance,
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-1129

COBRA OIL & GAS CORPORATION

Date: 7/18/16

By: 
Jeff Dillard, President

Combined Complaint and Consent Agreement - Appendix 1

The following are acceptable payment methods for the civil penalty required to be paid pursuant to the Agreement.

1. If payment is being made by check, submit the check, including the name, docket number, and the notation, "Oil Spill Liability Trust Fund-311," payable to "**Environmental Protection Agency**" :

Regular Mail:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Federal Express, Airborne, or other commercial carrier:

US Bank
Cincinnati Finance Center Box 979077
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Craig Steffen
513-487-2091

2. Wire Transfers:

Wire transfers must indicate the name and docket number of this case and be sent directly to the Federal Reserve Bank in New York City with the following information:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

3. ACH (also known as REX or remittance express):

Please indicate the name and docket number of this case on Automated Clearinghouse (ACH) payments to EPA made through the US Treasury using the following information:

US Treasury REX/Cashlink ACH Receiver

ABA: 051036706

Account Number: 310006, Environmental Protection Agency

CTX Format Transaction Code 22 – checking

Physical location of US Treasury Facility

5700 Rivertech Court

Riverdale, MD 20737

US Treasury Contact Information:

Randolph Maxwell: 202-874-7026

Remittance Express (REX): 1-866-234-5681

4. On-line Payment:

There is now an On Line Payment Option, available through the Dept. of Treasury. This payment option can be accessed from the information below:

www.pay.gov

Enter "sfo 1.1" (without the quotation marks) in the "Search Public Forms" field.

Click on the first link to open the form, complete required fields, and then click on "Submit Data" button at bottom of form.