

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of: :

Andrea Simmons, Executrix :
The Estate of Roger G. Fussell :
272 SE Dustin Terrace :
Lake City, FL 32025 :

Respondent, :

U.S. EPA Docket Number :
RCRA-03-2012-0027 :

Highlander Village :
William Avenue :
Davis, West Virginia 26260 :
Facility Id. No. 4-707673 :

Facility. :

RECEIVED
2011 DEC -1 AM 10:37
FEDERAL HEARING CLERK
EPA REGION III PHILA. PA

CONSENT AGREEMENT

Preliminary Statement

This Consent Agreement ("CA") is entered into by the Director, Land and Chemicals Division, U.S. Environmental Protection Agency, Region III ("EPA" or "Complainant") and Andrea Simmons in her capacity as the Executrix of the Estate of Roger G. Fussell ("Respondent"), pursuant to Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. § 6991e, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22, including, specifically 40 C.F.R. §§ 22.13(b) and .18(b)(2) and (3).

This CA and the accompanying Final Order (collectively "CAFO") resolve violations of RCRA Subtitle I, 42 U.S.C. §§ 6991-6991i, and the State of West Virginia's underground storage tank regulations authorized by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, by Respondent in connection with its underground storage tanks at Respondent's facility located at William Avenue, Davis, West Virginia (the "Facility").

Effective February 10, 1998, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the State of West Virginia was granted final authorization to administer its state underground storage tank management program *in lieu* of the Federal underground storage tank management program established under Subtitle I of RCRA, 42 U.S.C. §§6991-6991i. The provisions of West Virginia's authorized underground storage tank program

regulations ("WVUSTR"), set forth in WVHWMR Sections 33-30-1. *et seq.*, which incorporates by reference the federal underground storage tank program regulations set forth at 40 C.F.R. Part 280 (1995 ed.), with some modifications, are enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. The provisions of WVHWMR are cited as the legal basis for the violations alleged herein, with any incorporated provisions of the federal regulations cited immediately thereafter in a parenthetical.

EPA has given the State of West Virginia prior notice of the issuance of this CAFO in accordance with Section 9006(a) of RCRA, 42 U.S.C. § 6991e(a).

General Provisions

1. For purposes of this proceeding only, Respondent admits the jurisdictional allegations set forth in this CAFO.
2. Respondent neither admits nor denies the specific factual allegations and conclusions of law set forth in this CAFO, except as provided in Paragraph 1, immediately above.
3. Respondent agrees not to contest EPA's jurisdiction with respect to the execution of this CA, the issuance of the attached Final Order, or the enforcement of the CAFO.
4. For the purposes of this proceeding only, Respondent hereby expressly waives her right to contest the allegations set forth in this Consent Agreement and any right to appeal the accompanying Final Order.
5. Respondent consents to the issuance of this CAFO and agrees to comply with its terms and conditions.
6. Respondent shall bear her own costs and attorney's fees.
7. The provisions of this CAFO shall be binding upon Complainant and Respondent, her successors and assigns.
8. This CAFO shall not relieve Respondent of her obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit; nor does this CAFO constitute a waiver, suspension or modification of the requirements of RCRA Subtitle I, 42 U.S.C. §§ 6991-6991i, or any regulations promulgated and/or authorized thereunder.

Findings of Fact and Conclusions of Law

In accordance with the *Consolidated Rules of Practice* at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3), Complainant makes the following findings of fact and conclusions of law:

9. The United States Environmental Protection Agency's Office of Administrative Law Judges has jurisdiction over this matter pursuant to RCRA Section 9006(a) and (d), 42 U.S.C. § 6991e(a) and (d), and 40 C.F.R. § 22.1(a)(4) and .4(c).
 10. Andrea Simmons, Executrix of the Estate of Roger G. Fussell, is a "person" as defined by WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12), Section 9001(5) of RCRA, 42 U.S.C. § 6991(5).
 11. Roger G. Fussell is and/or was, the "owner" and/or the "operator" of "underground storage tanks" ("USTs"), as these terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) located at the Facility.
 12. Roger G. Fussell died testate on December 21, 2009 and Roger G. Fussell named his daughter, Andrea Simmons, as the Executrix of his Last Will and Testament.
 13. Andrea Simmons, as the Executrix of the Estate of Roger G. Fussell is, at the time of the violations alleged in this CAFO, the "owner" and/or the "operator" of "underground storage tanks" ("USTs"), as these terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) located at the Facility.
 14. At all times relevant to the violations alleged herein, three (3) USTs, as described in the following subparagraphs, were located at the Facility:
 - A. an eight thousand (8,000) gallon composite steel tank that was installed in or about 1987 and that, at all times relevant hereto, routinely contained gasoline, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 1");
 - B. a six thousand (6,000) gallon composite steel tank that was installed in or about 1987 and that, at all times relevant hereto, routinely contained gasoline, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 2"); and
 - C. a six thousand (6,000) gallon composite steel tank that was installed in or about 1990 and that, at all times relevant hereto, routinely contained gasoline, a "regulated substance" as that term is defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12) (hereinafter "UST No. 3").
-

15. USTs Nos. 1 through 3, referenced in the immediately preceding Paragraph, are "petroleum UST systems" and "existing tank systems" as defined in WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12).
16. USTs Nos. 1 through 3 were, at all times relevant to the violations alleged in this CAFO, used to store and routinely contained "regulated substance(s)" at Respondent's Facility, as defined in Section 9001(2) of RCRA, 42 U.S.C. § 6991(2), and WVUSTR Section 33-30-2.1 (40 C.F.R. § 280.12).

COUNT 1

(Failure to perform release detection on
USTs Nos. 1 through 3)

17. The allegations of Paragraphs 1 through 16 of this CAFO are incorporated herein by reference.
 18. Pursuant to WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c), owners and operators of new and existing UST systems must provide a method or combination of methods of release detection monitoring that meets the requirements described therein.
 19. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a) provides, in pertinent part, that USTs shall be monitored at least every 30 days for releases using one of the methods listed in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d) through (h), except that:
 - (1) UST systems that meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 (Performance Standards for New UST Systems) or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Upgrading of Existing UST Systems), and the monthly inventory control requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(a) or (b) (Inventory Control or Manual Tank Gauging), and tank tightness testing, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(c) (Tank Tightness Test), at least every 5 years until December 22, 1998, or until 10 years after the UST is installed or upgraded under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21(b) (Tank Upgrading Requirements); and
 - (2) UST systems that do not meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 (Performance Standards for New UST Systems) or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Upgrading of Existing UST Systems), may use monthly inventory controls,
-

conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(a) or (b) (Inventory Control or Manual Tank Gauging) and annual tank tightness testing, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(c) (Tank Tightness Test) until December 22, 1998, when the tank must be upgraded under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Tank Upgrading Requirements) or permanently closed under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71; and

- (3) Tanks with a capacity of 550 gallons or less and not metered may use weekly tank gauging, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(b).
20. From at least September 21, 2010 until at least the filing of this CAFO, Respondent's USTs No. 1 through 3 at the Facility have not been monitored in compliance with any of the methods set forth in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a)(1)-(3) and/or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d)-(h).
21. Respondent's acts and/or omissions as alleged in Paragraph 20, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c) and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a).

COUNT 2

(Failure to Provide Financial Assurance)

22. The allegations in Paragraphs 1 through 21, above, are incorporated herein by reference as though fully set forth at length herein.
23. WVUSTR Section 33-30-2.2.1 incorporates by reference 40 C.F.R. §§ 280.90 through 280.112, which provide, in pertinent part, that owners and operators of petroleum UST systems are required, with exceptions not relevant hereto, to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs. Subject to the limitations set forth in 40 C.F.R. §§ 280.94, incorporated by reference into WVUSTR Section 33-30-2.2.1, an owner or operator may demonstrate financial responsibility using any of the mechanisms set forth in 40 C.F.R. §§ 280.95 through 280.103.
24. From at least September 21, 2010 until at least the filing of this CAFO, Respondent did not demonstrate financial responsibility for USTs Nos. 1 through 3 by any of the methods set forth in 40 C.F.R. §§ 280.95 through 280.103, incorporated by reference into WVUSTR Section 33-30-2.2.1.
-

25. Respondent's acts and/or omissions as alleged in Paragraph 24, above, constitute a violation by Respondent of WVUSTR Section 33-30-2.2.1.

COUNT 3

(Failure to permanently close UST systems)

26. The allegations in Paragraphs 1 through 25, above, are incorporated herein by reference as though fully set forth at length herein.
27. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.70, owners and operators of an UST system that is temporarily closed for more than 12 months must permanently close the UST system in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71 if it does not meet either the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 for new UST systems or the upgrading requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21, with exceptions not relevant to this case.
28. Pursuant to WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71, in order to permanently close an UST system, the owner or operator must empty and clean the UST by removing all liquids and accumulated sludges from the UST, and remove the UST from the ground or filled with an inert solid material.
29. On or before February 27, 2009, the USTs at the Facility were placed into "temporary closure" within the meaning of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.70.
30. From at least February 27, 2009 until the date of this CAFO, the USTs at the Facility did not meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 for new UST systems or the upgrading requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 for the UST systems.
31. By March 1, 2010, the USTs at the Facility were required to be permanently closed in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
32. Upon information and belief, from at least September 21, 2010 until at least the filing of this CAFO, Respondent did not remove the UST systems from the Facility from the ground or fill the UST systems with an inert solid material and thus did not permanently close the UST systems as required by WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.

33. Respondent's acts and/or omissions as alleged in Paragraph 32, above, constitute a violation by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.

CIVIL PENALTY

34. In settlement of EPA's claims for the violations alleged in this CAFO, the proposed civil penalty in this matter is \$0.00.
35. The aforementioned settlement penalty amount was determined after consideration of the statutory factors set forth in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), which include the seriousness of the violation and any good faith efforts to comply with the applicable requirements, and in accordance with EPA's November 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations ("UST Penalty Guidance").

COMPLIANCE ORDER

Pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e, Respondent is hereby ordered to:

36. Within forty-five (45) days of the effective date of this Compliance Order, close all the UST systems at the Facility UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
37. Within sixty (60) days of the effective date of this Compliance Order, submit to EPA a report which documents and certifies Respondent's compliance with the terms of this Compliance Order.
38. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Compliance Order shall be certified by the executor or executrix of Respondent.

The certification required above shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is true, accurate, and complete. As to [the/those] identified portions of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there

are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: Andrea Simmons
Name: Andrea Simmons
Title: EXECUTIVE

39. All documents and reports to be submitted pursuant to this Compliance Order shall be sent to the following persons:

Debra Moody
RCRA Compliance and Enforcement Branch (3LC70)
U.S. Environmental Protection Agency - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

and

Louis F. Ramalho
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

One copy of all documents submitted to EPA shall also be sent by regular mail to the attention of:

Ruth M. Porter
UST Program Manager
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
Telephone; 304-926-0499 ext. 1007
Fax: 304-926-0457
Ruth.M.Porter@wv.gov

40. If activities undertaken by the Respondent in connection with this Compliance Order or otherwise indicate that a release of a regulated substance from any UST system at the Facility may have occurred, Respondent may be required to undertake corrective action pursuant to applicable regulations in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
41. Respondent is hereby notified that failure to comply with any of the terms of this Compliance Order may subject it to imposition of a civil penalty of up to \$37,500 for each day of continued noncompliance, pursuant to Section 9006(a)(3) of RCRA, 42 U.S.C. § 6991e(a)(3), the Debt Collection Improvement Act of 1996

("DCIA"), and the subsequent Civil Monetary Penalty Inflation Adjustment Rules, 61 *Fed. Reg.* 69360 (December 31, 1996) and 69 *Fed. Reg.* 7121, 7126 (February 13, 2004), codified at 40 C.F.R. Part 19. (Enclosure "D" and "E").

42. The term "days" as used herein shall mean calendar days unless specified otherwise.

VI. OTHER APPLICABLE LAWS

43. Nothing in this CAFO shall relieve Respondent of any duties otherwise imposed upon it by applicable federal, state, or local law and/or regulation.

VII. RESERVATION OF RIGHTS

44. Nothing in this CAFO shall be construed as limiting the authority of EPA to undertake action against any person, including the Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare or the environment. In addition, this settlement is subject to all limitations on the scope of resolution and to the reservation of rights set forth in Section 22.18(c) of the *Consolidated Rules of Practice*. Further, EPA reserves any rights and remedies available to it under RCRA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this CAFO following its filing with the Regional Hearing Clerk.

VIII. FULL AND FINAL SATISFACTION

45. This settlement shall constitute full and final satisfaction of all civil claims for penalties which Complainant has under RCRA Sections 3008(a) and (g), 42 U.S.C. § 6928(a) and (g), for the violations alleged in this CA.

IX. PARTIES BOUND

46. This CA and the accompanying FO shall apply to and be binding upon the EPA, the Respondent, and Respondent's successors and assigns. By his or her signature below, the person signing this CA on behalf of Respondent acknowledges that he or she is fully authorized to enter into this CA and to bind the Respondent to the terms and conditions of this CA and the accompanying FO.

X. EFFECTIVE DATE

47. The effective date of this CAFO is the date on which the FO is filed with the Regional Hearing Clerk after signature by the Regional Administrator or his designee, the Regional Judicial Officer.

XI. ENTIRE AGREEMENT

48. This CAFO constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this CAFO.

For Respondent: _____ The Estate of Roger G. Fussell

Date: 11/1/11 By: Andrea Simmons
Andrea Simmons
Executrix

For Complainant: _____ United States Environmental Protection Agency, Region III

Date: 11/21/11 By: _____
Louis F. Ramalho
Sr. Assistant Regional Counsel

After reviewing the foregoing Consent Agreement and other pertinent information, the Waste and Chemicals Management Division, EPA Region III, recommends that the Regional Administrator or the Regional Judicial Officer issue the Final Order attached hereto.

Date: 11/23/11 By: Abraham Ferdas
Abraham Ferdas, Director
Land and Chemicals Division, EPA Region III

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103**

In the Matter of:

**Andrea Simmons, Executrix
The Estate of Roger G. Fussell
272 SE Dustin Terrace
Lake City, FL 32025**

Respondent,

**Highlander Village
William Avenue
Davis, West Virginia 26260
Facility Id. No. 4-707673**

Facility.

:
:
:
:
:
:
:
:
:
:

**U.S. EPA Docket Number
RCRA-03-2012-0027**

**FEDERAL HEARING CENTER
EPA REGION III, PHILA, PA**

2011 DEC -1 AM 10:37

RECEIVED


FINAL ORDER

Complainant, the Director, Land and Chemicals Division, U.S. Environmental Protection Agency - Region III, and Respondent, Andrea Simmons in her capacity as the Executrix of the Estate of Roger G. Fussell, have executed a document entitled "Consent Agreement" which I hereby ratify as a Consent Agreement in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. The terms of the foregoing Consent Agreement are accepted by the undersigned and incorporated herein as if set forth at length.

NOW, THEREFORE, PURSUANT TO Section 22.18(b)(3) of the *Consolidated Rules of Practice* and Section 9006(a) and (d) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e(a) and (d) ("RCRA"), and having determined, based on the representations of the parties in the attached Consent Agreement, that the civil penalty agreed to therein was based upon a consideration of the factors set forth in Section 9006(c), 42 U.S.C. § 6991e(c), **IT IS HEREBY ORDERED** that Respondent comply with each of the terms and conditions as specified in the attached Consent Agreement.

The effective date of this Final Order and the accompanying Consent Agreement is the date on which the Final Order, signed by the Regional Administrator of U.S. EPA Region III or the Regional Judicial Officer, is filed with the Regional Hearing Clerk of U.S. EPA - Region III.

Date: 12/11/11


Renee Sarajian
Regional Judicial Officer
U.S. EPA, Region III

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date listed below, the original of the foregoing Consent Agreement and Final Order, Docket No. RCRA-03-2012-0027, was filed with the Regional Hearing Clerk, U.S. EPA - Region III, 1650 Arch Street, Philadelphia, Pennsylvania, 19103-2029, and that a true and correct copy was sent to the following parties:

T

The Court:

Honorable Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460

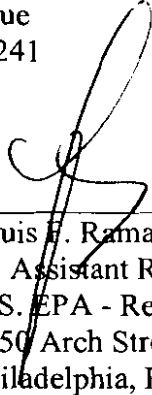
RECEIVED
2011 DEC - 1 AM 10:37
REGIONAL HEARING CLERK
EPA REGION III PHILA. PA

Respondent:

John J. Wallace, IV, Esquire
Wallace Law Offices L.C., Inc.
14 South Randolph Avenue
Elkins, West Virginia 26241

Date

12/1/2011



Louis F. Ramalho
Sr. Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029