

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

2010 FEB 17 AM 9:53

BEFORE THE ADMINISTRATOR

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:) Docket No. CWA-08-2009-0035
)
Avista Utilities, Inc.) **CONSENT AGREEMENT**
1411 East Mission)
Spokane, WA 99202-3727,)
)
(Noxon Rapids Hydroelectric)
Development Facility)
Sanders County, Montana,)
)
Respondent.)

Complainant, United States Environmental Protection Agency, Region 8 (EPA), and Respondent, Avista Corporation, dba Avista Utilities (Avista), by their undersigned representatives, hereby consent and agree as follows:

BACKGROUND

1. On September 30, 2009, EPA issued Avista an Administrative Complaint and Notice of Opportunity for Hearing (Complaint) pursuant to its authority under § 311(b)(6)(B) of the Clean Water Act (Act), as amended by the Oil Pollution Act of 1990. EPA alleged in the Complaint that Avista discharged oil into a water of the U.S. from its Noxon Rapids Hydroelectric Development Facility (facility) in violation of § 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3). EPA also alleged that Avista failed to prepare and implement an adequate Spill Prevention Control and Countermeasure (SPCC) plan for the facility in violation of § 311(j) of the Act, 33 U.S.C. § 1321(j), and the oil pollution prevention regulations set forth at 40 C.F.R. Part 112. The Complaint proposed a civil penalty for the violations alleged therein.

2. Avista admits the jurisdictional allegations of the Complaint and neither admits nor denies the specific factual allegations of the Complaint.

3. Avista waives its right to a hearing before any tribunal, to contest any issue of law or fact set forth in the Complaint or this Consent Agreement.

4. This Consent Agreement, upon incorporation into a final order, applies to and is binding upon EPA, and Avista, its successors, and assigns. Any change in ownership or corporate status of Avista, including, but not limited to, any transfer of assets or real or personal property, shall not alter Avista's responsibilities under this agreement. This Consent Agreement contains all terms of the settlement agreed to by the parties.

TERMS OF SETTLEMENT

CIVIL PENALTY

5. Avista consents and agrees to pay a civil penalty in the amount of seven thousand five hundred dollars (\$7,500), in the manner described below in this paragraph:

- a. Payment is due within thirty (30) calendar days from the date written on the final order, issued by the Regional Judicial Officer that adopts this Consent Agreement. If the due date falls on a weekend or legal federal holiday, then the due date becomes the next business day. The date the payment is made is considered to be the date processed by Mellon Bank described below. Payments received by 11:00 AM EST are processed on the same day, those received after 11:00 AM are processed on the next business day.
- b. The payment shall be made by remitting a cashier's or certified check, referencing the name and docket number of this case, and "Oil Spill Liability Trust Fund-311," for this amount, payable to "**Environmental Protection Agency,**" to:

**US checks by regular
US postal service mail:**

US EPA Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

**Federal Express, Airborne,
or other commercial carrier:**

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Wire transfers:

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 "

On Line Payment:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required
fields.

Copies of the check or wire transfer shall be simultaneously sent to:

Donna K. Inman
U.S. EPA Region 8 (8ENF-UFO)
1595 Wynkoop Street
Denver, CO 80202-1129

Tina Artemis, Regional Hearing Clerk
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

- c. In the event payment is not received by the specified due date, interest accrues from the date of the final order, not the payment 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 the payment is received in full (i.e., on the 1st late day, 30 days of interest accrues).

- d. In addition to the accrual of interest specified in Paragraph (5) of this Agreement, a handling charge of fifteen dollars (\$15.00) shall be assessed on the 31st day from the date of the final order, and each subsequent 30-day period that the penalty, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if the penalty payment is not received within ninety (90) days of the due date (i.e., the 121st day from the date the final order is signed). Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.
- e. Avista agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

6. For settlement purposes only, Avista shall undertake the performance of a Supplemental Environmental Project (SEP) as described in Appendix A, attached and incorporated herein, which the parties agree is intended to secure significant environmental and/or public health protection. This SEP has been reviewed by EPA's legal counsel for legal sufficiency and conformance with the 1988 SEP Policy (SEP Policy). The SEP is within EPA's legal authority to include in the Consent Agreement.

7. The SEP consists of purchasing a spill response trailer that will be available for responders in the lower Clark Fork watershed. Avista will initially outfit the trailer with booms, anchors, tools, rope, drum liners, safety equipment, first aid equipment, and additional materials for deployment. The trailer will be accessible to Local Emergency Planning Committees (LEPC) responders for incident response. Avista will provide a secure, year-round accessible location for the trailer. By making available emergency oil response equipment to local responders in the lower Clark Fork watershed, this SEP advances the objective of the Oil Pollution Act by

minimizing the impact of oil and hazardous substances spills into the Clark Fork River. The SEP also will reduce the adverse impact to public health or the environment caused by similar, future discharges.

8. Avista shall complete the SEP as soon as practicable but no later than December 31, 2010.

9. Avista agrees to spend a minimum of \$28,125 in performing the SEP. This minimum amount was calculated in accordance with Section E of the SEP Policy, Calculation of the Penalty. EPA used the five-step process for calculating a final settlement penalty set forth in the SEP Policy. EPA assessed a mitigation credit of 80 percent (80%) based on the benefit to the public and environment at large that will result from the proposed project. The SEP Policy provides that the mitigation percentage should not exceed 80 percent (80%) unless the respondent is a small business, non-profit organization, or government agency performing a project of outstanding quality. The civil penalty agreed to by Avista in Paragraph 5 represents equal or greater than a) the economic benefit of noncompliance plus 10 percent (10%) of the gravity component; or b) 25 percent (25%) of the gravity component only.

10. Consistent with the statement in Section B, Page 4 of the 1998 SEP Policy, Avista "is not otherwise legally required to perform" the SEP proposed. The SEP cannot constitute injunctive relief because § 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), does not grant the Administrator authority to order injunctive relief. Similarly, this SEP is not required by EPA's cleanup authority under § 311(c) of the Act, 33 U.S.C. § 1321(c). In addition, the SEP is not an existing compliance requirement of the oil pollution prevention regulations. Lastly, there are no other federal or state compliance requirements that direct Avista to provide oil spill

response equipment to a LEPC to mitigate future discharges of oil and hazardous substances. In sum, because purchasing emergency response equipment for use by a LEPC is not mandated by any federal or state laws or regulations, it is eligible for SEP consideration.

11. In compliance with the statement in Section C, Page 5 of the SEP Policy, the SEP is not inconsistent with any provisions of the underlying statute. The Act is part of a Congressional declaration against discharges of oil or hazardous substances into or upon the navigable waters of the U.S. By providing the LEPC materials and equipment critical to respond to water-related public health and environmental emergencies, the SEP advances the goal of the underlying statute to protect and preserve our nation's waters from oil and hazardous substance pollution.

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

13. Any public statement, oral or written, made by Avista making reference to the SEP shall state that "the project is being undertaken as part of settlement of an enforcement action."

14. SEP Reports

- a. Avista shall submit a SEP Completion Report to EPA within thirty (30) days following completion of the final SEP. The SEP Completion Report shall contain the following information:
 - (i) A detailed description of the SEP as implemented;

- (ii) A description of any operating problems encountered and the solutions thereto;
 - (iii) Itemized costs, documented by copies of purchase orders and receipts or canceled checks;
 - (iv) Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement.
- b. Avista shall submit a status report within five (5) months of the Final Order unless the SEP has been completed and a SEP Completion Report already submitted. The status report will include: a progress report of the SEP implementation during the reporting period; problems encountered and solutions implemented; planned activities for the remainder of the SEP implementation period; and costs incurred during the reporting period.
- c. Avista agrees that failure to submit the SEP Completion Report shall be deemed a violation of this Consent Agreement and Avista shall become liable for full payment in accordance with Paragraph 16(b) below.
- d. Avista shall submit all notices and reports required by this Consent Agreement by first class mail, fax, or e-mail to:

Donna K. Inman
U.S. EPA Region 8 (8ENF-UFO)
1595 Wynkoop Street
Denver, CO 80202-1129
E-mail: inman.donnak@epa.gov
Fax: (303) 312-6953

15. Avista agrees that EPA may inspect the trailer described in Paragraph 7 at any time in order to confirm that the implementation, completion, or use of the SEP conforms with the representations made herein.

16. EPA acceptance of SEP Completion Report.

- a. Following receipt of the SEP Completion Report described in paragraph no. 14(a) above, EPA will do one of the following: (i) accept the SEP Completion Report; (ii) reject the SEP Completion Report, notify the Avista, in writing, of deficiencies in the SEP Completion Report and grant Avista an additional thirty (30) days in which to correct any deficiencies; or (iii) reject the SEP Completion Report and demand full payment in accordance with Paragraph 16(b) below.

- b. If EPA elects to exercise option (ii) above, EPA shall permit Avista the opportunity to object in writing to the notification of deficiency or disapproval given pursuant to this paragraph within ten (10) days of receipt of such notification. EPA and Avista shall have an additional thirty (30) days to reach agreement from the receipt by the EPA of the notification of objection. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision to Avista, which shall be final and binding upon Avista. Avista agrees to comply with any requirements imposed by EPA as a result of any such deficiency or failure to comply with the terms of this Consent Agreement. In the event that the SEP is not completed as contemplated herein, as determined by EPA, EPA may demand in writing the full cost of the SEP in the amount of \$28,125 as a civil penalty in accordance with Paragraph 5 , subject to invocation of the dispute resolution procedures described herein, or a claim of force majeure.

GENERAL PROVISIONS

17. Nothing in this Consent Agreement shall relieve Avista of the duty to comply with the Act and its implementing regulations.

18. Failure by Avista to comply with any of the terms of the Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of the Consent Agreement and for such other relief as may be appropriate in federal district court.

19. Nothing in the Consent Agreement shall be construed as a waiver by the EPA 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 Avista's failure to perform pursuant to the terms of the Consent Agreement.

20. The undersigned representative of Avista certifies that he/she is fully authorized to enter into and bind Avista to the terms and conditions of this Consent Agreement.

21. The parties agree to submit this Consent Agreement to the Regional Judicial Officer, with a request that it be incorporated into a final order.

22. Each party shall bear its own costs and attorney fees in connection with this matter.

23. The Consent Agreement, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete and full civil settlement of the violations alleged in the Complaint.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.**

Date: February 10, 2010

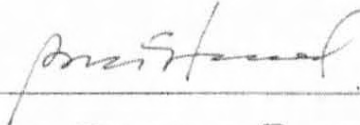
By: David Rochlin
David Rochlin, Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 2/11/2010

By: Mark A.R. Chalfant
Mark A.R. Chalfant, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

AVISTA CORPORATION,
Respondent.

Date: 2-11-2010

By: 

Its: Director, Environmental Affairs

Appendix A

Supplemental Environmental Project

This Appendix describes a Supplemental Environmental Project (SEP) that Avista Corporation (“Avista”) and the U.S. Environmental Protection Agency (“EPA”) have agreed is adequate to offset a portion of the stipulated penalty, as set forth in detail in the Consent Agreement. This SEP has a direct relationship to the underlying violation. This SEP is voluntary and not a current regulatory requirement, had not been committed to or started before EPA identified the violation, and is in addition to ongoing and planned facility improvements. Those improvements, planned and underway, include updates to the SPCC plans and additional training, participation in Local Emergency Planning Committees, upgrades to facilities to prevent falling ice and protect equipment from falling ice, and additional work on equipment containment. This SEP will improve, protect, and/or reduce risks to public health, or the environment at large, by providing benefits to the Lower Clark Fork watershed and the communities of people that live there.

Avista agrees to complete this SEP as soon as practicable, but no later than 12/31/2010. If for reasons beyond Avista’s control it is unable to complete the SEP by 12/31/2010, EPA and Avista will in good faith negotiate an extended completion deadline. Within one month after completion of the SEP, Avista will submit to EPA photographs and documentation verifying the completion and the costs incurred.

Project	Estimated Cost	Description
Purchase of a spill response trailer that will be available for responders in the lower Clark Fork watershed.	Avista will spend a minimum of \$28,125.	Avista will purchase a trailer and initially outfit it with booms, anchors, tools, rope, drum liners, safety equipment, first aid equipment, and additional materials for deployment. This trailer will be accessible to LEPC responders for incident response. Avista will provide a secure, year-round accessible location for this trailer. Disposable materials used will be replaced in accordance with local agreements.

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT/FINAL ORDER** in the matter of **AVISTA UTILITIES INC.; DOCKET NO.: CWA-08-2009-0035** was filed with the Regional Hearing Clerk on February 17, 2010.


Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Amy Swanson, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt requested and e-mailed on February 17, 2010, to:

Martin K. Banks
Stovel, Rives, LLP.
201. S. Main Street, Suite 1100
Salt Lake City, UT 84111

Honorable Spencer T. Nissen
Administrative Law Judge (1900L)
U. S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Michelle Angel
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

February 17, 2010


Tina Artemis
Paralegal/Regional Hearing Clerk

