

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
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)

Bayer CropScience)
17745 South Metcalf Avenue)
Stilwell, KS 66085-9104)

Docket No. CAA-07-2008-0011

Respondent)

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region VII (EPA) and Bayer CropScience (Respondent) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) 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).

FACTUAL ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d).

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated the Federal Plan Requirements for Commercial and Industrial Solid Waste Incinerators (CISWI), 40 C.F.R. Part 62, Subpart III, promulgated pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d); and Section 129 of the Clean Air Act, 42 U.S.C. § 7429, and that Respondent is therefore in violation of Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d); and Section 129 of the Clean Air Act, 42 U.S.C. § 7429. Furthermore, this Consent Agreement and Final Order serves as notice pursuant to Section 113(d)(2)(A) of the Act, 42 U.S.C. § 7413(d)(2)(A), of EPA's intent to issue an order assessing penalties for this violation.

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region VII, is the Director, Air and Waste Management Division, EPA, Region VII.

4. The Respondent is Bayer CropScience. The Bayer CropScience Research Park located at 17745 South Metcalf Avenue, Stilwell, Kansas, is owned by Respondent as a research and development facility.

Statutory and Regulatory Requirements

5. Under Section 129 of the Clean Air Act, as amended in 1990, EPA is required to develop new source performance standards (NSPS) and emissions guidelines for solid waste incinerators.

6. Sections 111 and 129 of the Clean Air Act require EPA to establish NSPS for new units, while Sections 111(d) and 129(b) require EPA to establish emissions guidelines for existing units.

7. Pursuant to Section 129(b)(3) of the Clean Air Act, EPA issued a Federal Plan for existing commercial and industrial solid waste incinerators (CISWI) that were built on or before November 30, 1999.

8. The Federal Plan implements the emission guidelines for CISWI units located in States or Tribal areas that have not submitted an acceptable State plan to the EPA pursuant to Section 129(b)(2) of the Clean Air Act. The state of Kansas does not have an approved State plan in effect.

9. The Federal Plan, described at 40 C.F.R. Part 62, Subpart III, implements EPA's CISWI emission guidelines and sets forth the emissions requirements and compliance schedules for the control of emissions from CISWI units that are not covered by an EPA approved and currently effective State Plan.

10. As defined in 40 C.F.R. 62.14840, CISWI unit means any combustion device that combusts commercial and industrial waste.

11. Pursuant to 40 C.F.R. § 62.14535(a)(1), owners or operators of CISWI units must comply with the operator training and qualification requirements and inspection requirements by October 4, 2004.

12. Pursuant to 40 C.F.R. § 62.14535(a)(2), owners or operators of CISWI units must submit a waste management plan no later than April 5, 2004.

13. Pursuant to 40 C.F.R § 62.14535(a)(3), owners or operators of CISWI units are required to incorporate all process changes and complete retrofit construction of control devices to meet emission limits specified in Table I of Subpart III by October 4, 2004.

14. Pursuant to 40 C.F.R § 62.14535(a)(4), owners or operators of CISWI units must conduct an initial performance test within 90 days after the date of compliance required under 40 C.F.R § 62.14535(a)(3).

15. Pursuant to 40 C.F.R § 62.14535(a)(5), owners or operators of CISWI units must submit an initial report including the results of the initial performance test no later than 60 days following the initial performance test.

16. Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), states that the Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000 per day of violation whenever, on the basis of any available information, the Administrator finds that such person has violated or is violating any requirement or prohibition of the Clean Air Act referenced therein, including Section 112(r)(7). Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), as amended by the Debt Collection Improvement Act of 1996, authorizes the United States assess civil administrative penalties of not more than \$27,500 per day for each violation that occurs after January 30, 1997 through March 15, 2004 and \$32,500 per day for each violation that occurs after March 15, 2004.

Alleged Violations

17. EPA alleges that Respondent has violated the Clean Air Act and federal regulations, promulgated pursuant to the Clean Air Act, as follows:

18. Respondent is, and at all times referred to herein, was a "person" as defined by Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e).

19. Respondent is subject to 40 C.F.R. Part 62 Subpart III, because it is an owner or operator of a commercial and industrial solid waste incinerator that was built on or before November 30, 1999.

20. Respondent was required under Section 129 of the Clean Air Act, 42 U.S.C. § 7429, and 40 C.F.R. Part 62, Subpart III, to comply with the Federal Plan.

21. Respondent failed to comply with all the requirements of the Federal Plan. Specifically, Respondent failed to: (1) comply with the operator training and qualification requirements and inspection requirements by October 4, 2004, as required by 40 C.F.R. § 62.14535(a)(1); (2) submit a waste management plan no later than April 5, 2004, as required by 40 C.F.R § 62.14535(a)(2); (3) to incorporate all process changes and complete retrofit construction of control devices to meet emission limits specified in Table I of Subpart III by October 4, 2004, as required by 40 C.F.R § 62.14535(a)(3); (4) conduct an initial performance test, as required by 40 C.F.R § 62.14535(a)(4); and (5) submit an initial report including the

results of the initial performance test no later than 60 days following the initial performance test, as required by 40 C.F.R. § 62.14535(a)(5).

22. Respondent's failure to comply with the Federal Plan, 40 C.F.R. Part 62, Subpart III, as set forth above is a violation of Sections 111(d) and 129 of the Clean Air Act, 42 U.S.C. §§ 7411(d) and 7429.

CONSENT AGREEMENT

23. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.

24. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this Consent Agreement and Final Order.

25. Respondent neither admits nor denies the factual allegations set forth above.

26. 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 portion of this Consent Agreement and Final Order.

27. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees incurred as a result of this action.

28. This Consent Agreement and Final Order addresses all civil and administrative claims for the Clean Air Act violations identified above, existing through the effective date of this Consent Agreement and Final Order. Complainant reserves the right to take enforcement action with respect to any other violations of the Clean Air Act or other applicable law.

29. Respondent certifies by the signing of this Consent Agreement and Final Order that to the best of its knowledge, Respondent's facility is in compliance with all requirements for Commercial and Industrial Solid Waste Incinerators, 40 C.F.R. Part 62, Subpart III. EPA agrees that on April 27, 2007, Respondent submitted proper notification to the Administrator pursuant to 40 C.F.R. § 62.14525(a)(1), of an intention to operate exempt from 40 C.F.R. Part 62, Subpart III. EPA further agrees that Respondent is not obligated to retroactively comply with the requirements of 40 C.F.R. Part 62, Subpart III, as referenced in paragraph 21 above, of this Consent Agreement and Final Order. In the event that Respondent no longer qualifies for the exemption pursuant to 40 C.F.R. § 62.14525, Respondent is required to comply with all applicable provisions of 40 C.F.R. Part 62 Subpart III without prior notice by EPA.

30. The effect of settlement described in paragraph 28 is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 29, above, of this Consent Agreement and Final Order.

31. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

32. Pursuant to § 113(e) of the Clean Air Act, the nature of the violations, Respondent's agreement to perform a Supplemental Environmental Project (SEP) and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is in the amount of Sixteen Thousand One Hundred Nineteen Dollars (\$16,119).

33. The penalty specified in paragraph 32, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal taxes.

34. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty cited in paragraph 32, above, and to the performance of the Supplemental Environmental Project.

35. In settlement of this matter, Respondent agrees to complete the following Supplemental Environmental Project (SEP), which the parties agree is intended to secure significant environmental and/or public health benefits.

36. Respondent shall complete the SEP as follows: perform a comprehensive light change-out of existing T-12 light fixtures and lamps for T-5 and T-8 technology in Building 2 at Bayer Research Park. The SEP is more specifically described in the scope of work (hereinafter the "Scope of Work"), attached hereto as Appendix A and incorporated herein by reference. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

37. The total expenditure for the SEP is estimated to be \$75,320 and the SEP shall be completed no later than three hundred (300) days after the effective date of this Consent Agreement and Final Order, in accordance with the specifications set forth in the Scope of Work. Respondent shall include documentation of the expenditures made in connection with the SEP as part of the SEP completion report.

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

39. For federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

40. Within thirty (30) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA. The SEP Completion Report shall contain the following:

- (i) A detailed description of the SEP as implemented;
- (ii) Itemized costs;
- (iii) A description of any operating problems encountered and the solutions thereto;
- (iv) A certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order; and
- (v) A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).
- (vi) The report shall be submitted via first class mail to:

Ms. Lisa Hanlon
United States Environmental Protection Agency - Region VII
901 N. Fifth Street
Kansas City, Kansas 66101.

41. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the SEP Completion Report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

42. Respondent shall maintain legible copies of documentation and/or the underlying research and data for any and all documents or reports submitted to EPA pursuant to this Consent Agreement and shall provide the documentation of any such underlying research and data to EPA not more than seven days after a request for such information. In all documents or reports, including, without limitation, any SEP reports, submitted to EPA pursuant to this Consent Agreement, Respondent shall, by its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

43. After receipt of the SEP Completion Report described in paragraph 40, above, EPA will notify Respondent, in writing, regarding:

- (i) any deficiencies in the SEP report itself along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies; or
- (ii) indicate that EPA concludes that the project has been completed satisfactorily; or
- (iii) determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with paragraph 45 herein.

If EPA elects to exercise option (i) above, i.e., if the SEP report is determined to be deficient, but EPA has not yet made a final determination about the adequacy of SEP completion itself, EPA shall permit Respondent the opportunity to object in writing to the notification of deficiency given pursuant to this paragraph within ten (10) days from the receipt of such notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by EPA of the notification of objection to reach agreement on changes necessary to the SEP report. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision on adequacy of the completion of the SEP to Respondent, which decision shall be final and binding upon Respondent. Respondent agrees to comply with any requirements imposed by EPA as a result of any failure to comply with the terms of this Consent Agreement and Final Order. In the event the SEP is not completed as contemplated herein, as determined by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with paragraph 45 herein.

44. Respondent agrees that failure to submit the SEP Completion Report required by paragraph 40 above, shall be deemed a violation of this Consent Agreement and Final Order and Respondent shall become liable for stipulated penalties pursuant to paragraph 45 below.

45. Stipulated Penalties

a) In the event that Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP described in paragraph 36 above, and/or to the extent that actual expenditures for the SEP do not equal or exceed the cost of the SEP described in paragraph 37 above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- (i) Except as provided in subparagraph (ii) immediately below, for a SEP which has not been completed satisfactorily pursuant to this Consent Agreement and Final Order, Respondent shall pay a stipulated penalty to the United States in the amount of \$50,464.
- (ii) If the SEP is not completed in accordance with paragraph 36, but the Complainant determines that the Respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.
- (iii) If the SEP is completed in accordance with paragraph 36, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States in the amount of \$8,830.

- (iv) If the SEP is completed in accordance with paragraph 36, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.
- (v) For failure to submit the SEP Completion Report required by paragraph 40 above, Respondent shall pay a stipulated penalty in the amount of \$100 for each day after the due date of the Completion Report stated in paragraph 40 above, until the report is submitted.

b) The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.

c) Stipulated penalties for paragraph (v) above shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.

d) Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of paragraph 1 below. Interest and late charges shall be paid as stated in paragraph 47 herein.

46. Respondent understands that the failure to pay any portion of the mitigated civil penalty as stated in paragraph 32, or any portion of a stipulated penalty as stated in paragraph 45, in accordance with the provisions of this order may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest at the applicable statutory rate.

47. Pursuant to 31 U.S.C. §3717, EPA is entitled to assess interest and penalties on debts owed to the United States and charge to cover the costs of processing and handling delinquent claims. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States tax and loan rate in accordance with 31 C.F.R. § 901.9(b). A charge will be assessed to cover the debt collection, including processing and handling costs and administrative costs. In addition, a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue from the date the penalty becomes due and is not paid, 31 C.F.R. §§ 901.9(c) and (d).

48. Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the United States Environmental Protection Agency."

49. This Consent Agreement and Final Order shall not relieve Respondent of its obligation to comply with all applicable federal, state, and local laws, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent in connection with the SEP undertaken pursuant to this Agreement.

50. 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.

FINAL ORDER

Pursuant to the provisions of the Clean Air Act, 42 U.S.C. § 7401, and based upon the information set forth in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Sixteen Thousand One Hundred Nineteen Dollars (\$16,119), within thirty (30) days of entry of this Final Order. Payment shall be by cashier's or certified check made payable to the "United States Treasury" and shall be remitted to:

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

This payment shall reference docket number CAA-07-2008-0011.

2. A copy of the check should be sent to:

Regional Hearing Clerk
United States Environmental Protection Agency - Region VII
901 N. Fifth Street
Kansas City, Kansas 66101

and to:

Sarah LaBoda
Assistant Regional Counsel
United States Environmental Protection Agency - Region VII
901 N. Fifth Street
Kansas City, Kansas 66101.

3. Respondent shall complete the Supplemental Environmental Project in accordance with the provisions set forth in the Consent Agreement and shall be liable for any stipulated penalty for failure to complete such a project as specified in the Consent Agreement.

COMPLAINANT:
U. S. ENVIRONMENTAL PROTECTION AGENCY

By Becky Weber
Becky Weber
Director
Air and Waste Management Division

Date 4/3/08

By Sarah Thibos LaBoda
Sarah Thibos LaBoda
Assistant Regional Counsel
Office of Regional Counsel

Date: April 1, 2008

RESPONDENT:
BAYER CROPSCIENCE

By Minda Borhan
Title SVP, R&D, BCS

Date MARCH 28, 2008

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

By Karina Borromeo
Karina Borromeo
Regional Judicial Officer

Date April 24, 2008

Appendix A

Supplemental Environmental Project – Scope of Work

In satisfaction of its obligations under this Consent Agreement and Final Order (“CAFO”), Bayer CropScience LP (“BCS”) will complete the supplemental environmental project (“SEP”) listed below. A SEP is an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action, but one which the respondent is not otherwise legally required to perform, and that primarily benefits the public health or the environment. EPA has approved the following SEP, in addition to the administrative penalty set forth in this CAFO, for the settlement of this matter.

1. The SEP described below is designed to secure environmental benefit by reducing the daily electrical demand needed to operate an environmental research laboratory (Building 2) at the Bayer Research Park, located in Stilwell, Kansas (“BRP”). This SEP is projected to reduce the electrical demand by 274,240 kWatt Hours annually, corresponding to a reduction in CO₂, NO_x, and SO₂ air emissions by 589,116, 1,196 and 1,823 pounds, respectively per year.
2. BCS agrees to a light change-out program in Building 2 at BRP. The implementation of this SEP is estimated to result in an expenditure of \$75,320. This SEP is a pollution prevention project that reduces both annual and daily peak demands on the local power grid. Details of the SEP are provided below:
 - a. BCS agrees to change-out T-12 type fluorescent lamps in Building 2 at BRP with T-5 and T-8 lamps as needed to provide similar lighting in the workplace. The newer T-5 and T-8 technology provides brighter lighting with reduced heat generation per light fixture. This SEP will reduce the daily demand for electricity in the laboratory with an annualized reduction projected to be 274,240 kWatt Hours.
3. The implementation of the SEP described in paragraph 2 of this Appendix A is estimated to result in a total BCS expenditure of \$75,320. EPA agrees that BCS will have fulfilled its obligations under this CAFO related to the SEP, if (i) the SEP is completed, as described herein, and (ii) actual costs incurred by BCS (including equipment and installation costs) are 90 percent or more of the estimated expenditures for the implementation of this SEP, based upon the cost documentation in the SEP Final Report required in paragraph 5 below.
4. BCS shall order equipment described in this Appendix A within 120 days of the effective date of this CAFO. The vendor can deliver the equipment within 90 days of order placement from BCS. Installation of the equipment will be completed within 90 days of receipt to complete the SEP described in this Appendix. BCS will complete the SEP within 300 days of the effective date of the CAFO.
5. Within 30 days from the completion of the SEP described in this Appendix A, BCS will submit to EPA a Final SEP Report. This Final SEP Report shall provide a detailed description of the SEP as implemented, including dates of completion of the SEP and an estimate of the measurable reduction in energy usage and corresponding pollutants generated and released to the environment at a result of the SEP. The report shall also document all approvable costs incurred in the planning, purchase, installation and operation of the SEP.

IN THE MATTER OF Bayer CropScience, Respondent
Docket No. CWA-07-2008-0011

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:

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

Copy by Certified Mail Return Receipt to:

Robert Lambrechts, Esq.
Lathrop & Gage L.C.
10851 Mastin Boulevard
Building 82, Suite 1000
Overland Park, Kansas 66210-1669

Dated: 4/24/08


Kathy Robinson
Hearing Clerk, Region 7