

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
Omaha Public Power District (OPPD))
Sarpy County Station)
)
Omaha, Nebraska)
)
)
Respondent.)
)
)
_____)

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. CWA-07-2011-0073

The United States Environmental Protection Agency ("EPA"), Region 7 ("Complainant") and Omaha Public Power District ("OPPD" or "Respondent") have agreed to a settlement of this action before the 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) and 22.18(b)(2).

A. FINDINGS OF VIOLATIONS

Jurisdiction

1. This is a Class I administrative action for the assessment of civil penalties instituted pursuant to Section 311 of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1321, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.
2. This Consent Agreement and Final Order ("CA/FO") serves as notice that the EPA has reason to believe that Respondent has violated Sections 311(j) of the CWA, 33 U.S.C. § 1321(j), and regulations promulgated thereunder at 40 C.F.R. Part 112 for the requirements for Facility Response Plans ("FRP").

Parties

3. The authority to take action under Sections 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6) is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Air and Waste Management Division of EPA, Region 7 (Complainant).

4. Respondent OPPD is a utility and public corporation authorized to conduct business in the state of Nebraska.

Statutory and Regulatory Framework

Section 311(j)(5) of the CWA

5. Sections 311(j)(5) of the CWA, 33 U.S.C. § 1321(j)(5), provides that the President shall issue regulations requiring the owner or operator of “an onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or upon the navigable waters [or] adjoining shorelines” to “submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil.”

6. Under the authority of Section 311(j)(5) of the CWA, Subparts A and D of 40 C.F.R. Part 112 (“the Facility Response Plan” or “FRP”) require FRP-regulated facilities to prepare a FRP as specified in 40 C.F.R. § 112.20(h), and to develop and implement a facility response training program and a drill/exercise program to address a “worst case discharge” from the facility in conformance with the requirements of the regulations (40 C.F.R. § 112.21(a)).

Factual Background

Complainant alleges and states as follows:

7. Respondent is a person within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 CFR §112.2.

8. Between 2006 and the present, Respondent was at all relevant times the “owner or operator,” within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6) and 40 C.F.R. § 112.2, of a power generating station located in Bellevue, Nebraska and known as the Sarpy County Station (“Sarpy County Station” or “Facility”).

9. Surface water runoff from the OPPD Sarpy County Station flows via a swale into Big Papillion Creek. Big Papillion Creek then flows to Papillion Creek which flows into the Missouri River.

10. Big Papillion Creek, Papillion Creek and the Missouri River are each navigable waters of the United States within the meaning of 40 C.F.R. § 112.2.

11. Respondent's Facility is an "onshore facility" within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

12. Respondent's Facility is a "non-transportation-related facility" as defined by Appendix A to 40 C.F.R. Part 112, as incorporated by reference within 40 C.F.R. § 112.2.

13. Until July 2010, the Facility had a documented storage capacity of 1,376,369 gallons of fuel oil at the Facility. Product released from a spill at the Facility could reach Big Papillion Creek, Papillion Creek and the Missouri River.

14. The fuel oil stored at the Facility is a form of "oil" as defined by Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1) and 40 C.F.R. § 112.2.

15. As the owner and operator of a non-transportation-related facility that, because of its location and storage of over 1,000,000 gallons of oil (prior to July 2010), could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, Respondent was subject to Section 311(j)(5) of the Act and the SPCC and FRP regulations at 40 C.F.R. Part 112.

16. On or about December 7, 2006, the EPA conducted a SPCC inspection of the Facility. During the EPA's 2006 inspection, the EPA reviewed Appendix F of the Facility's SPCC plan which certified that a "worst case discharge" from the Facility did not have the potential to cause "substantial harm" to "fish wildlife and sensitive environments."

17. Based on the EPA's subsequent review of OPPD's planning distance calculation, EPA determined OPPD had not properly documented its substantial harm certification, including a failure to utilize the full storage capacity of the largest storage tank at the facility (440,000 gallons) in order to calculate the "planning distance," as required by 40 C.F.R. 112, Appendix D, Section 1.2.

Violations

Violations of FRP Requirements

18. The facts stated in paragraphs A.7 through A.17, above, are hereby incorporated by reference.

19. Respondent's failure to comply with the FRP requirements cited in Paragraph 17, is a violations of 40 C.F.R. 112.20 and 112.21 and Section 311(j)(5).

Relief

20. Based on the foregoing Findings of Violation, and pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1311(b)(6), EPA, Region 7 hereby proposes to issue a Final Order assessing an administrative penalty against the Respondent, for the violations cited above, in the amount of \$8,000.

B. CONSENT AGREEMENT

1. Respondent and EPA agree to the settlement of this matter pursuant to Sections B & C of this CA/FO and Respondent agrees to comply with the terms of this Sections B & C of this CA/FO.

2. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce a failure by Respondent to comply with the terms of this CA/FO.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this CA/FO.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal this CA/FO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and agree to each bear their own costs and attorney's fees incurred as a result of this action.

6. This CA/FO addresses all civil and administrative claims for the CWA violations alleged in Section A of this CA/FO. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

7. Nothing contained in this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

8. The undersigned representative of the Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind the Respondent to the terms contained herein.

9. Respondent OPPD certifies, that as of the date that it executes this CA/FO, it has (1) permanently decommissioned a storage tank at the Facility which has reduced the storage capacity of the Facility below 1,000,000 gallons; (2) it has increased the secondary containment at the Facility sufficiently to contain the capacity of the largest remaining storage tank at the Facility (440,000 gallons), plus adequate freeboard to contain precipitation; and (3) that OPPD is otherwise in compliance with the SPCC and FRP requirements of 40 C.F.R. 112 and Section 311(j) of the CWA, 33 U.S.C. § 1321, at the Facility.

10. The effect of settlement described in Paragraph B.6, above, is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in Paragraph B.9, above, of this CA/FO.

11. Respondent agrees that, without admission of violation of law, that in settlement of the claims alleged in this CA/FO, Respondent shall pay a CWA penalty of \$8,000 as set forth in Paragraph C.1 of the Final Order.

12. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

13. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

14. This CA/FO shall apply to and be binding upon EPA, 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 CA/FO.

General Provisions

15. Notwithstanding any other provision of this CA/FO, in the event of a failure by Respondent to comply with the terms of this CA/FO, the EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 311 of the CWA, 33 U.S.C. § 1321, and to seek penalties against Respondent, or to seek any other remedy allowed by law.

16. Complainant reserves the right to take enforcement action against Respondent for any past or future violations of the CWA and its implementing regulations and to enforce the terms

and conditions of this CA/FO.

17. Respondent and Complainant shall each bear their respective costs and attorney's fees.

18. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

C. FINAL ORDER

Payment Procedures

Pursuant to the authority of Section 311 of the CWA, 33 U.S.C. § 1321 and according to terms of this CA/FO, IT IS HEREBY ORDERED THAT:

1. Within thirty (30) days of the effective date of the Final Order, Respondent shall pay a CWA civil penalty of \$8,000. This payment shall reference the CWA Docket No. CWA-07-2011-0073, and shall be made by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency – Region 7
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

2. A copy of the payment check shall be mailed to:

Howard C. Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101

and

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

For the Respondent Omaha Public Power District:

Greg Krieser

Printed Name: *Greg Krieser*

Title: *Division Manager
Production Operations*

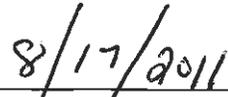
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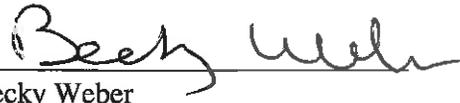
For the Complainant:
The United States Environmental Protection Agency



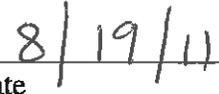
Howard C. Bunch
Sr. Assistant Regional Counsel



Date



Becky Weber
Director
Air and Waste Management Division



Date

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



Robert Patrick
Regional Judicial Officer



Date

IN THE MATTER OF Omaha Public Power District (OPPD), Respondent
Docket No. CWA-07-2011-0073

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:

Howard C. Bunch
Senior Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

James J. Krajicek
Environmental Affairs Administrator
Environmental and Regulatory Affairs
444 South 16th Street Mall
Omaha, Nebraska 68102-2247

Dated: 8/29/11


Kathy Robinson
Hearing Clerk, Region 7