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HEARINGS CLERK
EPA -- REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
) DOCKET NO. EPCRA-10-2010-0135
)
)
BERRY PLASTICS CORPORATION)
8039 South 192nd Street)
Kent, Washington 98032)
)
)
Respondent.)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 325 of the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11045.

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to EPCRA Section 325, 42 U.S.C. § 11045, and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Berry Plastics Corporation (“Respondent”) agrees to issuance of, the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Director of the Office of Air, Waste and Toxics, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to EPCRA Section 325, 42 U.S.C. § 11045, to sign consent agreements between EPA and the party against whom an administrative penalty for violations of Section 313 of EPCRA is proposed to be assessed.

2.3. Part III of this CAFO contains a concise statement of the factual and legal basis for the alleged violations, together with the specific provisions of EPCRA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. Under Section 313(a) of EPCRA, 42 U.S.C. § 11023(a), the owner or operator of a covered facility must submit annually a Toxic Chemical Release Inventory Reporting Form, EPA Form 9350-1 (“Form R Report”) for each toxic chemical referenced in Section 313(c) of EPCRA and listed in 40 C.F.R. § 372.65 that was manufactured (including imported), processed, or otherwise used during the preceding calendar year in quantities exceeding the established toxic chemical threshold.

3.2. The regulations at 40 C.F.R. Part 372 set forth the definitions and requirements for submission of information relating to the release of toxic chemicals under Section 313 of EPCRA.

3.3. Under 40 C.F.R. § 372.22, a facility that meets each of the following criteria in a calendar year is a covered facility for that calendar year and must report under 40 C.F.R.

§ 372.30 by July 1 of the following year:

- a. the facility has 10 or more full-time employees;
- b. the facility is in a Standard Industrial Classification (SIC) major group or industry code or North American Industrial Classification System (NAICS) code listed in 40 C.F.R. § 372.22(b) and § 372.23 ; and
- c. the facility manufactured (including imported), processed, or otherwise used a toxic chemical in excess of an applicable threshold quantity of that chemical set forth in 40 C.F.R. § 372.25, 40 C.F.R. § 372.27, or 40 C.F.R. § 372.28.

3.4 The toxic chemicals which are subject to the reporting requirement of 40 C.F.R. § 372.30 are listed at 40 C.F.R. § 372.65.

3.5 Certain Glycol Ethers is a toxic chemical category listed at 40 C.F.R. § 372.65. The threshold quantity for otherwise use of Certain Glycol Ethers reporting is 10,000 pounds per year, as set forth at 40 C.F.R. § 372.25.

3.6 Respondent is the owner and operator of the facility located at 8039 South 192nd Street, in Kent, Washington 98032 (“the Facility”). Respondent currently conducts business at this location under the name of Berry Plastics Corporation, formerly Pliant Corporation.

3.7 During calendar years 2004, 2005, and 2007 the Facility had 10 or more full-time employees.

3.8 The Facility is included in SIC code 2673 (Plastics, Foil, and Coated Paper Bags), corresponding to NAICS code 326111, which is included in the list of covered industry codes found at 40 C.F.R. § 372.22(b) and 40 C.F.R. § 372.23.

3.9 The Facility otherwise used more than 10,000 pounds of Certain Glycol Ethers during each of the calendar years 2004, 2005, and 2007.

3.10 Respondent failed to file a Form R Report with EPA and the state of Washington in accordance with the requirements of 40 C.F.R. § 372.30 by July 1, 2005 for calendar year 2004, by July 1, 2006 for calendar year 2005, and by July 1, 2008 for calendar year 2007.

3.11 Under Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), a civil penalty of up to \$25,000 may be assessed for each violation of Section 313 of EPCRA, 42 U.S.C. § 11023. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 42 C.F.R. Part 19, increased the statutory maximum penalty to \$32,500 per violation occurring after March 15, 2004 and before January 12, 2009.

IV. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in Part III of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in Part III of this CAFO.

4.3. In light of the nature of the violation, Respondent's actions to correct the violation after having been notified by Complainant, and Respondent's willingness to settle this matter without litigation and in accordance with the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act and Section 6607 of the Pollution Prevention Act," EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$ 46,060 (forty-six thousand and sixty dollars).

4.4. Respondent agrees to pay the total civil penalty set forth in Paragraph 4.3 within thirty (30) days of the effective date of the Final Order contained in Section V of this CAFO.

4.5. Payment under this CAFO must be made by wire transfer directed to the Federal Reserve Bank of New York that makes reference to the docket number of this action and in accordance with the following payment instructions:

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"

4.6. Respondent must deliver via United States mail written proof of the penalty payment described in Paragraph 4.5 to the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Graham Kim, EPCRA Compliance Officer
U.S. Environmental Protection Agency
Region 10, Mail Stop AWT-128
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

4.7. If Respondent fails to pay the penalty assessed by this CAFO in full by the due date set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under EPCRA Section 325(f), 42 U.S.C. § 11045(f), together with interest, handling charges, and additional non-payment penalties described below.

4.7.1. Interest. Any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the

effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order.

4.7.2. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the assessed penalty is more than 30 days past due.

4.7.3 Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay a nonpayment penalty in an amount equal to six percent (6%) per annum on any portion of the assessed penalty that is more than 90 days past due, which nonpayment penalty shall be calculated as of the date the underlying penalty first becomes past due.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this CAFO and to bind Respondent to this document.

4.10. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this CAFO, Respondent has corrected the violation(s) alleged in Section III and is currently in compliance with all applicable EPCRA requirements at each of the facilities under its control.

4.11. Except as described in Subparagraph 4.7.2, above, each party shall bear its own fees and costs in bringing or defending this action.

4.12. Respondent expressly waives any right to contest the allegations and waives any right to appeal the Final Order set forth in Part V.

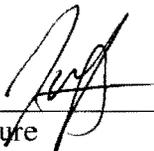
4.13. The provisions of this CAFO shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.14. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

FOR RESPONDENT:

4/15/10


Signature

Print Name: Jeffrey D. Thompson

Title: EVP

DATED:

FOR COMPLAINANT:

4/20/10

Richard Albright for

RICHARD ALBRIGHT, Director
Office of Air, Waste and Toxics
U.S. Environmental Protection Agency
Region 10

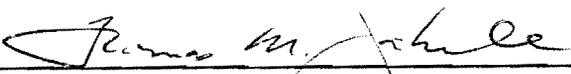
V. **FINAL ORDER**

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to EPCRA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of EPCRA and regulations promulgated thereunder.

5.3. This Final Order shall become effective upon filing.

SO ORDERED this 26th day of April, 2010.



THOMAS M. JAHNKE
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER in In the Matter of: Berry Plastics Corporation, DOCKET NO.: EPCRA-10-2010-0135** was filed with the Regional Hearing Clerk on April 26, 2010.

On April 26, 2010 the undersigned certifies that a true and correct copy of the document was delivered to:

Shirin Venus, Esquire
US Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on April 26, 2010, to:

Berry Plastics Corporation
Jeffrey D. Thompson, EVP
8039 South 192nd Street
Kent, Washington 98032

DATED this 26th day of April 2010.

A handwritten signature in black ink, appearing to read "Carol Kennedy", is written over a horizontal line.

Carol Kennedy
Regional Hearing Clerk
EPA Region 10