

FILED

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

2008 SEP 24 AM 8:14
U.S. EPA, REGION IX
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
Super Store Industries)
16888 McKinley Ave)
P.O. Box 549)
Lathrop CA 95330)
)
Respondent)
)
)
)
_____)

Docket No. EPCRA-09-2008- 00 1 4
CERCLA-09-2008- 00 0 3

**CONSENT AGREEMENT
AND FINAL ORDER PURSUANT
TO 40 CFR §§ 22.13 and 22.18**

CONSENT AGREEMENT

A. PRELIMINARY STATEMENT

1. This is a civil administrative enforcement action initiated pursuant to Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9609; Section 325 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045; and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 CFR Part 22. Complainant is the United States Environmental Protection Agency, Region IX ("EPA"). Respondent, Super Store Industries is a partnership organized under the laws of the State of California.
2. This Consent Agreement and Final Order ("CA/FO"), pursuant to 40 CFR §§ 22.13 and 22.18, simultaneously commences and concludes this proceeding, wherein EPA alleges that Respondent violated the following statutes and their implementing regulations: Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1).

B. STATUTORY AND REGULATORY FRAMEWORK

3. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and 40 CFR § 302.6 require the person in charge of a vessel or an offshore or onshore facility to immediately notify the National Response Center ("NRC") as soon as he or she has knowledge of a release of a hazardous substance that exceeds the reportable quantity ("RQ") during a 24-hour period.

4. Section 304(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1), and 40 CFR § 355.40 require the owner or operator of a facility that produces, uses, or stores hazardous chemicals to immediately notify the appropriate state and local emergency planning and response agencies when (1) an extremely hazardous substance is released from the facility and (2) the release requires a CERCLA 103(a) notification. The owner or operator must immediately provide the required notice to the community emergency coordinator for the local emergency planning committee ("LEPC") for any area that is affected by the release and to the state emergency response commission ("SERC") for any state that is affected by the release.

C. GENERAL ALLEGATIONS

5. Section 109(a)(1)(A) of CERCLA, 42 U.S.C. § 9609(a)(1)(A), authorizes EPA to assess civil penalties for any violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).
6. The Administrator of EPA delegated enforcement authority under Section 109 of CERCLA, 42 U.S.C. § 9609, to the Regional Administrators with EPA delegation 14-31, dated May 11, 1994. The Regional Administrator, EPA Region IX, in turn, redelegated that authority to the Director of the Superfund Division, Region IX, with delegation R9 1290.16.
7. Section 325(b)(1)(A) of EPCRA, 42 U.S.C. § 11045(b)(1)(A), authorizes EPA to assess civil penalties for any violation of Section 304 of EPCRA, 42 U.S.C. § 11022.
8. The Administrator of EPA delegated enforcement authority under EPCRA to the Regional Administrators with EPA delegation 22-3-A, dated May 11, 1994. The Regional Administrator, EPA Region IX, redelegated the authority to enforce Sections 302, 303, 304, 311, 312, 322, and 323 of EPCRA, 42 U.S.C. §§ 11002, 11003, 11004, 11021, 11022, and 11043, to the Director of the Superfund Division, Region IX, with delegation R9 1290.18.
9. Respondent owns and operates a dairy and beverage processing facility. Respondent's business is located at 199 Red Top Road, Fairfield, Solano County, California (the "Facility").
10. This CA/FO address only Respondent's failure to report its August 25, 2007 release of ammonia to the proper response agencies pursuant to the requirements in Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1). This CA/FO does not allege any violations with respect to other actions taken by Respondent in response to the release.

D. ALLEGED VIOLATIONS

COUNT I

(Failure to immediately notify the NRC)

11. Paragraphs 1 through 10 above are incorporated herein by this reference as if they were set forth here in their entirety.
12. At all times relevant to this CA/FO, Respondent has been a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
13. The Facility is an “onshore facility” as defined by Sections 101(18) and 101(9) of CERCLA, 42 U.S.C. §§ 9601(18) and 9601(9).
14. At all times relevant to this CA/FO, Respondent has been in charge of the Facility.
15. Ammonia is designated as a “hazardous substance” in Sections 101(14) and 102(a) of CERCLA, 42 U.S.C. §§ 9601(14) and 9602(a), and 40 CFR § 302.4, Table 302.4, and Appendix A to Section 302.4. The RQ for ammonia is 100 pounds.
16. Beginning at approximately 11 pm, on August 25, 2007, approximately 242 pounds of ammonia leaked or was emitted into the environment from the Facility within a 24-hour period. The leaking or emitting of ammonia from the Facility was a “release” as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
17. Respondent had actual or constructive knowledge that the release exceeded the RQ soon after the release began at 11 pm on August 25, 2007.
18. At 4:06 pm, on November 26, 2007, 93 days after Respondent knew or should have known that there had been an ammonia release at the Facility in excess of the RQ, Respondent notified the NRC of the release.
19. Respondent’s failure to immediately notify the NRC of the August 25, 2007 release from the Facility is a violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and 40 CFR § 302.6.

COUNT II

(Failure to immediately notify the SERC and the LEPC)

20. Paragraphs 1 through 10 above are incorporated herein by this reference as if they were set forth here in their entirety.
21. The Facility is a “facility” as defined by Section 329(4) of EPCRA, 42 U.S.C. § 1049(4).
22. At all times relevant to this CA/FO, Respondent has been the owner or operator of the Facility.

23. At all times relevant to this CA/FO, Respondent has been a “person” as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).
24. Ammonia is designated as an “extremely hazardous substance” in Section 302(a) of EPCRA, 42 U.S.C. § 11002(a), and 40 CFR § 355, Appendices A and B. The RQ for ammonia is 100 pounds.
25. Ammonia is a “hazardous chemical” as defined by Sections 329(5) and 311(e) of EPCRA, 42 U.S.C. §§ 11049(5) and 11021(e).
26. At all times relevant to this CA/FO, Respondent “produced, used, or stored” ammonia at the Facility.
27. Beginning at approximately 11 pm, on August 25, 2007, approximately 242 pounds of ammonia leaked or was emitted into the environment within a 24-hour period from the Facility. The leaking or emitting of ammonia from the Facility was a “release” as defined by Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).
28. The 242 pounds of ammonia released from the Facility entered the ambient air outside the boundaries of the Facility.
29. Respondent was required to report the release to the NRC under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).
30. At 10:26 am, on August 26, 2007, more than 11 hours after the release began, Respondent notified the California Office of Emergency Services, which functions as the SERC in California, of the ammonia release from the Facility. At 8:00 am on August 27, 2007, more than 33 hours after the release began, Respondent provided notice of the release to the Hazardous Materials Section of the Solano County Health Services Division, the Certified Unified Program Agency (“CUPA”) with jurisdiction over the Facility, which functions as the LEPC in California.
31. Respondent’s failure to immediately notify the SERC and the LEPC of the August 25, 2007 release from the Facility is a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

E. CIVIL PENALTY

32. Section 109(a)(1)(A) of CERCLA, 42 U.S.C. § 9609(a)(1)(A), as adjusted by the Debt Collection Improvement Act of 1996, *see* 40 CFR Part 19, authorizes a civil penalty of up to THIRTY-TWO THOUSAND FIVE HUNDRED DOLLARS (\$32,500) per day for each day a violation of CERCLA Section 103 occurs after March 15, 2004. *See* Table 1 of 40 CFR § 19.4, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004).

33. Section 325(b) of EPCRA, 42 U.S.C. § 11045(b), as adjusted by the Debt Collection Improvement Act of 1996, *see* 40 CFR Part 19, authorizes a civil penalty of up to THIRTY-TWO THOUSAND FIVE HUNDRED DOLLARS (\$32,500) per day for each day a violation of EPCRA Section 304 occurs after March 15, 2004. *See* Table 1 of 40 CFR § 19.4, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004).
34. Based on the facts alleged herein and upon all the factors that EPA considers pursuant to the *Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act* (“EPCRA/CERCLA ERP”) including the nature, extent, and gravity of the violations; Respondent’s ability to pay, its prior history of violations, its degree of culpability, and any economic benefit; and such other matters as justice may require, EPA proposes that Respondent be assessed a civil penalty of **TWENTY THOUSAND TWO HUNDRED EIGHTY DOLLARS (\$20,280)** for the violations alleged herein.

F. ADMISSIONS AND WAIVERS

35. For purposes of this proceeding, Respondent admits and agrees that EPA has jurisdiction and authority over the subject matter of the action commenced in this CA/FO and over Respondent pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609; Section 325 of EPCRA, 42 U.S.C. § 11045; and 40 CFR §§ 22.4 and 22.39. Further, for the purposes of this proceeding, Respondent admits to the general allegations of facts and law set forth in Sections B and C of this CA/FO. Respondent consents to and agrees not to contest EPA’s jurisdiction and authority to enter into and issue this CA/FO or to enforce its terms. Further, Respondent will not contest EPA’s jurisdiction and authority to compel compliance with this CA/FO in any enforcement proceedings, either administrative or judicial, or to impose sanctions for violations of this CA/FO.
36. Respondent neither admits nor denies any allegations of fact or law set forth in Section D of this CA/FO. Respondent hereby waives any rights Respondent may have to contest the allegations set forth in this CA/FO, waives any rights Respondent may have to a hearing on any issue relating to the factual allegations or legal conclusions set forth in this CA/FO, including without limitation a hearing pursuant to Section 109 of CERCLA, 42 U.S.C. § 9609, or Section 325 of EPCRA, 42 U.S.C. § 11045, and hereby consents to the issuance of this CA/FO without adjudication. In addition, Respondent hereby waives any rights Respondent may have to appeal the Final Order attached to this Consent Agreement and made part of this CA/FO.

G. PARTIES BOUND

37. This CA/FO shall apply to and be binding upon Respondent and its agents, successors, and assigns and upon all persons acting under or for Respondent until such time as the civil penalty required under Section E has been paid in accordance with Section I, and any delays in performance and/or stipulated penalties have been resolved. At such time

as those matters are concluded, this CA/FO shall terminate and constitute a release and full settlement of the violations alleged herein.

38. No change in ownership or corporate, partnership, or legal status relating to the Facility will in any way alter Respondent's obligations and responsibilities under this CA/FO.
39. Until termination of this CA/FO, Respondent shall give notice of this CA/FO to any successor in interest prior to transfer of ownership or operation of the Facility and shall notify EPA within seven (7) days prior to such transfer.
40. The undersigned representative of Respondent hereby certifies that he or she is fully authorized by Respondent to enter into this CA/FO and to execute and legally bind Respondent to it.

H. CERTIFICATION OF COMPLIANCE

41. Upon signing this CA/FO, Respondent certifies to EPA that, to the best of its knowledge, Respondent has fully complied with the requirements of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004(a), that formed the basis for the violations alleged in Section D above.
42. The signatory for Respondent certifies under penalty of law that this certification of compliance is based upon true, accurate, and complete information, which the signatory can verify personally or regarding which the signatory has inquired of the person or persons directly responsible for gathering the information.

I. PAYMENT OF CIVIL PENALTY

43. Respondent hereby consents to the assessment of and agrees to pay a civil penalty of **TWENTY THOUSAND TWO HUNDRED EIGHTY DOLLARS (\$20,280)** in settlement of the violations set forth in Section D above. This CA/FO constitutes a full settlement of all claims for the violations of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), alleged in Section D above.

Respondent shall pay the civil penalty within thirty (30) days of the effective date of this CA/FO, by sending two separate certified or cashier's checks as identified below:

- a. CERCLA § 109 Penalties: Respondent shall submit a certified or cashier's check in the amount of **TWELVE THOUSAND FOUR HUNDRED EIGHTY DOLLARS (\$12,480)**, payable to "EPA Hazardous Substance Superfund," which shall be sent to:

U.S. EPA, Region IX
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

- b. EPCRA § 325 Penalties: Respondent shall submit a certified or cashier's check in the amount of **SEVEN THOUSAND EIGHT HUNDRED DOLLARS (\$7,800)**, payable to "Treasury, United States of America," which shall be sent to:

U.S. EPA, Region IX
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Each check shall reference the name and corresponding CERCLA or EPCRA docket number for this CA/FO, and shall be accompanied by a cover letter stating that payment is being made pursuant to this CA/FO. The cover letter and civil penalty shall be sent by certified mail, return receipt requested. Copies of the transmittals shall be sent to:

Janice Witul
Emergency Prevention & Preparedness Section (SFD-9-3)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, California 94105

and

Danielle Carr
Regional Hearing Clerk (ORC-1)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

44. In accordance with the Debt Collection Act of 1982 and U.S. Treasury directive (TFRM 6-8000), the payment must be received within thirty (30) calendar days of the effective date of this CA/FO to avoid additional charges. If payment is not received within thirty (30) calendar days, interest will accrue from the effective date of this CA/FO at the current rate published by the United States Treasury as described at 40 CFR §13.11. A late penalty charge of \$15.00 will be imposed after thirty (30) calendar days with an additional \$15.00 charge for each subsequent 30-day period. A 6% per annum penalty will further apply on any principal amount not paid within ninety (90) calendar days of the due date. Respondent further will be liable for stipulated penalties as set forth below for any payment not received by its due date.

45. The civil penalties specified in this CA/FO shall represent civil penalties assessed by EPA and shall not be deducted by Respondent or any other person or entity for federal, state, or local taxation purposes.

J. DELAY IN PERFORMANCE / STIPULATED PENALTIES

46. In the event Respondent fails to meet any requirement set forth in this CA/FO, Respondent shall pay stipulated penalties as set forth below. Compliance by Respondent shall include completion of any activity under this CA/FO in a manner acceptable to EPA and within the specified time schedules in and approved under this CA/FO.
47. In addition to the interest and per annum penalties described in Paragraph 44, in the event that Respondent fails to pay the full amount of the penalty within the time specified in Section I, Respondent agrees to pay EPA a stipulated penalty in the amount of ONE HUNDRED DOLLARS (\$100.00) for each day the default continues.
48. Stipulated penalties shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day until performance is complete. Respondent shall pay stipulated penalties within fifteen (15) days of receipt of a written demand by EPA for such penalties. Payment of stipulated penalties shall be made in accordance with the procedure set forth for payment of penalties in Section I of this CA/FO.
49. If a stipulated penalty is not paid in full, interest shall begin to accrue on the unpaid balance at the end of the fifteen-day period at the current rate published by the United States Treasury, as described at 40 CFR §13.11. EPA reserves the right to take any additional action, including but not limited to, the imposition of civil penalties, to enforce compliance with this Agreement or with CERCLA or EPCRA and their implementing regulations.
50. The payment of stipulated penalties specified in this Section shall not be deducted by Respondent or any other person or entity for federal, state, or local taxation purposes.

K. RESERVATION OF RIGHTS

51. EPA expressly reserves all rights and defenses that it may have.
52. EPA hereby reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, including the right to require that Respondent perform legally required tasks in addition to those required by this CA/FO. EPA further reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, which may pertain to Respondent's failure to comply with any of the requirements of this CA/FO, including without limitation, the assessment of penalties under Section 109 of CERCLA, 42 U.S.C. § 9609, and Section 325 of EPCRA, 42 U.S.C. § 11045.

53. This CA/FO shall not be construed as a covenant not to sue, a release, waiver or limitation of any rights, remedies, powers, or authorities, civil or criminal, which EPA has under CERCLA, EPCRA, or any other statutory, regulatory, or common law enforcement authority of the United States, except as otherwise set forth herein.
54. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law. This CA/FO is not intended to be nor shall it be construed as a permit. This CA/FO does not relieve Respondent of any obligation to obtain and comply with any local, state, or federal permits nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
55. The entry of this CA/FO and Respondent's consent to comply shall not limit or otherwise preclude EPA from taking additional enforcement actions should EPA determine that such actions are warranted, except as they relate to Respondent's liability for federal civil penalties for the specific alleged violations and facts as set forth in Section D of this CA/FO. Full payment of the penalty shall resolve Respondent's liability for the violations and facts alleged herein.

L. OTHER CLAIMS

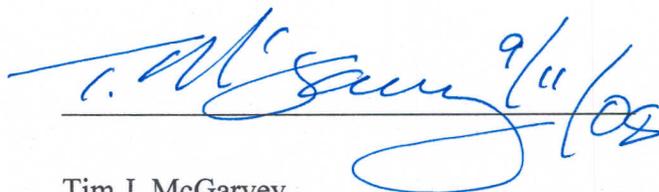
56. Nothing in this CA/FO shall constitute or be construed as a release from any other claim, cause of action, or demand in law or equity by or against any person, firm, partnership, entity, or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Facility.

M. MISCELLANEOUS

57. This CA/FO may be amended or modified only by written agreement executed by both EPA and Respondent.
58. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.
59. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

60. In accordance with 40 CFR §§ 22.18(b)(3) and 22.31(b), this CA/FO shall be effective on the date that the Final Order contained in this CA/FO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed.

IT IS SO AGREED.



Handwritten signature of Tim J. McGarvey in blue ink, dated 9/11/08.

Tim J. McGarvey
Vice President of Human Resources
Super Store Industries

18 September 2008



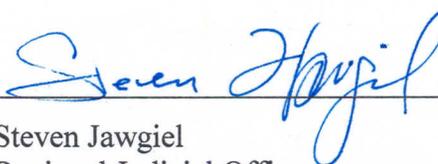
Handwritten signature of Keith Takata in black ink.

Keith Takata
Director
Superfund Division
U.S EPA, Region IX

FINAL ORDER

IT IS HEREBY ORDERED that this Consent Agreement and Final Order (EPA Docket No. EPCRA-09-2008-~~004~~, CERCLA-09-2008-~~0000~~) be entered, and that Respondent pay a civil penalty in the amount of **TWENTY THOUSAND TWO HUNDRED EIGHTY DOLLARS (\$20,280)**.

09/23/08



Steven Jawgiel
Regional Judicial Officer
U.S. EPA, Region IX

CERTIFICATE OF SERVICE

Docket No. CERCLA - 09-2008-0003
EPCRA - 09-2008-0014

I hereby certify that the original copy of the foregoing CAFO with the Docket numbers referenced above, has been filed with the Region 9 Hearing Clerk and that a copy was sent by certified mail, return receipt requested, to:

Mr. Tim J. McGarvey
Vice President of Human Resources
Super Store Industries
16888 McKinley Ave.
P.O. Box 549
Lathrop CA 95330

SEP 24 2008

Date

Danielle E. Carr

Danielle Carr
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco CA 94105