UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
AboveNet Communications, Inc.	)	Docket No. EPCRA-HQ-2012-8000
360 Hamilton Avenue	)	Docket No. CWA-HQ-2012-8000
White Plains, NY 10601	)	
	)	
Respondent	)	

CONSENT AGREEMENT

I. Preliminary Statement

1. Complainant, the United States Environmental Protection Agency (EPA) and Respondent, AboveNet Communications, Inc. (AboveNet), having consented to the terms of this Consent Agreement (Agreement), and before the taking of any testimony and without the adjudication of issues of law or fact herein, agree to comply with the terms of this Agreement and attached proposed Final Order hereby incorporated by reference.

2. By letters dated July 29, 2011, and October 27, 2011, Respondent notified EPA that violations of certain environmental statutes and regulations were discovered during a July 2011 corporate-wide audit of AboveNet's telecommunication facilities.

3. Pursuant to EPA's policy entitled *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (Audit Policy), 65 Fed. Reg. 19,618 (April 11, 2000), Respondent submitted voluntary disclosures to EPA regarding potential violations of:

   a. The Spill Prevention, Control, and Countermeasure Plan requirements under Section 311(j) of the Clean Water Act (CWA), 33 U.S.C. § 1321(j);

   b. Emergency Planning and Community Right-to-Know Act (EPCRA) Section 311, 42 U.S.C. § 11021; and

   c. EPCRA Section 312, 42 U.S.C. § 11022.

4. AboveNet's disclosures have resulted in a final list of disclosed violations compiled in Attachment A, hereby incorporated by reference, which are the subject of this Agreement.

5. The disclosures listed in Attachment A, hereby incorporated by reference, have been determined by EPA to satisfy all the conditions set forth in the Audit Policy. These violations therefore qualify for a 100% reduction of the civil penalty's gravity component.

II. Jurisdiction

6. The parties agree to the commencement and conclusion of this cause of action by issuance of this Agreement, as prescribed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, and more specifically by 40 C.F.R. § 22.13 and 40 C.F.R. § 22.18(b).

7. Respondent agrees that Complainant has the jurisdiction to bring an administrative action, based upon the facts which Respondent disclosed, for these violations and for the assessment of civil penalties pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), and Section 325 of EPCRA, 42 U.S.C. § 11045.

8. Respondent hereby waives its right to request a judicial or administrative hearing on any issue of law or fact set forth in this Agreement and its right to judicial review of the proposed Final Order accompanying this Agreement. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or judicial review of, any action taken by EPA to enforce this Agreement.

9. For purposes of this proceeding, Respondent admits that EPA has jurisdiction over the subject matter that is the basis of this Agreement.

10. Respondent neither admits nor denies the conclusions of law as set forth in this Agreement.

III. Statements of Fact

11. AboveNet is a telecommunications company organized under the laws of the state of Delaware.

12. Pursuant to EPA's Audit Policy, Respondent hereby certifies as to the accuracy of the following facts upon which this Agreement is based:

    a. The violations were discovered through an audit or through a compliance management system reflecting due diligence;

    b. The violations were discovered voluntarily;

    c. The violations were promptly disclosed to EPA in writing;

d. The violations were disclosed prior to commencement of an agency inspection or investigation, notice of a citizen suit, filing of a complaint by a third party, reporting of the violations by a "whistle blower" employee, or imminent discovery by a regulatory agency;

e. The violations were timely corrected and Respondent is, to the best of its knowledge and belief, in full compliance with Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), and Sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021, 11022, and the implementing regulations of each Act, with respect to the violations set forth in Attachment A;

f. Appropriate steps have been taken to prevent a recurrence of the violations;

g. The specific violations (or closely related violations) identified in Attachment A have not occurred within three (3) years of the date of disclosure identified in Paragraphs 2-4 above, at the same facilities that are the subject of this Agreement, and have not occurred within five (5) years of the date of disclosure identified in Paragraphs 2-4 above, as part of a pattern at multiple facilities owned or operated by the Respondent. For the purposes of this subparagraph (g), a violation is:

   i. any violation of federal, state, or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

   ii. any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency;

h. The violations have not resulted in serious actual harm nor presented an imminent and substantial endangerment to human health or the environment and did not violate the specific terms of any judicial or administrative Final Order or Agreement; and

i. Respondent has cooperated as requested by EPA.

IV. Conclusions of Law

EPCRA

13. Respondent is a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), and is the owner or operator of each "facility" listed in Attachment A as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

14. Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), and the implementing regulations found at 40 C.F.R. Part 370, require the owner or operator of a facility that is required to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.*, (OSH

Act), and regulations promulgated under the OSH Act, to submit the MSDS, or in the alternative, a list of such hazardous chemicals to the appropriate Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the fire department with jurisdiction over the facility by October 17, 1987, or within three months of first becoming subject to the requirements of EPCRA Section 311.

15. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and the implementing regulations found at 40 C.F.R. Part 370, require the owner or operator of a facility that is required to prepare or have available an MSDS for a hazardous chemical under the OSH Act and regulations promulgated under the OSH Act, to prepare and submit an emergency and hazardous chemical inventory form containing the information required by the regulations at 40 C.F.R. Part 370 to the appropriate LEPC, SERC, and the fire department with jurisdiction over the facility by March 1, 1988 (or March 1 of the first year after the facility first becomes subject to EPCRA Section 312 requirements), and annually thereafter. The inventory form contains "Tier I" or "Tier II" information, pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022, and 40 C.F.R. Part 370.

16. The facilities at issue in this Agreement are "facilities" as defined in Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), and 40 C.F.R. § 370.66, and subject to Sections 311 and 312 of EPCRA and regulations promulgated thereunder.

17. Diesel fuel, lead, and sulfuric acid are "hazardous chemicals," as defined in Sections 311(e) and 329(5) of EPCRA, 42 U.S.C. §§ 11021(e), 11049(5), and 40 C.F.R. § 370.66. Sulfuric acid is also listed, in the appendices to 40 C.F.R. Part 355, as an "extremely hazardous substance" (EHS), as defined in 40 C.F.R. § 370.66.

18. As set forth in 40 C.F.R. § 370.10(a)(2), the reporting threshold amount for hazardous chemicals present at a facility at any one time during the preceding calendar year is ten thousand (10,000) pounds. Therefore, the reporting thresholds for diesel fuel and lead are ten thousand (10,000) pounds. Pursuant to 40 C.F.R. § 370.10(a)(1), the reporting threshold for EHSs present at a facility is five hundred (500) pounds or the threshold planning quantity (TPQ) as defined in 40 C.F.R Part 355, whichever is lower. The TPQ for sulfuric acid is one thousand pounds (1,000). The reporting threshold for sulfuric acid, therefore, is five hundred (500) pounds.

19. For purposes of this Agreement, complainant hereby states and alleges that, based on the information supplied to EPA by the Respondent, for varying lengths of time between 2007 through 2011, Respondent violated the following requirements:

    a. Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), and the regulations found at 40 C.F.R. Part 370, by failing to submit an MSDS for a hazardous chemical(s) and extremely hazardous chemical(s) for 48 facilities, to the LEPC, SERC, and/or the fire department with jurisdiction over these facilities, as identified in Attachment A; and

b. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and the regulations found at 40 C.F.R. Part 370, at 48 facilities, by failing to prepare and submit emergency and chemical inventory forms to the LEPC, the SERC and/or the fire department with jurisdiction over each facility for Reporting Years 2006 through 2010, as identified in Attachment A.

CWA: Spill Prevention, Control, and Countermeasure (SPCC) Plan

20. Respondent is a person within the meaning of Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2, and is the owner or operator, as defined by Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of the four (4) facilities described in Attachment A.

21. The regulations at 40 C.F.R. §§ 112.3 through 112.7, which implement Section 311(j)(1)(c) of the CWA, 33 U.S.C. § 1321(j)(1)(C), set forth procedures, methods and requirements to prevent the discharge of oil from non-transportation related facilities into or upon the navigable waters of the United States and adjoining shorelines in such quantities that by regulation have been determined may be harmful to the public health or welfare or environment of the United States by owners or operators who are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products.

22. Owners and operators of onshore and offshore facilities that have discharged or, due to their location, could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, must prepare and implement an SPCC Plan as required by 40 C.F.R. § 112.3(a).

23. Respondent is engaged in storing or consuming oil or oil products located at the four (4) facilities described in Attachment A, in quantities such that discharges "may be harmful," as defined by 40 C.F.R. § 110.3.

24. Respondent's four (4) facilities described in Attachment A are onshore facilities 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, which, due to their location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

25. Based on the above, and pursuant to Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), and its implementing regulations, Respondent is subject to the requirements of 40 C.F.R. §§ 112.3 through 112.7, at the four (4) facilities listed in Attachment A.

26. Complainant hereby states and alleges that, based on the information supplied to EPA by the Respondent, Respondent violated the CWA at four facilities identified in Attachment A by failing to prepare and implement an SPCC Plan, as required by Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), and the regulations found at 40 C.F.R. §§ 112.3 through 112.7.

V. Civil Penalty

27. EPA agrees, based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, that Respondent has satisfied all of the conditions set forth in the Audit Policy and thereby qualifies for a 100% reduction of the gravity component of the civil penalty that otherwise would apply for the 48 facilities listed in Attachment A. Complainant alleges that the gravity component of the unmitigated civil penalty for violations described in Attachment A ordinarily would have been $1,195,800. Of that potential penalty, $915,800 is attributable to EPCRA violations, and $280,000 is attributable to CWA violations. EPA alleges that this gravity component is potentially assessable against Respondent for these violations. However, pursuant to the Audit Policy, EPA will waive 100% of the gravity-based penalties assessed for violations at the 48 facilities listed in Attachment A.

28. Under the Audit Policy, EPA has discretion to assess a penalty equivalent to the economic benefit Respondent gained as a result of its noncompliance. Based on information provided by Respondent and use of the Economic Benefit (BEN) computer model, EPA has determined that Respondent obtained an economic benefit of $19,024 as a result of its noncompliance in this matter for all the facilities listed in Attachment A. Of this amount, $14,088 is attributable to EPCRA violations, and $4,936 is attributable to CWA violations. Pursuant to the Audit Policy, EPA will assess a penalty equivalent to the economic benefit for violations listed in Attachment A.

VI. Terms of Settlement

29. Respondent agrees to pay a civil penalty in the total sum of **NINETEEN THOUSAND, AND TWENTY-FOUR dollars ($19,024.00)**, in the manner set forth in the following paragraphs, for the violations alleged herein within thirty (30) calendar days of issuance of the Final Order (i.e., the effective date of this Consent Agreement and attached Final Order) by the Environmental Appeals Board (EAB). *See* 40 C.F.R. § 22.31(c).

30. For payment of the civil penalty related to the EPCRA violations, Respondent shall pay the amount of **FOURTEEN THOUSAND, AND EIGHTY-EIGHT dollars ($14,088.00)** using one of the following instructions:

a. Via U.S Postal Service regular mail of a certified or cashier's check, made payable to the "United States Treasury," sent to the following address:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, MO 63197-9000

b. Via overnight delivery of a certified or cashier's check, made payable to the "United States Treasury," sent to the following address:

United States Environmental Protection Agency
Fines and Penalties
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

The U.S. Bank customer service contact for both regular mail and overnight delivery is Natalie Pearson, who may be reached at 314-418-4087.

c. Via electronic funds transfer (EFT) to the following account:

Federal Reserve Bank of New York
Account Number: 68010727
ABA Number: 021030004
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency-AboveNet Communications, Inc, Docket No. EPCRA-HQ-2012-8000."

The Federal Reserve customer service contact may be reached at 212-720-5000.

d. Via automatic clearinghouse (ACH), also known as Remittance Express (REX), to the following account:

US Treasury/Cashlink ACH Receiver
ABA No. 05136706
Account 31006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking
5700 Rivertech Court
Riverdale, MD 20737

The Finance Center customer service contact, Jesse White, may be reached at 301-887-6548.

e. Via on-line payment (from bank account, credit card, debit card):

Website: www.pay.gov
Enter "SFO 1.1" in the search field.
Open the form and complete the required fields (marked with an asterisk).
Under "Type of Payment," choose "Civil Penalty." Under "Invoice#" type "AboveNet Communications, Inc., Docket No. HQ-2012-8000" into the Court # or Bill #" subfield.
Leave the other subfields blank. Under "Installments?" choose "No." Under "Region," type "HQ."

Payment by check or wire transfer shall have a notation of "In the Matter of AboveNet Communications, Inc., Docket No. EPCRA-HQ-2012-8000."

31. For payment of the civil penalty related to the CWA SPCC violations, Respondent shall, within thirty (30) days of the filing of the Final Order, forward a cashier's or certified check, in the amount of **FOUR THOUSAND, NINE HUNDRED AND THIRTY-SIX dollars ($4,936.00)** made payable to the "Environmental Protection Agency," and bearing the notation "OSLTF-311" to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077
St. Louis, MO 63197-9000

The check shall indicate that it is for "In the Matter of AboveNet Communications, Inc., Docket No. CWA-HQ-2012-8000."

Alternatively, Respondent shall pay **FOUR THOUSAND, NINE HUNDRED AND THIRTY-SIX dollars ($4,936.00)** via wire transfer with a notation of "In the Matter of AboveNet Communications, Inc, Docket No. CWA-HQ-2012-8000" to the Federal Reserve Bank of New York using the following instructions:

Federal Reserve Bank of New York
ABA Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the wire transfer shall read "D 68010727 Environmental Protection Agency."

32. Respondent shall forward evidence of the checks, wire transfers, and/or internet-based payments to EPA, within five (5) days of payment, to the attention of:

Sanda Howland
Special Litigation and Projects Division (2248-A)
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Ariel Rios Building, Room 3119C
Washington, DC 20460; and

Clerk, Environmental Appeals Board
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
EPA East Building
Mail Code 1103M
Washington, DC 20460

33. Respondent's obligations under this Agreement shall end when it has paid the civil penalties is accordance with this Section of this Agreement.

34. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty from the date of entry of the Final Order, if the penalty is not paid by the date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11. A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorney fees. In addition, a penalty charge of twelve percent (12%) per year compounded annually will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due.

35. For the purposes of state and federal income taxation, Respondent shall not be entitled, and agrees not to attempt, to claim a deduction for any civil penalty payment made pursuant to the Final Order. Any attempt by Respondent to deduct any such payments shall constitute a violation of the Agreement.

36. As part of this Agreement, and in satisfaction of the requirements of the Audit Policy, Respondent has certified to certain facts, as delineated in Section III, Paragraph 12 of this Agreement. The parties agree that, should EPA receive information that proves or demonstrates that these facts are other than as certified by Respondent, the portion of this Agreement pertaining to the affected facility or facilities, including mitigation of the proposed penalty, may be voided or this entire agreement may be declared null and void at Complainant's election, and EPA may proceed with an enforcement action.

37. The parties agree that Respondent preserves all of its rights should this Agreement be voided in whole or in part. The parties further agree that Respondent's obligations, agreements and waivers under this Agreement will cease, and be null and void with no effect, should this Agreement be rejected by the EAB.

VII. State and Public Notice

38. The parties acknowledge that the settlement portions of this Agreement which pertain to the CWA violations are, pursuant to Section 311(b)(6)(C)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(i), subject to public notice and comment requirements. Furthermore, the parties acknowledge and agree that EPA will also provide public notice of the EPCRA portions of this Agreement. Should EPA receive comments regarding the issuance of the proposed Final Order assessing the civil penalty agreed to in Section VI, Paragraph 29, EPA shall forward such comments to Respondent within ten (10) days of the receipt of the public comments.

VIII. Reservation of Rights and Settlement

39. This Agreement and the Final Order, when issued by the EAB, and upon payment by Respondent of civil penalties in accordance with Section VI shall resolve only the civil and administrative claims specified in Section IV, and found in Attachment A. Nothing in this Agreement and the Final Order shall be construed to limit the authority of EPA and/or the United States to undertake any action against Respondent, in response to any condition which EPA or the United States determines may present an imminent and substantial endangerment to the public health, welfare, or the environment. Furthermore, issuance of the Final Order does not constitute a waiver by EPA and/or the United States of its right to bring an enforcement action, either civil or criminal, against Respondent for any other violation of any federal or state statute, regulation or permit.

IX. Other Matters

40. Each party shall bear its own costs and attorney fees in this matter.

41. The provisions of this Agreement and the Final Order, when issued by the EAB, shall apply to and be binding on the Complainant, and Respondent, as well as Respondent's officers, agents, successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Agreement, including the obligation to pay the civil penalty referred to in Section VI.

42. Nothing in this Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the CWA and EPCRA, or other federal state or local laws or statutes, nor shall it restrict EPA's authority to seek compliance with any applicable laws, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state or local permit.

The undersigned representatives of each party to this Agreement certify that each is duly authorized by the party whom he represents to enter into these terms and bind that party to it.

FOR Respondent:

AboveNet Communications, Inc.

_____, 11/20/12
Date

FOR Complainant:

_____, 10/17/2012
Bernadette Rappold Date
Director
Special Litigation and Projects Division
Office of Civil Enforcement
U.S. Environmental Protection Agency