

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

FILED

2009 MAY 21 PM 3:00

REGIONAL PUBLIC CLERK

Docket No.

IN THE MATTER OF:

Fisher Sand and Gravel Company,
Respondent.

EPCRA-09-2009-0003

CONSENT AGREEMENT
AND
FINAL ORDER PURSUANT TO
40 C.F.R. §§ 22.13 and 22.18

CONSENT AGREEMENT

A. PRELIMINARY STATEMENT

1. This is a civil administrative enforcement action initiated pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 ("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 C.F.R. Part 22. Complainant is the United States Environmental Protection Agency, Region IX ("EPA"). Respondent is Fisher Sand and Gravel Company, 3020 Energy Drive, Dickinson, North Dakota, a corporation organized under the laws of the state of North Dakota.
2. This Consent Agreement and Final Order ("CA/FO"), pursuant to 40 C.F.R. §§ 22.13 and 22.18, simultaneously commences and concludes this proceeding, wherein EPA alleges that Respondent violated Section 312 of EPCRA, 42 U.S.C. § 11022, and its implementing regulations.

B. STATUTORY AND REGULATORY FRAMEWORK

3. Section 312 of EPCRA, 42 U.S.C. § 11022, and 40 C.F.R. § 370.25, 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 ("OSHA"), 29 U.S.C. § 651 *et seq.*, to submit an annual emergency and hazardous chemical inventory form containing information on hazardous chemicals present at the facility during the preceding calendar year above the threshold levels established in 40 C.F.R. § 370.20(b). This inventory must be submitted by March 1 of each year to the State Emergency Response Commission ("SERC"), the Local Emergency Planning Committee ("LEPC"), and the fire department having jurisdiction over the facility. 40 C.F.R. § 370.25.

C. GENERAL ALLEGATIONS

4. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), authorizes the assessment of civil penalties for any violation Section 312 of EPCRA, 42 U.S.C. § 11022.
5. The Administrator of EPA has delegated enforcement authority under EPCRA to the Regional Administrators by EPA delegation 22-3-A, dated May 11, 1994.
6. The Regional Administrator, EPA Region IX, has delegated the authority to enforce Section 312 of EPCRA, 42 U.S.C. § 11022, to the Director of the Superfund Division with delegation R9 1290.18.
7. Respondent is, and at all times referred to herein was, a "person" as defined by Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).
8. The real property, including improvements thereto, located at for their facility, Fisher Sand and Gravel Company, doing business as Southwest Asphalt, located at 3826 South 28th Street, Phoenix, Arizona, within Maricopa County (the "Facility"), is a "facility" as defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).
9. At all times relevant to this CA/FO, the Facility used or stored Hazardous Chemicals.
10. Pursuant to Section 312(b) of EPCRA, a facility is exempt from the reporting requirements of Section 312(a) of EPCRA if the quantities of "Hazardous Chemicals"

present are below the thresholds established by EPA. EPA has established a minimum threshold level of 10,000 pounds for all Hazardous Chemicals unless they are either: (a) listed as "Extremely Hazardous Substances;" or (b) certain fuels stored underground at retail gas stations in compliance with specified regulations. 40 C.F.R. § 370.20.

11. EPA, as required under Section 302 of EPCRA, 42 U.S.C. §11002, published a list of substances designated as "Extremely Hazardous Substances" which, when released into the environment, may present substantial danger to public health or welfare or the environment, and has promulgated regulations establishing the threshold planning quantity of each Extremely Hazardous Substance. This list, including the corresponding threshold planning quantities for the Extremely Hazardous Substances, is codified at 40 C.F.R. Part 355, Appendices A and B.
12. Asphalt cement, diesel fuel number 2 and on-specification burner oil are Hazardous Chemicals as defined by OSHA and regulations promulgated thereunder. 29 C.F.R. § 1910.1200. However, none of these Hazardous Chemicals is an Extremely Hazardous Substance under EPCRA. 40 C.F.R. Part 355, Appendices A and B. Furthermore, neither the diesel fuel number 2 nor the on-specification burner oil at the Facility was stored underground at a retail gas station. Therefore, the minimum threshold level for each of these Hazardous Chemicals is ten thousand (10,000) pounds. 40 C.F.R. § 370.20(b)(4).
13. At all times relevant to this CA/FO, Respondent has been the owner and operator of the Facility.
14. The Arizona Emergency Response Commission ("AERC") was established as the SERC for the State of Arizona in accordance with Section 301 of EPCRA, 42 U.S.C. § 11001.
15. The Maricopa County LEPC was established as the LEPC for the county in which the facility is located, in accordance with Section 301 of EPCRA, 42 U.S.C. § 11001.

16. The Phoenix Fire Department is the fire department having jurisdiction over the facility.
17. The Facility is and was subject to Section 312 of EPCRA, 42 U.S.C. § 11022, and had Hazardous Chemicals above the applicable thresholds established in 40 C.F.R. § 370.20(b)(4).
18. EPA alleges that Respondent has violated Section 312 of EPCRA, 42 U.S.C. § 11022, and its implementing regulations.
19. Respondent is therefore subject to the powers vested in the EPA Administrator by Section 325 of EPCRA, 42 U.S.C. § 11045.

D. ALLEGED VIOLATIONS

COUNT I

(Failure to Timely Submit Annual Chemical Inventory Form for 2006)

20. Paragraphs 1 through 19 above are incorporated herein by this reference as if they were set forth here in their entirety.
21. Respondent was required to submit an annual emergency and hazardous chemical inventory form containing information on Hazardous Chemicals present at the facility during calendar year 2006 to the AERC, the Maricopa County LEPC, and the Phoenix Fire Department on or before March 1 of the following years.
22. Respondent did not timely submit the annual emergency and hazardous chemical inventory form containing information on the asphalt cement, diesel number two fuel and on-specification burner fuel present at the Facility during calendar year 2006 to the AERC, the Maricopa County LEPC, or the Phoenix Fire Department.
23. Therefore, EPA alleges that Respondent failed to submit the completed emergency and hazardous chemical inventory forms to the SERC, the LEPC, and the fire department for

reporting year 2006 by March 1 of the following year, in violation of Section 312 of EPCRA, 42 U.S.C. § 11022.

E. CIVIL PENALTY

24. Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), as adjusted by the Debt Collection Improvement Act of 1996, *see* 40 C.F.R. 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 312 occurs on or after March 15, 2004. *See* Table 1 of 40 C.F.R. § 19.4, 69 Fed. Reg. 7121, 7126 (Feb. 13, 2004).
25. Based on the facts alleged herein and upon all the factors which the Complainant 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 ("ERP"), including the nature, extent, and gravity of the violations, the Respondent's ability to pay, prior history of violations, degree of culpability, and any economic benefit, and such other matters as justice may require, the Complainant proposes that the Respondent be assessed, and Respondent agrees to pay **EIGHTEEN THOUSAND TWO HUNDRED DOLLARS (\$18,200)** as the civil penalty for the violations alleged herein. The proposed penalty was calculated in accordance with the ERP.

F. ADMISSIONS AND WAIVERS

26. 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 325 of EPCRA, 42 U.S.C. § 11045, and 40 C.F.R. §§ 22.4 and 22.37. 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 and 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.

27. 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 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

28. 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 full settlement of the violations alleged herein.
29. 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.
30. 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.

31. The undersigned representative of Respondent hereby certifies that he or she is fully authorized by Respondent to enter into this CA/FO, to execute and to legally bind Respondent to it.

H. CERTIFICATION OF COMPLIANCE

32. Upon signing this CA/FO, Respondent certifies to EPA that the Facility has fully complied with the requirements of Section 312 of EPCRA that formed the basis for the violations alleged in Section D above, and that the Facility is now in compliance with the relevant current reporting obligations under Section 312 of EPCRA.
33. 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

34. Respondent hereby consents to the assessment of and agrees to pay a civil penalty of **EIGHTEEN THOUSAND TWO HUNDRED DOLLARS (\$18,200)** in settlement of the violations set forth in Section D above. This Consent Agreement and Final Order constitutes a settlement of all claims for the violation of Section 312 of EPCRA alleged in Section D above.
35. Respondent shall pay the civil penalty within thirty (30) days of the Effective Date of this CA/FO, by sending a check in the amount of **EIGHTEEN THOUSAND TWO HUNDRED DOLLARS (\$18,200)**, payable to "Treasurer, United States of America,"
to:

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

The check shall reference the name and docket number of the 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:

Joshua Wirtschafter (ORC-3)
Assistant Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

and

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

36. In accordance with the Debt Collection Act of 1982 and U.S. Treasury directive (TFRM 6-8000), failure to send the penalty by the due date will result in imposition of interest from the effective date of this CA/FO at the current interest rate published by the U.S. Treasury, as described at 40 C.F.R. §13.11. In addition, a twelve percent (12%) per annum penalty will be applied on any principal amount not paid within ninety (90) days of the due date.

37. The 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

38. 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.

39. For failure to submit a payment to EPA by the time required in this CA/FO: FIVE HUNDRED DOLLARS (\$500) per day for each day of delay.
40. The determination of whether Respondent has satisfactorily complied with the terms of this CA/FO and the determination of whether Respondent has made a good faith, timely effort to complete the tasks required by this CA/FO, are within the sole discretion of the Division Director, Superfund Division, EPA Region IX. The decision of the Division Director, Superfund Division, EPA Region IX is not reviewable in any forum.
41. 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 Complainant for such penalties. Payment of stipulated penalties shall be made in accordance with the procedure set forth for payment of penalties in Section J of this CA/FO.
42. 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 C.F.R. §13.11. Complainant 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 EPCRA and its implementing regulations.
43. 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

44. EPA and Respondent each expressly reserve all rights and defenses that each may have, except to the extent specifically waived herein.
45. 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 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 325 of EPCRA, 42 U.S.C. § 11045. 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 EPCRA, or any other statutory, regulatory or common law enforcement authority of the United States, except as otherwise set forth herein.
46. Compliance by Respondent with the terms of this CA/FO shall not relieve Respondent of its obligations to comply with any applicable local, state or federal laws and regulations.
47. 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 proposed herein shall resolve Respondent's liability for federal civil penalties for the violations and facts alleged herein.
48. 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.

L. OTHER CLAIMS

49. 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.

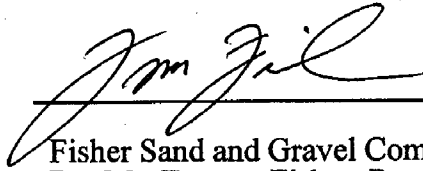
M. MISCELLANEOUS

50. This CA/FO may be amended or modified only by written agreement executed by both EPA and Respondent.
51. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.
52. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.
53. In accordance with 40 C.F.R. §§ 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,

4-8-09

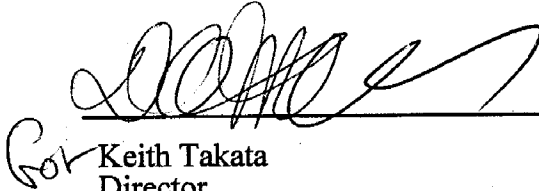
Date



Fisher Sand and Gravel Company
By: Mr. Tommy Fisher, President

19 May 2009

Date



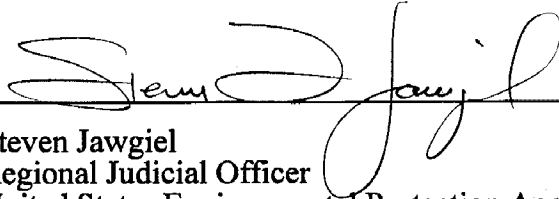
601 Keith Takata
Director
Superfund Division
United States Environmental Protection Agency,
Region IX

FINAL ORDER

IT IS HEREBY ORDERED that this Consent Agreement and Final Order (EPA Docket No. EPCRA-09-2009-0003) be entered and that Respondent pay a civil penalty in the amount of **EIGHTEEN THOUSAND TWO HUNDRED DOLLARS (\$18,200)**.

05/21/09

Date

A handwritten signature in black ink, appearing to read "Steven Jawgiel", written over a horizontal line.

Steven Jawgiel
Regional Judicial Officer
United States Environmental Protection Agency,
Region IX

CERTIFICATE OF SERVICE

I hereby certify that the foregoing CONSENT AGREEMENT AND FINAL ORDER in the matter of Fisher Sand and Gravel Company (EPCRA-09-2009-0003), dated May 21, 2009, has been filed with the Regional Hearing Clerk, and a copy was served on Respondent, and Counsel for EPA, as indicated below:

BY FIRST CLASS MAIL:

Respondent -

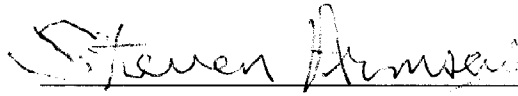
Tommy Fisher
Fisher Sand and Gravel Company
3020 Energy Drive
Dickinson, North Dakota 58601

HAND DELIVERED:

Complainant -
(By Counsel)

Joshua Wirtshafter
Office of Regional Counsel
ENVIRONMENTAL PROTECTION AGENCY
75 Hawthorne Street
San Francisco, CA. 94105

Dated at San Francisco, Calif., this 21st day of May, 2009.



Steven Armsey
Regional Hearing Clerk
EPA, Region 9