

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) DOCKET NO. CAA-10-2020-0095
)
J.K. MERRILL & SONS., INC.) **CONSENT AGREEMENT**
)
Pocatello, Idaho)
)
Respondent.)
)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 113(d) of the Clean Air Act (“CAA”), 42 U.S.C. § 7413(d).

1.2. Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), 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 J.K. Merrill & Sons, Inc. (“Respondent”) agrees to issuance of, the Final Order attached to this Consent Agreement (“Final Order”).

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Director of the Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), to sign consent agreements between EPA and the party against whom an administrative penalty for violations of the CAA is proposed to be assessed.

2.3. EPA and the United States Department of Justice jointly determined, pursuant to 42 U.S.C. § 7413(d) and 40 C.F.R. § 19.4, that this matter, although it involves alleged violations that occurred more than one year before the initiation of this proceeding, is appropriate for an administrative penalty action.

2.4. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CAA together with the specific provisions of the CAA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. Section 112 of the CAA, 42 U.S.C. § 7412, and its implementing regulations at 40 C.F.R. Part 63, require the owner or operator of an affected source of hazardous air pollutants to comply with emission limitations and operating limitations, as well as requirements to demonstrate initial and continuous compliance with the emission limitations and operating limitations. The regulations at 40 C.F.R. Part 63 Subpart ZZZZ establish national emission limitations and operating limitations for hazardous air pollutants (HAP) emitted from stationary

reciprocating internal combustion engines (RICE) located at major and area sources of HAP emissions.

3.2. Section 112(a)(9) of the CAA, 42 U.S.C. § 7412(a)(9), defines an “owner or operator” as any person who owns, leases, operates, controls, or supervises a stationary source.

3.3. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines “person” to include, among other things, a corporation.

3.4. 40 C.F.R. § 63.6590 defines an “affected source” as any existing, new, or reconstructed stationary RICE located at a major or area source of HAP emissions, excluding stationary RICE being tested at a stationary RICE test cell/stand.

3.5. 40 C.F.R. § 63.6585(a) defines a stationary RICE as any internal combustion engine which uses reciprocating motion to convert heat energy into mechanical work and which is not mobile. Stationary RICE differ from mobile RICE in that a stationary RICE is not a non-road engine as defined at 40 C.F.R. § 1068.30 and is not used to propel a motor vehicle or a vehicle used solely for competition.

3.6. 40 C.F.R. § 1068.31(e)(1) provides that a non-road engine ceases to be a non-road engine and becomes a new stationary engine when it is placed in a single specific location for 12 months or longer.

3.7. 40 C.F.R. § 60.4219 provides that for an engine that is converted to a stationary engine after being placed into service as a non-road or other non-stationary engine, ‘model year’ means the calendar year or new model production period in which the engine was manufactured (see definition of “date of manufacture”). Therefore, pursuant to the definition of “model year” at 40 C.F.R. § 60.4219, the date that an engine was “constructed” for purposes of 40 C.F.R. Part 60, Subpart IIII and 40 C.F.R. Part 63, Subpart ZZZZ applicability, is the date that the engine

was originally produced (so long as the engine has not been “reconstructed” within the meaning of 40 C.F.R. § 60.15).

3.8. Existing stationary RICE is defined at 40 C.F.R. § 63.6590(a)(1) as (i) for stationary RICE with a site rating of more than 500 brake horsepower (HP) located at a major source of HAP emissions, a stationary RICE is existing if you commenced construction or reconstruction of the stationary RICE before December 19, 2002; (ii) for stationary RICE with a site rating of less than or equal to 500 brake HP located at a major source of HAP emissions, a stationary RICE is existing if you commenced construction or reconstruction of the stationary RICE before June 12, 2006; (iii) for stationary RICE located at an area source of HAP emissions, a stationary RICE is existing if you commenced construction or reconstruction of the stationary RICE before June 12, 2006.

3.9. A major source of HAP emissions is defined at 40 C.F.R. § 63.6585(b) as a plant site that emits or has the potential to emit any single HAP at a rate of 10 tons (9.07 megagrams) or more per year or any combination of HAP at a rate of 25 tons (22.68 megagrams) or more per year.

3.10. An area source of HAP emissions is defined at 40 C.F.R. § 63.6585(c) as a source that is not a major source.

3.11. 40 C.F.R. § 63.6603(a) provides that if you own or operate an existing stationary RICE located at an area source of HAP emissions, you must comply with the requirements in Table 2d to subpart ZZZZ and the applicable operating limitations in Table 2b to subpart ZZZZ. Compliance with the numerical emission limitations is based on the results of testing the average of three 1-hour runs using the testing requirements and procedures in 40 C.F.R. § 63.6620 and Table 4 of subpart ZZZZ.

3.12. 40 C.F.R. § 63.6612(a) provides that if you own or operate an existing stationary RICE with a site rating of less than or equal to 500 brake HP located at an area source of HAP emissions that you must conduct any applicable initial performance test or other initial compliance demonstration according to Tables 4 and 5 of Subpart ZZZZ within 180 days after the compliance date that is specified in 40 C.F.R. § 63.6595 and according to the provisions in 40 C.F.R. § 63.7(a)(2).

3.13. 40 C.F.R. § 63.6595 requires that an existing stationary Compression Ignition RICE located at an area source of HAP emissions must comply with the applicable emission limitations, operating limitations, and other requirements no later than May 3, 2013. A Compression Ignition is defined at 40 C.F.R. § 63.6675 as relating to a type of stationary internal combustion engine that is not a spark ignition engine.

3.14. 40 C.F.R. § 63.6612 requires that an owner or operator of an existing stationary RICE located at an area source of HAP emissions must conduct any initial performance test or other initial compliance demonstration according to Tables 4 and 5 of Subpart ZZZZ that apply within 180 days after the compliance date specified in 40 C.F.R. § 63.6595 and according to the provisions in 40 C.F.R. § 63.7(a)(2).

3.15. 40 C.F.R. Part 71 establishes a federal operating permit program consistent with the requirements of Title V of the Clean Air Act. Pursuant to 40 C.F.R. § 71.1(b), all sources subject to the operating permit requirements of Title V and Part 71 shall have a permit to operate that assures compliance by the source with all applicable requirements.

3.16. Pursuant to 40 C.F.R. 71.4(b), the EPA Administrator will administer and enforce an operating permits program in Indian country, as defined in § 71.2, when an operating permits program which meets the requirements of part 70 of this chapter has not been explicitly granted full or interim approval by the Administrator for Indian country.

3.17. The Shoshone-Bannock Indian Reservation meets the definition of “Indian country” as defined in 40 C.F.R. § 71.2.

3.18. EPA has not approved an operating permit program for the Shoshone-Bannock Indian Tribe.

3.19. Pursuant to 40 C.F.R. 71.3(a)(1), major sources of air pollution are subject to the requirement to have an operating permit under Part 71 and are defined as “Part 71 sources.” “Major sources” are defined at 40 C.F.R. § 71.2 and include, among other things, a stationary source that directly emits or has the potential to emit, 100 tons per year or more of any air pollutant subject to regulation.

3.20. For purposes of Part 71, a stationary source is defined at 40 C.F.R. § 71.2 as any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Clean Air Act.

3.21. Nitrogen Oxides (NO_x) are a criteria pollutant subject to regulation under the Clean Air Act and Part 71.

3.22. 40 C.F.R. § 71.5(a) requires the owner or operator of a Part 71 source to submit a timely and complete permit application in accordance with this section. 40 C.F.R. § 71.5(a)(1) provides that a timely application for a source which does not have an existing operating permit issued by a State under the State's approved part 70 program and is applying for a part 71 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish.

3.23. 40 C.F.R. § 71.7(b) provides in relevant part that no part 71 source may operate after the time that it is required to submit a timely and complete application under this part, except in compliance with a permit issued under Part 71.

3.24. Respondent is a corporation incorporated and doing business in the State of Idaho.

3.25. Respondent is the owner and operator of a sand and gravel processing and production facility located at 1850 Tank Farm Road on the Shoshone-Bannock Indian Reservation in Pocatello, Idaho (the Facility).

3.26. Respondent is a “person” as defined in Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

3.27. The Facility has the potential to emit less than 10 tons per year of a single HAP or 25 tons or more per year of any combination of HAP and is, therefore, an area source of HAP emissions.

3.28. Since at least 2014, the Facility has been a stationary source.

3.29. Since at least 2014, the Facility has the potential to emit more than 100 tons per year of NOx and is, therefore, a major source of emissions and a Part 71 source.

3.30. The Facility does not have an operating permit issued pursuant to 40 C.F.R. Part 71.

3.31. Respondent owns and operates a Crushing Plant Engine at the Facility which has a horsepower rating of 1576 and is a Compression Ignition engine.

3.32. Since at least 2014 the Crushing Plant Engine has been placed in the same location at the Facility for more than 12 months.

3.33. Respondent own and operates a Wash Plant Engine at the Facility which has a horsepower rating of 536 and is a Compression Ignition engine.

3.34. Since at least 2014, the Crushing Plant Engine has been placed in the same location at the Facility for more than 12 months.

3.35. The Crushing Plant Engine and the Wash Plant Engine were each originally produced before June 12, 2006 (and were never re-constructed), and are, therefore, existing stationary RICE, pursuant to 40 C.F.R. § 63.6590(1)(iii).

3.36. The Crushing Plant Engine and the Wash Plant Engine are subject to the emission standards in Table 2d of 40 C.F.R. Part 63, subpart ZZZZ.

3.37. Line 3 of Table 2d of 40 C.F.R. Part 63, subpart ZZZZ establishes an emission limit for carbon monoxide (CO) of 23 parts per million (ppm) for engines with a horsepower rating in excess of 500.

Violation 1

Failure to Comply with 40 C.F.R. Part 63, Subpart ZZZZ Emission Limitations

3.38. Line 3 of Table 2d of 40 C.F.R. Part 63, subpart ZZZZ establishes an emission limit for carbon monoxide (CO) of 23 ppm for existing stationary RICE with a horsepower rating in excess of 500 at an area source of HAP emissions or achieve a 70% reduction in CO due to operation of a catalyst.

3.39. 40 C.F.R. § 63.6605(a) requires that an affected source must comply with the emission limitations, operating limitations, and other requirements of Subpart ZZZZ at all times.

3.40. Testing of the Crushing Plant Engine performed on July 18, 2018, demonstrated emissions of 236 ppm CO corrected to 15% oxygen.

3.41. Testing of the Wash Plant Engine performed on July 18, 2018, demonstrated emissions of 211 ppm CO corrected to 15% oxygen.

3.42. The Crushing Plant Engine and the Wash Plant Engine exceeded the applicable emission limitation provided in Line 3 of Table 2d of 40 C.F.R. Part 63, subpart ZZZZ.

Violation 2

Failure to Comply with 40 C.F.R. Part 63, Subpart ZZZZ Emission Limitation

Compliance Demonstration and Notification

3.43. 40 C.F.R. § 63.6612(a) provides that if you own or operate an existing stationary RICE located at an area source of HAP emissions you are subject to the requirements of this

section, then you must conduct any initial performance test or other initial compliance demonstration according to Tables 4 and 5 to this subpart that apply to you within 180 days after the compliance date that is specified for your stationary RICE in §63.6595 and according to the provisions in §63.7(a)(2).

3.44. 40 C.F.R. § 63.6595(1) provides that an existing stationary CI RICE located at an area source of HAP emissions must comply with the applicable emission limitations, operating limitations, and other requirements no later than May 3, 2013.

3.45. 40 C.F.R. § 63.6645(h) provides that an existing stationary RICE that is required to conduct a performance test or other initial compliance demonstration as specified in Tables 4 and 5 of Subpart ZZZZ, must submit a Notification of Compliance Status according to the requirements of 40 C.F.R. § 63.9(h)(2)(ii) before the close of business on the 60th day following completion of the relevant compliance demonstration activity.

3.46. Respondent has not submitted a Notification of Compliance Status within 60 days of the date of a required compliance demonstration activity.

3.47. Respondent failed to perform a timely initial performance test or other initial compliance demonstration as required by Tables 4 and 5 of Subpart ZZZZ within 180 days of becoming a stationary source subject to the requirements of Subpart ZZZZ in violation of 40 C.F.R. § 63.6612(a).

3.48. Respondent failed to submit a Notification of Compliance Status in violation of the requirements of 40 C.F.R. § 63.9(h)(2)(ii).

Violation 3

Failure to Apply for a Title V Operating Permit and Operating without a Title V Permit

3.49. Since at least 2014, the Facility has been a major source of air pollution with a potential to emit more than 100 tons per year of NO_x.

3.50. Respondent has not submitted an application for a Part 71 permit for the Facility.

3.51. Respondent has failed to comply with the requirement to submit a timely and complete Part 71 permit in violation of 40 C.F.R. § 71.5(a).

3.52. Respondent has operated the Facility since at least 2014 without having applied for a Part 71 permit, in violation of 40 C.F.R. § 71.7(b).

3.53. Under Section 113(d) of the CAA, 42 U.S.C. § 7413(d), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$48,192 per day of violation.

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. In determining the amount of penalty to be assessed, EPA has taken into account the factors specified in Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1). After considering these factors, EPA determined and Respondent agrees that an appropriate penalty to settle this action is \$123,552 (the "Assessed Penalty").

4.4. Respondent agrees to pay the Assessed Penalty in installments as specified in this paragraph. The first installment of \$61,776 shall be paid within 30 days of the effective date of the Final Order. The second and final installment of \$65,926.89 (which consists of a payment of

\$61,776 plus interest calculated in accordance with Paragraph 4.8(a)) shall be paid no later than 545 days after the effective date of the Final Order.

4.5. Payments under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.6. Concurrently with payment, Respondent must serve photocopies of the check, or proof of other payment method, described in Paragraph 4.5 on the Regional Hearing Clerk and EPA Region 10 by electronic mail at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
R10_RHC@epa.gov

John Keenan
U.S. Environmental Protection Agency
Region 10, Mail Stop 20-C04
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
keenan.john@epa.gov

4.7. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. If such a failure to pay occurs, Respondent may be subject to a civil action pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), to collect the Assessed Penalty under the

CAA. In any collection action, the validity, amount, and appropriateness of the Assessed Penalty shall not be subject to review.

4.8. If Respondent fails to pay any portion of the Assessed Penalty in full by its due date, Respondent shall be responsible for payment of the following amounts:

a. Interest. Any unpaid portion of the Assessed Penalty shall bear interest at the rate established pursuant to 26 U.S.C. § 6621(a)(2) from the effective date of the Final Order, provided, however, that no interest shall be payable on any portion of the Assessed Penalty that is paid within 30 days of the effective date of the Final Order contained herein.

b. Attorneys' Fees, Collection Costs, Nonpayment Penalty. Pursuant to 42 U.S.C. § 7413(d)(5), should Respondent fail to pay the Assessed Penalty and interest on a timely basis, Respondent shall also be required to pay the United States' enforcement expenses, including but not limited to attorneys' fees and costs incurred by the United States for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be ten percent of the aggregate amount of Respondent's outstanding penalties and nonpayment penalties accrued from the beginning of such quarter.

4.9. The Assessed Penalty, including any additional costs incurred under Paragraph 4.8, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

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

4.11. Except as described in Paragraph 4.8, each party shall bear its own costs and attorneys' fees in bringing or defending this action.

4.12. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in this Consent Agreement and to appeal the Final Order.

4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.


4.14. Respondent consents to the issuance of any specified compliance or corrective action order, to any conditions specified in this consent agreement, and to any stated permit action.

4.15. The above provisions in Part IV are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

s - -U.GZO

FOR RESPONDENT:



LLOYD MERRILL, President
J.K. Merrill & Sons, Inc.

DATED:

FOR COMPLAINANT:

**LAURIS
DAVIES**

Digitally signed by LAURIS
DAVIES
Date: 2020.06.03 11:52:47
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LAURIS C. DAVIES, Acting Director
Enforcement and Compliance Assurance Division
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	DOCKET NO. CAA- 10-2020-0095
)	
J.K. MERRILL & SONS., INC.)	FINAL ORDER
)	
Pocatello, Idaho)	
Respondent.)	
)	
)	

1.1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

1.3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties under the CAA for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order 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 Final Order does not waive, extinguish, or otherwise affect Respondent’s obligations to comply with all applicable provisions of the CAA and regulations promulgated or permits issued thereunder and any applicable implementation plan requirements.

1.4. This Final Order shall become effective upon filing with the Regional Hearing Clerk.

SO ORDERED this _____ day of _____, 2020.

RICHARD MEDNICK
Regional Judicial Officer
EPA Region 10