



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION 8  
 1595 WYNKOOP STREET  
 DENVER, CO 80202-1129  
 Phone 800-227-8917  
<http://www.epa.gov/region08>

2013 JUN -4 AM 11:40  
 FILED  
 EPA REGION VIII  
 HEARING CLERK

DOCKET NO.: CWA-08-2013-0015

IN THE MATTER OF:

MITCHELL CONCRETE PRODUCTS CO.  
 721 N. Edmunds  
 Mitchell, SD 57301-1828

Respondent


)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

FINAL ORDER

Pursuant to 40 C.F.R. §22.13 (b) and §22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order.

The Parties are hereby **ORDERED** to comply with this Final Order.

SO ORDERED THIS 4<sup>th</sup> Day of June, 2013

  
 \_\_\_\_\_  
 Elyana R. Sutin  
 Regional Judicial Officer

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

FILED  
EPA REGION VIII  
ST. LOUIS, MO  
MAY 4 AM 11:41

<b>IN THE MATTER OF:</b>	)	<b>COMBINED COMPLAINT AND</b>
	)	<b>CONSENT AGREEMENT</b>
Mitchell Concrete Products Co.	)	
721 N. Edmunds	)	Docket No.: CWA-08-2013-0015
Mitchell, SD 57301-1828	)	
	)	Simultaneous Commencement and
	)	Conclusion of a Proceeding Pursuant to
<b>Respondent</b>	)	Section 311(b)(6) of the Clean Water Act
_____	)	and 40 C.F.R. § 22.13(b)

Complainant, United States Environmental Protection Agency, Region 8 (EPA), and Respondent, Mitchell Concrete Products Co., by their undersigned representatives, hereby consent and agree as follows:

**A. STATUTORY AUTHORITY**

1. This Combined Complaint and Consent Agreement (Agreement) is issued pursuant to section 311(b)(6) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1321(b)(6), and 40 C.F.R. § 22.13(b). Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), authorizes the Administrator of the EPA to assess civil penalties for violations of sections 311(b)(3) and 311(j)(1)(C), 33 U.S.C. §§ 1321(b)(3) and 1321(j)(1)(C) of the Act, which authority has been properly delegated to the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region 8. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, governs such proceedings. 40 C.F.R. § 22.13(b) provides that a proceeding subject to the Consolidated Rules may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to 40 C.F.R. § 22.18(b)(2) and (3).

**B. PARTIES BOUND**

2. This Agreement shall apply to and be binding upon Complainant and shall be binding upon the Respondent, its officers, directors, agents, successors, and assigns. Any change in the ownership or legal status of Respondent or the business organization, structure or status of Respondent, including, but not limited to, any transfer of assets or real or personal property, shall not alter its responsibilities under this Agreement.

**C. STATEMENT OF PARTIES**

3. Respondent stipulates to EPA's jurisdiction and venue over the matters contained in this Agreement; however, Respondent neither admits nor denies the specific factual allegations contained herein.

4. Respondent waives its right to a hearing before any tribunal to contest any issue of law or fact set forth in this Agreement, and waives its right to appeal the Final Order.

5. The signatories to this Agreement certify that they are authorized to execute and legally bind the parties they represent to this Agreement.

6. This Agreement contains all terms of the settlement agreed to by the parties.

7. Complainant and Respondent agree that settlement of this matter is in the public interest, and that execution of this Agreement and issuance of a final order without further litigation and without adjudication of any issue of fact or law is the most appropriate means of resolving this matter.

**D. STATUTORY AND REGULATORY FRAMEWORK**

8. The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

9. Section 311(j)(1)(C) of the Act, provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to

prevent discharges of oil . . . from onshore . . . facilities, and to contain such discharges . . . .” 33 U.S.C. § 1321(j)(1)(C).

10. Pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), the implementing regulations for oil pollution prevention are found at 40 C.F.R. part 112.

11. 40 C.F.R. § 112.3 requires that the owner or operator of a Spill Prevention Control and Countermeasures (SPCC) -regulated facility must prepare a written SPCC plan in accordance with 40 C.F.R. §§ 112.7 and 112.8 and any other applicable section of 40 C.F.R. Part 112.

12. Initially by Executive Order 11548 (July 20, 1970), 35 Fed. Reg. 11677 (July 22, 1970), and most recently by section 2(b)(1) of Executive Order 12777 (October 18, 1991), 56 Fed. Reg. 54757 (October 22, 1991), the President delegated to EPA his section 311(j)(1)(C) authority to issue the regulations referenced in Paragraph 11 for non-transportation-related onshore facilities.

13. EPA subsequently promulgated the SPCC regulations pursuant to these delegated statutory authorities and pursuant to its authorities under the Act, 33 U.S.C. § 1251 *et seq.*, which established certain procedures, methods and requirements upon each owner and operator of a non-transportation-related onshore if such facility, due to its location, could reasonably be expected to discharge oil into or upon the navigable waters of the United States and their adjoining shorelines in such quantity as EPA has determined in 40 C.F.R. § 110.3 may be harmful to the public health or welfare or the environment of the United States (“harmful quantity”).

14. For purposes of sections 311(b)(3) and (b)(4) of the Act, 33 U.S.C. §§ 1321(b)(3) and (b)(4), discharges of oil into or upon the navigable waters or adjoining shorelines of the United States in such quantities that have been determined may be harmful to the public health or

welfare or the environment of the United States are defined in 40 C.F.R. § 110.3 to include discharges of oil that violate applicable water quality standards; or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; and/or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.

15. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), in pertinent part, prohibits the discharge of any oil or hazardous substances into or upon the navigable waters of the United States or their adjoining shorelines in such quantities as may be harmful as determined by the President.

16. The term “discharge” is defined in section 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2), to include, in pertinent part, “any spilling, leaking, pumping, pouring, emitting, emptying or dumping . . . .”

17. The term “oil” is defined in section 311(a)(1) of the Act, in pertinent part, as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge . . . .” 33 U.S.C. § 1321(a)(1).

18. The term “navigable waters” is defined in section 502(7) of the Act as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

19. The term “navigable waters,” as further defined in 40 C.F.R. § 110.1, “means the waters of the United States, including the territorial seas,” and includes, *inter alia*: “(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide; (b) Interstate waters, including interstate wetlands; . . . ; (e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and (f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section . . . .”

20. The term “sheen” is defined in 40 C.F.R. § 110.1 as an “iridescent appearance on the surface of the water.”

21. The term “sludge” is defined in 40 C.F.R. § 110.1 as “an aggregate of oil or oil and other matter of any kind in any form other than dredged spoil having a combined specific gravity equivalent to or greater than water.”

22. Pursuant to section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), any owner, operator, or person in charge of any vessel, onshore facility or offshore facility from which oil is discharged in violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), or who fails or refuses to comply with any regulation issued under subsection (j) may be assessed a class I or class II civil penalty.

23. The term “owner or operator” is defined in section 311(a)(6) of the Act in pertinent part as “in the case of an onshore facility, . . . any person owning or operating such onshore facility . . .” 33 U.S.C. § 1321(a)(6).

24. According to section 311(a)(7) of the Act, “‘person’ includes an individual, firm, corporation, association, and a partnership.” 33 U.S.C. § 1321(a)(7).

25. The term “onshore facility” is defined in section 311(a)(10) of the Act as “any facility of any kind located in, on, or under, any land within the United States other than submerged land.” 33 U.S.C. § 1321(a)(10).

26. In accordance with 40 C.F.R. § 112.2, “[t]ransportation-related and non-transportation related, as applied to an onshore or offshore facility, are defined in the Memorandum of Understanding between the Secretary of Transportation and the Administrator of [EPA] dated November 24, 1971(appendix A of this part).”



27. Section II(1)(G) of Part 112, Appendix A defines a “non-transportation-related onshore facility” as “[i]ndustrial, commercial, agricultural or public facilities which use and store oil.”

**E. GENERAL ALLEGATIONS**

28. Respondent is and was at all relevant times a corporation organized under the laws of South Dakota. Respondent’s office is located at 721 N. Edmunds, Mitchell, South Dakota.

29. The registered agent of Mitchell Concrete Products Co. is Dean Robideau. The address of Respondent’s registered agent, on file with the South Dakota Secretary of State, is 721 N. Edmunds, Mitchell, SD 57301-1828.

30. Respondent is and was at all times relevant to the Agreement a “person” within the meaning of section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7).

31. At all relevant times, the Respondent owned and operated a concrete company in Mitchell, South Dakota, with one 4,000 gallon tank of diesel fuel (facility).

32. The facility referenced in Paragraph 31 was at all relevant times an “onshore facility” within the meaning of section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10).

33. The facility referenced in Paragraph 31 was at all relevant times a “non-transportation-related” onshore facility. 40 C.F.R. § 112.2.

34. Dry Run Creek and Firesteel Creek are “navigable waters” of the United States as defined in CWA section 502(7), 33 U.S.C. § 1362(7), and the Oil Pollution Act (OPA) section 1001(21), 33 U.S.C. § 2701(21).

35. The facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 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 (3) cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

36. The facility is subject to the oil pollution prevention requirements of 40 C.F.R. part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.

#### **F. SPECIFIC ALLEGATIONS**

37. On or before April 27, 2008, Respondent's 4,000 gallon diesel tank was left unlocked and subsequently compromised, discharging approximately 2,000 or more gallons of diesel into a storm water drain that flowed to Dry Run Creek, a tributary to Firesteel Creek, a traditional navigable water of the United States.

38. The discharge of 2,000 gallons of diesel into Dry Run Creek violated water quality standards, caused a film or sheen upon or discoloration of the surface of the water and/or its adjoining shorelines and/or caused a sludge or emulsion to be deposited beneath the surface of the water and/or upon the adjoining shorelines of the Dry Run Creek.

39. On August 2, 2010, EPA determined, following its review of information provided by Respondent under section 308 of the Act, 33 U.S.C. § 1318, that Respondent had failed to prepare an SPCC plan in writing for the facility in accordance with the regulations at 40 C.F.R. §§ 112.7 and 112.8 as required by 40 C.F.R. §112.3.

#### **G. VIOLATIONS OF SECTIONS 311(B)(3) AND 311(J)**

40. Paragraphs 1 through 39 of this Agreement are re-alleged and incorporated herein by reference.

42. The release of diesel referenced in Paragraph 37 was at all relevant times a "discharge" within the meaning of section 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2).



43. The discharged diesel referenced in Paragraph 37 was at all relevant times “oil” within the meaning of section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

44. The diesel referenced in Paragraph 37 that was discharged into Dry Run Creek and upon the adjoining shorelines violated water quality standards of Dry Run Creek in “quantities as may be harmful” within the meaning of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3.

45. Respondent’s release of approximately 2000 gallons of oil on or before April 27, 2008, into navigable waters of the United States constitutes a violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3).

46. Respondent’s failure to prepare and implement an SPCC plan in writing and in accordance with the regulations at 40 C.F.R. §§ 112.7 and 112.8 from August 10, 2010, through and including February 26, 2013 (a duration of approximately 32 months), constitutes violations of 40 C.F.R. §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

47. Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. Part 19 authorize the assessment of a Class I civil penalty not to exceed \$16,000 per violation, up to a maximum civil penalty of \$37,500, for violations of section 311(b)(3) and 311(j)(1)(C), 33 U.S.C. § 1321(b)(3) and 33 U.S.C. § 1321(j)(1)(C) of the Act occurring after January 12, 2009. Prior to January 12, 2009, a Class I penalty could not exceed \$11,000 per violation, up to a maximum civil penalty of \$32,500. *Id.*

#### **H. PAYMENT OF CIVIL PENALTY**

48. Respondent consents and agrees to pay a civil penalty in the amount of fourteen thousand seven hundred and seven dollars (\$14,707) within thirty days of the Final Order issued in this matter incorporating this Agreement.

a. If the due date of the payment falls on a weekend or legal federal holiday, the due date is the next business day. Payment must be received by 11:00 a.m. Eastern Standard Time to be considered as received that day.

b. Payment shall be made by any of the methods set forth in Appendix 1 to this Agreement.

c. At the same time that payment is made, notice that the payment has been made shall be provided to:

Christopher Ajayi  
Technical Enforcement Program (8ENF-UFO)  
U.S. EPA Region 8  
1595 Wynkoop  
Denver, CO 80202-1129

Tina Artemis  
Regional Hearing Clerk (8RC)  
U.S. EPA Region 8  
1595 Wynkoop  
Denver, CO 80202-1129

If a payment is made by cashiers or certified check, the notice shall include a copy of the check. If a payment is made in any other manner, the notice shall include documentation demonstrating that the payment was made.

d. In the event a payment is not received by the specified due date, interest on the late payment shall accrue from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received (e.g., on the 1<sup>st</sup> late day for the first payment, 30 days of interest accrues).

e. In addition, a handling charge of fifteen dollars (\$15) shall be assessed on the 31st day from the date of the Final Order, and each subsequent 30-day period that the initial payment, or any portion thereof, remains unpaid, and a handling charge of fifteen dollars (\$15)

shall be assessed on the 1st day after the due date of the payment, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (e.g., the 121st day from the date the Final Order is signed). Payments are first applied to handling charges, 6% penalty interest, late interest, and any balance is then applied to the outstanding principal amount. Further, Respondent shall be subject to the fees, costs, and nonpayment penalty set forth in section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H).

f. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

49. The civil penalty set forth in paragraph 48 of this Agreement was determined by Complainant after taking into account all factors identified in section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), i.e., the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

#### I. SEVERABILITY

50. Should Complainant modify or withdraw its consent to this Agreement, both parties agree that the Consent Agreement portion of this Agreement will be severed and the Complaint will remain valid, intact, and effective as of the date that this Agreement was initially filed. Respondent further agrees that by signing this Agreement, regardless of whether the Consent Agreement sections are ultimately upheld, Respondent waives any and all objections and defenses it may otherwise legally have to any claim based upon the Statute of Limitations relative to the filing of this Agreement.

51. The parties agree to submit this Agreement to the Regional Judicial Officer for Region 8 with a request that it be incorporated into a final order.

**J. OTHER TERMS AND CONDITIONS**

52. Failure by Respondent to comply with any of the terms of this Agreement shall constitute a breach of the agreement and may result in referral of the matter to the United States Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

53. Nothing in this Agreement shall be construed as a waiver by Complainant or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this Agreement.

54. Respondent agrees that it is now in compliance with the Act.

55. This Agreement, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the civil penalty owed for violations alleged in this Agreement.

56. This Agreement resolves Respondent's liability for Federal civil penalties under section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6) for the alleged violations contained in this Agreement. This Agreement shall not in any case affect Complainant's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law whether or not alleged in this Agreement.

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8**  
Office of Enforcement, Compliance, and  
Environmental Justice, Complainant

Date: May 30, 2013

By:   
Darcy O'Connor, Director  
Technical Enforcement Program

Date: May 30, 2013

By: Sheldon H. Muller, Acting for  
James Eppers, Supervisor  
Legal Enforcement Program

**MITCHELL CONCRETE PRODUCTS CO.,**  
Respondent

5/30/13  
Date

Dean Robideau  
Dean Robideau, President



**Combined Complaint and Consent Agreement - Appendix 1**

The following are acceptable payment methods for the civil penalty required to be paid pursuant to the Agreement.

1. If payment is being made by cashier's or certified check, submit the check, including the name, docket number, and the notation, "Oil Spill Liability Trust Fund-311," payable to **"Environmental Protection Agency"** :

Regular Mail:

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

Federal Express, Airborne, or other commercial carrier:

US Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101

Contact: Natalie Pearson  
314-418-4087

2. Wire Transfers:

Wire transfers must indicate the name and docket number of this case and be sent directly to the Federal Reserve Bank in New York City with the following information:

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 "

3. ACH (also known as REX or remittance express):

ACH payments must indicate the name and docket number of this case and be paid in accordance with the following information:

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact - Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

CTX Format

4. On-line Payment:

There is now an On Line Payment Option, available through the Dept. of Treasury. This payment option can be accessed from the information below:

[www.pay.gov](http://www.pay.gov)

Enter "sfo 1.1" (without the quotation marks) in the "Search Public Forms" field.

Click on the first link to open the form, complete required fields, and then click on "Submit Data" button at bottom of form.

**CERTIFICATE OF SERVICE**

The undersigned certifies that the original of the attached **COMBINED COMPLAINT, CONSENT AGREEMENT AND FINAL ORDER** in the matter of **MITCHELL CONCRETE PRODUCTS CO.; DOCKET NO.: CWA-08-2013-0015** was filed with the Regional Hearing Clerk on June 4, 2013.

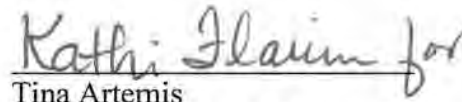
Further, the undersigned certifies that a true and correct copy of the document was delivered to Brenda L. Morris, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified mail/return receipt requested on June 4, 2013, to:

Dean Robideau  
Mitchell Concrete Products, Co.  
721 N. Edmunds  
Mitchell, SD 57301-1828

E-mailed to:

Kim White  
U. S. Environmental Protection Agency  
Cincinnati Finance Center  
26 W. Martin Luther King Drive (MS-0002)  
Cincinnati, Ohio 45268

June 4, 2013

  
Tina Artemis  
Paralegal/Regional Hearing Clerk