



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 08 2019

REPLY TO THE ATTENTION OF

SC-5J

John Pelizzari
Chief of Operations
Burnette Foods, Inc.
PO Box 128
Elk Rapids, Michigan 49629
jpelizzari@burnettefoods.com


Re: Burnette Foods, Inc., Traverse City, Michigan
Consent Agreement and Final Order
Docket No. CAA-05-2019-0022

Dear Mr. Pelizzari,

Enclosed please find a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. U.S. EPA has filed the original CAFO with the Regional Hearing Clerk on May 8, 2019. Please note Burnette Foods, Inc.'s obligation to pay a civil penalty in the amount of \$125,000 in the manner prescribed in paragraphs 31-36 and please reference your check with the docket number.

Please feel free to contact Monika Chrzaszcz at (312) 886-0181 if you have any questions regarding the enclosed documents. Please direct any legal questions to Gillian Asque, Assistant Regional Counsel, at (312) 886-3283. Thank you for your assistance in resolving this matter.

Sincerely yours,


Michael E. Hans, Chief
Chemical Emergency
Preparedness & Prevention Section

Enclosure

cc. Gillian Asque, ORC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:

Burnette Foods, Inc.,
Traverse City, Michigan,

Respondent.



) Docket No. CAA-05-2019-0022

) Proceeding to Assess a Civil Penalty Under
) Section 113(d) of the Clean Air Act, 42
) U.S.C. § 7413(d)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 113(d) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(d), and Section 22.1(a)(2), 22.13(b), and 22.18(b)(2)-(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. § 22.1(a)(2), 22.13(b), and 22.18(b)(2)-(3), for alleged violations of Section 112(r) of the Act, 42 U.S.C. § 7412(r) and the implementing regulations at 40 C.F.R. Part 68.

2. The Complainant is, by lawful delegation, the Director of the Superfund Division, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is Burnette Foods, Inc. ("Burnette Foods, Inc." or "Respondent"), a corporation doing business in the State of Michigan.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO, including any right of review under Section 113(d)(4) of the Act, 42 U.S.C. § 7413(d)(4), and under 40 C.F.R. § 22.15(c), its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, any right to contest the allegations in this CAFO, and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. In accordance with Section 112(r) of the Act, 42 U.S.C. § 7412(r), EPA promulgated the “Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7),” 61 Fed. Reg. 31,668 (June 20, 1996), to prevent accidental releases of regulated substances and minimize the consequences of those releases that do occur. These regulations were codified at 40 C.F.R. Part 68 (Chemical Accident Prevention Provisions) and are commonly known as the “Risk Management Program regulations”.

10. The Risk Management Program regulations apply to all stationary sources with

processes that contain more than a threshold quantity of a regulated substance. *See* 40 C.F.R. § 68.10(a). The List of Regulated Toxic Substances and Threshold Quantities for Accidental Release Prevention is codified at 40 C.F.R. § 68.130.

11. The Risk Management Program regulations define a “stationary source” as “any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur.” *See* 40 C.F.R. § 68.3.

12. The Risk Management Program regulations define a “process” as “any activity involving a regulated substance including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities.” *See id.*

13. Sulfur dioxide is a “regulated substance” as that term is defined in Section 112(r)(3) of the Act and 40 C.F.R. § 68.3. *See* 40 C.F.R. § 68.130, Table 1.

14. The “threshold quantity” (as that term is defined in 40 C.F.R. § 68.3) for sulfur dioxide is 5,000 pounds. This threshold quantity is present at a stationary source if the total quantity of sulfur dioxide contained in a process exceeds 5,000 pounds. *See* 40 C.F.R. § 68.115(a) and 68.130, Table 1.

15. Each process in which a regulated substance is present in more than a threshold quantity (a “covered process”) is subject to one of three risk management programs. *See* 40 C.F.R. § 68.10(b)-(d). If a covered process does not meet the eligibility requirements for Program 1 under 40 C.F.R. § 68.10(b), and the process is subject to the OSHA process safety management standard at 29 C.F.R. § 1910.119, then the process is subject to Program 3 under 40

C.F.R. § 68.10(d).

16. In addition to meeting the requirement to submit a risk management plan (RMP) under 40 C.F.R. § 68.12(a), the Program 3 requirements include developing and implementing a management system as provided in 40 C.F.R. § 68.15; conducting a hazard assessment as provided in 40 C.F.R. § 68.20 through 68.42; implementing the prevention requirements of 40 C.F.R. § 68.65 through 68.87; developing and implementing an emergency response program as provided in 40 C.F.R. § 68.90 to 68.95; and submitting as part of the RMP the data on prevention program elements for Program 3 processes as provided in 40 C.F.R. § 68.175. *See* 40 C.F.R. § 68.12(d).

Factual Allegations and Alleged Violations

17. Respondent is a “person” as that term is defined at Section 302(e) of the Act, 42 U.S.C. § 7602(e).

18. At all times relevant to this CAFO, Respondent owned and operated a facility at 2955 Kroupa Road, Traverse City, Michigan 49686 (the “facility”). Therefore, Respondent was the “owner or operator” of the facility for purposes of 40 C.F.R. Part 68. *See* 42 U.S.C. § 7412(a)(9) (definition of “owner or operator”).

19. The facility consisted of buildings, structures, equipment, installations, or substance emitting stationary activities which belonged to the same industrial group, which were located on one or more contiguous properties, which were under the control of the same person (or persons under common control), and from which an accidental release may have occurred. The facility was a “stationary source” under 40 C.F.R. § 68.3.

20. At all times relevant to this CAFO, Respondent stored and used sulfur dioxide, a

“regulated substance” under Section 112(r)(3) of the Act and 40 C.F.R. § 68.3, at the facility when it brined cherries.

21. Respondent’s activities involving a regulated substance, as described in paragraph 20, constituted a “process” under 40 C.F.R. § 68.3.

22. At all times relevant to this CAFO, Respondent’s brining process, as described in paragraph 20, contained more than the threshold quantity (5,000 pounds) of sulfur dioxide. *See* 40 C.F.R. § 68.130, Table 1.

23. The Risk Management Program regulations applied to Respondent’s facility as a stationary source with a process that contained more than a threshold quantity of a regulated substance. *See* 40 C.F.R. § 68.10(a).

24. Respondent’s brining process did not meet the eligibility requirements for Program 1 under 40 C.F.R. § 68.10(b) and was subject to the OSHA process safety management standard since the process involved sulfur dioxide above the threshold quantity in 29 C.F.R. § 1910.119, App. A. Respondent’s brining process was therefore subject to Program 3 under 40 C.F.R. § 68.10(d).

25. On January 20, 2017, a representative from EPA sent a Request for Information pursuant to Section 111(a) of the Act, 42 U.S.C. § 7414(a) to Respondent. The purpose of the request was to determine whether the Respondent was complying at the facility with Section 112(r) of the Act and the Risk Management Program regulations.

26. Based on Respondent’s response to the request, from June 21, 1999 to December 28, 2017, Respondent failed to comply with the Risk Management Program regulations at the facility for Program 3 requirements as set forth below:

- a. Respondent failed to submit a single Risk Management Plan that includes the information required by §§ 68.150 through 68.158 for all covered processes, and as required under 40 C.F.R. § 68.12(a).
- b. Respondent failed to develop a management system as provided in § 68.15 and as required under 40 C.F.R. § 68.12(d)(1).
- c. Respondent failed to conduct a hazard assessment as provided in §§ 68.20 through 68.42 and as required under 40 C.F.R. § 68.12(d)(2).
- d. Respondent failed to implement the prevention requirements of §§ 68.65 through 68.87 and as required under 40 C.F.R. § 68.12(d)(3).

27. Section 112(r)(7)(E) of the Act, 42 U.S.C. § 7412(r)(7)(E), provides that after the effective date of any regulation or requirement imposed under Section 112(r) of the Act, it shall be unlawful for any person to operate any stationary source subject to such regulation or requirement in violation of such regulation or requirement.

28. Under Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), the Administrator may issue an administrative order against any person assessing a civil administrative penalty whenever, on the basis of any available information the Administrator finds that such person has violated Section 112(r) of the Act and 40 C.F.R. Part 68. The Administrator may assess a civil penalty of up to \$46,192 per day of violation, up to a total of \$369,532 for violations that occurred after November 2, 2015, where penalties are assessed on or after January 15, 2018. *See* 40 C.F.R. Part 19.

29. Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), limits the Administrator's authority to matters where the first alleged date of violation occurred no more than 12 months

prior to initiation of the administrative action, except where the Administrator and Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

30. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violations alleged in this CAFO.

Civil Penalty

31. Complainant has determined that an appropriate civil penalty to settle this action is \$125,000. In determining the penalty amount, Complainant has considered the factors specified in Section 113(e) of the Act, 42 U.S.C. § 7413(e), the facts and circumstances of this case, and other factors such as cooperation and prompt return to compliance. Complainant has also considered U.S. EPA's Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68 (June 2012).

32. Within 30 days after the effective date of this CAFO, Respondent must pay the \$125,000 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

The check must note the following: the case title ("In the Matter of Burnette Foods, Inc.") and the docket number of this CAFO.

33. A transmittal letter stating Respondent's name, complete address, and the docket

number of this CAFO must accompany the payment in paragraph 32. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Monika Chrzaszcz (SC-5J)
Chemical Emergency Preparedness and Prevention Section
Superfund Division
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Gillian Asque (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

34. This civil penalty is not deductible for federal tax purposes.

35. If Respondent does not timely pay the civil penalty, EPA shall request the Attorney General to bring a civil action in the appropriate district court to recover the amount assessed (plus interest at rates established pursuant to 26 U.S.C. § 6621(a)(2) from the effective date of the CAFO), as well as the United States enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings. Respondent acknowledges that, in such an action, the validity, amount, and appropriateness of the civil penalty shall not be subject to review.

36. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date the payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15

handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue according to Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). Such nonpayment penalty shall be 10 percent of the aggregate amount of such person's outstanding penalties and nonpayment penalties accrued as of the beginning of such quarter. *Id.*

General Provisions

37. Pursuant to 40 C.F.R. § 22.5(b)(2), the parties consent to service of this CAFO by email at the following email addresses: asque.gillian@epa.gov (for Complainant) and jpelizzari@burnettefoods.com (for Respondent). *See* 40 C.F.R. § 22.5-6. The parties waive their right to service by the methods specified in 40 C.F.R. § 22.6.

38. Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations alleged in the CAFO.

39. This CAFO does not affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

40. This CAFO does not affect Respondent's responsibility to comply with the Act, the Risk Program Management regulations, and any other applicable federal, state, and local laws and regulations.

41. This CAFO constitutes a "previous violation" under EPA's *Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68*, June 2012.

42. Respondent certifies that it is complying fully with Section 112(r) of the Act and 40 C.F.R. Part 68.

43. The terms of this CAFO bind Respondent and its successors and assigns.

44. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

45. Each party agrees to bear its own costs and attorney's fees in this action.

46. This CAFO constitutes the entire agreement between the parties.

47. The effective date of this CAFO is the date on which it is filed with the Regional Hearing Clerk.

**In the Matter of Burnette Foods, Inc.
Docket No.**


4/18/2019
Date



John Pelizzari
Chief of Operations
Burnette Foods, Inc.

United States Environmental Protection Agency, Complainant

5/9/19
Date



Douglas Ballotti
Director
Superfund Division

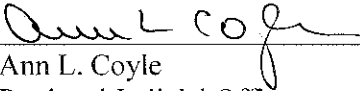
In the Matter of Burnette Foods, Inc.,
Docket No. CAA-05-2019-0022

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. § 22.18 and 22.31. IT IS SO ORDERED.

5/8/19

Date



Ann L. Coyle
Regional Judicial Officer
United States Environmental Protection Agency
Region 5

CONSENT AGREEMENT AND FINAL ORDER

In the Matter of Burnette Foods, Inc.

Docket No. CAA-05-2019-0022

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, docket number CAA-05-2019-0022, which was filed on May 8, 2019, in the following manner to the addressees:

Copy be E-Mail to
Respondent:

John Pelizzari
jpelizzari@burnettefoods.com

Copy by E-Mail to
Attorney for Complainant,
EPA, Region 5:

Gillian Asque
asque.gillian@epa.gov

Copy by E-Mail to
Enforcement Officer
EPA, Region 5:

Monika Chrzaszcz
Chrzaszcz.monika@epa.gov

Copy by E-Mail to
Regional Judicial Officer,
EPA, Region 5:

Ann Coyle
coyle.ann@epa.gov

Dated: May 8, 2019

LaDawn Whitehead
LaDawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5