

Assessment of Civil Penalties,” 40 C.F.R. § 22.13(b), EPA hereby issues and Tree Top, Inc. (Respondent) hereby agrees to issuance of the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. § 22.13(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. Respondent operates a facility in Selah, Washington, located at 205 South Railroad Avenue (Facility).

2.3. The Facility operates as a fruit processing center.

2.4. A concise statement of the factual basis for alleging violations of CERCLA and EPCRA, together with specific references to the provisions of the Acts and implementing regulations Respondent is alleged to have violated, appears in Part III of this CAFO.

III. ALLEGATIONS

3.1 Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires that the person in charge of a facility immediately notify the National Response Center (NRC) as soon as he or she has knowledge of a release of a hazardous substance from such facility in an amount equal to or greater than the reportable quantity (RQ).

3.2. Section 304(a) and (b) of EPCRA, 42 U.S.C. § 11004(a) and (b), requires that if a facility at which hazardous chemicals are produced, used or stored releases an RQ of an extremely hazardous substance and the release requires, or occurred in a manner that would require, notice under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), the owner or operator of

the facility must immediately notify the State Emergency Response Commission (SERC) of any state likely to be affected by the release and the Local Emergency Planning Committee (LEPC) for any area likely to be affected by the release.

3.3. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370 require that the owner or operator of a facility which is required by the Occupational Safety and Health Administration (OSHA) to prepare or have available a material safety data sheet (MSDS) for a hazardous chemical, submit a completed Emergency and Hazardous Chemical Inventory Form (Tier I or Tier II as described in 40 C.F.R. Part 370) to the SERC, the LEPC and the fire department with jurisdiction over the facility by March 1, 1988, and annually thereafter. The form must contain the information required by Section 312(d) of EPCRA, 42 U.S.C. § 11022(d), covering all hazardous chemicals present at the facility at any one time during the preceding year in amounts equal to or exceeding 10,000 pounds and all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity (TPQ) designated by EPA at 40 C.F.R. Part 355, Appendices A and B, whichever is lower.

3.4. Ammonia is listed as a toxic and hazardous substance under OSHA regulations at 29 C.F.R. § 1910.1000, Table Z-1; therefore, the owner or operator of a facility with ammonia on-site must prepare or have available an MSDS for ammonia. Ammonia is a CERCLA "hazardous substance," 40 C.F.R. § 302.4, and an "extremely hazardous" substance under Section 302 of EPCRA, 42 U.S.C. § 11002, with an RQ of 100 pounds and a TPQ of 500 pounds, as provided in 40 C.F.R. Part 355.

3.5. Under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), “person” means, among other things, any corporation.

3.6. Under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), “facility” means, among other things, any building, structure, installation, storage container, equipment or any site or area where a hazardous substance has been deposited, stored, disposed of or placed or otherwise come to be located.

3.7. Under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), “facility” means all buildings, equipment, structures and other stationary items that are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person who controls, is controlled or under common control with, such person).

3.8. Under Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), and Section 328 of EPCRA, 42 U.S.C. § 11048, “release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment.

3.9. Respondent is incorporated in the State of Washington.

3.10. On July 10, 2009, the Facility released in excess of 100 pounds of ammonia to the environment.

3.11. Respondent failed to immediately notify the NRC of the release of ammonia from the Facility.

3.12. Respondent also failed to immediately notify the Washington SERC and the Yakima County LEPC of the release of ammonia from the Facility.

3.13. During at least one period of time during calendar year 2009, ammonia was present at the Facility in an amount equal to or greater than the TPQ.

3.14. For calendar year 2009, Respondent did not submit to the SERC, LEPC or local fire department an Emergency and Hazardous Chemical Inventory Form including ammonia.

3.15. Under Section 109 of CERCLA, 42 U.S.C. § 9609, EPA may assess a civil penalty for each day of violation of Section 103 of CERCLA, 42 U.S.C. § 9603. Under Section 325(b) of EPCRA, 42 U.S.C. § 11045(b), EPA may assess a civil penalty for each day of violation of Sections 304 and 312 of EPCRA, 42 U.S.C §§ 11004 and 11022.

IV. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in Part III of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in Part III of this CAFO.

4.3. Respondent expressly waives any rights to contest the allegations and to appeal the Final Order contained herein.

4.4. The provisions of this CAFO shall bind Respondent and its agents, servants, employees, successors and assigns.

4.5. Except as described in Paragraph 4.11(b) below, each party shall bear its own fees and costs in bringing or defending this action.

4.6. Based on Respondent's willingness to settle this matter without litigation, the nature of the violations, Respondent's agreement to perform a Supplemental Environmental

Project (SEP) and other relevant factors, and in accordance with 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," EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$21,697, which includes \$1,550 for the alleged CERCLA violation and \$20,147 for the alleged EPCRA violations.

4.7. Respondent consents to the issuance of the Final Order recited herein and to payment of the penalty cited in Paragraph 4.6.

4.8. Payments under this CAFO shall be made by cashier's check or certified check or money order made payable to the order of the "U.S. Treasury" within 30 days of the effective date of the Final Order contained herein and shall be delivered to the following addresses:

(a) The CERCLA portion of the penalty (\$1,550) shall be mailed to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

(b) The EPCRA portion of the penalty (\$20,147) shall be mailed to:

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

Respondent shall note on the checks the title and docket number of this case.

4.9. Respondent shall submit a photocopy of the checks described above to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Suite 900
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

Suzanne Powers
U.S. Environmental Protection Agency
Region 10
Washington Operations Office
300 Desmond Drive S.E., Suite 102
Lacey, Washington 98503

4.10. Should Respondent fail to make any payment of the penalty assessed by this CAFO in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Should a failure to pay occur, Respondent may be subject to a civil action under CERCLA Section 109(a)(4), 42 U.S.C. § 9609(a)(4), and EPCRA Section 325(f), 42 U.S.C. § 11045(f), to collect any unpaid penalties, together with interest, handling charges and nonpayment penalties, as set forth below.

4.11. Should Respondent fail to make any payment of the penalty assessed by this CAFO in full by its due date, Respondent shall also be responsible for payment of the following amounts:

(a) Interest. Any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order contained herein, 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) Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the assessed penalty is more than 30 days past due.

(c) Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the assessed penalty that is more than 90 days past due, which nonpayment penalty shall be calculated as of the date the underlying penalty first becomes past due.

4.12. Respondent has agreed to perform a Supplemental Environmental Project (SEP) approved by the EPA and generally described in Appendix A designed to secure environmental benefits in accordance with the EPA's SEP policy. Respondent shall install the control and release detection systems described at Appendix A to this CAFO within 180 days of the effective date of this CAFO, in accordance with all provisions described in this CAFO.

4.13. Respondent's deadline to perform the SEP shall be excused or extended if such performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the reasonable control of Respondent, including its employees, agents, consultants and contractors, or which could not be overcome by due diligence and which delays or prevents the performance of the SEP within the specified time period. A Force Majeure event does not include, *inter alia*, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or

conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

4.14. The cost to Respondent of implementing the SEP shall be not less than \$81,362. Respondent shall include documentation of the expenditures made in connection with the SEP as part of the SEP Completion Report.

4.15. Respondent hereby certifies that, as of the date of this Consent Agreement, Respondent is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by any other agreement, under a grant, or as injunctive relief in any other case. Respondent further certifies that it has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP. Furthermore, for federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

4.16. Respondent shall submit a SEP Completion Report to EPA within 180 days of the Effective Date of the CAFO. The SEP Completion Report shall contain the following information:

- (a) A description of the SEP as implemented;
- (b) Itemized costs, documented by copies of purchase orders and receipts or cancelled checks;
- (c) Certification that the SEP has been fully implemented pursuant to the provisions of this CAFO;

(d) A description of any operating problems encountered and the solutions thereto; and

(e) A description of the environmental and public health benefits resulting from implementation of the SEP.

4.17. Respondent agrees that failure to implement the SEP and/or submit the SEP Completion Report required by 4.16, shall be deemed a violation of this CAFO and Respondent shall become liable for stipulated penalties pursuant to this CAFO.

4.18. Unless otherwise instructed in writing by EPA, Respondent shall submit all notices and reports required by this CAFO by first class mail, overnight mail, or hand delivery to:

Suzanne Powers
U.S. Environmental Protection Agency
Region 10
Washington Operations Office
300 Desmond Drive SE, Suite 102
Lacey, WA 98503

4.19. Respondent agrees that EPA may inspect Respondent's records related to the SEP at any reasonable time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.

4.20. Respondent shall maintain legible copies of documentation of the underlying data for documents or reports submitted to EPA pursuant to this CAFO until the SEP Completion Report is accepted pursuant to Paragraph 4.21., and Respondent shall provide the documentation of any such underlying data to EPA within 15 days of a written request for such information. In all documents or reports including, without limitation, the SEP Completion Report submitted to

EPA pursuant to this CAFO, Respondent shall, by a corporate officer, sign and certify under penalty of law that the information contained in such document or report is true, accurate and not misleading by signing the following statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

4.21. Following receipt of the SEP Completion Report described in Paragraph 4.16, EPA will do one of the following: (i) accept the Report; (ii) reject the Report, notify Respondent in writing of deficiencies in the Report with reasonable specificity and provide Respondent an additional 30 days in which to correct any deficiencies; or (iii) after the rejection notice and opportunity to cure set forth in item (ii) above, reject the Report and seek stipulated penalties in accordance with Paragraph 4.23.

4.22. In the event that the SEP is not completed as contemplated by this CAFO, and this failure was not caused solely by events which constitute a Force Majeure as defined by Paragraph 4.13, then stipulated penalties shall be due and payable by Respondent to EPA in accordance with Paragraph 4.23. Schedules herein may be extended based upon mutual written agreement of the parties.

4.23. In the event that Respondent fails to comply with any of the terms or provisions of this CAFO relating to the performance of the SEP described above and/or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in this

CAFO, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

(i) If the SEP is not satisfactorily completed pursuant to this CAFO, Respondent shall pay a stipulated penalty to the United States in the amount of \$81,362, less the amount actually expended.

(ii) For failure to submit the SEP Completion Report as required by Paragraph 4.16, Respondent shall pay a stipulated penalty in the amount \$100 for each day after the report is due until the report is received by EPA, not to exceed \$2,500.

4.24. Stipulated penalties under Paragraph 4.23 shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of satisfactory completion of the activity, subject to the maximum set forth in Paragraph 4.23(ii).

4.25. Respondent shall pay stipulated penalties within 15 days of receipt of a written demand by EPA for such penalties. Payment shall be in accordance with the provisions of Paragraph 4.8. Interest and late charges shall be paid as specified in Paragraph 4.11.

4.26. Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of Section 304 of EPCRA and Section 103 of CERCLA."

4.27. Except as provided in Paragraph 4.30 below, nothing in the CAFO shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other

remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.

4.28. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.

4.29. Respondent represents that it is authorized to execute this CAFO and that the party signing this CAFO on its behalf is authorized to bind Respondent to the terms of this CAFO.

4.30. Compliance with all the terms and conditions of this CAFO shall result in full settlement and satisfaction of all claims for penalties alleged in Section III above.

STIPULATED AND AGREED:

FOR TREE TOP, INC.

N S Buck
Signature

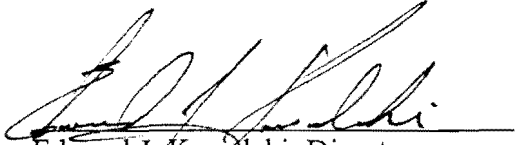
Dated: 8/27/10

Print Name: NANCY SMITH BUCK

Title: VP LEGAL SERVICES

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 10



Edward J. Kowalski, Director
Office of Compliance and Enforcement

Dated: 9/10/2010


V. FINAL ORDER

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

5.2. This CAFO constitutes a full and final settlement by EPA of all claims for administrative or judicial penalties pursuant to CERCLA and EPCRA for the particular violations alleged in Part III above. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO 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 CAFO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of federal, state or local law.

This Final Order shall become effective upon filing.

SO ORDERED this 13th day of Sept., 2010.



Thomas M. Jahnke
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

APPENDIX A

Tree Top, Inc. Supplemental Environmental Project Computer Control System w/ Ammonia Detection

Engine Room 1 at the Selah Plant

Tree Top will install an engineered computer control system that includes ammonia detectors in the relief piping of the ammonia system. The purpose of the computer is to provide better control and improved monitoring of the ammonia refrigeration system while having immediate detection of a relief incident due to an upset condition. The computer control system will provide the plant the capability to ensure the process cannot be run without the refrigeration system online.

The costs of the new system are as follows:

Tree Top Supplied Items:

- Control System programming (160 hours)
 - Endress Hauser pressure transmitters, 2 ea (suction and high pressure vapor)
 - Pyromation temperature transmitters 2 ea. (high pressure vapor and liquid condensate)
 - Outside temperature and humidity transmitter
 - PLC based refrigeration control system
 - Manning vent line ammonia detectors
- \$40,000**

Scope of Work By Vendors:

Parts and Services Supplied By Refrigeration Contractor

- Compressor controller
- Compressor digital communications modules
- Install and commission compressor controller
- Mechanically install Tree Top supplied temperature and pressure transmitters
- Mechanically install ammonia detectors in system vent lines

Estimated Mechanical Proposal Price **\$21,262**

Parts and Services Supplied by Electrical Contractor

- Labor and materials to electrically install compressor controller
- Labor and materials to electrically install instrumentation
- Labor and materials to install PLC based refrigeration control system

Estimated Electrical Proposal Price **\$20,000**

Project Cost **\$81,362**

Tree Top, Inc.
Selah, WA
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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1037

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of Tree Top, Inc., Docket No. EPCRA-10-2010-0194**, was filed with the Regional Hearing Clerk on September 13, 2010.

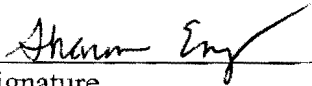
On September 13, 2010, the undersigned certifies that a true and correct copy of the document was placed in the mailbox of:

Stephanie Mairs, Esq.
U.S. EPA
Region 10, Suite 900
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on September 13, 2010, to:

Mark Fickes, Esq.
Velikanje Halverson P.C.
405 East Lincoln St.
P.O. Box 22550
Yakima, Washington 98907

DATED this 13th day of September 2010.



Signature
Print Name: Shawn Eng
Regional Hearing Clerk
EPA Region 10