

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III**

IN THE MATTER OF

**SERVICE ENERGY, LLC
3799 N. Dupont Highway
Dover, DE 19901-1574,**

Respondent

**Lewes Bulk Plant
33852 Clay Road
Lewes, Delaware 19958**

**Milford Bulk Plant
20141 Cedar Beach Road
Sussex, DE 19958,**

Facilities

**CWA SECTION 311 CLASS II
CONSENT AGREEMENT
AND FINAL ORDER
UNDER 40 C.F.R. § 22.13(b)**

Docket No. CWA-03-2010-0358

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LEGAL AUTHORITY

This Consent Agreement is proposed and entered into under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 311(b)(6)(B)(ii) of the Clean Water Act ("Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), and under the authority provided by 40 C.F.R. §§ 22.13(b) and 22.18(b)(2). The Administrator has delegated this authority to the Regional Administrator of EPA, Region III, who in turn has delegated it to the Director of the Hazardous Site Cleanup Division of EPA, Region III ("Complainant").

CONSENT AGREEMENT

STIPULATIONS

The parties, in their own capacity, or by their attorneys or other authorized representatives, hereby stipulate:

1. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), 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. . . .”

2. 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 authority, under Section 311(j)(1)(C) of the Act, to issue the regulations referenced in the preceding Paragraph for non-transportation-related onshore facilities.

3. EPA subsequently promulgated the SPCC regulations pursuant to these delegated statutory authorities, and pursuant to its authorities under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, which established certain procedures, methods and requirements for each owner and operator of a non-transportation-related onshore facility, if such facility, due to its location, could reasonably be expected to discharge oil into or upon the navigable waters of the United States or 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”).

4. In promulgating 40 C.F.R. § 110.3, which implements Section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA has determined that discharges of oil in harmful quantities

include oil discharges that cause either (1) a violation of applicable water quality standards or (2) a film, sheen upon, or discoloration of the surface of the water or adjoining shorelines, or (3) a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

5. Respondent is a limited liability company organized under the laws of Delaware with a place of business located at 3799 North Dupont Highway, Dover, Delaware. Respondent is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

6. Respondent is and was, at all times relevant to this action, the owner and operator, within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2 of the following oil storage and distribution facilities: the Lewes Bulk Plant located at 33852 Clay Road, Lewes, Delaware 19958, and the Milford Bulk Plant located at 20141 Cedar Beach Road, Sussex, DE 19958. Collectively, these plants will be referred to as the "Facilities."

7. Each of the Facilities has an aggregate above-ground storage capacity, including the capacity of any bunkered or partially buried tank (as defined in 40 C.F.R. § 112.2), greater than 1320 gallons of oil in containers, and each container has a shell capacity of at least 55 gallons.

8. The Lewes Bulk Plant drains into a storm water drainage system which flows into Ebenezer Branch. Ebenezer Branch drains to Canary Creek, a tributary of Broadkill River, which drains into Delaware Bay. The Milford Bulk Plant drains into a storm water drainage system which flows into the Mispillion River, located approximately 133 yards from the Facility. The Mispillion River flows east into the Delaware River.

9. The Delaware River and Delaware Bay are navigable waters of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

10. Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products located at each of the Facilities.

11. Each of the Facilities is a non-transportation-related facility within the meaning of 40 C.F.R. § 112.2 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

12. Each of the Facilities is an “onshore facility,” within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

13. Each of the Facilities is therefore a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity (“an SPCC-regulated facility”).

14. Service Energy began fuel storage and distribution operations at the Facilities in 1990. H.R. Phillips, Inc. owns Service Energy, LLC. Prior to 1990, Service Oil Co., Inc., another subsidiary of H.R. Phillips, conducted operations at the Facilities.

15. Pursuant to the Act, E.O. 12777, and 40 C.F.R. § 112.1, Respondent, as the owner and operator of two SPCC-regulated facilities, is subject to the SPCC regulations.

REGULATORY REQUIREMENTS

16. 40 C.F.R. § 112.3(b)(1973) requires any owner or operator of an SPCC-regulated facility to prepare and implement an SPCC plan, or any appropriate part of such plan, no later than one year from the date that the facility begins operations.

17. 40 C.F.R. § 112.7(e)(4)(ii)(1973) requires: “Where rack area drainage does not flow into a catchment basin or treatment facility designed to handle spills, a quick drainage system should be used for tank truck loading and unloading areas. The containment system should be designed to hold at least the maximum capacity of any single compartment of a tank car or tank

truck loaded or unloaded in the plant.” This requirement was recodified at 40 C.F.R. § 112.7(h) (2002, as amended in 2006).

18. 40 C.F.R. § 112.7(e)(2)(ii)(1973) requires: “All bulk storage tank installations should be constructed so that a secondary means of containment is provided for the entire contents of the largest single tank plus sufficient freeboard to allow for precipitation. Diked areas should be sufficiently impervious to contain spilled oil.” This requirement is now codified at 40 C.F.R. § 112.8(c)(2).

19. EPA promulgated Oil Pollution Prevention Regulations, 40 C.F.R. Part 112, 38 Fed. Reg. 34165 (Dec. 11, 1973), effective January 10, 1974. These regulations are referred to as the 1973 regulations. These regulations were revised in part in 2002, 67 Fed. Reg. 47042 (July 17, 2002), and in 2006, 71 Fed. Reg. 77266 (Dec. 26, 2006), and again in 2008 (74 Fed. Reg. 74303 (Dec. 5, 2008)). However, the deadline by which facilities must comply with the 2002, 2006 and 2008 regulations, as presently codified, is November 10, 2010. Pursuant to 40 C.F.R. § 112.3(a)(1)(2006), facilities in operation prior to August, 16, 2002 are required to maintain their Spill Prevention, Control and Countermeasure (“SPCC”) plans as required by the 1973 Regulations. Accordingly, for purposes of this Consent Agreement, unless otherwise noted, regulatory requirements cited herein refer to the 1973 Regulations.

GENERAL PROVISIONS

20. Respondent admits the jurisdictional allegations set forth in this Consent Agreement and Final Order (“CAFO”).

21. Respondent neither admits nor denies the specific factual allegations or the conclusions of law contained in this Consent Agreement, except as provided in the paragraph immediately above.

22. Respondent agrees not to contest EPA's jurisdiction with respect to the execution of this Consent Agreement ("CA"), the issuance of the attached Final Order ("FO"), or the enforcement of the Consent Agreement and Final Order ("CAFO").

23. For the purposes of this proceeding only, Respondent hereby expressly waives its right to contest the allegations set forth in this CA and any right to appeal the accompanying FO.

24. Respondent consents to the issuance of this CAFO and agrees to comply with its terms and conditions.

25. Respondent shall bear its own costs and attorney's fees.

26. The provisions of this CAFO shall be binding upon Complainant and upon Respondent, its officers, directors, employees, successors and assigns.

27. By his or her signature below, the person signing this CA on behalf of the Respondent is acknowledging that he or she is fully authorized by the party represented to execute this CA and to legally bind Respondent to the terms and conditions of the CA and accompanying FO.

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; nor does this CAFO constitute a waiver, suspension or modification of the requirements of 33 U.S.C. § 1321(b)(6)(B)(ii), or any regulations promulgated and/or authorized thereunder.

EPA FINDINGS OF FACT AND CONCLUSIONS OF LAW

COUNT I

Failure to Have Adequate Secondary Containment at the Loading/Unloading Area of the Milford Bulk Plant

29. Paragraphs 1 through 28 above are hereby incorporated by reference.

30. Respondent prepared an SPCC Plan for the Milford Bulk Plant in July 2005. The July 2005 SPCC Plan stated that the containment systems at the facility tank car and truck loading/unloading rack did not satisfy the requirements of the spill prevention regulations. The SPCC Plan advised Respondent to repair the inadequate structures.

31. On October 14, 2008, an EPA inspector conducted an inspection of the Milford Bulk Plant and observed that the secondary containment structures at the truck loading/unloading rack area were inadequate.

32. Respondent failed to provide adequate secondary containment at the truck loading/unloading area of the Milford Bulk Plant within twelve months of beginning operations at the Facility.

33. Respondent's failure to provide adequate secondary containment at the truck loading/unloading area of the Milford Bulk Plant within twelve months of beginning operations at the Facility violated 40 C.F.R. § 112.7(e)(4)(ii)(1973), now codified at 40 C.F.R. § 112.7(h) (2002, as amended in 2006).

34. In September of 2009, Respondent brought the secondary containment structures at the truck loading/unloading rack at the Milford Bulk Plant into compliance with the requirements of 40 C.F.R. § 112.7(e)(4)(ii)(1973), now codified at 40 C.F.R. § 112.7(h) (2002, as amended in 2006).

COUNT II

Failure to Have Secondary Containment at the Loading/Unloading Area of the Lewes Bulk Plant

35. Paragraphs 1 through 34 above are hereby incorporated by reference.

36. Respondent prepared an SPCC Plan for the Lewes Bulk Plant in December 2005.

The December 2005 SPCC Plan stated that the facility tank car and truck loading/unloading rack area lacked the secondary containment structures required by the spill prevention regulations. The SPCC Plan advised Respondent to provide adequate structures.

37. On February 28, 2008, an EPA inspector conducted an inspection of the Lewes Bulk Plant and observed that the truck loading/unloading rack area did not have any secondary containment structures.

38. Respondent failed to provide any secondary containment within twelve months of beginning operations at the Facility.

39. Respondent's failure to provide adequate secondary containment at the truck loading/unloading area at the Lewes Bulk Plant within twelve months of beginning operations at the Facility violated 40 C.F.R. § 112.7(e)(4)(ii)(1973), now codified at 40 C.F.R. § 112.7(h) (2002, as amended in 2006).

40. In October of 2009, Respondent provided secondary containment structures at the truck loading/unloading rack at the Lewes Bulk Plant, in compliance with the requirements of 40 C.F.R. § 112.7(e)(4)(ii)(1973), now codified at 40 C.F.R. § 112.7(h) (2002, as amended in 2006).

COUNT III

Failure to Have Adequate Secondary Containment at the Bulk Storage Tank Area of the Milford Bulk Plant

41. Paragraphs 1 through 40 above are hereby incorporated by reference.

42. Respondent prepared an SPCC Plan for the Milford Bulk Plant in July 2005. The July 2005 SPCC Plan stated that the secondary containment structures around the bulk storage tanks failed to satisfy the spill prevention regulation requirements. The SPCC Plan advised Respondent to repair the inadequate structures.

43. On October 14, 2008, an EPA inspector conducted an inspection of the Milford Bulk Plant and observed that the secondary containment structures for the bulk storage containers were inadequate.

44. Respondent failed to provide adequate secondary containment structures for the bulk storage tank area at the Milford Bulk Plant within twelve months of beginning operations at the Facility.

45. Respondent's failure to provide adequate secondary containment structures for the bulk storage tank area at the Milford Bulk Plant within twelve months of beginning operations at the Facility violated 40 C.F.R. § 112.7(e)(2)(ii)(1973), now codified at 40 C.F.R. § 112.8(c)(2).

46. In September of 2009, the Respondent brought the secondary containment structures for the bulk storage tank area at the Milford Bulk Plant into compliance with the requirements of 40 C.F.R. § 112.7(e)(2)(ii)(1973), now codified at 40 C.F.R. § 112.8(c)(2).

COUNT IV

Failure to Have Adequate Secondary Containment at the Bulk Storage Tank Area of the Lewes Bulk Plant

47. Paragraphs 1 through 46 above are hereby incorporated by reference.

48. Respondent prepared an SPCC Plan for the Lewes Bulk Plant in December 2005. The December 2005 SPCC Plan stated that the secondary containment structures for the bulk storage containers failed to satisfy the spill prevention regulation requirements. The SPCC Plan advised Respondent to repair the inadequate structures.

49. On February 28, 2008, an EPA inspector conducted an inspection of the Lewes Bulk Plant and observed that the secondary containment structures for the bulk storage tank area were inadequate.

50. Respondent failed to provide adequate secondary containment structures for the bulk storage tank area at the Lewes Bulk Plant within twelve months of beginning operations at the Facility.

51. Respondent's failure to provide adequate secondary containment structures for the bulk storage tank area at the Lewes Bulk Plant within twelve months of beginning operations at the Facility violated 40 C.F.R. § 112.7(e)(2)(ii)(1973), now codified at 40 C.F.R. § 112.8(c)(2).

52. In October of 2009, the Respondent brought the secondary containment structures for the bulk storage tank area at the Lewes Bulk Plant into compliance with the requirements of 40 C.F.R. § 112.7(e)(2)(ii)(1973), now codified at 40 C.F.R. § 112.8(c)(2).

Waiver of Rights

53. The Respondent waives the right to a hearing under Section 311(b)(6)(B)(ii) of the Act and to appeal any Final Order in this matter under Section 311(b)(6)(G)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(G)(ii), and consents to the issuance of a Final Order without further adjudication.

Penalty

54. The Complainant proposes, and Respondent consents to, the assessment of a civil penalty of Forty Thousand Dollars (\$40,000.00).

55. The Parties find and represent that the aforesaid settlement amount is reasonable and is based upon Complainant's consideration of a number of factors, including the penalty criteria set forth in Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(6), *i.e.*, the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent, economic impact of the penalty on the violator, any history of prior such violations, the degree of culpability, and such other matters as justice may require. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act* (August 1998), and the *Adjustment of Civil Monetary Penalties for Inflation Rule*, set forth at 40 C.F.R. Part 19. The Parties further acknowledge and represent that the aforesaid settlement is based, in part, upon an analysis of Respondent's ability to pay a civil penalty, performed with consideration of EPA's *Guidance on Determining a Violator's Ability to Pay a Civil Penalty* (1986).

56. In reliance upon the financial information submitted by Respondent, Complainant has concluded that Respondent has established that it is unable to pay the full amount of the civil penalty proposed by the Complainant, and that Respondent is able to pay a civil penalty in the amount of Forty Thousand Dollars (\$40,000.00) in settlement of the above-captioned action.

57. By the signature below, Respondent certifies that the information submitted to EPA regarding Respondent's ability to pay and regarding any other matter at issue in this proceeding, is accurate and not misleading. Respondent is aware that the submission of false or misleading information to the United States government may subject a person to separate civil

and/or criminal liability. Complainant reserves the right to seek and obtain appropriate relief if Complainant obtains evidence that the information provided and/or representations made by Respondent to Complainant regarding Respondent's claim of inability to pay, or regarding any of other matter herein at issue, are false or, in any material respect, inaccurate.

Payment Terms

Based on the forgoing, the parties, in their own capacity or by their attorneys or authorized representatives, hereby agree that:

58. No later than 30 days after the effective date of the Final Order, the Respondent shall pay Forty Thousand Dollars (\$40,000.00) by means of a cashier's or certified check, or by electronic funds transfer (EFT). If paying by check, the Respondent shall submit a cashier's or certified check, payable to the "Environmental Protection Agency," and bearing the notation "OSTLF-311" and the docket number of this case. If the Respondent sends payment by check, the payment shall be addressed to:

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

If paying by EFT, the Respondent shall transfer Forty Thousand Dollars (\$40,000.00) to:

Federal Reserve Bank of NY
ABA 021030004
Account 68010727
33 Liberty Street
New York, N.Y. 10045

Field Tag 4200 of the EFT message shall read "D 68010727 Environmental Protection Agency".

In the case of an international transfer of funds, the Respondent shall use SWIFT address FYNYS33.

59. The Respondent shall submit copies of the check (or, in the case of an EFT transfer, copies of the EFT confirmation) to the following persons:

Natalie L. Katz
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC30)
1650 Arch Street
Philadelphia, PA 19103-2029


and

Ms. Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

60. Failure by the Respondent to pay the penalty assessed by the Final Order in full by its due date may subject Respondent to a civil action to collect the assessed penalty, plus interest, attorney's fees, costs and an additional quarterly nonpayment penalty pursuant to Section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H). In any such collection action, the validity, amount and appropriateness of the penalty agreed to herein shall not be subject to review.


SERVICE ENERGY, LLC

Date: 7/26/10


Michael Steiner, Vice President

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 8/5/10


Ronald J. Borsellino, Director
Hazardous Site Cleanup Division
EPA Region III

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN THE MATTER OF

SERVICE ENERGY, LLC
3799 N. Dupont Highway
Dover, DE 19901-1574,

Respondent

Lewes Bulk Plant
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Lewes, Delaware 19958

Milford Bulk Plant
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CONSENT AGREEMENT
AND FINAL ORDER
UNDER 40 C.F.R. § 22.13(b)

Docket No. CWA-03-2010-0358

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SEP 15 2010

FINAL ORDER

Pursuant to Section 311(b)(6) of the Clean Water Act, 33 U.S.C. § 1321(b)(6), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits," codified at 40 C.F.R. Part 22, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order, and the Stipulations by the parties and the Allegations by the Complainant are adopted as Findings in this Final Order.

The Respondent is ordered to comply with the terms of the Consent Agreement.

Date: _____

9/15/10



Renee Sarajian
Regional Judicial Officer

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

IN THE MATTER OF

SERVICE ENERGY, LLC
3799 N. Dupont Highway
Dover, DE 19901-1574,

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OFFICE OF REGIONAL COUNSEL
PHILADELPHIA, PA

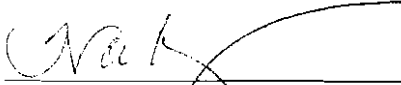
CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2010, I filed and served copies of the attached Consent Agreement and Final Order, as follows:

Original and One Copy
filed: (via hand delivery) Lydia Guy (3RC00)
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Copy to:
(via Overnight Mail) Michael Steiner, Vice President
Mr. Paul Hufschmidt, Vice President of Retail Operations
Service Energy, LLC
3799 N. Dupont Highway
Dover, DE 19901-1574

Date: September 15, 2010



Natalie L. Katz
Senior Assistant Regional Counsel
EPA, Region III