

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5



In the Matter of:) Docket No. CWA-05-2016-0016
)
Effort Enterprises of Indiana, Inc.) Proceeding to Assess a Class II Civil Penalty
Indianapolis, Indiana) Under Section 311(b)(6) of the Clean Water
) Act, 33 U.S.C. § 1321(b)(6)
Respondent.)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 311(b)(6)(A)(ii) of the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6)(A)(ii), and Sections 22.1(a)(2), 22.13(b) and 22.18(b)(2) and (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. Part 22.
2. Complainant is the Director of the Superfund Division, U.S. Environmental Protection Agency (EPA), Region 5.
3. Respondent is Effort Enterprises of Indiana, Inc., a corporation doing business in Indiana.
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). 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 assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Judicial Review and Hearing

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

8. Respondent waives its right to obtain judicial review of this CAFO under Section 311(b)(6)(G) of the CWA, 33 U.S.C. § 1321(b)(6)(G), its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

Statutory and Regulatory Background

Spill prevention, control and countermeasure plan requirements

9. Section 311(j)(1)(C) of the CWA, 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 and hazardous substances from vessels and from onshore and offshore facilities, and to contain such discharges. The authority to promulgate these regulations for non-transportation-related onshore facilities has been delegated to EPA by Executive Order 12777 (October 18, 1991).

10. The oil pollution prevention regulations at 40 C.F.R. Part 112 implement the requirements of Section 311(j)(1)(C) of the CWA, and set forth procedures, methods, equipment, and other requirements to prevent the discharge of oil from non-transportation-related onshore facilities into or upon, among other things, the navigable waters of the United States and adjoining shorelines. 40 C.F.R § 112.1(a)(1).

11. The oil pollution prevention regulations at 40 C.F.R. Part 112 apply to, among other things, owners and operators of non-transportation-related onshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil and oil products, which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in 40 C.F.R. § 110.3, into or upon the navigable waters of the United States or adjoining shorelines, and have an aboveground oil storage capacity of more than 1,320 U.S. gallons or a completely buried oil storage capacity greater than 42,000 U.S. gallons. 40 C.F.R. § 112.1(b).

12. 40 C.F.R. § 112.3 requires the owner or operator of a subject facility to prepare in writing and implement a Spill Prevention Control and Countermeasure Plan (“SPCC Plan”) in accordance with the requirements of 40 C.F.R. Part 112.

13. 40 C.F.R. § 112.7 requires the owner or operator of a subject facility to: prepare a SPCC Plan in accordance with good engineering practices; have the full approval of management at a level of authority to implement the Plan; and to prepare the Plan in writing and follow the sequence specified in 40 C.F.R. § 112.7 or to prepare an equivalent Plan that meets all of the applicable requirements listed 40 C.F.R. Part 112.

14. 40 C.F.R. § 112.7(a)(1) requires the owner or operator of a subject facility to include a discussion in the Plan of the facility’s conformance with the requirements listed in 40 C.F.R. Part 112.

15. 40 C.F.R. § 112.7(c) requires the owner or operator of a subject facility to provide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in 40 C.F.R. § 112.1(b), and further requires that the entire containment system,

including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs.

16. 40 C.F.R. § 112.7(e) requires the owner or operator of a subject facility to conduct inspections and tests required by 40 C.F.R. Part 112 in accordance with written procedures developed for the facility and to keep the written procedures and inspection records and tests, signed by the appropriate supervisor or inspector, with the SPCC Plan for a period of three years.

17. 40 C.F.R. § 112.8(b)(3) requires the owner or operator of a subject facility to design facility drainage systems from undiked areas with a potential for a discharge (such as where piping is located outside containment walls or where tank truck discharges may occur outside the loading area) to flow into ponds, lagoons, or catchment basins designed to retain oil or return it to the facility.

18. 40 C.F.R. § 112.8(b)(4) requires the owner or operator of a subject facility to, if facility drainage is not engineered as in 40 C.F.R. § 112.8(b)(3), equip the final discharge of all ditches inside the facility with a diversion system that would, in the event of an uncontrolled discharge, retain oil in the facility.

General provisions and enforcement of the CWA

19. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as waters of the United States.

20. Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10) and 40 C.F.R. § 112.2, define “onshore facility” as any facility of any kind located in, on, or under any land within the United States, other than submerged land.

21. Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1) and 40 C.F.R. § 112.2, define “oil” as oil of any kind and in any form, including but not limited to: petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

22. Section 311(a)(6)(B) of the CWA, 33 U.S.C. § 1321(a)(6)(B) and 40 C.F.R. § 112.2, define “owner or operator” in the case of an onshore facility as any person owning or operating such onshore facility.

23. Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2, define “person” as including an individual, firm, corporation, association, and a partnership.

24. 40 C.F.R. § 112.3(a)(1) provides that the owner or operator of a subject facility must prepare and implement a SPCC Plan that meets the requirements of 40 C.F.R. Part 112 no later than November 10, 2011, or before beginning operations if the facility becomes operational after November 10, 2011.

25. Appendix A to 40 C.F.R. § Part 112, Memorandum of Understanding between the Secretary of Transportation and EPA, defines “non-transportation-related” facility to include: oil production facilities including all equipment and appurtenances related thereto; oil refining facilities including all equipment and appurtenances related thereto; oil storage facilities, including all equipment and appurtenances related thereto; fixed bulk plant storage and terminal oil storage facilities; industrial, commercial, agricultural or public facilities which use and store oil; and waste treatment facilities, including in-plant pipelines, effluent discharge lines, and storage tanks.

26. EPA may assess a class II civil penalty against any owner, operator, or person in charge of any onshore facility who fails or refuses to comply with any regulations issued under Section 311(j) of the CWA, 33 U.S.C. 1321(j), under Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 3121(b)(6)(A)(ii).

27. EPA may assess a class II civil penalty of up to \$16,000 per violation for each day of violation up to a maximum of \$187,500 for violations that occurred after December 6, 2013, under Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R.

Part 19.

Factual Allegations and Alleged Violations

28. Respondent owns and operates a transportation logistics terminal at 9967 Westpoint Drive, Indianapolis, Indiana (“Facility”).

29. Respondent began operating the facility prior to 2009.

30. At all times relevant to this CAFO, Respondent operated an 8,000 gallon capacity above-ground oil storage tank (“oil tank”) to fill moving vans and trucks at the Facility.

31. Respondent is a corporation, and is therefore a “person” as defined in Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7) and 40 C.F.R. § 112.2.

32. Respondent is an “owner” and “operator” of the Facility within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2.

33. At all times relevant to this CAFO, Respondent engaged in drilling, producing, gathering, storing, processing, refining, transferring, using, distributing or consuming oil or oil products at the Facility.

34. The Facility is located on land within the United States, and is therefore an “onshore facility” as defined in Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

35. At all times relevant to this CAFO, Respondent stored oil at the Facility, and the Facility was therefore an onshore “non-transportation-related” facility within the meaning of 40 C.F.R. Part 112, Appendix A.

36. At all times relevant to this CAFO, the Facility had a total oil storage capacity of 8,000 gallons.

37. At all times relevant to this CAFO, there was a potential discharge pathway from the storm drains that are located at the Facility driveway several yards to the north of the oil tank. These storm drains flow north approximately 1,700 feet before discharging to a storm water retention basin. The retention basin contains a storm water pond approximately 1,000 feet in length which empties to Cheeney Creek, a tributary of the White River. The total distance from Respondent’s Facility to the White River through this drainage pathway is approximately two miles.

38. Cheeney Creek flows through sensitive areas including the Ritchey Nature Preserve, which is home to deer and migratory water fowl, and backyards of residential housing. Private drinking water wells are also found in the area.

39. The oil that Respondent stored, handled, refined and/or processed at the Facility could reasonably have been expected to discharge to Cheeney Creek and the White River.

40. Cheeney Creek is a tributary of and flows into the White River, and is therefore a “navigable water” of the United States within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

41. The White River is an interstate river that is used by interstate travelers for recreational or other purposes and is a navigable in fact water, and is therefore a “navigable water” of the United States within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

42. At all times relevant to this CAFO, Respondent was subject to the oil pollution prevention regulations, and was therefore required to prepare and implement a SPCC Plan in accordance with the requirements of 40 C.F.R. Part 112.

43. At all times relevant to this CAFO, a secondary containment system surrounded the oil tank, consisting of a steel base/floor that sits on steel channel beams.

44. On March 13, 2015, EPA On-Scene Coordinator Jason Sewell (OSC Sewell) arrived at the Facility in connection with responding to an oil discharge to Cheeney Creek and the White River.

45. On March 13, 2015, OSC Sewell requested a copy of Respondent’s SPCC Plan for the Facility.

46. On March 13, 2015, Respondent provided OSC Sewell with a copy of a four page undated document titled “Spill Containment Plan.”

47. On March 18, 2015, authorized representatives of EPA conducted an inspection of the Facility to determine Respondent’s compliance with the oil pollution prevention regulations at 40 C.F.R. Part 112.

48. During the March 18, 2015 inspection, EPA inspectors observed piping associated with a pump station for filling vans and trucks located outside the secondary containment system for the oil tank in the truck loading area. The inspectors did not observe any type of secondary containment or diversion system for this piping.

49. During the March 18, 2015 inspection, EPA inspectors requested copies of the written procedures for inspections and tests developed for the facility and records of those inspections and tests for the previous three years.

50. Respondent did not provide EPA inspectors with written procedures developed for the facility or any records of testing or inspections.

51. Respondent failed to prepare in writing and implement a SPCC Plan in accordance with 40 C.F.R. Part 112 to prevent the discharge of oil from the facility to navigable waters, in violation of 40 C.F.R. § 112.3.

52. Respondent failed to include in an SPCC Plan a discussion of the facility's conformance with 40 C.F.R. Part 112, in violation of 40 C.F.R. § 112.7(a)(1).

53. Respondent failed to provide appropriate containment and/or diversionary structures or equipment to prevent a discharge as described in 40 C.F.R § 112.1(b) from the piping associated with the pump station for filling vans and trucks in the loading area, in violation of 40 C.F.R. § 112.7(c).

54. Respondent failed to develop written procedures for conducting inspections and tests, signed by the appropriate supervisor or inspector, with the SPCC Plan for a period of three years, in violation of 40 C.F.R. § 112.7(e).

55. Respondent failed to design facility drainage systems from undiked areas with a potential for discharge (such as where piping is located outside containment walls or where tank truck discharges may occur outside the loading area) to flow into ponds, lagoons or catchment basins designed to return it to the facility, in violation of 40 C.F.R. § 112.8(b)(3).

56. Respondent failed to equip the final discharge of all ditches within the facility with a diversion system that would, in the event of an uncontrolled discharge, retain oil in the facility, in violation of 40 C.F.R. § 112.8(b)(4).

Civil Penalty

57. Based on analysis of the factors specified in Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8), the facts of this case, the *Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act*, dated August 1998, Complainant has determined that an appropriate civil penalty to settle this action is \$35,188.

58. Within 30 days after the effective date of this CAFO, Respondent must pay a \$35,188 civil penalty by an electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
"D68010727 Environmental Protection Agency"

The comment or description field of the electronic funds transfer must state Respondent's name and the docket number of this CAFO.

59. Respondent must send a notice of payment that states Respondent's name and the docket number of this CAFO to EPA at the following addresses when it pays the penalty:

Ellen Riley (SC-5J)
Enforcement Officer
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Kasey Barton (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

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

61. If Respondent does not pay timely the civil penalty, EPA may request the Attorney General of the United States to bring an action to collect any unpaid portion of the penalty with interest, nonpayment penalties and the United States enforcement expenses for the collection action under Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

62. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondent must pay the United States enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings. In addition, Respondent must pay a nonpayment

penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 20 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. 33 U.S.C. § 1321(b)(6)(H).

General Provisions

63. Consistent with the “Standing Order Authorizing E-Mail Service of Order and Other Documents Issued by the Regional Administrator or Regional Judicial Officer Under the Consolidated Rules,” dated March 27, 2015, the parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: barton.kasey@epa.gov (for Complainant); and timothy.swickard@lewisbrisbois.com (for Respondent).

64. As of the effective date of this CAFO, Respondent does not store any oil in the oil tank. Respondent is currently testing the oil tank dispenser system for any leakage and by April 15, 2016 must “permanently close” the oil tank within the meaning of 40 C.F.R. § 112.2. Should Respondent re-open the tank to store oil or otherwise become subject to the oil pollution prevention regulations at 40 C.F.R. Part 112, Respondent must comply with all applicable requirements, including but not limited to the requirement to develop and implement an SPCC Plan for the storage of oil in the re-opened tank pursuant to 40 C.F.R. Part 112.

65. This CAFO resolves only Respondent’s liability for federal civil penalties for the violations alleged in this CAFO.

66. The 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 violation of law.

67. Respondent certifies that it is complying with the requirements of the oil pollution prevention regulations at 40 C.F.R. Part 112.

68. This CAFO does not affect Respondent's responsibility to comply with the CWA and other applicable federal, state and local laws. Except as provided in paragraph 65 above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by EPA.

69. This CAFO constitutes a "prior violation(s)" as that term is used in EPA's Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act to determine Respondent's "history of prior violations" under Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8).

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

71. Each person signing this consent agreement 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.

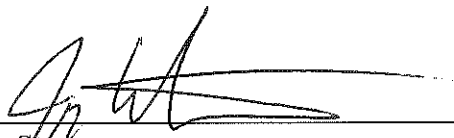
72. Each party agrees to bear its own costs and attorney fees in this action.

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

74. Complainant has provided public notice of and reasonable opportunity to comment on the proposed issuance of this CAFO in accordance with Section 311(b)(6)(C)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(i) and 40 C.F.R. § 22.45(b).


Effort Enterprises of Indiana, Inc., Respondent **CWA-05-2016-0016**

5/12/16
Date


Jay Strong
V.P. & General Manager
Effort Enterprises of Indiana, Inc.

United States Environmental Protection Agency, Complainant

5-26-16
Date


Richard C. Karl
Director
Superfund Division
U.S. Environmental Protection Agency, Region 5