



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

NOV 09 2007

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0006 0185 8023

Terry Wright
Director of Manufacturing
Austin Powder Company
P.O. Box 317
McArthur, OH 45651

Consent Agreement and Final Order, Docket No. TSCA-05-2008-0002

Dear Mr. Wright:

I have enclosed a copy of an original fully executed Consent Agreement and Final Order in resolution of the above case. This document was filed on November 9, 2007 with the Regional Hearing Clerk.

The civil penalty in the amount of \$5,000 is to be paid in the manner prescribed in paragraphs 37 and 38. Please be certain that the number **BD** 2750847X001 and the docket number are written on both the transmittal letter and on the check. Payment is due by December 10, 2007 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in cursive script that reads "Terry Bonace".

Terry Bonace
Pesticides and Toxics Compliance Section

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)
Ann Coyle, ORC/C-14J (w/Encl.)
Eric Volck, Cincinnati Finance/MWD (w/Encl.)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

**Austin Powder Company
McArthur, Ohio**

Respondent.

)
) **Docket No.: TSCA-05-2008-0002**
)
) **Proceeding to Assess a Civil Penalty**
) **under Section 16(a) of the Toxic**
) **Substances Control Act,**
) **15 U.S.C. § 2615(a)**
)
)

Consent Agreement and Final Order

1. This is an administrative action commenced and concluded under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a) and Sections 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. The Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. Respondent is Austin Powder Company, a corporation doing business in Ohio.

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.

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REGION 5

Jurisdiction and Waiver of Right to Hearing

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

8. Respondent waives 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.

9. Respondent certifies that it is complying with TSCA, 15 U.S.C. § 2601 *et seq.*

Statutory and Regulatory Background

10. Section 8(b)(1) of TSCA, 15 U.S.C. § 2607(b)(1), requires the Administrator to compile, keep current, and publish a list of each chemical substance that is manufactured or processed in the United States. This list is known as the “Master Inventory File.” It includes chemical substances reported under Sections 5(a)(1) and 8(a)(1) of TSCA, 15 U.S.C.

§§ 2604(a)(1) and 2607(a)(1), for which a valid Notice of Commencement of Manufacture or Import has been received by U.S. EPA pursuant to 40 C.F.R. § 720.102.

11. Pursuant to Section 8 of TSCA, 15 U.S.C. § 2607, U.S. EPA promulgated the Inventory Reporting Regulations on December 23, 1977 (42 Fed. Reg. 64572), and the *Partial Updating of TSCA Inventory Data Base* rule (IUR) on June 12, 1986 (51 Fed. Reg. 21447). The Inventory Reporting Regulations, as amended, and the IUR, as amended, are codified together at 40 C.F.R. Part 710.

12. Pursuant to 40 C.F.R. § 710.25, the reporting requirements set forth in 40 C.F.R. Part 710 apply to any chemical substance that is in the Master Inventory File at the beginning of a reporting period described in 40 C.F.R. § 710.33, unless the chemical substance is specifically excluded by 40 C.F.R. § 710.26.

13. 40 C.F.R. § 710.28 provides that, except as provided in §§ 710.29 and 710.30, the reporting requirements of Part 710 apply to any person who manufactures for commercial purposes 10,000 pounds or more of a chemical substance for which information is required to be reported under 40 C.F.R. § 710.25, at any single site owned or controlled by that person at any time during the person's latest complete corporate fiscal year before August 25, 1986, or before August 25 at four-year intervals thereafter.

14. Section 3(7) of TSCA, 15 U.S.C. § 2606(7) and 40 C.F.R. § 710.3 define "manufacture" to mean to manufacture, produce, or import for commercial purposes.

15. 40 C.F.R. § 710.29 states that a person described in 40 C.F.R. § 710.28 is not subject to the Inventory Update requirements if that person qualifies as a small business as defined in 40 C.F.R. § 704.3.

16. 40 C.F.R. § 704.3 defines a small manufacturer or importer as a manufacturer or importer whose total annual sales, when combined with those of its parent company (if any), are less than \$40 million. However, if the annual production or importation volume of a particular substance at any individual site owned or controlled by the manufacturer or importer is greater than 100,000 pounds, the manufacturer or importer does not qualify as "small" for purposes of reporting in the production or importation of that substance at that site unless the manufacturer or importer of a substance has a total annual sales, when combined with those of its parent company, of less than \$4 million.

17. 40 C.F.R. § 710.32 requires any person who must report under Part 710 to submit to U.S. EPA the required information for each chemical substance described in § 710.25 that the person manufactured for commercial purposes in an amount of 10,000 pounds or more at a single site during a corporate fiscal year as described at 40 C.F.R. § 710.28.

18. 40 C.F.R. § 710.33 requires that all information reported to U.S. EPA in response to the requirements of Part 710 be submitted during an applicable reporting period. The reporting periods are from August 25 to December 23, 1986, and from August 25 to December 23 at four-year intervals thereafter. Any person described in 40 C.F.R. § 710.28 must report during the appropriate reporting period for each chemical substance described in 40 C.F.R. § 710.25 that the person manufactured during the applicable corporate fiscal year described in 40 C.F.R. § 710.28.

19. Under Section 15(3) of TSCA, 15 U.S.C. § 2614(3), it is unlawful for any person to fail or refuse to establish or maintain records, submit reports, notices or other information required by TSCA, or any rule promulgated thereunder.

Factual Allegations and Alleged Violations

20. On June 30, 2005, a representative of U.S. EPA conducted an inspection at Respondent's place of business at 430 Powder Plant Road, McArthur, Ohio, to determine compliance with Sections 4, 5, 8, 12, and 13 of TSCA, 15 U.S.C. §§ 2503, 2604, 2607, 2611, and 2612, and regulations promulgated thereunder.

21. During and after the June 30, 2005, inspection, a representative of U.S. EPA reviewed, among other things, Respondent's chemical production records for the period January 1 to December 31, 2001.

22. Respondent produces explosives for commercial sale at this facility.

23. Respondent "manufactured," as that term is defined at Section 3(7) of TSCA, 15 U.S.C. § 2602(7) and 40 C.F.R. § 710.3, at least 87,895 pounds of ethylenediamine dinitrate, also known as 1,2-ethanediamine, N1,N2-dinitro-, CAS No. 505-71-5 (the chemical substance), between January 1 and December 31, 2001.

24. Respondent's latest complete corporate fiscal year prior to August 25, 2002, was January 1 to December 31, 2001.

25. From January 1 through December 31, 2001, Respondent, as a corporation, was a "person" as defined at 40 C.F.R. § 710.3.

26. U.S. EPA listed the chemical substance in its Master Inventory File prior to August 25, 2002.

27. Respondent manufactured "for commercial purposes," as that term is defined at 40 C.F.R. § 710.3, the entire quantity of the chemical substance.

28. The chemical substance is not excluded from the reporting requirements of 40 C.F.R. Part 710 by any provision of 40 C.F.R. § 710.26.

29. Respondent is not exempt from the reporting requirements of 40 C.F.R. Part 710 for its manufacture for commercial purposes of the chemical substance based on any provision of 40 C.F.R. § 710.29.

30. Respondent is not exempt from the reporting requirements of 40 C.F.R. Part 710 based on any provision of 40 C.F.R. § 710.30.

31. Respondent manufactured the entire quantity of the chemical substance entirely for use other than: as a pesticide, as defined in the Federal Insecticide, Fungicide, and Rodenticide Act; as tobacco or any tobacco product; as a source material, special nuclear material, or byproduct material as those terms are defined in the Atomic Energy Act of 1954 and any regulations issued under such Act; as an article the sale of which is subject to the tax imposed by Section 4181 of the Internal Revenue Code of 1954 (i.e., any pistol, firearm, revolver, shells or cartridges); or as a food, food additive, drug, cosmetic or device as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act.

32. The entire quantity of the chemical substance Respondent manufactured is a “chemical substance,” as that term is defined at Section 3(2) of TSCA, 15 U.S.C. § 2602(2) and 40 C.F.R. § 710.3.

33. As of the June 30, 2005, inspection, Respondent had not submitted to U.S. EPA the information required by 40 C.F.R. § 710.32 relating to its manufacture for commercial purposes of the chemical substance.

34. Respondent’s failure to submit to U.S. EPA, between August 25 and December 23, 2002, the information required by 40 C.F.R. § 710.32 relating to its manufacture for commercial purposes of the chemical substance violates 40 C.F.R. §§ 710.32 and 710.33 and Section 15(3) of TSCA, 15 U.S.C. § 2614(3).

35. Respondent’s violation of 40 C.F.R. §§ 710.32 and 710.33 and Section 15(3) of TSCA, 15 U.S.C. § 2614(3), subject it to civil penalties pursuant to Section 16 of TSCA, 15 U.S.C. § 2615.

Civil Penalty

36. Pursuant to Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), Complainant determined that an appropriate civil penalty to settle this action is \$5,000. In determining the penalty amount, Complainant considered the nature, circumstances, extent, and gravity of the violations, and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior TSCA violations, the degree of culpability, and such other matters as justice may require, and Respondent’s agreement to perform a supplemental environmental project. Complainant also considered U.S. EPA’s *Guidelines for Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act* (45 Fed. Reg. 59770) and

The Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12 and 13, effective June 1, 1999.

37. Within 30 days after the effective date of this CAFO, Respondent must pay a \$5,000 civil penalty for the TSCA violations. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

U.S. EPA, Region 5
P.O. Box 371531
Pittsburgh, PA 15251-7531

38. A transmittal letter stating Respondent's name, the case title, Respondent's complete address, the case docket number and the billing document number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-13J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Terence Bonace-CMB (LC-8J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Ann Coyle-ORC (C-14J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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

40. If Respondent does not timely pay the civil penalty or any stipulated penalties under paragraph 51 below, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and the United States' enforcement

expenses for the collection action. The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action. TSCA Section 16(a)(4), 42 U.S.C. § 2615(a)(4).

41. Interest will accrue on any overdue amount from the date payment was due in accordance with 31 C.F.R. § 901.9(b). Respondent will 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 6 percent per year penalty on any principal amount 90 days past due.

Supplemental Environmental Project

42. Respondent must complete a supplemental environmental project (SEP) designed to protect the environment and public health by improving the safety of local first responders when they deal with chemical emergencies.

43. Respondent must complete the SEP as follows: within 60 days of the effective date of this CAFO, purchase eight sets of National Fire Protection Association-approved personal protective equipment, including a helmet with shield, Nomex hood, coat, bunker pants, boots and gloves, and donate that equipment to the Zaleski, Ohio, fire department.

44. Respondent must spend at least \$16,000 to purchase the equipment.

45. Respondent certifies that it is not required to perform or develop the SEP by any law, regulation, grant, order, or agreement, or as injunctive relief as of the date it signs this CAFO. Respondent further certifies that it has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

46. Respondent must submit a SEP completion report to U.S. EPA within 60 days after the effective date of this CAFO. This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Description of any problems and the actions taken to correct the problems;

- c. Itemized costs of goods and services used to complete the SEP documented by copies of invoices, purchase orders, or canceled checks that specifically identify and itemize the individual costs of the goods and services;
- d. Letter from the Zaleski Fire Department confirming its receipt of the equipment to be purchased in fulfillment of this SEP;
- e. Certification that Respondent has completed the SEP in compliance with this CAFO; and
- f. Description of the environmental and public health benefits resulting from the SEP.

47. Respondent must submit all notices and reports required by this CAFO by first class mail to Terence Bonace of the Chemicals Management Branch.

48. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

49. Following receipt of the SEP completion report described in paragraph 46, above, U.S. EPA must notify Respondent in writing that:

- a. Respondent has satisfactorily completed the SEP and the SEP report;
- b. There are deficiencies in the SEP as completed or in the SEP report and U.S. EPA will give Respondent 30 days to correct the deficiencies; or
- c. It has not satisfactorily completed the SEP or the SEP report and U.S. EPA will seek stipulated penalties under paragraph 51.

50. If U.S. EPA exercises option b, above, Respondent may object in writing to the deficiency notice within ten days of receiving the notice. The parties will have 30 days from U.S. EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, U.S. EPA will give Respondent a written decision on its objection. Respondent will comply with any requirements that U.S. EPA imposes in its decision. If Respondent does not complete the SEP as required by U.S. EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 51, below.

51. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

- a. If Respondent has spent less than the amount set forth in paragraph 44, above, Respondent must pay a stipulated penalty equal to the difference between the amount it spent on the SEP and the amount set forth in paragraph 44.
- b. If Respondent has completed the SEP, but the SEP is not satisfactory, Respondent must pay \$1,600, in addition to any penalty required under subparagraph a, above.
- c. If Respondent halts or abandons work on the SEP, the Respondent must pay a stipulated penalty of \$3,200, in addition to the penalty required under subparagraph a, above. Such penalties will accrue as of the date for completing the SEP or the date performance ceases, whichever is earlier.
- d. If Respondent fails to comply with the schedule in paragraph 43 for implementing the SEP, fails to submit timely the SEP completion report, Respondent must pay stipulated penalties for each failure to meet an applicable milestone, as follows:

<u>Penalty per violation per day</u>	<u>Period of violation</u>
\$100	1 st through 14 th day
\$250	15 th through 30 th day
\$500	31 st day and beyond

These penalties will accrue from the date Respondent was required to meet each milestone until it achieves compliance with the milestone.

52. U.S. EPA's determination of whether Respondent satisfactorily completed the SEP will bind Respondent.

53. Respondent must pay any stipulated penalties within 15 days of receiving U.S. EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraph 37, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

54. Any public statement that Respondent makes referring to the SEP must include the following language, "Austin Powder Company undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against Austin Powder Company for violations of the Toxic Substances Control Act."

55. The costs of the SEP are not deductible or depreciable for federal tax purposes.

General Provisions

56. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.

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

58. This CAFO does not affect Respondent's responsibility to comply with TSCA and other applicable federal, state, and local laws.

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

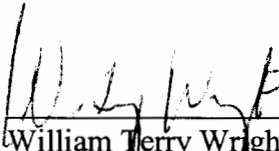
60. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

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

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

Austin Powder Company, Respondent

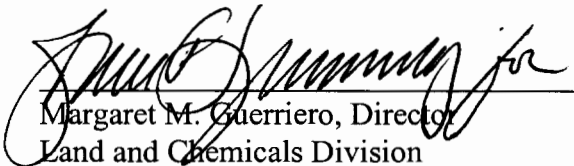
10/16/07
Date



William Terry Wright, Director of Manufacturing
Austin Powder Company

United States Environmental Protection Agency, Complainant

10/30/07
Date



Margaret M. Guerriero, Director
Land and Chemicals Division

TSCA-05-2008-0002

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In the Matter of:
Austin Powder Company
Docket No.

TSCA-05-2008-0002

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.

Date

11-06-07



Mary A. Gade
Regional Administrator
United States Environmental Protection Agency
Region 5

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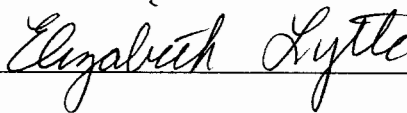
CERTIFICATE OF SERVICE

I hereby certify that a copy of the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving Austin Powder Company, was filed on November 9, 2007, with the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 0185 8023, a copy of the original to the Respondents:

Terry Wright
Director of Manufacturing
Austin Powder Company
P.O. Box 317
McArthur, OH 45651

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Ann Coyle, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD



Elizabeth Lytle
Pesticides and Toxics Compliance Section
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