

set forth the requirements of risk management programs that must be established and implemented at stationary sources subject to this section of the CAA. The regulations at 40 C.F.R. Part 68, Subparts A through G, require owners and operators of stationary sources to, among other things, develop and implement: (a) a management system to oversee the implementation of the risk management program elements; and (b) a risk management program that includes, but is not limited to, a hazard assessment, a prevention program, and an emergency response program. Pursuant to 40 C.F.R. Part 68, Subparts A and G, the risk management program for a stationary source that is subject to these requirements is to be described in a risk management plan ("RMP") that must be submitted to EPA.

7. Sections 112(r)(3) and (5) of the CAA, 42 U.S.C. §§ 7412(r)(3) and (5), require the Administrator to promulgate a list of regulated substances, with threshold quantities. EPA promulgated a regulation known as the List Rule, at 40 C.F.R. Part 68, Subpart F, which implements Sections 112(r)(3) and (5) of the CAA, and which lists the regulated substances and their threshold quantities.

8. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), and 40 C.F.R. §§ 68.10(a), 68.12, and 68.150, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process shall comply with the requirements of 40 C.F.R. Part 68 (including, but not limited to, submission of an RMP to EPA), no later than June 21, 1999, or three years after the date on which such regulated substance is first listed under 40 C.F.R. § 68.130, or the date on which the regulated substance is first present in a process above the threshold quantity, whichever is latest.

9. The regulations set forth at 40 C.F.R. Part 68 separate the covered processes into three categories, designated as Program 1, Program 2, and Program 3. A covered process is subject to Program 3 requirements, as per 40 C.F.R. § 68.10(d), if: (a) the process does not meet one or more of the Program 1 eligibility requirements set forth in 40 C.F.R. § 68.10(b); and (b) either one of the following conditions is met: the process is listed in one of the specific North American Industry Classification System (generally referred to as "NAICS") codes found at 40 C.F.R. § 68.10(d)(1) or the process is subject to the United States Occupational Safety and Health Administration process safety management standard set forth in 29 C.F.R. § 1910.119. As required by 40 C.F.R. § 68.10(c), a facility must register its RMP-covered process as a Program 2 process if it does not meet the requirements of either Program 1 or Program 3.

10. The regulations set forth at 40 C.F.R. § 68.12(d) require that the owner or operator of a stationary source with a Program 3 process undertake certain tasks, including, but not limited to, development and implementation of a management system (pursuant to 40 C.F.R. § 68.15), the implementation of prevention program requirements, which include mechanical integrity (pursuant to 40 C.F.R. §§ 68.65-68.87), the development and implementation of an emergency response program (pursuant to 40 C.F.R. §§ 68.90-68.95), and the submission of additional information on prevention program elements regarding Program 3 processes (pursuant to 40 C.F.R. § 68.175).

FINDINGS OF FACT

11. Respondent is the owner and/or operator of an ethanol manufacturing facility, located at 4141 Bates Road, Medina, New York (the "Facility").

12. On or about December 20, 2007, an RMP was submitted to EPA for the Facility, which registered two covered processes, an anhydrous ammonia process and a flammable mixture process. The RMP identified both processes as subject to Program 3 Level requirements. The RMP specified that the flammable mixture contained pentane, isopentane, butane, 1-butene, and isobutene. For the ammonia process, the RMP specified a quantity of 97,200 pounds of anhydrous ammonia, and for the flammable mixture process, the RMP specified a quantity of 314,160 pounds.

13. EPA conducted an inspection of the Facility on or about November 17, 2009 to assess compliance with Section 112(r) of the CAA and the applicable regulations, including those listed in 40 C.F.R. Part 68.

14. On June 16, 2010, EPA issued a "Show Cause" letter to Respondent regarding the results of the inspection, which, among other things, listed the violations discovered by EPA at the Facility as a result of the inspection, and requested that Respondent provide information including any steps taken by Respondent to come into compliance. Respondent submitted a response to the Show Cause letter to EPA dated July 1, 2010.

15. On or about February 26, 2013, an updated RMP was submitted to EPA for the Facility, in which Respondent registered two covered processes, an anhydrous ammonia process and the flammable mixture process. The RMP identified both processes as subject to Program 3 Level requirements. The RMP specified that the flammable mixture contained pentane, isopentane, butane, 1-butene, and isobutene. For the ammonia process, the RMP specified a quantity of 97,200 pounds of anhydrous ammonia, and for the flammable mixture process, the RMP specified a quantity of 924,000 pounds.

16. EPA issued a compliance order to Respondent on April 25, 2013, Index No. CAA-02-2013-1208 (the "Order"), pursuant to Section 113 of the CAA. The Order described violations of certain requirements of Section 112(r) of the CAA and 40 C.F.R. Part 68, including the following: hazard assessment requirements; process safety information requirements; process hazard analysis requirements; operating procedures requirements; mechanical integrity requirements; and initial training requirements. The Order required Respondent to perform certain activities at its Facility to come into compliance with the requirements of Section 112(r) of the CAA and 40 C.F.R. Part 68.

17. On September 3, 2013, Respondent submitted a final report to EPA pursuant to the requirements of the Order ("Final Report"). In response to questions and comments by EPA regarding the Final Report, Respondent submitted additional information to EPA by letter dated February 24, 2014.

EPA CONCLUSIONS OF LAW

18. Respondent is, and at all times referred to herein was, a “person” within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e).
19. The Facility is a stationary source pursuant to 40 C.F.R. § 68.3. The nearest public receptor is located approximately 700 feet from the Facility.
20. Anhydrous ammonia is a regulated substance pursuant to Section 112(r)(2) and (3) of the CAA and 40 C.F.R. § 68.3.
21. The threshold quantity for anhydrous ammonia, as listed in 40 C.F.R. § 68.130, Table 1, is 10,000 pounds.
22. Respondent handles and stores, and has handled and stored, anhydrous ammonia in its processes at the Facility in quantities exceeding the threshold quantity for anhydrous ammonia.
23. Pentane, isopentane, butane, 1-butene, and isobutane are regulated substances pursuant to Section 112(r)(2) and (3) of the CAA and 40 C.F.R. § 68.3.
24. At the time of the inspection, EPA identified violations of the regulations at 40 C.F.R. Part 68 at the Facility, including violations of hazard assessment requirements, of process safety information requirements, of process hazard analysis requirements, of operating procedures requirements, of mechanical integrity requirements, and of initial training requirements.
25. Respondent’s failure to comply fully with the requirements of 40 C.F.R. Part 68 regarding the Facility constitutes violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r). Respondent is therefore subject to the assessment of penalties under Section 113(d) of the CAA, 42 U.S.C. § 7413(d).

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Section 113(d) of the CAA and the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits” (40 C.F.R. Part 22), it is hereby agreed by and between Complainant and Respondent, as follows:

26. For the purpose of this proceeding and in the interest of an expeditious resolution of this matter, pursuant to 40 C.F.R. § 22.18(b)(2), Respondent (a) admits the jurisdictional basis for this matter, (b) admits the Findings of Fact set forth above, (c) consents to the assessment of the civil penalty set forth below, (d) consents to the issuance of the attached Final Order, and (e) waives its right to contest the allegations and its right to appeal the attached Final Order.

27. Respondent neither admits nor denies the EPA Conclusions of Law set forth above.

28. Respondent hereby certifies that it is now in compliance with all applicable requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and the regulations at 40 C.F.R. Part 68, at the Facility.

29. 40 C.F.R. § 68.115(b)(2) addresses regulated flammable substances in mixtures, and provides that if the concentration of the regulated substance in the mixture is one percent or greater by weight of the mixture, the entire weight of the mixture is treated as the regulated substance, unless the owner or operator can demonstrate that the mixture itself does not have a National Fire Protection Association (“NFPA”) flammability hazard rating of 4. Respondent certifies that the flammable mixture in the process at the Facility does not have an NFPA flammability hazard rating of 4, and that the flammable mixture process at the Facility is not subject to the requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and the regulations at 40 C.F.R. Part 68.

30. Respondent certifies that it does not intend to use a flammable mixture in the process at the Facility with a NFPA flammability hazard rating of 4.

31. Respondent further agrees to resubmit an RMP to EPA for the Facility, pursuant to the requirements of 40 C.F.R. §68.150 which will not include the flammable mixture process that it certifies is not subject to Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and the regulations at 40 C.F.R. Part 68. The RMP must be received by EPA **on or before thirty (30) calendar days** after the date of signature of the Final Order.

32. If Respondent begins to use a regulated flammable substance in a mixture that is subject to the requirements of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and the regulations at 40 C.F.R. Part 68, Respondent will comply with all such requirements, including timely submission of an RMP updated to address the use of a regulated flammable substance as required by 40 C.F.R. §68.150.

33. Respondent agrees to pay a civil penalty in the total amount of seventy-three thousand five hundred dollars (**\$73,500**), as described below. Such payment shall be made by cashier’s or certified check or by Electronic Fund Transfer (“EFT”). Payment of the penalty must be received by EPA **on or before thirty (30) calendar days** after the date of signature of the Final Order below (hereinafter referred to as the “due date”).

If the payment is made by check, then the check shall be made payable to the “Treasurer, United States of America” and shall be mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077

St. Louis, MO 63197-9000

The check shall be identified with a notation listing the following: "In the Matter of Western New York Energy, LLC" and shall bear thereon "Docket Number CAA-02-2014-1223."

If payment is made by check, Respondent shall simultaneously furnish proof that such payment has been made to:

Jocelyn Scott
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866

and

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866.

If Respondent chooses to make the payment by EFT, then Respondent shall provide the following information to its remitter bank:

- a. Amount of Payment: \$73,500
- b. SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045
- c. Account Code for Federal Reserve Bank of New York receiving payment: 68010727
- d. Federal Reserve Bank of New York ABA routing number: 021030004
- e. Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"
- f. Name of Respondent: Western New York Energy, LLC
- g. Case Number: CAA-02-2014-1223

If payment is made by EFT, Respondent shall simultaneously send a letter to Ms. Scott and the Regional Hearing Clerk at their addresses above which references the date of the EFT, the payment amount, the name of the case, the case number, and Respondent's name and address.

34. If Respondent fails to make full and complete payment of the civil penalty that it is required to pay by this CA/FO, this case may be referred by EPA to the United States Department of Justice and/or the United States Department of the Treasury for collection. In such an action, pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), and 31 U.S.C. § 3717, Respondent shall pay the following amounts:

- a. Interest. If Respondent fails to make payment, or makes partial payment, interest shall accrue on any unpaid portion of the assessed penalty at the rate established pursuant to 31 U.S.C. § 3717 and 26 U.S.C. § 6621 from the payment due date.
- b. Handling Charges. Pursuant to 31 U.S.C. § 3717(e)(1), a handling charge of fifteen dollars (\$15.00) shall be paid per month, or any portion thereof, if any portion of the assessed penalty is not paid within thirty (30) days of the payment due date.
- c. Attorney Fees, Collection Costs, Nonpayment of Penalty. If Respondent fails to pay the amount of an assessed penalty on time, pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), in addition to such assessed penalty and interest and handling assessments, Respondent shall also pay the United States' enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings, and a quarterly non-payment penalty for each calendar quarter during which such a failure to pay persists. Such non-payment penalty shall be ten percent (10%) of the aggregate amount of Respondent's outstanding penalties and non-payment penalties accrued from the beginning of such quarter.

35. The penalty specified in Paragraph 33, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of state or federal taxes.

36. This Consent Agreement is being voluntarily and knowingly entered into by the parties in full settlement of Respondent's alleged violations of the CAA set forth above in the Findings of Fact and EPA Conclusions of Law.

37. This CA/FO 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. This CA/FO shall not affect the right of the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.

38. This CA/FO and any provision herein is not intended to be an admission of liability in any adjudicatory or administrative proceeding except in an action, suit, or proceeding to enforce this CA/FO or any of its terms and conditions.

39. Respondent explicitly waives any right to request a hearing and/or contest any allegations in this Consent Agreement and explicitly waives any right to appeal the attached Final Order.

40. Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with, or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer, where the purpose of such discussion, memorandum, or communication is to recommend that such official accept this Consent Agreement and issue the attached Final Order.

41. Each party hereto shall bear its own costs and attorney fees in the action resolved by this CA/FO.

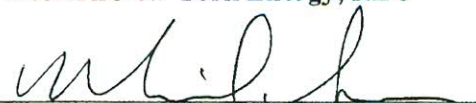
42. This CA/FO shall be binding on Respondent and its successors and assignees.

43. Each of the undersigned representatives to this CA/FO certifies that he or she is duly authorized by the party whom he or she represents to enter into the terms and conditions of the CA/FO and to bind that party to it.

44. Respondent consents to service upon Respondent of a copy of this CA/FO by any EPA employee, in lieu of service made by the EPA Region 2 Regional Hearing Clerk.

In the Matter of Western New York Energy, LLC
Docket Number CAA-02-2014-1223

For Respondent
Western New York Energy, LLC


Signature

Date: 9/30/14

Michael Sawyer
Name (Printed or Typed)

President
Title (Printed or Typed)

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**In the Matter of Western New York Energy, LLC
Docket Number CAA-02-2014-1223**

**For Respondent
Western New York Energy, LLC**


Signature

Date: 9/30/14

Michael Sawyer
Name (Printed or Typed)

President
Title (Printed or Typed)

In the Matter of Western New York Energy, LLC
Docket Number CAA-02-2014-1223

For Complainant
U.S. Environmental Protection Agency, Region 2



Walter Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2

Date: 9/29/2014

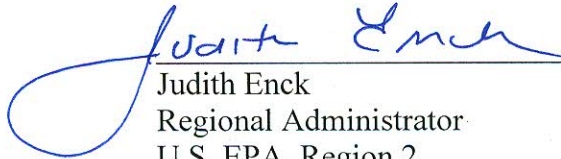
In the Matter of Western New York Energy, LLC
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FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Consent Agreement entered into by the Complainant and Respondent to this matter is hereby approved, incorporated herein, and issued as a Final Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, New York, New York.

Date

9/20/17



Judith Enck
Regional Administrator
U.S. EPA, Region 2

Re: In the Matter of Western New York Energy, LLC
Docket Number CAA-02-2014-1223

CERTIFICATE OF SERVICE

This is to certify that I have this day caused (or am causing) to be sent the foregoing fully executed Consent Agreement and Final Order, bearing Docket Number CAA-02-2014-1223 in the following manner to the respective addressees below:

Original and One Copy

By Hand:

Office of Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th Floor
New York, New York 10007

Copy by Certified Mail/

Return Receipt Requested:

Adam Schultz, Esq.
Couch White, LLP
540 Broadway
Albany, New York 12201-2222

Dated:

10/22/14
New York, New York