

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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HEARING CLERK

IN THE MATTER OF:)
)
D. Canale Beverages, Inc.) Docket Number: EPCRA-04-2007-2030(b)
)
Respondent.)
_____)

CONSENT AGREEMENT AND FINAL ORDER

I. Nature of the Action

1. This is a civil penalty proceeding pursuant to Section 325 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045, and pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), codified at 40 CFR Part 22. Complainant is the Director of the Air, Pesticides and Toxics Management Division, Region 4, United States Environmental Protection Agency (EPA). Respondent is D. Canale Beverages, Inc., (hereinafter, "Respondent").

2. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 CFR § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 CFR § 22.13(b), this Consent Agreement and Final Order (CAFO) will simultaneously commence and conclude this matter.

II. Preliminary Statements

3. The authority to take action under Section 325 of EPCRA, 42 U.S.C. § 11045, is vested in the Administrator of EPA. The Administrator of EPA has delegated this authority under EPCRA to the Regional Administrators by EPA Delegation 22-3-A, dated May 11, 1994. The Regional Administrator, Region 4, has re-delegated this authority to the Director, Air, Pesticides and Toxics Management Division, by EPA Region 4 Delegation 22-3-A, dated November 8, 1994. Pursuant to that delegation, the Director of the Air, Pesticides and Toxics Management Division has the authority to commence an enforcement action as the Complainant in this matter.

4. Respondent is a corporation doing business in the State of Tennessee.

5. Respondent is a "person" as defined in Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

6. Respondent owns and operates a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

7. Respondent's facility is located at 45 West E.H. Crump Boulevard, W., Memphis, Tennessee.

8. Section 312 of EPCRA, 42 U.S.C. § 11022, and the regulations found at 40 CFR Part 370, provide that the owner or operator of a facility that is required to prepare or have available a Material Safety Data Sheet (MSDS) for hazardous chemicals under the Occupational Safety and Health Act of 1970 (OSHA) and regulations promulgated under that Act, shall submit to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the fire department with jurisdiction over the facility, by March 1, 1988, and on or before March 1 annually thereafter, a completed emergency and hazardous chemical inventory form (Tier I or Tier II) as described in 40 CFR Part 370, containing the information required by that part for hazardous chemicals present at the facility at any one time in the calendar year in amounts equal to or greater than 10,000 pounds and containing the information required by that part for extremely hazardous substances (EHS) present at the facility at any one time in amounts equal to or greater than the threshold planning quantity (TPQ) or 500 pounds, whichever is less.

9. At some time during the calendar years of 2003, 2004 and 2005, sulfuric acid was present at the facility in an amount equal to or greater than 500 pounds.

10. Sulfuric acid is an "extremely hazardous substance" as defined under Section 329(3) of EPCRA, 42 U.S.C. § 11049, for which Respondent is required to prepare or have available an MSDS under OSHA at its facility.

11. Respondent failed to submit a completed Emergency and Hazardous Chemical Inventory Form for sulfuric acid to the SERC, LEPC and fire department with jurisdiction over the facility for calendar years 2003, 2004 and 2005, by March 1 of the year following the calendar year for which a report was required.

12. Respondent violated the reporting requirements of Section 312 of EPCRA, 42 U.S.C. § 11022, at its facility for calendar years 2003, 2004 and 2005 and is therefore subject to the assessment of penalties under Section 325 of EPCRA, 42 U.S.C. § 11045.

13. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and 40 CFR Part 19, EPA may assess a penalty of not more than \$27,500 for each violation of Section 312 that occurred on or after January 30, 1997 and \$32,500 after March 15, 2004. Each day a violation of Section 312 continues constitutes a separate violation. Civil penalties under Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), may be assessed by an Administrative Order.

III. Consent Agreement

14. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above but neither admits nor denies the factual allegations set out above.

15. Respondent waives any right to contest the allegations and its right to appeal the proposed final order accompanying the Consent Agreement.

16. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CAFO.

17. Respondent agrees to complete the Supplemental Environmental Project (SEP) set forth in this CAFO.

18. Respondent certifies that as of the date of its execution of this CAFO, it is in compliance with all relevant requirements of EPCRA.

19. Compliance with the CAFO shall resolve the allegation of violations contained herein. This CAFO shall not otherwise affect any liability of Respondent to the United States other than as expressed herein. Neither EPA nor Complainant waives any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

20. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of EPCRA.

IV. Final Order

21. Respondent is assessed a civil penalty of FIVE THOUSAND SEVEN HUNDRED SEVEN DOLLARS (\$5,707) which shall be paid within thirty (30) days of the effective date of this CAFO.

22. Respondent shall pay the penalty by forwarding a cashier's or certified check payable to the "Treasurer, United States of America," to the following address:

U.S. Environmental Protection Agency
Box 371099M
Pittsburgh, PA 15251

The check shall reference on its face the name and the Docket Number of the CAFO.

23. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Bryce Covington
U.S. EPA, Region 4
Air, Pesticides & Toxics Management Division
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Saundi Wilson
U.S. EPA, Region 4
Office of Environmental Accountability
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

24. Respondent shall undertake and complete, in accordance with the approved SEP in this matter, the following Emergency Planning and Preparedness SEP project within 60 days of the effective date of this CAFO: D. Canale Beverages, Inc., shall expend a total of EIGHT THOUSAND FOUR HUNDRED DOLLARS (\$8,400) for the purchase and donation of the following equipment to the Local Emergency Planning Committee located in Memphis, TN for an emergency planning and preparedness SEP:

- 1 ArcEditor
- 1 ArcGIS 9.2 Spatial Analyst
- 1 ArcGIS 9.2 3D Analyst

25. Respondent agrees that EPA may inspect the facility at any time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.

26. No later than thirty (30) calendar days after the completion of this project, Respondent shall submit to EPA a SEP Completion Report. The Report shall be sent to the EPCRA Enforcement Section, to the attention of Bryce Covington, at the address provided above. The Report shall include the following:

- (a) an affidavit from an authorized company official, attesting that the SEP has been completed or explaining in detail any failure to complete it; and

- (b) copies of appropriate documentation, including invoices and canceled checks, showing total amounts of EIGHT THOUSAND FOUR HUNDRED DOLLARS, or greater, was spent on the purchases and donation of the above equipment described in paragraph 24.

27. Respondent certifies that, as of the date this CAFO is signed, it is not required to perform any part of the SEP by any federal, state or local law, regulation, permit or order, or by any agreement or grant. Respondent further certifies that, as of this date, it has not received and is not negotiating to receive, credit for any part of the SEP in any other enforcement action of any kind.

28. Any public statement, oral or written, by Respondent making any 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 312 of the Emergency Planning and Community Right-to-Know Act of 1986."

29. If Respondent fails to timely and fully complete any part of the SEP, including failing to spend the minimum amount of EIGHT THOUSAND FOUR HUNDRED DOLLARS (\$8,400), for the SEP, Respondent shall be liable for stipulated penalties of the difference between \$8,400 and the amount actually expended, except as follows below:

- (a) if the SEP was fully and timely completed, and Respondent expended at least 90 percent of the minimum amount required, Respondent shall not pay a stipulated penalty; or
- (b) if the SEP was not fully and timely completed, but Respondent expended at least 90 percent of the minimum amount required, Respondent shall not pay a stipulated penalty if the Respondent has made a good faith effort to fully and timely complete the SEP.

For purposes of this paragraph, whether Respondent has fully and timely completed the SEP and whether Respondent made a good faith, timely effort to do so shall be in the sole discretion of EPA.

30. If Respondent fails to timely submit a SEP Completion Report as required by this CAFO, Respondent shall pay to the United States a stipulated penalty of \$100 for each calendar day the report is late.

31. Respondent shall pay any stipulated penalties that accrue under this CAFO within 15 calendar days of the receipt by Respondent of written demand from EPA for such penalties. Such penalties shall be paid in accordance with the procedures set forth above for the payment of

the civil penalty. If Respondent believes the demand for payment of any stipulated penalty is erroneous or contrary to law, Respondent may request a meeting with the Director, Air, Pesticides & Toxics Management Division.

32. For the purposes of state and federal income taxation, Respondent shall not be entitled, and agrees not to attempt, to claim a deduction for any civil penalty payment made pursuant to this CAFO or for the cost of the SEP. Any attempt by Respondent to deduct any such payments shall constitute a violation of this CAFO.

33. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty from the date of entry of the CAFO if the penalty is not paid by the date required. Interest will be assessed at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717. A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorney fees. In addition, a penalty charge will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due.

34. Complainant and Respondent shall bear their own costs and attorney fees in this matter.

35. This CAFO shall be binding upon the Respondent, its successors, and assigns.

36. The following individual represents EPA in this matter and is authorized to receive service for EPA in this proceeding:

Caron B. Falconer
U.S. EPA, Region 4
Air, Pesticides & Toxics Management Division
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
(404) 562-8451

37. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized by the party represented to enter into this CAFO and legally bind that party to it.

V. Effective Date

38. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

AGREED AND CONSENTED TO:

D. Canale Beverages, Inc.

By: Thomas R Wood Date: 5-31-07

Name: Thomas R. Wood (Typed or Printed)

Title: President (Typed or Printed)

U.S. Environmental Protection Agency

By: Michael A Schutt for Date: 5/1/07

Beverly H. Banister, Director
Air, Pesticides & Toxics
Management Division
Region 4

APPROVED AND SO ORDERED this 13th day of June, 2007.

Susan B. Schub
Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing
Consent Agreement and Final Order, in the Matter of D.Canale Beverages, Inc.,

Docket No. EPCRA-04-2007-2030(b) on the parties listed below in the manner indicated:

Caron B. Falconer
Air, Pesticides & Toxics
Management Division
61 Forsyth Street
Atlanta, Georgia 30303

(Via EPA's internal mail)

Nancy Tommelleo
U.S. EPA, Region 4
Office of Environmental Accountability
61 Forsyth Street
Atlanta, Georgia 30303

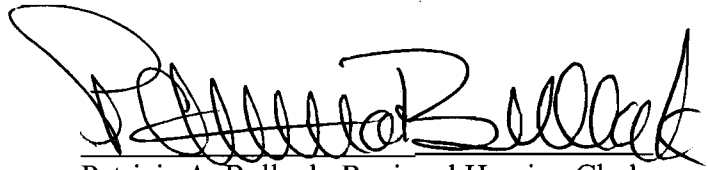
(Via EPA's internal mail)

Mr. Randy Womack
Glankler Brown, PLLC
1700 One Commerce Square
Memphis, TN 38103

(Via Certified Mail - Return Receipt
Requested)

Date: _____

6-14-07



Patricia A. Bullock, Regional Hearing Clerk
United States Environmental
Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street, S.W.
Atlanta, GA 30303
(404) 562-9511

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM

TO BE COMPLETED BY THE ORIGINATING OFFICE:

(Attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Saundi Wilson on 6/13/07
(Name) (Date)

in the DEA, OATGL at (404) 562-9504
(Office) (Telephone Number)

Non-SF Judicial Order/Consent Decree
USAO COLLECTS

Administrative Order/Consent Agreement
FMO COLLECTS PAYMENT

SF Judicial Order/Consent Decree
DOJ COLLECTS

Oversight Billing - Cost Package required:
Sent with bill

Not sent with bill

Other Receivable

Oversight Billing - Cost Package not required

This is an original debt

This is a modification

PAYEE: D. Canales Beverages Inc
(Name of person and/or Company/Municipality making the payment)

The Total Dollar Amount of the Receivable: \$ 5,707
(If installments, attach schedule of amounts and respective due dates. See Other side of this form.)

The Case Docket Number: EPCRA 04 2007 2030(b)

The Site Specific Superfund Account Number: _____

The Designated Regional/Headquarters Program Office: _____

TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT OFFICE:

The IFMS Accounts Receivable Control Number is: _____ Date _____

If you have any questions, please call: _____ of the Financial Management Section at: _____

DISTRIBUTION:

A. **JUDICIAL ORDERS:** Copies of this form with an attached copy of the front page of the **FINAL JUDICIAL ORDER** should be mailed to:

- | | |
|--|------------------------------|
| 1. Debt Tracking Officer Environmental Enforcement Section Department of Justice RM 1647 P.O. Box 7611, Benjamin Franklin Station Washington, D.C. 20044 | 2. Originating Office (EAD) |
| | 3. Designated Program Office |

B. **ADMINISTRATIVE ORDERS:** Copies of this form with an attached copy of the front page of the Administrative Order should be to:

- | | |
|---------------------------|------------------------------|
| 1. Originating Office | 3. Designated Program Office |
| 2. Regional Hearing Clerk | 4. Regional Counsel (EAD) |