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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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HEARINGS CLERK
EPA -- REGION 10

In the Matter of:)	
)	DOCKET NO. CWA 10-2010-165
John C. Berry & Sons, Inc.)	
)	CONSENT AGREEMENT AND
)	FINAL ORDER
)	
Respondent)	
_____)	

1. AUTHORITIES

1.1. This Consent Agreement and Final Order (CAFO) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 311(b)(6)(B)(i) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990. The Administrator has delegated the authority to issue the Final Order in Part 5 of this CAFO to the Regional Administrator of EPA Region 10, who in turn has delegated this authority to the Regional Judicial Officer.

1.2. In accordance with Section 22.18 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA issues and John C. Berry & Sons, Inc. (Respondent) agrees to issuance of the Final Order in Part 5 of this CAFO.

1.3. Section 311(b)(6)(B)(i) of Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. Part 19 authorize EPA to assess a civil penalty not to exceed \$37,500 against any owner, operator, or person in charge of an onshore facility who fails or refuses to comply with any regulation issued under Section 311(j) of Act, 33 U.S.C. § 1321(j).

1.4. The Oil Pollution Prevention regulations that implement Section 311(j) of the Act, 40 C.F.R. Part 112, establish requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products that, due to facility location, could reasonably be expected to discharge oil in harmful quantities to navigable waters of the United States or adjoining shorelines.

1.5. "Harmful quantities" are defined in 40 C.F.R. § 110.3 to 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 adjoining shorelines.

1.6. "Navigable waters" are defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 112.2.

1.7. Under 40 C.F.R. § 112.3, the owner or operator of an onshore facility that became operational on or before August 16, 2002, that due to its location, could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States and adjoining shorelines shall have prepared and implemented a Spill Prevention, Control and Countermeasure (SPCC) Plan in accordance with 40 C.F.R. § 112.7.

1.8. Under 40 C.F.R. § 112.7, the SPCC Plan shall be prepared "in accordance with good engineering practices" and have the full approval of management with authority to commit the necessary resources to implement the plan.

2. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order in Part 5 of this CAFO becomes effective.

2.2. A concise statement of the factual bases for alleged violations of the Act and specific references to the statutory and regulatory provisions Respondent is alleged to have violated appear in Part 3 of this CAFO.

3. ALLEGATIONS

3.1. Respondent is a corporation organized under the laws of the State of Idaho and is a “person” within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

3.2. Respondent is the “owner or operator” within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), of an oil storage and distribution facility located at 1810 South Yellowstone Highway in Idaho Falls, Idaho.

3.3. The Facility 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.

3.4. The Facility is “non-transportation-related” within the meaning of 40 C.F.R. § 112.2.

3.5. The Facility is a non-transportation facility that, due to its location, could reasonably have been expected, at the time of inspection, to discharge oil from an above-ground container to a navigable water of the United States or its adjoining shorelines in a harmful quantity and is therefore subject to the SPCC regulations at 40 C.F.R. Part 112.

3.6. The Facility had, at the time of inspection, an aggregate above-ground storage capacity greater than 1,320 gallons of oil in containers each with a shell capacity of at least 55 gallons.

3.7. The Facility is located approximately 800 feet uphill from the Snake River, a “navigable water” within the meaning of 40 C.F.R. § 112.2.

3.8. Respondent, at the time of inspection, was engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products at the Facility, as described in 40 C.F.R. § 112.1(b).

3.9. The Facility began operating before August 16, 2002.

3.10. Under 40 C.F.R. § 112.3, the owner or operator of an SPCC-regulated facility that was in operation on or before August 16, 2002, shall have prepared and implemented a written SPCC Plan that complies with 40 C.F.R. §§ 112.3 and 112.7.

3.11. On August 19, 2009, authorized EPA representatives inspected the Facility to determine compliance with Section 311(j) of the Act, and in particular with the requirements of 40 C.F.R. Part 112 related to SPCC Plans.

3.12. EPA alleges that Respondent:

3.12.1. Failed to have an SPCC Plan that meets the requirements of 40 C.F.R. §§ 112.3 and 112.7;

3.12.2. Failed to have a licensed professional engineer review and certify the SPCC Plan, as required by 40 C.F.R. § 112.3(d);

3.12.3. Failed to provide general secondary containment at the truck loading and unloading areas, as required by 40 C.F.R. § 112.7(c);

- 3.12.4. Failed to provide adequate secondary containment at three 2,000-gallon storage tanks and two 300-gallon storage tanks located outside the Facility warehouse, as required by 40 C.F.R. § 112.8(c)(2);
- 3.12.5. Failed to provide adequate secondary containment for mobile, portable containers located inside the Facility warehouse, as required by 40 C.F.R. § 112.8(c)(2);
- 3.12.6. Failed to conduct inspections and tests and maintain records of those inspections and tests, as required by 40 C.F.R. §§ 112.7(e) and 112.8(c)(6);
- 3.12.7. Failed to conduct and document the training of oil-handling personnel, as required by 40 C.F.R. § 112.7(f);
- 3.12.8. Failed to implement and document Facility security measures, as required by 40 C.F.R. § 112.7(g);
- 3.12.9. Failed to promptly correct visible discharges of oil and to promptly remove any accumulations of oil in diked areas as required by 40 C.F.R. § 112.8(e)(10);
- 3.12.10. Failed to ensure that drainage from storage areas was properly restrained, as required by 40 C.F.R. § 112.8(b).
- 3.12.11. Failed to follow the requirements for transfer operations, pumping and facility process required by 40 C.F.R. § 112.8(d).

3.13. Respondent's failure to prepare and implement an adequate SPCC Plan for the Facility in accordance with the requirements of 40 C.F.R. §§ 112.7 and 112.8 violated 40 C.F.R. §112.3.

4. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in Part 3 of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations in Part 3 of this CAFO.

4.3. Respondent expressly waives any rights to contest the allegations and to appeal the Final Order in Part 5 of this CAFO.

4.4. The provisions of this CAFO shall bind Respondent and its servants, employees, successors and assigns.

4.5. Except as provided in paragraph 4.12 below, each party shall bear its own costs in bringing or defending this action.

4.6. Pursuant to Section 311(b) of the Act, 33 U.S.C. § 1321(b), EPA has determined, and Respondent agrees, that an appropriate penalty to settle this action is \$15,000. This penalty amount has been agreed upon in consideration of the statutory penalty factors identified in Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8).

4.7. Pursuant to Section 311(b)(6)(B)(i) and (b)(6)(C)(i) of the CWA, 33 U.S.C. §§ 1321(b)(6)(B)(i) and (b)(6)(C)(i), the penalty assessed in paragraph 4.6 constitutes a Class I civil penalty, which is not subject to a public notice and comment requirement.

4.8. Respondent agrees to pay the civil penalty assessed in paragraph 4.6 within thirty (30) days of the effective date of the Final Order.

4.9. Payment under this CAFO shall be made by cashier's check or certified check, payable to "Environmental Protection Agency," and bearing the notation "OSLTF-311."

Payment sent by the U.S. Postal Service shall be addressed to:

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

Payment sent by express mail via a non-U.S. Postal Service carrier shall be addressed to:

U.S. Bank
Government Lockbox 979077
U.S. E.P.A. Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Respondent shall note on the check the title and docket number as they appear in the caption of this CAFO.

4.10. Respondent shall serve photocopies of the check described above on the Regional Hearing Clerk and EPA at the following two addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Mail Stop ORC-158
Seattle, Washington 98101

Ms. Kimberly Ogle
Unit Manager, NPDES Compliance Unit
1200 Sixth Avenue, Suite 900
Mail Stop OCE-133
Seattle, Washington 98101

4.11. If Respondent fails to pay the penalty assessed by paragraph 4.6 of this CAFO in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may subject Respondent to a civil action to collect the

assessed penalty under the Act. In any collection action, the validity, amount, and appropriateness of the penalty assessed by paragraph 4.6 shall not be subject to review.

4.11.1. Interest. Pursuant to Section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H), any unpaid portion of the assessed penalty shall bear interest from the effective date of the Final Order in Part 5 of this CAFO, at the rate established by the Secretary of the Treasury under 31 U.S.C. § 3717(a)(1).

4.11.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H), Respondent shall pay (in addition to any assessed penalty and interest), attorneys fees and costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter.

4.12. Respondent represents that it is authorized to sign this CAFO and that the party signing on its behalf is authorized to bind Respondent to the terms of this CAFO. This CAFO may be executed in multiple counterparts, each of which shall be deemed to have the same force and effect as an original. A facsimile signature shall be treated as an original.

4.13. Compliance with all terms and conditions of this CAFO shall result in full settlement and satisfaction of all penalty claims for violations alleged in Section 3 above.

STIPULATED AND AGREED:

FOR RESPONDENT

Ronald L. Berry Pres.

Dated: 8-27-2010

Mr. Ronald L. Berry, President
John C. Berry & Sons, Inc.

FOR COMPLAINANT

Edward J. Kowalski

Dated: 9/15/2010

Edward J. Kowalski, Director
Office of Compliance and Enforcement
U. S. Environmental Protection Agency Region 10

5. FINAL ORDER

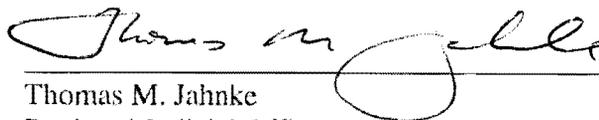
5.1. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement in the Consent Agreement.

5.2. In accordance with Section 311(b)(6)(B)(i) and (b)(6)(C)(i) of the CWA, 33 U.S.C. §§ 1321(b)(6)(B)(i) and (b)(6)(C)(i), this CAFO assesses a Class I civil penalty, which is not subject to a public notice and comment requirement.

5.3. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act for the particular violations alleged in Part 3 above. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of the Act and any regulations promulgated or permits issued thereunder.

5.4. This Final Order shall become effective upon filing.

SO ORDERED this 23^d day of September, 2010.



Thomas M. Jahnke
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: John C. Berry & Sons, Inc., DOCKET NO. CWA 10-2010-165** was filed with the Regional Hearing Clerk on Sept. 24, 2010.

On Sept. 24, 2010, the undersigned certifies that a true and correct copy of the document was delivered to:

Kimberly A. Owens, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on Sept. 24, 2010 to:

Ronald L. Berry, President
John C. Berry & Sons, Inc.
3193 Leigh
Tetonia, Idaho 83452

DATED this 24 day of Sept. 2010.



Signature
Print Name: Carol D. Kennedy
Regional Hearing Clerk
EPA Region 10