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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

In the matter of)	U.S. EPA Docket No.
)	RCRA-9-2007-0006
U.S. FOODSERVICE)	
)	CONSENT AGREEMENT AND
EPA ID No. AZR000502906)	FINAL ORDER PURSUANT TO
)	40 C.F.R. SECTIONS 22.13 AND
<u>Respondent.</u>)	22.18

CONSENT AGREEMENT AND FINAL ORDER

A. PRELIMINARY STATEMENT

1. This is a civil administrative enforcement action initiated under the United States Environmental Protection Agency's ("EPA") *Incentives for Self-Policing: Discovery, Disclosures, Correction and Prevention of Violations*, 65 Fed. Reg. 19618, ("Audit Policy"), effective May 11, 2000.
2. Complainant is the EPA. Respondent is U.S. Foodservice, Inc. ("Respondent" or "U.S. Foodservice"). Respondent owns and operates a facility located at 4650 West Buckeye Road in Phoenix, Arizona, 85043 (the "Facility"). The Facility's EPA Identification Number is AZR000502906. At the Facility, Respondent's daily operations consist of selecting packaged food items and shipping them to food establishment customers. The Facility includes a maintenance/truck stop, which performs routine maintenance on tractors.
3. Respondent performed a voluntary environmental audit at the Facility, and identified to EPA certain violations disclosed to U.S. Foodservice on March 7, 2006.
4. In a letter dated March 28, 2006, Respondent voluntarily disclosed to EPA that it had failed to meet certain required hazardous waste management laws, as required by Arizona Administrative Code ("A.A.C.") R18-8-266 [see also 40 C.F.R Part 279], by failing to conduct required analysis of used oil and failing to notify EPA of its fuel burning activity.

These are violations of Section 3001 et seq. of RCRA, 42 U.S.C. § 6921 et seq., and state regulations adopted pursuant thereto.¹

5. Complainant and Respondent consent to the terms of this Consent Agreement and Final Order ("CA/FO" or "Agreement") pursuant to Section 3008(a)(1) of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. § 6928(a)(1), 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, as revised by 64 Fed. Reg. 141 (July 23, 1999).
6. Pursuant to 40 C.F.R. §§ 22.13 and 22.18, this CA/FO simultaneously commences and concludes this proceeding.

B. JURISDICTION

7. On November 20, 1985, the State of Arizona received authorization to administer the hazardous waste management program in lieu of the federal program pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926 and 40 C.F.R. § 271, effective December 4, 1985. The authorized program is established pursuant to the Arizona Laws Relating to Environmental Quality, Title 49, (Arizona Revised Statutes ("A.R.S.") 49-921, et seq.), and the regulations promulgated thereunder in the Arizona Administrative Code, Title 18, Chapter 8, Article 2. Effective October 7, 1991, the State of Arizona received authorization for revisions to A.R.S. 49-921, et seq. The State of Arizona has been authorized for all the regulations referenced in this CA/FO.
8. Respondent is a "person" as defined in A.R.S. 49-921 and A.A.C. R18-8-260.F.5. [*See also* 40 C.F.R. §260.10].

¹All citations to the "A.A.C." refer to the Arizona Administrative Code, contained in Title 18, Chapter 8, Department of Environmental Quality Waste Management, Article 2, Hazardous Waste. EPA is enforcing Arizona hazardous waste management program requirements as approved and authorized by the United States on October 7, 1991. 40 C.F.R. §§124, 260 through 266, 268, 270 and 273, or parts thereof, are adopted by reference. Federal statutes and regulations that are cited within 40 C.F.R. §§124 and 260 through 270 that are not adopted by reference may be used as guidance in interpreting federal regulatory language.

In 1985 EPA promulgated regulations for burning of waste fuel and used oil fuel, codified at that time at Part 266 Subpart E. 50 FR 49201 (November 29, 1985). Arizona was authorized for Part 266 Subpart E. In 1992 EPA promulgated recycled used oil management standards, and created a new Part 279, recodifying the 1985 used oil regulations into Part 279. 57 FR 41566 (September 10, 1992). The violations alleged in this CA/FO involve regulations that were part of Part 266 Subpart E.

9. Respondent is a "used oil generator" and a "used oil fuel marketer" as defined in A.A.C. R18-8-266. [See also 40 C.F.R. §279.1].
10. Respondent is therefore subject to the State regulations adopted pursuant to A.R.S. 49-922. [See also Sections 3001, 3004, and 3005 of RCRA, 42 U.S.C. §§6921, 6924 and 6925, and regulations adopted pursuant thereto].
11. Based on information provided to EPA by Respondent, Respondent failed to comply with the requirements of A.A.C. R18-8-266, which constitutes a violation of RCRA. Respondent is therefore subject to the powers vested in the EPA Administrator by Section 3008 of RCRA, 42 U.S.C. § 6928 and Section 6001 of RCRA, 42 U.S.C. § 6921.
12. Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes the EPA Administrator to issue orders requiring compliance immediately or within a specified time for violation of any requirement of Subtitle C of RCRA, Section 3001 of RCRA et seq., 42 U.S.C. § 6921, et seq.
13. Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), provides that when a violation of Subtitle C of RCRA occurs in a state which has been authorized under Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator must notify an authorized state prior to issuing an order under Section 3008 of RCRA in that state. EPA notified the State of Arizona as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).
14. The Administrator has delegated the authority under Section 3008 of RCRA, 42 U.S.C. §6928, to the EPA Regional Administrator for Region IX, who has redelegated this authority to the Director of the Waste Management Division.

C. CONCLUSIONS OF LAW

14. Pursuant to A.A.C. R18-8-266 [see also 40 C.F.R. § 279.11], used oil burned for energy recovery is subject to regulation under 40 C.F.R. Part 279 unless it is shown not to exceed any of the allowable levels of the constituents and properties in the specification table shown in Table 1 of 40 C.F.R. § 279.11, and the person making the showing complies with 40 C.F.R. §§ 279.72, 279.73, and 279.74(b).
15. Of the three referenced sections, only 40 C.F.R. §§ 279.72 and 279.73 apply to the U.S. Foodservice facility at issue in this Agreement.
16. 40 C.F.R. § 279.72 provides methods for a fuel burner to document that the used oil fuel meets the specifications of section 279.11, and requires that copies of the analysis be kept for three years.

17. 40 C.F.R. § 279.73 requires that the used oil fuel marketer must notify EPA and obtain an EPA identification number.
18. Based on information provided to EPA by Respondent, Respondent was burning oil for energy recovery without having conducted the required analysis, and without notifying EPA or obtaining an EPA identification number.
19. Therefore, EPA alleges that based on information provided by Respondent, Respondent has violated A.A.C. R18-8-266 [see also 40 C.F.R. § 279.11].

D. TERMS OF SETTLEMENT

20. Based upon the facts and information submitted by Respondent and upon Respondent's certification herein to the veracity of this information, EPA has determined that Respondent has satisfied all of the conditions set forth in EPA's Final Policy Statement on *Incentives for Self-Policing: Discovery, Disclosures, Correction and Prevention of Violations*, 65 Fed. Reg. 19618, ("Audit Policy"), effective May 11, 2000, for violations described herein, and thereby qualifies for a 100% reduction of the gravity component of the civil penalty.
21. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), as adjusted by the Debt Collection Improvement Act of 1996, see 61 Fed. Reg. 69360 (Dec. 31, 1996), and the Civil Monetary Penalty Inflation Adjustment Rule, see 69 Fed. Reg. 7121 (Feb. 13, 2004), authorizes a civil penalty of up to TWENTY-SEVEN THOUSAND, FIVE HUNDRED DOLLARS (\$27,500) per day for violations of Subtitle C of RCRA, 42 U.S.C. § 6921 *et seq.*, occurring between January 31, 1997 and March 15, 2004. The Civil Monetary Penalty Inflation Adjustment Rule issued in February 2004 authorizes a civil penalty of up to THIRTY-TWO THOUSAND FIVE HUNDRED DOLLARS (\$32,500) for violations that occur after March 15, 2004. 69 Fed. Reg. 7121 (Feb. 13, 2004).
22. Under EPA's Audit Policy EPA has the discretion to eliminate or substantially reduce the gravity component of a penalty if it determines that a respondent has satisfied the nine conditions set forth in the Audit Policy.
23. The nine conditions a respondent must satisfy under the Audit Policy are: (a) systematic discovery of the violation through an environmental audit or a compliance management system; (b) voluntary discovery; (c) prompt disclosure; (d) discovery and disclosure independent of government or third party plaintiff; (e) correction and remediation; (f) prevention of recurrence; (g) no repeat violations; (h) other violations excluded; and (i) cooperation.

24. Regulated entities deemed by EPA to have satisfied the nine conditions in the Audit Policy will not face any gravity-based civil penalties.
25. EPA has concluded that Respondent has, as described herein, satisfied the nine conditions outlined in the Audit Policy and therefore will not face gravity-based civil penalties.
26. Systematic Discovery of the Violation Through an Environmental Audit or a Compliance Management System. Respondent discovered the violations during an environmental compliance audit of the Facility that was conducted by an independent consulting company, hired for that purpose by Respondent.
27. Voluntary Discovery. Respondent's discovery of the violations was voluntary and did not result from any legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement.
28. Prompt Disclosure. Respondent fully disclosed the violations to EPA within 21 days after it discovered the violations had, or may have, occurred. Respondent received the preliminary draft compliance audit report findings on March 7, 2006, and were reported to EPA in a letter dated March 28, 2006.
29. Discovery and Disclosure Independent of Government or Third Party Plaintiff. Respondent discovered and disclosed the violations to EPA prior to any federal, state, or local agency inspection or investigation, notice of citizen suit, the filing of a third-party complaint, the reporting of the violations by a "whistle-blower," or imminent discovery by a regulatory agency.
30. Correction and Remediation. Respondent has ceased burning used oil for energy recovery until it can document it is in compliance with the exemption. The disclosed violations did not cause any environmental or human harm.
31. Prevent Recurrence. Respondent has agreed to take steps to prevent recurrence of these violations through improvement of its environmental management systems.
32. No Repeat Violations. Respondent states that it is not aware that it has had any other occurrence of these specific violations at the Facility within the past three years or at any other facility owned or operated by Respondent within the past five years.
33. Other Violations Excluded. The violations did not result in serious actual harm, present an imminent and substantial endangerment to public health or the environment, or violate the specific terms of any judicial or administrative order or consent agreement.
34. Cooperation. Respondent has fully cooperated with EPA in determining the applicability of the Audit Policy.

35. In signing this Agreement, Respondent certifies under penalty of law that the information submitted to EPA in the letter dated March 28, 2006, disclosing violations of A.A.C. R18-8-266 [see also 40 C.F.R. § 279.11], and the information in paragraphs 26 - 34 of this CA/FO are based upon true, accurate, and complete information that the signatory can verify personally, or regarding which the signatory has inquired of the person or persons directly responsible for gathering the information.
36. EPA has determined that the violations did not result in an economic benefit to Respondent.
37. For the reasons set forth above, all penalties based on the gravity of the violations and the savings of economic costs related to the failure meet the conditions of the exemption for management of used oil are waived.
38. Because EPA has concluded that Respondent has, as described herein, satisfied the nine conditions set forth in the Audit Policy, Complainant has not sought gravity-based penalties for the violations alleged.
39. Based on Complainant's determination that there was no economic benefit derived from the violations, Complainant has not sought to collect any economic benefit penalty for the violations alleged.
40. Complainant and Respondent hereby consent that no civil penalty will be assessed in settlement of the alleged violations set forth in Section C above. This CA/FO constitutes a settlement of the civil and administrative penalty claims of the United States for the alleged violations of RCRA set forth in Section C above.
41. The effect of the settlement described above is conditional upon the accuracy of Respondent's representations to EPA as memorialized in paragraphs 26 - 34 of this CA/FO and Respondent's self-disclosure dated March 28, 2006.

E. ADMISSIONS AND WAIVERS OF RIGHTS

42. For the purposes of this proceeding, Respondent admits to the jurisdictional allegations set forth in Section B of this CA/FO. Respondent consents to and agrees not to contest EPA's jurisdiction and authority to enter into and issue this CA/FO and to enforce its terms. Further, Respondent will not contest EPA's jurisdiction and authority to compel compliance with this CA/FO in any enforcement proceedings, either administrative or judicial, or to impose sanctions for violations of this CA/FO.
43. Respondent neither admits nor denies any allegations of fact or law set forth in Section C of this CA/FO. Respondent hereby waives any rights Respondent may have to contest the allegations set forth in this CA/FO, waives any rights Respondent may have to a hearing on any issue relating to the factual allegations or legal conclusions set forth in this

CA/FO, including without limitation a hearing pursuant to Section 3008(b) of RCRA, 42 U.S.C. § 6928(b) and hereby consents to the issuance of this CA/FO without adjudication. In addition, Respondent hereby waives any rights Respondent may have to appeal the Final Order attached to this Consent Agreement and made part of this CA/FO.

F. PARTIES BOUND

44. This CA/FO shall apply to and be binding upon Respondent and its agents, successors and assigns. This CA/FO shall constitute full settlement of the violations alleged herein.
45. No change in ownership or corporate, partnership or legal status relating to the Facility will in any way alter Respondent's obligations and responsibilities under this CA/FO.
46. The undersigned representative of Respondent hereby certifies that he or she is fully authorized by Respondent to enter into this CA/FO, to execute and to legally bind Respondent to it.

G. RESERVATION OF RIGHTS

47. This CA/FO resolves Respondent's liability for federal civil penalties for the specific alleged violations and facts as set forth in Section C of this CA/FO. EPA hereby reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, including the right to require that Respondent perform tasks in addition to those required by this CA/FO. EPA further reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable, which may pertain to Respondent's failure to comply with any of the requirements of this CA/FO, including without limitation, the assessment of penalties under Section 3008(c) of RCRA, 42 U.S.C. § 6928(c).
48. This CA/FO shall not be construed as a covenant not to sue, release, waiver or limitation of any rights, remedies, powers or authorities, civil or criminal, which EPA has under RCRA, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), or any other statutory, regulatory or common law enforcement authority of the United States, except as they relate to Respondent's liability for federal civil penalties for the specific alleged violations and facts as set forth in Section C of this CA/FO.
49. Compliance by Respondent with the terms of this CA/FO shall not relieve Respondent of its obligations to comply with RCRA or any other applicable local, State or federal laws and regulations.
50. The entry of this CA/FO and Respondent's consent to comply shall not limit or otherwise preclude EPA from taking additional enforcement actions should EPA determine that such actions are warranted except as they relate to Respondent's liability for federal civil

penalties for the specific alleged violations and facts as set forth in Section C of this CA/FO.

51. This CA/FO is not intended to be nor shall it be construed as a permit. This CA/FO does not relieve Respondent of any obligation to obtain and comply with any local, State or federal permits.

H. THIRD PARTY CLAIMS

52. Nothing in this CA/FO shall constitute or be construed as a release from any other claim, cause of action or demand in law or equity by or against any person, firm, partnership, entity or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from the Facility.

I. MISCELLANEOUS

53. This CA/FO may be amended or modified only by written agreement executed by both EPA and U.S. Foodservice.

54. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

55. The Effective Date of this CA/FO is the date the Final Order, signed by the Regional Judicial Officer, is filed by the Regional Hearing Clerk.

IT IS SO AGREED.

12-17-06
Date

John Lynch VP of Operations
Name, Title:
U.S. Foodservice

12/21/06
Date

Jeff Scott
Jeff Scott, Director
Waste Management Division
U.S. Environmental Protection Agency, Region 9

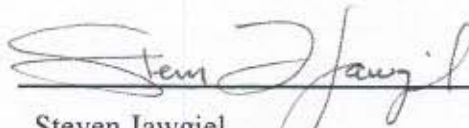
FINAL ORDER

IT IS HEREBY ORDERED that this Consent Agreement and Final Order Pursuant to 40 C.F.R. Sections 22.13 and 22.18 (U.S. EPA Docket No. RCRA-9-2007 0006) be entered and that pursuant to the U.S. EPA Audit Policy, U.S. Foodservice pay a civil penalty of ZERO DOLLARS (\$0).

This Final Order shall be effective upon filing by the Regional Hearing Clerk.

01/05/07

Date



Steven Jawgiel
Regional Judicial Officer
United States Environmental Protection Agency,
Region 9

CERTIFICATE OF SERVICE

I hereby certify that on the date below, the original copy of the foregoing Complaint, Consent Agreement and Final Order, was filed with the Regional Hearing Clerk, Region IX, and that copies were sent by certified mail, return receipt requested, to:

Mr. Jerry Urick
Vice President of Operations
U.S. Foodservice, Inc.
4650 West Buckeye Road
Phoenix, AZ 85043-4907

Jan 8, 2007

Date

Danielle E Carr

Danielle Carr
Regional Hearing Clerk
Office of Regional Counsel, Region IX