

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

BEFORE THE ADMINISTRATOR

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| In the Matter of |) | |
| |) | Docket No. CWA-07-2023-0136 |
| BG Products, Inc., |) | |
| |) | COMPLAINT AND |
| Respondent. |) | CONSENT AGREEMENT / |
| |) | FINAL ORDER |
| Proceedings under Section |) | |
| 311(b)(6)(B)(ii) of the Clean Water Act, |) | |
| 33 U.S.C. § 1321(b)(6)(B)(ii) |) | |
| _____ |) | |

1. This is an administrative action for the assessment of civil penalties pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6), as amended by the Oil Pollution Act of 1990, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

2. Complainant, the United States Environmental Protection Agency Region 7 (EPA), and BG Products, Inc., (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

3. The authority to act under Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated the authority under Section 311(b)(6) to the Director of the Enforcement and Compliance Division (Complainant).

4. This Complaint and Consent Agreement/Final Order (CAFO) serves as notice that the EPA has reason to believe that Respondent has violated Section 311 of the CWA, 33 U.S.C. § 1321, and regulations promulgated thereunder.

Statutory and Regulatory Framework

5. The objective of the CWA, 33 U.S.C. § 1251 *et seq.*, is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

6. Sections 311(b)(3) and (4) of the CWA, 33 U.S.C. § 1321(b)(3) and (4), prohibit the discharge of oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities as have been determined may be harmful to the public health or welfare of the United States.

7. Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), and 40 C.F.R. § 112.2 define “oil” as “oil of any kind or in any form, including, but not limited to, petroleum [or] fuel oil”

8. Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), authorizes the EPA to promulgate a regulation to define what discharges of oil may be harmful to the public health or welfare or environment of the United States.

9. 40 C.F.R. § 110.3 defines discharges of oil that the Administrator has determined may be harmful to the public health or welfare or the environment of the United States to include discharges of oil that: (a) violate applicable water quality standards, or (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

10. Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), provides in part that the President shall issue regulations establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities, and to contain such discharges.

11. To implement Section 311(j)(1)(C), the EPA promulgated regulations to prevent oil pollution at 40 C.F.R. Part 112 that set forth the requirements for the preparation and implementation of Spill Prevention, Control, and Countermeasure (SPCC) Plans. The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities with an aboveground storage capacity of 1,320 gallons or greater who are engaged in gathering, storing, transferring, distributing, using, or consuming oil or oil products which, due to their locations, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.

Allegations of Fact

12. Respondent is and was at all relevant times a corporation under the laws of, and authorized to conduct business in, the state of Kansas.

13. Respondent, a corporation, is a “person” within the meaning of Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

14. At all times relevant to this action, Respondent was the owner and/or operator, within the meaning of Section 311(a)(6) of the CWA and 40 C.F.R. § 112.2, of the specialty lubricant and fuel treatment manufacturing facilities (“Facilities”) located at 701 South Wichita Street, Wichita, Kansas and 2415 Pioneer Drive, El Dorado, Kansas.

15. The Facilities store and produce petroleum products including motor oils, lubricating oils, and fuel treatment oils. The Wichita Facility has an estimated storage capacity of 1,128,379 gallons. The El Dorado Facility has an estimated storage capacity of 1,108,750 gallons.

16. The Wichita Facility is adjacent to the Arkansas River.

17. The Arkansas River is a navigable water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

18. An outfall from the El Dorado Facility is 1150 feet away from Constant Creek, a perennial tributary, that flows into the Walnut River.

19. The Walnut River and its tributaries are navigable waters of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).

20. Respondent is engaged in storing, processing, using or consuming oil or oil products located at the Facilities.

21. The Facilities are “non-transportation-related” facilities within the meaning of 40 C.F.R. § 112 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

22. The Facilities are onshore facilities 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.

23. The Facilities are non-transportation-related onshore facilities which, due to their locations, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity and, therefore, is an SPCC-regulated facility pursuant to Section 311(j)(1)(C) of the Act, Executive Order 12777 and 40 C.F.R. § 112.1.

24. The Facility is a non-transportation-related onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, and, therefore, is required to prepare and submit a facility response plan (FRP) pursuant to the requirements of 40 C.F.R. § 112.20.

25. The Wichita Facility has an SPCC plan. The current version of the SPCC plan for the Wichita Facility was recertified in December 2021.

26. On or about June 3, 2022, representatives of the EPA inspected the Wichita Facility to determine its compliance with the SPCC regulations of 40 C.F.R. Part 112 and obtained information about the Facility.

27. The EPA’s findings about the Wichita facility and its SPCC plan were memorialized in an inspection report. The EPA did not receive a copy of the Wichita Facility’s FRP until July 11, 2022.

28. In July of 2019 the El Dorado Facility self-reported that its storage capacity exceeded 1,000,000 gallons.

29. The El Dorado Facility has an SPCC Plan. The current version of the SPCC plan for the El Dorado Facility was recertified in December 2021.

30. The EPA's findings about the facility and its SPCC plan were memorialized in an inspection report.

31. The EPA did not receive a copy of the El Dorado Facility's FRP until July 11, 2022.

Findings of Violation

Count 1: Failure to Fully Prepare and Implement an FRP

32. The facts stated in Paragraphs 12 through 34 above are herein incorporated.

33. 40 C.F.R. § 112.20(a)(2)(i) requires the owner or operator of a facility in operation on or after August 30, 1994, that has over 1,000,000 gallons of storage and, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines, to prepare and submit a facility response plan that satisfies the requirements of this section to the Regional Administrator.

34. In July 2019, BG Products self-reported that the El Dorado Facility had surpassed 1,000,000 gallons of storage capacity.

35. BG Products failed to prepare a FRP for the El Dorado Facility until July 11, 2022.

36. On or about June 3, 2022, the EPA inspected the Wichita Facility. The inspection revealed that the Wichita Facility had over 1,000,000 gallons of storage capacity and required an FRP. The inspection confirmed that the Wichita Facility did not have an FRP.

37. BG Products submitted a FRPs for the Wichita Facility and the El Dorado Facility to EPA on July 11, 2022.

38. Respondent's failure to timely prepare a FRP for the Facilities violated 40 C.F.R. § 112.20.

Count 2: Failure to Fully Prepare and Implement an SPCC Plan

39. The facts stated in Paragraphs 12 through 34 above are herein incorporated.

40. 40 C.F.R § 112.3 requires Respondent to fully prepare and implement an SPCC plan.

41. The EPA's June 3, 2022, inspection documented Respondent's failure to fully prepare and implement an SPCC Plan at the Wichita Facility as required by 40 C.F.R. 112.3, as follows:

- a. Respondent failed to include accurate information in the SPCC Plan's facility diagrams, in violation of 40 C.F.R. § 112.7(a)(3)(i);

b. Respondent failed to provide appropriate containment and/or diversionary structures or equipment in violation of 40 C.F.R. § 112.7(c);

c. Respondent failed to hold annual discharge prevention briefings in violation of 40 C.F.R. § 112.7(f)(3);

d. Respondent failed to complete integrity testing for all subject containers and tank ages are not provided in the plan in violation of 40 C.F.R. § 112.8(c)(6);

e. Respondent failed to position mobile or portable containers to prevent a discharge in violation of 40 C.F.R. § 112.8(c)(11).

42. Respondent's failures to meet the requirements of 40 C.F.R. § 112.7 and 112.8, above, evidence a failure fully prepare and implement an SPCC Plan in violation of 40 C.F.R. § 112.3.

Consent Agreement

General Provisions

43. Respondent and the EPA agree to the terms of this CAFO and Respondent agrees to comply with the terms of this CAFO.

44. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal any portion of this CAFO.

45. Respondent and Complainant agree to bear their own costs and attorney's fees incurred as a result of this action.

46. Respondent agrees that, in settlement of the claims alleged in this CAFO, Respondent shall pay a civil penalty of **\$258,978** as set forth in the Penalty section below.

47. Respondent admits the jurisdictional allegations of this CAFO and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CAFO.

48. Respondent neither admits nor denies the factual allegations asserted above by the EPA.

49. Respondent certifies by the signing of this CAFO that Respondent is in compliance with all requirements of the CWA.

50. The effect of settlement is conditional upon the accuracy of Respondent's representations to the EPA in this CAFO.

Reservation of Rights

51. This CAFO addresses all civil and administrative claims for the CWA violations alleged above. With respect to matters not addressed in this CAFO, the EPA reserves the right to take any enforcement action pursuant to the CWA and its implementing regulations, or any other

available legal authority, including without limitation, the right to seek injunctive relief, penalties and damages.

52. Nothing contained in this CAFO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

53. Notwithstanding any other provision of this CAFO, the EPA reserves the right to enforce the terms of this CAFO by initiating a judicial or administrative action pursuant to Section 311 of the CWA, 33 U.S.C. § 1321, and to seek penalties against Respondent or to seek any other remedy allowed by law.

Penalty

54. Respondent agrees to pay a civil penalty of Two Hundred Fifty-Eight Thousand Nine Hundred Seventy-Eight (**\$258,978**) pursuant to the authority of Section 311 of the CWA, 33 U.S.C. § 1321, within thirty (30) days of the Effective Date of this CAFO.

55. The payment of penalties must reference docket number CWA-07-2023-0136 and be remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979078
St. Louis, Missouri 63197-9000

or by alternate payment method described at
<http://www.epa.gov/financial/makepayment>.

56. Copies of the checks or verification of another payment method for the penalty payments remitted shall be emailed to:

Adam Hilbert
Attorney Advisor
U.S. Environmental Protection Agency Region 7
Hilbert.adam@epa.gov

and

Regional Hearing Clerk
U.S. Environmental Protection Agency Region 7
r7_hearing_clerk_filings@epa.gov.

57. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

58. Respondent understands that its failure to timely pay any portion of the civil penalty described in herein may result in the commencement of a civil action in the United States District Court for the District of Kansas to recover the full remaining balance, along with penalties and accumulated interest.

59. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CAFO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Signatories

60. The undersigned for each party has the authority to bind each respective party to the terms and conditions of this CAFO. The CAFO may be signed in part and counterpart by each party.

Parties Bound

61. This CAFO shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CAFO.

Definitions

62. Terms used in this order that are defined in the CWA or EPA regulations promulgated under the CWA have the meanings assigned to them in the CWA or those regulations, unless otherwise provided in this Order.

Executed Agreement Filed

63. This executed Complaint and Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

Electronic Service

64. Respondent consents to receiving the filed Consent Agreement/Final Order electronically at the following email address: *rgarcia@bgprod.com*

For the Respondent, BG Products, Inc.:

Signature: 

Date: August 9, 2023

Name: RON GARCIA

Title: EVP / CFO / COO

For the Complainant, U.S. Environmental Protection Agency, Region 7:

DAVID
COZAD

Digitally signed by DAVID
COZAD
Date: 2023.09.26
08:07:47 -05'00'

David Cozad
Director
Enforcement and Compliance Assurance Division

Adam Hilbert
Office of Regional Counsel

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), 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, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date

Karina Borrromeo
Regional Judicial Officer

Certificate of Service

I certify that on the date noted below I delivered a true and correct copy of this Complaint and Consent Agreement/Final Order by electronic mail, to:

For Complainant:

Adam Hilbert
Office of Regional Counsel
U.S. Environmental Protection Agency Region 7
Hilbert.adam@epa.gov

William Blair
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency Region 7
Blair.william@epa.gov

For Respondent:

Ron Garcia
Chief Operating Officer/Chief Financial Officer
BG Products, Inc.
rgarcia@bgprod.com

Date

Signature