

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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|-------------------------------|---|--|
| In the Matter of: |) | Docket No. CWA-05-2022-0004 |
| |) | |
| Harsco Corporation dba |) | Proceeding to Assess a Class II Civil |
| Harsco Metals |) | Penalty under Section 309(g) of the Clean |
| 1344 Bowman Street |) | Water Act, 33 U.S.C. § 1319(g) |
| Mansfield, Ohio 44903 |) | |
| |) | |
| Respondent. |) | |

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b)(2)-(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2)-(3).

2. The Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, EPA Region 5, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is Harsco Corporation, a corporation doing business as Harsco Metals in Mansfield, Ohio.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO including, but not limited to, its right to request a hearing under 40 C.F.R. § 22.15(c) and Sections 309(g)(2)(B) and (4)(C) of the CWA, 33 U.S.C. § 1319(g)(2)(B) and (4)(C); its right to appellate review under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B); its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CAFO; and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

10. Section 402 of the CWA, 33 U.S.C. § 1342, establishes the NPDES program under which EPA and, upon receiving authorization from EPA, a state may permit discharges into navigable waters, subject to specific conditions. A violation of a NPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

11. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the State of Ohio requested approval from EPA to administer its own permit program for discharges into navigable waters within Ohio, and such approval was granted by EPA on March 11, 1947, 39 Fed. Reg. 26,061 (July 16, 1974). Therefore, pursuant to the State’s permit program, the Ohio Environmental Protection Agency (“OEPA”) has issued OH NPDES permits.

12. Section 502(12) of the CWA defines “discharge of a pollutant,” as, *inter alia*, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

13. Section 502(6) of the CWA defines “pollutant,” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

14. Section 502(14) of the CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

15. Section 502(7) of the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

16. Section 502(5) of the CWA defines a “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

17. The regulation at 40 C.F.R. § 122.2 (1993) defines the term “waters of the United States,” as

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (b) All interstate waters, including interstate “wetlands;”
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- (f) The territorial sea; and
- (g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

18. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator to assess a Class II civil penalty under Section 309(g)(2)(B) of the CWA, 33 U.S.C.

§ 1319(g)(2)(B), after consultation with the State in which the violation occurs, when the Administrator finds, on the basis of any information available, that a person has violated Section 301 of the CWA, 33 U.S.C. § 1311, which includes discharges not in compliance with a permit under Section 402 of the CWA, 33 U.S.C. § 1342.

Factual Allegations and Alleged Violations

19. Respondent is a corporation and therefore a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5) and 40 C.F.R. §.122.2

20. At all times relevant to this Order, Respondent owned and operated the Harsco Metals Facility, a scrap steel storage facility, located in Mansfield, Ohio (“Facility”).

21. At all times relevant to this Order, the Facility’s Outfall No. 001 discharged total suspended solids (TSS) into the Rocky Fork of the Mohican River.

22. TSS is a “pollutant,” as defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

23. The discharge described in paragraph 21 is a “discharge of a pollutant,” as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

24. Outfall No. 001 at the Harsco Metals Facility is a “point source,” as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. At all times relevant to this Order, the outfall at the Harsco Metals Facility was a point source of “discharges” of a “pollutant” to the Rocky Fork of the Mohican River.

26. The Rocky Fork of the Mohican River is a “navigable water” within the meaning of Section 502 of the CWA, 33 U.S.C. § 1362, and “water of the United States” within the meaning of 40 CFR § 122.2.

27. Because Respondent owned or operated a Facility with an outfall that acted as a point source for the discharge of a pollutant to navigable waters, Respondent and the Facility have been subject to the CWA at all times relevant to this Order. Thus, any such discharge has been and is subject to the specific terms and conditions prescribed in the NPDES Permit.

28. The Ohio Environmental Protection Agency ("Ohio EPA"), under the authority of Section 402(b) of the CWA, 33 U.S.C. § 1342(b), issued NPDES Permit No. OH0053040 to TMS International LLC, which became effective on July 1, 2015. The 2015 NPDES Permit was transferred to the Respondent effective February 13, 2018. At all times relevant to this Order, Respondent was authorized to discharge pollutants from the Facility to Rocky Fork only in compliance with the specific terms and conditions of the Permit.

29. The Permit includes monitoring and reporting requirements that require Respondent to sample and test its effluent and monitor its compliance with Permit conditions and applicable regulations, according to specific procedures. The Permit also requires Respondent to file certified Discharge Monitoring Reports ("DMRs") of the results of monitoring and noncompliance reports with Ohio EPA, as appropriate.

30. The Permit contains effluent limitations and monitoring requirements that place certain limitations on the quality and quantity of effluent discharged by Respondent. The relevant discharge limitations are specified in Part I.A of the Permit, which is incorporated herein by reference.

31. Certified DMRs filed by Respondent with Ohio EPA, as required by the Permit, show discharges of a pollutant from the Harsco Metals Facility that exceed the effluent limitations established in the Permit, which are incorporated herein by reference. The list of

discharges of pollutants exceeding Permit effluent limitations is included in Appendix A to this Order.

Alleged Violations: Unlawful Discharge of Pollutants into Rocky Fork

32. The statements in Paragraphs 1 through 31 are hereby incorporated by reference as if set forth in full.

33. From March 2018 through May 2020, Respondent filed certified DMRs with the Ohio EPA that reported twenty-nine instances where NPDES discharges of Pollutants from the facility exceeded the permitted effluent limitations established in the NPDES Permit related to TSS effluent limits at Outfall 001, as specified in Attachment A, which is incorporated by reference.

34. Each instance in which Respondent discharged Pollutants to navigable waters in amounts exceeding the effluent limitations contained in the Permit is a violation of the Permit and Section 301 of the CWA, 33 U.S.C. § 1311.

Civil Penalty

35. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, the Administrator may assess a Class II civil penalty of up to, up to \$22,584 per day of violation up to a total of \$282,293, for violations of the CWA that occurred after November 2, 2015 and for which penalties are assessed on or after December 23, 2020, or other amounts as penalty levels may be later adjusted at 40 C.F.R. Part 19.

36. Based upon the facts alleged in this CAFO, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondent's ability to pay, prior history of such violations, degree of culpability, economic benefit or savings (if any) resulting from the

violations, and such other matters as justice may require, U.S. EPA has determined that an appropriate civil penalty to settle this action is \$32,136.

37. Within 30 days after the effective date of this CAFO, Respondent must pay the \$32,136 civil penalty by ACH electronic funds transfer, payable to “Treasurer, United States of America,” and sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22-checking

In the comment area of the electronic funds transfer, state Respondent’s name and the docket number of this CAFO.

38. At the time Respondent makes the ACH electronic funds transfer required by paragraph 37, Respondent shall notify the following persons in writing, stating Respondent’s name, complete address, and the case docket number, and provide a screen shot, pdf or other proof of the ACH electronic funds transfer:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (E-19J)
Chicago, Illinois 60604-3590

Andi Hodaj (ECW-15J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Susan Prout (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

And email copies to hodaj.andi@epa.gov and prout.susan@epa.gov

39. This civil penalty is not deductible for federal tax purposes.

40. If Respondent does not timely pay the civil penalty, Complainant may request the United States Department of Justice bring a civil action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action. Respondent acknowledges that the validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

41. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established pursuant to 26 U.S.C. § 6621(a)(2); 31 U.S.C. § 3717. In addition to the assessed penalty and interest, Respondent must pay the United States' attorneys fees and costs for collection proceedings, and Respondent must pay a nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 20 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. *See* 33 U.S.C. § 1319(g)(9).

General Provisions

42. The parties consent to service of this CAFO by email at the following valid email addresses: prout.susan@epa.gov (for Complainant) and james.hauck@h2lawyers.com (for Respondent).

43. Full payment of the penalty as described in paragraphs 36 and 37 and full compliance with this CAFO shall not in any case affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

44. As provided under 40 C.F.R. § 22.18(c), full payment of the penalty as described in paragraphs 36 and 37 and full compliance with this CAFO shall only resolve Respondent's

liability for federal civil penalties under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for the particular violations alleged in this CAFO.

45. This CAFO does not affect Respondent's responsibility to comply with the CWA and other applicable federal, state, or local laws, regulations, or permits.

46. Respondent certifies that it is complying with Sections 301(a) and 402 of the CWA, 33 U.S.C. §§ 1311(a), 1342.

47. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31 and the EPA's Interim Clean Water Act Settlement Penalty Policy (Mar. 1995).

48. The terms of this CAFO bind Respondent and its successors and assigns.

49. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to the terms of this CAFO.

50. Each party agrees to bear its own costs and attorneys fees in this action.

51. This CAFO constitutes the entire agreement between the parties.

52. The effective date for this CAFO is the date it is filed with the Regional Hearing Clerk, which is after completion of the notice and comment requirements of Sections 309(g)(4)(C) and 309(g)(5) of the CWA, 33 U.S.C. §§ 1319(g)(4)(C), (5) and 40 C.F.R. §§ 22.38, 22.45, and which shall be at least 30 days after the CAFO has been signed by the Regional Judicial Officer or Regional Administrator.

In the Matter of:
Harsco Corporation
Docket No. CWA-05-2022-0004

Harsco Corporation, Respondent



Edward Ramsey
Regional President – North America Harsco Environmental

December 29, 2021

Date

In the Matter of:
Harsco Corporation
Docket No. CWA-05-2022-0004

United States Environmental Protection Agency, Complainant

**MICHAEL
HARRIS**

Digitally signed by MICHAEL
HARRIS
Date: 2022.01.13 11:31:20
-06'00'

Michael D. Harris
Division Director
Enforcement and Compliance Assurance Division
U.S. EPA Region 5

Date

In the Matter of:
Harsco Corporation
Docket No. CWA-05-2022-0004

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

By: _____ Date: _____
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

ATTACHMENT A

**Harsco Metals
Total Suspended Solids (TSS) Effluent Limit Exceedances**

| Monitoring Period End Date | Monthly Average* – milligrams/Liter (mg/L) | Percent Exceedance of Limit | Daily Max** - milligrams/Liter (mg/L) | Percent Exceedance of Limit |
|-----------------------------------|---|------------------------------------|--|------------------------------------|
| 3/31/2018 | 56 | 87 | 56 | 24 |
| 5/31/2018 | 64 | 113 | 64 | 42 |
| 8/31/2018 | 41 | 37 | | |
| 12/31/2018 | 500 | 1,567 | 500 | 1,011 |
| 1/31/2019 | 170 | 467 | 170 | 278 |
| 3/31/2019 | 200 | 567 | 200 | 344 |
| 4/30/2019 | 180 | 500 | 180 | 300 |
| 6/30/2019 | 3,900 | 12,900 | 3,900 | 8,567 |
| 9/30/2019 | 250 | 733 | 250 | 456 |
| 10/31/2019 | 150 | 400 | 150 | 233 |
| 11/30/2019 | 46 | 53 | 46 | 2 |
| 12/31/2019 | 1,100 | 3,567 | 1,100 | 2,344 |
| 1/31/2020 | 230 | 667 | 230 | 411 |
| 3/31/2020 | 110 | 267 | 110 | 144 |
| 4/30/2020 | 45 | 50 | | |
| 5/31/2020 | 38 | 27 | | |

* Monthly Average limit is 30 mg/L

** Maximum limit is 45 mg/L

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Docket No: **CWA-05-2022-0004**

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, docket number CWA-05-2022-0004 which was filed on _____, in the following manner to the following addressees:

Copy by E-mail to
Respondent:

James M. Hauck
james.hauck@h2lawyers.com

Copy by E-mail to
Attorney for Complainant:

Susan Prout
prout.susan@epa.gov

Copy by E-mail to
Regional Judicial Officer:

Ann Coyle
coyle.ann@epa.gov

Dated _____

Isidra Martinez
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5