

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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3 HEARINGS CLERK
4 EPA -- REGION 10

5)
6 IN THE MATTER OF:)

Docket No. EPCRA-10-2004-0151

7 EL PASO MERCHANT ENERGY -)
8 PETROLEUM COMPANY)

CONSENT AGREEMENT AND
FINAL ORDER

9 Respondent.)
10 _____)

11
12 I. PRELIMINARY STATEMENT

13 Complainant, the Director of the Office of Environmental Cleanup, United States
14 Environmental Protection Agency Region 10 (EPA), and Respondent, El Paso Merchant Energy -
15 Petroleum Company, by their undersigned representatives, hereby stipulate and agree as follows:
16

17 1.1 This action for civil penalties is brought pursuant to Section 109 of the
18 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.
19 § 9609, and Section 325 of the Emergency Planning and Community Right-to-Know Act (EPCRA),
20 42 U.S.C. § 11045.
21

22 1.2 EPA initiated this proceeding by sending a letter to Respondent inviting the
23 commencement of pre-filing settlement discussions. Such discussions were timely commenced and
24 have resulted in this settlement.

25 1.3 In accordance with Section 22.13(b) of the "Consolidated Rules of Practice
26 Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, issuance of this
27

28 CONSENT AGREEMENT
AND FINAL ORDER
EL PASO MERCHANT ENERGY
PETROLEUM COMPANY

1 Consent Agreement and Final Order (CAFO) both commences and concludes this action for
2 assessment of civil penalties.

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5 **II. JURISDICTION**

6 2.1 Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires the person in charge of a
7 facility to immediately notify the National Response Center (NRC) as soon as he or she has
8 knowledge of a release of a hazardous substance from such facility in an amount equal to or greater
9 than the reportable quantity (RQ).

10 2.2 Sections 304(a) and (b) of EPCRA, 42 U.S.C. §§ 11004(a) and (b), require that if a
11 facility at which hazardous chemicals are produced, used, or stored releases an RQ of an extremely
12 hazardous substance and the release requires, or occurred in a manner that would require, notice
13 under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), the owner or operator of the facility must
14 immediately notify the State Emergency Response Commission (SERC) of any state likely to be
15 affected by the release and the Local Emergency Planning Committee (LEPC) for any area likely to
16 be affected by the release.

17 2.3 Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), requires the owner or operator of
18 the facility, as soon as practicable after a reportable release occurs, to provide to the SERC and
19 LEPC a written followup notice setting forth and updating the information required under Section
20 304(b) of EPCRA, 42 U.S.C. § 11044(b).

21 2.4 Under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and Section 329(7) of
22 EPCRA, 42 U.S.C. § 11049(7), "person" means, among other things, any corporation.

1 2.5 Under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), “facility” means, among
2 other things, any building, structure, installation, storage container, equipment or any site or area
3 where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come
4 to be located.
5

6 2.6 Under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4), “facility” means all
7 buildings, equipment, structures, and other stationary items which are located on a single site or on
8 contiguous or adjacent sites and which are owned or operated by the same person (or by any person
9 which controls, is controlled by, or under common control with, such person).
10

11 2.7 Under Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), “release” means any
12 spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching,
13 dumping, or disposing into the environment.

14 2.8 Ammonia is an “extremely hazardous substance” under Section 302 of EPCRA, 42
15 U.S.C. § 11002, with an RQ of 100 pounds, as indicated at 40 C.F.R. Part 355, Appendix A, and
16 with a minimum threshold level of 500 pounds, as provided in 40 C.F.R. Part 370, and a threshold
17 planning quantity of 500 pounds, as provided in 40 C.F.R. Part 355, Appendix A.
18

19 2.9 Ammonia is listed as a toxic and hazardous substance under Occupational Safety and
20 Health Administration (OSHA) regulations at 29 C.F.R. § 1910.1000, Table Z-1. OSHA requires
21 the owner or operator of a facility with this substance on-site to prepare or have available a Material
22 Safety Data Sheet (MSDS) for it.
23

24 2.10 Under Section 109 of CERCLA, 42 U.S.C. § 9609, the EPA Administrator may
25 assess a civil penalty of up to \$25,000 per day of violation of CERCLA Section 103. Under Section
26 325(b) of EPCRA, 42 U.S.C. § 11045(b), the EPA Administrator may assess a civil penalty of up
27

1 to \$25,000 for each day of violation of Section 304 of EPCRA, 42 U.S.C. § 11004. The Debt
2 Collections Improvements Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 42
3 C.F.R. Part 19, increased these statutory maximum penalties to \$27,500 per day of violation
4 occurring during the period from January 31, 1997 through March 15, 2004.
5

6 7 **III. FACTS**

8 3.1 Respondent is a corporation incorporated in the State of Delaware.

9 3.2 Respondent formerly owned a facility that produces ammonia in St. Helens, Oregon,
10 which is located at 73149 Columbia River Highway, St. Helens, Oregon 97051.
11

12 3.3 Respondent sold the St. Helens facility to Dyno Nobel, Inc. on December 3, 2003.
13 Respondent has assumed responsibility for the violations addressed in this CAFO.

14 3.4 During the period from October 28, 2003, through November 11, 2003, the facility
15 released approximately 20.44 tons (40,880 pounds) of ammonia to the atmosphere over a 14-day
16 period from a damaged vent valve.
17

18 3.5 The facility managers knew of the release at approximately 8:00 a.m. Pacific time on
19 November 11, 2003.

20 3.6 The facility managers did not notify the NRC of the release until approximately 12:11
21 p.m. Pacific time on November 12, 2003.

22 3.7 The release was likely to affect the States of Oregon and Washington.

23 3.8 The facility managers notified the Oregon SERC at 12:19 p.m. Pacific time on
24 November 12, 2003, approximately 28 hours 38 minutes after the release of ammonia was
25 discovered.
26

1 3.9 The facility managers did not notify the Washington State SERC of the ammonia
2 release.

3 3.10 The facility management notified the Oregon LEPC of the ammonia release at 12:19
4 p.m. Pacific time on November 12, 2003, approximately 28 hours 38 minutes after discovery of the
5 release.
6

7 3.11 The facility management did not report the ammonia release to the Cowlitz County,
8 Washington state LEPC.

9 3.12 Records indicate that facility management made no written follow-up reports of the
10 release to the SERCs or the LEPCs.
11

12 **IV. AGREEMENT**

13 4.1 EPA and Respondent agree that settlement of this matter is in the public interest and
14 that entry of the CAFO without litigation is the most appropriate means of resolving this matter.
15

16 4.2 Respondent admits that EPA has jurisdiction over this matter.
17

18 4.3 Respondent neither admits nor denies the facts alleged by EPA in Section III of this
19 CAFO.

20 4.4 Based on Respondent's willingness to settle this matter without litigation, the nature
21 of the violations, Respondent's agreement to perform a Supplemental Environmental Project (SEP),
22 and other relevant factors, and in accordance with the *Enforcement Response Policy for Sections 304,*
23 *311, and 312 of the Emergency Planning Community Right-to-Know Act* and *Section 103 of the*
24 *Comprehensive Environmental Response, Compensation, and Liability Act*, EPA has determined and
25 Respondent agrees that an appropriate penalty to settle this action is \$50,345.20.
26

1 4.5 Respondent consents to the issuance of this CAFO, to the payment of the civil penalty
2 cited in the foregoing paragraph, and to performance of the SEP described in Appendix A.

3 4.6 The SEP is specifically described in the SEP Scope Of Work attached hereto as
4 Appendix A and incorporated herein by reference.

5 4.7 Respondent shall provide \$9,981.00 in communications equipment to the Columbia
6 County Amateur Radio Emergency Services and \$49,600.00 in computer and communications
7 equipment to the Columbia County Department of Emergency Management, as listed in Appendix
8 A to this CAFO. Respondent shall make the purchases required by the SEP within 90 days of entry
9 of this CAFO.
10

11 4.8 The total expenditure for the SEP shall be not less than \$59,581.00 in accordance with
12 the specifications set forth in the SEP Scope of Work at Appendix A. Respondent shall include
13 documentation of the expenditures made in connection with the SEP as part of the SEP Completion
14 Report.
15

16 4.9 Respondent hereby certifies that, as of the date of this CAFO, Respondent is not
17 required to perform or develop the SEP by any federal, state, or local law or regulation and that
18 Respondent is not required to perform or develop the SEP by agreement, grant, or as injunctive relief
19 in any other case. Respondent further certifies that it has not received, and is not presently
20 negotiating to receive, credit in any other enforcement action for the SEP.
21

22 4.10 a. Respondent shall submit a SEP Completion Report to EPA within 90 days of
23 entry of this CAFO. The SEP Completion Report shall contain the following information:

- 24 (i) A detailed description of the SEP as implemented;
25 (ii) Itemized costs, documented by copies of purchase orders and receipts
26 or canceled checks; and
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(iii) Certification that the SEP has been fully implemented pursuant to the provisions of this CAFO.

b. Respondent agrees that failure to submit the SEP Completion Report required by subsection 4.10.a, above, shall be deemed a violation of this CAFO, and Respondent shall become liable for stipulated penalties pursuant to this CAFO.

c. Respondent shall submit all notices and reports required by this CAFO by first class mail to: Suzanne Powers, EPA Region 10, Washington Operations Office, 300 Desmond Drive SE, Suite 102, Lacey, Washington 98503, unless otherwise instructed in writing by EPA.

4.11 Respondent agrees that EPA may inspect Respondent's records related to the SEP at any reasonable time in order to confirm that the SEP is being undertaken in conformity with the representations made herein.

4.12 In all documents or reports including, without limitation, the SEP Completion Report, submitted to EPA pursuant to this CAFO, Respondent shall, by a corporate officer, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

4.13 a. Following receipt of the SEP Completion Report described in Paragraph 4.11 above, EPA will do one of the following: (i) accept the Report; (ii) reject the Report, notify Respondent, in writing, of deficiencies in the Report and provide Respondent an additional 30 days

1 in which to correct any deficiencies; or (iii) reject the Report and seek stipulated penalties in
2 accordance with Paragraph 4.14 below.

3 b. In the event the SEP is not completed as contemplated herein, as determined
4 by EPA, stipulated penalties shall be due and payable by Respondent to EPA in accordance with
5 Paragraph 4.14 below. Schedules herein may be extended based upon mutual written agreement of
6 the parties.

8 4.14 a. In the event that Respondent fails to comply with any of the terms or
9 provisions of this CAFO relating to the performance of the SEP described in the preceding
10 paragraphs and in Appendix A, and/or to the extent that the actual expenditures for the SEP do not
11 equal or exceed the cost of the SEP described in this CAFO, Respondent shall be liable for stipulated
12 penalties according to the provisions set forth below:

14 (i) For the SEP which has not been completed satisfactorily pursuant to
15 this CAFO, Respondent shall pay a stipulated penalty to the United
16 States in the amount of \$59,581.00 less the amount actually
expended.

17 (ii) For failure to submit the SEP Completion Report required by
18 Paragraph 4.10 above, Respondent shall pay a stipulated penalty in
19 the amount of \$100.00 for each day after the report is due until the
report is received by EPA.

20 b. The determinations of whether the SEP has been satisfactorily completed and
21 whether the Respondent has made a good faith, timely effort to implement the SEP shall be at the
22 sole discretion of EPA. In raising any objection to EPA's determinations, Respondent has the burden
23 of proving that EPA's determinations are arbitrary or capricious.
24

1 c. Stipulated penalties for subparagraph 4.15.a(ii) above shall begin to accrue
2 on the day after performance is due, and shall continue to accrue through the final day of satisfactory
3 completion of the activity.

4 d. Respondent shall pay stipulated penalties within 15 days of receipt of written
5 demand by EPA for such penalties. Payment shall be in accordance with the provisions of Paragraph
6 6.2 below. Interest and late charges shall be paid as stated in Paragraph 6.4 below.

7 e. Nothing in this CAFO shall be construed as prohibiting, altering, or in any
8 way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of
9 Respondent's violation of this agreement.
10

11
12 4.15 Any public statement, oral or written, in print, film, or other media, made by
13 Respondent making reference to the SEP shall include the following language: "This project was
14 undertaken in connection with the settlement of an enforcement action taken by the U.S.
15 Environmental Protection Agency for violations of Section 304 of EPCRA and Section 103 of
16 CERCLA."
17

18 4.16 EPA reserves the right to take any enforcement action, civil or criminal, pursuant to
19 EPCRA, CERCLA, or any other available legal authority including, without limitation, the right to
20 seek injunctive relief, to compel compliance with this CAFO, and for monetary penalties.

21 4.17 This CAFO shall not relieve Respondent of its obligation to comply with all
22 applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or
23 determination of, any issue related to any federal, state or local permit, nor shall it be construed to
24 constitute EPA approval of the equipment or technology purchased by Respondent in connection
25 with the SEP under the terms of this Agreement.
26

1 4.18 Respondent agrees not to claim or attempt to claim a federal tax deduction or credit
2 covering all or any part of the penalty paid to the United States Treasurer or all or any part of the
3 expenditures for the SEP required by this CAFO. Respondent also agrees not to make a profit on
4 any services provided as part of the SEP project.
5

6 4.19 Respondent represents that it is duly authorized to execute this CAFO and that the
7 party signing this CAFO on its behalf is duly authorized to bind Respondent to the terms of this
8 CAFO.

9 4.20 Respondent explicitly waives its right to request an adjudicatory hearing on any issue
10 addressed in this CAFO.
11

12 4.21 Compliance with all the terms and conditions of this CAFO shall result in full
13 settlement and satisfaction of all claims alleged in Sections II and III above.

14 **V. APPENDIX A**

15 5.1 "Appendix A" is the Scope of Work for the SEP to be implemented by Respondent.
16 "Appendix A" is attached to and incorporated within this CAFO.
17

18 **VI. FINAL ORDER**

19 It is hereby ordered and adjudged as follows:

20 6.1 For the reasons set forth above, Respondent is assessed a civil penalty in the amount
21 of \$50,345.20, including \$8,390.87 for the CERCLA penalty and \$41,954.33 for the EPCRA
22 penalty.
23

24 6.2 Within 30 days of Respondent's receipt of a conformed copy of the fully executed
25 CAFO, Respondent shall pay the total penalty of \$50,345.20 by cashier's or certified check or money
26 order made payable appropriately as indicated and mailed to the addresses below:
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28 CONSENT AGREEMENT
AND FINAL ORDER
EL PASO MERCHANT ENERGY
PETROLEUM COMPANY

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a. For the EPCRA violations, \$41,954.33 payable to the "U.S. Treasury" and

sent to:

Mellon Client Services Center
EPA Region 10
500 Ross Street
P.O. Box 360903
Pittsburgh, Pennsylvania 15251-6903

b. For the CERCLA violation, \$8,390.87 payable to "EPA Hazardous

Substance Superfund" and sent to:

Mellon Client Services Center
EPA Region 10
500 Ross Street
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251-6903

Each check shall reference Respondent's name and address, the case name and docket number of this CAFO, and be accompanied by a transmittal letter. A photocopy of each check and its accompanying transmittal letter shall be mailed to:

Region 10 Hearing Clerk
U.S. EPA Region 10
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101

and

Suzanne Powers
U.S. EPA Region 10
Washington Operations Office
300 Desmond Drive SE
Suite 102
Lacey, Washington 98503

6.3 Should Respondent fail to pay the penalty assessed by this CAFO in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Should such a failure to pay occur, Respondent may be subject to a civil action under Section

1 325(f) of EPCRA, 42 U.S.C. § 11045(f), and Section 109(a)(4) of CERCLA, 42 U.S.C. § 9609(a)(4),
2 to collect any unpaid penalties, together with interest, handling charges, and nonpayment penalties,
3 as set forth below.

4
5 6.4 Should Respondent fail to pay any portion of the penalty assessed by this CAFO in
6 full by its due date, Respondent shall also be responsible for payment of the following amounts:

7 a. Interest. Any unpaid portion of the assessed penalty shall bear interest at the
8 rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the
9 effective date of the Final Order contained herein; provided, however, that no interest shall be
10 payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the
11 Final Order contained herein.

12
13 b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling
14 charge of \$15 shall be paid if any portion of the assessed penalty is more than 30 days past due.

15 c. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment
16 penalty of 6% per annum shall be paid on any portion of the assessed penalty that is more than 90
17 days past due, which nonpayment penalty shall be calculated as of the date the underlying penalty
18 first becomes past due.
19

20 6.5 The provisions of this CAFO shall be binding on Respondent, its officers, directors,
21 agents, servants, authorized representatives, employees, successors, and assigns.

22 6.6 Except as described in Paragraph 6.4 above, each party shall bear its own costs in
23 bringing or defending this action.
24

25 Stipulated, Agreed, and
26 Approved for Entry,
27 Waiving Notice:

28 CONSENT AGREEMENT
AND FINAL ORDER
EL PASO MERCHANT ENERGY
PETROLEUM COMPANY

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FOR UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, REGION 10, COMPLAINANT


Dated: 9/2/04



Daniel D. Opalski, Director
Environmental Cleanup Office

FOR EL PASO MERCHANT ENERGY,
PETROLEUM COMPANY, RESPONDENT

Dated: _____



Respondent, El Paso Merchant Energy – Petroleum Company

SJM

IT IS SO ORDERED.

Dated this 2nd day of September, 2004.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, REGION 10



Ronald A. Kreizenbeck
Acting Regional Administrator

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: EL PASO MERCHANT ENERGY - PETROLEUM COMPANY, DOCKET NO.: EPCRA-10-2004-0151** was filed with the Regional Hearing Clerk on September 08, 2004.

On September 08, 2004 the undersigned certifies that a true and correct copy of the document was delivered to:

Stephanie Mairs, Esquire
US Environmental Protection Agency
1200 Sixth Avenue, ORC-158
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 September 08, 2004, to:

Mr. Scott Miller, Esq.
El Paso Merchant Energy-Petroleum Company
1001 Louisiana Street
Houston, TX 77002

DATED this 08th day of September 2004.



Carol Kennedy
Regional Hearings Clerk
EPA Region 10