



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

REGIONAL HEARING
CLERK

2015 DEC 23 PM 1:13

U.S. Environmental
Protection Agency-Reg 2

Couch & White LLP
Attn: Adam J. Schultz, Esq.
540 Broadway, P.O. Box 22222
Albany, New York 12201

December 22, 2015

Subject: In the Matter of Western New York Energy. Docket No. CWA 02-2010-3816

Dear Mr. Schultz:

Attached herewith is the proposed Consent Agreement/Final Order (CAFO) for the subject case. Please contact me at (212) 637-3236 if you have any questions with respect to this matter. Thank you.

Yours truly,

Timothy C. Murphy
Assistant Regional Counsel

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY, REGION 2
290 Broadway
New York, New York 10007

REGIONAL HEARING
CLERK

2015 DEC 23 PM 1:18

U.S. Environmental
Protection Agency-Reg 2

IN THE MATTER OF:
Western New York Energy
4141 Bates Road
Medina, NY 14103

Respondent

Proceeding pursuant to Section 311(b)(6)
of the Clean Water Act, 33 U.S.C. §
1321(b)(6)

**CONSENT AGREEMENT
AND
FINAL ORDER**

**DOCKET NO.
CWA-02-2010-3816**

I. PRELIMINARY STATEMENT

The Complainant in this proceeding, the Director of Emergency and Remedial Response Division ("ERRD"), Region 2, United States Environmental Protection Agency ("EPA" or "Complainant"), filed, on October 10, 2010, a "Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing" ("Complaint") against Western New York Energy ("Respondent").

Complainant and Respondent, having agreed that settlement of this matter is in the public interest, and that entry of this Consent Agreement and Final Order ("CA/FO" or "Agreement") without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties, it is hereby agreed and ordered as follows:

II. PROCEDURAL AND FACTUAL FINDINGS

1. EPA initiated this proceeding for the assessment of a civil penalty, pursuant to Section 311(b)(6) of the Clean Water Act ("Act"), 33 U.S.C. § 1321(b)(6).
2. The Complaint alleged that Respondent violated the Act by failing or refusing to comply with regulations issued under Section 311(j) of the Act, 33 U.S.C. § 1321(j), and found at 40 C.F.R. § 112.20, to which Respondent was subject at its facility

located at 4141 Bates Avenue, Medina, New York ("the Facility"). The Complaint proposed to assess a civil penalty of ninety-four thousand seven hundred dollars (\$94,700).

3. The Facility is an onshore facility within the meaning of 40 C.F.R. § 112.2, that could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines of the United States. Under 40 C.F.R. § 112.20(f)(1), a facility could be classified as such if the facility's total oil storage capacity is greater than 1 million gallons and the facility is located at a distance such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments.
4. Respondent submitted documents to EPA dated March and June 2010, which demonstrated the Facility met both of the aforementioned criteria under 40 C.F.R. § 112.20(f)(1). Therefore, the Facility is subject to the facility response plan ("FRP" or "response plan") submission requirement in 40 C.F.R. § 122.20.
5. Pursuant to 40 C.F.R. 112.20(a)(2)(ii), which applies to a newly constructed facility that commences operation after August 30, 1994, and is required to prepare and submit a response plan based on the criteria in 40 C.F.R. § 112.20(f)(1), Respondent, as the owner and operator, was required to submit a response plan to EPA prior to the start of the operation of its facility.
6. The Facility commenced operation on December 1, 2007. Respondent failed to submit a response plan until March 25, 2010, 27 months after starting operations. This failure to comply constitutes a violation of Section 311(j) of the Act, 33 U.S.C. § 1321(j).
7. This action was public noticed. No public comment was received.

III. TERMS OF SETTLEMENT

8. The Paragraphs above are re-alleged and incorporated herein by reference.
9. This Consent Agreement and Final Order shall apply to and be binding upon Respondent, its officers, directors, employees, successors and assigns, including, but not limited to, subsequent purchasers.
10. Respondent stipulates that EPA has jurisdiction over the subject matter alleged in the Complaint and that the Complaint states a claim upon which relief can be granted against Respondent.
11. Respondent waives any defenses it might have as to jurisdiction and venue, and, without admitting or denying the factual or legal allegations contained in the

Complaint or this CA/FO, consents to the terms of this Consent Agreement and Final Order.

12. Respondent hereby waives their right to a judicial or administrative hearing or appeal on any issue of law or fact set forth in the Complaint.
13. Pursuant to Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), given the seriousness of the violations and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is in the amount of **thirty-five thousand five hundred dollars (\$35,500.00)**.
14. For purposes of settlement, Respondent consents to the issuance of this Consent Agreement and consents to the payment of the civil penalty cited in the foregoing Paragraph.

VI. PAYMENT OF CIVIL PENALTY

15. Respondent shall pay a civil penalty to EPA in the amount of **thirty-five thousand five hundred dollars (\$35,500.00)**. Such payment shall be made by cashier's or certified check, or by Electronic Fund Transfer ("EFT"). If the payment is made by check, then the check shall be payable to the "Treasurer, United States of America," and shall be mailed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The check shall be identified with a notation thereon listing the following: **IN THE MATTER OF WESTERN NEW YORK ENERGY**, and shall bear thereon the **Docket Number CWA-02-2010-3816**. Payment of the penalty must be received at the above address on or before sixty (60) calendar days after the Effective Date of this CA/FO.

If Respondent elects to make the payment by EFT, then Respondent shall provide the following information to its remitter bank:

- a. Amount of Payment: \$35,500.00.
- b. SWIFT address: FRNYUS33, 33 Liberty Street, New York, NY 10045
- c. Account Code for Federal Reserve Bank of New York receiving payment:
68010727
- d. Federal Reserve Bank of New York ABA routing number: 021030004
- e. Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

Name of Respondent: Western New York Energy
f. Case Number: CWA-02-2010-3816

Such EFT must be received on or before 60 calendar days after the Effective Date of this CA/FO. Whether the payment is made by check or by EFT, Respondent shall promptly thereafter furnish reasonable proof that such payment has been made, to both:

Tim Murphy, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
(212) 637-3236

and

Karen Maples, Regional Hearing Clerk
U.S. Environmental Protection Agency – Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

- g. Failure to pay the amount in full within the time period set forth above may result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection.
- h. The civil penalty constitutes a penalty within the meaning of 26 U.S.C. § 162(f).
- i. Any requirement for the payment of funds established under the terms of this Consent Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

V. GENERAL PROVISIONS

- 16. The Respondent waives any right they may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Director or the Regional Administrator where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.
- 17. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon

which this agreement is based, or for Respondent's violation of any applicable provision of law.

18. This Consent Agreement and Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit.
19. This Consent Agreement and Final Order constitute a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act for the violations alleged in the Complaint. Nothing in this Consent Agreement and Final Order is intended to, nor shall be construed to, operate in any way to resolve any criminal liability of the Respondent. Compliance with this Consent Agreement and Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.
20. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Consent Agreement and to execute and legally bind that party to it.
21. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this Consent Agreement and Order.

FOR RESPONDENT, Western New York Energy:

BY:


Michael C. Sawyer

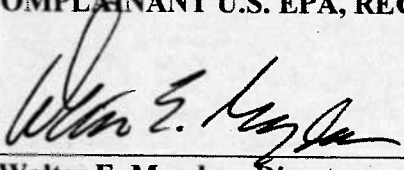
Western New York Energy

DATE:

11/24/15

FOR COMPLAINANT U.S. EPA, REGION 2:

BY:


Walter E. Mugdan, Director
Emergency and Remedial Response Division
U.S. EPA, Region 2
290 Broadway
New York, New York 10007-1866

DATE:

12/4/2015

V. FINAL ORDER

The Regional Judicial Officer of the U.S. Environmental Protection Agency Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, NY.

12/15/15

Date

Helen Ferrara

Helen Ferrara
Regional Judicial Officer
United States Environmental Protection
Agency, Region 2
290 Broadway
New York, NY 10007

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, New York 10007

IN THE MATTER OF:
Western New York Energy
4141 Bates Road
Medina, NY 14103

RESPONDENT

Proceeding pursuant to Section 311(b)(6)
of the Clean Water Act, 33 U.S.C. §
1321(b)(6), for FRP violations

**CONSENT AGREEMENT
AND
FINAL ORDER**

**DOCKET NO.
CWA-02-2010-3816**

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I served the foregoing fully executed Consent Agreement and Final Order, bearing the above-referenced docket number, in the following manner.

Copy by Certified Mail to Respondent's Counsel
Return Receipt Requested:

Adam J. Schultz
Couch White, LLP
540 Broadway
P.O. Box 22222
Albany, NY 12201
Telephone (518) 426-4600
aschultz@couchwhite.com

Original and One Copy
By Hand-Delivery to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway, 16th floor
New York, New York 10007-1866

Date: 12/22/15

NAME

Katherine Giudice
AIR Branch Secretary

In the matter of Western New York Energy
Docket No. CWA-02-2010-3816