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HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	
)	DOCKET NO. CWA-10-2012-0124
Nielsen Brothers, Inc.)	
Bellingham, Washington)	CONSENT AGREEMENT AND
)	FINAL ORDER
)	
Respondent.)	
_____)	

1. AUTHORITIES

1.1. This Consent Agreement and Final Order (CAFO) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 311(b)(6)(B)(i) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990. The Administrator has delegated the authority to issue the Final Order contained in Part 5 of this CAFO to the Regional Administrator of EPA Region 10, who in turn has delegated this authority to the Regional Judicial Officer.

1.2. In accordance with Section 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, EPA hereby issues, and Nielsen Brothers, Inc. (Respondent) hereby agrees to issuance of, the Final Order contained in Part 5 of this CAFO.

1.3. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or a hazardous substance into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or the environment of the United States.

1.4. “Navigable waters” are defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1.

1.5. Pursuant to Section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA, acting through its delegated authority under Executive Order No. 11735, 38 Fed. Reg. 21243 (Aug. 7, 1973), has determined by regulation that the quantities of oil which may be harmful to the public health or welfare or the environment of the United States include discharges of oil that 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. 40 C.F.R. § 110.3.

2. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part 5 of this CAFO becomes effective.

2.2. A concise statement of the factual bases for alleging violations of the Act, together with specific references to the provisions of the Act and implementing regulations Respondent is alleged to have violated, appears in Part 3 of this CAFO.

3. ALLEGATIONS

3.1. Respondent, a corporation organized under the laws of the state of Washington, is a “person” within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7).

3.2. Respondent is the “owner or operator,” within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), of a truck that discharged oil (Facility).

3.3. The Facility is an “onshore facility” within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10).

3.4. On March 29, 2011, Respondent spilled approximately 120 gallons of diesel from the Facility when the driver veered into a ditch along State Route 9 in Whatcom County, Washington. The diesel spilled onto shoreline and into high, running water in a ditch that flows to the South Fork of the Nooksack River in Whatcom County, Washington.

3.5. The spill constituted a “discharge” within the meaning of 33 U.S.C. § 1321(a)(2).

3.6. Respondent’s March 29, 2011 discharge of oil from the Facility caused a sheen upon the surface of the ditch and adjoining shorelines.

3.7. The ditch into which the diesel spilled and the South Fork of the Nooksack River are “navigable waters” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

3.8. Respondent’s March 2011 discharge of oil from the Facility upon the adjoining shoreline and navigable waters of the United States in a quantity that has been determined may be harmful under 40 C.F.R. § 110.3 violated Section 311(b)(3) of the Act, 33 U.S.C. §1321(b)(3).

4. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in Part 3 of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in Part 3 of this CAFO.

4.3. Respondent expressly waives any rights to contest the allegations and to appeal the Final Order contained herein.

4.4. The provisions of this CAFO shall bind Respondent and its servants, employees, successors and assigns.

4.5. Except as provided in Paragraph 4.10 below, each party shall bear its own costs in bringing or defending this action.

4.6. Pursuant to Section 311(b) of the Act, 33 U.S.C. § 1321(b), EPA has determined and Respondent agrees that an appropriate penalty to settle this action is ELEVEN-THOUSAND DOLLARS (\$11,000). This penalty amount has been agreed upon in consideration of statutory penalty factors identified in Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), including Respondent's agreement to pay a \$6,000 penalty to the Washington Department of Ecology for the same incident alleged above.

4.7. Respondent consents to the issuance of the attached Final Order and to payment of the civil penalty cited in the foregoing paragraph within thirty (30) days of the effective date of the Final Order.

4.8. Payment under this CAFO shall be made by cashier's check or certified check, payable to "Environmental Protection Agency" and bearing the notation "OSLTF-311."

Payment sent by the U.S. Postal Service shall be addressed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

Payment sent by express mail via a non-U.S. Postal Service carrier shall be addressed to:

U.S. Bank
Government Lockbox 979077
U.S. E.P.A. Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Respondent shall note on the check the title and docket number as they appear in the caption of this CAFO.

4.9. Respondent shall serve photocopies of the check described above on the Regional Hearing Clerk and EPA at the following two addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Mail Stop ORC-158
Seattle, Washington 98101

Ms. Kimberly Ogle
Unit Manager, NPDES Compliance Unit
1200 Sixth Avenue, Suite 900
Mail Stop OCE-133
Seattle, Washington 98101

4.10. If Respondent fails to pay the penalty assessed by paragraph 4.6 of this CAFO in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such a failure may subject Respondent to a civil action to collect the assessed penalty under the Act. In any collection action, the validity, amount and appropriateness of the penalty set out in paragraph 4.6 shall not be subject to review.

4.10.1. Interest. Pursuant to Section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321 (b)(6)(H), any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order contained herein.

4.10.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 311(b)(6)(H) of the Act, 33 U.S.C. § 1321(b)(6)(H), should Respondent fail to pay on a timely basis the amount of the penalty assessed by the Final Order contained herein, Respondent shall pay (in addition to any assessed penalty and interest), attorneys fees and costs for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the

aggregate amount of Respondent's penalties and nonpayment penalties that are unpaid as of the beginning of such quarter.

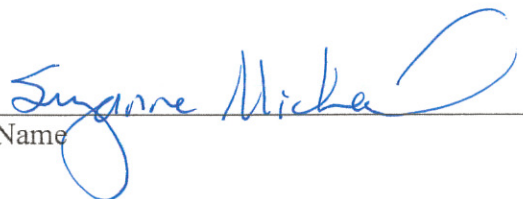
4.11. The penalty described in Paragraph 4.6, including any costs incurred under Paragraph 4.10 above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.12. Respondent represents that it is authorized to execute this CAFO and that the party signing this CAFO on its behalf is authorized to bind Respondent to the terms of this CAFO. This CAFO may be executed in multiple counterparts, each of which shall be deemed to have the same force and effect as an original. A facsimile signature shall be treated as an original.

4.13. Compliance with all the terms and conditions of this CAFO shall result in full settlement and satisfaction of all claims for penalties alleged in Section 3 above.

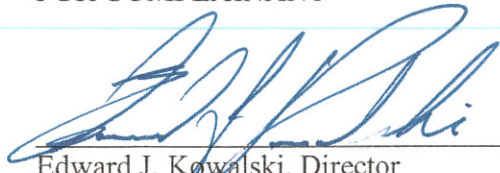
STIPULATED AND AGREED:

FOR RESPONDENT NIELSEN BROTHERS, INC.


Name _____

Dated: 4-25-12

FOR COMPLAINANT


Edward J. Kowalski, Director
Office of Compliance and Enforcement
U. S. Environmental Protection Agency Region 10

Dated: 5/9/2012

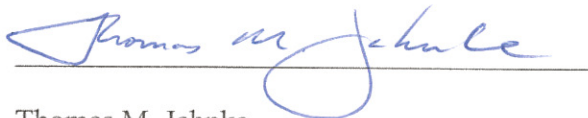
5. FINAL ORDER

5.1. The terms of the foregoing Consent Agreement are hereby ratified and incorporated by reference into this Final Order. Respondent is hereby ordered to comply with the terms of settlement contained in the Consent Agreement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act for the particular violations alleged in Part 3 above. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive relief or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of the Act and regulations and permits there under.

5.3. This Final Order shall become effective upon filing.

SO ORDERED this 11th day of May, 2012.



Thomas M. Jahnke
Regional Judicial Officer
U.S. Environmental Protection agency
Region 10

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CERTIFICATE OF SERVICE 12 MAY 15 PM 1:39

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER, In the Matter of Nielsen Brothers, Inc., Docket No. CWA-10-2012-0124**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

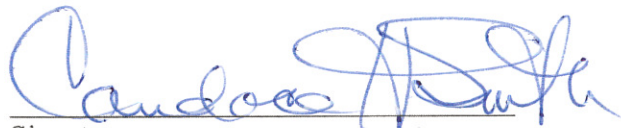
The undersigned certifies that a true and correct copy of the document was delivered to:

Ms. Stephanie L. Mairs, Esquire
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, Washington 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 to:

Ms. Suzanne Michael, Esquire
Michael & Alexander PLLC
701 Pike Street, Suite 1150
Seattle, WA 98101

DATED this 15 day of May, 2012



Signature

Candace H. Smith

Print Name

Regional Hearing Clerk
EPA Region 10