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EPA REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

THE JERRY BROWN CO., INC.

Eugene, Oregon

Respondent.

DOCKET NO. CWA-10-2017-0107

CONSENT AGREEMENT

Proceedings Under Section 311(b)(6) of the
Clean Water Act, 33 U.S.C. § 1321(b)(6)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 311(b)(6) of the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6).

1.2. Pursuant to Section 311(b)(6)(A) of the CWA, EPA is authorized to assess a civil penalty against any owner, operator, or person in charge of an onshore facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), and/or who fails or refuses to comply with any regulation issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j).

1.3. Section 311(b)(6)(B) of the CWA, 33 U.S.C. § 1321(b)(6)(B), authorizes the administrative assessment of Class I civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$25,000. Pursuant to the 2015 amendments to the Federal Civil Penalty Inflation Adjustment Act, 28 U.S.C. § 2461, and 40 C.F.R. Part 19, the administrative assessment of Class I civil penalties may not exceed \$18,107 per day for each day during which the violation continues, up to a

maximum penalty of \$45,268. *See also* 82 Fed. Reg. 3633 (January 12, 2017) (2017 Civil Monetary Penalty Inflation Adjustment Rule).

1.4. Pursuant to Section 311(b)(6)(A) and (b)(6)(B) of the CWA, 33 U.S.C. § 1321(b)(6)(A) and (B), and 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 issues, and The Jerry Brown Co., Inc. (Respondent) agrees to issuance of, the Final Order attached to this Consent Agreement.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. An onshore facility means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land. CWA § 311(a)(10), 33 U.S.C. § 1321(a)(10).

2.3. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a penalty is proposed to be assessed pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”).

2.4. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CWA together with the specific provisions of the CWA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Framework

3.1. The objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a).

3.2. It is the policy of the United States that there should be no discharge of oil into or upon the navigable waters of the United States or their adjoining shorelines. CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1).

3.3. 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. CWA § 311(b)(4), 33 U.S.C. § 1321(b)(4); 40 C.F.R. § 110.3(b); Exec. Order No. 11735; 38 Fed. Reg. 21243 (Aug. 7, 1973); 61 Fed. Reg. 7419 (Feb. 28, 1996).

General Allegations

3.4. Respondent, The Jerry Brown Co., Inc., is a corporation organized under the laws of the State of Oregon.

3.5. Respondent is a “person,” within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7), 1362(5).

3.6. In February 2016, Respondent was the “owner or operator” of an aboveground storage tank (AST) that contained diesel fuel, which was located at or near 32342 Seefeld Drive, near Halsey, Oregon (“Facility”). *See* CWA § 311(a)(6), 33 U.S.C. § 1321(a)(6).

3.7. For purposes of Section 311 of the CWA, the Facility was an “onshore facility.” *See* CWA § 311(a)(10), 33 U.S.C. § 1321(a)(10), and 40 CFR § 112.2.

3.8. On February 11, 2016, Respondent filled its AST, at which point the AST

contained approximately 1,000 gallons of diesel fuel.

3.9. For purposes of Section 311 of the CWA, diesel fuel is an “oil.” *See* CWA § 311(a)(1), 33 U.S.C. § 1321(a)(1).

3.10. On or before the evening of February 19, 2016, Respondent’s AST began releasing oil. By the time the release of oil was discovered on the evening of February 19, 2016, approximately 900 gallons (21 barrels) of oil had been released from Respondent’s AST.

3.11. Respondent’s AST did not have secondary containment, and the release described in Paragraph 3.10 resulted in the “discharge” of “oil,” which flowed into or upon a channel downgradient from the AST; fluid in that channel flows from the west towards the east (“west-east channel”). *See* CWA § 311(a)(1)-(2), 33 U.S.C. § 1321(a)(1)-(2).

3.12. The west-east channel flows into a channel that flows from the southwest towards the northeast (“southwest-northeast channel”), which in turn flows into Spoon Creek. The west-east channel and the southwest-northeast channel are tributaries to Spoon Creek.

3.13. On February 22, 2016, Respondent hired contractors to respond to the discharge of oil from the Facility.

3.13.1. Respondent’s contractors placed a boom in the southwest-northeast channel.

3.13.2. Respondent’s contractors placed booms in Spoon Creek where Seefeld Drive crosses over Spoon Creek.

3.13.3. Respondent’s contractors placed booms in Spoon Creek where Highway 228 crosses over Spoon Creek.

3.14. Respondent’s contractors notified the Oregon Department of Environmental Quality (ODEQ) of the release on February 22, 2016, and Respondent notified the National Response Center of the release on February 23, 2016.

3.15. On or about February 22, 2016, there was a visible oil “sheen” in the west-east channel, the southwest-northeast channel, and Spoon Creek. *See* 40 C.F.R. § 110.1.

3.15.1. On at least February 22, 2016, a visible sheen and standing product was observed in the west-east channel, in the reach near the point of release to where the west-east channel discharges into the southwest-northeast channel.

3.15.2. On at least February 22 through 24, 2016, a visible sheen was observed in the southwest-northeast channel, between the west-east channel to Spoon Creek.

3.15.3. On at least February 22 through 24, 2016, a visible sheen was observed in Spoon Creek, between the southwest-northeast channel and the boom that was placed near Seefeld Drive.

3.15.4. On at least February 22 through 24, 2016, a visible sheen was observed in Spoon Creek, between the booms near Seefeld Drive and Highway 228.

3.15.6. On at least February 22 through 24, 2016, a visible sheen was observed in Spoon Creek, immediately upgradient of the boom near Highway 228.

3.15.7. ODEQ determined the release of oil from Respondent’s AST resulted in a sheen that extended 1.75 miles from its source to the Highway 228 crossing of Spoon Creek.

3.16. Diesel/water emulsions were observed in or on the adjacent shoreline of the southwest-northeast channel on February 22, 2016 and in or on the adjacent shoreline of Spoon Creek between Seefeld Road and Highway 228 on February 22 through February 24, 2016.

3.17. As of February 27, 2016, Respondent’s contractors continued to collect pockets of oil and oily debris in Spoon Creek.

3.18. Spoon Creek converges with Courtney Creek to form Walton Slough, which flows to the Calapooia River. The Calapooia River flows into the Willamette River, which flows

into the Columbia River, which flows into the Pacific Ocean.

3.18.1. The Calapooia River, Willamette River, and Columbia Rivers are all traditional “navigable waters” and inland “waters of the United States,” and subject to the jurisdiction of the CWA. *See* CWA §§ 311(a)(16), 502(7); 33 U.S.C. §§ 1321(a)(16), 1362(7); 33 C.F.R. § 328.3(a); and 40 C.F.R. §§ 110.1, 232.2.

3.18.2. Walton Slough is a tributary of the Calapooia River with perennial flow that is navigable-in-fact.

3.18.3. Spoon Creek is a tributary of Walton Slough. The downgradient portion of Spoon Creek relevant to this Complaint has perennial flow, while the upgradient portion of Spoon Creek relevant to this Complaint has either perennial or continuous seasonal flow.

3.18.4. Walton Slough and the portion of Spoon Creek relevant to this Complaint are permanent or relatively permanent waters, inland “waters of the United States,” and subject to the jurisdiction of the CWA.

3.18.5. The southwest-northeast channel is a tributary of Spoon Creek, and has continuous seasonal flow.

3.18.6. The west-east channel is a tributary of the southwest-northeast channel, and has continuous seasonal flow.

3.18.7. The west-east channel and the southwest-northeast channel are relatively permanent waters, inland “waters of the United States,” and subject to the jurisdiction of the CWA.

3.19. **Violation:** Respondent discharged oil into or upon waters of the United States and adjoining shorelines in a quantity that has been determined may be harmful under 40 C.F.R. § 110.3(b), in violation of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

IV. TERMS OF SETTLEMENT

- 4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.
- 4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.
- 4.3. *Penalty:* Pursuant to Section 311(b) of the CWA, 33 U.S.C. § 1321(b), and in consideration of statutory penalty factors identified in Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8), EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$9,900. This penalty amount is based upon Respondent's agreement to pay a \$13,200 penalty to the State of Oregon for the same incident alleged above, and Respondent's effective spill response.
- 4.4. Respondent consents to the assessment of the civil penalty set forth in Paragraph 4.3 and agrees to pay the total civil penalty within 30 days of the effective date of the Final Order.
- 4.5. Payment under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must serve photocopies of the check, or proof of other payment method described in Paragraph 4.5, on the Regional Hearing Clerk and EPA Region 10

Compliance Officer at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Young.teresa@epa.gov

Rick Cool
U.S. Environmental Protection Agency
Region 10, Mail Stop OCE-101
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Cool.richard@epa.gov

4.7. If Respondent fails to pay the penalty assessed by this Consent Agreement and the Final Order in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. *Interest.* Pursuant to Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order, however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

4.7.2. *Attorneys Fees, Collection Costs, Nonpayment Penalty.* Pursuant to Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, 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 20% of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7 above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.10. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this Consent Agreement, Respondent has corrected the violation(s) alleged in Part III above.

4.11. Except as described in Subparagraph 4.7.2, above, each party shall bear its own costs in bringing or defending this action.

4.12. Respondent expressly waives any right to contest the allegations and waives any right to appeal the Final Order.

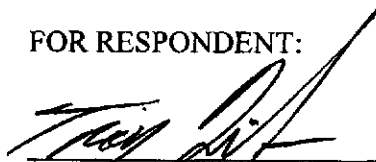
4.13. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.14. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

6-21-17

FOR RESPONDENT:

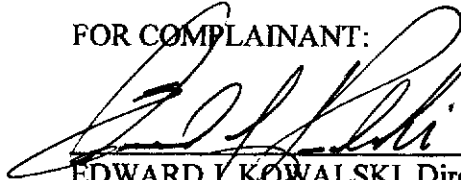


TROY LIKENS, President
The Jerry Brown Co., Inc.

DATED:

6/29/2017

FOR COMPLAINANT:



EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

THE JERRY BROWN CO., INC.

Eugene, Oregon

Respondent.

DOCKET NO. CWA-10-2017-0107

FINAL ORDER

Proceedings Under Section 311(b)(6) of the
Clean Water Act, 33 U.S.C. § 1321(b)(6)

1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) Region 10, who has in turn delegated this authority to the Regional Judicial Officer in EPA Region 10.

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

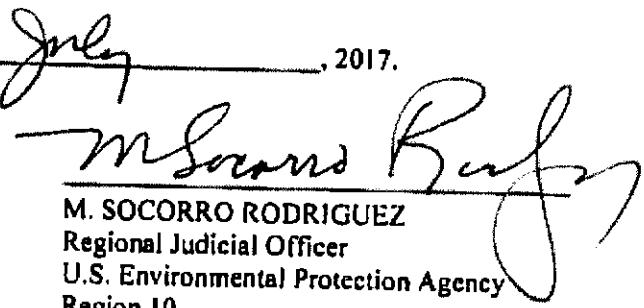
3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act (CWA) for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

4. Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondent may have with respect to any

issue of fact or law set forth in this Final Order, including, but not limited to, any right of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-708.

5. This Final Order shall become effective upon filing.

SO ORDERED this 10th day of July, 2017.


M. SOCORRO RODRIGUEZ
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

Certificate of Service

The undersigned certifies that the original of the attached CONSENT AGREEMENT and FINAL ORDER, In the Matter of: THE JERRY BROWN CO., INC., Docket No.: CWA-10-2017-0107, 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:

Christopher Bellovary, Esquire
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-113
1200 Sixth Avenue, 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:

Michael J. Gelardi, Esquire
Hershner Hunter LLP
180 East 11th Avenue
Eugene, Oregon 97401

DATED this 10 day of July, 2017.



TERESA YOUNG
Regional Hearing Clerk
EPA Region 10