

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF

Cargill, Inc.
a Delaware corporation,

Fullerton, CA,

Respondent.

**CWA SECTION 311 CLASS II
CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. OPA-9-2015-00⁰²

CONSENT AGREEMENT

Preliminary Statements

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)(A) and (B)(ii) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §1321(b)(6)(A), (B)(ii), as amended by the Oil Pollution Act of 1990, and under the authority provided by 40 C.F.R. § 22.18(b)(2). The Administrator has delegated these authorities to the Regional Administrator of EPA Region 9, who has in turn delegated them to the EPA Region 9 Director of the Enforcement Division (“Complainant”).

2. Complainant initiates this proceeding against Cargill, Inc., (“Respondent”) for alleged violation of Section 311(j) of the Act, 33 U.S.C. § 1321(j) at Respondent’s facility located at 600 North Gilbert Street, Fullerton, California (the “Facility”). Complainant and Respondent are hereinafter collectively referred to as the “Parties.”

3. This CAFO simultaneously commences and concludes this penalty proceeding, as authorized by 40 C.F.R. § 22.13(b).

4. The Parties agree that settlement of this matter is consistent with the Act's objectives, in the public interest, and the most appropriate means of resolving this matter.

NOW THEREFORE, before the taking of any testimony, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties to this Stipulation and Order, it is hereby AGREED, STIPULATED, and ORDERED:

General Provisions

5. EPA has jurisdiction over the subject matter of this action. The Consent Agreement contains the elements of a complaint required by 40 C.F.R. §§ 22.14(a)(1)-(3) and (8).

6. For purposes of this proceeding, Respondent admits the jurisdictional allegations herein and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this CAFO.

7. Respondent neither admits nor denies the factual allegations set forth herein.

8. Respondent agrees not to contest the terms and conditions set forth in this CAFO in this or subsequent proceedings, and agrees not to appeal the Final Order set forth below.

9. Respondent explicitly waives its right to a hearing on any issue of fact or law set forth herein.

10. This CAFO, inclusive of all exhibits and attachments, is the entire agreement between the Parties to resolve EPA's civil penalty claim against Respondent for the specific

CWA violations alleged herein. Full compliance with this CAFO shall constitute full settlement only of Respondent's federal civil penalty liability for the CWA violations specifically alleged herein.

11. This CAFO does not constitute a waiver, suspension or modification of the requirements of Section 311 of the Act, 33 U.S.C. § 1321, or any regulations promulgated thereunder, and does not affect the right of the Administrator or the United States to pursue any applicable injunctive or other equitable relief or criminal sanctions for any violation of law. Payment of the penalty pursuant to this Consent Agreement resolves only Respondent's civil liability for the violations and facts alleged in this Consent Agreement.

12. Respondent certifies by signing this CAFO that, to the best of its knowledge, as of the Effective Date of this CAFO, it is in compliance with the requirements of Section 311(j) of the Act, 33 U.S.C. § 1321(j) at the Facility.

13. Except as set forth in Paragraph 38, the Parties agree to bear their own costs and attorneys' fees.

14. This CAFO shall in no way affect the right of EPA or the United States against any third party or the right of any third party against Respondent. This CAFO does not create any right in or grant any cause of action to any third party.

15. This CAFO shall apply to and be binding upon Respondent, successors, and assigns. Changes in ownership, including but not limited to any transfer of assets or real or personal property, shall not alter Respondent's obligations under this CAFO.

16. This Consent Agreement may be executed and transmitted by facsimile, email or other electronic means, and in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument. If any portion of this Consent Agreement is determined to be unenforceable by a competent court or tribunal, it is the Parties' intent that the remaining portions shall remain in full force and effect.

17. Each signatory to this CAFO certifies he or she is fully authorized to enter into and bind the party for whom it is signing to the terms of the CAFO.

Statutory and Regulatory Framework

18. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore facilities . . . and to contain such discharges"

19. Initially by Executive Order 11548 (July 20, 1970), 35 Fed. Reg. 11677 (July 22, 1970), and most recently by Section 2(b)(1) of Executive Order 12777 (October 18, 1991), 56 Fed. Reg. 54757 (October 22, 1991), the President delegated to EPA his Section 311(j)(1)(C) authority to issue the regulations referenced in the preceding Paragraph for non-transportation-related onshore facilities.

20. EPA subsequently promulgated regulations, codified at 40 C.F.R. Part 112 (the "Oil Pollution Prevention regulations") pursuant to these delegated statutory authorities and pursuant to its authorities under the CWA, 33 U.S.C. § 1251 *et seq.*, which set forth certain procedures, methods and requirements, including requirements for Spill Prevention,

Countermeasure and Control (“SPCC”) planning, applicable to an owner or operator of an onshore facility that became operational on or before August 16, 2002, which, due to its location, reasonably could be expected to discharge oil into or on navigable waters and their adjoining shorelines in such quantities as EPA has determined in 40 C.F.R. Part 110 may be harmful to the public health or welfare or the environment of the United States.

21. “Navigable waters” are defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 112.2.

22. In promulgating 40 C.F.R. § 110.3, which implements Section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA has determined that the quantities of oil that 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.

General Allegations

23. At the time of an EPA inspection conducted on August 21, 2013, Respondent was the “owner or operator” within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), of a vegetable oil terminal and packaging facility located at 600 North Gilbert Street, Fullerton, California.

24. Respondent is a “person” within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. § 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

25. The Facility is “non-transportation-related” within the meaning of 40 C.F.R. § 112.2.

26. The Facility is an “onshore facility” within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

27. Respondent, at the time of EPA’s August 21, 2013 inspection, was engaged in the packaging and loading of food-grade oil for delivery to retail, wholesale, and bulk customers at the Facility, as described in 40 C.F.R. § 112.1(b).

28. The Facility had, at the time of inspection, several above-ground oil storage tanks with an aggregate maximum above-ground oil storage capacity of approximately 10 million gallons.

29. The Facility is in close proximity to “navigable waters” of the United States within the meaning of Section 502(7) of the Act, U.S.C. § 1362(7) and 40 C.F.R. § 112.2; specifically, the Facility is located across Moore Avenue from Brea Creek which flows west and discharges to Coyote Creek. Coyote Creek conveys flow southwest for approximately 6.5 miles until discharging into the San Gabriel River. The Facility is approximately 13 miles from the San Pedro Bay and Pacific Ocean.

30. The Facility is a non-transportation-related facility that, due to its location, could reasonably have been expected, at the time of inspection, to discharge oil from an above-ground container to a navigable water of the United States or its adjoining shorelines in a harmful quantity, and is therefore subject to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.

31. EPA alleges that Respondent failed to amend and recertify the SPCC Plan as required by 40 C.F.R. 112.5(a) following a change to its facility; the Respondent failed to conduct and document a review and evaluation of the SPCC plan at least once every 5 years as required by 40 C.F.R. § 112.5(b); the Respondent failed to provide adequate general containment or drainage controls as required by 40 C.F.R. § 112.7(c); the Respondent failed to ensure the secondary containment walls of the East Tank Farm were sufficiently impervious to contain spilled oil as required by 40 C.F.R. § 112.12(c)(2); and the Respondent failed to remove accumulations of oil outside of primary containers such as tanks and piping, transfer areas and process area collection trenches, as required by 40 C.F.R. § 112.12(c)(10).

Penalty

32. Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), authorizes the administrative assessment of 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 \$125,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. Part 19, the administrative assessment of civil penalties may not exceed \$16,000 per day for each day during which the violation continues, up to a maximum Class II civil penalty of \$187,500. See also 78 Fed. Reg. 66643 (November 6, 2013).

33. Respondent consents to the assessment of and agrees to pay a civil penalty of FORTY-FIVE THOUSAND DOLLARS (\$45,000.00) in full settlement of the federal civil penalty claims set forth in this CAFO. The penalty was calculated based on the nature, circumstances, extent and gravity of the violations, Respondent's ability to pay, its prior history

of violations, its degree of culpability, and any economic benefit or savings accruing to Respondent as a result of the violations.

Payment Terms

34. Respondent shall submit payment of the FORTY-FIVE THOUSAND DOLLARS (\$45,000.00) within thirty (30) days of the Effective Date as specified in Paragraph 40 of this CAFO.

35. Respondent shall make required payments by cashier's check, certified check or electronic funds transfer ("EFT") payable to the "U.S. Environmental Protection Agency," with the notation "OSLTF - 311" and the docket number of this CAFO. Payment by check shall be addressed to:

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

If paying by EFT, the Respondent shall transfer the payment to:

Federal Reserve Bank of NY
ABA-021030004
Account 68010727
33 Liberty Street
New York, N.Y. 10045

Field Tag 4200 of the EFT message shall read "D 68010727 Environmental Protection Agency."

36. Respondent shall submit copies of payment made by certified mail or private delivery service postmarked within thirty (30) days after the due date to the following persons:

Steven Armsey
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street (ORC-1)
San Francisco, California 94105

and to:

Peter Reich
U.S. Environmental Protection Agency (ENF-8-2)
Region 9
75 Hawthorne Street
San Francisco, California 94105

37. EPA assesses interest on all debts not paid within 30 days of the Effective Date.
38. Respondent's failure to make timely payment in full within the time provided in Paragraph 34 may subject Respondent to a civil action to collect the assessed penalties, plus interest, attorneys' fees, costs and additional quarterly nonpayment penalties pursuant to Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H). In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.
39. The civil penalty and any interest, late handling fees, or late penalty payments provided for in the CAFO shall not be deducted from Respondent's or any affiliated entity's taxes.

Effective and Termination Dates

40. This CAFO shall take effect on the date the Final Order is filed with the Regional Hearing Clerk, and shall terminate when Respondent has fully complied with its terms.

Public Notice

41. EPA's consent to this Consent Agreement is subject to the requirements of Section 309(g)(4) of the Act, 33 U.S.C. §1319(g)(4), and 40 C.F.R. § 22.45(b), that EPA provide public notice of and a reasonable opportunity for comment on the Consent Agreement and proposed Final Order. EPA reserves the right to withdraw the Consent Agreement and proposed Final Order in response to public comments that petition EPA to set aside the Consent Agreement and proposed Final Order on the basis that material evidence was not considered. 40 C.F.R. § 22.45(c)(4). In such case, Respondent's obligations under this document shall terminate, and EPA may pursue any and all enforcement options as provided by law. If no comment is received during the comment period regarding the Consent Agreement, EPA shall file the Final Order.

CONSENTING PARTIES

For Respondent Cargill, Inc.:

Gonzalo Petschen

Name: Gonzalo Petschen

Title: President DSO-NA

Date: 6/26/15

For Complainant U.S. Environmental Protection Agency:

 _____

Date: 8/5/15

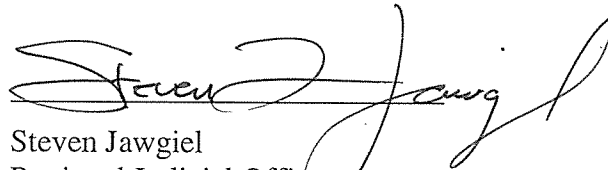
Kathleen Johnson
Director, Enforcement Division
U.S. Environmental Protection Agency Region 9
75 Hawthorne Street
San Francisco, CA 94105

FINAL ORDER

Pursuant to Section 311(b)(6) of the Act, 33 U.S.C. §1321(b)(6) and the delegated authority of the undersigned, and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits,” codified at 40 C.F.R. Part 22, the foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order.

The Respondent is ordered to comply with the terms of the Consent Agreement. This order shall become effective on the date the Final Order is filed with the Regional Hearing Clerk and shall constitute a full adjudication of the allegations stated in the Consent Agreement.

Date: 09/15/15



Steven Jawgiel
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

CERTIFICATE OF SERVICE

Docket No. OPA -9-2015-0002

I hereby certify that the original copy of the foregoing CAFO with the Docket number referenced above, has been filed with the Region 9 Hearing Clerk and that a copy was sent by certified mail, return receipt requested, to:

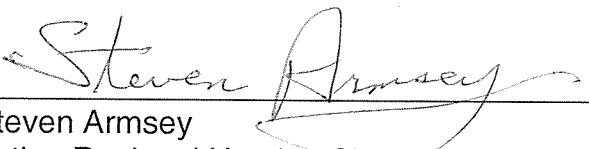
Cargill Law Department
Attn: Ms. Gina Young, Esq.
15407 McGinty Road West MS 24
Wayzata, MN 55391

CERTIFIED MAIL NUMBER: 7012 1640 0001 2190 5751

Additional copies were hand-delivered to the following U.S. EPA case attorney:

Janet A. Magnuson, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
75 Hawthorne St.
San Francisco, CA 94105

Sept. 17, 2015
Date


Steven Armsey
Acting Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105