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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

HEARINGS CLERK
EPA -- REGION 10

IN THE MATTER OF:

McNabb Grain, Inc.

Respondent.

DOCKET NO. CAA-10-2009-0243

CONSENT AGREEMENT AND
FINAL ORDER

I. AUTHORITY

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 or Complainant) by Section 113(d) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7413(d). The Administrator has delegated the authority to issue the Final Order contained in Section V. of this CAFO to the Regional Administrator of EPA, Region 10, who in turn has re-delegated this authority to the Regional Judicial Officer.

2. Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties" (Part 22 Rules), EPA hereby issues, and McNabb Grain, Inc. (Respondent) hereby agrees to issuance of, the Final Order contained in Section V. of this CAFO.

3. In accordance with 40 C.F.R. § 22.13(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Section V. of this CAFO becomes effective.

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EPA Region 10
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101
Telephone: (206)553-4194
Fax: (206) 553-0163

4. Section II. of this CAFO contains a concise statement of the statutory and factual basis for the alleged violations of the CAA. Section III. of this CAFO contains the specific provisions of the CAA that Respondent is alleged to have violated. Section IV. delineates the terms of settlement agreed to by the parties in this matter.

II. BACKGROUND

5. Pursuant to Section 301(a) and (d)(4) of the CAA, 42 U.S.C. § 7601(a) and 7601(d)(4), EPA has adopted air quality regulations that apply to air pollution sources on Indian Reservations in Idaho, Oregon, and Washington, which are codified at 40 C.F.R. Part 49, Subparts C and M. These rules are known as the Federal Air Rules for Indian Reservations in Region 10 (FARR) and became effective on June 7, 2005.

6. The FARR provisions that apply on the Fort Hall Indian Reservation are incorporated by reference at 40 C.F.R. § 49.10710(a) through (l).

7. 40 C.F.R. § 49.126, the rule for limiting fugitive particulate matter emissions, is incorporated by reference at 40 C.F.R. § 49.10710(d) and applies to the owner or operator of any source of fugitive particulate matter emissions on the Fort Hall Indian Reservation.

8. 40 C.F.R. § 49.126(d) requires that the owner or operator of any source of fugitive particulate matter emissions, including any source or activity engaged in materials handling or storage, construction, demolition, or any other operation that is or may be a source of fugitive particulate matter emissions, must take all reasonable precautions to prevent fugitive particulate matter emissions and must maintain and operate the source to minimize fugitive particulate matter emissions.

9. 40 C.F.R. § 49.126 (e)(1)(i) provides that the owner or operator of a source of

fugitive particulate matter emissions shall (a) annually survey its facility during typical operating conditions and meteorological conditions conducive to producing fugitive dust to determine the sources of fugitive particulate matter emissions; and (b) document the results of the survey, including the date and time of the survey and identification of any sources of fugitive particulate matter emissions found. For new sources or new operations, a survey must be conducted within 30 days after commencing operation.

10. 40 C.F.R. § 49.126(e)(1)(ii) and (iii) provide that if sources of fugitive particulate matter emissions are present, the owner or operator shall (a) determine the reasonable precautions that will be taken to prevent fugitive particulate matter emissions; and (b) prepare, and update as necessary following each survey, a written plan that specifies the reasonable precautions that will be taken and the procedures to be followed to prevent fugitive particulate matter emissions, including appropriate monitoring and recordkeeping.

11. 40 C.F.R. § 49.126(e)(1)(iv) requires the owner or operator to implement the written plan, and maintain and operate all sources to minimize fugitive particulate matter emissions:

12. 40 C.F.R. § 49.126(e)(1)(v) requires the owner or operator to maintain records for five years that document the surveys and the reasonable precautions that were taken to prevent fugitive particulate matter emissions.

13. 40 C.F.R. § 49.138(d), which is incorporated by reference at 40 C.F.R. § 49.10710(g), requires any person who owns or operates an air pollution source subject to this section on the Fort Hall Indian Reservation, except for Part 71 sources (major sources), to

register the source with the Regional Administrator and submit reports as specified in 40 C.F.R. § 49.138(e).

GENERAL FINDINGS

14. McNabb Grain, Inc. (McNabb Grain) is a general business corporation incorporated under the laws of Idaho.

15. McNabb Grain is currently the owner and operator of a facility located at 1384 Beechcraft Avenue on the Fort Hall Indian Reservation near Pocatello, Idaho (all such real property and any structures or equipment located on such property shall be referred to as the "McNabb facility").

16. Activities that generate fugitive particulate matter emissions, including storing, loading, or transporting grain, are currently being conducted, or have been conducted, at the McNabb facility.

17. McNabb Grain is, therefore, an owner or operator of a source or sources of fugitive particulate matter emissions.

18. McNabb Grain is subject to the rule for the registration of air pollution sources and the reporting of emissions, 40 C.F.R. § 49.138, because it is an air pollution source and does not meet the exemptions listed in 40 C.F.R. § 49.138(e).

19. Section 113(d) of the CAA authorizes EPA to commence an administrative action for the assessment of civil penalties of up to \$25,000 per day for each violation whenever any person has violated or is violating any requirement of the CAA. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2471, as amended by 31 U.S.C. § 3701, and as provided in 40 C.F.R. Part 19, this amount increased.

to \$27,500 per day for each violation occurring on and after January 31, 1997, and further increased to \$32,500 per day for each violation occurring on or after March 15, 2004.

III. ALLEGED VIOLATIONS

Count 1

20. Under 40 C.F.R. § 49.138(e)(1), the owner or operator of an air pollution source that existed on June 7, 2005, the effective date of the FARR, must initially register the source with EPA no later than February 15, 2007.

21. Under 40 C.F.R. § 49.138(e)(2), after initial registration, the owner or operator of an air pollution source must re-register with EPA by February 15 of each year.

22. McNabb Grain did not submit to EPA an initial registration as required by 40 C.F.R. § 49.138(d) and (e)(1) on or before February 15, 2007.

23. McNabb Grain did not submit to EPA an annual registration as required by 40 C.F.R. § 49.138(d) and (e)(2) on or before February 15, 2008.

24. McNabb Grain did not submit to EPA an annual registration as required by 40 C.F.R. § 49.138(d) and (e)(2) on or before February 15, 2009.

25. McNabb Grain failed to comply with the initial and annual registration requirements of 40 C.F.R. § 49.138(d) and (e), beginning February 15, 2007, and continuing annually until McNabb Grain submitted a late initial registration and annual updates to correct these violations on March 16, 2009.

Count 2

26. Under 40 C.F.R. § 49.126(d)(1), any person who owns or operates a source of fugitive particulate matter emissions must take all reasonable precautions to prevent fugitive

particulate matter emissions and must maintain and operate the source to minimize fugitive particulate matter emissions.

27. On July 15, 2008, an EPA inspector observed emissions of fugitive particulate matter released from loading trucks with grain at the McNabb Grain facility. The grain was loaded into the trucks from a discharge spout high enough above the truck to cause fugitive particulate matter emissions. Control devices are widely available to control emissions from grain discharge spouts, and no such control device was in use at the McNabb Grain facility until one was installed on or about April 30, 2009.

28. McNabb Grain failed to take all reasonable precautions to prevent fugitive particulate matter emissions from at least July 15, 2008 until April 30, 2009, in violation of 40 C.F.R. § 49.126(d)(1).

Count 3

29. Under 40 C.F.R. § 49.126(e)(1)(i), any person who owns or operates a source of fugitive particulate matter emissions must annually survey the source(s) during typical operating and meteorological conditions to determine the sources of fugitive particulate matter emissions.

30. McNabb Grain did not conduct an annual survey of sources of fugitive particulate matter emissions until March 16, 2009.

31. McNabb Grain failed to conduct a survey to determine the sources of fugitive particulate matter emissions by the due date of June 7, 2006, one year after the effective date of the FARR, and annually thereafter until March 16, 2009, in violation of 40 C.F.R. § 49.126(e)(1)(i).

Count 4

32. Under 40 C.F.R. § 49.126(e)(1)(ii) and (iii) any person who owns or operates a source of fugitive particulate matter emissions must annually determine what reasonable precautions will be taken to prevent fugitive particulate matter emissions and prepare and update as necessary following each emissions survey a written plan that specifies those reasonable precautions and procedures to be followed.

33. From June 7, 2006 until March 16, 2009, McNabb Grain did not prepare and update a written plan that specified the reasonable precautions that will be taken and the procedures to be followed to prevent fugitive particulate matter emissions.

34. McNabb Grain failed to determine the reasonable precautions and prepare a written plan for preventing fugitive particulate matter emissions in violation of 40 C.F.R. § 49.126(e)(1)(ii) and (iii).

Count 5

35. Under 40 C.F.R. § 49.126(e)(1)(iv), any person who owns or operates a source of fugitive particulate matter emissions must implement the written plan and maintain and operate the source to minimize fugitive particulate matter emissions.

36. McNabb Grain failed to implement a written plan to maintain and operate the McNabb facility to minimize fugitive particulate matter emissions from June 7, 2006, through March 16, 2009.

37. McNabb grain failed to implement a written plan to minimize fugitive particulate matter emissions in violation of 40 C.F.R. § 49.126(e)(1)(iv).

Count 6

38. Under 40 C.F.R. § 49.126(e)(1)(v), any person who owns or operates a source of fugitive particulate matter emissions must maintain records for five years that document the surveys and the reasonable precautions that were taken to prevent fugitive particulate matter emissions.

39. McNabb Grain does not have records that document the surveys and the reasonable precautions that were taken to prevent fugitive particulate matter emissions for the period between June 7, 2006, and March 16, 2009.

40. McNabb Grain failed to maintain records that document the surveys and the reasonable precautions that were taken to prevent fugitive matter emissions in violation of 40 C.F.R. § 49.126(e)(1)(v).

IV. CONSENT AGREEMENT

EPA and Respondent, by their undersigned representatives, hereby stipulate and agree as follows:

41. Respondent stipulates that EPA has jurisdiction over this matter.

42. Respondent neither admits nor denies the specific factual allegations set forth in Sections II. and III. of this CAFO.

43. Upon consideration of the factors in Section 113(e) of the CAA, 42 U.S.C. § 7413(e), and in accordance with the EPA Region 10 Clean Air Act Civil Penalty Guidelines for Indian Reservations, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is FIFTEEN THOUSAND FOUR HUNDRED AND SIXTY TWO DOLLARS (\$15,462.00).

44. Respondent consents to the issuance of the Final Order set forth herein, and to payment of a civil penalty of FIFTEEN THOUSAND FOUR HUNDRED AND SIXTY TWO DOLLARS (\$15,462.00) within 30 days of the effective date of the Final Order.

45. Payment under the CAFO shall be made by cashier's or certified check or money order, made payable to the order of "United States Treasury" 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 shall note on the payment Respondent's name and address, the case name, and the docket number of the case and shall submit a photocopy of the payment to:

Region 10 Hearing Clerk
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900, ORC-158
Seattle, Washington 98101

Office of Compliance and Enforcement
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900, OCE-127
Seattle, Washington 98101
Attn: Donald Dossett

46. Should Respondent fail to pay the penalty assessed by this CAFO against Respondent in full by its due date, the entire unpaid balance of the penalty and accrued interest assessed against Respondent by this CAFO shall become immediately due and owing. Should such a failure to pay occur, Respondent may be subject to a civil action pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), to collect the assessed

penalty under the CAA. In any such collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

47. Should Respondent fail to pay the penalties assessed by this CAFO in full by their due date, Respondent shall also be responsible for payment of the following amounts:

a. Interest. Any unpaid portion of the assessed penalty shall bear interest at the rate established pursuant to 26 U.S.C. § 6621(a)(2) from the effective date of the Final Order, provided, 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.

b. Attorney Fees, Collection Costs, Nonpayment Penalty. Pursuant to 42 U.S.C. § 7413(d)(5), should Respondent fail to pay on a timely basis the penalty and interest assessed against Respondent, Respondent shall also be required to pay the United States' enforcement expenses, including but not limited to attorney fees and costs incurred by the United States for collection proceedings, and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be ten percent of the aggregate amount of Respondent's outstanding penalties and nonpayment penalties accrued from the beginning of such quarter.

48. Respondent agrees not to claim or attempt to claim a federal or state income tax deduction or credit covering all or any part of the penalty paid to the United States Treasurer under this CAFO.

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

50. The provisions of this CAFO shall bind Respondent and its officers, directors, agents, servants, employees, successors, and assigns.

51. Respondent explicitly waives its right to contest the allegations contained in this CAFO and to appeal the Final Order contained herein.


52. Except as described in paragraph 47, each party to this action shall bear its own costs in bringing or defending this action.

53. This CAFO 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.

STIPULATED AND AGREED BY:

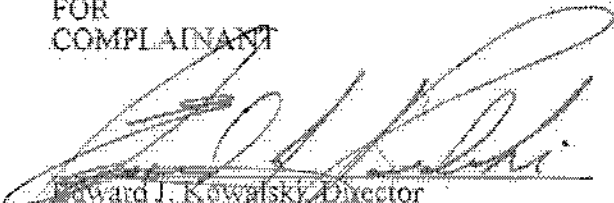
FOR
RESPONDENT



William McNabb, President
MCNABB GRAIN, INC.

9 Oct 09
Date

FOR
COMPLAINANT



Edward J. Kowalsky, Director
Office of Compliance and Enforcement
U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10

10/21/09
Date

V. FINAL ORDER

54. 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 foregoing terms of settlement.

55. This CAFO constitutes a release and settlement by EPA of all claims for civil penalties pursuant to the CAA for the particular violations alleged in Sections II. and III. of this CAFO. 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 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 CAA and regulations and permits issued thereunder.

56. Respondent shall pay a civil penalty in the amount of FIFTEEN THOUSAND FOUR HUNDRED AND SIXTY TWO DOLLARS (\$15,462.00) as provided in Section IV. above.

57. This Final Order shall become effective upon filing.

SO ORDERED this 22 day of October, 2009.


Thomas M. Jahnke
Regional Judicial Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Robert Meyer, DOCKET NO.: CAA-10-2009-0243** was filed with the Regional Hearing Clerk on October 27, 2009.


On October 27, 2009 the undersigned certifies that a true and correct copy of the document was delivered to:

Shirin Venus, Esquire
US Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
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 October 27, 2009, to:

William B. McNabb
President and Registered Agent
McNabb Grain, Inc.
P.O. Box C
Pocatello, ID 83205

DATED this 27th day of October 2009.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10