

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:)
)
THE OESER COMPANY) Docket No. RCRA-10-2007-0174
Bellingham, Washington)
)
Respondent.) CONSENT AGREEMENT AND
) FINAL ORDER
_____)

CONSENT AGREEMENT

I. Preliminary Statement

Complainant, the Director of the Office of Compliance and Enforcement of the United States Environmental Protection Agency (“EPA”), Region 10, brings this administrative action seeking a civil penalty under Section 3008 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act, (“RCRA”), 42 U.S.C. § 6928, and in accordance with the United States Environmental Protection Agency’s Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, Title 40 C.F.R. Part 22 (“Consolidated Rules of Practice”). The Respondent is The Oeser Company (“Oeser” or “Respondent”), a Washington corporation. Respondent owns and operates a facility located at 730 Marine Drive, Bellingham, Washington 98225.

Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the State of Washington has been granted final authorization to administer and enforce a hazardous waste program. The Washington Revised Statutes provide authority for the Washington State Dangerous Waste Regulations, Chapter 173-303, which include the regulations that are part of the state program authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926.

When EPA determines that any person fails to take corrective action within the time specified in a compliance order, the Administrator may, pursuant to Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), issue an order assessing a civil penalty.

EPA alleges that Respondent failed to take certain corrective actions required by paragraph 19.h. of the compliance order contained in the Consent Agreement and Final Order, Docket No. RCRA-10-2003-0151, filed February 7, 2005 ("2005 CAFO"). The parties have engaged in settlement discussions regarding the alleged failure to comply with paragraph 19.h. of the 2005 CAFO. The parties have agreed that settlement of this matter is in the public interest, and that entry of this Consent Agreement and the Final Order without further litigation is the most appropriate means of resolving this matter. Thus, pursuant to 40 C.F.R. § 22.13, EPA is simultaneously commencing and concluding this proceeding through this Consent Agreement and the Final Order ("CAFO") under 40 C.F.R. § 22.18(b)(2).

This CAFO resolves the alleged failure by Respondent to comply with paragraph 19.h. of the 2005 CAFO as identified below. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18 (b)(2) and (3), Complainant EPA alleges the following:

II. Findings of Fact and Conclusions of Law

1. Respondent is a Washington corporation under the laws of the State of Washington.

2. Respondent owns and operates a facility located at 730 Marine Drive, Bellingham, Washington 98225 (“Facility”).

3. Respondent entered into a settlement agreement with EPA in February 2005. As a result of that agreement, Respondent was subject to a compliance order that required Respondent to take certain corrective actions within specified periods of time.

4. Respondent is a “person” within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903, and is the owner or operator of a facility as defined at 40 C.F.R. § 260.10.

5. Paragraph 19.h. of the 2005 CAFO requires the following:

Within 180 days of the effective date of this CAFO, Respondent shall establish financial assurance in an amount at least equal to twenty-five percent (25%) of the cost estimate for closure of all three (3) of the drip pads. Within one (1) year of the effective date of this CAFO, Respondent shall establish additional financial assurance such that the total financial assurance established at that time is an amount at least equal to fifty percent (50%) of the cost estimate for closure of all three (3) of the drip pads. Within two (2) years of the effective date of this CAFO, Respondent shall establish additional financial assurance such that the total financial assurance established at that time is an amount at least equal to one hundred percent (100%) of the cost estimate for closure of all three (3) of the drip pads. Such financial assurance must be established and maintained in accordance with 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3). If Respondent closes one or two of the drip pads in accordance with WAC 173-303-675(6) while financial assurance obligations remain under this paragraph 19.h., Respondent may revise its cost estimate for financial assurance purposes accordingly. If Respondent closes all three drip pads in accordance with WAC 173-303-675(6) while financial assurance obligations remain under this paragraph 19.h., the obligations under this paragraph shall cease to apply.

6. Respondent was required to establish financial assurance in an amount at least equal to twenty-five percent (25%) of the cost estimate for closure of all three (3) of the drip pads by August 7, 2005.

7. Respondent was required to establish financial assurance in an amount at least equal to fifty percent (50%) of the cost estimate by February 7, 2006.

8. Respondent was required to establish financial assurance in an amount at least equal to one hundred percent (100%) of the cost estimate by February 7, 2007.

9. Respondent chose a letter of credit and standby trust agreement as the financial assurance mechanism to submit in accordance with paragraph 19.h.

10. On August 3, 2005, Respondent submitted a cover letter, letter of credit and standby trust agreement to EPA. Respondent directed the cover letter for the letter of credit and standby trust agreement to EPA and the letter of credit and trust fund were established for the benefit of EPA.

11. The regulations at WAC 173-303-400(3) revise the federal regulations at 40 C.F.R. Part 65, Subpart H, by substituting the Washington State Department of Ecology (“Ecology”) Director for the EPA Regional Administrator.

12. The regulations require that the cover letter be directed to the Ecology Director and that the letter of credit and the trust fund be established for the benefit of the Ecology Director.

13. Respondent corrected this error after EPA informed Respondent of the error.

14. On September 28, 2005, Respondent submitted a cover letter, letter of credit and standby trust agreement to Ecology. The amount of this letter of credit was \$16,000.

15. On February 3, 2006, Respondent submitted an amendment to the letter of credit increasing the amount of the letter of credit to \$32,000.

16. On February 2, 2007, Respondent submitted an amendment to the letter of credit extending the maturity date from February 7, 2007, to July 15, 2007. No change was made to the amount of the letter of credit by this amendment.

17. On April 24, 2007, Respondent submitted an amendment to the letter of credit that increased the amount to \$64,000.

18. Respondent failed to comply with paragraph 19.h. of the 2005 CAFO in the following ways:

a. Respondent failed to initially establish financial assurance as required by 40 C.F.R. Part 65, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3) within the time required because Respondent established financial assurance for the benefit of EPA rather than the Ecology Director. Respondent did not establish financial assurance for the benefit of the Ecology Director until September 27, 2005, and Ecology did not receive the initial submission of financial assurance until September 28, 2005.

b. The cover letter for the letter of credit that was directed to the Ecology Director does not contain the language required by 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3).

c. The language of the letter of credit does not conform to the language required by 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3).

d. The standby trust agreement did not include the current cost estimate in Schedule A as required by 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3).

e. Respondent failed to establish financial assurance in an amount at least equal to one hundred percent (100%) of the cost estimate for closure of all three (3) of the drip pads within two (2) years of the effective date of the 2005 CAFO as required.

III. TERMS OF SETTLEMENT

19. The allegations of paragraphs 1. through 18. are hereby incorporated as if fully set forth herein.

20. Pursuant to Section 3008(c) of RCRA, 42 U.S.C. § 6925(c), and based on the allegations above and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is in the amount of SEVEN THOUSAND, EIGHT HUNDRED AND EIGHTY DOLLARS (\$ 7,880.00).

21. In settlement of this matter, Respondent consents to the issuance of this CAFO and consents for the purposes of settlement to the payment of the civil penalty cited in the foregoing paragraph.

22. Respondent has addressed the allegations in paragraph 18, including revising the cover letter for the letter of credit that was directed to the Ecology Director, and the letter of credit itself, so that both letters contain the language required by 40 C.F.R. Part 265, Subpart H, as incorporated into the Washington Administrative Code at WAC 173-303-400(3), and including the current cost estimate in Schedule A to the letter of credit.

23. Attached to this CAFO is a Certificate of Completion (Attachment A). Respondent must execute and submit this Certificate to EPA at the address set forth in paragraph 28. within fourteen (14) days of the effective date of this CAFO.

24. Respondent shall pay the full amount of the assessed penalty no later than thirty (30) days after the date a copy of this CAFO signed by the Regional Administrator is mailed to Respondent.

25. Respondent shall make its payment by mailing a cashier's or certified check payable to "Treasurer, United States of America" to:

U.S. Environmental Protection Agency, Region 10
P.O. Box 371099M
Pittsburgh, Pennsylvania 15251

A transmittal letter giving Respondent's name, complete address, and this case docket number must accompany the payment. A copy of the check and of the accompanying transmittal letter shall be delivered or mailed to the Regional Hearing Clerk and to Jennifer G. MacDonald and Cheryl Williams at the following address:

U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington 98101.

26. Failure to make timely payment of the assessed penalty may subject Respondent to a civil action pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, to collect any unpaid portion of the assessed penalty, together with interest, handling charges, and nonpayment penalties as set forth in paragraph 31. below.

27. In accordance with Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), and the regulations governing the Adjustment of Civil Penalties for Inflation, 40 C.F.R. Part 19, promulgated pursuant to the Debt Collection Improvement Act of 1996, violation of any portion of this CAFO shall subject Respondent to a civil penalty of up to \$32,500 per day, per violation.

28. Unless otherwise specified, any communications with EPA regarding this CAFO shall be in writing and directed to Jennifer G. MacDonald, Assistant Regional Counsel, and Cheryl Williams, RCRA Compliance Officer, at the following address:

U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington 98101.

29. All actions required pursuant to this CAFO shall be undertaken in accordance with all applicable local, state, and federal laws and regulations.

30. Nothing in this CAFO 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 CAFO or of the statutes and regulations upon which this CAFO is based, or for Respondent's violation of any applicable provision of law.

31. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Respondent shall pay the following amounts:

a. Interest. 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 date a conformed copy of this CAFO is mailed to Respondent; provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the date a conformed copy of this CAFO is mailed to Respondent.

b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the assessed penalty is more than thirty (30) days past due.

c. Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), a nonpayment penalty of 6% per annum shall be paid on any portion of the assessed penalty that is more than ninety (90) days past due, which nonpayment penalty shall be calculated from the date that a conformed copy of this CAFO is mailed to Respondent.

IV. General Provisions and Stipulations

32. The allegations of paragraphs 1. through 31. are hereby incorporated as if fully set forth herein.

33. Respondent admits EPA's jurisdictional allegations.

34. Respondent neither admits nor denies specific factual allegations contained in this Consent Agreement.

35. Respondent agrees not to contest EPA's jurisdiction with respect to the execution of this Consent Agreement, the issuance of the attached Final Order, or the enforcement of the CAFO.

36. Respondent waives any right to contest the allegations and to an adjudicatory hearing on any issue of law or fact set forth in and resolved by this Consent Agreement and waives its right to appeal the accompanying Final Order.

37. Respondent agrees not to claim or attempt to claim a tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer.

38. Respondent and Complainant shall each bear its own costs and attorney fees.

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

40. Respondent understands that failure to pay any portion of the civil penalty assessed herein in accordance with the provisions of the CAFO may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

41. The provisions of this CAFO shall be binding on Respondent, its officers, directors, agents, servants, authorized representatives, successors, and assigns.

42. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to RCRA for the violations alleged in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of Respondent. Compliance with this CAFO 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.

43. 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.

FOR RESPONDENT THE OESER COMPANY:

Dated: _____

(signature)

(print or type name and title)

FOR COMPLAINANT U.S. ENVIRONMENTAL PROTECTION AGENCY:

Dated: _____

Margaret B. Silver
Associate Regional Counsel

FINAL ORDER

Pursuant to the provisions of RCRA, 42 U.S.C. § 6901 et seq., and to the foregoing Consent Agreement between EPA Region 10 and The Oeser Company, IT IS HEREBY ORDERED that this Consent Agreement and Final Order (Docket No. RCRA-10-2007-0174) be entered, and Respondent shall pay a civil administrative penalty in the amount of SEVEN THOUSAND, EIGHT HUNDRED AND EIGHTY DOLLARS (\$ 7,880.00) in accordance with the terms set forth in the Consent Agreement and comply with its terms.

This Consent Agreement and Final Order shall become effective on the date below.

DATED this _____ day of _____, 2007

Richard A. McAllister
Regional Judicial Officer

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
)
THE OESER COMPANY) EPA Docket No. RCRA-10-2007-0174
Bellingham, Washington)
)
)
)
Respondent) CERTIFICATION

_____ certifies under penalty of perjury that
the following statements are true, accurate and correct:

1. I am _____ of
the above-captioned Respondent, The Oeser Company.
2. Respondent has come into compliance with the requirements set forth in
paragraph 19.h. of the February 2005 Consent Agreement and Final Order.

EXECUTED this _____ day of _____, 2007 .

(signature)

(print or type name and title)