



ENVIRONMENTAL PROTECTION AGENCY

[CWA-05-2016-0015; FRL-9978-10-OARM]

Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order

AGENCY: Office of Administrative Law Judges, Environmental Protection Agency (EPA).

ACTION: Notice of order denying petition to set aside consent agreement and proposed final order.

SUMMARY: In accordance with section 311(b)(6)(C)(iii) of the Clean Water Act (CWA or Act), notice is hereby given that an Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order has been issued in the matter styled as *In the Matter of BP Products North America Inc.*, Docket No. CWA-05-2016-0015. This document serves to notify the public of the denial of the Petition to Set Aside Consent Agreement and Proposed Final Order filed in the matter and explain the reasons for such denial.

ADDRESSES: To access and review documents filed in the matter that is the subject of this document, please visit

https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/Dockets/CWA-05-2016-0015.

FOR FURTHER INFORMATION CONTACT: Jennifer Almase, Attorney-Advisor, Office of Administrative Law Judges (1900R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW; telephone number: (202) 564-6255 (main) or (202) 564-1170 (direct); fax number: (202) 565-0044; email address: ojlffiling@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Legal Authority

Section 311(b)(6)(A) of the CWA empowers EPA to assess a class I or class II administrative civil penalty against any owner, operator, or person in charge of any onshore facility from which oil or a hazardous substance is discharged in violation of section 311(b)(3), or who fails or refuses to comply with any regulation issued under section 311(j) to which that owner, operator, or person in charge is subject (33 U.S.C. 1321(b)(6)(A)). However, before issuing an order assessing a class II civil penalty under section 311(b)(6), EPA is required by the CWA and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Rules of Practice) to provide public notice of and reasonable opportunity to comment on the proposed issuance of such order (33 U.S.C. 1321(b)(6)(C)(i); 40 CFR 22.45(b)(1)).

Any person who comments on the proposed assessment of a class II civil penalty under section 311(b)(6) is then entitled to receive notice of any hearing held under section 311(b)(6) of the CWA and at such hearing is entitled to a reasonable opportunity to be heard and to present evidence (33 U.S.C. 1321(b)(6)(C)(ii); 40 CFR 22.45(c)(1)). If no hearing is held before issuance of an order assessing a class II civil penalty under section 311(b)(6) of the CWA, such as where the administrative penalty action in question is settled pursuant to a consent agreement and final order, any person who commented on the proposed assessment may petition to set aside the order on the basis that material evidence was not considered and to hold a hearing on the penalty (33 U.S.C. 1321(b)(6)(C)(iii); 40 CFR 22.45(c)(4)(ii)).

The CWA requires that if the evidence presented by the petitioner in support of

the petition is material and was not considered in the issuance of the order, the Administrator shall immediately set aside such order and provide a hearing in accordance with section 311(b)(6)(B)(ii) (33 U.S.C. 1321(b)(6)(C)(iii)). Conversely, if the Administrator denies a hearing, the Administrator shall provide to the petitioner, and publish in the *Federal Register*, notice of and reasons for such denial. *Id.*

Pursuant to section 311 of the CWA, the authority to decide petitions by commenters to set aside final orders entered without a hearing and provide copies and/or notice of the decision has been delegated to Regional Administrators in administrative penalty actions brought by regional offices of EPA. Administrator's Delegation of Authority 2-52A (accessible at: <http://intranet.epa.gov/ohr/rmpolicy/ads/dm/2-52A.pdf>). The Rules of Practice require that where a commenter petitions to set aside a consent agreement and final order in an administrative penalty action brought by a regional office of EPA, the Regional Administrator shall assign a Petition Officer to consider and rule on the petition (40 CFR 22.45(c)(4)(iii)). Upon review of the petition and any response filed by the complainant, the Petition Officer shall then make written findings as to (A) the extent to which the petition states an issue relevant and material to the issuance of the consent agreement and proposed final order; (B) whether the complainant adequately considered and responded to the petition; and (C) whether resolution of the proceeding by the parties is appropriate without a hearing (40 CFR 22.45(c)(4)(v)).

If the Petition Officer finds that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and establish a schedule for a hearing (40 CFR 22.45(c)(4)(vi)). Conversely, if the Petition Officer finds that resolution of the proceeding without a hearing is appropriate, the Petition

Officer shall issue an order denying the petition and stating reasons for the denial (40 CFR 22.45(c)(4)(vii)). The Petition Officer shall then file the order with the Regional Hearing Clerk, serve copies of the on the parties and the commenter, and provide public notice of the order. *Id.*

II. Procedural Background

In May of 2016, the Director of the Superfund Division of EPA's Region 5 (Complainant) and BP Products North America Inc. (Respondent) executed a Consent Agreement and Final Order (CAFO) in the matter styled as *In the Matter of BP Products North America Inc.*, Docket No. CWA-05-2016-0015.¹ The CAFO sought to simultaneously commence and conclude an administrative penalty action under section 311(b)(6)(A)(ii) of the CWA against Respondent for alleged violations related to a discharge of oil from Respondent's petroleum refinery located at 2815 Indianapolis Boulevard in Whiting, Indiana (Facility), into Lake Michigan on March 24, 2014. Under the terms of the CAFO, Respondent admitted the jurisdictional allegations set forth in the CAFO but neither admitted nor denied the factual allegations and alleged violations. Nevertheless, Respondent waived its right to a hearing or to otherwise contest the CAFO, and agreed to pay a civil penalty in the amount of \$151,899.

On or about June 1, 2016, EPA provided public notice of its intent to file the proposed CAFO and accept public comments thereon. Carlotta Blake-King, Carolyn A. Marsh, Debra Michaud, and Patricia Walter (Petitioners) timely filed comments on the proposed CAFO (Comments). Complainant subsequently prepared a Response to

¹ While titled "Consent Agreement and Final Order," a final order was not actually included with the CAFO filed with this Tribunal. It is the execution of a final order by Region 5's Regional Administrator, and its subsequent filing with the Regional Hearing Clerk at Region 5, that will effectuate the parties' Consent Agreement and conclude the proceeding.

Comments Regarding Proposed CAFO (Response to Comments), which indicated that EPA would not be altering the proposed CAFO. The Response to Comments was mailed to Petitioners, together with a copy of the proposed CAFO, on or about January 17, 2017, and each Petitioner received the materials by January 30, 2017. On or about February 24, 2017, Petitioners timely filed a joint petition seeking to set aside the proposed CAFO and have a public hearing held thereon (Petition).

A Request to Assign Petition Officer (Request) was issued by Region 5's Acting Regional Administrator on May 17, 2017, and served on Petitioners on May 30, 2017. In the Request, the Acting Regional Administrator stated that after considering the issues raised in the Petition, Complainant had decided not to withdraw the CAFO. Accordingly, the Acting Regional Administrator requested assignment of an Administrative Law Judge to consider and rule on the Petition pursuant to §22.45(c)(4)(iii) of the Rules of Practice, 40 CFR 22.45(c)(4)(iii). By Order dated June 16, 2017, the undersigned was designated to preside over this matter, and Complainant was directed to file a response to the Petition. Complainant filed its Response to Petition to Set Aside Consent Agreement and Proposed Final Order (Response to Petition) on July 13, 2017.²

III. Denial of Petitioners' Petition

On May 8, 2018, the undersigned issued an Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order (Order). Therein, the undersigned denied the Petition without the need for a hearing on the basis that Petitioners had failed to

² Richard C. Karl, who executed the CAFO as Region 5's Director of the Superfund Division, seemingly left that position by the time the Acting Regional Administrator issued the Request to Assign Petition Officer. In the Request, the Acting Regional Administrator noted that Complainant, the Acting Superfund Division Director, had decided not to withdraw the CAFO. Subsequently, Margaret M. Guerriero, as the Acting Director of Region 5's Superfund Division, submitted the Response to Petition.

present any relevant and material evidence that had not been adequately considered and responded to by Complainant.

Specifically, Petitioners raised issues that the undersigned grouped into four categories.³ First, Petitioners argued that the alleged violations warranted the assessment of the maximum penalty of \$187,500 allowed under the applicable law, suggesting that Complainant failed in its penalty calculation to consider material evidence regarding the magnitude of the violations to the local community. Petitioners cited, among other considerations, that Lake Michigan is a source of drinking water for residents of the City of Chicago and surrounding region and that the March 24, 2014 discharge of oil from the Facility into Lake Michigan occurred only a few miles from the structures operating in Lake Michigan to collect that drinking water. Petitioners further argued that the violations were part of a broader environmental crisis perpetuated by Respondent. The undersigned determined that while Complainant did not provide a detailed explanation of how the civil penalty assessed in the proposed CAFO had been calculated, and in particular an account of how the environmental impact of the alleged violations on the community, if any, was considered, it had considered and responded to Petitioners' arguments in its Response to Comments and Response to Petition. The undersigned further found that Petitioners had produced no evidence to support their position or rebut Complainant's position that it had properly implemented the applicable policy governing its calculation and negotiation of the penalty assessed in the proposed CAFO. The undersigned concluded that Petitioners had not met the burden of demonstrating that the

³ Petitioners described the arguments set forth in the Petition as additions to the Comments they had previously submitted to EPA in response to the public notice of EPA's intent to file the proposed CAFO. Accordingly, the undersigned considered the arguments raised by Petitioners in both the Petition and the Comments.

matters they raised with respect to the assessment of a higher penalty constituted material and relevant evidence that Complainant failed to consider in agreeing to the proposed CAFO. Thus, Petitioners' claim in this regard was denied.

Second, Petitioners urged that an additional fine of \$100,000 be levied against Respondent for its purported culture of indifference towards health and safety, which, according to Petitioners, was evident from the violations Respondent has committed and the ineffective responses it has undertaken over many years. In considering this issue, the undersigned first noted that EPA is limited to imposing the maximum penalty permitted under applicable law for the violations alleged and determining the penalty based on the statutory factors and that Petitioners failed to cite any legal authority allowing EPA to impose a fine beyond the maximum statutory penalty. The undersigned then noted that Petitioners also failed to offer any argument or evidence rebutting Complainant's position that it had properly implemented the applicable policy governing its calculation and negotiation of the penalty assessed in the proposed CAFO, which takes the statutory penalty factors into account. Accordingly, the undersigned found that with respect to this issue, Petitioners did not present any fact or argument relevant and material to the proposed CAFO that was not already considered by Complainant. Thus, the claim was denied.

Third, Petitioners urged that a Supplemental Environmental Project (SEP) be incorporated into the proposed CAFO for local projects and that local residents be included in the projects. In association with those requests, Petitioners questioned the manner in which funds for SEPs were distributed by EPA and the Department of Justice and asserted that residents had not been included in projects occurring in the Lake George

Branch of the Indiana Harbor Ship Canal. The undersigned found that as Complainant had stated in its Response to Comments and Response to Petition, EPA lacks the legal authority to demand a SEP or control the distribution of civil penalty funds. The undersigned concluded that given this lack of authority, the issues raised by Petitioners with regard to a SEP were immaterial to the issuance of the proposed CAFO. Thus, this claim was denied.

Fourth, Petitioners urged that an independent advisory committee and environmental monitoring program for Respondent's wastewater treatment plant be created. Petitioners then questioned Respondent's community outreach activities, which Complainant had referenced in its Response to Comments. The undersigned found that as argued by Complainant in its Response to Petition, EPA lacks the legal authority under section 311(b)(6) of the CWA to establish advisory committees or environmental monitoring programs or compel Respondent to engage in outreach activities. The undersigned concluded that given the absence of any material and relevant issue not considered by Complainant with respect to the course of action requested by Petitioners, their claim in this regard was also denied.

Having found that Petitioners failed to present any relevant and material evidence that had not been adequately considered and responded to by Complainant in agreeing to the proposed CAFO, the undersigned then addressed Petitioners' requests for a public hearing in their Comments and Petition. Noting that Petitioners appeared to seek a public forum, at least in part, for the parties to explain the meaning of the proposed CAFO to the public, the undersigned observed that section 311(b)(6)(B)(ii) of the CWA and the Rules of Practice provide, not for a meeting of that nature, but rather a hearing at which

evidence is presented for the purpose of determining whether Complainant met its burden of proving that Respondent committed the violations as alleged and that the proposed penalty is appropriate based on applicable law and policy. The undersigned noted that Petitioners did not specifically identify any testimonial or documentary evidence that they would present at any such hearing. The undersigned further noted that Petitioners did not offer in either their Comments or the Petition any relevant and material evidence or arguments that had not already been adequately addressed by Complainant. For these reasons, the undersigned found that resolution of the proceeding by the parties would be appropriate without a hearing.

The undersigned thus issued the Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order.

Dated: May 8, 2018.

Susan L. Biro,
Chief Administrative Law Judge.
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