



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

OFFICE OF THE
SECRETARY

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CONCILIATION ORDER BY CONSENT

SECRETARY'S ORDER NO. 2012-A-0016

Issued Pursuant to 7 *Del. C.* § 6005(b)(3)

Date of Issuance: May 10, 2012

Issued to:

Royal Pest Solutions Inc.
Attn: Anne Bookout, Esquire
General Counsel
53 McCullough Drive
New Castle, DE 19720

Dear Ms. Bookout:

Royal Pest Solutions Inc. ("Royal") and the Secretary of the Department of Natural Resources & Environmental Control ("Secretary" or "Department") are endeavoring by Conciliation to ensure compliance with 7 *Del. C.* Chapter 60. The Department believes that a violation of 7 *Del. C.* Chapter 60 is either continuing or threatening to begin. The parties have agreed to this order to resolve solely any liabilities of Royal for alleged violations of law and regulations associated with methyl bromide fumigation conducted at the facilities owned by Diamond State Port Corporation ("DSPC") at the Port of Wilmington, Delaware, as set out herein.

BACKGROUND

Royal has offices at 53 McCullough Drive, New Castle, Delaware. Royal conducts fumigation activities under contract to various shipping companies and other customers at the Port of Wilmington (“Port”), which is located near the confluence of the Christina and Delaware Rivers. On a seasonal basis, beginning mid-December through approximately April of the following year, various companies import fruit from Chile into the United States using ports such as the Port. These and other fresh produce shipments, as well as other imported commodities, undergo fumigation as a condition of entry into the country.

The U.S. Department of Agriculture (“USDA”) has rules and regulations designed to eliminate dangerous agricultural pests from produce and other imports to the United States. A common method of eliminating such pests, and at times the only treatment method approved by USDA, is that of quarantining incoming shipments and requiring that they be fumigated (held in the presence of a gaseous pesticide, methyl bromide), under supervision by USDA officers and in accordance with USDA treatment protocols, as a condition of release from quarantine and entry into the US. Royal is the only quarantine fumigation company that currently conducts fumigation activities at the Port, and it has been the exclusive fumigator at the Port for at least the past 18 years. Royal has no contractual relationship with DSPC; rather, when quarantine fumigation services are required, Royal is hired by the companies that import commodities through the Port.

Methyl bromide is a volatile organic compound (“VOC”) and hazardous air pollutant (“HAP”) under the federal Clean Air Act. It is also an ozone-depleting substance that is regulated under the Montreal Protocol, an international treaty to protect the upper atmosphere’s ozone layer, the terms of which have been adopted in the U.S. through the Clean Air Act. Title I

of the Clean Air Act contemplated the establishment of source categories and emissions standards for the chemicals designated as HAPs, but the U.S. Environmental Protection Agency (“EPA”), charged with implementing the Act, has not established a HAP source category for quarantine fumigation, nor has it established a national emissions standard for methyl bromide. Title VI of the Clean Air Act specifically addresses methyl bromide and preserves its use for quarantine fumigation of import/export commodities. There currently are, and have been, no alternatives to methyl bromide fumigation approved by USDA for quarantine treatments.

Under the supervision of USDA officers and in full compliance with USDA mandates and regulations, Royal has performed methyl bromide fumigation at the Port using tented enclosures inside buildings and outside of buildings it has also treated commodities under tarpaulins. Royal has assured DNREC that it has conducted, and continues to conduct, fumigations at the Port in compliance with USDA requirements and methodologies. Royal has assured DNREC that it has also followed, and will continue to follow, all chemical product label requirements prescribed by the EPA under the Federal Insecticide, Fungicide and Rodenticide Act. Neither DSPC nor Royal, however, has sought a permit for emissions of methyl bromide under the Clean Air Act or Delaware law.

In 2009 the Virginia Department of Environmental Quality determined that quarantine fumigation activities in that state required air permits. Royal and another fumigation company with operations in Virginia entered into negotiations with the state, and on June 22, 2010, the Commonwealth of Virginia issued an Order by Consent to each of the companies for violations of Virginia’s air pollution control law and its regulations related to use of methyl bromide at facilities in Suffolk, Virginia. In June 2010, EPA’s Region III began an investigation into

fumigation activities at Philadelphia port terminals and it submitted Clean Air Act Section 114 Information Requests to a number of parties, including Royal and DSPC.

DSPC and Royal initiated contact with DNREC in July of 2010, and in October of 2010, DNREC met with representatives of the DSPC and Royal. At the meeting, DNREC requested copies of the information submitted to U.S. EPA. DSPC and Royal provided that information to DNREC. The parties also discussed the need to collect data on methyl bromide emissions during fumigation of Chilean fruit at the Port in order to ascertain the nature and amounts of emissions occurring during fumigation activities at the Port. In January of 2011, Royal and DSPC submitted to DNREC a sampling protocol designed to obtain relevant measurements of methyl bromide emissions during the Chilean fruit season that was expected to begin in January and continue through April, on a schedule of approximately two ships per week. Royal indicated that the seasonal nature of the shipments meant that the opportunities to sample would be similarly limited. Royal also noted that the sampling protocol was developed through a joint effort of DSPC, Royal, an air emissions consultant and an industrial hygiene consultant familiar with USDA quarantine fumigation.

By letter dated October 4, 2011, DSPC submitted to DNREC the results of monitoring conducted by Royal during a fumigation event on February 23-24, 2011, at the Port. In that correspondence, DSPC reiterated that the purpose of the ambient air monitoring had been to gather initial data on ambient air concentrations of methyl bromide throughout a fumigation event. On November 23, 2011, DNREC met with Royal, DSPC and an engineer retained by DSPC to assess the data and participate in the permitting process on behalf DSPC.

DNREC, based on the data submitted to it, believes that the fumigation activities at the Port require the owner and any operator of methyl bromide-emitting activities to obtain a Title V

permit, as the Port is a major source of methyl bromide emissions. As neither DSPC nor Royal is currently permitted to emit methyl bromide, DNREC believes that compliance with Title 7, Chapter 60 and the Title V program can best be achieved by setting out schedules through which Royal and DSPC can attain compliance. This Conciliation Order on Consent is being issued pursuant to 7 *Del. C.* § 6013(b)(3) in order that Royal may attain compliance. A similar Conciliation Order was entered into by DSPC on April 17, 2012.

This Conciliation Order on Consent is being issued pursuant to 7 *Del. C.* § 6013(b)(3) for that purpose.

FINDINGS

Based on the above, the Secretary makes the following findings:

1. Commodities from other countries are brought into the United States via the Port of Wilmington, Delaware.
2. USDA rules and regulations contain exacting phytosanitary requirements for imported commodities such as table grapes from Chile and other agricultural products. USDA's mandate includes the authority to put commodities under quarantine and require treatment as a condition of entry into the U.S. Under USDA rules and regulations, the only approved treatment for the types of perishable and other cargo imported through the Port, including Chilean fruits and vegetables, is methyl bromide fumigation.
3. Royal is providing fumigation services at the Port, in accordance with USDA rules and regulations and under USDA supervision, using methyl bromide to eradicate dangerous agricultural pests. In the course of fumigating, Royal is releasing methyl bromide to the atmosphere.

4. Methyl bromide is classified as a hazardous air pollutant and a volatile organic compound.

5. The federal Clean Air Act and Delaware law have exacting permitting requirements for owners or operators that emit hazardous air pollutants and volatile organic compounds.

6. The existing air quality permit issued to DSPC does not authorize any emissions of methyl bromide. Likewise, Royal has not acquired any air permit to discharge emissions of methyl bromide from its fumigation operations at the Port.

7. DSPC is operating a facility at which methyl bromide, an air pollutant, is emitted without DSPC having obtained permission in its air quality permit for such emissions. Likewise, Royal has been conducting fumigation operations without a permit to emit methyl bromide and has never applied for a permit for its emissions.

8. Major sources of hazardous air pollutants and VOCs are required to obtain a Title V permit pursuant to the federal Clean Air Act and Delaware laws and regulations.

9. Royal and DSPC are now studying the emissions of methyl bromide during fumigation activities at the Port to better quantify the amount of methyl bromide emitted and its impact on ambient air quality.

10. DSPC has commissioned a consultant to develop a recommendation for an acceptable ambient air concentration for methyl bromide.

11. DNREC believes that, based on the data currently in its possession, the Port is a major source of methyl bromide emissions and that the ongoing fumigation activities violate the Clean Air Act and Delaware law.

12. DNREC requires further information in order to make appropriate permitting decisions, including but not limited to appropriate permit conditions.

REGULATORY AND STATUTORY PROVISIONS

Seven *Del. C.* § 6003 states in pertinent part:

(a) The Secretary shall enforce this chapter.

(b) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any condition of a permit issued pursuant to § 6003 of this title, or any order of the Secretary, shall be punishable as follows:

* * *

(2) * * * If the violation is continuing or is threatening to begin, the Secretary may also seek a temporary restraining order or permanent injunction in the Court of Chancery. In his or her discretion, the Secretary may endeavor by conciliation to obtain compliance with all requirements of this chapter. Conciliation shall be giving written notice to the responsible party (i) specifying the complaint, (ii) proposing a reasonable time for its correction, (iii) advising that a hearing on the complaint may be had if requested by a date stated in the notice, and (iv) notifying that a proposed correction date will be ordered unless a hearing is requested. * * *

CONCLUSION

Based on the above findings, the Secretary has determined that Royal has violated the Clean Air Act and Delaware law because it is conducting fumigation activities at the Port and neither DSPC nor Royal have obtained a permit for those activities and this violation is continuing, and he has further determined that at this time it is appropriate to endeavor to obtain compliance by Royal by conciliation pursuant to 7 *Del. C.* § 6003(b)(1).

ASSESSMENT OF PENALTY

Pursuant to the provisions of 7 *Del. C.* § 6005(b)(3), this is written notice to Royal that, on the basis of its findings, the Department is assessing Royal an administrative penalty of

\$150,000.00 (the “Administrative Penalty Amount”). Royal may offset \$50,000.00 of the Administrative Penalty Amount by transferring the same to DSPC for use by DSPC on ambient air quality monitoring or on projects that would develop, implement and verify measures to limit methyl bromide emissions from the Port so that they do not cause ambient air concentrations to exceed an appropriate level (the “Control Technology Project”). These funds shall be spent in addition to any funds DSPC is obligated to spend by virtue of its Conciliation order and no portion of that offset shall be included within the amount of money DSPC is required to spend. If Royal spends said portion of the Administrative Penalty Amount on the Control Technology Project, Royal shall submit to DNREC documentation of the commitment to transfer funds to DSPC, and Royal shall pay to the Department \$25,000.00 within 30 days of receipt of this Order. If Royal fails to submit documentation that the funds are being provided as designated herein, DNREC shall respond in writing and Royal will have 30 days from receipt of the notification of the deficiency to correct the deficiency. If Royal fails to correct the deficiency within 30 days, then Royal shall submit a check to DNREC for the offset amount of \$50,000.00. Any portion of the Administrative Penalty Amount that is not transferred to DSPC for use on the Control Technology Project shall be made payable to the “State of Delaware” and shall be directed to: Valerie M. Satterfield, Deputy Attorney General, Department of Justice, Environmental Unit, 102 W. Water Street, 3rd Floor, Dover, DE 19904. Additionally, \$75,000.00 of the Administrative Penalty shall be suspended on the condition that Royal comply with the terms and conditions of this Conciliation Order, and that Royal engage in no future violations of Delaware or federal environmental laws for a period of one year; however, continued fumigation by Royal at the Port without a permit from the Secretary for the time period from issuance of this order until issuance of a decision on the Port’s application for a permit to emit methyl bromide,

in and of itself, shall not constitute a ground for revoking this suspension. If DNREC determines that Royal has committed a violation during that time period, DNREC may submit a written demand for payment of this suspended \$75,000.00 penalty and Royal shall pay that penalty within 30 days from issuance of that demand letter.

CONCILIATION AND ORDER

It is the desire of the Secretary that Royal take actions to ensure that its operations at the Port of Wilmington comply with DSPC's Air Permit and Delaware laws and regulations. Therefore, in consideration of the foregoing findings,

IT IS HEREBY ORDERED and agreed as follows:

1. Royal shall work cooperatively with DSPC to develop, implement and verify measures to be set forth in DSPC's Air Permit to limit methyl bromide emissions at the Port so that such emissions do not cause ambient air concentrations to exceed an appropriate level. Until such time as continuous compliance has been achieved, no changes to Royal's current fumigation practices at the Port shall take place that would cause an increase in methyl bromide ambient air concentrations without prior approval of the Department, unless the changes are required by the USDA and would not create a condition of air pollution (as defined in Air Quality Management Regulations 1101 § 2.0 Definitions). Royal shall report any changes required by USDA within five business days of implementation.

2. In order to make progress towards achieving continuous compliance, Royal shall commit, for so long as Royal provides fumigation services to the Port, to DSPC's proposed emissions and/or ambient air concentration limits based on appropriate environmental and health

factors and proposed practices designed to meet those limits and methods of demonstrating compliance with the limits.

3. By agreeing to the terms of this Conciliation Order by Consent (“Consent Order”), Royal does not admit any violation of any law, regulation, directive, instruction, order, obligation or duty, or any liability to any person or party.

4. This Consent Order constitutes a full and final settlement of, and the Department forever releases and discharges Royal and its successors in interest, agents, employees, representatives, officers and directors from any and all liability for statutory or regulatory violations relating to air quality, any and all enforcement activities or actions by the Department or other claims, penalties, fees, fines, assessments, costs, expenses, or causes of action (of any form or type relating to air quality) arising from, related to or in connection with the use of methyl bromide for any purpose (including but not limited to fumigation), at any time prior to the Date of Issuance of the Consent Order. The foregoing release shall become null and void (i) if Royal fails to make the payments and/or expenditures set forth in the Assessment of Penalty section of this Consent Order or (ii) if Royal fails to comply with paragraphs 1, 2 and 3 of this Consent Order.

6. Failure to comply with paragraphs 1, 2, and 3 may also result in the Department’s pursuing other enforcement options in its discretion.

PUBLIC HEARING

The Secretary is issuing this Conciliation Order on Consent anticipating that the Consent/Waiver provision herein will be signed by Royal upon receipt. Nonetheless, should Royal choose not to sign the Consent/Waiver provision, the Order shall become effective and final 30 days after signature by the Secretary unless the Secretary receives from Royal, within 30

days from receipt of this Notice, a written request for a public hearing on these matters as provided in 7 Del. C. § 6005(b)(3) and (c). In the event Royal requests a hearing, the Secretary reserves the right to withdraw this Notice and Order and to take additional enforcement actions regarding these and other violations at the Port, including but not limited to the imposition of civil penalties and recovery of the Department's costs and attorney's fees. The Department does not otherwise intend to convene a public hearing on these matters, but reserves the right to do so at its discretion.

If you have any questions, please contact Paul Foster at (302) 323-4542.

Date: _____

5/9/12



Collin O'Mara, Secretary

CONSENT/WAIVER OF STATUTORY RIGHT TO A HEARING

Royal Pest Solutions Inc. hereby waives its right to a hearing and its opportunity to appeal or contest this Conciliation Order by Consent and agrees to the terms of this Order.

ROYAL PEST SOLUTIONS INC.

Date: 5/8/12

By: 

Title: President

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