

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2007 JUN 29 PM 3:03

IN THE MATTER OF)
)
Flannery Oil Company, Inc.)
1012 E. Centre St.)
P.O. Box 1580)
Rapid City, SD 57709)
and)
Black Hills Marketers, Inc.)
1012 E. Centre St.)
P.O. Box 1580)
Rapid City, SD 57709)
and)
Shannon Capital, Inc.)
1012 E. Centre St.)
P.O. Box 1580)
Rapid City, SD 57709)
and)
M. G. Oil Company, Inc.)
1012 E. Centre St.)
P.O. Box 1580)
Rapid City, SD 57709)
and)
Kelly Flannery, Individually)
Kevin Flannery, Individually)
4931 Ireland Place)
Rapid City, SD 57702-8333)
)

Respondents.)

**ADMINISTRATIVE COMPLAINT AND
OPPORTUNITY TO REQUEST HEARING**

Proceeding to Assess Class II
Civil Penalty Under Section 311
of the Clean Water Act

Docket No. **CWA-08-2007-0011**

EPA REGION VIII
ADMINISTRATIVE CLERK

AUTHORITY

1. This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990. The Administrator has properly delegated this authority to the undersigned EPA official. This proceeding is governed by the Consolidated Rules of Practice

Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”) set forth at 40 CFR part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

2. Respondents, Flannery Oil Company, Inc., Black Hills Marketers, Inc., Shannon Capital, Inc., and M.G. Oil Company, Inc. are corporations organized under the laws of South Dakota and authorized to do business in South Dakota.

3. Respondents, Kelly Flannery, individually, Kevin Flannery, individually, Flannery Oil Company, Inc., Black Hills Marketers, Inc., Shannon Capital, Inc., and M.G. Oil Company, Inc. are "persons" within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

4. The Respondents, Kelly Flannery, individually, and Kevin Flannery, individually, are the sole officers and directors of Flannery Oil Company, Inc. located at 1012 East Centre Street., Rapid City, South Dakota..

5. The Respondents, Kelly Flannery, individually, and Kevin Flannery, individually, are the sole officers and directors of Black Hills Oil Marketers, Inc. located at 1012 East Centre Street., Rapid City, South Dakota..

6. The Respondents, Kelly Flannery, individually, and Kevin Flannery, individually, are the sole officers and directors of Shannon Capital, Inc. located at 1012 East Centre Street., Rapid City, South Dakota.

7. Black Hills Marketers, Inc., Shannon Capital, Inc., Flannery Oil Company, Inc., operated as a single enterprise with Kelly Flannery, individually, and Kevin

Flannery, individually, as the sole officers and directors of each of the corporations which listed 1012 East Centre Street, Rapid City, SD, as their principle place of business.

8. Kelly Flannery, individually, and Kevin Flannery, individually, disregarded the independence of the Respondents, Black Hills Marketers, Inc., Shannon Capital, Inc., and Flannery Oil Company, Inc. entities using the corporations as a mere instrumentality to conduct their own personal affairs by placing all operations and payroll for Shannon Capital and Black Hills Marketers, Inc. under Flannery Oil Company, Inc. in approximately 2004.

9. Respondents, Kelly Flannery, individually, Kevin Flannery, individually, Black Hills Marketers, Inc., Shannon Capital, Inc., and Flannery Oil Company, Inc. owned and operated a bulk fuel storage facility located at 1012 East Centre Street., Rapid City, South Dakota (hereinafter, “the facility”) prior to February 16, 2007, within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

10. On or about February 16, 2007, M.G. Oil Company purchased Flannery Oil Company located at 1012 East Centre Street., Rapid City, South Dakota (hereinafter, “the facility”).

11. Since February 16, 2007, Respondent, M.G. Oil Company has owned or operated, and continues to own or to operate the facility within the meaning of sections 311(a)(6) and (10)of the Act, 33 U.S.C. §§1321(a)(6) and (10).

12. The facility includes, but is not limited to, four 21,000 gallon tanks containing #1 clear diesel fuel, #2 clear diesel fuel, unleaded gasoline fuel, and unleaded gasoline with alcohol fuel; three 12,000 gallon tanks containing Jet A fuel, #2 diesel- low sulfur fuel, and #1

diesel- dyed fuel; and one 15,000 gallon tank containing 100 octane low lead fuel, with a total oil storage capacity of approximately 135,000 gallons.

13. Gasoline, diesel, octane low lead fuel, and jet fuels are oils within the meaning of “oil” as defined at §311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

14. Respondents store, transfer, distribute, use or consume oil or oil products at the facility.

15. Respondent, M.G. Oil Company, is the owner or operator of the facility.

16. Respondents, Kelly Flannery, individually, Kevin Flannery, individually, Black Hills Marketers, Inc., Shannon Capital, Inc., and Flannery Oil Company, Inc., were at the time of the inspection, an “owner or operator” of an “onshore facility” within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

17. The facility is a “non-transportation related” onshore facility within the meaning of 40 CFR § 112.2.

18. Drainage from the facility flows into a storm water intake adjacent to the facility that discharges into Rapid Creek.

19. Rapid Creek is a “navigable water” and “water of the United States” within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 CFR § 110.1.

20. 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 vessels and from onshore and offshore facilities, and to contain such discharges"

21. EPA promulgated the oil pollution prevention regulations, set forth at 40 CFR part 112. 40 CFR § 112.1(b) states that the requirements of part 112 apply

“to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines”

22. The facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 CFR § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen 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.

23. The facility is subject to the oil pollution prevention requirements of 40 CFR part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.

24. 40 CFR § 112.3 requires that owners or operators of onshore and offshore facilities prepare a Spill Prevention, Control, and Countermeasure (“SPCC”) plan in writing, and in accordance with applicable sections of part 112, including, but not limited to, sections 112.7 and 112.8.

25. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this

section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by ... the Administrator.

26. On or about July 12, 2006, EPA conducted an unannounced SPCC inspection ("the Inspection") at the facility with the consent of Kelly Flannery, the Owner and Manager of the facility.

27. From the date of the Inspection to the present date, the Respondents have not produced an SPCC Plan for the facility.

28. The facility does not have a written SPCC plan.

29. The following SPCC measures were found to be deficient at the facility at the time of the Inspection and remain deficient as of the date of this complaint:

- a. Failure to provide secondary containment in the loading/unloading area in accordance with 40 CFR 112.7(c)(1);
- b. Failure to provide a catchment basin for the drainage from the undiked area in accordance with 40 CFR 112.8(b)(3);
- c. Failure to provide adequate secondary containment for the fuel storage tanks in accordance with 40 CFR 112.8(c)(2);
- d. Failure to provide secondary containment for the 55 gallon drums in accordance with 40 CFR 112.8(c)(11); and
- e. Failure to properly support above ground pipes in accordance with 40 CFR 112.8(d)(4).

30. In correspondence from Respondent, M.G. Oil Company, dated March 20, 2007, and May 9, 2007, M.G. Oil Company has admitted receiving correspondence from EPA regarding the above-referenced deficiencies at the facility and has been working cooperatively with EPA.

31. The Respondents' failed to prepare and to implement an SPCC plan for the facility in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 as required by 40 CFR §112.3.

28. Respondents' failure to prepare and to implement an SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 from July 12, 2006, through and including June 29, 2007, (a duration of approximately 372 days) constitutes violations of 40 CFR §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

PROPOSED PENALTY

As alleged in the preceding Paragraphs, and pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §1321(b)(6)(B)(ii), and 40 CFR §19.4, the Respondents are liable for civil penalties of up to \$11,000 per day for each day during which the violation continues, up to a maximum total of \$157,500 for all violations. Complainant proposes the assessment of administrative penalties against the Respondents in the amount of \$48,770. Complainant proposes this penalty amount after considering the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8): Respondents' alleged violations, the seriousness of the violations, the economic benefit to the violator resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other factors as justice may require. Specifically, the proposed penalty amount is based on Respondents' major non-compliance and moderate environmental impact for a duration of at least 11.5 months

with a major degree of culpability. No additions were made to the proposed penalty amount based on either a history of violations or economic benefit.

TERMS OF PAYMENT FOR QUICK RESOLUTION

If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 CFR § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no Answer need be filed. For more time for payment, Respondents may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. The payment shall be made by remitting a cashier's or certified check, including the name and docket number of this case, referencing "Oil Spill Liability Trust Fund-311," for the amount, **payable to the "Environmental Protection Agency,"** to:

US checks by regular

US postal service mail: U.S. Environmental Protection Agency
P.O. Box 371099M
Pittsburgh, PA 15251

**Federal Express, Airborne,
or other commercial carrier:**

Mellon Client Service Center
ATTN: Shift Supervisor
Lockbox 371099M Account 9109125
500 Ross Street
Pittsburgh, PA 15251-0001

Wire Transfers:

Mellon Bank
ABA 043000261
Account 9109125
22 Morrow Drive
Pittsburgh PA 15235

A copy of the check, or wire transfer, shall be sent simultaneously to:

Donna K. Inman (8ENF-UFO)
U.S. EPA Region 8
Technical Enforcement Program
1595 Wynkoop St.
Denver, CO 80202-1129

Payment of the penalty in this manner does not relieve Respondents of their obligations to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in the Act, a Respondents have the right to a public hearing to contest this Complaint. If you (1) contest the factual claims made in this Complaint; (2) contest the appropriateness of the proposed penalty; and/or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with section 22.15 and 22.38 of the Consolidated Rules within 30 calendar days after receipt of this Complaint. Your Answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which you have knowledge; (2) state circumstances or arguments which are alleged to constitute grounds for defense; (3) state the facts you dispute; (4) the basis for opposing the proposed relief, and (5) specifically request an administrative hearing, if desired. Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation.

The Answer and one copy must be sent to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-1129

and a copy must be sent to the following attorney:

Brenda Morris, Enforcement Attorney (8ENF-L)
U.S. EPA Region 8, Legal Enforcement Program
1595 Wynkoop St.
Denver, CO 80202-1129
Telephone: (303) 312-6891

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

PUBLIC NOTICE

Pursuant to section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), the Complainant is providing public notice of and reasonable opportunity to comment on this proposed issuance of a complaint assessing administrative penalties against you. If a hearing is held on this matter, members of the public who submitted timely comments on this proceeding have the right under section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), to be heard and present evidence at the hearing.

SETTLEMENT CONFERENCE

The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations and is willing to explore

this possibility in an informal settlement conference. If you or your attorney, if you choose to be represented by one, have any questions or wish to have an informal settlement conference with EPA, please call Brenda Morris at (303) 312-6891. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in the Consolidated Rules. If a settlement can be reached, its terms must be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the Regional Judicial Officer.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**
Complainant.

Date: 6/29/07 *for* Michael T. Bisner
Eddie Sierra,
Acting Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Date: 6/29/07 Brenda Morris
Brenda Morris, Enforcement Attorney
U.S. EPA, Region 8
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop St, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Mr. Kelly Flannery, Registered Agent for:

Flannery Oil Co., Inc.
Black Hills Marketers, Inc.
Shannon Capital, Inc.
4931 Ireland Place
Rapid City, SD 57702-8333

Marlyn Ericson, Registered Agent for:

M.G. Oil Company
1002 Main St.
P.O. Box 1006
Rapid City, SD 57709

July 2, 2007
Date

Judith McTernan
Judith McTernan