



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

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Suite 1100 - SEL
Boston, MA 02114-2023

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April 9, 2009

Wanda Rivera
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region I
One Congress Street
Suite 1100, Mail Code RAA
Boston, MA 02114-2023

Re: Notice of CWA Administrative Penalty Complaint Issued to
HOP Energy, LLC, d.b.a. DDLC Energy, New London, CT
Docket No. CWA-01-2009-0004

Dear Ms. Rivera:

Enclosed for filing in the above-referenced action, please find the original and one copy of Complainant's Initial Prehearing Exchange.

Thank you for your attention to this matter.

Sincerely,

Tonia Bandrowicz
Senior Enforcement Counsel

Enclosure

cc: Honorable Susan L. Biro,
Chief Administrative Law Judge
Christopher Foster, Esq.

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

1. Pursuant to the Prehearing Order and Section 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules"), Complainant submits the following:

- (A) The names of the expert and other witnesses intended to be called at hearing, identifying each as a fact witness or an expert witness, with a brief narrative summary of their expected testimony, or a statement that no witness will be called.**

Complainant anticipates that it will call the following fact witnesses. Copies of the witnesses' resumes are enclosed.

- (1) Mia Pasquerella
EPA On-Scene Coordinator
Emergency Planning and Response Branch
Office of Site Remediation and Restoration
U.S. Environmental Protection Agency, Region 1

Ms. Pasquerella will testify as to the Clean Water Act SPCC and FRP requirements applicable to this case, the facts leading up to, and including the Government Initiated Unannounced Exercise (GIUE) of Respondent's New London facility on May 19, 2008, including the observations she made during the GIUE and conversations she had with representatives of the company and other agencies, as well as her report and photographs taken during the GIUE, and correspondence she had with the company. She will also testify as to facts relevant to the statutory penalty factors as set forth in Section 311(b)(8) of the Act.

- (2) Melanie Morash
US/Mexico Border Coordinator
Emergency Prevention & Preparedness Section
U.S. Environmental Protection Agency, Region 9

Ms. Morash, currently an employee in EPA, Region 9, was, at all times relevant to this case, an On-Scene Coordinator in the Emergency Planning and Response Branch of the Office of Site Remediation and Restoration in Region 1. Ms. Morash will testify as to the Clean Water Act SPCC and FRP requirements applicable to this case, the facts leading up to, and including the May 19, 2008 GIUE, including her pre-exercise review of the company's SPCC and FRP documents and correspondence with the company, and the observations she made during the

GIUE, as well as conversations she had with representatives of the company and other agencies, and correspondence she had with the company. She will also testify as to facts pertaining to the statutory penalty factors as set forth in Section 311(b)(8) of the Act.

- (3) Marine Science Technician Chief Hugh M. Hamilton, III
Facilities Division Supervisor and
Bullpen Chief for Sector Long Island Sound
U.S. Coast Guard
Sector Long Island Sound

MSTC Hamilton will testify as to his observations during the May 19, 2008 GIUE, conversations he had with representatives of the company and other agencies during the GIUE, and the issuance of the May 19, 2008 Captain of the Port Order suspending transfer operations to the facility by vessel as a result of the GIUE.

- (4) Mary Medeiros,
EPA Region 1 Financial Analyst
Office of Environmental Stewardship
U.S. EPA Region 1

Ms. Medeiros will provide testimony regarding economic benefit and, if necessary, inability to pay claims by the company.

- (5) Paul Callahan
Readiness Coordinator Environmental Health & Safety Officer
Weston Inc.
EPA Region 1 START Contract

Mr. Callahan will testify as to the facts pertaining to the May 19, 2008 GIUE, including the observations he made during the GIUE and conversations he had with representatives of the company and the agencies.

- (B) Copies of all documents and exhibits intended to be introduced into evidence. Included among the documents produced shall be a curriculum vita or resume for each identified expert witness. The documents and exhibits shall be identified as Complainant's or Respondent's exhibit, as appropriate, and numbered with Arabic numerals (e.g., COMPLAINANT'S EX. 1 or RX 1).**

In addition to the Complainant's December 15, 2008 Complaint and Respondent's February 17, 2009 Answer (copies of which have already been filed in the case, and which the Presiding Officer and parties presently possess), incorporated herein by reference, EPA intends to

offer into evidence the documents listed in section 2 below, as well as the additional document below:

- (1) Dun & Bradstreet Reports for HOP Energy, LLC and DDLC Energy
(COMPLAINANT'S EX.-42)

In addition, Complainant may request this Court to take official notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

- (C) A statement of an appropriate city or county in which to conduct the hearing and an estimate of the time needed to present its direct case See §§ 22.21(d) and 22.19(d) of the Rules. Also state if translation services are necessary in regard to the testimony of any anticipated witness(es), and, if so, state the language to be translated.**

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent conducts business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional office is located, or in Washington, D.C. Complainant proposes that the hearing be held in New London, Connecticut, which the city in which the DDLC Energy facility is located. If appropriate federal or state courthouse space is not available in New London, Connecticut, Complainant proposes that the hearing be held in New Haven, Connecticut, the next closest large city to Respondent's places of business.

It is the Complainant's view that a length of time of no more than two (2) days is needed to present its direct case.

Translation services are not needed.

2. In addition, Complainant submits the following as part of its Initial Prehearing Exchange as required by paragraph 2 of the Prehearing Order:

(A) a copy of documentation evidencing the truth of all of the allegations made in paragraphs 20 of the Complaint, including that “[t]he Facility is listed by the EPA new England Office as a ‘significant and substantial harm’ facility.”

This information is included in a self-certification submitted by the company and located at the beginning of the Respondent's FRP which is attached as **COMPLAINANT'S EX.-1**. The self-certification states that the DDLC facility meets the criteria of a “significant and substantial harm” facility, as defined in 40 C.F.R. 112.

(B) a copy of all the filed SPCC plans for the Facility from 1999 to 2008, including any and all updates or revisions thereof, with documentation such as cover letters evidencing the date upon which each such plan , update or revision was filed.

Under the Oil Pollution Prevention regulations at 40 C.F.R. Part 112, entities required to prepare and implement SPCC plans are not required to submit such plans to EPA, only to have them available on-site for review. Consequently EPA generally does not keep copies of SPCC plans on file. Prior to the May 19, 2008 GIUE, EPA a copy of the DDLC facility's SPCC plan dated February 1999 on file. EPA reviewed this plan prior to the GIUE and provided comments to the company noting specific deficiencies. After receiving EPA's comments, the company submitted a revised SPCC plan to EPA dated June 2008. EPA replaced the previous SPCC plan it had on file with the revised June 2008 SPCC plan, which is attached as **COMPLAINANT'S EX. -2**. This is the only SPCC plan EPA currently has on file for the company.

(C) a copy of all the filed FRP plans for the Facility from 1999 to present, including any an all updates thereof, with documentation evidencing the date upon which each such plan or updated was filed.

In the ordinary course of business, EPA does not keep copies of pre-existing FRP plans on file, but continuously updates them, replacing outdated pages with revised replacement pages. If the company submits a transmittal cover letter with an FRP update, EPA includes that letter in the file. All correspondence relating to the DDLC facility, including such transmittal cover letters, is included as part of Section (D) below. In addition, EPA currently has a revised FRP plan on file, dated June 2008, which is attached as **COMPLAINANT'S EX. -1** . The June 2008 FRP plan corrects the deficiencies noted by EPA as part of the GIUE pre-review and exercise.

(D) a copy of all documentation evidencing EPA's approval of any and all FRP plans for the facility and the date of such approval.

Copies of all correspondence to, and from the company, including EPA approvals, are included as **COMPLAINANT'S EX.- 3** through **COMPLAINANT'S EX. - 31**. (An Exhibit List identifying all the documents is attached.)

(E) A copy of documentation evidencing EPA's "review of the Facility's SPCC plan" and "inspection of the Facility" as alleged in paragraph 23 of the Complaint, including any inspection report, photographs, diagram, charts, maps, notes, etc. relating thereto.

A copy of EPA's May 15, 2008 Memorandum from OSC Melanie Morash to DDLC Energy, is attached as COMPLAINANT'S EX.-17, and EPA's May 19, 2008 inspection report, is attached as COMPLAINANT'S EX.- 16.

(F) a copy of all documentation reflecting the evaluation of the Facility's containment dike by the "facility's Professional Engineer" as referenced in paragraph 23 of the Complaint and the results of such evaluation.

The facility's Professional Engineer's evaluation is contained in an October 17, 2008 report by Hartman Engineering, which is included as COMPLAINANT'S EX.- 4. Also included is an October 10, 2008 letter from DDLC Energy to EPA referring to this report, attached as COMPLAINANT'S EX.-5.

(G) a copy of the memo and all attachments thereto referenced in paragraph 24 of the Complaint.

A copy of EPA's May 15, 2008 Memo is attached as COMPLAINANT'S EX. - 17

(H) a copy of the Cover letter and revised SPCC plan and "additional revisions" and other "supporting material" referenced in paragraph 25 of the Complaint.

A copy of a July 5, 2008 cover letter and attached July 8, 2008 revised SPCC plan submitted by Respondent are attached as COMPLAINANT'S EX. - 11. Additional supporting information received by EPA on August 1, 2008 (dated July 14, 2008), is included as COMPLAINANT'S EX.-10, and supporting material received by EPA on October 10, 14, and 28, 2008 (dated October 9, 10 and 17, 2008) is included as COMPLAINANT'S EXS. 6, 5, and 4 respectively.

(I) A copy of any and all telephone logs, memoranda, or other writings documenting the telephone conversations(s) referenced in paragraph 25 of the Complaint.

A June 2, 2008 phone notation is written on a letter dated May 27, 2008, and included as COMPLAINANT'S EX.-14. A second e-mail between the parties is included as COMPLAINANT'S EX.-15.

(J) A copy of the EPA letter dated November 6, 2008 referenced in paragraph 25 of the Complaint.

A copy of the EPA letter dated November 6, 2008 referenced in paragraph 25 of the Complaint is attached as COMPLAINANT'S EX.- 3.

(K) A copy of documentation evidencing that the Facility had "stated that the [facility response drill / exercise] program" it had developed and/or intended to follow was the PREP, as alleged in paragraph 30 of the Complaint.

Documentation evidencing this is contained in Section 1.8.2. on p. 44 of the FRP, included as COMPLAINANT'S EX.-1.

(L) A copy of documentation evidencing the GIUE conducted in regard to Respondent's Facility as alleged in paragraph 31 of the Complaint, including any report, photographs, diagrams, charts, maps, notes, etc. relating thereto.

A copy of a May 19, 2008 letter announcing the GIUE is attached as COMPLAINANT'S EX.-32. A copy of the official May 19, 2008 Government Initiated Unannounced Exercise Verification Checklist is attached as COMPLAINANT'S EX. -33. Also attached as COMPLAINANT'S EX. - 36 various draft notes prepared by the governmental personnel or their agents during the GIUE . Copies of all photographs taken during the May 19, 2008 GIUE are included in photologs attached as COMPLAINANT'S EXS. - 40 and 41.

(M) A copy of documentation evidencing the rating Respondent received in regard to the GIUE conducted at its Facility as alleged in paragraph 32 of the Complaint, and the basis therefore.

This information is contained in the May 19, 2008 Government Initiated Unannounced Exercise Verification Checklist which is attached as COMPLAINANT'S EX. - 33.

(N) A copy of the letter including any and all attachments thereto reference in paragraph 33 of the Complaint.

A copy of the EPA June 6, 2008 letter is attached as COMPLAINANT'S EX.-12.

(O) A copy of the Captain of the Port Order including any and all attachments thereto reference in paragraph 33 of the Complaint.

A copy of the May 19, 2008 Captain of the Port Order is attached as COMPLAINANT'S EX.-35.

(P) A narrative statement describing exactly what Complainant means by the terms "developed" and "implemented" as used in paragraphs 37 and 38 of the Complaint.

The purpose of the FRP regulations is to ensure that oil storage facilities, especially those that store large quantities of oil such as Respondent with over a million gallons of oil storage capacity, are fully prepared to adequately response to spills and take adequate measures to clean-up and mitigate a spill's effects. In order to do so, FRP-regulated facilities must perform response training and drills/exercises. Thus, the FRP regulations as 40 C.F.R. § 112.21(a) specifically require that "[t]he owner or operator of any facility required to prepare a facility response plan ... shall *develop* and *implement* a facility response training program and a drill/exercise program that satisfy the requirements of this section." (emphasis added). In paragraphs 37 and 38 of the Complaint, Complainant alleges that the Respondent, as evidenced by the unsuccessful GIUE and other information, had neither "developed" nor "implemented" a training program or drill/exercise program that satisfied the requirements of 40 C.F.R. § 112.21. For instance, EPA alleges that the unsuccessful rating shows that the company had not adequately developed or implemented "a facility response training program to train those personnel involved in oil spill response activities," as required by 40 C.F.R. § 112.21(b). In addition, EPA alleges that the unsuccessful rating shows that the company had failed to adequately develop or implement facility response drills/exercises, including evaluation procedures, as required by 40 C.F.R. § 112.21(c).

(Q) A detailed narrative statement of all factual information Complainant considers relevant to the assessment of the penalty and/or a coducement specifying the proposed penalty and a separate penalty Calculation Worksheet detailing exactly how the proposed penalty was calculated.

Below is a narrative statement of all factual information Complainant considers relevant to the assessment of the penalty. Pursuant to 40 C.F.R. 22.19(a)(4), Complainant will file within 15 days after respondent files its prehearing information exchange, a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

There is no Clean Water Act penalty policy for calculating a proposed penalty to plead in the complaint.¹ At the hearing, EPA intends to put on witnesses, as identified in this Prehearing Exchange, who will present facts relating to the statutory penalty factors in Section 311 of the Act, and then argue in the post-trial brief what the appropriate penalty should be in light of the facts that were put into evidence.

¹ The March 1, 1995 *Interim Clean Water Act Settlement Penalty Policy* ("CWA Penalty Policy") is designed to establish how the Agency expects to calculate the minimum penalty for which it would be willing to settle a case and is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at hearing or trial. See CWA Penalty Policy, p. 3 and Section VI.

1. Nature, circumstances, extent and gravity of the violations

The Complainant will present testimony and exhibits on how the DDLC Facility meets the regulatory requirements for both SPCC and FRP (regulatory storage thresholds, proximity to water, reasonable likelihood that spilled oil would reach a navigable water as defined by the Clean Water Act) and why, as a "significant and substantial harm" facility that stores large quantities of oil, Respondent is subject to the more expansive FRP regulations. Testimony will also show that Respondent's noncompliance with the FRP requirements, as evidenced by the unsuccessful GIUE, represent significant violations of the Act because failure to fully prepare and implement adequate FRP plans leaves a facility unprepared to deal with an oil spill or to prevent the spill from having potentially serious environmental consequences. Specifically pertinent, is the fact that the U.S. Coast Guard took the highly unusual action of issuing a Captain of the Port Order on the day of the GIUE suspending transfer operations to the facility by vessel.

2. Ability to Pay

Based on the information available to date, including a Dun & Bradstreet Report (COMPLAINANT'S EX. -42), there is no basis to believe that the Respondent cannot pay a penalty up to the statutory maximum in a Clean Water Act Class II administrative penalty action. If Respondent raises ability to pay issues, EPA will present testimony by its Financial Analyst.

3. Prior History of Such Violations

While there have been no formal enforcement actions taken against the company for past violations, the record will show, primarily through EPA documents included in COMPLAINANT'S EX. 3 through 31 (such as EPA checklists and notice letters to the facility) that EPA had observed and notified the Respondent's of various FRP and SPCC deficiencies in past years.

4. Degree of Culpability

EPA will present evidence under this factor relating to the degree to which the company, a sophisticated corporation with access to resources and information on oil spill prevention requirements, and which stores significant quantities of oil at the New London location, should have taken steps to ensure that both it and its contractor had developed and implemented an adequate training program and drill/exercise program that satisfied the requirements of 112.21.

5. Economic Benefit or Savings

EPA does not have actual cost estimates for preparing / implementing an SPCC and FRP

plan but will present evidence, through the testimony of the EPA Financial Analyst, on estimated economic benefits based on different inputs.

6. Such Other Matters as Justice May Require

None were identified so Complainant will not be presenting any evidence relating to this factor.

CERTIFICATE OF SERVICE

I, Tonia Bandrowicz, hereby certify that on this 9th day of April, 2009, I caused the foregoing Prehearing Exchange to be served on the following persons in the manner indicated:

Original and One Copy By Hand Delivery

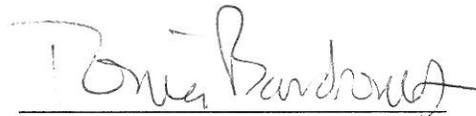
Wanda I. Santiago, Regional Hearing Clerk
U.S. EPA, Region 1
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One Copy By Fax (202-565-0044) and Pouch Mail

The Honorable Susan L. Biro
Chief Administrative Law Judge and Presiding Officer
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