

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

NUSSER OIL COMPANY)
HANSTON, KANSAS)

Respondent)

) Docket No. CWA-07-2010-0011

) **COMPLAINT AND NOTICE OF**
) **OPPORTUNITY FOR HEARING**

) Proceeding to Assess Class II Civil Penalty
) Under Clean Water Act Section 311 for
) Spill Prevention Control and
) Countermeasure Violations

COMPLAINT

Legal Authority

1. This is an administrative action for the assessment of civil penalties issued pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 311(b)(6) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1321(b)(6), as amended by the Oil Pollution Act of 1990, and in accordance with 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, Title 40 Code of Federal Regulations ("C.F.R.") Part 22 ("Consolidated Rules of Practice" or "Part 22").

2. This Complaint serves as notice that EPA has reason to believe that Respondent has violated Section 311(b) and (j) of the CWA, 33 U.S.C. § 1321(b) and (j), and the regulations promulgated thereunder and codified at 40 C.F.R. Part 112 governing the requirements to prevent the discharge of oil. This Complaint also serves as notice of Respondent's opportunity to file an Answer to this Complaint and to request a hearing on the proposed penalty assessment.

Parties

3. The Complainant, by delegation from the Administrator of EPA, and the Regional Administrator, EPA, Region 7, is the Director of Air and Waste Management Division, EPA, Region 7.

4. The Respondent is Nusser Oil Company, a bulk oil plant, doing business in the State of Kansas. The Respondent's bulk plant address is 101 Railroad Row, Hanston, Kansas.

Statutory and Regulatory Framework

5. Section 311(j) of the CWA, 33 U.S.C. § 1321(j), provides for the regulation of onshore facilities to prevent or contain discharges of oil. Section 311(j) of the CWA, 33 U.S.C. § 1321(j), provides in part that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.”

6. To implement Section 311(j), 33 U.S.C. § 1321(j), EPA promulgated regulations to prevent oil pollution. These regulations, codified at 40 C.F.R. Part 112, set forth the requirements for the preparation and implementation of a Spill Prevention Control and Countermeasure Plan (“SPCC Plan”).

7. More specifically, under the authority of Section 311(j) of the CWA, 33 U.S.C. § 1321(j), 40 C.F.R. Part 112 establishes procedures, methods and equipment and other requirements to prevent the discharge of oil from non-transportation-related onshore facilities into or upon the navigable waters of the United States or adjoining shorelines.

8. The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products, which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.

9. Further, under 40 C.F.R. Part 112, owners or operators of onshore facilities that have an aboveground storage capacity of more than 1,320 gallons of oil, and due to their location could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, must prepare a SPCC Plan in writing and in accordance with 40 C.F.R. § 112.7.

Allegations

10. Respondent is a corporation organized under the laws of Kansas.

11. Respondent is a “person” as defined by Section 311(a)(7) and 502(5) of the CWA, 33 U.S.C. § 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

12. Respondent was at all relevant times the “owner or operator,” within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6) and 40 C.F.R. § 112.2, of the bulk oil plant located at 101 Railroad Row, Hanston, Kansas (“the Facility”).

13. The Facility is located approximately 1000 feet from the Buckner Creek.
14. Respondent's Facility has a storage capacity which is not buried of 1,320 gallons or more of oil in containers each with a shell capacity of at least 55 gallons.
15. Buckner Creek is a navigable water of the United States as defined by 40 C.F.R. § 112.2.
16. Respondent's facility is an "onshore facility" within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.
17. Respondent's facility is a "non-transportation-related facility" as defined by Appendix A to 40 C.F.R. Part 112, as incorporated by reference within 40 C.F.R. § 112.2.
18. Respondent's facility was engaged in the storage of diesel fuel and gasoline.
19. Diesel fuel and gasoline are forms of oil as defined by Section 311(a)(1) of the CWA, 33 U.S.C. § 321(a)(1) and 40 C.F.R. § 112.2.
20. The Facility is therefore a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity ("an SPCC-regulated facility").
21. Pursuant to the CWA and 40 C.F.R. § 112.1, Respondent, as the owner and operator of an SPCC-regulated facility, is subject to the SPCC regulations.

Violations

Count I

22. The facts stated in Paragraphs 1 through 21 above, are herein incorporated.
23. 40 C.F.R. § 112.3 requires that the owner or operator of an SPCC-regulated facility must prepare a written SPCC plan in accordance with 40 C.F.R. § 112.7 and any other applicable section of 40 C.F.R. Part 112.
24. On July 24, 2008, EPA inspected the Facility and found that Respondent had failed to prepare an SPCC plan for the facility.
25. During the July 24, 2008 inspection, EPA observed that Respondent had no, or inadequate, secondary containment around the oil storage containers, as required by 40 C.F.R. Part 112.

26. Respondent's failure to prepare such an SPCC plan for the facility was a violation of 40 C.F.R. § 112.3.

27. As alleged in the preceding paragraph, and pursuant to Section 311(b)(6)(B)(ii) of the Act and 40 C.F.R. § 19.4, Respondent is liable for civil penalties of up to \$11,000 per day for each day during which the violation continues, up to a maximum of \$157,500.

28. Based on the forgoing allegations, and pursuant to the authority of Section 311(b)(6)(B)(ii) of the Act and 40 C.F.R. § 19.4, the Complainant proposes that the Administrator issue a Final Order assessing administrative penalties in the amount of \$46,134.

Relief

29. Section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per violation, up to a maximum total penalty of \$25,000. Pursuant to the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Inflation Rule, 40 C.F.R. Part 19, civil administrative penalties of up to \$11,000 per violation, up to a maximum of \$32,500, may be assessed for violations of CWA Section 311 that occur after March 15, 2004. The penalties proposed in Paragraph 28 above are based upon the facts stated in this Complaint, the seriousness of the violation, the economic benefit to the violator resulting from the violation, 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 in accordance with the CWA.

30. The penalties proposed in this Complaint are based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

31. If Respondent does not contest the findings and assessments set forth above, within 30 days of receiving this Complaint Respondent must file a written statement with the Regional Hearing Clerk at the address provided below agreeing to pay, and subsequently pay within 60 days after receiving this Complaint, the full penalty requested in Paragraph 28.

Payment must be made by a cashier's or certified check, or by an electronic funds transfer (EFT). If payment is made by check, make it payable to "Environmental Protection Agency," noting on the check "OSTLF-311," the name of the case (In the Matter of Nusser Oil Company), and the docket number (CWA-07-2010-0011).

If a check is mailed by U.S. Mail, it must be sent to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000.

If payment is made by Electronic Funds Transfer ("EFT"), funds must be transferred to the Federal Reserve Bank of New York at the following address:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental Protection Agency"

Pursuant to 40 C.F.R. § 22.18(a)(1), copies of the check or a copy of the EFT confirmation must be filed with the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

In either case, a copy of the check or EFT confirmation must be sent simultaneously to Kristen Nazar at the following address:

Kristen Nazar, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

32. Respondent may, pursuant to Section 311(b)(6) of the Act and 40 C.F.R. § 22.15(c), request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Even if a hearing is not explicitly requested in the Answer, a Presiding Officer may hold such a hearing if the Answer raises issues appropriate for adjudication. The procedures for any such hearing and for all proceedings in this action are set out in the Consolidated Rules of Practice, a copy of which is enclosed with this Complaint.

33. Default constitutes an admission of all facts alleged in this Complaint and a waiver of your right to a hearing on such factual allegations. In order to avoid default in this matter, you must within 30 days after receipt of this Complaint either (1) settle this matter with the Complainant; (2) file a written statement with the Regional Hearing Clerk at the address provided below that you agree to pay the proposed penalty in this Complaint, and subsequently pay the proposed penalty no later than 60 days after receiving this Complaint, as described below; or (3) file both an original and one copy of a written Answer to this Complaint with:

Regional Hearing Clerk
United States Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

34. You are also required, pursuant to § 22.5(b) of the enclosed Consolidated Rules of Practice, to provide a contemporaneous copy of any Answer to the Complainant. Complainant's counsel, who is authorized to receive service on behalf of the Complainant, shall be served at the following address:

Kristen Nazar, Attorney
Office of Regional Counsel
United States Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

35. Pursuant to 40 C.F.R. § 22.15, the Answer shall clearly and directly admit, deny or explain each of the factual allegations contained in this Complaint with regard to which you have knowledge. An allegation shall be deemed denied if Respondent states in the Answer that they have no knowledge of a particular factual allegation. The Answer shall also state (1) the

circumstances or arguments which are alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing the proposed relief; and (4) whether a hearing is requested.

36. Failure of Respondent to admit, deny, or explain any material factual allegation contained in this Complaint constitutes an admission of the allegation.

37. Following receipt of your Answer, a Presiding Officer will be assigned. The Presiding Officer will notify the parties of his assignment, and shall notify the parties of the time and place of further proceedings in the case.

38. Default by the Respondent constitutes, for the purposes of this proceeding, admission of all allegations made in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalty proposed shall be ordered unless the penalty is clearly inconsistent with the record of the proceeding or the CWA.

Informal Settlement Conference

39. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

Kristen Nazar, Attorney
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone: 913-551-7450.

40. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

41. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Consent Order issued by the Regional Judicial Officer, EPA Region 7. The issuance of such a Consent Agreement and Consent Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.

42. If Respondent has neither achieved a settlement by informal conference nor filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

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 Final Order 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 to be heard and present evidence at the hearing.

Date

11/20/09



for Becky Weber
Director

Air and Waste Management Division



Kristen Nazar

Assistant Regional Counsel

Enclosures: 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, 40 C.F.R. Part 22.
Civil Penalty Policy for Section 311(b)(3) and (j) of the Clean Water Act
Penalty Calculation

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a true and correct copy of the signed original Complaint and Notice of Opportunity for Hearing; and a copy of 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, 40 C.F.R. Part 22; and a copy of the Civil Penalty Policy for Sections 311(b)(3) and (j), to the following attorney for Nusser Oil Company and the owner of Nusser Oil Company:

Mr. Shawn Stogsdill
Van Ogsdol & Magruder PC
2400 Commerce Tower
911 Main Street
Kansas City, Missouri 64105

Mr. Terry Nusser
403 Roughton Street
Jetmore, Kansas 67854.

NOV 23 2009

Date


