

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)

Stilwell Oil Company)
Stilwell, Kansas)

Respondent.)

) Docket No. CWA-07-2009-0093

) **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 ("Consolidated Rules of Practice"), Title 40 Code of Federal Regulations ("C.F.R.") Part 22.

2. This Complaint serves as notice that EPA has reason to believe that Respondent has violated Section 311(j) of the CWA, 33 U.S.C. § 1321(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 Stilwell Oil Company, a bulk oil plant, incorporated and doing business in the State of Kansas. The Respondent's business address is 19760 Metcalf Avenue, Stilwell, Kansas 66085.

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." Initially, by Executive Order 11548 (July 20, 1970), 35 Fed. Reg. 11677 (July 22, 1970), and most recently by Section 2(b)(1) of Executive Order 12777 (October 18, 1991), 56 Fed. Reg. 54757 (October 22, 1991), the President delegated to EPA his Section 311(j) authority to issue the regulations cited above for non-transportation-related onshore facilities.

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

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 Spill Prevention Control and Countermeasure 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 19760 Metcalf, Stilwell, Kansas (“the Facility”).
13. The Facility is located approximately 250 feet from the Camp Branch of the Big Blue River.
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. The Camp Branch of the Big Blue River is a navigable water of the United States as defined by 40 C.F.R. § 112.2.
16. The Camp Branch of the Big Blue River is a 303(d) listed water that has a state-designated use for acute aquatic life and non-contact recreation.
17. 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.
18. 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.
19. Respondent’s facility was engaged in the storage and distribution of diesel fuel and gasoline.
20. 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.
21. 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 (“a SPCC-regulated facility”).
22. Pursuant to the CWA and 40 C.F.R. § 112.1, Respondent, as the owner and operator of a SPCC-regulated facility, is subject to the SPCC regulations.
23. The Facility began operations in 1926.

Violations

Count I

24. The facts stated in paragraphs 10 through 23 above, are herein incorporated.
25. 40 C.F.R. § 112.3 requires that the owner or operator of a 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.
26. On March 4, 2008, EPA inspected the Facility and found that Respondent had failed to prepare such a SPCC Plan for the facility.
27. On March 12, 2008, EPA sent Respondent a copy of a written inspection report that documented the findings of the March 4, 2008 inspection.
28. During the March 4, 2008, inspection, EPA observed that Respondent had no, or inadequate, secondary containment around the oil storage containers.
29. On May 18, 2009, EPA again inspected the Facility and found that Respondent still had not prepared an SPCC Plan for the facility.
30. Respondent's failure to prepare the required SPCC Plan for the facility violated 40 C.F.R. § 112.3.
31. As alleged in the preceding paragraph, and pursuant to Section 311(b)(6)(B)(ii) of the CWA 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.
32. 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 \$53,744.

Relief

33. Section 311(b)(6)(B)(ii) 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 day for each day during which the violation continues, up to a maximum total penalty of \$125,000. 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 each day for during which the violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Section 311 that occur after March 15, 2004. The penalties proposed in

paragraph 32 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.

34. 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.

35. 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 32.

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 "United States Treasury" noting on the check, the name of the case (In the matter of Stilwell Oil Company), and the docket number CWA-07-2009-0093 and send to:

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

Wire transfers should be directed to the Federal Reserve Bank of New York:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 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:

Demetra O. Salisbury
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

36. 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, 40 C.F.R. Part 22, a copy of which is enclosed with this Complaint.

37. Default constitutes an admission of all facts alleged in this Complaint and a waiver of the right to a hearing on such factual allegations. In order to avoid default in this matter, Respondent 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 it agrees 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 above; 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.

38. Respondent is 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:

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

39. 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 Respondent has knowledge. An allegation shall be deemed denied if Respondent states in the Answer that it has 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.

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

41. Following receipt of the 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.

42. Default by the Respondent constitutes, for the purposes of this proceeding, admission of all allegations made in the Complaint and a waiver of the 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

43. 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:

Demetra Salisbury
Attorney
United States Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone: 913-551-7369
Email: salisbury.demetra@epa.gov.

44. 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.

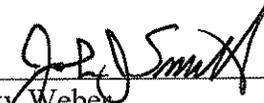
45. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent Agreement and Final Order ("CAFO") issued by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

46. 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.

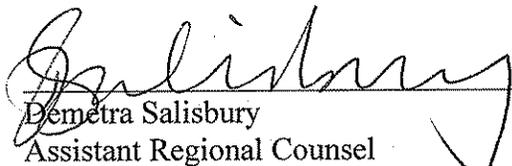
PUBLIC NOTICE

47. 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 Respondent. 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 7/20/09

for 
Becky Weber
Director
Air and Waste Management Division
U.S. Environmental Protection Agency
Region 7

Date 7/20/09


Demetra Salisbury
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7

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 registered agent for Stilwell Oil Company:

William M. Tuley
Registered Agent
Stilwell Oil Company
5401 College Blvd., Suite 106
Leawood, Kansas 66211.

7/21/09
Date

Carah Zamora