

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In The Matter of:

ADMINISTRATIVE COMPLAINT
AND OPPORTUNITY TO REQUEST
HEARING AND CONFERENCE

Tunstall Fuel Company

Proceeding to Assess Class II
Civil Penalties Under Section
311 of the Clean Water Act, *as
amended*, 33 U.S.C. § 1321.

**8700 Somerset Pike
Boswell, Pennsylvania 15531**

Respondent.

Docket No. CWA-03-2009-0162

I. STATUTORY AUTHORITY

1. This Administrative Complaint and Opportunity to Request Hearing and Conference (“Complaint”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 311(b)(6)(B)(ii) of the Clean Water Act, as amended, (“CWA”), 33 U.S.C. § 1321(b)(6)(B)(ii). The Administrator has delegated this authority to the Regional Administrator of EPA, Region III, by Delegation No. 2-52-A, who in turn has delegated it to the Director of the Region’s Hazardous Site Cleanup Division (“Complainant”), by Regional Delegation No. 2-52-A.

2. The Administrator of the EPA has determined that Class II penalty proceedings for violations of Sections 311(b)(3) and 311(j) of the CWA, 33 U.S.C. §§ 1321(b)(3) and 1321(j), shall be conducted in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action

7. For purposes of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), “navigable water” is defined by 40 C.F.R. § 112.2 (2001-2002), to include, among other things, tributaries to waters that could be used for industrial purposes or interstate commerce.

8. For purposes of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), “sheen” is defined by 40 C.F.R. § 110.1(i) (2001-2002), amended by 40 C.F.R. § 110.1 (2003), as an iridescent appearance on the surface of water.

9. Section 311(j)(1)(C) of the CWA, 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 and hazardous substances from vessels and from onshore and offshore facilities, and to contain such discharges”

10. In 1973, EPA promulgated 40 C.F.R. Part 112 (“Oil Pollution Prevention Regulations”), 38 Fed.Reg. 34165 (Dec. 11, 1973), which went into effect on January 10, 1974. 40 C.F.R. Part 112 (1974).

11. The Oil Pollution Prevention Regulations were revised in part in 2002, 67 Fed. Reg. 47042 (July 17, 2002), and the effective date for those changes is July 1, 2009, pursuant to 72 Fed. Reg. 27443 (May 16, 2007).

12. The Oil Pollution Prevention Regulations, 40 C.F.R. Part 112 (2001-2002), which implement Section 311(j) of the CWA, 33 U.S.C. § 1321(j), apply to owners or operators of non-transportation-related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products (“Part 112 Facilities”).

Respondent is a person within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 CFR § 112.2.

17. Respondent is the operator within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 CFR § 112.2 of a bulk petroleum storage facility, located at the Facility which is approximately 528 feet from North Branch Creek.

18. Respondent has operated the Facility since approximately 1982.

19. The ASTs at the Facility have an aggregate storage capacity of approximately 50,000 gallons of oil.

20. The Facility has an aggregate above-ground storage capacity greater than 1320 gallons of oil in containers each with a shell capacity of at least 55 gallons.

21. North Branch Creek is a navigable water of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

22. North Branch Creek is a tributary of the Quemahoning Creek, which is a tributary of Stonycreek River, which is a tributary of the Conemaugh River, all of which are navigable waters within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

23. Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products located at the facility.

24. The Facility is a non-transportation-related facility within the meaning of 40 CFR § 112.2 Appendix A, as incorporated by reference within 40 CFR § 112.2.

25. The Facility is an onshore facility within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 CFR § 112.2.

33. Due to its location, the Facility could reasonably be expected to discharge oil in harmful quantities into or upon a navigable water of the United States or its adjoining shoreline.

34. Pursuant to Section 311(j)(1) of the CWA, 33 U.S.C. § 1321(j)(1), and 40 C.F.R. § 112.3 (1974), the Facility is subject to SPCC Plan requirements.

35. Pursuant to Section 311(j)(1) of the CWA, 33 U.S.C. § 1321(j)(1), as implemented by 40 C.F.R. § 112.3(b) (1974), Respondent were required to prepare an SPCC Plan for the Facility within six months of the date in or around 1982 when that the Facility became operational.

36. During the Inspections, Respondent could only produce a Commonwealth of Pennsylvania Spill Prevention Response Plan (“SPR Plan”).

37. The SPR Plan failed to comply with 40 C.F.R. § 112.3(d) in that it was not certified by a Professional Engineer as being in compliance with 40 C.F.R. Part 112, nor does it include the required attestations by the Professional Engineer, nor does it include the Professional Engineer’s seal.

38. The SPR Plan failed to comply with 40 C.F.R. § 112.5(b), in that it was not reviewed and evaluated every five (5) years by the owners or operators of the Facility.

39. The SPR Plan failed to comply with 40 C.F.R. § 112.7 which required that it follow sequence of 40 C.F.R. § 112.7 (1974) or was an equivalent Plan with a cross reference to the 40 C.F.R. Part 112 requirements as permitted by 40 C.F.R. § 112.7 (2003).

40. The SPR Plan failed to comply with 40 C.F.R. § 112.7(e)(8), in that written procedures and inspection records were not signed by the appropriate supervisor and inspector, nor were they maintained as required.

47. During the Inspections, the Respondent did not have in place an SPCC Plan or a comparable plan that meets all the requirements and is cross referenced to the requirements at 40 C.F.R. § 112.

48. Respondent's failure to prepare an SPCC Plan within the time provided by the regulations, in violation of Section 311(j)(1) of the CWA, 33 U.S.C. § 1321(j)(1), 40 C.F.R. § 112.3(b) (1974), and 40 C.F.R. § 112.3(b) (2003), subjects the Respondent to penalties pursuant to section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), as increased by 40 C.F.R. Part 19, of up to \$16,000.00 per day per violation, up to a maximum of \$177,500.00.

IV. PROPOSED PENALTY

49. Based on the foregoing allegations, and pursuant to the authority of Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. §§ 1321(b)(6)(B)(ii), the Complainant proposes that the Regional Administrator assess administrative penalty of \$39,930.00 against the Respondent for its violation of Section 311(j)(1) of the CWA, 33 U.S.C. § 1321(j)(1), and 40 C.F.R. § 112.3(b) (2001-2002).

50. The proposed penalty was determined after taking into account the factors identified at Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8), including: 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 violation, the economic impact of the penalty on the violator, and any other factors as justice may require. This proposed penalty does not constitute a demand as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. The proposed penalty may be

53. The Respondent's Answer(s) shall clearly and directly admit, deny or explain each of the factual allegations contained in the Administrative Complaint with regard to which Respondent has knowledge. Where Respondent has no knowledge of a particular factual allegation, they shall so state and the allegation shall be deemed denied. Failure to admit, deny, or explain any material factual allegation contained in the Administrative Complaint constitutes an admission of the allegation. Respondent's Answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which that Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested.

54. If Respondent fail to submit an Answer within thirty (30) days of receipt of this Administrative Complaint, and the case is not otherwise disposed of through settlement, Respondent may be found in default. For purposes of this action, default constitutes an admission of all facts alleged in the Administrative Complaint and a waiver of the right to a hearing to contest such factual allegations.

55. Pursuant to the procedures set forth in Section 311(b)(6)(G) of the CWA, 33 U.S.C. § 1321(b)(6)(G), Respondent may obtain judicial review of any civil penalty assessed pursuant to a hearing under Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii).

VI. PUBLIC NOTICE

56. Pursuant to Section 311(b)(6)(C) of the CWA, 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 the Respondent. If a hearing is held on this matter, members of the public who submitted timely comments on this

62. In accordance with 40 C.F.R. § 22.18(a)(3), upon receipt of payment in full, the Regional Administrator shall issue a Final Order. Payment by Respondent shall constitute a waiver of Respondent's right to contest the allegations contained in this Complaint and to appeal the final order.

63. Quick resolution cannot be concluded until ten (10) days after the close of the public comment period.

64. Payment shall be made by a cashier's or certified check, or by an electronic funds transfer (EFT). If you are paying by check, pay the check to "Environmental Protection Agency," noting on the check "OSTLF-311" and docket number **CWA-03-2009-0162**. If you use the U.S. Postal Service, address the payment to "U.S. Environmental Protection Agency, P.O. Box 371099M, Pittsburgh, Pa. 15251"; if you use a private delivery service, address the payment to "Mellon Client Service Center, ATTN: Shift Supervisor, Lockbox 371099M Account 9109125, 500 Ross Street, Pittsburgh, Pa. 15262-0001."

65. If you are paying by EFT, you must instruct your agent to transfer funds to "Mellon Bank, ABA 043000261, Account 9109125, 22 Morrow Drive, Pittsburgh, Pa. 15235." (In the case of an international transfer of funds, use the SWIFT address MELNUS3P.) Pursuant to 40 C.F.R. § 22.18(a)(1), you must file a copy of your check with the Regional Hearing Clerk at the address provided above. For EFT transfers, you must instead file a copy of your EFT confirmation with the Regional Hearing Clerk. In either case, you shall simultaneously send a copy of the check or EFT confirmation to the following person at the address below:

X. INFORMAL CONFERENCE

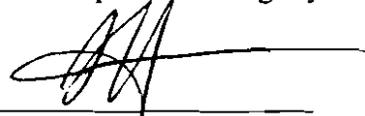
68. Respondent may request an informal conference concerning the alleged violations and the amount of the proposed penalty. The request for an informal conference does not extend the thirty (30) day period in which the Respondent must submit its written Answer in order to preserve the right to a hearing. To request an informal conference relating to this Administrative Complaint, Respondent should contact James F. Van Orden, Assistant Regional Counsel, at (215) 814-2693.

Signed this 30th day of APRIL, 2009.


James J. Burke, Director
Hazardous Site Cleanup Division

Upon information and belief, I certify this Administrative Complaint as a legally sufficient pleading:

Date: April 24, 2009


James F. Van Orden
Assistant Regional Counsel

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