

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

2010 SEP 24 AM 9:41

FILED

IN THE MATTER OF:)
)
) **ADMINISTRATIVE COMPLAINT AND**
) **OPPORTUNITY TO REQUEST A HEARING**
)
 Kimball Property Management)
 12717 South 125 East)
 Draper, UT 84020)
)
 Respondent.) Docket No. **CWA-08-2010-0032**

LEGAL AUTHORITY

1. This Administrative Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 311(b)(6)(B)(i) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990. The Administrator has delegated this authority to the Regional Administrator of EPA, Region 8, who in turn has delegated it to the undersigned EPA officials (Complainant).

2. Pursuant to Section 311(b)(6)(B)(i) of the Act, and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," codified at 40 C.F.R. Part 22 (Part 22), a copy of which is enclosed, Complainant hereby provides notice of its proposal that the Administrator assess a civil penalty against Respondent, Kimball Property Management (Respondent), for failing to comply with Spill Prevention Control and Countermeasure regulations set forth at 40 CFR Part 112 under the authority of Section 311(j) and other provisions of the Clean Water Act, 33 U.S.C., §§ 1251 *et seq.* (SPCC regulations), and notice of Respondent's opportunity to file an Answer to this Complaint and to request a hearing on the proposed penalty assessment. Subpart I of Part 22 applies to this proceeding.

ALLEGATIONS

3. 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 onshore . . . facilities, and to contain such discharges”

4. 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)(1)(C) authority to issue the regulations referenced in the preceding Paragraph for non-transportation-related onshore facilities.

5. EPA subsequently promulgated the SPCC regulations pursuant to these delegated statutory authorities, and pursuant to its authorities under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, which established certain procedures, methods and requirements upon each owner and operator of a non-transportation-related onshore facility, if such facility, due to its location, could reasonably be expected to discharge oil into or upon the navigable waters of the United States and their adjoining shorelines in such quantity as EPA has determined in 40 C.F.R. § 110.3 may be harmful to the public health or welfare or the environment of the United States (harmful quantity).

6. In promulgating 40 C.F.R. § 110.3, which implements Section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA has determined that discharges of harmful quantities include oil discharges that cause either (1) a violation of applicable water quality standards or (2) a film, sheen upon, or discoloration of the surface of the water or adjoining shorelines, or (3) a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

7. Respondent is a corporation organized under the laws of Utah with a place of business located at 12717 South 125 East, Draper, Utah. 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 C.F.R. § 11.2.

8. Respondent is the owner and/or operator within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2 of a facility located at 12717 South 125 East, Draper, Utah (the facility).

9. The facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112.2 Appendix A,¹ as incorporated by reference within 40 C.F.R. § 112.2.

10. 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 C.F.R. § 112.2.

11. Drainage from the facility would flow into Willow Creek, a tributary of the Jordan River.

12. Willow Creek and the Jordan River are navigable waters 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).

13. The facility includes, but is not limited to, three (3) oil storage tanks with capacities, respectively, of 4,000 gallons of diesel, 4,000 gallons of gasoline, and 2,600 gallons of cycle oil and four (4) 55 gallon drums of oil. The total oil storage capacity at the facility is approximately 10,820 gallons.

14. The facility has an aggregate above-ground storage capacity greater than 1,320 gallons of oil in containers that each have a shell capacity of at least 55 gallons.

15. Respondent is engaged in storing, distributing, transferring, using, or consuming oil or oil products located at the facility.

16. Diesel fuel, gasoline, hydraulic oil, motor oil, lube oil, cycle oil, and waste oil are all oil within the meaning of “oil” as defined at Section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

¹ Appendix A excerpts a portion of an EPA/CG MOU that defines “non-transportation-related” for purposes of Executive Order 11548 (July 20, 1970). EO 12777, cited above, is the successor to EO 11548.

17. 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”).

18. Pursuant to the Act, E.O. 12777, and 40 C.F.R. § 112.1 Respondent, as the owner and/or operator of an SPCC-regulated facility, is subject to the SPCC regulations.

19. The facility began operations in the 1990’s and Respondent began operating the facility in 2000.

**COUNT 1
FAILURE TO PREPARE/IMPLEMENT SPCC PLAN**

20. Paragraphs 3 through 19 above are hereby incorporated by reference.

21. 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.

22. On September 2, 2009, EPA inspected the facility accompanied by a facility representative.

23. EPA determined that the Respondent had failed to prepare a written SPCC plan in accordance with 40 C.F.R. § 112.7 and other applicable sections of 40 C.F.R. Part 112.

24. EPA determined that the Respondent had failed to implement the following SPCC measures at the facility at the time of the inspection:

- a. Failure to maintain inspection records; and
- b. Failure to maintain training records.

25. In October 2009, Respondent conducted employee training and inspections and submitted a written SPCC plan to EPA.

26. In November 2009, EPA informed Respondent that its SPCC plan was inadequate based on the following noted deficiencies:

- a. Inadequate facility diagram lacking the location of transfer stations and associated piping;
- b. Inadequate discharge notification forms lacking the cause of the discharge;
- c. Inadequate security information on flow and drain valves, loading/unloading connections, and lighting to detect discharges at night;
- d. Inadequate discussion regarding internal heating coils and bulk tanks; and
- e. Inadequate discussion of facility transfer operations and procedures for capping/blank-flanging terminal connections and marking piping.

27. Respondent failed to adequately revise its SPCC plan until August 23, 2010.

28. Respondent's failure to prepare and implement an adequate written SPCC plan for the facility in accordance with 40 C.F.R. § 112.7 violated 40 C.F.R. § 112.3.

29. As alleged in the preceding Paragraph, and pursuant to Section 311(b)(6)(B)(i) of the Act and 40 C.F.R. § 19.4, the Respondent is liable for civil penalties of up to \$16,000 per violation, up to a maximum of \$37,500. On information and belief, Respondent has violated these requirements for each day during the period from September 2, 2009, until August 23, 2010, for a total of 355 days in violation of 40 C.F.R. § 112.3.

PROPOSED PENALTY

Based on the forgoing Allegations, and pursuant to the authority of Section 311(b)(6)(B)(i) 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 two thousand five hundred and nineteen dollars (**\$2,519**). The Complainant bases this proposal after considering the applicable statutory penalty factors in section

311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8): 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 Respondent's minor noncompliance and minor environmental impact for duration of approximately (11.5) months. A nominal amount was calculated to reflect economic benefit and no additional amount was added to the proposed penalty amount based on a history of violations.

OPPORTUNITY TO REQUEST A HEARING

As provided in the Act, you 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 sections 22.15 and 22.38 of the Consolidated Rules within thirty (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 Street
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 Street
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 THIRTY (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.

TERMS OF PAYMENT FOR QUICK RESOLUTION

If the 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 C.F.R. § 22.18. If such payment is made within thirty (30) calendar days of receipt of this Complaint, no Answer need be filed. For more time for payment, Respondent 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 the 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:**

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

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

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Wire transfers:

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 "

On Line Payment:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required fields.

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

Jane Nakad (8ENF-UFO)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

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

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 Senior Enforcement Attorney 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: Sept. 23, 2010

David Rochlin
Michael T. Risner, Director
David Rochlin, Acting REU Supervisory Attorney
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 9-23-2010

Philip S. Strobel
Philip S. Strobel, Acting Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Date: 9-24-10

Brenda Morris
Brenda Morris, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop Street (8ENF-L)
Denver, CO 80202-1149
Colorado Atty. Reg. No. 26488
Telephone: 303/312-6891
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

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

Kimball Strickland, Registered Agent for
Kimball Property Management
3418 S. 300 W
Salt Lake City, UT 84115

and

Kimball Property Management
12717 South 125 East
Draper, UT 84020

9/24/2010
Date

Judith M. McTernan
Signature

§ 21.13

approve or disapprove the State issued statement, in accordance with the requirements of § 21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with § 21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in § 21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§ 21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

- Sec.
- 22.1 Scope of this part.
 - 22.2 Use of number and gender.
 - 22.3 Definitions.
 - 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
 - 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
 - 22.6 Filing and service of rulings, orders and decisions.
 - 22.7 Computation and extension of time.
 - 22.8 *Ex parte* discussion of proceeding.
 - 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.