

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

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IN THE MATTER OF:

DRAPER ENERGY
COMPANY, INCORPORATED
148 Forest Road
Wilton, New Hampshire 03086

ENERGY NORTH
INCORPORATED
1700 Shawsheen Street
Tewksbury, Massachusetts 01876

Respondent.

**ADMINISTRATIVE COMPLAINT AND
NOTICE OF OPPORTUNITY TO REQUEST A
HEARING**

Proceeding to Assess Class II Civil Penalty Under
Clean Water Act Section 311 for SPCC and Oil
Spill Violations

Docket No. CWA-01-2009-0083

I. STATUTORY AUTHORITY

1. This Administrative Complaint is issued under the authority vested in the U.S.

Environmental Protection Agency ("EPA") by Section 311(b)(6)(B)(ii) of the Clean Water Act
("CWA" or "Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990.

"Complainant" is the Director of the Office of Environmental Stewardship, EPA, Region 1.

2. Pursuant to Section 311(b)(6)(B)(ii) 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"), Complainant hereby provides notice of its proposal to assess a civil penalty against Draper
Energy Co., Inc. and Energy North, Inc. ("Respondents") for failure to comply with the Oil
Pollution Prevention regulations set forth at 40 C.F.R. Part 112 promulgated under the authority
of Section 311(j), 33 U.S.C. § 1321(j), and other provisions of the Act, 33 U.S.C. §§ 1251 *et*

seq., and for discharge of oil into or upon the navigable waters of the United States or adjoining shorelines in a quantity that has been determined may be harmful, in violation of Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3). This Complaint also provides notice of Respondent's opportunity to file an Answer to this Complaint and to request a hearing on the proposed penalty.

3. Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore and offshore facilities, and to contain such discharges . . ."

4. Under the authority of Section 311(j)(1) of the Act, the Oil Pollution Prevention regulations establish procedures, methods, and requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products that, due to their location, could reasonably be expected to discharge oil in harmful quantities (as defined in 40 C.F.R. Part 110) to navigable waters of the United States or adjoining shorelines. 40 C.F.R. § 112.1(b).

5. Under 40 C.F.R. § 112.3, the owner or operator of an onshore facility that became operational prior to August 16, 2002, that has discharged or, due to its location, could reasonably be expected to discharge, oil in harmful quantities into or upon the navigable waters of the United States shall have prepared and implemented a Spill Prevention Control and Countermeasure ("SPCC") Plan in accordance with 40 C.F.R. § 112.7.

6. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil, as defined in Section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1), into or upon the navigable waters of the United States or adjoining shorelines in such quantities as may be harmful, as determined under Section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4).

7. In promulgating 40 C.F.R. § 110.3, which implements Section 311(b)(4) of the Act, EPA has determined that an oil discharge “may be harmful” to the public health or welfare or the environment of the United States if it causes either: (1) a violation of applicable water quality standards; or, (2) a film or 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 (“harmful quantity”).

8. “Navigable waters” of the United States are defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), as “waters of the United States” and are further defined in 40 C.F.R. § 110.1.

II. GENERAL ALLEGATIONS

9. Respondents are two corporations, one which is the owner of the facility and the other which is the operator. Draper Energy, Inc. (“Draper”), the owner, is a corporation organized under the laws of New Hampshire with its headquarters located at 148 Forest Road, Wilton, New Hampshire, and, therefore, is a “person” within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2. Energy North, Inc. (“ENI”), the operator, is a corporation organized under the laws of Massachusetts with its headquarters located at 1700 Shawsheen Street, Tewksbury, Massachusetts, and, therefore, is also a “person” within the

meaning of Section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

10. Each Respondent is the “owner 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 an above-ground oil storage and distribution facility located at 38 Elm Street, Milford, New Hampshire (“the facility”).

11. On March 20, 2009, a duly authorized representative of EPA conducted an inspection of the facility and noted that the facility had two 20,000-gallon above-ground storage tanks, one which contained diesel oil and the other which contained gasoline. The EPA representative also noted that the facility had a Spill Prevention, Control, and Countermeasure (“SPCC”) plan dated March 27, 2002, as required by the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112, promulgated under Section 311 of the Act, 33 U.S.C. § 1321, that was not fully implemented.

12. Respondents are engaged in storing, using, and consuming “oil” or oil products located at the facility within the meaning of 40 C.F.R. §§ 112.2 and 112.1(b).

13. 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.

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

15. The facility is surrounded by forested landscape to the east and the west and a paved road, Elm Street, to the north. A storm drain located on the facility site is connected to a drainage pipe that discharges into the Souhegan River. The Souhegan River flows into the Merrimack River, which flows into the Atlantic Ocean. Due to the location of the facility with respect to the Souhegan River and the topography of the area, the facility could reasonably be

expected to discharge oil into waters of the United States.

16. The Souhegan River, the Merrimack River, and the Atlantic Ocean are “navigable waters” and are “waters of the United States” and are subject to the jurisdiction of Section 311 of the Act, 33 U.S.C. § 1321, as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1.

17. Based on the allegations in paragraphs 9 through 16 above, Respondents are the owner and operator of a transportation-related facility engaged in storing, using, and consuming oil or oil products that could reasonably be expected to discharge oil in harmful quantities to navigable waters of the United States, and, therefore, are subject to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.

III. VIOLATIONS

Count I: Failure to Maintain and Implement an SPCC Plan

in Violation of 40 C.F.R. § 112.3

18. On March 20, 2009, an authorized EPA representative, who was at the facility to follow up on an oil spill that occurred on March 5, 2009, inspected the facility for compliance with Section 311(j) of the Act, in particular, the requirements of the Oil Pollution Prevention regulations.

19. Under 40 C.F.R. § 112.3, the owner or operator of an SPCC-regulated facility in operation prior to August 16, 2002, shall prepare and implement an SPCC plan that is in accordance with the requirements of 40 C.F.R. § 112.7.

20. Respondent Draper has owned the facility for the past five years and operated it

through December 31, 2008. On January 1, 2009, Respondent ENI became the operator of the facility.

21. EPA determined that the facility had an aggregate above ground oil storage capacity of 40,000 gallons (which is greater than 1,320 gallons) and that the facility had prepared but not fully implemented an SPCC Plan, in violation of Section 311(j) of the Act. Respondents failed to adequately provide for measures which would prevent the discharge of oil from reaching waters of the United States and to implement specific requirements listed in 40 C.F.R. §§ 112.3, 112.7 and 112.8. In particular, the facility lacked appropriate secondary containment for piping that connected the above ground storage tanks to a diesel pump and two gasoline pumps, as required by 40 C.F.R. §§ 112.7(c) and 112.8(c), and failed to keep signed records for inspections of the facility, as required by 40 C.F.R. § 112.7(e). In addition, Respondents failed to have a licensed professional engineer certify the Plan, as required by 40 C.F.R. § 112.3(d).

22. Respondents' failure to maintain and implement an SPCC Plan for the facility in accordance with the requirements of 40 C.F.R. §§ 112.3, 112.7 and 112.8, as described above, violated 40 C.F.R. § 112.3. Respondents violated these requirements for each day for the period of violation, which was for a total of at least 772 days.

Count II: Illegal Discharge of Oil into Waters of the United States

23. At some point in time on March 5, 2009, the pipe connecting to the above-ground storage tank of diesel fuel failed near the base of the pump and released over 1500 gallons of diesel, which constitutes "oil," as it is defined in Section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1), and 40 C.F.R. § 112.2. Due to a hole in the sump area, the automatic

discharge alarm failed to alert employees of the discharge. The released diesel flowed through the soil beneath the pump, then into a granite culvert that runs beneath the site, under Elm Street, and, subsequently, into the Souhegan River.

24. Respondents' discharge of oil from the facility caused an oil sheen on the Souhegan River, which was in a quantity that has been determined may be harmful under 40 C.F.R. § 110.3, in violation of Section 311(b)(3) of the Act. Respondents' discharge continued until at least March 8, 2009, for a total of at least three days of violation.

IV. PROPOSED PENALTY

25. Based on the forgoing Findings of Violation, and pursuant to the authority of Section 311(b)(6)(B)(ii) of the Act and 40 C.F.R. § 19.4, and Section 311(b)(8) of the Act, the Complainant proposes that a Final Order assessing administrative penalties be issued against Respondents in an amount not to exceed \$11,000 per day for each day during which its violations continued, up to a maximum of \$177,500, taking into account the seriousness of the violations, the economic benefit to the violator, if any, 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 matters as justice may require.

26. Respondents' violations of the Oil Pollution Prevention regulations alleged above represent significant violations of the Act because failure to fully prepare and implement an adequate SPCC plan leaves a facility unprepared to deal with an oil spill or to prevent the spill

from having potentially serious environmental consequences.

27. Respondents' illegal discharge of oil into waters of the United States alleged above represents a significant violation of the Act because of the actual impacts the discharge of oil could have had in adversely affecting navigable waters, shorelines, vegetation, habitat for fish and wildlife, as well as creating threats to human health and safety.

V. OPPORTUNITY TO REQUEST HEARING

28. Respondents may, pursuant to Section 311(b)(6) of the Act and 40 C.F.R. § 22.15(c), request a hearing on the proposed penalty assessment in its Answer to this Complaint. Even if Respondents do not explicitly request a hearing in their Answers, the Presiding Officer may hold such a hearing if the Answers raise issues appropriate for adjudication. The procedures for any such hearing and for all proceedings in this action are set out in 40 C.F.R. Part 22, a copy of which is enclosed with this Complaint.

29. 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, Respondents must within 30 days after receipt of this Complaint either: (1) settle this matter with the Complainant; or (2) file both an original and one copy of a written Answer to this Complaint to:

Judy Lao-Ruiz
Acting Regional Hearing Clerk (RAA)
U.S. Environmental Protection Agency-Region 1
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

Respondents are also required to provide a contemporaneous copy of any Answer to Complainant's counsel, who is authorized to receive service on behalf of EPA pursuant to 40 C.F.R. § 22.5(c)(4), at the following address:

Andrea Simpson, Senior Enforcement Counsel
Office of Environmental Stewardship (SEL)
U.S. Environmental Protection Agency – Region 1
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

30. 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 Respondents have knowledge. If the Answer asserts no knowledge of a particular factual allegation, the allegation shall be deemed denied. Otherwise, the failure to admit, deny, or explain any material factual allegation contained in this Complaint constitutes an admission of the allegation. The Answer shall also state the circumstances or arguments for any defense Respondents wish to assert, challenges to any factual allegation in the Complaint, and any basis Respondents may have to oppose the Complainant's proposed penalty.

31. 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.

VI. PUBLIC NOTICE

32. 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 Respondents. 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.

VII. SETTLEMENT

33. You may request an informal conference with Complainant's attorney, Andrea Simpson, concerning the alleged violations and the amount of the proposed penalty. A request for an informal conference does not extend any deadline in this proceeding, including the deadline by which you must submit an Answer to this Complaint.

34. If you have any questions concerning the enclosed Consent Agreement or the settlement process, or wish to arrange for an informal conference, please contact Ms. Simpson at (617) 918-1738.

Date: 9-25-09

Susan Studlien, acting for
Susan Studlien
Director, Office of Environmental Stewardship
U.S. Environmental Protection Agency
Region 1

In the Matter of Draper Energy Co., Inc. and Energy North Incorporated
Docket No. CWA-01-2009-0083

CERTIFICATE OF SERVICE

I certify that the foregoing ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING was sent to the following persons, in the manner specified, on the date below:

Original and one copy
hand-delivered:

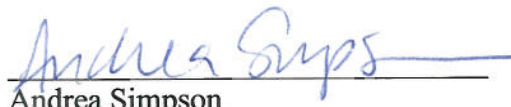
Judy Lao-Ruiz
Acting Regional Hearing Clerk
U.S. EPA, Region 1
One Congress Street (RAA)
Boston, MA 02114-2023

Copy and a copy of the
Part 22 Rules by certified mail,
return receipt requested:

Robert Farr, General Manager
Draper Energy Co., Inc.
148 Forest Road
Wilton, NH 03086

Pat O'Connell, Vice President
Energy North Incorporated
1700 Shawsheen Street
Tewksbury, MA 01876

Dated: 9/30/09


Andrea Simpson
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