



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 8
 Denver, Colorado



IN THE MATTER OF:)
)
 Silco Distributing Co.)
 5915 N. Broadway)
 P.O. Box 16048) DOCKET NO. CWA-VIII-93-05-PI
 Denver, Colorado 80216)
)
)
 RESPONDENTS)

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under Subsection 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. '1319(g). The proceeding is governed by the Environmental Protection Agency's **PROPOSED 40 C.F.R. PART 28 - CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991) - ("Part 28 Rules").**¹ This is the Decision and Order of the Regional Administrator under **'28.28 of the Part 28 Rules.**

INTRODUCTION

The objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Act, 33 U.S.C. '1251(a). Subsection 301(a) of the Act, 33 U.S.C. '1311, prohibits the unauthorized discharge of any pollutant "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1318, 1342 and 1344 of this title,...." Section 309 of the Act, 33 U.S.C. '1319, provides for administrative, civil and criminal enforcement actions against any "person" who violates the prohibition of Subsection 301(a).

Administrative penalties may be assessed

"Whenever on the basis of any information available - (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title... the Administrator... may, after consultation with the State in which the violation occurs, assess a Class I civil penalty or a Class II civil penalty under this subsection."

Subsection 301(g) of the Act, 33 U.S.C. '1319(g).

Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing. Subsection 309(g) (2) (A) of the Act, 33 U.S.C.

'1319(g) (2) (A) (emphasis added). Before issuing an order assessing a civil penalty under this subsection the Administrator must provide public notice and a reasonable opportunity to comment on the penalty assessment. Subsection 309(g) (4) of the Act, 33 U.S.C. '1319(g) (4).

PROCEDURAL BACKGROUND

The Director of the Water Management Division of the U.S. Environmental Protection Agency (EPA), Region VIII ("complainant") initiated this action on November 18, 1992, by issuing to Silco Distributing Co. ("respondent") an administrative complaint ("complaint") under **28.16(a) of the Part 28 Rules**. The complaint was served by certified mail, return receipt requested. The dated return receipt indicated the respondent received the complaint November 23, 1992. The complaint contained recitations of statutory authority and allegations regarding respondent's operation of a de-icing fluid recovery system at Continental Airline's de-icing pad at Stapleton Airport, which was at relevant times a source of pollution of waters of the United States. The complainant made reference to pertinent provisions of the Clean Water Act, provided notice of a proposed penalty of \$10,000, notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed respondent of its opportunity to request a hearing. The notice of opportunity to request a hearing included in the administrative complaint gave very explicit instructions on procedures for filing a hearing request.

By a **REGION VIII DELEGATION** dated April 16, 1990, the Regional Administrator designated the Regional Presiding Officer as a standing Presiding Officer to conduct Class I proceedings under section 309(g) of the Act, 33 U.S.C. '1319(g).

Under **'28.20 of the Part 28 Rules**, respondent had thirty days from its receipt of the administrative complaint to file a response:

Respondent's deadline.

The respondent shall file with the Hearing Clerk a response within thirty days after receipt of ... [t]he administrative complaint.

Since the certified mail return receipt for the administrative complaint was signed on November 23, 1992, the deadline for the filing of the response was December 23, 1992. [Under **'28.7(a) of the Part 28 Rules the thirty-day period began on November 24, 1992. and ended on December 23, 1992.**]

Silco Distributing Co. failed to respond to the subject complaint, by December 23, 1992. In fact, the respondent did not file a response to the complaint with the Regional Hearing Clerk until May 14, 1993, nearly five months after the due date, which also was after the initiation of default proceedings.

As a consequence of its failure to file a response to the administrative complaint, respondent has waived its opportunity to appear in this action for any purpose. See Section 28.20(e) of the Part 28 Rules.

Respondent's failure to file a response to the administrative complaint also automatically triggers the default proceedings provision of the **Part 28 Rules**.

Determination of Liability.

If the Respondent fails timely to respond pursuant to '28.20(a) or (b) of this part ... the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

Section 28.21(a) of the Part 28 Rules.

By Order dated April 15, 1992, the Presiding Officer determined that the complainant had stated a cause of action in the administrative complaint. In the same Order the Presiding Officer directed the Regional Hearing Clerk to enter respondent's default as to liability in the record of the proceeding as required by **'28.21(a) (1) of the Part 28 Rules** and directed complainant to submit a written argument regarding assessment of an appropriate civil penalty in accordance with **'28.21(c) of the Part 28 Rules**. Counsel for complainant filed this written argument as directed and that submission has been included in the administrative record.

On May 14, 1993, the respondent filed a response to the administrative complaint. Since, the respondent failed to file a timely response, "...the respondent...waived its

opportunity to appear in [this] action for any purpose." **'28.20(e) of the Part 28 Rules.** The subject document is therefore excluded from the administrative record. **See '28.2(b)(15)(ii) of the Part 28 Rules.**

On May 14, 1993, respondent filed a Motion to Set Aside Order.²

On May 17, 1993, complainant filed its Written Argument Regarding the Assessment of an Appropriate Civil Penalty. This document is included in the administrative record and is considered below in determining an appropriate penalty.

On May 17, 1993 respondent filed a Written Argument in Opposition to EPA's Proposed Penalty.³

On May 17, 1993 complainant filed a Response to Respondent's Motion to Set Aside Order.⁴

On May 17, 1993 complainant filed a Response to Respondent's Written Argument in Opposition to EPA's Proposed Penalty.⁵

On May 19, 1993 respondent filed a Response to EPA's Written Argument.⁶

On May 19, 1993 respondent filed a Reply to complainant's Response to Respondent's Motion to Set Aside Order.⁷

On May 19, 1993 respondent filed a Reply to EPA's Response to Respondent's Written Argument in Opposition to EPA's Proposed Penalty.⁸

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under **'28.21(a)(1) of the Part 28 Rules**, upon entry of the respondents default, "...the allegations as to liability included in the administrative complaint shall be deemed recommended findings of fact and conclusions of law." In accordance therewith, the following allegations in the administrative complaint are incorporated herein as Findings of Fact and Conclusions of Law:

1. Respondent is a corporation organized under the laws of the State of Colorado. Silco Distributing Co. is a "person" within the meaning of Section 502(5) of the Act. 33 U.S.C. '1362(5) .

2. Respondent owns and operates a de-icing fluid recovery system at Continental Airline's de-icing pad at Stapleton Airport, which is and was at relevant times a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. '1362(14) .

3. The recovery system consists of 14 above- ground 12,000 gallon storage tanks

which contain diluted wing de-icing fluid. The fluid is concentrated to 98 percent ethylene glycol for resale.

4. Section 301(a) of the Act, 33 U.S.C. '1311(a), prohibits the discharge of pollutants into the navigable waters of the United States, except in compliance with certain sections of the Act.

5. On August 3, 1991, a severe storm caused runoff to take a subterranean route, undermining the asphalt pad where the tanks were located. One of the tanks fell against the concrete wall surrounding the tanks, breaking a pipe and causing 2857 gallons of 24% ethylene glycol to spill into a drainage ditch 200 feet south of Sand Creek, which is a "navigable Water" within the meaning of Section 502(7) of the Act, 33 U.S.C. '1362(7). Ethylene glycol is a "pollutant" within the meaning of Section 502(6) of the Act, 33 U.S.C. '1362(6).

6. This discharge was not permitted under Section 402 of the Act, 33 U.S.C. '1342. No permit authorizing Respondent's discharges of pollutants to Sand Creek has been issued pursuant to 33 U.S.C. '1342.

Accordingly, each day of discharge is a separate violation of Section 301 of the Act, 33 U.S.C., '1311, which prohibits the discharge of any pollutant to waters of the United States except in conformity with a permit issued under the Act.

7. The Respondent's discharges as described above violated Section 301(a) of the Act. Consequently, under Section 309(g)(2)(A) of the Act, 33 U.S.C. '1319(g)(2)(a), the Respondent is liable for the administrative assessment of Class I civil penalties in an amount not to exceed \$10,000 per violation up to a maximum of \$25,000.

DETERMINATION OF REMEDY

In determining the amount of a penalty to be assessed, the Administrator: [S]hall take into account the nature, circumstances, extent and gravity of the violation or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require... (emphasis added). Subsection 309(g)(3) of the Clean Water Act, 33 U.S.C. '1319 (g)(3).

In accordance with **Section 28.21(b) of the Part 28 Rules** and the Presiding Officer's Order of April 15, 1993, complainant submitted a written argument regarding the assessment of an appropriate civil penalty, addressing the nature, circumstances, extent and gravity of the violation and, with respect to respondent's, ability to pay, prior history of such violations, the degree of culpability, the economic benefit or savings respondent enjoyed resulting from the violation, and specific deterrence. Complainant also addressed the issue of general deterrence in its penalty argument. Complainant did not associate specific dollar amounts with the statutory factors in the administrative complaint or in its written penalty argument.

I find the complainant's "Written Argument Regarding the Assessment of an Appropriate Civil Penalty", appropriately considered the statutory factors set forth in subsection 309(g)(3) of the Act, 33 U.S.C. '1319(g)(3), as applied to this case. The complainant's written argument is therefore incorporated herein and a copy attached to this decision (Attachment A).

I further find upon review of the complainant's argument and the remainder of the Administrative Record, that a \$10,000 penalty, as proposed by the complainant, is appropriate for the violations in this matter.

ORDER

On the basis of the administrative record and applicable law, including '28.28(a)(2)(ii) of the Part 28 Rules, respondent is hereby **ORDERED** to comply with all of the terms of this **ORDER**:

A. Respondent is hereby assessed a civil penalty in the amount of \$10,000 and **ORDERED** to pay the civil penalty as directed in this **ORDER**.

B. Pursuant to '28.28(f) of the Part 28 Rules, this **ORDER** shall become effective 30 days following its date of issuance unless the Administrator suspends implementation of the **ORDER** pursuant to '28.29 of the Part 28 Rules (relating to Sua Spontere review).

C. Respondent shall, within 30 days after this **ORDER** becomes effective, mail a cashier's check or certified check (return receipt requested), payable to "Treasurer, United States of America," in the amount of \$10,000 to:

EPA - Region VIII
Regional Hearing Clerk
P.O. Box 360859M
Pittsburgh, Pa 15251

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (8RC)
U.S.E.P.A., Region 8
999 18th Street, Suite 500
Denver, CO 80202

D. In the event of failure by Respondent to make payment within 30 days of the date this **ORDER** becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(g)(9) of the Clean Water Act, 33 U.S.C. '1319(g)(9).

E. Pursuant to 31 U.S.C. '3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

Interest will therefor begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. '102.13(c).

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. '102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this **ORDER**. Under subsection 309(g)(8) of the Clean Water Act, 33 U.S.C. '1319(g)(8), respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the District of Colorado by filing a notice of appeal in such court within the 30-day period beginning on the date this **ORDER** is issued (5 days following the date of mailing under '**28.28(e) of the Part 28 Rules**) and simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED:

Date: _____

JACK W. MCGRAW

_____ Acting Regional Administrator

¹Part 28 is being used as procedural guidance in Class I penalty cases prior to its adoption in final form.

². Pursuant to '28.2(b)(15)(ii) of the Part 28 Rules this document is excluded from the administrative record.

³. Id.

⁴. Id.

⁵. Id.

⁶. Id.

⁷. Id.

⁸. Id.