IN RE PEPPERELL ASSOCIATES

CWA Appeal Nos. 99-1 & 99-2

FINAL DECISION

Decided May 10, 2000

Syllabus

This proceeding stems from an oil spill that occurred on October 17, 1996, at a facility (the "Facility") owned by Pepperell Associates ("Pepperell" or "the company") in the City of Lewiston, Maine. The spill, which took place in the Facility's boiler room, caused several hundred gallons of oil to be discharged into Gully Brook and the Androscoggin River, both navigable waters of the United States. At the time of the spill, Pepperell did not have in place a Spill Prevention Control and Countermeasures Plan ("SPCC Plan") to prevent oil spills, as required by 40 C.F.R. part 112 ("SPCC regulations"). Ultimately, in July 1997, the company removed the underground oil storage tanks at its Facility that gave rise to the spill; the tanks were replaced with a single above-ground oil storage tank in October 1997.

The United States Environmental Protection Agency Region I (the "Region") filed an administrative penalty action against Pepperell in connection with the above events. In Count I of its three-count complaint, the Region alleged that Pepperell had violated 40 C.F.R. part 112 by failing to have an SPCC Plan in place for the period December 1985 to July 1997. Count II alleged that the company violated the SPCC regulations by failing to timely prepare an amended SPCC Plan upon installing its above-ground storage tank and by failing to implement the amended Plan within 6 months of the tank's installation. Count III alleged that Pepperell had violated section 311(b)(3) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(j)(1), by discharging oil into a navigable water in harmful quantities as defined by 40 C.F.R. § 110.3.

Following an evidentiary hearing, the Presiding Officer found that Pepperell was liable under Count I, but for a shorter period of time than alleged by the Region. The Presiding Officer dismissed Count II and found Pepperell liable under Count III. Applying the statutory penalty factors at CWA section 311(b)(8), the Presiding Officer assessed a total penalty of $24,876 for those violations for which she found Pepperell liable.

Both sides appealed. The Region challenges the Presiding Officer's liability determinations under Counts I and II. It also challenges the penalty assessment, asserting that application of the statutory penalty factors supports a higher penalty than that assessed by the Presiding Officer. Pepperell contests the Presiding Officer's liability determination under Count I and further argues for a penalty less than that assessed by the Presiding Officer.

Held:

(1)(a) During the full time period of violation alleged under Count I, the Facility could reasonably have been expected to discharge oil in harmful quantities into or upon the navigable waters of the United States, and thus satisfied a necessary threshold for SPCC jurisdiction. The particular path by which oil on the boiler room floor migrated to Gully Brook, as stipulated to by both parties, was not reasonably foreseeable. Nevertheless, a drain in the boiler room floor providing a direct pathway to a sewer conduit made the prospect of a discharge from the Facility to a navigable water reasonably foreseeable at the time that the oil spill, in fact, occurred. The fact that oil in the sewer conduit discharged into Gully Brook via a combined sewer and stormwater overflow ("CSO") does not preclude a finding that a discharge of oil was reasonably foreseeable.

(b) The Presiding Officer erroneously intertwined the "reasonable expectation of discharge" and "storage capacity" jurisdictional thresholds in finding that Pepperell's disconnection of one of its underground tanks removed the facility from SPCC jurisdiction. A straightforward reading of the SPCC regulations demonstrates that these jurisdictional criteria must be evaluated independently. Applied in this manner, Pepperell continued to satisfy the jurisdictional criteria for SPCC regulation up until the time of removal of its underground storage tanks. Accordingly, the Board reverses the Presiding Officer's finding of only partial liability under Count I and finds Pepperell liable for the entire period of violation alleged in the complaint.

(2) In dismissing Count II, the Presiding Officer erred in determining that Pepperell's installation of a 20,000 gallon above-ground storage tank in October 1997 was subject to the relaxed timing requirements for facilities having to submit new SPCC Plans rather than the accelerated timelines applicable to facilities having to submit amended SPCC Plans. She based this determination on her erroneous finding that the Facility had experienced an eleven-month lapse in jurisdiction before installation of the above-ground tank. There was no lapse in SPCC jurisdiction that would warrant treating Pepperell as a facility subject to the requirements for new plans. Rather, the company initiated a *facility change* precipitating the need to submit an amended SPCC Plan while still subject to SPCC regulation. Its plan for accomplishing this change occurred over the course of several months and included, as discrete but integral steps, the removal of its existing underground storage tanks and their replacement with an above-ground oil storage tank. Because the facility change occurred while Pepperell was still required to submit an SPCC Plan for its Facility, and because the installation of the above-ground tank materially affected the Facility's potential for discharge, the company was obligated to submit an amended SPCC Plan under an expedited schedule, which it failed to do. The Presiding Officer's dismissal of Count II is therefore reversed.

(3) In accordance with the statutory penalty factors, the Board assesses a total penalty of $43,643 for the three counts of the complaint ($22,133 for Count I; $8,855 for Count II; and $12, 655 for Count III). On Count I, the Board imposes a higher penalty than that assessed by the Presiding Officer to correct the Presiding Officer erroneous determination of the length of the company's violation. On Count III, the Board reverses the Presiding Officer's 25% reduction of the Region's proposed penalty to reflect the company's partial reimbursements of the State of Maine's cleanup costs following the oil spill. Such a reduction is not justified under the "other matters as justice may require" statutory penalty factor because the payments did not constitute a "good deed" that exceeded the requirements of the law; rather the payments were simply an obligation under Maine law. *See In re Spang & Co.*, 6 E.A.D. 226 (EAB 1995).

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

Complainant, U.S. EPA Region I (the "Region") and Respondent, Pepperell Associates ("Pepperell") both appeal from an Initial Decision by Administrative Law Judge Barbara A. Gunning ("Presiding Officer") arising from a September 29, 1998 administrative action by the Region alleging that Pepperell violated the Spill Prevention Control and Countermeasure Plan ("SPCC Plan") requirements of 40 C.F.R. part 112 and section 311 (j)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(j)(1), and the oil discharge prohibitions under either CWA sections 311(b)(3), 33 U.S.C. § 1321(b)(3), or 307(d), 33 U.S.C. § 1317(d). The Region sought a civil administrative penalty of $47,930 for the alleged violations.

The proceeding stems from a discharge of oil that occurred on Pepperell's property on October 17, 1996, and the company's subsequent efforts to achieve compliance with the SPCC Plan requirements at 40 C.F.R. part 112.

In a February 26, 1999 Initial Decision, the Presiding Officer found that Pepperell was liable on only the first of two counts alleging violations of the SPCC regulations. Moreover, the Presiding Officer found that the company was liable on the first count for a shorter period of time than that alleged by the Region. In a third count, the Presiding Officer found that Pepperell had violated section 311(b)(3) of the CWA by discharging oil into a navigable water of the United States in a quantity determined to be harmful under the provisions of 40 C.F.R. § 110.3. The Presiding Officer assessed a total penalty of $24,876 for the CWA violations.

The two sides both appeal the Initial Decision. The Region contends that Pepperell should be found liable on all counts as charged and should be assessed a penalty of $43,643. Pepperell disputes the Presiding Officer's finding of liability on the SPCC regulations and requests a penalty of $4,261 for the discharge violation alone. In the alternative, the company requests a penalty of $15,788 for the SPCC and discharge violations.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

A. *Regulatory Background*

In its complaint, the Region alleges that Pepperell violated sections 311(b)(3), 311(j)(1), and 307(d) of the CWA and implementing regulations.

The first two statutory provisions relevant to our decision[1] spring from the Federal Water Pollution Control Act of 1972, which establishes as a national policy "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone * * *." CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1). The first provision, CWA section 311(b)(3), broadly proscribes the discharge of oil from facilities of any kind; the second, CWA section 311(j)(1), requires certain types of facilities to develop measures to prevent the occurrence of such spills.

Also of relevance is section 311(b)(3) of the CWA, which prohibits, inter alia, "the discharge of oil or hazardous substances into or upon the navigable waters of the United States * * * in such quantities as may be harmful as determined by the President * * * except where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful."

The pivotal phrase in the statutory provision above — "the discharge of oil * * * in such quantities as may be harmful" — is defined in part 110 of 40 C.F.R. as including discharges of oil that:

> (a) violate applicable water quality standards; or
> (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

40 C.F.R. § 110.3.

CWA section 311(j)(1) directs the President, inter alia, to "establish[] procedures, methods, 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 * * * ." 33 U.S.C. § 1321(j)(1). To this end, the U.S. EPA (the "Agency") in 1973 promulgated the oil spill prevention

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[1] The Region alleged a violation of CWA § 307(d) as part of an alternative Count III. However, the Presiding Officer did not consider § 307(d) in her Initial Decision, and this provision is not relevant to our decision today. *See infra* note 5.

regulations 40 C.F.R. part 112. One of the primary directives in part 112 is that facilities covered by CWA section 311(j)(1) must prepare SPCC Plans to prevent discharges of oil if such facilities have "discharged or due to their location could reasonably be expected to discharge oil in harmful quantities, as defined in 40 C.F.R. part 110, into or upon the navigable waters of the United States or adjoining shorelines * * * ." 40 C.F.R. § 112.3(a).

These regulations invest the EPA with broad jurisdiction over facilities engaging in the handling of oil products. The regulations, with certain exceptions, 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 and oil products, and which, *due to their location could reasonably be expected to discharge oil in harmful quantities,* as defined in Part 110 of this chapter, into or upon the navigable waters of the United states or adjoining shorelines.

40 C.F.R. § 112.1(b) (emphasis added).

While the Agency's authority over facilities handling oil and oil products is wide-ranging, the words emphasized above serve as a restraint on the Agency's jurisdiction, for the regulations conversely *exclude* from part 112 those facilities that "*could not reasonably be expected to discharge oil into or upon the navigable waters of the United States or adjoining shorelines.*" 40 C.F.R. § 112.1(d)(i) (emphasis added). The SPCC regulations explain that this determination:

> shall be based solely upon a consideration of the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) and shall exclude consideration of manmade features such as dikes, equipment or other structures which may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters of the United States or adjoining shorelines * * *.

40 C.F.R. § 112.1(d)(1).[2]

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[2] Agency jurisdiction under part 112 does not apply to the "[e]quipment or operations of vessels or transportation-related onshore and offshore facilities which are subject to authority and control of the Department of Transportation, as defined in the Memorandum of Understanding between the Secretary of Transportation and the administrator of the Environmental Protection Agency, dated November 24, 1971, 36 FR 24000." 40 C.F.R. § 112.1(d)(1)(ii). Pepperell's onshore facility is not transportation related and is hence not covered by this exception to the Agency's jurisdiction.

The regulations in part 112 further narrow the scope of the Agency's jurisdiction by providing that facilities that are "otherwise subject to the jurisdiction" of the Agency are nevertheless exempt from part 112 if they meet both of the following requirements: (1) the facilities have an "underground buried storage capacity * * * [of] 42,000 gallons or less of oil," and (2) a non-buried storage capacity of "1,320 gallons or less of oil, provided no single container has a capacity in excess of 660 gallons." 40 C.F.R. § 112.1(d)(2)(i)-(ii)

B. *Factual and Procedural Background*

Pepperell is the owner and operator of the historic "Pepperell Mill" building in an industrialized section of Lewiston, Maine. Complainant's Trial Exhibit ("CTE") No. 5 (Stipulation ("Stip.") Nos. 1, 4, 5). Pepperell's partners and owners, Robert R. Gladu and Ralph J. Sawyer, purchased Pepperell Mill ("the Facility") on June 27, 1985, after its use as a mill had been discontinued. Stip. Nos. 2, 6. During the time of the incident that gave rise to this proceeding, the owners were renting the building out for light industrial and warehousing use. Stip. No. 4.

A spill occurred early in the morning of October 17, 1996, when a gasket on the building boiler ruptured, spilling number six heating oil onto the boiler room floor, after which the oil flowed in turn down a stairwell, through a condensate pipe tunnel, and then into a city sewer conduit and box culvert. Stip. No. 12; Initial Decision at 9. The city sewer conduit and box culvert ordinarily discharge municipal solid waste and storm water from Lewiston to the Lewiston-Auburn Treatment Plant, a publicly owned treatment works ("POTW") operated by the Lewiston-Auburn Water Pollution Control Authority ("LAWPCA"). Stip. No. 13. The box culvert also operates as a combined sewage and stormwater overflow ("CSO"), periodically discharging sewer and stormwater into Gully Brook during times of high water. In this case, the oil not only spilled into the sewer line but also discharged through the culvert into Gully Brook. Initial Decision at 9.

As a result of the spill, some of the oil entered the Androscoggin River, to which Gully Brook is a tributary. The spill caused a noticeable sheen on the surface of both Gully Brook and the Androscoggin River, with the oil sheen on the Androscoggin River extending for approximately one mile from the confluence of Gully Brook and the Androscoggin. Hearing Transcript ("Tr.") at 64-68 (Testimony of Nathan J. Thompson, Maine Department of Environmental Protection ("Thompson Testimony")).

The remaining portion of the oil entered the POTW, which is designed to treat domestic waste and lacks the capacity to treat industrial waste such as number six heating oil. CTE No. 30; Tr. at 543-51 (Testimony of Clayton M. Richardson, LAWPCA ("Richardson Testimony")). The POTW was forced to "decelerate" its treatment process while oil was removed from the incoming wastewater, wet wells and the primary sedimentation basin. Initial Decision at 8.

At 8:30 a.m., October 17, 1996, Pepperell owner Robert Gladu notified the Maine Department of Environmental Protection ("MDEP") of the spill, which dispatched Nathan J. Thompson to the spill site. That day, Scott Pellerin, EPA's On-Scene Coordinator, also responded to the spill and assisted Pepperell owner Ralph Sawyer in the cleanup process. The Coast Guard and fire department likewise responded to the spill. Tr. at 693.

At the time of the spill, Pepperell had three 30,000-gallon underground oil storage tanks buried adjacent to the boiler room building. CTE No. 4 (SPCC Inspection Report at 2). Pepperell stored number six heating oil, sludge, and/or oil refuse in the tanks. Tr. 233-36 (Testimony of Jon Woodward, MDEP ("Woodard Testimony")). According to owner Ralph Sawyer, only two of the tanks were connected to the boiler, with only one being used on a daily basis. CTE No. 4 (SPCC Inspection Report at 2).

Pepperell had not registered the three underground storage tanks with the MDEP; however, there were four other storage tanks at the Facility that the company had previously registered with the MDEP. Tr. at 258 (Testimony of Beth DeHass, MDEP ("DeHaas Testimony")).

The MDEP arranged for cleanup of the spill, spending a total of $23,643.82 for cleanup of the boiler room, Gully Brook, the Androscoggin River, and LAWPCA. CTE No. 2. The bulk of cleanup operations were completed on October 19, 1996, after which MDEP reported no further discharge of oil into Gully Brook. Tr. at 72; CTE No. 1. In all, between 350 and 400 gallons of oil reached Gully Brook and the Androscoggin River; of this amount, 300 gallons were recovered from the two water bodies, while the rest was unrecoverable. Initial Decision at 8; Tr. at 77-84 (Thompson Testimony). Eventually, Pepperell reimbursed the State of Maine for $10,876 in cleanup costs, an amount representing the company's conditional deductible under Maine's Ground Water Oil Clean Up Fund. *See* Me. Rev. Stat. Ann. tit. 38, § 568-A (West 1999); Tr. at 251 (DeHaas Testimony).[3]

During an inspection of the Facility on the day of the spill, EPA's Scott Pellerin informed Sawyer that, based upon his inspection, the Facility was required to have prepared and implemented an SPCC Plan. CTE No.4 (SPCC Inspection Report); Tr. at 139-142 (Testimony of Scott Pellerin, EPA ("Pellerin Testimony")). Pellerin asked Ralph Sawyer to show him an SPCC Plan for the

[3] Maine's Ground Water Oil Clean Up Fund makes oil tank owners who have registered oil tanks with the state eligible to have the MDEP clean up an oil spill from the owners' registered tanks, subject to the owners' payment of certain deductibles. Although Pepperell had not registered its three 30,000-gallon underground storage tanks at the time of the oil spill, it subsequently registered the tanks on January 20, 1997, Tr. at 261 (DeHass Testimony), thus entitling the company to the benefits of Maine's Ground Water Oil Clean Up Fund.

Facility, but Mr. Sawyer could not produce an SPCC Plan for the Facility. Stip. No. 2.

On July 14, 1997, Pepperell removed the three underground storage tanks at the Facility. Stip. No. 26. Up to the time of removal of the tanks, Pepperell had not prepared or implemented an SPCC plan. Stip. No. 27. On October 16, 1997, Pepperell replaced the tanks with a single 20,000-gallon above-ground storage tank. Stip. No. 31. On April 14, 1998, Pepperell submitted an SPCC Plan that recommended a series of alterations to the Facility in order to prevent oil spills. Pepperell fully implemented the SPCC Plan on or about September 15, 1998. Tr. at 145 (Pellerin Testimony).

On September 30, 1997, Region I filed an Administrative Complaint and Notice of Opportunity to Request Hearing against Pepperell alleging that it had failed to prepare and implement an SPCC plan as required by the CWA and that it had discharged oil into a navigable water in violation of the CWA. With leave of the Presiding Officer, on September 29, 1998, the Region filed the First Amended Complaint and Opportunity to Request Hearing in this action, adding an additional count to its previous complaint.[4] The amended complaint alleged the following violations by Pepperell:

> Count(I): CWA section 311(j)(1) and 40 C.F.R. part 112, for the period December 1985 to July 1997, for failure to have prepared and implemented an SPCC Plan for the Facility;
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> Count (II): CWA section 311(j)(1) and 40 C.F.R. part 112.5(a), for failure to prepare an amended SPCC plan for the Facility from October 16, 1997, to April 16, 1998, and for its failure to have implemented the SPCC Plan within six months of the installation of the 20,000-gallon above-ground storage tank on October 16, 1997; and
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> Count (III): CWA section 311(b)(3), for discharging oil in a quantity that has been determined to be harmful under 40 C.F.R. § 110.3, as a consequence of the October 17, 1996 spill. In the alternative, the Region alleged that Pepperell had violated CWA section 307(d) by discharging oil through a sewer conduit into LAWPCA POTW in exceedence of local pretreatment standards that LAWPCA had established pursuant to 40 C.F.R. § 403.5.

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[4] The Region filed its original complaint before Pepperell installed its new above-ground 20,000-gallon oil storage tank on October 16, 1997. In its motion for leave to file an amended complaint on August 11, 1998, the Region stated that the installation of the above-ground tank gave rise to an additional period of violation of the SPCC Regulations. Motion to Amend Complaint at 1.

Pursuant to CWA section 311(b)(6)(B)(ii), 33 U.S.C. § 1321(b)(6)(B)(ii), the Region proposed a total civil penalty of $47,930 against Pepperell for the alleged violations.

On August 31, 1998, the Region filed a motion for partial accelerated decision on liability; Pepperell countered with its own motion for partial accelerated decision on liability on September 14, 1998. In an order on the parties' cross-motions on accelerated decision entered October 9, 1998, the Presiding Officer granted the Region's motion for partial accelerated decision on liability as to Count I, in part, finding Pepperell liable for violating the SPCC requirements from December 1985 to October 17, 1996 (around the time Pepperell disconnected the piping for the second tank). The Presiding Officer determined, however, that there remained a genuine issue of material fact for the remaining time period of violation from October 18, 1996, to July 14, 1997. The Presiding Officer also denied the Region's motion for accelerated decision as to Counts II and III. The Presiding Officer denied Pepperell's cross-motion for partial accelerated decision as to all counts. An evidentiary hearing was subsequently held on matters not disposed of in the Presiding Officer's order on the cross-motions for accelerated decision.

In a February 26, 1999 Initial Decision the Presiding Officer found that Pepperell had violated section 311(j)(1)(i) of the CWA as charged in Count I of the complaint, but determined that Pepperell's liability extended only from December 1985 to October 31, 1996, a shorter time than that alleged by the Region. Initial Decision at 21. The Presiding Officer also found that Pepperell was not liable for the violations alleged in Count II of the amended complaint. *Id.* at 23. The Presiding Officer further found that, as a result of its oil spill, Pepperell had violated section 311(b)(3) of the CWA by discharging oil into a navigable water of the United States in a quantity determined to be harmful under the provision of 40 C.F.R. § 110.3.[5] *Id.* at 25-28. Applying the statutory factors in CWA section 311(b)(8), the Presiding Officer assessed a total penalty of $24,876 for the alleged violations. *Id.* at 39.

The two sides both appealed. On appeal, the Region contends that Pepperell's liability under Count I should extend for the full period alleged in its amended complaint, from December 1985 to July 14, 1997. U.S. EPA Region I's Appeal Brief ("RAB") at 11-22. It also seeks reversal of the Presiding Officer's determination that Pepperell was not liable under Count II of the amended complaint. *Id.* at 26-33. Moreover, the Region contests the penalty assessment, asserting that a proper evaluation of the statutory penalty factors warrants a higher pen-

[5] Having found Pepperell liable for violating CWA § 311(b)(3), as alleged in Count III, the Presiding Officer did not consider the Region's alternative Count III, which alleged a violation of CWA § 307(d). Initial Decision at 25.

alty of $43,643 for the alleged violations. U.S. EPA Region I's Proposed Alternative Findings of Fact, Conclusions of Law, and Proposed Order at 2.

In its appeal, Pepperell contests its liability under Count I, arguing that the Presiding Officer erred by determining as a basis for Pepperell's liability that "due to [its] location, [the Facility] could reasonably be expected to discharge oil in harmful quantities * * * into or upon the navigable waters of the United States or adjoining shorelines." Respondent's Brief in Support of Its Cross-Appeal ("PAB") at 4; *see* 40 C.F.R. § 112.1(b). In addition, Pepperell asserts that the Presiding Officer erred by failing to make downward adjustments in the penalty based on the statutory penalty factors. PAB at 10. Pepperell does not contest its liability under Count III of the amended complaint. The company requests a reduced penalty of $4,261 on Count III alone or, in the alternative, $15,788 for Counts I and III. Id.

III. *ANALYSIS*

A. *Pepperell's Liability on Count I*

In her Initial Decision assessing liability for failure to submit an SPCC Plan under Count I, the Presiding Officer found that the Facility could reasonably be expected to discharge oil in harmful quantities from 1985 to the end of October 1996 (shortly after the oil spill) and that Pepperell met the storage capacity threshold for regulation (42,000 gallons).

In addition, concluding that the "reasonably expected to discharge" and storage capacity criteria are intertwined, she held that liability did not continue after October 31, 1997, the approximate time that Pepperell disconnected the second 30,000-gallon oil tank from the boiler. She determined that once this tank was disconnected from the boiler, the tank's capacity no longer had a reasonable expectation of discharging oil, and thus should not count toward the storage capacity threshold of 42,000 gallons necessary to establish the Agency's jurisdiction. In support of this determination, she reasoned that "the storage capacity of oil tanks that are not a threat to discharge oil [i.e., cannot reasonably discharge] into navigable water should not be considered in determining the amount of the jurisdictional threshold." Initial Decision at 19.

1. *Whether the Facility Was Reasonably Expected to Discharge Harmful Quantities*

We agree with the Presiding Officer's finding, in assessing liability under Count I, that the Facility was subject to the SPCC regulations because "due to its location," it "could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States * * *." Initial Decision at

17-18. Thus we reject Pepperell's argument that no one "could have reasonably expected a discharge based on geographic and locational considerations" as described in 40 C.F.R. § 112.1(d)(1)(i). PAB at 5.

The subject that absorbs the attention of the parties in their briefs is whether there was a reasonable foreseeability that oil spilled in the boiler room would reach Gully Brook in the manner that they have stipulated occurred here — by flowing through a condensate pipe tunnel, and then entering a sewer conduit, which discharged the oil through a box culvert serving as a CSO into Gully Brook, a navigable water and tributary of the Androscoggin River.[6] Stip. Nos. 12, 15.

By what course the oil migrated during the initial stages of its journey — from the boiler room floor and condensate pipe tunnel to the sewer conduit — is obscure, as is evident from the testimony of the Region's witnesses who responded to and saw the boiler room spill on October 16, 1996. For example, Nathan Thompson of the MDEP and Scott Pellerin of the EPA acknowledged that they did not enter the condensate pipe tunnel, and were thus unable to see the path the oil took to reach the sewer conduit. Both witnesses surmised that the oil might have entered the sewer conduit via unknown "chinks," "fissures," or "holes" in the condensate pipe tunnel. Tr. at 97 (Thompson Testimony); Tr. at 169-70 (Pellerin Testimony). In addition, Donald Grant, the Agency's Oil Spill and SPCC Plan Coordinator for Portland, Maine, admits that the plant diagram that Pepperell showed the EPA on the day of the spill (CTE No. 3) does not document a direct link between the condensate pipe tunnel and the sewer conduit. Tr. at 453 (Testimony of Donald Grant, U.S. EPA ("Grant Testimony")). In sum, none of the Region's witnesses were able to identify a pathway by which the oil traveled from the boiler room floor to the sewer conduit.

Pepperell cites to the Agency's decision in *In re City of Akron*, 1 E.A.D. 442 (JO 1978), as the roadmap for assessing foreseeability in this case, asserting that the holding in that case demonstrates that the discharge of oil to a navigable water was not reasonably foreseeable in this instance. In *City of Akron*, the Agency alleged that an oil storage facility located 100 yards from a navigable water was in violation of 40 C.F.R. part 112 for not preparing and implementing an SPCC Plan. *City of Akron*, 1 E.A.D. at 446. The Judicial Officer in that case determined, however, that by failing to identify any pathway by which oil from the respondent's facility might travel to a navigable waterway, the Region had not shown the reasonable expectation of a discharge necessary to prove a violation of SPCC requirements. *Akron* stands for the proposition that proximity alone — at least at a

[6] Pepperell does not dispute that the Androscoggin River is a "navigable water of the United States."

distance of 100 yards — may not be sufficient in all circumstances to create a reasonable expectation of a discharge to navigable waters.

We are likewise reluctant, based on the record before us, to find that it was reasonably foreseeable that oil, if spilled, would take the particular route stipulated to by the parties. There is no doubt that the boiler room and condensate pipe tunnel are in proximity to the sewer conduit,[7] but there is a dearth of information in the record regarding or explaining how such a large quantity of oil so quickly traversed the distance between these structures. In the absence of evidence of an identifiable pathway, it is difficult to conclude that a discharge to Gully Brook was within the respondent's reasonable anticipation. *See City of Akron*, 1 E.A.D. at 446.[8]

The lack of evidence of such an identifiable connection between the boiler room, the condensate pipe tunnel, and the sewer conduit does not, however, preclude a finding of a reasonable expectation of discharge because, as explained below, the Facility nevertheless exhibited locational and geographical characteristics that compel the conclusion that a discharge from the Facility to a navigable water in harmful quantities was foreseeable.

At the evidentiary hearing, EPA's Donald Grant testified that it was common practice that all boiler rooms, "especially in the age of the [Pepperell Mill] to have a floor drain to prevent the boiler rooms from filling up with water if the pipes break." Tr. at 451. Pepperell owner Robert Gladu related that a floor drain located in the corner of the boiler room formed a direct connection between the boiler room and sewer conduit. Tr. at 752.[9]

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[7] The record clearly reveals that the condensate pipe tunnel runs directly above the sewer conduit, *see* Tr. at 450 (Grant Testimony), and suggests as well that the two structures are in fairly close proximity. There is some uncertainty, however, about their degree of proximity. In support of her argument for "reasonable foreseeability" in her Initial Decision, the Presiding Officer notes that the "evidence of record strongly suggests that the sewer conduit lies just a few feet below the condensate pipe." Initial Decision at 16. Pepperell counters that the sewer conduit is located "twenty-five feet below the mill buildings." Respondent's Reply Brief in Opposition to Claimant's Appeal ("PRB") at 3.

[8] We do not agree with the Region's characterization of MDEP's Nathan Thompson's testimony regarding his October 17, 1996 tour of the Facility as showing that there was a "visible connection" between the condensate pipe tunnel and sewer conduit. U.S. EPA Region I's Reply Brief (" RRB") at 4. Mr. Thompson does note that in another Facility building "adjacent to the boiler room" he observed a "flow of water with oil on it entering what I consider to be, generally, * * * a surface water drainage conduit or system." Tr. at 47-48. While Mr. Thompson appears to have witnessed the introduction of spilled oil into the sewer conduit, his observations do not demonstrate that there was a visible pathway between the condensate pipe tunnel and sewer conduit.

[9] We note that there is no reference to a drainage discharge or pipe on the Facility map that Pepperell presented to the EPA on the day of the spill. Tr. at 452 (Grant Testimony). Nonetheless, given the ubiquity of floors drains in boiler rooms of the same era as Pepperell's, together with Robert
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Although this structure was apparently not involved in the drainage of spilled oil in the October 17, 1996 spill, given the presence of a drain providing a direct pathway to a navigable water in a Facility unit utilizing the company's heating oil, we find that a discharge into a navigable water could reasonably have been expected at the Facility at the time that the spill did, in fact, occur.

We concur with the Presiding Officer's view "that an owner of a facility covered by the SPCC regulations cannot abrogate his responsibility and be absolved from liability by blindly operating his facility or operating the facility without exercising some common sense as to the mechanical and structural aspects of the facility." Initial Decision at 17. The overriding purpose of CWA section 311(j) and its implementing regulations — to *prevent* oil discharges — demands that facility operators should have a basic knowledge of their facility and their locational setting — including the relationship of a facility to natural and manmade drainage. This knowledge should in turn inform the "reasonably expected to discharge" criterion at 40 C.F.R. § 112.1. In this light, Pepperell's knowledge that the Facility was in close proximity to a sewer conduit and that a boiler room floor drain provided a direct access to the sewer conduit should have made the prospect of a discharge of oil to navigable water reasonably foreseeable.[10]

That a connection between the Facility, sewer conduit, and Gully Brook was within the reasonable apprehension of even self-proclaimed "unsophisticated laymen," such as Pepperell's owners, *see* PRB at 3, is demonstrated by the actions of the owners on the morning of the spill. At the hearing, both Mr. Sawyer and Mr. Gladu testified that after noticing oil flowing into the condensate pipe, but not finding anything on the other end, they went down to Gully Brook to see if oil was discharging into that water body. Tr. at 732-36 (Sawyer Testimony); Tr. at 802-03 (Gladu Testimony). Therefore, Pepperell's owners' actions — immediately checking for a discharge into Gully Brook — tend to corroborate our conclusion that a discharge of oil into the brook, a navigable water, was reasonably foreseeable.

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Gladu's knowledge that the boiler room drain did in fact connect with the sewer conduit, it is reasonable to conclude that there was such a drain in the boiler room.

[10] We note that it is not clear from Mr. Gladu's testimony whether he knew that the drain in the corner of the boiler room provided a direct connection to the sewer conduit at the time of the oil spill. Tr. at 782. Even if he did not, we find that facility owners should be charged with knowledge of the functioning of common, visible structures such as the boiler room floor drain in this situation. Thus, in the case of Pepperell it should have been within the ken of a reasonably alert owner that a drain designed to collect and drain water that accumulated in the boiler room would act similarly with oil that spilled in the boiler room.

We also reject Pepperell's argument that the discharge of oil into a navigable water was not reasonably foreseeable because the discharge did not directly enter a navigable water but instead took place via a man-made drainage structure. PAB at 6; PRB at 7. A determination of reasonable expectation based on locational and geographical considerations does not bar examination of all manmade structures, but only those that "may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters of the United States or adjoining shorelines." Initial Decision at 16-17; RRB at 4-5; 40 C.F.R. § 112.1(d)(1)(i). Thus, man-made features such as sewer pipes that could facilitate rather than inhibit drainage to a navigable waterway are not excluded in making this determination. Indeed, they are highly relevant to this inquiry.

Pepperell also contends the discharge of oil into a navigable waterway was an unforeseeable event because the oil spill occurred "serendipitously" during a time of high water (which caused the CSO at Gully Brook to become operational) and because of the City of Lewiston's "extraordinary" ability to continue to dump raw sewage through CSOs with EPA's permission in "glaring violation of the Clean Water Act."[11] PAB at 6; *see* PRB at 8. However, the occurrence of high water events was a "serendipity" of which a reasonably alert oil facility owner in Lewiston should have been aware and should have taken into consideration, since these events apparently occured on a regular basis. Tr. at 712 (Gladu Testimony); Tr. at 533-36 (Richardson Testimony). In addition to times of heavy rain and storm events, sewage overflows through CSOs, such as that at Gully Brook, usually occurred in morning hours around 8 a.m., when there was a high sewer flow. Tr. at 594-95. The routineness of such events is demonstrated by Pepperell owner Ralph Sawyer's testimony that he had seen the CSO at Gully Brook in overflow conditions "generally early in the morning hours." Tr. at 712.

Moreover, Pepperell should not be shielded from liability simply because the slow pace of Lewiston's construction of new sewer lines has allowed the City to continue its use of CSOs.[12] In the absence of sufficient sewer lines, the fact that CSOs like the box culvert at Gully Brook were commonplace and thus posed a foreseeable risk of discharging to navigable waters was or should have been known to the company and, if anything, made all the more critical the need for

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[11] At the evidentiary hearing, a LAWPCA employee testified that the City of Lewiston is permitted to discharge raw sewage as part of its National Pollution Discharge Elimination System permit, and that the City has "more than ten [CSO] structures." Tr. at 595.

[12] As Clayton M. Richardson, superintendent of LAWPCA, testified, the City of Lewiston had historically discharged raw sewage into the Androscoggin River. Even with the construction of the Lewiston/Auburn water treatment plant in 1974, this practice continued through CSOs in times of high water despite the City's incremental efforts to eliminate CSOs such as the box culvert at Gully Brook by installing dedicated sewer lines. Tr. at 533. According to Richardson, the communities of Lewiston and Auburn "have in the last two years just completed a * * * master plan" to eliminate CSOs. *Id.*

SPCC plans at facilities like Pepperell's. In sum, given the above circumstances, the periodic release of raw sewage in Lewiston during times of high water was a "geographical," "locational" feature that should have engendered in Pepperell a reasonable expectation that a discharge would find its way into a navigable water and thus prompted the company to prepare and implement an SPCC Plan.

In sum, we find that the existence of a boiler room drain with a connection to a sewer conduit providing direct access to a navigable water during periods of high water supports a finding that the discharge of oil to a navigable water from the Facility was reasonably foreseeable. Consequently, we agree with the Presiding Officer that the Region has satisfied this threshold criteria for showing that Pepperell was liable as charged under Count I of the amended complaint.

2. *Liability under Count I from October 31, 1996, to July 14, 1997.*

In our view, the Presiding Officer erred when she found Pepperell's liability under Count I only extended to October 31, 1986, Initial Decision at 21, when Pepperell removed its second 30,000-gallon tank, rather than until all three tanks were removed in July 1997. We find that Pepperell was liable under Count I for the entire period of time alleged by the Region because during that time the Facility satisfied the storage capacity and foreseeability of discharge criteria needed to establish SPCC jurisdiction.[13]

We agree with the Region's assertion that the Presiding Officer erroneously intertwined the storage capacity and reasonable expectation of discharge criteria in finding that the disconnection of a second underground oil tank reduced the Facility's storage capacity below the 42,000-gallon storage capacity threshold needed for jurisdiction under the SPCC regulations. This approach strikes us as incompatible with a straightforward reading of the SPCC regulations.

The provision in the regulations establishing storage capacity thresholds exempts certain small-quantity storage facilities that would be "*otherwise* subject to the jurisdiction of the Environmental Protection Agency." 40 C.F.R. § 112.1(d)(2). The words "otherwise subject to jurisdiction" undoubtedly make reference to sections 112.1(d)(1) and 112.3(a)-(c), which together subject to SPCC jurisdiction those *facilities* that "because of their location" "can be reasonably expected to discharge oil in harmful quantities upon navigable waters."

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[13] The Presiding Officer found that the underground tank that Pepperell claimed was disconnected from the boiler when the company purchased the Facility also did not provide storage capacity for purposes of calculating the regulatory threshold. Tr. at 805-06 (Testimony of Robert Gladu). Thus, the Presiding Officer concluded that the removal of the second tank in July 1997 reduced the Facility's oil storage capacity to 30,000 gallons, below the jurisdictional threshold. Initial Decision at 21.

40 C.F.R. § 112.3(b). The structure of the regulation thus establishes a two-part test for assessing the regulatory status of storage facilities: (1) whether a facility can reasonably be expected to discharge; and (2) whether the storage capacity exceeds the small-facility thresholds. While related, these two elements are neither interdependent nor intertwined. Importantly, the only quantitative dimension to the first element is the requirement that a discharge of a *harmful quantity* be expected. The second element adds the idea that even if a harmful discharge can be expected, a facility may still escape regulation if its storage *capacity* is sufficiently small.

The significance of the use of the term storage *capacity* in the regulation rather than *inventory* cannot be overlooked, nor can the fact that the regulations are premised on the storage capacity of facilities as a whole rather than on individual units within facilities. The choice of terms and the structure of the regulations reflect the Agency's judgment that facilities that have large storage capacity and a potential for harmful discharge must have SPCC plans, whether or not all the available capacity is in use and irrespective of the discharge potential of individual storage units within the facility. *See In re Ashland Oil Co.*, 4 E.A.D. 235, 249 (EAB 1992) (holding that commencement of violation for failing to prepare and submit an amended SPCC Plan began when tank was first installed rather than when tank was connected to piping or actually filled). In view of the foregoing, it was erroneous for the Presiding Officer to merge the two elements by separately assessing each storage tank's reasonable likelihood to discharge oil, and eliminating (as she did for the second storage tank) storage capacity that she determined could not by itself meet the reasonable discharge threshold.[14]

We note that at the evidentiary hearing, the witnesses for the Region allowed for the possibility that, short of removal, storage tanks that are truly "taken out of service" or "decommissioned" pursuant to the SPCC regulations would not count toward the storage capacity thresholds. Tr. at 184 (Pellerin Testimony); Tr. at 323 (Grant Testimony). Although the regulations do not actually describe how an operator can reduce its oil storage capacity in this manner,[15] we do not find

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[14] The Presiding Officer's reading of the regulation also ignores the instruction at 40 C.F.R. § 112.1 that a determination of whether a facility "can be reasonably expected to discharge oil" must only incorporate "geographical" and "locational" factors and "exclude consideration of manmade features * * * which may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters of the United States or adjoining shorelines * * * ." The Presiding Officer's determination that the tank's disconnection from the boiler rendered a discharge unforeseeable involves considering a manmade feature — the disconnection of the tank from the boiler — in contravention of the above regulatory language. *See* RAB at 21.

[15] The regulations in 40 C.F.R. § 112.7, which provide guidance in the preparation of SPCC plans, do not specifically refer to "decommissioning" oil storage tanks or taking tanks out of service. The Agency has proposed that "permanently closed" tanks not be considered for purposes of the stor-
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unreasonable the Region's contention that Pepperell did not take any of its tanks out of service in a way that would eliminate their storage capacity.

The Region's witnesses testified that disconnecting a tank from its downstream use does not alone reduce its storage capacity and that, at a minimum, additional steps such as cleaning storage tanks and altering tank fill pipes to prevent the filling of tanks with oil are necessary. Pepperell offered no compelling testimony to the contrary. Along these lines, Scott Pellerin of the EPA testified that after speaking with Ralph Sawyer and inspecting the Facility on October 17, 1996, he determined that the one tank that Pepperell claimed to have disconnected from the boiler room had not been taken out of service and thus still provided storage capacity because the fill pipes "were not anywhere secured, to prevent an oil spill" and, in addition, that the company had not provided him with any information "on whether the tank itself was totally clean and free of oil or of any product." Tr. at 140. Donald Grant of the EPA, observing photographs of Pepperell's fill pipes, noted that contrary to the regulations at 40 C.F.R. § 112.7, Pepperell had not marked any of the fill pipes to prevent accidental filling of the tanks and had not placed a lock on the cap of the fill pipe or replaced the cap with a blank flange to prevent introduction of oil. Tr. at 325 (Grant Testimony). The testimony of an MDEP official, Jon Woodard, bolsters these findings. Woodard, who inspected the Facility in June 1997 after Pepperell claimed to have disconnected a second storage tank from the boiler room, agreed that access to the three fill pipes leading into the three buried tanks was not controlled by any security devices; one could access the pipes simply by removing a metal lid covering the "fill box" that housed the pipes. Tr. at 221 (Woodard Testimony).[16]

Significantly, the testimony at hearing indicates that two of the buried tanks contained oil at least until shortly before the tanks were removed. When Woodard of MDEP inspected the Facility in June 1997 (one month before Pepperell removed the buried tanks), he found that two of the fill boxes housing the ends of the tank fill pipes contained "black, wet oil," Tr. at 229, suggesting that the tanks

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age capacity criterion under part 112. *See* Oil Pollution Prevention, 56 Fed. Reg. 54,612, 54,617, 54,631 (Oct. 22, 1991) (proposing to exempt from the calculation of storage capacity under 40 C.F.R. § 112.1(d)(2)(i) and (ii) tanks and facilities that are "permanently closed"). The proposal defines a "permanently closed" tank or facility as one that has been closed using, *inter alia*, procedures such as cleaning oil from tanks and connecting lines, marking closed tanks with signs, and "blank[ing] off" connecting lines. 56 Fed. Reg. at 54,632. However, the Agency has never finalized this proposal.

[16] In the Initial Decision, the Presiding Officer never determined whether Pepperell had properly secured tank fill pipes in a manner that prevented its buried tanks from being filled and providing storage capacity. Rather, her determination that the company was not subject to the SPCC regulations for the full period of time alleged in Count I was predicated on her finding that the second tank's disconnection from the boiler room rendered the tank's storage capacity not reasonably expected to discharge, and thus not countable towards the storage capacity thresholds for SPCC jurisdiction.

themselves still contained oil. In addition, Woodard testified that in response to his concerns about the wet oil, Pepperell owner Robert Gladu told him that the company was then in the process of trying to "consolidate" the Facility's fuel into one tank. Tr. at 234-36 (Woodard Testimony). Later during the hearing, owner Ralph Sawyer explained that this consolidation involved transferring oil from the tank that had been disconnected shortly after the spill into the only tank still connected to the boiler. Tr. at 700 (Sawyer Testimony). Thus, at this late date, the evidence in the record indicates that at least two tanks still contained oil and thus provided storage capacity.[17]

Robert Gladu and Ralph Sawyer testified that they locked the fill pipe covers with padlocks, which they unlocked when expecting an oil delivery. Tr. at 697 (Sawyer Testimony); Tr. at 809 (Gladu Testimony). However, their testimony regarding fill pipe security conflicts with the corroborative observations of the Region's witnesses, who saw no padlocks on the pipe covers during separate visits of the Facility eight months apart. Moreover, Pepperell did not take any further steps, such as marking the fill pipes, which, according to the Region, could "alert oil truck drivers that only one of the tanks should be filled." *See* RAB at 19. In sum, we find that the Region has established that Pepperell did not take actions that could prevent its buried tanks from being filled with relative ease, and in any case did not remove oil from the tanks, so as to preclude the tanks from providing storage capacity.

For the above reasons, we determine that Pepperell never reduced the storage capacity of its underground storage tanks below 90,000 gallons of storage capacity until July 14, 1997, when it eliminated the Facility's storage capacity by removing the tanks. Because the Facility exceeded the storage capacity thresholds, and could be "reasonably expected to discharge" pursuant to the SPCC regulations as we determined above, we find that the company was liable for violating the SPCC requirements from June 1985 until July 14, 1997 — the full time charged under Count I of the amended complaint.

B. *Pepperell's Count II Liability for Failing to Prepare and Implement an Amended SPCC Plan.*

In her Initial Decision, the Presiding Officer found that Pepperell's installation of a 20,000-gallon above-ground tank on October 16, 1997, was subject to the timing requirements for facilities having to submit new SPCC Plans, rather

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[17] The record also suggests that the other buried tank that Pepperell had never used also contained oil until its removal, and likewise provided storage capacity. Mr. Gladu, Pepperell's owner, referring to this tank, testified that he was "sure that there was a small residue [of oil] in the bottom of the tank." Tr. at 805. The record contains no information that this tank was cleaned before being removed.

than those having to submit amended SPCC Plans, as charged by the Region, and that Pepperell met the applicable deadlines for preparing and implementing new SPCC Plans. Consequently, she found that Pepperell was not liable under Count II. The Region challenges the Presiding Officer's determination as erroneous. As described below, we reverse the Presiding Officer's decision on this point.

Facilities subject to 40 C.F.R. part 112 must submit either "new" or "amended" SPCCs, depending upon whether the facilities are beginning operations or are preexisting facilities already subject to the SPCC regulations that undergo a material change. The regulations impose shorter time frames on preexisting facilities than new facilities in preparing and implementing SPCC Plans. New facilities "that have discharged or, due to their location, could reasonably be expected to discharge" have six months to prepare an SPCC Plan and one year to implement it. *See* 40 C.F.R. § 112.3. However, preexisting facilities that are "subject to [40 C.F.R.] § 112.3" must amend an SPCC plan "whenever there is a change in facility design, construction, operation or maintenance which materially affects the facility's potential for the discharge of oil into or upon the navigable waters of the United States or adjoining shorelines." 40 C.F.R. § 112.5(a). The Board has interpreted 40 C.F.R. § 112.5 to require that an amended SPCC Plan be prepared contemporaneously with the change that triggered the need for the amendment. *In re Ashland Oil Co.*, 4 E.A.D. 235, 246 (EAB 1992). Such facilities must implement the amended SPCC plan "no later than 6 months" after the change occurs. 40 C.F.R. § 112.5.

In determining that Pepperell did not have to submit an amended plan with shorter deadlines, the Presiding Officer explained that Pepperell's disconnection of its second underground storage tank from the Facility's boiler brought its storage capacity below the 42,000-gallon capacity threshold necessary to apply the SPCC regulations to the Facility and thus "severed" any relationship between the Facility and the SPCC regulations. Initial Decision at 24. The parties agree that Pepperell once again became subject to the SPCC regulations when it installed its 20,000-gallon above-ground storage tank, which exceeded the storage capacity threshold for above-ground oil storage. *See* 40 C.F.R. § 112.1(d)(2)(ii). Thus, according to the Presiding Officer, the company was not subject to these regulations during an eleven-month period from November 1, 1996, (the time of disconnection of the second storage tank) until October 16, 1997. She determined that "in this case, the Respondent's year-long exclusion from the jurisdiction of the EPA and the applicability of the SPCC Rule fully and completely severed any relationship between the Respondent and the EPA." Initial Decision at 24. She held that in view of this long time period of severed jurisdiction "it would be illogical and unjust to determine that the [installation of the above-ground tank] requires an amendment rather than a new plan." *Id.* Accordingly, the Presiding Officer found Pepperell not liable under Count II of the amended complaint. Instead, she stated that "fairness and logic dictate that the requirements for the Respondent's above-ground storage tank be for a new plan." *Id.* In this regard, she noted that the com-

pany had met the timing requirements for new operations by preparing and implementing an SPCC plan within six months (April 14, 1998) and one year (September 15, 1998), respectively, of the above-ground tank's installation. *Id., see* 40 C.F.R. § 112.5(b); Stip. No. 31; Tr. at 145.

In appealing the Presiding Officer's finding of no liability under Count II, the Region counters that the Presiding Officer's legal conclusion constituted clear error because it was based on an erroneous determination that Pepperell was not subject to the EPA's jurisdiction for a period of eleven months. According to the Region, the Presiding Officer mistakenly found that Pepperell's obligation to submit an SPCC Plan under 40 C.F.R. § 112.3 extended only to October 31, 1996, instead of July 14, 1997, when the company removed its underground tanks. Correctly measured from the latter date, the gap in jurisdiction lasted only three months, since jurisdiction resumed on October 16, 1997. RAB at 28. The Region contends that since Pepperell had been subject to SPCC regulations for twelve years by the time it removed the underground storage tank on July 14, 1997, the Facility did not *begin* operations "solely because of a three-month gap." *Id.* at 31. This alteration, notes the Region, involved no change of business by Pepperell and consisted only of "replac[ing] its three oil tanks, which required an SPCC Plan, with another oil tank which also required an SPCC Plan." Id. at 28.

Moreover, the Region avers that the Facility satisfies all the conditions for the applicability of 40 C.F.R. § 112.5(a). The Region states that the Facility was "subject" to 40 C.F.R. § 112.3(b) and that the installation of the 20,000-gallon above-ground storage tank is a "change in facility design, construction, operation or maintenance which materially affects the facility's potential for the discharge of oil into or upon the navigable waters of the United States." RAB at 31; *see* 40 C.F.R. § 112.5(a). The Region argues that there is no doubt that the above-ground tank "materially affect[ed]" the Facility's potential to discharge since the SPCC regulations impose a 42,000-gallon threshold for underground versus a 1,320-gallon threshold for above-ground tanks, "demonstrating EPA's recognition that above-ground tanks inherently pose a greater risk to the environment than do underground tanks." RAB at 31. Consequently, the Region maintains that Pepperell is liable under 40 C.F.R. § 112.5 because it did not prepare an amended SPCC plan contemporaneously with the installation of the above-ground tank and did not implement the plan within six months of the tank's installation. *Id.* at 32.

The Region argues that the occurrence of a gap in the applicability of the SPCC regulations should not determine, by itself, "whether the alterations at the facility constitute a commencement of operations for purposes of the SPCC regulations." *Id*. at 30. In this regard, the Region notes that:

> [a] construction of the SPCC regulations which would allow a facility to delay preparing an SPCC plan if there is any lapse of time between the removal of one tanks(s) and the replacement with another, if taken

> to its logical extreme, would allow owners or operators of facilities subject to the SPCC regulations to restart the compliance clock at 6 months for SPCC plan preparation and one year for SPCC plan implementation if there is any time lapse between tank removal and replacement.

Id. at 33. According to the Region, such an approach, allowing delays in preparing and submitting SPCC Plans, would undermine the intent of the SPCC regulations, "[which] is to provide for the prevention and containment of oil spills." *Id.* The Region states that recognition of this purpose prompted the Board to decide in *Ashland Oil* that the SPCC regulation should require an amended plan "as soon as a triggering event occurs, thus most promptly achieving the goals of spill prevention and containment." *Ashland Oil*, 4 E.A.D. at 246.

The Region asserts that allowing Pepperell to qualify as a facility beginning operations simply by virtue of a three-month gap in regulatory coverage is particularly inappropriate because of Pepperell's control over the timing of the replacement of the tanks, which allowed the company to "manipulate" the SPCC regulations to the detriment of spill prevention. RAB at 34. The Region notes that the MDEP, in a Notice of Violation issued February 15, 1997, had ordered Pepperell to remove its tanks by July 15, 1997, upon learning that removal of the tanks was already almost three years overdue. *Id*. at 30; CTE No. 1 (Notice of Violation). If MDEP had not accommodated Pepperell's request to allow it to wait until summer to begin replacing the tanks (in order to avoid a difficult winter replacement) rather than replace the tanks immediately, "it could not be argued that the facility was in anything other than continuous operation for purposes of the SPCC regulations." RAB. at 30 n.11. The Region also observes that Pepperell already knew that it had to replace its underground tank in February 1997, when it received the Notice of Violation from DEP, and thus "had an eight-month window of time within which to decide how to heat its facility." *Id* at 34. Therefore, the company had sufficient time to prepare an SPCC plan "in conjunction with the installation of the above-ground tank," as it would be required to do if submitting an amended SPCC Plan. *Id.* Asserting that the company is not entitled to the more relaxed time frames applicable to new SPCC Plans, the Region states that "[i]t would be grossly inconsistent with the purpose of the SPCC regulations to reward Respondent for such a lack of responsible planning." *Id.*

Pepperell argues that any lapse in the Agency's jurisdiction over the Facility renders the requirement to submit an amended SPCC inapplicable. PRB at 14. Alternatively, Pepperell contends that the requirement would not apply because the installation of the "state-of-the-art," above-ground tank did "not materially affect the facility's potential for discharge into or upon the navigable waters of the United States * * *." *Id.* In support of this position, Pepperell maintains that the tank's installation did not change the risk of an accidental spill from the piping in

the boiler room and that "the potential for discharge was clearly less after the new tank and its leak detection system were installed." *Id.* at 14-15.

The Presiding Officer's resolution of this issue was greatly influenced by her predicate determination that Pepperell had, by disconnecting its second tank in October 1996 (eleven months before installation of the above-ground tank), successfully removed itself from SPCC jurisdiction. Having already rejected this proposition, we approach the question from a different vantage point. The question now becomes whether the three-month period between the removal of the underground tanks and completion of the installation of the above-ground tank should be viewed as a "break" in regulatory coverage, such that the time frame for submitting an SPCC Plan associated with the above-ground tank should be that for "new" facilities. We think not. As discussed below, we conclude that the scenario in this case should be appropriately viewed as a modification of an existing facility. Accordingly, we reverse the Presiding Officer's determination on Count II and find Pepperell liable, as explained below.

In support of treating the Facility as one commencing operations, Pepperell notes that the regulations requiring preexisting facilities to prepare and implement amended SPCC Plans under an accelerated time schedule only applies to "owners or operators of facilities *subject to* § 112.3[] * * *." 40 C.F.R. § 112.5(emphasis added.). According to the company, this language clearly limits the requirement to prepare and implement amended SPCC Plans to facilities or operators already subject to the Agency's jurisdiction by virtue of having to submit and implement SPCC plans under 40 C.F.R. § 112.3. Thus, Pepperell concludes that since the company had already reduced its storage capacity below the 42,000-gallon underground capacity jurisdictional threshold before it modified the Facility by installing the new above-ground tank, the company could not have been subject to the requirements of 40 C.F.R. § 112.3 at the time, and that consequently it cannot be liable under 40 C.F.R. § 112.5 as charged under Count II.

The SPCC regulations identify a "*change in facility design, operation, or maintenance*" as the action that precipitates the obligation for facilities subject to 40 C.F.R. § 112.3 to prepare and implement amended SPCC Plans (assuming the change materially affect the facility's potential to discharge into navigable waters). 40 C.F.R. § 112.5. In arguing against liability, Pepperell adopts a view of the precipitating facility "change" limited to the discrete moment that a change in facility design, operation, or maintenance is fully consummated — in this case when Pepperell installed the above-ground tank. Viewed in this narrow manner, the "change" in facility in this case did indeed occur at a time when the facility was no longer subject to 40 C.F.R. § 112.3 since three months earlier the Facility's oil storage capacity had fallen below the regulatory threshold.

In our view, the change in facility design is best viewed as a process that included both the act of removing the underground tanks and their replacement

with an above-ground tank in October 1997. There does not appear to be any question in the record that, notwithstanding its problems with its underground tanks, Pepperell fully intended to continue its enterprise. Thus, removal of its underground oil tanks would necessarily require replacement with a substitute fuel source for heating. It is clear that in Spring 1997, Pepperell, having already received the order to remove its underground storage tanks, was contemplating retaining oil as its heating source and storing the oil above ground.[18] In addition, the company was at this time considering using natural gas as an alternative to oil and had communicated this interest to the Region. CTE No. 18 (Letter from Ralph Sawyer, Pepperell Associates, to Region I, U.S. EPA (Mar. 6, 1997)). Pepperell, however, discarded the idea of using natural gas in "May or June" of 1997, when it concluded that natural gas would not be economically feasible, Tr. at 773, 811, and thus determined to continue using oil as fuel for heating.[19] *See* Tr. at 773.

Consequently, by May or June of 1997, the company contemplated a change in its heating oil storage facilities. Its plan for accomplishing this change occurred over the course of the next several months and included, as discrete but integral steps, the removal of the existing underground tanks and their replacement with an above-ground tank. Viewed in this light, the facility "change" or modification was initiated while Pepperell was still *subject* to 40 C.F.R. § 112.3, since at that time the company still had storage capacity above the jurisdictional threshold. *See supra* Part III.A.2. Accordingly, assuming that the "change," when consummated, "materially affect[ed] the potential for discharge," Pepperell was required to submit an amended SPCC Plan under an expedited schedule, pursuant to 40 C.F.R. § 112.5.

We find that this broader view of "facility change" will best further the purpose of the SPCC regulations. In our view, Pepperell's cramped interpretation of a "facility change" limited to the moment of its final physical installation invites manipulation of the regulations by facility owners who wish to delay the preparation and implementation of SPCC Plans. Under Pepperell's interpretation, oil facility owners can use any hiatus between removal or replacement of tanks as a pretext for not preparing and implementing amended SPCCs Plans under 40 C.F.R. § 112.5 since the actual physical replacement of the tanks — the facility change — would often occur at a time that SPCC jurisdiction had lapsed due to the earlier tank removal. This would occur even in situations where the actual commitment to make the change occurred while the facility was still subject to the

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[18] Jon Woodard of the MDEP testified that in Spring 1997, Pepperell owner Robert Gladu contacted the MDEP to find out whether he could use one of the removed underground storage tanks as an above-ground oil storage tank. Tr. at 213.

[19] In response to a question by Pepperell's counsel regarding which heat source the company decided to use after it "decided against [natural] gas heat," Robert Gladu responded that "[w]e decided to stay with our No. 6 oil." Tr. at 773.

SPCC regulations. One can surmise that the potential for manipulation is greatest, as in the instant case, where a business uses oil only for seasonal heating, and can therefore operate without inconvenience during interludes between the removal and replacement of oil tanks.

Another consideration supporting a broader interpretation of "facility change" is that under Pepperell's interpretation, *ongoing* operations, by virtue of the briefest termination of oil storage capacity, could take advantage of relaxed deadlines for preparing and implementing SPCC requirements that appear to have been designed in recognition of the particular challenges faced by truly *new* operations. In this regard, Pepperell bore all the marks of an ongoing operation: it already stored oil as a heating fuel to support its business activities and, while planning to continue its business activities, resolved to continue storing oil after removing and replacing its illegal tanks. As such, the company should not be entitled to the additional time a new facility facing many start-up burdens may reasonably need in order to prepare and implement an SPCC Plan.[20]

In sum, we find that in order to further the purpose of the SPCC regulations, the determination of the timing of a "facility change" in 40 C.F.R. § 112.5 should not be limited to the final act that completes a change. Rather, facility change should be viewed as a process that can include, in addition to installation of new facilities, the planning for change and the removal of existing facilities.

Finally, we reject Pepperell's argument that even if the company were subject to 40 C.F.R. § 112.3 during the time of the facility change, the company was nevertheless not subject to the requirement to submit an amended SPCC Plan because the change did not "materially affect[] the facility's potential for discharge." 40 C.F.R. § 112.5(a). As the Region persuasively explains, the regulations make an explicit distinction between underground and above-ground oil storage tanks, imposing a 42,000-gallon threshold on underground tanks as opposed to only a 1,320-gallon threshold for above-ground tanks. As explained by the Region, the great disparity between the two arises from the Agency's recognition that above-ground tanks "inherently pose a greater risk to the environment than do underground tanks." RAB at 31. Citing the testimony of its witnesses at the evidentiary hearing, the Region notes that above-ground tanks pose a greater risk of catastrophic failure, and that unlike an underground tank, an above-ground tank "is not buried in soil which can contain, to some degree, the contents of an oil spill." *Id*. at 31; Tr. at 144 (Pellerin Testimony). In view of the greater dangers of above-

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[20] We agree with the Region that the fact the company did not have an SPCC Plan in place from December 1985 to July 14, 1997, should not excuse it from preparing and submitting an SPCC Plan under the timelines for amended SPCC Plans at 40 C.F.R. § 112.5. RAB at 34 n.13. As the Region explains, "Respondent should be held to the same standard to which a facility that is in compliance with the SPCC regulation would be held." *Id.*

ground tanks as compared with underground tanks, we reject as lacking merit Pepperell's contention that installation of a 20,000-gallon above-ground tank — a storage capacity fifteen times the regulatory threshold — did not materially affect the Facility's potential to discharge.

In sum, we determine that Pepperell violated 40 C.F.R. § 112.5 and is therefore liable under Count II by failing to prepare an SPCC Plan by October 17, 1997, on which date Pepperell consummated a facility change affecting the facility's potential to discharge by installing an above-ground storage tank. In addition, we find that the company violated section 112.5 by failing to implement the SPCC Plan within six months of the above date.

C. *Presiding Officer's Penalty Imposition*

The Presiding Officer imposed a penalty of $24,876 for Counts I and III of the amended complaint, substantially reducing the Region's proposed penalty of $47,390. In their appeals, the Region and Pepperell dispute the Presiding Officer's penalty calculation. The Region proposes a total penalty of $43,643 for all three counts of the amended complaint; Pepperell proposes $4,261, or in the alternative, $15,788,[21] as appropriate penalty amounts.

As did the Region in proposing a penalty, the Presiding Officer applied the civil penalty factors listed at CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8), to arrive at a penalty amount. The statute provides, in relevant part, that:

> in determining the amount of a civil penalty * * * the Administrator * * * shall consider the seriousness of the violation or violations, the economic benefit to the violator, if any, 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 matters as justice may require.

CWA section 311(b)(8), 33 U.S.C. § 1321(b)(8).[22] As is evident from the foregoing language, these terms prescribe no precise formula by which these factors must be computed. *See Tull v. United States*, 481 U.S. 412, 426-27 (1987)

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[21] Pepperell proposes the $4,261 amount for Count III only, to reflect its claim that it was not liable under Counts I and II. The company proposes the $15,788 amounts in the case it is found liable for Counts I and III.

[22] In assessing a penalty, the Presiding Officer did not have the benefit of a statute-specific penalty policy to guide her decision, for unlike the case with other statutes it administers, the EPA has not developed such a policy for the CWA.

("highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the [CWA]"). The Presiding Officer's approach in arriving at a penalty was to adopt the Region's own methodology derived from the penalty factors, which consisted of assigning a base penalty dollar amount to reflect the "seriousness" of the violation, and then making appropriate monetary adjustments to this amount based on the potential environmental impact of a spill, the company's culpability, and other listed penalty factors. Reviewing the figures the Region assigned to these factors, the Presiding Officer then made changes to the figures based on her own interpretation of the evidence. Because neither side on appeal challenges this basic analytical framework,[23] we will likewise employ this framework in our analysis of the Presiding Officer's penalty assessment.

The following discussion will consider the penalty amount to be imposed on Pepperell for Counts I, II, and III.[24]

1. *Penalty Imposed for Count I*

In disputing the Presiding Officer's penalty assessment of $15,385 for Count I, Initial Decision at 32, the Region asserts that the Presiding Officer improperly ratcheted down the base amount of the penalty (reflecting the seriousness of the violation) based on her incorrect finding that the Facility had at most 60,000 rather than 90,000 gallons of storage capacity during the alleged period of violation and that the actual period of violation lasted only until October 31, 1996, rather than July 14, 1997.[25] RAB at 23. (The Presiding Officer compared her calculations of storage capacity and period of violation with the Region's, and then made proportional reductions in the base penalty, lowering the base penalty from $15,000 to $10,286. Initial Decision at 31.) Additionally, the Region finds fault with the Presiding Officer's reduction of the Region's "economic benefit" to reflect a shorter period of violation. The Region requests restoration of the original base penalty amount of $15,000, as well as its full proposed "economic benefit" of $1,508. Restoration of these amounts yields an increase of $6,748 over the Presiding Officer' assessment, for a total Count I penalty of $22,133. RAB at 23.

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[23] The two parties do not challenge the analytical framework adopted by the Presiding Officer; rather, the parties challenge only numerical values the Presiding Officer assigned to the criteria, and the manner in which she characterized certain criteria.

[24] As provided by the Consolidated Rules of Practice, 40 C.F.R. Part 22, as amended by 64 Fed. Reg. 40,176 (July 23, 1999), the Environmental Appeals Board has the authority to impose a penalty that is higher or lower than the one assessed in the Initial Decision . 40 C.F.R. § 22.30(f).

[25] The Region does not dispute any of the other adjustments to the base penalty that the Presiding Officer made in her Initial Decision, which, together with the lower base penalty, accounted for a reduced penalty assessment.

In contesting the penalty assessment for Count I, Pepperell claims that the Presiding Officer erroneously failed to make necessary downward adjustments to reflect the company's lack of environmental expertise and its cooperative behavior once a violation was discovered. In particular, the company maintains that the company's owners "had no prior knowledge of the SPCC requirements and immediately took steps to bring the Facility into compliance by disconnecting an oil tank and erecting a berm.[26] They then wrote to the EPA and sought guidance and assistance." PAB at 9. Pepperell also contends that the company's previous contacts with the MDEP should not have been considered an "aggravating factor," stating that an "an unsophisticated owner could reasonably have assumed that the tanks were subject to State jurisdiction, not both State and Federal jurisdiction." *Id.* In her Initial Decision, the Presiding Officer rejected these arguments when she ratified the Region's proposed 25% upward adjustment in the base penalty based on the company's "moderate culpability." Initial Decision at 32. Referring to the "matters as justice may require" penalty factor, she also held that "justice [did] not require that any further adjustments be made for other matters." *Id.*

We agree with the Region that the Presiding Officer erroneously made downward adjustments to the base penalty amount proposed by the Region — $15,000 — and that these reductions should be cancelled. We make this determination because we have already found that Pepperell was liable for the full period alleged under Count I in the amended complaint, and because the Facility had a storage capacity of 90,000 gallons throughout the period of violation. *See supra* Part III.A.2.

This being said, we concur with the Presiding Officer that Pepperell merits no downward reduction in its penalty based on its alleged lack of culpability or other factors. Pepperell's claimed ignorance of the SPCC regulations, which the Region does not dispute, *see* RRB at 8, does not support a reduction in the company's penalty. The company had an ongoing relationship with the MDEP, through which it registered its storage tanks, *see supra* Part II.B., and thus was cognizant of the regulated nature of its oil storage activities. For example, on one occasion in June 1996, MDEP sent Pepperell a Notice of Violation informing the company that it had failed to remove one of its registered tanks by a mandatory deadline, as required by Maine statute obligating tank owners to remove bare steel or asphalt-coated steel tanks and piping. CTE No. 13 (Notice of Violation, June 1996); Tr. at 266-67 (DeHaas Testimony). The notice of violation informed Pepperell that "[a]ll unprotected underground oil storage tanks are subject to corrosion and may eventually leak and contaminate groundwater." CTE No. 13. Pepperell's knowledge that its activities were subject to environmental regulation should have alerted it to the need to make further inquiries into what other regula-

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[26] Pepperell relates that after the spill it erected a "sandbag berm in its boiler room to prevent the escape of oil in the unlikely event of a future spill." PRB at 3.

tions, such as EPA's SPCC regulations, might also apply to the Facility. Given the company's incomplete efforts to become better versed in environmental regulation affecting the Facility, we find that the company does not merit a downward reduction of the assessed penalty on the grounds of low culpability.

Pepperell similarly does not merit a reduced penalty based on the actions it took to come into compliance after an SPCC violation was discovered. We endorse the Presiding Officer's views that these actions were not significant because they were tardy, not covered by the statutory penalty factors or, even if covered, not relevant to an assessment of a penalty under Count I. *See* Initial Decision at 33. For example, the company sought the Region's consultation and guidance on compliance only after being informed by the Region that it was in violation of the SPCC requirements. Also, the disconnection of an oil tank from the boiler and erection of a sandbag berm in the boiler room are directed toward remedying future oil spills, not a failure to file an SPCC Plan, which is at issue here. *Id.* Furthermore, as the Region contends, citing the Board's decision in *In re Spang & Co*, 6 E.A.D. 229 (EAB 1995), Pepperell's efforts at compliance are not "good environmental deeds that go beyond that which the law required of Respondent," such that the company would be entitled to a penalty adjustment under the "other matters as justice may require" penalty factor. RRB at 9; *see Spang*, 6 E.A.D. at 249-50.

For the foregoing reasons, in keeping with the Region's request and rejecting Pepperell's arguments for a reduced penalty, we impose on Pepperell a total Count I penalty of $22,133.

2. *Count II Penalty*

In seeking reversal of the Presiding Office's decision to find Pepperell not liable under Count II, the Region contends that an $8,855 penalty should be imposed upon the company for failing to prepare and implement an amended SPCC Plan in a timely manner.[27] RAB at 34-36; *See* Region's Post-Hearing Memorandum at 35-37.

The Region arrived at its proposed penalty by applying and considering the statutory penalty factors at CWA section 311(b)(8). First, the Region proposed a $4,600 base penalty reflecting the "moderate" seriousness of the alleged violation. The Region then adjusted the base penalty upwards by 75%, to $8,050, to account for the company's "high culpability." The Region used no additional statutory pen-

[27] The Region's proposed $8,855 penalty for Count II in its appeal brief represents the amount it originally proposed in its amended complaint reduced by a small amount associated with an alleged economic benefit realized by Pepperell as a result of its noncompliance, which the Region waived at the evidentiary hearing. Region's Post-Hearing Memorandum at 38.

alty factors to adjust the penalty. After making a 10% upward adjustment in the gravity (non-economic benefit) portion of the penalty to account for inflation in accordance with the Civil Monetary Penalty Inflation Rule, 40 C.F.R. part 119, the Region arrived at a total proposed penalty of $8,855. Tr. at 375-81 (Grant Testimony); Region's Post-Hearing Memorandum at 35-37.

Having found Pepperell liable under Count II, we determine that the penalty proposed by the Region for the company's violation is reasonable and consistent with the statutory penalty factors at CWA section 311(b)(8). In our view, the Region provides a sound explanation for characterizing the seriousness of the company's violation as "moderate." The Region notes the fact that Pepperell had no SPCC Plan at all for six months of the violation (which the Region characterizes as the "most serious type of SPCC violation") as well as the greater susceptibility of above-ground tanks to "catastrophic spills" as compared with underground tanks. Region's Post-Hearing Memorandum at 35. On the other hand, the Region observes that Pepperell's construction of secondary containment around the above-ground tank to prevent a worst-case spill and the shorter violation period — eleven months — for Count II in comparison with Count I favor mitigation of the penalty. *Id.* at 36. It is our view that in weighing these and other factors and concluding that company's violation was of "moderate" seriousness, the Region arrived at a reasonable base penalty of $4,600.

We also concur with the Region's decision to enhance the company's penalty by 75% to reflect its high culpability. We share the Region's view that Pepperell exhibited a remarkable lack of concern regarding the possible application of the regulations to the installation of the above-ground oil storage tank — at a time that the company was already aware of the regulations and had compelling reasons to acquire a basic understanding about them. Referring to the hearing record, the Region notes that before installing the above-ground oil storage tanks, the company:

> 1) had had a serious oil spill at the facility; 2) had been inspected for compliance with the SPCC regulations and been told by EPA that the Facility was not in compliance; [Tr. at 142, (Pellerin Testimony)]; 3) had been given the SPCC regulations on two separate occasions, *Id.*; [Tr. at 309 (Grant Testimony)]; and 4) had spoken with EPA's SPCC compliance officer who had told Mr. Gladu to hire an environmental consultant [to] help with Respondent's compliance. [Tr. at 314-15 (Grant Testimony); Tr. at 789 (Gladu Testimony); CTE No. 17.]

Region's Post-Hearing Memorandum at 36.[28]

In light of Pepperell's knowledge of the existence of the SPCC regulations, and the Agency's advice to the company to seek professional advice concerning its regulatory compliance, it is astonishing that the company's owners apparently did not realize that installing an above-ground oil storage tank could subject them to the SPCC regulations and the need to submit an SPCC Plan. As the Region notes, Pepperell owner Robert Gladu testified at the evidentiary hearing that he had not read the SPCC regulations when he installed the above-ground tank and was under the impression that once the Pepperell installed the above-ground tank, the company "[was] rid of the DEP and EPA forever." *Id.* at 37; (quoting Tr. at 786-87).

Thus, this is not a case in which the respondent can credibly claim that, at the time the above-ground tank was installed, it was uncertain as to whether the time frame for submitting an SPCC Plan was the one for existing, as opposed to new, facilities. This is a case not about regulatory confusion, but about indifference. Even a cursory familiarity with the SPCC regulations would have alerted Pepperell to the need to seek professional advice about whether it needed to provide an SPCC Plan for its above-ground tank, and, if so, the appropriate timeline to follow in preparing and implementing a Plan. Here, there is no indication that Pepperell even consulted the regulations. In sum, in regard to this matter, Pepperell exhibited a high degree of indifference and neglect that justifies the Region's proposed 75% enhancement of the base penalty.

For the above reasons, we impose an $8,855 penalty upon Pepperell for its violation of Count II, as proposed by the Region.

3. *Count III Penalty*

The Region challenges the $9,491 penalty amount assessed under Count III by asserting that the Presiding Officer erred when, after calculating a base penalty and making further adjustments, she reduced the penalty amount by 25% under the "other matters as justice may require factor" to reflect Pepperell's reimbursement payments to the State of Maine for the State's costs of cleaning up the oil spill. *See* RAB at 36; Initial Decision at 36; *supra* Part II.B. The Region requests that the assessed penalty be increased by $3,164, the amount of reduction taken by the Presiding Officer under this factor. RAB at 43.

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[28] The Region also notes that it filed the initial complaint in this proceeding two weeks before Pepperell installed the above-ground tank, and that the company "had by this time already retained competent legal counsel who could have reviewed the regulations and advised [Pepperell] on the above-ground capacity thresholds." Region's Post-Hearing Memorandum at 36.

In contesting the penalty assessment under Count III, Pepperell states that the Presiding Officer failed to make downward adjustments to account for the company's cooperative behavior in addressing the oil spill. PAB at 10. Pepperell's challenge is directed toward the Presiding Officer's increasing the company's penalty by 50% under the "culpability" factor, based in part on the company's poor cooperative behavior during the oil spill. Pepperell also maintains that the Presiding Officer erred by citing the allegedly unsafe cleanup methods the company used in its initial efforts to remove oil from the boiler room floor[29](before allowing MDEP to manage the boiler room cleanup) as an additional reason to find the company highly culpable. *Id.* As described in an MDEP report, the company's cleanup efforts consisted of two employees "on their hands and knees mopping up the spilled product with putty knives into little buckets and using kerosene to wipe up the remaining oil stains on equipments, floors, and walls." CTE No. 1.

Finally, challenging the Presiding Officer's 50% enhancement of the base penalty based on the environment impact of the spill,[30] the company states that environmental factors and "other matters as justice may require" support a reduction or, at a minimum, no increase in the company's base penalty in light of the already degraded environmental state of Gully Brook. PAB at 10. We consider these arguments in turn.

a. *Presiding Officer's Penalty Reduction to Reflect Pepperell's Reimbursement Payments to State of Maine*

In our view, Pepperell's partial reimbursement of Maine for the latter's cleanup costs does not justify reducing the company's penalty under the "other matters as justice may require" penalty factor. 33 U.S.C. § 1321(b)(8). As a general matter, Board precedent makes clear that the application of this factor to reduce penalties should be "far from routine" and should be used to "reduce [a] penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." *In re Spang & Co.*, 6 E.A.D. 226, 249-50 (EAB 1995); *accord In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 215-16 (EAB 1999).

In *Spang*, the Board considered whether a party's allegedly beneficial environmental expenditures warranted a penalty reduction under the "other matters as justice may require" factor and articulated a high standard for invoking this factor:

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[29] Nathan Thompson of the MDEP reported that Pepperell's employees were using neither gloves nor respiratory equipment to clean up oil from the boiler room floor, and wore no special protective clothing. Tr. at 44-45 (Thompson Testimony).

[30] The Presiding Officer gave as reasons for increasing the company's base penalty due to environmental impact the fact that MDEP was unable to recover all the spilled oil from Gully Brook and the Androscoggin River and the fact that the spill had contaminated the Androscoggin River for a mile downstream of the confluence of the two water bodies. Initial Decision at 34; *see supra* Part II.B.

> [W]e are of the view that the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.

Spang, 6 E.A.D. at 250.

We determined in *Spang* that the respondent's allegedly beneficial environmental expenditures did merit consideration as a basis for penalty reduction under the "other matters as justice may require" factor, and remanded to the Region. It is revealing that here, unlike in *Spang*, there is no allegation that the company's environmental expenditures constituted "good deeds" that exceeded the requirements of the law; rather, Pepperell's payments to Maine were simply an obligation under Maine's oil spill law that flowed proximately from an environmental harm caused by the company. *See supra* Part II.B.

Furthermore, we share the Region's concern that allowing a downward adjustment of the penalty for the company's reimbursement payments to the State of Maine would undermine the statutory schemes set out in the CWA, the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-2761, and Maine oil spill statutes, which "fully contemplate that owners or operators of facilities from which oil is spilled will pay both clean up costs *and* penalties for these spills." RAB at 37 (emphasis added). The expectation that owners and operators will pay both is indicated, the Region notes, by the separate provisions in CWA and OPA providing for the imposition of penalties and payment of cleanup costs.[31] *Id.* Therefore, we regard as well-grounded the Region's concern that "granting a deduction for clean up costs will weaken the deterrent effect of both the penalty provisions of Section 311 of the [CWA] and the clean up provisions of the CWA and OPA." *Id.*

In addition, we find that giving the company a downward penalty adjustment for actions it is already required to take under collateral legal provisions would undercut the deterrent value of Pepperell's penalty. *See In re B & R Oil Co.*, 8 E.A.D. 39, 60 (EAB 1999). In *B & R Oil*, a company argued that its penalty assessment for violation of an underground storage tank regulation should be offset by the amount it had spent to comply with a separate regulatory requirement under the program. We rejected the company's argument on the grounds that granting the offset would undermine the deterrent value of the penalty imposed for the applicable regulatory violation. *Id.* Although the instant case does not

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[31] As the Region observes, the Agency uses CWA § 311 to impose civil penalties for oil spills, while using the OPA to recover cleanup costs. RAB at 37; *see* CWA § 311(b)(3)-(7) (imposing civil penalties); OPA § 1002 (imposing liability for removal costs and damages). The Region notes that before passage of the OPA in 1990, the Agency used the CWA to seek recovery of cleanup costs. RAB at 37; *see* CWA § 311(f) (establishing liability for actual costs of removal of oil or a hazardous substance).

involve a dollar-per-dollar offset of the penalty amount, as in *B & R Oil*, the underlying consideration disfavoring a reduction of Pepperell's penalty is the same. Here, Pepperell's payment of a substantial deductible for the costs of cleaning up its spill and the company's penalty payment serve two essential and distinct purposes. The first partially compensates Maine taxpayers for cleanup costs of a public waterway; the second sanctions the company and deters it and other facility owners from engaging in actions or omissions that allow oil spills to occur at their facilities. Pepperell's fulfillment of the former obligation should not be used to attenuate and thus detract from the purpose of the latter.

For the foregoing reasons, we fail to find in Pepperell's payments to the State of Maine any clear and compelling reason, as articulated in *Spang*, to justify a penalty reduction for Pepperell under the "other matters as justice may require factor." Accordingly, we determine that the Presiding Officer erred by granting the company a 25% reduction of Pepperell's penalty because of the company's reimbursement of Maine's cleanup costs under the Oil Spill Act.

b. *Pepperell's Challenge to the Presiding Officer's Penalty Increase Based on Company's High Culpability.*

The Presiding Officer did not err by enhancing Pepperell's penalty for its "high culpability" during the oil spill because of the company's lack of cooperation during the oil spill and inadequate cleanup of the boiler room.

In asserting that a penalty reduction for its cooperative behavior is appropriate, Pepperell points to evidence that "the Coast Guard, LAWPCA and Fire Department successfully met with Respondent early in the day," Tr. at 687-95, and that work by the contractors had already begun the morning of the spill. PAB at 10; Tr. at 833 (Gladu Testimony).

On closer examination, it appears that Pepperell took a lackadaisical, or at best, passive approach in confronting the oil spill. While the company claims to have "successfully" met with the several responding agencies, it appears from the record that the company took little initiative in arranging those encounters. For example, an LAWPCA official testified that LAWPCA, not Pepperell, contacted the fire department, Tr. at 579, 582, as well as the National Response Center, which dispatched the Coast Guard to the scene of the spill. Tr. at 584. (However, it does appear that Pepperell contacted the MDEP the morning of the spill. Stip.No. 17.) Nathan Thompson of the MDEP testified that containment of oil in Gully Brook began the morning of the spill, and that a contractor began to vacuum oil from Gully Brook that afternoon. Tr. at 32, 57. However, as the Region explains, MDEP did not need Pepperell's permission to conduct these cleanup efforts. RRB at 13. Therefore, it appears that the promptness of response to the oil spill owes more to the diligence of other parties than to Pepperell.

Furthermore, the record indicates that Pepperell failed to communicate essential information concerning the spill to the MDEP and to cooperate with the agency, thereby causing delays in the cleanup operation. Although Pepperell owner Ralph Sawyer apparently met with Nathan Thompson of the MDEP on the morning of the spill,[32] the testimony of both Thompson and Sawyer indicates that Sawyer failed to identify himself to Thompson as the owner of the Facility, and neither provided him with information on the spill's source nor offered to lead him to the boiler room. Tr. at 34, 36-39 (Thompson Testimony); Tr. at 720-22 (Sawyer Testimony). As Thompson testified, he was only able to meet Sawyer to discuss proper cleanup of the boiler room several hours later, at approximately 1 p.m. Tr. at 49. In addition, Thompson related that Sawyer did not at first grant MDEP permission to arrange for the cleanup of the boiler room, and that the company only granted the permission at approximately 5 p.m. that day, as oil continued to flow into Gully Brook.[33] Tr. at 51, 54. In light of the foregoing evidence, we do not find unreasonable the Presiding Officer's determination that Pepperell's actions were highly culpable because they delayed cleanup of the oil spill and thus allowed a greater quantity of oil to enter Gully Brook and the Androscoggin River than otherwise would have been the case. Initial Decision at 35.

We also find that there is sufficient evidence in the record to support the Presiding Officer's determination that Pepperell's approach to cleaning up the boiler room reflected high culpability and justified an enhanced penalty. While there is some dispute between the parties over the exact details of how Pepperell carried out the cleanup, both Nathan Thompson and Scott Pellerin, who claimed to have knowledge of cleanup standards and experience in observing professional oil cleanups, expressed consensus that Pepperell's cleanup was not being conducted in a safe and effective manner. Tr. at 44-45 (Thompson Testimony); Tr. at 137 (Pellerin Testimony). For example, Thompson noted that the workers wore no respiratory equipment to protect them from the strong fumes emitted by oil, and "had no clothing that would give a barrier between themselves and the material that they were cleaning up." Tr. at 44-46. In addition, Pellerin related that one worker had taped trash bags onto his feet and legs "to prevent oil from further saturating his clothes," a practice that Pellerin characterized as posing "a tremendous slip, trip and fall hazard." Tr. at 137.

Moreover, we find disingenuous Pepperell's contention that its cleanup methods employing shovels, pails, and brooms were not reflective of culpability

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[32] Pepperell owner Ralph Sawyer provided unopposed testimony that, on the morning of the spill, he assisted MDEP's Nathan Thompson's efforts to extend a "sorbent boom" across Gully Brook to soak up discharge oil. Tr. at 692.

[33] Thompson testified that cleanup of the boiler room by a contractor began the day after the spill, Tr. at 58-59, and that starting the cleanup the day of the spill would have shortened the overall cleanup operation "perhaps by a day." Tr. at 71.

because the company's approved SPCC Plan recommended using the above items in case of an oil spill. PRB at 2; CTE No. 21 (Pepperell Associates, SPCC Plan). To be sure, section 2.7 of the SPCC Plan does list these items in the company's inventory of "response equipment" for use during an oil spill. CTE No. 21. However, as the Region notes, Pepperell's SPCC Plan anticipates using a pump or vacuum truck — not manual equipment alone — to address oil spills of the magnitude of the October 1996 spill at the Facility.[34] RRB at 14.

In sum, we concur with the Presiding Officer's finding that the company's cleanup methods in the boiler room were ill-considered and ineffective. Undoubtedly, such ineffective cleanup methods allowed more oil to enter Gully Brook and the Androscoggin River than would have been the case had appropriate cleanup measures been used, and the attendant risk of worker injury further calls into question the efficacy of the cleanup effort. Thus, we uphold the Presiding Officer's determination that Pepperell's ineffective cleanup efforts in the boiler room also reflected high culpability and merited an enhanced penalty.

c. *Pepperell's Challenge to the Presiding Officer's Penalty Increase Based on the Environmental Impact of Oil Spill*

We reject Pepperell's argument that Gully Brook's allegedly degraded environmental condition, due to the water body functioning as a periodic receptacle for raw sewage, justifies a reduction of its penalty under the statutory penalty factors. PAB at 10. Implicit in Pepperell's argument is that the company's discharge of oil could not have caused significant environmental harm, since Gully Brook was already environmentally damaged. As the Region correctly points out, however, "[c]ourts have uniformly rejected the notion that no penalties or low penalties should be imposed in cases where pollutants are discharged to already polluted waters." RRB at 14. Indeed, courts have consistently affirmed that the fundamental objective of the CWA is to "*restore* and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a) (emphasis added); *see PIRG v. C.P. Chems.*, 26 Env't Rep. Cas. (BNA) 2017, 2021 (D.N.J. 1987); accord *United States v. Gulf Park Water Co.*, 14 F. Supp.2d 854, 860-61 (S.D. Miss. 1998)*; PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1166 (1989). Accordingly, in rejecting a company's request for a penalty elimination in *C.P. Chemicals*, a court stated that "even if defendant's discharge did not measurably damage the [heavily polluted river], the fact that defendant violated its permit by discharging more pollutants than authorized means that the restoration and enhancement of the river's water quality was inhibited and therefore the objective of the [CWA] was frustrated." *C.P. Chemicals*, 26 Env't Rep. Cas. at 2021. Following the reasoning of these

[34] Section 2.8.1 of the SPCC Plan states that "[a] medium [oil] spill will likely involve the use of a pump or vacuum truck to remove bulk liquid." CTE No. 21.

cases, we determine that a downward adjustment of the penalty in this case is inappropriate, given that the Facility's discharge of oil into Gully Brook and the Androscoggin River has frustrated the CWA's goal of environmental restoration.

In sum, with regard to the Count III penalty, we reverse the Presiding Officer's $3,164 penalty reduction under the "other matters as justice may require" penalty factor and deny Pepperell's requests for any downward adjustments. Adding the above dollar amount to the penalty assessed by the Presiding Officer — $9,491 — we impose on Pepperell a total Count III penalty of $12,655.

IV. *CONCLUSION*

For the foregoing reasons, we find that a preponderance of evidence in the record establishes that Pepperell is liable under Count I of the amended complaint for failure to prepare and implement an SPCC Plan as required under 40 C.F.R. part 112. We determine that Pepperell's liability under Count I continued for the full period alleged under Count I by the Region and thus reverse the Presiding Officer's finding of only partial liability on this count. We also reverse the Presiding Officer's determination that Pepperell is not liable for the SPCC violation alleged in Count II. The company does not contest its liability under Count III for discharging oil into a navigable water in a quantity determined to be harmful under the provision of 40 C.F.R. § 110.3.

Adding the amounts of $22,133, $8,855, and $12,655 we have imposed for Count I, Count II, and Count III, we assess against Respondent Pepperell Associates, Inc. a total penalty of $43,643. The Respondent shall pay the full amount of the civil penalty within thirty (30) days of receipt of this decision. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

EPA-Region I
Mary Anne Gavin
Regional Hearing Clerk
P.O. Box 360188
Pittsburgh, PA 15251-6188

So ordered.