UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 10
Seattle, Washington

IN THE MATTER OF:	)	
	)	
Sheldon Jackson College	)	
	)	
	)	
	)	DOCKET NO. 10-96-0063 OPA
	)	
	)	
	)	
RESPONDENTS		

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(B)(i). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28, Non-APA Consolidated Rules of Practice for Administrative Assessment of Civil Penalties ("the Consolidated Rules"), 56 Fed. Reg. 29,996 (July 1, 1991), which are to be used as procedural guidance for Class I administrative penalty proceedings under Section 311 of the Clean Water Act, 33 U.S.C. §1321. 57 Fed. Reg. 52,704, 52,705 (November 4, 1992).
This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules.

STATUTORY BACKGROUND

Section 311(j)(1) of the Clean Water Act, 33 U.S.C. §3121(j)(1), provides for the issuance of regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . from onshore and offshore facilities, and to contain such discharges . . . .
The implementing regulations, found at 40 C.F.R. Part 112, 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 . . . into or upon the navigable waters of the United States or adjoining shorelines. 40 C.F.R. 112.1(b).
Section 311(b)(6)(A)(ii) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(A)(ii), provides for Class I or Class II administrative penalties against any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility who fails or refuses to comply with any regulation issued under Section 311(j) to which that owner, operator, or person in charge is subject.[(1)] Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i), provides that, before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request a hearing on the proposed penalty.

PROCEDURAL BACKGROUND

The Unit Manager of Emergency Response and Site Cleanup Unit No. 1 of the Office of Environmental Cleanup of Region 10 of the United States Environmental Protection Agency (Complainant) initiated this action on November 7, 1996, by issuing to Sheldon Jackson College (Respondent) an amended administrative complaint under Section 28.16(a) of the Consolidated Rules.[(2)] The amended complaint provided notice of a proposed penalty in the amount of $10,000. The Respondent answered the amended complaint on February 12, 1997, admitting liability but denying the allegations regarding penalty.[(3)] The Respondent requested a hearing to contest the penalty assessment "because of its financial inability to pay said penalty and because it has worked, in good faith, to prepare an SPCC [plan] as required."
By memorandum dated June 20, 1995, Steven W. Anderson was designated as Presiding Officer in this matter pursuant to §28.16(h) of the Consolidated Rules.

On February 12, 1997, the Presiding Officer issued a Prehearing Order at the request of the parties, directing them to file written submissions regarding the appropriate remedy (i.e., whether a penalty should be assessed and if so in what amount). The order provided that the parties' written submissions could include legal arguments and affidavits, and/or written recommended findings of fact and conclusions of law, as provided by Section 28.26 of the Consolidated Rules.

In accordance with a schedule agreed to by the parties, Complainant filed a Memorandum in Support of Penalty Assessment (with attachments) dated March 7, 1997 and Respondent filed an Affidavit Regarding Hardship to Sheldon Jackson College dated March 5, 1997. Complainant filed a reply to the affidavit dated March 14, 1997; Respondent filed a reply to the memorandum dated March 26, 1997. As ordered by the Presiding Officer, Respondent filed a Report Regarding Compliance Efforts by Sheldon Jackson

College, dated June 12, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the Respondent's admission of the allegations in Paragraphs II and III of the Amended Complaint, I make the following Findings of Fact and Conclusions of Law:

(1) Respondent Sheldon Jackson College ("College") is a non-profit corporation organized under the laws of Alaska with a place of business located at or near 802 Sawmill Creek Road in Sitka, Alaska 99835. Respondent is a person within the meaning of Section 502(5) of the Clean Water Act and 40 C.F.R. Section 112.2.

(2) Respondent College is the owner or operator within the meaning of Section 311(a)(6) of the Clean Water Act, 33 U.S.C. §1321(a)(6), and 40 C.F.R. §112.2 of a facility used for gathering, storing, processing, transferring, or distributing oil or oil products, located at or near 802 Sawmill Creek Road in Sitka, Alaska 99835 ("the Facility").

(3) The Facility is an "onshore facility," as defined in Section 311(a)(10) of the Clean Water Act and 40 C.F.R. Section 112.2. Due to its location, the Facility could reasonably be expected to discharge oil in harmful quantities to the navigable waters of the U.S. or adjoining shorelines, as described in 40 C.F.R. Section 110.3.

(4) The Facility has an above-ground storage capacity greater than 1,320 gallons of oil. See 40 C.F.R. Section 112.1(d)(2)(ii).

(5) The Facility is a non-transportation-related facility under the definition referenced at 40 C.F.R. Section 112.2 and set forth in 40 C.F.R. Part 112, Appendix A § II and 36 Fed. Reg. 24,080 (December 18, 1971).

(6) Based on the above, and under Section 311(j) of the Clean Water Act and its implementing regulations, Respondent is subject to 40 C.F.R. Part 112 as an owner or operator of the Facility.

(7) Under 40 C.F.R. Section 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. Section 112.7 not later than six months after the facility began operations, or by July 10, 1974, whichever is later, and must implement that SPCC plan not later than one year after the facility began operations, or by January 10, 1975, whichever is later.

(8) On June 7, 1995, an EPA inspection revealed that Respondent had failed to prepare an SPCC plan for its facility, in violation of 40 C.F.R. Section 112.3.

(9) The Facility has been in operation more than one year before June 7, 1995, the date of inspection.

(10) Pursuant to Section 311(b)(6)(B)(i) of the Clean Water Act, the Respondent is liable for a civil penalty of up to $10,000 per violation, up to a maximum of $25,000.

(11) The Complainant proposes that an administrative penalty be assessed against the Respondent in the amount of $10,000.

DETERMINATION OF REMEDY

In accordance with the Presiding Officer's Order of February 12, 1997, Complainant and Respondent have each submitted written argument and supporting affidavits regarding the assessment of an appropriate civil penalty.

Based upon the administrative record, I have taken into account the following factors in determining an appropriate civil penalty:[(4)]

The seriousness of the violation or violations: The violation involves the failure to prepare and implement an SPCC plan at the Respondent's waste-to-energy plant on the grounds of Sheldon Jackson College in Sitka, Alaska. Garbage and used oil from the community of Sitka are burned in the plant to provide power and steam heat for the campus; new and used oil are stored at the facility in four above-ground storage tanks; the tanks lack adequate secondary containment. See Complaint and Exhibit 2 to Complainant's Memorandum in Support of Penalty Assessment (SPCC Report).

The Respondent's storage tanks are relatively small, having a total capacity of 27,050 gallons. See Exhibit 2 to Complainant's Memorandum in Support of Penalty Assessment.

The facility is situated approximately fifty to eighty feet upgrade from the Indian River flume, which flows directly to the Indian River. See Complainant's Memorandum in Support of Penalty Assessment at p. 4. The administrative record does not state whether Indian River is a navigable water, but it can be inferred from the map of Sitka in Exhibit 2 to Complainant's Memorandum in Support of Penalty Assessment that, even if it is not, oil spilled at the facility can reach navigable waters or adjoining shorelines fairly directly. The administrative record does not identify any particular sensitivity of the waters that would

receive an oil spill from the facility, nor does it describe the likely environmental impact of a potential spill at the facility. Absent more facts on the areas subject to potential oil spills, it is difficult to assess the potential environmental impacts of an oil spill from the facility.

The facility has apparently never had an SPCC plan. Failure to prepare and implement an SPCC plan is a serious violation, in that it leaves the facility unprepared to deal with a oil spill or to prevent the spill from having potentially serious environmental consequences.

The Complainant correctly characterizes the violation as having lasted for the full six years the storage tanks have been in their current location. Complainant's Memorandum in Support of Penalty Assessment, p.3. The Respondent objects to the assessment of a penalty for a six-year violation, arguing that operation and maintenance of the incinerator and oil tanks "was probably the responsibility of the City and Borough of Sitka, Alaska until it was specifically assumed by SJC through a contract dated March, 1996," and that the Respondent was not aware of its responsibility for preparing the SPCC plan. Respondent's Reply to Memorandum in Support of Penalty Assessment, p.1.

Since Complainant's Memorandum in Support of Penalty Assessment states that the proposed penalty of $10,000 was not based on multiple-day violations, Complainant's Memorandum, p.3, the proposed penalty amount apparently does not in actuality contain any increase to reflect the extended duration of the violation. In any event, assuming only that the violation was in existence at the time the Respondent acknowledges that it took responsibility for the facility, the seriousness of the violation would amply justify a penalty of $10,000 or more, without any upward adjustment for the previous period.

The economic benefit to the violator, if any, resulting from the violation: Economic benefit to the violator could include, for example, the cost savings to the Respondent from its delay in preparing and implementing an SPCC plan, including delay in constructing secondary containment around its oil storage tanks. Neither party has provided any facts or argument regarding this penalty factor.

The degree of culpability involved: Respondents' conduct reflects a degree of culpability. The EPA inspection which ultimately resulted in this penalty proceeding took place on June 7, 1995; the facility's plant supervisor was made aware of the need to prepare and implement an SPCC plan at the time of the inspection. Exhibit 2 to Complainant's Memorandum in Support of

Penalty Assessment. It is unclear from the record whether Respondent's senior management was informed of the SPCC requirements at that time, but if not, Respondent's president received an information copy of a follow-up letter from EPA dated February 12, 1996 which reiterated the deficiencies found during the inspection and requested a response. Exhibit 3 to Complainant's Memorandum in Support of Penalty Assessment. Thus, before Respondent accepted formal responsibility for operation of the facility from the City of Sitka in March, 1996, Respondent had received actual and detailed notice of the applicable SPCC requirements. The Respondent was derelict in not remedying the violations at that time.

Any other penalty for the same incident: The record does not contain any information to indicate that Respondent has been assessed any other penalty for this violation.

Any history of prior violations: The record contains no evidence of any prior violations of the Clean Water Act by the Respondent.

The nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge: While this penalty factor does not apply literally to cases alleging failure to prepare and implement an SPCC plan, it should be noted that the Respondent has not yet remedied the violation completely. Complainant states that it notified the Respondent in August, 1996 that it was about to be served with an administrative complaint, and that the Respondent submitted an unsigned SPCC plan to EPA on August 13, 1996. Complainant's Memorandum in Support of Penalty Assessment, p.5; Exhibit 3 to Complainant's Memorandum in Support of Penalty Assessment. A complete plan certified by a registered professional engineer was apparently not submitted to EPA until March 26, 1997. Report Regarding Compliance Efforts of Sheldon Jackson College, Ex. A. Importantly, secondary containment has not yet been constructed around any of the storage tanks; construction of secondary containment is apparently planned to commence shortly after July 1, 1997. Report Regarding Compliance Efforts of Sheldon Jackson College, Ex. B.

The economic impact of the penalty on the violator: At the Complainant's request, the Respondent submitted tax returns, financial statements, and other financial information to EPA in support of its argument that it is unable to pay a penalty in the amount of $10,000, the penalty sought in the Amended Administrative Complaint. The Complainant's analysis of the data leads it to conclude that the Respondent has the ability to pay a penalty of $10,000 in a single payment "with neglible or no adverse impact on [the College's] short-term or long-term operations, student programs, or continuing viability." Exhibit

7 to Complainant's Memorandum in Support of Penalty Assessment. The Respondent disputes that analysis, explaining the College's history of financial difficulties and arguing that no penalty should be imposed. Affidavit Regarding Hardship to Sheldon Jackson College; Report Regarding Compliance Efforts of Sheldon Jackson College, p. 2.

Specifically, Respondent notes that it is a non-profit institution of higher education, founded for the purpose of assisting in the education of Alaska's native population, and that it currently offers accredited college level courses to 200 students. Affidavit Regarding Hardship to Sheldon Jackson College, par. 2. The Respondent argues that it has had to take extraordinary steps such as laying off faculty, reducing faculty pay, and reducing library expenditures in order to address twelve years of operating deficits, and these budget-cutting efforts are endangering the necessary infrastructure of the College.

Affidavit Regarding Hardship to Sheldon Jackson College, par. 4, 7. The attorney for the Respondent states that the College will run a deficit for the 1996-97 school year. Report Regarding Compliance Efforts of Sheldon Jackson College, p. 2. The Respondent argues that all but $96,000 of the $4.96 million in "investments" identified by EPA's economist as a possible source of payment for a penalty are unavailable because they are pledged as collateral for a letter of credit, and the balance of the funds are normal operating account balances of the College. Affidavit Regarding Hardship to Sheldon Jackson College, par. 9. In addition, the Respondent argues that the $3.9 million in the College's "quasi-endowment" should not be considered as a potential source of funds to pay a penalty, because the College's Board of Directors has taken the position that it is imprudent to use these funds to cover operating losses, and because the income from these funds is used for necessary scholarships. Affidavit Regarding Hardship to Sheldon Jackson College par. 10.

Giving the Respondent's arguments careful and due consideration, it is nevertheless clear that the Respondent currently has the ability to pay an administrative penalty in the amount of $10,000 without adversely affecting the operations, student programs, or continued viability of the College.[(5)]

Any other matters as justice may require: The Respondent argues that it should not be required to pay an administrative penalty because any funds used to pay the penalty will be diverted from other worthy purposes, such as improving the College's library or awarding scholarships to students who would otherwise not be able to attend the College. In light of the College's difficult financial situation, described above, it appears that, while the proposed $10,000 penalty may not threaten the viability of the

College, the penalty will likely be paid out of revenues that would otherwise be used for educational expenses, or out of funds that the College is treating as endowment. The Respondent is essentially arguing that it should not have to pay any penalty under these circumstances. There do not appear to be any previous EPA administrative decisions directly addressing this issue in the context of the Clean Water Act.[(6)]

While it is appropriate to take the Respondent's argument into account in determining the amount of the penalty, it cannot, on the facts of this case, serve as a basis to relieve the Respondent entirely from paying an administrative penalty. Monetary penalties are a primary means for achieving compliance in EPA's administrative enforcement program under the Clean Water Act. Clean Water Act Section 309(g), 33 U.S.C. §1319(g); Clean Water Act Section 311(b)(6), 33 U.S.C. §1321(b)(6). The Act contains no exception for administrative penalties assessed against educational institutions as compared to other Respondents. Clean Water Act Section 309(g)(3), 33 U.S.C. §1319(g)(3); Clean Water Act Section 311(b)(8), 33 U.S.C. §1321(b)(8). It is necessary to assure that the Respondent is deterred from future violations and that other similarly situated persons will also be deterred from violations; these goals of EPA's enforcement program, and the goals of the Clean Water Act itself, would be thwarted if no penalty were assessed in this case.[(7)]

However, it appears that a penalty in an amount less than $10,000 would accomplish the necessary deterrent effect. Accordingly, I determine that a penalty of $5,000 is appropriate in this case.

ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2)(ii) of the Consolidated Rules, Respondent is hereby ORDERED to comply with all of the terms of this ORDER:

A. Respondent is hereby assessed a civil penalty in the amount of $5,000 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Environmental Appeals Board suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to Sua Sponte review).

C. Respondent shall, within 30 days after this ORDER becomes effective, mail a cashier's check or certified check, payable to

"Oil Spill Liability Trust Fund" in the amount of $5,000, by certified mail, return receipt requested, to:

Commander, National Pollution Funds Center United States Coast Guard Ballston Common Office Building, Suite 1000
4200 Wilson Boulevard
Arlington, Virginia 22203

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

Regional Hearing Clerk (SO-155)
United States EPA - Region X
1200 Sixth Avenue
Seattle, WA 98101

D. In the event of failure by Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(b)(6)(H) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(G).

E. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment handling charge of twenty ($20) dollars will be imposed after 30 days, with an additional charge of ten ($10) dollars for each subsequent 30-day period over which an unpaid balance remains. In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 311(b)(6)(G)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(G)(i), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the District in which the violation is alleged to have occurred by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such

notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.
Date: 7/1/97 /S/_____
Chuck Clarke Regional Administrator

Prepared by: Steven W. Anderson, Presiding Officer.

1. The Oil Pollution Act of 1990 amended Section 311 of the Clean Water Act to increase penalties for oil spills and for violations of Section 311(j).

2. A previous Complaint issued to Sheldon Jackson College and the City and Borough of Sitka, Alaska was withdrawn by stipulation of the parties dated November 7, 1996.

3. Under Section 28.20 of the Consolidated Rules, Respondent had thirty days from receipt of the administrative complaint to file a response, unless the deadline was extended under Section 28.20(b)(1) for the purpose of engaging in informal settlement negotiations.

4. Section 28.21(b)(2) of the Consolidated Rules specifies the penalty factors which are to be addressed for violations of Section 311 of the Clean Water Act, 33 U.S.C. §1321:

The argument shall be limited to 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 the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

5. For example, if a $10,000 penalty were paid out of the $3.9 million in principal in the College's "quasi-endowment," the resulting reduction in future annual income from the "quasi-endowment" would be very small.

6. Compare the Toxic Substances Control Act, which provides that penalties collected from a "local educational agency" for violations relating to asbestos hazard in elementary and secondary schools are to be used to remedy the violations, with any excess deposited in the Asbestos Trust Fund. TSCA Section 207(a), 15 U.S.C. §2647(a). See also Rose and Alex Pilibos Armenian School, No. TSCA-09-91-001 (EPA IX RJO, November 27, 1991) (determination of civil penalty against a local educational agency under TSCA Section 207(c) includes consideration of "the ability of the violator to continue to provide educational services to the community").

7. See Buxton v. EPA, No. 95-1301, slip op. at 9-10 (D.D.C. April 10, 1997) (upholding a monetary penalty under Clean Water Act Section 309(g) designed to deter

future violations).