



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 3
 Philadelphia, Pennsylvania



IN THE MATTER OF:)
)
 MIKE FUEL OIL CORPORATION)
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)
)
 RESPONDENTS) DOCKET NO. CWA-III-149
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)
)

ORDER DIRECTING ENTRY OF RESPONDENT'S DEFAULT AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Subsection 311(b)(6) of the Clean Water Act, 33 U.S.C. § 1321(b)(6). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28--CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CLASS I CIVIL PENALTIES UNDER THE CLEAN WATER ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT, AND THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES UNDER PART C OF THE SAFE DRINKING WATER ACT, 56 Fed. Reg. 29,996 (July 1, 1991), issued December 2, 1991 as procedural penalty guidance for Class I administrative penalty proceedings under Subsection 311(b)(6) of the Clean Water Act. ("Consolidated Rules"). The case involves the discharge or spill of some 200 gallons to the Navigable Waters of the United States on January 23, 1993. **This ORDER directs entry of Respondent's liability under Subsection 28.21(a) of the Consolidated Rules and directs Complainant to submit written argument regarding assessment of an appropriate civil penalty under Subsection 28.21(b) of the Consolidated Rules.**

PROCEDURAL BACKGROUND

The Associate Division Director for Superfund Programs of Region III of the United States Environmental Protection Agency (Complainant) initiated this action on June 28, 1995, issuing to

Mike Fuel Oil Corporation, d/b/a Sandman Plaza II Truckstop (Respondent), an administrative complaint under Subsection 28.16(a) of the Consolidated Rules. The administrative complaint was served by certified mail, and Respondent received it on January 22, 1996. The administrative complaint contained recitations of statutory authority and allegations regarding Respondent's releases of 200 gallons of oil from an onshore facility to an unnamed tributary of the Swatera Creek. The administrative complaint made reference to pertinent enforcement provisions of the Clean Water Act, provided notice of a proposed penalty of \$10,000.00 and notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order and informed Respondent of its opportunity to request a hearing. Complainant transmitted a copy of the Consolidated Rules with the administrative complaint. The notice of opportunity to request a hearing included in the administrative complaint gave very explicit instructions on procedures for filing a hearing request and made reference to the enclosed Consolidated Rules.

The Respondent failed to respond to the administrative complaint in a timely fashion.

UNTIMELY RESPONSE

20. Under Subsection 28.20 of the Consolidated Rules, Respondent had thirty days from its receipt of the administrative complaint to file a response:

Respondent's deadline. The respondent shall file with the Hearing Clerk a response within thirty days after receipt of the ... administrative complaint.

This thirty-day time limit is statutorily-based:

...Before assessing a civil penalty under this clause, the Administrator...shall give to the person to be assessed such penalty written notice of the Administrator's...proposal to assess the penalty and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order.

Subsection 311(b)(6)(B)(1) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i) (emphasis added).

Since the certified mail return receipt for the administrative complaint was signed by Respondent's agent on January 22, 1996, the deadline for the filing of the response was February 21, 1996. According to the preamble to the Federal Register publication of proposed Part 28, "[t]he Presiding Officer may not extend a respondent's deadline." 56 Fed. Reg. 30,011 (July 1, 1991). As a consequence of its failure to file a timely response to the administrative complaint, **Respondent has waived its opportunity to appear in this action for any purpose.**

See Subsection 28.20(e) of the Consolidated Rules.

Respondent's failure to file a timely response to the administrative complaint also automatically triggers the default proceedings provision of the Consolidated Rules. Subsection 28.21(a) of the Consolidated Rules provides:

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

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the congressional declaration of policy that there should be no discharge of oil into or upon the navigable waters of the United States or their adjoining shorelines. See Section 311(b)(1) of the Clean Water Act, 33 U.S.C. § 1321(b)(1).

Section 311 of the Clean Water Act, 33 U.S.C. § 1321, provides an elaborate set of penalties and remedies for dealing with prohibited acts, spills and regulatory violations. Subsection 311(b)(6)(A) and (B), 33 U.S.C. § 1321(b)(6)(A) and (B) allow for the administrative of civil penalties by the United States Coast Guard and by EPA.

Administrative penalties may be assessed under conditions set forth in Subsection 311(b)(6)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(A): "Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility-

(1) from which oil ...is discharged...

May be assessed a class I or a class II civil penalty by the Secretary of the department in which the Coast Guard is operating or the Administrator."

Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing. Subsection 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i) (emphasis added).

In addition to requesting a hearing, a respondent may extend the deadline for answering the administrative complaint by negotiating towards settlement with the complainant and filing a notice of those negotiations with the Regional Hearing Clerk. See § 28.20(b) of the Consolidated Rules.

CAUSE OF ACTION

To state a cause of action against Respondent under Subsection 311(b)(6) of the Clean Water Act, 33 U.S.C. § 1321(b)(6), Complainant must allege that:

Respondent is a person;

Respondent owned or operated or was in charge of a vessel, onshore facility or offshore facility from which oil was discharged to Navigable Waters of the United States or their adjoining shorelines;

The Complainant has stated a cause of action in the administrative complaint. In Paragraph 6 of the administrative complaint Complainant alleged that Respondent is a person within the meaning of Subsection 311(a)(7) of the Clean Water Act, 33 U.S.C. § 1321(a)(7). In Paragraph 9 of the administrative complaint Complainant alleged that Respondent owns and operates an underground storage tank from which there was a discharge of oil. In Paragraph 10 of the administrative complaint complainant alleged that the underground storage tank is an onshore facility, and in Paragraph 11 complainant alleged that the tank released 200 gallons of oil to an unnamed tributary of Swatera Creek on or about January 23, 1993. In Paragraph 12 complainant alleged that the discharge of oil caused a visible sheen upon the surface of the unnamed tributary of Swatera Creek.

The foregoing factual allegations suffice to state a cause of action.

ENTRY OF DEFAULT AS TO LIABILITY

Having determined that Complainant has stated a cause of action in the administrative complaint, the Presiding Officer must direct the Regional Hearing Clerk to enter Respondent's default as to liability in the administrative record of this proceeding. See Subsection 28.21(a)(1) of the Consolidated Rules. Accordingly, by this ORDER the Presiding Officer directs the Regional Hearing Clerk to enter Respondent's default as to liability in the record of this proceeding. Upon entry of this ORDER, the factual allegations of the administrative complaint as to liability (Paragraphs 6, 9, 10, 11, and 12 in the administrative complaint) shall be deemed recommended findings of fact and the "allegations" of law (Paragraphs 1, 2, 3, 4, 5, 7,) and the assertions of liability (Paragraph 13) shall be deemed recommended conclusions of law. (Complainant's request for relief, contained in the second sentence of Paragraph 2, is not deemed a recommended conclusion of law.)

As stated above, Respondent's failure to file a timely response to the administrative complaint waived Respondent's opportunity to appear in this action for any purpose under

Subsection 28.20(e) of the Consolidated Rules.

ORDER

The Regional Hearing Clerk is directed to enter the Respondent's default as to liability in the record of this proceeding.

DETERMINATION OF REMEDY

In accordance with Subsection 28.21(b)(2) of the Consolidated Rules, **Complainant shall submit within thirty days of receipt of the entry of default a written argument (with any supporting documentation) regarding the assessment of an appropriate civil penalty, limited to the seriousness of the violation, 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.**

Date: February 14, 1997 /S/ _____
BENJAMIN KALKSTEIN
Presiding Officer

Last Updated: October 18, 1999