

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

IN THE MATTER OF:)	Docket No. 10-97-0120-OPA
)	
Baker Aviation, Inc.,)	Proceeding to Assess
)	Class I Administrative
)	Penalty Under Clean Water
)	Act Section 311,
RESPONDENT)	33 U.S.C. §1321
)	
)	

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), 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. §1321(j) (1), provides for the issuance of regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and 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. Section 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

¹The 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).

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 July 1, 1997, by issuing to Baker Aviation, Inc. (Respondent) an administrative complaint under the Consolidated Rules. The administrative complaint contained recitations of statutory authority and allegations regarding Respondent's alleged violation of the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 and the Clean Water Act. The administrative complaint provided notice of a proposed penalty in the amount of \$11,000. The letter accompanying the administrative complaint provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed the Respondent of its right to a hearing and of the opportunity to seek an extension of the thirty-day period for filing a response.

By memorandum dated July 9, 1997, Steven W. Anderson was designated as Presiding Officer in this matter pursuant to §28.16(h) of the Consolidated Rules.

Under Section 28.20 of the Consolidated Rules, Respondent had thirty days from its 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. The Respondent and the EPA Regional Counsel executed a stipulation on August 7, 1997 which extended the response deadline to September 10, 1997.

No response was filed by the Respondent. The Complainant filed a Motion for Default Judgment on November 4, 1997. No reply to the motion was filed by the Respondent. The Respondent has therefore failed to respond to the administrative complaint in a timely fashion and failed to provide any explanation for not filing a timely response.

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 Section 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. Section 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.

By Order dated January 23, 1998 the Presiding Officer determined that the Complainant had stated a cause of action in the administrative complaint. In the same Order the Regional Hearing Clerk was directed to enter Respondent's default as to liability in the record of the proceeding as required by § 28.21(a) (1) of the Consolidated Rules.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under § 28.21(a) (1) of the Consolidated Rules, upon entry of Respondent's default as to liability, the allegations as to liability included in the administrative complaint are deemed recommended findings of fact and conclusions of law. Accordingly, I accept those allegations and make the following Findings of Fact and Conclusions of Law:

(1) Respondent Baker Aviation, Inc. is a corporation organized under the laws of the State of Alaska with a place of business located at or near Kotzebue, Alaska. Respondent is a person within the meaning of Section 311(a) (7) of the Clean Water Act and 40 C.F.R. Section 112.2.

(2) Respondent 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 Baker Aviation, Inc., a facility used for gathering, storing, processing, transferring, or distributing oil or oil products, located at or near Kotzebue, Alaska ("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 and has at least one container whose capacity exceeds 660 gallons. Specifically, Respondent has two 3,000 gallon and one 300 gallon above-ground storage tanks, for a total above-ground storage capacity of 6,300 gallons.

(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) Respondent began operations more than six months prior to the date of the Complaint.

(7) 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.

(8) 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.

(9) As of the date of the Complaint, Respondent had failed to prepare an SPCC plan for its facility, in violation of 40 C.F.R. Section 112.3.

(10) Under Section 311(b)(6)(B)(i) of the Clean Water Act, Respondent is liable for a civil penalty of up to \$11,000 per violation, up to a maximum of \$27,500.

(11) The Complainant proposes that an administrative penalty be assessed against the Respondent in an amount not to exceed \$11,000.

DETERMINATION OF REMEDY

In accordance with Section 28.21(c) of the Consolidated Rules, Complainant has submitted written argument regarding the assessment of an appropriate civil penalty.²

²Section 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,

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

The seriousness of the violation or violations: The violation involves the failure to prepare an SPCC plan for the Respondent's commuter and charter airline terminal at the Ralph Wien Memorial Airport in Kotzebue, Alaska. The facility has apparently never had an SPCC plan. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 3, page 5. 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.

Aviation gasoline and heating fuel are stored at the facility in three above-ground storage tanks.³ The tanks had no secondary containment as of the August 11, 1996 EPA inspection, and still lacked adequate secondary containment at the time of an EPA follow-up inspection on August 11, 1997. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 2.

the economic impact of the penalty on the violator, and any other matters as justice may require.

³Two aviation gasoline tanks of 3,300 and 2,300 gallons capacity and one 300 gallon tank for heating oil. See note 1 to Complainant's Argument Regarding Assessment of Appropriate Penalty.

The Respondent's storage tanks are relatively small, having a total capacity of 5,900 gallons. Complainant's Argument Regarding Assessment of Appropriate Penalty, footnote 1.

The facility is situated less than one hundred yards from navigable water. Complaint, Paragraph 18. Given the flat topography of the area, oil spilled at the facility can reach navigable waters or adjoining shorelines directly. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 4. 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, other than that a spill would have an "adverse" effect on vegetation (including adjacent tundra) or on receiving waters. Complainant's Argument Regarding Assessment of Appropriate Penalty, page 3. 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 economic benefit to the violator, if any, resulting from the violation: The SPCC plan prepared for the Respondent in October, 1997 by an engineer cost \$2,300. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 5. EPA estimates that constructing proper containment for the three tanks at the facility will cost \$5000. Complainant's Argument

Regarding Assessment of Appropriate Penalty, page 4. The economic benefit accruing to the Respondent from delaying these expenditures would range from approximately \$230 dollars for one year's delay up to \$3,635 for five years' delay. Complainant's Argument Regarding Assessment of Appropriate Penalty, pages 4 and 5.

The degree of culpability involved: Respondents' conduct reflects a high degree of culpability. The EPA inspection which ultimately resulted in this penalty proceeding took place on August 11, 1996. The Respondent was apparently derelict in responding to communications from EPA in September, 1996, December, 1996, and February, 1997, and apparently did not retain an engineer to prepare a SPCC plan until after the Complaint was issued. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibits 1, 3, and 5. In addition, the SPCC plan had not been fully implemented as of October, 1997, for example with respect to construction of adequate secondary containment. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 1. There is no indication in the administrative record that the lack of secondary containment has yet been corrected by the Respondent. The Respondent has been derelict in not responding to EPA's enforcement actions and in not remedying these violations more promptly.

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 apparently not yet remedied the violation completely. Importantly, secondary containment has not yet been constructed around two of the storage tanks and the secondary containment for the third tank is inadequate. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 1.

The economic impact of the penalty on the violator: In a proceeding under the Consolidated Rules the respondent is to bear the burden of going forward to present exculpatory statements as to liability and statements opposing the complainant's request for relief. See § 28.10(b)(1) of the Consolidated Rules. The Complainant does not have the burden of persuading Agency decisionmakers on the respondent's inability to pay, if the respondent has failed to come forward with such information by

the applicable deadline. Respondent's default results in an un rebuttable presumption that Respondent can pay any assessed penalty. See Preamble to Proposed Consolidated Rules, 56, Fed. Reg. 29.996, 30,013 (July 1, 1991). Accordingly, Complainant is not required to make an affirmative showing of the Respondent's ability to pay.

Complainant has provided a Dun & Bradstreet report on the Respondent, which states that the Respondent's airline passenger and charter service and air courier service provides service to twenty communities in Alaska. Respondent employs 33 people, 23 of whom work in Kotzebue, and owns 12,000 square feet in a two-story metal building and a 2,300 square foot hanger on a leased lot at a state airport. Sales for 1997 totaled \$4.5 million. Complainant's Argument Regarding Assessment of Appropriate Penalty, Exhibit 6.

Any other matters as justice may require: Assessment of a penalty for the violations involved in this action will encourage both Respondent and others similarly situated to plan for and deal expeditiously with the requirements of the Oil Pollution Prevention Regulations applicable to their business operations.

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). 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, or an inappropriately small penalty, were assessed in this case.⁴

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of \$11,000 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 \$11,000 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

⁴See 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).

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 \$11,000, 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 (ORC-158)
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 311(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: June 8, 1998

(signed) _____
Chuck Clarke
Regional Administrator

Prepared by: Steven W. Anderson, Presiding Officer.