UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	:	
	:	
Philadelphia Macaroni Company,	:	Docket No. CWA-III-187
	:	
Respondent	:	

INITIAL DECISION

This is a civil administrative proceeding instituted pursuant to section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6)(B)(ii). The complaint charges that the Respondent violated section 311(j), 33 U.S.C. § 1321(j), of the CWA and its implementing regulations at 40 C.F.R. Part 112 when it failed to prepare a Spill Prevention Control and Countermeasure ("SPCC") plan within 6 months of installing a 10,000 gallon oil tank at its facility in Warminster, Pennsylvania. The Complainant proposes that a penalty of $33,420 be assessed for Respondent's alleged violation.

In opposition, the Respondent urges that it was not required to prepare an SPCC plan because a discharge of oil from its facility into a navigable water could not reasonably be expected and that the penalty proposed by Complainant is arbitrary and excessive. A hearing was held in this matter on January 22, 1998 in Philadephia, Pennsylvania.(1)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CWA § 311(j)(1)(C) directs the President(2) to "issue regulations consistent with maritime safety and with marine and navigation laws . . . establishing procedures, methods, and equipment 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 . . ." The regulations implementing CWA § 311(j) are found at 40 C.F.R. Part 112 which sets forth procedures, methods and requirements to prevent the discharge of harmful quantities of oil from non-transportation-related facilities into or upon the navigable waters of the United States. 40 C.F.R. § 112.3(b) provides that:

> [O]wners or operators of onshore and offshore facilities that become operational after the effective date of this part, and that have discharged or could reasonably be expected to discharge oil in harmful quantities . . . shall prepare an SPCC in accordance with [40 C.F.R.] § 112.7. [S]uch plan shall be prepared within six months after the date such facility begins operations . . . .

Thus, under § 112.3(b) a facility may be subject to the requirement to prepare an SPCC plan in either of two ways: if it has discharged a harmful quantity of oil into the navigable waters of the United States, or if it could reasonably be expected to make such a discharge.

The complaint in this matter arose from a January 29, 1997 EPA inspection of Respondent's facility by EPA Inspector Robert J. Sanchez.[(3)] During his inspection, Mr Sanchez found that Respondent did not have an SPCC plan for its facility.[(4)] Tr.-108 (Sanchez); CX 1 at ¶ 11. The inspection was prompted by a call from the Pennsylvania Department of Environmental Protection ("PADEP") informing EPA that Respondent's facility might be in violation of the oil pollution prevention rules and that it had previously discharged oil into an unnamed tributary of Pennypack Creek ("tributary"). Tr.-102 (Sanchez). John Haggerty, Respondent's plant manager, confirmed to Mr. Sanchez during his inspection that, on January 11, 1996, Respondent discharged #2 fuel oil into the tributary.[(5)] Tr.-110-11 (Sanchez). Mr. Breitenstein, the PADEP inspector who responded to the spill testified that, based on his observations at the spill site it was his opinion that a "harmful quantity" of oil was discharged into the tributary on January 11, 1996. Tr.-37. Respondent's January 11, 1996 discharge of a harmful quantity of oil into a navigable water of the United States brought it within 40 C.F.R. § 112.3(b)'s SPCC plan requirement. Respondent's failure to complete an SPCC plan by April 3, 1996 put it in violation of the Part 112 rules and the CWA § 311(j).[(6)]

Respondent argues that, because its plant is located approximately one quarter of a mile across a flat vegetated field from the tributary, and because of measures taken by it to contain or prevent spills, including placing the tank in an impermeable vault large enough to hold the contents of the tank, it could not reasonably be expected to discharge oil into the tributary. It claims further that the extraordinary combination of events that led to the January 1996 release demonstrates that a discharge from its facility into a navigable water could not reasonably be expected. Moreover, Respondent asserts, measures taken after the January 12, 1996 spill made the chances of a repeat of that incident almost nonexistent. Respondent adds, citing In the Matter of the City of Akron, SPCC 76-V-048, 1 E.A.D. 442, 445-46 (Final Decision, Mar. 20, 1978), that mere proximity to a navigable waterway is not sufficient, by itself, to place a facility in the purview of 40 C.F.R. Part 112.

While unopposed evidence establishes that the January 1996 spill subjects Respondent to the SPCC plan requirement, Respondent's contention that a spill at its facility could not reasonably be expected to reach a navigable waterway is also contrary to preponderance of record evidence. The purposes of the oil pollution prevention rules are first, to prevent spills from reaching navigable waters and second, to ensure that when a spill does occur that its impact on the waters of the United States is minimized. When assessing whether a facility can reasonably be expected to discharge oil into a navigable water, the focus should be "on the maximum possibility of a discharge." In the Matter of Central Florida Pipeline Corporation, Docket No. SPCC-IV-369, 1 E.A.D. 264, 266 (Final Decision, July 6, 1976). As the CJO observed in Florida Pipeline, this is particularly the case when one considers CWA § 311(b)(1), 33 U.S.C. § 1321(b)(1), which provides that:

> The Congress hereby declares that it is the policy of the United States

> that there should be *no* discharges of oil or hazardous substances into or upon the navigable water of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

Id. (emphasis included). Testimony presented at hearing shows that it was reasonable to expect that Respondent's facility could discharge oil into a navigable water.

EPA Inspector Sanchez testified that, based on his inspection of the facility, Respondent should reasonably have expected that a spill from its facility could reach a navigable water. Tr.-126-27. As directed by 40 C.F.R. § 112.1(d)(1)(I), Mr. Sanchez based his conclusion on consideration of the geography of the facility's location, which included proximity to navigable waters, land contours and drainage while excluding from consideration manmade features that might prevent a spill from reaching a navigable waterway. Tr.126-32. Mr. Sanchez determined that the facility was approximately one quarter mile from the tributary. Tr.-120. He also determined that an automatic sump pump, which empties directly into the tributary, was located approximately ten feet from the oil tank. Tr.-115 The sump pump was also in close proximity to the tank fill lines, and was connected to a drain in an outside stairwell, which, in turn was near the relief vent for the oil tank fill line. Tr.-117-19, 127-28.(7) Taken together, these factors led Mr. Sanchez to conclude that Respondent's facility was one which could reasonably be expected to discharge oil into navigable waters. Tr.-127-28. Inspector Breitenstein reached the same conclusion based on his own observations. Tr.-44.

Respondent argues that the "extraordinary" events that led to the January 1996 spill show that a discharge into navigable waters could not reasonably be expected, but that argument does not stand up in the face of the thorough and persuasive testimony of Mr. Sanchez and Mr. Breitenstein. If anything, the events leading up to the spill demonstrate the importance of preparing and implementing a plan. As Mr. Sanchez testified, plans help facilities determine their weak points. Although Respondent was not required to have a plan in place on January 11, 1996, if it had, its spill might have been prevented or might never have reached the tributary.(8) Moreover, the plain language of 40 C.F.R. § 112.1(d)(1)(I) shows that Respondent's reliance on the vault enclosing the tank and other manmade measures taken to prevent or contain a spill is misplaced. It explicitly states that when evaluating a facility's potential to discharge oil into navigable waters, manmade features that may prevent a spill from reaching the water are to be excluded from consideration.

Finally, Akron, is distinguishable from the instant case. In Akron the CJO found that the complainant had failed to offer specific evidence, such as an explanation of how oil discharged from the facility in question might reach the water, to demonstrate that respondent's facility could reasonably be expected to discharge into a navigable water. Complainant's witnesses have explained in detail how a discharge at Respondent's facility may be expected to reach Pennypack Creek. Both Mr. Sanchez and Mr. Breitenstein testified that the sump pump in the basement empties directly into the tributary, a navigable water, as it did on January 11, 1996. Mr. Sanchez described it, "as a source for spills to get out, [] that drainage system to me was the same as if that stream ran right through that room." Tr.-134.

PENALTY

Administrative penalties for violations of CWA § 311 are determined in accordance with CWA § 311(b)(6)(B)(ii), which establishes an overall limit of $125,000 and a maximum of $10,000 per day for class II civil penalties, and CWA § 311(b)(8) which establishes the factors that are to be considered in determining the amount of any penalty to be assessed. Section 311(b)(8) directs consideration of the seriousness of the violation, any economic benefit accruing to the violator as a consequence of 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 to minimize or mitigate the effects of the discharge, the

economic impact of the penalty on the violator, and any other matters that justice requires. In addition, Consolidated Rules of Practice 22.14(c) and 22.27(b) direct the Presiding Officer to consider, in addition to the factors laid out in the statute, any civil penalty guidelines issued under the statute. 40 C.F.R. §§ 22.14(c), 22.27(b).[(9)]

The Complainant argues that a penalty of $33,420 is warranted based on its application of the statutory factors to the facts of the case. Complainant points in particular to the seriousness of Respondent's violation, its culpability, and its history of past violations in urging that imposition of a significant penalty is justified.

Seriousness of the Violation

Respondent's violation, a complete failure to prepare an SPCC plan, is one of the most serious possible violations of the Part 112 rules. Mr. Sanchez, Complainant's penalty witness, testified that such a failure "is a very significant blow to this regulation." Tr.-174. Such a failure thwarts both objectives of the oil pollution prevention rules -- prevention of spills and containment of spills that do occur. The formulation of a plan requires consideration of the myriad ways in which a spill might occur, thereby contributing to the prevention of spills, and the plan itself, when implemented, provides a means to minimize the impact of spills that do occur.

The threat of another spill and the potential for damage to the environment from a spill during the period of Respondent's noncompliance was significant. Respondent's tank has a capacity of 10,000 gallons, more than 15 times the regulatory threshold of 660 gallons. If discharged into the tributary, that amount of oil could cause significant damage in an area that Mr. Sanchez characterized as largely rural and minimally degraded. Tr.-173-74.

The January 1996 spill is indicative of the type of harm that could have been anticipated from another spill at Respondent's facility. Among other damage, that spill caused thirty six ducks to be covered with oil, killing two of them. Tr.-37-38 (Breitenstein). Although the precise scope of the damage caused by the spill is not clear because Mr. Breitenstein's investigation was hindered by darkness, Mr. Breitenstein testified that based on his investigation, "there could very easily have been further impacts to the ecosystem besides ducks being oiled." Tr.-40. Overall Mr. Breitenstein, based on his experience, characterized the spill as "definitely . . . a more severe type of spill." Tr.-44. Furthermore, although the tank itself is approximately one quarter of a mile over land from the water, the sump pump which empties into the tributary is only about ten feet from the tank. The ease with which a spill could reach the tributary is another factor increasing the seriousness of Respondent's violation.

Balanced against these considerations are several factors mitigating the seriousness of Respondent's violation. First is the fact that Respondent, a pasta maker, is not in the business of oil storage. Second are the secondary containment measures employed by Respondent. Specifically, the vault around Respondent's tank has the capacity to hold the entire 10,000 gallon contents of the tank should it fail. Third are the measures Respondent took after its 1996 spill to prevent a similar occurrence. These measures included construction of a containment box around the fill pipe, installation of an additional tank capacity alarm, extension of the relief valve beyond the outside stairway so that any spill would hopefully be deposited on the ground and not find its way to the sump pump, and the implementation of procedures to monitor oil deliveries. The measures taken by Respondent, while no substitute for an SPCC plan, do merit a reduction of ten percent in the proposed penalty.

Culpability

The record in this case establishes Respondent's culpability. Respondent made no apparent effort to make itself aware of the environmental regulations that might apply to its new oil tank. Even after the 1996 spill, which should have triggered

some reflection about the environmental responsibilities that accompany installation of a large oil tank, Respondent still failed to make itself aware of its responsibilities. Respondent, with yearly sales in the neighborhood of $40 million and several manufacturing plants, had the resources to determine its environmental responsibilities, either through its own efforts or by hiring an environmental consultant, and to pay a professional engineer to prepare an SPCC plan.

Respondent's efforts to diminish its culpability and deflect responsibility for its violations are not persuasive. Respondent asserts that the contractor who installed the tank was responsible for ensuring that Respondent was in compliance with all necessary environmental laws and regulations. The record, however, does not support this argument. The document relied upon by Respondent to establish that the contractor was responsible for ensuring compliance with all environmental laws and regulations indicates only that the contractor would take care of all necessary state and local permits. RX 1 at ¶1.

Respondent also urges a reduced penalty because it is a naive pasta maker, not a tank farm or other facility that deals with large quantities of oil. This argument, that Respondent should be held to a lower standard because it does not handle what it considers large quantities of oil, is without merit. The oil pollution prevention regulations exist to prevent pollution from all regulated facilities, not only large ones. Respondent has not shown any reason to reduce its penalty on culpability grounds.

Prior Violations and Penalty Paid for Same Incident

Respondent's January 1996 spill, and its failure to report it to the National Response Center as required under CERCLA are both prior violations to be considered in determining an appropriate penalty. Respondent appears to confuse its January 1996 spill with the violation it is charged with in this proceeding when it argues that it has already paid a penalty to the state of Pennsylvania for its violation and that this amount should be credited in some way against any penalty to be assessed in this case. The spill is a separate violation from Respondent's failure to have an SPCC plan. Thus, Respondent's claim to never having violated an environmental law or regulation until "this incident" is incorrect and Respondent is due no penalty reduction.

Economic Impact of Penalty on Respondent

Complainant introduced at hearing Dun and Bradstreet reports showing Respondent's projected sales to be $40 million in 1996 as evidence that the proposed penalty will not adversely impact Respondent's business. CX 7(a)-(c). In response Respondent asserts that sales do not equal profits. However, Respondent has not introduced any documents, such as its tax returns, to support its apparent claim that it cannot afford to pay the proposed penalty. Respondent also appears to argue that, because it is a "small business," as that term is defined under the Small Business Act and EPA regulations, any penalty assessed against it should be minor. Respondent's status as a "small business" under the SBA and EPA regulations is not relevant to a determination of the economic impact of the proposed penalty on Respondent. Respondent has not provided any evidence to warrant a penalty reduction based on the economic impact of the proposed penalty on Respondent's business.

Other Matters as Justice May Require

Respondent makes several attacks on Complainant's proposed penalty on grounds that it is arbitrary and excessive. Respondent asserts that Complainant arbitrarily decided to pursue a class II penalty instead of a class I penalty, which is capped at $25,000. This argument is without support in the record. The seriousness of Respondent's violation as demonstrated by Complainant amply justifies the imposition of a class II penalty in this case. The proposed penalty is also arbitrary, Respondent argues, because Complainant simply picked a penalty amount more or less at random and worked backward through the statutory factors to justify it. While Complainant's method of penalty calculation was not precise, in its consideration of all the required statutory factors it provided sufficient

justification for imposition of a significant penalty. Moreover, Respondent has offered no alternative amount or method for calculating a penalty in this case.

Respondent also argues that the penalty proposed by Complainant is out of line with past penalty awards for SPCC plan violations and cites a string of cases that it claims demonstrates this point. This argument is unavailing. No effort was made to show why the penalty determinations in the cited cases are relevant to a determination in the instant case. In addition, many of those listed were instituted under statutes other than the CWA, and all were decided before passage of the Oil Pollution Act of 1990 ("OPA"), Pub. L. No. 101-380, 101 Stat. 484, which, among other changes, provided for increased civil penalties under CWA § 311.[(10)]

In addition, Respondent's effort to distinguish Ashland Oil, the most recent SPCC case under the CWA, is not persuasive. In Ashland Oil, the EAB assessed a penalty of $55,125 for Respondent's failure to timely amend its SPCC plan and to have a "carefully thought-out" plan. In seeking to distinguish Ashland Oil, Respondent again appears to argue that the oil pollution prevention rules are not really meant to apply to facilities like Respondent's, and again confuses the imposition of a penalty for a spill with that for a violation of the Part 112 rules. Respondent has failed to show that any equitable considerations merit a reduced penalty in this case.[(11)]

Based on the foregoing, it is determined that Complainant's proposed penalty of $33,420 will be reduced by 10% resulting in a total penalty of $30,078.

ACCORDINGLY, IT IS ORDERED that Respondent violated section 311(j), 33 U.S.C. § 1321(j), of the CWA and its implementing regulations at 40 C.F.R. Part 112 when it failed to prepare a Spill Prevention Control and Countermeasure plan within 6 months of installing a 10,000 gallon oil tank at its facility in Warminster, Pennsylvania.

IT IS FURTHER CONCLUDED that Respondent Philadelphia Macaroni Company IS ASSESSED a civil penalty of $30,078 for the violations of the Clean Water Act.

Payment of the full amount of the civil penalty assessed must be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

U. S. EPA, Region III
(Regional Hearing Clerk)
Mellon Bank
P.O. Box 360515M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address must accompany the check.

Failure by Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27 (c), this initial decision will become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. If an appeal is taken, it must comply with § 22.30. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties within twenty (20) days after this decision is served upon the parties.

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Edward J. Kuhlmann
Administrative Law Judge

May 28, 1998
Washington, D. C.

1. In addition to filing post-hearing and reply briefs, both parties requested, and were granted the opportunity to file a sur-replies.

2. The President has delegated his authority under this section to the Administrator of the EPA.

3. The joint stipulations filed by the parties as Complainant's Exhibit ("CX") 1 establish that Respondent Philadephia Macaroni Company is a person within the meaning of CWA § 311(a)(7), 33 U.S.C. § 1321(a)(7), and that Respondent is, for purposes of CWA § 311(a)(6), 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, the owner and/or operator of a facility located at 40 Jacksonville Road in Warminster, Pennsylvania. CX 1 at ¶¶ 1,2. It is further stipulated that Respondent's facility is an "onshore facility" within the meaning of CWA § 311(a)(10), 33 U.S.C. § 1321(a)(10) and that Respondent's facility has a 10,000 gallon tank for storage and consumption of fuel oil, which tank is an above ground tank for purposes of 40 C.F.R. Part 112 and became operational on October 3, 1995.

4. Based on the date the tank became operational, October 3, 1995, Respondent was required to have an SPCC plan by April 3, 1996.

5. Respondent does not dispute that this unnamed tributary of Pennypack Creek is a navigable water for purposes of the CWA and 40 C.F.R. § 112.2. Tr.-14.

6. Respondent submitted its SPCC plan to EPA on March 19, 1997. Tr.-144.

7. The spill on January 11, 1996 was discharged into the tributary through the automatic sump pump after the tank overflowed, spilling oil from the relief vent. The oil flowed down the outside stairwell and under the basement door, entering the sump pit from both the stairwell drain and the basement floor. Tr.-110-112 (Sanchez).

8. The importance of going through the SPCC plan process is further highlighted in the testimony of Mr. Sanchez when he notes that during his inspection of Respondent's facility he observed several open five gallon buckets of oil in the room where the sump pump was located which, "if they were to tip over, could end up in the sump and, again, be discharged to Pennypack Creek." Tr.-109. Although Respondent had taken measures to prevent a repeat of its January 1996 spill, these measures were obviously no substitute for the thorough evaluation of a facility's "weak points" that preparation of a plan entails.

9. The Agency has not adopted a policy for calculating penalties for violations of the Part 112 rules. Complainant considered and rejected using a draft policy to calculate its proposed penalty and instead based its penalty calculation on the statutory factors enumerated in CWA § 311(b)(8). The penalty assessed here will likewise be based on an application of the statutory factors to the facts of the case.

10. Passage of the OPA prompted the EAB to observe in In the Matter of Ashland Oil, Inc., Floreffe, PA, SPCC Appeal No. 91-1, 4 E.A.D. 235 (Final Decision, Sept. 15, 1992), which was decided under the pre-OPA CWA, that "we would expect in future cases involving violations of [Part 112] regulations that far larger penalties would be assessed." Id. at 250 n.29.

11. The remaining statutory factors, economic benefit and efforts to mitigate the effects of a discharge did not contribute to the penalty determination in this case. In calculating its penalty Complainant assumed, because the cost of coming into compliance is relatively small, that Respondent gained no economic benefit

from its noncompliance. As for mitigation, SPCC violations do not involve spills, thus there were no mitigation efforts to take into consideration.