

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of )  
 )  
Wolco, Inc., ) Docket No. CWA-07-2001-0067  
 )  
Respondent )

**ORDER DENYING EPA'S  
MOTION FOR ACCELERATED DECISION**

**I. Background**

The United States Environmental Protection Agency (“EPA”) has filed a complaint charging Wolco, Inc. (“Wolco”), with violating the Clean Water Act (the “Act”), 33 U.S.C. § 1251 *et seq.*, by failing to comply with the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.<sup>1</sup> Specifically, respondent is charged with failing to prepare and implement a Spill Prevention Control and Countermeasure Plan (“SPCC Plan”) as required by 40 C.F.R. 112.3.<sup>2</sup> Wolco denies this allegation. EPA now moves for accelerated decision, *i.e.*, summary judgment, as to liability, pursuant to Procedural Rule 22.20. 40 C.F.R. 22.20. It does not seek judgment as to the \$74,217 civil penalty proposed in the complaint.

Wolco is located in St. Louis, Missouri. Ans. ¶ 4. There, it operates a facility which stores, transfers, and distributes oil products. Ans. ¶ 11. On or about July 18-19, 2000, EPA conducted an unannounced SPCC inspection of respondent’s facility. At the time of the inspection, the facility had a storage capacity of approximately 413,420 gallons, with the largest above ground storage tank having a capacity of approximately 20,000 gallons. Ans. ¶ 21.

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<sup>1</sup> Section 112.1 is titled, “General applicability,” and it provides:

- (a) This part establishes procedures, methods and equipment ... to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or upon the navigable waters of the United States or adjoining shorelines.

<sup>2</sup> The complaint contains two counts. In Count I, EPA charges that Wolco failed to submit an SPCC plan. In Count II, EPA charges that the documents actually submitted by respondent were so inadequate as not to constitute a valid SPCC Plan. While EPA characterizes the two counts as alternative pleading, the fact is that Wolco is simply charged with failing to submit an SPCC Plan in violation of 40 C.F.R. 112.3.

As a result of its inspection, EPA filed a complaint against Wolco which led to the present enforcement action. In the complaint, EPA asserts that during the July 18, 2000, inspection, facility personnel were requested by the EPA inspectors to produce the SPCC Plan required by 40 C.F.R. 112.3, but were unable to do so. Compl. ¶ 26. EPA further asserts that the inspectors returned to the facility on July 19, 2000, at which time respondent's facility personnel still were unable to produce an SPCC Plan. Compl. ¶ 27. In its answer, Wolco "admits that facility personnel were unaware of the location or the existence of an 'SPCC Plan' defined as such, but ... facility personnel were aware of the Procedure Manual and the Wolco Spill Procedure documents which significantly conformed to the guidelines found in 40 C.F.R. §112.7." Ans. ¶¶ 26 & 27.

## **II. Discussion**

Section 311(b)(6)(A)(ii) of the Clean Water Act provides that an owner or operator of an onshore facility "who fails or refuses to comply with any regulation issued under subsection (j) of this section" may be assessed a civil penalty. 33 U.S.C. § 1321(b)(6)(A)(ii). Among other things, Section 311(j) provides the statutory authority for the issuance of regulations "establishing procedures, methods, and equipment ... to prevent discharges of oil and hazardous substances from ... onshore facilities ...." 33 U.S.C. § 1321(j). As noted, 40 C.F.R. Part 112 contains those regulations intended to prevent the discharge of oil from non-transportation-related onshore facilities into "the navigable waters of the United States or adjoining shorelines."

The requirement for the preparation and the implementation of Spill Prevention Control and Countermeasure Plans is contained in Section 112.3. 40 C.F.R. 112.3. This is the regulation that Wolco is alleged to have violated. As it relates to this case, Section 112.3 provides that owners of onshore facilities that either 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 the navigable waters of the United States, or adjoining shorelines, shall prepare an SPCC plan, in writing, in accordance with Section 112.7. 40 C.F.R. 112.3 & 112.7.

In its motion for accelerated decision, EPA asserts that Wolco had a duty to prepare and implement an SPCC Plan for its facility, and it failed to do so. According to complainant, the record shows that respondent owns a non-transportation-related oil storage and distribution facility that has the potential to discharge oil in harmful quantities (and, in fact, already has done so) into navigable waters of the United States and adjoining shorelines. Thus, according to EPA, the requirement that Wolco have a Spill Prevention Control and Countermeasure Plan.

Wolco defends against EPA's motion on two grounds. First, respondent argues that EPA does not have jurisdiction in this matter. In that regard, respondent submits that it had no duty to prepare and implement an SPCC Plan in the first place because its facility could not reasonably be expected to discharge oil into navigable waters or adjoining shorelines. Second, Wolco submits that even if it had a duty to prepare and implement an SPCC Plan, it nonetheless adopted a plan which substantially conformed to the SPCC Plan guidelines that are contained in Section 112.7, thus satisfying its regulatory obligation.

Under 40 C.F.R. 22.20, accelerated decision may be awarded if the moving party can show that there are no material facts in dispute and that it is entitled to judgment as a matter of law. EPA has not satisfied this standard. Here, on the strength of the affidavit of Gene A. Warmann, respondent is able to show that there are mixed questions of law and fact that can not be resolved short of a hearing. While it is the “Warmann” affidavit which is the key to Wolco’s defeating EPA’s motion for accelerated decision, respondent’s threshold argument that the provisions of 40 C.F.R. Part 112 do not apply to its facility also must be addressed.

**a. The Jurisdictional Issue**

Respondent argues that there is no connection between its facility in St. Louis, Missouri, and the navigable waters of the United States. It concludes, therefore, that the SPCC provisions of 40 C.F.R. Part 112 are inapplicable. Based upon the record thus far developed in this case, respondent’s jurisdictional argument must fail.

In that regard, EPA has attached the affidavits of two EPA inspectors to its motion for accelerated decision. *See* Affidavits of Scott David Hayes and Jeffrey Gene Weatherford. Both Hayes and Weatherford stated that they conducted an SPCC Compliance Inspection of the Wolco facility on May 15-16, 2002. During this inspection, Hayes and Weatherford followed a water flow beginning in a drainage ditch on respondent’s facility property and determined that the water ultimately reached the navigable waters of the United States. As to this determination, Inspector Hayes’ affidavit reads as follows:

10. I observed water in the ditch flowing northwardly from the outfall pipe. From the northern boundary of the facility, I observed water in the ditch flowing in a southerly direction. The water was flowing at a sufficient rate to move debris such as sticks, leaves, and plastic pop bottles. Near the midpoint of the eastern boundary of the facility, the water flow direction was imperceptible and the water level was not rising. As water was flowing to this point from both the south and north directions of the ditch, it became apparent that the water was flowing through the gravel base (ballast) of the railroad tracks that bordered the east side of the facility. I also observed a recent high-water mark in the ditch left by heavy rains in the days preceding May 15. This mark was approximately 1-2 feet higher than the present water level indicating water does flow out of the ditch. In addition, the high-water mark indicates that should the water accumulating in the ditch not flow under or through the railroad ballast, it would migrate from the ditch by overflowing the ditch banks or railroad ballast. I then observed, across the railroad tracks to the east, water pooled to a depth of two to four feet at the base of the gravel bed railroad ballast.

11. I did not observe any other sources of water flowing into the pooled area east of the railroad tracks. However, on the southeastern edge of the pooled area water was flowing out of it forming a stream with perceptible flow again. I followed this stream for several hundred feet in a generally southeastern direction, noting perceptible water flow the entire way, until I observed the stream's confluence with a tributary of Watkins Creek. The tributary to Watkins Creek was a larger stream with a greater volume of water and higher banks and slower flow.

12. The tributary flows south where it empties into Watkins Creek as shown on a USGS topographical map. Watkins Creek then flows into the Mississippi River east of the facility.

Affid. of Scott Hayes.<sup>3</sup>

In arguing that water does not flow from its property to a navigable water of the United States, Wolco asserts that the affidavits of Hayes and Weatherford are based upon mere speculation. Moreover, in Wolco's view, the observations of the two EPA inspectors are contradicted by the affidavit of Don Maddox, an engineer who accompanied the inspectors on May 15. Resp. Opp. at 1-2.

Wolco is wrong on both counts. First, the affidavits of Hayes and Weatherford are based upon their eyewitness account of the water flow from the drainage ditch on respondent's property to a navigable water of the United States. Given the inspectors' observations, their conclusions regarding this water flow are reasonable, and not speculative.

Second, the Maddox affidavit upon which Wolco relies does not contradict the Hayes and Weatherford affidavits as respondent states is the case. Maddox accompanied Inspectors Hayes and Weatherford on May 15, 2002. If anything, the Maddox affidavit appears to contradict the statements that Maddox himself made to the company's legal counsel in a letter dated February 19, 2002 (Compl. Ex. 10), where he stated that a drain pipe runs through the railroad embankment. The Maddox affidavit also appears to be at odds with the company's SPCC Plan dated May 11, 2001 (Compl. Ex. 7), where Maddox certified that "[t]his property drains to a ditch, which drains to an unnamed wet-weather branch, which flows about 4,500 feet to Watkins Creek, which drains to the Mississippi River."<sup>4</sup> Respondent's reliance upon *Solid Waste Agency*

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<sup>3</sup> The affidavit of Inspector Weatherford similarly depicted the water flow from Wolco's facility to the Mississippi River.

<sup>4</sup> Although Complainant's Exhibits 7 and 10 have not yet been received in evidence, they are relied upon here because of the indicia as to their reliability. In that regard, Exhibit 7 contains a "Professional Engineer's Certification" signed by Maddox in which he represents that the information contained in the SPCC Plan is true, accurate, and complete to the best of his

*of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), therefore, is misplaced.

In sum, EPA has shown that water flows from the Wolco property and ultimately reaches the Mississippi River, a navigable water of the United States. Given the fact that respondent's facility has a storage capacity of 413,420 gallons, it is reasonable to conclude that oil spilled at this facility could reach the Mississippi River "in harmful quantities." See 40 C.F.R. 100.3.<sup>5</sup>

#### **b. The Warmann Affidavit**

Wolco's second line of defense to EPA's motion for judgment rests on the affidavit of its president, Gene A. Warman. In the affidavit, Warman states that in 1998, Wolco adopted a "Procedure Manual for Loading & Unloading Bulk Trucks and Filling Containers with Bulk Oil," and that in 1999, it adopted a one-page document titled, "Spill Procedure." In opposing EPA's present motion, Wolco essentially argues that these documents satisfy the requirements of 40 C.F.R. 112.7. Resp. Opp. at 3.<sup>6</sup>

EPA, however, argues that these documents do not comply with SPCC Plan requirements of Section 112.7. EPA's position is not based upon any affidavits of personnel qualified to interpret SPCC Plans and to determine the adequacy of such plans. Nor is complainant's position supported by any admissions of Wolco that its SPCC Plan is deficient. Instead, EPA's argument is based upon its reading of the Section 112.7 provisions and its analysis of the documents offered by respondent. Compl. Mot. at 10-16.

Whether, after a hearing, EPA's analysis is ultimately proven to be correct is different from the question presented here. That question is whether, given the state of the prehearing record, the undisputed facts show that respondent violated 40 C.F.R. 112.3 because it did not have in effect a valid SPCC Plan. As the record now stands, that is a question that can not presently be answered.

In that regard, a review of the provisions of Section 112.7 shows that they are fairly extensive. In considering these SPCC Plan provisions, and in reviewing the Warmann affidavit along with the company manuals referenced in that affidavit, this tribunal is simply unable to conclude, without more, that Wolco violated Section 112.3 because it did not have a Spill

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knowledge. As for Exhibit 10, the reliability of that document comes from the fact that it was submitted by respondent in opposing EPA's present motion for accelerated decision.

<sup>5</sup> As noted by EPA, "harmful" discharges of oil include discharges that "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines ...." 40 C.F.R. 100.3(b).

<sup>6</sup> Respondent doesn't specifically show how these documents meet the SPCC Plan regulatory requirements, apparently taking the position that the documents speak for themselves.

Prevention Control and Countermeasure Plan. An evidentiary hearing is necessary to develop these facts. Indeed, even EPA's recently filed Motion to Amend the Complaint underscores the complexity of the case and the need for testimonial evidence.<sup>7</sup>

### **III Order**

Accordingly, EPA's motion for accelerated decision is *denied*.

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Carl C. Charneski  
Administrative Law Judge

Issued: September 4, 2002  
Washington, D.C.

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<sup>7</sup> Moreover, inasmuch as EPA would still be required to present much the same evidence to support its proposed penalty as it would regarding liability, even if its motion for summary judgment had been granted, the better course is to develop the facts at hearing. In that way, there will be a better picture as to what is required by 40 C.F.R. 112.7 in an SPCC Plan and just how respondent's purported plan measures up.