IN THE MATTER OF:)	
)	**Docket No. CWA-01-2007-0161**
Butler, Maxcy & Heath. Inc.)	
)	
)	
Respondent.)	
)	

INITIAL DECISION AND DEFAULT ORDER

This is a civil administrative proceeding instituted under the Clean Water Act, 33 U.S.C. §§ 1251 to 1387 ("CWA"), the Federal Oil Pollution prevention regulations set forth at 40 C.F.R. Part 112 ("Part 112") promulgated under the authority of § 311(j) of the CWA, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules") 40 C.F.R. Part 22.

The proceeding was initiated by a Complaint and Notice of Opportunity to Request a Hearing ("Complaint") filed by the Complainant, United States Environmental Protection Agency, Region 1 ("Complainant" or "EPA") against the Respondent, Butler, Maxcy & Heath, Inc. ("Respondent") on December 26, 2007. In its Complaint, EPA alleges that the Respondent violated certain provisions of the CWA and implementing regulations by failing to reply to an information request as required by § 308 of the CWA, or to prepare and implement a Spill Prevention, Control, and Countermeasure ("SPCC") plan as required under § 311(j) of the CWA and implementing regulations. For these violations, the Complainant proposes the assessment of a civil administrative penalty in the amount of Sixty Four Thousand, Five Hundred Dollars ($64,500) against the Respondent.

In the currently pending Motion for Default Order, the Complainant alleges that the Respondent is in default for failure to file an Answer to the Complaint and requests that the full penalty of $64,500 be assessed.

Based upon the record in this matter and the following Findings of Fact and Conclusions of Law and Penalty Calculation, the Complainant's Motion for Default Order is hereby GRANTED. The Respondent, Butler, Maxey & Heath, Inc., is hereby found in default and a civil penalty in the amount of $64,500 is assessed.

BACKGROUND

This is a proceeding under §§ 308 and 311 of the CWA, and the Federal Oil Pollution prevention regulations set forth at 40 C.F.R. Part 112, initiated by issuing a Complaint on December 26, 2007 against Respondent. The Complaint alleges violations of the CWA for failure to respond to an information request (§ 308) and for failure to comply with the Oil Pollution Prevention regulations by failing to fully prepare and implement a SPCC plan in accordance with 40 C.F.R. § 112.7 and § 311(j) of the CWA.

The Complaint explicitly stated on page 9, in section V. titled *Opportunity to Request a Hearing*, that:

> Pursuant to Sections 309(g) and 311(b)(6) of the Act and 40 C.F.R. § 22.15(c), Respondent may request a hearing on the proposed penalty assessment in the Answer to this Complaint. Even if Respondent does not explicitly request a hearing in its Answer, the Presiding Officer may hold such a hearing if the Answer raises issues appropriate for adjudication. The procedures for any such hearing and for all proceedings in this action are set out in 40 C.F.R. Part 22, a copy of which is enclosed with this Complaint.

The Complaint also states on p. 9 that

> Default constitutes an admission of all facts alleged in this Complaint and a waiver of the right to a hearing on such factual allegations. In order to

> avoid default in this matter, Respondent must within 30 days after receipt of this complaint either: (1) settle this matter with the Complainant, or (2) file an original and one copy of a written Answer to this Complaint...

Respondent was served with a copy of the Complaint by certified mail, return receipt requested. Respondent signed for the Complaint on January 11, 2008 and service was complete on that date. Under 40 C.F.R § 22.15(a) of the Consolidated Rules an Answer is due within thirty days after service of the Complaint. In addition, the Complainant notified the Respondent that it was subject to default in a letter dated March 17, 2008, sent by certified mail. Respondent signed a receipt for the March 17, 2008 letter on April 2, 2008. To date, Respondent has neither filed a written Answer nor requested a hearing in this matter, and the thirty day period for doing so has lapsed.

On October 30, 2008, Complainant filed a Motion for Default Order. It was mailed to Respondent via certified mail, return receipt requested. To date, the Respondent has not filed a response to the Motion for Default Order.

FINDINGS OF FACT AND CONCULSIONS OF LAW

Pursuant to 40 C.F.R. § 112.3 and based upon the entire record, I make the following findings:

1. Respondent is a "person" as defined in § 311(A)(7) of the CWA and 40 C.F.R. § 112.2, in that Respondent is a corporation organized under the laws of Maine with a place of business located at 329 Common Road, Union, Maine.

2. Respondent is an "owner or operator" of a facility within the meaning of § 311(a)(6) of the CWA and 40 C.F.R. § 112.2 in that it has owned and operated an unattended petroleum bulk storage and distribution facility with an aboveground storage capacity of approximately 33,800 gallons (the "Facility") since March 27, 1952.

3. Respondent's Facility is a "non-transportation-related" facility as defined by the "Memorandum of Understanding between the Secretary of Transportation and the Administrator of the Environmental Protection Agency," initially published in 36 Fed. Reg. 24,080 (Dec. 18, 1971) incorporated by reference by 40 C.F.R. § 112.2 and set forth in 40 C.F.R. Part 112, app. A(1). In addition, Respondent's Facility is an "onshore facility" within the meaning of §311(a)(10) of the CWA and 40 C.F.R. § 112.2, engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil (as defined by § 311(a)(1) of the CWA and 40 C.F.R. § 112.2) or oil products at its facility as set forth in 40 C.F.R. § 112.1.

4. Respondent's Facility could reasonably be expected, due to its location, to discharge oil in harmful quantities (as defined by 40 C.F.R. Part 110) into or on navigable waters of the United States (as defined by § 502(7) of the CWA and 40 C.F.R. § 112.2), or its adjoining shorelines. The facility is located approximately 50 feet up gradient from a storm drain that discharges under the adjacent roadway (Depot Street) into an unnamed tributary of Seven Tree Pond. This unnamed tributary flows into Seven Tree Pond. Seven Tree Pond flows into the Saint George River. The Saint George River flows into the Atlantic Ocean.

5. On January 3, 2007, EPA conducted an SPCC compliance inspection at the Facility. During the inspection, the EPA inspector noted several deficiencies including, but not limited to, an incomplete, noncompliant, SPCC plan that was not fully implemented; inadequate secondary containment systems for the Facility's bulk storage tanks, unloading areas, and loading racks; and a missing plug in the dike drain for a 1000 gallon above ground gasoline tank. On that inspection day, Respondent signed the Inspection Report verifying that EPA completed an SPCC inspection of the Facility. The

Inspection Report concluded that the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 were applicable to Respondent's Facility and that the Facility was not in compliance with the requirements of 40 C.F.R. Part 112.

6. On January 23, 2007, EPA issued a letter pursuant to §§ 308(a) and 311(m) of the CWA ("the § 308 letter"). The § 308 letter, sent certified mail, return receipt requested, asked the Respondent to submit information to EPA about, *inter alia,* the oil storage capacity at the Facility and its compliance with the SPCC regulations. Respondent signed the return receipt on February 3, 2007. Therefore, Respondent's response to the § 308 letter was due to EPA no later than March 5, 2007. Respondent failed to respond to the § 308 letter by March 5, 2007, and made no request to extend the 30 day time period.

7. On March 23, 2007, EPA sent a certified mail, return receipt requested, letter to the Respondent advising that a reply to the § 308 letter was mandatory, instructed the Respondent to reply, and informed Respondent that failure to reply could result in an enforcement action against Respondent and an assessment of civil penalties. Respondent signed the return receipt for the certified letter on April 18, 2007.

8. On April 17, 2007, EPA issued an Administrative Order (Docket No. CWR 311-077-021) (the "Order") directing Respondent to comply with the Oil Pollution Prevention regulations. The Order required Respondent's compliance within 30 days from receipt of the Order. Respondent received the Order and signed the return receipt on May 4, 2007. To date, Respondent has not replied to the § 308 letter, the March 23, 2007 letter, or the Order.

9. Based on the facts outlined above, I find that Respondent failed to respond to EPA's information request issued under § 308 of the CWA, 33 U.S.C. § 1318. Accordingly, I conclude that Respondent violated § 308 of the CWA.

10. Based on the facts outlined about, I also find that the Respondent is subject to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112, and that Respondent lacked a fully prepared or implemented SPCC plan from January 10, 1974, the date on which the SPCC requirements in 40 C.F.R. § 112.3 became effective, through December 26, 2007, the date of the Complaint. Based on the applicable statute of limitation, I conclude that Respondent has been in violation of § 311(j) of the CWA and 40 C.F.R. § 112.3 for at least five years.

11. In accordance with § 22.17 (c) of the Consolidated Rules, 40 C.F.R. Part 22, the failure to file a timely Answer to the Complaint constitutes an admission of the facts alleged in the Complaint and grounds for assessing the proposed civil penalty.

DETERMINATION OF PENALTY

Violation of Section 308 of the CWA

As set forth above, the failure to reply to the § 308 of the CWA information request subjects the Respondent to penalties under § 309(g) of that Statute. Federal regulations set both a daily maximum penalty and total maximum penalty for a § 308 violation. Specifically, 40 C.F.R. § 19.4, in modification of and conjunction with § 309(g)(2)(B) of the CWA authorizes the assessment of a civil administrative penalty at a maximum of $11,000 per day for each day that a violation of § 308 continues up to a maximum of $157,500. Each day Respondent failed to reply to EPA's § 308 request constitutes a separate day of violation. When assessing a penalty for a violation of § 308,

the "nature, circumstances, extent and gravity of the violation or violations" shall be accounted for. See 33 U.S.C. § 1319(g)(3). Additionally, the violators "ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require" must be taken into account.

The response to EPA's § 308 letter was due on March 5, 2007. As of the date EPA filed the Complaint, December 26, 2007, EPA had not received a response. Therefore, Respondent has failed to comply with the requirements of § 308 of the CWA for 283 days. As cooperation by the regulated community in response to EPA's requests for information is critical to the agency's ability to effectively enforce the Act, I find a penalty of $8,000 proposed by the Complainant to be warranted.

I further find that no downward adjustments should be made to the penalty based on compliance history, good faith efforts to comply, or for the payment of penalties previously assessed for the same violations. I further find that there should be no increases to the penalty based on a prior history of violations by Respondent. Finally, in the absence of probative information from Respondent on the impact of the penalty on its business, I make no adjustments to the penalty under this factor.

Violations of Section 311(j) of the CWA

As set forth above, the failure of the Respondent to have an adequate SPCC plan and adequate secondary containment subjects the Respondent to penalties under § 311 of the CWA. Federal regulations at 40 C.F.R. §19.4, in modification of and in conjunction with § 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), authorizes the

assessment of a civil administrative penalty at a maximum of $11,000 per day for each day that a violation of § 311 continues, up to a maximum of $157,500.

A civil penalty for a § 311 violation is based on the following statutory factors: (1) the seriousness of the violation or violations; (2) the degree of culpability involved; (3) the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; (4) any history of prior violations; (5) any other penalty for the same incident; (6) the economic impact of the penalty on the violator; (7) any other matters as justice may require; and (8) any economic benefit to the violator resulting from the violation. CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8). EPA's guidance on calculating CWA penalties, the Civil Penalty Policy for the CWA ("Penalty Policy"), is based on the above statutory factors.

According to the Penalty Policy, the seriousness of a violation can be evaluated through an examination of the amount of storage capacity at a facility, the presence or absence of secondary containment and other spill prevention measures, the likelihood of a spill, the sensitivity of the environment around the facility, and the duration of the violation.

The Facility lacked both an adequate SPCC plan and appropriately sized and sufficiently impervious secondary containment for all of its aboveground oil storage containers. Secondary containment was also inadequate for the unloading areas and loading rack. Inadequate secondary containment combined with an incomplete and noncompliant SPCC plan constitutes major noncompliance under the Penalty Policy. I conclude that Respondent's major noncompliance at its Facility with a storage capacity of 33,800 gallons justifies a base penalty of $16,000.

The sensitivity of the environment around the Facility is a relevant factor and can be characterized by considering the potential environmental impact from a worst case discharge at the facility. Without adequate secondary containment, a worst case discharge at the Facility would likely have a significant effect on a sensitive ecosystem and on wildlife. Spilled oil from the Facility could run into the storm drain on Depot Street and then flow into several bodies of water, each considered a navigable waterway of the United States. I conclude, based on the potential harm likely to be caused by a worst case discharge, that a spill from the Facility would likely have a major environmental impact. Therefore, I conclude that an upward adjustment of 25% is appropriate, increasing the penalty from $16,000 to $20,000.

The Penalty Policy recommends that for each month of noncompliance .5% be added to the penalty. Respondent was required to have a SPCC plan on January 10, 1974, the date on which the SPCC requirements in 40 C.F.R. § 112.3 took effect. The statute of limitations limits the maximum period of liability to five years. EPA, accordingly, seeks liability for a period of sixty months. Relying on the guidance provided by the Penalty Policy and considering the sixty month period of liability sought by EPA, I conclude that a 30% upward adjustment of the penalty to $26,000 is appropriate.

The culpability of Respondent is based on the degree to which it should have been able to prevent the violation, considering its level of sophistication and the amount of information and regulatory explanation to which it has been exposed. Respondent has been in the business of storing and distributing oil for more than fifty years and has a high level of sophistication in this regard when compared to establishments with more limited storage experience (e.g. schools, hospitals). Moreover, it appears Respondent

was aware of its regulatory obligations for quite some time. Respondent created a draft SPCC plan in February of 2003, evincing its awareness of its legal obligations. At the January 3, 2007 inspection, EPA inspectors informed Respondent that the Oil Pollution Prevention regulations, including the SPCC plan requirement, were applicable to the Facility. On the day of the inspection, Respondent formally acknowledged that it understood its legal obligations. The Respondent's lengthy experience in the oil storage and distribution operations combined with its awareness of its regulatory obligations, suggests a high level of culpability. Comparing Respondent's level of culpability with the Penalty Policy, I conclude that a 65% increase, from $26,000 to $42,900 is justified.

The record reveals no other penalties imposed on Respondent for the same violations. Therefore, I conclude that a downward adjustment for such a reason would be inappropriate.

The record reveals no history of prior violations by Respondent. Therefore, I conclude that an upward adjustment for such a reason would be inappropriate.

Respondent's violation spanned a five year period, and therefore the penalty assessed must be adjusted for inflation. Per EPA guidance, the penalty was increased by 10% for those violations occurring on or after January 31, 1997 through March 15, 2004 and increased by 17.23% for those violations occurring after March 15, 2004. (See "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule" by Thomas V. Skinner, 2004.) In this case, approximately 27% of the violations occurred between January 31, 1997 and March 15, 2004 and is subject to a 10% increase. Approximately 73% of the violations occurred after March 15, 2004 and is subject to a 17.23% increase. Therefore, I conclude that an increase in the penalty from $42,900 to $49,536 on account of inflation is appropriate.

EPA used a computer model to calculate Respondent's economic benefit from delaying and avoiding expenditures associated with regulatory compliance. In its calculations, the computer model considers capital investments, one-time non-depreciable expenditures, and any annual recurring costs avoided through non-compliance. Also, the model accounts for the state tax rates associated with the non-compliance period. Relying on its computer model, EPA estimates that Respondent realized a $6,963 economic benefit through its noncompliance. I conclude that an upward adjustment of $6,963 to account for the economic benefit realized by Respondent is justified, increasing the penalty to $56, 499, which was rounded to $56,500.

The information necessary to accurately determine the penalty's economic impact on Respondent lies almost exclusively within the control of Respondent. Respondent, however, provided no economic information to EPA. Consequently, the record reveals nothing as to Respondent's inability to pay. I conclude, therefore, that the proposed penalty should not be reduced on account of Respondent's inability to pay.

After weighing the nature, circumstances, extent, and gravity of the violations, history of similar violations, degree of culpability, and without provision by the Respondent of information concerning either its ability to pay or ability to continue to do business, I conclude that the total proposed penalty of $64,500 is appropriate. The aforesaid statutory factors provide clear support for the conclusion that an $8000 penalty for Respondent's violation of §308 and a $56,500 penalty for Respondent's violation of §311 are appropriate. The Consolidated Rules of Practice provide that upon issuing a default order "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or [the statute authorizing the proceeding]." 40 C.F.R. § 22.17(c). I therefore,

assess a total penalty of $64,500. In assessing this penalty, I find the rationale for its calculation, as set forth in the Complaint and in the Complainant's memorandum of law, particularly persuasive. I incorporate that rationale by reference in this Order.

DEFAULT ORDER

I conclude that Respondent is in default for failing to answer the Complaint and that Respondent violated § 308 of the CWA, 33 U.S.C. § 1318. I also conclude that Respondent violated the Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112, promulgated under the authority of § 311(j) of the CWA, 33 U.S.C. § 1321(j). Accordingly, I hereby order the assessment of a civil administrative penalty in the amount of $64,500 against Respondent Butler, Maxcy & Heath, Inc.

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, a Default Order and Initial Decision is hereby ISSUED and Respondent is ordered to comply with all terms of this Order.

Full payment of the $64,500 penalty shall be made no later than 30 days from the date on which this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Of this amount, $8000 shall represent payment for Respondent's violations of § 308 of the CWA, and $56,500 shall represent payment for Respondent's violations of § 311(j) of the CWA. For the § 308 penalty payment amount of $8000, Respondent shall make payment by cashier's or certified check, payable to "Environmental Protection Agency," and referencing the title and docket number of the action ("In the Matter of Butler, Maxcy & Heath, Inc., CWA-01-2007-0161"). For the § 311(j) penalty payment amount of $56,500, Respondent shall make payment by cashier's or certified check, payable to "Environmental Protection Agency," and referencing the title and docket number of the

action ("In the Matter of Butler, Maxcy & Heath, Inc., CWA-01-2007-0161") and specifically noting: "Oil Spill Liability Trust Fund-311." Both checks shall be mailed to the address below:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter must accompany the check. The transmittal letter must identify the subject case, the EPA docket number, and Respondent's name and address. If the Respondent fails to pay the penalty within the period outlined above, interest on the penalty may be assessed. See 31 U.S.C. §3717; 40 C.F.R. §13.11.

A copy of the payment shall be mailed to:

Regional Hearing Clerk
U.S. EPA
Region 1 (Mail Code RAA)
One Congress Street, Suite 1100
Boston MA 02114-2023

This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties unless (1) party moves to reopen the hearing, (2) a party appeals the initial decision to the Environmental Appeals Board, (3) a party moves to set aside the default order, or (4) the Environmental Appeals Board chooses to review the initial decision *sua sponte*.

IT IS SO ORDERED.

Dated: July 7, 2009

Jill T. Metcalf
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that the **Default Order and Initial Decision** by Regional Judicial Officer Jill Metcalf in the matter of Butler, Maxcy & Heath, Inc., Docket No. CWA-01-2007-0161, was served on the parties as indicated.

Federal Express	Butler, Maxcy & Heath, Inc. c/o Tom Heath Office Manager P.O. Box 188 329 Common Road Union, ME 04862
Federal Express	Environmental Appeals Board U.S. Environmental Protection Agency Colorado Building, Suite 600 1341 G. Street, N.W. Washington, DC 20005 (with copy of official file)
Pouch Mail	Assistant Administrator for Enforcement and Compliance Assurance U.S. EPA 1200 Pennsylvania Ave. N.W. Mail Code 2201A Washington, DC 20460
Hand Delivered	Michelle Lauterback Senior Enforcement Counsel U.S. EPA Region 1 1 Congress Street, Suite 1100 (SEL) Boston, MA 02114-2023

Dated: July 7, 2009

Wanda I. Santiago

Wanda I. Santiago
Paralegal/Regional Hearing Clerk
US EPA Region 1
1 Congress Street, Suite 1100 (RAA)
Boston, MA 02114

CERTIFICATION OF ADMINSTRATIVE RECORD BEFORE THE ENVIRONMENTAL APPEALS BOARD

I, Wanda I. Santiago, am the Regional Hearing Clerk for U.S. Environmental Protection Agency ("EPA") Region 1. My duties include maintenance of the official records for all administrative proceedings filed in EPA Region 1. My duties also include transmitting the official records from an administrative proceeding initiated in Region 1 to the Clerk of the EPA's Environmental Appeals Board.

I hereby certify that the attached document is a true, correct, and complete index of the administrative record that was before the Presiding Officer in the administrative proceeding for Butler, Maxcy & Heath, Inc., Docket No. CWA-01-2007-0161.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 7, 2009

Wanda I. Santiago
Regional Hearing Clerk
EPA Region 1