

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION III**  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

In The Matter of: )

**H.C. McComas Fuel Co.** )  
2301 Evergreen Street )  
Baltimore, MD 21216 )

Respondent. )

Docket No. CWA-03-2007-0098

03/11/07 11:53

**I. CASE HISTORY AND PROCEDURAL BACKGROUND**

Region III of the Environmental Protection Agency (“EPA”) initiated this administrative proceeding for the assessment of a civil penalty. On March 6, 2007, the EPA issued an Administrative Complaint and Opportunity to Request a Hearing (“Complaint”) against H.C. McComas Fuel Company, the Respondent in this case (“McComas Fuel”), pursuant to Section 311 of the Federal Water Pollution Prevention and Control Act (“Clean Water Act”), 33 U.S.C. § 1321(b)(6)(A), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. Part 22. McComas Fuel filed Respondent’s Answer to Administrative Complaint on April 6, 2007.

On May 10, 2007, the EPA filed Complainant’s Motion for Leave to Amend the Administrative Complaint, but before this Court granted the motion, McComas Fuel filed Respondent’s Answer to Plaintiff’s Amended Administrative Complaint (“Answer”) on

June 1, 2007, denying the allegations and requesting a hearing. The EPA's motion for leave to amend was granted on June 8, 2007, and the EPA filed its Amended Administrative Complaint and Opportunity to Request a Hearing ("Amended Complaint") on June 12, 2007. The Amended Complaint alleged that McComas Fuel violated the regulations at 40 C.F.R. § 112.7(e)(4)(ii) (2002), promulgated under Section 311(j) of the Clean Water Act, 33 U.S.C. § 1321(j)(1)(C), by failing to have adequate secondary storage capacity for a loading rack at its oil handling facility located at 2301 Evergreen Street, Baltimore, Maryland, ("Facility") at the time of an October 18, 2006, inspection. The EPA seeks a penalty of \$9,910.10.

McComas Fuel filed a Memorandum in Opposition to Complainant's Motion for Leave to Amend the Administrative Complaint and Motion to Dismiss on June 4, 2007, and the EPA filed Complainant's Response to Respondent's Motion to Dismiss on June 27, 2007. McComas Fuel's motion to dismiss was denied in an order dated December 27, 2007.

A hearing was held in Philadelphia, Pennsylvania, on October 30, 2008. The EPA filed Complainant's Post-Hearing Brief on June 24, 2009. McComas Fuel filed Respondent's Findings of Fact and Conclusions of Law a day later.

## **II. REGULATORY BACKGROUND**

Congress passed the Clean Water Act in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 311 of the Clean Water Act instructs the President to establish "procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil" from onshore facilities into waters of the United States. *Id.*

§ 1321(j)(1). The EPA has authority to assess administrative penalties against parties who violate these regulations. *Id.* § 1321(b)(6).

The EPA promulgated regulations in 1973 to implement these provisions (the “Oil Pollution Prevention” regulations). *See* Oil Pollution Prevention: Non-Transportation Related Onshore and Offshore Facilities, 38 Fed. Reg. 34,164 (Dec. 11, 1973) (codified at 40 C.F.R. pt. 112). These regulations included Guidelines for the Preparation and Implementation of a Spill Prevention Control and Countermeasure Plan (“The Guidelines”). 40 C.F.R. § 112.7 (2002). The Guidelines contain regulations intended to prevent facilities handling oil from accidentally discharging that oil into a water of the United States. 40 C.F.R. § 112.1(a) (2002).

The EPA has amended the Oil Pollution Prevention regulations several times since 1973. The controlling version of the regulations in this proceeding is published in the July 1, 2002 edition of 40 C.F.R. pt. 112. The EPA has announced upcoming changes to the controlling provisions. Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 67 Fed. Reg. 47,042 (July 17, 2002) (to be codified at 40 C.F.R. pt. 112). However, the EPA has postponed the implementation of these changes beyond the relevant time period for this proceeding.<sup>1</sup>

### **III. ANALYSIS**

Resolution of this case requires two determinations: (1) whether McComas Fuel is subject to the Oil Pollution Prevention regulations and, therefore, the Guidelines, and

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<sup>1</sup> The EPA has published these postponements in a long series of Federal Register notices. *See* Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 68 Fed. Reg. 1,347 (Jan. 9, 2003); Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 68 Fed. Reg. 18,890 (Apr. 17, 2003); Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities, 69 Fed. Reg. 48,794 (Aug. 11, 2004); Oil Pollution Prevention; Non-Transportation Related Onshore Facilities, 71 Fed. Reg. 8,462 (Feb. 17, 2006); Oil Pollution Prevention; Non-Transportation Related Onshore and Offshore Facilities, 72 Fed. Reg. 27,443 (May 16, 2007).

(2) whether McComas Fuel was in violation of those regulations and Guidelines at the time of the October 2006 inspection.

The Consolidated Rules of Practice provide that “[t]he complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint.” 40 C.F.R. § 22.24(a). Further, “[f]ollowing complainant’s establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint.” *Id.* This opinion reviews the evidence to determine whether the EPA met its burden, and where the EPA had met its burden, whether McComas Fuel was then able to overcome that burden.

**A. McComas Fuel’s Status as an Owner and Operator of a Non-Transportation-Related Onshore Facility**

The EPA’s Oil Pollution Prevention regulations apply only when two conditions are met. First, they only apply to “owners or operators of non-transportation-related onshore . . . facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products.” 40 C.F.R. § 112.1(b) (2002). Second, they only apply when the facilities, “due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in [40 C.F.R. Part 110], into or upon the navigable waters of the United States or adjoining shorelines.” *Id.*

**1. The McComas Fuel Facility is a Non-Transportation-Related Onshore Facility**

Under this first criterion, a determination must be made whether the Facility was a non-transportation-related onshore facility, whether the Facility was engaged in activities that bring it within the ambits of the regulation, and whether McComas Fuel was the Facility’s owner or operator.

The Oil Pollution Prevention regulations refer to a 1971 Memorandum of Understanding between the Secretary of Transportation and the EPA (“Memorandum”) to define non-transportation-related onshore facilities. 40 C.F.R. § 112.2 (2002). The Memorandum defines non-transportation-related facilities to include “[o]il storage facilities including all equipment and appurtenances related thereto as well as fixed bulk plant storage, terminal oil storage facilities, consumer storage, [and] pumps and drainage systems used in the storage of oil.” Memorandum of Understanding Between the Environmental Protection Agency and the Department of Transportation, 36 Fed. Reg. 24080, 24081 (Dec. 18, 1971). Also within the definition of non-transportation-related facilities are “[l]oading racks, transfer hoses, loading arms and other equipment which are appurtenant to a nontransportation related facility . . . and which are used to transfer oil in bulk to or from highway vehicles.” *Id.* Lastly, an onshore facility is “any facility of any kind located in, on, or under any land within the United States, other than submerged lands, which is not a transportation-related facility.” 40 C.F.R. § 112.2 (2002).

The Facility’s Spill Prevention Control and Countermeasure Plan (“SPCC Plan”), signed by Edward McComas, described the Facility as a “bulk petroleum storage facility that stores and delivers bulk petroleum products.” Compl.’s Ex. 3. McComas Fuel’s Answer contained admissions that it operated an “oil storage facility” and that it was engaged in “producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products at the Facility.” Answer ¶¶ 6, 8. Further, testimony at the hearing indicated that McComas Fuel employees pump heating oil from the Facility’s loading rack into delivery trucks, and that McComas Fuel operated eleven heating oil delivery trucks at the time of the 2006 inspection. Tr. 15, 20. Photographs in evidence,

Compl.'s Ex. 4-6, and testimony, Tr. 52:18-20, 179:5-8, also indicated that the Facility was not on submerged lands. It is thus clear from the evidence that the Facility satisfied the Memorandum's definitions for both a non-transportation-related facility and an on-shore facility in fulfillment of the first half of the 40 C.F.R. § 112.1(b) definition.

2. The Facility Could Reasonably Be Expected to Discharge Oil in Harmful Quantities into Navigable Waters

Under this second criterion, a determination must be made, pursuant to 40 C.F.R. § 112.1(b), not only whether the Facility could discharge a harmful quantity of oil, but also whether this discharge could affect any navigable waters of the United States. In terms of quantity, the EPA's regulations at 40 C.F.R. pt. 112 no longer apply when, *inter alia*, the aggregate above-ground storage capacity of the facility is 1,320 gallons or less of oil. 40 C.F.R. § 112.1(d)(2)(ii) (2002). McComas Fuel asserted in its Answer that its Facility's aggregate above-ground storage capacity was 90,000 gallons. Answer ¶ 6. Testimony supported the finding that McComas Fuel loaded 2,800-gallon delivery trucks at the loading rack. Tr. 20:7. Thus, the record supports the finding that McComas Fuel's Facility had capacity to hold more than the threshold quantity of oil.

The Facility's nexus to navigable waters of the United States is also demonstrated in the record. The EPA's regulations include within the definition of navigable waters of the United States "[a]ll navigable waters of the United States, as defined in judicial decisions prior to passage of the [Clean Water Act], and tributaries of such waters." 40 C.F.R. § 112.2 (2002). In McComas Fuel's stormwater discharge permit from the Maryland Department of the Environment, owner Edward McComas certified that, to the best of his knowledge, stormwater discharges at the Facility would travel through a publically owned stormwater sewer system as surface water into Gwynns Run and

subsequently to Baltimore Harbor. Compl.'s Ex. 10 at 6, 7. Mr. McComas later confirmed this in his testimony, Tr. 216-17, and testimony from both parties confirmed that the storm drain underneath the Facility's loading rack leads through an oil/water separator and into an outfall that discharges into Gwynns Run, Tr. 56:2-14, 215-16.

Gwynns Run, which appears to also be known as Gwynns Falls, empties into the Patapsco River on its way to Baltimore Harbor. Compl.'s Ex. 1 at 2. The Circuit Court for the District of Maryland found the Patapsco River to be navigable-in-fact in *Chappell v. Waterworth* (The *Hawkins Point Light-House Case*). 39 F. 77, 86-87 (C.C.D. Md. 1889). In a later case, the Supreme Court mentioned in reference to the *Hawkins Point Light-House* case that the Patapsco River was a public navigable water of the United States. *See* *Scranton v. Wheeler*, 179 U.S. 141, 150 (1900). Thus, Gwynns Run, as a tributary to the navigable-in-fact Patapsco River, constitutes a navigable water of the United States under the Clean Water Act, and a discharge of oil at the Facility could endanger the navigable waters of the United States.

**B. McComas Fuel Failed to Comply With the Guidelines' Secondary Containment Requirement**

The EPA alleged in its Amended Complaint that McComas Fuel violated the Guidelines by failing to provide adequate secondary containment for the loading rack at its Facility, as identified at the time of an October 18, 2006, inspection. The focal point of this inquiry is whether McComas Fuel met the secondary containment requirement for its rack. This section reviews the regulatory requirements for loading racks, presents factual findings needed to determine if McComas Fuel met the requirements, and then reviews each of McComas Fuel's arguments that it has not violated the Oil Pollution Prevention regulations or Guidelines.

1. The Oil Pollution Prevention Regulations and Guidelines for Loading Racks

The first step in this analysis is to determine the exact contours of the Guidelines' requirements for loading racks. This requires a look at the overall structure of the regulatory framework contained in the Guidelines.

The Guidelines' preamble provides that the regulated entity must demonstrate its compliance to the applicable requirements in an SPCC Plan. 40 C.F.R. § 112.7 pmb1 (2002). The Guidelines provide flexibility and options to regulated entities to help them comply when designing and implementing protective measures. For example, an onshore facility may use dikes, berms, retaining walls, curbing, weirs, booms, or sorbent materials to meet the minimum protective requirements for various components of a facility. *See id.* § 112.7(c). The *SPCC Guidance for Regional Inspectors* (2005) contains a chapter addressing secondary containment determinations ("Secondary Containment Guidance"), and it describes these minimum protective requirements as "*general secondary containment requirements [that] are intended to address the most likely oil discharge*" from a variety of regulated portions of a facility. *See* Resp't Ex. 12 at 1 (emphasis in original). The Secondary Containment Guidance notes further that these general requirements are intended for "(non-rack) transfer activity." *Id.*

The types of protective measures described in 40 C.F.R. § 112.7(c) are not appropriate for all types of facility components. For some facility components, the regulations provide more specific requirements. To this effect, the regulations provide that "[i]n addition to the minimal prevention standards listed under § 112.7(c), sections of the Plan should include a complete discussion of conformance with the following applicable guidelines, other effective spill prevention and containment procedures (or, if



more stringent, with State rules, regulations and guidelines).” 40 C.F.R. § 112.7(e) (2002). In other words, a facility owner or operator may choose from the measures provided in 40 C.F.R. § 112.7(c) to comply generally with the SPCC Plan requirements, but if the regulations identify a particular facility component in 40 C.F.R. § 112.7(e), the owner or operator of such a component must meet additional SPCC Plan requirements for that particular facility component. The Secondary Containment Guidance describes these additional requirements as “*specific* secondary containment requirements [that] are intended to address a major container failure (the entire contents of the container and/or compartment),” Resp’t Ex. 12 at 1 (emphasis in original), but they only apply at the facility components listed in 40 C.F.R. § 112.7(e).

Loading racks are one of these facility components listed in 40 C.F.R. § 112.7(e). The Guidelines provide additional requirements for onshore facility tank car and tank truck loading/unloading racks. 40 C.F.R. § 112.7(e)(4) (2002). Among the additional requirements is a limitation on the type of containment system the owner or operator must provide for the loading rack:

Where rack area drainage does not flow into a catchment basin or treatment facility designed to handle spills, a quick drainage system should be used for tank truck loading and unloading areas. The containment system should be designed to hold at least maximum capacity of any single compartment of a tank car or tank truck loaded or unloaded in the plant.

*Id.* § 112.7(e)(4)(ii) (2002). The regulations provide that loading racks must have one of three types of containment systems: a catchment basin, a treatment facility designed to handle spills, or a quick drainage system. Further, the capacity of the containment system must be equal to the largest single compartment of the tank car or tank truck used at the loading rack.

McComas Fuel suggested that the specific loading rack requirements simply establish a total capacity that can be met using the 40 C.F.R. § 112.7(c) general methods and equipment. *See* Resp't Findings of Fact and Conclusions of Law ¶ 50. In other words, McComas Fuel ignores the first sentence of 40 C.F.R. § 112.7(e)(4)(ii) and only gives credence to the second sentence. On the contrary, this section establishes not only the total capacity of the loading rack's secondary containment system as set forth in the Guidelines, but also the specific and exclusive means required to meet that capacity.

## 2. Secondary Containment Measures in Place at the McComas Fuel Facility Loading Rack

The next step in this analysis is to determine the required volume for secondary containment at McComas Fuel's loading rack and to determine what measures McComas Fuel had in place to meet the requirements at the time of the October 2006 inspection. The largest single compartment of the tank trucks that load at the McComas Fuel loading rack was 2,800 gallons. Answer ¶ 18; Tr. 28:14-16. Thus, McComas Fuel's compliance depends on whether it provided 2,800 gallons of secondary containment capacity at the loading rack in the form of a catchment basin, a treatment facility designed to handle spills, or a quick drainage system.

The owner or operator of a facility must include in its SPCC Plan "a discussion of the facility's conformance with the appropriate guidelines." 40 C.F.R. § 112.7 (2002). At the time of the October 2006 inspection, McComas Fuel's SPCC Plan contained two explicit references to the loading rack. First, the SPCC Plan noted, under the heading "Facility Drainage," that "[w]aters from the loading rack are processed by an oil/water separator" and "[f]loating petroleum product will be absorbed from the water surface prior to discharge of the collected water." Compl.'s Ex. 3 at 9. Second, a facility layout

diagram attached to the SPCC Plan identified a drain under the loading rack of unlisted capacity, a 550-gallon tank with oil separator, another oil separator of unlisted capacity, and a series of hash marks surrounding the drain and one of the oil separators. *Id.* at 16.

The EPA's lead inspector for the October 2006 inspection, Anne Gilley-Taurino, testified that she interviewed Edward McComas and James McComas during the inspection and learned from them that McComas Fuel had roughly 1,500 gallons of secondary containment capacity from a 500-gallon oil/water separator and a 1,000-gallon oil/water separator. Tr. 30:8-11. The EPA expressed willingness to stipulate that the smaller tank had 550 gallons of capacity and the larger tank had 1,000 gallons of capacity, for a total of 1,550 gallons.<sup>2</sup> Tr. 209:5-12. During the inspection, McComas Fuel identified no additional structures or facilities that added to the loading rack's secondary containment capacity. Compl.'s Ex. 1 at 8; Tr. 30-31.

After the EPA issued its Complaint, McComas Fuel identified two additional catchment basins at the loading rack: a drain underneath the loading rack and a bermed area surrounding the rack. McComas Fuel asserted that the drain had a capacity of either 178 gallons, Answer ¶ 10, or 119 gallons, Resp't Ex. 11 at 1. The bermed area was denoted by the hash marks on the Facility diagram in the SPCC Plan. *See* Compl.'s Ex. 3 at 16. Without the bermed area's capacity included, and giving McComas Fuel the larger capacity for the drain, McComas Fuel had up to 1,728 gallons of secondary capacity at its loading rack, which was over a thousand gallons short of the 2,800-gallon requirement. The next step is to resolve how much capacity the berm provided.

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<sup>2</sup> The EPA expressed willingness to credit the full 1,000 gallons for the larger oil/water separator, even though the EPA presented uncontested testimony at the hearing that the separator's lack of an oil stop valve likely meant that the separator would pass oil after filling with as little as 600 gallons of oil. Tr. 132.

The EPA had the initial burdens of persuasion and presentation regarding whether the berm provided the necessary capacity to bring McComas Fuel's total capacity above the required 2,800-gallon secondary containment volume. The EPA provided testimony from Ms. Gilley-Taurino and Arthur Shellhouse, an environmental consultant familiar with the Facility. Ms. Gilley-Taurino testified that she did not include any secondary containment capacity for the berm because it was in such disrepair at the time of the inspection that she did not believe it to be part of the Facility's secondary containment measures. Tr. 109:14-24. She counted among the berm's deficiencies its lack of a uniform height, Tr. 35-36, and the presence of gaps, Tr. 32-34. She also described the Facility grounds as sloping to the west, and noted the berm was lowest at its westernmost point, meaning that liquids would tend to pool in that area and escape. Tr. 41-43.

Mr. Shellhouse also testified that the berm likely had gaps and was "totally ineffective" because fluid would escape over the berm on one low edge. Tr. 125-26, 127-28. Mr. Shellhouse's consulting firm had prepared the initial SPCC Plan for McComas Fuel, and he had submitted a proposal to McComas Fuel to improve the secondary containment system for the loading rack. *See* Tr. 127; Compl.'s Ex. 7 at 4.

The EPA also introduced photographs of the loading rack and berm area to substantiate the conclusion that the berm was ineffective. One photograph showed a gap at the berm's southeast corner, Compl.'s Ex. 5, and another showed a longer section of the berm that was lower in elevation than other sections of the berm, Compl.'s Ex. 4.

The EPA provided sufficient evidence to meet its burden of persuasion and presentation that the berm did not provide adequate secondary containment for the

loading rack. The burden then shifted to McComas Fuel to provide sufficient evidence to overcome the conclusions derived from the EPA's evidence.

McComas Fuel presented testimony to try to substantiate the effectiveness of the berm in providing the adequate volume of containment. McComas Fuel challenged the photographs and testimony of Ms. Gilley-Taurino as misrepresenting the height of the berm.<sup>3</sup> Mr. McComas testified that the berm was constructed of 3.5-inch-diameter pipe embedded in asphalt. Tr. 180-81. McComas Fuel further pointed to photographs in an amendment to its 2002 SPCC Plan illustrating the berm to be 4.5 and 5 inches high in some places. *See* Resp't Ex. 8 at 6-12. However, the EPA's claim rested not merely on the height of portions of the berm, but also on the berm's continuity. Both Ms. Gilley-Taurino and Mr. Shellhouse testified that gaps in the berm defeated its utility as a secondary containment device, and McComas Fuel did not present any evidence that the berm was continuous. McComas Fuel did assert that the feature the EPA alleged as a "breach in the berm" was on the portion of the berm with a higher elevation, Tr. 194, but McComas Fuel offered nothing to substantiate that claim.

After reviewing the evidence, I conclude that the EPA met its initial burden in showing that the berm did not provide adequate secondary containment for the loading rack, and McComas Fuel did not succeed in defeating this showing.

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<sup>3</sup> During the hearing, Edward McComas challenged the angles of the EPA's photographs, noting that "you have to go by mathematics and prove [the berm's effectiveness] that way rather than looking at the picture." Tr. 191-92. However, because the EPA had already met its prima facie burden, the onus had shifted to McComas Fuel to substantiate the berm's secondary capacity.

3. McComas Fuel's Arguments Against a Determination That It Violated the Guidelines

a. McComas Fuel's Reliance on Active Measures to Provide Secondary Containment

McComas Fuel argued that the EPA must include McComas Fuel's active containment efforts using equipment and methods provided in 40 C.F.R. § 112.7(c) when determining whether it met the 2,800-gallon secondary containment requirement.

McComas Fuel failed to recognize the difference between two separate SPCC provisions in the regulations.

McComas Fuel argued that, in the event its berm and other containment structures failed to provide sufficient containment, McComas Fuel would rely on other measures to contain the spilled oil. In accordance with its SPCC Plan, McComas Fuel contemplated using absorbent material, temporary dikes constructed of Facility yard dirt, and booms to compensate for any volume of oil not fully contained in the existing containment system. In other words, McComas Fuel argued that it should be able to use 40 C.F.R. § 112.7(c) *general* methods to compensate for the inadequacy of a 40 C.F.R. § 112.7(e) *specific* method. This argument is not supported by law. The regulations limit the types of allowable containment measures for some specific structures and equipment. In the present case, the regulations and Guidelines are clear that containment for a loading rack can only be provided by a catchment basin, treatment facility, or quick drainage system, not the general containment measures of absorbent materials, makeshift dikes, and booms.

Even if the regulations were interpreted to allow the active containment methods in 40 C.F.R. § 112.7(c) to apply to loading racks, the record shows that this would still be unavailing for McComas Fuel. The Secondary Containment Guidance contemplates the

use of active measures, or measures that require deployment or specific action by the owner or operator, in limited circumstances. Resp't Ex. 12 at 16. In situations where the active measure must be deployed after a spill has occurred, the effectiveness of the measure depends on its "technical effectiveness (e.g., mode of operation, adsorption rate), placement and quantity, and timely deployment." *Id.* at 18. The Secondary Containment Guidance states that the SPCC Plan "must describe the procedures used to deploy the active measures, explain how the use of active measures is appropriate to the situation, and explain the methods for discharge discovery that will be used to determine when deployment of the active measures is appropriate." *Id.* at 19. Thus, judging the efficacy of a facility's active measures requires more than tallying the measures' respective containment capacities; it requires determining whether the entity has the procedures and manpower to implement them before an accidental discharge reaches navigable waters.

The record shows that McComas Fuel did not have the procedures and manpower to implement sufficient active measures to address a spill of the magnitude contemplated under 40 C.F.R. § 112.7(e)(4)(ii). *See, e.g.*, Tr. 221:2-24, 225:20-21. The regulations provide specific containment measures for a loading rack such that if the entire contents of the vehicle's largest compartment spilled, the oil would be contained without reliance on any individual's actions. Mr. McComas testified that McComas Fuel had absorbent materials and booms immediately available to help contain a spill. Tr. 173:7, but these containment measures required the active measures of individuals to keep the spilled oil from escaping into the waters of the United States. Indeed, Ms. Gilley-Taurino testified that McComas Fuel would need to deploy 289 pails or bags of sorbent to contain 1,300 gallons of spilled oil, Tr. 60, and Mr. McComas testified that as few as two or three

people may be at the Facility at any given time, Tr. 220-221. Bags of absorbent material, booms pulled into place, and quickly-dug temporary earthen dikes may be appropriate for small spills at miscellaneous facilities, but they are likely insufficient to safely contain much larger volumes, such as the instant case where McComas Fuel needed containment measures for over a thousand gallons.

Further, the efficacy of McComas Fuel's active containment measures is itself questionable. Ms. Gilley-Taurino testified that she contacted several sorbent boom manufacturers to discuss the use of boom to contain a spill of 1,300 gallons. Tr. 59-60. The manufacturers were "very cautious about using their sorbent booms for that type of scenario." Tr. 59:19-21. One in particular had warned that booms can become saturated and float, Tr. 59:21-60:4, the implication being that oil could then escape underneath the boom. The same manufacturer also warned that the sections of the boom do not connect seamlessly, meaning that oil could escape between them. *Id.*

McComas Fuel also claimed that the EPA inspector did not take adequate notice of the active measures McComas Fuel had written into its SPCC Plan or that were visible onsite at the time of the inspection. This is not a relevant consideration. As described above, the regulations limit the types of containment systems allowable to satisfy the loading rack requirements. The regulations prohibit the EPA from including within its secondary containment calculation any containment McComas Fuel could provide by applying absorbent materials, digging makeshift earthen dikes, or pulling out sorbent booms. Whether the EPA inspector measured how much containment McComas Fuel could provide through active means where the Guidelines require passive containment is besides the point. Here, McComas Fuel failed to provide adequate secondary



containment in a form acceptable under 40 C.F.R. § 112.7(e)(4). The EPA could not consider any of the active measures McComas Fuel cited in determining the total volume of secondary capacity at the loading racks.

b. McComas Fuel's Reliance on Its Consultant

McComas Fuel also made repeated reference to the mistakes and errors of Mr. Shellhouse, the environmental consultant McComas Fuel hired to help it comply with the SPCC Plan requirements. McComas Fuel alleged that it was its consultant who misunderstood the EPA regulations, Resp't Findings of Fact and Conclusions of Law ¶ 22, and who provided misleading information to McComas Fuel, *id.* ¶ 23. This defense does not withstand scrutiny after considering the facts and the applicable law.

First, McComas Fuel failed to recognize that it was ultimately responsible to comply with the SPCC Plan requirements, not its environmental consultant. The Guidelines require that a registered professional engineer certify a facility's SPCC Plan, but they further provide that "[s]uch certification shall in no way relieve the owner or operator of an onshore or offshore facility of his duty to prepare and fully implement such Plan in accordance with § 112.7." 40 C.F.R. § 112.3(d) (2002).

Second, several facts derived from the evidence show that McComas Fuel is ultimately responsible for its failure to comply with the Guidelines. First, the owner and operator of the Facility, Mr. McComas, signed the SPCC Plan saying he had reviewed the plan. Compl.'s Ex. 3 at 1, 5. At the hearing, Mr. McComas testified that prior to receiving the Complaint, he had never read 40 C.F.R. Part 112. Tr. 217-18. He also testified that he did not know he was required to have 2,800 gallons of secondary capacity at the loading rack. Tr. 217:10.

McComas Fuel included in this claim the same argument it made in its June 4, 2007, Motion to Dismiss, namely, that the Guidelines as effective in 2002 were voluntary because they used the words “should” and not the words “must” as reflected in subsequent updates to the regulations that have yet to take effect. A determination on this issue was previously made in the December 27, 2007, Order on Motion to Dismiss, that the applicable provisions set forth in the Guidelines were required and not voluntary.

McComas Fuel’s consultant was somewhat confused about whether the applicable provisions set forth in the Guidelines were required or voluntary. Tr. 136:15-17. Further, Mr. McComas testified that he delayed implementing a proposal from his consultant to revamp the loading rack’s secondary containment because the consultant advised him, “Don’t do anything until we’re sure.” Tr. 217:17-18. However, McComas Fuel’s pleas of ignorance and reliance on a third party are unavailing. The regulations place responsibility for compliance on McComas Fuel and no other party. In an EPA administrative hearing under a different Clean Water Act provision, the administrative law judge found the respondent liable for violations despite his ignorance of the regulatory requirements and despite professed reliance on county and state personnel. *See In re Roger Barber*, 2007 EPA ALJ LEXIS 17, at \*48 (2007). McComas Fuel’s decision to rely on its consultant and to delay or forgo work on its loading rack secondary containment system is the relevant consideration, not the consultant’s, or even the local industry’s, understanding of the regulations.

c. The EPA’s Alleged Failure to Properly Conduct Its Investigation

McComas Fuel next claimed that the EPA inspectors failed to adhere to investigation procedures during the October 2006 inspection. Among these alleged

deficiencies were: (1) failure to thoroughly inspect the Facility and its documents; (2) failure to complete EPA documentation; (3) failure to identify and test the berm; (4) failure to include absorbent materials, booms, and like materials in the loading rack secondary containment volume; and (5) inappropriate communication with Mr. Shellhouse, McComas Fuel's former environmental consultant.

First, McComas Fuel claimed the EPA was less than thorough in its Facility and document inspection. McComas Fuel alleged there was a lack of thoroughness on the part of Ms. Gilley-Taurino when assessing the adequacy of the berm in providing secondary containment capacity. McComas Fuel alleged that she seemingly overlooked several references and photographs in the SPCC Plan that documented the berm's presence and height, that she asked no questions specifically about the berm during her inspection interview with McComas Fuel, and that she reviewed the SPCC Plan after departing the Facility rather than while conducting the inspection.

Under the circumstances, Ms. Gilley-Taurino's alleged actions regarding the berm, even if taken as true, are understandable. First, the SPCC Plan did not explicitly identify the berm as a "berm" or as a feature providing a specific volume of secondary capacity for the loading rack. Second, neither Edward McComas nor James McComas identified the berm when discussing the loading rack's secondary containment system. Tr. 31. Third, it is apparent that Ms. Gilley-Taurino failed to pursue a line of questioning about the berm for those exact reasons, noted *supra*, that support the finding that the berm was ineffective. Indeed, Ms. Gilley-Taurino testified that the berm's disrepair and inability to provide adequate containment led her to conclude that it was a barrier system designed to keep trucks from moving prematurely in compliance with a separate

regulatory requirement. Tr. 109:15-24. Ms. Gilley-Taurino's review of the SPCC Plan after she departed from the Facility does seem to be a deviation from what she testified is her typical inspection routine. Tr. 9:17-10:2; 103:6-11, however, McComas Fuel failed to identify any law or regulation requiring her to review the plan while still onsite.

Second, McComas Fuel alleged that Ms. Gilley-Taurino failed to complete required documentation. The support for this assertion seemed to rest with some incomplete areas of an EPA inspector document called "SPCC Field Inspection and Plan Review Checklist." Compl.'s Ex. 1. McComas Fuel highlighted the fact that the EPA inspector did not complete a portion of the checklist regarding whether the containment system at the loading racks was adequate, *id.* at 8, and that the EPA inspector's failure to address this issue while onsite showed a breach of protocol. At the hearing, however, Ms. Gilley-Taurino stated that she did not check "Yes" or "No" in this area of the checklist because "this was a major concern during the interview" and she "was not prepared to say whether or not [the amount of secondary containment] was sufficient at the time of the interview." Tr. 89:20-24. Ms. Gilley-Taurino did make several notes in the "Comments" section later in the checklist regarding the loading rack's secondary containment capacity. Compl.'s Ex. 1 at 8. Further, McComas Fuel failed to identify any law or regulation requiring Ms. Gilley-Taurino to complete every entry on a checklist document labeled "deliberative."

Next, McComas Fuel claimed that Ms. Gilley-Taurino failed to test the berm for corrosion and breaches to determine whether it provided adequate secondary containment. As discussed *supra*, Ms. Gilley-Taurino was justified in excluding the berm's secondary capacity from her initial analysis. McComas Fuel here argued that

Ms. Gilley-Taurino was required to conduct an actual test of capacity. Contrary to McComas Fuel's assertions, the Secondary Containment Guidance does not require actual tests. The EPA met its initial burdens of persuasion and presentation that the berm provided inadequate secondary containment by documenting, among other features, its lack of continuity. In response to the EPA meeting that burden, McComas Fuel then had the burden of showing it *was* adequate. McComas Fuel suggested ignoring the wealth of evidence against the berm's effectiveness and requiring the EPA to confirm its every conclusion through field tests. The EPA is not in error for failing to conduct field tests in the face of sufficient evidence that the berm was ineffective.

McComas Fuel's next claim was that Ms. Gilley-Taurino erred by failing to include a host of other containment measures in her analysis. None of the measures McComas Fuel cited falls within the category of a catchment basin, treatment system, or quick drainage system required by 40 C.F.R. § 112.7(e)(4)(ii) and as discussed *supra*. Contrary to McComas Fuel's assertion, Ms. Gilley-Taurino omitted the containment capacities of absorbent materials, booms, and other similar measures not because the McComas Fuel representatives failed to identify them, but because the regulations prohibit the EPA from including them in the total secondary containment analysis for loading racks. *See* 40 C.F.R. § 112.7(e)(4)(ii) (2002).

Last, McComas Fuel cited Ms. Gilley-Taurino's communications with Mr. Shellhouse as inappropriate because Mr. Shellhouse was allegedly motivated for economic reasons and because McComas Fuel was not represented in the conversations. McComas Fuel failed to provide a legal basis for this argument, and the record contains no details of any improper conduct by Ms. Gilley-Taurino.

#### IV. DETERMINATION OF AN APPROPRIATE PENALTY

The EPA seeks to impose a Class I civil penalty of \$9,910.10 for McComas Fuel's failure to provide adequate secondary containment at its Facility's loading rack, a violation of EPA regulations promulgated pursuant to Section 311(j) of the Clean Water Act. The Consolidated Rules of Practice require that the Presiding Officer assess a penalty based on evidence in the record, in accordance with penalty factors enumerated in the statute, and in consideration of any penalty guidelines issued under the statute. 40 C.F.R. § 22.27(b). Section 311(b)(6) of the Clean Water Act provides the EPA with authority to impose civil administrative penalties for violations of Section 311(j). 33 U.S.C. § 1321(b)(6). The Clean Water Act permits Class I civil penalties for such violations provided they do not exceed \$10,000 per violation and \$25,000 per administrative action. *Id.* § 1321(b)(6)(B)(i). Subsequent federal regulation has adjusted these penalty ceilings to \$11,000 per violation and \$32,500 per administrative action to account for inflation. 40 C.F.R. § 19.4.

Section 311(b)(8) of the Clean Water Act lists the factors the court shall consider in determining the amount of a civil penalty under Section 311(b)(6):

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

33 U.S.C. § 1321(b)(8).

The EPA's Office of Enforcement and Compliance Assurance published a civil penalty policy ("Penalty Policy") in 1998 to address violations of Section 311(j) and the Section 311(b)(6) and (7) provisions that authorize the EPA to seek civil penalties for

such violations. *See* Compl.'s Ex. 8. The EPA Environmental Appeals Board recognized that the EPA commonly uses the Penalty Policy "to establish settlement and pleading amounts in cases concerning oil spill and prevention violations" under the Clean Water Act. *See, e.g., In re: Industrial Chemicals Corp.*, 2002 EPA App. LEXIS 7 at \*21 (EPA App. 2002). The Penalty Policy characterizes the statutory factors of seriousness, culpability, mitigation efforts, and history of violations as related to the severity of the violator's actions. Compl.'s Ex. 8 at 3. The Penalty Policy further characterizes other penalties incurred, other matters as justice may require, and the economic impact on the violator as "broad considerations that may lead to case-by-case adjustments of the gravity component based on specific circumstances." *Id.* The Penalty Policy notes that the penalty should fully recognize all delayed or avoided costs. *Id.* at 16.

On March 18, 2008, McComas Fuel expressed an intention to contest the appropriateness of civil penalties in a statement it filed and shared with the EPA. McComas Fuel Prehearing Statement at 8. However, McComas Fuel failed to do so in either its subsequent briefs or during the proceeding. Regardless, the Consolidated Rules of Practice provide that "[t]he complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that *the relief sought is appropriate.*" 40 C.F.R. § 22.24(a) (emphasis added). The EPA, therefore, has the burden of demonstrating the appropriateness of the proposed penalty. This section's discussion follows the order of the Penalty Policy: it first discusses the gravity components (seriousness, culpability, mitigation, and history of prior violations); it next considers the adjustments to gravity to account for other penalties for the same incident,

other matters as justice may require, and economic impact of the penalty on the violator; and it last addresses the economic benefit the violator gained through non-compliance.

**A. Seriousness**

The Penalty Policy begins with an assessment of the seriousness of the Section 311(j) violation. Seriousness relates to the risk of the violation leading to environmental harm, and the Penalty Policy measures seriousness using two variables: the volume of storage capacity at the facility and the degree of non-compliance. Compl.'s Ex. 8 at 7-8. The storage capacity component has four entries, ranging from less than 42,000 gallons of oil to more than one million gallons of oil. *Id.* The extent of non-compliance is broken into three categories: minor, moderate, and major. *Id.*

Ms. Gilley-Taurino completed a worksheet calculating the proposed penalty and finding the Facility to be within the "42,001 to 200,000 gallon" category.<sup>4</sup> Compl.'s Ex. 9. Though the Facility's capacity was only 90,000 gallons, not the 119,000 gallons Ms. Taurino had originally found, it still fit within the Penalty Policy's "42,001 to 200,000" category. Compl.'s Ex. 8 at 7.

The Penalty Policy provides criteria for determining the extent of non-compliance, as measured through the violation's effect on the owner or operator to respond to worst case spills. Compl.'s Ex. 8 at 8. At the lowest range, the non-compliance can have a minor effect on the owner or operator's ability to respond to a worst-case spill; at the highest range, the non-compliance can essentially undermine the ability for the owner or operator to respond to a worst case spill. *Id.*

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<sup>4</sup> Ms. Gilley-Taurino originally computed the Facility's aggregate capacity to be 119,000 gallons, but this figure was corrected at the hearing to be 90,000 gallons. However, both volumes are still within the same 42,000-to-200,000-gallon capacity range.



The Penalty Policy provides examples related to the SPCC Plan requirements to demonstrate the differences among minor, moderate, and major non-compliance. Minor SPCC Plan non-compliance includes failure to review the plan after three years and failure to have an amendment certified. *Id.* Moderate SPCC Plan non-compliance includes inadequate or incomplete plans or implementation of plans that provide some but not all of the required secondary containment, failure to have a plan but adequate secondary containment provided, and failure to certify the plan. *Id.* Major SPCC Plan non-compliance includes having no plan or secondary containment or an incomplete plan that leads to grossly inadequate secondary containment or hazardous site conditions. *Id.*

After determining the initial violation using the capacity and non-compliance matrix, the Penalty Policy directs the EPA to adjust the penalty upward up to 50 percent to account for the potential for significant environmental harm in the event of a worst case scenario discharge and upward up to 30 percent (i.e., 0.5 percent per month, up to a maximum of five years) to account for the duration of the violation. *Id.* at 9.

In her testimony, Ms. Gilley-Taurino explained that she found the non-compliance to be moderate. Tr. 65. She testified that secondary containment is vital to the regulations, and because its deficiency is never a minor violation, she had to choose from moderate and major non-compliance. *Id.* She found the violation was moderate because McComas Fuel had roughly one-half of its required secondary containment and was not completely lacking. *Id.* Given a range of \$6,000 to \$15,000, Ms. Gilley-Taurino chose \$7,000 as her starting point, in part because she understood from her interview with Edward McComas and James McComas that they knew they might have an issue regarding secondary containment and wanted her help in addressing it. Tr. 66.

The penalty calculation worksheet also shows that Ms. Gilley-Taurino did not adjust the penalty to account for the potential for significant environmental harm, but she did adjust it the full 30 percent to account for an extended duration. Compl.'s Ex. 9. Ms. Gilley-Taurino then applied a factor to account for inflation for those months following March 15, 2004, but not for those months prior to March 15, 2004. *Id.* Ms. Gilley-Taurino testified that she found them to have violated the secondary containment requirement for at least as long as the five years the Penalty Policy allows the EPA to consider. Tr. 66:18-24.

After reviewing the facts of the Facility's secondary containment system and the Penalty Policy matrix for determining the dollar amount ascribed to seriousness, I find that the initial penalty of \$7,000 and the subsequent 30 percent adjustment for duration are fair applications of the principles in the Penalty Policy. The Clean Water Act's focus is the protection of the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Thus, the seriousness of a violation must relate to the danger the Nation's waters face as a result of non-compliance. The Penalty Policy's use of a matrix to determine the intersection between the volume of oil at risk for discharge and the extent of an owner or operator's non-compliance is a rational approach to measuring this risk. Further, Ms. Gilley-Taurino's placement of the McComas Fuel violation as one of moderate non-compliance fits the criteria espoused in the Penalty Policy, and its placement in the lower third of the range shows recognition for the efforts McComas Fuel has given in complying with the regulations, including its SPCC Plan and the secondary containment it provided at the loading rack. I find no contrary evidence to the conclusion that McComas Fuel violated its secondary containment for at least the five

years preceding the October 2006 inspection. As such, the duration and its accompanying inflation adjustments are appropriate.

**B. Culpability**

The Penalty Policy permits the EPA to adjust the proposed penalty by up to an additional 75 percent to account for the violator's culpability. The measure of culpability here is "the degree to which the respondent should have been able to prevent the violation, considering the sophistication of the respondent and the resources and information available to it, and any history of regulatory staff explaining to the respondent its legal obligations or notifying the respondent of violations." Compl.'s Ex. 8 at 10.

Ms. Gilley-Taurino did not adjust the proposed penalty upward to capture any additional culpability, Compl.'s Ex. 9, but she did testify that she could have if she had given consideration to two additional facts. First, she testified that the regulations regarding secondary containment had been in place for 30 years, so McComas Fuel should have known about the requirements. Tr. 67. Second, she testified that had she known that Mr. Shellhouse had proposed an engineering upgrade to the secondary containment in 2003, effectively putting McComas Fuel on notice, she would have increased the penalty. Tr. 68.

Regardless of the two additional facts Ms. Gilley-Taurino cited, I find the lack of an additional factor for culpability an appropriate outcome. The record indicates that though the regulations applied to McComas Fuel since their inception, McComas Fuel's culpability is mitigated by the fact that its engineering consultant certified the secondary capacity to be adequate in 1993, see Compl.'s Ex. 3, and he continued to advise McComas Fuel that according to his interpretation of the pre-2002 regulations, McComas

Fuel had additional time to come into compliance, Tr. 217. As explained *supra*, McComas Fuel cannot rely on the advice of its consultant when it bears ultimate responsibility, but it does illustrate that, “considering the sophistication of the respondent and the resources and information available to it,” Compl.’s Ex. 8 at 10, the lack of any culpability adjustment here is appropriate.

**C. Mitigation**

The Penalty Policy permits the EPA to adjust downward the proposed penalty by up to 25 percent for actions the violator takes to minimize or mitigate the effects of its violation. *Id.* A violator can only minimize or mitigate the effects of an SPCC Plan violation by coming into compliance “before being notified of its violation by regulatory staff.” *Id.* The EPA did not include any adjustment for mitigation. Compl.’s Ex. 9. As the record indicates, McComas Fuel did not mitigate its compliance by securing adequate secondary containment for its loading rack before being notified by the EPA. Therefore, no adjustment to the civil penalty is appropriate for this category.

**D. History of Prior Violations**

The Penalty Policy permits the EPA to adjust upward the proposed penalty by up to 100 percent when the violator has a history of relevant violations within the past five years. Compl.’s Ex. 8 at 10. The EPA penalty calculation worksheet shows no adjustment for a history of past violations, Compl.’s Ex. 9, and the record contains no references to any prior act of non-compliance by McComas Fuel. Thus, this factor is properly omitted from the calculation.

**E. Other Penalties for the Same Incident**

The Penalty Policy permits the EPA to offset its proposed penalty by the amount of a penalty the violator has paid to a state or local government for a violation arising out

of the same incident. Compl.'s Ex. 8 at 15. Neither the EPA's penalty calculation worksheet, Compl.'s Ex. 9, nor the record make any mention of other penalties or payments that would qualify McComas Fuel for this offset. Thus, no adjustment for this category is appropriate.

**F. Other Matters as Justice May Require**

The Penalty Policy permits the EPA to adjust the proposed penalty amount to account for other relevant factors not yet included in the calculation. Compl.'s Ex. 8 at 15. The EPA's proposed penalty includes no such adjustments. Compl.'s Ex. 9. Neither the EPA nor McComas Fuel argued in their briefs or in the hearing that other relevant factors exist that, in the interests of justice, should affect the proposed penalty amount. Thus, no adjustment for this category is appropriate.

**G. Economic Impact on the Violator**

The Penalty Policy permits the EPA to adjust downward the proposed penalty when the violator is able to document its inability to pay. Compl.'s Ex. 8 at 15. Further, the EPA assumes the viability of violators unless the violator provides "copies of actual federal tax returns, audited financial statements, or financial information of comparable reliability." *Id.* The EPA's penalty calculation omits any reference to an adjustment based on the economic impact on the violator. Compl.'s Ex. 9.

The EPA Environmental Appeals Board has held that a respondent may only pursue a claim on inability to pay if he provides the necessary documentation supporting such a claim in advance of the hearing, and "where a respondent does not raise its ability to pay as an issue in its answer," the Presiding Officer may properly conclude that respondent has waived any objection to the penalty on the basis of its ability to pay. *In re Strubinger*, 2002 EPA ALJ LEXIS 44, at \*9-11 (July 12, 2002)(citations omitted).

McComas Fuel did not raise its ability to pay in its Answer or in its prehearing exchanges, and therefore, it is presumed that McComas Fuel is able to pay the penalty.

#### **H. Economic Benefit Gained Through Non-Compliance**

The Penalty Policy permits the EPA to add to the proposed penalty the amount of a violator's economic benefit that it obtained by avoiding or delaying necessary compliance costs, illegally obtaining profit, or obtaining a competitive advantage over its competitors who comply with the regulations. Compl.'s Ex. 8 at 15-16. The Penalty Policy notes that the "recapture of economic benefit prevents a violator of environmental laws from having any financial incentive to disregard its legal obligations," and that "[i]n Section 311(j) cases, [EPA] staff should fully recognize all delayed or avoided costs." Compl.'s Ex. 8 at 16.

However, in this case, the EPA's proposed penalty calculation worksheet is silent on the issue of economic benefit, and Ms. Gilley-Taurino gave testimony regarding the omission:

Q. You did not increase the penalty for any economic benefit realized by the company for its non-compliance with regulations, did you?

A. I did not.

Q. Why not?

A. At the time when this inspection was conducted and the subsequent follow-up with preparing a penalty, we were not including economic benefits with our cases and within our group. That has since changed. At that time we weren't doing economic benefits for any of our cases, so McComas just happened to fall -- fall in during that time.

Tr. 69:5-15. Ms. Gilley-Taurino then testified that she now includes a penalty for economic benefit, and indeed, that she had recently done so in other analogous secondary containment cases. Tr. 69:16-22.

The EPA argued that, in its enforcement discretion, it omitted this factor in the proposed penalty's calculation, and that this supports the conclusion that the proposed

penalty is “justified, reasonable, and significantly conservative.” Compl.’s Post-Hearing Brief at 38-39. In addition, the EPA noted testimony from Mr. Shellhouse that the construction proposal he submitted to McComas Fuel, which would have provided adequate secondary containment, would have cost approximately \$25,000 or \$30,000. Tr. 133:8-13. Mr. Shellhouse’s proposal, Compl.’s Ex. 7 at 4, would have provided 5,180 gallons of capacity within the bermed area, much more than the roughly 1,000 gallons the EPA cited as McComas Fuel’s capacity deficiency. Thus, any determination of economic benefit would need to be tied to the actual costs one would expect McComas Fuel to undertake to provide for the needed secondary capacity, not what it would have cost McComas Fuel to construct nearly five times the required additional containment capacity. The omission of the Shellhouse estimated costs is appropriate because only a portion of it would have been necessary to provide adequate containment, and the omission of the factor generally appears to be a valid exercise of the EPA’s enforcement discretion.

In these circumstances, I find that the EPA’s proposed penalty, omitting any factor to account for economic benefit, is an appropriate penalty.

## **V. CONCLUSION**

I find that McComas Fuel violated the secondary containment requirements for loading racks at its on-shore oil handling facility. In consideration of the statutory factors, the EPA’s Penalty Policy, and the facts, the appropriate penalty in this case is **\$9,910.10.**

**ORDER**

1. Respondent H.C. McComas Fuel Company is hereby assessed a civil penalty in the amount of \$9,910.10.
2. McComas Fuel must pay the full amount of this civil penalty within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) by certified or cashier's check, payable to the Treasurer, United States of America, mailed to:
  - a. All payments made by certified or cashier's check and sent by regular mail shall be addressed and mailed to:

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

Contact: Natalie Pearson, 314-418-4087
  - b. All payments made by certified or cashier's check and sent by overnight delivery service shall be addressed and mailed to:

U.S. Environmental Protection Agency  
U.S. Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101

Contact: Natalie Pearson, 314-418-4087
  - c. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York  
ABA No. 021030004  
Account No. 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York NY 10045

Field Tag 4200 of the Fedwire message should read  
"D 68010727 Environmental Protection Agency"  
(For Customer Service, dial 212-720-5000)



- d. All payments made through the automated clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

PNC Bank  
ABA No. 051036706  
Transaction Code 22 - Checking  
Environmental Protection Agency  
Account 310006  
CTX Format  
808 17th Street, NW  
Washington, DC 20074

Contact: Jesse White 301-887-6548  
(For Customer Service, dial 800-762-4224)

- e. All payments made online can be made at:

WWW.PAY.GOV  
Enter sfo 1.1 in the search field  
Open form and complete required fields.

- f. Additional payment guidance is available at:

[http://www.epa.gov/ocfo/finservices/make\\_a\\_payment.htm](http://www.epa.gov/ocfo/finservices/make_a_payment.htm)

- g. At the same time that payment is made, McComas Fuel shall mail copies of any corresponding check, or written notification confirming any electronic wire transfer to:

Lydia Guy  
Regional Hearing Clerk  
U.S. EPA Region III (Mail Code: 3RC00)  
1650 Arch Street  
Philadelphia, PA 19103-2029

and

James Van Orden  
Senior Assistant Regional Counsel  
U.S. EPA Region III (Mail Code: 3RC42)  
1650 Arch Street  
Philadelphia, PA 19103-2029

A transmittal letter identifying the name and docket number should accompany both the remittance and/or a copy of the check or a copy of Respondent's electronic wire transfer.

3. In the event that McComas Fuel fails to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.
4. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, the EPA is entitled to assess interest and penalties on debt owed to the United States and to assess a charge to cover the cost of processing and handling a delinquent claim.
5. McComas Fuel is ordered to pay the civil penalty of Nine Thousand Nine Hundred Ten Dollars and Ten Cents (\$9,910.10) pursuant to 40 C.F.R. § 22.17(c), thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c).
6. This Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondent unless (1) a party moves to reopen the hearing, (2) a party appeals this Initial Decision to the EPA Environmental Appeals Board in accordance with 40 C.F.R. § 22.30, (3) a party moves to set aside the Order that constitutes this Initial Decision, or (4) the EPA Environmental Appeals Board elects to review the Initial Decision on its own initiative.

IT IS SO ORDERED.

3/23/10  
Date

Renee Sarajian  
Renee Sarajian  
Regional Judicial Officer/Presiding Officer

**CERTIFICATE OF SERVICE**

This Initial Decision was served on the date below, by the manner indicated, to the following people:

**VIA HAND DELIVERY:**

James F. Van Orden  
Assistant Regional Counsel (3RC42)  
U.S. EPA, Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

**VIA CERTIFIED MAIL/  
RETURN RECEIPT REQUESTED:**

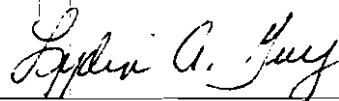
William A. McComas  
Shapiro Sher Guinot & Sandler  
36 South Charles Street  
Charles Center South, Suite 2000  
Baltimore, MD 21201

**VIA POUCH MAIL:**

Eurika Durr  
Clerk of the Board, Environmental Appeals Board (MC 1103B)  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

MAR 23 2010

Date



Lydia Guy  
Regional Hearing Clerk  
Region III, EPA