

STATUTORY AND REGULATORY FRAMEWORK

CWA Unauthorized Discharge

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into a “navigable water of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362, by any person except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3) states, in pertinent part, that when any person is in violation of Section 301, EPA may issue an order requiring such person to comply with the section.

Information necessary to determine compliance

8. Section 308 of the CWA, 33 U.S. § 1318, authorizes the agency to issue an order to obtain information to determine compliance with the CWA.

CWA Oil Pollution Prevention

9. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States.

10. Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), and 40 C.F.R. § 112.2 define "oil" as "oil of any kind or in any form, including, but not limited to, petroleum [or] fuel oil... "

11. Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), authorizes EPA to promulgate a regulation to define what discharges of oil may be harmful to the public health or welfare or environment of the United States. 40 C.F.R. § 110.3 defines such discharges to include discharges of oil that violate applicable water quality standards or cause a film or a sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.

12. Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), provides in part that the President shall issue regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges.”

13. To implement Section 311(j)(1)(C), EPA promulgated regulations to prevent oil pollution at 40 C.F.R. Part 112 that set forth the requirements for the preparation and implementation of Spill Prevention Control and Countermeasure Plans (“SPCC Plans”).

The requirements of 40 C.F.R. Part 112 apply to owners and operators of non-transportation-related onshore facilities with an aboveground storage capacity of 1,320 gallons or greater, engaged in gathering, storing, transferring, distributing, using or consuming oil or oil products, which due to their locations, could reasonably be expected

to discharge oil in quantities that may be harmful into or upon the navigable waters of the United States or adjoining shorelines.

14. Section 311(c) of the CWA, 33 U.S.C. § 1321(c), provides authority, delegated to EPA, to “remove or arrange for the removal of a discharge, and mitigate or prevent a threat of a discharge...” of oil.

15. Section 311(e) of the CWA, 33 U.S.C. § 1321(e), provides authority, delegated to EPA, to issue “administrative orders that may be necessary to protect the public health and welfare” due to an “actual or threatened discharge of oil . . . from a . . . facility in violation of [Section 311(b) of the CWA]” if “the President determines that there may be an imminent and substantial threat to the public health or welfare.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

16. As a corporation, Respondent is a “person” within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

17. At all times relevant to this action, Respondent was the owner and/or operator, within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of approximately ninety oil production leases in Kansas (collectively, “Facilities”), including three oil production facilities, or leases, in Russell and Ellis Counties of Kansas: known as the “Dumler Lease,” the “Braun Lease” and the “Gilbert Lease” at the following approximate locations:

- a. Dumler Lease: Section 24, Township 14 South, Range 14 West of Russell County;
- b. Braun Lease: Section 34, Township 13 South, Range 17 West of Ellis County; and
- c. Gilbert Lease: Section 29, Township 11 South, Range 15 West of Russell County.

18. The Dumler Lease facility includes production wells, flowlines, a storage tank battery consisting of two above ground storage tanks for oil, one other vessel used for oil/water separation and one produced water tank, and other oil filled equipment. The Dumler Lease facility has an estimated aggregate above-ground storage capacity of 30,870 gallons of oil and produced water.

19. The Braun Lease facility includes production wells, flowlines, storage tank battery consisting of two above ground storage tanks for oil and one other above ground storage tank used for oil/water separation, and other oil-filled equipment. The Braun Lease facility has an estimated aggregate above-ground storage capacity of 25,620 gallons of oil and produced water.

20. The Gilbert Lease facility includes production wells, flowlines, a storage tank battery consisting of two above ground storage tanks for oil and one other above ground storage tanks used for oil/water separation, produced water tanks, and other oil filled equipment. The Braun Lease facility has an estimated aggregate above-ground storage capacity of 25,620 gallons of oil and produced water.

21. The Braun Lease facility is adjacent to a tributary of the North Fork of Big Creek (300 feet) that flows to the Smoky Hill River; the Gilbert Lease facility is adjacent to an unnamed

tributary to the Saline River (500 feet); and the Dumler Lease facility is adjacent to Fossil Creek (225 feet) that flows to the Smoky Hill River. The tributary of the North Fork of Big Creek, the unnamed tributary of the Saline River and Fossil Creek, and the Smoky Hill and Saline Rivers are each navigable waters of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).

22. Respondent is engaged in storing, processing, using or consuming oil or oil products located at the Facilities.

23. The Facilities, including the Dumler, Braun and Gilbert Leases, are “non-transportation-related” facilities within the meaning of 40 C.F.R. § 112 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

24. The Facilities, including the Dumler, Braun and Gilbert Leases, are “onshore” facilities within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

25. The Facilities, including the Dumler, Braun and Gilbert Lease facilities are non-transportation-related onshore facilities which, due to their location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity and are, therefore, are SPCC-regulated facilities.

26. Pursuant to Section 311(j)(1)(C) of the Act, Executive Order 12777, and 40 C.F.R. § 112.1 Respondent, as the owner and/or operator of SPCC-regulated facilities, is subject to the SPCC regulations at all times relevant to this action.

27. On or about August 24, 2016, Respondent reported to the National Response Center (“NRC”) that a discharge of approximately 15 barrels of crude oil from the Gilbert Lease facility (“August 2016 spill”) had reached and caused the observable presence of oil and a sheen in the tributary to the Saline River.

28. On or about September 22, 2016, Respondent reported to the NRC that a discharge of approximately 150 barrels of crude oil from the Gilbert Lease facility (“September 2016 spill”), had reached and caused the observable presence of oil and a sheen in the adjacent tributary to the Saline River.

29. Following the August and September 2016 spills, representatives of the Kansas Corporation Commission (“KCC”) inspected and/or obtained information about the Gilbert lease facility and provided oversight to Respondent’s response to the spill. The information obtained by the KCC included photographs of sheen in the tributary and in two downstream ponds on the tributary, as well as sampling data that documented the presence of oil in these waters.

30. On July 22, 2019, EPA issued the KCC an “open records” request for all information of past spills for the Dumler, Braun and Gilbert Leases facilities. The response from KCC provided documentation of a chronic pattern of oil spills and releases at each of the Braun, Gilbert and Dumler leases, including the August and September 2016 discharges from the Gilbert lease.

31. Respondent's August 2016 and September 2016 discharges of oil from the Gilbert Lease facility caused a film or sheen upon the surface of the tributary of the Saline River and/or adjoining shorelines, and, therefore, was in a quantity that has been determined may be harmful under 40 C.F.R. § 110.3, which implements Section 311(b)(3) and (b)(4) of the Act, 33 U.S.C. § 1321(b)(3) and (b)(4).

32. Respondent's August 2016 and September 2016 discharges of oil from the Gilbert Lease facility into the tributary Saline River and/or adjoining shorelines violated Sections 301 and 311 (b)(3) of the Act, 33 U.S.C. §§ 1311 and 1321(b)(3).

33. On March 21, 2019, a representative of EPA inspected the Facilities in order to determine compliance with the SPCC regulations of 40 C.F.R. Part 112 ("EPA's Inspections") and obtained information about each facility which was documented in separate inspection reports for each facility. Copies of these inspection reports were transmitted to Respondent by EPA on June 7, 2019.

34. EPA's Inspections documented Respondent's failure to fully prepare and implement an SPCC Plan at the Braun, Gilbert and Dumler lease facilities (as required by 40 C.F.R. 112.3), included but are not limited to the following:

- a. Respondent failed to include accurate information in the SPCC Plans' facility diagrams, including the locations of all tanks and containers, production and injection wellheads, test barrels, breakout tanks, portable containers, transfer areas, flowlines, and intra-facility gathering lines, in violation of 40 C.F.R. § 112.7(a)(3);
- b. Respondent failed to describe a procedure adequate for reporting a discharge, in violation of 40 C.F.R. § 112.7(a)(4);
- c. Respondent failed to list all scenarios of a reasonable potential for equipment failure, such as discharges from wellheads, breakout tanks, flowlines, or intra-facility gathering lines, and for discharges from transfers, failed to provide a prediction of the direction, rate of flow, and total quantity of oil, in violation of 40 C.F.R. § 112.7(b);
- d. Respondent failed to have adequate secondary containment and/or describe secondary containment in the Plans (both general and sized containment; including for portable containers, production wellheads, transfer area at the tank batteries, above-ground flowlines and buried flowlines), in violation of 40 C.F.R. § 112.7(c), or to clearly explain in the Plan why secondary containment measures are not practicable, in violation of 40 C.F.R. § 112.7(d);
- e. Respondent failed to include an adequate oil spill contingency plan, as required by 40 C.F.R. §§ 112.7(d)(1) and 112.9(d)(3)(i), following the provisions of 40 C.F.R. Part 109, including failure to provide information specific to the Facilities for the components required by 40 C.F.R. §§ 109.5(b)(2)-(3), 109.5(c)(1)-(3), 109.5(d)(1), and 109(d)(5); and
- f. Respondent failed to prepare and implement a written program of flowline maintenance, in violation of 40 C.F.R. § 112.9(d)(4), that addresses procedures to ensure compatibility, visually inspect and test flowlines and any associated appurtenances on a periodic and regular schedule, take corrective action based on regularly scheduled inspections, tests, or evidence of discharge, and promptly remediate any accumulations of oil discharges.

35. There exists a continuing threat of a “discharge” of oil as defined in Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), and 40 C.F.R. § 112.2, into navigable waters of the United States, from Respondent’s SPCC regulated Facilities, including the Braun, Gilbert and Dumler lease facilities, as evidenced by Respondent’s violation of Sections 301(a), 311(b)(3) and 311(j) of the CWA and 40 C.F.R. Part 112.

36. The threat of a discharge of oil from the Facilities may pose an imminent and substantial threat to public health or welfare of the United States, including drinking water, fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources under the jurisdiction and control of the United States.

37. The actions agreed to by Respondent and required by this Order are necessary to protect the public health and welfare of the United States, including threats and/or potential threats to drinking water, fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources under the jurisdiction and control of the United States.

38. The actions agreed to by Respondent and required by this Order are in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”) and are authorized by EPA pursuant to the authority granted in Section 311(c) and (e) of the CWA, 33 U.S.C. § 1321(c) and (e).

39. EPA has notified the state of Kansas of this action pursuant to Sections 309(a)(4) and 311(e)(1)(B) of the CWA, 33 U.S.C. §§ 1319(a)(4) and 1321(e)(1)(B).

ORDER

40. Based on the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW and pursuant to the authority of Sections 308, 309(a)(3) and 311(c) and 311(e) of the CWA, 33 U.S.C. §§ 1318, 1319(a)(3) and 1321(c) and (e), Respondent hereby agrees and is ORDERED to take the following actions and provide the following information:

- a. **Assessment of compliance actions for all active leases** – Upon the effective date of this Order, Respondent shall commence an assessment and evaluation of all Respondent’s active production leases (Facilities) for compliance with the SPCC requirements of Section 311 of the CWA and 40 C.F.R. Part 112, including but not limited to the requirements of the CWA violated at the Dumler, Gilbert and Braun leases, as described in Paragraphs 25 to 34 of this Order. The required compliance assessment by Respondent shall prioritize leases by proximity to waters of the United States (including proximity to geographic features that drain to waters of the United States). The results of this compliance assessment and documentation of all actions taken shall be submitted by Respondent to EPA pursuant to Paragraphs 40.d and e, below;
- b. **Documentation of Compliance at the Dumler, Gilbert and Braun leases** – Within 45 days from the effective date of this Order, Respondent shall submit documentation of the compliance actions taken at the Dumler, Gilbert and Braun leases to address the violations set forth in Paragraphs 25 to 34 of this Order. This documentation shall include but not be limited to a narrative description of all

- actions taken, a copy of the SPCC plan for each lease (as updated), and photographs of any changes to equipment and/or containment;
- c. **Identification of Active Leases with SPCC Plans** – Within 45 days of the effective date of this Order, Respondent shall provide EPA a list of all of Respondent’s active leases, as of the effective date of this Order, owned and/or operated by Respondent that have SPCC Plans, and the volume of oil storage at each identified lease. Upon request, Respondent will provide EPA a copy of the current SPCC Plan for any identified lease;
 - d. **Phase 1 report of additional compliance actions** - Within 180 days of the effective date of this Order, Respondent shall submit a Phase 1 report to EPA that provides documentation of all compliance actions taken at Respondent’s SPCC regulated leases from the effective date through the date of submittal. The Phase 1 report shall include but not be limited to a narrative description for each lease of all actions taken and photographs of any changes to equipment and/or containment. Upon request, Respondent will provide EPA a copy of any SPCC Plan (as updated) for any identified lease; and
 - e. **Final Report** - Within 360 days the effective date of this Order, Respondent shall submit a Final report to EPA that provides documentation of all compliance actions taken at Respondent’s SPCC regulated leases from the effective date through the date of submittal. The Final Report shall include but not be limited to a narrative description for each lease of all actions taken and photographs of any changes to equipment and/or containment. Upon request, Respondent will provide EPA a copy of any SPCC Plan (as updated) for any identified lease.

Submittals

41. All submittals to EPA that are required of Respondent by this Order shall be made by electronic submission to:

Mark Aaron
Compliance Officer
U.S. Environmental Protection Agency
Water Branch
Enforcement & Compliance Assurance Division
11201 Renner Boulevard
Email: aaron.mark@epa.gov

42. Electronic submissions to the EPA will be deemed submitted on the date they are transmitted electronically. Any report, notification, certification, or other communication that cannot be submitted electronically to the EPA shall be submitted in hard copy to the address provided above.

General Provisions

43. EPA and Respondent acknowledge that this Order has been negotiated in good faith and that neither consenting to the terms of this Order, nor the actions undertaken by Respondent in accordance with this Order, constitute an admission of liability.

44. By entering into this Order, Respondent (1) consents to and agrees not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) agrees to undertake all actions required by the terms and conditions of this Order, and (3) consents to be bound by the requirements set forth herein.

45. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Order, including, but not limited, any right of judicial review of this Order under the CWA, or under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

46. Nothing in this Order shall be construed to relieve Respondent of the requirements of the CWA or any other applicable requirements under federal, state or local law. EPA reserves the right to take, direct, or order all actions as necessary as authorized by law for any violation of this Order, and for other future or past violations of the CWA.

47. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of liability for its responsibility to obtain and comply with any required local, state and/or federal permits.

48. Failure to comply with the terms of this Order may result in your liability for significant statutory civil penalties for each violation under Sections 309(d) and 311(b)(7)(B) of the CWA, 33 U.S.C. §§ 1319(d) and 1321(b)(7)(B), as modified by 40 C.F.R. Part 19. Upon suit by the EPA, the United States District Court for the District Kansas may impose such penalties if, after notice and opportunity for a hearing, the court determines that you have violated the CWA as described above and failed to comply with the terms of this Order. In determining the amount of any penalty, the court will consider the seriousness of violation, the economic benefit resulting from the violations, any history of such violations, any good faith efforts made to comply with legal requirements, the economic impact a penalty may have, and such other matters as justice may require. The district court has the authority to impose separate civil penalties for any violations of the CWA and for any violations of this Order.

49. EPA may subsequently amend this Order, upon written agreement with Respondent, in accordance with EPA's authority under the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by the original Order. All deadlines for performance under this Order may be extended upon written approval by EPA, at its sole discretion, without formal amendment to the Order.

50. If any provision or authority of the Order or the application of the Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of the Order shall remain in full force and effect and shall not be affected by such a holding.

51. Nothing in this Order shall limit the EPA's right to obtain access to, and/or to inspect the facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, and/or any other authority. Respondent must provide and/or obtain access to the facility, to off-site areas where access is necessary to implement this Order, and to all documents related to conditions at the facility and work conducted

under this Order. Respondent must provide this access to EPA and EPA's contractors and representatives, upon presentation of verifiable documentation of identity and authorization. Respondent must notify EPA immediately of any denial of access to areas that Respondent does not own or control.

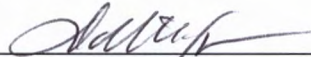
52. Respondent must retain all documents and information relating to the work performed under and the implementation of this Order and relating to the oil and/or hazardous substances found on or discharged from the facility, for five years after completing removal actions required by this Order. Before destroying any documents or information, Respondent must notify EPA that the documents and/or information are available to EPA for inspection and, upon request, must provide the documents and/or information to EPA. In addition, Respondent must provide these documents and/or this information at any time before the five-year period expires at the written request of EPA.

53. This Order shall become effective and enforceable on the date that the Order is signed by EPA. Any amendments shall become effective and enforceable on the date that the amendment is signed by all Parties. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date. Respondent agrees to receipt and service of this Order at the following email address: dnixon111@gmail.com,

54. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA.

RESPONDENT:
R.P. NIXON OPERATIONS, INC.

Date: 11/17/2020



Dan Nixon, President
R.P. Nixon Operations, Inc.

**COMPLAINANT:
U. S. ENVIRONMENTAL PROTECTION AGENCY**

Date: _____

David Cozad
Director
Enforcement and Compliance Assurance Division

Date: _____

Mary Peterson
Director
Superfund and Emergency Management Division

Date: 11/17/2020

Howard Bunch

Howard C. Bunch
Senior Assistant Regional Counsel
Office of Regional Counsel

CERTIFICATE OF SERVICE

I certify a true and correct copy of the Administrative Order for Compliance on Consent was sent this day in the following manner to the addressees:

Regional Hearing Clerk:

R7_Hearing_Clerk_Filings@epa.gov

Copy emailed to Respondent:

Dan Nixon, President
R.P. Nixon Operations, Inc.
dnixon111@gmail.com

Copy emailed to representatives of EPA:

Howard Bunch
EPA Region 7 Office of Regional Counsel
bunch.howard@epa.gov

Mark Aaron
EPA Region 7 Enforcement and Compliance Assurance Division
aaron.mark@epa.gov

Date: _____

Signature