

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III**

IN THE MATTER OF:

**PETROLEUM MARKETERS, INC.
d/b/a APB Whiting Oil Co.
1415 Eastern Road
Roanoke, VA 24013**

Respondent.

**ADMINISTRATIVE COMPLAINT AND
OPPORTUNITY TO REQUEST A HEARING**

**Proceeding to Assess a Class II
Civil Penalty Under Section
311 of the Clean Water Act, as amended,
for SPCC Violations**

Docket No. CWA-03-2008-0103

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REGIONAL ADMINISTRATOR
EPA REGION III

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I. STATUTORY AUTHORITY

1. This Administrative Complaint is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 311(b)(6)(B)(ii) of the Clean Water Act, as amended, ("CWA"), 33 U.S.C. § 1321(b)(6)(B)(ii). The Administrator has delegated this authority to the Regional Administrator of EPA, Region III, who in turn has delegated it to the Director of the Region's Hazardous Site Cleanup Division ("Complainant").

2. Pursuant to Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(ii), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," codified at 40 C.F.R. Part 22, ("Part 22" or "Consolidated Rules of Practice"), Complainant hereby provides notice of his proposal that the Regional Administrator or his designee assess a civil penalty against Petroleum Marketers, Inc. d/b/a APB Whiting Oil Co. ("PMI" or "Respondent") for its failure to comply with regulations issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j).

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

4. 40 C.F.R. Part 112 (the "Oil Pollution Prevention Regulations"), which implements Section 311(j) of the CWA, 33 U.S.C. § 1321(j), sets forth procedures, methods and equipment and other requirements to prevent the discharge of oil from non-transportation-related facilities into or upon the navigable waters of the United States and adjoining shorelines in such quantities

that by regulation have been determined may be harmful to the public health or welfare or environment of the United States by owners or operators who are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products. The Oil Pollution Prevention Regulations apply to non-transportation-related facilities with: (1) an underground storage capacity greater than 42,000 gallons of oil, or, (2) an above-ground aggregate storage capacity of greater than 1,320 gallons of oil.

5. In 2002, the Oil Pollution Prevention Regulations were amended. The implementation deadline for the 2002 amended regulatory requirements for existing facilities subsequently was extended to October 31, 2007. 40 C.F.R. § 112.3(a). In 2007, the implementation deadline was extended to July 1, 2009. 72 Fed.Reg. 27443 (May 16, 2007). However, oil storage facilities in operation prior to August 16, 2002, such as the Respondent's Facility, were required to maintain their existing SPCC plan and remain in compliance with all preexisting regulatory requirements prior to the implementation deadline for the amended regulations pursuant to 40 C.F.R. § 112.3(a).

II. THE RESPONDENT

6. The Respondent is a Virginia corporation with a principal place of business located at 3000 Ogden Road, Roanoke, Virginia 24018. The Respondent is engaged in the retail and wholesale marketing of petroleum products, including fuel oil, kerosene and gasoline.

7. The Respondent owns and operates a bulk oil storage facility known as the APB Whiting Oil Co. Facility located at 1415 Eastern Avenue in Roanoke, Virginia (the "Facility").

III. GENERAL ALLEGATIONS

8. The Respondent is a person within the meaning of Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.

9. The Respondent is the owner, within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of the Facility.

10. The Respondent is engaged in producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products at the Facility.

11. The Facility became operational in 1969.

12. EPA personnel inspected the Facility on January 10, 2006.

13. The EPA inspectors observed that the Facility has the capacity to store approximately 120,000 gallons of petroleum products, including fuel oil, kerosene and gasoline. The Facility maintains two above-ground storage tanks ("ASTs") each having a storage capacity of 30,000 gallons, as well as three ASTs each having a storage capacity of 20,000 gallons.

14. At the time of EPA's inspection, the secondary containment system for the five ASTs at the Facility consisted of an earthen containment dike surrounding the ASTs and connecting with an adjacent natural hillside. One wall of the containment dike was surfaced with gravel.

15. At the time of EPA's inspection, the containment dike surrounding the ASTs appeared to provide appropriate secondary containment for the ASTs. However, the EPA inspectors noted several instances of regulatory noncompliance during the January 2006 inspection. EPA subsequently provided the Respondent with notice of these violations.

16. On September 7, 2006, EPA sent an information request to the Respondent pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318(a), seeking information about the Respondent's efforts to bring the Facility into compliance with the Oil Pollution Prevention Regulations. In a response dated October 6, 2006, the Respondent admitted that the secondary containment system for the ASTs at the Facility had an insufficient containment volume and that the containment dike needed an additional 22,500 gallons of storage capacity to meet regulatory requirements.

17. During the January 10, 2006 inspection, EPA's inspectors were informed by a representative of PMI that the secondary containment system for the Facility's loading rack consisted of a concrete pad which drained to a 1,000 gallon catchment basin. The EPA inspectors were told that trucks with storage compartments as large as 3,000 gallons used this loading rack.

18. During a telephone call on July 23, 2007, a PMI representative described the secondary containment system for the loading rack as a concrete pad which emptied into a trench drain which, in turn, drained into an underground storage tank with a storage capacity of 1,000 gallons. The PMI representative claimed that the trench drain itself provided an additional 139 gallons of containment capacity.

19. On September 6, 2007, the EPA sent an information request to the Respondent pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318(a), seeking information about the loading rack secondary containment system at the Facility. In a response dated September 20, 2007, the Respondent reiterated that the secondary containment system for the loading rack consisted of a trench drain and UST with a total storage capacity of 1,139 gallons.

20. During the January 10, 2006 inspection of the Facility, the EPA inspectors reviewed the Facility's records of weekly and monthly inspections of the premises. EPA discovered that the Facility apparently ceased maintaining records of weekly inspections in 2004 and similarly ceased keeping monthly records after June 2005.

21. The Facility is approximately 500 feet northeast of Tinker Creek, a tributary of the Roanoke River.

22. The Facility is an "onshore facility" within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2, which, due to its location, could

reasonably be expected to discharge oil to a navigable water of the United States (as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen 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 adjoining shorelines.

23. Tinker Creek and the Roanoke River are navigable waters of the United States as defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1. These surface waters provide habitats for various species of wildlife and encompass environmentally sensitive areas.

24. The Facility is a non-transportation-related facility under the definition incorporated by reference at 40 C.F.R. § 112.2 and set forth in an appendix thereto and published on December 18, 1971, at 36 Fed. Reg. 24,080 (Dec. 18, 1971).

COUNT I – LACK OF SUFFICIENT SECONDARY CONTAINMENT

25. The allegations in paragraphs 1 through 24 are incorporated by reference.

26. The Oil Pollution Prevention Regulations provide that all bulk storage tank installations must be equipped with a secondary containment system large enough to contain the volume of the contents of the largest tank in the installation plus sufficient freeboard for precipitation. 40 C.F.R. § 112.8(c)(2).

27. The requirement for secondary containment for bulk storage tanks has been part of the Oil Pollution Prevention Regulations since 1974. In 2002, the Oil Pollution Prevention Regulations were amended, and the secondary containment requirement for the loading rack found at 40 C.F.R. § 112.7(e)(2) was moved to 40 C.F.R. § 112.8(c)(2). The 2002 regulatory amendments did not suspend the requirement for secondary containment for bulk storage tanks at an oil storage facility.

28. In response to an information request dated September 7, 2007 sent by EPA pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318(a), the Respondent admitted that the secondary containment system for the ASTs at the Facility had an insufficient containment volume. The Respondent acknowledged that the Facility's containment dike required an additional 22,500 gallons of storage capacity to comply with the Oil Pollution Prevention Regulations.

29. The largest AST at the Facility has a volume of 30,000 gallons. The Facility's containment dike should have had a volume in excess of 30,000 gallons (volume of largest AST plus sufficient freeboard for precipitation) to comply with 40 C.F.R. § 112.8(c)(2). If the containment dike was deficient by 22,500 gallons, it did not even provide 25% of the required containment volume.

30. The lack of sufficient secondary containment for the bulk storage ASTs at the Facility constituted a violation of the Oil Pollution Prevention Regulations at 40 C.F.R. § 112.8(c)(2).

31. As a result of the violation alleged in the preceding paragraph, the Respondent is liable for a civil penalty not to exceed \$11,000.00 per day for each day the violation continues, up to a maximum of \$137,500.00, for violations occurring between January 30, 1997 and March 15, 2004, pursuant to Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. §1321(b)(6)(B)(ii), and 40 C.F.R. § 19.4. For violations occurring after March 15, 2004, the maximum applicable penalty is \$157,500.00 pursuant to 40 C.F.R. § 19.4.

COUNT II – INSUFFICIENT SECONDARY CONTAINMENT AT LOADING RACK

32. The allegations in paragraphs 1 through 31 are incorporated by reference.

33. Pursuant to the Oil Pollution Prevention Regulations at 40 C.F.R. § 112.7(e)(4)(ii) (2002), a loading rack must drain into a catchment basin, treatment system or quick drainage system sufficient to contain at least the maximum cargo capacity of any single storage compartment of a vehicle using the loading rack.

34. The requirement for secondary containment at a facility loading rack has been part of the Oil Pollution Prevention Regulations since 1974. In 2002, the Oil Pollution Prevention Regulations were amended, and the secondary containment requirement for the loading rack found at 40 C.F.R. § 112.7(e)(4)(ii) was moved to 40 C.F.R. § 112.7(h)(1). The 2002 regulatory amendments did not suspend the requirement for secondary containment at an oil storage facility's loading rack.

35. In response to an information request dated September 6, 2007 sent by EPA pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318(a), the Respondent acknowledged that the largest compartment of any tanker truck using the loading rack at the Facility has a volume of 3,000 gallons.

36. At the time of EPA's inspection of the Facility in January 2006, the Facility's loading rack area drained into a secondary containment system with a total storage capacity of no more than 1,139 gallons.

37. The loading rack at the Facility did not have a secondary containment system sufficient to contain a discharge of 3,000 gallons of oil from a tanker truck using the loading rack.

38. The Respondent's failure to have secondary containment for the loading rack at the Facility with a capacity of at least 3,000 gallons in January 2006 constituted a violation of the Oil Pollution Prevention regulations formerly at 40 C.F.R. § 112.7(e)(4)(ii), and now, found at 40 C.F.R. § 11.27(h)(1).

administrative penalty against PMI in the amount of **\$122,982.39**. The Complainant proposes this penalty amount based upon the best information available to EPA at this time and after considering the applicable statutory penalty factors in Section 311(b)(8) of the CWA, 33 U.S.C. §1321(b)(8). These factors include: the seriousness of the violation; 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 violations; the economic impact of the penalty on the violator; and any other matters as justice may require. The proposed penalty may be adjusted if Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty. This proposed civil penalty does not constitute a “demand” as that term is defined in the Equal Access to Justice Act, 28 U.S.C. §2412.

47. Civil penalties under Section 311(b)(6)(B)(ii) of the CWA, 33 U.S.C. §1321(b)(6)(B)(ii), are to be assessed and collected subject to the procedures and requirements of Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, which provide for notice and an opportunity for a hearing on the record in any assessment of penalties.

V. ANSWER TO THE ADMINISTRATIVE COMPLAINT AND OPPORTUNITY TO REQUEST A HEARING

48. Pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), and Section 22.15(c) of the Consolidated Rules, the Respondent may request a hearing. The procedures for the hearing, if one is held, are set out in the Consolidated Rules, a copy of which was enclosed with the Complaint.

49. If the Respondent contests any material fact upon which the Complaint is based; contends that the proposed penalty is inappropriate; or contends that it is entitled to judgment as a matter of law, the Respondent shall file an original and one copy of a written answer to the Complaint (“Answer”) with the Regional Hearing Clerk and shall serve copies of its Answer on all other parties. Any Answer to the Complaint must be filed within thirty (30) days after service of this Administrative Complaint with:

Lydia Guy (3RC00)
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

The Respondent must also provide a copy of its Answer to the attorney representing EPA in this matter at the following address:

John J. Monsees
Senior Assistant Regional Counsel (3RC42)

U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

50. The Respondent's Answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the Administrative Complaint with regard to which Respondent has knowledge. Where the Respondent has no knowledge of a particular factual allegation, the Respondent shall so state and the allegation shall be deemed denied. Failure to admit, deny, or explain any material factual allegation contained in the Administrative Complaint constitutes an admission of the allegation. The Respondent's Answer shall also state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested.

51. If the Respondent fails to submit an Answer within thirty (30) days of receipt of this Administrative Complaint, and the case is not otherwise disposed of through settlement, the Respondent may be found in default. For purposes of this action, default constitutes an admission of all facts alleged in the Administrative Complaint and a waiver of the right to a hearing to contest such factual allegations.

VI. PUBLIC NOTICE

52. Pursuant to Section 311(b)(6)(C) of the CWA, 33 U.S.C. § 1321(b)(6)(C), the Complainant is providing public notice of and reasonable opportunity to comment on the proposed issuance of a Final Order assessing an administrative penalty against the Respondent. If a hearing is held on this matter, members of the public who submitted timely comments on this penalty proposal shall have the right under Section 311(b)(6)(C) of the CWA to be heard and present evidence at the hearing.

VII. SETTLEMENT

53. The Respondent may resolve the proceeding by paying the specific penalty proposed in the Complaint or in Complainant's prehearing exchange in full, as specified by Complainant, and by filing with Regional Hearing Clerk a copy of the check or other instrument of payment. If the Complaint contains a specific proposed penalty and the Respondent pays that proposed penalty in full within thirty (30) days after receiving the Complaint, then no Answer need be filed. This resolution is not available until ten (10) days after the close of the public comment period as provided by Section VI herein.

VIII. EX PARTE COMMUNICATIONS

54. Please be advised that Section 22.8 of the Consolidated Rules prohibits any ex parte discussion of the merits of a case, any communication regarding the substance of any settlement negotiation or the substance of any proposed consent order lodged with the Hearing Clerk, or any

communication regarding the substance of a recommended decision by the Presiding Officer with the EPA Administrator, the EPA Region III Regional Administrator, the Presiding Officer, or any other Agency decision maker.

IX. INFORMAL CONFERENCE

55. EPA encourages all parties against whom a civil penalty is proposed to pursue settlement through an informal conference. In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by the Complainant, signed by the parties and incorporated into a Final Order signed by the Regional Administrator or his designee.

SETTLEMENT CONFERENCES SHALL NOT AFFECT THE REQUIREMENT TO FILE A TIMELY ANSWER TO THE COMPLAINT. To request an informal conference relating to this Administrative Complaint, the Respondent or its counsel should contact John J. Monsees, Senior Assistant Regional Counsel, at (215) 814-2632.

Signed this 28th day of January, 2008.

1/28/08
Date

James J. Burke
Complainant
James J. Burke, Director
Hazardous Site Cleanup Division

Upon information and belief, I certify this Administrative Complaint to be a legally sufficient pleading:

1/15/08
Date

John J. Monsees
John J. Monsees
Senior Assistant Regional Counsel (3RC42)

Of Counsel:
United States Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
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