

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III**

In The Matter of:	:	ADMINISTRATIVE COMPLAINT AND OPPORTUNITY TO REQUEST HEARING AND CONFERENCE
<b>Portsmouth Boating Center, Inc.</b>	:	Proceeding to Assess Class II Civil Penalties Under Section
1244 Bay Street	:	311(b)(6)(B) of the Clean Water Act, as
Portsmouth, Virginia 23704,	:	amended, 33 U.S.C. § 1321(b)(6)(B).
Respondent.	:	Docket No. CWA-03-2011-0099
_____	:	

**I. STATUTORY AUTHORITY**

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

2. The Administrator of EPA has determined that Class II penalty proceedings shall be conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22, for violations of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), and implementing regulations codified at 40 C.F.R. Part 112 and issued pursuant to Section 311(j) of the CWA, 33 U.S.C. § 1321(j).

3. Therefore, pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), and in accordance with the Consolidated Rules, Complainant hereby requests that the Regional

Administrator, or the Regional Judicial Officer, assess civil penalties against Portsmouth Boating Center, Inc. (“Respondent”) for its failure to prepare and implement a Spill Prevention, Control and Countermeasure (“SPCC”) Plan for the Portsmouth Boating Center located at 1244 Bay Street, Portsmouth, Virginia 23704 (“Facility”), as required by 40 C.F.R. § 112.3.

4. Section 311(b)(6)(B) of the CWA, 33 U.S.C. § 1321(b)(6)(B), authorizes EPA to assess a Class II penalty in the amount of \$10,000 per day, not to exceed a maximum penalty of \$125,000. Pursuant to the Debt Collection Improvement Act, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19, violations of Section 311(b)(6)(B) which occur after January 12, 2009, are subject to a statutory penalty of \$16,000 per day of violation, not to exceed a maximum penalty amount of \$177,500.

5. Congress enacted the CWA, 33 U.S.C. §§ 1251-1387, in 1972. 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 requirements for the prevention of, preparedness for, and response to oil discharges into navigable waters at specific non-transportation-related facilities.

6. In Executive Order 12777, the President delegated the authority of Section 311(j)(1)(C) of the CWA to the Administrator of EPA, and in 1973, the EPA Administrator promulgated the Oil Pollution Prevention Regulations, codified at 40 C.F.R. §§ 112.1-112.7.

#### **A. Oil Pollution Prevention Regulations**

7. Pursuant to the authority delegated by the President to EPA, EPA promulgated the Oil Pollution Prevention Regulations (“Regulations”), 40 C.F.R. Part 112, 38 Fed. Reg. 34165, on December 11, 1973, which became effective on January 10, 1974 (“1974 Regulations”).

8. Section 112.3(a) of the 1974 Regulations requires owners and operators of onshore and offshore facilities becoming operational on or before January 10, 1974, that could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, to prepare SPCC Plans no later than July 10, 1974, and to implement those plans as soon as possible but no later than January 10, 1975.

9. In addition, Section 112.3(b) of the 1974 Regulations requires owners and operators of onshore and offshore facilities becoming operational after January 10, 1974, that could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines, to prepare SPCC Plans no later than six months after the facilities become operational.

10. On July 17, 2002, EPA promulgated an amendment to the Regulations, 67 Fed. Reg. 47042 ("2002 Regulations"). The 2002 Regulations became effective on August 16, 2002. On December 26, 2006, EPA promulgated revisions to the 2002 Regulations, 71 Fed. Reg. 77266 ("2006 Regulations"). The 2006 Regulations became effective on February 27, 2007. On December 5, 2008, EPA promulgated additional revisions to the 2002 Regulations, 73 Fed. Reg. 74236 ("2008 Regulations"). The 2008 Regulations became effective on January 14, 2010. Furthermore, on November 13, 2009, EPA promulgated revisions to the 2008 Regulations, 74 Fed. Reg. 58784 ("2009 Regulations"). The effective date of the 2009 Regulations is January 14, 2010.

11. The deadlines for complying with the 2002, 2006, 2008, and 2009 regulations have been extended several times. However, under the current provisions of 40 C.F.R. § 112.3(a), an owner or operator of a facility that was in operation on or before August 16, 2002, that could

reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines must maintain and implement the facility's SPCC Plan, must make any necessary revisions to the Plan, pursuant to the 2002, 2006, 2008, and 2009 amendments, and fully implement the amended Plan by November 10, 2011.<sup>1</sup> Pursuant to the 2009 Regulations, codified at 40 C.F.R. § 112.3(a)(1), facilities in operation prior to August 16, 2002 are required to maintain their SPCC plans as required by the 1974 Regulations. Accordingly, for the purposes of this Complaint, unless otherwise noted, regulatory requirements cited herein refer to the 1974 Regulations.

12. The Regulations, 40 C.F.R. Part 112, which implement Section 311(j) of the CWA, 33 U.S.C. § 1321(j), apply to owners or operators of non-transportation-related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products.

13. The Regulations, 40 C.F.R. Part 112, set forth procedures, methods, and 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 may be harmful to the public health or welfare or to the environment.

## **B. Definitions**

14. "Discharge" is defined at Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), as any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil other than federally permitted discharges pursuant to a permit under 33 U.S.C. § 1342.

---

<sup>1</sup> If the owner or operator of such a facility has not established an SPCC Plan, then the date by which the SPCC Plan must be amended does not apply because the SPCC regulatory revisions promulgated since 2002 are inapplicable. Thus, the owner or operator is not eligible for any extension. 75 Fed. Reg. 63093.

15. “Harmful quantity” is defined at 40 C.F.R. § 110.3(b) as discharges that cause a film or 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 adjoining shorelines.

16. “Navigable waters” is defined at 40 C.F.R. § 112.2 as all navigable waters of the United States, as defined in judicial decisions prior to the passage of the 1972 Amendments to the CWA, and tributaries of such waters; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

17. “Non-transportation-related facility” is defined at 40 C.F.R. Part 112, Appendix A, and incorporated by reference at 40 C.F.R. § 112.2, as oil drilling, producing, refining and storage facilities.

18. “Oil” is defined at Section 311(a)(1), 33 U.S.C. § 1321(a)(1), as oil of any kind or in any form, including, but not limited to petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes other than dredge spoil. The regulations at 40 C.F.R. § 112.2 further define oil to also include fats, oils, or greases of animal, fish, or marine mammal origin; vegetable oils, including oils from seeds, nuts, fruits, or kernels; and, other oils and greases including petroleum, fuel oil, sludge, synthetic oils, mineral oils, oil refuse and oil mixed with wastes other than dredge spoil

19. “Onshore facility” is defined at 33 U.S.C. § 1321(a)(10) and 40 C.F.R. § 112.2, in relevant part, as “any facility . . . located in, on, or under any land within the United States, other than submerged land.”

20. “Owner or operator” is defined at 33 U.S.C. § 1321(a)(6) and 40 C.F.R. § 112.2 as, *inter alia*, any person owning or operating an onshore facility or offshore facility.

21. "Person" is defined at 33 U.S.C. § 1321(a)(7) and 40 C.F.R. § 112.2 as any individual, firm, corporation, or partnership.

## **II. GENERAL ALLEGATIONS**

22. Respondent is a corporation organized under the laws of the Commonwealth of Virginia.

23. Respondent operates a place of business under North American Industry Classification System ("NAICS") Code 713930.

24. The Respondent's principal place of business is the Facility located at 1244 Bay Street, Portsmouth, Virginia 23704, which is known as the Portsmouth Boating Center.

25. 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.

26. Respondent is the owner and operator of the Facility, 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.

27. Upon information and belief, since 1984, Respondent has operated the Facility.

28. Respondent is engaged in producing, gathering, storing, processing, refining, transferring or consuming oil or oil products at the Facility, pursuant to 40 C.F.R. § 112.2.

29. The Facility is a non-transportation-related facility, within the meaning of 40 C.F.R. § 112.2.

30. 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.

31. Upon information and belief, the Facility consists of aboveground storage tanks with a capacity of 16,800 gallons of oil.

32. Upon information and belief, the Facility maintains one 6,000-gallon above-ground horizontal tank and two 5,000-gallon above-ground horizontal tanks.

33. Upon information and belief, on April 1, 1998, Respondent installed the two 5,000-gallon tanks at its Facility.

34. The Facility is a full service marina.

35. Upon information and belief, the Facility maintains at least thirty-three (33) wet boating slips.

36. The Respondent's oil tanks are positioned less than sixty (60) feet from Scotts Creek.

37. Scotts Creek flows into the Elizabeth River. The Elizabeth River flows into the James River and the James River empties into Chesapeake Bay.

38. Scotts Creek is a navigable water, as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. §§ 110.1 and 112.2.

39. The Facility is located such that a discharge from the Facility would impact Scotts Creek and its adjoining shorelines, causing injury to fish, wildlife, and sensitive environments.

40. Due to its location, the Facility could reasonably be expected to discharge oil in harmful quantities, as defined by 40 C.F.R. § 110.3, into or upon navigable waters of the United States or its adjoining shoreline.

**III. COUNT I – FAILURE TO PREPARE AND IMPLEMENT A SPILL PREVENTION, CONTROL, AND COUNTERMEASURE PLAN**

41. The allegations in Paragraphs 1 through 40 are incorporated by reference and Complainant further alleges:

42. On or before April 1, 1998. Respondent's facility became subject to the SPCC regulations at 40 C.F.R. Part 112, Subparts A and B, as such applicability is described in 40 C.F.R. § 112.1

43. Pursuant to Section 311(j) of the CWA, 33 U.S.C. § 1321(j), and 40 C.F.R. §§ 112.1(c)(2) and 112.3, the Facility is subject to the SPCC requirements of 40 C.F.R. § 112.3 because the Facility's 16,800-gallon oil storage capacity exceeds the 1,320-gallon above-ground capacity threshold of the Regulations and the facility is an onshore non-transportation-related facility that could be reasonably expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines.

44. EPA inspected the Facility on October 21, 2009 ("the Inspection").

45. At the time of the Inspection, Respondent was unable to produce a prepared or implemented SPCC Plan.

46. Respondent failed to prepare and implement an SPCC plan as required by 40 C.F.R. § 112.3, and therefore, Respondent is subject to civil penalties of up to a \$16,000 per day of violation, not to exceed a maximum of \$177,500, pursuant to Section 311(b)(6)(B) of the CWA, 33 U.S.C. § 1321(b)(6)(B), and 40 C.F.R. § 19.4.

#### IV. PROPOSED PENALTY

47. The proposed penalty for Count I is **\$29,542** and is based upon the statutory factors set forth in Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8): the seriousness of the violation; the economic benefit to the violator 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 violation; the economic impact of the penalty on the violator; and any other factors as justice may require.

48. The proposed penalty may be adjusted by Complainant if the Respondent establishes a bona fide inability to pay or any other defenses relevant to the appropriate amount of the proposed penalty.

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

49. Pursuant to Section 311(b)(6)(C) of the CWA, 33 U.S.C. § 1321(b)(6)(C), and Section 22.15(c) of the Consolidated Rules, the Respondent may request a hearing. The procedures for the hearing, if held, are set forth in the Consolidated Rules.

50. Pursuant to 40 C.F.R. § 22.15(a), if the Respondent contests any material fact upon which the Complaint is based, contends that the proposed penalties are inappropriate, or contends that it is entitled to judgment as a matter of law, it 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 Complaint with:

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

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

Suzanne M. Parent  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street (Mail Code 3RC42)  
Philadelphia, Pennsylvania 19103-2029  
(215) 814-2630

52. Pursuant to 40 C.F.R. § 22.15(b), the Respondent's Answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with regard to which Respondent has knowledge. Where Respondent has no knowledge of a particular factual allegation, Respondent shall so state and the allegation shall be deemed denied. Failure to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation. Respondent's Answer shall also state: (1) the circumstances or arguments which are alleged to constitute any grounds for defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested.

53. In accordance with Section 22.17 of the Consolidated Rules, if Respondent fails to submit an Answer within thirty (30) days of receipt of this Administrative Complaint, Respondent may be found in default. For purposes of this action, a default constitutes an admission of all facts alleged in the Complaint and a waiver of the right to a hearing to contest such factual allegations.

## **VI. PUBLIC NOTICE**

54. Pursuant to Section 311(b)(6)(C) of the CWA, 33 U.S.C. § 1321(b)(6)(C), in the event of the proposed settlement of this matter, including quick resolution pursuant to Section VII below, or the proposed issuance of a Default Order pursuant to 40 C.F.R. §22.17, the

Complainant will provide public notice of and a reasonable opportunity to comment on the proposed issuance of a Final Order or Default Order, as the case may be, assessing an administrative penalty against the Respondent. If a hearing is held on this matter, members of the public who submit timely comments on this penalty proposal shall have the right under Section 311(b)(6)(C)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(ii), to be heard and present evidence at the hearing. If a hearing is not held, such persons who timely comment on the proposed penalty may, within 30 days of issuance of an order to assess a Class II civil penalty, petition EPA to set aside such order and to provide a hearing.

#### **VII. SETTLEMENT AND QUICK RESOLUTION**

55. In accordance with Section 22.18(a) of the Consolidated Rules of Practice, the Respondent may resolve this proceeding at any time by either: (1) paying the full penalty proposed in Paragraph 47; or (2) filing a written statement with the Regional Hearing Clerk at the address provided above agreeing to pay, and subsequently paying within (sixty) 60 days of Respondent's receipt of this Complaint, the full penalty proposed in Paragraph 47. If Respondent pays or agrees to pay within sixty (60) days the specific penalty proposed in this Complaint within thirty (30) days of receiving this Complaint, then, pursuant to the Consolidated Rules of Practice, no Answer needs to be filed.

56. If Respondent wishes to resolve this proceeding by paying the penalty proposed in this Complaint instead of filing an Answer, but needs additional time to pay the penalty, pursuant to 40 C.F.R. § 22.18(a)(2). Respondent may file a written statement with the Regional Hearing Clerk within thirty (30) days after receiving this Complaint, stating that Respondent agrees to pay the proposed penalty in accordance with 40 C.F.R. § 22.18(a)(1). Such written statement

need not contain any response to, or admission of, the allegations in the Complaint. Such statement shall be filed with the Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103-2029, and a copy shall be provided to Suzanne M. Parent (3RC42), Senior Assistant Regional Counsel, at the address below. Within sixty (60) days of receiving the Complaint, Respondent shall pay the full amount of the proposed penalty in accordance with the instructions provided in Paragraph 59.

57. Failure to make such payment within 60 days of receipt of the Complaint may subject the Respondent to a default judgment pursuant to 40 C.F.R. § 22.17.

58. In accordance with 40 C.F.R. § 22.18(a)(3), upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator shall issue a Final Order. Payment by Respondent shall constitute a waiver of Respondent's right to contest the allegations contained in this Complaint and to appeal the Final Order.

59. Payment shall be made by a cashier's or certified check, or by an electronic funds transfer ("EFT"). If paying by check, the Respondent shall submit a cashier's or certified check, payable to "Environmental Protection Agency," and bearing the notation "OSLTF - 311." If the Respondent sends payment by the U.S. Postal Service, the payment shall be addressed to:

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

If the Respondent sends payment by a private delivery service, the payment shall be addressed to:

U.S. Bank  
Attention: Natalie Pearson  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, Missouri 63101

If paying by Electronic EFT, the Respondent shall make the transfer to:

Federal Reserve Bank of New York  
ABA 021030004  
Account 68010727  
33 Liberty Street  
New York, New York 10045

If paying by EFT, field tag 4200 of the Fedwire message shall read: (D 68010727

Environmental Protection Agency).

In the case of an international transfer of funds, the Respondent shall use SWIFT address FRNYUS33.

If paying through the Department of Treasury's Online Payment system, please access [www.pay.gov](http://www.pay.gov), enter sfo 1.1 in the search field. Open the form and complete the required fields and make the payment. Note that the type of payment is "civil penalty," the docket number "CWA-03-2011-0099" should be included in the "Court Order # or Bill #" field and 3 should be included as the Region number.

If paying by check, the Respondent shall note on the penalty payment check the title and docket number of this case. The Respondent shall submit a copy of the check (or, in the case of an EFT transfer, a copy of the EFT confirmation) to the following person:

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

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

Suzanne M. Parent  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region III  
1650 Arch Street (Mail Code 3RC42)  
Philadelphia, Pennsylvania 19103-2029


### **VIII. EX PARTE COMMUNICATIONS**

60. The following EPA offices, and the staffs thereof, are designated as the trial staff to represent EPA as a party in this case: the Region III Office of Regional Counsel; the Region III Hazardous Site Cleanup Division; the Office of the EPA Assistant Administrator for Solid Waste and Emergency Response; and the Office of the EPA Assistant Administrator for Enforcement and Compliance Assurance. Please be advised that, pursuant to Section 22.8 of the Consolidated Rules, from the date of this Complaint until the final Agency decision in this case, the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer, or any person who is likely to advise these officials on any decision in the proceeding, shall not have any ex parte communication about the merits of the proceeding with the Respondent, a representative of Respondent, or any person outside EPA having an interest in the proceeding, or with any EPA staff member who performs a prosecutorial or investigative function in this proceeding or a factually related proceeding. Any communication addressed to the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall be regarded as argument made in the proceeding, and shall be served upon all other parties.

**IX. INFORMAL CONFERENCE**

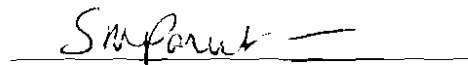
61. Respondent may request an informal conference concerning the alleged violations and the amount of the proposed penalty. The request for an informal conference does not extend the thirty (30) day period in which the Respondent must submit its written Answer to preserve the right to a hearing. To request an informal conference relating to this Administrative Complaint, Respondent should contact Suzanne M. Parent, Senior Assistant Regional Counsel, at (215) 814-2630.

Signed this 21 day of March, 2011

  
Ronald J. Borsellino, Director  
Hazardous Site Cleanup Division

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

Date: March 14, 2011

  
Suzanne M. Parent  
Senior Assistant Regional Counsel



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

**HAND DELIVERY**

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

Re: **In the Matter of Portsmouth Boating Center, Inc.**  
**Docket No. CWA-03-2011-0099**

Dear Ms. Guy:

Enclosed please find the original and one copy of Complainant's Administrative Complaint, along with a certificate of service.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne M. Parent".

Suzanne M. Parent  
Senior Assistant Regional Counsel

Enclosures

cc: Alexandra Whittaker  
Anne Gilley

