



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

1 Congress Street, Suite 1100 (SEL)
Boston, MA 02114-2023

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2009 MAR -3 P 3: 18

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OFFICE OF
REGIONAL HEARING CLERK *wt*

March 4, 2009

Wanda Rivera
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 1
One Congress Street, Suite 1100 (RCA)
Boston, MA 02114-2023

BY HAND

Re: In the Matter of Phillips Academy
Docket Nos. CWA-01-2009-0032; EPCRA-01-2009-0033

Dear Ms. Rivera:

Enclosed for filing in the above-referenced action, please find the original and one copy of an Administrative Complaint and Opportunity to Request a Hearing.

Thank you for your attention to this matter.

Sincerely,

Tonia Bandrowicz
Senior Enforcement Counsel

Enclosure

cc: Barbara L. Chase, Head of School

In the Matter of Phillips Academy
Docket Nos. CWA-01-2009-0032, EPCRA-01-2009-0033

CERTIFICATE OF SERVICE

I certify that the foregoing ADMINISTRATIVE COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING was sent to the following persons, in the manner specified, on the date below:

Original and one copy
hand-delivered:

Wanda Rivera
Regional Hearing Clerk
U.S. EPA, Region 1
One Congress Street (RAA)
Boston, MA 02114-2023

Copy and a copy of the
Part 22 Rules by certified mail,
return receipt requested:

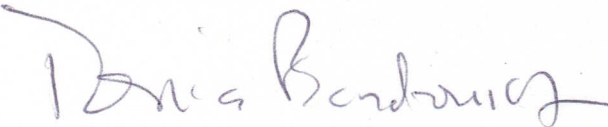
Barbara L. Chase, Head of School
Phillips Academy
180 Main Street
Andover, MA 01810

Copy by certified mail:

Albe Simenas
MADEP – BWSC
One Winter Street
Boston, MA 02108

CDR Wayne Clayborne
First Coast Guard District
Captain John Foster Williams Building
408 Atlantic Avenue
Boston, MA 02210-2209

Dated: 3-3-09



Tonia Bandrowicz
Senior Enforcement Counsel
Office of Environmental Stewardship
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100 (SEL)
Boston, MA 02114-2023
Tel: (617) 918-1734
Fax: (617) 918-0796
Email : Bandrowicz.Toni@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

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2009 MAR -3 P 3:18

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IN THE MATTER OF:)
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PHILLIPS ACADEMY)
180 Main Street)
Andover, MA)
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Respondent.)
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ADMINISTRATIVE COMPLAINT AND
NOTICE OF OPPORTUNITY TO REQUEST A
HEARING *WR*

HEARING CLERK

Proceeding to Assess Class II Civil Penalty Under
Section 311 of the Clean Water Act and a
Civil Penalty under Section 312 of the Emergency
Planning and Community Right-to-Know Act

Docket Nos. CWA-01-2009-0032
EPCRA-01-2009-0033

I. STATUTORY AUTHORITY

1. This Administrative Complaint is issued under the authority vested in the U.S. Environmental Protection Agency (“EPA”) by Section 311(b)(6)(B)(ii) of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990, and by Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. § 11045(c) (also known as the Emergency Planning and Community Right-to-Know Act (“EPCRA”)). “Complainant” is the Director of the Office of Environmental Stewardship, EPA, Region 1.

2. Pursuant to Section 311(b)(6)(B)(ii) of the CWA, and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,

and the Revocation, Termination or Suspension of Permits,” codified at 40 C.F.R. Part 22 (“Part 22”), Complainant hereby provides notice of its proposal to assess a civil penalty against Phillips Academy (“Respondent” or the “School”) for its:

- a. failure to comply with the Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112 in violation of Section 311(j) of the CWA, 33 U.S.C. § 1321(j); and
- b. failure to file Tier II hazardous chemical inventory forms to the proper authorities, in violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20 and 370.25.

3. This Complaint also provides notice of Respondent’s opportunity to file an Answer to this Complaint and to request a hearing.

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

5. Under the authority of Section 311(j)(1) of the CWA, the Oil Pollution Prevention regulations establish procedures, methods, and requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products that, due to their location, could reasonably be expected to discharge oil in harmful quantities (as defined in 40 C.F.R. Part 110) to navigable waters of the

United States or adjoining shorelines. 40 C.F.R. § 112.1(b).

6. “Navigable waters” of the United States are defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), as “waters of the United States” and are further defined in its implementing regulations.

7. Under Section 312(a) of EPCRA and 40 C.F.R. §§ 370.20 and 370.25, any facility which is required to prepare or have available a Material Safety Data Sheet (“MSDS”) for a hazardous chemical under the Occupational Safety and Health Act of 1970 (“OSHA”) must prepare and submit an emergency and hazardous chemical inventory form (Tier I or Tier II form or its state equivalent) to the Local Emergency Planning Committee (“LEPC”), the State Emergency Response Commission (“SERC”), and the local fire department. The Tier I or Tier II form must be submitted annually on or before March 1 and is required to contain information with respect to the preceding calendar year.

II. GENERAL ALLEGATIONS

8. Respondent is an association and/or corporation operating a secondary school in Massachusetts located at 180 Main Street in Andover; and, therefore, Respondent is a “person” within the meaning of Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7); Section 329(7) of EPCRA, 42 U.S.C. § 11049(7); and 40 C.F.R. §§ 112.2 and 370.2.

9. Respondent has owned and operated the School for at least five years and is the “owner or operator” 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 an “onshore facility.”

10. On December 13 and 18, 2007 and January 11, 2008, a duly authorized representative of

EPA conducted an inspection at the School to determine compliance with the requirements of Section 311 of the CWA and Section 312 of EPCRA. At the time of the inspection, Respondent was storing oil, as well as several other chemicals that are labeled as hazardous or extremely hazardous under EPCRA, throughout the campus.

11. The Respondent's underground oil storage tanks include two 20,000 gallons tanks and one 10,000 gallon tank. The total belowground oil storage at the School is 50,000 gallons.

12. The Respondent's aboveground oil storage tanks include eight 275 gallon tanks and three 55 gallon tanks. In addition to the oil storage tanks, Respondent operated hydraulic elevators, which contained a total of 2,987 gallons of oil. The Respondent also possessed transformers that contained a total of 7,460 gallons of oil. The total aboveground oil storage at the School is 12,962 gallons.

13. The Respondent also possesses a portable generator which contains 80 gallons of oil.

14. The School's total oil storage capacity is 63,042 gallons.

15. Respondent is engaged in storing, using, and consuming "oil" or oil products located at the School within the meaning of 40 C.F.R. §§ 112.2 and 112.1(b).

16. The School 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, and is a "facility" as that term is defined by Section 329(4) of EPCRA, 42 U.S.C. § 11049(4) and 40 C.F.R. § 370.2.

17. The School is a "non-transportation-related" facility within the meaning of 40 C.F.R. § 112.2 Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

18. From the School there are storm drains to the North and West which discharge into the

Shawsheen River. To the Northeast there are storm drains that flow into Rogers Brook which flows into the Shawsheen River. The Shawsheen River then feeds into the Merrimack River, which flows into the Atlantic Ocean near Salisbury Beach State Park. Due to the fact that the School has multiple drains which discharge into the Shawsheen River and Rogers Brook, the School could reasonably be expected to discharge oil into Rogers Brook, the Shawsheen River and the downstream bodies of water.

19. Rogers Brook, Shawsheen River, Merrimack River and the Atlantic Ocean are all “navigable waters of the United States” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and in its implementing regulations, and are therefore subject to the jurisdiction of Section 311 of the CWA.

20. Based on the allegations above, Respondent is the owner and operator of a non-transportation-related facility that was engaged in storing, using, and consuming oil or oil products that could reasonably be expected to discharge oil in harmful quantities to navigable waters of the United States, and is, therefore, subject to the Oil Pollution Prevention regulations at 40 C.F.R. Part 112.

21. During the calendar year 2006, Respondent stored or used fuel oil, diesel fuel, automotive gasoline and hydraulic oil which are “hazardous chemicals”, and ammonia and sulfuric acid, which are “extremely hazardous chemicals,” as defined in 40 C.F.R. § 370.2, at the School.

22. Respondent was required to prepare or have available an MSDS for fuel oil, diesel fuel, automotive gasoline and hydraulic oil which are “hazardous chemicals,” and ammonia and sulfuric acid, which are “extremely hazardous chemicals,” under the Occupational Safety and

Health Act of 1970, 15 U.S.C. § 651 *et seq.*, and the regulations promulgated thereunder at 29 C.F.R. § 1910.1200.

23. Pursuant to 40 C.F.R. § 370.20(b)(4), the minimum threshold level for Tier I or Tier II reporting for fuel oils, diesel fuel, automotive gasoline and hydraulic oil (as “hazardous chemicals”) at facilities that are not retail gas stations is 10,000 pounds.

24. During calendar year 2006, Respondent stored fuel oil, diesel fuel, automotive gasoline and hydraulic oil at the School in quantities that exceeded 10,000 pounds.

25. Pursuant to 40 C.F.R. § 370.20(b)(1), the minimum threshold level for Tier I and II reporting of ammonia and sulfuric acid is 500 pounds.

26. During calendar year 2006, Respondent stored ammonia and sulfuric acid in quantities that exceeded 500 pounds.

27. Respondent was therefore subject to the reporting requirements of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20 and 370.25 for the calendar year 2006.

28. Accordingly, on or before March 1 of 2007, Respondent was required to prepare and submit to the SERC, LEPC and the fire department with jurisdiction over the facility a Tier II form containing chemical information for calendar year 2006.

III. VIOLATIONS

Count I: Failure to Prepare and Implement an SPCC Plan in Violation of Section 311(j) of CWA

29. Under 40 C.F.R. § 112.3, the owner or operator of an SPCC-regulated facility in operation prior to August 16, 2002, shall have prepared and implemented an SPCC plan that is in

accordance with the requirements of 40 C.F.R. § 112.7.¹

30. For at least five years prior to the date of the complaint, up until April 1, 2008, the School had not prepared or implemented an SPCC Plan, in violation of 40 C.F.R. § 112 and Section 311(j) of the CWA.

31. Respondent's failure to prepare and implement an SPCC plan for the School in accordance with the requirements of 40 C.F.R. § 112.7 violated 40 C.F.R. § 112.3 and Section 311(j) of the CWA. Respondent violated these requirements for each day for the period of violation until coming into compliance with the regulations on April 1, 2008.²

32. Respondent is therefore subject to an assessment of penalties under Section 311(b)(6)(B)(ii) of the CWA as amended by 40 C.F.R. § 19.4, which authorizes EPA to assess a civil penalty, for the period at issue, of up to \$11,000 per day for each day during which the violations of Section 311 continue, up to a maximum of \$157,500.

Count II: Failure to file Tier II Hazardous Chemical Inventory Forms to the Proper Authorities, in Violation of Section 312(a) of EPCRA

33. The Complaint incorporates Paragraphs 1-32 above by reference.

34. Based on the three inspections of December 13 and 18, 2007 and January 11, 2008, and a review of documents collected during the inspections, EPA determined that Respondent did not submit a Tier II Emergency and Hazardous Chemical Inventory form to the LEPC, the SERC and

¹The preamble to the amended SPCC regulations for 40 CFR § 112.3(a) states that "the owner or operator of a facility in operation on the effective date of this rule who is required to have prepared or implemented an SPCC Plan, but has not, remains subject to civil penalties for a violation of current § 112.3 if the time has expired for preparation or implementation of his Plan." 67 FR 47042, 47083 (July 17, 2002)

² EPA is not pursuing penalties for violations of 40 C.F.R. Part 112 beyond the federal five year statute of limitations found at 28 U.S.C. § 2462.

the fire department with jurisdiction over the facility for the calendar year 2006, in violation of the reporting requirement of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20 and 370.25.

35. Respondent's failure to prepare and submit a Tier II form for the calendar year 2006 to the LEPC, the SERC, and the fire department with jurisdiction over the facility, on or before the reporting deadline of March 1, 2007, constitutes a violation of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and 40 C.F.R. §§ 370.20 and 370.25.

36. Respondent is therefore subject to an assessment of penalties up to \$32,500 per day of violation under Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1).

IV. PROPOSED PENALTY

Clean Water Act Penalty

37. Based on the forgoing Findings of Violation, and pursuant to the authority of Sections 309(g)(2)(B) and 311(b)(6)(B)(ii) of the CWA as amended by 40 C.F.R. § 19.4, the Complainant proposes that a Final Order assessing administrative penalties be issued against Respondent in an amount not to exceed \$11,000 per day for each day during which its violations continued, up to a maximum of \$157,500.

38. Pursuant to Section 311(b)(8) of the CWA, EPA calculates the proposed penalty taking into account the seriousness of the violations, the economic benefit to the violator, if any, resulting from the violations, 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.

39. Respondent's violations of the Oil Pollution Prevention regulations alleged above represent significant violations of the CWA because failure to fully prepare and implement an adequate SPCC plan leaves a facility unprepared to deal with an oil spill or to prevent the spill from having potentially serious environmental consequences.

EPCRA Penalty

40. Section 325(c) of EPCRA, 42 U.S.C. §11045(c), 40 C.F.R. §§370.5(b) and 372.18, and 40 C.F.R. Part 19, provide that any person who violates any requirement of Section 312 after March 15, 2004 and on or before January 12, 2009 shall be liable to the United States for a civil penalty in an amount not to exceed \$32,500 per day for each violation. Failure to report in a timely manner, as required by Section 312, may deprive the community of its right to know about chemicals used or stored near or in the neighborhood that may affect public health and the environment, and may prevent comprehensive planning by federal, state and local authorities to properly prepare for accidental chemical releases.

41. The proposed civil penalty has been determined in accordance with Section 325(c) of EPCRA, 42 U.S.C. § 11045(c). For purposes of determining the amount of any penalty to be assessed, EPA considered the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent, its ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

V. OPPORTUNITY TO REQUEST HEARING

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

43. Default constitutes an admission of all facts alleged in this Complaint and a waiver of the right to a hearing on such factual allegations. In order to avoid default in this matter, Respondent must within 30 days after receipt of this Complaint either: (1) settle this matter with the Complainant; or (2) file both an original and one copy of a written Answer to this Complaint to:

Wanda Rivera
Regional Hearing Clerk (RAA)
U.S. Environmental Protection Agency-Region 1
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

44. Respondent is also required to provide a contemporaneous copy of any Answer to Complainant's legal counsel, who is authorized to receive service on behalf of EPA pursuant to 40 C.F.R. § 22.5(c)(4), at the following address:

Toni Bandrowicz, Senior Enforcement Counsel
Office of Environmental Stewardship (SEL)
U.S. Environmental Protection Agency – Region 1
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023
Tel: 617-918-1734
Fax: 617-918-0734
Email: bandrowicz.toni@epa.gov

45. Pursuant to 40 C.F.R. § 22.15, the Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has knowledge. If the Answer asserts no knowledge of a particular factual allegation, the allegation shall be deemed denied. Otherwise, the failure to admit, deny, or explain any material factual allegation contained in this Complaint constitutes an admission of the allegation. The Answer shall also state the circumstances or arguments for any defense Respondent may wish to assert, challenges to any factual allegation in the Complaint, and any basis Respondent may have to oppose the Complainant's proposed penalty.

46. Following receipt of the Answer, a Presiding Officer will be assigned. The Presiding Officer will notify the parties of his assignment, and shall notify the parties of the time and place of further proceedings in the case.

VI. PUBLIC NOTICE FOR CLEAN WATER ACT VIOLATION

47. 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 this proposed issuance of a Final Order assessing administrative penalties against Respondent for CWA violations. If a hearing is held on this matter, members of the public who submitted timely comments on this proceeding have the right under Section 311(b)(6)(C) of the CWA to be heard and present evidence at the hearing.

VII. SETTLEMENT

48. You may request an informal conference with Complainant's attorney, Toni Bandrowicz, concerning the alleged violations and the amount of the proposed penalty. A request for an

informal conference does not extend any deadlines in this proceeding, including the deadline by which you must submit an Answer to this Complaint.

49. If you have any questions concerning the enclosed Complaint, or wish to arrange for an informal conference, please contact Ms. Bandrowicz at (617) 918-1734.

Date: 03/03/09

Susan Studlien
Susan Studlien, Director
Office of Environmental Stewardship
U.S. Environmental Protection Agency
Region 1