

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

Portsmouth Boating Center, Inc.

Respondent.

**ANSWER TO COMPLAINT
AND REQUEST FOR HEARING**

Docket No. CWA-03-2011-0099

Portsmouth Boating Center, Inc. ("Portsmouth Boating Center" or "PBC") denies that it committed the violations alleged in the Complaint and requests a hearing before an administrative law judge to contest the allegations in the Complaint.

SUMMARY OF PORTSMOUTH BOATING CENTER'S ANSWER

Portsmouth Boating Center denies that it failed to produce and implement a SPCC Plan, as alleged in Count I of the Complaint. While the Respondents actions may not have met the full burden of a full and complete Spill Prevention, Control, and Countermeasure Plan ("SPCC Plan" or "Plan"), Portsmouth Boating Center has had spill prevention, control and countermeasure procedures and components in place. Respondent notes that what began as a simple paperwork error and compliance issue has compounded into the present Administrative Complaint. Portsmouth Boating Center asserts that any possible violations are far less severe than those alleged in the Complaint, and would merit a greatly reduced penalty, if any.

STATEMENT OF FACTS REGARDING COUNT I

Portsmouth Boating Center is a small, locally-owned business that is trying to stay afloat during tough economic times. PBC is a progressive and innovative environmental steward. Portsmouth Boating Center has been recognized as an environmental leader in the marina

industry. It is a member of the Elizabeth River Project's River Stars Program. The Elizabeth River Project ("ERP") is a 501(c)(3) organization headquartered in Portsmouth, Virginia whose purpose is to restore the Elizabeth River to the highest practical level of environmental quality through government, business and community partnerships. ERP is an EPA 2008 Regional Environmental Awards winner. Portsmouth Boating Center is a member of the Elizabeth River Projects River Stars Program as a recognized environmental steward in its industry. Respondent is similarly recognized by the Commonwealth of Virginia as a Virginia Clean Marina.

In the present matter, there was no discharge. Portsmouth Boating Center prides itself in never having had an oil spill or any environmental violation. The threat of a discharge is minimal if not nil due to the nature of Portsmouth Boating Center's fuel system. The tanks are double-lined, as are the fuel lines. Further, the fuel lines are enclosed in PVC tubing, creating a triple layer of protection, and providing resistance to deterioration from UV rays. Additionally, there is a secondary containment system in the form of a containment berm, and intermediate catch basins for the fuel lines. PBC maintains a substantial amount of solid and oil absorbent boom on-site which is can deploy promptly if there were to be any discharge to contain and absorb such a discharge to prevent any environmental damage. Beyond its efforts to prevent oil spills, Portsmouth Boating Center voluntarily captures all of its pressure water and has created an innovative series of settling tanks to separate out particulates.

During the EPA inspection on October 21, 2009, Portsmouth Boating Center became aware of the requirement for a formal SPCC Plan. At the time of the inspection PBC was following a spill prevention plan based on the Virginia Clean Marina guidelines. In response to the EPA letter dated July 8, 2010, Portsmouth Boating Center promptly sent EPA staff a SPCC Plan for review. Portsmouth Boating Center did not receive comment on its SPCC Plan from

EPA staff until November 2010, when it also received a letter of Alleged Violation. PBC again responded with an updated SPCC Plan and discussed the matter with a member of EPA Region III's staff, who subsequently had a conversation with PBC's engineer who was reviewing and certifying the SPCC Plan. EPA's next response to PBC, instead of comment on the SPCC Plan, was an Administrative Complaint.

With limited staff and resources, Portsmouth Boating Center has been responsive to EPA requests throughout this matter and has been working from the onset on correcting any deficiencies. Respondent wishes to resolve this matter amicably and expeditiously. As detailed below, PBC asserts that the allegations and prescribed penalty are out of line with the facts and circumstances in the case.

ANSWER TO SPECIFIC ALLEGATIONS

Respondent acknowledges the Statutory Authority of the Administrator of the EPA, Regional Administrator of EPA, Region III, and the Director of the Region III Hazardous Site Cleanup Division, the Oil Pollution Prevention Regulations, and the relevant Definitions as set forth in Paragraphs 1 through 21 of the Complaint. To the extent that Paragraphs 1-21 of the Complaint may be deemed to allege facts, those allegations are denied. Portsmouth Boating Center's responses to the specific allegations in the Complaint appear below. The paragraphs are numbered to correspond to the numbered paragraphs of the Complaint.

Response To General Allegations

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

23. Respondent admits that it operates a place of business under NAICS Code 713930.

24. Respondent admits that its principal place of business is Portsmouth Boating Center at 1244 Bay Street, Portsmouth, Virginia 23704.

25. Respondent admits to being 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 admits to be 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. Respondent admits to have operated the Facility since 1984.

28. Respondent admits to be engaged in the storing and transferring of oil or oil products at the Facility, pursuant to 40 C.F.R. § 112.2.

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

30. Respondent admits that 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. Respondent admits that the Facility consists of aboveground storage tanks with a capacity of 16,800 gallons of oil.

32. Respondent admits that the Facility maintains one 6,000 gallon aboveground horizontal tank and two 5,000 gallon aboveground horizontal tanks.

33. Respondent admits that on April 1, 1998 it installed the two 5,000 gallon tanks at the Facility.

34. Respondent admits that it is a full service marina.

35. Respondent admits that it maintains at least thirty-three (33) wet boating slips.

36. Respondent admits that its oil tanks are within sixty (60) feet of Scotts Creek.

37. Respondent admits that Scotts Creek flows into the Elizabeth River, the Elizabeth River flows in the James River, and the James River flows into the Chesapeake Bay.

38. Respondent admits that 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. Respondent denies that 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. Respondent admits that the Facility is located such that a discharge from the Facility could impact Scotts Creek and its adjoining shorelines, and could potentially cause injury to fish, wildlife, and sensitive environments.

40. Respondent denies that 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. Respondent notes that it has taken all reasonable precautions to prevent such a discharge, but admits that due to its location, the Facility could potentially 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.

Response To Count I

41. The Respondent addressed Paragraphs 1 through 21 and 22 through 40 separately above.

42. Paragraph 42 states a conclusion of law that requires no answer. To the extent that it might be deemed to allege facts, notwithstanding those admitted in Paragraph 33, those allegations are denied.

43. Paragraph 43 states a conclusion of law that requires no answer. To the extent that it might be deemed to allege facts, notwithstanding those admitted in Paragraphs 29, 30 and 31, those allegations are denied.

44. Respondent admits that EPA inspected the Facility on October 21, 2009 (“the Inspection”).

45. Respondent admits that at the time of the Inspection it was unable to produce a fully prepared and certified SPCC Plan. Respondent notes that at the time of the Inspection it did produce a spill prevention plan it was following, provided by the Virginia Clean Marina Manual. Respondent denies that at the time of the Inspection it failed to implement a SPCC Plan. Respondent notes that the only physical deficiencies noted by the inspection were the need for a small bead of caulk around the secondary containment berm, and the required SPCC Plan signage. Respondent has had oil spill prevention, control and countermeasure procedures and devices in place at all times including double-lined tanks and lines, a containment berm, intermediate catch basins, and solid and absorbent booms.

46. Respondent denies the allegations in Paragraph 46.

AFFIRMATIVE DEFENSES

Portsmouth Boating Center states the following affirmative defenses, and expressly reserves the right to amend this Answer to raise additional affirmative defenses as may arise during the course of discovery and information exchange in this matter:

FIRST AFFIRMATIVE DEFENSE (Reasonableness and Good Faith)

Portsmouth Boating Center at all times acted reasonably and in good faith based on all relevant facts and circumstances known by Portsmouth Boating Center at the time it acted.

**SECOND AFFIRMATIVE DEFENSE
(Arbitrary and Capricious, and Abuse of Discretion)**

Complainant's allegations constitute agency action that is arbitrary and capricious, and an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. §§ 553 and 706(2).

DISCUSSION OF PENALTY

The penalty proposed in the Complaint exceeds any amount warranted by the alleged violations and any actual violations based on the statutory factors outlined in Section 311 (b)(8) of the CWA, 33 U.S.C. § 1321 (b)(8). The violations alleged are of a minor nature based on the specific facts of the case and the number of violations involved. The alleged violations are paperwork violations and at no time was there a discharge or threat of a discharge. If there were a discharge, Portsmouth Boating Center has at all times had preventative secondary measures and spill prevention plans. The alleged violations have only a minor impact on the ability of the Respondent to prevent or respond to worst case spills. There is a minor potential environmental impact for a worst case discharge based on Portsmouth Boating Center's preventative and secondary measures.

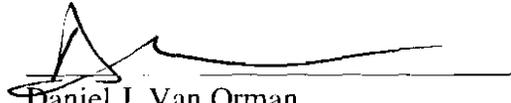
Regarding the duration of the alleged violations, the Respondent notes that since the time it became aware of the need for a formal SPCC Plan they have made all reasonable effort to respond quickly to EPA requests and produce a certified Plan.

Portsmouth Boating Center has never had a spill or any previous environmental violation. To the contrary, they are a recognized environmental leader in their industry through their inclusion in the Virginia Clean Marina and Elizabeth River Project River Stars programs.

REQUEST FOR HEARING

Portsmouth Boating Center requests a hearing on the facts alleged in the Complaint and the proposed penalty.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Daniel J. Van Orman", written over a horizontal line.

Daniel J. Van Orman
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Counsel for the Respondent
Portsmouth Boating Center, Inc.

4/21/11
Date

CERTIFICATE OF SERVICE

I certify that the foregoing Answer to Complaint, dated, April 21, 2011, was sent this day in the following manner to the addressees listed below:

Original on one copy by FedEx Overnight to:

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

Copy by FedEx Overnight and facsimile to:

Attorney for Complainant: Suzanne M. Parent
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street (Mail Code 3RC42)
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Dated: April 21, 2011