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HEARINGS DIVISION
EPA--REGION 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington

IN THE MATTER OF:)	Administrative Complaint and
)	Opportunity to Request Hearing
)	and Conference
GARDNER OIL COMPANY)	
)	Proceeding to Assess Class II Civil
)	Penalty Under Section 311 of the
)	Clean Water Act
Respondent.)	
)	Docket No. CWA-10-2000-0139
)	

I. JURISDICTION AND STATUTORY AUTHORITY

1. This Administrative Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 311(b)(6) of the Clean Water Act ("Act"), 33 U.S.C. § 1321(b)(6). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 10, who in turn has delegated it to the Director, Office of Environmental Cleanup, EPA Region 10 ("Complainant").

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ENVIRONMENTAL PROTECTION AGENCY
1200 Sixth Avenue
Seattle, Washington 98101
(206) 553-1037

2. This proceeding is authorized by Section 311(b)(6)(A) and (b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(A) and (b)(6)(B)(ii), and is conducted 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." 40 C.F.R. Part 22 ("Part 22").

3. Complainant proposes that the Regional Administrator assess a civil penalty against Gardner Oil Company ("Respondent") for its violations of regulations issued under Section 311(j) of the Act, 33 U.S.C. § 1321(j), and provides notice of Respondent's opportunity to request a hearing on the proposed penalty assessment.

4. Section 311(j)(1) of the Act, 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 Act, 33 U.S.C. § 1321(j)(1), 40 C.F.R. Part 112 establishes 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 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 U.S. or adjoining shorelines.

6. Under 40 C.F.R. § 110.3, discharges of oil in harmful quantities are those discharges that 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. The term "navigable waters" is defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1.

7. Under 40 C.F.R. § 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare and fully implement a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. § 112.7 not later than six months after the facility began operations, or by July 10, 1973, whichever is later, and must implement that SPCC plan not later than six months after the facility began operations, or by January 10, 1974, whichever is later.

8. Under 40 C.F.R. § 112.7, the SPCC plan shall contain a discussion of the appropriate containment and/or diversionary structures or equipment to prevent discharged oil from reaching a navigable water course.

II. GENERAL ALLEGATIONS

9. Respondent is a corporation organized under the laws of Washington with a place of business located at or near Highway 195 South, Rosalia, Washington. Respondent is a "person" within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. § 1321(a)(7) and 40 C.F.R. § 112.2.

10. Respondent is an "owner 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 a facility used for gathering, storing, processing, transferring or distributing oil or oil products, located at or near Highway 195 South, Rosalia, Washington (the "facility").

11. The facility has four above-ground storage tanks with a combined total capacity of 29,000 gallons. One of these tanks has a capacity of 11,000 gallons; one has a capacity of 8,000 gallons; the remaining two tanks are 5,000 gallon capacity each.

12. The facility is an "onshore facility," as defined in Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and

40 C.F.R. § 112.2.

13. The facility is located approximately 75 yards from Hangman Creek and/or Pine Creek, which are navigable waters of the U.S.

14. Due to its location, the facility could reasonably be expected to discharge oil in harmful quantities to the navigable waters of the U.S. or adjoining shorelines, as described in 40 C.F.R. § 110.3.

15. The facility is a non-transportation-related facility under the definition referenced at 40 C.F.R. § 112.2 and set forth in 40 C.F.R. Part 112, Appendix A, Section II, and 36 Fed. Reg. 24080 (December 18, 1971).

16. The facility began operations more than six months prior to the date of this Complaint.

17. Based on the above, and under Section 311(j) of the Act, 33 U.S.C. § 1321(j) and its implementing regulations, Respondent is subject to 40 C.F.R. Part 112 as owner or operator of the facility described above.

III. DESCRIPTION OF VIOLATIONS

18. On April 14, 1999, EPA representatives inspected the facility to determine compliance with Section 311(j) of the Act and 40 C.F.R. Part 112.

19. In violation of 40 C.F.R. § 112.3, Respondent failed to prepare and fully implement an SPCC plan for the facility in accordance with the provisions of 40 C.F.R. § 112.7.

20. In violation of 40 C.F.R. § 112.5(b), Respondent failed to complete a review and evaluation of its SPCC Plan at least once every three years.

21. In violation of 40 C.F.R. § 112.7(e)(1), Respondent failed to provide valves or other positive means or restraining drainage from diked areas.

22. In violation of 40 C.F.R. § 112.7(e)(2)(ii), Respondent failed to provide adequate secondary containment constructed of an impervious material for the bulk storage areas.

23. In violation of 40 C.F.R. § 112.7(e)(3)(v), Respondent failed to warn vehicular traffic granted entry into the facility either verbally or by appropriate signs to be sure that vehicles, because of their size, will not endanger above ground piping.

24. In violation of 40 C.F.R. § 112.7(e)(4)(ii), Respondent failed to provide a quick drainage system at its tank truck loading/unloading rack consisting of secondary containment designed to hold at least maximum capacity of any single compartment of a tank car or tank truck loaded or unloaded in the plant.

25. In violation of 40 C.F.R. § 112.7(e)(9), Respondent

failed to provide adequate security precautions. The facility is not fully fenced with locked or guarded entrance gates as required by 40 C.F.R. § 112.7(e)(9)(i). Respondent also failed to provide adequate facility lighting as required by 40 C.F.R. § 112.7(e)(9)(v).

IV. PROPOSED PENALTY

26. Under Section 311(b)(6)(A) and (B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(A) and (B)(ii), any owner or operator in charge of any onshore facility who fails or refuses to comply with any regulation issued under Section 311(j) of the Act, 33 U.S.C. § 1321(j), may be assessed a civil penalty.

27. Pursuant to Section(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. Part 19, Respondent is liable for civil penalties up to \$11,000 per day for each day during which the violation continues, up to a maximum of \$137,500.

28. Based on the foregoing authority and allegations, and pursuant to the authority of Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), Complainant proposes that the Regional Administrator issue a Final Order assessing an administrative civil penalty against Respondent in the amount of \$11,000.

29. The proposed penalty has been calculated based on the facts alleged in this complaint and the factors in Section

311(b)(8) of the Act, 33 U.S.C. 1321(b)(8), including: 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 discharge; the economic impact of the penalty on the violator; and any other matters as justice may require.

a. **Seriousness of the violation:** Complainant considers the failure to prepare and fully implement an SPCC plan to be a serious violation, in that it leaves the facility unprepared to deal with an oil spill or to prevent the spill from having potentially serious environmental consequences. In determining an appropriate penalty, Complainant has taken into account the above-ground storage capacity of the facility (29,000 gallons) and the potential environmental impact on nearby waters of the U.S.

b. **Economic benefit:** Economic benefit is determined based on the cost savings from delayed compliance. In this case, Respondent has enjoyed the cost savings from its delay in preparing and implementing an SPCC plan, from its delay in constructing an adequate secondary containment for the bulk storage area, and from its delay in erecting fences, lights and other security measures.

Respondent also enjoyed cost savings from its delay in retaining an engineer to certify the plan and from failing to review the plan at the required three year intervals.

c. **Degree of culpability:** Respondent's conduct reflects a high degree of culpability in that Respondent failed to prepare an SPCC plan and comply with applicable regulations. Despite being informed by a Notice of Violation, sent certified mail on July 09, 1999, to Respondent, informing Respondent of its obligations under the Act and requesting that Respondent submit an SPCC plan to EPA within 7 days of receipt of the NOV, Respondent did not notify EPA until May 22, 2000 that it had fully implemented its SPCC plan.

d. **Any other penalty for the same incident and history of prior violations:** Respondent has not been assessed any other penalty for this violation. Complainant is unaware of any history of prior violations of the Act.

e. **The nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge:** This penalty factor does not apply to cases alleging failure to prepare and implement an SPCC plan.

f. **Economic impact of penalty on violator:** Complainant has obtained a Dun & Bradstreet, Inc. report for Respondent which shows that it has a clear financial history and characterizes its

financial condition as "Strong." Respondent reported net sales of over \$2,000,000 in 1998. Complainant has no information to conclude that the Respondent is unable to pay a penalty of \$11,000.

g. **Other matters as justice may require:**

Finally, Respondent may be deterred from future violations by the assessment of a penalty. Other persons will be deterred from similar violations by assessment of a penalty in the case. In particular, assessment of a penalty for the violations involved in this action may encourage Respondent and others similarly situated to properly prepare and fully implement SPCC plans for facilities under their control and thus decrease the risk of oil spills to the environment.

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

30. The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled "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," and which are to be codified at 40 C.F.R. part 22. A copy of these rules accompanies this Complaint.

A. ANSWERING THE COMPLAINT

31. If Respondent intends to contest any material fact upon which this Complaint is based, to contend that the proposed penalty is inappropriate, or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 10, both an original and one copy of a written Answer to this Complaint. Such answer must be filed within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a). The address of the Regional Hearing Clerk is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101-1128**

Respondent shall also then serve one copy of the Answer to the Complaint upon complainant and any other party to the action. 40 C.F.R. § 22.15(a).

32. Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation, and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The 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 the proposed penalty; and (4) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

33. If Respondent fails to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of its defense, Respondent may be precluded from raising such facts and/or from having such facts admitted into evidence at a hearing or subsequent stage in this proceeding.

B. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

34. If requested by Respondent, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c)

35. Any hearing in this proceeding will be held at a location determined according to 40 C.F.R. § 22.21(d). The hearing will be conducted in accord with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. FAILURE TO ANSWER

36. If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file an Answer within 30 days from service of the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for failure to timely file and Answer, any order issued shall be issued pursuant to 40 C.F.R. § 22.17(c).

37. Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent and to collect the assessed penalty amount in federal court.

D. PUBLIC NOTICE

38. If Respondent requests a hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give

notice of this proposed action, will have a right under Section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), to be heard and to present evidence on the appropriateness of the penalty assessment.

39. If the Respondent does not request a hearing, EPA will issue the Final Order Assessing Administrative Penalties. Any members of the public who commented on this proposed assessment during the thirty day period following Respondent's receipt of this document will have an additional thirty days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to request EPA to hold a hearing thereon. EPA will grant the petition and will hold a hearing if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

E. Exhaustion of Administrative Remedies

40. Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. §22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

41. In order to appeal an initial decision to the Agency's Environmental Appeal Board [EAB; see 40 C.F.R. § 1.25(e)],

Respondent must do so "within thirty (30) days after the initial decision is served upon the parties". 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.07(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document". Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

VI. INFORMAL CONFERENCE

42. EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settling this matter. Respondent may also provide whatever additional information it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other

special facts or circumstances Respondent wishes to raise.

43. Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to complainant or to dismiss any or all of the charges if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

44. Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Jeffrey Kopf, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, ORC-158
Seattle, Washington 98101
(206) 553-1477

45. The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.19(b)(1). Respondent's request of a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the

Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

46. A request for an informal settlement conference does not affect Respondent's obligations to file a timely Answer to the Complaint pursuant to 40 C.F.R. §22.15. No penalty reduction will be made simply because an informal settlement conference is held.

47. Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. §22.18(b)(3).

48. Respondent's entering into a settlement through the signing of such Consent agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise

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ENVIRONMENTAL PROTECTION AGENCY
1200 Sixth Avenue
Seattle, Washington 98101
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affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VII. RESOLUTION WITHOUT HEARING OR CONFERENCE

49. Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 10 (at the address noted above), a copy of the check or other instrument of payment. 40 C.F.R. § 22.18(a). A copy of the check or other instrument of payment should also be provided to the EPA Assistant Regional Counsel identified above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this complaint to the following addressee:

**EPA Region 10 Hearing Clerk
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251-6903**

Such payment terminates this administrative litigation and the civil proceedings arising out of the allegations made in this complaint. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to

comply with all applicable regulations and requirements, and to maintain such compliance.

Dated this 26th day of JUNE, 2000



Michael F. Gearheard, Director,
Office of Environmental Cleanup

CERTIFICATE OF SERVICE

I certify that the forgoing Administrative Complaint, IN THE MATTER OF: GARDNER OIL COMPANY, No. CWA-10-2000-0139, was sent to the following persons, in the manner specified, on the date below:

Original and one copy hand-delivered:

Mary Shillcutt, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop OR-158
Seattle, Washington 98101

Copy by certified mail, return receipt requested and one copy of 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 ("Part 22 Rules"):

Gordon Gardner, Jr.
Gardner Oil Company
P.O. Box 107
Oakesdale, Washington 99158

Patricia Gardner
Registered Agent, Gardner Oil Company
Steptoe Avenue & Highway 27
Oakesdale, Washington 99158

Date: 06/27/00



U.S. EPA, Region 10