

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 SEP 30 PM 3:07

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF)
)
Public Service Company of Colorado)
d/b/a Xcel Energy, Inc.)
)
1225 17th Street)
Denver, CO 80202-5533)
Respondent.)

**COMPLAINT AND CONSENT
AGREEMENT**

DOCKET NO. : CWA-08-2009-0037

Complainant, United States Environmental Protection Agency, Region 8 (EPA or Complainant), and Public Service Company of Colorado, d/b/a Xcel Energy, Inc. (Respondent) by their undersigned representatives, hereby consent and agree as follows:

A. PRELIMINARY MATTERS

1. This Complaint and Settlement Agreement (CASA) is issued to Respondent for violations alleged by EPA of sections 311(b)(3), 33 U.S.C. § 1321(b)(3), 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Clean Water Act (CWA or the Act) as amended by the Oil Pollution Act of 1990, and the implementing regulations at 40 C.F.R. part 112.
2. The Administrator has properly delegated this authority to the undersigned EPA officials.
3. Section 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) authorizes EPA to bring an action under section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), for civil administrative penalties against Respondent who has violated, or is in violation of, a requirement or prohibition of the CWA or its implementing regulations.
4. This proceeding is governed by 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 (Consolidated Rules) set forth at 40 C.F.R. part 22.

5. This CASA is entered into by the parties for the purpose of simultaneously commencing and concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3) of the Consolidated Rules.

6. Respondent admits the jurisdictional allegations in this CASA and neither admits nor denies the specific factual allegations contained herein.

7. Respondent waives its rights to a hearing before any tribunal and to contest any issue of law or fact set forth in this CASA.

8. This CASA, upon incorporation into a final order, applies to and is binding upon Complainant, Respondent and Respondent's officers, directors, employees, agents, successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this agreement.

9. This CASA contains all terms of the settlement agreed to by the parties.

B. ALLEGED VIOLATIONS

10. Respondent is a person within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

11. Respondent is the owner and/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 the following facilities:

- a. **Arapahoe Station** located at 2601 S. Platte River Drive, Denver, CO;

- b. **Cabin Creek Hydroelectric Station (Cabin Creek)** located at 6276 County Rd. 381, Georgetown, CO;
 - c. **Shoshone Hydroelectric Station (Shoshone)** located at I-70 & Exit 123, Glenwood Springs, CO;
 - d. **Tacoma Hydroelectric Station (Tacoma)** located on the narrow gauge railroad line, Rockwood, La Plata County, CO;
 - e. **Valmont Station** located at 1800 63rd Street, Boulder, CO; and
 - f. **Zuni Station** located at 1335 Zuni Street, Denver, CO.
12. Hydraulic oil, transformer oil, lubricating oil, bearing oil, gasoline, diesel, and fuels are oils within the meaning of “oil” as defined at section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).
13. Respondent stores, transfers, distributes, uses or consumes oil or oil products at each of the facilities.
14. Each of the facilities referenced in paragraph 11 is an “onshore facility” within the meaning of section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.
15. Each of the facilities referenced in paragraph 11, 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.
16. Due to each facility’s location, a discharge of oil has the potential to reach the following navigable water(s) of the United States within the meaning of 40 C.F.R. § 112.2, as amended at 73 Fed. Reg. 71,944 (November 20, 2008), and Section 502(7) of the Act, 33 U.S.C. § 1362(7):
- a. Arapahoe Station - the South Platte River;
 - b. Cabin Creek - South Clear Creek to Clear Creek, to the South Platte River;
 - c. Shoshone - the Colorado River;

- d. Tacoma - the Animas River;
 - e. Valmont Station - Hot Water Canal to the Leggett Reservoir to Boulder Creek to the South Platte River; and
 - f. Zuni Station - the South Platte River.
17. The approximate, aggregate above-ground oil storage capacity for each of the facilities is as follows:
- a. 161,241 gallons at Arapahoe Station;
 - b. 131,603 gallons at Cabin Creek;
 - c. 30,311 gallons at Shoshone;
 - d. 7,665 gallons at Tacoma;
 - e. 107,462 gallons at Valmont Station; and
 - f. 12,255,378 gallons at Zuni Station.
18. The aggregate above-ground oil storage capacity at each of the Respondent's six facilities exceeds the minimum requirements found at 40 C.F.R. § 112.1(d)(2)(ii), because each facility has greater than 1,320 gallons of oil in containers each with a shell capacity of at least 55 gallons.
19. Each of the facilities is therefore a non-transportation-related, onshore facility which, due to its location, has the potential to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity (a "Spill Prevention Control and Countermeasure-regulated facility" or "an SPCC-regulated facility").
20. Each of the Respondent's non-transportation onshore facilities is subject to the oil pollution prevention requirements of 40 C.F.R. part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.
21. 40 C.F.R. § 112.3 requires that the owner or operator of an SPCC-regulated facility must prepare and implement a written SPCC plan in accordance with 40 C.F.R. §§ 112.7, and 112.8.

Discharge Violations

22. Respondent's discharge of oil from its Cabin Creek facility on May 22, 2006, into South Clear Creek, a navigable water of the United States, constitutes a violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3).
23. Respondent's discharge of oil from its Shoshone facility on September 8, 2006, into the Colorado River, a navigable water of the United States, constitutes a violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3).
24. Respondent's discharge of oil from its Tacoma facility on October 31, 2005, into the Animas River, a navigable water of the United States, constitutes a violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3).
25. Respondent's discharge of oil from its Zuni Station facility on March 26, 2007, into the South Platte River, a navigable water of the United States, constitutes a violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3).
26. Respondent's discharge of oil from the above facilities occurred in volumes that were a fraction of the total storage capacity of the facility.

SPCC Violations

27. In response to a Request for Information issued pursuant to section 308 of the Act, 33 U.S.C. § 1318, Respondent submitted copies of its SPCC Plans for each of the facilities referenced in paragraph 11.
28. On March 10, 2008, EPA reviewed Respondent's SPCC Plan dated November 14, 1997, revised August 28, 2006, for its Arapahoe facility and determined that it was not prepared in

accordance with certain provisions of 40 C.F.R. §§ 112.7, and 112.8 as is required by 40 C.F.R. § 112.3.

29. On March 10, 2008, EPA reviewed Respondent's SPCC Plan dated March 31, 1999, revised June 14, 2007, for its Cabin Creek facility and determined that it was not prepared in accordance with certain provisions of 40 C.F.R. §§ 112.7, and 112.8 as is required by 40 C.F.R. § 112.3.

30. On March 10, 2008, EPA reviewed Respondent's SPCC Plan dated March 2, 2000, revised February 18, 2004, for its Shoshone facility and determined that it was not prepared in accordance with certain provisions of 40 C.F.R. §§ 112.7, and 112.8 as is required by 40 C.F.R. § 112.3.

31. On February 14, 2008, EPA reviewed Respondent's SPCC Plan dated September 20, 2005, for its Tacoma facility and determined that it was not prepared in accordance with certain provisions of 40 C.F.R. §§ 112.7, and 112.8 as is required by 40 C.F.R. § 112.3.

32. On March 13, 2008, EPA reviewed Respondent's SPCC Plan dated December 29, 1998, revised July 5, 2006, for its Valmont facility and determined that it was not prepared in accordance with certain provisions of 40 C.F.R. §§ 112.7, and 112.8 as is required by 40 C.F.R. § 112.3.

33. On March 13, 2008, EPA reviewed Respondent's SPCC Plan dated September 23, 1997, revised April 9, 2004, for its Zuni facility and determined that it was not prepared in accordance with certain provisions of 40 C.F.R. §§ 112.7, and 112.8 as is required by 40 C.F.R. § 112.3.

34. Respondent's failure to prepare and implement an adequate SPCC plan in accordance with 40 C.F.R. §§ 112.7(a)(2), 112.7(g), 112.7(c)(1) and 112.8(c)(2) from February

14, 2008, through September 14, 2009, constitutes six violations of 40 CFR §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

C. CIVIL PENALTY

35. As alleged in the preceding Paragraphs, and pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. §19.4, the Respondent is liable for civil penalties of up to \$11,000 per day for each day during which the violation continues, up to a maximum of \$157,500.

36. Respondent, by signing this CASA herein certifies to EPA that, to the best of Respondent's knowledge, Respondent is now in compliance with each of the relevant provisions of the CWA that formed the basis of the Complaint.

37. Based on the foregoing alleged violations and pursuant to the authority of section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. § 19.4, Complainant proposes the assessment of administrative penalties against the Respondent in the amount of ninety-five thousand dollars (\$95,000).

38. Complainant proposes this penalty amount after considering the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8): 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.

39. Respondent, by signing this CASA, consents to the issuance of a final order and consents for the purposes of settlement to the payment of the civil penalty in the amount of ninety-five thousand dollars (\$95,000).

40. **Payment is due within 30 calendar days from the date written on the Final Order**, issued by the Regional Judicial Officer, that incorporates this Consent Agreement. If the due date falls on a weekend or legal federal holiday, then the due date becomes the next business day. The date the payment is made is considered to be the date processed by the Bank described below. Payments received by 11:00 AM. EST are processed on the same day; those received after 11:00 AM are processed on the next business day.

40. The payment in paragraph 37 shall be made by remitting a cashier's or certified check, including the name and docket number of this case, referencing "Oil Spill Liability Trust Fund-311," for the amount, **payable to the "Environmental Protection Agency,"** to:

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York

ABA = 021030004

Account = 68010727

SWIFT address = FRNYUS33

33 Liberty Street

New York NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact – Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Department of Treasury.

This payment option can be accessed from the information below:

WWW.PAY.GOV

Enter sfo 1.1 in the search field.

Open form and complete required fields.

A copy of the check, or wire transfer, shall be sent simultaneously to:

Jane Nakad (8ENF-UFO)
Technical Enforcement Program
U.S. EPA Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

and

Tina Artemis
Regional Hearing Clerk
Office of Regional Counsel
1595 Wynkoop St.
Denver, CO 80202-1129

41. In the event payment is not received by the specified due date, interest accrues from the date of the Final Order, not the due date, at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, and will continue to accrue until payment in full is received (i.e., on the 1st late day, 30 days of interest accrues).

42. In addition, a handling charge of fifteen dollars (\$15) shall be assessed the 31st day from the date of the Final Order, and each subsequent thirty day period that the debt, or any portion thereof, remains unpaid. In addition, a six percent (6%) per annum penalty shall be assessed on any unpaid principal amount if payment is not received within 90 days of the due date (i.e., the 121st day from the date the final consent order is signed). Payments are first applied to outstanding handling charges, 6% penalty interest, and late interest. The remainder is then applied to the outstanding principal amount.

43. Respondent agrees that the penalty shall never be claimed as a federal or other tax deduction or credit.

44. Payment of the penalty in this manner does not relieve Respondent of its obligations to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

D. TERMS AND CONDITIONS

45. Failure by Respondent to comply with any of the terms of this CASA shall constitute a breach of the CASA and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

46. Nothing in this CASA shall be construed as a waiver by the EPA or any other federal

entity of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this CASA.

47. Each undersigned representative of the parties to this CASA certifies that he or she is fully authorized by the party represented to bind the parties to the terms and conditions of this CASA and to execute and legally bind that party to this CASA.

48. The parties agree that this CASA is subject to the public notice requirements found at section 311(b)(6)(C)(i) of the Act, 33 U.S.C. § 1321(b)(6)(C)(i).

The parties agree to submit this CASA to the Regional Judicial Officer, with a request that it be incorporated into a final order.

49. This CASA, upon incorporation into a final order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the violations alleged in this CASA.

50. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this CASA.

In the Matter Of: Public Service Company of Colorado
d/b/a Xcel Energy (PSCo) (Continued)

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 8, Office of Enforcement, Compliance
and Environmental Justice, Complainant.**

Date: 30 September 2009

Sharon Z Keicher
for Eddie A. Sierra,
Acting Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Date: 9-30-09

Brenda Morris
Brenda Morris, Enforcement Attorney
U.S. EPA, Region 8

**PUBLIC SERVICE COMPANY OF COLORADO
d/b/a XCEL ENERGY, INC., Respondent.**

Date: 9/29/2009

By: Olon Plunk
Olon Plunk
Vice President, Environmental Services
Type or print name