



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

CERTIFIED MAIL # 7001 0320 0004 7789 4514
RETURN RECEIPT REQUESTED

SEP 29 2010

Mr. John Sawyer
Western New York Energy
PO Box 191
Medina, NY 14103

RE: Notice of Proposed Assessment of a Civil Penalty
Docket No. CWA-02-2010-3816
Western New York Energy
4141 Bates Rd
Medina, NY 14103

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 OCT 12 A 9:08
REGIONAL HEARING
CLERK

Dear Mr. Sawyer:

Enclosed is a document entitled "Administrative Complaint and Opportunity to Request Hearing and Conference", hereinafter referred to as the "Complaint". We have filed this Complaint against the Western New York Energy ("Respondent"), under the authority of 311(b)(6) of the Clean Water Act (Act), 33 U.S.C. 1321(b)(6). In the Complaint, the United States Environmental Protection Agency (EPA) alleges that the Western New York Energy facility in Medina, New York has violated the Clean Water Act. The violations EPA is alleging are specifically set out under "Specific Claims" in the Complaint. The amount of the civil penalty proposed to be assessed is \$94,700.

For purposes of determining the amount of any penalty to be assessed, Section 311(b)(8) of the Act requires EPA to take into account the following factors: the seriousness of the violation or violations, 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 economic impact of the penalty on the violator, and any other matters as justice may require. To develop the penalty proposed in the Complaint, EPA has taken into account the statutory factors with respect to the particular facts and circumstances of this case, to the extent known at this time.

By law, the Respondent has the right to request a hearing regarding the violations alleged in the Complaint and the proposed civil penalty. A request for a hearing must be contained in a written Answer to the Complaint. 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; Final Rule," (hereinafter "Consolidated Rules") Fed. Reg. Volume 64, Number 141 (a copy of which is enclosed), the Respondent must file a written Answer with the Regional Hearing Clerk within thirty (30) days of receipt of this Complaint if the Respondent contests any material fact upon which the Complaint is based, contend that the proposed penalty is inappropriate or contend it is entitled to judgment as a matter of law. If the Respondent does not file a timely Answer in accordance with the requirements specified in the Consolidated Rules, the Respondent may be found in default and the proposed civil penalty may be assessed without further proceedings. The Respondent has the right to be represented by an attorney, or to represent itself at any stage of these proceedings.

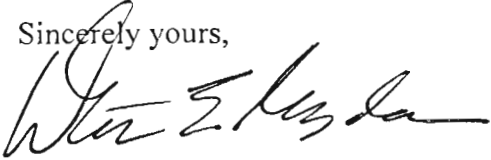
EPA encourages all parties against whom it files a Complaint to pursue settlement discussions with the Agency. Whether or not the Respondent requests a formal hearing, the Respondent may request an informal conference with EPA to discuss the alleged violations and the proposed civil penalty. Specifically EPA invites information pertaining to the factors in Section 311(b)(8) of the Act. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty. The Respondent may represent itself or be represented by an attorney at any conference, whether in person or by telephone. An attorney from the Agency's Office of Regional Counsel (ORC) will normally be present at any informal conference. Please be advised that any informal conferences conducted in person with Agency officials will be held in New York City or in Edison, New Jersey. Please also be advised that a request for an informal conference does not substitute for a written Answer nor does it extend the period of time (thirty days) within which you must file an Answer and request a hearing.

If a mutually satisfactory settlement can be reached, it will be formalized by the issuance of a Consent Agreement and Order signed by you and by the Regional Administrator, EPA Region 2. The issuance of such a Consent Agreement and Order shall constitute a waiver by the Respondent of its right to a hearing on, and to a judicial appeal of, the agreed upon civil penalty. If you have any questions or wish to discuss the possibility of settlement of this matter, please contact:

Tim Murphy
Office of Regional Counsel
U.S. Environmental Protection Agency
290 Broadway - 16th Floor
New York, New York 10007-1866
Telephone: (212) 637-3236

We urge your prompt attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Walter E. Mugdan". The signature is written in a cursive style with a large initial "W" and "M".

Walter E. Mugdan, Director
Emergency and Remedial Response Division

Enclosures

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF
Western New York Energy
4141 Bates Ave
Medina, NY 14103

Respondent

Proceeding Pursuant to §311(b)(6) of the
Clean Water Act, 33 U.S.C. §1321(b)(6),
for FRP Violations

Proceeding to Assess Class II
Civil Penalty Under Section
311(b)(6) of the Clean
Water Act

Docket No.
CWA-02-2010-3816

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2010 OCT 12 A 9: 09
REGIONAL HEARING
CLERK

**COMPLAINT
FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF A CIVIL PENALTY, AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

I. Statutory Authority

1. This Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 311(b) (6) (B) (ii) of the Clean Water Act ("Act"), 33 U.S.C. §1321(b) (6) (B) (ii). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Emergency and Remedial Response Division ("ERRD") of EPA, Region 2 ("Complainant").

2. Pursuant to Section 311(b) (6) (B)(ii) of the Act, and 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" ("CROP"), *64 Federal Register 40176 et seq.*, (July 23, 1999), a copy of which is attached, Complainant hereby requests that Regional Administrator assess a civil penalty against Western New York Energy ("Respondent") for the failure or refusal to comply with regulations issued under Section 311(j) of the Act, 33 U.S.C. §1321(j), and found at 40 CFR Part 112 to which Respondent is subject at its facility at 4141 Bates Avenue, Medina, New York.

II. Findings of Violation

JURISDICTIONAL ALLEGATIONS

1. The Respondent is a corporation with a place of business located at 4141 Bates Ave, Medina, New York 14103. The Respondent is a person within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. §1321(a)(7) and 40 CFR §112.2.
2. The Respondent is the owner and operator within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. §1321(a)(6), and 40 CFR §112.2 of an oil storage facility located at 4141 Bates Ave, Medina, New York ("the Facility"), that as referenced by 40 CFR §112.2, is a non-transportation-related facility according to the definition set forth in 40 CFR Part 112, Appendix A, §II. and initially published at 36 Fed. Reg. 24,080 (December 18, 1971).
3. The Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products located at the Facility.
4. The Facility is an onshore facility within the meaning of 40 CFR § 112.2 that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines of the United States, within the meaning of Section 311(j)(5)(B)(iii) of the Act, 33 U.S.C. § 1321(j)(5)(B)(iii), and Appendix C to 40 CFR Part 112, and is subject to the facility response plan ("FRP" or "response plan") submission requirements of 40 CFR §112.20 ("an FRP facility").
5. Section 311(j)(5)(A) of the Act, 33 U.S.C. § 1321(j)(5)(A), provides that the President shall issue regulations requiring each owner or operator of an FRP facility to "submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance."
6. By Section 2(d)(1) of Executive Order 12777 (October 18, 1991), the President delegated to the Administrator of EPA the authorities under Section 311(j) of the Act that are described in this Complaint.
7. The Administrator of EPA promulgated regulations, codified at 40 CFR §112.20 and §112.21, implementing these delegated statutory authorities.
8. Pursuant to Section 311(j)(5), 33 U.S.C. §1321(j)(5), and 40 CFR §§112.1 and 112.20, the Facility is therefore subject to the requirements of 40 CFR §112.20 and §112.21.

9. Oak Orchard Creek, Glenwood Lake and Lake Ontario are navigable waters of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 110.1.

SPECIFIC CLAIMS

1. Pursuant to 40 CFR §112.20(a)(2)(ii), for a newly constructed facility that commences operation after August 30, 1994, and is required to prepare and submit a response plan based on the criteria in 40 CFR §112.20(f)(1), the owner or operator shall submit the response plan to EPA prior to the start of operations.
2. Pursuant to 40 CFR §112.20(f)(1), a facility could be reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines if the facility's total oil storage capacity is greater than 1 million gallons and the facility is located at a distance that such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments.
3. The Respondent submitted documents to EPA dated March 2010 and June 2010 which demonstrated the facility's total oil storage capacity is greater than 1 million gallons and the facility is located at a distance that such that a discharge from the facility could cause injury to fish and wildlife and sensitive environments.
4. The Respondent's facility commenced operation after August 30, 1994, specifically on December 1, 2007.
5. The Respondent did not submit the response plan to EPA until March 25, 2010, 27 months after starting operations.

CLAIM FOR RELIEF

1. Complainant realleges and incorporates by reference the allegations in Paragraphs 1 through 5 in Specific Claims above.
2. As alleged in Paragraph 5 above, Respondent's failure to submit a response plan to EPA after it's facility began operations, as required in 40 CFR §112.20(a)(2)(ii), violated regulations issued under Section 311(j) of the Act. Pursuant to Section 311(b)(6)(B)(ii) of the Act and 40 CFR §19.4 (Table 1), the Respondent is liable for civil penalties of up to \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500.

III. Notice of Proposed Order Assessing a Civil Penalty

Based on the foregoing Findings of Violation, and pursuant to the authority of Section 311(b)(6)(B)(ii) the Act, 33 U.S.C. §1321(b)(6)(B)(ii), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes, subject to receipt and evaluation of further relevant information, to issue a Final Order Assessing Administrative Penalties ("Final Order") to Respondent assessing a civil penalty of Ninety-four Thousand Seven Hundred dollars (\$94,700). EPA determined the proposed penalty after taking into account the applicable factors identified at Section 311(b)(8) of the Act, 33 U.S.C. §1321(b)(8). These are: 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 economic impact of the penalty on the violator, and any other factors as justice may require.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case, to the extent known to Complainant at the time of this Complaint.

IV. Procedures Governing This Administrative Litigation

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, which have been codified at 40 CFR Part 22. A copy of these rules accompanies this Complaint.

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the 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 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within thirty (30) days after service of the Complaint. 40 CFR § 22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th floor
New York, New York 10007-1866**

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

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 CFR §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 CFR §22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding), (3) the basis for opposing the proposed relief and (4) whether Respondent requests a hearing. 40 CFR §22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity To Request A Hearing

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

Any hearing in this proceeding will be held at a location determined in accordance with 40 CFR §22.21(d). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§551-59, and the procedures set forth in Subpart D of the CROP, 40 CFR Part 22, Subpart D.

Should Respondent request 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)(ii) of the Act, 33 U.S.C. §1321(b)(6)(C)(ii), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondent not request a hearing, EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a hearing thereon. EPA will grant the petition and will hold a hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order.

C. Failure To Answer

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 CFR §22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 CFR §22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 CFR §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 CFR §22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefor shall be issued pursuant to 40 CFR §22.17(c).

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 CFR §22.27(c). 40 CFR §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.

V. Informal Settlement Conference

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 CFR §22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein 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.

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 CFR §22.18.

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

Timothy Murphy, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
(212) 637-3236

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 CFR §22.18(b)(1). Respondent's requesting 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 CFR §22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 CFR §22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement. 40 CFR §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 CFR §22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 CFR §22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondents entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VI. Resolution of this Proceeding Without Hearing or Conference

If you wish to settle this matter without hearing, you may, subject to the provisions of 40 CFR § 22.18(a)(1), either (1) file an Answer to this Complaint and subsequently pay the full penalty requested within 60 days, or (2) within 30 days of your receipt of this Complaint file a written statement with the Regional Hearing Clerk at the address provided below agreeing to pay, and subsequently pay within 60 days of your receipt of this Complaint, the full penalty.

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 17th Floor
New York, New York 10007

In either case, your payment shall be made by a cashier's or certified check, or by an electronic funds transfer (EFT). If you are paying by check, pay the check to "Environmental Protection Agency," noting on the check "OSTLF-311" and docket number "CWA-02-2010-3816". If you use the U.S. Postal Service, address the payment to "U.S. Environmental Protection Agency, Fines & Penalties, CFC, PO Box 979077, St Louis, MO 63197-9000

Pursuant to 40 CFR §22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within 30 days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order in accordance with 40 CFR §22.18(a)(3). In accordance with 40 CFR §22.45(c)(3), no Final Order shall issue until at least ten (10) days after the close of the public comment on this Complaint. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Further, pursuant to 40 CFR §22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to federal court. 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.

VI. Filing of Documents

1. The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway - 17th Floor
New York, New York 10007

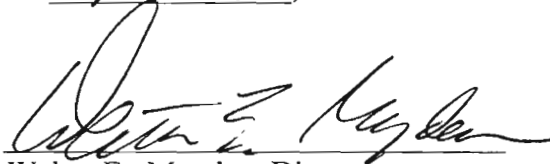
2. A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to

Timothy Murphy, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 2
290 Broadway, New York, New York 10007
(212) 637-3236

VII. General Provisions

1. Respondent has a right to be represented by an attorney at any stage of these proceedings.
2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act or regulations promulgated thereunder.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 311(b)(6) of the Act will affect Respondent's continuing obligation to comply with the Act, and with any regulations promulgated, or orders issued, pursuant thereto.

ISSUED THIS 29th DAY OF September, 2010.



Walter E. Mugdan, Director
Emergency and Remedial Response Division
United States Environmental Protection Agency - Region 2
290 Broadway
New York, New York 10007

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF
Western New York Energy
4141 Bates Road
Medina, NY 14103
Respondent.

Proceeding to Assess Class II
Civil Penalty Under Section 311(b)(6)
of the Clean Water Act

Proceeding Pursuant to §311(b)(6) of the
Clean Water Act, 33 U.S.C. §1321(b)(6)

Docket No.
CWA-02-2010-3816

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I caused to be mailed, by certified mail, return receipt requested, a copy of the foregoing "ADMINISTRATIVE COMPLAINT" and a copy of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," (64 *Federal Register* 40176 *et seq.*, July 23, 1999) to the following person at the address listed below:

Mr. John Sawyer
Western New York Energy
PO Box 191
Medina, NY 14103

I [hand carried / mailed] the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Date: Oct. 12, 2010
New York, New York

Ana Madera
[Signature of Sender]