UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

IN THE MATTER OF:	)	Docket No. 10-97-0122-OPA
	)	
City of Nondalton,	)	Proceeding to Assess
	)	Class I Administrative
	)	Penalty Under Clean Water
	)	Act Section 311,
RESPONDENT	)	33 U.S.C. §1321
	)	
_____	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i). The proceeding is governed by the Environmental Protection Agency's procedural rules at 40 C.F.R. Part 22, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("the Consolidated Rules"), 64 Fed. Reg. 40138 (July 23, 1999).[1]

[1] The proceeding was originally governed by proposed procedural rules in 40 C.F.R. Part 28, 56 Fed. Reg. 29996 (July 1, 1991).

STATUTORY AND REGULATORY BACKGROUND

Section 311(j)(1) of the Clean Water Act, 33 U.S.C. §1321(j)(1), provides for the issuance of regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore facilities, and to contain such discharges . . . ."

The implementing regulations, found at 40 C.F.R. Part 112, apply to

> owners or operators of non-transportation-related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities . . . into or upon the navigable waters of the United States or adjoining shorelines.

40 C.F.R. Section 112.1(b).

Under 40 C.F.R. Section 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. Section 112.7 not later than six months after the facility began operations, or by July 10, 1974, whichever is later, and must implement that SPCC plan not later than one year after the facility began operations, or by January 10, 1975, whichever is later.

Section 311(b)(6)(A)(ii) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(A)(ii), provides for Class I or Class II administrative penalties against any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility who fails or refuses to comply with any regulation issued under Section 311(j) to which that owner, operator, or person in charge is subject.[2] Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i), provides that, before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request a hearing on the proposed penalty.

FACTUAL AND PROCEDURAL BACKGROUND

The Unit Manager of Emergency Response and Site Cleanup Unit No. 1 of the Office of Environmental Cleanup of Region 10 of the United States Environmental Protection Agency (Complainant) initiated this action on September 30, 1997, by issuing an administrative complaint to City of Nondalton, Nondalton, Alaska, (Respondent) alleging that Respondent violated the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 and the Clean Water Act. The complaint provided

[2]The Oil Pollution Act of 1990 amended Section 311 of the Clean Water Act to increase penalties for oil spills and for violations of Section 311(j).

notice of a proposed penalty for one violation in an amount up to $10,000.

By memorandum dated October 2, 1997, the undersigned was designated as Presiding Officer in this matter.

The Respondent failed to answer the Complaint. The Complainant filed a Motion for Default Judgment on May 7, 1998. On June 3, 1998 the Presiding Officer denied the motion for default and issued an Order Granting Leave to Amend the Administrative Complaint.

An Amended Administrative Complaint was issued July 17, 1998, alleging that the City of Nondalton violated the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 by failing to prepare an SPCC plan for its bulk fuel storage facility (tank farm) located at the Nondalton airport. The Mayor of the City of Nondalton, apparently acting pro se, answered the Amended Administrative Complaint by letters dated October 3, 1997, March 6, 1998, and August 14, 1998, in which he disputed that the SPCC regulations applied to the tank farm because the City had discontinued operation of the tank farm in December, 1995, disputed certain other allegations in the Amended Administrative Complaint not relevant here,[3] and

[3] For example, the letters state that the tank farm has secondary containment. The Amended Administrative Complaint does not charge the Respondent with failure to have secondary

requested a hearing. The Mayor stated that the City would prepare an SPCC plan for the tank farm, but the parties were unable to reach agreement on a number of issues, and the case was scheduled for hearing on September 28, 1999.

On July 26, 1999, the Complainant requested that the hearing schedule be changed so the Complainant could file a Motion for Accelerated Decision, which it anticipated filing by September 30, 1999. The Complainant's request was granted by the Presiding Officer on August 20, 1999. The Complainant filed its Motion for Accelerated Decision as to Liability on August 24, 2000. In light of the fact that the Complainant's motion was filed later than anticipated, the Respondent was allowed 21 days from October 18, 2000, to file a response to the motion. The Respondent has failed to file any response to the Motion for Accelerated Decision as to Liability.[4]

STANDARDS FOR SUMMARY DETERMINATION

Section 22.20(a) of the Consolidated Rules provides:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact

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containment for the facility.

[4] Under Section 22.16(b) of the Consolidated Rules, any party who fails to respond within the designated period waives any objection to the granting of the motion.

> exists and a party is entitled to judgment as a matter of law . . . .

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decisions under the Consolidated Rules of Practice. Puerto Rico Aqueduct and Sewer Authority v. EPA, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995); CWM Chemical Services, Inc., 6 E.A.D. 1 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact. Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. Clarksburg Casket Company, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); Green Thumb Nursery, 6 E.A.D. 782, 793 (EAB 1997). A factual issue is "material where, under the governing law, it might affect the outcome of the proceeding," and is "genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." Clarksburg Casket, slip op. at 9. The record must be viewed in a light most favorable to the party opposing the motion,

indulging all reasonable inferences in that party's favor. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

DISCUSSION

To state a cause of action against the Respondent under Section 311 of the Clean Water Act, 33 U.S.C. § 1321, and 40 C.F.R. Section 112.3, Complainant must allege that (1) the Respondent is the owner or operator (2) of an onshore facility (3) that could reasonably be expected to discharge oil in harmful quantities (4) into or upon the navigable waters of the United States or adjoining shorelines, and that (5) the Respondent has failed to prepare a SPCC plan within six months after the facility began operation or by July 10, 1973, whichever is later.[5]

(1) The term "owner or operator" as it applies to an onshore facility is defined in Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. Section 112.2 as "any person owning or operating" the facility. "Person" is defined in turn in Section 311(a)(7) of the Clean Water Act and 40 C.F.R. Section 112.2 to include "an individual, firm, corporation, association, and a partnership." Although it is not obvious from these definitions, a municipality organized

[5]Other violations that could be alleged under Section 311 of the Clean Water Act and 40 C.F.R. Section 112 are omitted, in the interests of simplicity of exposition.

under State law is included in the definition of "person" under Section 311 of the Clean Water Act. United States v. City of New York, 481 F. Supp. 4, (S.D.N.Y. March 7, 1979) aff'd U.S. v. City of New York, 614 F.2d. 1292 (2d Cir. November 26, 1979), cert. den. City of New York v. U.S., 446 U.S. 936, 100 S.Ct. 2154 (May 12, 1980). Consequently, Respondent City of Nondalton is a "person" under Section 311 of the Clean Water Act. The Respondent does not dispute that it is the "owner or operator" of the bulk fuel storage facility.

(2) The Respondent does not dispute that the bulk fuel storage facility meets the definition of a non-transportation-related onshore facility. See Section 311(a) of the Clean Water Act, 40 C.F.R. Section 112.2, and Appendix A Section II to 40 C.F.R. Part 112 for the relevant definitions.

(3) Due to the number and size of the above-ground fuel storage tanks at the facility, which have a total capacity of 40,000 gallons,[6] the facility could reasonably be expected to discharge oil in harmful quantities. The Respondent has not disputed this.

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[6] At the time of the July 31, 1996 inspection, four of the tanks were connected to a temporary fuel distribution system, which consisted of flexible hoses and a portable gasoline-powered fuel pump. Complainant's Exhibits 3 and 4.

(4) Due to its location in close proximity to Six Mile Lake, oil from the facility would be discharged into or upon the navigable waters of the United States or adjoining shorelines. The Respondent has not disputed this.

(5) The Respondent does not dispute that it failed to prepare an SPCC plan within six months after the facility began operation, or by July 10, 1973, whichever is later. However, the Respondent argues that as of the time of the July 31, 1996 EPA inspection it was not required to prepare an SPCC plan because it had closed the facility in December, 1995, and disconnected the tanks.

The Complainant argues that at the time of the July 31, 1996 inspection, the facility was only temporarily out of service, rather than permanently shut down, so that the requirement for an SPCC plan continued to be in effect. The Complainant notes that at the time of the inspection, four of the eight fuel storage tanks were connected to distribution lines (rubber hoses) and a portable gasoline-powered fuel pump was on site. Complainant's Memorandum in Support of Motion for Accelerated Decision as to Liability, p. 6. Citing proposed regulations amending 40 C.F.R. Part 122 at 56 Fed. Reg. 54,612 (October 22, 1991) which would add a definition of

"permanently closed tanks" to the SPCC regulations,[7] the Complainant argues that the facility's tanks were not permanently closed as of July 31, 1996, because at that time there were still active connections between four of the tanks and distribution lines. Complainant's Memorandum in Support of Motion for Accelerated Decision as to Liability, p. 7. Since the tanks were not permanently closed, the Complainant argues that the facility was required to have an SPCC plan.

Complainant's Exhibit 3, the inspection report, and Exhibit 4, photographs taken during the inspection, show that at the time of the July 31, 1996 inspection four of the oil storage tanks were connected to a fuel distribution system consisting of flexible hoses and a portable gasoline-powered fuel pump. Consequently, it is clear that the tank farm was at least partially operable in July, 1996 and therefore an SPCC plan was required under the regulations then in effect. In addition, the inspection report, Complainant's Exhibit 3,

[7] Complainant states that, in order to be permanently closed under the proposed regulation, tanks must meet the following criteria: (1) all liquid and sludge have been removed from each container and connecting lines; (2) all connecting lines and piping have been disconnected from the container and blanked off, and valves have been closed and locked. The proposed regulation has apparently never been finalized, and was therefore not in effect at the time of the initial EPA inspection. Current SPCC regulations at 40 C.F.R. Part 112 do not specifically refer to taking tanks out of service.

states that the fuel pump sat on a cut-down 55 gallon drum "which appears to contain several gallons of spilled fuel." This suggests that the facility was in operation more recently than 1995, and therefore had not been shut down as asserted by the Respondent. The record contains no evidence to show that all of the facility's tanks were inoperable as of the date of the initial EPA inspection, and the Respondent has not come forward with any such evidence.

The opponent of a motion for accelerated decision must set forth facts showing that there is a genuine issue of material fact for hearing; it is not sufficient for the opponent to simply disagree with or deny the allegations of the Complaint. Clarksburg Casket Co., EPCRA Appeal No. 98-8 slip op. at 9 (EAB, July 16, 1999). In light of the evidence in the record, and the fact that the Respondent has made no showing to the contrary, I find that as of July 31, 1996, the facility was operable and was required to have an SPCC plan, regardless of whether any of the tanks had fuel in them or whether some of the tanks were disconnected from the distribution system. See Pepperell Associates, CWA Appeal Nos. 99-1, 99-2, slip op. at 21-26 (EAB, May 10, 2000), citing Ashland Oil Co., 4 E.A.D. 235, 249 (EAB 1992) which holds that commencement of a violation for failing to prepare and submit

an amended SPCC plan began when a tank was first installed rather than when the tank was connected to piping or actually filled. The Complainant's Motion for Accelerated Decision as to Liability should therefore be granted.[8]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the pleadings, exhibits, and other documents filed in this proceeding, I make the following Findings of Fact and Conclusions of Law:

(1) Respondent is a municipal corporation organized under the laws of Alaska. Respondent is a person within the meaning of Section 502(5) of the Clean Water Act and 40 C.F.R. Section 112.2.

(2) Respondent is an owner or operator within the meaning of Section 311(a)(6) of the Clean Water 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 Nondalton, Alaska ("the facility").

[8] EPA conducted an additional inspection of the facility in June, 1999. At that time, all of the facility's tanks had been fully disconnected and capped off. Therefore, as of June, 1999, the Complainant considered the tanks to be out of service and therefore no longer subject to the requirement for an SPCC plan. The Complainant's Motion concerns the period of noncompliance prior to June, 1999.

(3) The facility is an "onshore facility," as defined in Section 311(a)(10) of the Clean Water Act and 40 C.F.R. Section 112.2. 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. Section 110.3.

(4) The facility has an above-ground storage capacity greater than 1,320 gallons of oil or oil products and has at least one container whose capacity exceeds 660 gallons. Specifically, the facility has eight above-ground storage tanks with a capacity of 5,000 gallons per tank, for a total above-ground storage capacity of 40,000 gallons.

(5) The facility is a non-transportation-related facility under the definition referenced at 40 C.F.R. Section 112.2 and set forth in 40 C.F.R. Part 112, Appendix A § II and 36 Fed. Reg. 24,080 (December 18, 1971).

(6) Based on the above, and under Section 311(j) of the Clean Water Act and its implementing regulations, Respondent is subject to 40 C.F.R. Part 112 as an owner or operator of the facility.

(7) Under 40 C.F.R. Section 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare a Spill Prevention Control and Countermeasure

("SPCC") plan in accordance with 40 C.F.R. Section 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 one year after the facility began operations, or by January 10, 1974, whichever is later.

(8) The City of Nondalton began operating the facility more than six months prior to July 17, 1998, the date the Complainant issued the Amended Administrative Complaint in this matter.

(9) On July 31, 1996, EPA representatives inspected the facility to assess its compliance with federal oil spill prevention requirements.

(10) As of July 31, 1996, the facility was at least partially operable, and therefore an SPCC plan was required.

(11) Respondent has failed to prepare an SPCC plan for the facility, in violation of 40 C.F.R. Section 112.3.

(12) Pursuant to Section 311(b)(6)(B)(i) of the Clean Water Act, the Respondent is liable for a civil penalty of up to $10,000 for one violation, the failure to prepare an SPCC plan for the facility.

(13) As of June, 1999, all of the facility's tanks had been fully disconnected and capped off, and were considered

out of service and therefore no longer subject to the requirement for an SPCC plan.

CONCLUSION

On the basis of the findings and reasons set forth above, I find that no genuine issue of material fact exists as to Respondent's liability, and the Complainant is entitled to judgment as a matter of law. The Complainant's Motion for Accelerated Decision as to Liability is hereby GRANTED. Further proceedings to determine the appropriate penalty will be scheduled by subsequent order.

/S/
Steven W. Anderson
Regional Judicial Officer

Date: March 1, 2001