UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 3
Philadelphia, Philadelphia

IN THE MATTER OF:	)	
	)	
MIKE FUEL OIL CORPORATION	)	
	)	
	)	
RESPONDENTS	)	DOCKET NO. MIKE FUEL OIL CORPORATION
	)	
	)	
	)	

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

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 Proposed 40 C.F.R. Part 28 -- Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act, the Comprensive Environmental Response, Compensation and Liability Act, and the Emergency Planning and Community Right-to-Know Act, and the Administrative Assessment of Civil Penalties Under Part C of the Safe Drinking Water Act, 56 Fed. Reg. 29,996 (July 1, 1991), issued December 2, 1991 as procedural guidance for Class I administrative penalty proceedings under Section 311 of the Clean Water Act, 33 U.S.C. § 1321, (the "Consolidated Rules").

This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules, following a default by the Respondent.

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the prohibition on unauthorized discharges of oil and hazardous

substances:

The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States; adjoining shorelines, or into or upon the waters of the contiguous zone, . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited .... "

Subsection 311(b)(3) of the Clean Water Act, 33 U.S.C. §1321(b)(3).

Section 311(b)(6)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(A), provides for Class I or Class II administrative enforcement actions against any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of subsection 311(b) (3), 33 U.S.C. § 1321(b) (3). In a Class I action, the maximum penalty assessable per violation is $10,000, up to a total of $25,000; in a Class II action, a total penalty of up to $125,000 may be assessed, with a $10,000 per day of continuing violation limit . 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, "within 30 days of the date the notice is received by such person," a hearing on the proposed penalty. Subsection 311(b) (6) (B) (i) of the Clean Water Act, 33 U.S.C. § 1321(b) (6) (B) (i).

PROCEDURAL BACKGROUND

The Associate Division Director for Superfund Programs, Hazardous Waste Management Division, U.S. EPA-Region III (Complainant) initiated this action on June 28, 1995, by filing an administrative complaint under § 28.16(a) of the Consolidated Rules. An initial attempt to serve the administrative complaint was ineffective. Service was effected on January 22, 1996.

The administrative complaint contained recitations of statutory authority and allegations regarding Respondent's discharge of oil from an onshore facility, to wit, an underground storage tank, into an unnamed tributary of Swatara (also referred to as "Swatera") Creek in Lebanon County, Pennsylvania, a tributary of the Susquehanna River, in a manner alleged to be in violation of the Clean Water Act. The administrative complaint provided notice of a proposed penalty in the amount of $10,000. The administrative complaint and the letter accompanying the administrative complaint each provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed Respondent of the right to a hearing and of the opportunity to seek an extension of the thirty day period for filing a response.

By memorandum dated February 13, 1997, I designated Benjamin Kalkstein as Presiding Officer in this proceeding

pursuant to § 28.16(h) of the Consolidated Rules.

Under § 28.20 of the Consolidated Rules, Respondent had thirty days from receipt of the administrative complaint to file a response, unless the deadline was extended under § 28.20(b)(1) for the purpose of engaging in informal settlement negotiations.

The initial deadline under § 28.20(a) for filing a response was February 20, 1996, thirty days after service of the administrative complaint. The Record does not contain any stipulations extending the response deadline as allowed under § 28.20(b)(1).

No response has been filed to date by the Respondent; Respondent has therefore failed to respond to the administrative complaint in a timely fashion.

As a consequence of the failure to file a timely response to the administrative complaint, Respondent has waived its opportunity to appear in this action for any purpose. See § 28.20(e) of the Consolidated Rules. Respondent's failure to file a timely response to the administrative complaint also automatically triggers the default proceedings provision of the Consolidated Rules. Section 28.21(a) of the Consolidated Rules provides:

> Determination of Liability. If the Respondent fails timely to respond pursuant to § 28.20(a) or (b) of this Part . . . the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

By Order dated February 14, 1997 the Presiding Officer determined that the Complainant had stated a cause of action in the administrative complaint. In the same Order the Regional Hearing Clerk was directed to enter Respondent's default as to liability in the record of the proceeding as required by § 28.21(a) (1) of the Consolidated Rules and Complainant was directed to submit a written argument regarding assessment of an appropriate civil penalty in accordance with § 28.21(c) of the Consolidated Rules. Counsel for Complainant filed the written argument as directed and that submission has been included in the administrative record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under § 28.21(a) (1) of the Consolidated Rules, upon entry of Respondent's default as to liability, the allegations as to liability included in the administrative complaint are deemed recommended findings of fact and conclusions of law. I accept those recommendations and make the following Findings of Fact and Conclusions of Law:

(1) Mike Fuel Oil Corporation d/b/a/ Sandman Plaza II Truckstop ("Respondent") is a corporation organized and existing under the laws of New Jersey. At all times relevant to the

allegations in this matter Respondent has conducted business in Pennsylvania under the name "Sandman Plaza II Truckstop."

(2) Respondent is a "person" within the meaning of Section 311(a)(7) of the Clean Water Act, 33 U.S.C. § 1321(a)(7).

(3) At all times relevant to this proceeding, Respondent was the owner or operator of an underground storage tank situated at RD 1 Route 22 in Grantville, Lebanon County, Pennsylvania.

(4) The underground storage tank identified above was an "onshore facility" within the meaning of Section 311(a)(10) of the Clean Water Act, 33 U.S.C. § 1321(a)(10).

(5) On or about January 23, 1993, the underground storage tank identified above discharged approximately 200 gallons of oil into an unnamed tributary of Swatara Creek, a tributary of the Susquehanna River, a navigable water of the United States.

(6) Respondent's January 23, 1993 discharge of oil caused a visible film upon the surface of the unnamed tributary of Swatara Creek.

(7) Section 311(b) (3) of the Act, 33 U.S.C. § 1321(b)(3) prohibits the discharge of oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States.

(8) For purposes of Section 311(b)(3) and (b) (4) of the Act, 33 U.S.C. § 1321(b) (3) and (b) (4), discharges of oil into or upon the navigable waters of the United States in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States are defined in 40 C.F.R. §110.3 to include discharges of oil that (1) violate applicable water quality standards or (2) cause a film or sheen upon 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 the adjoining shorelines.

(9) Respondent's January 23, 1993 discharge of oil was in a quantity that has been determined "may be harmful" under Section 311(b)(3) ofthe Clean Water Act, 33 U.S.C. § 1321(b)(3) and 40 C.F.R. § 110.3(b).

(10) Respondent is liable for an administrative civil penalty under Section 311(b)(6)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(A).

DETERMINATION OF REMEDY (PENALTY)

In accordance with § 28.21(b) of the Consolidated Rules and the Presiding Officer's Order of February 14, 1997, Complainant has submitted a written argument regarding the assessment of an appropriate civil penalty.

Based upon the administrative record, I have taken into account the following matters in determining an appropriate civil penalty:

The seriousness of the violation or violations:

According to documents attached to Complainant's Penalty Argument, the incident that is the the subject of this proceeding involved the release of approximately 1,000 gallons of diesel fuel from an underground storage tank, which occurred when a nozzle failed to click off when the tank was full. Complainant's Penalty Argument, Exhibit 1. This document is Respondent's reply to an information-gathering letter from EPA some time after the incident. The same document estimates the amount of oil reaching the water at 200 gallons, but no basis is given for the estimate, and no accounting is given for the other 800 gallons. Another document,Complainant's Penalty Argument, Exhibit 2, provides some evidence that some of the oil may have contaminated the soil in and around the drain into which the January 23, 1993 discharge flowed. This document is a General Inspection Report written by a Pennsylvania Department of Environmental Resources Inspector some 18 days after the incident, in which she recommended removal of contaminated soil from the drain into which the spill flowed. In drafting the administrative complaint and in calculating the proposed penalty of $10,000 Complainant has apparently focussed on Respondent's 200 gallon estimate in determining the seriousness of the discharge. Although there is no record basis for finding that an amount larger than 200 gallons of oil was discharged to the unnamed tributary, it likely that a greater amount, possibly as much as 1,000 gallons, was discharged to the unnamed tributary and to the adjoining shorelines. \

The economic benefit to the violator, if any, resulting from the violation: Complainant's proposed penalty and Penalty Argument assumed that Respondent obtained no economic benefit from this violation, and I agree with that assumption. The loss of 1,000 gallons of product and the procurement of mitigation services were significant costs Respondent incurred as a result of the incident, but even if they were documented in the record they should not be considered as offsets to any benefit Respondent might have enjoyed.

The degree of culpability involved: This incident was the result of minor equipment failure and, according to Complainant's Penalty Argument, p. 3, failure of a low level employee to monitor the equipment. There is no evidence in the record regarding the cause of the equipment failure, although it appears that the offending nozzle was replaced after the incident. Complainant's Penalty Argument, Exhibit 2. There is no evidence of employee negligence at the time of the incident, although Exhibit 2 does indicate that as of February 10, 1993, the date of the Pennsylvania Inspection, "the person running the fuel desk is responsible to check each nozzle once each shift to assure proper operation." Respondent lost approximately 1,000 gallons of salable diesel fuel, a significant economic loss most

would not choose to incur, and it is an indication of a relatively low degree of culpability.

Any other penalty for the same incident: No other penalties were assessed for this incident.

Any history of prior violations: The record contains no evidence of any prior violations of the Clean Water Act by the Respondent. Complainant's Penalty Argument alleges two subsequent discharges of oil from the facility, on March 25 and on June 9, 1993 and attaches two Region III Incident Notification Reports providing some sketchy details of these alleged discharges. Penalty Argument, pp. 3-4, Exhibits 3 and 4. Exhibits 5 and 6 demonstrate EPA's unsuccessful efforts to obtain additional information regarding these subsequent incidents from Respondent in order to determine a course of action. None of this information is relevant to the consideration of prior violations, and I will disregard it.

The nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge: Complainant argues that Respondent failed to make any efforts to minimize or mitigate the effects of the January 23, 1993 discharge.Complainant's Penalty Argument, p. 4. The record shows that when the Pennsylvania inspector was at the site on February 10, 1993, the outfall from which the oil had discharged into the unnamed tributary had been dammed, and that this action had contained the remaining oil fairly effectively. Complainant's Penalty Argument, Exhibit 2. I believe that this containment action was done by or at the behest of the Respondent. When she returned on February 18, 1993, the Pennsylvania inspector met a cleanup contractor, presumably retained by the Respondent on her February 10 recommendation, and saw that the oil contained near the outfall had been removed and that absorbent booms had been placed there. She noted that her February 10 recommendation to remove contaminated soil from the drain had not been implemented.Complainant's Penalty Argument, Exhibit 2. (A second General Inspection Report, dated February 18, 1993).

These mitigation efforts may have had some success, but the record is unclear on how much. First, there is no evidence indicating how much of the oil escaped before any of the mitigation measures were undertaken. I think it is likely that a significant amount of oil escaped downstream immediately after the spill. There is nothing in the record to indicate exactly when mitigation measures were undertaken, although some were in place on February 10, 1993. When the Pennsylvania inspector examined the unnamed tributary downstream of the outfall on February 10, she saw no significant oil sheen. Complainant's Penalty Argument, Exhibit 2. She also took a sample of the water, and analysis showed estimated concentrations of 89 mg/l of #2 fuel oil (roughly equivalent to diesel oil). Id. An upstream

sample had no detectable organics. Id. When she returned on February 18, she noted some oil sheen in the frozen creek. Id. There is also no evidence of how much oil contained at the outfall was absorbed and removed. In sum, I think it is fair find that Respondent made some efforts to mitigate the effects of the discharge and that there was some limited success to those efforts.

The economic impact of the penalty on the violator: Information regarding the economic impact of the penalty lies almost exclusively within the control of the Respondent. Under these Consolidated Rules, a defaulting respondent is unable to argue that the economic impact of the penalty is too severe or otherwise unfair, because he has waived the opportunity to appear in the action for any purpose. Consolidated Rules § 28.20(e). According to the*Preamble* to the Consolidated Rules, a "default results in an unrebuttable (*sic*) presumption that the respondent can pay any assessed penalty." 56 Fed. Reg. 30,013 (July 1, 1991). "Any assessed penalty" must be taken to mean any penalty within the statutory limits, here, the limit is $ 10,000. In this case, Complainant argues that Respondent can pay the proposed penalty of $10,000, based primarily upon a Dun & Bradstreet report showing that an Internal Revenue Service tax lien was filed against Respondent on April, 1996 for quarterly Federal taxes owed. This presumably suggests that Respondent has a sizable cash flow, and that the economic impact of the penalty will be small. The record is thus admittedly sparse, but in light of the "unrebuttable presumption" of the Consolidated Rules, it supports a finding that even a $10,000 penalty will not have an unfair economic impact on the violator.

Any other matters as justice may require: Complainant suggests, "No additional factors need to be addressed." Complainant's Penalty Argument, p. 7. Respondent may be deterred from future violations by the assessment of a penalty. Other persons may be deterred from similar violations by assessment of a penalty in this case. In particular, assessment of a penalty for the violations involved in this action may encourage Respondent and others similarly situated to properly maintain and repair fuel nozzles and other oil transfer devices under their control and thus prevent oil spills of the type which occurred in this case.

By way of summary, it is apparent that Complainant has proposed the maximum penalty allowable in this case, and has argued the sparse facts contained in the record in support of such a penalty. I do not believe that these facts warrant imposition of the maximum penalty allowable, and I also do not agree with Complainant's application of certain of the statutory factors to the facts of the case. As discussed above, I have disregarded Complainant's argument with respect to two alleged subsequent oil spills because they are irrelevant to the

statutory factors, and I have found , contrary to Complainant's argument, that Respondent did engage in some efforts to mitigate the effects of the discharge. Further, I conclude there is a deterrent value to assessing a significant penalty here, a factor that Complainant may have assumed but did not argue.

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of $6,500 is appropriate in this case.

ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2) (ii) of the Consolidated Rules, Respondent is hereby ORDERED to comply with all of the terms of this ORDER:

A. Respondent is hereby assessed a civil penalty in the amount of $6,500 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Environmental Appeals Board suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to *Sua Sponte* review).

C. Respondent shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Oil Spill Liability Trust Fund," in the amount of $6,500. Respondent shall mail the check by certified mail, return receipt requested, to:

Commander
National Pollution Funds Center
U.S. Coast Guard
The Ballston Common office Building, Suite 1000
4200 Wilson Blvd.
Arlington, VA 22203

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (3RC00)
United States Environmental Protection Agency
841 Chestnut Building
Philadelphia, PA 19107

D. In the event of failure by Respondent to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 311(b)(6)(H) of the Clean Water Act, 33 U.S.C. § 1321(b) (6) (H).

E. Pursuant to 31 U.S.C. § 3717, the United States is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid as directed.

Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment handling charge of twenty ($20) dollars will be imposed after 30 days, with an additional charge of ten ($10) dollars for each subsequent 30-day period over which an unpaid balance remains.

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13 e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 311(b)(6)(G)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(G)(i), Respondent may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the District in which the violation is alleged to have occurred by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: March 27, 1997 /S/_____

W. Michael McCabe Regional Administrator

Prepared by: Benjamin Kalkstein, Presiding Officer.

Last Updated: October 18, 1999