UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

IN THE MATTER OF:	)	Docket No. 10-97-0062 OPA
	)	
Alaska's Fishing Unlimited Lodges,	)	Proceeding to Assess Class I Administrative Penalty Under Clean Water Act Section 311, 33 U.S.C. §1321
	)	
	)	
	)	
RESPONDENT	)	
	)	
_____	)	

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, Non-APA Consolidated Rules of Practice for Administrative Assessment of Civil Penalties ("the Consolidated Rules"), 56 Fed. Reg. 29,996 (July 1, 1991), used as procedural guidance for Class I administrative penalty proceedings under Section 311 of the Clean Water Act, 33 U.S.C. §1321. 57 Fed. Reg. 52,704, 52,705 (November 4, 1992).

This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules.

STATUTORY BACKGROUND

Section 311(j)(1) of the Clean Water Act, 33 U.S.C. §3121(j)(1), provides for the issuance of 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 . . . .

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. 112.1(b).

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.[1] 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.

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 April 4, 1997, by issuing to Alaska's Fishing Unlimited Lodges (Respondent) an administrative complaint under Section 28.16(a) of the Consolidated Rules.[2] The complaint provided notice of a proposed penalty in an amount up to $10,000. The Respondent entered into a Stipulation of Facts filed June 22, 1998, admitting liability but reserving the right to present

[1]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).

[2]The Administrative Complaint was dated March 20, 1997 and was sent to the Respondent by certified mail on April 4, 1997. The Complaint was filed with the Regional Hearing Clerk on April 7, 1997.

arguments and evidence as to the appropriateness of a civil penalty, (including the appropriateness of assessment of no penalty) in the matter.

By memorandum dated May 16, 1997, Steven W. Anderson was designated as Presiding Officer in this matter pursuant to §28.16(h) of the Consolidated Rules.

On July 28, 1998, the Presiding Officer issued a Prehearing Order directing the parties to file written submissions regarding the appropriate remedy (i.e., whether a penalty should be assessed and if so in what amount).

In accordance with a schedule set out in the Prehearing Order, Complainant filed an Argument Regarding Assessment of Appropriate Civil Penalty (with attachments) dated September 11, 1998 and Respondent filed letters dated August 28, 1998 and October 9, 1998. Complainant filed a Response to Respondent's Argument Regarding Assessment of Appropriate Civil Penalty, dated October 22, 1998. Respondent's previous filing dated May 5, 1998 was also considered by the Presiding Officer in determining an appropriate penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the Stipulation of Facts filed June 22, 1998 and the other documents filed in this proceeding, I make the following Findings of Fact and Conclusions of Law:

(1) Respondent is a corporation organized under the laws of Alaska. Respondent operates a fishing lodge located at Port Alsworth on Lake Clark, Alaska, and has a business office in Anchorage, 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 the 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 Port Alsworth on Lake Clark, Alaska ("the Facility").

(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. See 40 C.F.R. Section 112.1(d)(2)(ii).

(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 six months after the facility began operations, or by January 10, 1974, whichever is later.

(8) On August 1, 1996, EPA representatives inspected the Facility to assess its compliance with federal oil spill prevention requirements. As of that date, Respondent had failed to prepare an SPCC plan for the Facility, in violation of 40 C.F.R. Section 112.3.

(9) The Facility has been in operation since June, 1976.

(10) 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 per violation, up to a maximum of $25,000.

(11) The Complainant proposes that an administrative penalty be assessed against the Respondent in the amount of $4,224.

(12) As of July 31, 1997, Respondent had not yet developed an SPCC Plan.

(13) In September, 1997, Respondent installed secondary containment for its oil or oil product storage tanks. Prior to that date, Respondent's Facility did not have secondary containment for its oil or oil product storage tanks.

(14) At some point between May 21, 1998 and September 11, 1998, Respondent came into compliance with the Part 112 Regulations to the Complainant's satisfaction.[3]

DETERMINATION OF REMEDY

In accordance with the Presiding Officer's Prehearing Order of July 28, 1998, Complainant and Respondent have each submitted written argument regarding the assessment of an appropriate civil penalty.

[3]The major elements of compliance include having an approved SPCC plan available at the Facility and installing secondary containment around the Facility's oil storage tanks.

Based upon the administrative record, I have taken into account the following factors in determining an appropriate civil penalty:[4]

The seriousness of the violation or violations: The violation involves the failure to prepare an SPCC plan[5] for the Respondent's fishing lodge in Port Alsworth, Lake Clark, Alaska. See Complaint, page 4, and Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, page 5.

The Respondent's oil storage tanks are relatively small, having a total capacity of about 7,500 gallons. See Exhibit 1 to Complainant's Argument Regarding Assessment of Appropriate Civil Penalty.

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[4]Section 28.21(b)(2) of the Consolidated Rules specifies the penalty factors which are to be addressed for violations of Section 311 of the Clean Water Act, 33 U.S.C. §1321:

> The argument shall be limited to 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 nature, extent and degree of success of any efforts of the violator to minimize the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

[5]The Administrative Complaint did not charge the Respondent with failure to implement an SPCC plan, which would include the failure to provide secondary containment for petroleum storage tanks. Complaint, Paragraph 14.

The Respondent’s seven 1000 gallon storage tanks are situated approximately 50 yards uphill from Lake Clark; its 500 gallon tank is within 500 yards of the Lake. Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, page 5. The administrative record does not state whether Lake Clark is a navigable water, but it can be inferred to be so from standard reference works, e.g. Rand McNally Road Atlas (1997) and Britanica Atlas (1972), which show it to be of substantial size. Oil spilled from the seven 1000 gallon tanks at the facility can presumably reach navigable waters or adjoining shorelines directly, due to their short distance from the lake. The actual situation with regard to the 500 gallon tank is not specified in the administrative record. The administrative record does not identify any particular sensitivity of the waters that would receive an oil spill from the facility, nor does it describe the likely environmental impact of a potential spill at the facility. Absent more facts on the areas subject to potential oil spills, it is difficult to assess the potential environmental impacts of an oil spill from the facility.

It appears from the Respondent’s argument, and is not controverted by the Complainant, that the fishing lodge is closed and the tanks are emptied for the winter, reducing the

risk of an oil spill during the winter months. Respondent's letter dated October 9, 1998, page 1.

The facility has apparently never had an SPCC plan. Failure to prepare an SPCC plan is a serious violation, in that it leaves the facility unprepared to deal with a oil spill or to prevent the spill from having potentially serious environmental consequences.

The violation has lasted for over 20 years, from the time the facility first began operation in June of 1976, but the Complaint charged a single violation as of August 1, 1996, the date of the EPA inspection. Complainant's Response to Respondent's Argument Regarding Assessment of Appropriate Civil Penalty, page 2.

The economic benefit to the violator, if any, resulting from the violation: Where, as in the present case, the violator has remedied the violation by the time economic benefit is calculated, any economic benefit would be derived primarily from the imputed savings to the violator from making an expenditure a certain number of months later than it would otherwise have if it had complied in a timely manner with the particular regulatory requirement at issue. In the present case this could include, for example, the cost savings to the Respondent from its delay in preparing an SPCC plan, or from

delay in retaining an engineer to review the plan. Based on costs incurred at similar facilities in rural Alaska, the Complainant estimates that Respondent's cost of compliance with the spill prevention regulations would be $10,000. The Respondent did not provide actual cost figures for remedying the violation. Using EPA's "BEN" computer model, which calculates the economic benefit of delayed compliance with environmental regulations, the Complainant argues that the economic benefit to the Respondent of 22 months of delayed compliance (from the August 1, 1996 EPA inspection until June, 1998) is $2,224.00. Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, page 6 and Exhibit 4.

The delayed cost figure of $10,000 used by the Complainant in the BEN model includes the cost of constructing secondary containment. Since the Complaint did not charge the Respondent with failure to implement the SPCC plan, including construction of secondary containment around its oil storage tanks, it is doubtful whether the economic benefit analysis should consider cost savings to the Respondent from its delay in constructing secondary containment. Neither the Complainant nor the Respondent have addressed this issue in their penalty arguments. Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, page 5.

The Respondent's president argues that she was told by EPA inspectors during the August 1, 1996 inspection that she would not be expected to come into compliance in 1996. Respondent's Letter dated May 5, 1998, page 1. The Respondent's recollection of the EPA inspectors' assurances regarding the expected time for coming into compliance is not controverted by the Complainant. Given the seasonal nature of the activity at the Respondent's fishing lodge, the remote location,[6] the difficulty of doing any construction or site-related work in that location during the winter, and the lead time typically needed to obtain the services of a civil engineer to prepare and/or approve the SPCC plan and to construct secondary containment, the inspectors' assurances as recalled by the Respondent appear to be reasonable, and are consistent with the EPA's apparent treatment of other businesses in the area with oil storage tanks. Respondent's Argument Regarding Assessment of Appropriate Civil Penalty, pp. 10-11. This argues for using a shorter period of noncompliance in the BEN model than was used by the Complainant, by deducting approximately nine months from August, 1996 to May, 1997.

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[6]Lake Clark is approximately 190 miles Southwest of Anchorage and is not accessible by road. Rand McNally Road Atlas (1997) and Britanica Atlas (1972).

In addition, as discussed below, the EPA reinspection, performed after the Respondent prepared the SPCC Plan and built secondary containment in August and September, 1997, was delayed from September or October, 1997 until May, 1998. This also argues for using a shorter period of noncompliance in the BEN model, by deducting the months in which the Respondent was waiting for EPA to reinspect -- approximately seven months from October, 1997 to May, 1998.

Since the May 14, 1998 reinspection by EPA found only "some remaining areas of noncompliance," which were corrected to the Complainant's satisfaction within approximately a month, Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, page 7, it can be inferred that the Respondent had incurred the major portion of the cost of achieving compliance by September or October, 1997, well before the June, 1998 compliance date used in the BEN model. Consequently, it would appear that the estimated capital cost of compliance used in the BEN model, $10,000, should be substantially reduced for any months after September, 1997, that are retained in the BEN calculation.

Since both the number of months of noncompliance and the amount of the Respondent's avoided capital cost used in the BEN model appear to have been significantly overstated, the

economic benefit to the Respondent of delayed compliance, as shown in Exhibit 4 to Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, is also overstated. On the present record it is not possible to determine the economic benefit to the Respondent resulting from the violation, other than that it appears to be substantially less than $2,224.[7]

The Respondent appears to have achieved compliance in approximately the same time frame as the other businesses in the area, none of which were issued an administrative complaint, and therefore none of which are being required to disgorge any economic benefits of delayed compliance. The facts asserted in the letter from Respondent dated August 28, 1998 regarding the compliance status of other businesses in the Port Alsworth area are not controverted by the Complainant. Thus, the Respondent does not appear to have benefited from delayed compliance in comparison to, or to the detriment of, other businesses in the area. While recapture of economic benefits also supports the more general objective

[7]Where preparation of an SPCC plan cost another Respondent $2,300 and construction of secondary containment cost $5000, the economic benefit of one year of delayed compliance was said by EPA to be $230, well below the amount argued for here on the basis of an estimated $10,000 cost. In re Baker Aviation, Inc., Docket No. 10-97-0120-OPA (June 8, 1998) at pp. 9-10.

of EPA's enforcement program to eliminate incentives to delay or avoid compliance, that factor does not appear to have been of primary importance to enforcement staff in the present case, as evidenced by their general willingness to allow a reasonable period of time for businesses in rural Alaska to come into compliance with the requirements of the SPCC program. On the facts of this case, therefore, it appears appropriate to find that the civil penalty should include no recapture of economic benefit of delayed compliance.

The degree of culpability involved: Respondent's conduct reflects a degree of culpability in two respects: (1) Respondent failed to prepare an SPCC plan for the petroleum storage tanks at its facility, and (2) Respondent failed, for approximately seven months, to reply to notifications from EPA regarding the violation.[8]

As noted above, other businesses in the area were also in violation of the SPCC regulations, and took about the same amount of time as the Respondent, or in some cases more time, to correct the violations, but contacted EPA promptly enough in response to one or more letters that EPA compliance staff

[8]The Complainant states that once the Respondent's president contacted EPA, she "demonstrated a cooperative attitude and worked steadily, albeit slowly, towards achieving compliance." Respondent's Argument Regarding Assessment of Appropriate Civil Penalty, page 7.

did not consider it necessary to issue administrative complaints to any of them. See Respondent's letter dated August 28, 1998 and Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, pp. 10-11.

The culpability at issue here, therefore, is primarily or exclusively the Respondent's delay in contacting EPA staff to advise them that Respondent intended to remedy the violation voluntarily and to advise them of the expected time it would need for doing so, not the underlying culpability associated with the failure to have an SPCC plan.

The Respondent clearly was derelict in not contacting EPA promptly in response to either of the first two notices it received. The issue for decision here is the appropriate amount of penalty for disregarding EPA's initial attempts to get the Respondent to address the violation.[9] The Respondent argues that under the circumstances of this case no penalty is appropriate, while the Complainant proposes that the penalty include a $2000 deterrence component.

The penalty amount sought by the Complainant seems excessive for a situation where the Respondent ultimately

[9] Attempts by the Complainant and Respondent to reach a settlement foundered on disagreement over the appropriateness of, and amount of, a penalty, resulting in the submission of the case to the Presiding Officer on written arguments.

contacted EPA before realizing that it was being issued an administrative complaint[10] and then remedied the violation in approximately the same amount of time as the other businesses in the area.

The Complainant asserts that

> A major priority of the EPA Oil Pollution Prevention program is to ensure that measures are in place to prevent spills from occurring and to minimize damage to human health and the environment if a spill does occur. By not responding when contacted by EPA, Respondent further delayed the attainment of these goals at its facility.

Respondent's Argument Regarding Assessment of Appropriate Civil Penalty, page 7. However, the administrative record does not support the contention that the Respondent's delay in contacting EPA led to a delay in compliance. The fishing lodge was closed for the winter from October, 1996, to approximately May, 1997, during which time the tanks were

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[10] After its first two attempts produced no response, EPA contacted the Respondent a third time on March 21, 1997 by a faxed message from an EPA employee in Anchorage, Alaska, requesting that the Respondent contact the Agency by April 4, 1997. The Respondent's president went to the EPA office in Anchorage in person on April 2, 1997, but found that both EPA employees familiar with the matter were out of town. She was given an appointment for April 9, 1997. These events occurred before the Respondent learned that an administrative complaint had been issued for the violation. The administrative complaint was signed on March 20, 1997 in EPA's Seattle office, but not served on the Respondent until April 4, 1997, when it was sent by certified mail. The Respondent received it prior to meeting with EPA staff on April 9th. Respondent's letter dated May 5, 1998.

empty, and Respondent argues that it is one of the first businesses in the area to be in compliance as to both the SPCC plan and construction of secondary containment. Respondent's letter dated October 9, 1998. Respondent apparently came into substantial compliance by September, 1997 and into full compliance shortly after the May 14, 1998, EPA reinspection. One of the other businesses in its area had come into compliance by August, 1998, but the others had not. Respondent's letter dated August 28, 1998. On these facts, the Respondent's delay in contacting EPA did not in practical terms delay putting spill prevention measures in place at the Respondent's facility.

The assessment of an appropriate civil penalty would encourage both the Respondent and others similarly situated to respond promptly in the future to enforcement-related correspondence from EPA. However, a penalty of substantially less than $2000 will accomplish that purpose. I find that a penalty in the range of $400 to $1000 would be sufficient to achieve the necessary deterrent effect under the circumstances of this case.

Any other penalty for the same incident: The record does not contain any information to indicate that Respondent has been assessed any other penalty for this violation.

Any history of prior violations: The record contains no evidence of any prior violations of the Clean Water Act by the Respondent.

The nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge: While this penalty factor does not apply literally to cases alleging failure to prepare an SPCC plan, it should be noted that the Respondent has now remedied the violation charged in the administrative complaint. Beginning in May, 1997, the Respondent contracted with an engineering firm to prepare an SPCC plan and plans and specifications for secondary containment. Respondent's May 5, 1998 letter. After a series of difficulties in obtaining the services of a registered engineer, the Respondent's president prepared a draft SPCC plan herself by August 1, 1997. The secondary containment was constructed in September, 1997. Engineering approval of the SPCC plan and secondary containment were received in November, 1997. Respondent's letter dated May 5, 1998, pp 6-8. EPA had been scheduled to inspect facilities in the Port Alsworth area, including the Respondent's fishing lodge, in September or October, 1997, but rescheduled to May, 1998. Respondent's letter dated May 5, 1998, p. 8. The EPA reinspection on May 14, 1998 revealed some remaining areas of

noncompliance, which "were addressed shortly after EPA brought them to Respondent's attention in a May 21, 1998, letter." Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, p. 7. The Respondent's efforts to minimize or mitigate the potential effects of a discharge have been taken into account in selecting a range of $400 to $1000 for the deterrence component of the penalty, instead of the $2000 deterrence component requested by the Complainant.

The economic impact of the penalty on the violator: The Respondent has not presented any facts or arguments to show that it cannot afford a civil penalty in the amount sought by the Complainant.

Any other matters as justice may require: Complainant argues that the settlement in Rainbow King Lodge & Seaplane Site, Docket No. 10-97-0039-OPA, is analogous to the present case and supports a penalty of $2000. That case, however, involved two facilities rather than one, and thirteen storage tanks totaling 14,000 gallons, rather than eight tanks totalling 7500 gallons. Consent Order dated May 9, 1997, page 3. Very approximately, then, the $2000 settlement in Rainbow King Lodge might appear to support a penalty of only $1000. In any event, the terms of a settlement reflect the parties' interest in resolving the proceeding, and do not necessarily

indicate the appropriate penalty in a contested case. The only recently litigated case of which I am aware involving the Oil Pollution Prevention program in Alaska is Sheldon Jackson College, Docket No. 10-96-0063-OPA, in which a penalty of $5000 was assessed. However, the facts of that case are not sufficiently similar to this one to provide useful guidance on an appropriate penalty.[11]

The Respondent argues that it should not be required to pay an administrative penalty because it believes the administrative complaint was issued in error when the Anchorage EPA office failed to inform the Seattle EPA office that that the Respondent had finally contacted the Anchorage office regarding the violations.

After EPA inspected the Respondent's facility on August 1, 1996, EPA attempted to contact the Respondent by letter on August 26, 1996 and again on November 8, 1996 to determine whether the Respondent would voluntarily remedy the violations found during the inspection. The Respondent did not reply to

[11]The College was not in full compliance with the SPCC regulations at the time the decision was issued, and the facility was distinguishable in terms of size, the more urban area in which it was located, year-round operation, and other factors.

either letter.[12] EPA attempted to contact the Respondent a third time on March 21, 1997 by a faxed message from an EPA employee in EPA's Anchorage, Alaska, office, which requested that the Respondent contact the Agency by Friday, April 4, 1997. The Respondent's president went to the EPA office in Anchorage in person on Wednesday, April 2, 1997, but found that both EPA employees familiar with the matter were out of town. She was given an appointment for the following Wednesday, April 9, 1997. These events occurred before the Respondent learned that an administrative complaint had been issued for the violation. The complaint was signed on March 20, 1997 in EPA's Seattle office, but not served on the Respondent until April 4, 1997, when it was sent by certified

[12]The Respondent's president states that she did not reply in part because she found the letters offensive in tone and ambiguous as to what the Respondent was expected to do. Respondent's letter dated May 5, 1998, pp. 2-4. With respect to the tone of the letters, the Respondent may be interested to learn that the Small Business Administration has recently recommended that all federal agencies, including EPA, make a greater effort to monitor the tone of letters sent to small businesses. See, EPA's February 18, 1999 comments on the Small Business Administration's 1999 SBREFA Section 222 Report to Congress, p. 5. With respect to any ambiguity as to what action was expected of the Respondent, the Complainant notes correctly that the Respondent could have contacted EPA promptly to seek clarification. It must also be noted that other small businesses in the Respondent's area were apparently able to respond satisfactorily to similar letters from EPA. See Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, pp. 10-11.

mail. The Respondent received it several days later. The Respondent argues that the coincidence of dates indicates that the administrative complaint was issued in error. That is, the Respondent believes that if the Respondent had been able to meet with EPA staff by April 4th the complaint would not have been issued.

The coincidence that the administrative complaint was signed the day before EPA's Alaska office sent the March 21st fax to the Respondent, and the further coincidence that the complaint was mailed to the Respondent on the same date as the deadline set in the fax for the Respondent to contact the EPA Alaska office, have not been adequately explained by the Complainant. See for example, Complainant's Argument Regarding Assessment of Appropriate Civil Penalty, p.9. The record does not contain a definitive explanation of the relationship or lack of relationship between the April 4th deadline for reply set in the fax from the EPA Anchorage office and the April 4th mailing of the administrative complaint by the EPA Seattle office. Similarly, it is unclear from the record why the Complainant would have signed the administrative complaint on March 20th, but delayed issuing it until April 4th, unless the complaint was in fact being held pending a reply from the Respondent. In the absence of a more

adequate explanation of these discrepancies, I must assume for the purpose of this decision that the administrative complaint in this matter would not have been issued if EPA's Seattle office had known that the Respondent had contacted EPA's Anchorage office prior to the April 4th deadline.[13] It would serve no logical deterrent effect to assess a civil penalty against the Respondent under these circumstances, even though a penalty in a range of $400 to $1000 would otherwise have been appropriate.

Accordingly, I determine that no penalty 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 $0.00.

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

[13]Assuming the Respondent would have offered a satisfactory proposal to remedy the violation charged in the complaint.

implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to Sua Sponte review).

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 2, 1999

/s/
Chuck Clarke
Regional Administrator

Prepared by: Steven W. Anderson, Presiding Officer.