UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
LOGGINS OIL COMPANY, INC.,	)	**DOCKET NO. OPA-4-99-01**
	)	
	)	
RESPONDENT	)	

CLEAN WATER ACT-OIL POLLUTION PREVENTION-DEFAULT-DETERMINATION OF PENALTY

Where penalty for violation of Oil Pollution Prevention regulation (40 C.F.R. Part 112) was determined in accordance with the "Civil Penalty Policy For Section 311(b)(3) And Section 311(j) of the Clean Water Act" (August 1998) and Respondents were found to be in default in accordance with Rule 22.17, entitled "Default", of the Consolidated Rules of Practice, as revised (64 Fed. Reg. 40176 et seq. July 23, 1999), for failure to provide a pre-hearing exchange as directed by the ALJ, the penalty, which was neither "clearly inconsistent with the record of the proceeding or the Act" within the meaning of Rule 22.17(c) was assessed.

Appearance for Complainant:

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Atlanta, Georgia

Appearance for Respondent:

Elliott R. Baker, Esq.
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ORDER ON DEFAULT

This is a proceeding under § 311(b)(6)(B)(ii) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990 ("OPA"), instituted by a complaint dated April 19, 1999, filed by the Director, Waste Management Division, U.S. EPA, Region 4, against Respondents (Loggins).[1/] Specifically, the complaint alleged that Loggins failed and/or refused to comply with the Oil Pollution Prevention regulation (40 C.F.R. Part 112), which, inter alia, requires the development and implementation of Spill Prevention and Countermeasures (SPCC) plans. For these alleged violations, Complainant proposed to assess Loggins a civil penalty of $75,254. According to the Complainant, this penalty was derived by considering the factors required by the Act (33 U.S.C. § 1321(b)(8)).

Loggins filed a response [answer] to the complaint, a request for a hearing, and a request for an informal conference on May 13, 1999. The response denied the allegations of the complaint upon the ground that Ronald H. Loggins was the primary owner of Loggins Oil Company, that Mr. Loggins had suffered a severe stroke and was

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[1/] The complaint names Ronald H. Loggins, Kim Loggins, and Loggins Oil Co., Inc. as respondents. (Complaint, at 1). According to the complaint, Ronald H. Loggins is the Secretary and principal owner of Loggins Oil Co., Inc., while his wife Kim Loggins is the Chief Executive Officer, Chief Financial Officer, as well as an owner of Loggins Oil Co., Inc. (Complaint ¶ 3). As owners and/or operators of the facility, Ronald H. Loggins and Kim Loggins are jointly and severally liable for the violations found herein.

unable to speak and that Kim Loggins was not involved in the operation of the business and lacked sufficient knowledge or information to respond to the allegations in the complaint.

By a letter, dated August 11, 1999, the ALJ directed the parties to submit prehearing exchanges on or before September 17, 1999. As part of its prehearing exchange, Loggins was directed to:

1. State whether Mr. Loggins' health has improved to the extent that he is able to assist in the defense of this action and respond to the assertions in Complainant's letter to the Chief Judge, dated May 27, 1999, [2/] alleging that Mr. Loggins' health should not be an obstacle to the trial of this matter.
2. State whether Loggins is currently operating and whether it has or is engaged in the preparation of a [Spill Prevention Control and Countermeasure] Plan.
3. If Loggins is contending that the proposed penalty exceeds its ability to pay, provide financial statements, copies of income tax returns or other documents to support such contention.

[2/] A letter to the Chief Judge, dated May 25, 1999, from Elliott R. Baker, Respondent's attorney, states in part:

> . . . Ronnie Loggins is the owner of the business, and Kim Loggins was listed as an owner in name only and she has no information as to the day to day running of the business. Also, Mr. Loggins has suffered a severe stroke and at present does not have the ability to speak, and it is unknown if he has the complete ability to understand what is said to him. At the present time Mr. Loggins' prognosis to recover is unknown, however, Mrs. Loggins is having his doctor prepare a report of his condition. As soon as it is available, I will forward it to all appropriate parties.

On September 15, 1999, Complainant submitted its prehearing exchange, which included a list of expected witnesses and supporting exhibits. Loggins, on the other hand, did not submit a prehearing exchange and made no response to the ALJ's order. On November 8, 1999, the ALJ issued an order directing Loggins to show cause, if any there be, on or before December 17, 1999, why a default judgment should not be entered against it. To date, Loggins has not responded to the order nor has it requested an extension of time to do so. This failure constitutes a default within the meaning of Rule 22.17(a) of the Consolidated Rules of Practice.[3/] A finding of default constitutes an admission of the

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[3/] The Consolidated Rules of Practice (40 C.F.R. Part 22) were revised on July 23, 1999, effective August 23, 1999 (64 Fed. Reg. 40137, 40176, July 23, 1999). Proceedings commenced before August 23, 1999, became subject to the revised rules on August 23, 1999, unless to do so would result in a substantial injustice. The revised rules are considered to apply here. Rule 22.17, entitled "Default", provides in pertinent part:

> (a) A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. 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. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

64 Fed. Reg. 40,182.

facts alleged in the complaint and a waiver of Respondent's right to contest such factual allegations.

Based on the allegations in the complaint and the exhibits submitted by Complainant, I make the following:

Findings of Fact

1. Respondent, Loggins Oil Co., Inc., is a corporation organized under the laws of the State of Georgia. Respondent Ronald H. Loggins is an individual who is the Secretary and principal owner of Loggins Oil Co., Inc. Respondent Kim Loggins is the wife of Ronald Loggins, the Chief Executive Officer and the Chief Financial Officer of Loggins Oil Co., Inc. as well as an owner. (Complaint ¶ 3).
2. Respondents are "persons" within the meaning of CWA Section 311(a)(7), 33 U.S.C. § 1321(a)(7) and 40 C.F.R. § 112.2.
3. Respondent, Ronald H. Loggins, is and was, at all times relevant to the complaint, the owner and/or operator within the meaning of CWA Section 311(a)(6), 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2 of a facility located at 695 Hickory Flat Rd., Canton, Georgia. (Complaint ¶ 5). The facility is a commercial, onshore, oil storage facility (Inspection Report, dated March 21, 1995 (C's Exh 4); Inspection Report, dated May 14, 1997 (C's Exh 5). Types of oil [petroleum products] stored are gasoline, kerosine, and diesel fuel.

Loggins acquired ownership of the facility in 1991 (Complaint ¶ 27).

4. Although Loggins' facility is reported to have seven above-ground storage tanks, each with a capacity of 20,000 gallons, the inspection report of March 21, 1995, states that the capacity of the facility is 120,000 gallons, as one tank was apparently not in use.[4/] Loggins' facility is located approximately 100 feet away from an unnamed creek, which apparently drains to Scott Mill Creek, which in turn drains to Canton Creek and the Etowah River.

5. CWA § 311, 33 U.S.C. § 1321, is entitled "Oil and hazardous substance liability", and § 1321(j), "National Response System", authorizes the President to issue regulations, inter alia, "(C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities and to contain such discharges,". One of the resulting regulations is 40 C.F.R. Part 112, "Oil Pollution Prevention". Part 112 establishes the procedures, methods and requirements to prevent the discharge of oil from non-transportation-related facilities

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[4/] The inspection report of May 14, 1997, indicates that, although the capacity of the seven tanks is unknown, all tanks were in use, four containing gasoline, two containing diesel and one containing kerosine.

into or upon the navigable waters of the United States and adjoining shorelines (§ 112.1(a)).

6. Part 112 is applicable to owners or operators of non-transportation-related onshore and offshore facilities who are engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, or consuming oil or oil products, which due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines. Part 112 is not applicable to facilities which have an underground buried storage capacity of 42,000 gallons or less of oil and the storage capacity, which is not buried of the facility is 1,320 gallons or less of oil, provided that no single container has a capacity in excess of 660 gallons (§ 112.1(d)(2)).

7. In accordance with 40 C.F.R. § 112.3(b), the owner or operator of an onshore facility that became operational after January 10, 1974 (the effective date of the Oil Pollution Prevention regulations) shall have prepared a Spill Prevention Control and Countermeasure (SPCC) plan not later than six months after the date that such new facility began operations, if the new facility has violated or could reasonably be expected to violate 40 C.F.R. §§ 110 and 112. Respondents'

facility began operating after January 10, 1974 and were required to have a SPCC plan.

8. On March 21, 1995, EPA performed an inspection of Respondents' facility and found, inter alia, that the facility failed to have and implement a SPCC Plan as required by 40 C.F.R. § 112.3. [5/] The inspection concluded that the only SPCC plan available was prepared for or by the former owner in 1977 and that this plan had not been implemented [by Respondent] (C's Exh 4). The inspection also concluded that there was no [secondary] containment for tanks or [loading] racks and that secondary containment was incomplete.

9. EPA issued a Letter of Deficiency (LOD) to Respondent, dated April 13, 1995, identifying six compliance deficiencies, which were: (1) failure to prepare a written [SPCC] Plan for the facility in accordance with the guidelines for plan preparation at 40 C.F.R. § 112.7, as required by § 112.3(a); (2) failure to implement the SPCC Plan as required by § 112.3(a) in accordance with the guidelines for plan implementation at § 112.7; . . . (3) failure to amend the SPCC Plan after a change in facility design as required by §

[5/] Section 112.3(b) provides that the owner or operator of a new facility that has violated or could reasonably be expected to violate §§ 110 and 112 shall have fully implemented an SPCC plan not later than one year after such facility began operations.

112.5(a); [6/] (4) failure to review the SPCC Plan every three (3) years as required by § 112.5(b); (5) failure to amend the SPCC Plan after review as required by § 112.5(b); and (6) failure to have the SPCC Plan amendment certified [by a professional engineer] and implemented as required by § 112.5(c) (C's Exh 6).

10. Loggins responded to the LOD, stating that "we are not familiar with the requirements of the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 . . . We do not know also about the 6 deficiencies, you listed. Please send us information of which you have written us about." (Letter, dated April 26, 1995, C's Exh 7).

11. EPA issued a follow-up LOD to Loggins, enclosing a copy of its SPCC Guide to aid Respondent in preparing and implementing a SPCC plan for its facility (LOD, dated May 8, 1995, C's Exh 8). The letter pointed out that "it is an inadequate response to our Letter of Deficiency to state that you don't know about

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[6/] Section 112.5(a) provides that:

"Owners or operators of facilities subject to § 112.3(a), (b) or (c) shall amend the SPCC Plan for such facility in accordance with § 112.7 whenever there is a change in facility design, construction, operation or maintenance which materially affects the facility's potential for the discharge of oil into or upon the navigable waters of the United States or adjoining shore lines. Such amendments shall be fully implemented as soon as possible, but not later than six months after such change occurs." EPA apparently regards a change in ownership as a change in operation, triggering the requirement for an amendment to the SPCC plan.

deficiencies which were pointed out by our inspector and reiterated in our letter." Accordingly, Respondent was required to correct the deficiencies in accordance with the said regulations and return a notarized copy of a Statement of Correction within thirty (30) days after receipt of the follow-up LOD. The letter concluded by stating that Loggins was expected to be in compliance with the regulations by June 30, 1995.

12. On May 14, 1997, EPA conducted another inspection of Loggins' facility, which again found that Respondents did not have a SPCC Plan (Inspection Report, dated May 14, 1997 (C's Exh 5)). Both the March 21, 1995 and May 14, 1997 inspections, reported that Respondent failed to have a SPCC plan maintained at the facility and failed to make such plan available to EPA representatives for onsite review during normal working hours, in violation of § 112.3(e).[7/] (Complaint ¶ 21). On or about May 22, 1997, Loggins forwarded a purported SPCC plan, dated August 18, 1977, that apparently was prepared by the previous owner of the facility, Bagwell & Spears (Complaint ¶ 24;

[7/] Under 40 C.F.R. § 112.3(e):

> Owners or operators of a facility for which an SPCC Plan is required pursuant to paragraph (a), (b) or (c) of this section shall maintain a complete copy of the Plan at such facility if the facility is normally attended at least 8 hours per day, or at the nearest field office if the facility is not so attended, and shall make such Plan available to the Regional Administrator for on-site review during normal working hours.

Respondent's SPCC Plan Submission ("SPCC Plan") (C's Exh 9)). However, this Plan lacked management approval, did not list Loggins as operator of the facility, did not contain a date of certification, nor did the Plan adequately adhere to the guidelines set forth in § 112.7 (Complaint ¶ 24).

13. Other than submitting the purported SPCC plan, Loggins has made no response to the LODs (Complaint ¶ 25). By a letter, dated May 19, 1997, EPA invited Loggins to discuss by telephone conference or at its office the circumstances of the facility's status regarding its violations of the CWA, such as Respondents' failure to prepare and implement a SPCC Plan as required by 40 C.F.R. Part 112, which were outlined in the LODs to Respondent, referred to above. Because EPA believed that Loggins "has had ample warning and time to come into compliance with the regulations," Loggins was offered an opportunity to "show cause why EPA should not proceed with the initiation of civil or criminal proceedings or the institution of administrative proceedings to assess penalties" and also requested that Loggins "provide all relevant information with documentation pertaining to the . . . violations, including, but not limited to, any financial information which may reflect [Loggins'] ability to pay a penalty." (Notice of Show Cause Proceeding, dated May 19, 1997 (C's Exh 10)).

14. The show-cause-letter referred to in finding 13, requested a response within 14 calendar days from the receipt of the letter, if Loggins wished to schedule a meeting or telephone conference. Loggins received the letter on May 22, 1997, but did not respond thereto (Complaint ¶ 30).

15. The complaint alleges that the proposed penalty of $75,254 was determined after considering the applicable statutory penalty factors.[8/] In determining the proposed penalty, Complainant used the Civil Penalty Policy For Section 311(b)(3) and Section 311(j) of the Clean Water Act (August 1998), "Penalty Policy" (C's Exh 3). The details of the penalty calculation are set forth in "Notes on the Proposed Penalty Assessment" ("Notes"), a copy of which accompanied the complaint (C's Exh 1). EPA considered that Loggins' failure to have an SPCC plan combined with the lack of secondary containment was a serious violation and that the extent of non-compliance was major. This was in accordance with the Penalty Policy which specifies with respect to SPCC violations that failure to have a SPCC

[8/] In determining the amount of the civil penalty, the Administrator, Secretary, or the court, shall consider: the seriousness of the violations; the economic benefit to the violator resulting from the violations; the degree of culpability involved; any other penalty for the same incident; any history of prior violations; the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator; and any other matters as justice may require. 33 U.S.C. § 1321(b)(8).

plan and lack of secondary containment constitute major non-compliance (Id. 8).

16. Step 1 of the Penalty Policy concerns the Seriousness of the violation. The Policy provides that the penalty for a facility in major non-compliance having a storage capacity of from 42,001 to 200,000 gallons, which encompasses Loggins' facility, ranges from $15,000 to $30,000 (Matrix, Id. 7). EPA determined that a facility having a storage capacity of 120,000 gallons was at the mid-point of this range, which, although not broken out in dollar amounts, would result in a base penalty of $22,500. [9/] The Notes state that there are no known water intakes or sensitive ecosystems located downstream of the facility and concludes that a worst-case discharge of the volume of oil present would result in a moderate environmental impact. The Penalty Policy provides for an upward adjustment of up to 25 percent of the matrix value in instances of a moderate environmental impact (Id. 9). The Notes state that an upward adjustment of 25 percent can be [and was] applied to the [matrix] penalty.

17. Regarding the duration of the violation, the Notes state that for approximately six years or 72 months, Loggins has been a discharge threat to navigable waters, because it did not have

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[9/] EPA used 120,000 gallons as the capacity of the facility. Seven 20,000-gallon tanks would, however, indicate a maximum capacity of 140,000 gallons.

a SPCC plan nor secondary containment for its facility. According to the Notes, EPA may add one-half of one percent to the penalty for each month of violation for a maximum increase of 30%. The 30% was applied even though by the Agency's own finding there were no water intakes or sensitive ecosystems downstream of the facility. Moreover, despite the length of time the risks continued, there is no evidence or allegation of spills or discharges from Loggins' facility.

18. The next factor (Step 2) considered in the penalty calculation was the [degree of] culpability. The Notes point out that Loggins initially claimed no knowledge of the SPCC regulations and later attempted to use a predecessor's deficient SPCC plan to comply with the regulations. Moreover, Loggins failed to come into compliance after two inspections, two Letters of Deficiency, and after having been provided with EPA's SPCC guidance. The Notes emphasize that EPA does not have any evidence that Loggins made any attempt to comply with the SPCC requirements and that it failed to respond to the Letter of Show Cause. In accordance with the Penalty Policy, EPA may, and apparently has, added 75% of the Step 1 portion of the penalty for this factor.

19. Step 3 of the penalty calculation concerns mitigation and the Notes state that, because Loggins made no attempt to come into compliance, either before or after being notified by EPA, this

factor is not applicable to Loggins. Step 4 of the penalty calculation is history of prior violations and the Notes state that Loggins has no known history of prior violations.

20. Step 5 of the penalty calculation is the economic benefit of the violation. EPA determined that Loggins benefitted financially by not preparing and implementing a SPCC plan and used the BEN Model, version 4.4, to calculate the benefit (Notes at 3). A D&B Report, dated July 31, 1998, indicates that Loggins assumed operation and control of the business in November 1991. This date is the baseline for the calculation of economic benefit because, in accordance with § 112.3, "new facilities" are required to prepare SPCC plans within six months after beginning operations and to fully implement the plans within one year. These dates for Loggins are May 1992 and November 1992, respectively. The cost of preparing a SPCC plan for Loggins' facility was determined to be $5,000 (Notes at 4).

21. Secondary containment at the Loggins' facility was determined to be inadequate, because the storage area was not completely contained and the loading area was not contained at all. Using measurements from an August 1977 site-plan provided by Loggins, EPA estimated that the cost of constructing a three-foot berm including drainage valves was $2,736 (Id.). The cost to include the loading area within the proposed

containment was estimated to be $1,000. These figures plus the $5,000 cost of preparing a SPCC plan total $8,736. The BEN economic benefit, however, was determined to be $9,096. The additional $360 is not explained, but presumably includes the discount rate (weighted average cost of capital) and other standardized cost factors utilized by the BEN model.

22. EPA estimated the cost of tank integrity testing, inspection and maintenance of piping, tank battery appurtenances and leak detection systems, record keeping, SPCC plan review and/or amendments, and of training at $1,500 for 12 months. The BEN economic benefit was determined to be $9,096 plus $2,173 for a total economic benefit of $11,269 (Notes at 4).

23. Regarding the economic impact of the penalty on the violator (Step 8), the Notes state that a D&B report, dated 7/27/98, indicates Loggins had annual sales of $3.1 million, that an American Business Disk, 2nd Edition (1998), which is not in the record, indicates that Loggins had sales ranging from $10-$20 million and that reports obtained by EPA indicate that the company is financially secure (Id. 5). EPA, therefore, assumed that Loggins was able to pay the proposed penalty.

24. D&B reports, dated September 29, 1997 and July 27, 1998, are in the record (C's Exh 11). The former report is based on an interview with Carol Greene, office manager, conducted on July 31, 1997. This report indicates projected annual sales

of $3,100,000 (emphasis added). The latter D&B report is based upon an interview with Ms. Carol Greene, office manager, on January 26, 1998, and again indicates projected annual sales of $3,100,000. Each of these reports state “financing secured”, which is a far different matter from the “financially secure” statement appearing in the Notes.

25. Loggins’ corporate income tax returns for the fiscal years 1998, 1997, 1996, 1995, and 1994 are in the record (C’s Exh 12). The returns reflect gross sales of approximately $1.1 million in 1998, approximately $3.12 million in 1997, approximately $2.567 million in 1996, approximately $1.725 million in 1995 and approximately $1.86 million in 1994. These figures indicate that the American Business Disk sales figure of from $10-$20 million reported in the Notes has no basis in fact. The record includes correspondence wherein Loggins was requested to furnish financial information including income tax returns (C’s Exhs 13 and 14) and a letter to Loggins’ counsel, dated July 21, 1999, stating that EPA had determined that Loggins has the ability to pay a penalty of $50,000 (C’s Exh 15).

26. The Notes state that Loggins has not been subject to any other known penalty (Step 7) and that there are no other matters as justice may require [for consideration as an adjustment to the penalty] (Step 8) (Id. 5).

Conclusions

1. Respondent, Loggins Oil Company, Inc., (Loggins) is a corporation and a person within the meaning of CWA § 311(a)(7), 33 U.S.C. § 1321(a)(7), and 40 C.F.R. § 112.2.
2. At all times relevant to the complaint, Loggins Oil Company, Inc. and Ronald H. Loggins and Kim Loggins as individuals were the owners and/or operators of a commercial, onshore, oil storage facility within the meaning of CWA § 311(a)(6), 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2.
3. Loggins' facility has an above-ground storage capacity of at least 120,000 gallons (a maximum capacity of 140,000 gallons), which, due to its location, could reasonably be expected to discharge oil in harmful quantities as defined in Part 110 to a navigable water of the United States or its adjoining shoreline. Loggins was thus subject to the Oil Pollution Prevention regulation (40 C.F.R. Part 112), promulgated under CWA § 311(j).
4. Loggins assumed operation and control of the facility in November 1991 and in accordance with § 112.3(b) was required to prepare a Spill Prevention and Countermeasures (SPCC) plan complying with § 112.7 not later than six months thereafter (May 1992) and to have implemented the plan not later than one year after the facility began operations (November 1992).

Among the requirements for SPCC plans specified by § 112.7 is appropriate containment and/or diversionary structures, sometimes referred to as "secondary containment", or equipment to prevent discharged oil from reaching a navigable water course, which as a minimum was to include for onshore facilities "(d)ikes, berms or retaining walls sufficiently impervious to contain spilled oil." (§ 112.7(c)). Loggins has neither prepared nor implemented a SPCC plan complying with § 112.7.

5. The complaint issued on April 19, 1999, alleged, inter alia, that Loggins had not prepared a SPCC plan complying with § 112.7, did not maintain the plan at its facility and make the plan available for on-site review by EPA representatives during normal business hours in violation of § 112.3(e), did not complete a review and evaluation of the SPCC plan at least once every three years as required by § 112.5(c), and did not amend the plan after a change in facility ownership or design as required by § 112.5. [10/]

6. Loggins has failed to comply with the ALJ's letter-order, dated August 11, 1999, requiring the submission of a pre-

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[10/] The failure to maintain a copy of the SPCC plan at the facility and to make it available for on-site review, to review the plan at least once every three years and make such amendments as may be required, and to amend the plan after a change in ownership or design all stem from the failure to have a SPCC plan and thus may not properly be the subject of separate counts or penalties.

hearing exchange on or before September 17, 1999, and is in default. In accordance with Rule 22.17(a) of the Consolidated Rules of Practice, as revised (64 Fed. Reg. 40176 et seq. July 23, 1999), a finding of default constitutes an admission of the facts alleged in the complaint and a waiver of Loggins' right to contest such facts.

7. Therefore, the violations alleged in the complaint are deemed to be established. The penalty proposed in the complaint of $75,254 is not inconsistent with the record of the proceeding or the Act and will be assessed.

Discussion

The AlJ's letter-order, dated August 11, 1999, directing the parties to submit pre-hearing exchanges on or before September 17, 1999, specifically directed Loggins to state whether Mr. Loggins health had improved to the extent that he is able to assist in the defense of this action and to respond to the assertions in Complainant's letter to the Chief Judge, dated May 27, 1999, that Mr. Loggins' health should not be an obstacle to the trial of this matter, to state whether Loggins was currently operating and whether it has or is engaged in the preparation of a SPCC plan and, if Loggins were contending that the proposed penalty exceeds its ability to pay, to furnish financial statements, copies of income

tax returns or other documents to support such contention. Loggins did not respond to this order.

It appears that Loggins had in fact raised the issue of the economic impact of the proposed penalty on the company, or its "ability to pay", in the alternative dispute resolution (ADR) process and, unbeknownst to the ALJ, had provided Complainant with a copy of its corporate income tax returns for each of the past five years. This fact makes it difficult to find that Loggins' failure to furnish financial data is material, warranting a finding of default. If, however, Loggins wished to rely on the previous submission as partial compliance with the ALJ's order, it would have been a simple matter to so state and the fact remains that Loggins has failed to comply with the pre-hearing exchange requirements of Rule 22.19(a) and an order of the ALJ. It is concluded that Loggins was properly found to be in default.

In accordance with Rule 22.19(a), a finding of default constitutes, for the purpose of this proceeding only, an admission of all facts alleged in the complaint and a waiver of the right to contest such allegations. Loggins having been found to be in default, the violations alleged in the complaint are deemed to have been established.

In accordance with Section 311(b)(6), 33 U.S.C. § 1321(b)(6), "Administrative penalties", Loggins may be assessed a class I or

class II civil penalty for these violations by the Administrator.[11/] Although Section 311(b)(6)(B)(ii) provides that the amount of class II penalty shall not exceed $10,000 for each day the violation continues and that the total administrative penalty shall not exceed $125,000, this section has in effect been amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701. The maximum administrative penalty for violations occurring after January 30, 1997, is now $11,000 per day and the maximum administrative penalty is $137,500. See 40 C.F.R. Part 19.

Loggins' default does not, of course, relieve the Agency of the necessity of considering the statutory factors in determining the penalty (supra note 8). The Notes on the Proposed Penalty Assessment, which accompanied the complaint, indicate that the proposed penalty was determined in accordance with the August 1998 Civil Policy for Section 311(b)(3) and Section 311(j) of the CWA. This prima facie constitutes adequate consideration of the factors set forth in Section 311(b)(8) of the Act.

[11/] CWA § 311(b)(6), "Administrative penalties", provides in pertinent part:

> (A) Violations
> Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility.....(ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which the owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by the Secretary of the Department in which the Coast Guard is operating or the Administrator.

Loggins' failures to have a SPCC plan and secondary containment were, in accordance with the Penalty Policy, determined to be major violations (finding 15). The base matrix penalty for a facility, having a storage capacity of 120,000 to 140,000 gallons, in major noncompliance was determined to be $22,500 (finding 16). Although there are no known water intakes or sensitive ecosystems downstream of the facility and the impact of a worst-case discharge was determined to be moderate, the maximum upward adjustment of 25 percent of the matrix penalty was nevertheless applied. The base penalty at this point was thus $28,125.

The next upward adjustment applied to the matrix penalty was 30 percent for the duration of the violations (finding 17). This was determined at the rate of one-half percent for 72 months, the length of time the violations were considered to have continued up to the maximum of 30 percent provided by the policy. This seems harsh, because there is no evidence or allegation of spills or discharges from Loggins' facility and because this situation continued for six years, it is unlikely to be due to simple "luck" and is at least some evidence that Loggins was handling petroleum products and maintaining its facility in an appropriate manner.

The final adjustment to the matrix penalty was 75 percent for culpability (finding 18). Once more the maximum upward adjustment provided by the penalty policy is being applied to two other

adjustments which were also the maximums provided by the policy. While as previously indicated there appear to be sound reasons for questioning some of the assumptions underlying this penalty calculation, the penalty so determined is neither clearly inconsistent with the record of the proceeding nor of the Act within the meaning of Consolidated Rule 22.17(c).[12/] The penalty of $75,254 determined by Complainant will, therefore, be imposed.

Two matters, however, warrant brief mention. Firstly, Complainant's economic impact or "ability to pay" determination overlooks or ignores the precipitate decline in gross revenues shown by Loggins' most recent corporate income tax returns, i.e., from over $3 million in 1997 to approximately $1.1 million in 1998 (finding 25). This decline in gross revenue, which may be attributable to Mr. Loggins' health problems, would certainly affect Loggins' ability to pay a penalty and may, indeed, make payment of a penalty of the magnitude assessed "out of the question". Moreover, Complainant appears to have had some doubts in this regard, for, while it assessed a penalty 50 percent greater, it determined that Loggins had the ability to pay a penalty of $50,000. Loggins' default has, however, precluded development of a factual record on this issue and thus, Loggins'

[12/] Consolidated Rule 22.17, entitled "Default", provides in part at ¶ 22.17(c): "(t)he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." (64 Fed. Reg. 40182).

"ability to pay" is not a basis at this juncture to reduce the penalty.

Secondly, Mr. Loggins' health problems may be a basis for adjusting the penalty downward under the rubric "any other matters as justice may require" of § 311(b)(8) of the Act. Again, however, these matters have not been developed on the record and, consequently, afford no basis for a penalty adjustment.

ORDER

Respondents, Loggins Oil Company, Inc., Ronald H. Loggins and Kim Loggins, having violated the Act and regulation as alleged in the complaint, a penalty of $75,254 is assessed them in accordance with CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8). [13/] Payment of the full amount of the penalty shall be made by mailing or delivering a cashier's or certified check in the amount of $75,254 payable to

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[13/] In accordance with Consolidated Rule 22.17(c) (60 Fed. Reg. 40182, July 23, 1999), this default order constitutes an initial decision which unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 or, unless the EAB elects to review the same sua sponte, as therein provided, will become the final decision of the Agency in accordance with Rule 22.27(c).

the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA, Region 4
P.O. Box 100142
Atlanta, GA 30384

Dated this 3rd day of August 2000.

Original signed by undersigned
_____
Spencer T. Nissen
Administrative Law Judge