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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
PEPPERELL ASSOCIATES,	)	DOCKET NO. CWA-2-I-97-1088
	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Clean Water Act: Pursuant to Section 311(b)(6)(B)(ii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii), the Respondent, Pepperell Associates, is assessed a civil penalty of $24,876 for violating the Spill Prevention Control and Countermeasure Plan requirements of 40 C.F.R. Part 112 and Section 311(j)(1) of the Clean Water Act, and the oil discharge prohibitions of Section 311(b)(3) of the Clean Water Act.

Issued: February 26, 1999
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Beth Tomasello, Esquire
Tonia Bandrowicz, Esquire
Senior Enforcement Counsel

U.S. Environmental Protection Agency

Region 1
One Congress St.
Boston, MA 02114-2023

For Respondent: Martha C. Gaythwaite, Esquire
Friedman, Babcock & Gaythwaite
6 City Center, Suite 400
Portland, ME 04104

PROCEEDINGS

The Complaint in this matter, as amended, was filed on September 30, 1997, by the Regional Administrator for Region I of the United States Environmental Protection Agency ("EPA" or "Complainant") under the authority of Sections 309(g)(2)(B) and 311(b)(6)(B)(ii) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, as amended, 33 U.S.C. §§ 1319(g)(2)(B) and 1321(b)(6)(B)(ii) (1996), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01- 22.32 (1998).[(1)] The Complaint charges Pepperell Associates ("Respondent") with violations of Section 311(j)(1) of the Clean Water Act and Section 311(b)(3) of the Clean Water Act or, in the alternative, Section 307(d) of the Clean Water Act, 33 U.S.C. § 1317(d). The Complaint proposes a civil administrative penalty of $47,930 for the alleged violations.

Specifically, Count I of the Complaint charges that the Respondent operated a facility regulated under the Oil Pollution Prevention regulations, 40 C.F.R. Part 112, without a Spill Prevention Control and Countermeasure Plan ("SPCC Plan") from December 1985 to July 14, 1997, in violation of Section 311(j)(1) of the Clean Water Act and the implementing regulations at 40 C.F.R. Part 112 ("SPCC regulations"). Count II charges that the Respondent failed to prepare an SPCC Plan from October 16, 1997, to April 16, 1998, and failed to implement the SPCC Plan within six months of installing a new above-ground oil storage tank on October 16, 1997, in violation of Section 311(j)(1) of the Clean Water Act and 40 C.F.R. § 112.5(a). Count III charges that the Respondent on October 17, 1996, discharged oil into or upon a navigable water of the United States in a quantity that has been determined may be harmful in violation of Section 311(b)(3) of the Clean Water Act; or, in the alternative (Alternative Count III), that the Respondent discharged oil into a publicly owned treatment works ("POTW") in violation of a Pretreatment Standard, thereby violating Section 307(d) of the Clean Water Act.

In an Order on the parties' cross-motions for accelerated decision entered on October 9, 1998, the undersigned granted the EPA's Motion for Partial Accelerated Decision on Liability as to Count I, in part, and denied the EPA's Motion for Accelerated Decision as to Counts II and III. The October 9, 1998, Order also denied the Respondent's Cross-Motion for Partial Accelerated Decision as to all counts. In the October 9, 1998, Order it was held that the Respondent was liable for the failure to have prepared an SPCC Plan for its Facility from December 1985 to October 17, 1996. As to the remaining alleged time-period of violation under Count I, from October 18, 1996, to July 14, 1997, the undersigned determined that a genuine issue of material fact existed that must be resolved in hearing.

The October 9, 1998, Orders on the Complainant's Motion for Partial Accelerated Decision on Liability and Respondent's Cross-Motion for Partial Accelerated Decision ("Accelerated Decision") are incorporated herein by reference.

Thereafter, an evidentiary hearing was conducted in Portland, Maine, from October 20 to 23, 1998, to determine the remaining issues of liability for Count 1, the

issues of liability for Counts II and III, as well as Alternative Count III, and issues pertaining to the appropriate civil administrative penalty for the violation of Count I and any other alleged violations.

On December 10, 1998, the parties filed Post-Hearing Briefs. On January 7, 1999, the parties filed Post-Hearing Reply Briefs.

Rulings on the Parties' Post-Hearing Motions

Before proceeding into a discussion of the relevant liability and penalty issues in this matter, I must first dispense with the post-hearing motions filed by the Respondent and the Complainant. Accompanying the Respondent's Post-Hearing Brief are a Motion for Reconsideration of the Accelerated Decision and a Motion to Open the Record to File Robert Gladu's Affidavit. Accompanying the Complainant's Motion in Opposition to the Respondent's Motion to Open the Record, dated December 16, 1998, is the Complainant's Cross-Motion to Open the Record to File Consent Agreement and Enforcement Order. As discussed below, both motions of the Respondent and the Complainant's Cross-Motion to Open the Record to File Consent Agreement and Enforcement Order will be granted.

In its Motion to Open the Record, the Respondent moves to enter into the record the December 9, 1998, affidavit of Mr. Robert Gladu, a co-owner of Pepperell Associates. In this affidavit, Mr. Gladu states that the Respondent has signed a Consent Agreement with the Maine Department of Environmental Protection ("DEP") and that pursuant to that agreement the Respondent has paid the State of Maine $10,876.55. Mr. Gladu further states that this amount was required by the State as a "conditional deductible to repay for its clean-up costs" of the oil spill at issue. The affidavit also states that the total cost to the Respondent, including its direct cleanup costs, was $13,130. The Respondent argues that Mr. Gladu's affidavit attests to the fact that the Respondent has paid civil penalties to the State of Maine and that this information is directly relevant to the consideration of penalties proposed by the EPA.

In its opposition to the Respondent's Motion to Open the Record, the EPA argues that the record should not be opened because Mr. Gladu's affidavit is irrelevant and immaterial to any issue in this case and is not reliable. The EPA contends that the affidavit is irrelevant because it affects none of the statutorily delineated penalty factors under Section 311(b)(8) of the Clean Water Act. Specifically, the EPA argues that Section 311(b)(8) of the Clean Water Act authorizes the EPA to reduce the amount of the penalty for "any other penalty paid for the same incident" and that there is no authority to reduce the penalty for cleanup costs. In this regard, the EPA maintains that Section 311(f) of the Clean Water Act contains a provision requiring parties who discharge oil into navigable waters to reimburse the federal government for its oil spill cleanup costs, indicating that Congress is well aware that some violators would be paying both a penalty and cleanup costs. The EPA points out that Mr. Gladu's affidavit does not state that the Respondent paid a civil penalty. The EPA argues that the Respondent's reimbursement of the Maine DEP's cost of cleaning up the spill is not a penalty payment and therefore is not relevant in this case. The EPA further maintains that the Respondent's payment to the State of Maine is not relevant to any "economic benefit the Respondent allegedly received" because the EPA did not allege that the Respondent received any economic benefit from the spill, nor is it a factor "that justice requires this Court to consider." Additionally, the EPA argues that the affidavit is unreliable because the actual Consent Agreement shows that the payment was not a penalty, but rather a reimbursement.

The record discloses that at the hearing, the Respondent requested that the record be held open for the purpose of receiving evidence concerning the Respondent's intended payment to the State of Maine for the reimbursement of cleanup costs for the spill in question pursuant to a Consent Agreement. At that time, the EPA objected on the same grounds as set forth above. At the hearing, the parties were advised that such request would be considered when and if the information in question became available and after both parties had an opportunity to respond. Transcript ("Tr.") at 858-59 (Judge Gunning).

The Rules of Practice do not contemplate precisely a Motion to Open the Record. However, Mr. Gladu's December 9, 1998, affidavit meets the basic test for admissibility of evidence under Section 22.22(a) of the Rules of Practice, 40 C.F.R. § 22.22(a). First, Mr. Gladu's affidavit concerns a reimbursement to the State of Maine for cleanup costs associated with the oil spill at the center of this proceeding. Second, as the Consent Agreement between the Respondent and the State of Maine had not been finalized, no evidence of such payment could have been adduced at the hearing. Thus, the evidence is neither cumulative nor untimely. Moreover, evidence of payment to the State of Maine associated with the cleanup costs of the October 17, 1996, oil spill is of at least some relevance to the imposition of any penalty should liability be established. Finally, the EPA's objection to the affidavit as being unreliable has no merit. Regardless of Respondent's counsel's characterization of the monies paid by the Respondent to the State, the affidavit of Mr. Gladu describes the payment as a "conditional deductible to repay" the Maine DEP cleanup costs. The EPA's argument that Mr. Gladu's affidavit is unreliable is further undermined by the testimony by a Maine DEP employee that the Respondent would likely have to reimburse the state in an amount approximating that in Mr. Gladu's affidavit. As such, the December 9, 1998, affidavit of Mr. Gladu is admitted. [(2)]

Moreover, even if the Respondent's Motion to Open the Record were considered under the standard for reopening a hearing set forth at Section 22.28(a) of the Rules of Practice, 40 C.F.R. § 22.28(a), the motion would be granted. As previously noted, the Rules of Practice do not contemplate precisely a Motion to Open the Record. However, the Rules, at Section 22.28(a), do set forth the procedures and requirements for a Motion to Reopen a Hearing, procedures and requirements that are closely analogous to the Respondent's motion. [(3)] In all fairness, a motion such as the Respondent's should be held to a lower standard than that set forth in Section 22.28(a) because the Respondent's request occurs prior to the promulgation of an initial decision and because the Respondent gave both the Complainant and the Presiding Officer fair warning that such a request would be made as soon as appropriate. The Respondent's motion is sufficient to meet the more stringent requirements of Section 22.28(a).

By the same token, however, the Complainant's December 16, 1998, Motion to Open the Record to File Consent Agreement and Enforcement Order is also granted. Like Mr. Gladu's affidavit, of which it is the subject, the Consent Agreement is relevant to the determination of a penalty for the Respondent's alleged oil spill. Moreover, as the Consent Agreement was not signed by the Respondent until December 3, 1998, it could not have been adduced at the hearing.[(4)] Nor is the Consent Agreement cumulative to Mr. Gladu's testimony or affidavit. As his affidavit and its representation of the Consent Agreement was supported by nothing but his signature, the entry of the agreement itself allows for a critical evaluation of Mr. Gladu's affidavit, an evaluation that demonstrates the general accuracy of Mr. Gladu's representations.

Finally, although an argument could have been raised against the authenticity of the document given that it was signed only by the Respondent and was not a certified copy of the Consent Agreement, the Respondent does not object to the entry of the document. [(5)] Although the Respondent agrees to admission of the Consent Agreement, it does not waive its previous arguments that evidence of a post-spill, unrelated enforcement action should not be admitted. Respondent's Reply Memorandum in Support of Motion to Reopen p. 1. I concur with the Respondent's objection, and any portion of the Consent Agreement pertaining to a post-spill enforcement action is not considered for purposes of this decision. The Complainant's motion is hereby granted and the Consent Agreement, in part, along with Mr. Gladu's affidavit, is received into the record.

The Respondent's Motion for Reconsideration of the October 9, 1998, Accelerated Decision, which found partial liability for Count I, is more problematic. [(6)] In its motion, the Respondent argues that the Accelerated Decision, insofar as it is analogous to a summary judgment order, is an interlocutory ruling that can be modified or vacated by the trial court at any time prior to the entry of final

judgment. The Respondent claims that new evidence, relevant to liability on Count I, was adduced at the hearing and which militates toward a reconsideration and possible vacating of the partial liability determination for Count I.

The EPA, in its December 16, 1998, opposition to the Respondent's motion, argues that the Rules of Practice contain no provision for a motion for reconsideration of an accelerated decision and that other Administrative Law Judges have imposed very high standards on a party requesting reconsideration of an accelerated decision. [(7)] See In re Oklahoma Metal Processing Company, Inc., TSCA Docket No. VI-659C, Order Denying Motion for Reconsideration, 1997 TSCA LEXIS 6 (June 4, 1997). The EPA also argues that the accelerated decision was substantively correct in light of the facts and controlling law, and that the Respondent's motion is untimely and prejudicial in that it was filed after the hearing, thereby depriving the Complainant of an opportunity to present evidence toward the issues resolved in the Accelerated Decision.

The Respondent, in its December 23, 1998, Reply to the Complainant's Opposition, accepts the EPA's proffered standard for reconsideration, but argues that such a standard has been met. The Respondent asserts that the Accelerated Decision must have been made under the assumption that a direct link existed between the boiler room and the sewer pipe, and because evidence arose at hearing rebutting the EPA's claim of a direct link, the Accelerated Decision must be reconsidered. Therefore, suggests the Respondent, the Presiding Officer in the Accelerated Decision, misapprehended either the facts of the case or the position of the Respondent.

Although the evidence adduced at the hearing, contrary to the Respondent's assertion in its Post-Hearing Brief and Reply to Complainant's Opposition, [(8)] does not undermine the October 9, 1998, Accelerated Decision, the Accelerated Decision will be reconsidered. The Respondent is correct in noting that a partial accelerated decision is an interlocutory order that may be modified or vacated prior to final judgment. See Section 22.20(b)(2) of the Rules of Practice. However, it is emphasized that it was incumbent upon the Respondent to raise all questions of material fact and all objections to the EPA's motion at the time of its response to the EPA's Motion for Accelerated Decision. See Section 22.16(b) of the Rules of Practice. The Respondent's elaboration upon the stipulated facts at the hearing cannot be used as an attempt to alter those admitted facts, which were the bases of the Accelerated Decision. Although the Respondent's new arguments at hearing and on briefing do not meet the EAB's standard for reconsideration of a final decision, the fact that an accelerated decision is an interlocutory order suggests the employment of a somewhat lower standard for reconsideration. Although I decline to articulate an official standard at this time, inasmuch as reconsideration of the Accelerated Decision leads to the same conclusion as reached in the Accelerated Decision, I hereby grant the Respondent's Motion for Reconsideration of the Accelerated Decision. Such reconsideration will be included in the discussion portion of this opinion.

FINDINGS OF FACT

1. The Findings of Fact in the October 9, 1998, Accelerated Decision are hereby incorporated into this decision. To the extent that any findings from the October 9, 1998, Accelerated Decision are inconsistent with those of this decision, they are superseded by these findings.
2. As a result of the October 17, 1996, oil spill at the Respondent's facility, Pepperell Mill ("Facility"), sufficient quantities of number six heating oil reached Gully Brook and the Androscoggin River to cause a noticeable sheen on the surface of both bodies of water, with the oil sheen on the Androscoggin River extending for approximately one mile downstream from the confluence of Gully Brook and the Androscoggin River. Tr. at 64-68 (Thompson); Complainant's Exhibit ("Exb.") 1, p. 10-11. Approximately 300 gallons of oil were recovered from Gully Brook and the Androscoggin River, whereas between 50 and 100 gallons remained unrecovered. Between 350 and 400 gallons of oil reached Gully Brook and the Androscoggin River, with the majority of the oil being recovered from Gully Brook prior to reaching the Androscoggin River.
3. As a result of the oil spill at the Facility, on October 17, 1996, 100 to 200 gallons reached the Lewiston Wastewater Treatment Plant, a publicly owned treatment works ("POTW"), operated by the Lewiston-Auburn Water Pollution Control Authority ("LAWPCA"). Complainant's Exb. 5 (Stipulation 18). The POTW is designed to treat domestic waste and does not have the capacity to treat industrial waste such as water contaminated with number six heating oil. In order to maintain the integrity of the treatment process, the POTW was forced to decelerate severely its treatment process while oil was

removed from the incoming wastewater, wet wells and the primary sedimentation basins. Complainant's Exb. 30; Tr. at 543-551 (Richardson). No noticeable oil passed through the POTW and into the Androscoggin River. Complainant's Exb. 31.

4. The spilled oil flowed from the floor of the Facility's boiler room down a condensate pipe tunnel and into a city sewer conduit. Complainant's Exb. 5 (Stipulation 12). The sewer conduit is beneath the condensate pipe tunnel. The sewer conduit empties into the municipal sewer line below Lisbon Street and periodically a combined sewer overflow ("CSO") which discharges to Gully Brook. The Lisbon Street sewer line eventually enters the POTW. Gully Brook is approximately 20 to 25 feet below the CSO at street level, but the exact depth of the sewer conduit as it passes beneath the condensate pipe tunnel is unknown. Tr. at 169 (Pellerin); Tr. at 97, 169 (Thompson); Complainant's Exb. 3, Attachment 2 (site diagram). The precise path by which the oil made its way from the condensate pipe tunnel to the city sewer conduit is unknown but the path is somewhat direct.
5. On October 17, 1996, Mr. Nathan Thompson, an Oil and Hazardous Waste Specialist I at the Maine DEP, responded to the oil spill from the Respondent's Facility. Mr. Scott Pellerin, EPA's On-scene Coordinator, also responded to the spill and inspected the Respondent's Facility for compliance with the SPCC regulations. Complainant's Exbs. 4, 5 (Stipulations 20-22); Tr. at 16, 19 (Thompson).
6. On the morning of the spill, Mr. Ralph Sawyer, one of the Respondent's co-owners, assisted Mr. Thompson during his initial efforts to arrest the spread of the oil in Gully Brook. Tr. at 689, 92 (Sawyer). During this initial period of activity, Mr. Sawyer did not identify himself as one of the Respondent's owners and did not show Mr. Thompson the area from which the spill originated. Tr. at 720-22 (Sawyer); Tr. at 41, 88-91 (Thompson).
7. On the morning of the spill, the boiler room from which the spill originated was saturated with oil, with a coat of oil on the floor. Complainant's Exbs. 3, 34. The Respondent's two employees were attempting to clean up the oil using procedures considered to be unsafe by Mr. Thompson and Mr. Pellerin. Tr. at 136-38 (Pellerin); Tr. at 658-59 (Thompson). The Respondent's employees did show some records concerning the approximate amount of oil in the underground oil storage tanks to Mr. Pellerin on October 17, 1996, but the Respondent did not present any records concerning this matter at the hearing. Complainant's Exbs. 1, 3, 4 .
8. At approximately 1 p.m. on October 17, 1996, after determining the location of the spill and inspecting the boiler room, Mr. Thompson requested permission to hire a cleanup contractor and have that contractor enter the premises and clean up the spilled oil. Tr. at 49-51 (Thompson). Permission to have this done was not given by the Respondent until 5 p.m. Tr. at 57-58 (Thompson). A cleanup contractor, hired by Mr. Thompson, began cleanup operations on the boiler room during the morning of October 18, 1996. During the time between Mr. Thompson's initial request to enter and clean the boiler room and the actual initiation of cleaning on October 18, 1996, oil continued to flow into Gully Brook from the CSO. Tr. at 60 (Thompson). However, little to no oil migrated to the POTW during the night of October 17, 1996. Oil did discharge from the Respondent's Facility out the CSO into Gully Brook for three days commencing on October 17, 1996. Tr. at 28, 59-60, 70 (Thompson).
9. The Maine DEP spent $23,643.82 to clean up the oil in Gully Brook, the Androscoggin River, the boiler room and tunnel system at the Respondent's Facility, and the POTW. Tr. at 74-76 (Thompson); Complainant's Exbs. 1, 2.
10. No observable degradation of wildlife occurred as a result of the spill although residual oil was left behind in both the Androscoggin River and Gully Brook and adjoining shorelines. Tr. at 83-84, 102 (Thompson). Gully Brook receives both storm water discharge and untreated sewage during periods of high water, some of which may flow into the Androscoggin River. Tr. at 534-36, 568-70 (Richardson).
11. The Respondent has paid a conditional deductible for the Maine DEP's cleanup of the oil spill in the amount of $10,876.55. When added to the Respondent's direct costs for the cleanup of oil from the October 17, 1996, spill, the Respondent has paid a total of $13,130 toward the cleanup of the oil spill. Gladu 12/9/98 Affidavit. The Respondent's payment to the Maine DEP has not been made to cover any penalty imposition, but rather to cover portions of the Maine DEP's costs for cleaning up the oil spill. Gladu 12/9/98 Affidavit; Tr. at 264-66 (DeHaas).
12. Immediately after the oil spill, the Respondent installed a sand bag berm around the entrance to the stairway and the condensate pipe tunnel in the boiler room. Tr. at 768-69 (Gladu).
13. On October 17, 1996, Mr. Pellerin informed Mr. Sawyer that an SPCC Plan was needed for the Facility. He also provided Mr. Sawyer with a copy of the SPCC regulations set forth at 40 C.F.R. Part 112, and with a copy of his business card with his name and telephone number. Complainant's Exbs. 4 p. 3, 5 (Stipulation 25); Tr. at 139-42 (Pellerin).
14. There were three 30,000 gallon underground oil storage tanks at the Facility. These tanks were originally connected to a pumping system that pumped the oil to the boilers in the Respondent's boiler room. Each tank was connected to the pumping system by piping and the flow of oil could be controlled by the opening or closing of a valve on each set of piping. Tr. at 804-07 (Gladu). The exact placement of the two oil circulating pumps is not clearly shown. The tanks were connected to one another through a valve system and header. Tr. at 806-07 (Gladu).
15. The first of the three 30,000 gallon underground tanks had been disconnected from the pumping system at the time the Facility was purchased in 1985. The tank contained a residual amount of oil. Tr. at 804-05 (Gladu).
16. The second of the three 30,000 gallon underground tanks was taken out of use at some point prior to the October 17, 1996, oil spill, but was still connected to the pumping system. To take the tank out of use, the Respondent closed a valve on the piping running from the tank to the pumping system. The second tank was disconnected from the pumping system and header within a few weeks of the October 17, 1996, oil spill. The residual oil from the second tank was emptied into the third and final 30,000 gallon tank in June of 1997. Tr. at 804-07 (Gladu); Tr. at 235 (Woodard); Tr. at 699 (Sawyer).
17. No evidence was presented to show that the relevant part of the pumping system or the header was located in the boiler room rather than in the

ground near the underground tanks reached through manholes or in the pipe shed (pump room) adjoining the boiler room. As such, after the second 30,000 gallon underground tank was disconnected from the header and pumping system, there is no evidence that the tank was connected in any manner to the boiler room.

18. The third 30,000 gallon underground tank remained connected and in use until it was emptied and removed on July 14, 1997. Complainant's Exb. 5 (Stipulation 26).
19. The Respondent was unaware of the SPCC requirements for its underground oil tanks until October 17, 1996. The Respondent was unaware of the exact number and types of tanks existing at its Facility prior to discussions with the EPA and the Maine DEP in 1997. The three 30,000 gallon underground oil storage tanks were not registered with the Maine DEP at the time of the October 17, 1996, oil spill. The Respondent completed its application to register the three 30,000 gallon underground storage tanks on January 20, 1997. Tr. at 701 (Sawyer); Tr. at 728-30 (Sawyer); Complainant's Exb. 9.
20. The three 30,000 gallon underground oil storage tanks were removed on July 14, 1997. Complainant's Exb. 5 (Stipulation 26).
21. On or about October 16, 1997, the Respondent installed a 20,000 gallon above-ground oil storage tank with secondary containment at its Facility. Complainant's Exb. 5 (Stipulation 31). This tank, through piping, was connected to the boiler in the boiler room.
22. The Respondent submitted an SPCC Plan to the EPA for the 20,000 gallon above-ground tank on or about April 14, 1998. The Respondent fully implemented its SPCC Plan at the Facility on or about September 15, 1998. The SPCC Plan for the above-ground tank fully complies with EPA requirements. Complainant's Exb. 5 (Stipulation 32); Tr. at 145 (Pellerin).
23. The seriousness of the Respondent's SPCC Plan violation, based on its oil storage capacity of 60,000 gallons and its major violation for total noncompliance, was major, warranting a base penalty of $10,286. The potential environmental impact of the violation was moderate, warranting a 10% upward adjustment of the base penalty. The penalty based on the statutory factor of seriousness is $11,315.
24. The Respondent's level of culpability for the SPCC Plan violation was moderate, warranting a 25% upward adjustment of the penalty to $14,144.
25. No adjustments to the penalty for the SPCC Plan violation are warranted based on the statutory factors of violation history, mitigation, any other penalty for the same incident, economic impact on the violator, or other matters as justice may require.
26. The economic benefit to the Respondent for its SPCC Plan violation is $1,241, increasing the penalty to $15,385. The total penalty for the SPCC Plan violation is $15,385.
27. The seriousness of the Respondent's spill violation, based on the amount of 350 to 400 gallons of oil entering navigable waters, was moderate, warranting a base penalty of $5,625. The environmental impact resulting from the spill was moderate to high, warranting a 50% upward adjustment of the base penalty. The penalty based on the statutory factor of seriousness is $8,437.
28. The Respondent's level of culpability for the spill violation was high, warranting a 50% upward adjustment of the penalty to $12,655.
29. No adjustments to the penalty for the spill violation are warranted based on the statutory factors of violation history, mitigation, economic benefit to the Respondent, other penalty for the same incident, or economic impact on the Respondent.
30. The Respondent's partial reimbursement of the cleanup costs to the Maine DEP warrants a 25% downward adjustment of the penalty under the statutory factor of "other matters as justice may require," reducing the penalty to $9,491. The total penalty for the spill violation is $9,491.

DISCUSSION

Liability

Count I

Count I of the Complaint alleges that the Respondent's failure to have prepared an SPCC Plan for its Facility from December 1985 to July 14, 1997, constitutes a violation of 40 C.F.R. Part 112 and Section 311(j)(1) of the Clean Water Act. Complaint ¶ 19. As indicated in the October 9, 1998, Accelerated Decision, various requirements must be met in order for the EPA to establish the Respondent's liability for this alleged violation and each matter of controversy must be established by a preponderance of the evidence. See Section 22.24 of the Rules of Practice, 40 C.F.R. § 22.24. Specifically, the SPCC regulations apply to "owners or operators of non-transportation-related onshore...facilities engaged in...storing...oil..., 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). Moreover, only facilities with greater than 42,000 gallons of underground buried storage capacity or 1,320 gallons of above-ground storage capacity are subject to the jurisdiction of the EPA, and therefore are covered by the SPCC regulations. 40 C.F.R. §§ 112.1(d)(2)(i),(ii).

In the October 9, 1998, Accelerated Decision, I found that, up through the October 17, 1996, oil spill, the Respondent had met the jurisdictional requirements

necessary for the SPCC regulations to apply to its Facility in that the Respondent was an onshore facility engaged in storing oil, maintained greater than 42,000 gallons of underground buried storage capacity, and due to its location, could reasonably be expected to discharge oil in harmful quantities into the navigable waters of the United States. Furthermore, I found that the Respondent had failed to have prepared an SPCC Plan for its Facility and that it did not have an SPCC Plan from December 1985 through July 14, 1997.

The Respondent, at the hearing and subsequent to the hearing in Respondent's Post-Hearing Brief, Respondent's Reply Brief, and Respondent's Reply Memorandum in Support of Motion for Reconsideration, raises numerous arguments denying its alleged liability. I note that some of these issues raised during and after the hearing were disposed of in the Accelerated Decision, and that it was incumbent upon the Respondent to have raised all relevant questions of fact and law when it filed its response to the Complainant's Motion for Partial Accelerated Decision on Liability and its Cross-Motion for Partial Accelerated Decision. See Sections 22.16 and 22.20 of the Rules of Practice. However, upon reconsideration of my conclusions in the October 9, 1998, Accelerated Decision, as requested in the Respondent's Motion for Reconsideration and as granted in this opinion, I find no reason to disclaim my earlier conclusions.

The Respondent, at the hearing and in its post-hearing briefs, reiterates its argument that the Facility, due to its location, could not reasonably be expected to discharge oil into the navigable waters of the United States and, thus, the EPA has no SPCC jurisdiction. 40 C.F.R. § 112.1(d)(1)(i). This argument is twofold. First, the Respondent argues that new evidence brought forth at the hearing undermines the factual conclusion that a direct link existed between the Facility's boiler room and Gully Brook via the condensate pipe tunnel and sewer conduit. The Respondent also argues that the sewer conduit and sewer line are not navigable waters and that there was no reasonable expectation that oil entering the sewer conduit would enter a navigable water. Both arguments fail. I disagree, both with the purported lack of a link between the condensate pipe tunnel and the sewer pipe and the correlating lack of a reasonable expectation of discharge into a navigable water. In addition to the discussion of Count I in the Accelerated Decision which disposes of some of Respondent's related arguments, I note the following.

First, the Respondent stipulated to the facts that "the oil flowed from the boiler room floor, down a stairwell and through underground pipe(s) or tunnel(s), to a sewer line and box culvert... [and t]he box culvert is part of a combined sewer and storm water overflow which also sometimes discharges into Gully Brook." Complainant's Exb. 5 (Stipulations 12, 14). The fact that Complainant's witnesses admitted on cross-examination that possibly the oil could have dripped through holes in the mortar or chinks in the brickwork does little to limit the effect of the Respondent's stipulations. Second, while there is no direct evidence to show that the oil traveled on an unobstructed path from the condensate pipe tunnel to the sewer conduit, there is strong circumstantial evidence that there was, at minimum, a somewhat direct route between the condensate pipe tunnel and the sewer conduit.

The record, including the testimony of Mr. Gladu and Mr. Sawyer, establishes that within a period of a few hours after the gasket failed in the boiler room, the viscous number six heating oil traveled across the lengthy boiler room floor, down some steps, and entered the condensate pipe tunnel. Tr. at 701 (Sawyer); Tr. at 802-03 (Gladu); Tr. at 42-46, 93-94 (Thompson); Tr. at 134-136. (Pellerin). Respondent's Exb. 3, ¶ 1c. There was no berm or barrier to prevent the oil from entering the condensate pipe tunnel, which is at least three feet in diameter. Although Mr. Sawyer and Mr. Gladu testified that when they first saw the oil entering the condensate pipe tunnel in the early morning they went to the machine shop to look in the tunnel end but saw no oil, Mr. Thompson testified that during his early afternoon inspection he observed oil in the pipe tunnel running below the machine shop, which is adjacent to the boiler room. Tr. at 701-02 (Sawyer); Tr. at 803 (Gladu); Tr. at 47-48, 93-96 (Thompson). When the tunnel system from the boiler room was flushed on October 19, 1996, Mr. Thompson observed oil moving with flush water at the tunnel access in the machine shop. Complainant's Exb. 1. The site diagram shows that the condensate pipe tunnel runs between the boiler room and the

machine shop and that the sewer conduit lies beneath the condensate pipe tunnel in the area of the machine shop. Complainant's Exb. 3, Attachment 2 (site diagram).

We know that the oil then had to have entered the sewer conduit at some point simply because the oil was found to be discharging with the water from the CSO into Gully Brook, and such is not disputed by the Respondent. Tr. at 33 (Thompson); Respondent's Post-Hearing Brief p. 12-13. [(9)] The condensate pipe tunnel was the only discernible avenue of exit for the oil in the boiler room. Tr. at 135 (Pellerin); Tr. at 782 (Gladu). There is no dispute that the sewer conduit is directly connected to the sewer line running below Lisbon Street and the CSO which overflows into Gully Brook. Also, there is no dispute that the oil in Gully Brook and the Androscoggin River was from the Respondent's spill. The gasket failed on the boiler piping in the boiler room sometime on October 17, 1996, before 8 a.m. Complainant's Exb. 5 (Stipulation 10). We also know that the oil reached Gully Brook in observable quantities by at least early morning (approximately 8:15 a.m.) and the LAWPCA POTW about one mile away through the Lisbon Street sewer line by 8:15 a.m. or earlier. Tr. at 28 (Thompson); 579 (Matkivich), 701-02 (Sawyer), 803 (Gladu). This undisputed course of the oil within a few hours contradicts the Respondent's suggestion that the oil may have migrated to the covered sewer conduit through a very complicated and unexpected path consisting of "centuries old catacombs beneath the facility" or through a "chink in the bricks or a fissure in the mortar or some other way." Respondent's Cross-Motion p. 2; Tr. at 97 (Thompson).

Further, I note the testimony of Mr. Donald Grant, the EPA's Clean Water Act, Section 311, Oil Spill and SPCC Plan Coordinator for Portland, Maine, who explained that it is common practice that all boiler rooms have a floor drain to prevent the boiler rooms from filling up with water if the pipes break. Tr. at 451. As pointed out by the Respondent, there is no documentary evidence that there was a drainage pipe in the boiler room. Tr. at 452 (Grant). Mr. Gladu testified that there was a floor drain in the corner of the boiler room but the drain was not involved in the October 17, 1996, spill. Tr. at 782 (Gladu). When Mr. Pellerin entered the boiler room and inquired as to the possible exit where the oil drained, he was advised by a worker for the Respondent that the there was a pipe tunnel that the oil was draining into and down. Tr. at 135 (Pellerin). Thus, the only discernible exit for the oil in the boiler room was the condensate pipe tunnel. The record shows that the boiler room floor sloped towards the condensate pipe tunnel. Tr. at 452 ; Complainant's Exb. 3. The very existence of a condensate pipe tunnel which houses pipes containing water, along with the absence of a relevant floor drain and the sloping of the floor towards the pipe tunnel, strongly indicates that the pipe tunnel would drain to the sewer conduit below it.

The Respondent continually references "evidence" that the sewer pipe or sewer conduit is 20 to 25 feet below street level as support for the claim that the sewer conduit is located 20 to 25 feet below the floor of the boiler room. Respondent's Motion for Reconsideration p.2-3; Respondent's Post-Hearing Brief p.12; Respondent's Reply Brief p. 4; Tr. at 96-96, 169 (Respondent's counsel). This allegation is misleading. There is no dispute that the sewer conduit which runs underneath the Respondent's Facility empties into the Lisbon Street sewer line and/or the CSO. The evidence shows that the sewer line, which can be accessed through manholes on Lisbon Street, and the CSO are just below Lisbon Street, which is about 20 to 25 feet above Gully Brook. Tr. at 534-38 (Richardson); Complainant's Exb. 3, Attachment 2 (site diagram). The "sewer pipe or sewer conduit" discharging at Gully Brook is not the identical sewer conduit from beneath the Facility as insinuated by the Respondent. Tr. at 534-38 (Richardson). The flow going directly to Gully Brook is from the CSO. Thus, the sewer conduit does not travel on a direct slant between the Facility and Gully Brook. After the sewer conduit empties into the sewer line and/or CSO there must be a drop of several feet of the sewer piping carrying the water and sewage from the CSO to Gully Brook.

No direct evidence was adduced at the hearing concerning the level of the sewer conduit as it travels under the boiler room. However, the evidence of record strongly suggests that the sewer conduit lies just a few feet below the condensate pipe tunnel. First, I note that the documentary evidence presented at the hearing,

including the aerial photograph of the Facility, does not indicate any significant downward slope of the land from the area of the boiler room to Lisbon Street. Respondent's Exb. 3. Second, in order for proper gravitational flow from the sewer conduit to the sewer line and CSO to occur, the sewer line and CSO would have to be at a greater depth than the sewer conduit. As the sewer line is accessed from Lisbon Street, the depth of the sewer conduit cannot be more than the distance between Lisbon Street and the Lisbon Street sewer line. Exactly how much more is a matter of conjecture but it cannot be a significant amount. Even if it were established that the sewer conduit was many feet below the boiler room floor, such distance does not negate the existence of a rather direct path from the condensate pipe tunnel to the sewer conduit.

Third, even assuming that no direct link exists between the condensate pipe tunnel and the sewer conduit, an indirect link does not compel the conclusion that a discharge of oil into the sewer conduit and ultimately into a navigable water of the United States would not be reasonably expected. Likewise, the discharge of oil into the sewer conduit does not support the finding that the Facility, due to its location, could not be reasonably expected to discharge oil into navigable waters of the United States. That such a discharge was reasonably expected is clearly indicated by the actions of Mr. Sawyer and Mr. Gladu on the morning of the spill. Despite their protestations to the contrary, their actions show that they suspected that any oil spilled down the condensate pipe tunnel would end up in Gully Brook.

At the hearing, Mr. Sawyer and Mr. Gladu testified that after finding no oil flowing out from the other end of the condensate pipe tunnel in the machine shop, they next checked Gully Brook. Tr. at 732-36 (Sawyer); Tr. at 802-03 (Gladu). Moreover, when asked why they went to Gully Brook before 8 a.m. to check for oil discharge, Mr. Gladu responded, "[w]e saw the oil going down the steps to the condensate tunnel." Tr. at 802 (Gladu). Statements such as these indicate that the Respondent quickly concluded that the spilled oil might have reached Gully Brook, a reasonable expectation. Given the emergent situation described by Mr. Gladu and Mr. Sawyer on the morning of the spill, their willingness to take valuable time to walk down a somewhat distant foot path to inspect Gully Brook some 20 to 25 feet below street level belies their assertion that there was no reasonable expectation that the oil would reach Gully Brook. I also note that in Mr. Sawyer's summary of events concerning the spill which is contained in his March 6, 1997, letter to the EPA, he states that "[r]ealizing that some oil had entered the condensate sump tunnel, he [Mr. Gladu] notified DEP." Complainant's Exb. 18, ¶ 1d,e. In light of this contradictory evidence, I do not find Mr. Gladu's and Mr. Sawyer's self-serving testimony that they had no idea whatsoever that the oil would reach Gully Brook to be credible.

Finally, with regard to the Respondent's argument that there was no reasonable expectation of oil being discharged into a navigable water because there was no direct link between the boiler room and Gully Brook via the condensate pipe tunnel and sewer conduit, I emphasize that an owner of a facility covered by the SPCC regulations cannot abrogate his responsibility and be absolved from liability by blindly operating his facility or operating the facility without exercising some common sense as to the mechanical and structural aspects of the facility. In other words, here the Respondent is charged with having some working knowledge of the operation of its Facility, including the underground pipe tunnels that drain to the sewer system.

Relying on the EPA's stipulation at the hearing that the sewer conduit and sewer line are not navigable waters, the Respondent next argues that there was no reasonable expectation that oil entering the sewer conduit would enter a navigable water and, thus, the Respondent's Facility is not required to have an SPCC Plan. Respondent's Post-Hearing Brief p. 13. In support of this argument, the Respondent states that "[i]t is nothing short of shocking (and certainly unforeseeable) that the Agency allows the City to regularly discharge into a navigable waterway from this sewer pipe." I strongly reject the Respondent's argument. First, as pointed out in the Accelerated Decision with supporting authority, the Respondent cannot avoid liability for its oil discharge and/or need to have an SPCC Plan on the ground that the oil was transported or could be transported from its Facility to the navigable water by a manmade structure or feature. The fact that the sewer

conduit and sewer line are not navigable waters is not relevant and certainly is not dispositive.

Similarly, the fact that the oil was discharged into the sewer conduit before entering a navigable water does not negate the reasonable expectation that the oil could enter navigable waters. The water must go somewhere and the Respondent should have known that discharges entering the sewer line could reasonably be expected to enter Gully Brook or the Androscoggin River. While not condoning Lewiston's poor operation of its sewer and storm drain system under a permit issued by the EPA, such conduct does not vitiate the Respondent's violation or absolve it from liability. A respondent cannot allow oil to enter a sewer line and then escape liability by placing blame on those who operate the sewer system. There must be some accountability for allowing oil to enter the sewer line and one cannot hide behind their alleged ignorance.

The Respondent's remaining arguments regarding the reasonable expectation issue were addressed in the Accelerated Decision and will not be restated here. However, I do note that additional evidence concerning this issue was presented at the hearing which warrants comment. First, the Respondent points out that overflow storm and sewer water periodically entered Gully Brook via the CSO, particularly in the early morning. The testimony of Mr. Sawyer, as well as witnesses for the Complainant, supports this assertion. Tr. at 538 (Richardson); Tr. at 594-595 (Matkivich); Tr. at 712 (Sawyer); Respondent's Exb. 2. Evidence was presented at the hearing demonstrating that on the day of the spill there was some overflow from the CSO entering Gully Brook although there had been no appreciable rain the week before the spill. Tr. at 100 (Thompson); Complainant's Exbs. 4, 5 (Stipulations 29, 30); Respondent's Exb. 4. The water entering Gully Brook via the CSO and the water draining from Gully Brook into the Androscoggin River is not treated. Tr. at 538, 568 (Richardson). I observe that the evidence adduced at the hearing demonstrating that overflow sewer and storm water from the sewer conduit periodically enters Gully Brook, which is a tributary of the Androscoggin River, directly contradicts the argument that there was no reasonable expectation that oil discharged into the sewer conduit could enter navigable waters.

Second, even if the Respondent were able to assume that all the oil entering the sewer conduit would travel to the LAWPCA POTW via the sewer line, there still remains the reasonable expectation that some of the oil could reach the Androscoggin River. The testimony of Mr. Clayton M. Richardson, the superintendent and engineer director of LAWPCA, reflects that oil entering the LAWPCA POTW could have passed through the POTW system into the Androscoggin River. Tr. at 559-561 (Richardson).

In view of the foregoing determinations concerning the Respondent's liability under Count I, the Accelerated Decision stands after reconsideration. The Respondent is liable for violating the SPCC requirements of 40 C.F.R. Part 112 from June 1985 through October 17, 1996, the date of the spill. The situation changes after the spill, however, and the Respondent's introduction of evidence that it disconnected the second 30,000 gallon tank from the pumping system at the end of October requires an examination of the Respondent's liability for the full period alleged in Count I.

As will be discussed in greater detail below, the disconnection of the second tank from the boiler, although not affecting the actual storage capacity of the Facility, does affect the reasonable expectation of a discharge of the oil in the second tank into navigable waters of the United States. The EPA emphasizes repeatedly its argument that the Respondent's Facility's location on a sewer conduit creates a reasonable expectation that the Facility will discharge oil in harmful quantities into Gully Brook, a navigable water of the United States. A logical reading of the SPCC regulations would require that, for EPA jurisdiction to attach, over 42,000 gallons of underground buried storage capacity must exist and all this storage capacity must be reasonably expected to potentially discharge to navigable waters. Because, upon disconnection of the second tank, the Complainant can prove only that one 30,000 gallon tank could reasonably be expected to discharge into navigable waters, the Respondent cannot be held liable for SPCC violations after the end of October of 1996. The following discussion addresses

this issue in greater detail.

Before discussing the substantive elements of this important and complicated issue, the propriety of this adjudication must first be addressed. The Complainant may argue that a denial of liability on this ground is improper in that the Respondent has not directly raised this particular issue as material or disputed and the Complainant has not articulated its case so as to open the door for the *sua sponte* consideration of this issue. Were this an Article III court, perhaps a claim of judicial overreaching would suffice to restrict me from raising this issue and denying liability on this ground. Nonetheless, this is not an Article III court, but rather an administrative court under the direction of an Administrative Law Judge. (10) As I have indicated at various times throughout this proceeding, neither gamesmanship nor strict rules of procedure and evidence may be employed to unduly restrict my responsibility for developing an accurate and complete record and rendering a fair and equitable decision. See Richardson v. Perales, 402 U.S. 389 (1971) . The role of an Administrative Law Judge is an active one, and one that is more concerned with complete fact-finding than procedural pitfalls. An Administrative Law Judge has a strong affirmative duty not only to ensure that an accurate and complete record is developed but to try a case fairly and to write a sound decision. Manual for Administrative Law Judges, Administrative Conference of the United States , 4-5 (3d ed. 1993). This affirmative duty may require raising issues *sua sponte* upon essential matters not covered by the parties. Id. Moreover, although my determination rests on factual underpinnings, it is at its essence a jurisdictional determination. As such, the *sua sponte* raising of this issue is even more appropriate, and indeed, mandatory.

The jurisdictional requirements for the SPCC regulations to apply to a particular facility are extensive. As stated earlier, for the EPA to have jurisdiction and for the SPCC regulations to apply, a facility must, among other things, have underground buried storage capacity of greater than 42,000 gallons and must be located such that it could reasonably be expected to discharge oil in harmful quantities into navigable waters. 40 C.F.R. §§ 112.1(b), (d). It is noted that the Complainant has the burden of establishing a *prima facie* case against the Respondent and that such burden must be shown by a preponderance of the evidence. See Section 22.24 of the Rules of Practice. Thus, in order to establish the Respondent's liability under the SPCC regulations, the EPA must prove that the Respondent is subject to the terms of the regulations and that the Respondent violated the regulations by operating a facility without an SPCC Plan. This burden of presentation and persuasion was readily recognized by the EPA in its memorandum submitted in support of its motion for accelerated decision. Complainant's Memorandum of Law in Support of it Motion for Partial Accelerated Decision on Liability at 13.

Although the storage capacity requirement and the reasonableness of discharge requirement are not explicitly linked, the more logical reading of the regulation recognizes that the two are inextricably entwined. For example, it would be unreasonable to apply the SPCC requirements to a facility with ten 25,000 gallon underground buried tanks if, due to their placement, only one 25,000 gallon tank could reasonably be expected to discharge oil into navigable waters. In other words, considering the concerns of the SPCC regulations, the storage capacity of oil tanks that are not a threat to discharge oil into navigable waters should not be considered in determining the amount of the jurisdictional threshold. The regulation specifically exempts certain classes of facilities from EPA jurisdiction. Any limitation on those clearly delineated classes thwarts the clear intent of the regulation to exempt those facilities from the SPCC requirements. Thus, for all intents and purposes, a tank that cannot reasonably be expected to discharge oil into a navigable water does not exist for purposes of SPCC applicability.

When the Respondent disconnected the second 30,000 gallon tank at the end of October 1996, the role of that tank in the determination of the applicability of the SPCC regulations became suspect. If oil from the second tank no longer had any reasonable path to a navigable water, it could no longer be considered for purposes of the jurisdictional threshold. Unfortunately, the evidence is not completely

clear as to the precise manner of the second tank's disconnection. Mr. Gladu testified that, shortly after the October 17, 1996, oil spill, he disconnected the piping of the second tank from the pumping system by disconnecting the second tank's piping from the header, a valve system that connected the three oil tanks. Tr. at 804-07 (Gladu). Apparently, the header and at least one of the two oil circulating pumps were located fairly close to the tanks, probably in the manholes adjacent to the tanks and/or the pipe shed located between the tanks and the boiler room, with a single line running from the header on to the boilers. Tr. at 804-07 (Gladu); Tr. at 172 (Pellerin); Complainant's Exb. 3, Attachment 2 (site diagram). At any rate, there is no evidence that the second tank was taken out of service simply by closing a valve or disconnecting the piping in the boiler room as opposed to disconnecting the piping outside the boiler room. Insofar as such a distinction is crucial to the EPA's prima facie case, as will be explained below, the burden of persuasion must fall accordingly on the Complainant. See Section 22.24 of the Rules of Practice. The Complainant has failed to show by a preponderance of the evidence that after the end of October 1996, two or more of the Respondent's underground oil tanks were still connected to the boiler in the boiler room so as to allow the discharge of oil into the boiler room.

What makes this distinction of crucial importance is the fact that the EPA never alleged nor attempted to prove that any reasonable expectation existed that spilled oil from the tanks or piping could reach navigable waters by any method other than the boiler room's condensate pipe tunnel to sewer conduit link. (11) Thus, once the connection between a tank and the boiler room was severed, the discharge of oil from that tank into navigable waters became no longer reasonably expected. For the purpose of determining the applicability of the SPCC regulations to the Respondent's Facility, that second tank and its 30,000 gallons of storage capacity should no longer be considered.

Mr. Gladu testified at the hearing that the first 30,000 gallon tank had been disconnected from the pumping system in 1985 when the Facility was purchased. Tr. at 804-06 (Gladu). The EPA has not disputed this testimony. In fact, it is noted that Mr. Pellerin testified that he accepted Mr. Sawyer's statements that the first tank had been taken out of service by disconnecting the oil lines to and from the tank and to the boiler itself, and that he did not refute Mr. Sawyer's assertion that the piping had been removed in the pump room (pipe shed), which is adjacent to the boiler room. Tr. at 140, 172 (Pellerin). Again, given the Complainant's burden of proof and its decision not to dispute the Respondent's claims concerning the first tank, it must be concluded that the first tank was never a factor in the determination of the applicability of the SPCC regulations. As such, at the time at which the Respondent disconnected the second tank's piping outside the boiler room, only 30,000 gallons of underground storage capacity remained in any relevant sense. As a result, the EPA lost jurisdiction over the Respondent's Facility at that point.

Therefore, the Respondent cannot be found liable for Count I for the dates after it had disconnected the piping for the second tank outside the boiler room. The question remains at what exact date did this disconnection take place. At the hearing, Mr. Gladu testified that the piping was disconnected approximately two or three weeks after the oil spill. Tr. at 770, 807 (Gladu). The EPA did not dispute this testimony. In its March 6, 1997, and April 8, 1998, letters to the EPA, the Respondent stated that "immediately following the spill" it disconnected all the pipes to the second tank. Complainant's Exb. 20; Respondent's Exb. 1. As two weeks after the oil spill would fall on October 31, 1996, I have chosen that date as the last date of violation of the SPCC regulations by the Respondent. As such, the Respondent is found liable for Count I of the Complaint through October 31, 1996.

The argument could be made that the language of the SPCC regulations at 40 C.F.R. § 112.3(b), stating that "[o]wners or operators ... that have discharged **or** could reasonably be expected to discharge oil in harmful quantities," relieves the Complainant of proving that the second tank was reasonably expected to discharge oil, required by § 112.1(b), for periods after the October 17, 1996, oil spill. In other words, once a facility has spilled, it must meet the SPCC Plan requirements of § 112.3(b) no matter how little storage capacity it might have that could

reasonably be expected to discharge oil in harmful quantities into navigable waters. Focusing solely on the language of § 112.3(b), it appears that the Respondent would clearly be under an obligation to prepare and implement an SPCC Plan after the spill, irrespective of the location of its tanks or the reasonableness of any expectation of discharge into navigable waters.

However, the provisions of §§ 112.1 and 112.3 must be considered in this analysis. First, it is noted that § 112.1 sets forth the general applicability of 40 C.F.R. Part 112, the SPCC regulations. Sections 112.1(b) and (d) delineate the basic jurisdictional thresholds for the SPCC Rule, defining which facilities are contemplated by the Rule and which are not contemplated or are not subject to the jurisdiction of the EPA. On the other hand, § 112.3 is a requirements section that delineates under what circumstances a regulated entity under the SPCC Rule must submit an SPCC Plan. As a result, the requirements of § 112.3 cannot be considered until a determination is made that the SPCC Rule in fact applies to a facility. If the jurisdictional requirements of §§ 112.1(b) and (d) are not met, the EPA cannot take refuge in the more broadly written language of Section 112.3. It is noted that the EPA, in its Memorandum in Support of its Motion for Accelerated Decision, recognizes that § 112.3's requirement to prepare and implement an SPCC Plan applies to "owners of covered facilities which have discharged or could reasonably be expected to discharge oil in harmful quantities" (emphasis added). Complainant's Memorandum of Law in Support of its Motion for Partial Accelerated Decision on Liability at 5.

As such, the disjunctive language of § 112.3(b) cannot be used to relieve the Complainant from proving that at least two of the Respondent's tanks, at all times, could have been reasonably expected to discharge harmful quantities of oil into navigable waters. To hold otherwise would allow the EPA to impose SPCC requirements on a hypothetical facility with 42,001 gallons of storage capacity, even if **none** of the oil could reasonably be expected to discharge into navigable waters, so long as that facility had discharged oil to navigable waters on a prior occasion. Such an interpretation would be contrary to the stated goals and objectives of the SPCC Program, to protect the nation's navigable waters, and would impose an unfair burden on both the EPA and industry.

Count II

Count II of the Complaint charges the Respondent with violating 40 C.F.R. § 112.5(a) and Section 311(j)(1) of the Clean Water Act by failing to have prepared an SPCC Plan for its Facility from October 16, 1997, through April 16, 1998, and failing to have implemented the SPCC Plan within six months of the October 16, 1997, installation of a 20,000 gallon above-ground oil storage tank. The parties agree on the respective dates of the installation of the above-ground tank, the preparation of the SPCC Plan and the implementation of the Plan. Complainant's Exb. 5 (Stipulations 31, 32); Tr. at 145 (Pellerin). What is at issue in this Count is whether the Respondent's SPCC Plan is a new plan, requiring it to follow the mandates of 40 C.F.R. § 112.3(b), or an amended plan, requiring it to follow the mandates of 40 C.F.R. § 112.5(a).

In its post-hearing briefs, the Respondent argues that the EPA does not have jurisdiction over the acts alleged in Count II. The Respondent's argument is twofold. First, the Respondent asserts that the EPA never had jurisdiction over the Facility and that the EPA is attempting to bootstrap jurisdiction where none existed. In the alternative, the Respondent argues that once its Facility had less than 42,000 gallons of underground buried storage capacity, when it disconnected its second tank in late October of 1996 or when it removed all three tanks in July of 1997, the EPA lost jurisdiction over the Facility. Once an above-ground tank was installed and the EPA obtained jurisdiction, argues the Respondent, a new plan, rather than an amended plan, was appropriate. Finally, the Respondent argues that an amended SPCC Plan was not required because the new above-ground storage tank does not materially affect the Facility's potential for an oil discharge into a waterway. In the alternative, the Respondent argues that an SPCC Plan is not required for the above-ground tank because, as with the underground tank, there is no reasonable expectation that oil will discharge to a navigable water.

The EPA, on the other hand, argues in its post-hearing briefs that, once the Respondent "began operations" in 1985, it was subject to the requirements of the SPCC Rules, and that it remained subject to the SPCC Rules until the three 30,000 gallon underground storage tanks were removed on July 14, 1997. In this regard, the EPA contends that the Respondent did not "begin operations" within the meaning of § 112.3(b) with the installation of the above-ground tank by virtue of a three-month lapse between the removal of the three underground oil storage tanks with a capacity subjecting the Facility to the SPCC regulations with an above-ground tank which also subjects the Facility to the SPCC regulations. Because it replaced its three underground tanks, which required a Plan, with an above-ground tank, which also required a Plan, such a change clearly called for an amendment rather than a new plan. The EPA contends that a construction of the SPCC regulations which would allow a facility to delay preparing an SPCC Plan if there is any lapse between the removal of one tank(s) and the replacement with another tank(s), particularly where the lapse is completely within a respondent's control, would defeat the purpose of the SPCC regulations which is to provide for the prevention and containment of oil spills. The EPA asserts that the Respondent's failure to prepare an SPCC Plan from 1985 to July 14, 1997, in violation of § 112.3(b), should not be used to excuse the Respondent from meeting the requirements and deadlines for an amended Plan. Finally, the EPA asserts that the installation of the above-ground storage tank was a change in the Respondent's Facility which materially affected the Facility's potential for a discharge into navigable waters.

In its Reply Brief, the Respondent argues that the proper approach to determining whether an amendment or a new plan is required would focus on when the EPA had jurisdiction to require an SPCC Plan, not when the Facility began operations, as argued by the EPA. Finally, the EPA, in its Reply Brief, reiterates its argument that because the Respondent had been subject to the SPCC Rules from 1985 to July of 1997, its replacement of the underground tanks with an above-ground tank was required to meet the deadlines of Section 112.5 rather than 112.3.

I find that the Respondent's SPCC Plan for its above-ground storage tank is more accurately considered subject to the timing requirements of a new plan, rather than the timing requirements of an amendment. As such, the Respondent was not required to meet the deadlines imposed by 40 C.F.R. § 112.5(a) and, thus, cannot be held liable for Count II.

As determined by the above adjudication of Count I, the Respondent ceased to have the requisite storage capacity with a reasonable expectation of discharge to navigable waters on November 1, 1996. The Respondent installed its 20,000 gallon above-ground oil storage tank on October 16, 1997. As a result, over eleven months passed during which the Respondent was not subject to the requirements of the SPCC regulations. The governing SPCC regulations at 40 C.F.R. § 112.1(d)(2) state, in pertinent part, "[t]his part does not apply to ... [t]hose facilities [at which]... [t]he underground buried storage capacity ... is 42,000 gallons or less of oil." Clearly, the language "this part does not apply" imparts a total severance of a facility's obligations under the SPCC regulations. Therefore, for nearly one full year, from November 1, 1996, to October 16, 1997, the Respondent had no obligations under, and was not even contemplated by, the SPCC regulations. We now turn to the issue of whether, in light of this separation, an amended plan or a new plan is more appropriate.

The SPCC regulations at 40 C.F.R. § 112.3 sets forth the requirements for the preparation of a new SPCC Plan. This section focuses on the date on which a facility becomes operational in determining the appropriate deadlines for the preparation and implementation of its new plan. Conversely, § 112.5, which sets forth the requirements for the amendment of an SPCC Plan, appears to contemplate only changes that occur while a facility is currently operating under continuing requirements of the SPCC Rule. Taken together, the two regulations appear to envision only two scenarios: when a new facility becomes operational, and when a facility, which continues to be subject to the regulations, makes a material change. What the regulations do not expressly address, however, is the situation in this proceeding in which a facility serendipitously moves outside the scope of the SPCC Rule then returns by means of a material change. Likewise, the SPCC

regulations do not expressly address the scenario where a facility, which has been in operation for years, initially becomes subject to the jurisdiction of the EPA or is covered by the SPCC regulations years later, such as when a facility first engages in oil-related activities or adds oil storage capacity so as to meet the jurisdictional threshold. Moreover, no guidance exists, in the form of case law or agency publications, to direct this inquiry.

Nonetheless, conclusions concerning the instant scenario can be reached. The language of § 112.1(d) and its implications of total severance militate toward a determination that, at least in this case, the Respondent's year-long exclusion from the jurisdiction of the EPA and the applicability of the SPCC Rule fully and completely severed any relationship between the Respondent and the EPA under the SPCC regulations. Against this backdrop of divestiture of jurisdiction and finality, it would be illogical and unjust to determine that the Respondent's installation of an above-ground oil storage tank requires an amendment rather than a new plan.

This is not to say that the Respondent should benefit from having violated the SPCC Rule and having not had an SPCC Plan earlier, but a legitimate one-year gap in coverage is simply too great a time period to justify an amendment rather than a new plan. Fairness and logic dictate that the requirements for the Respondent's above-ground tank be that for a new plan. As such, I need not reach the question of the relevance of the Respondent's heating plans at the time it removed its underground tanks and I need not determine whether the three month gap in the summer and fall of 1997 merited a new plan or an amendment. This decision simply holds that a legitimate one-year lapse in the coverage of a facility under the SPCC Rule, followed by a material alteration in the facility's storage system that brings the facility back under the jurisdiction of the SPCC Rule, allows for the promulgation of a new plan rather than just an amendment.

The Respondent's installation of the above-ground tank almost one year after the EPA was divested of its jurisdiction and many years after the Facility began operations is analogous to the situation in which a facility has been in operation for years but initially becomes subject to the jurisdiction of the EPA or is covered by the SPCC regulations years later. As noted above, the SPCC regulations do not expressly address either of these scenarios. The most reasonable interpretation of the SPCC regulations would be to treat the date of the event triggering the applicability of the SPCC regulations as superseding the date that the facility "begins operations" for calculating the time limits for the preparation and implementation of the SPCC Plan. To hold otherwise, would create a nonsensical situation; that is, establishing liability for a violation before the violation occurred.

The record reflects that the Respondent has satisfied the requirements of § 112.3(b) by preparing an SPCC Plan for the above-ground oil storage tank within six months of the tank's installation and fully implementing that Plan within one year after the installation. Complainant's Exb. 5 (Stipulations 31, 32); Tr. at 145 (Pellerin). The EPA does not allege a violation of Section 112.3(b) with respect to the installation of the above-ground tank, the only regulatory section that could apply in view of the foregoing determination.

As a final matter concerning Count II, I note the Respondent's assertion that the SPCC regulations do not apply to its above-ground oil tank because the Facility, due to its location, could not reasonably be expected to discharge oil into navigable waters of the United States. Although this question is now moot, I find no merit to the Respondent's argument. First, it is noted that the storage capacity of the above-ground tank exceeds the jurisdictional threshold of 1,320 gallons. 40 C.F.R. § 112.1(d)(2)(ii). Second, inasmuch as the piping from this tank goes to the boiler in the boiler room where there is a condensate pipe tunnel leading to the sewer conduit, there is a reasonable expectation that the requisite oil storage capacity could be discharged from the Facility into a navigable water due to the Facility's location. 40 C.F.R. § 112.1(d)(1)(i). Also, the Facility, in fact, has discharged oil in harmful quantities into a navigable water. As such, the Respondent's Facility clearly is not exempt from the jurisdiction of the EPA and is covered by the SPCC regulations. 40 C.F.R. §§ 112.1, 112.3(b).

Count III

Count III of the Complaint alleges that the Respondent violated Section 311(b)(3) of the Clean Water Act for discharging oil into or upon a navigable water of the United States in a quantity that has been determined to be harmful. Specifically, the Complaint alleges that on October 17, 1996, the Respondent's Facility discharged approximately 800 to 1,200 gallons of number six heating oil and that a significant portion of this oil entered Gully Brook or was discharged onto adjoining shorelines. The EPA further alleges that the October 17, 1996, discharge of oil from the Respondent's Facility caused a sheen upon the surface of Gully Brook and, therefore, was of sufficient quantity to violate Section 311(b)(3) of the Act.

Section 311(b)(3) of the Clean Water Act prohibits "[t]he discharge of oil or hazardous substances ... into or upon the navigable waters of the United States, adjoining shorelines..." Section 311(b)(4) authorizes the EPA to determine "those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States." [(12)] The EPA has defined the applicable quantities under Section 311(b)(4) of the Act to be those that "[c]ause 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 adjoining shorelines." 40 C.F.R. § 110.3(b).

The Respondent has stipulated that oil from its October 17, 1996, spill flowed to a sewer line and the CSO at Gully Brook and that one of the Respondent's co-owners, Mr. Sawyer, observed what appeared to be oil in Gully Brook. Complainant's Exb. 5 (Stipulations 12, 14, 16). Nonetheless, in response to the EPA's Motion for Accelerated Decision as to Liability for Count III, the Respondent claimed that it could not be found liable for discharging oil into navigable waters for two reasons. First, the Respondent argued that Gully Brook, being a "manmade sewage detention basin," is not a navigable water. At the hearing, the Respondent recanted that argument, admitting that Gully Brook (the body of water beyond the weir in the CSO and not the sewer conduit or sewer line) is indeed a navigable water of the United States, as I had previously found in the Accelerated Decision. [(13)] Tr. at 683-85, 853 (Respondent's counsel); Respondent's Post-Hearing Brief p. 15.

Second, the Respondent claimed that any oil that might have entered Gully Brook did not do so in sufficient quantities to be considered harmful under 40 C.F.R. § 110.3(b). The Respondent disputed the EPA's allegations that the spilled oil had caused a sheen or discoloration upon the surface of Gully Brook, arguing that the EPA's photographs were insufficient to demonstrate the presence of such a sheen. Again, at the hearing, in the face of overwhelming evidence that harmful quantities of oil, as defined in 40 C.F.R. § 110.3(b), had entered Gully Brook, the Respondent indicated that the issue was no longer in dispute. [(14)] Tr. at 683-85, 824 (Respondent's counsel). Regardless of any admissions made by the Respondent at the hearing, I find that the testimony and documentary evidence presented at the hearing unequivocally establishes that the Respondent's Facility discharged oil into Gully Brook, a navigable water, which caused a sheen upon the surface of the water and, therefore, was of sufficient quantity to violate Section 311(b)(3) of the Clean Water Act. As such, the EPA has established all factual elements of its prima facie case to establish the Respondent's liability for Count III.

The Respondent invokes one final legal argument against liability for Count III of the Complaint, arguing that the fact that the oil from the Respondent's Facility flowed through a municipal sewer line prior to reaching Gully Brook absolves it of responsibility and liability for discharging oil into Gully Brook, a navigable water. The issue, as characterized by the Respondent in its closing argument, is whether the path of the oil through a city sewer line eliminates "the causation requirement of the ... Clean Water Act." Tr. at 853 (Respondent's Closing Argument). In essence, then, the Respondent argues that it is guilty of spilling oil into a municipal sewer line, but not of violating the Clean Water Act's

prohibition against discharging oil into navigable waters. In its Post-Hearing Rebuttal Brief, the Respondent contends that "while the discharge may constitute a violation of pre-treatment standards, [footnote] 2 it is not clear that the same discharge constitutes a discharge to a navigable waterway where, as here, the oil was discharged into the waterway via a permit that allows untreated sewage and effluent to enter the waterway as part of normal operations." [(15)] Respondent's Post-Hearing Rebuttal Brief p. 5. Thus, the Respondent argues that the discharge is more properly brought as a pretreatment violation rather than as an alleged discharge to a "navigable water." Respondent's Post-Hearing Rebuttal Brief p. 2.

The EPA responds to this argument with the assertion that no third-party defense exists to liability for penalties imposed under Section 311 of the Clean Water Act. See United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978); United States v. Marathon Pipe Line Company, 589 F.2d 1305, 1308-1309 (7th Cir. 1978). Complainant's Post-Hearing Brief p. 20-21. In addition, the EPA cites various federal court decisions that impose liability for discharges that reach navigable waters through sewer systems or other manmade structures. See United States v. Velsicol Chemical Corp., 438 F.Supp. 945, 947 (W. D. Tenn. 1976); Anglo Fabrics Co. and Industrial Risk Insurers v. U. S., 1981 U.S. Ct. Cl. LEXIS 1315 [*22] (1981).

The EPA's position regarding this issue is persuasive, and I find no merit to the Respondent's argument. Initially, I point out that the Respondent has cited no relevant authority in support of its position. Both relevant case law and logic contravene the Respondent's claim that the intervention of the sewer system in the oil's pathway to Gully Brook breaks the chain of causation required by the Clean Water Act. As indicated in United States v. Tex-Tow, Inc., supra, at 1313, even a strict liability statute such as the Clean Water Act requires some sort of causation, even if fault is immaterial. Nonetheless, both cause-in-fact and proximate cause, to adopt tort terminology, are easily demonstrated in a case such as this. As indicated in United States v. Tex-Tow, Inc., the occurrence of a spill will suffice to show actual causation whereas the requirement of proximate cause is met when such a spill is foreseeable. See id. at 1314. In the instant case, the Respondent's blown gasket was clearly a factual cause for the eventual discharge into Gully Brook and the Androscoggin River. Moreover, as demonstrated in the discussion of Count I, it was reasonably expected, from both the subjective perspective of the Respondent's witnesses and an objective perspective, that oil spilled in the boiler room of the Respondent's Facility would reach Gully Brook. Finally, other courts have held that a discharge into a municipal treatment system, when such discharge reaches navigable waters after traversing the system, is a *per se* discharge into navigable waters. See United States v. Velsicol Chemical Corp., supra.

Alternative Count III

Inasmuch as I have found the Respondent to be liable for the violation alleged in Count III of the Complaint, there is no need to address the Respondent's alleged liability for Alternate Count III. Nevertheless, I note that the Respondent failed to offer any rebuttal arguments or evidence at the hearing on Alternate Count III, failed to even mention Alternate Count III in its Post-Hearing Brief, and all but admitted to the allegation in its Post-Hearing Reply Brief. Respondent's Reply Brief p. 5. I also note that, although Alternate Count III was alleged in the Amended Complaint and was only alleged in the alternative to Count III, the EPA could have opted to allege the pre-treatment violation as an entirely separate charge. Had that been the case, the Respondent would almost certainly be facing a markedly greater penalty than that which is imposed in this decision. With regard to the Respondent's assertion that the instant discharge is more appropriately characterized as a pretreatment violation (Alternate Count III) rather than a discharge to navigable water violation (Count III), I note that the propriety of the EPA's tactical decision to charge the Respondent with the later charge is beyond the scope of this decision.

Penalty Determination

Section 311(b)(8) of the Clean Water Act sets forth various factors that the EPA

and the Presiding Officer must consider in determining the appropriate amount of the civil administrative penalty for violations of Sections 311(j)(1) and 311(b)(3) of the Act pursuant to the authority of Section 311(b)(6)(B)(ii) of the Act. Unlike many of the other federal environmental statutes, there are no regulatory provisions or published agency policies regarding penalty determinations for Clean Water Act violations. As such, the determination of the appropriate penalties for Counts I and III of the Complaint must be made solely by application of the statutory penalty factors listed at Section 311(b)(8) of the Act. Unfortunately, the Clean Water Act does not elaborate as to the application of these factors in determining the appropriate penalty. (16)

The factors in determining the amount of the civil administrative penalty under Section 311(b)(8) of the Clean Water Act are as follows:

> (1) the seriousness of the violation or violations,
> (2) the economic benefit to the violator, if any, resulting from the violation,
> (3) the degree of culpability involved,
> (4) any other penalty for the same incident,
> (5) any history of prior violations,
> (6) the nature, extent, and degree of success of any efforts of the violator to minimize or
> mitigate the effects of the discharge,
> (7) the economic impact of the penalty on the violator, and
> (8) any other matters as justice may require.

33 U.S.C. § 1321(b)(8).

Count I

The EPA proposes a civil administrative penalty in the amount of $25,230 for the Respondent's violation of the SPCC regulations at 40 C.F.R. § 112.3 and Section 311(j) of the Clean Water Act as alleged in Count I of the Complaint. Section 311(b)(6)(B)(ii) of the Clean Water Act establishes an overall limit of $125,000 and a maximum of $10,000 per day for Class II civil penalties for the period before January 31, 1997, and a limit of $137,500 with a daily maximum of $11,000 thereafter.

In its proposed penalty determination for Count I, the EPA first assesses the seriousness of the violation in monetary terms, an amount reached by determining a base penalty, from the Respondent's storage capacity and degree of noncompliance, and adjusting that base penalty by the potential environmental impact of a worst case spill at the facility arising from the violation based on the capacity and degree of noncompliance. The EPA chose $15,000 as its base value of the penalty, concluding that the Respondent had a moderate amount of storage capacity, 90,000 gallons, and that the degree of noncompliance was major because there was no SPCC Plan at all.

I agree with the conclusion that the Respondent's level of noncompliance is properly characterized as "major" because of the Respondent's complete failure to prepare an SPCC Plan. As pointed out by the EPA's expert witness, Mr. Grant, the EPA's Clean Water Act, Section 311, Oil Spill and SPCC Plan Coordinator for Portland, Maine, the degree of noncompliance is considered major because the Respondent had no SPCC Plan at all as compared to having a flawed plan or partially implemented plan. Tr. at 357-58 (Grant). The total absence of an SPCC Plan completely thwarts the stated purpose of Section 311 of the Clean Water Act and the implementing SPCC regulations; that is, to prevent, or at least minimize, the discharge of oil into navigable waters. See Section 311(b) of the Clean Water Act; 40 C.F.R. §§ 112.1(a), (e). As such, the Respondent's violation is one of the most egregious violations of the SPCC regulations.

However, as discussed earlier, I find that the Respondent had only 60,000 gallons of applicable oil storage capacity for purposes of this Count. As such, the EPA's proposed base penalty should be reduced by 16.66% (due to a 33.33% drop in the storage capacity component, which is 50% of the base penalty (1/3 of ½ or 1/6) to $12,500. It is noted that the EPA considered the mitigating factor that the Respondent's tanks were below ground and buried as opposed to above ground in assessing the capacity as "moderate." Tr. at 358 (Grant). This consideration is not

appropriate for application under the violation as found in this decision because the reasonable expectation of oil discharge is not based on a possible spill from the tanks *per se.*

Further, the EPA alleged that the period of noncompliance was 48 months, from June 15, 1993, to July 14,1997. (17) I have concluded, however, that the Respondent's SPCC Plan violation and attendant liability terminated at the end of October 1996, equaling a noncompliance period of 39 and ½ months, or 82.29% of the alleged period of noncompliance. Therefore, the base penalty is appropriately $10,286, which is 82.29% of $12,500.

The second component of the seriousness factor, as assessed by the EPA, is the potential environmental impact of a worst case spill at the Facility. The EPA characterizes the potential environmental impact of the violation as high based on its determinations that there was close proximity to a navigable water, Gully Brook, and that there was a "documented" pathway to that navigable water from the boiler room and the CSO. Tr. at 359 (Grant). The EPA also considered the factor that oil discharged through the sewer system could reach navigable waters through the POTW. Tr. at 359-60 (Grant). As a result of this high potential for harm, the EPA recommends an increase to the base penalty of 25%, an increase with which I disagree. As discussed above, while I find that the Respondent's Facility, due to its location, could reasonably be expected to discharge oil in harmful quantities into a navigable water, I do not find that the potential environmental impact was more than moderate in nature. The pathway between the boiler room and sewer conduit, while somewhat direct, is not shown to be through a "documented" direct route. The discharge of oil into a navigable water through the CSO or POTW, while reasonably expected, is contingent upon other factors, thereby reducing the possibility and possible extent of the worst case scenario. As such, I find that the potential risk to the environment posed by the Respondent's violation of the SPCC regulations is more appropriately characterized as moderate and warranting a 10% increase. Accordingly, the penalty is increased from $10,286 to $11,315.

The next factor considered by the EPA in its proposed calculation is the culpability of the Respondent for the violation, which the EPA concludes to be moderate due to the presence of some environmental sophistication on the part of the Respondent, resulting from its interaction with the Maine DEP concerning its underground tank registration. (18) At the hearing, Mr. Grant testified that he would have ranked the Respondent's culpability as higher had he known of the difficulties that the Maine DEP had encountered with the Respondent's registration and management of its tanks. Tr. at 362 (Grant). I conclude that a culpability determination of moderate is appropriate. The Respondent's interaction with the Maine DEP put it on notice that its oil tanks were subject to regulation and that it had a duty to determine its obligations to the Maine DEP and the EPA. The Respondent has given no indication that it ever attempted to ascertain its full responsibilities as the owner of underground oil tanks. At the same time, though, I decline to follow Mr. Grant's suggestion that the Respondent's culpability be increased due to its errors in tank registration and management. Those activities are beyond the scope of this decision and do not, by themselves, indicate a greater culpability on the part of the Respondent. As a result of the culpability determination of moderate, the penalty of $11,315 will be increased by 25% to $14,144.

Continuing on to the other factors, the EPA has shown no prior related violations on the part of the Respondent, so no adjustment will be made for this statutory factor. Additionally, as the Respondent has paid no other penalties for the Count I violation, and made no effort to mitigate the damage of its violation until well after the fact, no downward adjustment will be made. As the Respondent has not explicitly raised a defense of inability to pay, and in light of the EPA's introduction of a Dun & Bradstreet report indicating that the Respondent can pay the penalty to be assessed, no downward adjustment will be made. Complainant's Exb. 28. An upward adjustment will be made to account for any economic benefit that accrued to the Respondent as a result of its noncompliance with the SPCC Rule. The EPA calculated such benefit to be $1,508 and this amount has not been contested by the Respondent. (19) Because the duration of the violation was 39.5 months, as

opposed to the EPA's alleged 48 months, the benefit will be decreased proportionately to $1,241 and added to the penalty to make a final penalty of $15,385.

Finally, justice does not require that any further adjustment be made for other matters. The Respondent's payment to the Maine DEP is not appropriate for consideration of the penalty for the SPCC Plan violation. The payment was a partial reimbursement for cleanup costs resulting from the spill and is more appropriately considered in an adjustment to the penalty for the spill violation, which is addressed below. Therefore, a penalty of $15,385 is assessed against the Respondent for its violation of 40 C.F.R. § 112.3(b) for failing to develop and implement an SPCC Plan from June 15, 1993, through October 31, 1996.

In its post-hearing briefs, the Respondent takes issue with several facets of the EPA's penalty case for Count I. I will address them *in seriatem*. First, the Respondent argues that the EPA's characterization of the violation as "major" is illogical because the EPA relies on the mere fact of violation to view it as "major." The Respondent mistakenly assumes that its only manner of violating the regulations is to have no SPCC Plan at all. In fact, as noted above, various intermediate violations are possible, from the promulgation of an incomplete plan to the failure to have a plan signed by a professional engineer. The Respondent's violation is the most obvious, but it is also by comparison the most severe. Hence a characterization of "major" is appropriate.

Second, the Respondent opposes the EPA's 25% increase of the penalty due to its characterization of the Respondent's culpability as "moderate," a characterization purportedly based on the Respondent's sophistication and simultaneous lack thereof. Admittedly, the EPA's rationale for its determination could have been more clearly laid out. It appears obvious, though, that the Respondent, while not an entity concentrating in the oil industry, nonetheless had ample opportunity and incentive to investigate its responsibilities as an oil tank owner, particularly in light of the regulatory relationship it maintained with the Maine DEP. The Respondent's lackadaisical approach to its responsibilities to the Maine DEP act only to support a conclusion of "moderate" culpability.

I also note that the Respondent's witness, Mr. Gladu, in an attempt to demonstrate the Respondent's lack of environmental sophistication, testified that after learning about the SPCC regulations from Mr. Pellerin on October 17, 1996, he and Mr. Sawyer sent their wives to the library to find the regulations. Tr. at 768 (Gladu). As pointed out by the EPA on cross-examination, such excursion to the library was unnecessary because a copy of the SPCC regulations had been provided to the Respondent by Mr. Pellerin on October 17, 1996. Tr. at (Pellerin); Complainant's Exbs. 3, 4. Mr. Gladu then refused to deny or affirm that he had received a copy of the SPCC regulations. Tr. at 786 (Gladu). Such action on the part of the Respondent and the testimony of its witnesses discredit its assertions as to the question of culpability.

Next, the Respondent argues that the proposed penalty is disproportionate to the actual events giving rise to the enforcement action. Specifically, the Respondent contends that the penalty comprises an unjustifiably large portion of the Respondent's total worth and may force the sale or re-mortgaging of the Pepperell Mill. In addition, the Respondent objects to the EPA's use of the Dun & Bradstreet report dated October 21, 1996. Complainant's Exb. 28. This issue, the economic impact of the penalty on the violator, will be addressed below in the discussion pertaining to the appropriate penalty for Count III.

Finally, the Respondent focuses on the EPA's failure to take into account the Respondent's efforts to minimize future violations. The Respondent points to its subsequent installation of a state-of-the-art above-ground storage tank with secondary containment and a sophisticated leak detection system. The Respondent also invokes its immediate efforts to minimize the possibility of another violation, such as erecting sandbag berms and disconnecting the piping of the second tank. The Respondent points to its efforts to procure guidance from the EPA concerning its obligations under the SPCC Rule. Even assuming that the Respondent is correct in arguing that the EPA is statutorily required to consider its

mitigation efforts, [(20)] none of the Respondent's alleged mitigation efforts are relevant. The installation of a new tank system and the concurrent implementation of an SPCC Plan both occurred well after the final date of violation, as did the Respondent's efforts to discuss its responsibilities with the EPA. Furthermore, its immediate efforts to minimize future spills speaks to future oil spills, not future SPCC Plan violations and has nothing to do with mitigation efforts for the violation that actually occurred. As such the Respondent's arguments supporting a decrease in the imposed penalty are unavailing.

Count III

In its proposed penalty determination for Count III, the October 17, 1996, oil spill violation, the EPA first ascertains the seriousness of the violation in monetary terms by considering the actual amount of oil entering navigable waters of the United States and the environmental impact of the spill. Relying on the volumetric calculations of its On-Scene Coordinator, Mr. Pellerin, the EPA determined that 600 gallons of oil had been spilled into navigable waters, equating to a moderate spill and a base penalty of $9,000. Considering only the impact of the oil to Gully Brook, the EPA then concluded that the environmental impact of the spill was low, and therefore did not adjust the base penalty upward from the $9,000 base penalty.

I agree, in part, with the EPA's determination concerning the seriousness of the spill, but I reach my conclusions in a different manner. At the hearing, counsel for the Respondent cast sufficient doubt on the accuracy of Mr. Pellerin's calculations, that I refrain from using such calculations and will instead adopt the spill calculations of Mr. Thompson, the Oil and Hazardous Material Waste Specialist at the Maine DEP, who responded to and directed the cleanup of the oil spill. Mr. Thompson testified that he recovered approximately 300 gallons of oil from Gully Brook and the Androscoggin River and that between 50 and 100 gallons were unrecoverable. Tr. at 77-84 (Thompson); Complainant's Exb. 1. As such, I conclude, conservatively, that the approximate volume of the spill into navigable waters was between 350 and 400 gallons rather than the 600 gallons employed by the EPA in its calculations. Although still a moderate spill, I assess a base penalty of $5,625, equaling the proportionate decrease in the amount of oil determined to have reached navigable waters.

However, I do not agree with the EPA's determination that the environmental impact of the spill was low. At the hearing, Mr. Grant testified that he made that determination without knowing that the spill had reached the Androscoggin River and had contaminated the river and its eastern bank for nearly a mile downstream. Tr. at 384-85 (Grant). Given this information, and the fact that not all the oil was able to be recovered from Gully Brook and the Androscoggin River, I find the environmental impact to be moderate to high, warranting a 50% increase to the base penalty. Therefore, the base penalty is appropriately $8,437.

The next factor considered by the EPA in determining its proposed penalty is the culpability of the Respondent in the context of the spill. The EPA concluded that the Respondent's culpability was high due to its lack of secondary containment and its failure to have implemented an SPCC Plan, either of which would likely have mitigated or prevented the contamination of Gully Brook and the Androscoggin River. Although I place little reliance on the Respondent's lack of an SPCC Plan, for which it already has been assessed a substantial penalty, as I discuss further below, I have no compunction about gauging the Respondent's culpability as high in light of the unsafe oil cleanup procedures to which it subjected its employees, along with its delay in allowing the Maine DEP to bring a contractor onto the Facility to initiate mitigation activities. First, photographic and testimonial evidence clearly demonstrates that the Respondent's employees were cleaning the boiler room with kerosene in an unsafe manner, with a great slip and fall risk and little protection from the oil. For example, one of the workers in the boiler room was wearing plastic trash bags on his feet and neither worker had gloves or respiratory equipment. Tr. at 44-45 (Thompson); Complainant's Exb. 34.

As for the Respondent's cooperation with the Maine DEP in terms of entering the

Facility to remove the spilled oil, although contradictory testimony exists as to the Respondent's level of cooperation, I find persuasive the testimony of the EPA's witnesses that the Respondent injected some delay into the cleanup of the Facility. Such delay led to more oil reaching Gully Brook and the Androscoggin River and extended the cleanup to three days. In particular, I refer to the parties' testimony concerning the questions of whether Mr. Sawyer introduced himself to Mr. Thompson on the morning of October 17, 1996, and whether Mr. Gladu or Mr. Sawyer made themselves and the site where the spill originated available to Mr. Thompson in a timely manner. Although there is no dispute that Mr. Sawyer probably assisted Mr. Thompson in spreading an oil absorbent boom across Gully Brook to prevent the oil from spreading during the morning of the spill, it becomes apparent from the testimony of Mr. Thompson and Mr. Sawyer that Mr. Sawyer did not introduce himself to Mr. Thompson as an owner or manager of the Respondent until later in the day of the spill. Tr. at 34, 36-39 (Thompson); Tr. at 720, 740 (Sawyer). Also, the more credible testimony indicates that neither Mr. Gladu nor Mr. Sawyer cooperated fully by showing Mr. Thompson the site where the spill originated until several hours after Mr. Thompson sought to contact the owners through a receptionist. Tr. at 49-50 (Thompson). Later in the hearing, Mr. Gladu's testimony indicated that the receptionist must have been a wife of one of the two owners. Tr. at 763 (Gladu). Further, Mr. Thompson credibly testified that the Respondent did not give him permission to clean up the spill until 5 p.m. on the day of the spill. Tr. at 57-58 (Thompson). As such, I find the Respondent's culpability to be high and increase the penalty by 50% to $12,655.

The next factor considered by the EPA in its determination was any relevant history of violations for the Respondent and, having no evidence of such, the EPA made no upward adjustments to the penalty. The EPA then considered any mitigation attempts made by the Respondent with respect to the oil spill. As indicated by Mr. Grant's testimony and accompanying memorandum concerning the Count III penalty, the EPA viewed mitigation as a negative factor, meaning that mitigation efforts and financial responsibility by the Respondent were required and any lack of such militated toward an increase in the penalty. Tr. at 386 (Grant); Complainant's Exb. 26. Mr. Grant indicated that he had initially believed the Respondent to have covered the costs of cleanup and mitigation and therefore did not increase the penalty. Mr. Grant testified that, after learning at the hearing that the Maine DEP had initiated the cleanup and had paid for the costs, subject to the Oil Tank Trust Fund, he would have increased the penalty due to the Respondent's failure to take immediate financial responsibility. Tr. at 386 (Grant).

First, I do not agree with the application of the mitigation factor only as a negative factor. The statute requires consideration of mitigation efforts, but does not dictate that such efforts, or lack thereof, be approached only from a negative perspective. Second, the reimbursement paid by the Respondent to the Maine DEP for the cleanup, which I discuss below, would seem to meet Mr. Grant's requirements of financial responsibility and preclude the imposition of an additional penalty for this factor. However, the Respondent's reimbursement to the Maine DEP was not made until after the hearing and therefore was not considered by Mr. Grant in his testimony based on the facts at the time of the hearing. In other words, Mr. Grant's initial belief that an increase of the penalty was not warranted because the Respondent had assumed some financial responsibility for the cleanup more accurately depicts the facts which are now before me in the record. As such, I decline to increase the base penalty from $12,655 for any perceived lack of mitigation by the Respondent.

The EPA then considered three adjustment factors that ultimately did not affect the penalty amount, the civil monetary inflation rule, economic benefit to the Respondent for noncompliance, and the economic impact on the Respondent. I agree with the EPA's conclusions as to these factors. Because the spill occurred prior to January 30, 1997, no inflation adjustment is appropriate. The Respondent's spill was entirely accidental and, although it could have been averted through the implementation of an SPCC Plan, the spill itself resulted in no economic benefit for the Respondent. Finally, as indicated in the discussion for the Count I penalty, the EPA has demonstrated the Respondent's ability to pay the proposed penalty, particularly given the fact that the penalty ultimately imposed will be markedly lower than that proposed by the EPA.

Finally, we come to the issue of other matters as justice may require. Although this adjustment option is ordinarily exercised only in rare circumstances, the Respondent's situation, specifically its reimbursement of a portion of the spill cleanup costs to the Maine DEP, militates toward such an adjustment. As a preliminary matter, I note my agreement with the EPA's contention that the Respondent's payment to the Maine DEP should not be considered under the statutory factor of "any other penalty for the same incident." because the reimbursement for cleanup costs does not constitute a "penalty" as contemplated by Section 311(b)(8) of the Clean Water Act. As pointed out by the EPA, this point is demonstrated by the distinction between reimbursement and penalty found in Section 311(c) of the Clean Water Act, which addresses federal removal authority and national contingency planning for oil spill cleanup. Nonetheless, fairness dictates that I not totally ignore the Respondent's $10,876.65 payment to the Maine DEP. I find that the Respondent's payment to the Maine DEP, to borrow tax terminology, is more appropriately treated as a deduction rather than a credit. The payment of $10,876 is a sizeable amount of money. However, I observe that this amount represents less than one-half of the cleanup costs. Complainant's Exb. 2. Accordingly, the base penalty for the oil spill will be decreased by 25% pursuant to the statutory factor of "other matters as justice may require" to a total penalty of $ 9,491.

At this juncture, it is emphasized to the Respondent that the statutory penalty factors in the Clean Water Act are intended to further a number of important public policy goals. As noted by the Supreme Court in Tull v. United States, 481 U.S. 412, 423 (1987), the legislative history of the Act reflects that the courts, in imposing civil penalties, may consider the need for retribution and deterrence, in addition to restitution. The courts "may also seek to deter future violations by basing the penalty on its economic impact." Id. While the need for retribution is not suggested in the instant case, the record indicates that the goals of deterring future violations as well as restitution would be well served by imposition of the above determined civil administrative penalty. Tr. at 787 (Gladu); Complainant's Exb. 2.

As with the penalty calculation for the SPCC Plan violation, the Respondent takes issue with many of the EPA's applications of the statutory penalty factors. The Respondent, both at the hearing and in its post-hearing briefs, focused heavily on the fact that Gully Brook was a frequent recipient of storm water and sewer overflows and was greatly degraded. It would be unjust, argues the Respondent, to impose a significant penalty on it for spilling a small quantity of oil into a water body that is systematically, and with the accession of the EPA, polluted with storm water and raw sewage. For a number of reasons, however, I find the Respondent's argument to be unavailing.

First, as demonstrated at the hearing, the Respondent's spill affected not only Gully Brook, but also a lengthy portion of the Androscoggin River. However degraded Gully Brook may or may not be, there was no evidence adduced at the hearing as to any degradation to the Androscoggin River resulting from the storm water and sewer overflows. Second, as was testified to by Mr. Richardson, the supervisor of the LAWPCA plant and an undisputed expert in environmental engineering and wastewater treatment, the introduction of organic wastes, at certain levels of dilution, may not necessarily be harmful to a particular body of water. Tr. at 567 (Richardson). Although such a position cannot be taken to argue that Gully Brook was in pristine condition at the time of the Respondent's spill, I reject the argument that it was so degraded that the introduction of heating oil would not have further damaged that particular environment. Finally, however degraded Gully Brook may have been, its condition cannot be used to excuse the fact that the Respondent introduced harmful quantities of oil to navigable waters of the United States in violation of Section 311(b)(3) of the Clean Water Act.

The Respondent also argues that the proposed penalty is disproportionate to the actual events giving rise to the enforcement action and that it fails to account for the Respondent's cleanup costs of over $13,000, which include a $10,876.65 reimbursement payment made to the Maine DEP. Specifically, the Respondent argues that the penalty comprises an unjustifiably large portion of the Respondent's total worth and may force the sale or re-mortgaging of the Pepperell Mill. In support of

this argument, the Respondent, while not waiving its objection to the Dun & Bradstreet report introduced by the EPA at the hearing, points out that the report shows that the proposed penalty is approximately one-sixth of the value of the entire equity in the mill complex. Complainant's Exb. 28. The Respondent objects to the Dun & Bradstreet report dated October 21, 1996, on the ground that the report in question is outdated and unauthenticated information based on unverified hearsay statements.

First, I note that this allegation concerning the economic impact of the penalty on the violator is raised for the first time on post-hearing briefing and that there is no accompanying motion to reopen the record based on the proffer of new and material evidence which was not available at the time of the hearing. In its Post-Hearing Brief, the Respondent acknowledges that it has not submitted financial information nor has it asked me to consider its economic position when imposing a penalty. At the hearing, the Respondent repeatedly stated that it was not contesting its ability to pay the proposed penalty of $47,930 or that it would go bankrupt by payment of the penalty. Tr. at 394 (Respondent's counsel). If that is the case, then the Respondent clearly has the ability to pay a penalty of $24,876, less than fifty-two percent of the EPA's proposed penalty. Second, as discussed above, the Respondent's reimbursement to the Maine DEP has been taken into account in my determination of an appropriate penalty, leading to a 25% reduction.

I find no merit to the Respondent's objection to the admission of the Dun & Bradstreet report dated October 21, 1996. The report is relevant to the penalty factor of the economic impact of the penalty on the violator, and the Respondent has not presented any evidence to demonstrate that the report is unreliable. See Section 22.22 (a) of the Rules of Practice.

Next, the Respondent argues that the EPA impermissibly enhanced the Count III penalty due to the Respondent's failure to have an SPCC Plan, a violation for which the Respondent was penalized under Count I. The EPA alleged a culpability level of moderate with respect to the spill violation, in part due to the Respondent's failure to have implemented an SPCC Plan. Considering the lack of an SPCC Plan under Count III, argues the Respondent, would be tantamount to imposing a double penalty for the SPCC Plan violation. However, the lack of an SPCC Plan is relevant to the Respondent's culpability and, contrary to its claims, is not impermissible under the Clean Water Act. Although relying primarily on the lack of an SPCC Plan for a determination of moderate culpability may be unjust in light of Count I, that is not the case here. Unlike the EPA, my determination of moderate culpability for the oil spill rests on a variety of grounds, including the Respondent's lack of cooperation on the day of the spill, the unsafe conditions the Respondent's workers were subjected to during the cleanup, and the Respondent's lack of an SPCC Plan. Moreover, even if I had not considered the lack of an SPCC Plan, I still would not have made a determination of lower culpability.

The Respondent then argues that too small an amount of oil spilled into the outside environment, eschewing the calculations and observations of Mr. Pellerin and Mr. Thompson, and relying on Mr. Gladu's statement that "I can only assume it was a small amount." I also note that Mr. Sawyer asserted in his testimony that "very little oil" entered Gully Brook. Tr. at 742 (Sawyer). Although Mr. Pellerin's calculations were thrown into some doubt during cross-examination, I have relied on Mr. Thompson's estimates entirely when determining the amount of oil spilled into the navigable waters. Mr. Thompson estimated that the Maine DEP and its contractor recovered approximately 300 gallons of oil, with 50 to100 gallons of oil remaining unrecoverable. Tr. at 77-84 (Thompson); Complainant's Exb. 1. The Respondent has offered neither a logical argument nor evidence that would support the abandonment of Mr. Thompson's estimates and the reliance on Mr. Gladu's and Mr. Sawyer's limited and clearly biased testimony. Photographic, videographic, and documentary evidence all contradict the Respondent's claims that only "a small amount" of oil or "very little oil, if any," spilled into navigable waters. Complainant's Exbs. 1, 3, 34. With regard to Mr. Thompson's characterization of the spill as being "minor" during his interviews with the television news reporters, I note that such characterization is not determinative of the seriousness of the spill for EPA penalty purposes and that the record, including the videotapes and Mr. Thompson's

testimony, indicates that this assessment was made when comparing the spill in question to a recent local spill of oil from a tanker in the approximate amount of 179,000 gallons. Tr. at 655-57 (Thompson); Complainant's Exb. 34.

Moreover, in making the determination that at least 350 to 400 gallons entered navigable waters, I make the following observation. There is no dispute that 100 to 200 gallons of oil reached the POTW operated by LAWPCA. Complainant's Exb. 5 (Stipulation 18). The record reflects that early on the morning of the October 17, 1996, spill, the inlet pipe to the sewer line leading to the POTW was blocked with bales of hay. Tr. at 34-35 (Thompson); Complainant's Exb. 1. Thus, virtually all the oil mixed with the water exiting the sewer conduit after the morning of the spill entered Gully Brook via the CSO rather than the sewer line. Also, the record reflects that very little, if any, oil reached the POTW after the day of the spill while oil continued to enter Gully Brook for three days. Tr. at 60-62 (Thompson); Complainant's Exb. 1. As such, it is only reasonable to assume that the amount of oil entering Gully Brook far exceeded the amount reaching the POTW. Therefore, the amount of 350 to 400 gallons is considered to be a rather conservative estimate of the amount of oil entering navigable waters.

Finally, the Respondent argues that other purported violations that the EPA referenced at the hearing are neither relevant nor probative to the Count III penalty. As I did not consider these alleged acts, the Respondent's argument is moot. As such, I find that the appropriate penalty for the Respondent's violation of Section 311(b)(3) of the Clean Water Act is $9,491.

In conclusion, it is my determination that the appropriate and reasonable penalty for Count I, the Respondent's violation of 40 C.F.R. § 112.3 for failing to develop and implement an SPCC Plan, is $15,385. Additionally, the appropriate and reasonable penalty for Count III, the Respondent's violation of Section 311(b)(3) of the Clean Water Act for discharging oil in harmful quantities into the navigable waters of the United States, is $9,491. The total penalty imposed on the Respondent is $24,876.

CONCLUSIONS OF LAW

1. The October 9, 1998, Accelerated Decision is incorporated herein by reference. See 40 C.F.R. § 22.20.
2. The Respondent violated Section 311(j)(1) of the Clean Water Act and the implementing SPCC regulations at 40 C.F.R. Part 112 for the period from December 1985 to October 31, 1996, for its failure to prepare and implement an SPCC Plan.
3. From November 1, 1996, to July 14, 1997, the Respondent's Facility was not subject to the jurisdiction of the EPA because the underground buried oil storage capacity of the Facility which could reasonably be expected to discharge to navigable waters was 30,000 gallons, which is below the jurisdictional threshold of 42,000 gallons. 40 C.F.R.§ 112.1. Thus, the Respondent was not liable for violation of Section 311(j)(1) of the Clean Water Act and 40 C.F.R. Part 112 during such period of time.
4. As the Respondent's Facility was not subject to the EPA's jurisdiction for SPCC regulation purposes for the period from November 1, 1996, to October 16, 1997, the Respondent was not required to prepare and implement an amended SPCC Plan as opposed to a new SPCC Plan for its above-ground oil tank installed on October 16, 1997. 40 C.F.R.§§ 112.1, 112.3, 112.5. Thus, the Respondent is not liable for an SPCC Plan violation as alleged in Count II of the Complaint.
5. On October 17, 1996, the Respondent violated Section 311(b)(3) of the Clean Water Act by discharging oil into a navigable water of the United States in a quantity that has been determined to be harmful under the provisions of 40 C.F.R. § 110.3.
6. An appropriate and reasonable civil administrative penalty for the Respondent's violation of Section 311(j)(1) of the Clean Water Act and the implementing SPCC regulations at 40 C.F.R. Part 112 for its failure to prepare and implement an SPCC Plan is $15,385. Section 311(b)(8) of the Clean Water Act, 33 U.S.C. §1321(b)(8).
7. An appropriate and reasonable civil administrative penalty for the Respondent's violation of Section 311(j)(1) of the Clean Water Act for its discharge of oil into a navigable water as alleged in Count III of the Complaint is $ 9,491. Section 311(b)(8) of the Clean Water Act, 33 U.S.C. §1321(b)(8).

ORDER

1. The Respondent, Pepperell Associates, is assessed a civil administrative penalty in the amount of $24,876.
2. Payment of the full amount of this civil penalty shall be made within sixty

(60) days of the service date of the final order by submitting a certified or cashier's check in the amount of $24,876, payable to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
EPA - Region I
P.O. Box 360197M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and EPA docket number, and the Respondent's name and address, must accompany the check.
4. If the Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 102.13(b), (c), (e).

Appeal Rights

Pursuant to 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within twenty (20) days of service of this Order, or the Environmental Appeals Board elects to review this decision *sua sponte*.

Original signed by undersigned
_____
Barbara A. Gunning
Administrative Law Judge

Dated: 2-26-99
Washington, DC

1. The Complaint was amended by Order on September 16, 1998, upon motion by the EPA. The term "Complaint" hereafter refers to the First Amended Complaint.

2. The EPA alleges that the December 9, 1998, affidavit of Mr. Gladu was altered after he signed it because the parenthetical addition in paragraph 4 was not acknowledged by Mr. Gladu and is clearly not his handwriting. Such alleged defect in the document is not considered fatal as it does not alter the meaning of the typed portion of the affidavit and only serves to limit the amount of the Respondent's alleged costs for its own cleanup expenses.

3. From a substantive perspective, Section 22.28(a) of the Rules of Practice requires the following:

> (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing.

4. In fact, at the hearing, I specifically declined to hear information about the Consent Agreement with the Maine DEP until the agreement had been agreed to and finalized.

5. The Respondent states that if the Agreement had been fully executed by both parties before the December 10, 1998, briefing deadline, the Respondent would have submitted it to the court at that time. Respondent's Reply Memorandum in Support of Motion to Reopen.

6. Pursuant to Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20, an Administrative Law Judge, upon motion of any party or *sua sponte*, may render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. When an

accelerated decision is rendered on less than all issues, the Administrative Law Judge issues an interlocutory order specifying the facts which appear substantially uncontroverted and the issues upon which the hearing will proceed. Unfortunately, the issuance of interlocutory orders on motions for accelerated decisions sometimes creates the conundrum of dealing with new evidence or arguments first adduced at the hearing that concern issues already decided in the interlocutory orders. Although it is incumbent upon the parties to raise any genuine question of material fact or to contest judgment as a matter of law at the time of the motion for accelerated decision, occasionally new evidence or arguments concerning the adjudicated issue surface at the hearing. See Section 22.16(b) of the Rules of Practice, 40 C.F.R. § 22.16(b). Also, a similar dilemma arises when evidence or arguments are presented regarding a penalty factor during the penalty phase of the hearing that directly relate to the previously decided liability issue. Such new evidence or arguments may present fairness and undue prejudice problems as the opposing party, relying on the interlocutory order, may not be prepared to address this new evidence or arguments.

7. The EPA references the Environmental Appeals Board's ("EAB") promulgation of its standard for reconsideration as appropriate guidance given the lack of direction in the Rules of Practice. As stated in Southern Timber Products, Inc., 3 E.A.D. 880, 889 (1992):

> [a] motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

8. Ironically, the Respondent's Post-Hearing Brief begins with the claim "[t]his is a penalty case." Regardless of repeated protestations to the contrary, the Respondent has repeatedly attempted to relitigate liability issues for Count I. Despite my inclination to hold the Respondent at its word and focus solely on penalty issues, I will consider the evidence from both liability and penalty perspectives, something the Respondent should have been more forthright about throughout this proceeding.

9. In its Post-Hearing Brief, the Respondent states that there is no dispute "that oil from the boiler room ended up in the sewer pipe." Respondent's Post-Hearing Brief p.13.

10. The powers and responsibilities of federal administrative law judges are defined in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559 (1997). The EPA's procedural rules governing administrative proceedings are found in the Rules of Practice at 40 C.F.R. §§ 22.01-22.32.

11. Had the Complainant attempted and succeeded in demonstrating the reasonable expectation of oil migrating above ground or seeping through the soil around the tanks to navigable waters, this concern would have been moot. However, the only pathway to navigable waters that was alleged was through the sewer conduit under the condensate pipe tunnel from the boiler room. Although Mr. Pellerin's testimony vaguely referenced the possibility that the catch basins near the delivery area could drain to the sewer conduit, no probative evidence was presented as to this issue. Tr. at 146 (Pellerin). The site diagram indicates that the pipe shed (pump room) extends over a pipe tunnel but the EPA presented no evidence to show that this pipe tunnel leads to the sewer line.

12. Authority to promulgate these regulations was delegated to the Administrator of the EPA by Executive Order 11735, 38 Fed. Reg. 21243 on August 7, 1993.

13. At the hearing, the Respondent unpersuasively argued that its earlier denial of Gully Brook's status as a navigable water was based on its misconception, of which it has been disabused, that Gully Brook referred only to closed sewer pipes and not the open waterway that actually exists. Tr. at 683-84, 844-853 (Respondent's counsel). Moreover, evidence adduced at the hearing demonstrated that the oil from the spill made its way to the Androscoggin River, which connects to the Atlantic

Ocean.

14. In fact, testimony from the Respondent's witnesses at the hearing casts considerable doubt upon the credibility of the Respondent's earlier claims on this issue in its response to the Complainant's Motion for Accelerated Decision. Mr. Sawyer, one of the Respondent's co-owners, testified that he aided the cleanup of Gully Brook. Given the obvious sheen of oil on the surface of Gully Brook, as demonstrated by the videotaped news excerpts, it strains the bounds of credulity to assert that the Respondent truly believed its claims that oil did not enter Gully Brook in harmful quantities.

15. In its footnote, the Respondent asserts its opposition to the EPA's proposed penalty of $10,000 for Alternative Count III which is the statutory maximum penalty.

16. It is noted that neither at the hearing nor in its post-hearing briefs did the Respondent take issue with the methodology employed by the EPA in determining the penalty. Rather, the Respondent objected to the numerical values assigned to various criteria by the EPA, as well as the EPA's characterization of certain criteria.

17. At the hearing, Mr. Grant testified that he calculated the proposed penalty for Count I based on the time period from June 1993 through July 14, 1997, a period of 48 months. The Complaint alleges that the period of violation for purposes of calculating a penalty is from June 1993 through July 1997. Complaint p. 4. However, the EPA, in its Post-Hearing Brief, now states that it based its penalty calculation on the period of time from May 21, 1993, to July 14, 1997, excluding the period from September 30, through November 4, 1996. Complainant's Post-Hearing Brief p. 27, f/n 13. The EPA's lack of certainty in alleging the period of violation for penalty calculation purposes is disconcerting. For purposes of this decision, I am assuming the EPA based the amount of its proposed penalty on the period of time from June 15, 1993, through July 14, 1997, a period of 48 months.

18. The Respondent takes great issue with the EPA's determination that the Respondent was moderately sophisticated in environmental matters. These arguments will be addressed following the description of the penalty determination.

19. The EPA proposed an addition of $281 pursuant to the civil monetary penalty inflation rule based on an alleged six months of penalty after January 30, 1997. Tr. at 369 (Grant). As the violation did not extend beyond January 30, 1997, no adjustment for inflation is warranted.

20. The statutory clause upon which the Respondent appears to rely states "the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge." Section 311(b)(8) of the Clean Water Act. This factor appears only to apply to actual spill violations rather than other violations such as SPCC Plan violations.