UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
	)	**Docket No. CWA-7-2000-0015**
ALDI, Inc., Kansas	**)**	
	)	
Respondent,	**)**	

Order on Motions

In this proceeding under Section 311(b)(6) of the Clean Water Act, ("CWA"), 33 U.S.C. § 1321(b)(6), EPA alleges that the Respondent, ALDI, Inc., Kansas, ("ALDI"), violated Section 311 of the CWA by discharging diesel fuel, on or about December 7, 1998, into an unnamed tributary of the Little Cedar, which is itself a tributary of the Kansas River. In its Answer, ALDI "admitted" that on or about the date charged approximately 2,000 gallons of diesel fuel was discharged into an unnamed tributary of the Little Cedar, but that the fuel was discharged by Amoco Oil Company, not ALDI.[1] The discharge was attributable, ALDI maintains, to the negligent overfilling of the tank by the Amoco delivery driver.

On September 21, 2000, ALDI, through Counsel, filed a Motion to Dismiss the Complaint for failure to join indispensable parties.[2] The Motion reasserts the substance of ALDI's Answer that any civil penalty should be directed to the responsible third parties, identified in the letter which ALDI submitted with its Answer.[3] ALDI maintains that EPA's refusal to pursue the responsible third parties is inconsistent with the goals and intent of the CWA. Further, it asserts that EPA rejected adding the third parties because it believed ALDI had no valid third party defense and that adding those parties

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[1]ALDI raised other contentions in its Answer, among them that the penalty calculation did not properly consider various factors and that there was a miscalculation as well.

[2]The undersigned was designated as the presiding judge in this matter on January 3, 2001.

[3]In addition to Amoco, ALDI names Food Plant Engineering Inc., P.B. Hoidale Co., Inc., Vaughan Mechanical, Inc., and The Marley Company, as "responsible part[ies]," although only the basis for Amoco's alleged negligence is explained. The other companies' alleged roles are not set forth in the Answer or the accompanying letter.

would complicate the proceeding. Based upon its characterization of EPA's response, ALDI replies that such reasons for declining to add the third parties are not valid and their inclusion will not complicate the case. Further, ALDI asserts that if it has to pay a civil penalty it will have to pursue these parties for reimbursement.

On September 28, 2000, EPA filed a Response to ALDI's Motion and also filed a Motion for Partial Accelerated Decision as to Liability. This was accompanied by a Memorandum in Support of the Response and Motion ("EPA Memorandum"). EPA notes that Section 311(b)(3) of the CWA "prohibits the discharge of oil in 'such quantities as may be harmful' into the waters of the United States." EPA Memorandum at 2. Through regulation, EPA has provided that harmful discharges include those that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. 40 C.F.R. § 110.3. The administrative authority to take action for such oil discharges that violate Section 311(b) of the CWA encompasses "any owner, operator, or person in charge of any ... onshore facility ...." 33 U.S.C. § 1321(b)(6)(A).

EPA distinguishes the civil penalty provisions for oil discharges from distinct provisions addressing *clean up and removal of oil spills*. It acknowledges that where such clean up and removal issues are involved Section 311(f)(1) provides an exception from liability in instances where the owner or operator of an onshore facility can prove that a discharge was caused solely by "... an act or omission of a third party without regard to whether any such act or omission was was not negligent ...." Thus, EPA maintains that Respondent's reliance upon Section 311(f) of the CWA is misplaced, as that section provides a potential defense to actions for the cost of clean up and removal of oil but not for penalties assessed for a discharge. Where the offense is for the discharge of oil into United States waters, there is strict liability. As the admitted owner of the onshore facility, ALDI is strictly liable for the oil discharge. EPA argues that it is not required to name additional respondents; it is within its enforcement discretion to choose those it decides to proceed against.

Addressing its Motion for Accelerated Decision as to liability, EPA notes that to establish the violation it must show that the Respondent is the owner or operator of an onshore facility that discharged oil, in quantities that may be harmful, into waters of the United States. EPA maintains that each of these elements was admitted in Respondent's Answer. EPA Memorandum at 6 - 7. Given that even a sheen of oil can be harmful, EPA submits that as a matter of law, the discharge of 2,000 gallons of diesel fuel is harmful per se. Id.

ALDI, in its Response, asserts that EPA overstates its Answer, that the case law cited is not precedent for the federal circuit (the Tenth Circuit) where this case arose, and that EPA misconstrues the case law regarding "the basic causation elements necessary to establish that a facility owner or operator is liable for civil penalties under Section 311(b)(6)..." ALDI Response at 1. Specifically, ALDI, while conceding that it owns an onshore facility and that diesel fuel was discharged into waters of the United States, asserts that it has not admitted "that *it* discharged the diesel fuel in question in quantities that may be harmful to the environment." Id. at 2. (emphasis added). By Respondent's perspective, unless the third parties it has named are included, the Court will not be able to decide the

liability issue or the civil penalty amount.

Further, ALDI maintains that the cases cited by EPA, United States v. Tex-Tow, Inc., 589 F.2d 1310 (7th Cir. 1978) ("Tex-Tow"), and United States v. West of England Ship Owner's Mut. Protection & Index. Assoc., 872 F.2d 1192 (5th Cir. 1989) ("West of England") do not hold that one can be liable for Section 311(b)(6) violation merely because one is a facility owner or operator. Id. 2-3. In ALDI's view, these cases support the proposition that liability under this section must not disregard whether a respondent's acts were the actual or proximate cause of the oil spill.

Thereafter, EPA filed a Reply, maintaining that causation theories are not material to a Section 311(b)(6) discharge of oil violation, as that provision imposes strict liability on any *owner* or *operator* of a facility. EPA cites U.S. v.Coastal States Crude Gathering Co., 643 F.2d 1125 (5th Cir. 1981), ("Coastal States"), U.S. v. V-1 Oil Co., Memorandum Decision and Order, Civil No. 96-0454-E-BLW (D. Idaho 1999), ("V-1"), and Tex-Tow.

Discussion

The provision of the Clean Water Act in issue, Section 311(b)(6), provides:

> **(A) Violations**
> Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility-
> **(i)** from which oil or a hazardous substance is discharged in violation of paragraph (3), or
> **(ii)** who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject,
> may be assessed a class I or class II civil penalty by the Secretary of the department in which the Coast Guard is operating or the Administrator.

33 U.S.C. § 1321(b)(6).

Paragraph (3), referenced in Section 311(b)(6) above, provides, in pertinent part:

> **(3)** The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone ... in such quantities as may be harmful as determined by the President under paragraph (4)[4] of this

[4]Paragraph (4) in turn provides that "The President shall by regulation determine for purposes of this section those quantities of oil and any hazardous substances the discharge of which may be

subsection, is prohibited ...

33 U.S.C. § 1321(b)(3).

Thus under the plain terms of Section 311(b)(6), *any* owner, operator or person in charge of an offshore facility from which oil or a hazardous substance is discharged may be assessed a civil penalty. These are the only requirements for liability to attach and the statutory provision does not concern itself with third parties who may have created such a discharge. Given this plain language, it is not surprising that other courts which have examined this section have reached the same conclusion. In Tex-Tow, the Court dealt with a situation in which it was found that Tex-Tow was not at fault for a discharge of oil into navigable waters. Tex-Tow's barge was being loaded with gasoline by an oil company and during this process the barge continued to sit lower in the water as the filling process continued, with the result that it impacted a submerged steel piling which punctured the hull. Although there was no way Tex-Tow could have known of the submerged piling, the court noted that the civil penalty liability was absolute and rejected arguments that third party causation should be read into the section.[5] The court noted that as Tex-Tow was engaged in an "enterprise which will inevitably cause pollution," Congress determined to place the cost of such pollution on such enterprises when an actual discharge occurs.[6] Id. at 1314.

Similarly, in Coastal States there was a discharge of several thousand barrels of gasoline into a bay under circumstances where the discharge was attributable to the act of an unknown third party, when a vessel struck Coastal's buried pipeline. Interpreting the same provision, the court observed that the provision "establishes an absolute liability standard which obviates the need for finding of fault.[7] 643 F.2d at 1127. The result in West of England is also consistent with these holdings. There, the provision in issue was Section 311(f)(1), dealing with clean up and removal liability, not discharge. The

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harmful to the public health or welfare or the environment of the United States, including but limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

[5]The court also noted that a similar conclusion was reached in United States v. Marathon Pipe Line Company, 589 F.2d 1305 (7th Cir. 1978). Whether the defense is denominated as "fault" or "cause" of another, the result is the same: liability under Section 311(b)(6) attaches upon showing ownership or operation of a discharging facility.

[6]That court also noted that its ruling would not impact the ultimate liability if, for example, Tex-Tow had an indemnity clause of action against the oil company. This Court makes the same observation: ALDI may have some cause of action against others. Indeed, ALDI seems to recognize that it may have "to pursue [those] responsible third parties for any civil penalty." ALDI Motion to Dismiss at 2.

[7]The court also noted, as EPA has similarly observed that, by contrast, other provisions, *dealing with liability for clean-up costs*, impose a different scheme, allowing certain defenses where an act or omission of a third party caused the discharge. Coastal States at 1127.

Fifth Circuit, noting that the former is "causation based" while the latter is "fault based, held that the provision's potential exception to liability must be narrowly construed, with the effect that the act or omission of a third party must be the sole cause of the discharge. 872 F.2d at 1198. More important to the issue at hand is the Fifth Circuit's recognition[8] that "section 1321(b)(6) does not include a third party defense..." Id. at 1199.

Given the unambiguous wording of the provision in issue and ALDI's corresponding admissions to each element of the offense in its Answer and accompanying letter, there is no genuine issue of material fact and EPA is entitled to judgment as a matter of law. Accordingly, the Court grants EPA's Motion for Accelerated Decision as to liability.[9]

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: February 7, 2001

[8]EPA also cites United States v. V-1 Oil, Memorandum Decision and Order, Civil No. 96-0454-E-BLW (D. Idaho 1999), in which that court observed that the CWA has a strict liability scheme applicable to owners and operators of facilities from which oil is discharged. While that proceeded under Section 311(f)(2) liability, it highlights that no case has been identified which supports ALDI's argument.

[9]ALDI separately raises defenses challenging the appropriateness of the penalty EPA proposes. The cases referred to in this Order seem to suggest limited liability in this matter. See Tex-Tow at 1314. At an appropriate time, the Court may direct the parties to brief this issue. The factors to be considered in assessing a penalty are set forth in Section 311(b)(8) and the penalty will be decided by the Court based on the evidence put forth in the penalty phase and upon consideration of any applicable civil penalty guidelines. A Prehearing Order, regarding the remaining issues, is being issued separately today.

In the Matter of Aldi, Inc., Kansas, Respondent
Docket No. CWA-7-2000-0015

CERTIFICATE OF SERVICE

I hereby certify that the following **Order on Motions**, dated February 7, 2001, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

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Regional Hearing Clerk
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Copy by Regular Mail to:

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Rachele D. Jackson
Legal Staff Assistant

Dated: February 7, 2001
Washington, D.C.