UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8
1595 Wynkoop Street; Denver, CO 80202-1129

PUBLIC NOTICE OF PROPOSED ADMINISTRATIVE PENALTY ASSESSMENT AND OPPORTUNITY TO COMMENT ON CWA COMPLAINT

Action: EPA is providing notice of a proposed administrative penalty assessment and the opportunity to comment on the proposed assessment (complaint) for alleged violations of the Clean Water Act.

Summary: EPA is authorized in Class II proceedings under Section 311(b)(6) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6), to issue orders assessing civil penalties for violations of the CWA and implementing regulations, after providing the person subject to the penalty notice and opportunity for a hearing, and after providing the public with notice of the proposed penalty, opportunity to submit written comments and to participate in a Class II penalty proceeding, if any. The deadline for submitting public comment is thirty days after issuance of this notice.

On September 30, 2008, EPA commenced a civil administrative action by filing a complaint against the Respondent identified below, alleging violations of the CWA and its regulations. Pursuant to Section 311(b)(6)(C) of the CWA, EPA hereby notifies the public of this proposed penalty assessment:

In the matter of: Farmers Union Oil Company
121 Main Street
Reliance, SD 57569

EPA Docket Number: CWA-08-2008- **0033**
Proposed penalty in the Complaint: $58,700.00

Alleged violations: Failure to prepare and implement a Spill Prevention Control and Countermeasure Plan in accordance with 40 C.F.R. §§ 112.7 and 112.8 as required by 40 C.F.R. § 112.3, regulations issued under Section 311(j) of the CWA.

Submit written comments to: Tina Artemis
Regional Hearing Clerk (8RC);
EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: (303) 312-6765.

FOR FURTHER INFORMATION: Persons wishing to receive a copy of the Consolidated Rules, the Complaint, or other documents in this proceeding, or to comment upon the proposed penalty assessment, or any other aspect of the matter, should contact the Regional Hearing Clerk identified above. The administrative record for the proceeding is located in the EPA Region 8 Hearing Clerk Office identified above and the file will be open for public inspection during normal business hours. No action will be taken by EPA to finalize a settlement in this matter until 30 days after this public notice.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No. CWA-08-2008-0033

2008 SEP 30 PM 4:47

IN THE MATTER OF	)	
	)	**ADMINISTRATIVE COMPLAINT AND OPPORTUNITY TO REQUEST HEARING**
Farmers Union Oil Company of Reliance, Presho, and Draper, South Dakota	)	Proceeding to Assess Class II Civil Penalty Under Section 311 of the Clean Water Act
121 S. Main St. Reliance, SD 57569	)	
Respondent.	)	

AUTHORITY

1. This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990. The Administrator has properly delegated this authority to the undersigned EPA official. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 CFR part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

2. Respondent, Farmers Union Oil Company of Reliance, Presho, and Draper, South Dakota, (hereinafter, "Respondent") is a corporation organized under the laws of South Dakota and authorized to do business in South Dakota.

3. Respondent is a "person" within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

4. The Respondent owns and operates a bulk fuel storage facility located at West Railway Avenue, Reliance, South Dakota (hereinafter, "the facility") within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

5. On or about September 14, 2006, Respondent's facility included, but was not limited to, the following: One 1,000 gallon tank and one 17,000 gallon tank of unleaded gasoline; two 2,000 gallon tanks and one 7,500 gallon tank of road diesel; one 2,000 gallon tank and one 7,500 gallon tank of ethanol; two 12,000 gallon tanks of Field Master; and one 12,000 gallon tank and one 9,000 gallon tank of #1 Dyed, with a total oil storage capacity of approximately 84,000 gallons.

6. Gasoline, diesel, ethanol, Field master and #1 Dyed are oils within the meaning of "oil" as defined at §311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

7. Respondent stores, transfers, distributes, uses or consumes oil or oil products at the facility.

8. Respondent, was at the time of the inspection, an "owner or operator"of an "onshore facility" within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

9. The facility is a "non-transportation related" onshore facility within the meaning of 40 CFR § 112.2.

10. Drainage from the facility flows east-northeast approximately 600 yards following the railroad ditch, then north approximately 300 yards to Reliance Lake and wildlife refuge.

11. Reliance Lake is a "navigable water" and "water of the United States" within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 CFR § 110.1.

12. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "waters of the United States, including the territorial seas."

13. For discharges of oil prohibited by Section 311(b)(3) of the CWA, 33 U.S.C. §1321(b)(3), 40 C.F.R. §§ 110.1 further defines "navigable waters" to include, inter alia, waters susceptible to use in interstate commerce, interstate waters, and tributaries of such waters.

14. For purposes of complying with the National Response System required by Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C), the regulations at 40 C.F.R. § 112.2, as interpreted by the decision in American Petroleum Institute v. Johnson, Civil Action Nos. 02-2247 and 02-2254 (PLF), 2008 WL 834435 (D.D.C. May 31, 2008), define "navigable waters" to include, inter alia, all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments of the [CWA] and tributaries of such waters; and interstate waters. Am. Petroleum Inst., 2008 WL 834435, at *17.

15. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from vessels and from onshore and offshore facilities, and to contain such discharges ...."

16. EPA promulgated the oil pollution prevention regulations, set forth at 40 CFR part 112.

17. 40 CFR § 112.1(b) states that the requirements of part 112 apply

> "to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines ...."

18. The facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen 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.

19. The facility is subject to the oil pollution prevention requirements of 40 CFR part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.

20. 40 CFR § 112.3 requires that owners or operators of onshore and offshore facilities prepare and implement a Spill Prevention, Control, and Countermeasure ("SPCC") plan in writing, and in accordance with applicable sections of part 112, including, but not limited to, sections 112.7 and 112.8.

21. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that "any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by the Administrator.

22. On or about September 14, 2006, EPA conducted an unannounced SPCC inspection ("the Inspection") at the facility with the consent of Mr. Wayne Lundquist, the facility representative.

23. During the Inspection the following SPCC measures were deficient at the facility:

    a. Failure to provide secondary containment in the loading/unloading area in accordance with 40 CFR § 112.7(c)(1);
    b. Failure to have adequate security measures in accordance with 40 CFR § 112.7(g)(1);
    c. Failure to provide adequate secondary containment for the west area bulk fuel storage tanks in accordance with 40 CFR § 112.8(c)(2);
    d. Failure to have secondary containment for the piping to the rack in accordance with 40 CFR § 112.7(c);
    e. Failure to have records or a schedule of integrity testing of tanks as stated in the SPCC Plan as required by 40 CFR § 12.8(c)(6); and
    f. Failure to have documentation of inspections as required by 40 CFR § 112.7(e).

24. On September 14, 2006, EPA Inspector, Jim Peterson, provided Mr. Lundquist with the SPCC Compliance Inspection Report that was signed and dated by Mr. Lundquist, indicating that Mr. Lundquist was informed that there was no secondary containment for the bulk tanks, the piping to the loading and unloading area, or for the rack located on the western part of the facility; there was no fence; and the facility lacked appropriate signage.

25. During the Inspection, EPA reviewed Respondent's SPCC Plan dated April 9, 2003, and learned that Respondent's consultant, Dakota Environmental, had identified to Mr. Lundquist in 2003, the following items that needed to be implemented by the SPCC Plan:

1) the lack of adequate secondary containment in the loading/unloading area, the piping to the rack, and the west bulk tank area;
2) the lack of security measures, i.e., a fence; and
3) the failure to perform and document inspections.

26. In a letter dated December 18, 2006, EPA informed Mr. Lundquist of the violations found during the Inspection at Respondent's facility.

27. On or about September 6, 2007, EPA contacted Respondent's consultant to determine the status of compliance with the implementation of Respondent's SPCC Plan and discovered the secondary containment had not been built, the Respondent did not have evidence of inspections, and a partial fence had been constructed but not finished.

28. On or about September 10, 2007, EPA contacted Mr. Lundquist, informed him that legal action in the form of a complaint and penalties would be issued and requested the name of counsel for Respondent. Mr. Lundquist stated that counsel would not be hired and that he would represent Respondent.

29. During the September 10, 2007 telephone conversation, EPA informed Respondent of the possibility of engaging in pre-filing negotiations and requested that any documentation that evidenced compliance be sent to EPA. Mr. Lundquist stated he would send pictures shortly.

30. On or about September 17, 2007, EPA contacted Respondent to inquire as to whether he

had sent the pictures to EPA and Mr. Lundquist stated he would do so by September 30, 2007.

31. EPA received the pictures prior to September 30, 2007, and observed that the fencing was not complete and the secondary containment was not built.

32. During October, 2007, Respondent and/or its consultant, submitted to EPA, design construction modification specifications, leak testing results, and documentation evidencing that Respondent had been sent an invoice for the partial fence work on or about April 4, 2007, and the status of compliance at the facility as of May 4, 2007.

33. Between October 2007 and September 2008, EPA periodically contacted Respondent and/or his consultant by telephone, to ascertain the status of SPCC compliance at Respondent's facility.

34. On or about September 26, 2008, EPA contacted Respondent's consultant and learned that Respondent's consultant had invoiced Respondent for all outstanding work on or about November 24, 2007.

35. Respondent's failure to implement an SPCC plan in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 from September 30, 2003, through approximately November 24, 2007, constitutes violations of 40 CFR §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

PROPOSED PENALTY

Based on the forgoing Allegations, and pursuant to the authority of Section 311(b)(6)(B)(ii) of the Act and 40 CFR § 19.4, the Complainant proposes that the Administrator, after considering the statutory penalty factors set forth at Section 311(b)(8) of the Act, issue a Final Order assessing administrative penalties against the Respondent in an amount not to exceed $11,000 per day for each day during which the violation continues, up to a maximum of $157,500. Each violation alleged in the preceding Paragraphs and incorporated herein by reference, represents for the period of September 30, 2003, through and including November 24, 2007, major noncompliance with the SPCC regulations due to the lack of secondary containment and a potential moderate environmental impact resulting in a significant impact on Respondent's ability to respond or prevent spills through the implementation of its SPCC plan. The Respondent's culpability is significant given the fact that it was informed by its consultant of the SPCC implementation deficiencies back in 2003, and by EPA in 2006, of those same deficiencies. Respondent continued to obtain an economic benefit by failing to implement the SPCC measures from 2003 through November 2007. To date, Respondent has not provided documentary evidence showing that the secondary containment and the fencing have been completed. EPA has no evidence that Respondent has had a history of prior violations.

TERMS OF PAYMENT FOR QUICK RESOLUTION

If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying a proposed penalty of $58,700 in full pursuant to 40 CFR § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no Answer need be filed. For more time for payment, Respondents may file a statement agreeing to pay the penalty

within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. The payment shall be made by remitting a cashier's or certified check, including the name and docket number of this case, referencing "Oil Spill Liability Trust Fund-311," for the amount, **payable to the "Environmental Protection Agency,"** to:

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental Protection Agency "

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury. This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required fields.

A copy of the check, or wire transfer, shall be sent simultaneously to:

Jane Nakad (8ENF-UFO)
U.S. EPA Region 8
Technical Enforcement Program
1595 Wynkoop St.
Denver, CO 80202-1129

Payment of the penalty in this manner does not relieve Respondents of their obligations to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in the Act, a Respondents have the right to a public hearing to contest this Complaint. If you (1) contest the factual claims made in this Complaint; (2) contest the appropriateness of the proposed penalty; and/or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with section 22.15 and 22.38 of the Consolidated Rules within 30 calendar days after receipt of this Complaint. Your Answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which you have knowledge; (2) state circumstances or arguments which are alleged to constitute grounds for defense; (3) state the facts you dispute; (4) the basis for opposing the proposed relief, and (5) specifically request an administrative hearing, if desired. Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation.

The Answer and one copy must be sent to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop St.
Denver, Colorado 80202-1129

and a copy must be sent to the following attorney:

Brenda Morris, Enforcement Attorney (8ENF-L)
U.S. EPA Region 8, Legal Enforcement Program
1595 Wynkoop St.
Denver, CO 80202-1129
Telephone: (303) 312-6891

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

PUBLIC NOTICE

Pursuant to section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), the Complainant is providing public notice of and reasonable opportunity to comment on this proposed issuance of a complaint assessing administrative penalties against you. If a hearing is held on this matter, members of the public who submitted timely comments on this proceeding have the right under section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), to be heard and present evidence at the hearing.

SETTLEMENT CONFERENCE

The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations and is willing to explore this possibility in an informal settlement conference. If you or your attorney, if you choose to be represented by one, have any questions or wish to have an informal settlement conference with EPA, please call Brenda Morris at (303) 312-6891. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in the Consolidated Rules.

If a settlement can be reached, its terms must be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the Regional Judicial Officer.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8
Complainant.

Date: 9/30/08

Andrew M. Gaydosh,
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Date: 9/30/08

Brenda Morris, Enforcement Attorney
U.S. EPA, Region 8
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region 8, located at 1595 Wynkoop St., Denver, Colorado, 80202-1129 and that a true copy of the same was sent via certified mail to:

Wayne Lundquist, Registered Agent for
Farmers Union Oil Company of Reliance,
Presho, and Draper, South Dakota
121 S. Main St.
Reliance, SD 57569

9/30/08
Date

Judith McTernan
Judith McTernan