23

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CHEVRON U.S.A. INC. Barbers Point Refinery, Honolulu, Hawaii Respondent	)	DOCKET No. IX-FY88-54 Class I Administrative Penalty Proceeding Under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)

FINAL ORDER

I have reviewed the attached Recommended Decision of the Presiding Officer, which decision is hereby incorporated and made a part of this Final Order. I concur with the Recommended Decision and adopt its conclusions and recommendations.

Therefore, IT IS ORDERED THAT:

1. Respondent shall pay a civil penalty of $10,000.00 for its violation of the Clean Water Act, by cashier's or certfied check made payable to "Treasurer, United States of America" and mailed not more than 30 days after issuance of this order to:

U.S. EPA, Region 9
P.O. Box 360863M
Pittsburgh, PA 15251

2. Respondent shall also send notice of payment, including a copy of the check, to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
U.S. EPA, Region 9
1235 Mission Street
San Francisco, CA 94103

3. Issuance of this order constitutes final Agency action for purposes of judicial review, and the order shall become effective 30 days following its issuance unless an appeal is taken pursuant to Section 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8).

Issued this 29th day of July, 1990.

Daniel W. McGovern

Daniel W. McGovern
Regional Administrator

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CHEVRON U.S.A. INC. Barbers Point Refinery, Honolulu, Hawaii Respondent	)	DOCKET No. IX-FY88-54 Class I Administrative Penalty Proceeding Under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)

RECOMMENDED DECISION

On October 6, 1988 the United States Environmental Protection Agency, Region 9, ("EPA") issued a complaint against Chevron U.S.A. Inc. ("Chevron") pursuant to Section 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. § 1319(g). The Complaint alleged that Chevron violated Section 301(a) of the Act, 33 U.S.C. § 1311(a), by the unauthorized discharge of approximately 104,000 gallons of Jet-A fuel into Waiawa Stream and Middle Loch, Pearl Harbor, Hawaii from a rupture in a pipeline owned by Chevron which runs from Chevron's Barbers Point Refinery to Chevron's marketing facility at Pier 30 in Honolulu. EPA proposed to assess a Class I penalty of $10,000.00.

On November 3, 1988 Chevron filed a "Special Appearance and Request for Hearing" in which it took the position that EPA lacks subject matter jurisdiction to assess a civil penalty under Section 309(g) of the Act for the violation alleged in the administrative complaint. Subsequently Chevron and EPA each filed motions for summary determination with supporting briefs. Chevron argued that the administrative complaint should be dismissed with prejudice because an oil spill caused by the unanticipated rupture of a

pipeline that is not subject to an NPDES permit may violate Section 311 of the Clean Water Act, 33 U.S.C. § 1521, but does not violate Section 301(a) of the Act, and Section 309(g) may not be used to enforce Section 311.

In a decision dated May 3, 1990, which is attached as Appendix A and is incorporated herein by reference, I found that such an oil spill constitutes the "discharge of a pollutant" from a "point source" in violation of Section 301(a) of the Clean Water Act. I also noted that, while Chevron had conceded that a spill occurred, it was not clear from the administrative record whether Chevron had agreed to the facts of the spill as narrated in the report prepared by the federal on-scene coordinator. I therefore looked to the undisputed statements of fact contained in Chevron's motion and in paragraph II.2 of the Administrative Complaint,[1] and found that those statements taken together set out a violation of Section 301(a) of the Clean Water Act. I therefore denied Chevron's motion for summary determination and granted EPA's motion as to liability.

A hearing on the amount of penalty was scheduled for July 19, 1990. However, prior to hearing the parties entered into an agreement under which Chevron waived its right to a hearing on penalty and agreed to the full $10,000.00 penalty amount sought by EPA. Under the terms of the stipulation Chevron did not waive its right to seek judicial review of "the issues of the jurisdiction of the United States Environmental Protection Agency (EPA) to file

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[1]Chevron agreed at the first prehearing conference that "the events described in paragraph II.2 of the Complaint took place."

this administrative action and that Chevron is liable for such penalty." The stipulation is attached as Appendix B.

Based on my May 3, 1990 Decision and Order on Motions for Summary Decision and on the stipulation as to penalty amount entered into by the parties, I recommend that a final order be issued assessing a civil penalty of $10,000.00 against Chevron U.S.A. Inc.

Steven W. Anderson
Presiding Officer

Dated: July 26, 1990

APPENDIX A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
1235 MISSION STREET
SAN FRANCISCO, CA 94103

IN THE MATTER OF CHEVRON U.S.A. Inc., Barbers Point Refinery, Honolulu, Hawaii Respondent	)	DOCKET No. IX-FY88-54 Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(g)

DECISION AND ORDER ON MOTIONS
FOR SUMMARY DECISION

On October 6, 1988, the United States Environmental Protection Agency Region 9 ("EPA or "Complainant") issued a complaint against Chevron U.S.A., Inc. ("Chevron" or "Respondent") pursuant to section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g). The Complaint alleges that Chevron violated section 301(a) of the Act, 33 U.S.C. § 1311(a), by the unauthorized discharge of approximately 104,000 gallons of Jet-A fuel into Waiawa Stream and Middle Loch, Pearl Harbor, Hawaii from a rupture in a pipeline owned by Chevron U.S.A. Inc. which runs from Chevron's Barbers Point Refinery to Chevron's marketing facility at Pier 30 in Honolulu. EPA proposes to assess a Class I penalty of $10,000.

On November 3, 1988 Chevron filed a "Special Appearance and Request for Hearing" in which it alleged that EPA lacks subject matter jurisdiction to assess a civil penalty under Section 309(g) of the Act for the violation alleged in the administrative complaint. On March 24, 1989 EPA and Chevron each filed Motions for Summary Determination.[1] EPA filed a "Memorandum of Law in Opposition to Respondent's Motion..." on April 28, 1989; Chevron filed a "Reply Brief of Chevron U.S.A..." on May 1, 1989.[2]

Chevron argues that the Adminstrative Complaint should be dismissed with prejudice because an oil spill caused by the unanticipated rupture of a pipeline that is not subject to an NPDES permit may violate Section 311 of the Clean Water Act, 33 U.S.C. §1521, but does not violate Section 301(a) of the Act, and Section 309(g) may not be used to enforce Section 311. EPA argues that the events described in the Administrative Complaint do make out a violation of Section 301(a) and therefore EPA has jurisdiction to bring this action for an adminstrative penalty under Section 309(g) of the Act.

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1. Chevron's motion is captioned "Motion of Chevron U.S.A. Inc. for Summary Dismissal of Administrative Complaint."

2. Procedures for issuance of Class I administrative penalty orders under Section 309(g) of the Act are set forth in Guidance on Class I Clean Water Act Administrative Penalty Procedures, dated July 27, 1987. Under section 126.104(f) of the Procedures a party may move for summary determination as to any issue on the basis that there is no genuine issue of material fact.

Regulatory Background

Following is a brief review of the provisions of the Clean Water Act at issue here:

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, except in compliance with other terms of the Act:

> Except as in compliance with this section, and sections 302, 306, 307, 318, 402 and 404[3] of this Act, the discharge of any pollutant by any person shall be unlawful.

The terms used in Section 301(a) are defined in Section 502, 33 U.S.C. § 1362. The term "discharge of a pollutant" is defined in Section 502(12), 33 U.S.C. § 1362(12), as[4]

> ... any addition of a pollutant to navigable waters from a point source....

The term "point source" is defined in Section 502(14), 33 U.S.C. § 1362(14) as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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3. The only section relevant here is Section 402, 33 U.S.C. § 1342, under which EPA issues National Pollutant Discharge Elimination System (NPDES) permits which authorize the holder to discharge pollutants in compliance with the terms of the permit.

4. "Discharge" is defined in Section 502(16) by reference to the term "discharge of a pollutant."

The term "pollutant" is defined in Section 502(6), 33 U.S.C. § 1362(6) as:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Although neither "oil" nor "petroleum products" are specifically included in the definition of "pollutant" under Section 502, case law has interpreted the definition to include petroleum. U.S. v. Standard Oil Co., 384 U.S. 224, 86 S.Ct. 1427, 16 L.Ed. 2d 492 (1966); U.S. v. Hamel, 551 F.2d 107 (6th Cir. 1977).

Section 301(a) is enforced using Section 309 of the Act, which provides civil judicial penalties at Section 309(b), criminal penalties under Section 309(c), and Class I and Class II administrative penalties under Section 309(g). Class I adminstrative penalties under Section 309(g)(2)(A) may not exceed $10,000 per violation.

The Clean Water Act regulates oil and hazardous substances specifically in Section 311, 33 U.S.C. § 1321.

Section 311(b)(3) prohibits the discharge of oil as follows:

> 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) of this subsection, is prohibited, except ... where permitted in quantities and at times and locations or under such circumstances as the President may, by regulation, determine not to be harmful....

Certain terms, including "discharge", are defined differently for the purposes of Section 311 than for the rest of Subchapter 3.

Section 311(a)(2) defines "discharge" for the purposes of Section 311 as follows:

> "[D]ischarge" includes but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 402 of this Act, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such a permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit application under section 402 of this Act, which are caused by events occurring within the scope of relevant operating or treatment systems.

The definition of "discharge" applicable to Section 311 thus does not require a discharge to be from a "point source", in contrast to the corresponding definition in Section 502 of "discharge of a pollutant" which applies to Section 301(a).

Section 311 contains its own enforcement provision at Section 311(b)(6)(A), which provides that the U.S. Coast Guard may assess an administrative penalty of not more than $5,000 for each

violation of Section 311.[5]

Chevron's Arguments

Chevron makes three interrelated arguments:

(1) That Section 311 is the exclusive remedy under the Clean Water Act for oil spills of the type at issue here;

(2) That Section 309(g) is not available to remedy violations of Section 311;[6] and

(3) That the oil spill at issue here is not a violation of Section 301(a) because this spill is not a "discharge of a pollutant" from a "point source" as those terms are defined in Sections 502(12) and (14).

Consequently, Chevron concludes, the U.S. Coast Guard could have brought an administrative enforcement action for this oil spill under Section 311(b)(6)(A), but EPA cannot bring an administrative enforcement action under Section 309(g)(1)(A), because Section 309 is not available for a violation of Section 311 and no violation of Section 301(a) has occurred.

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5. The civil judicial enforcement authority in Section 311(b)(6)(B) is applicable only to hazardous substances, not to oil. 44 F.R. 50766, 50774 (August 29, 1979)

6. EPA and Chevron apparently agree that Section 309(g) is not an available enforcement mechanism for violations of Section 311. EPA's complaint charges only a violation of Section 301(a), not Section 311. As explained above, the administrative penalty provisions of Section 311 are enforced by the U.S. Coast Guard, not EPA.

(1) Is Section 311 of the Clean Water Act the exclusive remedy for oil spills of the type at issue in this case?

Chevron argues that for "classic oil spills," which it claims this to be, the 1978 amendments to the Clean Water Act show legislative intent to allow enforcement activities only under Section 311, not under Section 301(a) and Section 309(g).[7]

Chevron asserts that prior to the decision in Manufacturing Chemists Association v. Costle, 455 F.Supp. 968, 980 (W.D.La. 1978) enjoining the implementation of EPA's Section 311 program, it was "at best unclear" whether discharges of oil were subject to Section 301(a) as well as to Section 311, and argues that the 1978 amendments, which were proposed as a direct result of the Court's injunction[8], clarified the law in that respect.[9]

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7. Motion of Chevron U.S.A. at pp.5-8. Chevron does not argue that Section 311 is the exclusive remedy for all oil spills, Reply Brief of Chevron U.S.A. at pp.2 and 15.

8. The 1978 amendments changed the definition of the term "discharge" applicable to Section 311 by excluding certain discharges that were regulated by the NPDES permit system under Section 402. Those exclusions are:

> ...(A) discharges in compliance with a permit under section 402 of this Act, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such a permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit application under section 402 of this Act, which are caused by events occurring with the scope of relevant operating or treatment systems.

33 U.S.C. § 1321(a)(2).

9. Motion of Chevron U.S.A. at pp.4 and 5.

Chevron bases its argument primarily on statements made during the floor debate in Congress by Senator Stafford, the lead Senate sponsor of the legislation. For example, Senator Stafford explained the purpose of the proposed amendments as follows:

> In the amendment adding a new definition of discharge for purposes of section 311, we are attempting to draw a line between the provisions of the act under sections 301, 304, 402 regulating chronic discharges and 311 dealing with spills. At the extremes it is relatively easy to focus on the difference but it can become complicated. The concept can be summarized by stating that those discharges of pollutants that a reasonable man would conclude are associated with permits, permit conditions, the operation of treatment technology, and permit violations would result in 402/309 sanctions; those discharges of pollutants that a reasonable man would conclude are episodic or classical spills not intended or capable of being processed through the permitted treatment system and outfall would result in application of section 311.

124 Cong.Rec. 37683 (October 14, 1978)

Senator Stafford also remarked:

> Basically, the changes make it clear that discharges, from a point source permitted under section 402...are to be regulated under sections 402 and 309.
>
> "Spill" situations will be subject to section 311, however, regardless of whether they occur at a facility with a 402 permit.

124 Cong. Rec. 37683 (October 14, 1978).

From these and similar statements by Senator Stafford, Chevron concludes that the sudden and unanticipated discharge of oil from a pipeline not subject to an NPDES permit (referred to by Chevron as a "classic spill") is now regulated under Section 311

of the Act, but not under Sections 301(a) and 309.

Chevron's argument appears persuasive on first reading. However, a careful review shows that it is based on a misconception of the action taken by Congress in 1978 and on a related misunderstanding of the scope of Section 301(a).

Prior to passage of the 1978 amendments to Section 311, EPA clearly had the authority to enforce against violations of Section 301(a) through the then-available enforcement mechanisms of Section 309[10] even though the same facts might also constitute a violation of Section 311. For example, in United States v. Hamel, 551 F.2d 107 (6th Cir. 1977), which involved the pumping of gasoline into a lake from a gasoline dispenser in a marina, the Court of Appeals held that the negligent or willful violation of Section 301(a) subjects the violator to the criminal sanctions of Section 309(C)(1). U.S. v. Hamel, supra at p. 109. The court held so despite the defendant's argument that he should only have been charged under the civil enforcement provisions of then Section 311 or under the criminal enforcement provisions of the Refuse Act. The court stated "...we do not believe ...that § 1321 [Section 311] was intended to be the sole Congressional expression on oil discharges." U.S. v. Hamel, supra at 111.

Chevron argues that U.S. v. Hamel is no longer applicable because of the effect of the 1978 amendments to Section 311,

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10. In 1977-78 Section 309 contained civil and criminal judicial enforcement mechanisms, but it did not include class I and class II administrative penalty provisions until amended in 1987.

under which Chevron claims "it is clear that Congress intended Section 311 to be the exclusive remedy for non-NPDES related spills of oil." Motion of Chevron U.S.A. Inc. for Summary Dismissal at n.3.

However, a close reading of the 1978 Amendments and their legislative history leads to the conclusion that Congress' action in 1978 was more narrow in scope than Chevron claims. Manufacturing Chemists Assn. v. Costle, the case that necessitated the 1978 amendments, involved several groups of plaintiffs not all of which appear to have had NPDES permits, but the court's discussion regarding what it considered to be EPA's unlawful attempts to enforce under both Section 309 and Section 311 only refers to violations involving NPDES permits. 455 F.Supp. 968 at 979-80. There is no reference to direct violations of Section 301(a), i.e., to discharges of pollutants without a permit.[11] Since the court's decision did not deal with discharges other than those associated with NPDES permits, it did not deal with

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11. Senator Stafford's description of the issues and holding in Manufacturing Chemists is consistent with this. He states that

> [t]he principle challenges to the regulations included allegations...that EPA had unlawfully applied the provisions of section 311 to facilities with NPDES permits....

and that

> the court held that discharges subject to section 402 of the act [relating to NPDES permits] should not be subject to the reporting requirements, civil penalty liabilities, and cleanup costs of section 311.

124 Cong,Rec. 37682 (October 14, 1978).

1 the fact situation in U.S. v. Hamel or in the present case.

2 Similarly, to the extent Congress addressed only the issues
3 decided by the court in Manufacturing Chemists Assn. v. Costle,
4 the 1978 amendments to the Clean Water Act have no application to
5 U.S. v. Hamel or to the present case. Consequently, the rule
6 stated in U.S. v. Hamel with respect to criminal enforcement un-
7 der Section 309 would still be applicable to civil administrative
8 enforcement under Section 309 today.

9 It is clear from the legislative history[12] of the 1978
10 amendments that they were intended to address a narrow range of
11 issues. The legislation was requested by Thomas C. Jorling, then
12 EPA Assistant Administator for Water, who advised Senator Muskie,
13 Chairman of the Subcommittee on Environmental Pollution of the
14 Committee on Environment and Public Works, that EPA had con-
15 sidered alternative approaches to dealing with the Manufacturing
16 Chemists case and had concluded that the preferable approach was
17 to request legislation which would be "a quick fix addressed to
18 the specific problems raised by the court." 124 Cong.Rec. 37681
19 (October 14, 1978). Senator Stafford states that his committee
20 considered

21 > ...two legislative repair possibilities:
22 > There could be a lengthy, full-fledged effort to repair section 311 and, perhaps, related authority: or, alternatively, a more focused
23 > effort addressed to the specific problems raised by the recent Court decision. After
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12. There are no House or Senate committee reports on this legislation; the legislative history is contained in remarks on the floors of the Senate and the House. 124 Cong.Rec. 37680; 124 Cong.Rec. 38685.

> intense review, the parties[13] concluded that there was no recourse but to seek quick legislative repair if section 311 were to be implemented without further unconscionable delay. The committee agreed.

124 Cong.Rec. 37682 (October 14, 1978).

The rest of Senator Stafford's remarks on the floor of the Senate in support of the 1978 amendments show consistently that the proposed legislation was concerned only with discharges related to NPDES permits. For example, he states:

> The third area of change[14] would clarify jurisdiction over discharges of oil and hazardous substances from point sources with NPDES permits. The issue of which section of the act governs these discharges is a principal source of controversy in the litigation. This proposal only affects the jurisdiction over certain discharges permitted under section 402.

124 Cong.Rec. 37683 (October 14, 1978).

To the extent any of Senator Stafford's remarks about oil spills can be read to include oil spills other than those related to an NPDES permit, there is no indication that he intended to change current law. To the contrary, he was at pains to affirm that then-current law would remain unchanged.

> While most discharges from permitted point sources will, therefore, be regulated solely under the section 402 permit system, the oil spill program under section 311 will remain intact, and other classic spill situations will continue to be subject to section 311.

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13. Sen. Stafford referred earlier to "a large number of interested parties." The litigants from Manufacturing Chemists had been in negotiation with EPA concerning possible legislative proposals that all could agree to. 124 Cong.Rec. 37681-2.

14. The other changes, involving hazardous pollutants, are not relevant to the present case.

124 Cong.Rec. 37683 (October 14, 1978).

Unstated by Senator Spafford, and irrelevant to the precise business then before the Senate, was the fact that under the holding in Hamel, "classic spill situations" that did not involve an NPDES permit were then subject to Section 311 and subject to Section 301(a) as well. Senator Spafford's incomplete statement of then-current law regarding oil spills not involving a permit does not necessarily evidence any intent on his part to change the law relating to such spills. If he had intended to do so, his remarks on the limited scope of his proposed legislation and his many references to NPDES permits would have been erroneous or misleading. The more logically consistent reading of Senator Spafford's remarks is that the 1978 amendments changed the law as to spills related to NPDES permits, but made no other changes in the existing law concerning oil spills.

The floor debate in the House of Representatives also demonstrates the limited scope of the proposed amendments to Section 311:

> H.R. 12140 would amend section 311 in such a way as to meet the court's concerns and to allow the immediate implementation of the program
> ...
>
> In these last days of the Congress, I recommend this legislation to my colleagues as a means of developing some regulation of hazardous substances while preserving the House's options to consider the entire program in depth in the next Congress.

Remarks of Congressman Breaux, 124 Cong. Rec. 38686 (October 14, 1978).

> ...H.R. 12140 would clarify which provisions of the Federal Water Pollution Control Act govern discharges of oil and hazardous substances <u>from point sources with effluent permits</u>. (emphasis added)

Remarks of Congressman Johnson, 124 Cong. Rec. 38686 and 38687 (October 14, 1978).

> H.R. 12140 would enable the hazardous substances spill program to be implemented by resolving the issues raised by the court.
> ...
> [T]he amendment clarifies which section of the Act, 311 or 402, governs discharges of oil and hazardous substances <u>from point sources with NPDES permits</u>. (emphasis added)

Remarks of Congressman Nowak, 124 Cong. Rec. 38688 and 38689 (October 14, 1978).

The legislative history, both in the Senate and the House, thus shows clearly that the 1978 Amendments were limited in scope and focussed on spills related to NPDES permits. The legislative history contains no unambiguous statement that the amendments also were intended to change existing law with respect to spills not involving a permit and the best interpretation of the floor debates is that Congress never considered the latter type of spill. Consequently, the 1978 amendments had no effect on the rule stated in <u>U.S. v. Hamel.</u>

The actual text of the 1978 amendments requires the same result. While the legislation amends the definition of discharge" applicable to Section 311 to exclude three types of

discharge related to NPDES permits,[15] it makes no corresponding change in the definition in Section 502(12) of "discharge of a " pollutant" which is the definition applicable to Section 301. Accordingly, although the 1978 amendments clearly exclude certain discharges from the coverage of Section 311, it is impossible to argue from the text itself that anything has been excluded from the coverage of Section 301.[16] Chevron's claim that Congress excluded "classic oil spills" from the coverage of section 301 is thus not supported in any way by the statutory language actually enacted. To the contrary, the fact that Congress did not change the definition of "pollutant" or "discharge of a pollutant" in Section 502 shows that Congress did not change then-existing law with respect to the scope of Section 301(a) - - oil is still a "pollutant" under Section 502(6) and the "discharge of a

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15. Quoted above at p.7.

16. While Congress could have excluded certain discharges of oil from Section 301 through a variety of means, e.g., by amending the definition of "pollutant" in Section 502(6) to exclude oil, the 1978 amendments contain no such changes. Congress also did not make any changes in 1978 in the "savings" clause for Section 311, which provides

> Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Section 311(o)(3) of the Clean Water Act, 33 U.S.C. § 1321(o)(3).

pollutant" as defined in Section 502(12) is still a violation of Section 301(a) if unauthorized, notwithstanding the existence of another regulatory structure for dealing with oil spills in Section 311.

Chevron also claims that EPA's explanatory preamble to the regulations implementing the 1978 amendments supports Chevron's position. However, the language of the preamble copies very closely the language of Senator Stafford's remarks to the Senate, and states consistently that the change made by the amendments concerns facilities with NPDES permits. 44 Fed. Reg. 50766-76 (August 29, 1979). Similarly, although the preamble states at several places that "spills" or "classic spills" are subject to Section 311, nowhere does the preamble say that Section 311 is the exclusive remedy for those spills. As with Senator Stafford's remarks to the Senate, a statement that certain spills are "subject to" Section 311 does not necessarily mean "subject only to" that section, and leaves room for the particular spill to be subject to one or more other statutory provisions as well.

In summary, where Congress has stated that it was acting with respect to discharges involving permits and specifically did not undertake a "full-fledged effort to repair Section 311," 124 Cong. Rec. 37682, there is no clear basis in Congressional "intent" on which EPA could read the effect of the 1978 amendments as extending to non-permit-related spill situations. Considering that case law generally interprets pollution control statutes broadly to effectuate their purpose, U.S. v. Standard Oil Co., 384 U.S. 224 at 226, 86 S.Ct. 1427, 16 L.Ed.2d 492

(1966), it would be anomalous to interpret the 1978 amendments so that the scope of Section 301(a)'s prohibition on discharging pollutants is reduced, without an unambiguous statement of Congressional intent to do so and absent any change in the language of Section 301(a) itself or of the definitions in Section 502 applicable to it.

(2) Is this oil spill a "discharge of a pollutant" from a "point source" as those terms are defined in Sections 502(12) and (14)?

Chevron argues that this oil spill was not a "discharge of a pollutant" from a "point source" (and therefore is not a violation of Section 301(a)) because the definitions of those terms in Section 502(12) and (14) show that "discharges" regulated under Section 301(a) must be expected or anticipated discharges, not an unanticipated discharge like the spill into Pearl Harbor from a ruptured pipeline that is the subject of this case. Chevron bases this argument on the definition of "point source" as

> Any discernible, confined and discrete conveyance...from which pollutants are or may be discharged. (emphasis added)

Clean Water Act Section 502(14); 33 U.S.C. § 1362(14), as well as on Chevron's reading of the relationship between Section 311 and Section 301(a). Motion of Chevron U.S.A. at pp. 2-4.

Chevron's arguments regarding the relationship between Section 311 and Section 301(a) are discussed above beginning at page 6. As explained there, Chevron misreads the intent and scope of the 1978 amendments to Section 311 and is incorrect in its claim that those amendments require unanticipated oil spills not involving an NPDES permit to be regulated only by Section 311.

Chevron's argument based on the definitions of "discharge" and "point source" is also incorrect. The phrase "are or may be discharged" quoted above is obviously ambiguous. It can mean "are or are expected to be discharged," but it can also mean "are or are capable of being discharged." Chevron's preference for the former reading is mistaken, since many reported cases hold that unexpected discharges of pollutants can violate Section 301(a). For example, in U.S. v. Earth Sciences, Inc. 599 F.2d 368 (10th Cir. 1978) the operator of a gold leaching process was charged with a violation of Section 301 when a faster-than-expected snow melt caused sumps to overflow into a creek. The sumps were part of a closed system for collecting and recirculating a cyanide solution used to leach gold from piles of ore. U.S. v. Earth Sciences, supra, at p. 370. The court found that no discharge was intended from the facility (and so the facility would not have been required to have an NPDES permit). Nevertheless an accidental release from the collection system was found to be a discharge from a point source in violation of Section 301(a). The cases of O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981) and Fishel v. Westinghouse Elect. Corp., 640 F.Supp. 442 (M.D. Pa. 1986) involve similar violations of Section 301(a) at facilities that did not have NPDES permits.[17] See also Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 397 (5th Cir. 1985), a citizen suit under Section

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17. In each case it appears there would have been no discharge if the facilities had been maintained and operated properly and so neither facility would have required an NPDES permit.

505 of the Clean Water Act, 33 U.S.C. § 1365, in which the court stated that a single prior leak from an oil pipeline would not constitute a continuing violation of Section 301(a), as is required in order to maintain a suit under Section 505.

Chevron argues essentially that the "point sources" regulated under Section 301(a) all require NPDES permits. Motion for Summary Dismissal at pp. 3-4; Reply Brief at n.3. Chevron's oil pipeline did not have or require an NPDES permit,[18] and consequently in Chevron's view is only regulated under Section 311 relating to oil spills, and not under section 301(a) relating to unauthorized discharges. As shown in the cases cited above, however, there can be point sources that discharge unexpectedly (and therefore do not require NPDES permits) that nevertheless violate Section 301(a).

Chevron's also argues (Reply Brief at p.5) that the only "discharges" of oil covered by Section 301(a) are the three types of "discharges" excluded from Section 311 by the definition of "discharge" in Section 311(a)(2) and that "[n]o other reading gives meaning to the language of Section 311(a)(2)." However, as discussed above, while the 1978 amendments to Section 311(a)(2) exclude certain types of spills from regulation under Section 311, they do not do the reverse: that is, they do not exclude from regulation under Section 301 all spills that are regulated under Section 311. Thus Section 311(a)(2) has a clear function,

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18. Chevron holds NPDES permit NI0000329 for the refinery, but states that under the permit "no treatment system for the pipeline was ever considered or required." Motion for Summary Dismissal, p.10.

(which is to exclude certain discharges related to permits from coverage under Section 311) eventhough it does have not the double function Chevron claims for it of also defining which "discharges" of oil are covered by Section 301(a).

Chevron does not concede that a pipe can be a "point source" where it was not anticipated that there would be a discharge from the pipe. Reply Brief at n.3. However, it is clear as a matter of law that accidental or otherwise unanticipated discharges of pollutants can be from a "point source." For example, in U.S. v. Earth Sciences, the court said:

> We have no problem finding a point source here. The undisputed facts demonstrate the combination of sumps, ditches, hoses and pumps is a circulating or drainage system to serve this mining operation....
>
> [W]e view this operation as a closed circulating system to serve the gold extraction process with no discharge. When it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source.

U.S. v. Earth Sciences, supra at p. 374.

Similarly, in O'Leary v. Moyer's Landfill the court said:

> The essence of a point source discharge is that it be from a "discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14). Contrary to defendants' assertions, this has nothing to do with the intent of the operators....
>
> The discharges here from inter alia (1) overflowing ponds, (2) collection-tank bypasses, (3) collection-tank cracks and defects, (4) gullies, trenches, and ditches (5) broken dirt berms, all constitute point source discharges.

O'Leary v. Moyer's Landfill, supra, at p.655.

The seven-inch rupture in Chevron's pipeline, apparently caused by operator error when personnel at Chevron's Barbers Point Refinery attempted to pump jet fuel from the refinery to Chevron's marketing facility in Honolulu before the valves were opened at the Honolulu end of the pipeline,[19] is directly analogous to the discharge in U.S. v. Earth Sciences "from a fissure in [a] dirt berm" and to the discharge in O'Leary v. Moyer's Landfill from "collection-tank cracks and defects."

Findings

The events described in the Federal On-Scene Coordinators Report at pages 3-4 and 10-11, if proved at hearing, would constitute the "discharge of a pollutant" from a "point source" in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

It is not clear from the administrative record, however, that Chevron has conceded the accuracy and completeness of the Federal On-Scene Coordinator's Report. Chevron appears instead to assert that under its theory of the case the question whether the Barbers Point - Honolulu pipeline is a "point source" should be deferred for resolution at such time as EPA "attempts to regulate the pipeline in a permit proceeding." Reply Brief at n.3. Thus while Chevron's legal arguments against finding the pipeline to be a "point source" have failed, Chevron does not appear to

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19. Federal On-Scene Coordinator's Report at p.10.