

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Mayflower International, Ltd.
AAD NO. 04-006/WRE
Notice of Violation OC&I/WP 04-14
May 2006

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (“AAD”) pursuant to Respondent's request for hearing on the Notice of Violation (“NOV”) issued by the DEM Office of Compliance and Inspection (“OCI”) on November 19, 2004. Pursuant to Rule 4.00(b) of the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters*, Respondent designated Thomas Nye Swift, Vice President of Mayflower International, Ltd., to act as the Respondent's spokesperson during most of the AAD proceedings in this matter. Mr. Swift participated in the hearing conducted on February 20, 2006. The OCI was represented by Gregory S. Schultz, Esq..

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 et seq.); Chapter 17.6 of Title 42 entitled “*Administrative Penalties for Environmental Violations*”; the *Administrative Procedures Act* (R.I. GEN. LAWS § 42-35-1 et seq.); the *Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters*; and the *Rules and Regulations for Assessment of Administrative Penalties* (“*Penalty Regulations*”).

PREHEARING CONFERENCE

A prehearing conference was held on September 30, 2005. At the prehearing conference, the parties agreed to the following stipulations of fact:

1. Mayflower International, Ltd. is the holder of Rhode Island Pollutant Discharge Elimination System (“RIPDES”) Permit No. RI0023621. Said RIPDES Permit was issued to Mayflower International, Ltd. by DEM on January 8, 2003 and became effective on January 8, 2003.
2. On November 19, 2004, DEM issued a Notice of Violation (“NOV”) to Mayflower International, Ltd.

A list of the exhibits, marked as they were admitted at the hearing, is attached to this Decision as Appendix A.

HEARING SUMMARY

At the hearing, the OCI called one (1) witness: **David Chopy**, a Supervising Sanitary Engineer for the OCI and a Registered Professional Engineer who, by agreement, was qualified as an expert in the areas of sanitary and civil engineering and in the application of and compliance with the Department's *Water Quality Regulations* and *RIPDES Regulations*. Respondent did not call any witnesses to testify at the hearing.

I. The Notice of Violation

The NOV (OCI 8) issued to Mayflower International, Ltd. (the “Respondent”) concerns the requirements of the RIPDES Permit and allegations of noncompliance with those requirements.

The NOV states that the RIPDES Permit authorized Respondent to discharge seawater from flumes that are used to transport fish from fishing vessels to a fish processing vessel anchored in Narragansett Bay. According to the NOV, the Permit required the Respondent to perform sampling of the seawater discharge every two (2) weeks during a discharge; to summarize the monitoring results from the previous month; and to report the results on Discharge Monitoring Report (“DMR”) Forms that are submitted to the DEM no later than the fifteenth (15th) day of the month following the completed reporting period. The NOV alleges that a discharge of seawater from a fish processing vessel to Narragansett Bay occurred between February 16, 2003 and April 4, 2003 but that no samples of the discharge were taken. In addition, DMR Forms were not submitted within the required timeframe.

The NOV cites Respondent for violating *The Rhode Island Water Pollution Act*, specifically R.I. GEN. LAWS § 46-12-5(b); and Rule 14.02(a), Rule 14.14 and Rule 14.17(d) of the *DEM RIPDES Regulations*. The OCI seeks the assessment of an administrative penalty against Respondent in the amount of Eleven Thousand Five Hundred (\$11,500.00) Dollars.

II. Sampling of Discharge and Reporting Requirements

OCI's witness David Chopy explained that among his duties was the enforcement of requirements set forth in RIPDES Permits. The Office of Water Resources (“OWR”), which had issued the RIPDES Permit to Mayflower International, Ltd., referred the matter to Mr. Chopy for enforcement. In the referral, according to the witness, the OWR stated that Respondent had not complied with the conditions set forth in the Permit. Mr. Chopy then spoke to OWR personnel, reviewed the permitting file, and prepared the NOV and the penalty calculation.

The witness testified that the RIPDES Permit issued to Mayflower International, Ltd. required Respondent, as the Permittee, to file a report of the previous month's monitoring results by the 15th day of the following month. Mr. Chopy stated that these reports, or DMR Forms, were required even if there had been no discharge in the previous month.

Respondent filed the DMR Forms for the period January through September, 2003 with an accompanying letter dated September 28, 2003. OCI 7. In that letter, Respondent stated the following:

The Russian processing vessel MV Dauriya received fresh mackerel and herring via pump from U.S. fishing vessels at the Jamestown anchorage location between 16 February and April 4, 2003. Approx [sic] 3,800 MT of fresh fish was frozen during this period. No samples of the flume water were analyzed. *Id.* at 1.

Mr. Chopy concluded that not only were the DMR Forms filed late, but that the reports indicated that there had been discharges in February, March and April, 2003 and no sampling and testing had been done as was required by the Permit. Under cross-examination, the witness explained in more detail his role in reviewing permits referred for enforcement action. Mr. Chopy acknowledged that the DEM had received complaints regarding discharges, odors and lights, but that he had not followed up on the complaints about the fish processing vessel.

Respondent did not present any witnesses. Mr. Swift, in a combined opening and closing statement, stated that in the year prior to receiving the RIPDES Permit, Mayflower International, Ltd. had not needed a Permit. He argued that there was no discharge of pollutants pursuant to the *RIPDES Regulations* and that the only reason Mayflower International, Ltd. had applied for the Permit was to appease the neighbors. He concluded that DEM had exceeded its authority and since the Permit was void *ab initio*, the alleged violations were not, in fact, violations because the Permit was not required.

OCI counsel stated that any right to raise this argument had previously been waived by Mayflower International, Ltd. since the applicant had submitted the application, obtained the Permit, and failed to appeal any of the conditions attached to the Permit. In addition, counsel cited the provisions of Rules 8 and 9 of the *RIPDES Regulations*, which sections specify those

persons who are required to apply for a Permit, those activities that are exempt, and those activities where the exemption does not apply. Counsel concluded that Rule 9(a) provides that seafood processing facilities are not excluded from compliance with the requirement to obtain a RIPDES Permit.

Conclusion

R.I. GEN. LAWS § 46-12-5(b) provides the following:

It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit.

The chapter defines “pollutant” to mean “any material or effluent which may alter the chemical, physical, biological, or radiological characteristics and/or integrity of water, including but not limited to... biological materials... heat...” R.I. GEN. LAWS § 46-12-1 (15). “Pollution” is defined to mean “the man made or man induced alteration of the chemical, physical, biological, and radiological integrity of water. R.I. GEN. LAWS § 46-12-1 (17).”

In this matter fish were held in the flumes for processing aboard the *M/V Dauriya*. The waste water was then discharged into the waters of the State. It is likely that the water may have contained higher concentrations of fish waste (biological materials) or higher or lower readings of temperature (heat) than the receiving waters. Pollutants, as defined by the statute, would be discharged into the waters of the State.

Rule 8 of the *RIPDES Regulations* provides that any person who discharges, or proposes to discharge, pollutants into the waters of the State must submit an application for a RIPDES Permit. Rule 9 lists activities which do not require a Permit. Specifically excluded from the exempt activities are discharges when the vessel is operating as a seafood processing facility. *RIPDES Regulations* Rule 9(a). I therefore conclude that Mayflower International, Ltd. was indeed required to obtain a RIPDES Permit by statute and by departmental regulation.

The OCI contends that Respondent has violated R.I. GEN. LAWS § 46-12-5(b), discussed above, as well as Rule 14.02(a), Rule 14.14 and Rule 14.17(d) of the *RIPDES Regulations*. The first Rule requires the Permittee to comply with all conditions of the Permit and provides that “[a]ny permit noncompliance constitutes a violation of the State Act or other authority of these regulations and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.” Rule 14.14 requires that monitoring results be reported on a DMR and on the Department's Monitoring Report Form. Rule 14.17(d) requires that monitoring reports be reported at the intervals specified in the Permit. Mayflower International, Ltd. was issued RIPDES Permit No. RI0023621 on January 8, 2003. The Permit authorized the discharge of fish flume water from the vessel *M/V Dauriya* and required that the discharges be monitored for certain specified effluent characteristics. OCI 5 at 5 (page 2 of Permit). All monitoring required by the Permit was to be done in accordance with sampling and testing procedures set forth in the Federal Regulations. *Id.* at 7 (page 4 of Permit). The RIPDES Permit issued to the Respondent also contained reporting requirements: Monitoring results obtained during the previous month(s) shall be summarized and reported on Discharge Monitoring Report (DMR) Forms, postmarked no later than the 15th day of the month following the completed reporting period. A copy of the analytical laboratory report, specifying analytical methods used, shall be included with each report submission. The first report is due on February 15, 2003... *Id.*

According to Mr. Chopy's testimony, William Quinby (identified as Director of Mayflower International Ltd. on the correspondence from the Department that accompanied the RIPDES Permit) was aware of the need to submit the reports because of a conversation Mr. Quinby had with DEM personnel in April 2003.

In the letter dated September 28, 2003 (OCI 7 at 1), Respondent stated that the vessel M/V *Dauriya* received mackerel and herring from other fishing vessels during the period of February 16 through April 4, 2003. In the DMR Forms attached to the letter, discharges during the months of February, March and April, 2003 are identified. The DMR Forms indicate that there were no discharges for January, May, June, July, August and September, 2003. All of the DMR Forms are dated September 30, 2003 and were filed with the DEM on or after that date. No samples were taken in any of the months. *Id.* at 2-9.

The OCI has therefore proven by a preponderance of the evidence that during February through April, 2003, Respondent violated *The Rhode Island Water Pollution Act*, specifically R.I. GEN. LAWS § 46-12-5(b), and Rule 14.02(a), Rule 14.14 and Rule 14.17(d) of the *DEM RIPDES Regulations*, by not sampling and testing the discharges as required under the terms of the Permit and by not submitting the DMR Forms by the 15th day of the month following the completed reporting period.

OCI's witness David Chopy had testified that Permittees were required to submit monthly DMR Forms even if there had been no discharge to monitor in the preceding month. The Respondent should therefore have submitted DMR Forms for January, May, June, July and August, 2003 by the 15th day of the succeeding month. The OCI has therefore proven by a preponderance of the evidence that Respondent violated R.I. GEN. LAWS § 46-12-5(b), and Rule 14.02(a), Rule 14.14 and Rule 14.17(d) of the *DEM RIPDES Regulations* by not submitting the DMR Forms by the 15th day of the month following the completed reporting period.

III. Assessment of an Administrative Penalty

As indicated in the NOV, the OCI sought the imposition of an administrative penalty for all of the alleged violations in the amount of Eleven Thousand Five Hundred (\$11,500.00) Dollars. OCI 8 at 2. The NOV states that the penalty was assessed pursuant to R.I. GEN. LAWS §42-17.6-2 and was calculated pursuant to the *Penalty Regulations*.

Section 12(c) of the *Penalty Regulations* provides the following:

In an enforcement hearing the Director must prove the alleged violation by a preponderance of the evidence. Once a violation is established, the violator bears the burden of proving by a preponderance of the evidence that the Director failed to assess the penalty and/or the economic benefit portion of the penalty in accordance with these regulations.

The Department's interpretation of this provision requires the OCI to establish in evidence the penalty amount and its calculation. The violator must then prove that the penalty was not assessed in accordance with the *Penalty Regulations*. In Re: Richard Fickett, AAD No. 93-014/GWE, Final Decision and Order entered on December 9, 1995.

Section 10 of the *Penalty Regulations* provides for the calculation of the penalty through the determination of whether a violation is a Type I, Type II or Type III violation and whether the Deviation from Standard is Minor, Moderate or Major. Once the Type and Deviation from Standard are established, a penalty range for the violation can be determined by reference to the appropriate penalty matrix.

The penalty amount and its calculation for the alleged violations was established in evidence through the testimony of David Chopy and the admission into evidence of the Administrative Penalty Summary and the Administrative Penalty Matrix Worksheets attached to the NOV (OCI 8 at 5-8). Mr. Chopy testified that he used the *Penalty Regulations* in calculating the assessment of the penalty. He determined that the failure to perform sampling was a Type I violation, in that it was of major importance to the regulatory program and directly related to protecting the health, safety, welfare or environment. The Administrative Penalty Summary and the Administrative Penalty Matrix Worksheet indicate that the failure to perform sampling for the discharges that occurred in February, March and April, 2003 was considered a single violation and determined to

be a Minor Deviation from Standard. The penalty assessed was \$2,500.00, the minimum from the penalty matrix. OCI 8 at 5, 8.

Mr. Chopy had also determined that the failure to timely submit the DMR Forms for January (due by February 15), February (due by March 15), March (due by April 15), April (due by May 15), May (due by June 15), June (due by July 15) and July (due by August 15), because they were more than thirty (30) days overdue, were Type III violations with a Moderate Deviation from Standard. He selected the minimum in the penalty range, for an assessment of a \$1,250.00 penalty for each of the seven (7) violations. OCI 8 at 5-6.

The DMR Form for the month of August, which was due by September 15 but not received until on or after September 30, 2003, was calculated as a filing violation of less than thirty (30) days overdue. The witness stated that he determined it to be a Type III violation with a Minor Deviation from Standard. The assessed penalty for the violation was \$250.00, the minimum in the penalty range. OCI 8 at 5, 7.

Respondent's Designated Spokesperson questioned the witness as to whether he had considered any mitigating factors in determining the administrative penalty for the late filing of the DMR Forms. Mr. Chopy responded that he had considered Respondent's knowledge of the need to submit the reports.

Conclusion

Respondent has not proved that the administrative penalty set forth in the NOV for the failure to conduct sampling and testing of the discharges and for untimely submission of the DMR Forms, was not assessed in accordance with the *Penalty Regulations*. An administrative penalty in the total amount of \$11,500.00 is therefore warranted.

Wherefore, after considering the stipulations of the parties and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. Mayflower International, Ltd. ("Respondent") is the holder of Rhode Island Pollutant Discharge Elimination System ("RIPDES") Permit No. RI0023621. The RIPDES Permit was issued to Mayflower International, Ltd. by DEM on January 8, 2003 and became effective on January 8, 2003.
2. The RIPDES Permit authorized the Respondent to discharge fish flume water from the fish processing vessel M/V *Dauriya* into the waters of Narragansett Bay.
3. The RIPDES Permit required the Respondent to monitor discharges and test for certain specified effluent characteristics.
4. The RIPDES Permit required the Respondent to report monitoring results obtained in the previous month on DMR Forms to be postmarked no later than the 15th day of the month following the reporting period. The first report was due on February 15, 2003.
5. The fish processing vessel M/V *Dauriya* received fish from fishing vessels between February 16 and April 4, 2003.
6. The fish processing vessel M/V *Dauriya* made discharges into Rhode Island waters in February, March and April, 2003.
7. The Respondent did not conduct sampling and testing on the discharges that occurred in February, March and April, 2003.
8. On or after September 30, 2003, the Respondent submitted to the DEM DMR Forms for January through September, 2003.
9. The DMR Forms for January through July, 2003 were submitted more than thirty (30) days past the deadline.

10. The DMR Form for August, 2003 was submitted approximately fifteen (15) days past the deadline.
11. The OCI established in evidence the calculation and amount of the administrative penalty for each of the alleged violations.
12. The OCI established in evidence that the Respondent's failure to perform sampling and testing on the discharges in February, March and April 2003 was determined to be a Type I Minor Deviation from Standard for an administrative penalty in the amount of \$2,500.00.
13. The OCI established in evidence that the Respondent's submission of the DMR Forms for January, February, March, April, May, June and July, 2003 more than thirty (30) days after the date upon which they were due, was determined to be a Type III Moderate Deviation from Standard. Each instance was assessed an administrative penalty in the amount of \$1,250.00.
14. The OCI established in evidence that the Respondent's submission of the DMR Form for August, 2003, which was due on September 15, 2003 but not submitted until on or about September 30, 2003, was determined to be a Type III Minor Deviation from Standard and was assessed an administrative penalty in the amount of \$250.00.
15. An administrative penalty in the amount of \$11,500.00 is not excessive.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above Findings of Fact and the legal arguments of the parties, I conclude the following as a matter of law:

1. Pursuant to R.I. GEN. LAWS § 46-12-5(b), Rule 8 and Rule 9(a) of the *RIPDES Regulations*, Mayflower International, Ltd. was required to obtain a RIPDES Permit in order to discharge fish flume water into the waters of the State.
 2. The OCI has proved by a preponderance of the evidence that the Respondent failed to perform sampling and testing of the discharges that occurred in February, March and April, 2003 as required by the RIPDES Permit, in violation of R.I. GEN. LAWS § 46-12-5(b) and Rule 14.02(a) of the *RIPDES Regulations*.
 - 3 The OCI has proved by a preponderance of the evidence that the Respondent failed to timely submit DMR Forms for the months of January through August, 2003 by the deadline specified in the RIPDES Permit, in violation of R.I. GEN. LAWS § 46-12-5(b), Rule 14.02(a), Rule 14.14 and Rule 14.17(d) of the *RIPDES Regulations*.
 - 4 The OCI established in evidence the calculation and amount of the administrative penalty for each of the alleged violations.
 5. Respondent has failed to prove by a preponderance of the evidence that the assessment of an administrative penalty in the amount of \$11,500.00 is not in accordance with the *Penalty Regulations*.
 6. The assessment of an administrative penalty in the amount of \$11,500.00 against the Respondent is in accordance with the *Penalty Regulations*.
- Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. An administrative penalty in the amount of Eleven Thousand Five Hundred (\$11,500.00) Dollars is hereby ASSESSED against Respondent.
2. Respondent shall make payment of the administrative penalty within thirty (30) days from the date of entry of the Final Agency Order in this matter. Payment shall be in the form of a certified check or money order made payable to the "General Treasury - Water & Air Protection Program Account", and shall be forwarded to:
R.I. Department of Environmental Management

Office of Management Services
235 Promenade Street, Room 340
Providence, RI 02908

Attn: Terrence Maguire

Entered as an Administrative Order this _____ day of May, 2006 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon
Hearing Officer

Entered as a Final Agency Order this _____ day of _____, 2006.

W. Michael Sullivan, Ph.D.,
Director

NOTICE OF APPELLATE RIGHTS

This Final Agency Order constitutes a final order of the Department of Environmental Management pursuant to R.I. GEN. LAWS §42-35-12. Pursuant to R.I. GEN. LAWS §42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

APPENDIX A

LIST OF EXHIBITS

OCI'S EXHIBITS

OCI 1 Copy of letter from William C. Quinby to Angelo Liberti and

FULL Eric Beck dated November 15, 2002, four (4) pages;

OCI 2 Copy of letter from Eric Beck to William Quinby, dated
for Id November 25, 2002, three (3) pages;

OCI 3 Copy of public notice of RIPDES permit application for
for Id Mayflower International LTD., dated November 29, 2002,
three (3) pages;

OCI 4 Copy of letter from Angelo Liberti to William Quinby, dated
for Id December 3, 2002, with draft RIPDES Permit No. RI0023621,
Statement of Basis, and public notice, fourteen (14) pages;

OCI 5 Copy of letter from Angelo Liberti to William Quinby, dated
FULL January 8, 2003, with final RIPDES Permit No. RI0023621 and
Statement of Basis, eleven (11) pages;

OCI 6 Copy of letter from Eric Beck to Linda Roccoforte of
for Id Mayflower International, LTD., dated February 27, 2003,
one (1) page;

OCI 7 Copy of letter from William C. Quinby to Annie McFarland,
FULL dated September 28, 2003, with copies of Discharge
Monitoring Reports, ten (10) pages;

OCI 8 Copy of Notice of Violation No. OC&I/WP/04-14 to Mayflower
FULL International, Ltd., dated November 19, 2004, eight (8) pages;

OCI 9 Resume of David Chopy, one (1) page;
for Id

OCI 10 Identified at prehearing conference but not submitted.

RESPONDENT'S EXHIBITS

Resp 1 Letter from Mayflower to Annie L. McFarland dated
Full September 28, 2003;

Resp 2 Group Exhibit - DMR Reports from January 2 through
Full September 4, 2003;

Resp 3 Copy of Rule 8 of the Regulations for the Rhode Island
Full Pollutant Discharge Elimination System;

Resp 4 Group Exhibit - Letter from Gordon McCay CPA to David
For Id Chopy at DEM dated July 19, 2005 with attached Mayflower
Tax Returns;

Resp 5 Copy of Rule 3 of the Regulations for the Rhode Island
Full Pollutant Discharge Elimination System.