

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)	Docket No. CWA-08-2009-0035
)	
Avista Utilities, Inc.)	
1411 East Mission)	ANSWER TO ADMINISTRATIVE
Spokane, WA 99202-3727,)	COMPLAINT AND REQUEST FOR
)	HEARING
(Noxon Rapids Hydroelectric)	
Development Facility)	
Sanders County, Montana),)	
)	
Respondent.)	

Respondent Avista Corporation, dba Avista Utilities (“Avista”), by and through its undersigned counsel, hereby answers the U.S. Environmental Protection Agency’s (“EPA”) civil administrative complaint filed on September 30, 2009 (“Complaint”) as follows:

FIRST DEFENSE

In response to the numbered paragraphs of EPA’s Complaint, Avista answers as follows:

AUTHORITY

1. The allegations contained in this paragraph do not call for a response. To the extent the allegations do call for a response, Avista states that the allegations are conclusions of law to which no response is required, and to the extent that such allegations require a response, Avista lacks knowledge or information sufficient to form a belief as to the truthfulness or accuracy of the allegations, and therefore denies the same at this time.

2. Avista Corporation, dba Avista Utilities, admits that it is a corporation organized under the laws of Washington and authorized to do business in the State of Montana. Avista denies the remaining allegations in this paragraph.

3. The allegation contained in this paragraph is a conclusion of law to which no response is required, and to the extent that such allegation requires a response, such allegation is denied.

4. Avista Corporation dba Avista Utilities admits that it owns and operates the Noxon Rapids Hydroelectric Development facility (“Facility”), and admits the other allegations contained in this paragraph.

5. Avista admits the allegations contained in this paragraph.

6. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

7. Avista admits that it stores, uses or consumes certain oil or oil products at the Facility.

8. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

9. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

10. Avista admits that the Clark Fork River is the river on which the Facility is located. Avista admits that the surface of the Clark Fork River is located below the Facility’s transformer deck and oil storage room. Avista admits that some of the mineral oil on the

transformer deck flowed into a deck drain near the broken valve, and then flowed down through the drain pipe to approximately 15 ft below the surface of the River, at which depth the mineral oil drained from the drain pipe into the River. Avista denies the remaining allegations contained in this paragraph.

11. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

12. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations do call for responses, Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), speaks for itself.

13. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied. Moreover, Section 311(b)(6)(B)(II) of the Act, 33 U.S.C. § 1321 (b)(3), and 40 C.F.R. § 19.4, speak for themselves.

COUNT I

14. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, Section 311(b)(3) of the Act, 33 U.S.C. § 1321 (b)(3) speaks for itself.

15. Avista admits that EPA has promulgated a regulation at 40 C.F.R. § 110.3. The other allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the other allegations contained in this paragraph do call for responses, 40 C.F.R. § 110.3 speaks for itself.

16. Avista admits that at approximately 12:15 p.m. (around noon) on Thursday, February 26, 2009, Avista discovered that an estimated release of approximately 1,145 gallons of

lightweight transformer cooling oil (aka mineral oil) containing approximately 3.7 parts per million of polychlorinated biphenyls (PCBs) had discharged from a transformer with a total oil storage capacity of approximately 6,300 gallons located on the transformer deck. Avista lacks knowledge or information as to when the actual discharge occurred. Avista admits that the transformer deck spans the Clark Fork River at the bottom of the hydroelectric dam on the discharge side. Avista admits that a piece of ice fell on and broke a relief valve on a 1/4-inch pipe used to circulate a lightweight mineral oil used for cooling the transformer systems. Avista admits that the mineral oil spilled onto the deck, flowed into the deck drain, and that an estimated 1,023 gallons flowed down the drain pipe, which drain pipe extended from the deck downward to approximately 15 feet below the surface of the Clark Fork River, and there spilled into the Clark Fork River. Avista admits that approximately 122 gallons of mineral oil were recovered from the piping and deck. Avista admits that due to a mechanical failure (floating arm getting caught up inside the transformer), the spill was not detected until February 26, 2009, at approximately 12:15 p.m. (around noon) during a visual inspection of the Facility. Avista denies the remaining allegations contained in this paragraph.

17. Avista lacks knowledge or information sufficient to form a belief as to the truthfulness or accuracy of the allegations contained in this paragraph, and therefore denies the same at this time. Chromatographic analyses indicates that the referenced sheens on the Clark Fork River are unrelated to the mineral oil release that is the subject of this Complaint.

18. Avista denies that two sets of booms were deployed at the Cabinet Gorge Dam's Boat Ramp. Avista admits that two sets of booms were deployed from boats that put in at the Cabinet Gorge Boat Ramp, one at the Cabinet Gorge boater safety cable and another at the Heron Bridge. In addition to those two sets of booms, Avista also deployed additional sets of

booms at other locations along the Clark Fork River. Avista admits the remaining allegations contained in this paragraph.

19. Avista admits that EPA's Emergency Response Unit issued to Avista an administrative order under § 311(c) of the Clean Water Act on February 28, 2009, in connection with the release that is the subject of this Complaint. Avista lack knowledge or information sufficient to form a belief as to the truthfulness or accuracy of the remaining allegations contained in this paragraph (*i.e.*, specifically why EPA dispatched its Response Unit and issued the administrative order), and therefore denies the same at this time. Chromatographic analyses indicates that the referenced sheens observed on the Clark Fork River are unrelated to the mineral oil release that is the subject of this Complaint.

20. Avista admits that NRCES, Avista's response contractor, reported that it observed oil sheens of an unknown origin downstream from the Facility on March 2 and 3, 2009. Chromatographic analyses indicates that the referenced sheens observed on the Clark Fork River are unrelated to the mineral oil release that is the subject of this Complaint.

21. Avista admits that the accidental release of approximately 1,145 gallons of mineral oil from the Facility on or about February 26, 2009, resulted in a release of limited PCBs into the Clark Fork River and its adjoining shorelines. Chromatographic analyses indicates that the referenced film, sheen or discoloration observed on the Clark Fork River and its adjoining shorelines are unrelated to the mineral oil release that is the subject of this Complaint. The other allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

COUNT II

22. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations contained in this paragraph do call for responses, Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), speaks for itself.

23. Avista admits that EPA has promulgated the regulations at 40 C.F.R. Part 112. The other allegation contained in this paragraph does not call for a response, and therefore, no responses are given. To the extent the other allegation contained in this paragraph does call for a response, 40 C.F.R. § 112.1(b) speaks for itself.

24. Avista admits that its facility has a total oil storage capacity greater than 1,320 gallons. The other allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

25. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

26. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

27. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations contained in this paragraph do call for responses, Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), speaks for itself.

28. Avista admits the allegations contained in this paragraph.

29. Avista admits the allegations contained in this paragraph.

30. Avista lacks knowledge or information sufficient to form a belief as to the truthfulness or accuracy of the allegation as to when EPA reviewed the revised Facility SPCC plan and assessed its adequacy, and therefore denies the same at this time. Avista admits that on August 24, 2009, Donna Inman of EPA had a telephone conversation with Kevin Booth of Avista, and informed Mr. Booth that she had determined that the revised SPCC plan was inadequate for several, but not all, of the reasons set forth in this paragraph. The allegations as to the specific bases for Ms. Inman's finding do not call for responses, and therefore, no responses are given at this time. To the extent that responses are required to the specific bases, Avista denies the allegations at this time.

31. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied. Avista also alleges that EPA failed to follow the regulatory process, set forth in 40 C.F.R. § 112.4(d), for the amendment of Avista's SPCC plan.

32. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied.

PROPOSED CIVIL PENALTY

33. The allegations contained in this paragraph are conclusions of law to which no responses are required, and to the extent that such allegations require responses, such allegations are denied. As to the allegation that "Complainant proposes the assessment of administrative penalties..." the allegation does not call for a response, and therefore, no response is given. To the extent the allegation does call for a response, Avista denies the allegation.

34. As to the allegation in the first paragraph, Avista lacks knowledge or information sufficient to form a belief as to the truthfulness or accuracy of the allegation (*i.e.*, what

Complainant considered in proposing the penalty amount), and therefore denies the same at this time.

As to the allegations in the second paragraph, Avista denies that it does not qualify for any penalty reduction based on mitigation factors or gravity adjustments. The remaining allegations do not call for responses, and therefore, no responses are given. To the extent the remaining allegations do call for responses, Avista lacks knowledge or information sufficient to form a belief as to the truthfulness or accuracy of the allegation (*i.e.*, the basis of the proposed penalty amounts, and whether additions were made), and therefore denies the same at this time.

TERMS OF PAYMENT FOR QUICK RESOLUTION

35. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations do call for responses, Avista denies the allegations.

36. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations do call for responses, Avista denies the allegations.

OPPORTUNITY TO REQUEST A HEARING

37. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations do call for responses, Avista denies the allegations.

PUBLIC NOTICE

38. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations do call for responses, Avista denies the allegations.

SETTLEMENT CONFERENCE

39. The allegations contained in this paragraph do not call for responses, and therefore, no responses are given. To the extent the allegations do call for responses, Avista denies the allegations.

40. Avista denies every other allegation in the Complaint which is not expressly admitted herein.

SECOND DEFENSE

The claims in the Complaint fail to state facts sufficient to warrant the assessment of civil penalties against Avista.

THIRD DEFENSE

The claims in the Complaint are barred, in whole or in part, by the doctrines of waiver and estoppel.

FOURTH DEFENSE

The claims in the Complaint are barred, in whole or in part, by the doctrine of laches.

FIFTH DEFENSE

The claims in the Complaint are barred, in whole or in part, by the act of God doctrine.

SIXTH DEFENSE

At all times alleged in the Complaint, Avista has acted in good faith.

SEVENTH DEFENSE

The Complaint is fatally flawed in that it fails to provide an adequate description of all relief sought, and an adequate explanation of the proposed penalties, as required by 40 C.F.R. § 22.14(a)(4).

EIGHTH DEFENSE

The assessment of civil penalties against Avista is barred for failure to consider and apply the applicable statutory penalty factors set forth in § 311(b)(8) of the Clean Water Act, 33 U.S.C. § 1321(b)(8).

NINTH DEFENSE

The presence of the oil sheens, films or discoloration were caused by third persons not parties to this action, for whose acts or omissions Avista is not liable.

TENTH DEFENSE

EPA failed to follow the regulatory process, set forth in 40 C.F.R. § 112.4(d), for the amendment of Avista's SPCC plan.

ELEVENTH DEFENSE

Avista reserves the right to set forth additional affirmative defenses, or to delete affirmative defenses already pled, as they become known during the course of discovery.

WHEREFORE, Avista respectfully requests that the Complaint be dismissed with prejudice, and requests an informal settlement conference and a hearing.

DATED:

October 26, 2009

Respectfully submitted,

STOEL RIVES LLP

By: Marty Banks
Martin K. Banks
(801) 578-6975

Attorneys for Respondent
Avista Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of Avista Corporation's Answer to Administrative Complaint and Request for Hearing, was sent via Certified Mail, Postage Pre-Paid, to the Tina Artemis, Regional Hearing Clerk (8RCD), EPA Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail, Postage Pre-Paid, to:

Amy Swanson
Enforcement Attorney (8ENF-L)
U.S. EPA Region 8, Legal Enforcement Program
1595 Wynkoop Street
Denver, CO 80202-1129
(303) 312-6906

10/26/09
Date

Josie Walsh
Josie Walsh