UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF	)	
	)	
Fulton Fuel Company	)	Docket No. CWA-08-2009-0006
127 Main Street	)	
Shelby, Montana 59474	)	REPLY IN OPPOSITION TO
	)	RESPONDENT'S MOTION
Respondent.	)	TO SET ASIDE DEFAULT
	)	

Complainant U.S. Environmental Protection Agency respectfully moves, pursuant to 40 C.F.R. § 22.16 of the Consolidated Rules of Practice, for an Order denying Fulton Fuel Company's Motion to Set Aside Default. The grounds for denying the Motion to Set Aside Default are as follows: (A) services of process on the Respondent was proper; (B) the purported defenses are insufficient as a matter of law because (1) the Respondent had a duty to answer the complaint, (2) jurisdiction is proper under the Clean Water Act because the Fred and George Creek is a "water of the United States" and (3) Respondent was required to establish and implement a Spill Prevention Control and Countermeasure Plan; (C) the determination of liability was proper. In support of this Reply, Complainant files the attached Memorandum in opposition to respondent's Motion to Set Aside Default, incorporated herein by reference.

Dated: March 22, 2010

Respectfully Submitted,

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Enforcement Attorney

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Andrea D. Loguidice, Esq.
Legal Intern

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I. Introduction

Complainant U.S. Environmental Protection Agency (hereinafter EPA or the Complainant) respectfully moves pursuant to 40 C.F.R. § 22.16 of the Consolidated Rules of Practice (hereinafter Consolidated Rules) for an Order denying Fulton Fuel Company's (hereinafter Respondent or Fulton) Motion to Set Aside Default (hereinafter Motion). The grounds for denying the Motion are as follows: (A) the Respondent was properly served under Montana State Law and the Consolidated Rules; (B) the purported defenses are insufficient as a matter of law because (1) the Respondent had a duty to answer the complaint, (2) jurisdiction is proper under the Clean Water Act because the Fred and George Creek is a "water of the United States" and (3) Respondent was required to establish and implement a Spill Prevention Control and Countermeasure Plan (hereinafter SPCC); (C) the determination of civil liability was proper.

II. Statutory and Regulatory Provisions

The Clean Water Act of 1972 (hereinafter the CWA or the Act) provides the foundation for this case. *See* 33 U.S.C. § 1251. The primary objective of the Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The purpose of § 311 of the Act, 33 U.S.C. § 1321, is to

deter conduct causing spills or discharges of oil and hazardous substances into waters under the jurisdiction of the United States. See, e.g., *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978). Section 311(b)(1) of the Act, 33 U.S.C. § 1321(b)(1), sets forth a congressional policy "that there should be no discharge of oil . . . into or upon the navigable waters of the United States."

The term "discharge" is defined as including "any spilling, leaking, pumping, pouring, emitting, emptying or dumping" except as in compliance with a permit under § 402 of the CWA and under certain other conditions not pertinent to this case. § 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2); 40 C.F.R. § 117.3. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), prohibits "the discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines" and other waters of the United States in quantities that have been determined may be harmful to the public health or welfare or the environment of the United States. For purposes of § 311(b)(3) and (b)(4) of the Act, 33 U.S.C. §§ 1321(b)(3) and (b)(4), discharges of oil into or upon the navigable waters of the United States which may be harmful to the public health or welfare or the environment of the United States include discharges of oil that "(a) violate applicable water quality standards or (b) cause a film or sheen upon or discoloration of the surface or the waters or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. § 110.3.

III. Deference to Agency Interpretation under *Chevron and Seminole Rock*

This case presents a threshold question as to what waters are covered under EPA regulations, and in particular, how a court might interpret the regulations. Because the

question in the instant action involves the interpretation of a regulation, principles of statutory construction lay the foundation for this discussion.

A. *Chevron* deference to EPA's interpretation of regulations

> When a case involves an agency's interpretation of a statute it administers, this court uses the two-step approach announced in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See, S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 824 (10th Cir. 2000). Under this approach, when Congress has addressed the precise question at issue, we give effect to the express intent of Congress. *Id.* (citing *Chevron*, 467 U.S. at 842-43). "If the statute is silent or ambiguous, however, we defer to the agency's interpretation" so long as it is permissible. *Id.* (citing *Chevron*, 467 U.S. at 843-44).

United States v. Hubenka, 438 F.3d 1026, 1031 (10th Cir. 2006)(affirming defendant's conviction and applying *Chevron* deference to the Corps of Engineer's and EPA's interpretation of the term "navigable waters" under the Act.); *See, Natural Resources Defense Counvil v. U.S.P.A.*, 542 F.3d 1235, 1250 (9th Cir. 2008).

When Congress passed the Act it expressed broad goals but generally left it to the EPA to promulgate regulations to achieve these goals.[1] As stated above, one of the principal provisions of the Act prohibits the discharge of oil "into or upon navigable waters of the United States." § 311(b)(1) of the Act, 33 U.S.C. 1321(b)(1). Congress' failure to further define the meaning of "waters of the United States" implies that Congress delegated policy-making authority to the agencies charged with administering the Act, namely the EPA and the Army Corps of Engineers. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007); *See also Chevron, supra,* 467 U.S. 837, 844 (holding that congressional delegation to an agency may be implicit). The *Chevron* deference applies "when it appears that Congress delegated authority to the

[1] § 501(a) of the Act, 33 U.S.C. 1361(a), explicitly authorizes the Administrator of the EPA to "prescribe such regulations as are necessary to carry out his functions under this chapter."

agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of authority." *United States v. Meade Corp.*, 533 U.S. 218, 226-27 (2001); *See also, Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (10th Cir. 2009)("an agency is entitled to substantial deference when it acts pursuant to an interpretation of its own regulation.")

B. *Seminole Rock* deference to EPA's interpretation of regulations

"Regulations promulgated by an agency exercising its congressionally granted rule-making authority . . . carry the force of law. *Been v. O.K. Industries, Inc.* 495 F.3d 1217, 1226 (10th Cir. 2007). Consequently, "[i]n addition to this deference to an agency's construction of statutes, we also owe deference to its construction of its own regulations." *HRI, Inc. v. EPA*, 198 F.3d 1224, (10th Cir. 2000). When the issue involves an agency's interpretation of its own regulation, as opposed to its interpretation of a governing statute, some courts have determined that even greater deference is to be accorded. *Bowles v. Seminal Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *See also Auer v. Robbins,* 519 U.S. 452, 461 (1997). "Agency interpretations of their own regulations have been afforded deference by federal reviewing courts for a very long time and are sustained unless 'plainly erroneous or inconsistent' with the regulation. It is sometimes said that this deference is even greater than that granted an agency interpretation of a statute it is entrusted to administer" *United States v. Kanchanalak*, 192 F.3d 1037, 1046 (D.C. Cir. 1999)(affirming conviction for false statements and upholding FEC interpretation of its regulation.) "This requirement of binding deference to agency interpretations of their own regulations, unless 'plainly erroneous or inconsistent with the

regulation,' is known as *Seminole Rock* deference." *Kentuckians for the Commonwealth, Inc. v. Rivenbaugh*, 317 F.3d 425, 439 (4th Cir. 2003).

IV. Procedural History

Pursuant to § 308 of the Act, 33 U.S.C. § 1318, the EPA has authority to request information pertinent to carrying out its responsibilities under the CWA. Accordingly, on May 15, 2006, the EPA served Fulton with the § 308 Expedited Information Request (hereinafter Information Request) regarding the status of a release of crude oil. The Information Request notified Respondent that the EPA was also investigating the status of the facility with regard to the regulations promulgated at 40 C.F.R. § 112 (hereinafter SPCC regulations) governing non-transportation facilities. Pursuant to § 309 of the Act, 33 U.S.C. § 1319, Respondent was advised that a failure to comply within thirty (30) days could result in administrative and civil penalties of up to $32,500.00 per day. Despite the immediacy set forth in the Letter, a response was not received until November 7, 2007. Richard L. Beatty and Renee Coppock both served as legal representatives of Fulton in discussions regarding the information request only.

On February 19, 2009, the action was initiated when the Administrative Complaint and Opportunity to Request Hearing was filed, charging Respondent, with violating § 311 of the Act, 33 U.S.C. § 1321, as amended by the Oil Pollution Act of 1990. Specifically, the Complaint alleged that on or about February 29, 2004, Respondent discharged approximately ten barrels (420 gallons) of crude oil into the Fred and George Creek (hereinafter the Creek) and upon adjoining shorelines. In addition, the Complaint charged Respondent with violating 40 C.F.R. § 112.3 for failure to prepare and implement an SPCC plan for the period of February 29, 2004 through January 2005.

On February 20, 2009, EPA sent its Complaint via certified mail to William M. Fulton, as the registered agent of Fulton Fuel Co., at 127 Main Street, Shelby, Montana 59474. Respondent refused to accept service at this address and provided an alternative handwritten address of P.O. Box 603, Shelby, Montana 59474. (Exhibit A) On March 23, 2009, EPA again mailed the Complaint via certified mail to both the aforementioned addresses. Once again Respondent did not accept service and the documents were returned to Complainant. (Exhibit B) On May 22, 2009, the Toole County Sherriff's Office (hereinafter Sherriff) served the Complaint along with the Consolidated Rules on Respondent. (Exhibit C) Pursuant to 40 C.F.R. § 22.15(a) Respondent was required to file an answer within 30 days after receipt of the Complaint. Respondent failed to file an answer by June 22, 2009, and on July 9, 2009, Complainant moved for the entry of a Default Order. On July 10, 2009, EPA mailed the Motion for Default via certified mail to Respondent. Once again Respondent refused to accept the certified mail and was subsequently served by the Sherriff on August 18, 2009. (Exhibit D) An Order to Show Cause and Order to Supplement the Record was issued by the Court on August 20, 2009, requesting both parties take action by September 30, 2009. Complainant was ordered to supplement the record with additional information on the penalty calculation. Respondent was ordered to show cause why it should not be held in default or be subject to the full amount of the proposed penalty. Complainant timely complied with the order by submitting the Declaration of Jane Nakad, an EPA representative responsible for calculating penalties for violations of § 311of the Act, 33 U.S.C. § 1321. Respondent did not submit a reply to the Court's Order.

The Court issued a Second Order to Supplement the Record on November 20, 2009 requesting additional information from Complainant and directing Respondent and/or Respondent's attorney to supplement the record no later than December 21, 2009. Complainant complied with the Order and submitted a Supplemental Declaration of Jane Nakad. On December 21, 2009, the last possible day to comply with the Court's Order, Counsel for the Respondent, Mr. Douglas C. Allen, filed a Notice of Appearance and Motion for Additional Time to Supplement the Record and Respond to the Order to Show Cause. On December 23, 2009, the Court granted the Motion for Additional Time, and Respondent was ordered to address the Motion for Default and the Order to Show Cause no later than December 30, 2009. On January 7, 2010, the Court ordered a conference call be set for January 14, 2010 to discuss the status of the matter and possible settlement opportunities. On January 29, 2010, Respondent requested an order setting a deadline for a motion to be filed and an additional thirty (30) days for settlement discussions. The Court granted Respondent's request and ordered that a consent agreement be filed by February 24, 2010. In the event an agreement could not be reached, the Court further ordered Respondent to show cause why a default should not be entered by March 3, 2010. Consistent with Respondent's untimely pleading practice, the deadline was missed. On March 4, 2010, Complainant received the overdue Motion to Set Aside Default from a fax machine belonging to Mr. Beatty, who alleges to have no involvement in the instant matter. (Exhibit E) Upon review of the faxed document, Complainant discovered that it was incomplete because it did not contain a supporting affidavit. After receiving the hard copy via regular mail on March 8, 2010 (postmarked on March 6,

2010) it became apparent that the Affidavit in Support was not included because it was not signed until March 5, 2010, two days after it was due.

V. Argument

A. Service of Process on Respondent Was Proper When Carried Out in Accordance With the Laws of Montana and the Consolidated Rules

A copy of the signed original complaint, along with the Consolidated Rules, shall be served upon respondent, a domestic corporation, by serving "an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive process"40 C.F.R. §§ 22.5(b)(1)(i), (ii)(A); *See also*, MONT. CODE ANN 25-20 RULE 4D (2010)("a copy of the summons and complaint [must be personally served upon] the registered agent . . . named on the records of the secretary of state). The records of the Montana Secretary of State indicate that William M. Fulton is the registered agent of Fulton Fuel Co.[2] (Exhibit F) As stated above, on February 20, 2009, EPA sent its Complaint via certified mail to Respondent at 127 Main Street, Shelby, Montana 59474. Respondent refused to accept service at this address and provided an alternative handwritten address of P.O. Box 603, Shelby, Montana 59474. (Exhibit A) On March 23, 2009, EPA again mailed the Complaint via certified mail to both the aforementioned addresses. Once again William M. Fulton, the certified agent for Fulton Fuel Co., did not accept service and the documents were returned to Complainant. (Exhibit B) On May 22, 2009, the Administrative Complaint along with the Consolidated Rules, were personally served on the Respondent by the Sherriff. (Exhibit C)

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[2] Montana Secretary of State, *available at https://app.mt.gov/cgi-bin/bes/besCertificate.cgi?action=detail&bessearch=D053211&trans_id=besa10068232705026b00* (last visited March 10, 2010) (listing Fulton Fuel Co. as active corporation and William M. Fulton as the registered agent).

On February 23, 2009, as a precautionary measure, the Complaint was delivered to Respondents last known legal representative, Mr. Beatty. (Exhibit G) Mr. Beatty acknowledged that he delivered the Complaint to Mr. Fulton and discussed the contents therein. (Exhibit H) Notwithstanding the serious allegations contained in the Complaint, Respondent did not file an answer to the Complaint or request a hearing, as provided for in the governing rules. *See* 40 C.F.R. 22.15 (requirements for answer).[3] In an effort to avoid additional motion practice, on April 28, 2009, the undersigned attempted to contact Mr. Beatty and Ms. Coppock by electronic mail to determine if either attorney would be entering an appearance and/or if they could assist in communicating with Respondent. (Exhibit I) The undersigned did not receive a response to the email communications. Sometime after, the undersigned discussed the matter with both attorneys and learned that neither claimed to representing the Respondent in the penalty proceeding. As noted, Respondent failed to file an answer within thirty (30) calendar days (by June 22, 2009) and thus was in default pursuant to 40 C.F.R.§ 22.15(a).

The Consolidated Rules provide that "a party may be found to be in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). Furthermore, "default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." *Id.* On July 9, 2009, Complainant filed a Motion for Default, which was mailed to Respondent and Mr. Beatty on July 10, 2009. Mr. Beatty accepted the certified mail on July 13, 2009. (Exhibit J) However, the Respondent,

[3] The Regional Judicial Officer shall "rule on all motions filed or made before an answer to the complaint is filed." 40 C.F.R. 22.16(c). Complainant's motion for Default was prompted by Respondent's failure to file an answer to the complaint, thus jurisdiction is proper to rule on the motion for default.

registered agent of Fulton Fuel Co., once again refused to accept the certified mail. On August 18, 2009, the Sherriff served Respondent with the Motion for Default. (Exhibit D)

On August 20, 2009, an Order to Show Cause to Supplement the Record was issued, directing Respondent to show cause, on or before September 30, 2009, why it should not be held in default. Once again Respondent failed to reply, the only difference being, this time it was with regard to a Court Order. The Court issued a Second Order to Show Cause to Supplement the Record on November 20, 2009, directing Respondent and/or Respondent's attorney to supplement the record by December 21, 2009.[4] The aforementioned Orders to Show Cause were served exclusively upon Richard L. Beatty. (Exhibit K)

Respondent's challenge to the Default Judgment is outrageous and makes no logical sense. As noted earlier, William M. Fulton, the registered agent of Fulton Fuel Co., was properly served with the Complaint, Consolidated Rules and the Motion for Default. Despite informing the Respondent multiple times in the aforementioned documents, Respondent failed to file an Answer within thirty (30) calendar days. As the registered agent, Respondent has a fiduciary duty to accept and respond to legal documents on behalf of the corporation. There is no reason why Respondent should now be excused for failing to obey the procedures of this Court. Setting aside the Default would improperly permit the Respondent to benefit from the wrongful conduct and set an improper precedent among the regulated community that ignorance and avoidance of the Consolidated Rules is acceptable. Therefore, it is respectfully requested that the Court

[4] On December 21, 2009, Counsel for the Respondent, Douglas C. Allen, filed a Notice of Appearance and Motion for Additional Time to Supplement the Record and Respond to the Order to Show Cause, which the Court granted. Respondent filed its response on January 4, 2010. On February 2, 2010, the Court issued an Order Allowing 30 Days Additional Time For Settlement and Order to Either Submit Consent Agreement or Show Cause Why Default Order Should Not Be Filed.

hold that service was properly made in accordance with the law and deny the Motion to Set Aside Default.

B. The Purported Defenses are Insufficient as a Matter of Law because: (1) The Respondent had a Duty to Answer the Complaint; (2) Jurisdiction was Proper, (3) Respondent was Required to Prepare and Implement a Spill Prevention Control and Countermeasure Plan.

When the presiding authority over a matter—the Court in this case—finds that default has occurred, it "shall issue a default order against the defaulting party as to any or all parts of the proceeding *unless* the record shows *good cause* why a default order should not be issued." 40 C.F.R. § 22.17(c)(emphasis added); *See also*, MONT. CODE ANN RULE 55 (2010)(default judgment rule). In determining good cause, the decision maker shall consider the totality of the circumstances presented. *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1999); accord *In re Rybond, Inc.*, 6 E.A.D. 614, 616 (EAB 1996)(affirming default judgment where respondent had made conscious decision to discontinue services of legal counsel). The factors to be considered under a totality of circumstances are "the alleged procedural omission that prompted the default order, considering such issues as whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement." *In re JHNY, Inc.*, 12 E.A.D. 372 (EAB 2005). The defaulting party must demonstrate a strong likelihood of success on the merits by presenting evidence that there is a strong probability, more than the mere possibility, that litigating the defense would be successful. *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 322 (EAB 1999).

1. The Respondent had a Duty to Answer the Complaint and Failure to Respond Does Not Amount to Excusable Neglect

As set forth in the Affidavit, Respondent wishes to set aside the default because "he does not handle legal matters for Fulton Fuel Company." (Affidavit of William M. Fulton ¶ 6) (Exhibit L) Respondent explains that attorney Renee Coppock was hired "to handle all legal matters pertaining to environmental issues with local, state and federal governments arising out of the spill" and that she was expected to address "all legal matters arising . . . out of the Administrative Complaint and file any legal papers required and participate in any hearings to he held herein." (Respondent's Affidavit ¶¶ 5-6) Respondent has alleged that it cannot be held liable for a third party's failure to act. Such statements, when made in reference to legal counsel, are without legal significance and are not sufficient to set aside the default. *See In re Pyramid Chemical Co.*, 11 E.A.D. 657 (EAB 2004).

The Complainant in *Pyramid Chemical Co.*, was served on the corporation by certified mail to a registered officer of the corporation. *Id.* Respondent had until July 18, 2003 to file an answer. *Id.* The Motion for Default was served on August 18, 2003, and the Board issued the Order to Show Cause, which was served on October 16, 2003. *Id.* On October 30, 2003, more than three months after the Answer was due, the Respondent's attorney filed a notice of appearance and its first document- the Motion for Extension of Time. *Id.* Respondent's motion was granted and Respondent requested the Board deny the Motion for Default. *Id.* In particular Respondent asserted that he believed corporate counsel in the Netherlands was addressing the complaint and therefore it was irrelevant whether an officer of the corporation had received notice of the motions. *Id.* In

affirming the Default, the Board pointed out that Respondent personally received both the Complaint and the Motion and was aware of the delinquency and could have responded directly to the Board. *Id.* Pursuant to Board precedent, an attorney stands in the shoes of his client, and ultimately the attorney's failings are the client's responsibilities. *See, e.g.*, *Jiffy Builders* 8 E.A.D. at 321; *See also*, *Link v. Wabash R.R. Co.*, 370 U.S. 634 n.10 (1962)(a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the [defense] of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice).

As stated above, on May 22, 2009, the Sherriff personally served the Complaint on Fulton, by serving the registered agent of the corporation. The Complaint and the Consolidated Rules annexed thereto clearly informed Respondent of the duty to file the Answer, within thirty (30) calendar days (by June 22, 2009). Respondent was also advised that a failure to file the Answer would result in a default judgment, including a civil penalty. Despite the numerous warnings, the Respondent did not file the Answer, and Complainant filed a Motion for Default Judgment. When received, the Motion for Default put Respondent on notice a third time that the Answer was overdue and the Court would issue a default judgment if no action was taken. Now, over eight (8) months late, Respondent wishes to place the blame on prior counsel, Renee Coppock, because "he believed she was handling the Administrative Complaint." (Respondent's Affidavit ¶ 6) As noted above, Ms. Coppock has never entered an appearance in this penalty proceeding. In light of the precedent of the Environmental Appeals Board, Respondents shift of blame to Ms. Copppock is insignificant to the purpose of the Motion to Set Aside

the Default. Therefore, Respondent's Motion to Set Aside the Default must be denied because the proper remedy for the alleged attorney misfeasance is in an action for malpractice.

2. The Fred and George Creek is a "water of the United States" Within the Meaning of the Act and the Commerce Clause Because it is a Direct Tributary to Miners Coulee, the Milk River and the Missouri River.

Section 502(7) of the Act, 33 U.S.C. 1352(7) and 40 C.F.R. § 110.1 reads in applicable part as follows: "*[n]avigable waters* means the waters of the§ United States . . . [t]he term includes . . . interstate waters, including interstate wetlands . . . All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . tributaries of [interstate] waters . . . including adjacent wetlands." The Senate Report accompanying the 1972 CWA states that "navigable waters" means: the navigable waters of the United States, portions thereof, *tributaries thereof.* S. Rep. NO. 92-414, at 77 (1971), *reprinted in,* 1972 U.S.C.C.A.N. 3668, 3742-43 (emphasis added). Senator Edmund Muskie, the principal author of the CWA explained that in 1972

> "[m]any of the Nation's navigable waters were severely polluted and major waterways near the industrial and urban areas were unfit for most purposes. Rivers were the prime sources of pollution of coastal waters and oceans. And many lakes and confined waterways were aging rapidly under the impact of increased pollution. River, lakes, and streams were being used to dispose of man's wastes rather than to support man's life and health." S. Rep. No. 103-257, at 3 (1994), *reprinted in* 1994 WL 184553 (Leg.Hist.).

Congress thus recognized that restricting CWA jurisdiction to those relatively few waterways that actually support navigation, e.g., the waterways that are navigable-in-fact or meet the traditional definition of "navigable waters" would make it impossible to achieve the objectives of the CWA. *See Rapanos v. United States*, 547 U.S. 715, 767-68

(2006). In *United States v. Riverside Bayview Homes*, the Supreme Court noted that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. 121, 133 (1985)(unanimous decision); see *International Paper Co. v. Ouellette,* 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").

In *Riverside*, the issue was whether landowners could discharge fill material into wetlands adjacent to navigable bodies of water and their tributaries without first obtaining a permit from the Army Corps of Engineers. *Riverside,* 474 U.S. at 123. The Corps construed the CWA to cover all freshwater wetlands that were adjacent to other covered waters. *Id.* at 124. *Riverside* concerned a non-navigable wetland consisting of 80 acres of low-lying marshland adjacent to but not regularly flooded by Black Creek, which was a navigable waterway. *Id.* at 311. In upholding the Corps assertion of jurisdiction, the Court stated "[w]e cannot say that the Corp's conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States- based as it is on the Corps' and EPA's technical expertise-is unreasonable." *Id.* In addressing only wetlands adjacent to navigable waters, the Supreme Court expressly left open the issue of isolated wetlands.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), the Court considered the Corps' jurisdiction over an abandoned sand gravel pit mining operation and ponds, that were not wetlands and not adjacent to a body of open water. *Id.* at 162, 164, 167-68. Asserting

jurisdiction pursuant to a regulation called the "Migratory Bird Rule", the Corps argued that the isolated ponds were "waters of the United States" (and thus navigable waters under the Act) because they were used as habitat by migratory birds. *Id.* at 167. The Court refused to grant *Chevron* deference to the Corps Migratory Bird Rule's interpretation because its assertion over non-navigable, isolated, intrastate wetlands would invoke the outer limits of Congress' power over interstate commerce "by permitting federal encroachment upon a traditional state power." *Id.* at 172-73. Thus the Court held that the Corps did not have jurisdiction because the plain text of the statute did not permit the action and there was no showing of a "significant nexus between wetlands and navigable waters" as established in *Riverside*. *Id.* at 167-68. Several federal courts have emphasized that the holding in *SWANCC* is limited to striking down the Migratory Bird Rule as a basis for jurisdiction under the CWA.[5]

More recently, in a 4-4-1 decision, the Supreme Court construed the CWA term "waters of the United States" in *Rapan*os. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. *See Rapanos*, 547 U.S. at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *See id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J. concurring in the judgment); *id.* at 793 (Stevens, J,

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[5] *See Headwaters, Inc. v. Talent Irrigation District,* 243 F.3d 526, 533 (9th Cir. 2001)(intermittently flowing canal that directly entered into a navigable body of water qualified as "waters of the United States"); *United States v. Budday*, 138 F. Supp. 2d 1282, 1284-88 (D. Mont. 2001)(non-navigable tributary of non-navigable tributary of a navigable-in-fact and interstate river qualified as "waters of the United States"); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 86 (E.D.N.Y. 2001)(pond and stream are "waters of the United States" where pond was flowing into well-defined stream, which was a tributary to a navigable-in-fact lake *even if* the pond and stream were non-navigable) *United States v. Interstate General Company*, 152 F. Supp. 2d 843, 847 (D. Md. 2001)(refusing to extend *SWANCC* to exclude jurisdiction over all waters not adjacent to a navigable-in-fact body of water).

dissenting). Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' [such as] streams," that are connected to traditional navigable waters, *Id.* at 739, 742. The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. A commonsense approach must be used in determining whether federal jurisdiction exists as it does not appear and evaporate along with the water. *Id.* at 733 n. 6. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting). Justice Kennedy interpreted the term "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment)(citing *SWANCC supra* at 167). In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters," may be sustained "by showing adjacency alone." *Id.* at 780.

Given the various opinions, the governing definition of "navigable waters" is often disputed under *Rapanos.* Under the rule of *Marks v. United States*, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by

those Members who concurred in the judgment on the narrowest grounds." *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 807 n. 17 (10th Cir. 2009)(citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). Although under *Marks*, one rule of law should have emerged from *Rapanos*, that is not the case. For example, both the Seventh and the Ninth circuits concluded that Justice Kennedy's concurrence controls and adopted the "significant nexus" test. See *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg,* 496 F.3d 993, 999-1000 (9th Cir. 2007)*("River Watch II")*; *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006). On the other hand, the First Circuit concluded that "the United States may elect to prove jurisdiction under either" Justice Scalia's plurality test or Justice Kennedy's significant nexus test. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006).

Under Justice Kennedy's standard, "significance" is determined with reference to the CWA's purpose - to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); *Rapanos*, 547 U.S. at 780. (Kennedy, J., concurring). In light of the fact that the CWA is concerned with downstream water quality, he explicitly disagreed with the plurality's requirement of permanent standing water or continuous flow for a period of some months. *Id.* at 769. (Kennedy, J., concurring). He explained that the plurality's requirements could not reasonably be applied to areas in the west because "the merest trickle, if continuous, would count as 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not." *Id.* "In fact, he put it thusly: 'the dissent is correct to observe that an intermittent flow can constitute a stream, in the sense

of a current or course of water or other fluid, flowing on the earth, while it is flowing. It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams'". *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007)(citing *Rapanos* 547 U.S. at 770)(Kennedy, J., concurring). Justice Kennedy's opinion was to remand Rapanos to the Court of Appeals for consideration of the "nexus" requirement under *SWANCC*. *Id.* at 787. Pursuant to *SWANCC*, although the evidence of the downstream effects of a particular discharge may demonstrate "nexus" between the tributary and the traditional navigable waters into which it flows, a discharge-specific showing is unnecessary. That point is established by the issues that Justice Kennedy would have the lower courts address on remand, namely, the general connections between the wetlands and waters at issue, not the particular effects that the defendant's conduct would have had. *See Id.* at 783-87. (note: chemical, physical and biological integrity change is discussed explicitly in context of wetlands at 780)

It is important to note that, unlike *Rapanos*, which involved landowners placing fill into wetlands on their property, this case involves respondents discharging crude oil into the Creek, a tributary to Miners Coulee, which flows into Canada and into the Milk River, a perennial international water. The Milk River flows back into the United States and into the Missouri River, a perennial interstate water. The question of whether an intermittent stream which eventually empties into a river that is a water of the United States can, by itself, be a water of the United States was most recently addressed in *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007). There the Defendant worked to reroute and reshape Teton Creek, in Alta, Wyoming, which only flows for approximately two months per year during spring run-off. *Id.* at 986-87. In an effort to reroute and

reshape the Creek, heavy equipment machinery was used to redeposit material within the creek and to erect log and gravel structures. *Id.* at 987. The Court explicitly stated that the *Rapanos* decision did not undercut their analysis in determining whether an intermittent stream is a water of the United States. *Id.* at 989. Rather, the Court relied on its prior analysis in holding that "even if [the alleged polluter] succeeds, at certain times, in preventing the canals from exchanging any water with the local streams and lakes, that does not prevent the canals from being 'waters of the United States' . . . even tributaries that flow intermittently are 'waters of the United States.") *Id.* (citing *Headwaters*, 243 F.3d at 534). The Court held that the Teton Creek remained subject to federal jurisdiction, despite man-made severances, which made the portion in question dry during much of the year. *Moses*, *supra*, at 991.

In the instant action, Respondent's unsupported statement that the Creek is a non-navigable small seasonal stream running dry each year is insufficient. Jurisdiction under the Act does not require a constant flow of water; it simply requires that the body of water at issue be a "water of the United States." On November 9, 2004, the Army Corps of Engineers issued a preliminary jurisdictional determination finding that the Fred and George Creek is a "water of the United States" because it is a "tributary to Miners Coulee, a tributary of the international Milk River; hence a tributary of the interstate and navigable Missouri River." (Exhibit M) Photographs submitted by HydroSolutions Inc. indicate that the Creek has flowing water at least during the months of March, May and June. The photographs also demonstrate that in December 2005, nine months after the discharge, the Creek had snow and ice in its bed and oil on its shorelines. (Exhibit N) In light of the fact that the spill occurred in late February, it is reasonable to conclude that

the Creek had flowing water at the time of the spill. As stated above, the Court will affirm federal jurisdiction where the evidence shows that a body of water is "capable" of transporting pollutants downstream to traditional navigable waters. Here the evidence is such that a reasonable fact finder could infer that the Creek is subject to the CWA because it has a "significant nexus" to Miners Coulee, the downstream tributary, and the navigable Milk River into which it flows and therefore it is "likely to play an important role in the integrity of [that] aquatic system." *See Rapanos* 547 U.S. at 781 (Kennedy, J., concurring). Accordingly, the Creek is capable of transporting pollutants and the Court must conclude it is a "navigable water of the United States" subject to federal regulation.

3. Fulton Fuel Co. was an "onshore facility" Required to Establish a Spill Prevention Control and Countermeasure Plan

Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), directs the President, *inter alia*, to establish "[p]rocedures, methods and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges." Subsequently, the EPA promulgated the SPCC regulations which established certain procedures, methods and requirements upon each owner and operator of a non-transportation-related onshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, which due to its location, could reasonably be expected to discharge oil into or upon the navigable waters of the United States in such quantity as EPA has determined may be harmful to the public health or welfare or the environment of the United States. 40 C.F.R. §§ 112.1(b), 112.3(a)(1). In promulgating 40 C.F.R. § 110.3, which implements § 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA has determined that discharges of harmful quantities

include oil discharges that cause a film, sheen upon, or discoloration of the surface of the water or adjoining shorelines.[6]

Respondent defends this action by accusing the EPA of confusing the flowline, which caused the oil spill, with a storage tank located some distance away from the spill. Clearly it is the Respondent who is confused and not the EPA. The SPCC Regulations unambiguously state that "an oil production facility means all structures . . . *piping* (including but not limited to *flowlines* or gathering lines), or equipment . . . used in the production, extraction, recovery, lifting, stabilization, separation or treating of oil , or associated storage or measurement, and located in a single geographical oil or gas field. *40 C.F.R.§112.2* (emphasis added).

The flowline at issue was an integral part of Respondent's oil production facility because it was a *pipe* which transported oil from a well to a tank battery at the facility. The flowline was three inches in diameter and was located directly beneath the bed of the Creek. The elevation of the flowline break is approximately 3750-3800 feet, and the confluence to Miner's Coulee is approximately 3519 feet, resulting in a down-gradient elevation of 231-281 feet. Based solely upon the Respondent's intimate familiarity with the geographical structure and elevation of the property, Respondent must have known that a discharge could potentially reach a navigable water of the United States. Therefore, the Respondents failure to prepare and implement an SPCC plan violated the Act and Respondent is subject to the proposed penalty.[7]

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[6] Samples collected by Mr. Larry Alheim of The Montana Department of Environmental Quality volatile petroleum hydrocarbons (VPH) analysis revealed that water sample #5 found C9-C10 Aromatics at 282 ppb which exceeds DEQ's Risk-Based Screening Level (RBSL) of 50 ppb and soil sample #2 found benzene at 1.6 ppm, which exceeds the RBSL of 0.05 ppm. (Exhibit O)

[7] The subsequent owner/operator of the facility, MCR LLC, has entered into an Agreement with the EPA whereby it acknowledged the duty to prepare and implement a written SPCC plan for the facility at issue and paid a civil penalty in the amount of fifty thousand ($50,000.00) dollars. MCR's immediate

C. The Determination of Liability Following Default was Proper because Civil Administrative Actions Brought Pursuant to § 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), are Subject to Strict Liability and Therefore Acts/Omissions of Third Parties are Irrelevant to Liability.

In terms of the relief granted, upon a finding of default, "the relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). Under § 22.27(b) of the Consolidated Rules, "[t]he Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. . . If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint . . . or motion for default, whichever is less." 40 C.F.R. § 22.27(b). The courts have made it clear that notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. *Katzson Brothers Inc. v. U.S. EPA*, 839 F.2d 1396, 1400-01 (10th Cir. 1988)(noting administrative law judge does not simply rubber-stamp complainant's penalty proposal, or any portion thereof, but must make an independent review.) Also, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. *In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996).

Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), authorizes the Administrator to bring a civil action against "any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (i) from which oil . . . is discharged . . . or

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replacement of the deteriorated flowlines at the facility illustrates that the Respondent willfully failed to adequately maintain them. (Exhibit P)

(ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section . . . may be assessed a class I or class II civil penalty by . . . the Administrator." In accordance with § 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8),

> "[i]n determining the amount of a civil penalty under paragraphs (6) and (7), the Administrator, the Secretary or the court . . . shall consider the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require."

In the instant action, pursuant to the Second Order to Supplement the Record issued by the Honorable Elyana R. Sutin on November 20, 2009, the EPA was ordered to supplement the record with respect to its penalty. On December 17, 2009, the EPA filed the Supplemental Declaration of Jane Nakad, an EPA representative responsible for calculating penalties for violations of §§ 311(b)(3) and (j) of the Act, 33 U.S.C. §§ 1321(b)(3), 1321(j). Ms. Nakad addressed the eight statutory factors and supported the proposed penalty of $11,445.00 (including $455.00 in economic benefits) with regard to the discharge of oil into the Fred and George Creek. In addition, her statutory analysis supported the proposed penalty of $21,055.00 (including $8,731.00 in economic benefits).

Respondent now challenges liability pursuant to § 311(f) of the Act, 33 U.S.C. § 1321(f), because the flowlines were installed by the previous property owner, Western Natural Gas. (Respondents Motion) (Exhibit Q) Respondent further alleges that the location and situation of the flow line was impossible to determine or detect and therefore the leak occurred from the acts and omissions of Western Natural Gas. (Respondents

Affidavit ¶ 3) The Respondent's reliance on § 311(f) of the Act is incorrect. Complainant is seeking penalties in the proceeding under §§ 311(b)(6) and (j) of the Act and is not seeking removal costs under § 311(c) of the Act. Therefore, any acts or omissions of a third party are not valid defenses to liability in this proceeding. Accordingly, the Court should affirm the Default Judgment and demand Respondent immediately pay penalties in the amount of thirty two thousand five hundred ($32,500.00) dollars to the EPA.

VI. Reservation of Right to Reply to Respondent's Affirmative Defenses Set Forth in the Answer

The authority in this memorandum strongly supports the conclusion that jurisdiction is proper under the Act, Respondent is subject to SPCC regulations, Respondent is in Default for failing to answer the Complaint and Respondent has failed to set forth grounds to set aside the Default. Therefore, the Court should order Respondent pay administrative penalties in the amount of thirty two thousand five hundred ($32,500.00) dollars. In the event that the Court should for any reason hold that Respondent is not in default, Complainant respectfully requests additional time to file a Motion to Strike the Affirmative Defenses raised by Respondent in its untimely Answer.

VII. Conclusion

For the aforementioned reasons, the Default Judgment should be affirmed and a civil penalty judgment in the amount of thirty two thousand five hundred ($32,500.00) dollars should be entered.

Respectfully Submitted,

Dated: March 22, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the REPLY IN OPPOSITION TO RESPONDENT'S MOTION TO SET ASIDE DEFAULT was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Douglas C. Allen
Attorney for Respondent
P.O. Box 873
153 Main Street
Shelby, Montana 59474

3/22/10
Date

Judith McTernan
Judith McTernan