

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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Philadelphia, Pennsylvania 19103-2029

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In the Matter of:

Ross Transport Co., Inc.
and Arnold Steinman

Respondents,

4220 Almond Street
Philadelphia, PA 19137

Facility.

U.S. EPA Docket No.
RCRA-03-2010-0268

Proceeding under Section 9006
of the Resource Conservation and
Recovery Act, as amended,
42 U.S.C. § 6991e

INITIAL DECISION AND DEFAULT ORDER

This Initial Decision and Default Order is issued in a case brought under the authority of Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively "RCRA"), 42 U.S.C. § 6991e. The Complaint, Compliance Order, and Notice of Right to Request Hearing ("Complaint") alleged that Ross Transport Co., Inc., and Arnold Steinman ("Respondents") violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991m, and the Commonwealth of Pennsylvania's federally authorized underground storage tank program ("Pennsylvania Authorized UST Management Program") with respect to a certain underground storage tank at Respondents' facility located at 4220 Almond Street, Philadelphia, Pennsylvania, 19137. Compl., 1. The Motion for Default Order ("Motion for Default") filed by Complainant in this proceeding seeks an Order assessing a thirty thousand, three hundred fifty-

two dollar (\$30,352.00) civil penalty against Respondents Ross Transport Co., Inc. and Arnold Steinman, the owners and operators of a certain underground storage tank located at 4220 Almond Street, Philadelphia, Pennsylvania, 19137. Mot. Default, 3. For the reasons set forth below, Complainant's motion will be granted in part and denied in part, and the civil penalty will be adjusted to twenty-three thousand, eight hundred, twenty-one dollars (\$23, 821.00).

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of fact:

1. As set forth in the Complaint, Respondent Ross Transport Co., Inc. ("Ross Transport") is a Pennsylvania corporation doing business in the Commonwealth of Pennsylvania, and is a "person" as defined in Section 9001(5) of RCRA, 42 U.S.C. § 6991(5) and 25 Pa. Code § 245.1. Compl., ¶ 2.
2. As set forth in the Complaint, Arnold Steinman is a "person" as defined in Section 9001(5) of RCRA, 42 U.S.C. 6991(5), and 25 Pa. Code § 245.1 residing in the Commonwealth of Pennsylvania and the President and sole shareholder of Ross Transport Co., Inc. Id. at ¶ 3.
3. The Facility is located at 4220 Almond Street, Philadelphia, Pennsylvania (the "Facility"). Id. at ¶ 3.
4. On April 21, 2009, a representative of the United States Environmental Protection Agency – Region III ("EPA") conducted a Compliance Evaluation Inspection ("CEI") of the Facility pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d. Id. at ¶ 5.
5. At all times relevant to this Complaint, Respondents have been the "owners" and/or "operators," as those terms are defined in Section 9001(3) and (4) of RCRA, 42 U.S.C.

§ 6991(3) and (4), and 25 PA Code § 245.1, of the “underground storage tank” (“UST”) and “UST system” as those terms are defined in Section 9001(10) of RCRA, 42 U.S.C. § 6991(10), and 25 PA Code § 245.1, located at 4220 Almond Street, Philadelphia, Pennsylvania, 19137. *Id.* at ¶ 4.

6. On August 3, 2010, an Administrative Complaint was issued to Respondents by the Director of the Land & Chemicals Division, EPA Region III (“Complainant”), pursuant to Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively “RCRA”), 42 U.S.C. § 6991e, and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules”). Compl., 1.
7. The Complaint alleged, in three counts, that Respondents violated RCRA Subtitle I and the Pennsylvania Authorized UST Management Program by:
 - a. Failing to perform release detection on the UST at the Facility, beginning on June 30, 2005, through the date of the Complaint, in violation of 25 PA Code § 245.441(a) and (c), *id.* at ¶¶ 10-16;
 - b. Failing to comply with 25 PA Code 245.442(2)(ii) by failing to ever perform a line tightness test every three years in accordance with 25 PA Code § 245.445(2) or have monthly monitoring conducted in accordance with 25 PA Code § 245.445(3) for the underground piping associated with the UST at the Facility. Further, the Complaint alleged that the piping did not meet the standards of 25 PA Code § 245.445(2)(ii)(A)-(D) allowing for the absence of release detection, *id.* at ¶¶ 17-21;
 - c. Failing to continuously participate in the Underground Storage Tank Indemnification Fund (“USTIF”), from June 1, 2005, through the date of the Complaint in violation of 25 PA Code §§ 245.703 and 245.704, *id.* at ¶¶ 22-27.

8. The Complaint did not include a specific penalty proposal for the violations alleged therein, but instead proposed to offer a penalty amount “at a later date after an exchange of information has occurred.” Compl., 8.
9. In the Motion for Default, Complainant proposed the specific penalty of thirty thousand, three hundred fifty-two dollars (\$30,352.00) for the alleged violations. Mot. Default, 3.
10. 40 C.F.R. § 22.15(a) provides that respondents are required to file an answer to the complaint within thirty (30) days of service of the complaint, and 40 C.F.R. § 22.15(c) provides that respondents have a right to request a hearing upon the issues raised by the complaint and answer.
11. 40 C.F.R. § 22.17(a) further provides that a party may be found in default “after motion, upon failure to file a timely answer to the complaint; 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.”
12. As stated in the Motion for Default and in the supporting Memorandum, on August 4, 2010, Complainant successfully served the Complaint upon Respondent Ross Transport Co., Inc. at Respondents’ corporate business address, via a “reliable commercial delivery service that provides written verification of delivery” within the meaning of 40 C.F.R. § 22.5(b)(1) (i.e., UPS Overnight Delivery), as evidenced by a UPS Proof of Delivery confirming the delivery. Mem. Supp. Mot. Default., 2. On September 2, 2010, Complainant successfully served the Complaint upon Respondent Arnold Steinman at Respondents’ corporate business address via the United States Postal Service, certified mail, return receipt requested, as specified in 40 C.F.R. § 22.5(b)(1). Id.
13. Respondents did not file an Answer to the Complaint within thirty (30) days of service and have not, to date, filed an Answer or other response to the Complaint.

14. On November 2, 2010, Complainant filed a Motion for Default stating that Respondents failed to file an Answer to the Complaint.
15. On November 2, 2010, the Motion for Default was mailed via certified mail, return receipt requested, to each Respondent at Respondents' business address. Mem. Supp. Mot. Default, Certification of Service.
16. Neither Respondent filed a response to the Motion for Default.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following conclusions of law:

17. The Complaint in this action was lawfully and properly served upon Respondents in accordance with the Consolidated Rules. See 40 C.F.R. § 22.5(b)(1)(i)-(ii)(A).
18. Respondents were required to file an Answer to the Complaint within thirty (30) days of service of the Complaint. See 40 C.F.R. § 22.15(a).
19. Respondents failed to file an Answer to the Complaint and such failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint, for the purposes of the pending proceeding only, and a waiver of Respondents' right to a hearing on such factual allegations. See 40 C.F.R. § 22.17(a).
20. Complainant's Motion for Default was lawfully and properly served on Respondents. See 40 C.F.R. § 22.7(c).
21. Respondents were required to file any response to the Motion for Default within fifteen (15) days of service. See 40 C.F.R. §§ 22.7(c) and 22.16(b).

22. Respondents failed to respond to the Motion for Default and such failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion. See 40 C.F.R. § 22.16(b).
23. Respondent Arnold Steinman is a “person” as defined in Section 9001(5) of RCRA, 42 U.S.C. § 6991(5) and 25 Pa. Code § 245.1, residing in the Commonwealth of Pennsylvania and the President and sole shareholder of Ross Transport Co., Inc. Compl., ¶ 3.
24. As set forth in the Complaint, Respondent Ross Transport Co., Inc. (“Ross Transport”) is a Pennsylvania corporation doing business in the Commonwealth of Pennsylvania, and is a “person” as defined in Section 9001(5) of RCRA, 42 U.S.C. § 6991(5) and 25 Pa. Code § 245.1. Id. at ¶ 2.
25. At all times relevant to the allegations in the Complaint, Respondents have been the “owners” and/or “operators,” as those terms are defined in Section 9001(3) and (4) of RCRA, 42 U.S.C. § 6991(3) and (4), and 25 PA Code § 245.1, of the “underground storage tank” (“UST”) and “UST system” as those terms are defined in Section 9001(10) of RCRA, 42 U.S.C. § 6991(10), and 25 PA Code § 245.1, located at 4220 Almond Street, Philadelphia, Pennsylvania. Id. at ¶ 4.
26. At the time of the April 21, 2009 CEI, and at all times relevant to the violations alleged in the Complaint, one UST was located at the Facility. Id. at ¶ 6.
27. The UST at the Facility is a ten thousand (10,000) gallon fiberglass tank that was installed on or about January 1, 2003, and that, at all times relevant to the allegations in the Complaint, routinely contained diesel fuel, a “regulated substance” as that term is defined in Section 9001(7) of RCRA, 42 U.S.C. § 6991(7), and 25 PA Code § 245.1. Id. at ¶ 7.

28. At all times relevant to the applicable violations alleged in the Complaint, the UST at the Facility has been a “petroleum system” and a “new tank system” as these terms are defined in 25 PA Code § 245.1. Compl., ¶ 8.
29. The UST at the Facility is and was, at all times relevant to applicable violations alleged in the Complaint, used to store “regulated substance(s)” at Respondents’ Facility, as defined in Section 9001(7) of RCRA, 42 U.S.C. § 6991(7), and 25 PA Code § 245.1, and has not been “empty” as that term is defined at 25 PA Code § 245.451. Id. at ¶ 9.
30. EPA has the authority to assess civil penalties on owners and operators of underground storage tanks who violate “any requirement or standard of a State program approved pursuant to section 9004 [42 USCS § 6991c].” 42 USCS § 6991e(d).
31. EPA has given the Commonwealth of Pennsylvania notice of the issuance of this Order in accordance with Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991e(a)(2). Mot. Default, Ex. 7.

COUNT I

32. Pursuant to 25 PA Code § 245.441(a) and (c), owners and operators of new and existing UST systems must provide a method or combination of methods of release detection monitoring that meets the requirements described therein.
33. 25 PA Code § 245.442(b)(1)¹ provides, in pertinent part, that USTs shall be monitored at least every 30 days for releases using one of the methods listed in 25 PA Code § 245.444(4)-(9), except that:
- (i) UST systems that meet the performance standards in 25 Pa Code §§ 245.421 (Performance Standards for New UST Systems) and .422 (Upgrading of Existing UST Systems), and the monthly inventory control requirements in 25 PA Code § 245.444(1) or (2) (Inventory Control or

¹ While there have been changes to 25 PA Code § 245.442 in recent years, these changes do not impact analysis of the issues in this case.

Manual Tank Gauging) may use tank tightness testing, conducted in accordance with 25 PA Code § 245.444(3) (Tank Tightness Test), at least every 5 years until December 22, 1998, or until 10 years after the UST is installed or upgraded under 25 PA Code § 245.422(b) (Tank Upgrading Requirements); and

- (ii) UST systems that do not meet the performance standards in 25 PA Code §§ 245.421 (Performance Standards for New UST Systems) and .422 (Upgrading of Existing UST Systems), may use monthly inventory controls, conducted in accordance with 25 PA Code § 245.444(1) or (2) (Inventory Control or Manual Tank Gauging) and annual tank tightness testing, conducted in accordance with 25 PA Code § 245.444(3) (Tank Tightness Test) until December 22, 1998, when the tank must be upgraded under 25 PA Code § 245.422 (Tank Upgrading Requirements) or permanently closed under 25 PA Code § 245.452; and
- (iii) Tanks with a capacity of 550 gallons or less may use manual tank gauging, conducted in accordance with 25 PA Code § 245.444(2).

34. From June 30, 2005, to August 3, 2010, the method of release detection selected by Respondents for the UST at the Facility had been automatic tank gauging in accordance with 25 PA Code § 245.444(4). Compl., ¶ 13.

35. From June 30, 2005 to August 3, 2010, Respondents failed to perform automatic tank gauging for the UST at the Facility in accordance with 25 PA Code § 245.444(4).
Compl., ¶ 14.

36. Respondents did not use any of the other release detection methods specified in 25 PA Code § 245.442(b)(1)(i)-(iii)² and/or 25 PA Code § 245.444(5)-(9) on the UST located at the Facility from June 30, 2005 to August 3, 2010. Compl., ¶ 15.

² Count I of the Complaint includes a typo, which refers to “25 PA Code § 245.442(1)(i)-(iii),” which omits the (b) subsection part of the regulation. However, this minor error is not fatal as subsection (b) is the only part of 245.442 containing subsections (1)(i)-(1)(iii), making it obvious which subsections have been violated. Therefore, Respondent was put on notice that Complainant was alleging allegations under subsection (b). Complainant has therefore adequately “state[d] the legal and factual grounds for the relief requested.” 40 C.F.R. § 22.17; see also 40 C.F.R. § 22.14(a)(2) (mandating a complaint include “[s]pecific reference to each provision of the . . . implementing regulations . . . which respondent is alleged to have violated”). This Initial Decision and Default Order will refer to the correct citation.

37. Respondents violated 25 PA Code § 245.441 and 25 PA Code § 245.442 by failing to perform automatic tank gauging for the UST at the Facility in accordance with 25 PA Code § 245.444(4) and failing to use another method of release detection specified in 25 PA Code § 245.442(b)(1)(i)-(iii) and/or 25 PA Code § 245.444(5)-(9) on the UST located at the Facility from June 30, 2005, until August 3, 2010. Compl. ¶ 16.

COUNT II

38. The Complaint alleged violations of 25 PA Code § 245.442(2)(ii) and also alleged that Respondents' piping did not meet the standards established by 25 PA Code § 245.445(2)(ii)(A)-(D) allowing for the absence of release detection. Compl., ¶ 18-19, 21. However, neither of the two aforementioned regulations exist as set forth. Presumably, Complainant had meant to refer to 25 PA Code §§ 245.442(b)(2)(ii) and 245.442(b)(2)(ii)(A)-(D), respectively. The error in referring to 25 PA Code § 245.442(2)(ii), as opposed to 25 PA Code § 245.442(b)(2)(ii), is not itself fatal for the reasons discussed in Count I, n. 2, supra. However, the error involving the citation to 25 PA Code § 245.445, which includes no subsection (2)(ii)(A)-(D), is significant. Unlike a simple error regarding a subsection that was readily apparent in the cited section, citing to an entirely incorrect section is more egregious and cannot be found to adequately state the legal grounds for the Count or put the Respondents on Constitutionally adequate notice of the charge underlying Count II's penalty. The relevant charge under 25 PA Code § 245.442(b)(2)(ii)(A)-(D) would have been that the Respondents' piping did not meet the standards allowing for the absence of release detection. Therefore, Respondents cannot be said to have been adequately apprised of the legal grounds of Count II and Complainant's have not adequately alleged that Respondents' piping did not meet the standards allowing for the absence of release detection.

39. In light of Complainant's failure to properly cite to the regulation establishing the violations alleged in Count II, the Motion for Default on Count II must be denied. The Consolidated Rules of Practice establish that "[w]here the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. § 22.17(b); see also 40 C.F.R. § 22.14(a)(2) (mandating a complaint include "[s]pecific reference to each provision of the . . . implementing regulations . . . which respondent is alleged to have violated"). The Complaint alleged violations of a non-existent regulation and thus has not conformed with the requirements of 40 C.F.R. § 22.17. While this mistake may very well be an inadvertent clerical error meant to address true regulatory violations, the Consolidated Rules of Practice require that the Motion for Default regarding Count II be denied. Additionally, 20 C.F.R. 22.17(a)'s language "is clearly expressed in a discretionary fashion. Without question, Presiding Officers, as authorized by 40 C.F.R. § 22.17, enjoy broad discretion in ruling on default motions." Agronics, Inc., A New Mexico Corp., CWA6-1631-99, 2003 WL 21480370 (E.P.A. Reg'l Judicial Officer May 7, 2003), 4.
40. Furthermore, notice, a fundamental element of Constitutional due process dictates that Default not be ordered regarding Count II because Respondents were not put on notice of all the actual regulatory violations in the Count. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) ("The essential requirements of due process . . . are notice and an opportunity to respond."). Additional caution is due as "a default order is a harsh remedy." Allied Environ., Inc., 2000 WL 968317 (EPA ALJ 2000), 3. Due process cannot be provided when a respondent is not put on notice of the actual charges underpinning the proposed penalty. It would be improper to hold a respondent liable in a

Default Order for violations not accurately alleged in the Complaint. See generally U.S. v. Palacios-Martinez, 845 F.2d 89, 94 (5th Cir. 1988). (“The essence of due process, after all, is fairness to the accused.”). The fact that Respondents may have nevertheless violated the Regulations that Complainant almost assuredly meant, but failed to refer to is of no consequence. Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 87 (1988) quoting Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915) (“Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, ‘it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.’”).

COUNT III

41. 25 PA Code § 245.703 requires, in pertinent part, that owners and operators of petroleum UST systems shall comply, with exceptions not relevant hereto, with the financial responsibility requirements of Subchapter H (i.e owners and operators are required to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs). See 25 PA Code § 245.704; 35 P.S. § 6021.701.
42. 25 PA Code § 245.704 provides, in pertinent part, that owners and operators of petroleum UST systems shall continuously participate in the Underground Storage Tank Indemnification Fund (“USTIF”), unless the Environmental Quality Board (“EQB”) has determined that the UST is an exempt UST.
43. From June 1, 2005, until at least August 3, 2010, Respondents’ UST at the Facility was not an exempted UST, and, therefore, Respondents were and are obligated to participate in the USTIF as required by 25 Pa Code § 245.704. Compl., ¶ 25.

44. From June 1, 2005 until August 3, 2010, Respondents did not participate in the USTIF.

Id. at ¶ 26.

45. Respondents violated 25 PA Code § 245.703 and 25 PA Code § 245.704 by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs and failing to continuously participate in the USTIF from June 1, 2005 until August 3, 2010. Compl., ¶ 27.

RESPONDENTS' CIVIL PENALTY LIABILITY

46. Respondents' failure to comply with the requirements of 25 PA Code § 245.441, 25 PA Code § 245.442, 25 PA Code § 245.703, and 25 PA Code § 245.704, are violations of RCRA Subtitle I, 42 U.S.C. §§ 6991-6991m, for which Respondents are liable for civil penalties under Section 9006 of RCRA, 42 U.S.C. § 6991e.
47. Respondents' failure to file a timely Answer to the Complaint or otherwise respond to the Complaint is grounds for the entry of a default order against the Respondents assessing a civil penalty for the violations described above. See 40 C.F.R. § 22.17(a)-(c).
48. Respondents' failure to file a response to Complainant's Motion for Default is deemed a waiver of Respondents' right to object to the issuance of this Order. See 40 C.F.R. § 22.16(b).

DETERMINATION OF CIVIL PENALTY AMOUNT

49. Complainant requested the assessment of a civil penalty in the amount of thirty thousand, three hundred fifty-two dollars (\$30,352.00) for the RCRA violations alleged in the Complaint. Mot. Default., 3. The proposed penalty is based upon Complainant's consideration of the statutory penalty factors set forth in Section 9006(e) of RCRA,

42 U.S.C. § 6991e(e) with specific reference to EPA's November 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations ("UST Penalty Guidance"); the Adjustment of Civil Monetary Penalties for Inflation, pursuant to Part 19; the December 29, 2008 memorandum by EPA Assistant Administrator Granta Nakayama, entitled Amendments to EPA's Civil Penalty Policy to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule; and the April 6, 2010 memorandum of the Director for the Waste and Chemical Enforcement Division, Office of Civil Enforcement, Rosemarie Kelley, entitled Revision to Adjusted Penalty Policy Matrices Package ("Nakayama/Kelley Memoranda"). Id. Pursuant to 40 C.F.R. Part 19, and as provided in the Nakayama/Kelley Memoranda and in the UST Penalty Guidance, penalties for RCRA Subtitle I violations occurring after January 30, 1997, were increased by 10% to account for inflation, not to exceed a \$11,000 per tank per day of violation. Pursuant to 40 C.F.R. Part 19, penalties for RCRA Subtitle I violations occurring after January 12, 2009, were increased to account for subsequent inflation, not to exceed a \$16,000 per tank per day of violation.

50. The UST Penalty Guidance provides a rational, consistent, and equitable methodology for applying the statutory penalty factors referenced above to the specific facts and circumstances of this case. Under the UST Penalty Guidance, an initial gravity-based penalty is calculated for each violation based on two components: the potential for harm of the violation and the extent of deviation from the applicable requirement. See UST Penalty Guidance, 14-15. The results of that analysis are used to select corresponding penalty amounts from the penalty matrices published in the UST Penalty Guidance. Id. at 16. The matrix penalty is then multiplied by the days of noncompliance multiplier ("DNC"). Id. at 21. An initial gravity-based penalty may be adjusted for certain of the

alleged violations to account for other applicable factors (e.g., degree of cooperation, degree of willfulness or negligence, history of noncompliance, and other unique factors). Id. at 23. Finally, any significant economic benefit that Respondents realized as a result of their noncompliance for any statutory or regulatory requirement should be added into the penalty calculation. See id. at 8.

51. Compliance with RCRA regulations requires a financial commitment, which all UST owners and operators are required to undertake. See UST Penalty Guidance, 8. Successful implementation of the RCRA Subtitle I program depends on the compliance and accountability of all regulated USTs and involves costs that must be shared equitably among all regulated entities to prevent any violator from enjoying a competitive advantage by not implementing the UST regulatory requirements. See id. Pursuant to the UST Penalty Guidance, the economic benefit of noncompliance may be included in the assessed penalty to ensure that a violator does not gain an economic advantage through its violations. Id.

52. The penalty proposed by Complainant in this matter was based upon Respondents' failure to comply with certain provisions of the Pennsylvania Authorized UST Management Program. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant provided an explanation of the number and severity of the violations in the Complaint. Mem. Supp. Mot. Default, 6-7, Ex. 5, Ex. 6. As an attachment to the Motion for Default, Complainant further provided specific penalty proposals for the violations alleged in each Count of the Complaint. Id. The explanations and associated penalty proposals are as follows:

Count I: Respondents violated 25 PA Code §§ 245.441 and 245.442 by failing to perform automatic tank gauging for the UST at the Facility in accordance with 25 PA Code § 245.444(4) or by failing to use another method of release detection

specified in 25 PA Code § 245.442(b)(1)(i)-(iii) and/or 25 PA Code § 245.444(5)-(9) on the UST located at the Facility from August 3, 2005 to August 3, 2010.³

53. For the reasons explained below, the failure to perform automatic tank gauging for the UST at the Facility in accordance with 25 PA Code § 245.444(4) constitutes both a “major” potential for harm and a “major” extent of deviation from the regulatory requirement for purposes of characterizing and calculating an initial gravity-based penalty. From at least five years prior to the filing of the Complaint on August 3, 2010, Respondents’ method of release detection for the UST at the Facility had been automatic tank gauging in accordance with 25 PA Code § 245.444(4). Compl., ¶ 13. From at least five years prior to the filing of the Complaint on August 3, 2010, Respondents failed to perform automatic tank gauging (a type of release detection) for the UST at the Facility in accordance with 25 PA Code § 245.444(4). Compl., ¶ 14. Respondents did not use any of the other release detection methods specified in 25 PA Code § 245.442(b)(1)(i)-(iii) and/or 25 PA Code § 245.444(4)-(9) on the UST located at the Facility during this period of time. As a result, Respondents did not perform release detection on the UST at the Facility. *Id.* at ¶ 15. The operation of an UST without utilizing a form of release detection is a substantial violation and a major deviation from the UST regulatory requirements. Mot. Default, Ex. 5, ¶ 13; see also UST Penalty Guidance, 15. Likewise, the UST Penalty Guidance specifically describes the failure to provide release detection as a major potential for harm. UST Penalty Guidance, 17.

³ While Complainant alleges that the violation under Count I occurred from June 30, 2005 to August 3, 2010, Compl., ¶¶ 13-15, Complainant calculates the penalty under Count I using August 3, 2005 to August 3, 2010. Mot. Default, Ex. 6. This minor error reduces Respondents’ multiplier, and therefore the August 3, 2005 start date employed by EPA will be used for the benefit of Respondents. See U.S. EPA Penalty Guidance for Violations of UST Regulations, 21. Pursuant to 40 C.F.R. § 22.27(b), I accept Complainant’s date in this calculation.

<u>Penalty:</u> Potential for Harm:	Major
Extent of Deviation:	Major
Per Tank Matrix Value	\$1,500.00
DNC before 1.12.2009: 6.0/ DNC after 1.12.2009: 0.5	
\$1,500 x 6.0 x 1.2895 Inflation	\$11,606.00
\$1,500 x 0.5 x 1.4163 Inflation	\$ 1,062.00
Economic Benefit (de minimis)	0
Total Penalty Count I:	<u>\$12,688.00</u>

Count II: Respondents are alleged to have violated 25 PA Code §§ 245.442(2)(ii) (erroneously cited) by failing to perform a line tightness test every three years in accordance with 25 PA Code § 245.445(2) or have monthly monitoring conducted in accordance with 25 PA Code § 245.445(3) for the underground piping associated with the UST at the facility. Further, Respondents are alleged to have not met the standards of 245.445(2)(ii)(A)-(D) (erroneously cited) allowing for the absence of release detection.

54. The Motion for Default proposed a penalty under Count II of \$6,334.00. Mot. Default, Ex. 5, ¶ 20. For the reasons set forth above, Default for Count II is denied. Therefore, no penalty is imposed under Count II.

Count III: Respondents violated 25 PA Code § 245.703 and 25 PA Code § 245.704 by failing to demonstrate financial responsibility for taking corrective action, failing to compensate third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs, and failing to continuously participate in the USTIF from August 3, 2005 to August 3, 2010.⁴

55. For the reasons explained below, with respect to the violations alleged in Count III of the Complaint, Respondents' failure to participate in the USTIF, as required by 25 PA Code § 245.704, constitutes both a "major" extent of deviation from the regulatory requirement and a "moderate" potential for harm for purposes of characterizing and calculating a gravity-based penalty. The purpose of the USTIF is to provide insurance to owners and operators of USTs to pay for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the

⁴ As previously discussed, the different date ranges alleged in the Complaint and used in calculating the DNC are minor and the reduced range employed by EPA favors Respondent and will therefore be used. See n.3, *supra*.

operation of petroleum USTs. Mot. Default, Ex. 5, ¶ 22. Respondents own and operate a 10,000 gallon UST. Compl., ¶¶ 4, 7. A release from this UST could cause significant harm to human health and the environment, and thus, would constitute a “moderate” potential for harm. Mot. Default, Ex. 5, ¶ 23; see also UST Penalty Guidance, 17.

Respondents have failed to comply with this requirement for at least the five year period prior to the filing of the Complaint on August 3, 2010, which is substantial noncompliance and a “major” deviation from the regulatory requirements. Mot. Default, Ex. 5, ¶ 23; see also UST Penalty Guidance, 15

56. The annual economic benefit is employed in calculating the total penalty amount. The economic benefit of the avoided cost of participating in the USTIF for this violation was determined using a standard formula, which multiplies the gallon capacity of the UST by a standard factor of 0.0825, or \$825.00 per year of violation. Mot. Default, Ex. 5, ¶ 24.

57. For at least five years prior to the filing of the Complaint on August 3, 2010, Respondents failed to participate in the USTIF. Compl., ¶ 26. Complainant calculated the penalty as follows:

<u>Penalty:</u> Potential for Harm:	Moderate
Extent of Deviation:	Major
Per Tank Matrix Value	\$ 750.00
DNC before 1.12.2009: 6.0 / DNC after 1.12.2009: 0.5	
\$750 x. 6.0 x 1.2895 Inflation	\$ 5,803.00
\$750 x 0.5 x 1.4163 Inflation	\$ 531.00
Economic Benefit	\$ 5,016.00
Total Penalty Count III:	<u>\$11,350.00</u>

However, the \$5,016.00 Economic Benefit calculated by Complainant in its Motion for Default Order will be adjusted due to subsequent findings on behalf of Complainant..

Complainant’s initial penalty calculations in the Motion for Default Order failed to adequately explain the calculations with respect to the days of noncompliance and Count

III's economic benefit. On July 2, 2013, the undersigned issued an Order to Supplement specifically requesting additional information regarding these calculations. Subsequently, on July 18, 2013 Complainant submitted the Declaration of Marie Owens Powell in Supplement to the Record ("First Supplement"),⁵ explaining the procedures for the DNC multiplier as well as a brief explanation, regarding Count III, of the economic benefit computations. However, the undersigned, having found the aforementioned First Supplement insufficient in its explanation of the calculation of Count III's economic benefit, on August 8, 2013, issued a second Order to Supplement requesting a more in depth explanation of the economic benefit calculations. On August 8, 2013, Complainant provided another Supplement ("Second Supplement")⁶ with detailed tabulations regarding the economic benefit calculations via the BEN model. Complainant determined the economic benefit to be \$4,799. Second Supplement; see also UST Penalty Guidance, 8-9 (describing the use of either the rule-of-thumb or the BEN model in determining penalty amounts). Therefore, the economic benefit under Count III is revised downward from \$5,016 to \$4,799, and the total Count III penalty will be adjusted down from \$11,350 to \$11,133 in accordance with this calculation.

CONCLUSION

Complainant proposed a penalty of \$30,352.00 against Respondents for the violations alleged in the Complaint in accordance with the statutory factors set forth at Section 9006e of RCRA, 42 U.S.C. § 6991e, and the UST Penalty Guidance.

⁵ The following was mailed to Respondents via certified mail, return receipt requested on July 18, 2013. Respondents did not reply to the First Supplement.

⁶ The following was mailed to Respondents via certified mail, return receipt requested on August 8, 2013. Respondents did not reply to the Second Supplement.

In light of the subsequent submittals by Complainant and the denial of Default regarding Count II, I have determined that the penalty amount of \$30,352.00 proposed by Complainant and requested in the Motion for Default shall be adjusted to \$23,821.00, reflecting a \$12,688.00 penalty for Count I and a \$11,133.00 penalty for Count III. This amount is not inconsistent with RCRA and is appropriate based on the record and on Section 9006e of RCRA, 42 U.S.C. § 6991e.

ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, Complainant's Motion for Default is hereby **GRANTED** as to Counts I and III and **DENIED** as to Count II, and Respondents hereby **ORDERED** as follows:

1. Respondents are hereby ordered to comply with the Compliance Tasks set forth at Paragraphs 28 through 32 of the Complaint.
2. Respondents Ross Transport Co., Inc. and Arnold Steinman, are hereby assessed a civil penalty, jointly and severally, in the amount of twenty-three thousand, eight hundred, twenty-one dollars (\$23,821.00), and ordered to pay the civil penalty as directed in this Order.
3. Respondents shall remit the civil penalty and any interest, administrative fees, and late payment penalties, by cashier's check, certified check or electronic wire transfer, within thirty (30) days after this Default Order has become final, see ¶ 7 below, in the following manner:
 - A. All payments by Respondents shall reference Respondents' names and addresses, and the Docket Number of this action, i.e., RCRA-03-2010-0268
 - B. All checks shall be made payable to "**United States Treasury**";

- C. All payments made by check and sent by regular mail shall be addressed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contact: Craig Steffen – (513-587-2091)

- D. All payments made by check and sent by private commercial overnight delivery service shall be addressed for delivery to:

U.S. Environmental Protection Agency
Fines and Penalties
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Craig Steffen – (513-587-2091)

- E. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA = 021030004
Account No. = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read:
“D 68010727 Environmental Protection Agency”

- F. All electronic payments made through the Automated Clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

US Treasury REX / Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTZX Format
Transaction Code 22 - Checking

Physical location of U.S. Treasury facility:

5700 Rivertech Court
Riverdale, MD 20737
Contact: John Schmid 202-874-7026 OR REX, 1-866-234-5681

G. On-Line Payment Option:

WWW.PAY.GOV

Enter "sfo 1.1" in the search field.

Open form and complete required fields.

H. Additional payment guidance is available at:

http://www.epa.gov/ocfo/finservices/make_a_payment.htm

At the time of payment, Respondents shall send a notice of such payment, including a copy of any check or electronic transfer, as appropriate, to:

Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

and

Joyce A. Howell
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC30)
1650 Arch Street
Philadelphia, PA 19103-2029

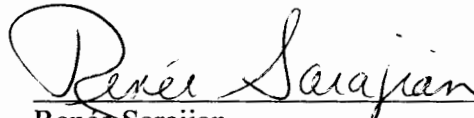
4. Along with its civil penalty remittance made pursuant to ¶ 3, above, and with the copy of the check or written notification (confirming any electronic fund transfer or online payment) sent pursuant to ¶ 3, immediately above, Respondents shall include a

transmittal letter identifying the caption (In the Matter of: Ross Transport Co., Inc. and Arnold Steinman.) and the docket number (RCRA-03-2010-0268) of this action.

5. In the event of failure by Respondents to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.
6. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debt owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.
7. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondents unless (1) a party appeals this Initial Decision to the EPA Environmental Appeals Board in accordance with 40 C.F.R. § 22.30,⁷ (2) a party moves to set aside the Default Order that constitutes this Initial Decision, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative. See 40 C.F.R. § 22.27(c).

IT IS SO ORDERED.

12/31/13
Date



Renee Sarajian
Regional Judicial Officer/Presiding Officer
U.S. EPA, Region III

⁷ Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this Initial Decision is served upon the parties.

CERTIFICATE OF SERVICE

This Initial Decision and Default Order (Docket No.: RCRA-03-2010-0268) was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

Joyce Howell (3RC30)
Senior Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

**VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED:**


Mr. Arnold Steinman
c/o Ross Transport Co., Inc.
4220 Almond Street
Philadelphia, PA 19137

Ross Transport Co., Inc.
4220 Almond Street
Philadelphia, PA 19137

VIA EPA POUCH:

Eurika Durr
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

DEC 31 2013
Date



Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029