

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

JUN -7 11 5 36
LEGAL HEARING CLERK
EPA REGION VI

In the Matter of:)
)
Freeman's Group, Inc.,) Docket No. UST-06-00-519-AO
)
Respondent.)

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 9006 of the Solid Waste Disposal Act, as amended ("SWDA"), 42 U.S.C. § 6991e(d), for violations of Section 9003 of the SWDA, 42 U.S.C. § 6991b, and regulations promulgated pursuant thereto. The proceeding is governed by procedures set forth in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") codified at 40 C.F.R. Part 22. Complainant, Director of the Multimedia Planning and Permitting Division of United States Environmental Protection Agency Region 6, has filed a Motion for Default as to Penalty and Liability ("Motion for Default") seeking a default order finding Respondent, Freeman's Group, Inc., liable for the violations of SWDA alleged in the Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") filed in this matter and assessing a civil penalty in the amount of \$52,763.00 against the Respondent. Pursuant to the Consolidated Rules and the record in this matter and for the reasons set forth below, the Complainant's Motion for Default is hereby **GRANTED**.

BACKGROUND

On November 2, 2000, Complainant filed the Complaint against Respondent in this matter. Section VI of the Complaint, entitled "Notice of Opportunity for Hearing," provides

information concerning Respondent's obligations with respect to responding to the Complaint. The last sentence of first paragraph of Section VI of the Complaint specifically states that ". . . Respondent shall file a written Answer to the Complaint with the Regional Hearing Clerk, Region 6, no later than thirty (30) days after the service of this Complaint." The last sentence of the second paragraph of Section VI of the Complaint states that "Failure of the Respondent to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation." Section VII of the Complaint, entitled "Default Order," states that "If Respondent fails to file an Answer within thirty (30) days after the date of service of this Complaint, Respondent may be found to be in default pursuant to 40 C.F.R. § 22.17.

The Certificate of Service attached to the Complaint includes a certification that a copy of the Complaint, together with a copy of the Consolidated Rules, was placed in the United States mail, postage prepaid, certified mail, return receipt requested on November 2, 2000, addressed to a person identified in the Certificate of Service as Respondent's President and to a person identified as Respondent's Registered Agent. A certified mail return receipt (green card) filed with the Regional Hearing Clerk, a copy of which is attached to Complainant's Motion for Default, shows that an article was delivered to the address of Respondent's President on November 6, 2000. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed., thus proper service of the Complaint may be presumed under the Consolidated Rules.

On November 3, 2003, Complainant filed its Motion for Default. The Certificate of Service attached to the Motion for Default shows that a copy of the Motion for Default was

served on the Respondent by United States mail, postage prepaid, certified mail, return receipt requested, on November 3, 2003.

As of the date of this order, the Respondent has not filed an Answer or a response to the Motion for Default or any other document in connection with this matter with the Regional Hearing Clerk.

FINDINGS OF FACT

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact:

1. The Freeman's Group, Inc., is the Respondent in this case.
2. Respondent is the owner and/or operator of a facility located at 512 W. Broadway, Forrest City, Arkansas 72235, with State ID# 62000093 ("Facility").
3. Respondent provides fuels to the public.
4. Respondent is the owner and/or operator of USTs located at the Facility.
5. On June 23, 1999, duly authorized EPA representatives conducted an inspection of the Facility.
6. According to Arkansas Department of Environmental Quality ("ADEQ") records, Respondent had registered four Underground Storage Tanks ("USTs"), which were installed in 1966, with ADEQ.
7. The four USTs at the Facility were permanently closed in 1996.
8. Two new USTs were installed at the Facility in 1996.

9. At the time of the inspection, Respondent had failed to notify ADEQ of the installation of the two new USTs at the Facility in 1996.
10. At the time of the inspection, Respondent had failed to install overfill prevention equipment at the Facility.
11. At the time of the inspection Respondent failed to protect all metal piping and/or metal piping components that was in contact with the ground with corrosion protection.
12. Respondent failed to conduct annual testing of the operation of automatic line leak detectors in accordance with the manufacturer's requirements at two USTs.
13. Respondent failed to conduct an annual line tightness test or to have monthly monitoring conducted.
14. On or about July 20, 1999, EPA mailed a Compliance Order and Settlement Agreement ("field citation") to Respondent noting violations and associated penalties.
15. By letter dated January 26, 2000, EPA requested specific information pursuant to Section 9005 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. § 6991d, which provides that any owner or operator of an underground storage tank shall, upon request of any authorized officer or employee of EPA, furnish information relating to the underground storage tanks, their associated equipment, and their contents.
16. By letter of July 13, 2000, EPA notified Respondent of its intention to file a civil administrative complaint.
17. EPA did not receive a response to its 9005 letter nor the July 13, 2000 notification of EPA's intent to file a civil administrative complaint.
18. The Complaint was filed with the Regional Hearing Clerk on November 2, 2000.

19. A copy of the Complaint was mailed to Respondent on November 2, 2000.
20. A properly executed return receipt shows that Respondent received a copy of the Complaint on November 6, 2000.
21. Respondent did not file an answer to the Complaint within 30 days of receipt and has not filed an answer as of the date of this Order.
22. On November 30, 2003, Complainant filed its Motion for Default as to Penalty and Liability and served it on the Respondent.
23. Respondent has not filed a response to Complainant's Motion for Default as to Penalty and Liability as of the date of this Order.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I reach the following conclusions of law:

24. EPA has approved Arkansas' UST program pursuant to section 9004 of the SWDA, 42 U.S.C. § 6991c. (40 C.F.R. § 282.53).
25. Arkansas' approved UST program provides that, except for the definitions of "Owner," "Person," and "Release" found at 40 C.F.R. § 280.12, the definitions set forth in 40 C.F.R. § 280.12 and 280.92 are all adopted by reference. (Arkansas Regulation 12 at 12.103(A)).
26. Arkansas' approved UST program provides that the federal regulations codified at 40 C.F.R. §§ 280.10 through 280.74, 280.90 through 280.116, and 280.200 through 280.230 are incorporated by reference. (Arkansas Regulation 12 at 12.104).
27. Respondent is a "person" as defined at Arkansas Regulation Number 12 at 12.103(B)(13).

28. Respondent violated Arkansas Regulation 12, 40 C.F.R. § 280.22(a), by failing to notify ADEQ of its USTs at the Facility.

29. Respondent violated Arkansas Regulation 12, 40 C.F.R. § 280.20(c)(1)(ii), by failing to use overfill equipment at the Facility.

30. Respondent violated Arkansas Regulation 12, 40 C.F.R. § 280.20(b)(2), by failing to protect all metal piping and/or metal piping components that was in contact with the ground with corrosion protection.

31. Respondent violated Arkansas Regulation 12, 40 C.F.R. § 280.44(a), by failing to conduct annual testing of the operation of automatic line leak detectors in accordance with the manufacturer's requirements at two USTs.

32. Respondent violated Arkansas Regulation 12, 40 C.F.R. § 280.41(b)(1)(ii), by failing to conduct an annual line tightness test or to have monthly monitoring conducted.

33. Respondent violated requirements of a State program approved pursuant to section 9004 of the SDWA, 42 U.S.C. § 6991c.

34. Respondent violated requirements of Subchapter IX of the SWDA, 42 U.S.C. §§ 6991 – 6991i.

35. Pursuant to section 9006(d)(2) of the SWDA, 42 U.S.C. § 6991e(d)(2), Respondent is liable for civil penalties not to exceed \$10,000 for each tank for each day of violation.

36. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

37. Respondent was required to file an answer to the Complaint within 30 days of the service of the Complaint. 40 C.F.R. § 22.15(a).

38. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

39. Complainant's Motion for Default was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

40. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b).

41. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

42. The civil penalty of \$52,763.00 proposed in the Complaint and requested in the Motion for Default is not inconsistent with Section 9006 of the SWDA, 42 U.S.C. § 6991e, and the record in this proceeding.

DISCUSSION OF PENALTY

The relief proposed in the Complaint and requested in the Motion for Default includes the assessment of a total civil penalty of \$52,753.00 for the alleged violations. With respect to penalty, the Consolidated Rules provide that the Presiding Officer shall determine the amount of the 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.”

40 C.F.R. § 22.27(b).

The statutory factors I am required to consider in determining the amount of the civil penalty are the seriousness of the violation and any good faith efforts of the Respondent to

comply with applicable requirements. Section 9006(c) of the SWDA, 42 U.S.C. § 6991e(c). I have examined Complainant's penalty calculations as set forth in the Complaint and considered the narrative summary explaining the reasoning behind the penalty proposed for the violations alleged in the Complaint as set forth in Declaration of John Cernero attached to Complainant's Motion for Default. I have also considered the provisions of the "U.S. EPA Penalty Guidance for Violations of UST Regulations," OSWER Directive 9610.12, November 14, 1990 ("UST Penalty Guidance"). I find that the Gravity component of the penalty calculation takes the seriousness of each violation into account. With respect to the second statutory factor, the record contains no evidence of good faith efforts on the part of Respondent to comply with the applicable requirements.

Pursuant to 40 C.F.R. § 22.17(c), "[t]he 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." The Complainant proposes to assess a total civil penalty of \$52,753.00 for the alleged violations as follows: Count I - \$19,500; Count II - \$7,685; Count III - \$10,031; Count IV - \$7,634; and Count V - \$7,903. After considering the UST Penalty Guidance, the statutory factors, and the entire record in this case, I find the civil penalty proposed is consistent with the record of this proceeding and the Act.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

- (1) Respondent is assessed a civil penalty in the amount of \$52,753.00.
 - (a) Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40

C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "Treasurer, United States of America," and mailed to:

Regional Hearing Clerk
EPA Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, shall accompany the check.

(b) Respondent shall mail a copy of the check to:

Lorena S. Vaughn
Regional Hearing Clerk (6RC)
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

and to:

Willie Kelley, Chief
UST/Solid Waste Section (6PD-U)
Multimedia Planning and Permitting Division
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Ellen Chang Vaughan
Assistant Regional Counsel (6RC-EW)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

(2) This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding

within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated this 7th day of June 2005.



MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena Vaughn, Regional Hearing Clerk, of the Environmental Protection Agency, hereby certify that a true and correct copy of an Initial Decision and Default Order in Docket No. UST-06-00-519-AO, was served upon the parties or their counsel of record on the date and in the manner set forth below:

Frederick Freeman, President
Freeman's Group, Inc.
512 West Broadway
Forrest City, Arkansas 72335

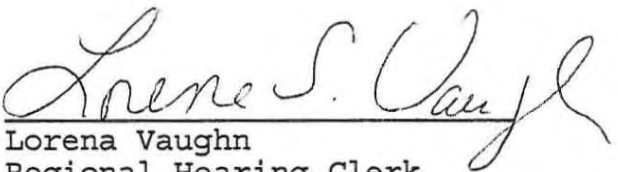
U.S. FIRST CLASS MAIL
RETURN RECEIPT REQUEST

Ellen Chang-Vaughan
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

HAND-DELIVERED

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
MC 1103B
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

DATE: 10-7-05


Lorena Vaughn
Regional Hearing Clerk