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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

GEORGE ATKINSON,[D/B/A/]	)	
GEORGE'S BRITISH PETROLEUM,	)	DOCKET NO.
	)	RCRA-(9006)-VIII-97-02
RESPONDENT	)	

Resource Conservation and Recovery Act - Regulation of Underground Storage Tanks - Default Order - Determination of Penalty

Notwithstanding provision of Consolidated Rule 22.17(a) (40 C.F.R. Part 22) to the effect that upon entry of a default order the full amount of the penalty proposed in the complaint shall become due and payable without further proceedings, where Complainant's assertion that the proposed penalty was computed in accordance with applicable penalty guidance was determined to be inaccurate, penalty was recomputed.

Appearance for Complainant:

Dana J. Stotsky, Esq.
Senior Enforcement Attorney
U.S. EPA Region VIII
Denver, Colorado

Appearance for Respondent:

George J. Atkinson
Pro Se
Ronan, Montana

ORDER ON DEFAULT

On March 23, 1998, Complainant moved for a Default Order against the Respondent, George Atkinson, [d/b/a] George's British Petroleum ("Respondent"), in this proceeding under Section 9006 of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6991e(a)). The stated basis of the motion is the failure of Respondent to file a prehearing exchange as ordered by the ALJ. By an order, dated June 30, 1998, Respondent was directed to show cause why it should not be held in default for failure to comply with the prehearing exchange order. The deadline for Respondent's response to the order was July 24, 1998. In an unsigned letter, dated July 29, 1998, Respondent alleged that he was unable to respond prior to July 24, because he

was out of town on family business. Respondent further alleged that he could not respond to the [order for a prehearing exchange] because the information was unavailable to him by the time of the previous deadline.

On August 27, 1998, Complainant filed a renewed motion for entry of default and issuance of a default order. In accordance with Rule 22.17 of the Rules of Practice (40 C.F.R. Part 22), a party may be found in default "after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer..." For the reasons discussed below, Complainant's motion is granted and Respondent is found to be in default.

The one count complaint, filed on May 30, 1997, charged Respondent with failure to respond to a confirmed release of a petroleum substance, as required by 40 C.F.R. § 280.60, and failure to replace a cracked compression fitting on copper blowback tubing on the turbine pump for an unleaded gasoline tank, as required by 40 C.F.R. § 280.33. For these alleged violations, it was proposed to assess Respondent a penalty of $13,700.

Respondent George Atkinson, appearing pro se, filed a letter-answer by facsimile, dated August 25, 1997, denying that any inspection of his facility had taken place, denying the existence of any leak, and denying Complainant's jurisdiction to enforce Solid Waste Disposal Act provisions with respect to Respondent.[(1)] Respondent alleged that the proposed penalty was excessive and inappropriate and requested a hearing.

On September 29, 1997, the ALJ issued a prehearing order requiring Complainant and Respondent to exchange specified prehearing information on or before November 21, 1997. Complainant filed its prehearing exchange by the mentioned date. Documents contained in Complainant's submission include a report of an EPA inspection of Respondent's facility conducted on January 22, 1997, and its attachment, a report of a 1996 inspection of Respondent's facility by the Montana Department of Environmental Quality (DEQ). These documents support Complainant's assertions concerning the release of a petroleum substance, Respondent's failure to respond thereto and his failure to replace the cracked compression fitting.

Respondent did not respond to the order that it file a prehearing exchange. Respondent was directed to furnish the factual basis for the denial of the allegation that its facility was inspected on January 22, 1997,[(2)] to state the factual basis for denying the allegation that Respondent was notified of a release by the Montana DEQ and that Respondent failed to correct the cause of the alleged leak. Additionally, Respondent was directed to furnish data such as financial statements or a copy of his income tax returns, if he were contending that assessment of the proposed penalty would jeopardize his ability to remain in business.

As noted at the outset of this order, Complainant, pointing to Respondent's failure to respond in any way to the prehearing exchange order, filed a motion for a default order on March 23, 1998. Respondent did not file any response to the motion. On June 30, 1998, the ALJ issued the previously mentioned order to show cause and on July 29, 1998, five days after the July 24 date set by the order, Respondent filed the response recited above. The response did not state whether the prehearing information which was allegedly unavailable on November 21, 1997, the date it was due to be filed, had since become available or describe the efforts made, if any, to obtain the information. More importantly, Respondent has not to date cured its default by submitting the information or, given any indication that he intends to do so.

Based on the entire record, primarily the January 1997 EPA inspection report, I make the following:

Findings of Fact

1. Respondent owns and/or operates, and, at all times relevant to the complaint in this matter, owned and/or operated nine underground storage tanks (USTs)

at a facility at 1018 Highway 93 South, Ronan, Montana. This facility, formerly known as George's Exxon and presently known and doing business as George's British Petroleum, is a retail outlet for motor vehicle fuels. (EPA Inspection Report, dated January 23, 1997, at 1).

2. On July 13, 1995, Montana DEQ performed an inspection of Respondent's facility during which a release of a regulated substance was observed. Montana DEQ issued a letter to Respondent on July 24, 1995, noting the violations discovered. DEQ issued a Notice of Violation to Respondent on September 21, 1995 for failure to continue the investigation and free product recovery at his facility. (EPA Inspection Report, at 1).
3. On June 6, 1996, Montana DEQ conducted a follow-up inspection and found, among other things, a cracked compression fitting on copper blowback tubing on a turbine pump for an unleaded gasoline tank. On June 11, 1996, Montana DEQ issued Respondent a letter requiring it to remedy listed violations, including replacing the cracked compression fitting. (EPA Inspection Report, at 2).
4. On January 8, 1997, after receiving information indicating continued releases from the facility, Montana DEQ re-inspected the facility and found that the Automatic Tank Gauging (ATG) system had not been used since the June 6, 1996 inspection. Because the ATG system functioned, in part, as a leak detection system, Montana DEQ and EPA inferred that the facility might have an undetected release. (EPA Inspection Report, at 2).
5. On January 22, 1997, EPA Inspector Kristine Knutson inspected Respondent's facility. During the inspection, Ms. Knutson found that the ATG module was not functioning properly and that the cracked compression fitting had not been repaired. Ms. Knutson was told by Lisa Starkel, an agent of Respondent, that the ATG system had not been working for a long time. (EPA Inspection Report, at 2-5).
6. As recited in the introduction to this order, Respondent has failed to submit prehearing information as directed by the ALJ. Information Respondent was directed to submit included the factual basis for the denial of the substantive allegations of the complaint, i.e., the fact of a release and the existence of a cracked compression fitting, and financial data, if Respondent contended that the proposed penalty exceeded his ability to pay. Respondent's response to the Order to Show Cause sets forth no reason for his continuing failure to cure his default.
7. The complaint alleges that the proposed penalty of $13,700 was determined in accordance with the "U.S. EPA Penalty Guidance for Violations of UST Regulations," OSWER Directive 9610.12 (November 1990, Complaint Exh. 5). The UST Guidance sets forth a two-step process of determining an initial penalty target, then making settlement adjustments, when applicable. (Id. 5). The determination of the initial penalty target involves the sum of two components, an economic benefit component and a gravity-based component. The economic benefit component is comprised of avoided costs and delayed costs (Id. 8-12). The initial gravity-based component is determined from a matrix which shows the extent of deviation from the requirement as major, moderate, minor on the horizontal axis and the potential for harm as major, moderate, minor on the vertical axis (Id. 16). After determining the level of the violation, the penalty amount is read from the appropriate cell, e.g., $1,500 for a major deviation from requirement and a major potential for harm.
8. After a base penalty is determined from the matrix, adjustments are then made to the matrix value to determine the initial penalty target figure. These adjustments include violator specific adjustments such as the violator's cooperation, willfulness, and history of noncompliance: an environmental sensitivity multiplier based on the environmental sensitivity associated with the location of the facility: and a days of noncompliance multiplier. (Id. 14-21). Because no compromise has been effected, settlement adjustments are not applicable in this case.
9. In calculating the proposed penalty herein, Complainant considered both the potential for harm and the extent of deviation to be major, resulting in an initial gravity-based penalty of $1500. (UST Guidance; UST Penalty Computation Worksheet, Motion Exh 2). Violator specific adjustments were plus 50% or $750 for noncooperation, i.e., failure to respond [to notice of violations] and to make repairs; another 50% or $750 for willfulness or negligence, i.e., although aware of problem Respondent failed to respond appropriately; and 25% or $375 for a history of noncompliance, a citation allegedly having been issued to Respondent in 1997 (Penalty Computation Worksheet). This resulted in an adjusted matrix value of $3,375, which was multiplied by a site specific environmental impact factor of 4.056 to reach a total of $13,687.50. This figure was rounded to $13,700.
10. The multiplier of 4.056 referred to in the previous finding, was computed by dividing 90 into 365, the number of days the violation is alleged to have continued. This method of determining the Environmental Impact Factor (EIF) is not explained and does not comport with UST Guidance. The impact from the release was considered to be moderate which results in an environmental sensitivity multiplier of 1.5 and the 365 days of noncompliance results in a DNM multiplier of 2.5. (Penalty Computation Worksheet; UST Guidance at 21). The EIF should thus have been 3.75 (1.5 x 2.5). Accordingly, the gravity-based penalty should be $12,656 ($3,375 x 3.75). Because the economic benefit from the violations was determined to be minimal, no economic benefit component was added to the proposed penalty.

Conclusions

1. Information Respondent was directed to provide in the ALJ's letter-order, dated September 29, 1997, was central to the issue of his liability for the violations alleged in the complaint and to a defense to the amount of the penalty based on ability to pay. The information was thus material. Respondent's failure and refusal to provide the information warrants a finding of default and pursuant to 40 C.F.R. § 22.17(a), Respondent is found to be in default. Respondent's default constitutes an admission of all facts alleged in the complaint and a waiver of its right to a hearing on such allegations.

2. Respondent has violated Section 9003 of RCRA, 42 U.S.C. § 6991b, and 40 C.F.R. §§ 280.60 and 280.33, as set forth above and as alleged in the complaint.
3. In accordance with RCRA § 9006(d)(2)(C), 42 U.S.C. § 6991e(d)(2), Respondent is liable for a civil penalty for the violations found herein. The penalty of $13,700 proposed by Complainant, however, does not comport with the EPA Penalty Guidance for Violations of UST Regulations (November 1990). As indicated in finding 10 above, an appropriate penalty computed in accordance with the UST Guidance totals $12,656. This is the amount that will be assessed.
4. In accordance with section 9003(h) and 9006 of RCRA, 42 U.S.C. §§ 6991b(h) and 6991e, Respondent will be ordered to perform the activities listed in the proposed compliance order in the complaint. The initial step of the compliance alternative chosen from the complaint must be completed within 60 days of the receipt of this order. The remaining steps of the alternative chosen must be completed within the time frame specified in the complaint.

Discussion

Although Respondent's July 29, 1998 letter is a tardy response to the Order to Show Cause, the assertion that information required by the prehearing order was not available at the time the information was to be submitted affords no reason or explanation for failing to submit the information at a later time. Respondent has not submitted the information or indicated in any way that the information will be forthcoming.

In order for a default order to ensue, the ALJ must conclude that Complainant has established a prima facie case of liability against the respondent.[(3)] To establish a prima facie case of liability, Complainant must present evidence "sufficient to establish a given fact ... which if not rebutted or contradicted, will remain sufficient ... to sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence." Black's Law Dictionary 1190 (6th. ed. 1990). Complainant must demonstrate both the occurrence of each alleged violation and the responsibility of each named respondent for those violations.

As indicated in the June 30, 1998 Order to Show Cause, Complainant's Prehearing Exchange establishes a prima facie case that Respondent had failed to replace a cracked compression fitting on copper blowback tubing on a turbine pump for an unleaded gasoline tank. Additionally, the Respondent failed to respond to the release of a regulated substance despite having been notified of the release by the Montana DEQ. These allegations are substantiated by the report of the EPA's January 22, 1997 inspection of Respondent's station and its attachment, the report of the Montana DEQ's June 11, 1996 inspection. As such, Complainant has established the prima facie case necessary for the issuance of a default order. Moreover, by its default, Respondent has waived his right to contest these facts.

Although Rule 22.17(a) provides that upon entry of an order of default, the penalty proposed in the complaint shall become due and payable without further proceedings within 60 days, the propriety of the proposed penalty of $13,700 warrants further scrutiny. The courts have made it clear that notwithstanding a respondent's default, the statutory factors in determining the amount of the penalty must be considered. Katzson Brothers, Inc. v. U.S. EPA, 839 F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that, notwithstanding the cited proviso of Rule 22.17(a), the Board is under no obligation to blindly assess the penalty proposed in the complaint. Rybond, Inc., RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614 (EAB, November 8, 1996).

Section 6991e(c) of the Act, 42 U.S.C. § 6991e(c), sets forth two factors the Administrator is to consider in determining a "reasonable" penalty, i.e., the seriousness of the violation and any good faith efforts to comply with the applicable requirements. It is concluded that the initial gravity-based penalty of $3,375 was determined in accordance with the EPA Penalty Guidance For Violations of UST Regulations and appropriately considers the presence [absence] of Respondent's good faith efforts to comply with the applicable requirements. It is further concluded that the environmental impact factor multiplier of 3.75 as calculated herein is in accordance with the UST Guidance and properly takes into account the seriousness of the violations. This results in a penalty of $12,656, which is considered to be reasonable.

Remaining for consideration is Respondent's ability [inability] to pay the penalty so determined. Although the Act does not require consideration of this factor, inability to pay is discussed in the UST Guidance (Id. 23). The EPA inspection report refers to Respondent's claims of financial problems and it may well be that Respondent could have demonstrated his inability to pay the $12,656 penalty or some portion thereof had he chosen to actively defend the complaint. However, the record before me affords no evidentiary basis for any such a reduction and Respondent, by its default, has waived the right to present evidence contesting the penalty. The penalty of $12,656 will be assessed.

Order

Respondent, George Atkinson (d/b/a George's British Petroleum), having violated Section 9003 of RCRA, 42 U.S.C. § 6991b, and 40 C.F.R. §§ 280.60 and 280.33 as alleged in the complaint, a penalty of $12,656 is assessed against him in accordance with Section 9006(d)(2) of the Act (42 U.S.C. 6991e(d)(2)). Additionally, Respondent is ordered to complete the requirements of one of the alternate compliance orders specified in the complaint. Respondent is to inform Complainant of the alternative chosen and the initial step of the compliance alternative chosen from the complaint must be completed within 60 days of the receipt of this order. The remaining steps of the alternative chosen must be completed within the time frame specified in the complaint.[(4)] Complainant is to make itself available to facilitate Respondent's efforts to comply with the alternative chosen. Payment of the full amount of the penalty shall be made by sending a certified or cashier's check in the amount of $12,656 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
EPA - Region VIII
P.O. Box 360859
Pittsburgh, PA 15251-6859

Dated this 26TH day of October 1998.

Original signed by undersigned _____
Spencer T. Nissen
Administrative Law Judge

1. Although the answer does not elaborate on the bases for the alleged jurisdictional deficiencies in the complaint, Respondent presumably was referring to the fact that the facility is located on an Indian reservation.

2. Inasmuch as the complaint alleges that the inspection was with the consent of the Respondent, it is probable that the denial was directed to that allegation rather than to the fact an inspection occurred.

3. A default order must include "findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed." 40 C.F.R. § 22.17(c).

4. In accordance with Rule 22.17(b) (40 C.F.R. Part 22), this order constitutes an initial decision, which unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 or unless the EAB elects to review the same sua sponte as therein provided, will become the final decision of the EAB and of the Agency in accordance with Rule 22.27(c).

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