UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR
Decision Published At Website - http://www.epa.gov/aljhomep/orders.htm

IN THE MATTER OF	)	
	)	
CHIE PING WU	)	
	)	
AND	)	**DOCKET NO. RCRA-3-99-9006-003**
	)	
PING AUTO CENTER, INC.,	)	
	)	
RESPONDENTS	)	

ORDER GRANTING MOTION FOR PARTIAL DEFAULT

This proceeding under Section 9006 of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6991e), commonly referred to as the Resource Conservation and Recovery Act (RCRA), was commenced on September 30, 1999, by the filing of a complaint by the Associate Director for Enforcement, Waste and Chemicals Management Division, U.S. Environmental Protection Agency, Region 3, ("Complainant"), charging Respondents, Mr. Chie Ping Wu and Ping Auto Center, Inc., with violations of RCRA Subtitle I, 42 U.S.C. §§ 6991-6991i, regulations at 40 C.F.R. Part 280, and the District of

Columbia Underground Storage Tank Regulations, District of Columbia Municipal Regulations ("DCMR"), Title 20, Chapters 55-68.[1/]

Specifically, the complaint alleges: Count I, that during their respective periods of ownership and operation of the Facility underground storage tanks ("USTs") between February 13, 1997 and May 3, 1998,[2/] Respondents violated 40 C.F.R. §§ 280.40(a)[3/] and

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[1/] The complaint alleges that:

> [o]n May 4, 1998, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the District of Columbia was granted final authorization to administer a state underground storage tank management program *in lieu* of the Federal underground storage tank management program established under Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i. The provisions of the District of Columbia underground storage tank management program, through this final authorization, have become requirements of Subtitle I of RCRA and are, accordingly, enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. §§ 6991e.

Complaint at 2.

[2/] Paragraph 4 of the complaint alleges that on or about December 16, 1985, Respondent Chie Ping Wu and his wife Ze Youye Wu, purchased the Facility and property at 2713 Good Hope Road, SE, Washington D.C., from Exxon Corporation. Respondents' answer states that they did not purchase and take possession of the Facility until 1986.

[3/] 40 C.F.R. § 280.40(a) provides that:

> [o]wners and operators of new and existing UST systems must provide a method, or combination of methods, of release detection that:
> (1) Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;
> (2) Is installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions,

(continued...)

(c),[4/] 280.41(a)[5/] and 280.43[6/] by failing to provide release detection monitoring of the 8,000-gallon and two 6,000-gallon petroleum USTs and 500-gallon petroleum/waste oil UST in accordance with the cited regulations.

Count II alleges that during their respective periods of being an owner and/or operator of the 8,000-gallon and two 6,000-gallon petroleum USTs and 500-gallon petroleum/waste oil UST, Respondents violated 20 DCMR §§ 6000 and 6003 (40 C.F.R. §§ 280.40(a) and (c) and 280.41(a) and 280.43) from at least May 4, 1998 to March 29, 1999, by failing to provide release detection monitoring for the 8,000-gallon and two 6,000-gallon petroleum USTs

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[3/] (...continued)
including routine maintenance and service checks for operability or running condition; and
(3) Meets the performance requirements in § 280.43 or 280.44, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. . . .

[4/] 40 C.F.R. § 280.40(c) provides that "[o]wners and operators of all UST systems must comply with the release detection requirements of this subpart by December 22 of the year" listed in an accompanying table of the regulation.For tanks installed between 1975 and 1979, release detection was required by December 22, 1992 (40 C.F.R.§ 280.40(c)).

[5/] 40 C.F.R. § 280.41(a) specifies that "[t]anks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h)" with certain exceptions.

[6/] 40 C.F.R. § 280.43, "Methods of release detection for tanks," requires that "[e]ach method of release detection for tanks used to meet the requirements of § 280.41 must be conducted in accordance with:" inventory control; manual tank gauging; tank tightness testing; automatic tank gauging; vapor monitoring; ground water monitoring; interstitial monitoring; and other methods.

and from at least May 4, 1998 to the present, by failing to provide release detection monitoring for the 500-gallon petroleum/waste oil UST. These dates for enforcing DCMR are reflective of the fact that May 4, 1998, was the effective date of the D.C. government's authorization to operate its UST program in lieu of the federal program, that the 8,000-gallon and two 6000-gallon petroleum tanks were removed on March 29, 1999, and the 500-gallon petroleum/waste UST is apparently still in service. The D.C. regulation, 20 DCMR Chapter 60, does not authorize inventory control as an approved method of release detection after December 22, 1995.

Count III alleged that during their respective periods of being an owner and/or operator of the 8,000-gallon and two 6,000-gallon petroleum USTs and 500-gallon petroleum/waste oil UST, Respondents violated 40 C.F.R. § 280.40(d) from at least February 13, 1997 through May 3, 1998. The cited regulation requires that any existing UST system that cannot apply a method of release detection which complies with the requirements of 40 C.F.R. Part 280, Subpart D, must complete closure requirements of 40 C.F.R. Part 280, Subpart G, by the date on which release detection is required for the UST system under 40 C.F.R. § 280.40(c). Because these tanks were installed during the 1975-79 period, release detection was required for the UST systems involved here no later than December 22, 1992 (40 C.F.R. § 280.40(c)). Respondents allegedly continued to use the 8,000-gallon and the two 6,000-

gallon USTs from at least February 13, 1997, until the tanks were removed on March 29, 1999.[7/] Respondents allegedly continue to use the 500-gallon petroleum waste oil UST.

Count IV alleges that during their respective periods of being an owner and/or operator of the 8,000-gallon and two 6,000-gallon petroleum USTs and 500-gallon petroleum/waste oil UST, Respondents violated 20 DCMR § 6000.4 (40 C.F.R. § 280.40(d)) from at least May 4, 1998 through at least March 29, 1999 for the 8,000-gallon and two 6,000-gallon petroleum USTs and through the present for the 500-gallon petroleum/waste oil UST. The cited regulation, 20 DCMR § 6000.4, the counterpart of 40 C.F.R. § 280.40(d), requires that any existing UST system that cannot apply a method of release detection which complies with the requirements of 20 DCMR § 6000 (40 C.F.R. Part 280, Subpart D) must complete the closure requirement of 20 DCMR Chapter 61 (40 C.F.R. Part 280, Subpart G) by the date on which release detection is required under 20 DCMR § 6000.3 (40 C.F.R.§ 280.4(c)). In accordance with 20 DCMR § 6000.3, an existing UST system installed prior to January 1, 1980, or for which the date of installation was unknown, was required to immediately comply with all release detection requirements.

[7/] Samples taken from adjacent soils at the time of the removal allegedly showed 100 ppm total hydrocarbons (THCs), indicating a possible leak (Proposed Civil Penalty, Complaint at 17).

Count V alleges that Respondents violated 20 DCMR §§ 5601.1,[8/] 5601.2,[9/] 5601.3,[10/] 5601.4,[11/] 5601.7,[12/] 5601.10[13/] and/or 5601.11[14/] by depositing waste oil into and dispensing waste oil out of a 500-gallon petroleum/waste oil UST and storing waste oil in the 500-gallon petroleum/waste oil UST at the Facility continuously from at least May 4, 1998 through the present without

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[8/] 20 DCMR § 5601.1 "provides that on or before January 1, 1994, the owner of an UST containing a regulated substance must register each UST with the DCRA and pay the required registration fee." Complaint ¶ 62.

[9/] 20 DCMR § 5601.2 "provides that the registration issued pursuant to 20 DCMR § 5601 shall be for one year." Complaint ¶ 63.

[10/] 20 DCMR § 5601.3 "provides that the initial registration fee for USTs with a capacity over 10,000 gallons is $500 and is $200 for USTs with a capacity of 10,000 gallons or less." Complaint ¶ 64.

[11/] 20 DCMR § 5601.4 "provides that the renewal fee for such registration is $200 for USTs with a capacity over 10,000 gallons and is $100 for USTs with a capacity of 10,000 gallons or less." Complaint ¶ 65.

[12/] 20 DCMR § 5601.7 "provides that the owner of the UST shall file an application with the DCRA for renewal of the registration of the UST at least 30 days prior to the expiration of the current registration until such time as the use of the UST is terminated as set forth in this section." Complaint ¶ 66.

[13/] 20 DCMR § 5601.10 "provides that no owner or operator shall deposit, or permit the deposit of, a regulated substance into an UST unless a registration application has been submitted to the DCRA for that UST along with the appropriate fee in accordance with the requirements of this section." Complaint ¶ 68.

[14/] 20 DCMR § 5601.11 "provides that no owner or operator shall dispense, or permit dispensing of, a regulated substance from an UST unless a registration application has been submitted to the DCRA for that UST along with the appropriate fee in accordance with the requirements of this section." Complaint ¶ 69.

having ever filed a registration or renewal application with the DCRA and paid the applicable fee for each UST.

For these alleged violations, it was proposed to assess Respondents a penalty of $55,404.

Respondents, through counsel, served an answer on November 2, 1999, denying the violations alleged in the complaint. Respondents requested a hearing. The matter was forwarded to the Office of Administrative Law Judges on November 23, 1999, and the undersigned was designated to preside on January 21, 2000.

On March 7, 2000, the ALJ issued a prehearing order, directing that, in the absence of settlement, the parties exchange specified prehearing information on or before April 21, 2000. In addition to providing an explanation and documents to support allegations in the complaint, which Respondents had denied, and to provide other documents referred to in the complaint, Complainant was directed to describe the differences, if any, between release detection requirements in 40 C.F.R. Part 280 and the release detection requirements in 20 DCMR Chapter 60. Complainant was also directed to explain its authority to enforce D.C. regulations to the extent that the D.C. regulations were “more stringent” or “broader in scope” than the federal regulations, to explain why allegations in Count I alleging violations of federal regulations were not duplicative of those in Count II which alleged violations of D.C. regulations, to explain why separate counts for failure to

comply with release detection requirements and failure to effect closure were proper in that these counts appeared to arise out of the same acts or failures to act, and to explain Complainant's authority to enforce D.C. registration and fee requirements for USTs.[15/]

Prehearing information Respondents were directed to provide included:

1. a copy of any records which would support denial of the allegations in paragraphs 29 and 30 of the complaint to the effect that Respondents failed to record daily volumes of inputs and withdrawals to and from USTs at their facility;
2. a copy of any records which would support the denial of the allegations in paragraphs 31 and 32 of the complaint to the effect that Respondents failed to conduct inventory control capable of detecting a release of 1.0 percent of flow-through plus 130 gallons on USTs at their facility;
3. a copy of any records which would support the denial of allegations in paragraphs 33 and 34 of the complaint to

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[15/] Because the initial registration fee for USTs having a capacity of 10,000 gallons or more is $500 and the fee for USTs having a capacity of 10,000 gallons or less is $200, renewal fees are $200 and $100, respectively and the registration period is only one year, there is a substantial basis for the contention that these fees are a revenue measure rather than fees designed to defray the cost of licensing.

the effect that Respondents failed to provide either of the methods of release detection described in 40 C.F.R. § 280.41(a)(1) or (2) for USTs at their facility and failed to provide any of the methods of release detection described in § 280.43(d)-(h) for USTs at their facility;

4. a copy of any records which would support denial of the allegation in paragraphs 35 and 46 of the complaint to the effect that Respondents failed to perform manual tank gauging on the 500-gallon waste oil UST at their facility;

5. a copy of any records or a summary of any witness testimony which would support the conclusion that any of the USTs identified in the complaint were “empty” as that term is defined in § 280.12 during any times relevant to the complaint; and

6. if Respondents were contending that the proposed penalty exceeds their ability to pay, provide financial statements, copies of income tax returns or other data to support such contention.

Under date of April 4, 2000, counsel for Complainant submitted a Settlement Status Report, which stated that no substantive settlement discussions had taken place and that Complainant had concluded that Respondents were not interested in pursuing settlement negotiations at this time. On April 6, 2000,

counsel for Complainant submitted a Settlement Status Report Update, stating that he had just received a telefax from opposing counsel requesting a meeting to discuss settlement. The report further stated that Respondents' counsel had indicated that Respondents may raise an issue of ability to pay and that, if so, EPA would need to review several years of income tax returns and possibly other data [to determine the validity of such a claim].

Complainant filed its prehearing exchange by the date established by the ALJ's order, April 21, 2000. Respondents did not file a prehearing exchange and made no response to the ALJ's order.

Counsel for Complainant noted this failure in a letter to Respondents' counsel, dated April 28, 2000. Among other things, the letter referred to an individual ability to pay claim, to income tax returns which had been sent to Complainant "last week", to Respondents' offer of settlement, and to the procedure for reviewing "ability-to-pay" claims. The letter acknowledged receipt of the June 1999 Notification for 500-gallon waste oil UST submitted to the DCRA on behalf of Ping Auto Center, Inc. by Calco Installation and Service, Inc. ("CIS") [the contractor who removed the 8,000-gallon UST and the two 6,000-gallon USTs in March of 1999, and who, in June of 1999, installed new USTs of 10,000-gallon, 7,000-gallon and 3,000-gallon capacity].

By a letter, dated June 22, 2000, Counsel for Complainant again reminded Respondents' counsel that he had not received a prehearing exchange which was due by April 21, 2000. The letter stated that as counsel for Plaintiff, he had a responsibility to move the matter toward resolution and that, unless he received Respondents' prehearing exchange by June 30, [2000] he would seek appropriate relief from the Judge. Additionally, the letter referred to prior letters pointing out that income tax returns submitted to date were lacking significant information and suggesting that he be supplied with complete income tax returns for the Wu's for the period 1995-1999 and for Ping Auto Center, Inc. for the period 1996-1999. A letter from Mr. Wu, dated May 29, 2000, was cited as indicating that he (Wu) had no intention of further pursuing an ability to pay review by EPA.

By a letter, dated June 24, 2000, counsel for Respondents acknowledged receipt of the most recent correspondence from counsel for Complainant. Counsel stated that his clients have been unavailable to him and requested that no further action be taken on this matter until his return from vacation on July 10, 2000. Under date of August 11, 2000, Complainant filed a motion for partial default judgment as to Counts I through IV of the complaint. Although the introduction to the motion asks for an order finding liability on all five counts of the complaint (Motion at 1), the balance of the motion as well as Complainant's subsequent action in

filing a separate motion finding liability as to Count V establish that the present motion is limited to Counts I through IV.[16/] The motion is based upon Respondents' failure to comply with the ALJ's order requiring the filing of a prehearing exchange and requests that the matter of the appropriate penalty be reserved for future proceedings. Respondents have not responded to the motion.

On August 21, 2000, counsel for Respondents, John R. Tjaden, Esq. served a Notice of Withdrawal of Appearance for Respondents, citing a lack of cooperation and agreement between counsel and Respondents.

DISCUSSION

Consolidated Rule 22.17(a), 40 C.F.R. Part 22, provides in part that "[a] party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the presiding officer; or upon failure to appear at a conference or hearing." Although not necessary to the decision here, Complainant appears to be of the view that under the quoted Rule a finding of default may only be made after motion. However, a careful reading of the quoted language, i.e., reading

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[16/] Under date of October 11, 2000, Complainant filed a motion for partial default judgment as to liability on Count V of the complaint.

the provision as if an "or" appeared after each semicolon in the series, leads to the conclusion that the listed grounds for default are in the alternative. Therefore, a motion is only required for a finding of default based upon the failure to file a timely answer to the complaint and the ALJ retains the authority to issue findings of default sua sponte for the other listed causes for default.[17/]

Respondents have failed to provide the information required by the ALJ's order of March 7, 2000, which information was to be furnished not later than April 21, 2000. This failure or refusal has persisted despite two warning letters to Respondents' then counsel and despite the notice provided by the pending motions for default. The information sought principally relates to Respondents' efforts to comply and thus, the basis for the denial of the violations alleged in the complaint. While the letter to Respondent's counsel from counsel for Complainant, dated June 22, 2000, indicates that Respondents have supplied manual tank gauge

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[17/] Support for the contrary view is provided by the fact that specific authorizations for sua sponte findings of default, which appeared in the former version of Rule 22.17(a), 45 Fed. Reg. 24363 (April 9, 1980), were deleted from the revised Rule without apparent explanation. 64 Fed. Reg. 40,137, 40,154 (July 23, 1999). However, a subsequent section of the revised Rule, § 22.19(g), provides that where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion: ".....(3) Issue a default order under § 22.17(c)." Thus it is likely that the specific authorizations for sua sponte findings of default were deleted from the Rule, because the authorizations were considered to be redundant.

information, it is not clear that this information is complete.[18/] Moreover, Respondents have apparently raised an ability-to-pay claim and supplied some tax return information in support of that claim. Although Complainant has asserted that this information is incomplete, it apparently concedes that there is or may be some validity to the claim, because it is asking for judgment for liability only at this time rather than moving for judgment for the penalty sought in the complaint, which is the Agency's usual practice on motions for default.

Among items of information Complainant was directed to supply in the prehearing order was a description of the differences between the release detection methods prescribed in 40 C.F.R. Part 280, which Respondents were charged with violating in Count I and those prescribed in 20 DCMR Chapter 60, which Respondents were charged with violating in Count II. Complainant was also asked to explain its authority to enforce the DCMR to the extent that it is "more stringent" or "broader in scope" than the federal regulation in the light of Hardin County, Ohio, RCRA (3008) Appeal No. 93-1, 5 E.A.D. 189 (EAB 1994). Complainant's response pointed out that the DCMR (20 DCMR § 6003.4) was more stringent than the federal regulation (40 C.F.R. § 280.41), because the federal regulation allowed inventory control in accordance with § 280.43 to be used as

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[18/] Manual tank gauging may be used as the sole method of release detection for USTs having a capacity of 550 gallons or less. (40 C.F.R. § 280.43(b)); 20 DCMR § 6006.1.

a method of release detection through December 22, 1998, while the DCMR did not allow inventory control to be used as a method of release detection beyond December 22, 1995. Complainant argues that it may enforce the more stringent DCMR, because, in accordance with the test established by the EAB in Hardin County, the DCMR does not increase the size of the regulated community and therefore is not "broader in scope" than the federal regulation (Phx at 45-47). Moreover, Complainant points out that the DCMR (20 DCMR § 6005) has a corresponding federal counterpart (§ 280.43(a)), the only difference being that the DCMR disallows the use of inventory control as a method of release detection three years earlier, that is, after December 22, 1995. Complainant's position is consistent with Hardin County and is accepted.

It should be noted that in Count I Complainant seeks to enforce the federal regulation, 40 C.F.R. Part 280, through May 3, 1998, and that in Count II, Complainant seeks to enforce the DCMR only on and after May 4, 1998, the effective date of the authorization to the District of Columbia to operate its own UST program in lieu of the federal program. This refutes any contention that the violations alleged in Count II duplicate those alleged in Count I.

Count III alleges that Respondents violated 40 C.F.R. § 280.40(d), which provides that any existing UST system that cannot apply a method of release detection which complies with the

requirements of 40 C.F.R. Part 280, Subpart D, must complete the closure requirements of 40 C.F.R. Part 280, Subpart G, by the date on which release detection is required for that UST system under 40 C.F.R. § 280.40(c). As indicated previously (supra note 4), release detection was required not later than December 22, 1992, for the USTs involved here. The violations were alleged to continue from at least February 13, 1997, through May 3, 1998.

Count IV alleges that Respondents violated 20 DCMR § 6000.4, the counterpart of 40 C.F.R. § 280.40(d), from May 4, 1998 until March 29, 1999, for the 8,000-gallon and two 6,000-gallon USTs and from May 4, 1998, to the present for the 500-gallon petroleum/waste oil UST, because it failed to apply an acceptable method of release detection during the mentioned periods and failed to effect closure in accordance with 20 DCMR Chapter 61. It is noted that the violations alleged in Counts III and IV seem to arise out of the same acts or failures to act as the violations alleged in Counts I and II, i.e., release detection in accordance with Part 280, Subpart D, 20 DCMR § 6000 would have obviated the need for closure. Conversely, closure in accordance with Part 280, Subpart G; 20 DCMR Chapter 61, would obviate the failure to comply with release detection requirements. Nevertheless, Complainant insists that failure to perform release detection and failure to close are separate and distinct violations warranting separate and distinct penalties (Phx at 49). While I do not find Complainant's

argument to be persuasive, it is unnecessary to finally determine the issue here, because Complainant is not seeking separate penalties for Counts III and IV and its motion asks that the amount of an appropriate penalty be reserved for further proceedings.

ORDER

Complainant's motion for a default judgment of liability for the violations alleged in Counts I through IV is granted. The amount of an appropriate penalty for these violations will be determined after further proceedings.

Dated this 23rd day of October 2000.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge