

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

EPA REGION 4
2010 SEP 30 PM 3:27
HARRIS/LLP

IN THE MATTER OF:	)	RCRA-UST-04-2010-0001
	)	
Donald F. Strickland	)	Proceeding under Section 9006
2425 Legion Road	)	of the Resource Conservation
Fayetteville, North Carolina 28306	)	and Recovery Act, as amended,
	)	42 U.S.C. § 6991e
RESPONDENT.	)	
	)	
	)	

**RESPONSE TO ORDER TO SUPPLEMENT RECORD, AND
MOTION TO AMEND MAY 27, 2010 MOTION FOR DEFAULT**

On May 27, 2010, the undersigned filed a Motion for Default on behalf of Complainant, Director of the Resource Conservation and Recovery Act Division of US Environmental Protection Agency Region 4 in the above styled matter. On August 30, 2010, this Tribunal issued an Order requiring Complainant to: (1) provide further legal and factual grounds for the proposed penalty; (2) explain why Complainant is seeking injunctive relief; and (3) provide copies of the return receipts for the Motion for Default that was sent on May 27, 2010, and re-sent on July 15, 2010. Complainant hereby seeks to: (1) provide the requested information and documentation; and (2) amend its May 27, 2010 Motion for Default by withdrawing the request for injunctive relief.

I. Legal and Factual Grounds for Proposed Penalty

1. As set forth in the Motion for Default, under Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d), EPA may assess a civil penalty against any person who violates federal or state UST requirements.
2. Complainant proposed that a \$8,520.00 civil penalty be assessed against Respondent for the violations described in the Motion for Default.

3. Pursuant to Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), this proposed civil penalty took into account the seriousness of the violations and any good faith efforts to comply with the applicable requirements. (*See Ex. A.*)

4. Pursuant to the *U.S. EPA Penalty Guidance for Violations of UST Regulations* (1990) (UST Penalty Policy)¹ the penalty was calculated based on an economic benefit component, a gravity-based component, and a determination as to whether adjustments were required to reflect the specific facts of this case. (*See id.*)

II. Injunctive Relief

5. On January 12, 2010, Complainant filed an Administrative Complaint and Compliance Order. The Complaint and Compliance Order was served on Respondent on January 23, 2010. Respondent failed to request a hearing or file an answer in response to the Complaint and Compliance Order.

6. Pursuant to Section 9006(b) of RCRA, 42 U.S.C. 6991e(b), as well as Section 22.37(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.37(b), a compliance order automatically becomes a final order unless, no later than 30 days after the order is served, the Respondent requests a hearing. Therefore, because Respondent failed to request a hearing within 30 days after the compliance order was served on Respondent, the compliance order automatically became a final order on February 23, 2010.

7. In its Motion for Default, Complainant sought, in addition to other requested relief, that this Tribunal issue an order requiring Respondent to perform the same injunctive relief contained in the final compliance order. This Tribunal, in its August 30, 2010 Order, required the undersigned to explain why, in light of the provisions at Section

¹ The UST Penalty Policy guidance implements the statutory factors set forth in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c) (requiring consideration of the seriousness of the violations and any good faith efforts to comply) that must be taken into account when assessing a civil penalty.

9006 of RCRA, 42 U.S.C. 6991e, Complainant sought the same injunctive relief as set forth in the final compliance order.

8. As Respondent was not represented by counsel, the undersigned was uncertain whether Respondent was aware that its failure to request a hearing within 30 days of being served with the compliance order would automatically render that order effective. Therefore, Complainant sought an order from this Tribunal in an attempt to ensure that Respondent was aware that it was being ordered to perform injunctive relief (and therefore liable for additional civil penalties for failure to perform such relief).

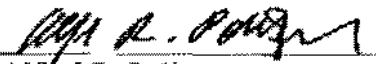
9. Complainant hereby withdraws its request for injunctive relief set forth in its May 27, 2010 Motion for Default, as that injunctive relief is already set forth in the final compliance order. However, Complainant respectfully renews its request that Respondent be found in default and ordered to pay the proposed \$8,520.00 penalty.

III. Delivery Confirmation of Motions Mailed to Respondent

10. Documentation of the attempted May 27, 2010 mailing of Complainant's Motion for Default is attached as Exhibit B, which includes: (1) a copy of the mailing envelope that was returned to the undersigned; (2) a copy of the certified mail receipt; and (3) a copy of the tracking information as provided by the US Postal Service.

11. Documentation of the attempted July 15, 2010 mailing of Complainant's Motion for Default is attached as Exhibit C, which includes: (1) a copy of the shipping label; and (2) a copy of the tracking information as provided by the commercial delivery service.

Date: Sept. 30, 2010


Alfred R. Politzer
Counsel for Complainant

IN THE MATTER OF: Donald F. Strickland, RCRA-UST-04-2010-0001

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Order to Supplement Record for the above referenced matter was sent this day, Sept. 30, 2010, to the following person in the following manner:

Certified Mail
Return Receipt Requested

Donald F. Strickland
2425 Legion Road
Fayetteville, North Carolina 28306

I further certify that the Response to Order to Supplement Record was filed this day, Sept. 30, 2010, with the Region 4 Regional Hearing Clerk, as specified below:

Hand Delivery – Original and one copy

Patricia Bullock
Regional Hearing Clerk
US Environmental Protection Agency, Region 4
61 Forsyth St, S.W.
Atlanta, Georgia 30303

Sept. 30, 2010


Alfred Politzer
Assistant Regional Counsel
US Environmental Protection Agency, Region 4
Office of Environmental Accountability
61 Forsyth St, S.W.
Atlanta, Georgia 30303

EXHIBIT A

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF:	)	RCRA-UST-04-2010-0001
	)	
Donald F. Strickland	)	Proceeding under Section 9006
2425 Legion Road	)	of the Resource Conservation
Fayetteville, North Carolina 28306	)	and Recovery Act, as amended,
	)	42 U.S.C. § 6991e (RCRA)
	)	
RESPONDENT.	)	
	)	

AFFIDAVIT OF JASON POE

Jason Poe, being duly sworn, deposes and says:

1. My name is Jason Poe, and I am employed as a Compliance and Enforcement Officer in the Underground Storage Tank (UST) Section of the Resource Conservation and Recovery Act (RCRA) Division of the US Environmental Protection Agency (EPA), Region 4. In my capacity as a Compliance and Enforcement Officer, I conduct inspections at UST facilities in order to determine their compliance status.
2. On June 25, 2009, I conducted a UST inspection at Respondent's facility located at 2425 Legion Road, Fayetteville, North Carolina 28306. I documented the results of the June 25, 2009 inspection in a report. (See Ex. A1.)
3. As described in Complainant's May 27, 2010 Motion for Default, as a result of my inspection, I determined that Respondent had violated various federal and state UST regulatory requirements. I calculated a penalty for these violations.
4. When calculating the penalty, I followed the *U.S. EPA Penalty Guidance for Violations of UST Regulations* (1990) (UST Penalty Policy), which takes into account the

seriousness of the violations and any good faith efforts to comply. The penalty calculation worksheets I used to calculate the penalty are attached as Exhibit A2.

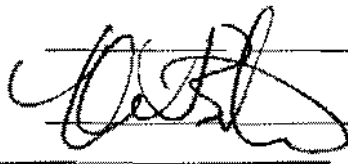
5. As described in my penalty calculation worksheets, and pursuant to the UST Penalty Policy, I calculated an economic benefit component and a gravity-based component, and I determined whether adjustments were required to reflect the specific facts of this case. (*See* Ex. A2.)

6. Notably, the potential for harm and the extent of deviation from the regulations was major for the violations. The environmental sensitivity multiplier was low, because the facility was not located in an environmentally sensitive area. The days of non-compliance multiplier was based on the number of days (172) of non-compliance for each annual testing requirement violation. (*See id.*)

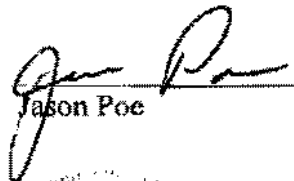
7. Based on the UST Penalty Policy, I calculated the total penalty as follows:

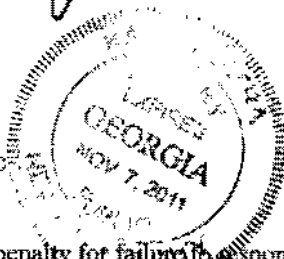
Count 1: failure to comply with line leak detector requirements	\$3,195
Count 2: failure to comply with line tightness requirements	\$3,195
Count 3: failure to respond to information request ¹	<u>\$2,130</u>
TOTAL PENALTY AMOUNT	\$8,520

Sworn to and Subscribed before me this
30th day of September, 2010.



Notary Public


Jason Poe



¹ Pursuant to the UST Penalty Policy (Appendix A), the penalty for failure to respond to an information request is based on the underlying recordkeeping violations. Here, the potential for harm and the extent of deviation from the regulations for Counts 1 and 2 was major. Therefore, pursuant to the applicable UST Penalty Policy penalty matrixes, the penalty for failure to respond to the information request is \$2,130.

EXHIBIT A1

UNDERGROUND STORAGE TANK (UST) COMPLIANCE INSPECTION

DATE: June 25, 2009

INSPECTORS: Jason Poe Credential # F13111

Mallory O. Miller Credential # F11003

FACILITY: DF Strickland Merchandise

LOCATION: 2425 Legion Road

FACILITY REPRESENTATIVE: Donald Strickland

Inspector's credentials were presented to Mr. Strickland.

The facility is owned and operated by Donald F. Strickland as a gas station and convenience store. Mr. Donald Strickland was present at the inspection and assisted in the inspection. The facility consists of one 10,000 gallon double walled fiberglass tank storing regular unleaded gasoline, one 4,000 gallon double walled fiberglass tank storing premium unleaded gasoline and one 2,500 gallon double walled fiberglass tank storing kerosene. All three tanks were installed in May, 2006. The pressurized product lines for all three tanks are constructed of thermoplastic flexible piping manufactured by Environ. All pressurized product lines are equipped with mechanical line leak detectors (MLLDs). At the time of the inspection, no documentation was provided showing that the pressurized product lines are tightness tested annually. Automatic Tank Gauging (ATG) is utilized for tank release detection monitoring. Spill buckets are installed on all three tanks. The spill buckets were free of debris. All tanks are equipped with flapper valves to meet overfill prevention requirements.

Prior to the inspection, a letter was sent to Donald F. Strickland on May 29, 2009 indicating a UST compliance inspection was going to be conducted the week of June 22nd and outlined the necessary information that would be required.

Records:

Records were provided during the inspection. Records for the last line tightness test and line leak detector test were not provided during the inspection. An information request was left with Mr. Strickland stating that these records are required and should be sent to EPA Region 4 office by July 14, 2009. As of the August 5, 2009, no documentation has been provided indicating that these tests have been done.

Notification:

The facility was registered with NCDENR under ID# 0-012085. The UST permit was current and posted.

Cathodic Protection (CP):

Components are constructed of non-corrosive materials thus, the facility is not required to have cathodic protection.

7/14/09

Release Detection:

The facility is currently using a Veeder Root TLS 350 Automatic Tank Gauging (ATG) system to meet tank leak detection requirements. At the time of the inspection, the previous 12 months of passing results was provided. No records were shown indicating the last annual product line tightness test and functionality test of the mechanical line leak detectors.

Spill and Overfill Protection:

Spill prevention was accomplished through the use of spill buckets which were installed on tank fill ports. All tanks are equipped with flapper valves to meet overfill prevention requirements.

Release Reporting:

There was no release history at this facility.

Violations under 40 C.F.R. Part 280:

Release Detection

- 1) §280.44 (a) Failure to provide adequate line leak detector system for underground piping

Automatic line leak detectors are designed to alert the operator of the presence of a leak by restricting or shutting off flow of regulated substances through piping if leaks of 3 gallons an hour or more are detected. An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.

- 2) §280.44 (b) Failure to provide adequate line tightness testing system for underground piping system

Underground pressurized piping that routinely contains regulated substances must be monitored for releases. An annual line tightness test must be capable of detecting a 0.1 gallon per hour leak rate at one and one-half times the operating pressure

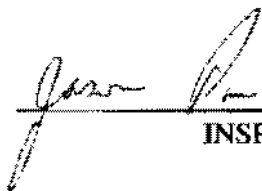
 E13111 8/5/2009
INSPECTOR DATE

EXHIBIT A2

UST PENALTY COMPUTATION WORKSHEET

Assessments for each violation should be determined on separate worksheets and totaled. (If more space is needed, attach a separate sheet.)

PART 1 - BACKGROUND

Company Name: DF Strickland Merchandise

Regulation violated: 40 CFR 280.44 (a) Failure to provide adequate line leak detector system for underground pipind

Previous violations: _____

Date of requirement: 1/22/2009

Date of Inspection: 6/25/2009

Date of compliance: 7/13/2009

Explanation (if appropriate): _____

1. Days of noncompliance: 172

2. Number of tanks: 3

PART 2 - ECONOMIC BENEFIT COMPONENT

Avoided Expenditures: _____ Basis: 0

Delayed Expenditures: _____ Basis: 300

Weighted Tax Rate: _____ Source: .15 (15%)

Interest Rate: _____ Source: .072 (7.2%)

Avoided = $\left[\text{Avoided Expenditures} + \frac{\text{Avoided Expenditures} \times \text{Interest} \times \text{No. Of Days}}{365 \text{ Days}} \right] \times (1 - \text{Weighted Tax Rate})$

Costs

3. Calculated Avoided Cost: \$ 0

$$\left[0 + 0 \times \frac{.072 \times 172}{365} \right] \times (1 - .15)$$

$$0 \times .85 = 0$$

UST PENALTY COMPUTATION WORKSHEET

Delayed Costs = $\frac{\text{Delayed Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}}$

$\frac{\$ \times \% \times \text{days}}{365} = \0.00

$\frac{300 \times .072 \times 172}{365}$

4. Calculated Delayed Cost: \$ 10.18

5. Economic Benefit Component: \$ 0 + 10.18 = \$10.18
(Line 3 + Line 4)

PART 3 - MATRIX VALUE FOR THE GRAVITY-BASED COMPONENT

Potential for Harm: Major Extent of Deviation: Major

6. Matrix Value (MV): \$2130 (From document page 16 or Appendix A)

7. Per-tank MV: \$2130 If violation is per facility, the amount on Line 7 (Line 2 x Line 6) will be the same as the amount on Line 6)

PART 4 - VIOLATOR-SPECIFIC ADJUSTMENTS TO MATRIX VALUE

	Percentage Change (+ or -)	x Matrix Value	= Dollar Adjustment (+ or -)	Justification
8. Degree of cooperation/ noncooperation:	<u>0</u>	<u>0</u>	<u>\$0</u>	
9. Degree of willfulness or negligence:	<u>0</u>	<u>0</u>	<u>\$0</u>	
10. History of noncompliance:	<u>0</u>	<u>0</u>	<u>\$0</u>	
11. Unique factors:	<u>0</u>	<u>0</u>	<u>\$0</u>	

Adjusted Matrix Value
(Line 7 + Lines 8-11): \$2130

UST PENALTY COMPUTATION WORKSHEET
--

PART 5 - GRAVITY-BASED COMPONENT

Level of

Environmental Sensitivity: Low Justification: few receptors13. ESM (from document Page 21): 1.014. DNM (from document Page 21): 1.5

	Environmental Sensitivity Multiplier	x	Days of Noncompliance Multiplier
--	--	---	--

GRAVITY-BASED COMPONENT = Adjusted Matrix Value

15. Gravity-Based Component:
 (Line 12 x Line 13 x Line 14): \$ 2130 x 1 x 1.5 = 3195

PART 6 - INITIAL PENALTY TARGET FIGURE

16. Economic Benefit Component: \$ negligible (\$10.18)
 (from Line 5)

17. Gravity-Based Component: \$ 3195.00

18. Initial Penalty Target Figure: \$ 3195.00
 (Line 16 + Line 17)

SIGNATURE: _____

DATE: _____

UST PENALTY COMPUTATION WORKSHEET

Assessments for each violation should be determined on separate worksheets and totaled. (If more space is needed, attach a separate sheet.)

PART 1 - BACKGROUND

Company Name: DF Strickland Merchandise

Regulation violated: 40 CFR 280.44(b) Failure to provide adequate line tightness testing system for underground piping system

Previous violations: _____

Date of requirement: 1/22/2009

Date of inspection: 6/25/2009

Date of compliance: 7/13/2009

Explanation (if appropriate): _____

1. Days of noncompliance: 172

2. Number of tanks: 3

PART 2 - ECONOMIC BENEFIT COMPONENT

Avoided Expenditures: _____ Basis: 0

Delayed Expenditures: _____ Basis: 300

Weighted Tax Rate: _____ Source: .15 (15%)

Interest Rate: _____ Source: .072 (7.2%)

Avoided = $\left[\frac{\text{Avoided Expenditures} + \text{Delayed Expenditures} \times \text{Interest} \times \text{No. Of Days}}{365 \text{ Days}} \right] \times (1 - \text{Weighted Tax Rate})$

Costs

3. Calculated Avoided Cost: \$ 0

$$\left[\frac{0 + 0 \times .072 \times 172}{365} \right] \times (1 - .15)$$

$$0 \times .85 = 0$$

UST PENALTY COMPUTATION WORKSHEET

Delayed Costs = Delayed Expenditures x Interest x Number of Days

365 Days

$$\frac{\$ \times \% \times \text{days}}{365} = \$0.00$$

$$\frac{360 \times .012 \times 172}{365}$$

4. Calculated Delayed Cost: \$ 10.18

5. Economic Benefit Component: \$ 0 + 10.18 = \$10.18
(Line 3 + Line 4)

PART 3 - MATRIX VALUE FOR THE GRAVITY-BASED COMPONENT

Potential for Harm: Major Extent of Deviation: Major

6. Matrix Value (MV): \$ 2130 (From document page 16 or Appendix A)

7. Per-tank MV: \$ 2130 If violation is per facility, the amount on Line 7 (Line 2 x Line 6) will be the same as the amount on Line 6)

PART 4 - VIOLATOR-SPECIFIC ADJUSTMENTS TO MATRIX VALUE

	Percentage Change (+ or -)	x Matrix Value	= Dollar Adjustment (+ or -)	Justification
8. Degree of cooperation/ noncooperation:	<u>0</u>	<u>0</u>	<u>\$0</u>	
9. Degree of willfulness or negligence:	<u>0</u>	<u>0</u>	<u>\$0</u>	
10. History of noncompliance:	<u>0</u>	<u>0</u>	<u>\$0</u>	
11. Unique factors:	<u>0</u>	<u>0</u>	<u>\$0</u>	

Adjusted Matrix Value
(Line 7 + Lines 8-11): 2130

UST PENALTY COMPUTATION WORKSHEET
--

PART 5 - GRAVITY-BASED COMPONENT

Level of

Environmental Sensitivity: low Justification: few receptors13. ESM (from document Page 21): 1.014. DNM (from document Page 21): 1.5

	Environmental Sensitivity Multiplier	x	Days of Noncompliance Multiplier
GRAVITY-BASED COMPONENT = Adjusted Matrix Value x			

15. Gravity-Based Component:

(Line 12 x Line 13 x Line 14): \$ 2130 x 1 x 1.5 = 3195**PART 6 - INITIAL PENALTY TARGET FIGURE**16. Economic Benefit Component: \$ negligible (\$10.18)
(from Line 5)17. Gravity-Based Component: \$ 3195.0018. Initial Penalty Target Figure: \$ 3195.00
(Line 16 + Line 17)

SIGNATURE: _____

DATE: _____

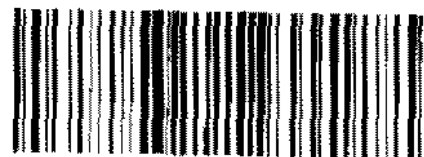
EXHIBIT B

UNITED STATES
ENVIRONMENTAL PROTECTION /
REGION 4
ATLANTA FEDERAL CENTER
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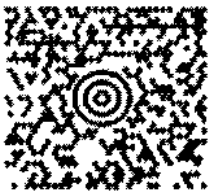
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ATLANTA GA 30303

1.0 LBS LTR

1 OF 1

SHIP TO:

MR. DONALD R. STRICKLAND
2425 LEGION ROAD
FAYETTEVILLE NC 28306-2997

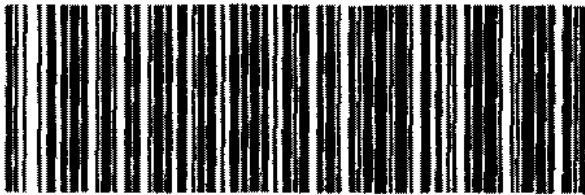


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Type: Package

Service: NEXT DAY AIR SAVER

Weight: 1.00 Lb

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	07/16/2010	1:20 P.M.	RECEIVER STATED THEY DID NOT ORDER AND REFUSED THIS DELIVERY	
	07/16/2010	7:46 A.M.	OUT FOR DELIVERY	
	07/16/2010	7:10 A.M.	ARRIVAL SCAN	
RALEIGH, NC, US	07/16/2010	5:54 A.M.	DEPARTURE SCAN	
	07/16/2010	5:21 A.M.	ARRIVAL SCAN	
LOUISVILLE, KY, US	07/16/2010	4:10 A.M.	DEPARTURE SCAN	
	07/16/2010	12:52 A.M.	ARRIVAL SCAN	
HAPEVILLE, GA, US	07/15/2010	11:31 P.M.	DEPARTURE SCAN	
	07/15/2010	10:01 P.M.	ARRIVAL SCAN	
ATLANTA, GA, US	07/15/2010	9:50 P.M.	DEPARTURE SCAN	
	07/15/2010	9:05 P.M.	ORIGIN SCAN	
	07/15/2010	7:12 P.M.	PICKUP SCAN	
US	07/15/2010	8:24 A.M.	BILLING INFORMATION RECEIVED	

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