

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

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**BEFORE THE ADMINISTRATOR**

FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF:	)	Docket Nos. CWA-08-2007-0025 and
	)	CWA-08-2007-0026
Burke Oil Company, Inc.,	)	
d/b/a Presho Oil Company,	)	
Presho Oil Facility	)	
	)	
and	)	
	)	
Burke Oil Company, Inc.,	)	
Chamberlain Bulk Plant Facility	)	
	)	
Respondents.	)	

COMPLAINANT'S PREHEARING EXCHANGE

Complainant, United States Environmental Protection Agency, Region 8 (EPA), files this COMPLAINANT'S PREHEARING EXCHANGE pursuant to 40 C.F.R. section 22.19(a) and ORDER GRANTING MOTION TO CONSOLIDATE PROCEEDINGS AND PREHEARING ORDER of the Administrative Law Judge issued April 23, 2008.

**I. WITNESSES TO BE CALLED**

1. Ms. Donna K. Inman, Environmental Scientist  
Technical Enforcement Program  
Office of Enforcement, Compliance and Environmental Justice  
EPA Region 8 (8ENF-UFO)  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

Ms. Inman is a multimedia inspector employed in the Region 8 Office of Enforcement, Compliance and Environmental Justice, Technical Enforcement Program. Ms. Inman is certified

to conduct inspections under the Clean Water Act (CWA) (including National Pollutant Discharge Elimination System and Spill Prevention Control and Countermeasures) and the Resource Conservation and Recovery Act. Ms. Inman, as the custodian of the Burke Oil enforcement file, will testify regarding the regulatory requirements contained in Section 311(b) of the Clean Water Act, and its implementing regulations set forth in 40 C.F.R. Part 112.

In her testimony, Ms. Inman will explain the requirements on owners or operators of non-transportation related onshore facilities to prepare and implement a Spill Prevention Control and Countermeasures (SPCC) Plan. She will also identify the specific inadequacies of the Respondents in meeting the CWA and the regulations observed during the compliance inspection conducted at Respondents' Presho Oil and Chamberlain Bulk Plant facilities on September 12 and 14, 2006. Ms. Inman also will testify regarding the deficiencies associated with the facility SPCC Plans reviewed as described in the inspection reports.

Ms. Inman will testify about the written and verbal communications EPA had with Mr. Robert Burke on behalf of the Respondents after the inspections before issuing the complaints regarding the SPCC noncompliance. Ms. Inman also will testify how and when the Respondents satisfactorily complied with the individual SPCC deficiencies alleged, and the impact, if any, of the Respondents' compliance efforts on the complaints and penalties proposed therein.

Relatedly, Ms. Inman will testify whether any deficiencies identified in the complaints remain outstanding.

Ms. Inman also will testify regarding the penalties proposed in the complaints. Ms. Inman will testify regarding EPA's Penalty Policy for Sections 311(b) and (j) of the Clean Water

Act (August 21, 1998), used to ensure a rational and consistent application of the statutory penalty factors in the Oil Pollution Act, and its application to the facts in this matter. Her testimony will include an explanation of the facilities' extent of noncompliance, environmental impact, duration of violations, culpability, and other factors used by the penalty policy in assessing a penalty. Ms. Inman will establish through testimony the basis for admitting into evidence Complainant's Exhibits 26-41.

2. Mr. James E. Peterson,  
Senior Environmental Employee  
Office of Ecosystems Protection and Remediation  
EPA Region 8 (8EPR-ER)  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

Mr. Peterson is a contractor to EPA. In his capacity as an EPA Region 8 Senior Environmental Employee, Mr. Peterson personally reviews SPCC plans and conducts SPCC inspections at the direction of the EPA. Mr. Peterson also routinely makes determinations whether a discharge from a facility can reasonably be expected to impact a water of the U.S. or adjoining shoreline in harmful quantities based on an assessment of a facility's location including, but not limited to, local land contours, geography and drainage features. Mr. Peterson will testify regarding the likelihood of a discharge from the Respondents' facilities reaching a navigable water of the U.S. in harmful quantities based on his consideration of the facilities' locations and spill pathways, and review of relevant topographic maps.

Mr. Peterson also will testify regarding the SPCC Plan compliance inspection he conducted on behalf of EPA at Respondents' facilities in September 2006, including the Presho Oil Facility and the Chamberlain Bulk Plant Facility. Mr. Peterson will testify regarding the

specific inadequacies of the Respondents in meeting the CWA and the regulations observed and photographed. Mr. Peterson also will testify regarding any post-inspection verbal or written communications he had with Burke Oil representatives. Mr. Peterson will authenticate the photos contained in Complainant's Exhibits 1 and 5. Mr. Peterson will establish, through testimony, the basis for admitting into evidence Complainant's Exhibits 1 through 25.

## **II. WITNESSES THAT MAY BE CALLED**

### **A. Potential Company Witnesses**

1. Mr. Robert Burke  
President and Owner  
Burke Oil Company and Presho Oil Company  
1200 East King Street  
Chamberlain, SD 57325

Mr. Burke has personal knowledge of the alleged SPCC Plan and implementation deficiencies at the Presho Oil and Chamberlain Bulk Plant facilities alleged in the complaints. He also has knowledge of the SPCC deficiencies noted by the Professional Engineer Mr. Burke retained in 2003 to prepare facility SPCC Plans. If not called as a Respondents' witness and thus made available to Complainant for cross examination, EPA may call Mr. Burke as a Complainant's witness to testify regarding his knowledge of past SPCC deficiencies at the facilities, and verbal and written communications with EPA following the inspection and prior to receipt of the complaints. EPA also may call Mr. Burke to testify regarding his overall knowledge of and familiarity with the SPCC from attending EPA-sponsored trainings and affiliation with the South Dakota Petroleum Marketers Association.

2. Mr. Jim Kotz  
Presho Oil Company  
500 East Highway 16  
Presho, SD 57568

Mr. Kotz, as the facility contact for the Presho Oil Company facility at the time of the SPCC inspection, may be called if not otherwise called by the Respondent to testify regarding the SPCC deficiencies identified at the time of the inspection.

B. Potential Federal/State/Tribal Witnesses

1. Mr. Randall W. Breeden  
Geohydrologist  
RCRA Corrective Action, Technical Support  
U.S. EPA Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

Mr. Breeden is a Geohydrologist employed by EPA Region 8's RCRA Corrective Action Program. Mr. Breeden assists the Clean Water Act Programs by routinely making determinations whether a discharge from a facility can reasonably be expected to impact a water of the U.S. or adjoining shoreline in harmful quantities based on an assessment of a facility's location, including, but not limited to local land contours, geography and drainage features. Mr. Breeden may be called to testify regarding the likelihood of discharges from the facilities reaching a navigable waters of the U.S. based on his consideration of the facilities' locations and spill pathways, and review of relevant topographic maps, and stream flow, precipitation and soils data. Mr. Breeden may establish, through testimony, the basis for admitting into evidence Complainant's Exhibits 12 through 21, and 41.

### III. ADDITIONAL INFORMATION REQUIRED BY ALJ's PREHEARING

#### ORDER

1. A copy of Donna Inman's, Complainant's expert witness, resume or curriculum vitae is attached as Exhibit 41.
2. Complainant estimates that it will take 1 day to put on its case in chief. Complainant requests that the hearing be held in a suitable, neutral courtroom facility in Chamberlain, South Dakota.
3. Complainant has been ordered to submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty. This statement is attached hereto as Exhibit 37.
4. Complainant has been ordered to "submit a statement regarding whether the Paperwork Reduction Act of 190 ("PRA"), 44 U.S.C. §§ 3501 *et seq.*, applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case." Complainant believes that the Paperwork Reduction Act (PRA) does not apply to the alleged violation in this proceeding. The regulatory requirement that owners and operators of non-transportation onshore and offshore facilities into or upon the navigable waters of the United States must establish procedures, methods and equipment to prevent the discharge of oil, in accordance with 40 CFR Part 112, is a substantive prevention requirement and therefore not subject to the PRA. Furthermore, section 3512 of the PRA does not apply in the case at hand since Respondent was

not charged with a paperwork violation. *See In the Matter of SCA Chemical Services*, 1994 TSCA LEXIS 79 (Sept. 7, 1994); *In re: TRW, Inc.*, 1995 TSCA LEXIS 8 (April 20, 1995).

In the event that the PRA should be deemed to apply to this case, Complainant has determined that the PRA may apply only to Count I of this proceeding. There is a current Office of Management and Budget ("OMB") control number pertaining to the SPCC regulations (OMB #2050-0021), the approval for which became effective on November 4, 1996, and expires on January 31, 2001. This OMB control number is found at 40 C.F.R. Part 9.

The PRA does not apply to Count II of this proceeding. According to Section 3518(c)(1)(B) of the PRA, the PRA requirements do not apply to the collection of information during the conduct of either: (i) a civil action to which the United States . . . is a party; or (ii) an administrative action or investigation involving an Agency against specific individuals or entities. Because of the applicability of Section 3518(c)(1)(B) of the PRA, an Office of Management and Budget control number is not required and the provisions of Section 3512 of the PRA are not applicable.

#### **IV. RESERVATIONS**

1. Complainant reserves the right to add witnesses to rebut Respondent's case, to call as a hostile witness any witness endorsed or noticed by Respondent, to subpoena any witnesses who is an employee, agent or contractor of the Respondent or is endorsed or noticed by Respondent and to cross-examine any witnesses examined by Respondent at any time.
2. Complainant respectfully reserves its right to supplement this Prehearing Exchange upon adequate notice to Respondent.

## V. COMPLAINANT'S EXHIBIT LIST

1. US EPA Inspection Report, 40 CFR 112, Spill Prevention, Control and Countermeasures, prepared by James E. Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, Inspection Date September 14, 2006, Report Date December 7, 2006 (with attached aerial photo, topographic map photo, and Photo Log).
2. US EPA Region 8 SPCC Plan Review Checklist, prepared by James E. (aka "Jim") Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, September 14, 2006.
3. US EPA Region 8 SPCC Facility Inspection Checklist, prepared by Jim Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, September 14, 2006.
4. US EPA SPCC Field Inspection and Plan Review Checklist, prepared by Jim Peterson for the Burke Oil facility located at 1200 E King Street in Chamberlain, SD, signed March 27, 2007.
5. US EPA Inspection Report, 40 CFR 112, Spill Prevention, Control and Countermeasures, prepared by James E. Peterson for Presho Oil, Inspection No. S06099, Inspection Date September 12, 2006, Report Date September 14, 2006 (with attached maps, diagrams, and Photo Log).
6. US EPA Region 8 SPCC Plan Review Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, September 13, 2006.
7. US EPA Region 8 SPCC Facility Inspection Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, September 13, 2006.
8. US EPA SPCC Field Inspection and Plan Review Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, signed March 16, 2007.
9. SPCC Compliance Inspection Report and handwritten regulatory information noticing inspection of SPCC #SO6099 with Jim Kotz on September 13, 2006, signed by Jim Peterson.
10. SPCC Compliance Status Report as of 12/2/2006, prepared by Jim Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, Inspection Date September 14, 2006, Report Date December 7, 2006
11. SPCC Compliance Status Report as of 12/12/2006, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, Inspection Date September 12, 2006, Report Date September 14, 2006.
12. Color copy of Microsoft Virtual Earth picture of Burke Oil-Chamberlain Facility, and surrounding area, <http://maps.live.com>, dated September 4, 2007.
13. Flow chart/table depicting Chamberlain site elevation change from site to creek draining into American Creek.
14. USGS, Chamberlain Site (4 pages)
15. Color copy of topographic map depicting area 4 kilometers south of Chamberlain, South Dakota, on 8.5 x 11 inch paper, image courtesy of US Geological Survey, <http://terraserver-usa.com>, dated March 3, 2008.

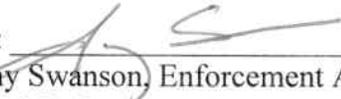
16. Color copy of topographic map depicting area 5 kilometers south of Chamberlain, South Dakota, on 8.5 x 11 inch paper, image courtesy of US Geological Survey, <http://terraser-USA.com>, dated March 3, 2008.
17. Color copy of topographic map depicting area 498 kilometers west of Minneapolis, Minnesota, on 8.5 x 11 inch paper, image courtesy of US Geological Survey, <http://terraser-USA.com>, dated March 3, 2008.
18. Color copy of Microsoft Virtual Earth picture of Presho Oil Facility, and surrounding area, <http://maps.live.com>, dated July 13 and September 4, 2007.
19. Flow chart/table depicting Presho site elevation change from site to creek draining into Medicine Creek.
20. USGS 06442500 Medicine Creek at Kennebec SD
21. Color copy of Microsoft Virtual Earth picture of Presho, Lyman, South Dakota, <http://maps.live.com>, dated March 4, 2008.
22. Fax Cover sheet and attached copy of the SPCC Compliance Inspection Report and handwritten regulatory information regarding Burke Oil Chamberlain from Burke Oil to Jim Peterson, EPA.
23. Record of Communication prepared by Jim Peterson regarding Burke Oil-Chamberlain and Wheat Growers (undated).
24. Undated letter from Robert Burke, Burke Oil, to Mr. Peterson, EPA, and copies of Attachment C, Weekly Facility Inspection Checklists consisting of two pages, dated October 2, 2006, for Wheat Growers Plant, Burke Oil Fuel Plant, respectively.
25. Letter from Melissa Payan, EPA, to Bob Burke notifying Mr. Burke of SPCC inspections and identified violations at the Presho Oil Facility, Burke Oil Chamberlain Facility, and the Burke Oil Wheat Growers Facility, with attached copies of SPCC Compliance Status Summaries, dated December 18, 2006.
26. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (May 31, 2007).
27. Letter from Bob Burke, Burke Oil, to Donna Inman, EPA, dated June 12, 2007.
28. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 1, 2007).
29. Letter from Bob Burke, Burke Oil, to Donna Inman, EPA, with attached copies of Integrity Tests for Presho Oil and Pictures of Presho Bulk Plant, dated October 3, 2007.
30. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 11, 2007).
31. Letter from Amy Swanson, EPA, to Robert Burke, Burke Oil, dated October 29, 2007.
32. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 31, 2007).
33. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (November 8, 2007).
34. Letter and attached Affidavit and Photos from Steve Fox, Larson, Sundall, Larson, Schaub & Fox, to Amy Swanson, EPA, and attachments, dated November 28, 2007.
35. Letter and attached Affidavit and Photos from Steve Fox, Larson, Sundall, Larson, Schaub & Fox, to Amy Swanson, EPA, dated December 20, 2007.

36. US EPA Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (Office of Enforcement and Compliance Assurance, August 1998).
37. EPA statement detailing its penalty calculation.
38. City of Chamberlain, Brule County, South Dakota, Basic Road Map.
39. City of Presho, Lyman County, South Dakota, Basic Road Map.
40. The 2008 South Dakota Integrated Report for Surface Water Quality Assessment, Prepared by South Dakota Department of Environment and Natural Resources, Steven M. Pirner, Secretary.
41. Resume or curriculum vitae for Donna Inman, Complainant's expert witness.

Respectfully submitted,

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

Date: 6/3/2008

By:   
Amy Swanson, Enforcement Attorney  
Legal Enforcement Program  
EPA Region 8  
1595 Wynkoop Street (8ENF-L)  
Denver, Colorado, 80202-1129  
Telephone No.: (303) 312-6906

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one true copy of the COMPLAINANT'S PREHEARING EXCHANGE and all exhibits was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that a true copy of the same was sent as follows:

Via Pouch Mail to:

The Honorable Barbara A. Gunning  
Administrative Law Judge  
Office of Administrative Law Judges (Mail Code 1900L)  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

and Via first class U.S. mail to:

Steve Fox, Esquire  
Larson, Sundall, Larson, Schaub & Fox, P.C.  
P.O. Box 547  
Chamberlain, SD 57325

Date: 6/3/08

By: *Judith M. McTernan*