

# **Exhibit 5**





LEXSEE 2007 EPA ALJ LEXIS 22

IN THE MATTER OF CENTURY OIL ACQUISITION CORP., Respondent

DOCKET NO. RCRA-03-2006-0088

United States Environmental Protection Agency  
Office of Administrative Law Judges

*2007 EPA ALJ LEXIS 22*

September 17, 2007

**PANEL:**

[\*1] Barbara A. Gunning, Administrative Law Judge

**COUNSEL:**

Jeffery S. Nast, Esquire, Assistant Regional Counsel, for the Complainant.

Michael J. Naughton, Esquire, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, for the Respondent.

**OPINION:**

**DEFAULT ORDER AND INITIAL DECISION**

Subtitle I of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6991-6991i: Pursuant to Section 22.17(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.17(a), Century Oil Acquisition Corp. ("Respondent") is found to be in default because of its failure to appear at the scheduled May 8, 2007 hearing and to pursue its defense. Such default by Respondent constitutes an admission of all facts alleged in the Complaint. Respondent violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, the Federal regulations promulgated thereunder set forth at 40 C.F.R. part 280, and the authorized regulations of the Commonwealth of Pennsylvania's Underground Storage Tank Program set forth at 25 Pa. Code Chapter 245. The \$ 193,538 civil administrative [\*2] penalty proposed in Complainant's prehearing exchange and Motion for Default Order is assessed against Respondent, and Respondent is Ordered to comply with the regulatory requirements set forth in the Compliance Order contained within the Complaint.

Issued: September 17, 2007

Barbara A. Gunning  
Administrative Law Judge

**FACTUAL AND PROCEDURAL HISTORY**

At all times relevant to the Complaint, Century Oil Acquisition Corp. ("COAC" or "Respondent") owned two

gasoline station facilities, including underground storage tank ("UST") systems in Stroudsburg, Pennsylvania. n1 The gasoline stations, including the USTs, were located on properties owned by a third-party. On March 30, 2004, representatives of the United States Environmental Protection Agency, Region III ("Complainant" or the "EPA") and the Pennsylvania Department of Environmental Protection ("PADEP") conducted an UST compliance inspection of the Facilities. Complainant alleges that Respondent neglected to upgrade and maintain its USTs at the Facilities as required under Federal and Pennsylvania UST regulations. n2

n1 Respondent's facilities were (and, at the time of the filing of the Complaint, are): 1) Fifth Street facility, located at 1410 North Fifth Street in Stroudsburg, Pennsylvania ("Fifth Street facility"); and 2) Scotrun facility, located on Route 611 in Scotrun, Pennsylvania ("Scotrun facility")(collectively referred to as the "Facilities").

[\*3]

n2 The Fifth Street and Scotrun facilities have three USTs with associated piping at each site.

The Fifth Street facility's three tanks are described in order: 1) approximately 10,000 gallon capacity steel UST used for the storage of gasoline; 2) approximately 10,000 gallon capacity steel UST used for the storage of gasoline; and 3) approximately 4,000 gallon capacity steel UST used for the storage of gasoline.

The Scotrun facility's three tanks are described in order: 1a) approximately 6,000 gallon capacity steel UST used for the storage of gasoline; 2a) approximately 4,000 gallon capacity steel UST used for the storage of gasoline; and 3a) approximately 3,000 gallon capacity steel UST used for the storage of gasoline.

### Complaint and Answer

Complainant initiated this proceeding by filing a Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") against Respondent pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. The Complaint was filed on March 31, 2006 with the Regional Hearing Clerk pursuant to 40 C.F.R. § 22.13(a) and [\*4] copies were sent to Respondent on April 3, 2006 by Federal Express. n3

n3 The Complaint advised Respondent, *inter alia*, that as a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19 (a)(4), Complainant would consider, among other factors, Respondent's ability to pay a civil penalty and that the burden of raising and demonstrating an inability to pay rests with the Respondent. Complaint at 23.

In the Complaint, Complainant charges that Respondent violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, the Federal regulations promulgated thereunder set forth at 40 C.F.R. part 280, and the authorized regulations of the Commonwealth of Pennsylvania's Underground Storage Tank Program set forth at 25 Pa. Code Chapter 245. Complainant alleges that Respondent failed to provide USTs Nos. 1, 2, 3, 1a, 2a, and 3a with corrosion protection as required by 40 C.F.R. § 280.21 and 25 Pa. Code § 245.422; failed to provide release detection for USTs Nos. 1 and 2a as required [\*5] by 40 CFR §§ 280.40-.41(a), and .43 and 25 Pa. Code §§ 245.441 and .444; and failed to provide USTs Nos. 1 and 2a with a line leak detector and annual line tightness testing or monthly monitoring as required by 40 C.F.R. § 280.41(b)(1) and 25 Pa. Code § 245.442(2)(i).

Pursuant to Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), Complainant proposes the imposition of a civil administrative penalty of \$ 193,538 against Respondent for failing to comply with the requirements or standards promulgated by the Administrator under Section 9003 of RCRA, 42 U.S.C. § 6991b, and for failing to comply with the requirements or standards of a State program approved pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c. Complainant also seeks the entry of a Compliance Order against Respondent.

On May 3, 2006, Respondent filed an Answer to the Complaint with the Regional Hearing Clerk. n4 In its Answer, Respondent requested a hearing on the issues raised in the Complaint and denied that it violated RCRA in the manner alleged in the Complaint. Respondent denied that it is the owner or the [\*6] operator of the USTs in question.

n4 Pursuant to 40 C.F.R. § 22.15(a), an answer to the complaint must be filed within 30 days after service of the complaint. Respondent filed its Answer three days past the April 30, 2006 deadline.

#### **Designation of the Presiding Judge and Prehearing Procedures**

By Order dated July 28, 2006, the Honorable Carl C. Charneski, an administrative law judge ("ALJ"), was designated as the Presiding Officer for this case. Judge Charneski issued a Prehearing Order dated August 8, 2006 that established a prehearing schedule for the parties. The Order required the parties to file opening prehearing exchanges by August 28, 2006 and replies to prehearing exchanges (optional) by September 11, 2006. On August 28, 2006, Complainant filed and served copies of its prehearing exchange in accordance with Judge Charneski's Prehearing Order.

Respondent failed to file timely its prehearing exchange as directed in Judge Charneski's August 8, 2006 Prehearing Order. Complainant then filed a Motion for Issuance [\*7] of Show Cause Order that was granted by Judge Charneski on September 11, 2006.

In response to the Order to Show Cause, Respondent's newly obtained counsel sent a letter to Judge Charneski on September 13, 2006 requesting an extension of time to file its prehearing exchange and raising Respondent's difficulty in obtaining witnesses, experts, and documentation relative to Respondent's ability-to-pay defense. n5 Respondent stated that it ceased doing business in the late 1990's and was pursuing inability to pay as one of its primary defenses. In an Order issued September 18, 2006, Judge Charneski granted Respondent an extension to file a prehearing exchange no later than September 25, 2006 and Complainant a reply no later than October 9, 2006. n6

n5 Respondent replaced its previous counsel, Paul S. Baum, by retaining Michael J. Naughton of Wilson, Elser, Moskowitz, Edelman & Dicker LLP.

n6 Judge Charneski specifically stated, "While counsel's explanation does not necessarily excuse respondent's failure to file a timely prehearing exchange, given the lack of any prejudice to complainant, and given the fact that respondent was not represented by counsel at this time, this tribunal will allow respondent to submit a prehearing exchange."

[\*8]

Respondent filed its initial prehearing exchange on September 25, 2006. Respondent's prehearing exchange included some financial information and documents as Respondent's proposed Exhibit 25 ("Respondent's Exhibit 25").

In a letter dated October 4, 2006, Complainant requested Respondent to provide additional information regarding

its ability-to-pay claim. Specifically, Complainant requested Respondent to complete an enclosed 8-page questionnaire pursuant to an EPA Memorandum dated December 16, 1986, entitled "Guidance on Determining a Violator's Ability to Pay a Civil Penalty" ("EPA's Ability-to-Pay Policy").

On October 6, 2006, Complainant filed its reply prehearing exchange. In this supplemental prehearing exchange, Complainant proposed the assessment of an administrative penalty against Respondent in the amount of \$ 193,538 pursuant to Section 9006(d)(2) of RCRA and 40 C.F.R. § 22.19(a)(4). The proposed penalty was based upon the statutory penalty factors set forth in Section 9006(c) of RCRA and the U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990 ("UST Penalty Policy").

### **Rescheduling of court proceedings**

On November 20, [\*9] 2006, Judge Charneski rescheduled the January 22, 2007 hearing for February 5, 2007. On January 8, 2007, Judge Charneski issued an Order extending the scheduled February 5, 2007 hearing to March 20, 2007, and afforded the parties an opportunity to supplement their prehearing exchanges on the ability-to-pay claim. Subsequently, via a January 19, 2007 Revised Scheduling Order, Judge Charneski postponed the March 20, 2007 hearing to May 8, 2007 due to a scheduling conflict and extended the due date for the supplemental prehearing exchanges on the issue of Respondent's ability to pay to February 19, 2007, with replies due on February 26, 2007. Additionally, this Order directed that Complainant and Respondent had until March 19, 2007 to file any expert reports relating to the ability-to-pay issue, until March 26, 2007 to file summary judgement motions, and until April 30, 2007 to file joint stipulations.

### **Ability to Pay Issue**

On February 20, 2007 Respondent sent a letter to Complainant regarding Complainant's October 4, 2006 questionnaire relating to the ability-to-pay claim. n7 In this letter, Respondent alleged that as a dissolved entity, it does not have the resources or information [\*10] to respond to Complainant's detailed questionnaire. Respondent stated that the documents that it previously supplied to Complainant as part of Respondent's Exhibit 25 justified its inability-to-pay defense.

n7 Because of the Federal Holiday on Monday, February 19, 2007, Respondent submitted the response to the Complaint on Tuesday, February 20, 2007 via facsimile and regular mail.

On February 26, 2007, Complainant sent a letter to Respondent stating that it had submitted Respondent's previously submitted financial information (Respondent's Exhibit 25) to Leo Mullin, the EPA's cost-recovery analyst. Complainant further stated that Mr. Mullin, according to his February 23, 2007 memorandum, was unable to accurately assess Respondent's ability to pay the proposed penalty based on previously provided financial information submitted as Respondent's Exhibit 25.

On March 12, 2007, pursuant to 40 C.F.R. §§ 22.16 and 22.19, Complainant filed a Motion for Discovery or in the alternative Motion *In Limine*. Complainant's motion [\*11] sought to obtain financial information and curriculum vitae initially requested on October 4, 2006 to substantiate Respondent's ability-to-pay claim and witnesses' resumes, respectively. In the alternative, Complainant sought to preclude Respondent from raising an ability-to-pay claim as a defense to the proposed penalty of \$ 193,538 and from proffering certain proposed expert witnesses or introducing any oral and written testimony in the form of expert reports for such witnesses at the hearing.

In an April 4, 2007 Order, Judge Charneski granted Complainant's request to obtain additional ability-to-pay information and the requested curriculum vitae from Respondent. Specifically, Judge Charneski ordered Respondent to

provide the curriculum vitae for the identified expert witnesses no later than April 11, 2007 and to provide financial information relating to the ability-to-pay issue raised by Respondent no later than April 25, 2007.

#### **Reassignment of the case to Judge Barbara A. Gunning**

On April 9, 2007, this case was reassigned to the undersigned ALJ Barbara A. Gunning because of Judge Charneski's departure from the EPA.

On April 12, 2007, Complainant filed a supplemental prehearing [\*12] exchange, including Mr. Mullin's February 23, 2007 memorandum analyzing Respondent's ability-to-pay claim pursuant to the EPA's Ability-to-Pay Policy.

#### **Notice of planned absence at the scheduled hearing**

On May 1, 2007 during a scheduled conference call between the undersigned, Complainant and Respondent, Respondent stated that it would not mount a defense nor attend the scheduled hearing because of Respondent's inability to pay. n8 The undersigned informed Respondent of the consequences of not defending the matter, specifically that Respondent could be found in default. At the undersigned's request, Respondent submitted a letter dated May 2, 2007 stating that it would not appear at the May 8, 2007 scheduled hearing and that it had knowledge of the potential negative consequences corresponding thereto. Respondent stated the following:

This is to confirm the substance of our telephone conference yesterday, May 1, 2007, with Your Honor, Jeffery Nast, Esq. and other EPA representatives wherein I advised that because of Century Oil's inability to pay, Century Oil will not be appearing at the hearing scheduled to begin in this matter on May 8, 2007 at 9:00 a.m. at the U.S. courthouse [\*13] in Philadelphia, PA.

Century Oil is aware of the fact that its failure to appear will result in negative consequences for it, which can include a default judgment being entered against Century Oil upon proper application and proofs by United States up to and including the penalty amount of \$ 193,538. Also, it is Century Oil's understanding that a compliance order will also be issued against it directing Century Oil to implement all required corrective action at the two Pennsylvania properties which are the subject of the United States' Administrative Complaint in the above matter.

n8 Respondent did not specify whether its professed inability to pay was primarily due to the cost of legal fees, the amount of the proposed penalty, or the anticipated cost of compliance.

Consequently, the May 8, 2007 scheduled hearing was cancelled by the undersigned.

#### **Motion for Default**

Pursuant to § 22.17(b), on June 15, 2007, Complainant filed a Motion for a Default Order ("Motion for Default") against Respondent for its failure [\*14] to appear at the May 8, 2007 hearing. Complainant requested the undersigned to issue a Default Order finding Respondent liable for all of the violations alleged in the Complaint; assessing the proposed penalty of \$ 193,538 against Respondent; and requiring Respondent to comply with all the regulatory requirements as set forth in the Compliance Order within the Complaint.

Respondent has not filed a response to Complainant's Motion for Default.

#### **FINDINGS OF FACT**

1. At all times relevant to the Complaint, including, but not limited to, March 2001 through the filing of the Complaint on March 31, 2006, Century Oil Acquisition Corp. ("COAC" or "Respondent") has been a New York corporation doing business in the Commonwealth of Pennsylvania.
2. As a corporation, Respondent has been a "person" within the meaning of that term, as provided in Section 9001(6) of RCRA, 42 U.S.C. § 6991(6), 40 C.F.R. § 280.12, and 25 Pa. Code § 245.1.
3. On or about October 2, 1990, COAC entered into an "Agreement of Purchase and Sale" ("Agreement") as "Purchaser" with Century Oil U.S.A., Inc. ("COUSA") as "Seller" and Herman DeJonge, Alma DeJonge, and Ronald [\*15] DeJonge as "Principals."
4. The Agreement stated that COUSA and Principals agreed to sell and COAC agreed to purchase "all of Seller's right, title, & interest in and to the assets, properties, equipment, tradenames and/or servicemarks . . . inventory . . . and rights of the Seller of every nature, kind and description, excluding cash and real property" including "all underground storage tanks" located at the petroleum gasoline retail stations at which UST systems were, and at the time of the filing of the Complaint, are located, at 1410 N. Fifth Street, Stroudsburg, Pennsylvania ("Fifth Street facility") and on Route 611, Scotrun, Pennsylvania ("Scotrun facility") (collectively "the Facilities").
5. The Agreement was signed by Michael A. Dattilo, President of COAC, Ronald DeJonge, President of COUSA, Herman DeJonge and Alma DeJonge.
6. On or about June 25, 1996, Michael Dattilo, President of COAC, registered the USTs Nos. 1, 2, 3, 1a, 2a, and 3a at the Facilities with the Pennsylvania Department of Environmental Resources (which has since been renamed "Pennsylvania Department of Environmental Protection" or "PADEP").
7. The "Registration of Storage Tanks" forms submitted by [\*16] Michael Dattilo to PADEP on or about June 25, 1996 stated that the owner of the underground storage tanks ("USTs") at the Facilities was Century Oil Acquisition Corp.
8. From at least October 2, 1990 and continuing through the filing date of this Complaint, Respondent has owned and/or operated the USTs at the Fifth Street facility.
9. From at least October 2, 1990 and continuing through the filing date of this Complaint, Respondent has owned and/or operated the USTs at the Scotrun facility.
10. On March 30, 2004, pursuant to Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, and the authorized Pennsylvania Underground Storage Tank regulations, 25 Pa. Code Chapter 245, representatives of the EPA-Region III and PADEP conducted an UST Compliance Inspection ("Inspection") of the Facilities.
11. At the time of the March 30, 2004 Inspection, the following three USTs containing petroleum were located at the Fifth Street facility:
  - a. An approximately 10,000 gallon capacity steel UST used for the storage of gasoline (UST No. 1);
  - b. An approximately 10,000 gallon capacity steel UST used for the storage of gasoline (UST No. 2); and



- c. An approximately [\*17] 4,000 gallon capacity steel UST used for the storage of gasoline (UST No. 3).
12. The Fifth Street facility's USTs Nos. 1, 2, and 3 were installed and brought into use in May 1973 and were never upgraded in accordance with 40 C.F.R. § 280.21 and 25 Pa. Code § 245.422.
13. At all times relevant to the Complaint, the Fifth Street facility's USTs Nos. 1, 2, and 3 routinely contained and were used to store petroleum, "a regulated substance" within the meaning of that term as provided by Section 9001(2) of RCRA, 42 U.S.C. § 6991(2), 40 C.F.R. § 280.12, and 25 Pa. Code § 245.1, and UST No. 1 was not "empty" within the meaning of 40 C.F.R. § 280.70 or 25 Pa. Code § 245.451.
14. At all times relevant to the Complaint, the Fifth Street facility's USTs Nos. 1, 2, and 3 were "underground storage tanks" or "USTs" within the meaning of those terms as provided by Section 9001(1), of RCRA, 42 U.S.C. § 6991(1), 40 C.F.R. § 280.12, and 25 Pa. Code § 245.1.
15. At all times relevant to the Complaint, the Fifth Street facility's USTs Nos. 1, 2 and 3 were "UST systems" or "tank systems" within the meaning of those terms [\*18] as provided by 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1.
16. At all times relevant to the Complaint, the Fifth Street facility's USTs Nos. 1, 2, and 3 were "petroleum UST systems" and "petroleum systems" within the meaning of those terms as provided by 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1.
17. At all times relevant to the Complaint, the Fifth Street facility's USTs Nos. 1, 2, and 3 were "existing tank systems" and "existing underground storage tank systems", as those terms are defined at 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1.
18. At all times relevant to the Complaint, Respondent has been the "owner" and "operator" of the Fifth Street facility's USTs Nos. 1, 2, and 3 within the meaning of those terms as provided by Section 9001(3)-(4) of RCRA, 42 U.S.C. § 6991(3)-(4), 40 C.F.R. § 280.12, and 25 Pa. Code. § 245.1.
19. At the time of the March 30, 2004 Inspection, the following three USTs containing petroleum were located at the Scotrun facility:
- a. An approximately 6,000 gallon capacity steel UST used for the storage of gasoline (UST No. 1a);
  - b. An approximately 4,000 gallon capacity steel UST used for the storage of gasoline [\*19] (UST No. 2a); and
  - c. An approximately 3,000 gallon capacity steel UST used for the storage of gasoline (UST No. 3a).
20. At all relevant times to the Complaint, the Scotrun facility's USTs Nos. 1a, 2a, and 3a routinely contained and were used to store petroleum, "a regulated substance" within the meaning of the term as provided by Section 9001(2) of RCRA, 42 U.S.C. § 6991(2), 40 C.F.R. § 280.12, and 25 Pa. Code § 245.1, and UST No. 2a was not "empty" within the meaning of 40 C.F.R. § 280.70 and 25 Pa. Code § 245.451.

21. At all relevant times to the Complaint, the Scotrun facility's USTs Nos. 1a, 2a, and 3a were "underground storage tanks" or "USTs" within the meaning of those terms as provided by Section 9001(1) of RCRA, 42 U.S.C. § 6991(1), 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1.
22. At all relevant times to the Complaint, the Scotrun facility's USTs Nos. 1a, 2a, and 3a were "UST systems" or "tank systems" within the meaning of those terms as provided by 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1.
23. At all relevant times to the Complaint, the Scotrun facility's USTs Nos. 1a, 2a, and 3a were [\*20] "petroleum UST systems" and "petroleum systems" within the meaning of those terms as provided by 40 C.F.R. 280.12 and 25 Pa. Code § 245.1.
24. At all relevant times to the Complaint, the Scotrun facility's USTs Nos. 1a, 2a, and 3a were installed and brought into use in September 1973, are "existing tank systems" and "existing underground storage tank systems" as those terms are defined at 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1, and were never upgraded in accordance with 40 C.F.R. § 280.21 and 25 Pa. Code § 245.422.
25. At all relevant times to the Complaint, Respondent has been the "owner" and/or "operator" of the Scotrun facility's USTs Nos. 1a, 2a, and 3a within the meaning of that term as provided by Section 9001(3)-(4) of RCRA, 42 U.S.C. § 6991(3)-(4), 40 C.F.R. § 280.12 and 25 Pa. Code § 245.1.
26. From at least March 31, 2001 to the date of Complaint, Respondent's USTs Nos. 1, 2, 3, 1a, 2a, and 3a at the Facilities did not comply with 40 C.F.R. § 280.21 or 25 Pa. Code § 245.421 because the USTs were not:
- a. Constructed of fiberglass-reinforced plastic; or
  - b. Constructed of steel and cathodically protected by being:
    - i. Coated [\*21] with a suitable dielectric material;
    - ii. Equipped with a field-installed cathodic protection system designed by a corrosion expert;
    - iii. Equipped with an impressed current system designed to allow determination of current operating status as required by 40 C.F.R. § 280.31(c) and 25 Pa. Code § 245.432(3);
    - iv. Equipped with a cathodic protection system operated and maintained in accordance with 40 C.F.R. § 280.31 and 25 Pa. Code § 245.432, or
  - c. Constructed of a steel-fiberglass reinforced-plastic composite; or
  - d. Constructed of metal without additional corrosion protection measures, provided that:
    - i. The tank is installed at a site that is determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operating life and
    - ii. Owners and operators maintain records that demonstrate compliance with 40 C.F.R. § 280.20(a)(4)(i) for the remaining life of the tank; or

- e. Determined by the EPA or PADEP to have tank construction and corrosion protection designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and environment than 40 C.F.R. [\*22] § 280.20(a)(1)-(4); or
  - f. Installed at a site that has been determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operational life; or
  - g. Upgraded with an interior lining in accordance with 40 C.F.R. § 280.33 and 25 Pa. Code § 245.434 and inspected with ten (10) years after such lining and every five (5) years thereafter and found to be structurally sound with the lining still performing in accordance with original design specifications; or
  - h. Upgraded by cathodic protection that meets the requirements of 40 C.F.R. § 280.20(a)(2)(ii), (iii) and (iv) and 25 Pa. Code § 245.421(1)(ii)(B)-(D), with the integrity of the tank ensured using one of the methods described in 40 C.F.R. § 280.21(b)(2)(i)-(iv) and 25 Pa. Code § 245.422(b)(2); or
  - i. Upgraded by both internal lining and cathodic protection as described in 40 C.F.R. § 280.21(b)(3) and 25 Pa. Code § 245.422(b)(3).
27. From March 31, 2001 through the date of the Complaint, USTs Nos. 1, 2, 3, 1a, 2a, and 3a at the Facilities did not meet the new UST performance standards pursuant to 40 C.F.R. § 280.20(a) and 25 Pa. Code § 245.421(1), the upgrading requirements [\*23] of 40 C.F.R. § 280.21(b) and 25 Pa. Code § 245.422(b)-(d) and/ or the closure requirements of 40 C.F.R. §§ 280.70-.74 and 25 Pa. Code §§ 245.451-455, including the requirements for corrective action under 25 Pa. Code § 245, Subchapter D.
28. At all relevant times to the Complaint, at the Facilities Respondent violated 40 C.F.R. § 280.21(a)(2) and 25 Pa. Code § 245.422(a) with respect to USTs Nos. 1, 2, 3, 1a, 2a, and 3a by failing to comply with the performance standards for existing UST systems, as applicable, requiring corrosion protection.
29. From March 31, 2001 through the date of the Complaint, Respondent violated 40 C.F.R. § 280.40-.41(a) and 25 Pa. Code § 245.441(a)-.442(1) by failing to provide release detection for USTs Nos. 1 and 2a at the Facilities that meets the requirements set forth in 40 C.F.R. § 280.43 (d)-(h) and 25 Pa. Code § 245.444(4)-(9).
30. From at least March 31, 2001 through the date of the Complaint, the underground piping associated with USTs Nos. 1 and 2a at the Facilities has routinely contained regulated substances and conveyed regulated substances under pressure.
31. From at least March 31, 2001 through the date of the Complaint, the underground [\*24] piping associated with USTs Nos. 1 and 2a at the Facilities has not been equipped with an automatic line leak detector as required by 40 C.F.R. § 280.41(b)(1)(i) and 25 Pa. Code § 245.442(2)(i)(A) and has not been monitored in accordance with 40 C.F.R. § 280.41(b)(1)(ii) and 25 Pa. Code § 245.442(2)(i)(B).
32. From at least March 31, 2001 through the date of the Complaint, Respondent violated 40 C.F.R. § 280.41(b)(1) and 25 Pa. Code § 245.442(2)(i) by failing to provide methods of release detection for the underground piping associated with UST systems for USTs Nos. 1 and 2a at the Facilities which meet the requirements referenced in the regulations, i.e. by failing to equip such piping with line leak detectors and by failing to conduct either annual line tightness testing or monthly monitoring.

33. Complainant's proposed civil administrative penalty was determined in accordance with the penalty factors listed in Section 9006(c) of RCRA, 42 U.S.C. § 6991e, and through application of the U.S. EPA Penalty Guidance For Violations of UST Regulations OSWER Directive 9610.12 - November 14, 1990 ("UST Penalty Policy").

34. In accordance with the [\*25] UST Penalty Policy, Complainant considered the seriousness of five of the six UST violations, as measured by the potential for human and environmental harm resulting from the violations, and the extent of deviation from the regulations. In assessing the penalty, Complainant included Respondent's failure to provide: 1) corrosion protection for UST systems; 2) release detection for UST systems; and 3) line leak detection and annual line tightness testing or monthly monitoring.

35. Complainant calculated the proposed penalty, taking into account the factors identified in the UST Penalty Policy and its appendices: the seriousness of the violation and extent of deviation; the degree of cooperation/noncooperation; the degree of willfulness or negligence; and the history of non-compliance. Complainant also adjusted the proposed penalty based on the factors of environmental sensitivity of the sites; the days of noncompliance; the application of the inflation rate rules; and the economic benefit to the violator resulting from the violation.

36. Complainant determined that an appropriate penalty for five of the six UST violations is \$ 193,538.

## DISCUSSION

### Applicable Law

Section [\*26] 9003 of RCRA authorizes the EPA Administrator to promulgate UST regulations to implement Subtitle I of RCRA and the Federal UST regulations, promulgated in 1988, are found at 40 C.F.R. part 280. Section 9004 of RCRA and 40 C.F.R. part 281, subpart A provide States, such as the Commonwealth of Pennsylvania, with delegated authority to administer a State underground storage tank management program in lieu of the Federal underground storage tank management program. Effective September 11, 2003, the provisions of the Pennsylvania underground storage tank management program became requirements of Subtitle I of RCRA and are, accordingly, enforceable by the EPA pursuant to Section 9006 of RCRA. Pennsylvania's authorized underground storage tank program regulations are set forth in 25 Pa. Code Chapter 245, Administration of the Storage Tanks and Spill Prevention Program. n9

n9 Allegations and conclusions set forth in the Complaint that relate to events that occurred prior to September 11, 2003 derive authority from the implementing Federal UST regulations promulgated pursuant to Subtitle I of RCRA and those allegations and conclusions that occurred after September 11, 2003 derive authority from the authorized Pennsylvania UST regulations promulgated pursuant to Section 9004 of RCRA and 40 C.F.R. part 281, subpart A.

### [\*27]

#### Default at Hearing

Respondent chose not to appear at the scheduled May 8, 2007 hearing, citing its inability to pay. As a result, Complainant submits that pursuant to 40 C.F.R. § 22.17(a), Respondent should be found in default for its failure to appear at the scheduled hearing. Complainant cites *In the Matter of Splendid Enterprises*, RCRA-02-2001-7101, 2002 EPA ALJ LEXIS 62 ( EPA ALJ September 20, 2002) for the proposition that a default order should be issued when

there has been a failure to appear at a hearing without "good cause." Complainant argues that Respondent's reason for not appearing, namely its purported inability to pay, is unfounded, because while Respondent did claim an ability-to-pay defense soon after answering the Complaint, it failed to fulfill its burden to provide supporting documents. *In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 E.A.D. 529, 542 (EAB 1994)*. Complainant argues that Respondent did not comply with the April 4, 2007 Financial Information Order because it failed to provide financial information on Respondent's ability to pay by April 25, 2007, as directed by Judge Charneski.

Complainant further alleges [\*28] that Respondent's claim of an inability to pay does not constitute "good cause" sufficient to avoid the finding of a default in this case. Complainant posits that the EPA's ALJs have consistently refused to recognize claims of financial hardship or distress as presenting good cause.

Although an ALJ is accorded some discretion in making a default determination under Section 22.17 for failure to appear at a hearing, such discretion is usually reserved for minor violative conduct or when the record shows "good cause" why a default order should not be issued. n10

n10 The language of Section 22.17(a) of the Rules of Practice concerning the entry of a default order is discretionary in nature, providing that "a party may be found in default . . . upon failure to appear at a conference or hearing." In general, the application of the regulation should be made to effectuate its intent. Thus, when the facts support a finding that there has been a failure to appear at a hearing without good cause, a default order generally should follow. Discretion may be exercised in instances of minor nonperformance, and lesser sanctions, as appropriate, are available to the ALJ for violative conduct that does not reach the level of default.

[\*29]

The applicable section of the Rules of Practice concerning default states, 40 C.F.R. § 22.17(a), in pertinent part:

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. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

40 C.F.R. § 22.17(a) (emphasis added).

I find that default has occurred because Respondent chose not to appear at the scheduled May 8, 2007 hearing and not to further defend itself. As such, all factual allegations in the Complaint are deemed admitted and Respondent has waived its right to contest such factual allegations. n11

n11 Nonetheless, Respondent's advisement that it would not appear at the May 8, 2007 hearing was appreciated by this Tribunal.

[\*30]

#### Good Cause

To negate a Default Order, Respondent must show good cause for not appearing at the scheduled May 8, 2007 hearing. Respondent cites the ability-to-pay claim as its main reason for its failure to appear. I find that Respondent's

ability-to-pay claim does not constitute good cause so as to preclude the entry of an Order for Default.

The procedural regulations concerning default orders, found within the Rules of Practice, state:

When the Presiding Officer finds that default has occurred, he [or she] shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17(c).

Here, Respondent's explanation for its failure to appear at [\*31] the scheduled hearing is that Respondent was unable to pay the penalty or comply with the compliance order requested by Complainant. As such, the record does not show good cause why a default order should not be issued. Simply stating an inability to pay without adequate foundation or proof thereof (discussed *infra*) does not negate a finding of default and is not a good cause for failure to appear at the hearing. Assuming *arguendo*, that Respondent was unable to pay for legal services at a hearing, Respondent could appear *pro se* to present its defenses to the allegations. Furthermore, Respondent has not responded to EPA's June 15, 2007 Motion for Default Order or otherwise presented argument to persuade me of good cause to negate a default order. 40 C.F.R. § 22.16(b).

#### **Liability on Default**

As cited above, Section 22.17(a) of the Rules of Practice provides that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). Thus, because Respondent has defaulted in the instant proceeding, the factual allegations [\*32] in the Complaint are accepted as true.

The facts alleged in the Complaint, deemed as admitted, establish Respondent's liability for the six violations of Subtitle I of RCRA and the Federal regulations and authorized Pennsylvania regulations as charged in the Complaint. Specifically, the alleged facts establish that Respondent is the owner and operator of the USTs at the Facilities and failed to provide the following at the Facilities: 1) corrosion protection for all six USTs (three at each facility), 2) release detection for two USTs (one at each facility), and 3) line leak detection and annual line tightness testing or monthly monitoring for piping of two UST systems (one at each facility). Pursuant to Respondent's default, the facts alleged in the Complaint are deemed to be admitted and Respondent has waived the right to contest the factual allegations. 40 C.F.R. § 22.17(a).

#### **Penalty on Default**

Complainant proposes the assessment of a \$ 193,538 civil administrative penalty against Respondent for its violations of RCRA, the implementing Federal regulations, and the authorized UST regulations of the Commonwealth of Pennsylvania.

In bringing forth a case against a respondent, [\*33] the Rules of Practice place the burden of presentation and persuasion on the complainant to prove that "the relief sought is appropriate." 40 C.F.R. § 22.24(a). Each matter of controversy is adjudicated under the preponderance of the evidence standard. 40 C.F.R. § 22.24(b). The complainant has the burden of production, i.e. a duty of going forward with the introduction of evidence, that can shift during the course of litigation. *In the Matter of Asbestex, Environmental Group Company*, CAA-03-2001-0004, 2002 EPA ALJ LEXIS 23 (EPA ALJ April 24, 2002)(quoting *In re New Waterbury*, 5 E.A.D. at 536-43). Once the complainant

produces evidence to establish the appropriateness of the proposed penalty, the burden of production shifts to the respondent to introduce rebuttal evidence. *Id.* The burden of persuasion "comes into play only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced." *Id.* To make a prima facie case to support evidence on the appropriateness of its recommended penalty, Complainant must come forward with evidence to show that it considered each factor identified in RCRA's [\*34] statutory penalty factors. *Id.*

However, by contrast, where a party is found liable in default, as is the case here, the Rules of Practice direct that "[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." 40 C.F.R. § 22.17(c). As such, Complainant's burden of proof as to the requested relief is less demanding in a default case than in a contested case. *In the Matter of B&L Plating, Inc.*, CAA-5-2000-012, 2002 EPA ALJ LEXIS 22 (EPA ALJ April 5, 2002). Nevertheless, in a default case, Complainant is still required to make a prima facie case regarding appropriateness of the proposed penalty and to carry forth the burdens of presentation and persuasion.

The appropriate assessment of a penalty arising under the authority of Section 9006 of RCRA must be examined in light of the statutory penalty factors set forth at Section 9006(c) of RCRA. Section 9006(c) of RCRA provides:

Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, which [\*35] the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

42 U.S.C. § 6991e(c).

Section 22.27(b) of the Rules of Practice, concerning the ALJ's initial decision, provides:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended 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).

Thus, in addition to consideration of the statutory penalty criteria, an ALJ must also consider the guidance of any applicable EPA penalty policy when assessing a civil penalty.

#### **A. Respondent raised the ability to pay issue**

Respondent first raised the ability to pay issue in its September 13, 2006 response to the ALJ's Order to Show Cause. n12 In its prehearing exchange, Respondent proffered some financial documents and information as Exhibit 25. Later, in [\*36] its February 20, 2007 letter to Complainant, Respondent stated that as a dissolved entity, it lacks the resources to respond to Complainant's detailed questionnaire on Respondent's financial status, specifically seeking information on Respondent's ability to pay. n13

n12 Respondent stated, "The Respondent Century Oil ceased doing business in the late 1990s and is pursuing an inability to pay as one of its primary defenses."

n13 Respondent wrote, "Since that time EPA has provided an additional questionnaire regarding Century Oil's ability to pay. The questionnaire is eight (8) pages and contains thirty-seven (37) questions with numerous subparts. Based on the above, as a dissolved entity, Century Oil simply does not have the resources or

information in which to respond to the detailed questionnaire. We believe the documents that Century Oil has supplied as part of Exhibit 25 justify its inability to pay defense."

#### B. Ability to Pay is treated as an Affirmative Defense

In proposing a \$ 193,538 civil administrative [\*37] penalty, Complainant considered, *inter alia*, Respondent's ability to pay. As noted above, the ability-to-pay factor is not a statutory penalty factor under Section 9006(c) of RCRA. Thus, Respondent's ability to pay is not a factor that Complainant must consider as part of its prima facie case to establish the appropriateness of its proposed penalty. n14 Rather, Complainant apparently considered Respondent's ability-to-pay claim pursuant to its application of EPA's Ability-to-Pay Policy, an Agency general penalty policy. Pursuant to 40 C.F.R. § 22.27(b), an ALJ must consider any civil penalty guidelines issued under the Act, but the Ability-to-Pay Policy does not reflect that it was issued under RCRA.

n14 In contrast, in cases where ability to pay is listed as a statutory penalty factor, the EPA bears the burden of proof as to the appropriateness of the penalty, taking all factors into account, including ability to pay. Thus, the EPA must demonstrate that it considered each statutory penalty factor and that the proposed penalty is supported by its analysis of the penalty factors. Then, the burden of production shifts to the respondent, but the burden of persuasion remains with the EPA. A respondent's inability to pay is not an affirmative defense because the EPA, by operation of statute, must show that it considered such factor as part of its *prima facie* case. Further, an affirmative defense based on inability to pay does not arise when the statute does not specifically provide for such and only identifies it as a penalty factor.

Correspondingly, the EPA must present some evidence at a hearing on the penalty to demonstrate that it considered the statutory penalty factor of ability to pay, and "must as part of its prima facie case produce some evidence regarding respondent's general financial status from which it can be inferred that respondent's ability to pay should not affect the penalty amount." *In re New Waterbury, supra, at 541.*

Respondent's ability to pay may be presumed until it is put at issue by respondent. *Id. at 537.* In addressing a respondent's ability-to-pay claim, the EAB has held that "the rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and, if so, to submit evidence to support its claim as part of the pre-hearing exchange." *Id. at 543.* When a respondent raises ability to pay as an issue, it must give the complainant reasonable access to relevant financial records before the start of the hearing. *See In Re Spitzer Great Lakes, Ltd., TSCA Appeal No. 99-3, 9 E.A.D. 302, 311 (EAB 2000).* Further, where a respondent "fails to produce any evidence to support an inability to pay claim after being apprised of the obligation during the pre-hearing process, the Region may properly argue and the Presiding Judge may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty." *Id. at 542.*

[\*38]

Regardless, the EAB has recognized that an ability-to-pay claim may be considered in UST cases, noting that "ability to pay" is not *per se* an inappropriate factor to consider in assessing a penalty under Subtitle I penalty factors." *In re Carroll Oil Company, 10 E.A.D. 635, 663 (EAB 2002).* However, such a claim of inability to pay must be raised and proven as an "affirmative defense" by the respondent. *Id.* Recognizing that an ability-to-pay claim is not a true affirmative defense because it does not defeat the cause of action or preclude the imposition of a penalty, the EAB in *Carroll Oil* treated respondent's claim as an affirmative defense and proceeded to determine if the respondent had



sustained its burden of proving that it lacked the ability to pay the penalty or reach compliance. Assuming *arguendo* that consideration of Respondent's ability-to-pay claim is appropriate here, the burden of proof for this mitigating defense lies with Respondent.

In support of its inability-to-pay claim, Respondent has proffered incomplete tax information in the form of unsigned tax returns for the tax years 1999-2002, an unsigned financial statement, [\*39] and balance sheets for the years 1998-2005. Respondent's Exhibit 25. EPA's cost recovery analyst, Leo J. Mullin, opined in his February 23, 2007 memorandum that this information provided by Respondent is insufficient for determining if the payment of the proposed penalty is likely to create an extreme financial hardship. More specifically, Mr. Mullin noted that the combination of the lack of earnings that would be expected by a gasoline station along with the significant level of related party transactions brings into question the reliability of the financial information submitted by Respondent. Mr. Mullin further noted that there were additional issues concerning the accuracy of the information that had been reported. In particular, he questioned whether Respondent was a "dissolved entity" in light of the absence of the filing of corporate dissolution papers and the status of Respondent's leasehold interest in the real property at issue.

Complainant argues that the financial information provided by Respondent in its prehearing exchange simply does not give a reliable view of Respondent's financial status. I agree. Moreover, Complainant persuasively argues that the lack of earnings [\*40] in the tax returns along with the significant level of "related party transactions" brings the reliability of the financial information that Respondent has submitted into question. n15 In light of the persuasiveness of Complainant's arguments concerning the accuracy and probative value of the financial documents proffered by Respondent, I conclude that Respondent clearly has not met its burden of proving its ability-to-pay defense.

n15 Complainant notes in its Motion for Additional Discovery or Motion *In Limine* that a related party is defined as affiliated companies, principal owners of the company, or any other party with which the company deals where one of the parties can influence the management or operating policies of the other.

Moreover, the EAB has held that "An entity's financially defunct status does not per se bar imposition of the economic benefit portion of a penalty." *Carroll Oil, supra* at 661. Even if an entity is financially defunct, it may still have reaped ill-gotten [\*41] gains from previous malfeasance that may enable it, or its successors, to obtain unfair market advantages at a later point. See *In re B.J. Carney Indus., 7 E.A.D. 171, 208 (EAB 1997)* ("the economic benefit of noncompliance component of a penalty helps 'ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance'")(citation omitted), *appeal dismissed, 192 F.3d 917 (9th Cir. 1999), vacated as moot, 200 F.3d 1222 (9th Cir. 2000)*.

#### **EPA's Determination of Penalty**

Section 9006(d)(2) of RCRA, provides, in relevant part, that any owner or operator of an UST who fails to comply with any requirement or standard promulgated by the EPA under Section 9003 of RCRA, or any requirement or standard of a State program approved pursuant to Section 9004 of RCRA shall be liable for a civil penalty not to exceed \$ 10,000 for each UST for each day of violation. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, UST violations are subject to new statutory maximum civil penalties: [\*42] \$ 11,000 subsequent to January 30, 1997, and \$ 12,895 on or after March 15, 2004. 40 C.F.R. part 19 - Adjustment of Civil Monetary Penalties for Inflation. For purposes of assessing the amount of any penalty, Section 9006(c) of RCRA requires the EPA to take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

In the instant matter, Complainant's proposed penalty was calculated using the guidelines set forth in the EPA's UST Penalty Policy and the Adjusted Civil Monetary Penalty Inflation Rates. Complainant's Reply to Respondent's Prehearing Exchange, Proposed Exhibit 48 (Supplemental Exhibit) ("Complainant's Ex. 48"); Motion for Default,

Attachments C, E, H, I.

The stated purpose of the UST Penalty Policy is to insure that penalties are assessed in a fair and consistent manner and that such penalties serve to deter potential violators and assist in achieving compliance. UST Penalty Policy at 2. In order to achieve these goals, the penalty must place the violator in a worse position economically than if it had complied on time. *Id.* at 5. Such deterrence is achieved by: 1) removing any significant economic benefit that [\*43] the violator may have gained from noncompliance ("the economic benefit component"); and 2) charging an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not complying with the law (the "gravity-based component"). *Id.*

### EPA Penalty Policy Calculations

Jan Szaro, an environmental engineer for EPA Region III, RCRA Compliance Enforcement Branch, who serves as an inspector and case developer in the UST Enforcement Program, calculated the EPA's proposed penalty of \$ 193,538. A detailed calculation of the proposed penalty was set forth in Complainant's Exhibit 48. In addition, Complainant proffered a Declaration from Mr. Szaro ("Szaro Declaration"), dated June 16, 2007, in support of its Motion for Default. Mr. Szaro states, without further explanation, that he calculated a total proposed penalty of \$ 193,548 for the five (vs. six) violations charged in the Complaint and that via the UST Penalty Policy the amount was capped at five (5) years of violations, despite the on-going nature of the violations.

In calculating the proposed penalty, Mr. Szaro relied on the UST Penalty Policy and consulted the penalty matrix set forth [\*44] in Appendix "A" of the UST Penalty Policy (Matrix Values for Selected Violations of Federal Underground Storage Regulations)("Appendix A"). He considered the factors identified in the UST Penalty Policy: the seriousness of the violation; the economic benefit to the violator resulting from the violation; the degree of cooperation/noncooperation; the degree of willfulness or negligence; the history of noncompliance; and any other factors as justice may require.

Mr. Szaro first addressed the gravity-based component under the UST Penalty Policy, which consists of four elements: 1) Matrix Value; 2) Violator-Specific Adjustments to the Matrix Value; 3) Environmental Sensitivity Multiplier and 4) Days of Noncompliance Multiplier. The initial matrix value is based on the following two criteria: extent of deviation from requirement and actual or potential harm. The extent of deviation from requirement is an assessment of the extent to which the violation deviates from UST statutory or regulatory requirements. Actual or potential harm is an assessment of the likelihood that the violation could or did result in harm to human health or the environment and/or has (or had) an adverse effect on [\*45] the regulatory program.

Mr. Szaro classified each of Respondent's five UST violations as "major" extent of deviation and "major" potential for harm. n16 For example, with respect to Count I, failure to provide corrosion protection for USTs Nos. 1, 2, 3, 1a, 2a, and 3a at the Facilities, Mr. Szaro concluded that the extent of deviation was major as failure to operate and maintain a cathodic protection system for USTs at a facility presents a substantial deviation from the requirements of the UST program. Additionally, Mr. Szaro determined that the "potential for harm" for these violations was major because Respondent's failure to protect the USTs, which are over 30 years old, could cause a substantial risk to human health or the environment from an undetected leak.

n16 The categories for extent of deviation from the requirements are the following: 1) Major- The violator deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance. An example is installing a bare steel tank without cathodic protection; 2) Moderate- The violator significantly deviates from the requirement of the regulation or statute, but to some extent has implemented the requirement as intended. An example is installing improperly constructed cathodic protection; 3) Minor- The violator deviates slightly from the regulatory or statutory requirements, but most of the

requirements are met. An example is failing to keep every maintenance record on properly constructed cathodic protection.

[\*46]

In assessing the penalty calculation, Mr. Szaro consulted Appendix A to determine the "major-minor" matrix value for each of the five violations. For example, Appendix A lists the matrix value at \$ 1,500 for the violation of failing to meet all tank upgrade standards pursuant to 40 C.F.R. § 280.21(b) (Count I). In calculating the matrix value for the three tanks at each of the two facilities, Mr. Szaro multiplied \$ 1,500 by the number of tanks at each facility (three), resulting in a figure of \$ 4,500.

Under the UST Penalty Policy, the matrix value is adjusted by the listed violator-specific factors: degree of cooperation/noncooperation; degree of willfulness or negligence; history of noncompliance; and other unique factors as justice may require. According to the UST Penalty Policy, the proposed penalty can be increased up to 50 percent or decreased up to 25 percent by assessing respondent's cooperation/non-cooperation. Mr. Szaro considered Respondent's failure to cooperate with Complainant by being non-responsive and evasive to Complainant's inquiries about Respondent's ownership of the USTs in question, corporate structure, financial health/ability-to-pay, or environmental compliance [\*47] record. Given the determined lack of cooperation, Mr. Szaro adjusted the proposed penalty by increasing it 10 percent for each violation.

With respect to the degree of willfulness or negligence, the UST Penalty Policy permits a penalty to be increased up to 50 percent or decreased up to 25 percent. Mr. Szaro determined that it was not clear whether there was willfulness or negligence on Respondent's part, so no adjustments were warranted.

As for the history of a respondent's noncompliance, the UST Penalty Policy permits a penalty to be increased up to 50 percent. Mr. Szaro took notice of two prior EPA civil enforcement actions against Super Value, another of Michael Datilo's companies, and that PADEP has previously issued two notices of violation to COAC regarding the USTs at the Facilities. Nonetheless, Mr. Szaro determined that the COAC's history of noncompliance was not clear to the extent to impose any upward adjustment to the proposed penalty.

Mr. Szaro then assessed the unique factors in this case which can increase or decrease a penalty by as much 50 percent or 25 percent. Mr. Szaro concluded that Complainant did not identify any unique factors in this case, so no adjustments [\*48] were warranted.

In addition to the violator-specific adjustments to the matrix value of the gravity-based component, Mr. Szaro considered the further adjustments based on potential site-specific impacts that could be caused by the violations. Such adjustments include the environmental sensitivity multiplier ("ESM")- a value based on the environmental sensitivity associated with the location of the facility, and the days of noncompliance multiplier factors("DNM")- a value based on the duration of noncompliance.

Mr. Szaro determined an ESM of 1.75 for the Fifth Street facility and an ESM of 1.5 for the Scotrun facility. n17 Following this, Mr. Szaro made a further adjustment to account for the DNM, determining Respondent's noncompliance exceeded four years and six months. Mr. Szaro applied the maximum DNM value of 6.5. Incorporating the further inflation adjustment multiplier, Mr. Szaro split the DNM into the period of time preceding and the period of time following the inflation adjustment: a DNM value of 4.5 for the violation prior to March 15, 2004 and a DNM value of 2.0 for the period of time following March 15, 2004. Lastly, Mr. Szaro accounted for the Inflation Rule Adjustment [\*49] Multiplier ("IRAM") which increases penalties due to inflation. Mr. Szaro incorporated the adjusted IRAMs of 1.1 for violations occurring after January 30, 1997 but before March 15, 2004 and 1.2895 for violations occurring after March 15, 2004.

n17 Mr. Szaro consulted reports from EPA Geologist, Joel Hennessy, and EPA Toxicologist, Elizabeth Quinn, on the adverse environmental effects that the violations may have had, given the sensitivity of the local area to damage posed by a potential or actual release. Szaro Declaration at 4, P19.

With respect to the UST Penalty Policy, the total gravity-based component was calculated on the following equation: Gravity-Based Component= Matrix value x Number of Tanks x Violator-Specific Adjustments x Environmental Sensitivity Multiplier x Days of Noncompliance Multiplier x Inflation Rule Adjustment Multiplier. For example, the calculation rendered for the Count I violation at the Fifth Street Facility proceeds as follows: (\$ 1,500) x (3 tanks) x (1.1) x(1.75) x(4.5) x (1.1)= \$ [\*50] 42,879 and (\$ 1,500) x (3 tanks) x (1.1) x (1.75) x (2.0) x (1.2895) = \$ 22,341 which adds up to \$ 65,220 for the Total Gravity Component.

Finally, Mr. Szaro reviewed any significant profit from Respondent's noncompliance to calculate the Economic Benefit Component ("EBC"). Mr. Szaro determined that Respondent had a delayed expenditure for each violation. For example, under Count I there was a delayed expense of \$ 10,000, which is the average cost in the industry for installing a pipe and tank impressed current system for corrosion protection at the Facilities. In this case, Complainant used a 39.5 percent tax rate to calculate the EBC, which was then added to the gravity-based component.

In conclusion, I find that Complainant has met its burden of establishing its prima facie case and demonstrating the appropriateness of the proposed penalty on default. Complainant's penalty calculation narrative included in the supplemental prehearing exchange and the declaration of Mr. Szaro submitted on Motion for Default show that Complainant considered both penalty factors identified in Section 9006(c) of RCRA in assessing the proposed penalty; that is, the "seriousness of the violation" and [\*51] "any good faith efforts to comply with applicable requirements." Further, the proposed penalty is not clearly inconsistent with the record of proceeding or RCRA itself. *See 42 U.S.C. § 9006; 40 C.F.R. §§ 22.17(c), 22.24(a)*. Accordingly, the proposed civil administrative penalty of \$ 193,538 is assessed against Respondent.

### CONCLUSIONS OF LAW

1. Respondent is found to be in default because it failed to appear at the scheduled hearing on May 8, 2007 in Philadelphia, Pennsylvania and to pursue its defense, and the record does not show good cause why a default order should not be issued. 40 C.F.R. § 22.17(a).
2. Default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of its rights to contest such factual allegations for purposes of the above-cited matter only. 40 C.F.R. § 22.17(a).
3. Respondent violated Subtitle I of RCRA, 40 C.F.R. § 280.21, and 25 Pa. Code § 245.422 with respect to USTs Nos. 1, 2, 3, 1a, 2a, and 3a at the Facilities by failing to comply with the performance standards for existing UST systems, as applicable, requiring corrosion protection.
4. Respondent violated Subtitle [\*52] I of RCRA, 40 C.F.R. § 280.40-.41(a) and .43, and 25 Pa. Code § 245.441-.442(1) and .444 with respect to USTs Nos. 1 and 2a at the Facilities by failing to provide release detection for these USTs.
5. Respondent violated Subtitle I of RCRA, 40 C.F.R. § 280.41(b)(1), and 25 Pa. Code § 245.442(2)(i) by failing to provide methods of release detection for the underground piping associated with the UST systems for USTs Nos. 1 and 2a at the Facilities.
6. Respondent failed to meet its burdens of presentation and persuasion on the defense of ability to pay.

40 C.F.R. § 22.24(a).

7. The proposed civil administrative penalty of \$ 193,538 is appropriate. The proposed penalty is not clearly inconsistent with the record of proceeding or RCRA. 42 U.S.C. § 9006; 40 C.F.R. §§ 22.17(c), 22.24(a).

#### **ORDER**

1. Respondent is found to be in default and, accordingly, is found to have violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, the Federal regulations promulgated thereunder set forth at 40 C.F.R. part 280, and the authorized regulations of the Commonwealth of Pennsylvania Underground Storage Tank Program [\*53] set forth at 25 Pa. Code Chapter 245 as charged in the Complaint.

2. Respondent, Century Oil Acquisition Corp., is assessed a civil administrative penalty of \$ 193,538.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the service date of the final order by submitting a cashier's check or certified check in the amount of \$ 193,538 payable to the "Treasurer, United States of America," and mailed to:

Mellon Bank  
EPA Region 3  
Regional Hearing Clerk  
P.O. Box 360515  
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number (RCRA-03-2006-0088) as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. See 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

#### **Appeal Rights**

This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with [\*54] the Environmental Appeals Board within thirty (30) days after the service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this Decision.

#### **COMPLIANCE ORDER**

Respondent is hereby ORDERED, pursuant to authority in Section 9006(a) of RCRA, 42 U.S.C. § 6991e(a), 40 C.F.R. §§ 22.27(a) and 22.37(b), and based on the foregoing determination of violations, to comply with all the regulatory requirements set forth in the Compliance Order contained in the Complaint, including, but not limited to closure and remediation. A default order requiring compliance or corrective action becomes effective and enforceable without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c).

Barbara A. Gunning

Administrative Law Judge

Dated: September 17, 2007

Washington, DC

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Environmental Law  
Hazardous Wastes & Toxic Substances  
Resource Conservation & Recovery Act  
General Overview  
Environmental Law  
Hazardous Wastes & Toxic Substances  
Underground Storage Tanks  
Real Property Law  
Environmental Regulation  
Underground Storage Tanks