

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No. RCRA-08-2008-0005

2008 OCT 15 AM 8:59
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)

Debra Werner)
Michael Werner)
United Oil and Gas, Inc.)
United C-Store)
BIA 7 South)
Belcourt, ND 58316)
EPA ID Number 3050006)

Respondents.)

FIRST AMENDED COMPLAINT
AND NOTICE OF OPPORTUNITY
FOR HEARING

AUTHORITY

This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency (EPA) by section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e. The Administrator has properly delegated this authority to the undersigned EPA officials. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules) set forth at 40 C.F.R. Part 22, a copy of which is enclosed.

This civil administrative action is also authorized by "ORDER ON MOTION TO AMEND COMPLAINT" dated August 20, 2008 (filed in Docket No. RCRA-08-2008-0005) and also by "ORDER REGARDING MOTIONS TO AMEND COMPLAINT" dated October 8, 2008 (filed in Docket No. RCRA-08-2008-0005).

GENERAL ALLEGATIONS

1. Subtitle I of RCRA, RCRA §§ 9001 - 9010, 42 U.S.C. §§ 6991 - 6991i, authorizes EPA to regulate the installation and use of "underground storage tanks" ("USTs" or "tanks") which contain "regulated substances."
2. EPA has jurisdiction over this matter pursuant to RCRA § 9006, 42 U.S.C. § 6991e.

3. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes EPA to promulgate regulations setting forth requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment. EPA has promulgated such regulations at 40 C.F.R. Part 280, subpart D.
4. Petroleum, and any fraction thereof, is a regulated substance as defined at RCRA § 9001(2), 42 U.S.C. § 6991(2).
5. EPA is the “implementing agency” as that term is used at 40 C.F.R. § 280.12.
6. Mike and Debra Werner (hereafter referred to collectively as “Respondents,” operate two 10,000 gallon single-walled STIP 3 tanks at the United C-Store facility (facility), located at BIA 7 South, Belcourt, North Dakota, within the exterior boundaries of the Turtle Mountain Indian Reservation. The tanks, installed in July 1986 and upgraded in January 2000, contain unleaded gasoline.
7. The Respondents, as of June 1, 2006, operate the United C Store, including the tanks, as a for-profit gas station and convenience store. The respondents are “persons” as defined by section 9001(5) of RCRA, 42 U.S.C. § 6991(5).
8. Respondents are "operators" within the respective meanings of RCRA § 9001(3), 42 U.S.C. § 6991(3), and 40 C.F.R. § 280.12, of an “underground storage tank system” (UST system) as defined by RCRA § 9001(10), 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.
9. Respondents’ UST systems meet the performance standards for new USTs described in 40 C.F.R. § 280.20.
10. Respondents were provided advance notice of a planned UST inspection at the facility by an EPA representative on June 12, 2007, at least four working days prior to the inspection. A facility representative was provided a list of documents that needed to be available on site for the inspection, including but not limited to the last 12-months of leak detection records.
11. On June 19, 2007, EPA inspector Christopher Guzzetti (the inspector), accompanied by Don DeCoteau, Turtle Mountain Band of Chippewa UST Coordinator, conducted an inspection at the facility with the consent of Leon Morin, Store Manager and facility representative, to determine compliance with RCRA Subtitle I and the EPA regulations relating to USTs.
12. At the time of the inspection, the facility representative confirmed that the piping was steel and pressurized. The facility representative stated that an automatic tank gauge (ATG) was used for monthly leak detection.

13. Leak detection records were unavailable at the time of inspection because the ATG system, Red Jacket Pro Link, was missing parts. According to Mr. Morin, the ATG system had not been working for at least a year, since the Respondents began leasing the facility.
14. Mr. Morin stated that the piping was metal and pressurized, with electronic line leak detectors connected to the Red Jacket Pro Link ATG.
15. At the time of the inspection, the facility representative informed the inspector that the tanks and piping had been tested for cathodic protection on May 17, 2004.
16. At the time of the inspection, the cathodic protection test due May 17, 2007, had not been performed.
17. At the time of the inspection, the facility could not produce the financial assurance mechanisms for the UST systems.
18. At the conclusion of the inspection, the inspectors informed the facility representative that the facility was out of compliance and explained the violations. The inspectors completed a "Notice of Inspection" form which was signed by and left with the facility representative.
19. Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), states in pertinent part that any owner or operator of an UST who fails to comply with any requirement or standard promulgated by the Administrator under section 6991b of this title shall be subject to a civil penalty not to exceed \$11,000 for each tank for each day of violation.
20. As alleged herein and pursuant to section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), and 40 C.F.R. § 19.4, Respondents are liable for civil penalties up to \$11,000 per day per tank during which the violation continues.
21. Paragraphs 1 through 20 are incorporated by reference in each of the counts listed below.

COUNT 1

(Failure to monitor USTs for releases at least every 30 days)

22. In accordance with 40 C.F.R. § 280.41(a), owners and operators of petroleum UST systems must provide release detection for tanks by monitoring tanks for releases at least every 30 days using one of the methods listed in 40

C.F.R. § 280.43(d) through (h) that meet the general requirements in 40 C.F.R. § 280.40.

23. At the time of inspection and for at least one year prior to the inspection date, the ATG system was inoperable and unable to perform leak detection.
24. Respondents' failure to monitor tanks 1 and 2 every 30 days for leak detection beginning June 2006, constitutes two separate violations of 40 C.F.R. § 280.41(a) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

COUNT 2

(Failure to conduct annual line tightness testing on pressurized piping)

25. In accordance with 40 C.F.R. § 280.41(b)(1)(ii), underground piping that conveys regulated substances under pressure must have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b).
26. At the time of inspection and for at least one year prior to the inspection date, Respondents failed to conduct annual line tightness testing on the piping. The ATG system that the electronic line leak detectors connected to was inoperable.
27. Respondents' failure to perform annual line tightness testing on the underground piping for tank 1 and 2 beginning June 2006, constitutes two separate violations of 40 C.F.R. § 280.41(b)(1)(ii) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

COUNT 3

(Failure to conduct cathodic protection test every three years)

28. In accordance with 40 C.F.R. § 280.31(b), all UST systems with cathodic protection must be tested at least every three years after being tested within six months of installation.
29. Respondents last performed cathodic protection on the tanks and piping on May 17, 2004.
30. Respondents were required to test for cathodic protection on or before May 17, 2007.
31. Respondents' failure to conduct cathodic protection on the tanks and piping on or

before May 17, 2007, constitutes a violation of 40 C.F.R. § 280.31(a) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

COUNT 4

(Failure to Comply with Financial Responsibility Requirements)

32. In accordance with 40 C.F.R. § 280.93, owners and operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks.
33. At the time of inspection, Respondents were unable to provide written verification that the tanks were covered by the North Dakota State Fund or proof of an alternative financial responsibility mechanism.
34. The facility failed to pay its registration fees to the North Dakota Petroleum Release Compensation Fund for calendar years 2005 through 2007, and continuing. The facility currently does not have a financial responsibility mechanism to pay for clean up in the event of a release from the UST systems.
35. Respondents' failure to demonstrate financial responsibility for the UST systems constitutes a violation of 40 C.F.R. § 280.93(a) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

PROPOSED CIVIL PENALTY

RCRA § 9006(d)(2)(C), 42 U.S.C. § 6991e(d)(2)(C), authorizes the assessment of a civil penalty of up to \$11,000 for each UST for each day of violation. Based upon the facts alleged in this Complaint and taking into account the factors prescribed by statute, i.e., the seriousness of the violations and any good faith efforts by Respondents to comply with the applicable requirements, Complainant proposes to assess a civil penalty of \$42,895 as follows:

COUNT	VIOLATION	PROPOSED PENALTY
Count 1	Failure to monitor tanks 1 and 2 every 30 days, 40 C.F.R. § 280.41(a)	\$18,170
Count 2	Failure to perform monthly monitoring on pressurized piping for tanks 1 and 2, 40 C.F.R. § 280.41(b)(1)(ii)	\$16,903
Count 3	Failure to operate and maintain corrosion protection system continuously, 40 C.F.R. § 280.31(a)	\$226
Count 4	Failure to maintain copies of financial assurance mechanism, 40 C.F.R. § 280.93	\$7,596
TOTAL PROPOSED PENALTY:		\$42,896

The proposed civil administrative penalty above has been calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990) (Exhibit 1). This policy is used by EPA to provide a rational and consistent application of the statutory factors to the facts and circumstances of a specific case. The Penalty Calculation Worksheets for the alleged RCRA UST violation in support of the assessment of civil penalties proposed in this Complaint are attached hereto (Exhibit 2).

TERMS OF PAYMENT

If Respondents do not contest the findings and penalty proposal set forth above, this action may be resolved by paying the proposed penalty in full. If such payment is made within thirty (30) calendar days of receipt of this Complaint, then no Answer need be filed. For more time for payment, Respondents may file a statement agreeing to pay the penalty within thirty (30) days of receipt of the Complaint, then pay the money within sixty (60) days of such receipt. Payment is to be made by sending a certified or cashier's check payable to "Treasurer, United States of America," to:

EPA Region 8 (Regional Hearing Clerk)
Mellon Bank
P.O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to:

Dana Stotsky, Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, Colorado 80202-1129

Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in RCRA § 9006(b), 42 U.S.C. § 6991e(b), a respondent has the right to request a public hearing within thirty (30) calendar days after the Complaint is served. If you (1) contest the factual claims made in this Complaint; (2) wish to contest the appropriateness of the proposed penalty; or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with 40 C.F.R §§ 22.15 and 22.37 within thirty (30) calendar days after this Complaint is received. Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state all facts and circumstances, if any, which constitute grounds for defense; (3) state the facts intended to be placed at issue; and (4) specifically request an administrative hearing, if desired. The denial of any material fact or the raising of any affirmative defense in your Answer shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this Complaint constitutes an admission of the undenied allegations.

The answer and one copy must be sent to the EPA Region 8 Regional Hearing Clerk (8RC), 1595 Wynkoop Street, Denver, Colorado 80202-1129, and a copy must be sent to the enforcement attorney listed below.

IF YOU FAIL TO REQUEST A HEARING, YOU MAY WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set forth above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in 40 C.F.R. Part 22. If a settlement can be reached, its terms shall be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the regional judicial officer. A request for a settlement conference or any questions that you may have regarding this Complaint should be directed to the attorney listed below.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 10/14/08

By: Michael T. Bisner
for David J. Janik, Director
Legal Enforcement Program

Date: 14 October 2008

By: Sharon L. Kercher
Sharon L. Kercher, Director
Technical Enforcement Program

Date: Oct. 14, 2008

By: Dana J. Stotsky
Dana J. Stotsky, Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street
Mail Code: 8ENF-L
Denver, Colorado 80202-1146
Colorado Bar # 14717
Phone: (303)-312-6905
FAX: (303) 312-6953
stotsky.dana@epa.gov

Complainant's Exhibit List

1. "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits," 40 C.F.R. part 22.
2. Penalty Calculation Worksheets for the 4 (FOUR) alleged RCRA UST violations.
3. U.S. EPA Penalty Guidance for Violations of the UST Regulations (November, 1990)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the FIRST AMENDED COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits 1 and 2 were hand-carried to the Regional Hearing Clerk, EPA, Region 8, 1595 Wynkoop Street, Denver, Colorado, and that a true copy of the same was mailed by certified mail, return receipt requested, to:

Mr. Michael Werner
P.O. Box 386
Bottineau, ND 58318

and

Ms. Debra Werner
P.O. Box 386
Bottineau, ND 58318

and

Debra Werner, President
United Oil and Gas, Inc. of Bottineau
P.O. Box 386
Bottineau, ND 58318

and

United C Store
P.O. Box 386
Bottineau, ND 58318

Date: 10/15/08

By: Judith M. McTernan