

MAR 8 2010

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5 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
6 REGION 8

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7 IN THE MATTER OF: \*  
\* Docket No. CWA-08-2009-0006  
8 FULTON FUEL COMPANY \*  
127 Main Street \* RESPONDENT'S MOTION TO SET ASIDE  
9 Shelby, MT 59474 \* DEFAULT AND TO SET HEARING ON  
\* THE MERITS

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11 **INTRODUCTION**

12 The Environmental Protection Agency (EPA) has made a Motion  
13 for Default Judgment and Order against Respondent Fulton Fuel  
14 Company assessing a fine of \$32,500.00.

15 In response Fulton Fuel Company filed its Response to Order  
16 to Supplement the Record and to Show Cause on January 4, 2010  
17 together with evidence in exhibits attached.

18 Respondent hereby files its Motion to Set Aside any Default  
19 that may have been heretofore executed and requests this matter  
20 be set for hearing on the merits. In support Respondent is filing  
21 herewith an Answer of Fulton Fuel Company and Request for Hear-  
22 ing, and an Affidavit of the President of Fulton Fuel Company,  
23 William M. Fulton Jr.  
24

25  
26 **MEMORANDUM IN SUPPORT OF THE MOTION**

27 An Order of Default may not yet have been entered in this  
28 case. If not Respondent requests that its Answer be filed. If  
Default is deemed already to be entered, Respondent requests that

1 its Answer be lodged pending an Order of the Court on the pending  
2 motion.

3  
4 1. Defaults are not favored.

5 It is the policy of the law that whenever possible disputes  
6 should be decided on the merits, with each party participating  
7 and having an opportunity to be heard.

8 2. Respondent has meritorious defenses.

9 In considering whether to enter a default the Court should  
10 consider whether the Respondent may have a meritorious defense.  
11 Here the Answer filed or lodged by Fulton Fuel Company, the  
12 Affidavit of William M. Fulton, Jr., and the Response of Fulton  
13 Fuel Company, and exhibits attached, filed January 4, 2010  
14 demonstrate Respondent has defenses including lack of jurisdic-  
15 tion, factual issues, acts or omissions of third party and  
16 unavoidable accident.

17 a. Jurisdiction.

18 The EPA is alleging violations of Section 33 USC §1321  
19 (b) and subsections which prohibit the discharge of oil  
20 into or upon navigable waters of the United States.  
21 Section (b)(1) indicates the scope and policy of the  
22 act.

23 [1] The Congress hereby declares that it is the policy  
24 of the United States that there should be no discharges  
25 of oil ....into or upon the navigable waters of the  
United States....

26 The EPA also asserts liability on the alleged duty of  
27 Respondent Fulton Fuel Company to create a "written SPCC plan"  
28 (spill plan) for its storage facility. Any adequate investigation  
by the EPA would have disclosed, and the Answer of Fulton Fuel

1 Company which buried the flowline in rock several feet below  
2 ground, and that the spill was as to Fulton Fuel Company, an  
3 unavoidable accident are defenses recognized by the Act. See 33  
4 USC §1321 (f).

5  
6 3. Any default against Respondent should be set aside on  
grounds of excusable neglect.

7 a. Fulton Fuel Company hired counsel, other than its present  
8 counsel and reasonably believed such hired counsel was  
meeting EPA claims and complaints.

9 The record now before the Regional Judicial Officer in this  
10 case demonstrates:

11  
12 1) Fulton Fuel Company promptly discovered a small 6 to 10  
13 barrel oil spill and immediately commenced, sustained and  
paid for remediation, testing and restoration of all envi-  
ronmental effects of that spill;

14 2) That Attorney Renee Coppock of the Crowley Fleck law firm  
15 of Billings, Montana, was retained by Fulton Fuel Company to  
handle all legal matters pertaining to environmental issues  
with local, state and federal governments;

16  
17 3) That attorney Coppock arranged for and monitored the  
remedial, testing and reporting activities of Hydro Solu-  
18 tions Inc., corresponded with state and federal agencies,  
including the EPA and filed the Response to the United  
19 States Environmental Protection Agency, which underlies this  
case, with the EPA; and

20 4) Fulton Fuel Company was unaware that attorney Coppock had  
21 not entered an appearance in this matter until December 21,  
2009. See Affidavit of William M. Fulton, Jr.

22 **CONCLUSION**

23 It is respectfully submitted that the Regional Judicial  
24 Officer should not enter a Default Order, or should set aside any  
25 Default Order heretofore granted; and further that Respondent be  
26 granted a hearing on the merits with an opportunity to refute the  
27 erroneous jurisdictional and factual allegations of the EPA.

28 Respectfully submitted this 4th day of March, 2010.

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Douglas Allen by TF  
Douglas C. Allen  
Attorney for Fulton Fuel Co.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of March, 2010, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Marc D. Weiner  
Enforcement Attorney  
1595 Wynkoop Street  
Denver, CO 80202-1129

Tina Artemis  
Regional Hearing Clerk  
US Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
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T. Frydenlund