



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
1595 WYNKOOP STREET
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

December 14, 2007

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Marcus Wells, Jr., Chairman
Fort Berthold Tribal Business Council
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763

Re: In the Matter of the Three Affiliated Tribes and Sharon Jacobs, Highway 8 Convenience Store, Docket No. RCRA-08-2008-0001
In the Matter of the Three Affiliated Tribes and Yolanda Bears Tail, White Shield Ree Store, Docket No. RCRA-08-2008-0002
In the Matter of the Three Affiliated Tribes and Dave Williams, West Dakota Service, Docket No. RCRA-08-2008-0003
Complaints and Notice of Opportunity for Hearing

Dear Chairman Wells:

Pursuant to our conversation this morning, the U.S. Environmental Protection Agency Region 8 (EPA) is issuing the Three Affiliated Tribes (Tribes) and facility managers of the Highway 8 Convenience Store, White Shield Ree Store, and West Dakota Service facilities (facilities) the enclosed Complaints and Notices of Opportunity for Hearing (Complaints) for alleged underground storage tank (UST) violations. The Complaints are issued pursuant to section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e.

EPA alleges in the Complaints that the Tribes as facility owner, and the individual facility managers as operators, failed to comply with the federal UST regulations codified at 40 C.F.R. Part 280, subpart D, for USTs located at the facilities in violation of RCRA § 9003(c), 42 U.S.C. § 6991(b)(c). EPA proposes a penalty of \$48,126 for the Highway 8 Convenience Store facility, \$48,125 for the White Shield Ree Store facility, and \$13,369 for the West Dakota Service facility for the violations alleged. Based on recent efforts by the Tribes to return the facilities to compliance with the UST regulations, and subject to the affirmative defenses and/or additional information provided by the Tribes in its Answer to the Complaints, EPA is willing to negotiate the final penalty amount as appropriate following verification of compliance. It is imperative, however, that any penalty mitigation be fully documented and based on written justification to uphold the credibility of the UST Program

and avoid the appearance of any impropriety within the regulated community. For that reason, and to ensure equal protection of human health and the environment in Indian country, I believe that proceeding with the enclosed Complaints is the best way to successfully resolve the noncompliance at issue.

The Tribes have the right to a hearing to contest the factual allegations in the Complaint. If it admits the allegations, or the allegations are found to be true after the Tribes have had an opportunity for a hearing, the Tribes have the right to contest the penalties proposed in the Complaints. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an Answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If the Tribes wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, it must file a written Answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129


If the Tribes do not file an Answer by the applicable deadline, it will have defaulted and each allegation in the Complaint may be deemed to be admitted as true. The Tribes will have waived its right to appear in this action for any purpose and will also have waived its right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the presiding officer may then find the Tribes liable and assess against it a civil penalty of up to \$11,000 per tank per day of violation.

Whether or not the Tribes request a hearing, it may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. The Tribes have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing an Answer and/or requesting a hearing.

Because these actions are issued jointly to the Tribes and individual facility managers, EPA encourages the Tribes to consult with the individual facility managers regarding any proposed informal conferences or settlement discussions. If you have any questions, please do not hesitate to contact me at (303) 312-6051. If your staff has questions or information to share, the most knowledgeable people on my staff regarding this matter are Amy Swanson and Francisca Chambus. Ms. Swanson is in our Legal Enforcement Program and can be reached at (303) 312-6906. Ms. Chambus is in our Underground Storage Tank Program and can be reached at (303) 312-6782.

We urge your prompt attention to this matter.

Sincerely,



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

Consolidated Rules of Civil Practice, 40 C.F.R. Part 22
Complaint and Notice of Opportunity for Hearing, with Exhibits 1 and 2

cc w/ all enclosures:

Elton Spotted Horse, Director
Environmental Division
Three Affiliated Tribes
204 W. Main Street
New Town, ND 58763

Delvin Wolf, UST Technician
Environmental Division
Three Affiliated Tribes
204 W. Main Street
New Town, ND 58763

Damon Williams, Attorney
Legal Department
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763

cc w/o enclosure:

Sharon Jacobs, Manager
Highway 8 Convenience Store
8098 BIA.Route 22
Halliday, ND 58636

Yolanda Bears Tail, Manager
White Shield Ree Store
Two Second Avenue West
Rose Glen, ND 58775

Dave Williams, Manager
West Dakota Service
202 Frontage Road
New Town, ND 58763



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET

DENVER, CO 80202-1129

Phone 800-227-8917

<http://www.epa.gov/region08>

December 14, 2007

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Yolanda Bears Tail, Manager
White Shield Ree Store
Two Second Avenue West
Rose Glen, ND 58775

Re: In the Matter of the Three Affiliated Tribes and Yolanda Bears Tail, Individually, White Shield Ree Store Facility
Docket No. **RCRA-08-2008-0002**
Complaint and Notice of Opportunity for Hearing

Dear Ms. Bears Tail:

The U.S. Environmental Protection Agency Region 8 (EPA) is issuing you, individually, and the Three Affiliated Tribes (Tribes) the enclosed Complaint and Notice of Opportunity for Hearing (Complaint) for alleged underground storage tank (UST) violations at the White Shield Ree Store facility (facility) in White Shield, North Dakota. The Complaint is issued pursuant to section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e.

EPA alleges in the Complaint that the Tribes as facility owner, and you as facility operator, failed to comply with the federal UST regulations codified at 40 C.F.R. Part 280, subpart D, for a compartmentalized UST located at the facility in violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c). Specifically, the Complaint alleges failure to monitor for leak detection every 30 days as required by 40 C.F.R. § 280.41(a); failure to perform monthly monitoring on pressurized piping as required by 40 C.F.R. § 280.41(b)(1)(ii); failure to comply with financial responsibility requirements as required by 40 C.F.R. § 280.93(a); and failure to operate and maintain corrosion protection system continuously as required by 40 C.F.R. § 280.31(a) since May 7, 2003. EPA proposes a total penalty of \$48,125 for the violations alleged.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an Answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If you wish to contest the allegations in the Complaint or the penalty

proposed in the Complaint, you must file a written Answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

If you do not file an Answer by the applicable deadline, you will have defaulted and each allegation in the Complaint may be deemed to be admitted as true. You will have waived your right to appear in this action for any purpose and will also have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the presiding officer may then find you liable and assess against you a civil penalty of up to \$11,000 for each tank for each day of violation.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people on my staff regarding this matter are Amy Swanson and Francisca Chambus. Ms. Swanson is in our Legal Enforcement Program and can be reached at (303) 312-6906. Ms. Chambus is in our Underground Storage Tank Program and can be reached at (303) 312-6782.

We urge your prompt attention to this matter.

Sincerely,



Sharon Kercher, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

Consolidated Rules of Civil Practice, 40 C.F.R. Part 22
Complaint and Notice of Opportunity for Hearing, with Exhibits 1 and 2

cc w/ all enclosures:

Marcus Wells, Jr., Chairman
Fort Berthold Tribal Business Council
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763

Elton Spotted Horse, Director
Environmental Division
Three Affiliated Tribes
204 W. Main Street
New Town, ND 58763

Delvin Wolf, UST Technician
Environmental Division
Three Affiliated Tribes
204 W. Main Street
New Town, ND 58763

Damon Williams, Attorney
Legal Department
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 DEC 11 11:34:55
HEAR. ROOM

| | | |
|---------------------------------------|---|-------------------------------------|
| IN THE MATTER OF: |) | Docket No. RCRA-08-2008-0002 |
| |) | |
| The Three Affiliated Tribes |) | COMPLAINT AND NOTICE OF |
| and Yolanda Bears Tail, individually, |) | OPPORTUNITY FOR HEARING |
| |) | |
| (White Shield Ree Store |) | |
| A Sesame Frontage Road, |) | |
| White Shield, ND 58775) |) | |
| EPA ID Number 3010039) |) | |
| |) | |
| Respondents. |) | |

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.

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” 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. The Three Affiliated Tribes and Ms. Yolanda Bears Tail (hereafter referred to collectively as “Respondents”) own and/or operate a 12,000 gallon compartmentalized double-walled STIP 3 tank at the White Shield Ree Store facility (facility), located at A Sesame Frontage Road, White Shield, ND, within the exterior boundaries of the Fort Berthold Indian Reservation. One 8,000 gallon compartment contains unleaded gasoline, and one 4,000 gallon compartment contains diesel fuel. The tank was installed on November 10, 2002.

7. Respondent Three Affiliated Tribes is a “municipality” and therefore a “person” as defined by section 1004 of RCRA, 42 U.S.C. § 6903.

8. Respondent Yolanda Bears Tail, Manager of the White Shield Ree Store, is a “person” as defined by section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

9. Respondents are “owners” or “operators” within the respective meanings of RCRA §§ 9001(3) and (4), 42 U.S.C. §§ 6991(3) and (4), and 40 C.F.R. § 280.12, of an “underground storage tank system” (“UST” or “tank”) as defined by RCRA § 9001(10), 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.

10. Respondents’ tank meets the performance standards for new USTs described in 40 C.F.R. § 280.20.

11. Respondents were provided advance notice of a planned UST inspection at the facility by an EPA representative at least four working days prior to the inspection. Facility representative Sharon Jacobs 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.

12. On June 8, 2005, EPA inspector Christopher Guzzetti (the inspector), accompanied by Delvin Wolf, Three Affiliated Tribes UST Coordinator, conducted an inspection at the facility with the consent of the facility representative, Ms. Bears Tail, to determine compliance with RCRA Subtitle I and the EPA regulations relating to USTs.

13. At the time of the inspection, the facility representative could not confirm whether the piping was suction or pressurized, or its material of construction. According to the notification form in the file, the piping is pressurized and double-walled. The facility representative at the time of the inspection did not know the method of leak detection used for the piping.

14. At the time of the inspection, the facility representative informed the inspector that the facility had not been monitoring the tanks or any part of the UST system since it was installed.

15. At the time of the inspection, the facility representative was unable to produce for review the facility's corrosion test records. Because the tank was installed in November 2002, the first corrosion tests should have been performed within six months of installation. No record of the initial or subsequent tests were available.

16. At the time of the inspection, the facility did not have a financial responsibility mechanism.

17. 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.

18. 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.

19. 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.

20. Paragraphs 1 through 20 are incorporated by reference in each of the counts listed below.

COUNT 1
Failure to monitor every 30 days

21. 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.

22. Respondents failed to monitor the tank every 30 days from the date the UST system was installed through January 2007.

23. Respondents' failure to monitor the UST system every 30 days for leak detection beginning November 2002 through January 2007 constitutes a violation of 40 C.F.R. § 280.41(a) and Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

COUNT 2
Failure to perform monthly monitoring on pressurized piping

24. In accordance with 40 C.F.R. § 280.41(b)(1)(ii), owners and operators of UST systems not equipped with an automatic line leak detector must monitor monthly any underground piping that conveys regulated substances under pressure in accordance with 40 C.F.R. § 280.44(c).

25. Respondents failed to conduct monthly monitoring since the UST system was installed.

26. Respondents' failure to perform monthly monitoring on the UST system piping beginning November 2002 constitutes a continuing violation 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 Comply with Financial Responsibility Requirements

27. In accordance with 40 C.F.R. § 280.93(a), 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.

28. Respondents do not have a financial responsibility mechanism for the tank since the UST system was installed.

29. Respondents' failure to obtain a financial responsibility mechanism for the UST system since November 2002 constitutes a continuing violation of 40 C.F.R. 280.93(a) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

COUNT 4

Failure to operate and maintain corrosion protection system continuously

30. In accordance with 40 C.F.R. § 280.31(a), owners and operators of steel UST systems with corrosion protection must operate and maintaining all corrosion protections systems to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.

31. Respondents failed to continuously operate and maintain the corrosion protection system for the tank from the date the UST system was installed.

32. Respondents' failure to continuously operate and maintain the corrosion protection system for the UST system since November 2002 constitutes a continuing violation of 40 C.F.R. 280.31(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 \$48,125 as follows:

| COUNT | VIOLATION | PROPOSED PENALTY |
|---------|---|------------------|
| Count 1 | Failure to monitor tanks every 30 days, 40 C.F.R. § 280.41(a) | \$13,500 |
| Count 2 | Failure to perform monthly monitoring on pressurized piping, 40 C.F.R. § 280.41(b)(1)(ii) | \$13,500 |
| Count 3 | Failure to comply with financial responsibility Requirement, 40 C.F.R. § 280.93(a) | \$7,442 |
| Count 4 | Failure to operate and maintain corrosion protection system continuously, 40 C.F.R. § 280.31(a) | \$13,683 |

TOTAL PROPOSED PENALTY: **\$48,125**

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:

Amy Swanson, 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 this 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 St., 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.

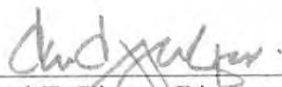
IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

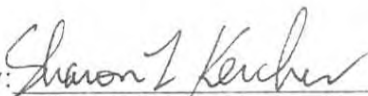
EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set forth above. The settlement process, 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: 13 December 2007

By: 
Michael T. Risner, Director
Legal Enforcement Program

Date: 14 December 2007

By: 
Sharon L. Kercher, Director
Technical Enforcement Program

Date: December 14, 2007

By: 
Amy Swanson, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop St. (8ENF-L)
Denver, CO 80202-1129
Telephone: 303/312-6906
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the 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 to:

Marcus Wells Jr., Chairman
Fort Berthold Tribal Business Council
404 Frontage Road
New Town, ND 58763

and to:

Yolanda Bears Tail, Manager
Highway 8 Convenience Store
A Sesame Frontage Road
White Shield, ND 58775

Date: 12/17/07

By: Judith M McTernan