

LAW OFFICE OF PAUL ZOGG

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VIA HAND DELIVERY

May 23, 2012

FILED
EPA REGION VIII
HEARING CLERK

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

Re: In re Asher Associates L.L.C.
CWA-08-2011-0037

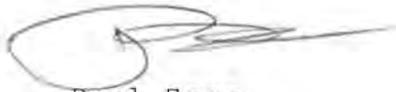
Dear Ms. Artemis:

Pursuant to 40 C.F.R. §22.5(a), enclosed please find an original and one copy of an Answer to First Amended Complaint for filing in the above-captioned action.

If you have any questions or concerns, or there are other filing requirements, don't hesitate to let me know immediately.

Thank you for your assistance.

Very truly yours,



Paul Zogg

cc: Asher
Brenda Morris, Esq.

3. Paragraph 3 of the First Amended Complaint appears to contain legal interpretation that does not appear to require a response. To the extent a response is required, these allegations are denied.

4. Paragraph 4 of the First Amended Complaint appears to contain legal interpretation that does not appear to require a response. To the extent a response is required, these allegations are denied.

5. Paragraph 5 of the First Amended Complaint appears to contain legal interpretation that does not appear to require a response. To the extent a response is required, these allegations are denied.

6. Paragraph 6 of the First Amended Complaint appears to contain legal interpretation that does not appear to require a response. To the extent a response is required, these allegations are denied.

7. Paragraph 7 of the First Amended Complaint is admitted.

8. In response to Paragraph 8 and Footnote 1 of the First Amended Complaint, Asher admits it is the operator, and Petra admits it owns the mineral leases, at the facilities described. The facilities appear to be accurately described based on information in Asher's Spill Prevention Control Plans. Asher and Petra lack information concerning latitude and longitude and therefore deny same. To the extent not admitted herein, the allegations of Paragraph 8 are denied.

9. Asher and Petra deny that the 33-20 injection facilities contains the oil storage capacity alleged since the storage there is produced water, not oil. Asher and Petra admit the allegations with respect to the other facilities. To the extent not admitted herein, the allegations of paragraph 9 of the First Amended Complaint are denied.

10. Asher and Petra lack sufficient information concerning the alleged tributaries and rivers and deny same. Asher and Petra deny any implied assertion that there is jurisdiction due to “substantial nexus” to “waters of the United States.”

11. Asher and Petra admit the allegations of paragraph 11 of the First Amended Complaint as to Asher, but deny the allegations as to Petra.

12. Asher and Petra admit the allegations of paragraph 12 of the First Amended Complaint.

13. Asher and Petra admit the allegations of paragraph 13 of the First Amended Complaint.

14. Asher and Petra admit the allegations of paragraph 14 of the First Amended Complaint that the facilities are non-transportation-related onshore facilities, but deny the allegations that due to their location, they could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity.

15. Asher admits that it is an operator of the facilities described and Petra owns the mineral leases. To the extent not admitted herein, the allegations of paragraph 15 of the First Amended Complaint are denied.

16. Asher and Petra admit that Asher and/or its predecessor began operating the facilities in question prior to Aug. 16, 2002.

**FAILURE TO ADEQUATELY PREPARE AND IMPLEMENT
REQUIRED WRITTEN SPCC PLAN**

17. In response to paragraph 17 of the First Amended Complaint, Asher and Petra hereby incorporate by reference all of their other responses in this pleading.

18. Paragraph 18 of the First Amended Complaint contains legal allegations which do not appear to require a response. To the extent a response is required, the allegations are denied.

19. Petra and Asher admit that an EPA inspection occurred on approximately the date alleged with David Weinert of Tetra Tech, but lack sufficient information to respond to the remaining allegations of the First Amended Complaint and therefore deny same.

20. Petra and Asher lack sufficient information to respond to the allegations of paragraph 20 of the First Amended Complaint, and therefore deny same. In response to Footnote 2 to paragraph 20 of the First Amended Complaint, Asher and Petra admit that portions of the old SPCC plans were subsequently provided to EPA, and they were unsigned and undated. To the extent not admitted herein, Asher and Petra deny the allegations of Footnote 2.

21. Asher and Petra deny the allegations of Paragraph 21 of the First Amended Complaint.

22. Asher and Petra lack sufficient information to admit or deny the allegations of paragraph 22 of the First Amended Complaint, and therefore deny same. Asher and Petra affirmatively assert that Asher did not receive the preliminary list of potential specific violations at this time if such were provided as alleged.

23. Asher and Petra admit the allegations of paragraph 23 occurred on approximately the date alleged. To the extent not admitted herein, Asher and Petra deny the allegations of paragraph 23.

24. Asher and Petra admit that EPA received a revised SPCC plan as described from Asher on or about the date alleged. To the extent not admitted herein, Asher and Petra deny the allegations of paragraph

25. Asher and Petra deny the allegations of paragraph 25 of the First Amended Complaint.

26. Asher and Petra admit the allegations of paragraph 26 of the First Amended Complaint, but as worded, the paragraph is extremely misleading. The letter did not contain a list of any specific deficiencies. Further, Asher also received approximately contemporaneously a Sept. 1, 2011, letter from EPA advising that certain warnings were being “closed out.” The latter letter states that the Fish and Wildlife Service and EPA “collectively appreciate Asher Associates’ environmental remediation work performed at this fee lease to date.”

27. Asher and Petra admit to receiving a list that may be the same as the one in Attachment A in approximately April 2011, but this was the “first” such list it received, not a “revised” list. Asher and Petra deny the assertions in Attachment A that there were deficiencies as alleged. To the extent not admitted herein, Asher and Petra deny the allegations of Paragraph 27 of the Complaint as it incorporates Attachment A.

28. Asher and Petra admits that Asher has worked cooperatively with EPA to address deficiencies alleged by EPA at all pertinent times. They deny any implication that they did not do so prior to April 11, 2011, or any implication that EPA’s allegations of deficiencies were then, or now, valid or substantial in nature. To the extent not admitted herein, Asher and Petra deny the allegations of Paragraph 28 of the First Amended Complaint.

29. In response to paragraph 29 of the First Amended Complaint, Asher and Petra admit that they satisfied EPA to some of the alleged deficiencies claimed by EPA. To the extent not admitted herein, Asher and Petra deny the allegations of paragraph 29 of the First Amended Complaint.

30. In response to paragraph 30 of the First Amended Complaint, Asher and Petra deny that they have failed to address the EPA's alleged deficiencies, or that there are any Oil Pollution Act or Spill Control regulation violations outstanding. Asher and Petra admit that EPA staffers have informed them that they remain unsatisfied, but Asher and Petra deny the remainder of the allegations in paragraph 30 of the First Amended Complaint.

31. Asher and Petra deny the allegations of paragraph 31 of the First Amended Complaint. They affirmatively aver that they have diligently and repeatedly and adequately addressed deficiencies alleged by EPA.

32. Asher and Petra deny the allegations of Paragraph 32 of the First Amended Complaint.

33. Asher and Petra deny the allegations of Paragraph 33 of the First Amended Complaint. .

34. Asher and Petra deny the allegations of Paragraph 34 of the First Amended Complaint.

CIVIL PENALTY

35. Asher and Petra deny liability as alleged in paragraph 35 of the First Amended Complaint. The remainder of the allegations in the paragraph appear to contain legal interpretations that do not require a response, and therefore are denied.

36. Asher and Petra deny liability as alleged in paragraph 36 of the First Amended Complaint. The remainder of the allegations in the paragraph appear to contain legal interpretations that do not require a response, and therefore are denied.

37. Asher and Petra affirmatively assert that a penalty of \$177,500 as proposed in paragraph 37 of the First Amended Complaint is grossly disproportionate to the facts and circumstances of this case. The remaining allegations of the paragraph appear to be legal interpretations, which do not require a response. To the extent they do require a response, they are denied.

38. Asher and Petra lack sufficient information concerning what factors EPA considered as alleged in paragraph 38 of the First Amended Complaint, and therefore deny those allegations. Asher and Petra affirmatively assert that any reasonable consideration of the pertinent factors would not have led to the assertion of a maximum penalty of \$177,500 against Asher and Petra for the violations alleged.

39. Asher and Petra deny the allegations of paragraph 39 of the First Amended Complaint that charges that the violations alleged should be considered “major” violations, where no actual environmental harm is alleged; where the only violations alleged are inadequate, not non-existent, prevention plans, which were in the process of revision prior to any EPA inspection; where the facilities are located in arid country significantly distant from flowing water; where the violations were cited long before the regulations became legally effective; where EPA was partly responsible for the delays in Asher’s ability to respond by failing to specify its concerns and notify Asher in a timely fashion; where most of the facilities cited by EPA were shut-in and not operating and any salable oil products were removed for most of the period in question; and where EPA has

unreasonably resisted reasonable and diligent efforts by Asher to address the concerns raised by the agency in light of the fact that the company has one full-time employee and a limited ability to pay large amounts for compliance or penalties. Many of EPA's objections appear to be subjective value judgments or involve technical issues that have nothing to do with any potential environmental harm or culpability. In light of Asher's small size, EPA's long list of alleged deficiencies merely shows a grossly disproportionate agency response to what is, at best, a handful of relatively minor issues with a small business attempting to comply with multiple agency regulators and a limited income stream. To the extent not admitted herein, the allegations of paragraph 39 are denied.

40. Asher and Petra deny that they are "culpable" and failed to "promptly rectify" EPA's concerns as alleged in Paragraph 40 of the First Amended Complaint, and further deny that any of these misleading allegations in this paragraph justify a large civil penalty. Furthermore, Asher and Petra affirmatively aver that Asher's "conversations and meetings with EPA" represent good-faith, diligent efforts, consistent with the company's resources, to try to *address* EPA's concerns, and do not show "culpability." EPA's long list of deficiencies merely demonstrate the agency's inability to proportionately address issues not involving actual environmental harm with a small business and a limited income stream. EPA's recitation of a "history of violations" is grossly misleading. The Region 7 violation referenced involved a predecessor company and predecessor management, involving a minor incident 10 years ago that was resolved with the agency for a nominal fine of \$3,000. The alleged Wyoming water violations involved a minor accident by a third-party skimming oil from a tank, did not result in any releases to

flowing water and were addressed with the state agency. The failure to send in discharge monitoring reports were minor incidents that occurred during a contractor transition; the tests were made during the transition and the results eventually sent in to the state. Asher and BLM agreed to shut in five wells, only two of which were operating, as a precaution to address a complaint of excess release of hydrogen sulfide. Asher has worked cooperatively with BLM in addressing this concern. There was no release of “deadly” amounts of hydrogen sulfide gas, as EPA appears to allege. The complaint, which is questionable to begin with, involved odors, not poisoning. To the extent not admitted herein, the allegations of paragraph 40 of the complaint are denied.

41. Asher and Petra lack sufficient information to form a belief about the EPA’s allegations in Paragraph 41 of the First Amended Complaint, and therefore deny those allegations.

OPPORTUNITY TO REQUEST A HEARING

42. In response to paragraph 42 of the First Amended Complaint, Asher filed a Request for Hearing on Nov. 9, 2011 and stands by that request. Petra Energy Inc. hereby files a Request for Hearing also. To the extent not admitted herein, Asher and Petra deny the allegations of paragraph 42 of the First Amended Complaint.

TERMS OF PAYMENT FOR QUICK RESOLUTION

43. In response to paragraph 43 of the First Amended Complaint, Asher and Petra elect not to make payment for quick resolution. To the extent the remainder of the allegations of paragraph 43 are relevant and deemed to require a response, they are denied.

PUBLIC NOTICE

41. [sic] The second paragraph 41 of the First Amended Complaint appears to contain only legal notice language that does not require a response. To the extent a response is required, the allegations of this paragraph are denied.

SETTLEMENT CONFERENCE

42. [sic] The second paragraph 42 of the First Amended Complaint appears to contain only legal notice language that does not appear to require a response. To the extent a response is required, the allegations of this paragraph are denied.

AFFIRMATIVE DEFENSES

1. EPA's lengthy, technical spill control regulations violate due process in general and as applied here because the regulations are so vague in some respects, and so technical in other respects, that EPA gains virtually absolute discretion as to who to prosecute for violations and when to say they are in compliance. For example, here, EPA questions whether inspection, monitoring and even engineer certifications are "adequate."

2. EPA has cited Asher for violations of Spill Control Regulations allegedly beginning in 2009 and extending forward to the present. However, the regulations cited did not become effective until Nov. 11, 2011, 40 C.F.R. §112.3(a)(1), and by that time, Asher was substantially compliant with the rules.

3. Asher has substantially complied with some or all of the rules allegedly violated during some or all of the period of time in question.

4. EPA failed to comply with its own statutes, regulations and policies.

REQUEST FOR RELIEF

WHEREFORE, for all the foregoing reasons, Asher and Petra respectfully request that EPA's proposal to assess a civil penalty in the First Amended Complaint be denied

in all pertinent respects, and that Asher and Petra be awarded their attorney fees and costs pursuant to the Equal Access to Justice Act, or other applicable law, and be awarded any other relief to which they are justly entitled under the circumstances.

Dated this 23rd day of May, 2012:

Respectfully submitted

LAW OFFICE OF PAUL ZOGG



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CERTIFICATE OF SERVICE PURSUANT TO 40 C.F.R. §22.5(A)

The undersigned hereby certifies that on this 23rd day of May 2012, a true and correct copy of the foregoing **ANSWER TO FIRST AMENDED COMPLAINT**, by email addressed to Morris.Brenda@epamail.epa.gov and by first-class mail, postage prepaid address to:

Brenda L. Morris, Esq.
U.S. EPA, Region 8
1595 Wynkoop St. (ENF-L)
Denver, CO 80202-1129

