

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

FILED
1/22/2024
9:30 AM
U.S. EPA REGION 8
HEARING CLERK

IN THE MATTER OF:)
)
Joseph Kary, Owner/Operator)
)
Kary's Service Center)
502 Main Street)
Parmelee, South Dakota 57566)
)
Respondent.)
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)
)
)
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Docket No. RCRA-08-2024-0004

COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY
FOR HEARING

I. AUTHORITY

This is a civil administrative action authorized by Section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e. The Complainant is the Administrator of the Environmental Protection Agency (EPA), whose authority has been properly delegated 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.

II. GENERAL ALLEGATIONS

1. Subtitle I of RCRA, RCRA sections 9001-9010, 42 U.S.C. §§ 6991 - 6991i, authorizes the EPA to regulate the installation and use of “underground storage tanks” (USTs or tanks) which contain “regulated substances” as those terms are defined in section 9001 of RCRA, 42 U.S.C. § 6991.
2. The EPA has jurisdiction over this matter pursuant to RCRA section 9006, 42 U.S.C. § 6991e.
3. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes the 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. The EPA has promulgated these regulations at 40 C.F.R. Part 280,

subpart D.

4. Petroleum, and any fraction thereof, is a regulated substance as defined at RCRA section 9001(2), 42 U.S.C. § 6991(2).
5. The EPA is the “implementing agency” as that term is used at 40 C.F.R. § 280.12.
6. Respondent Joseph Kary owns and/or operates two 1,000 gallon, single-walled STI-P3 tanks at the Kary’s Service Center Facility (“Facility”) located at 502 Main Street, Parmelee, South Dakota, within the exterior boundaries of the Rosebud Indian Reservation. The Respondent installed the tanks in May 1999 to store unleaded gasoline for use at the facility’s for-profit gas station.
7. The Respondent is a “person” as defined in RCRA § 9001 (6), 42 U.S.C. § 6991 (6), and 40 C.F.R. § 280.12, and is therefore subject to regulation under RCRA.
8. The Respondent is an “operator” as defined in RCRA § 9001 (4), 42 U.S.C. § 6991 (10), and 40 C.F.R. § 280.12 of the underground storage tank system, as defined in RCRA § 9001(1), 42 U.S.C. 6991 (10), and 40 C.F.R. § 280.12.
9. The Respondent is an “owner” as defined in RCRA § 9001 (3), 42 U.S.C. § 6991 (3), and 40 C.F.R. 280.12 of the UST system at the Facility.
10. One of the tanks in UST system (“UST 1”) has a capacity of 1,000 gallons and contains unleaded gasoline. UST 1 was installed in May 1999.
11. The second tank in the UST system (“UST 2”) has a capacity of 1,000 gallons and contains unleaded gasoline. UST 2 was installed in May 1999. UST 2 is not currently in use.
12. Any owner or operator of a UST who fails to comply with any requirement or standard promulgated by the Administrator under RCRA § 6991b is subject to a civil penalty not to exceed \$29,221 for each tank for each day of violation. 42 U.S.C. § 6991e(d)(2), 88 Fed. Reg. 247 (Dec. 27, 2023).
13. Pursuant to section 9006(a) of RCRA, 42 U.S.C. § 6991e(a), the EPA is authorized to issue compliance orders whenever the Agency determines that any person has violated or is in violation of any requirement of subtitle I of RCRA, 42 U.S.C. § 6991.
14. This order sets forth specific actions the Respondent is required to conduct within specified schedules to return the Facility to compliance with RCRA.

15. Any violator who fails to comply with a section 9006 order within the time specified in the order shall be liable for a civil penalty of not more than \$73,045 for each day of continued noncompliance. 42 U.S.C. § 6991e(a)(3), 88 Fed. Reg. 247 (Dec. 27, 2023).
16. On August 4, 2021, EPA Inspector Mark Hendrix conducted a routine facility compliance inspection of the USTs at the Facility. The purpose of the inspection was to assess the Facility's compliance with the UST regulations. The EPA identified several areas of potential noncompliance with 40 C.F.R. Part 280 at the time of the inspection.
17. During the August 4, 2021 inspection, the EPA requested a record of spill bucket integrity testing for UST 1. On August 9, 2021, the Respondent hired a contractor, Grimm's Pump and Industrial Supply ("Grimm's"), to perform tests on UST 1's spill prevention equipment. The equipment failed the required testing. The EPA received the test record from Grimm's on March 14, 2022.
18. During the August 4, 2021, inspection, the EPA requested a record of overfill prevention equipment inspection for UST 1. On August 9, 2021, the Respondent hired Grimm's to inspect UST 1's overfill prevention equipment. There was no overfill prevention equipment installed on UST 1. The EPA received Grimm's work order on March 14, 2022.
19. During the August 4, 2021 inspection, the Respondent stated that UST 2 was not in service. EPA requested a record of compliance with the temporary closure regulations. On August 9, 2021, the Respondent hired Grimm's to inspect UST 2. Grimm's found 10 inches of standing water inside UST 2. The EPA received Grimm's work order on March 14, 2022.
20. During the August 4, 2021 inspection, the EPA requested records of annual and monthly walkthrough inspections for UST 1 and UST 2. The Respondent did not provide those records.
21. On October 6, 2021, the EPA informed the Respondent of potential noncompliance by certified mail and provided a copy of the inspection report. The EPA informed the Respondent of what corrective actions were needed to return the Facility to compliance and requested proof of compliance within forty-five days of receipt of the letter. The EPA did not receive a response from the Respondent.
22. On December 14, 2021, the EPA again contacted the Respondent by certified mail, requesting that the Respondent complete corrective actions to bring the facility into compliance and submit proof of compliance within 45 days of receipt of the letter. The EPA did not receive a response from the Respondent.

23. On March 14, 2022, an employee of the Rosebud Environmental Department visited the Facility, photographed the Respondent's Class A&B Operator certificate and provided a copy to the EPA.
24. On April 4 and June 9, 2022, the EPA contacted the Respondent by telephone to determine if the repairs to the equipment, as well as the removal of the liquid from the UST 2, had been completed. During the conversation, the Respondent did not supply any compliance information.
25. On August 26, 2022, the EPA issued a Field Citation in the amount of \$2,494 to the Respondent. The field citation was hand-delivered on November 28, 2022, as the Respondent did not sign for certified mail from the EPA.
26. On March 6, 2023, the EPA withdrew the field citation and issued an expedited settlement agreement (ESA) to the Respondent in the amount of \$4,666. Certified mail sent to Respondent's address was not picked up and was returned to sender. The ESA was re-sent via priority mail in April 2023. No response has been received from the Respondent.
27. On September 11, 2023, the EPA withdrew the ESA and issued a Notice of Violation and Opportunity to Confer (NOVOC) to the Respondent.
28. Respondent contacted the EPA by phone on October 31, 2023. EPA discussed the work necessary to return the Facility to compliance with Respondent. Respondent confirmed no work had been completed as of that date.

III. FINDINGS OF VIOLATION

40 C.F.R. § 280.21(d) Failure to provide spill prevention equipment

29. 40 C.F.R. § 280.21(d) and the UST system performance standards in 40 C.F.R. §280.20(c) require that owners and operators of USTs use spill prevention equipment to prevent spilling associated with product transfer to the UST system.
30. During the August 4, 2021 inspection, the EPA requested Respondent provide a record of spill bucket integrity testing for UST 1. A test of the spill bucket was conducted by Grimm's, on August 9, 2021, and the spill bucket failed the integrity testing.
31. The EPA received proof of the failed test on March 14, 2022, from Grimm's.

32. The EPA discussed repair or replacement of the spill bucket with the Respondent on April 4, and June 9, 2022.
33. The Respondent has not provided proof of repair or replacement of the spill prevention equipment to the EPA.
34. The Respondent's failure to use proper spill prevention equipment constitutes a violation of 40 C.F.R. § 280.21(d) and section 9003(b) of RCRA, 42 U.S.C. § 6991b(c).

40 C.F.R. § 280.21(d) Failure to install overfill prevention equipment

35. 40 C.F.R. § 280.21(d) and the UST system performance standards in 40 C.F.R. § 280.20(c) require that owners and operators of USTs use overfill prevention equipment that will either alert the owner or automatically shut off flow into the tank to prevent release of product into the environment.
36. During the August 4, 2021 inspection, the EPA requested the Respondent provide a record of overfill prevention equipment inspection for UST 1.
37. On March 14, 2022, the EPA received a completed work order dated August 9, 2021, from Grimm's, noting that no overfill prevention equipment was installed on UST 1.
38. The EPA discussed the requirement to install overfill prevention equipment on UST 1 with the owner on April 4 and June 9, 2022.
39. The Respondent has not provided proof of installation of overfill prevention equipment on UST 1 to the EPA.
40. The Respondent's failure to install overfill prevention equipment on UST 1 constitutes a violation of 40 C.F.R. § 280.21(d) and section 9003(b) of RCRA, 42 U.S.C. § 6991b(c).

40 C.F.R. § 280.36 Failure to conduct walkthrough inspections

41. 40 C.F.R. § 280.36 requires owners and operators of USTs to conduct monthly and annual walkthrough inspections.
42. 40 C.F.R. § 280.36(1) requires monthly and annual walkthrough inspections of the spill prevention equipment and release detection equipment.

43. 40 C.F.R. § 280.36(b) requires owners and operators to maintain records of monthly and annual walkthrough inspections for one year.
44. During the August 4, 2021, inspection, the EPA requested records of Respondent's monthly and annual walkthrough inspections. The Respondent did not provide records of walkthrough inspections to the EPA.
45. To date, the EPA has not received records of monthly and annual walkthrough inspections from Respondent.
46. The Respondent's failure to provide records of monthly and annual walkthrough inspections to the EPA constitutes a violation of 40 C.F.R. § 280.36 and section 9003b(c) of RCRA, 42 U.S.C. § 6991b(c).

40 C.F.R. § 280.70 Failure to comply with temporary closure requirements

47. The temporary closure regulation set forth at 40 C.F.R. § 280.70 provides, in part, that when a UST system is temporarily closed, owners and operators must continue operation and maintenance of release detection equipment unless the UST is emptied. The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system.
48. During the August 4, 2021, inspection, the Respondent stated UST 2 was not in use. No release detection prevention equipment was installed on UST 2.
49. On August 9, 2021, the Respondent hired Grimm's to inspect UST 2. On March 14, 2022, the EPA received a work order from Grimm's that stated there was 10 inches of standing water inside UST 2.
50. To date, the EPA has not received proof from the Respondent that UST 2 has been emptied or that any release detection method has been installed or conducted.
51. The Respondent's failure to either maintain release detection equipment on the temporarily closed tank, or empty the UST 2, constitutes a violation of 40 C.F.R. § 280.70 and section 9003b(c) of RCRA, 42 U.S.C. § 6991b(c).

IV. COMPLIANCE ORDER

52. Based upon the Findings of Violation and the Findings of Fact and Law alleged above and pursuant to section 9006(a) of RCRA, 42 U.S.C. § 6991e(a), the Respondent is

hereby ORDERED to take the following actions in the specified timeframes:

53. Effective immediately, the Respondent shall comply with the walkthrough inspection requirements of 40 C.F.R. § 280.36. The Respondent will begin monthly and annual walkthrough inspections of the USTs immediately and maintain records of walkthrough inspections for one year. The Respondent shall provide the EPA with documentation of the monthly and annual walkthrough inspections upon request.
54. By June 30, 2024, the Respondent shall comply with the spill prevention equipment requirements of 40 C.F.R. § 280.21(d) and 40 C.F.R § 280.20(c) by repairing or replacing the spill prevention equipment on UST 1. Upon repair or replacement of the operating tank's spill bucket, the Respondent shall notify the EPA and provide documentation of the repair or replacement. Documentation of corrective action must include a completed work order to repair the spill bucket and a passing test of the spill bucket's ability to prevent a spill of product into the surrounding environment or a completed work order stating that the spill bucket was replaced.
55. By June 30, 2024, the Respondent shall comply with the overfill prevention equipment requirements of 40 C.F.R. § 280.21(d) and 40 C.F.R. § 280.20(c) by installing overfill prevention equipment on the operating tank (UST 1). Upon installation of the overfill prevent equipment, the Respondent shall notify the EPA and provide documentation of the installation. Documentation of corrective action must include a completed work order to install overfill prevention equipment that will automatically shut off flow into the tank when the tank is no more than 95 percent full; or alert the transfer operator when the tank is no more than 90 percent full by restricting flow into the tank or triggering a high-level alarm; or restrict flow 30 minutes prior to overfilling, alert the transfer operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings on top of the tank are exposed to product due to overfilling.
56. Within 90 days of the receipt of this Order, the Respondent shall either empty UST 2 or conduct tank release detection. Upon emptying UST 2, the Respondent shall notify the EPA and provide documentation that the UST has been emptied in compliance with 40 C.F.R. § 280.70. Documentation of corrective action must include a completed work order demonstrating that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in UST 2.

57. All documents required to be submitted by this Order shall be sent to the attention of:

Roberta Person
U.S. EPA Region 8
1595 Wynkoop St.
Mail Code: 8ENF-RO-O
Denver, CO 80202
person.roberta@epa.gov

V. PROPOSED CIVIL PENALTY

58. Section 9006e(d) of RCRA, 42 U.S.C. § 6991e(d), authorizes the assessment of a civil penalty of up to \$29,221 for each day of violation. Based on upon the facts alleged in this Complaint and considering the factors prescribed by statute, i.e., the seriousness of the violations and any good faith efforts by Respondent to comply with the applicable requirements, the EPA proposes to assess a civil penalty of \$71,993.26 for the following violations:

- a. First Count: At least one violation of 40 C.F.R. § 280.21(d) for failure to provide spill prevention – The Respondent’s failure to repair or replace the spill prevention equipment constitutes a major deviation from compliance with the UST regulations. The Respondent’s failure to provide spill prevention has a major potential to harm human health and the environment through, for example, spillage of petroleum fuel into the surrounding environment. The penalty for Count 1 is \$23,214.
- b. Second Count: At least one violation of 40 C.F.R. § 280.21(d) for failure to provide overfill protection - The Respondent’s failure to install overfill protection constitutes a major deviation from compliance with the UST regulations. The Respondent’s failure to provide overfill prevention equipment has a moderate potential to harm human health and the environment through, for example, overfill spillage of petroleum fuel into the surrounding environment. The penalty for Count 2 is \$10,141.
- c. Third Count: At least one violation of 40 C.F.R. § 280.36 for failure to conduct walkthrough inspections – The Respondent’s failure to conduct walkthrough inspections and provide records of walkthrough inspections constitutes a major deviation from compliance with the UST regulations. The Respondent’s failure to conduct walkthrough inspections has a major potential to harm human health and the environment through, for example, failing to inspect the functionality of equipment that prevents spills of petroleum fuel into the surrounding environment. The penalty for Count 3 is \$28,710.
- d. Fourth Count: At least one violation of 40 C.F.R. § 280.70(b) for failure to comply with temporary closure requirements – The Respondent’s failure to

comply with temporary closure requirements constitutes a major deviation from compliance with the UST regulations. The Respondent's failure to comply with temporary closure requirements has a moderate potential to harm human health and the environment through, for example, leakage of petroleum fuel residue into the surrounding environment. The penalty for Count 4 is \$9,928.

59. Enclosed with this Order is the EPA's Proposed Penalty Summary, which specifies the proposed penalty amount of \$71,993.26 for all of the violations alleged in this Order and explaining how the amount was calculated, as required by the Consolidated Rules of Practice.

VI. TERMS OF PAYMENT

60. If the Respondent does 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 30 calendar days of receipt of this Complaint, then no Answer need be filed. For more time for payment, the Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 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". The Respondent should note on the check the following: In the Matter of Kary's Service Center, and the EPA Docket No. (listed on the top of the first page of this Complaint, Compliance Order, and Notice of Opportunity for Hearing). The check shall be mailed to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
P.O. Box 979078
St. Louis, MO 63197-9000

In addition, at the time of payment, notice of payment of the civil penalty and copies of the check should be mailed to:

Katherine Tribbett, Regional Hearing Clerk
U.S. Environmental Protection Agency – Region 8
1595 Wynkoop Street (Mail Code 8ORC)
Denver, Colorado 80202
R8_Hearing_Clerk@epa.gov

and

Roberta Person
8ENF-RO-O
U.S. EPA Region 8
1595 Wynkoop St.
Denver, CO 80202
person.roberta@epa.gov

61. Payment of the penalty in this matter shall constitute consent by the Respondent to the assessment of the proposed penalty and a waiver of the Respondent's right to a hearing on this matter.
62. Payment of the penalty in this manner does not relieve Respondent of its obligation to perform the activities required by the Compliance Order.

VII. OPPORTUNITY TO REQUEST A HEARING

As provided in RCRA section 9006(b), 42 U.S.C. § 6991e(b), Respondent Kary's Service Center has the right to request a public hearing within 30 calendar days after the Complaint is served. If (1) you 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 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 Hearing Clerk (8RC), 1595 Wynkoop Street, Denver, Colorado 80202-1129, and a copy must be sent to the enforcement attorney below:

Colleen Adams, Honors Attorney
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop St.
Denver, Colorado 80202-1129
(303) 312-6673
adams.colleen@epa.gov

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.

VIII. OPPORTUNITY TO REQUEST A HEARING

The 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 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 the Complaint should be directed to the attorney-of-record listed below:

Colleen Adams, Honors Attorney
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop St.
Denver, Colorado 80202-1129
(303) 312-6673
adams.colleen@epa.gov

63. In accordance with section 9006(b) of RCRA, 42 U.S.C. 6991e(b), 40 C.F.R. 22.14(c) and 22.37(b), the RCRA requirements of this Order shall become final (30) days after service of this Order unless the Respondent requests a hearing in accordance with 40 C.F.R. § 22.15 no later than twenty (20) days after service of this Order.

IX. GENERAL PROVISIONS

64. The Respondent shall fully implement each item of this Order in accordance with the requirements and timeframes herein. The Respondent's failure to fully implement all requirements of this Order in the manner and time period required is a violation of this Order and may subject the Respondent to the assessment of penalties as provided under section 9006(a), 42 U.S.C. 6991e(a)(3).
65. Nothing in this Order shall be construed to prevent the EPA from taking whatever action(s) it deems appropriate for the violations cited in the Order or to relieve the Respondent from responsibilities, liabilities, or penalties pursuant to any applicable federal, tribal, or applicable law or regulation.
66. The Respondent may seek administrative review of this Order issued under section 9006(a) of RCRA in accordance with 40 C.F.R. part 22, and once this Order is final and reviewable pursuant to section 9006(b) of RCRA and 40 C.F.R. part 22, judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. 701-706.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY REGION 8,
COMPLAINANT.**

Janice A. Pearson, Manager
RCRA & OPA Enforcement Branch
Enforcement and Compliance Assurance Division