

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 JUL -9 AM 10:28

Docket No. CWA-08-2009-0006

In the Matter of:

Fulton Fuel Company,
a Montana corporation,

Respondent

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**MOTION FOR DEFAULT
JUDGMENT AND ORDER
AGAINST RESPONDENT**

Pursuant to 40 C.F.R. § 22.17(b) of the Consolidated Rules of Practice, Complainant hereby moves for a default judgment and order against Fulton Fuel Co. (Respondent) for failing to answer the Administrative Complaint and Notice of Opportunity to Request Hearing (Complaint) filed in this matter alleging violation of § 311(b)(6) of the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6), and of 40 C.F.R. §§ 112.3, 112.7, 112.9, and 112.10 for failure to prepare and implement a Spill Prevention, Control, and Countermeasure (SPCC) plan from February 29, 2004, through January 1, 2005. In support thereof states as follows:

1. Under 40 C.F.R. § 22.17(a) "A party may be found to be in default...after motion, upon failure to file a timely answer to the Complaint...."
2. In accordance with 40 C.F.R. § 22.15(a), Respondent is required to file an answer within 30 days after service of the Complaint. Respondent failed to file an answer prior to the expiration of the period, which was no later than June 22, 2009.
3. Prior to sending its Complaint, EPA sent a CWA § 308 Expedited Information Request on May 15, 2006, to Respondent's address at 127 Main Street,

Shelby, Montana 59474. On September 12, 2006, EPA sent a letter regarding Respondent's failure to answer to the information request. EPA did not receive Respondent's answer to the § 308 request until October 3, 2007, which was nearly a year and a half after the request was first made.

4. On February 20, 2009, EPA sent its Complaint via certified mail to both Respondent and its attorney, Mr. Richard L. Beatty. Mr. Beatty accepted service on February 23, 2009; however, Respondent declined, claiming that its address at 127 Main Street, Shelby, Montana 59474 was incorrect although it was the same address used for mailing of the § 308 information request referenced above and one of the addresses listed on the Montana Secretary of State's website for Respondent. Respondent provided an alternate handwritten address on the declined return receipt at P.O. Box 603, which is in fact a P.O. Box for the same mailing address to which the Complaint was initially sent and the alternate address listed at the Montana Secretary of State's website. The Montana Secretary of State website provides the following address for Respondent:

Registered Agent: WILLIAM M FULTON
Address 1: 127 MAIN STREET
Address 2: BOX 603
City: SHELBY
State: MT
Zip: 59474-0000

5. On March 23, 2009, EPA again sent its Complaint to Respondent by certified mail at both the aforementioned street address and the P.O. Box provided by Mr. Fulton and both addresses listed above by the Montana Secretary of State.

Respondent again did not accept service, and the mailing was marked “Unclaimed” and returned to Complainant.

6. After receiving the second returned certified mailing, the undersigned attorney for Complainant called Respondent’s attorney, Mr. Beatty, to discuss the Complaint. Mr. Beatty acknowledged that he had received the certified mailing of the Complaint to his office and had gone over it with his client, Mr. William M. Fulton, Jr. of Fulton Fuel Company. Mr. Beatty had no explanation as to why his client had rejected service of the Complaint on either of the two occasions it was sent by certified mail. Mr. Beatty was asked to inform Complainant as soon as possible if his client was willing to discuss the Complaint and explain why he was refusing service as well as discuss if he was interested in attempting to resolve this matter. Mr. Beatty stated he was not sure he would be able to reach his client. No response was received to this request. Again on April 28, 2009, the undersigned attorney contacted Mr. Beatty by email requesting a response to the Complaint and any desire by the Respondent to discuss resolution of this matter. To date, Complainant has received no response from this additional request.
7. Complainant then requested that the Montana Toole County Sheriff Donna Matoon (Sheriff) serve the Complaint on the Respondent at the addresses where service was attempted by certified mail on the two occasions in paragraphs 4 and 5, above. The Complaint was hand delivered and served on Respondent by Patrick T. Kellegher of the Sheriff’s office on May 22, 2009. The Complaint informed the Respondent of the requirement to file an answer

within 30 calendar days and that a failure to do so could result in a default judgment and an admission of all allegations contained in the Complaint.

8. As noted, Respondent failed to file an answer within 30 calendar days (by June 22, 2009). To date, Respondent has not filed an answer or any response to the Complaint. Respondent is thus in default pursuant to 40 C.F.R. § 22.15(a).
9. Pursuant to 40 C.F.R. § 22.17(a), “[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of respondent’s right to contest such factual allegations.” Respondent has waived its right to contest the factual allegations contained in the Complaint.
10. Pursuant to 40 C.F.R. § 22.17(c), when the Presiding Officer finds that a default has occurred, he or she shall issue a default order against the defaulting party, unless the record shows good cause why a default order should not be issued. In this case the record clearly demonstrates Respondent’s continuous efforts to delay these proceedings and lack of any cooperation with Complainant’s requests, justifying issuance of a default order.
11. In addition, 40 C.F.R. § 22.17(c) provides that the relief proposed in the Complaint, or the motion for default, “shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding....”
12. Section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(i), as adjusted by 40 C.F.R. § 19.4, authorizes the EPA to assess an administrative civil

penalty of up to \$11,000 per violation with a maximum for all violations of \$27,500 for violations occurring between January 30, 1997 and March 15, 2004. For violations occurring on or after March 15, 2004, EPA may assess penalties of up to \$11,000 per violation, or a maximum of \$32,500.

Respondent is therefore liable for penalties of up to \$27,500 for the February 29, 2004 oil spill and \$32,500 for failure to prepare and implement an SPCC plan from the time of the discharge through January 2005, when its facility was sold to another entity.

13. Pursuant to CWA § 311(b)(8), 33 U.S.C. § 1321(b)(8), EPA must take into account the following factors in assessing an administrative penalty: the seriousness of Respondent's alleged violations, the economic benefit to the violator resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any of the violator's efforts to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other factors as justice may require. The environmental impact of Respondent's discharge of approximately 10 barrels (420 gallons) of oil was moderate, as there was no significant threat to human health, drinking water supply, or sensitive ecosystems or wildlife; however, there was a direct impact on Fred and George Creek and its adjoining shorelines and vegetation. The discharge created an oil sheen and discoloration on the surface of Fred and George Creek, and a sludge or emulsion was deposited beneath the creek's surface and its adjoining shorelines in quantities

considered harmful under 40 C.F.R. § 110.3, which implements portions of CWA § 311, 33 U.S.C. § 1321. The proposed penalty amount for Respondent's lengthy failure to prepare an SPCC plan and conduct and document periodic inspections and maintenance of flowlines at the facility is considered to be moderate noncompliance. Notably, Respondent accrued an economic benefit through its failure to implement adequate SPCC and flowline inspection, maintenance, and documentation programs. Because Respondent is a small owner/operator with limited resources and has no history of prior violations, EPA does not propose additions for culpability or noncompliance history. However, Respondent does not qualify for a penalty reduction based on mitigation factors due to its inadequate efforts to respond to and minimize impacts from the spill.

PRAYER FOR RELIEF


In light of the statutory factors and the specific facts of this case, Complainant respectfully moves for a default judgment against Fulton Fuel Co. and requests that an administrative penalty of \$32,500 be assessed.

Respectfully submitted this 9th day of July, 2009.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
REGION 8

Complainant

BY:



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Docket No. CWA-08-2009-0006

Certificate of Service

In accordance with 40 C.F.R. § 22.5, the undersigned hereby certifies that on July 9, 2009 the original and one copy of the **Motion for Default Judgment and Order Against Respondent Fulton Fuel Co.**, Docket No. CWA-08-2009-0006, were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129, and that true copies of the same were delivered via U.S. first class mail to the following:

Mr. William M. Fulton, Jr., Registered Agent
Fulton Fuel Company
127 Main Street
P.O. Box 603
Shelby, MT 59474

and via U.S. certified mail, return receipt requested, to:

Mr. William M. Fulton, Jr., Registered Agent
Fulton Fuel Company
127 Main Street
P.O. Box 603
Shelby, MT 59474

And

Mr. Richard L. Beatty, Esq.
153 Main Street
P.O. Box 904
Shelby, MT 59474

Date: 7/9/09

By: Judith M. McTernan