

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2009 JAN 13 AM 9:49

IN THE MATTER OF:)
)
Stockton Oil Company, Inc.)
)
Battlefield Express Center Facility)
Crow Agency, MT 59022)
)
EPA ID NO. 2020002,)
)
Respondent.)
_____)

Docket No. RCRA-08-2008-0007

ORDER TO SHOW CAUSE AND ORDER TO SUPPLEMENT THE RECORD

Complainant, U.S. Environmental Protection Agency (EPA) Region 8, has moved for entry of a Default Order against Respondent, Stockton Oil Company, Inc., for its failure to file an Answer in this matter.

Complainant initiated this administrative action on July 15, 2008, alleging that Respondent violated Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, also known as the Underground Storage Tank Program. Respondent was served with a copy of the Complaint on July 21, 2008.¹ Respondent has failed to file an Answer as required by 40 C.F.R. § 22.15. *See* Complainant's Memorandum in Support of Motion for Default (Memo in Support). On November 14, 2008, Complainant moved for the entry of a Default Order against Stockton Oil Company, Inc. and the assessment of a penalty of \$41,511.

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Consolidated Rules). Section 22.17 of the Consolidated Rules provides in part:

¹ Section 22.5(b)(1) requires complainant to serve a copy of the signed original of the complaint on respondent or a representative authorized to receive service on respondent's behalf. Where respondent is a domestic corporation, complainant shall serve "an officer, partner, a managing or general partner, or any other person authorized by appointment or by Federal or State law to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii)(A). Complainant has demonstrated that it has complied with these service requirements. A properly executed certified mail receipt was signed by Cheryl Lingohr on July 21, 2008. The returned certified mail receipt is proof of service of the above referenced Complaint.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint Default 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. . . .

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

In addition, the Consolidated Rules provide in pertinent part that:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.


40 C.F.R. § 22.27(b).

As noted above, Consolidated Rules § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. Complainant has submitted its Memo in Support, which includes a narrative explanation of the penalty sought in this matter. Penalty calculation worksheets were also attached to the Complaint. *See* Attachments to Complaint. The person who calculated the penalty worksheets and the narrative explanation in the Memo in Support were not signed or provided in a declaration. While on their face, they appear to demonstrate that the agency took into account the facts and appropriate policy factors to calculate its proposed penalty, a

declaration of the agency representative responsible for calculation of the penalty should be submitted to demonstrate agency compliance with the policy.² Complainant is hereby ORDERED to supplement the record with respect to its penalty calculation **on or before January 30, 2009.**

Furthermore, based on the record and Complainant's Memo in Support, Respondent has not attempted to contact the Agency to resolve this matter. In view of the gravity and consequences of a default, Respondent is ORDERED, on or before **January 30, 2009**, to show cause why it should not be held in default and to answer the Complaint. **Failure on the part of Respondent Stockton Oil Company, Inc. to file a timely response to this Order could subject it to assessment of the full amount of the proposed civil penalty of \$41,511.**

SO ORDERED this 13th day of January, 2009.



Elyana R. Sutin
Regional Judicial Officer

² Any facts in support of a proposed penalty should be established by means of an affidavit or declaration of the agency representative who conducted the penalty calculation. Any documents relied upon or generated in the course of that calculation can be referenced in the affidavit (or declaration) and attached thereto. *See In re Mortillero*, No. VI-99-1622, slip op. at 6, (EPA RJO Aug. 4, 2000)(arguments by counsel in a legal memorandum do not constitute evidence. *Id.* at 7.), citing *British Airways Board v. Boeing Company*, 585 F. 2d 946,952 (9th Cir. 1978) (legal memoranda not evidence); *cert denied*, 440 U.S. 981 99 S.Ct. 1790 (1979).

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER TO SHOW CAUSE AND ORDER TO SUPPLEMENT THE RECORD** in the matter of **STOCKTON OIL COMPANY, INC., BATTLEFIELD EXPRESS CENTER FACILITY; DOCKET NO.: RCRA-08-2008-0007** was filed with the Regional Hearing Clerk on January 13, 2009.

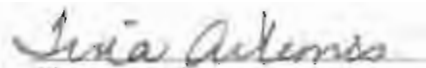
Further, the undersigned certifies that a true and correct copy of the document was delivered to Amy Swanson, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified mail/return receipt requested on January 13, 2009, to:

Mykel Stockton
Registered Agent
Stockton Oil Company, Inc.
1607 4th Avenue North
Billings, MT 59101

Hand-carried to:

Honorable Elyana R. Sutin
Regional Judicial Officer
U. S. Environmental Protection Agency
1595 Wynkoop Street (8RC)
Denver, CO 80202-1129

January 13, 2009



Tina Artemis

Paralegal, Regional Hearing Clerk