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EPA -- REGION 10  
UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
JOSEPH OH	)	Docket No. RCRA-10-2011-0164
	)	
and	)	
	)	
HOLLY INVESTMENT, LLC,	)	
	)	
Respondents.	)	
_____	)	

**COMPLAINANT’S MOTION FOR DEFAULT ORDER OR, IN THE ALTERNATIVE, MOTION IN LIMINE**

**I. Introduction**

Complainant U.S. Environmental Protection Agency Region 10 (“Complainant” or “EPA”) files this motion pursuant to Sections 22.16(a), 22.17 and 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (“the Consolidated Rules of Practice”), 40 C.F.R. §§ 22.16(a), 22.17 and 22.19. Complainant files this Motion for Default Order with regard to both the liability of Respondents Joseph Oh and Holly

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In the Alternative, Motion in Limine  
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U.S. Environmental Protection Agency  
1200 Sixth Avenue, Suite 900, ORC-158  
Seattle, Washington 98101  
206-553-1037

Investment, LLC and to the penalty proposed in the Administrative Complaint filed in this matter on September 28, 2011. Complainant also moves that the Presiding Officer issue a final compliance order consistent with the terms of the compliance order proposed in the Administrative Complaint. In the alternative, Complainant renews its motion in limine filed on June 29, 2012, requesting that the Presiding Officer draw an adverse inference from Respondents' failure to provide the information he was ordered to provide in various prehearing orders and preclude him from relying on such information as evidence at hearing. The legal grounds and factual basis for this motion are set forth below. On August 2, 2012, Complainant's counsel sent an email message notifying Mr. Oh and his associate, Gregory Tift, of Complainant's intent to file this motion. Complainant's counsel received a response from Mr. Tift who indicated that he did not believe that Mr. Oh would oppose this motion. However, Complainant's counsel has not received a response from Mr. Oh confirming this.

## **II. Procedural and Factual Background**

On September 28, 2011, EPA filed an administrative complaint ("Complaint") against Respondents alleging violations of Section 9003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b, and the implementing regulations at 40 C.F.R. Part 280. In the Complaint, EPA alleged that Respondents owned and/or operated two underground storage tanks ("USTs") at the Totem Grocery & Gas at which UST release detection and corrosion protection

violations occurred. On October 27, 2011, Joseph Oh filed an Answer generally denying all of the allegations in the Complaint and denying EPA is entitled to any relief or damages.

On December 7, 2011, Chief Administrative Law Judge Biro issued a Prehearing Order directing Respondent Joseph Oh to submit the following as part of his Prehearing Exchange:

(A) a narrative statement, and a copy of any supporting documents, explaining in detail the legal or factual bases for the denials in Paragraphs 2.1 through 2.12, and 3.2 through 3.11, of its Answer;

(B) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

Although Respondents filed an initial prehearing exchange in February 2012, Respondents have never provided any legal or factual basis for their denial of the allegations in the Complaint, nor a detailed narrative statement explaining the precise factual and legal bases for any position that the penalty should be reduced or eliminated, nor copies of any documents upon which they intend to rely in support of such position.

On June 29, 2012, Complainant filed a Motion to Compel Discovery or in the Alternative, a Motion in Limine, served the motion on Mr. Oh by overnight mail, and provided courtesy copies of the motion by email to Mr. Oh and Mr. Tift. Respondents did not file a response to the motion. On July 16, 2012, Judge Buschmann issued an order granting Complainant's Motion to Compel Discovery, and ordered Respondents to file and serve the

information requested by the Prehearing Order by July 23, 2012. Respondents have never filed or served the requested information, nor have they provided any response to the July 16<sup>th</sup> order. Further, Respondents did not move to supplement their initial prehearing exchange with any of the requested information by the July 30, 2012 deadline established in the Order Rescheduling Hearing and Prehearing Deadlines issued on April 18, 2012.

On July 24, 2012, Judge Buschmann issued a Notice of Hearing Location and Order Scheduling Prehearing Conference ordering the parties to participate in the prehearing conference on August 2<sup>nd</sup> to discuss, among other things, matters which may expedite the disposition of the proceeding. In this order, Respondents were specifically advised that failure to call in to the conference may result in a decision by default being entered against it.

Respondents failed to attend the prehearing conference.

### **III. Standard for Granting a Motion for Default Order**

Section 22.17 of the CROP, entitled "Default" reads as follows:

(a) Default. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. 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 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 the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. . . .

40 C.F.R. § 22.17(a).

In addition, section 22.19(g) of the Consolidated Rules of Practice, entitled “Failure to exchange information” provides that:

Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

- (1) Infer that the information would be adverse to the party failing to provide it;
- (2) Exclude the information from evidence; or
- (3) Issue a default order under § 22.17(c).

#### IV. ARGUMENT

Respondents have failed to comply with the information exchange requirements of 40 C.F.R. § 22.19(a) and the prehearing orders issued on December 11, 2011 and July 16, 2012, and failed to appear at the August 2<sup>nd</sup> prehearing conference as required in the order issued July 24, 2012. This clearly meets the standard for default in 40 C.F.R. § 22.17 and imposition of the sanctions in 40 C.F.R. § 22.19(g) is warranted Respondents’ continual disregard of the Court’s orders and the Consolidated Rules of Practice justify the entry of a default order against them.

To do otherwise would reward Respondents for their lack of diligence and their lack of respect for the administrative process.

In addition, Respondent has failed to submit "an explanation of why the proposed penalty of \$48,079 should be mitigated or eliminated," as required by the Prehearing Order. Thus, Respondent has not offered a rebuttal to Complainant's calculation of the penalty and the \$48,079 penalty should be assessed.

V. **Conclusion**

For the foregoing reasons, Complainant respectfully requests that the Presiding Officer enter an order of default against Respondents for liability and penalty and issue a compliance order consistent with the compliance order provisions proposed in the Complaint. In the alternative, Complainant renews its request for the motion in limine to draw adverse inferences as requested in its June 29<sup>th</sup> motion.

Respectfully submitted this 3rd day of August, 2012.



Deborah E. Hilsman  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 10

CERTIFICATE OF SERVICE

*for Default order  
D.E.H.*

In the Matter of Joseph Oh and Holly Investment, LLC, No. RCRA-10-2011-0164, I hereby certify that a copy of COMPLAINANT'S MOTION ~~TO COMPEL DISCOVERY OR,~~ IN THE ALTERNATIVE, MOTION IN LIMINE was sent to the following persons in the manner specified on the date below:

Original and one true and correct copy of the document, by hand delivery:

Candace H. Smith, Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region 10, Suite 900  
Office of Regional Counsel  
1200 Sixth Avenue, Mail Stop ORC-158  
Seattle, Washington 98101

A true and correct copy of the document, by Email and Pouch mail to:

The Honorable M. Lisa Buschmann, Administrative Law Judge  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W., Mail Code 1900L  
Washington, DC 20460  
Email: oaljfilng@epa.gov

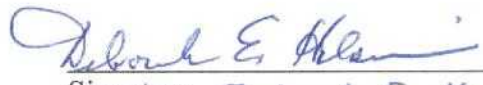
A true and correct copy document, by Email and Overnight Mail:

Joseph Oh, FBO  
4905 70<sup>th</sup> Avenue West  
University Place, Washington 98467  
Email: [josephoh405@gmail.com](mailto:josephoh405@gmail.com) and [oh.joseph@ymail.com](mailto:oh.joseph@ymail.com)

A true and correct copy by Email to:

Greg Tift  
Email: [ipwcci@mail.lawguru](mailto:ipwcci@mail.lawguru)

DATED: Aug 3, 2012

  
Signature *Deborah E. Hilsman*  
Print Name:  
Title: *Assistant Regional Counsel*