

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

In the Matter of:

Ross Transport Co., Inc.  
and Arnold Steinman

Respondents,

4220 Almond Street  
Philadelphia, PA 19137

Facility.

U.S. EPA Docket No.  
RCRA-03-2010-0268

Proceeding under Section 9006  
of the Resource Conservation and  
Recovery Act, as amended,  
42 U.S.C. § 6991e

PHILADELPHIA, PA  
OFFICE OF REGIONAL COUNSEL  
PER 2-14-10

**MOTION FOR DEFAULT ORDER**

Pursuant to 40 C.F.R. § 22.17(b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules")*, 40 C.F.R. Part 22, the United States Environmental Protection Agency, Region III ("Complainant") respectfully moves for the issuance of a Default Order against Respondents Ross Transport Co., Inc. and Arnold Steinman, for their failure to file a timely Answer to the Complaint, Compliance Order and Notice of Right to Request a Hearing ("Complaint"), which was filed on August 3, 2010. In support of this Motion, the Complainant avers as follows:

The Complaint alleges that the Respondents violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991m, and the Commonwealth of Pennsylvania's federally authorized underground storage tank program with respect to a certain underground storage tank at Respondents' facility located at 4220 Almond Street, Philadelphia, Pennsylvania, 19137. More specifically, the Complaint alleged that: 1) Respondents failed to perform automatic tank gauging for the UST at the Facility in accordance with 25 PA Code § 245.444(4); 2) Respondents have never performed a line tightness test every three years in accordance with 25 PA Code § 245.445(2) or have monthly monitoring conducted in accordance with 25 PA Code § 245.445(3) for the underground piping associated with the UST at the Facility as required by 25 PA Code § 245.442(2)(ii); and, 3) Respondents failed to continuously participate in the Underground Storage Tank Insurance Fund as required by 25 PA Code § 245.704.

The Complaint was served upon Respondent Ross Transport, Co., Inc. on August 4, 2010 by UPS, next day delivery and on Respondent Arnold Steinman on September 2, 2010 via by United States Postal Service ("USPS) certified mail, return receipt requested. UPS is "a reliable commercial delivery service that provides written verification of delivery", within the meaning of 40 C.F.R. § 22.5(b)(1). USPS certified mail, return receipt requested is method of service expressly authorized under 40 C.F.R. § 22.5(b)(1). A true and correct copy of the Complaint is attached as *Exhibit 1* to Complainant's accompanying Memorandum of Law. The Respondents each received a copy of the Complaint on August 4, 2010 and September 2, 2010, respectively, as evidenced by the documentation attached to the Certificates of Service previously filed with the Regional Hearing Clerk, copies of which are also attached to Complainant's accompanying Memorandum of Law as *Exhibit 2*.

In the Complaint, Complainant proposed the assessment of a statutory maximum civil administrative penalty against the Respondents, pursuant to Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2). For the purposes of this Default Motion, Complainant has calculated and now proposes the assessment of a specific penalty in the amount of \$30,352.00. The proposed penalty is based upon consideration of the statutory penalty factors set forth in Section 9006(c) and (e) of RCRA, 42 U.S.C. § 6991e(c) and (e), which include the seriousness of the violation and any good faith efforts to comply with the applicable requirements, the compliance history of the owner/operator and any other appropriate factors. These factors were applied to the particular facts and circumstances of this case with specific reference to EPA's November 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations ("UST Penalty Guidance"), annexed as *Exhibit 3* to Complainant's accompanying Memorandum of Law, which reflects the statutory penalty criteria and factors set forth at Section 9006 (c) and (e) of RCRA, 42 U.S.C. § 6991e(c) and (e), *Adjustment of Civil Monetary Penalties for Inflation*, pursuant to 40 C.F.R. Part 19 and the December 29, 2008 memorandum by EPA Assistant Administrator Granta Nakayama entitled, *Amendments to EPA's Civil Penalty Policy to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule* and April 6, 2010 memorandum of the Director for the Waste and Chemical Enforcement Division, Office of Civil Enforcement, Rosemary Kelley, entitled *Revision to Adjusted Penalty Policy Matrices Package*, annexed as *Exhibit 4* to

Complainant's accompanying Memorandum of Law.<sup>1</sup> See also *Declaration of Marie Owens, Exhibit 5* to Complainant's accompanying Memorandum of Law.

Under the *UST Penalty Guidance*, a company's inability to pay usually will be considered only if the issue is raised by the respondent and the burden of raising and presenting evidence regarding any inability to pay a particular penalty rests with the respondent. *UST Penalty Guidance*, at 23. Nevertheless, Complainant offers to consider Respondents' ability to pay a civil penalty in the Complaint. (see Complaint p. 8). Respondents have not responded in any manner to the Complaint. Respondents have failed to raise or pursue a claim of inability to pay a penalty and thus failed to meet its burden to present evidence regarding any claimed inability to pay a penalty. Therefore, Complainant made no adjustment to the proposed penalty based upon a claim of inability to pay any no such adjustment is appropriate on the record of this proceeding.

In the Complaint, Complainant ordered Respondents to perform certain "compliance tasks." Because Respondents did not file an answer to the Complaint, or otherwise request a hearing, this Compliance Order automatically became a final order 30 days after it was served. 40 C.F.R. § 22.37(b). Therefore, it is not necessary for the Regional Judicial Officer to take any further action with regard to the Compliance Order.

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<sup>1</sup> Pursuant to 40 C.F.R. Part 19, and as provided in the *Nakayama* memorandum and in the *UST Penalty Guidance*, penalties for RCRA I violations occurring after January 30, 1997 were increased by 10% to account for inflation, not to exceed a \$11,000.00 per tank per day of violation statutory maximum penalty. Pursuant to 40 C.F.R. Part 19, penalties for RCRA I violations occurring after January 12, 2009 have been increased to account for subsequent inflation, not to exceed a \$16,000.00 per tank per day of violation statutory maximum penalty.

Pursuant to 40 C.F.R. § 22.15(a), the deadline for Respondents to file an Answer to the Complaint was 30 days after service of the Complaint, or September 3, 2010 for Respondent Ross Transport and October 2, 2010 for Respondent Arnold Steinman. Neither Respondent has filed an Answer to the Complaint as of the date of filing of this Motion. In accordance with 40 C.F.R. § 22.15(d), “[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.” 40 C.F.R. § 22.17(a) provides, in relevant part, that “[a] party may be found to be in default, after motion, upon failure to file a timely answer to the complaint . . . .” 40 C.F.R. § 22.17(b) further provides, in relevant part, that “[w]hen the Presiding Officer finds that a default has occurred, [s/]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. . . . The relief proposed in the . . . motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act”

Pursuant to 40 C.F.R. § 22.17(a), Respondents’ failure to file an Answer within thirty (30) days of service of the Complaint “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.” In light of Respondents’ admission of all material factual allegations in the Complaint and on the basis of the law, the facts, the supporting evidence and the rationale in support of Complainant’s requested relief, as fully set forth in the accompanying Memorandum of Law and the attachments thereto, the Complainant respectfully moves:

- (a) For the entry of a Default Order jointly and severally against Respondents, pursuant to 40 C.F.R. § 22.17(b) of the *Consolidated Rules*; and

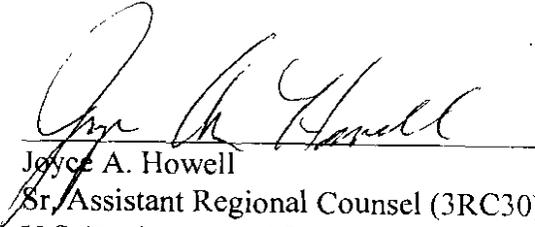
- (b) For the full assessment of the \$30,352.00 civil penalty proposed above, and such other relief as the Regional Judicial Officer determines to be fair and equitable, against Respondents and in the form of the proposed Order that is attached hereto for your consideration.

Such requested relief is clearly consistent with the record in this proceeding and with RCRA.

WHEREFORE, Complainant requests that the Regional Judicial Officer issue a Default Order against Respondents and therein assess the full amount of the proposed \$30,352.00 civil penalty and impose any such further relief to which the Regional Judicial Officer determines that Complainant is entitled, via execution of the proposed Order that is annexed hereto.

Respectfully submitted,

Dated: Nov. 2, 2010

  
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