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EPA REGION VIII
HEARING CLERK

December 29, 2009

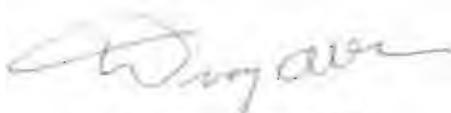
Ms. Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region VIII
1595 Wynkoop St.
Denver, CO 80202-1129
Facsimile: (303) 312-6859

*Re: In the Matter of Fulton Fuel Company
Docket No. CWA-08-2009-0006*

Dear Ms. Artemis:

Enclosed is Fulton Fuel Company's Response to Order to Supplement the Record and to Show Cause. Please file the same and bring it to the attention of the Judge.

Sincerely,



Douglas C. Allen

DCA/tf

Cc: Marc D. Weiner

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Attorney for Respondent

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8

IN THE MATTER OF:	* Docket #CWA-08-2009-0006
	*
Fulton Fuel Company	* FULTON FUEL COMPANY'S RESPONSE
	* TO ORDER TO SUPPLEMENT THE
a Montana Corporation	* RECORD AND TO SHOW CAUSE
	*
Respondent.	*

INTRODUCTION

The Environmental Protection Agency (EPA) filed an Administrative Complaint alleging a failure of Fulton Fuel Company to implement a Spill Prevention Control and Counter Measure (SPCC) plan from February 29, 2004 through January 1, 2005 and seeks to have a penalty assessed against Fulton Fuel Company based on the accidental and unpreventable discharge of a small amount of crude oil, from an underground three inch flowline buried underground, into Fred and George Creek, a small unnavigable stream in Toole County, Montana.

The flowline, which was not a storage facility within the meaning of the laws and regulations pertaining to and requiring SPCC plans, was not installed by Fulton Fuel company. Fulton Fuel Company acquired the property in the mid 1990's from Western Natural Gas Company (Western). The property acquired consisted of

three oil wells and a water injection well which are located in a remote rural area. Western placed the flow line across and beneath the creek bed several feet underground many years prior to Fulton Fuel Company's acquisition of the property. Prior to the leak which was detected on February 29, 2004, it would not have been possible for Fulton Fuel Company personnel to know the location or condition of the flowline so far underground.

Personnel from Fulton Fuel Company discovered the failure of the flowline as soon as it could be detected and took immediate remedial action so that the total loss of oil was only 6 to 10 barrels, not all of which entered Fred and George Creek. As detailed below, and in the exhibits which accompany this Response, Fulton Fuel Company took appropriate remedial and restoration actions From February 29, 2004 past the end of January 2005, when all of its properties were sold and Fulton Fuel Company ceased operations. It retained a competent engineering firm, HydroSolutions, Inc., worked closely with the Montana Department of Environmental Quality (DEQ) and spent over \$219,000.00 on remediation and restoration costs in the year and one half after the spill. The proposed penalty is not appropriate under the facts of this case.

DISCUSSION

Fred and George Creek meanders through rugged hill country in rural Northern Toole County, Montana. It is a small seasonal

stream which runs dry each year about one mile below the site of the spill. It is not even remotely navigable and does not reach any navigable stream. The EPA has apparently confused the small flowline which, unbeknown to Fulton Fuel Company, was located several feet under the creek bed, with a storage tank located some distance away from the spill. That storage facility was located at a place lower in elevation than the seasonal Fred and George Creek and any spill from that location could not reasonably be expected to reach any navigable waters of the United States. Therefore that facility may not even have been subject to SPCC rules. Assuming arguendo, that it was, the spill did not occur there.

The spill resulted from a break in a fiberglass underground three inch pipe buried several feet underground near where it crossed under the small creek bed of Fred and George Creek. The pipe was located there, years previously, by Western Natural Gas.

Fulton Fuel Company personnel inspected its properties on a regular basis. The leak was discovered by Mike Miller, a Fulton pumper, who immediately notified his supervisor, Mark Hesla. (HydroSolutions Inc., Technical Memorandum, Appendix A Exhibit 1). That document records their discovery and early response. Their early discovery and quick response with remedial measures occurred before a significant loss of oil could occur. The total loss of oil from the line was calculated, based on missing

production, to be 6 to 10 barrels; a minor amount, especially considering the remote rural site which is 55 miles north of Shelby, Montana. (HydroSolutions, Inc., draft work plan July 13, 2004. Exhibit 4.)

Fulton personnel immediately notified the landowners, the Montana Board of Oil and Gas Conservation and the Montana Department of Environmental Quality, among others. Letter of Renee Coppock, Exhibit 3. Remediation began on the day of discovery, February 29, 2004. A containment dike was constructed to contain the spilled oil, a siphon was constructed for clean water. The areas of oil accumulation were lined with absorbent pads and crews dug up the flow line, isolated the leak, and forever sealed off both ends of the failed flowline. Spilled oil was then burned on the advice of appropriate officials with the requisite permits. (Exhibit 3.)

Throughout 2004, Fulton Fuel Company worked with the Montana DEQ and through HydroSolutions, Inc., developed appropriate work plans to comply with directions of the DEQ.

On April 29, 2004 the DEQ wrote Mark Hesla, Fulton's production superintendent, concerning a recent site inspection it conducted, and directed Fulton Fuel to continue to monitor the release site, replace booms and pads as necessary and respond to landowner concerns on an ongoing basis pending DEQ's approval of a work plan. (Exhibit 2.) Fulton Fuel performed as requested and

on July 13, 2004 HydroSolutions Inc. submitted a draft work plan in response to the letter and other DEQ correspondence included in Exhibit 2, which contained detailed requirements. The purpose of the Draft Work Plan was to provide as per its cover letter, a:

...detailed response to all of the requirements contained in the referenced letter, written by Laura Alvey of the Remediation Division of the Montana Department of Environmental Quality (MDEQ). The responses are provided in the attached Remedial Investigation (RI) Work Plan, which describes how the work will be accomplished

The Draft Plan (Exhibit 4) provided DEQ with background, site history, release point and discovery information, initial response action, assessments, scope of work planned, sample locations and methodology and a whole lot more. The Draft Work Plan was approved by the DEQ on July 29, 2004. (Exhibit 5.)

On September 29, 2004 HydroSolutions Inc. updated or supplemented the Remediation Work Plan, noting,

"To date, Fulton Fuel, with HSI, has completed the background evaluation, characterization sampling along the creek, and addressed the management of surface clean up issues associated with the release."

The September 29, 2004 plan (Exhibit 6) was approved by the DEQ. (Exhibit 7.)

Fulton Fuel Company also provided, with the approval of the DEQ, a land farm site on other land owned by it for the removal

and disposal of contaminated soil at the disposal site. (See Exhibit 9.)

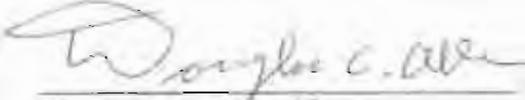
From the date of the release, February 29, 2004 to mid 2005, Fulton Fuel spent \$219,498.12 in providing the work of remediation and restoration associated with the flow line spill. Exhibit 8 is an itemization of those expenses.

In considering the items discussed in the Declaration and Supplemental Declaration of Jane Nakad, the actual facts of this case demonstrate: 1) that there was no violation by Fulton Fuel Company, or if so it was relatively minor and unrelated to the spill; 2) there was no economic benefit to Fulton Fuel Company, indeed it suffered a substantial financial detriment; 3) there was no culpability involved; 4) there was no other penalty assessed; 5) Fulton Fuel Company had no history of prior violations; 6) there were excessive, expensive and successful efforts to minimize or mitigate the effects of the discharge; and 7) Fulton Fuel Company has sold and no longer operates the property, but it paid for the cleanup and restoration, and therefore a penalty would have an unfair economic impact on Fulton Fuel Company. See §311 (b)(8) of the Act. 33USC §1321 (b)(8)

CONCLUSION

The penalty proposed by the EPA should not be assessed, or should be substantially mitigated and the EPA's complaint should be withdrawn or dismissed.

RESPECTFULLY SUBMITTED this 31st day of December, 2009.


Douglas C. Allen
Attorney for Fulton Fuel
Company

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 2009, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Marc D. Weiner
Enforcement Attorney
1595 Wynkoop Street
Denver, CO 80202-1129

