UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington

IN THE MATTER OF:	**)**	
	)	**DEFAULT ORDER**
Stutz Fuel Oil	**)**	
Service, Inc.	**)**	
	)	**Docket No. CWA-10-99-0238**
Respondent	**)**	
	)	

INTRODUCTION

This is a proceeding under the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits,* 40 C.F.R. Part 22, Fed. Reg./Vol. 64, N. 141/July 23, 1999 ("Consolidated Rules of Practice," "Consolidated Rules", or "the Rules"), by the U.S. Environmental Protection Agency, Region 10 ("EPA", "Agency", "Complainant"), to assess an administrative penalty pursuant to Subsection 311(b)(6) of the Clean Water Act ("CWA, "the Act"), 33 U.S.C. § 1321(b)(6), against Stutz Fuel Oil Service Inc. ("Stutz", "the Respondent"), for alleged violations of EPA's Oil Pollution Prevention regulations, promulgated pursuant to Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), as set forth in 40 CFR Part 112. Complainant has moved for Partial Default Order under § 22.17(b) of the *Consolidated Rules*. For the reasons set forth below a Partial Default Order is entered against the Respondent, and the matter is referred to the Complainant for subsequent submission of a motion and corroborating documentation for assessment of an appropriate penalty, in accordance with the Complaint in this matter.

PROCEDURAL BACKGROUND

On September 29, 1999, the Director, Office of Environmental Cleanup, EPA Region 10 ("Complainant") filed an administrative complaint with the Regional Hearing Clerk pursuant to § 22.13(a) of the *Consolidated Rules* citing Stutz Fuel Oil Service, Inc., under Section 311(b)(6) of the Consolidated Rules, 33 U.S.C. 1321(b)(6) for violations of Section 311(j)(1) of the Act, 33 U.S.C. §1321(j)(1), and regulations promulgated pursuant thereto. The Administrator delegated this authority to the Regional Administrator of EPA, Region 10, who in turn delegated it to the Director, Office of Environmental Cleanup, EPA Region 10. The Respondent was served with the Complaint, by certified mail, return receipt requested, on October 4, 1999.[1]

Section 22.15 of the *Consolidated Rules* requires Respondent to file an Answer with the Regional Hearing Clerk within 30 days after service of the Complaint.

Section 22.7 of the *Consolidated Rules* authorizes the Presiding Officer [Regional Judicial Officer] to grant timely motions for an extension of time to file an Answer to the Complaint.

On October 29, 1999, the Regional Judicial Officer granted the Respondent an extension of time to file an Answer by December 3, 1999.

On November 9, 1999, the Regional Judicial Officer granted the Respondent a second extension of time to file an Answer by January 3, 2000.

On January 3, 2000, the Regional Judicial Officer granted the respondent a third extension of time to file an Answer by February 3, 2000.

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[1] Complainant's Motion for Partial Default Order, Exhibit B

On May 25, 2000, the Complainant filed a Motion for Partial Default Order with the Regional Hearing Clerk.

As of the date of the filing of the Motion for Partial Default Order, nearly four months past the deadline set in the third Motion for Extension of Time , the Respondent had not filed an Answer to the Complaint.

STATUTORY AND REGULATORY FRAMEWORK

The objective of the Clean Water Act is " to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). To maintain the chemical, physical and biological integrity of the Nation's waters, EPA has promulgated regulations to prevent oil pollution of the Nation's waterways.

Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), provides that: "Any owner, operator, or person in charge of any . . . onshore facility, . . . (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be issued a Class I or Class II civil penalty by . . . the Administrator." Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from onshore and offshore facilities, and to contain such discharges ...."

Substantive Regulations

Under the authority of Section 311(j)(1) of the Act, 33 U.S.C. § 1321(j)(1), 40 C.F.R. Part 112 establishes procedures, methods, and requirements for preventing the discharge of oil. These requirements apply to owners or operators of non-transportation-related facilities engaged in drilling,

producing, gathering, storing, processing, refining, transferring, distributing or consuming oil or oil products that, due to their location, could reasonably be expected to discharge oil in harmful quantities (as defined in 40 C.F.R. Part 110) to navigable waters of the U.S. or adjoining shorelines.

Under 40 C.F.R. § 110.3, discharges of oil in harmful quantities are those discharges that either (1) violate applicable water quality standards, or (2) cause a film or sheen or discoloration on the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. The term "navigable water" is defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1.

Under 40 C.F.R. § 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare and fully implement a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. § 112.7 not later than six months after the facility began operations, or by July 10 1973, whichever is later, and must implement that SPCC plan not later than six months after the facility began operations, or by January 10, 1974, whichever is later.

Under 40 C.F.R. § 112.7, the SPCC plan shall contain a discussion of the appropriate containment and/or diversionary structures or equipment to prevent discharged oil from reaching a navigable water course.

Procedural Regulations

This proceeding is governed by the *Consolidated Rules of Practice*. Two provisions of the *Consolidated Rules* are relevant to the instant motion. 40 CFR § 22.15(d) provides as follows: "Failure of Respondent to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation." 40 CFR § 22.17 provides in part 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; . . . . 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.
>
> (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.

FINDINGS OF FACT

Pursuant to 40 CFR § 22.17(c) and based on the entire record, I make the following findings of fact:

The Complaint in this action, together with a copy of the *Consolidated Rules*, was served upon the Respondent by Certified Mail, returned Receipt Requested, on October 4, 1999. A copy of the properly executed Return Receipt is attached as Exhibit B to Complainant's Default Motion.

On October 29, 1999, the Parties filed a joint Motion for Extension of Time to File Answer with the Regional Hearing Clerk. The Regional Judicial Officer granted an extension of time to answer the complaint by December 3, 1999.

On December 3, 1999, the Parties filed a second joint Motion for Extension of Time to File Answer with the Regional Hearing Clerk. The Regional Judicial Officer granted an extension of time to answer the Complaint by January 3, 2000.

On January 3, 2000, the Parties filed a third joint Motion for Extension of Time to File Answer with the Regional Hearing Clerk. The Regional Judicial Officer granted an extension of time to answer the Complaint by February 3, 2000.

Respondent did not file an Answer to the Complaint by February 3, 2000, as required by the third extension of time, or obtain a further extension of time in which to file an Answer. To date, Respondent has not filed an Answer to the Complaint.

On May 25, 2000, Complainant filed Motion for Partial Default Order with the Regional Hearing Clerk . As of that date, the Respondent had not filed an Answer to the Complaint.

Complainant's Partial Default Motion was served on Respondent by Certified Mail, Return Receipt Requested, on May 26, 2000. The properly executed Return Receipt was received by the Regional Hearing Clerk, and a copy is attached hereto, as Exhibit 1.

Pursuant to 40 CFR § 22.16(b) Respondent had fifteen (15) days from the date of service to reply to Complainant's Default Motion. As of the date of this Order, the record contains no reply by Respondent to Complainant's Partial Default Motion.

The Consolidated Rules, § 22.17(a) provides: " 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."

Respondent is a corporation organized under the laws of Oregon with a place of business located at or near 3003 Harbor View Drive, Gig Harbor, Washington, Respondent is a "person" within the meaning of Section 311(a)(7) of the Act, 33 U.S.C. §1321(a)(7) and 40 C.F.R. § 112.2.

Respondent is an "owner or operator'" within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6) and 40 C.F.R. § 112.2, of a facility used for gathering, storing processing, transferring or distributing oil or oil products, located at or near 3003 Harbor view Drive, Gig Harbor, Washington ("the facility").

The facility has five above-ground storage tanks with a combined total capacity of 89,000 gallons. Two of these tanks have a capacity of 25,000 gallons each; two of the tanks are 12,000 gallon capacity; one is 15,000 gallon capacity. Numerous drums with oils, lubricants and other associated products are stored at the facility as well.

The facility is an "onshore facility", as defined in Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

The facility is located approximately ten feet from Puget Sound, which is a navigable water of the U.S.

Due to its location, the facility could reasonably be expected to discharge oil in harmful quantities to the navigable waters of the U.S. or adjoining shorelines, as described in 40 C.F.R. § 110.3

The facility is a non-transportation-related facility under the definition referenced at 40 C.F.R. § 112.2 and set forth in 40 C.F.R. Part 112, Appendix A, Section II, and 36 Fed. Reg. 24080 (December 18, 1971).

The facility began operations more than six months prior to the date of this complaint.

Based on the above, and under Section 311(j) of the Act, 33 U.S.C. § 1321(j) and its implementing regulations, respondent is subject to 40 C.F.R. Part 112 as owner or operation of the facility described herein.

On August 20, 1998, EPA representatives inspected the Stutz Fuel Facility to determine compliance with Section 311(j) of the Act and 40 C.F.R. Part 112.

In violation of 40 C.F.R. § 112.3(a), Respondent failed to fully implement a SPCC plan for the facility in accordance with the provisions of 40 C.F.R. § 112.7.

In violation of 40 C.F.R. 112.3(d), Respondent failed to have a registered professional engineer certify that the SPCC Plan had been prepared in accordance with good engineering practices.

In violation of 40 C.F.R. 112.5(b), Respondent failed to review and update the SPCC Plan every three (3) years. As of the date of inspection, the plan had not been reviewed and/or updated since 1994.

In violation of 40 C.F.R. § 112.7(e)(2)(ii), Respondent failed to provide adequate secondary containment constructed of an impervious material for the bulk storage areas.

In violation of 40 C.F.R. § 112.7(e)(2)(ii), Respondent failed to provide any containment in the loading rack area.

In violation of 40 C.F.R. § 112.7(e)(4)(iii), Respondent failed to provide an interlock warning light, barrier system or warning signs in the loading/unloading areas to prevent trucks from departing the facility prematurely or before complete disconnect of transfer lines.

In violation of 40 C.F.R. § 112.7(e)(9), Respondent failed to provide adequate security precautions. The facility is not fully fenced with locked or guarded entrance gates as required by 40 C.F.R. § 112.7(e)(9)(i). Respondent has also failed to provide adequate facility lighting as required by 40 C.F.R. § 112.7(e)(9)(v).

In violation of 40 C.F.R. § 112.7(e)(10((iii), Respondent failed to conduct spill prevention briefings for their operating personnel.

The above findings and facts alleged in paragraphs 1 -26 of the Complaint are admitted for the purposes of the pending proceeding only, and that as a consequence, Respondent is liable for the violations alleged above and in the subject paragraphs.

DISCUSSION

Prima Facie Case

In order for a default order to be entered against the Respondent, the Presiding Officer must conclude that Complainant has established a *prima facie* case of liability against the Respondent. To establish a *prima facie* case of liability, Complainant must present evidence 'sufficient to establish a given fact . . . which if not rebutted or contradicted, will remain sufficient . . . to sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence." **Black's Law Dictionary** 1190 (6th ed. 1990).

The facts set forth in the Complaint, and published above, in part, as Findings of Fact, establish jurisdiction over the Respondent and that the Respondent violated Sections 311(b)(6) and (j)(1) of the Act, 33 U.S.C. §§ 1321(b)(6) and (j)(1), and EPA's Oil Pollution Prevention regulations promulgated pursuant thereto under 40 CFR Part 112.

Since the Respondent did not file an Answer to the Complaint, it has presented no evidence to contravene the facts alleged in the Complaint. Section 22.17 of the *Consolidated Rules* provides that . . . "[d]efault by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a wavier of respondent's right to contest such factual allegations."

I therefore find that Complainant has established a prima facie case of liability and grant the Complainant's motion to admit for the purposes of the pending proceeding only, paragraphs 1 -26 of the Complaint, thereby finding the Respondent liable for the violations alleged in the Complaint.

Default

Under the *Consolidated Rules* - § 22.17(a) ". . . A party may be found to be in default . . . after motion, upon failure to file a timely answer to the Complaint; . . . ." In the instant case, the Complaint was filed with the Regional Hearing Clerk on September 29, 1999. The Complaint was served on the Respondent on October 4, 1999. Respondent's Answer to the Complaint was due to be filed with the Regional Hearing Clerk ". . . within 30 days after service of the Complaint" - by November 3, 1999. The Respondent requested and was granted three extensions of time to file an answer, the last of which expired February 3, 2000. On May 25, 2000, the Complainant filed a Motion for Partial Default Order with the Regional Hearing Clerk. The Motion for Partial Default Order was served on the Respondent on May 26, 2000. As of the date of this Order, the Respondent had not filed an answer to the Complaint. Therefore, based on the record and the above Findings of Fact, I find that the Respondent is in default for failing to file a timely Answer to the Complaint

CONCLUSIONS OF LAW

Pursuant to 40 CFR § 22.17(c) of the *Consolidated Rules*, and based upon the record, I conclude as follows:

Procedure for this case is governed by EPA's *Consolidated Rules of Practice*, 40 CFR Part 22. 40 CFR § 22.15(d) provides as follows: "Failure of the Respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation."

40 CFR § 22.17 provides in part 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; .... Default by Respondent constitute, 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.

(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.

The complaint in this action was lawfully and properly served on Respondent in accordance with Section 22.05(b)(1) of the Consolidated Rules, 40 CFR § 22.05(b)(1).

Pursuant to 40 CFR § 22.15(a), Respondent was required to answer the complaint within 30 days after service of the Complaint.

Respondent has failed to file a timely answer to the Complaint.

Complainant has moved for a Partial Default Order in the manner described by Section 22.17 of the *Consolidated Rules*, 40 CFR § 22.17.

Respondent is, therefore, in default pursuant to Section 22.17(a) of the *Consolidated Rules,* 40 CFR § 22.17(a)

In accordance with 40 CFR §§ 22.15(d) and 22.17(a), respondent's default constitutes an admission by Respondent of all the facts alleged in the Complaint and a waiver of Respondent's right to a hearing regarding these factual allegations. Respondent is thus held to have committed the violations alleged in the Complaint.

Having found the Respondent liable for the violations alleged in the Complaint, the issue of an appropriate penalty is referred back to the Complainant for subsequent action.

SO ORDERED This 1st Day of November, 2000.

/S/

Alfred C. Smith
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