UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

Docket No. SDWA-8-2000-01

IN THE MATTER OF:	)
	)
DAKOTA WINGS CORP., INC.	)
Madison, South Dakota	)
	)
Respondent.	)
	)

DEFAULT ORDER AND INITIAL DECISION

On June 22, 2000, the U.S. Environmental Protection Agency, Region VIII ("EPA", "Agency" or "Complainant") filed a motion for a Default Order with the Regional Hearing Clerk, pursuant to § 22.17 of the Consolidated Rules of Practice, against Dakota Wings Corporation, Inc. ("Dakota Wings", "the Corporation","Respondent") for failing to answer a complaint alleging that the respondent violated EPA's Underground Injection Control ("UIC") regulations promulgated under sections 1421 and 1422 of the Safe Drinking Water Act ("SDWA", "the Act"). 42 U.S.C. §§ 300h and 300h-1.

This proceeding is governed by EPA's *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, No. 141/July, 23, 1999, ("*Consolidated Rules*"or "the Rules"). For the reasons set forth below respondent is found in default and a penalty, in the amount of $9,500.00, is assessed against the respondent.

FINDINGS OF FACT

1. On November 10, 1999, the complainant filed a Proposed Administrative Order With Administrative Civil Penalty ("administrative order", or "complaint") against Dakota Wings Corporation Inc.("Dakota Wings", "the Corporation", "Respondent") with the Region VIII Hearing Clerk. The complaint charged that the respondent violated: (1) 40 C.F.R. § 144.12(a), by failing to close or retrofit a Class V disposal system to prevent contaminates from entering an underground source of drinking water ("USDW"); (2) 40 C.F.R. § 144.25(a), by failing to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from the drains in the required time period; and (3) 40 C.F.R. § 144.26, by failing to submit required inventory information. The complaint ordered the respondent's compliance with said regulations and proposed assessing an administrative civil penalty of $9,500.00 for the violations.

2. Dakota Wings Corporation, Inc. ("respondent") is a corporation organized under the laws of South Dakota, and is authorized to do business in the State of South Dakota. Respondent is a "person" within the meaning of Section 1401(12) of the SDWA , 42 § U.S.C. 300f(12).

3. Respondent owns and operates an airplane storage and maintenance hanger facility ("facility"), which is located at Highway 34 and S. Union Avenue at the airport in Madison, South Dakota.

4. Pursuant to Section 1422 of the SDWA , 42 U.S.C. § 1422, 42 U.S.C. § 300h-1, and Title 40, Code of Federal Regulations ("40 C.F.R".), Part 147, Subpart QQ, § 147.2101(a), EPA administers the Underground Injection Control ("UIC") program in the State of South Dakota. The effective date of the program is December 30, 1984 - see 40 C.F.R. § 147.2101(b). Said UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147, and 148.

5. On or about July 31, 1998, EPA sent a UIC introduction letter and a UIC Shallow Well Inventory Request Form to the respondent, certified mail return receipt requested. The envelope was returned to EPA by the U.S. Postal Service, as undelivered, after three unsuccessful delivery attempts.

6. On or about September 10, 1998, an EPA representative contacted a representative of Dakota Wings Corporation, Inc., Paul Moran, by telephone. Mr. Moran confirmed that the Dakota Wings Corporation Inc. facility, at the Madison airport, had an active Class V well. Mr. Moran described a floor drain, which ran the width of the hanger maintenance area, that was attached to a mounded septic system. He stated that both the facility's domestic sanitary waste and aircraft maintenance waste water entered the system.

7. The information provided by the September 10, 1998, phone conversation verified that the respondent operates a disposal system which EPA designates as a Class V injection well, subcategory 5X28. A Class V, subclass 5X28 injection well is any fluid waste disposal system which receives waste generated by an internal combustion engine repair and maintenance facility, that discharges into or above an underground source of drinking water ("USDW")[1]. EPA has determined that wastes generated by 5X28 type facilities may be harmful to human health and the environment. The injection of 5X28 waste into a shallow injection well, above the maximum contaminated levels for drinking water, may adversely affect the health of persons and is a violation of the SDWA.

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[1]. An underground source of drinking water ("USDW"), includes but is not limited to, an aquifer or its portion which: "(a) . . . (ii) [c]ontains less than 10,000 mg/l total dissolved solids; . . . ." See 40 C.F.R. § 144.3.

8. Septic tanks, dry wells, cesspools, and other types of disposal systems that could allow fluids to move into USDWs are considered shallow injection wells. The respondent's disposal system is a "Class V Injection Well", as defined by 40 C.F.R. §§ 144.6 and 146.5. The respondent is authorized by rule, under 40 C.F.R. § 144.24, to operate its disposal systems, subject to applicable requirements of 40 C.F.R. §§ 144.12, 144.25 and 144.26.

9. On September 10, 1998, EPA mailed an Underground Injection Control (UIC) Shallow Injection Well Program Class V Well compliance letter to the respondent, via certified mail. The letter required the respondent to bring the well into compliance with the EPA UIC regulations for Class V wells. This letter was subsequently returned to EPA as undelivered by the U.S. Postal Service after three unsuccessful delivery attempts.

10. On September 17, 1998, EPA representatives performed a routine inspection of the Dakota Wings Corporation, Inc. facility. The EPA inspectors identified a strip drain running across the maintenance area floor, which connected to a septic tank for solids separation, that discharged to a subsurface disposal system. Mr. Moran was present for the EPA UIC inspection. Mr. Moran described how the disposal system worked and said the ground water comes up into one of the drains and is pumped into the septic system and disposed of along with the other fluid waste.

11. On or about January 12, 1999, EPA mailed a second package, certified mail return receipt requested, to the respondent containing an UIC introduction letter and UIC Shallow Well Inventory Request Form. Again, this package was returned to EPA, as undelivered, by the U.S. Postal Service, after three unsuccessful delivery attempts.

12. As authorized by 40 C.F.R. § 144.12(c) and (d), on or about June 28, 1999, EPA sent the respondent an UIC noncompliance letter via certified mail. Mr. Paul Moran signed for this certified letter on July 14, 1999[2].

13. To date , EPA has not received from the respondent: a completed Class V inventory request form, a written well closure plan, or notification of intent to permit the Class V well system. Subsequent reminder calls to the respondent, as late as August 26 1999, verified that the respondent had not yet complied with any of the above requirements.

14. On October 19, 1999, an EPA representative performed a routine inspection of the Dakota Wings Corporation, Inc. facility. The EPA inspectors observed that the Class V disposal system had not been closed and was still in use.

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[2]. See June 28, 1999 letter in the administrative record, included as an attachment to the complaint.

15. On November 10, 1999, EPA filed a Proposed Administrative Order with Administrative Civil Penalty ("complaint") with the Regional Hearing Clerk.

16. After an unsuccessful attempt to serve a copy of the complaint on the respondent by certified mail, personal service was made on the respondent's representative, Mr. Paul Moran, on November 15, 1999, at the office of Dakota Wings Corporation Inc., in Madison, South Dakota, by EPA inspector, Ken Phillips.[3]

17. On June 22, 2000, the complainant filed a Motion for Default with the Regional Hearing Clerk and sent a copy to the respondent certified mail, return receipt requested.

18. After several unsuccessful attempt to serve a copy of the motion on the respondent by certified mail, service was made on the respondent's representative, Mrs. Joanne Moran, on October 5, 2000, by the U.S. Postal Service.

DISCUSSION

(a) 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 instance case, the complaint was filed with the Region VIII Hearing Clerk on November 10, 1999. The complaint was personally served on the respondent's representative, Paul Moran, by Ken Phillips, an EPA inspector, on November 15, 1999. Personal service is authorized by the *Consolidated Rules*[4]. Respondents' answer to the complaint was due to be filed with the Regional Hearing Clerk " ... within 30 days after service of the complaint" - by December 15.1999. See the *Consolidated Rules* - § 22.15(a). As of the date of this default order, the respondent has not filed an answer to the complaint. I therefore find that the respondent is in default for failing to file an answer to the complaint.

Further, on September 21, 2000, the complainant sent a copy of its motion for default to the respondent, certified mail return receipt requested. Service of this motion was confirmed by a return receipt signed by the respondent's agent on October 5, 2000. To date, the respondent has failed to respond to this motion.

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[3]. See certificate of service signed by Ken Phillips, dated November 24, 1999, attached to a copy of the complaint contained in the administrative record.

[4]. Section 22.5(b)(1)(i) of the *Consolidated Rules* provides that service of the complaint " . . . shall be made personally . . . ."

(b) Liability

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). Complainant must demonstrate both: the occurrence of each alleged violation, and the responsibility of the respondent for those violations.

The facts set forth in the complaint, and published in part above as Findings of Fact, establish jurisdiction over the respondent and that the respondent violated:

(a) 40 C.F.R. § 144.12(a) by failing to close or retrofits the Class V (5X28) disposal system in a manner that would keep contaminates from entering a USDW. The duration of respondent's violation for failure to close the Class V disposal system is from August 3, 1999 to the present.

(b) 40 C.F.R. § 144.25(a) by failing to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from the drains in the required time period. The duration of the violation is from July 24, 1999 to the present.

(c) 40 C.F.R. § 144.26 by failing to submit the required inventory information. The duration of the violation is from July 24, 1999 to the present.

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 waiver of respondent's right to contest such factual allegations."

I therefore find that the facts alleged in the complaint establish a *prima facie* case of liability against the respondent for the violations alleged therein, and restated, in part, above under Findings of Fact.

(d) Civil Penalty

Section 1423 of the SDWA, 42 U.S.C. § 300h-2, provides that in any case in which any person who violates any requirement of an applicable underground injection control program or an order requiring compliance, the Administrator is authorized to bring a civil action. Pursuant to SDWA Section 1423(c), 42 U.S.C. § 300h-2(C), the Administrator may also issue an administrative order, either assessing a civil penalty of not more than $11,000 for each day of violation, or any past or

current violation, up to a maximum penalty of $137,500, or requiring compliance with the violated regulation or other requirement, or both.

The complainant proposes assessing a penalty of $9,500.00 for the alleged violations. The complainant calculated this penalty after taking into consideration, among other things, the statutory factors identified and described in Section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B). These factors include: (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.

Specifically, the complainant found that the violations were serious because, waste fluids from the subject type of facility, may contain carcinogens which pose significant threat to human health. A second factor the complainant considered, in calculating the civil penalty, was the economic advantage the respondent gained over its competitors, by virtue of its violation, by not having to pay for: (1) properly disposing of its waste fluids; (2) coming into compliance by either permanently closing or applying for and receiving a permit for the system; and (3) analyzing its waste fluids. EPA seeks a civil penalty of $9,500.00 from the respondent. The respondent has not asserted or provided any information that paying a penalty of $9,500.00 would have a severe economic impact on the respondent ability to stay in business.

.The *Consolidated Rules*, 40 C.F.R. § 22.27(b) further provide:

> "(b) Amount of civil penalty. 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 on the evidence in the record and in accordance with any penalty criteria set forth 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 respondents have defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint,... or motion for default, whichever is less."**

The courts have made it clear that notwithstanding a respondents' default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. Katzson Brothers, Inc. v U.S. EPA, 839 F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the complaint. Rybond, Inc., RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614 (EAB, November 8, 1996).

The statutory factors that I am required to consider in determining the reasonableness of the penalty include the seriousness of the violation, and any good faith efforts of the respondent to comply with applicable requirements. After examining EPA's penalty calculation, I find that the gravity component of the penalty calculation takes the seriousness of each violation into account.

The failure of the respondent to reply to the complaint or compliance order contained therein, demonstrates a lack of a good faith effort to comply with applicable requirements.

Considering the above, and based on the entire administrative record, I find that a penalty of $9,500.00 is appropriate for the subject violations.

CONCLUSIONS OF LAW

Respondent violated 40 C.F.R. § 144.12(a) by failing to close or retrofit the Class V (5X28) disposal system in a manner that would keep contaminates from entering a USDW. The duration of respondent's violation for failure to close the Class V disposal system is from August 3, 1999 to the present.

Respondent violated 40 C.F.R. § 144.25(a) by failing to submit to EPA a completed UIC permit application along with the required analysis of the fluid waste from the drains in the required time period. The duration of the violation is from July 24, 1999 to the present.

Respondent violated 40 C.F.R. § 144.26 by failing to submit the required inventory information. The duration of the violation is from July 24, 1999 to the present.

Respondent's failure to file an answer to the complaint subjects the respondent to the default order provisions of the *Consolidated Rules* - 40 C.F.R. § 22.17.

Complainant properly filed a Motion for Default in accordance with the *Consolidated Rules* - 40 C.F.R. § 22.17.

The EPA Region VIII Regional Administrator has delegated to the Regional Judicial Officer the authority to act as Presiding Officer in proceedings under subpart I of the *Consolidated Rules*[5].

This is a proceeding under subpart I of the *Consolidated Rules*[6].

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[5]. See 40 C.F.R. § 22.4(b)

[6]. See 40 C.F.R. § 22.50(a)(2).

When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party, which shall constitute an initial decision under the *Consolidated Rules*.[7]

I find the respondent, Dakota Wings Corporation Inc. in default, pursuant to § 22.17 of the *Consolidated Rules of Practice*, 40 C.F.R. Part 22, for failure to file a timely answer to the complaint, in this matter.

Said default by the respondent constitutes, for the purposes of the pending proceeding only, an admission of all the facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. See *Consolidated Rules* - 40 C.F.R. § 22.17(a).

DEFAULT ORDER[8]

In accordance with Section 22.17 of the *Consolidated Rules*, 40 C.F.R. § 22.17, and based on the administrative record, I hereby grant the complainant's Motion for Default, against the respondent, Dakota Wings Corporation, Inc., for failing to answer the complaint in this matter.

The respondent shall comply with the requirements of 40 C.F.R. § 144.26, within (10) days of the effective date of this Order. Respondent shall complete and submit the Class V Well Inventory Form. Also, in accordance with 40 C.F.R. § 144.26, the respondent is prohibited from injecting into the well because respondent failed to submit inventory information for the well within the specified time. The respondent may resume injection 90 days after submitting the inventory information to EPA, unless the respondent receives notice from the EPA that injection may not resume or may resume sooner; and

Respondent shall comply with the requirements of 40 C.F.R. § 144.12(a), and the requirements of the June 28, 1999, noncompliance letter within twenty (20) days of the effective date of this Order. Respondent shall submit plans in writing for closure of the Class V disposal system, including a schedule for plugging the drains, or retrofitting the disposal systems, and submit a plan for alternative disposal for the waste; or

Respondent shall comply, within twenty (20) days of the effective date of this Order, with the requirements of 40 C.F.R. 144.25(a). Respondent shall submit a completed permit application form for continuing the use of the existing Class V disposal system. The required fluid analysis must accompany the permit application, the sample must be representative of the waste fluids disposed of in

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[7] See 40 C.F.R. §22.17(c)

[8] In accordance with §22.27(c) of the *Consolidated Rules*, this order constitutes an initial decision, which unless appealed to the Environmental Appeals Board ("EAB") in accordance with §22.30 of the *Consolidated Rules*, or unless the EAB elects to review the same *sua sponte*, will become the final order of the Agency in accordance with §22.27(c) of the *Consolidated Rules*.

the Class V system. To obtain representative samples of the fluids from the shop floor drain and associated septic tank, the respondent shall use the procedures set forth in the EPA publication "Proper Handling of the Fluid Sample". Each analysis must include the constituents listed EPA's "List of Required Constituents for Analysis". A quarterly analysis of the waste fluid will be a condition in all permits issued for Class V wells of this type.

Failure to comply with the above provisions could subject the respondent to additional penalties.

The respondent, Dakota Wings Inc., is hereby assessed a civil penalty in the amount of Nine Thousand, Five hundred Dollars ($9,500.00).

This penalty shall become due and payable, without further proceedings, 30 days after this Default Order becomes final[9]. Payment shall be made by forwarding a cashier's or certified check, marked with the Docket Number of this case, SDWA-8-2000-01, payable to the Treasurer of the United States, to:

U.S. EPA Region VIII
(Regional Hearing Clerk)
Mellon Bank
P.O. Box 360859M
Pittsburgh, PA 15251

Copies of the check must be sent both to the Regional Hearing Clerk and to Mr. James Eppers, Enforcement Attorney, at:

U.S. EPA, Region VIII (ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466

Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(e).

[9]. See 40 C.F.R. § 22.31(c).

SO ORDERED This 31st Day of January, 2001.

/S/
Alfred C. Smith
Presiding Officer