UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

Docket No. RCRA (9006)VIII-98-06

IN THE MATTER OF:	)
	)
BRYAN J. POWNALL	)
and	)
JUDY NIX	)
	)
Respondents.	)
	)

DEFAULT ORDER AND INITIAL DECISION

On February 23, 1999, the U.S. Environmental Protection Agency, Region VIII ("EPA", "Agency" or "Complainant") moved for a Default Order against Bryan J. Pownall and Judy Nix ("Respondents") for failing to answer a Complaint assessing an administrative penalty, under Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e, for alleged violations of Subchapter IX of the Resource Conservation and Recovery Act ("RCRA"), §§ 9001-9010, 42 U.S.C. §§ 6991-6991i, and regulations promulgated pursuant thereto.

This is a proceeding under 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*"). For the reasons set forth below Default is entered and a penalty, in the amount of $23,475.00, is assessed against the Respondents.

FINDINGS OF FACT

1. On August 19, 1998, the Complainant filed Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") against Bryan J. Pownall and Judy Nix ("Respondents"), with the Region VIII Hearing Clerk. The Complaint charged the Respondents with six (6) Counts: Counts I-III - failing to perform release detection; Count IV - failure to maintain the monthly inventory control records documenting release detection at the facility; Count V - failure to demonstrate financial responsibility; and Count VI - failure to permanently close underground storage tank ("UST") # 2, including notifying EPA and performing a site assessment for that UST, in accordance with section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c), and the regulations promulgated thereunder, for three underground storage tanks ("USTs"), identified in the Complaint respectively as UST #1, #2 and #3.

2. The allegations contained in the Complaint, as set forth below, are adopted herein as findings of fact.

3. Subchapter IX of RCRA, RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i, authorizes EPA to regulate the installation and use of "underground storage tanks" which contain "regulated substances."

4. EPA has jurisdiction of this matter pursuant to section 9006 of RCRA, 42 U.S.C. §6691e.

5. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorized EPA to promulgate regulations, which are codified at 40 C.F.R. Part 280, setting forth requirements for, among other things, maintaining a release detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment; requirements for maintaining records of any monitoring and release detection system, inventory control system, or comparable system; requirements for tank closure; and requirements for maintaining evidence of financial responsibility.

6. EPA is the "implementing agency" for the UST program in Wyoming as that term is used in 40 C.F.R. Part 280.

7. Respondents, Bryan J. Pownall and Judy Nix, are both "persons" as defined in section 9001(6) of RCRA, 42 U.S.C. § 6991(6) and 40 C.F.R. § 280.12, and are therefore subject to regulation under RCRA.

8. Respondent Bryan J. Pownall is the "owner" as defined in Section 9001(3) of RCRA, 42 U.S.C. § 6991(3), and 40 C.F.R. § 280.12 of three "underground storage tank system(s)" ("USTs"), as defined in Section 9001(1) of RCRA, 42 U.S.C. § 6991(1) and 40 C.F.R. § 280.12.

9. The three USTs described above as owned by Respondent Bryan J. Pownall are located at or near Bryan's Place, 14110 Highway 51, in or near Rozet, Wyoming (the "Facility").

10. Respondents Bryan J. Pownall and Judy Nix are both "operators", as defined in Section 9001(4) of RCRA, 42 U.S.C. § 6991(4), and 40 C.F.R. § 280.12, of the three USTs described in the preceding paragraphs.

11. Petroleum and any fraction thereof is a "regulated substance," as defined in section 9001(2) of RCRA, 42 U.S.C. § 6991(2).

12. The Facility includes three USTs ("UST #1, "UST #2," and "UST #3"). At the Facility, UST #1 has a capacity of 4,000 gallons and contained unleaded gasoline; UST #2 has a capacity of 4,000 gallons and contained, unleaded "plus" gasoline; and UST #3 has a capacity of 2,000 gallons and contained diesel fuel.

13. All of the USTs at the Facility were installed in 1986.

14. USTs #1 and #3 were out of service as of June 1, 1998. UST # 2 has been out of service since July 19, 1996.

15. On May 14, 1997, James Rakers, an authorized EPA inspector ("the Inspector"), accompanied by Paul Wollenstein, a representative of the Wyoming Department of Environmental Quality (WDEQ), conducted an inspection at the Facility, with the consent of Respondent Judy Nix, to determine compliance with RCRA Subchapter IX and the EPA regulations relating to USTs.

16. Pursuant to the requirements of 40 C.F.R. § 280.40, owners and operators of USTs installed between December 23, 1980 and December 22, 1988, must comply with release detection requirements for USTs found under 40 C.F.R. Part 280 Subpart D, by December 22, 1993.

17. All of the USTs at the Facility contain, or have contained, petroleum and are "petroleum UST systems" within the meaning of 40 C.F.R. § 280.12.

18. Pursuant to the requirements of 40 C.F.R. § 280.34(b)(4) and 40 C.F.R. § 280.45, owners and operators of petroleum UST systems must maintain for one year records of recent compliance with release detection requirements.

19. None of the UST systems at the Facility meet the performance standards set forth in 40 C.F.R. §§ 280.20 or 280.21.

20. As set forth in 40 C.F.R. § 280.41:

> "Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:
>
> (A) Tanks. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h) except that:... (2) UST systems that do not meet the performance standards in §280.20 or §280.21 may use monthly inventory controls (conducted in accordance with §280.43(a) or (b)) and annual tank tightness testing (conducted in accordance with § 280.43(c)) ..."

21. Pursuant to the requirements of 40 C.F.R. § 280.43(a), inventory control must be conducted monthly to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis.

22. On May 14, 1997, in response to the Inspector's request, Respondent Judy Nix stated that the Facility utilized tank tightness testing with inventory control as Respondents' release detection method.

23. During the Facility inspection on May 14, 1997, Respondent Judy Nix failed to provide to the Inspector any record of inventory control performed by Respondents at the Facility, failed to otherwise demonstrate to the Inspector the methods used to perform the inventory control method of release detection; failed to provide the Inspector with any gauging stick used for manual testing of the product level of the tank contents, and failed to provide the Inspector with annual records of tank tightness testing, other than a record of August, 1996, for any of the USTs at the Facility.

24. Based on all available information, EPA determined that Respondents had not adequately or properly performed release detection for any of the USTs at the Facility.

25. Respondents' failure to perform release detection for USTs #1, #2, and #3, as identified above, constitutes three violations of section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.41(a) - **Counts I, II and III of the Complaint.**

26. 40 C.F.R. § 280.45 states:

> "All UST system owners and operators must maintain records in accordance with 40 CFR §280.34 demonstrating compliance with all applicable requirements of this subpart. These records must include the following; (a) All written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested ... must be maintained for 5 years ...; (b) The results of any sampling, testing, or monitoring must be maintained for at least one year ..."

27. On May 14, 1997, the Inspector was informed by Respondent Judy Nix that Respondents did not maintain the past year (12 months) of inventory control records.

28. Respondents' failure to maintain the monthly inventory control records documenting release detection at the Facility for USTs #1, #2, and #3, as identified above, constitutes a violation of section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.45 - **Count IV of the Complaint.**

29. 40 C.F.R. § 280.93(a) states:

> "Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and or compensating third parties for bodily injury and property damage cause by accidental releases arising from the operation of petroleum underground storage tanks in at least the following per-occurrence amounts; ... $500,000".

30. 40 C.F.R. § 280.93(b) states:

> "Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and or compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following annual aggregate amounts: ... $1,000,000".

31. Based on available information EPA has determined that Respondents have not demonstrated financial responsibility as required pursuant to the regulations cited above.

32. Respondents' failure to demonstrate financial responsibility in relation to USTs #1, #2 and #3, as identified above, constitutes a violation of section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.93(a) - **Count V of the Complaint.**

33. 40 C.F.R § 280.70(c) states:

> "When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet . . . the upgrading requirements in § 280.21 . . . Owners and operators must permanently close the substandard UST systems at the end of this 12- month period ..."

34. Based on available information, EPA determined that UST #2 has been temporarily closed, within the meaning of 40 C.F.R. § 280.70, since July 19, 1996.

35. Pursuant to 40 C.F.R. § 280.71(b), to permanently close a tank, owners and operators must empty and clean the tank and must also either remove the tank from the ground or fill it with an inert solid material.

36. On June 23, 1998, Robert Lucht, representative of WDEQ conducted an inspection of the Facility and determined that UST #2 was empty but had not been removed from the ground or filled with inert solid material.

37. Pursuant to 40 C.F.R. § 280.71(a), owners and operators must provide the implementing agency timely notification of permanent closure and must perform a site assessment in accordance with 40 C.F.R. § 280.72.

38. Respondents have not notified EPA, the implementing Agency, regarding the permanent closure of UST #2 and has not performed a Site Assessment for UST #2.

39. Respondents failure to permanently close UST #2, including notifying EPA and - performing a site assessment for that UST, in accordance with the applicable regulatory deadlines constitutes a violation of section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.70(c) - **Count VI of the Complaint.**

40. The Complaint gave the Respondents Notice that under the *Consolidated Rules* - 40 C.F.R. § 22.15, they must file a written answer to the Complaint within 30 days after service of the Complaint, and that if they fail to meet this requirement a Default Judgment may be entered against them pursuant to 40 C.F.R. § 22.17 of the *Consolidated Rules* . A copy of the *Consolidated Rules*, in effect at that time, was enclosed with the Complaint.[1]

41. The Complainant made several unsuccessful attempts to serve the Complaint on the Respondents, by certified mail, before pursuant to a third mailing, receiving a properly executed return receipt verifying that the Respondents had received a copy of the Complaint on November 18, 1998, that was mailed on approximately November 16, 1998.

42. In addition, on approximately December 12, 1998, the U.S. Marshals Service effected personal service of two copies of the Complaint on Respondent Judy Nix at her residence adjacent to the establishment known as Bryan's Place in Rozet, Wyoming.

43. As of this date, Respondents have failed to file an Answer to the Complaint as required by the *Consolidated Rules* - 40 C.F. R. § 22.15.

44. On February 23, 1999, the Complainant filed a Motion for a Default Order in accordance with the requirements of the *Consolidated Rules* - 40 C.F.R § 22.17. Respondents have not replied to Complainant's Motion for Default Order.

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[1] There is no change in the time for the Respondents to answer (30 days) under the current Rule.

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 August 19, 1998. The Complaint was served on the Respondents on November 18, 1998. 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 18, 1998. See the *Consolidated Rules* - § 22.15(a). As of the date of this Default Order, the Respondents have not filed an Answer to the Complaint. I therefore find that the Respondents are in Default for failing to file an Answer to the Complaint.

B. Liability

In order for a default order to be entered against the Respondents, the Presiding Officer must conclude that Complainant has established a prima facie case of liability against the Respondents. 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 each named Respondents for those violations.

The facts set forth in the Complaint, and published in part above as Findings of Fact in this matter, establish jurisdiction over the Respondents and that the Respondents violated section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1) of RCRA and regulations promulgated pursuant thereto by: failing to perform release detection; failing to maintain the required monthly inventory control record documenting release detection at the facility; failing to demonstrate financial responsibility; and failing to permanently close an UST, including notifying EPA and performing a site assessment for the USTs at the Facility, Bryan's Place. These violations were documented by an EPA inspector during an inspection of the facility on May 14, 1997; and a representative of WDEQ on June 23, 1998.

Since the Respondents did not file an Answer to the Complaint, they have presented no evidence to contravene the facts alleged in the Complaint. Section 22.17 of the *Consolidated Rules* provides that ... "[d]efault by Respondents constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondents'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 Respondents for the violations alleged therein, and restated above under Findings of Fact.

C. Civil Penalty

Section 9006(d) of RCRA provides that statutory authority for the assessment of a civil penalty in this case - 42 U.S.C. § 6991e(d). Pursuant to Section 9006(d)(2)(A), a maximum daily penalty of $11,000 may be assessed, per tank, for a violation of any standard promulgated under Section 9003 of RCRA, 42 U.S.C. §§ 6991e(D)(2)(A) & 6991b. Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), sets forth the criteria for determining an appropriate civil penalty. It provides:

> Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, which the Administrator determines is reasonable taking into account **the seriousness of the violation and any good faith efforts to comply with the applicable requirements.**

EPA seeks a civil penalty of $23,450.00 from the Respondents.

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."**

Although Rule 22.17(a) provides that upon entry of an order of default, the penalty proposed in the Complaint shall become due and payable without further proceedings within 60 days, the appropriateness of the proposed penalty of $23,450.00 must be considered by the Presiding Officer. The courts have made it clear that notwithstanding a Respondents' default, the statutory factors determining the amount of the penalty must be considered. Katzson Brothers, Inc. v U.S. EPA, 839 F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that, notwithstanding the cited provison of Rule 22.17(a), 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 are the seriousness of the violation, and any good faith efforts of the Respondents to comply with applicable requirements. After examining EPA's penalty calculation (See Complaint - Exhibit 2),

I find that the Gravity component of the penalty calculation takes the seriousness of each violation into account. With respect to the second statutory factor failure of the Respondents to reply to the Complaint or compliance order contained therein, demonstrates a lack of their good faith efforts to comply with applicable requirements.

Section 9006(d)(2)(C) of RCRA, 42 U.S.C. § 6991e(d)(2)(C), authorizes the assessment of a civil penalty of up to $11,000 for each UST, for each day of violation (See also 40 C.F.R. Part 19). The Complaint proposes to assess a total civil penalty of $23,475.00, for the respective alleged violations as follows: Count I - $4,125, Count II - $4,125, Count III - $4,125, Count IV - $4,125, Count V - $2,475 and Count VI - $4,500. The Penalty Calculation Worksheets for the alleged RCRA UST violations in support of the assessment of civil penalties proposed in this Complaint are attached to the Complaint.[2] The proposed civil penalty was calculated in accordance with - the U.S. EPA Penalty Guidance for Violations of UST Regulations (November, 1990).[3]

Considering the UST Penalty Guidance, the statutory factors, and based on the entire administrative record, I find that a penalty of $23,475.00 is appropriate for the subject violations.

CONCLUSIONS OF LAW

46 Respondents's failure to file an Answer to the Complaint subjects the Respondents to the Default Order provisions of the *Consolidated Rules* - 40 C.F.R. § 22.17.

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

48 Under the Consolidated Rules of Practice, the EPA Region VIII Regional Administrator has delegated the Regional Judicial Officer authority to act as Presiding Officer until the Respondents file an Answer.[4]

49. 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*.[5]

50. Respondents are hereby found in default for failure to file a timely answer to the Complaint.

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[2] See Complaint Exhibit 2.

[3] See Complaint Exhibit 3

[4] See 40 C.F.R §22.4(b).

[5] See 40 C.F.R. §22.17(c)

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

52. The Respondents violated section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c), and the regulations promulgated thereunder, for three underground storage tanks ("USTs"), identified in the Complaint respectively as UST #1, #2 and #3 by: (1) failing to perform release detection (Counts I-III); (2) failure to maintain the monthly inventory control records documenting release detection at the facility (Count IV); (3) failure to demonstrate financial responsibility (Count V); and (4) failure to permanently close UST # 2, including not notifying EPA and not performing a site assessment for that UST (Count VI). The above "Counts" refer to the Counts contained in the Complaint.

53. For the violations set forth in paragraph #52 above the Respondents are assessed a penalty of $23,475.00.

ORDER[6]

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, and find the Respondents Bryan J. Pownall and Judy Nix in default for failing to answer the Complaint in this matter.

THEREFORE, pursuant to Section 9006(d)(2)(C) of RCRA, 42 U.S.C. § 6991e(d)(2)(C) and the *Consolidated Rules* § 22.17, the Respondents, being found in default, are assessed and ordered to pay a civil penalty of **$23,475.00**. This penalty shall become due and payable, without further proceedings, 30 days after this Default Order becomes final.[7] Payment shall be made by forwarding a cashier's or certified check, marked with the Docket Number of this case (RCRA (9006)VIII-98-06, payable to:

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[6] In accordance with §22.17(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* as therein provided, will become the final order of the Agency in accordance with §22.27(c) of the *Consolidated Rules.*

[7] 40 C.F.R. §22.31(c)

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 M. Stearns, Enforcement Attorney, at:

U.S. EPA, Region VIII
999 18th Street, Suite 500
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).

SO ORDERED This 6th Day of October, 1999.

/S/
Alfred C. Smith
Regional Judicial Officer
U.S. EPA, Region VIII