UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8



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| **IN THE MATTER OF:** | ) | |
| | ) | |
| **Gordon Poppens** | ) | **Docket No. SDWA-08-2007-0088** |
| **d/b/a Gordy's Garage** | ) | |
| **27096 SD Highway 17** | ) | **Proceeding under Subsection** |
| **Tea, SD 57064** | ) | **1423(c)(1) of the Safe Drinking Water** |
| | ) | **Act, 300h-2(c)(1)** |
| **EPA ID # SD50000-06838** | ) | |
| **Respondent.** | ) | |
| | ) | |

## DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of section 1423(c)(1) of the Safe Drinking Water Act, ("SDWA" or "the Act"), 42 U.S.C. § 300h-2(c)(1), and 40 C.F.R. §§ 124, 144, and 146. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

## I. BACKGROUND

On August 11, 2010, Complainant EPA filed a Motion for Default against Gordy Poppens and Gordy's Garage for the assessment of a $5,000 penalty. (See, Complainant's Memorandum in Support of Motion for Default ("Memo in Support")). Gordon Poppens, doing business as Gordy's Garage ("Gordy's Garage" or "Respondent") is a South Dakota sole proprietorship that owns and operates the facility located at 27096 SD Highway 1, in Tea, South Dakota ("facility"). The facility operated a Class V injection well also known as a " Motor Vehicle Waste Disposal Well." See, 40 C.F.R. §§144.6, and 144.81. Motor Vehicle Waste Disposal Wells are regulated by the Underground Injection Control ("UIC") regulations promulgated pursuant to the Safe Drinking Water Act. See, 40 C.F.R. §§ 124, 144, and 146. On April 5, 2005, EPA inspected the facility with Respondent's consent. (See, Memo in Support, p.1). The inspection showed Gordy's Garage was not in compliance with the regulations set forth at 40 C.F.R. §§ 124, 144, and 146. Specifically, Respondent was operating its Class V well without a permit.[1]

On June 27, 2005, EPA sent Respondent a letter stating that pursuant to 40 C.F.R. § 144.12(c) and (d), Respondent must either obtain a permit or close the well by October 24, 2005. (See, Memo in Support, p. 2). On August 22, 2005, an EPA

[1] The Complaint filed on September 17, 2007, suggests that there may be more than one Class V injection well. The Complaint states, "EPA directed Respondent to either permit or close the well(s), by October 24, 2005. (See, Complaint, p. 3). However, the Motion for Default and Memorandum in Support request relief for only one well.

representative contacted Respondent by phone. Respondent stated that he intended to close the well. On August 22, 2006, EPA inspected the facility, with the consent of the Respondent, to determine if the well had been closed. At the time of the inspection, the well had not been closed. (See, Memo in Support, p. 2). Respondent continued to own and operate the well. On March 27, 2007, EPA sent Respondent a letter indicating that the facility was in violation of UIC regulations related to Motor Vehicle Waste Disposal Wells and instructed Respondent to close the well within thirty days of receipt of the letter. Additionally, Respondent was notified in the letter that all owners and operators of motor vehicle waste disposal systems that existed prior to the April 5, 2000, ban of construction of new motor vehicle waste disposal systems were required to have submitted a completed permit application or have completed the closure of the motor vehicle waste disposal systems by January 1, 2007 pursuant to 40 C.F.R. § 144.88(b). (See, Memo in Support, p. 2). On April 24, 2007, EPA representatives spoke with Respondent on the telephone who admitted that the well had not been closed. (See, Complaint, p. 3).

On September, 17, 2007, EPA filed a Complaint for the above violations. The Complaint proposed a $42,120 penalty. Respondent's ownership and operation of the well was in violation of the following EPA regulations and therefore the Act, 42 U.S.C. § 300h-2(c)(l) for:

> 1) owning, operating, and maintaining a Class V disposal facility which, through injection activity, allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part 142 or may otherwise adversely affect the health persons; 40 C.F.R. §144.12(a) and 40 C.F.R. §144.82(a)(1);
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> 2) failing to close or retrofit the Class V disposal system in a manner that would keep contaminants from entering an Underground Source of Drinking Water ("USDW"); 40 C.F.R. §144.12(c)(1) and (2) and 40 C.P.R. §l44.88(b); and,
>
> 3) operating a motor vehicle waste disposal system after the January 1, 2007 ban of all motor vehicle waste disposal wells. 40 C.F.R. § 144.88(b).

The Complaint also ordered Respondent to submit a well closure plan and to close or retrofit the well by October 31, 2007.[2]

Respondent received the Complaint on September 20, 2007. (See, Memo in Support, p. 2). EPA staff contacted Respondent on several occasions between October and December, 2007 to discuss Respondent's failure to answer the Complaint as well as

[2] The Motion for Default does not request relief for the compliance portion of the Complaint. The Memorandum in Support does indicate that on March 12, 2008, EPA received confirmation from Respondent that the well was closed. The failure to timely close the well and show proof of closure is argued by Complainant for purposes of assessing a penalty.

settlement possibilities. During this time, Respondent indicated the well was closed and asserted an inability to pay the penalty. EPA requested document closure verification and forwarded information to Respondent to assist Respondent with supporting its inability to pay claim. (See, Memo in Support, p. 3). Respondent sent incomplete information back to EPA thereby making it difficult to determine if there was a valid inability to pay claim. EPA attempted again to retrieve additional information and gave Respondent additional time to respond to no avail. EPA contacted Respondent four additional times between the end of December, 2007 and the end of February, 2008 requesting the necessary information. (See, Memo in Support, p. 3).

On August 22, 2008, EPA restated in a letter to Respondent its desire to reach settlement with respect to the penalty. EPA also resent the information regarding inability to pay including the necessary documentation Respondent needed to provide. (See, Memo in Support, p.4). On September 2, 2008, Respondent returned an incomplete "Inability to Pay Form." Furthermore, Respondent provided no additional information and wrote on the form that he was "done with this situation." (See, Memo in Support, p. 4). On October 28, 2009, EPA, through counsel, contacted Respondent once again and encouraged settlement. In addition, Respondent was put on notice that "EPA would pursue a default judgment if neither a settlement nor an answer to the Complaint was filed by Respondent." (See, Memo in Support, p. 4).[3]

## II. DEFAULT ORDER

The Complaint iterates Respondent's obligations with respect to responding to the Complaint, including filing an Answer. (See, Complaint, pp. 1-2). Specifically, the Complaint states, "**FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 CALENDAR DAYS MAY WAIVE RESPONDENT'S PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM AUTHORIZED BY THE ACT.**" (emphasis in original document).

Respondent failed to file an Answer as required by 40 C.F.R. § 22.15. On August 11, 2010, Complainant moved for the entry of a Default Order against Gordy's Garage and the assessment of a penalty of $5,000.[4] To date, an Answer has not been filed with the Regional Hearing Clerk.

The relevant section of the Consolidated Rules related to default is 40 C.F.R. § 22.17. Section 22.17 provides in part:

> (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

[3] With the letter, EPA also included a copy of the Complaint and the Consolidated Rules.

[4] The Complaint alleges a proposed penalty $42,120. The Motion for Default requests an assessment of $5,000. Pursuant to 40 C.F.R. § 22.17(b) & (c), the relief proposed in the motion for default "shall be ordered..." See analysis below.

all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations...

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that a 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17.

In addition, the Consolidated Rules provide in pertinent part that:

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 upon the evidence in the record and in accordance with any civil penalty criteria 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 respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

Based on the above information, it is appropriate to now rule on the pending motion.

## III. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact:

1. Respondent Gordon Poppens doing business as Gordy's Garage is a South Dakota sole proprietorship that owns and operates an automotive service facility.

2. Gordy's Garage is located at 27096 SD Highway 1, in Tea, South Dakota.

3. On April 5, 2005, EPA entered Gordy's Garage, with the consent of Gordon Poppens, to inspect for compliance.

4. The inspection showed that Gordy's Garage operated a Class V injection well also known as a Motor Vehicle Waste Disposal Well.

5. On June 27, 2005, EPA sent Gordon Poppens a letter directing Respondent to either permit or close the well by October 24, 2005.

6. On August 22, 2006, EPA entered Gordy's Garage, with the consent of Gordon Poppens, to inspect for compliance.

7. The inspection showed that Gordy's Garage continued to operate a Motor Vehicle Waste Disposal Well without a permit.

8. On March 27, 2007, EPA sent Gordon Poppens a letter informing Respondent that Gordy's Garage was in violation of the regulations and instructed him to close the well.

9. On April 27, 2007, EPA spoke with Respondent who admitted the well was not closed.

10. Lying underneath the disposal system are underground sources of drinking water (USDWs), including but not limited to, unconsolidated sand and gravel aquifers approximately 100 feet below land surface.

11. On September 17, 2007, EPA filed its Administrative Complaint and Opportunity to Request a Hearing (Docket No. SDWA-08-2007-0088).

12. On September 20, 2007, Respondent received the Complaint.

13. Respondent had until October 20, 2007 to file an Answer to the Complaint.

14. Respondent did not file an Answer within 30 days or by October 20, 2007.

15. Complainant filed a Motion for Default Judgment and Order and Memo in Support on August 11, 2010. The Motion seeks the assessment of a $5,000 penalty.

## IV. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following conclusions of law:

16. Respondent, Gordon Poppens, doing business as Gordy's Garage, is a sole proprietorship and therefore a "person" as defined in the Act 42 U.S.C. § 300f(11) and 40 C.F.R. § 144.3 and subject to the statute and regulations.

17. Respondent operated at least one Class V injection well as defined by 40 C.F.R. § 144.6 and § 146.5 at the facility.

18. On the day of inspections, EPA determined that Respondent operated the type of Class V injection well known as a "Motor Vehicle Waste Disposal Well" as defined as follows: Motor vehicle waste disposal wells that receive or have received fluids from vehicular repair or maintenance activities, such as an auto body repair shop, new and used car dealership, specialty repair shop (e.g. transmission and muffler repair shop), or any facility that does any combustion engine repair maintenance work pursuant to 40 C.F.R. § 144.81 (16).

19. Respondent is subject to applicable UIC requirements set forth at 40 C.F.R. §§ 124, 144 and 146.

20. Pursuant to 40 C.F.R. § 144.81(16), Motor Vehicle Waste Disposal Wells may contain "organic and inorganic chemicals in concentrations that exceed the maximum contaminate levels (MCLs) established by the primary drinking water regulations (see, 40 CFR part 141). These fluids also may include waste petroleum products and may contain contaminants, such as heavy metals and volatile organic compounds, which pose risks to human health."

21. Pursuant to 42 U.S.C. § 300h-2(c)(1) of the Act, Respondent's ownership and operation of the well was in violation of regulations 40 C.F.R. 144.12(a) and 40 C.F.R. 144.82(a)(1) for owning, operating and maintaining a Class V disposal facility which, through injection activity, allows the movement of fluid containing any contaminant into underground sources of drinking water if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part 124.

22. Pursuant to 40 C.F.R. § 144.12(c)(1) and (2), Respondent is in violation for failure to obtain a permit and/or close the Class V disposal system in a manner that would keep contaminants from entered a USDW.

23. Pursuant to 40 C.F.R. § 144.88(b), Respondent is in violation for operating a motor vehicle waste disposal system after the January 1, 2007 ban of all motor vehicle waste disposal wells.

24. Pursuant to section 1423 of the Act, 42 U.S.C. §300h-2(c)(1) and 40 C.F.R. § 19.4, Respondent is liable for civil penalties of $5,000.

25. Pursuant to 40 C.F.R. § 22.5(b)(1), Complainant has demonstrated that it has complied with the service requirements.

26. 40 C.F.R. § 22.14 provides that an answer to a complaint must be filed within thirty (30) days after service of the complaint.

27. 40. C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to a complaint.

28. This default constitutes an admission, by Respondent, of all facts alleged in the Complaint and a waiver, by Respondent, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

## V. ASSESSMENT OF ADMINISTRATIVE PENALTY

Section 1423 of the Act, 42 U.S.C. §300h-2(c)(1), authorizes the Administrator to bring a civil action against any person subject to a requirement of an applicable UIC program. 42 U.S.C. §300h-2(c)(1). The Administrator may assess a civil penalty of up to $11,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $157,500 for violations that occur after March 15, 2004 and before January 12, 2009. For violations that occur on or after January 12, 2009 the dollar amounts the Administrator may assess are $16,000 per violation with a maximum for all violations not to exceed $177,500. (See, 40 C.F.R. Part 19). In the instant case, Respondent is subject to penalties up to $42,120 for operating a Class V injection well in violation of the UIC regulations.

The courts have made it clear that, notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. See, *Katson Brothers Inc., v. U.S. EPA*, 839 F.2d 1396 (10th Cir. 1988), *U.S. v. DiPaolo*, 466 Fed. Supp. 2d 476, 484 (S.D.N.Y., 2006). Moreover, the Environmental Appeals Board ("EAB" or "Board") has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. See, *In Re City of Marshall*, 10 E.A.D. 173,189 (EAB, 2001); *Rybond, Inc.*, RCRA (3008) Appeal No 95-3, 6 E.A.D. 614 (EAB, 1996).

Section 1423(c)(4)(B), 42 U.S.C. §300h-2(c)(4)(B), of the Act requires EPA to take into account the following factors in assessing a civil penalty: the seriousness of the violation, the economic benefit (if any) resulting from the violation, any good faith efforts to comply with the applicable requirements, any history of prior violations, the economic impact of the penalty on the violator and such matters as justice may require.

Complainant's Memo in Support includes a narrative explanation of the penalty sought in this matter. It also includes an analysis of the SDWA statutory factors in determining the penalty. See, 42 U.S.C. § 300h-2(c)(4)(B).

As noted above, Consolidated Rule § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. In this case, Complainant provided the grounds for calculating the $42,120 penalty proposed in the Complaint in its Memo in Support. However, Complainant requested in its Motion for Default that this court only assess a $5,000 penalty.[5] As § 22.17(b) states, "[i]f the respondent has defaulted, **the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.**" (emphasis added). Accordingly, a penalty no greater than $5,000 can be assessed despite Complainant's analysis providing for a larger penalty. Complainant is requesting significantly less in penalty than was alleged in the Complaint; and therefore, this court believes the narrative, based on the statutory factors, provided in the Memo in Support is sufficient to explain how the penalty was derived.

It appears the penalty was not evaluated in conjunction with a penalty policy.[6] This Presiding Officer has consulted the general policies on civil penalties in this matter. (See, EPA General Enforcement Policies #GM-21 and 22 ("GM 21 or GM-22"), Feb. 16, 1984). Therefore, the statutory factors are evaluated to create gravity and economic benefit components to the penalty.[7] This court has reached the following decision regarding the penalty:

**Gravity:**

Complainant states, "operating a banned motor vehicle waste disposal well is considered a 'most serious' violation by the UIC Program and closing such wells is a national priority." (See, Memo in Support, p. 10). EPA's website relating to UIC Class V wells provides considerable information on identifying whether one is an owner/operator of a motor vehicle waste disposal well, what the environmental and human health impacts are on the USDW if waste were to infiltrate and why closing these wells is important. See, http://www.epa.gov/region8/water/uic/. It is clear from the website, that EPA considers Class V injection wells, and motor vehicle waste disposal wells in particular, a serious concern to the environment. During normal vehicle repair

[5] An Agency representative affidavit on how the penalty was calculated was not provided in this matter.
[6] A penalty policy is considered guidance for establishing appropriate penalties for settlement of civil administrative and judicial actions or, under some statutes for pleading a certain penalty. Therefore, the Agency is not required to use the policy as the basis for its penalty. The Presiding Officer is expected to consider any penalty guidelines issued under the Act (See, 40 C.F.R. § 22.27(b)).
[7] Three of the statutory factors (seriousness, good faith efforts to comply, history of violations) are considered the gravity component of the penalty. The factors, other matters as justice may require and economic impact of the penalty on the violator, are considerations that can adjust the gravity component based on specific circumstances in the matter. Economic benefit is the expenses the Respondent would have incurred had it complied with the Act and its implementing regulations. (See, GM-22).

and maintenance, fluids such as engine oil or solvents may drip or spill into floor drains or sinks in service areas. Motor vehicle wastes include engine oil, transmission fluid, power steering fluid, brake fluid, antifreeze, solvents, and degreasers. If you dispose of these fluids through a motor vehicle waste disposal well, they may contaminate ground water. Therefore, EPA regulates these wells to prevent ground water contamination in certain areas. (See, 40 C.F.R. §§ 124, 144 and 146).

A demonstration of actual harm is not necessary and when assessing the seriousness of a violation the Agency should take into consideration not only actual harm, but potential harm as well. See, *In re Carroll Oil Company,* 10 E.A.D. 635,657 (EAB 2002), citing *In re Evenvood Treatment Co.,* 6 E.A.D. 589,602-03 (EAB 1996), *affm'd, Evenvood Treatment Co. v. EPA,* No. 96-1 1590RV-M (S.D. Ala., Jan. 21, 1998); and *In re* V-I *Oil Co.,* 8 E.A.D. 729,755 (EAB 2000). Here, the potential for harm is great due to Respondent operating a banned class of UIC well that could easily endanger, and certainly posed a risk of contaminating, the area in and near the facility and the USDWs. (See, Memo in Support, p. 9).

Furthermore, the seriousness of a violation should not only take into account actual and potential harm to the environment, but programmatic harm as well. See, *In Re Gaskey Construction Corp.,* Appeal No. CWA-06-07 (EAB 2006, Unpublished Final Order), *citing, In Re Phoenix Constr. Servs, Inc.,* 11 E.A.D. 379, 396-400 (EAB 2004) (finding that failure to obtain a Clean Water Act 404 permit could cause harm to the regulatory scheme, citing numerous federal judicial and administrative cases on programmatic harm as well). See also, GM-22, listing "importance of the regulatory scheme" as one of the factors to consider in quantifying gravity of a violation. GM-22, p. 14. Complainant states, "[i]f EPA fails to collect an adequate penalty, other businesses could be compelled to take similar obstructive actions, thereby risking impacts to additional resources..." (Memo in Support, p. 9). The Respondent's disregard of the regulatory program by failing to timely respond to Complainant's numerous communications is an appropriate consideration in the gravity violation.

Similarly, Respondent appears to have considerable culpability due its lack of effort to comply with the UIC regulations. Respondent was first informed of its non-compliance after EPA inspected in April, 1995, and then followed up by letter on June 27, 2005. In 2005, Respondent was provided the opportunity to either seek a permit for or close the Class V Motor Vehicle Waste Disposal Well. Respondent chose to do neither. When EPA inspected the facility again in August, 2006 and determined that the well was not closed, EPA reminded Respondent via letter dated March 27, 2007 to close the well. By this time, the regulation banning all unpermitted Motor Vehicle Waste Disposal Wells by January 1, 2007 had taken effect. Respondent admitted it had not closed the well on April 27, 2007. It wasn't until nearly one year later, March, 2008, that EPA received documentation that the well had been closed.[8] (See, Memo in Support, p.

[8] In the Complaint, for penalty purposes, EPA only considered Respondent's noncompliance from the closure date specified in the Permit or Close Letter (October 24, 2005) through the date by which EPA estimated Respondent would document the closure of the system (October 24, 2007). Respondent did not comply for nearly three years.

11). Clearly, Respondent made minimal effort to comply with the law and minimize the potential harm to the environment and human health.

The Complaint states that no prior formal enforcement actions have been taken against Respondent for UIC regulations. Therefore, no adjustment to the penalty was made for this statutory factor (See, Complaint, p. 4).

**Economic Benefit:**

Agency civil penalty policies mandate recapturing economic benefit as a result of non-compliance. (See, EPA General Enforcement Policies #GM-21 and GM-22, Feb. 16, 1984). The Complaint does not indicate what the economic benefit to Respondent was other than to state "Respondent enjoyed a minimal economic benefit by not expending money to come into compliance." (See, Complaint, p. 4). However, in its Motion for Default, Complainant states that Respondent derived an economic benefit of $76.00 for the deferred cost of permanently closing the Class V well.[9] When economic benefit is so minimal, an approximation can usually suffice. See, *PIRG v. Powell Duffryn*, 913 F.2d 64, 80 (3rd. Cir. 1990); *Pound v. Airosol*, 498 F.3d 1089 (10th Cir. 2007). There is nothing in the record to suggest that this economic benefit amount is unreasonable. Therefore, an economic benefit amount of $76.00 appropriate.

**Adjustments to Gravity**:

There is no evidence that the penalty should be adjusted due to the economic impact on the Respondent. Respondent provided incomplete evidence of inability to pay the penalty so EPA has not been able to make a reasoned determination on the economic impact on the violator. However, given the fact that the penalty has been significantly reduced, from the $42,120 alleged in the Complaint to $5,000 requested in the Motion for Default, Complainant has made a considerable downward adjustment in the penalty reflecting a benefit to the Respondent. This court supports the reduction in penalty given Respondent's attempts (albeit meager) to show its inability to pay the penalty. The Gravity is reduced to $4,924.

Last, Section 1423(c)(4)(B) allows the presiding officer to consider "other matters as justice may require." (See, 42 U.S.C. §300h-2(c)(4)(B). In general, federal courts and the EAB interpret the Act's mandate to consider "other matters as justice may require" to be a catch-all provision that provides the decision maker discretion to weigh evidence or information not explicitly listed under the Act. See, e.g., *Pound v. Airosol Co., Inc.*, 498 F.3rd 1089, 1096 (10th Cir. 2007); *In Re Sprang & Company*, 6 E.A.D. 226, 250 (EAB, 1995). This factor is meant to "operate as a safety mechanism when necessary to prevent an injustice." *Sprang*, at 250. These cases also suggest that the use of the justice factor

9 The standard method for calculating the economic benefit resulting from a violator's delayed or avoided compliance is through the use of EPA's BEN Model (See, UIC Program Judicial and Administrative Order Settlement Penalty Policy, 1993, p. 4). However, GM 22 provides for an estimate of economic benefit, or "rule of thumb" method that can be implemented in simple cases. (See, GM-22, p. 6-10).

should not be routine. There is no new evidence in the record to adjust the penalty for this factor.

## DEFAULT ORDER

In accordance with 40 C.F.R. § 22.17(c), "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." Based on the record, the Findings of Fact set forth above, the Conclusions of Law and the statutory factors, this court is awarding the full amount of the penalty proposed in the Motion for Default. I hereby find that Respondent is in default and liable for a total penalty of **$5,000.00.**

**IT IS THEREFORE ORDERED** that Respondent, Gordon Poppens, doing business as Gordy's Garage shall, within thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **$5,000.00** to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 163197-9000

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Each party shall bear its own costs in bringing or defending this action.

Should Respondent fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 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 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R.

§ 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its on initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. See, 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

**SO ORDERED This** 14th **Day of** October, **2010.**

**Elyana R. Sutin**
**Presiding Officer**

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INTITIAL DECISION AND ORDER** in the matter of **GORDON POPPENS d/b/a GORDY'S GARAGE.; DOCKET NO.: SDWA-08-2007-0088** was filed with the Regional Hearing Clerk was filed on October 14, 2010.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Eduardo Quintana, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail on October 14, 2010, to:

Gordon Poppins
d/b/a Gordy's Garage
27096 SD Highway 17
Tea, SD 57064

And hand-delivered to:

Honorable Elyana R. Sutin
Regional Judicial Officer
U. S. Environmental Protection Agency
1595 Wynkoop Street (8RC)
Denver, CO 80202-1129

October 14, 2010

Tina Artemis
Paralegal/Regional Hearing Clerk