UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Stockton Oil Company,	)	**Docket No. RCRA-08-2014-0002**
	)	
Respondent.	)	

DEFAULT ORDER AND INITIAL DECISION

I. Background

On February 27, 2014, the United States Environmental Protection Agency ("EPA" or "Agency"), Region 8, Director of RCRA/CERCLA Technical Enforcement Program and REU Supervisory Attorney of the Legal Enforcement Program ("Complainant"), initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") against Stockton Oil Company ("Respondent") under the authority of Section 9006 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6991e. The Complaint alleges that Respondent owns and/or operates the Battlefield Express C-Store located at the junction of Highway 212 and I-90 in Crow Agency, Montana, at which three underground storage tanks ("USTs") are installed. The Complaint charges Respondent with one count of violation of Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c), and the regulations governing USTs at 40 C.F.R. § 280.41(a), based upon its alleged failure to monitor one of the three USTs for releases every 30 days from May of 2012 through April 30, 2013. For this alleged violation, the Complaint proposes a civil penalty in the amount of $16,609.

Appearing *pro se* through its representative, Mykel Stockton, Respondent responded to the Complaint by letter dated April 3, 2014 ("Answer"), in which Respondent "admit[s] we did everything that was required of us," "oppose[s] the proposed relief because we did everything in a timely fashion," and "request[s] a hearing to prove our innocence." In order to "prove [its] case," Respondent attached photocopies of a number of documents and photographs to the Answer.

On April 14, 2014, this matter was referred to the Agency's Office of Administrative Law Judges ("OALJ") for adjudication. By letter dated April 17, 2014, the parties were invited to participate in the Alternative Dispute Resolution ("ADR") process offered by OALJ. The letter explained that ADR is a voluntary process and that "[b]oth EPA and Respondent[] must elect to participate in ADR" in order for it to proceed. While Respondent elected to participate in ADR, Complainant did not timely respond to the letter, and I was subsequently designated to preside over the litigation of this matter.

By Prehearing Order dated May 15, 2014, I directed the parties to prepare and file prehearing exchanges of information ("Prehearing Exchange") by certain dates listed therein. Each party was instructed to include the following information in its Prehearing Exchange:

> (A) A list of names of the expert and other witnesses intended to be called at hearing, . . . or a statement that no witnesses will be called;
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> (B) Copies of all documents and exhibits intended to be introduced into evidence . . .; and
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> (C) A statement explaining its views as to the appropriate place for the hearing and an estimate of the time needed to present its direct case. *See* 40 C.F.R. §§ 22.21(d), 22.19(d).

Prehearing Order (May 15, 2014), at 2. Respondent was further ordered to submit the following as part of its Prehearing Exchange:

> (A) List the following paragraph numbers of the Complaint: 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 29, and 30. Next to each number, state whether Respondent "admits," "denies," or "has no knowledge" of the facts alleged in the corresponding paragraph of the Complaint, or state the portion of the paragraph that Respondent admits and the portion that Respondent denies. For any paragraph that Respondent cannot admit or deny, provide an explanation in response to the facts alleged in the paragraph;
>
> (B) A narrative statement, and a copy of any documents in support, explaining in detail the legal and/or factual bases for any denials provided in response to (A);
>
> (C) All factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and
>
> (D) If Respondent takes the position that the penalty proposed in

> the Complaint should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the legal and/or factual bases for that position and a copy of any and all documents upon which Respondent intends to rely in support.

Id. at 3.

The Prehearing Order further directed the parties to hold a settlement conference on or before June 6, 2014, and instructed Complainant to file a Status Report regarding that conference on or before June 13, 2014. *Id.* at 1–2. In the event of settlement, the parties were instructed to file a fully-executed Consent Agreement and Final Order on or before June 27, 2014. *Id.* at 2. In the absence of a finalized Consent Agreement and Final Order by that deadline, the parties were directed to "prepare for hearing and strictly comply with the prehearing requirements" set forth in the Prehearing Order. *Id.* In this regard, the Prehearing Order contained the following warning in underlined print:

> The mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the following prehearing exchange requirements. Only the filing with the Regional Hearing Clerk of a fully-executed Consent Agreement and Final Order, or an order of the presiding judge, excuses noncompliance with filing deadlines.

Id. The parties were also informed of the consequences of failing to comply with the prehearing exchange requirements, again in underlined print:

> Respondent is hereby notified that its failure either to comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses may result in the entry of a default judgment against it. Complainant is hereby notified that its failure to file its prehearing exchange in a timely manner may result in a dismissal of the case with prejudice.

Id. at 4.

Following the issuance of the Prehearing Order, Complainant filed a Settlement Status Update on June 13, 2014, and a Supplemental Settlement Status Update ("Supp. Status Update") on June 20, 2014. In the Supplemental Settlement Status Update, Complainant stated that counsel for Complainant and Mr. Stockton spoke regarding "whether it was in the parties' mutual best interests to attempt to resolve this matter outside of hearing" and agreed to

"negotiate directly with one another rather than engage in ADR to attempt to resolve this matter." Supp. Status Update (June 20, 2014), at 1. Complainant also stated its intent to file a joint motion requesting a stay of the filing deadlines for the parties' prehearing exchanges to provide an opportunity to the parties to reach a settlement without expending time and resources preparing their prehearing exchanges. *Id.*

On June 25, 2014, Complainant filed a Joint Motion for Extension of Time to File Prehearing Exchanges ("Motion"), wherein Complainant, with the concurrence of Respondent, requested a two-month extension of the filing deadlines for the parties' prehearing exchanges and proposed a new schedule for these filings. By Order dated June 26, 2014, I granted the Motion and directed Complainant to file its Initial Prehearing Exchange no later than August 22, 2014, and Respondent to file its Prehearing Exchange no later than September 12, 2014.

Complainant timely filed its Initial Prehearing Exchange ("Complainant's PHE") on August 22, 2014. Respondent, on the other hand, failed to file a Prehearing Exchange or otherwise respond to the Prehearing Order.

Consequently, on October 9, 2014, I issued an Order to Show Cause, which directed Respondent to file a document, on or before October 23, 2014, showing good cause for its failure to file a prehearing exchange as required by the Prehearing Order and Order of June 26, 2014, and explaining why a default order should not be entered against it. Respondent was advised that "a party may be found to be in default upon failure to comply with an order issued by the presiding Administrative Law Judge," and that default by a respondent constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." Order to Show Cause (Oct. 9, 2014), at 1 (citing 40 C.F.R. § 22.17(a)). The Order to Show Cause was served on Respondent by facsimile and regular mail at its address of record. To date, Respondent has not filed a response to the Order to Show Cause. As a courtesy, a staff attorney from this Tribunal contacted the telephone number of record for Respondent on October 30, 2014, and left a message for Mr. Stockton with an employee of Respondent that inquired as to Respondent's intent to file a response to the Order to Show Cause. To date, Mr. Stockton has not responded to that message or otherwise communicated with this Tribunal.

II. Entry of Default

In determining the appropriateness of entering a default judgment, I am guided by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22, which govern this proceeding. The Rules of Practice provide, in pertinent part:

> (a) Default. A party may be found in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer. . . . 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 rights 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. 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 . . . 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.

The Environmental Appeals Board ("Board" or "EAB") has explained that default is generally disfavored as a means of resolving a case. *Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992). However, it has also observed that the Rules of Practice "do not support the notion that a Presiding Officer must show inexhaustible patience in reckoning with a party's inattentiveness; rather, they suggest the contrary – that default is an essential ingredient in the efficient administration of the adjudicatory process." *Jiffy Builders, Inc.*, 8 E.A.D. 315, 320 (EAB 1999). The Board thus "accords substantial deference to the presiding officer in managing the trial proceedings and, in so doing, to take appropriate action to prevent abuse of process." *Fulton Fuel Co.*, CWA Appeal No. 10-03, 2010 EPA App. LEXIS 41, at *8 (EAB, Sept. 9, 2010).

In considering whether a default order was properly entered, the Board applies a "totality of the circumstances" test, which examines such factors as the grounds for the default order and the likelihood of the defaulting party's success on the substantive merits if a hearing had been held. *See, e.g.*, *JHNY, Inc.*, 12 E.A.D. 372, 384-93 (EAB 2005); *Jiffy Builders*, 8 E.A.D. at 319-22. Because of the "fact-contingent" nature of this inquiry, the Board has declined to adopt a *per se* rule regarding the entry of default following a party's failure to comply with prehearing deadlines. *JHNY*, 12 E.A.D. at 389-90. Nevertheless, on a number of occasions, the Board has affirmed the issuance of default orders for failure to file a timely prehearing exchange, even where the defaulting party was afforded only one opportunity to comply with the filing deadline before the entry of default. *Id.* at 389 ("The Agency has . . . upheld a default order upon a party's single failure to file a timely prehearing exchange.") (citing *Detroit Plastic Molding Co.*, 3 E.A.D. 103, 107 (CJO 1990); *House Analysis & Assocs.*, 4 E.A.D. 501, 505-08 (EAB 1993)).

As explained by the Board in *JHNY*, the critical role of the prehearing exchange supports a finding of default following a failure to comply with requirements related to that process:

> [W]e do not regard the prehearing exchange as a procedural nicety. Rather, because federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition and does not allow for the kind of discovery available, for example, under the Federal Rules of Civil Procedure, the prehearing exchange plays a pivotal function -- ensuring identification and exchange of all evidence to be used at hearing and other related information (e.g., identification of witnesses). By compelling the parties to provide this information in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing. Given the key role of the prehearing exchange to administrative practice, it is not surprising that the regulations recognize that failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default.

JHNY, 12 E.A.D. at 382 (upholding default order where respondent failed to file a timely prehearing exchange or include required copies of documents and exhibits in the prehearing exchange it belatedly filed).

With respect to respondents appearing *pro se*, the Board has rejected the contention that a party's lack of legal representation excuses its failure to comply with the Rules of Practice and orders of the presiding Administrative Law Judge. *See, e.g.*, *Rybond, Inc.*, 6 E.A.D. 614, 626-27 (1996) ("A litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance."); *House Analysis & Assocs.*, 4 E.A.D. at 505 ("The fact that [the individual respondent], who apparently is not a lawyer, chooses to represent himself and House Analysis & Associates does not excuse respondent from the responsibility of complying with the applicable rules of procedure.").

Here, despite clear warnings of the consequences of a failure to comply, Respondent failed to file a prehearing exchange on or before September 12, 2014, in derogation of the Prehearing Order, Order of June 26, 2014, and the requirements of 40 C.F.R. § 22.19(a). Respondent also disregarded the Order to Show Cause by failing to file a document, on or before October 23, 2014, showing good cause for its failure to file a prehearing exchange and explaining why a default order should not be entered against it. To date, Respondent has not filed a prehearing exchange, filed a change of address, or otherwise communicated with this Tribunal to explain or remedy its failures to comply. Taken as a whole, the record does not show good cause as to why a default order should not be issued. *See* 40 C.F.R. § 22.17(c).

Accordingly, Respondent is hereby found to be in default for its failure to comply with the Prehearing Order, the Order of June 26, 2014, the Order to Show Cause, and the prehearing exchange requirements of 40 C.F.R. § 22.19(a). As set forth above, default constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." *See* 40 C.F.R. § 22.17(a). Thus, the facts alleged in the Complaint are deemed admitted by Respondent. Such admissions will be reviewed to determine whether they establish Respondent's liability for the charged violation in the Complaint.

III. Assessment of Liability

As previously noted, the Complaint charges Respondent with one count of violation of Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c), and the regulations governing USTs at 40 C.F.R. § 280.41(a). Section 9003(c) of RCRA directs EPA to promulgate regulations applicable to all owners and operators of underground storage tanks that establish requirements "for maintaining a leak 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." 42 U.S.C. § 6991b(c). EPA thereafter promulgated the regulations at 40 C.F.R. § 280.41(a), which require "[o]wners and operators of petroleum UST systems" to provide "release detection" for tanks by "monitor[ing] [the tanks] at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h)," unless an exception applies. 40 C.F.R. § 280.41(a)(1). Acceptable methods of release detection identified by 40 C.F.R. § 280.43 include "automatic tank gauging" and "interstitial monitoring." 40 C.F.R. § 280.43(d), (g).

The regulations at 40 C.F.R. § 280.12 define the following relevant terms:

> Motor fuel means petroleum or a petroleum-based substance that is motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any grade of gasohol, and is typically used in the operation of a motor engine.
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> * * *
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> Operator means any person in control of, or having responsibility for, the daily operation of the UST system.
>
> Owner means . . . any person who owns an UST system used for storage, use, or dispensing of regulated substances.
>
> * * *

Person means an individual, trust, firm, joint stock company, Federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" also includes a consortium, a joint venture, a commercial entity, and the Unites States Government.

Petroleum UST system means an underground storage tank system that contains petroleum or a mixture of petroleum with de minimus quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

* * *

Regulated substance means . . . petroleum, including crude oil or any fraction thereof . . . . The term "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil . . ., such as motor fuels. . . .

Release means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an UST into ground water, surface water or subsurface soils.

Release detection means determining whether a release of a regulated substance has occurred from the UST system into the environment or into the interstitial space between the UST system and its secondary barrier or secondary containment around it.

* * *

Underground storage tank or UST means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.

* * *

UST system or Tank system means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

40 C.F.R. § 280.12.

In order for Respondent to be held liable for the violation charged in the Complaint, Complainant is required to demonstrate (1) that Respondent is a "person" (2) who was an "owner" or "operator" of a "petroleum UST system," and (3) that the associated UST was not monitored at least every 30 days for releases using one of the methods identified by 40 C.F.R. § 280.43. *See* 40 C.F.R. § 280.41(a)(1). Complainant alleged the following facts in the Complaint to establish those elements.

Respondent "owns and/or operates" the Battlefield Express C-Store located at the junction of Highway 212 and I-90 in Crow Agency, Montana ("Facility"), as a for-profit gas station and convenience store. Complaint ¶¶ 6-7. The Facility is situated on the Crow Indian Reservation. *Id.* at ¶ 6. Respondent "owns and operates three 10,000 gallon fiberglass reinforced plastic double-walled tanks" present at the Facility. *Id.* at ¶¶ 6, 9. Each of the tanks was installed at the Facility in February of 2000. *Id.* One tank is a single 10,000 gallon tank that contains unleaded gasoline ("Tank1"). *Id.* Each of the remaining two tanks are compartmentalized. *Id.* One compartmentalized tank contains 6,000 gallons of plus ("Tank 2-1") and 4,000 gallons of premium unleaded gasoline ("Tank 2-2"). *Id.* The other compartmentalized tanks contains 6,000 gallons of diesel #2 in one compartment ("Tanks 3-1") and 4,000 gallons of dyed diesel in the other ("Tank 3-2"). *Id.*

To detect leaks from the tanks at the Facility, Respondent uses a combination of interstitial monitoring and "a Gilbarco EMC ATG with continuous statistical leak detection) [sic] automatic tank gauging (ATG) system." Complaint ¶¶ 15–16, 29.

On March 28, 2013, EPA informed a representative of the Facility that it intended to inspect the Facility on April 10, 2013. Complaint ¶ 11. On April 10, 2013, Gary Wang, an inspector from EPA,[1] "inspected the Facility to determine its compliance with RCRA Subtitle I and the EPA regulations relating to USTs." *Id.* at ¶ 12. A representative of the Facility consented to the inspection and was present at the time the inspection was conducted. *Id.* at ¶ 13. At that time, "Respondent confirmed that the piping is double-walled Environ Geoflex and a pressurized system" and "produced records of monthly tank leak detection results, tank inventory, and sensor status." *Id.* at ¶¶ 14, 17. While the records included both ATG printouts and interstitial monitoring records, neither contained leak detection results for Tank 3-2 for the previous 12 months. *Id.* at ¶ 18. More specifically, "Tank 3-2 [did] not have any passing continuous statistical leak detection tank tests or show interstitial monitoring for the 12 month period May 2012 through April 2013." *Id.* at ¶ 30. At the end of the inspection, Mr. Wang

[1] Mr. Wang's official title is Environmental Engineer, Office of Partnerships and Regulatory Assistance, EPA Region 8. Complainant's PHE, at 3.

informed Respondent that the Facility was in violation and explained "what was necessary to return the Facility to compliance with the UST regulations." *Id.* at ¶ 19.

On April 26, 2013, "Respondent submitted tank leak testing results to the EPA."[2] Complaint ¶ 20. The results "verif[ied] that the ATG had been repaired and Tank 3-2 had been returned to compliance with the leak detection requirements." *Id.*

The foregoing facts, as alleged in the Complaint and deemed to be admitted by Respondent by virtue of the entry of default, establish by a preponderance of the evidence the violation charged in the Complaint. Specifically, the facts establish that Respondent is a "person" who was an "owner" and "operator" of the "petroleum UST systems" located at the Facility, as those terms are defined by the regulations at 40 C.F.R. § 280.12. The facts further establish that Respondent failed to monitor one of those petroleum UST systems every 30 days using the methods of release detection selected by Respondent from the list of acceptable methods at 40 C.F.R. § 280.43 for the 12-month period beginning in May 2012 and continuing through April 2013. Respondent thus failed to comply with the requirement set forth at 40 C.F.R. § 280.41(a) that "[o]wners and operators of petroleum UST systems" provide "release detection" for tanks by "monitor[ing] [the tanks] at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h)." Accordingly, Respondent is liable for the violation of Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c), and the regulations at 40 C.F.R. § 280.41(a), charged in Count 1 of the Complaint.

IV. Assessment of Penalty

The Rules of Practice provide, in pertinent part, that where a default order "resolves all outstanding issues and claims in the proceeding," then "[t]he relief proposed in the complaint . . . 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(c). In order to determine whether the proposed penalty is clearly inconsistent with the "Act," I am required to consider the governing provisions of RCRA, which is the statute giving rise to this proceeding.

Section 9006(d)(2) of RCRA provides that "[a]ny owner or operator of an underground storage tank who fails to comply with . . . any requirement or standard promulgated by the Administrator under [S]ection 9003 . . . shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." 42 U.S.C. § 6991e(d)(2). In order to reflect inflation, the maximum allowable penalty has since been increased pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-

[2] According to PHE submissions, Respondent came into compliance with the leak detection requirements as of April 23, 2013, but tank leak testing results were not submitted to EPA until April 26, 2013. *See* Complainant's proposed exhibits ("CX") 1, 4, and 8.

134, § 31001(s), 110 Stat. 1321, 1321-358 to 1321-380 (codified at 31 U.S.C. § 3701 note). *See* Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340-46 (Dec. 11, 2008) (adjusting maximum penalties for inflation). Accordingly, for violations occurring after January 12, 2009, through December 6, 2013,[3] the Administrator may assess a civil penalty of up to $16,000 per tank per day of violation. *Id.* at 75,346.

In determining the appropriate civil penalty to assess for a violation of RCRA's UST provisions, Section 9006(c) of RCRA directs the Administrator to "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." 42 U.S.C. § 6991e(c). The Administrator may also take into account "[t]he compliance history of an owner or operator" and "[a]ny other factor the Administrator considers appropriate."[4] 42 U.S.C. § 6991e(e).

Additionally, the Rules of Practice provide that 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 Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. 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.

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[3] Notably, the Agency issued a subsequent Civil Monetary Penalty Inflation Adjustment Rule on November 6, 2013, that further adjusted certain civil monetary penalties for inflation. *See* Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643, 66,643–44 (Nov. 6, 2013). Such adjustments, however, are applied only to violations that have occurred after the effective date of the Final Rule, that is, after December 6, 2013. *Id.* at 66,645.

[4] RCRA places the burden on a respondent to allege and prove inability to pay as an affirmative defense should the respondent wish to have its financial condition considered as a mitigating penalty factor. *See Carroll Oil Co.*, 10 E.A.D. 635, 662–63 (EAB 2002). Respondent did not raise the issue of inability to pay the proposed penalty in its Answer or produce any evidence that would support such a claim.

40 C.F.R. § 22.27(b).

In November of 1990, EPA issued the U.S. EPA Penalty Guidance for Violations of UST Regulations ("Penalty Policy") in an effort to guide the calculation of civil penalties assessed under Section 9006 of RCRA.[5] U.S. EPA Office of Underground Storage Tanks, OSWER Directive 9610.12, U.S. EPA Penalty Guidance for Violations of UST Regulations (Nov. 1990), at ch. 1, http://www.epa.gov/oust/directiv/od961012.htm. While the Penalty Policy is not binding on a Presiding Officer, the Board has instructed that it must be considered and "should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *Carroll Oil*, 10 E.A.D. at 655-56 (quoting *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002)).

According to the Complaint and Initial Prehearing Exchange submissions, Complainant employed the Penalty Policy to calculate the proposed penalty in this proceeding. Initially, the Complaint proposed a civil administrative penalty of $16,609 for one count of violation of 40 C.F.R. § 280.41(a). Compl. at 5–6. As reflected in Complainant's Initial Prehearing Exchange and the accompanying Penalty Calculation Worksheet and Penalty Statement submitted as proposed exhibits 7 and 8, respectively, Complainant subsequently reduced the proposed penalty to $14,613. Complainant's PHE, at 2, CX 7, and CX 8. Complainant explained that it "revised the penalty proposed by giving the respondent a 25 percent gravity reduction based on unique factors, reducing the total penalty currently proposed by the EPA to $14,613." CX 8.

The Penalty Policy provides that the "Initial Penalty Target Figure" is comprised of two components: the Gravity-Based Component and the Economic Benefit Component. CX 6 at 5. The Gravity-Based Component consists of four elements – the Matrix Value, the Violator-Specific Adjustments to the Matrix Value, the Environmental Sensitivity Multiplier ("ESM"), and the Days of Noncompliance Multiplier ("DNM") – reduced to the following equation:

Gravity-Based Component = Matrix Value x Violator-Specific Adjustments x ESM x DNM

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[5] Complainant provided a copy of the Penalty Policy as proposed exhibit 6, or CX 6, in its Initial Prehearing Exchange. Relevant to this proceeding, the Penalty Policy has been adjusted by memorandum entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)," and "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)," and "Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009," dated April 6, 2010 and publicly available at http://www.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf.

CX 6 at 14. To calculate the Gravity-Based Component, the first step is to determine the Matrix Value, which is a value based on two criteria. The first criterion is the extent of deviation, which requires an examination and assessment of "the extent to which the violation deviates from the UST statutory or regulatory requirements." *Id.* The second criterion is the actual or potential harm, which requires an examination and assessment of "the likelihood that the violation could (or did) result in harm to human health or the environment and/or has (or had) an adverse effect on the regulatory program." *Id.* at 15. These criteria, each of which contains levels of gravity, namely major, moderate, and minor, are reflected on a matrix, with each criterion forming an axis on the matrix. *Id.* Determining the Matrix Value is then reached by selecting a gravity level for each criterion and identifying the point of intersection on the matrix. *Id.*

Following a determination of the Matrix Value, adjustments to this value may be made, referred to as Violator-Specific Adjustments, to account for the violator's degree of cooperation or lack thereof (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made), the degree of willfulness or negligence (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made), a history of noncompliance (adjustments up to a 50 percent increase may be made), and other unique factors (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made). *Id.* at 17. Additionally, further adjustment may be made "based on potential site-specific impacts that could be caused by the violation," referred to as the ESM. *Id.* at 20. This multiplier is intended to "take[] into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release." *Id.* Levels of the ESM are characterized as low, moderate, or high. *Id.* Finally, an adjustment may be made to "take[] into account the number of days of noncompliance," referred to as DNM. *Id.* at 21.

The Economic Benefit Component is intended to "remove[] any significant profit from noncompliance" and "represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance." *Id.* at 8. The Economic Benefit Component "is based on the benefit from two sources: (1) avoided costs; and (2) delayed costs." *Id.* Avoided costs are the "periodic, operation and maintenance expenditures that should have been incurred, but were not." *Id.* Delayed costs, though not a factor in this case, are the "expenditures that have been deferred by the violation, but will be incurred to achieve compliance." *Id.* The Penalty Policy identifies two methods for calculating the Economic Benefit Component. One method is referred to as the "rule-of-thumb" approach, and the other method utilizes a computer software program called BEN, referred to as the "BEN model." *Id.* at 8-9. Under the Penalty Policy, the "rule-of-thumb" approach "should be used for making an initial estimate of the economic benefit of noncompliance. If the initial estimate is less than $10,000, . . . [then it] may be used as a basis for the economic benefit assessed in the penalty." *Id.* at 9. If the initial estimate exceeds $10,000, then the BEN model should be used. *Id.*

The "rule-of-thumb" approach utilizes mathematical equations to calculate avoided and delayed costs. Specifically, as set out in the body of the Penalty Policy, avoided costs are calculated as follows:

DETERMINING AVOIDED COSTS

$$\text{Avoided Costs} = \text{Avoided Expenditures} + \text{Avoided Expenditures} \times \text{Interest} \times \frac{\text{Number of Days}}{\text{365 Days}} \times (1 - \text{Marginal Tax Rate})$$

Avoided Expenditures are estimated using local, comparable costs.
Interest is the equity discount rate provided in the BEN model (currently 18.1 percent).
Number of Days is from the date of noncompliance to the date of compliance.
365 Days is the number of days in a year.
Marginal Tax Rate is based on corporate tax rates or financial responsibility compliance class.

Id. at 9 (Chapter 2, Section 2.2 Avoided Costs). It should be noted, however, that there appears to be some inconsistency within the Penalty Policy with regard to the order of operations[6] to be followed when calculating avoided costs. For example, applying the default order of operations to the equation above, the order in which the calculation would be performed would be to first compute "1 - Marginal Tax Rate" and then multiply that value by "avoided expenditures x interest x number of days/365" and then add that value to the "avoided expenditures" to determine the "avoided costs." However, in the computation worksheet contained within "Appendix B: UST Penalty Computation Worksheet" of the Penalty Policy, the order in which the avoided costs calculation is to be performed was modified by adding brackets to the equation, shown as follows:

$$\text{AVOIDED COSTS} = \left[\text{Avoided Expenditures} + \text{Avoided Expenditures} \times \text{Interest} \times \frac{\text{Number of Days}}{\text{365 Days}}\right] \times (1 - \text{Weighted Tax Rate})$$

Id. at Appendix B, page 1 of 3. By the insertion of such brackets, and as evidenced by the penalty computation examples within "Appendix C: UST Penalty Computation Examples" of the Penalty Policy, the order in which the operations of the equation are to be performed was changed. In this modified, or bracketed, equation, one would compute the value for "1 -

[6] Generally, the order of operations refers to the order of precedence for mathematical operations within a mathematical expression, namely that the first operation to be performed is that which is within parentheses, followed by any exponents, followed by multiplication and division (as encountered from left to right), followed by addition and subtraction (as encountered from left to right).

Marginal Tax Rate" and compute the value for "'avoided expenditures' + 'avoided expenditures x interest x number of days/365'" and then multiply those two values to determine the avoided costs. By changing the order of operations to be followed in the equation, the end value for avoided costs will also vary.

Aside from this apparent inconsistency--between the avoided costs equation set out in the body of the Penalty Policy (see Chapter 2, Section 2.2 Avoided Costs) and the avoided costs equation set out in the penalty computation worksheet and examples (see Appendices B and C to the Penalty Policy)--it appears there is an additional inconsistency created by two different versions of the Penalty Policy (specifically with regard to the avoided costs equation set out in the body of the policy) that are publicly available and, presumably, in use. Both versions purport to be the same penalty policy in that both contain the same identifying information: Directive Number: 9610.12; Title: U.S. EPA Penalty Guidance for Violations of UST Regulations; Date: November 14, 1990; and Originating Office: OSWER. However, one version is like that submitted and used by Complainant in this case, CX 6, namely, the version that does not contain the modified or bracketed equation in the body of the Penalty Policy but that utilizes the modified or bracketed equation in Appendices B and C of the Penalty Policy, and that is publicly available at the following Web address for EPA's National Service Center for Environmental Publications: http://nepis.epa.gov/Exe/ZyNET.exe/9101Z2RE.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1986+Thru+1990&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C86thru90%5CTxt%5C00000032%5C9101Z2RE.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p%7Cf&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL#. The other version of the Penalty Policy contains the modified, or bracketed, equation for calculating avoided costs in both the body of the Penalty Policy (found in the Penalty Policy at Chapter 2, Section 2.2 Avoided Costs) as well as in Appendices B and C, and is publicly available at the following Web address: http://www.epa.gov/sites/production/files/2014-02/documents/d9610.12.pdf.

Given that Complainant relied upon the former version of the Penalty Policy in calculating the proposed penalty in this matter, submitted and part of the case record as CX6, I, too, will rely on that version of the Penalty Policy in my penalty assessment. In my analysis and assessment of the penalty in this matter, I considered the relevant statutory factors, regulatory requirements, and Penalty Policy. In my review of Complainant's proposed penalty, I have determined it to be reasonably calculated and consistent with the record, and I have adopted it as an appropriate civil monetary penalty to be assessed in this matter. My rationale follows.

In calculating the Gravity-Based Component, Complainant has proposed a Matrix Value of $2,130, based on an assessment of a "major" extent of deviation from the regulatory requirements, a "major" potential for harm to human health, the environment, and/or to the regulatory program, and on updated matrices consistent with the 2008 Civil Monetary Penalty Inflation Adjustment Rule. CX 7, CX 6 (Penalty Policy, Appendix A) at A-6. I agree, and I note that Respondent has not presented evidence to the contrary. Here, Respondent failed to monitor Tank 3-2 every 30 days for nearly 12 months, from May 2012 through most of April 2013, demonstrating "substantial noncompliance" with the statutory and regulatory requirements pertaining to owners and operators of USTs. Complaint ¶ 18, CX 6 at 15. Such violative conduct could have resulted in substantial risk to human health and the environment. For example, the failure to monitor the UST for nearly 12 months could have led to an unnoticed release for a lengthy period of time with detrimental consequences.

With regard to Violator-Specific Adjustments, Complainant has proposed an increase of 25 percent for Respondent's lack of cooperation in response to the enforcement action and an increase of 25 percent for Respondent's willfulness (or negligence) in committing the violation. In support, Complainant points to Respondent's "unwilling[ness] to resolve the noncompliance by accepting the EPA's expedited settlement offer" as demonstration of a lack of cooperation. CX 8. As to the degree of willfulness, Complainant asserts that Respondent "knew of the legal requirement from the EPA's prior enforcement action,"[7] which justifies an upward adjustment pursuant to the Penalty Policy. CX 6 at 18, CX 7, and CX 8. I find Complainant's arguments persuasive, consistent with the record as a whole and with the Penalty Policy, and unrebutted. Further support is found in other factors contained in the Penalty Policy, such as the control Respondent possessed in preventing the violation by simply conducting monthly monitoring of Tank 3-2 and making prompt repairs to any deficiencies in the monitoring system. As Complainant has noted, "Respondent had total control over the equipment and should have known that one or both of its leak detection methods was not operating if they had checked the data generated by the equipment for exactly that purpose." CX 6 at 18, CX 8.

Complainant proposed an upward adjustment of 50 percent in consideration of Respondent's history of noncompliance at the same facility. CX 7 and CX 8. As mentioned, Respondent, and this same facility, were the subject of a prior enforcement action for UST violations that occurred in 2007, which included the failure to perform regular monitoring. Under the Penalty Policy, "[p]revious violations of any environmental regulation are usually considered clear evidence that the violator was not deterred by previous interaction with enforcement . . . . Unless the current violation was caused by factors entirely out of the control of

[7] Respondent's prior enforcement action, which resulted in a Default Initial Decision involving various RCRA violations at the same facility, including the failure to perform monthly monitoring or have an annual line tightness test on the pressurized piping for three USTs, is publicly available at http://yosemite.epa.gov/oa/rhc/epaadmin.nsf/Advanced%20Search?SearchView&Query=%22stockton+oil%22&SearchMax=0.

the violator, prior violations should . . . [indicate] that the matrix value should be adjusted upwards." CX 6 at 19. As mentioned, the ability to conduct monthly monitoring fell squarely within Respondent's control. Moreover, similarities between the prior violation(s) and the current violation appear to exist and appear to demonstrate a pattern of failing to conduct regular monitoring of all the USTs at the Facility. Thus, I find an upward adjustment of 50 percent to be appropriate given the totality of the circumstances and noting the absence of evidence to the contrary.

Lastly, Complainant proposed a reduction of 25 percent based on "unique factors" and in consideration of facilitating settlement discussions. CX 7 and CX 8. Although the potential for settlement has passed, the Rules of Practice provide that "[t]he relief proposed . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceedings or the Act." 40 C.F.R. § 22.17(c). Further, the Rules of Practice provide that "[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." 40 C.F.R. § 22.27(b). In its narrative explaining its proposed penalty in this matter, Complainant has maintained that "unique factors" justify a downward adjustment of 25 percent. *See* CX 8. Accordingly, I have adopted that downward adjustment in my assessment of the penalty in this case.

As for the multipliers to be used in the Gravity-Based Component, namely the ESM and DNM, I have adopted that which Complainant proposed. Specifically, Complainant proposed an ESM of 1.5 "since the Facility is in Indian country, consistent with standard operating procedures." CX 8. I note that the same justification and multiplier of 1.5 was used in Respondent's prior violation. Complainant proposed 2.5 as the DNM since the number of days of violation was nearly 12 months, falling between 271 and 365 days as set out in the Penalty Policy. CX 6 at 21, CX 7, and CX 8. Consequently, the Gravity-Based Component totals $13,978.12 [$2,130 (matrix value) x .25 (lack of cooperation) x .25 (degree of willfulness) x .50 (history of noncompliance) x -.25 (unique factors) x 1.5 (ESM) x 2.5 (DNM) = $13,978.12].

The Economic Benefit Component in this matter is comprised only of the avoided costs since delayed expenses were not a factor in this case. I note that Complainant, in its narrative of the proposed penalty, refers to "delayed" costs while describing the monthly monitoring costs that Respondent "avoided" and that should be recouped so as to "eliminate any savings enjoyed by the Respondent for not complying with the regulations." CX 8. The Penalty Policy provides examples of "avoided costs" as the "failure to conduct a required periodic test," like the monthly monitoring violation at issue in this matter. CX 6 at 9. Further, Complainant's penalty calculation worksheet appropriately identifies the costs as an "avoided" rather than "delayed" expense. CX 7. Thus, it appears that Complainant's single reference to "delayed" costs in its narrative was simply a typographical error.

In calculating the avoided costs, Complainant, though not expressly stated, presumably utilized "estimated . . . local, comparable costs" as described in the Penalty Policy by estimating

avoided expenditures to be $50 per month to conduct "SIR tests for one tank" for a period of 12 months, totaling $600. CX 6 at 9, CX 7, and CX 8. The interest rate, utilizing the "equity discount rate provided in the BEN model," was set at .069. CX 6 at 13, CX 7. In the absence of any challenge or the submission of contrary evidence, I have adopted these figures proposed by Complainant. Complainant proposed the number of days of violation as 357, giving credit to Respondent for returning Tank 3-2 to compliance with the leak detection requirements "as of April 23, 2013," which is supported by the case record. CX 7 and CX 8. *See also* CX 1 at 1 and 3, and CX 4. With regard to the marginal tax rate, it appears that Complainant based that rate on the financial responsibility compliance class 4, or FR Class 4, established under the Penalty Policy at a tax rate of 15 percent, or .15, for "very small marketing firms with 1 to 12 USTs . . . ." CX 6 at 10, CX 7. Thus, the total Economic Benefit Component, comprised only of avoided costs, totals $634.41 [$600 + $40.49[8] x .85[9] = $634.41].

The Initial Penalty Target Figure, comprised of the Gravity-Based Component plus the Economic Benefit Component, totals $14,613 [$13,978.12 + $634.41 = $14,612.53, or $14,613 after rounding to the nearest unit of $100[10]]. Accordingly, I conclude that Respondent is liable for a civil monetary penalty of $14,613 for violation of Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c), and the regulations at 40 C.F.R. § 280.41(a).

ORDER

1. Respondent is hereby found to be in default for failing to comply with the Prehearing Order, the Order of June 26, 2014, the Order to Show Cause, and the prehearing exchange requirements set forth in 40 C.F.R. § 22.19(a), and no good cause has been shown why a default order should not be issued against Respondent.

2. The facts alleged in the Complaint and deemed to be admitted by Respondent by virtue of the entry of default establish that Respondent violated Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c), and the regulations at 40 C.F.R. § 280.41(a), by failing to monitor Tank 3-2 at its Facility for releases every 30 days from May 2012 through April 2013.

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[8] $600 x .069 x 357/365 = $40.49

[9] 1-.15 = .85

[10] See CX 6 at 16 and "Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009," dated April 6, 2010, and publicly available at http://www.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf at Attachment C, Exhibit 4.B.

3. Respondent is liable for a total civil monetary penalty of $14,613, and is ordered to pay that amount in the manner directed below.

4. Payment of the full amount of this civil penalty shall be made within 30 days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.

Payment shall be made by submitting a certified or cashier's check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number, Docket No. RCRA-08-2014-0002, as well as Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within 20 days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within 30 days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

Christine Donelian Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: February 3, 2016
Washington, DC

In the Matter of *Stockton Oil Company*, Respondent.
Docket No. RCRA-08-2014-0002

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Default Order and Initial Decision**, dated February 3, 2016, were sent this 3rd day of February 2016, in the following manner to the addressees listed below.

Mary Angeles
Paralegal

Original and One Copy By Hand Delivery To:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania Ave., NW
Washington, DC 20460

Copy By Electronic and Regular Mail To:

Amy Swanson, Esq.
Sr. Enforcement Attorney
U.S. EPA, Region VIII
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Copy By Facsimile, Overnight UPS, and Regular Mail To:

Mykel Stockton, President
Stockton Oil Company
1607 4th Avenue, North
P.O. Box 1756
Billings, MT 59103-1522
Fx: 406.259.9598

Copy By Facsimile and Interoffice Mail To:

U.S. Environmental Protection Agency
Environmental Appeals Board
Attn: Eurika Durr, Clerk of the Board
1200 Pennsylvania Ave., NW
Mail Code 1103M
Washington, DC 20460
Email: durr.eurika@epa.gov

Dated: February 3, 2016
Washington, DC