



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF

**TANANA OIL CORPORATION and
TRI-ANGLE HOLDING CORPORATION¹,**

RESPONDENTS

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) **Docket No. RCRA-03-2003-0263**
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DEFAULT ORDER AND INITIAL DECISION

Respondents are hereby found in default because each Respondent has failed to submit a prehearing exchange, motion for extension of time, or statement that it is electing only to conduct cross-examination of the Complainant's witnesses, as required by Orders of this Tribunal.

The Administrative Complaint, Compliance Order and Notice of Right to Request Hearing in this case was filed with the Regional Hearing Clerk on October 1, 2003 pursuant to Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively "RCRA"), 42 U.S.C. § 6991e, and the Consolidated Rules of Practice Governing the Administrative Assessments of Civil Penalties, and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules of Practice"). The Complaint does not specify a proposed penalty and seeks imposition of a Compliance Order. The Complaint was sent to Respondents by overnight express mail, return receipt requested, in accordance with 40 C.F.R. § 22.5(b)(1)(i). Respondents filed a joint Answer to the Complaint on November 3, 2003.²

This Tribunal's Prehearing Order, issued March 5, 2004, required that Complainant submit its prehearing exchange by May 5, 2004; that Respondents submit their prehearing exchange by June 5, 2004; and that Complainant submit its rebuttal prehearing exchange by June 19, 2004. That Prehearing Order stated, in part:

¹ In Respondent's Answer, Respondent states that Tri-Angle Holding Corporation's true and accurate name is Edgemere Tri-Angle Holding Corporation.

² Respondents' joint Answer was filed by counsel, Attorney Charles F. Speer, on behalf of both Respondents.

If either Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, that Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party.**

Prehearing Order at 4 (emphasis added).

Complainant timely filed its prehearing exchange on May 5, 2004. In Complainant's prehearing exchange, Complainant proposed that the Regional Administrator assess an administrative penalty against Respondents in the amount of \$46,789³, pursuant to Sections 9006(c) and (d) of RCRA, 42 U.S.C. §§ 6991e(c) and (d), as well as the *U.S. EPA Penalty Guidance for Violations of UST Regulations* ("UST Penalty Policy", November 1990).

Upon Respondents' failure to file their prehearing exchange(s), an Order to Show Cause was issued to Respondents on July 7, 2004, requiring them to explain why they failed to meet the deadline for filing their prehearing exchange and why the Court should not issue a default order against them.⁴ Respondents have not filed a response to the Order to Show Cause. More than seven weeks have elapsed since the passing of the June 5, 2004 deadline and Respondents still have not filed their prehearing exchange(s).

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. § 22.17, provides, 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 the respondent constitutes, for the purpose of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

* * *

(c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding

³ Complainant seeks \$49,264 as the penalty amount in Complainant's Prehearing Exchange, and \$46,789 as the proposed penalty amount in Complainant's Prehearing Exchange Exhibit 2, Detailed Summary of Penalty Proposed in the Complaint. See Complainant's Prehearing Exchange, at p. 11; Complainant's Prehearing Exchange, Exhibit 2.

⁴ The Order to Show Cause sent to Charles F. Speer of the Speer Law Firm was received on July 13, 2004, as evidenced by the certified mail return receipt signed by N. Landsberg.

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.

* * *

(d) *Payment of penalty; effective date of compliance...* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c).

Pursuant to § 22.17 of the Consolidated Rules, “[a] party may be found to be in default: ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer.” In the case before me, Respondents failed to file a prehearing exchange by June 5, 2004, or to date, as required by the Prehearing Order. Respondents have not responded to the Order to Show Cause issued to them. Nothing in Respondents’ pleadings provides “good cause” why Respondents failed to meet the June 5, 2004 prehearing exchange filing deadline or why a default order should not be issued against Respondents.

Complainant in this case seeks the assessment of a civil administrative penalty in the amount of \$46,789. Complainant stated in its prehearing exchange that the penalty amount takes into account the factors identified in the UST Penalty Policy including: the potential for harm, the extent of deviation, cooperation of Respondents, degree of willfulness or negligence, history of non-compliance, days of non-compliance, the economic benefit to the violator resulting from the violation, and any other factors as justice may require. *See* Complainant’s Prehearing Exchange, at Exhibit 1.

Respondents’ Answer did not address the ability to pay issue. The Prehearing Order specifically states that “[i]f either Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.” Prehearing Order, at 3.

Additionally, the Complaint seeks a Compliance Order pursuant to the authority of Section 9006 of RCRA, 42 U.S.C. § 6991e, requiring the Respondents to, among other things: submit a notice of intent to the Maryland Department of the Environment (“MDE”), within fifteen days after the effective date of the Compliance Order, to permanently close the two underground storage tanks (identified as Tanks #2 and #3) at the Facility known as Tanana Oil Station No. 409 located in Edgemere, Maryland; permanently close the tanks within sixty days; and submit a written report to MDE of the closure and assessment within ninety days.

I find Respondents to be in default for their failure to file a prehearing exchange as required under the July 7, 2004 Prehearing Order. Default by Respondents constitutes admissions of all facts alleged in the Complaint and waivers of Respondents’ rights to contest such factual allegations. *See* 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint

establish Respondents' violations of RCRA as charged. Finally, upon review, I conclude that the penalty and Compliance Order requested by Complainant are not "clearly inconsistent" with the record of the proceeding or the Act. *See* 40 C.F.R. § 22.17(c). Accordingly, the civil administrative penalty of \$46,789 proposed in Complainant's Prehearing Exchange is assessed against Respondents and the Compliance Order contained in the Complaint is entered against Respondents.

ORDER

1. Respondents are found in default for failing to comply with the Prehearing Order of the Administrative Law Judge, and no good cause is shown why a default order should not be issued.
2. Respondents Tanana Oil Corporation and Tri-Angle Holding Corporation are assessed a civil administrative penalty in the amount of \$46,789.
3. Respondents Tanana Oil Corporation and Tri-Angle Holding Corporation shall adhere to the requirements of the Compliance Order in the Complaint.
4. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of \$46,789, payable to "Treasurer, United States of America," and mailed to:

EPA Region III
(Regional Hearing Clerk)
P.O. Box 360515
Pittsburg, PA 15251
5. A transmittal letter identifying the subject case and EPA docket number (RCRA-03-2003-0263), as well as Respondents' names and addresses, must accompany the check.
6. If Respondents fail to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Appeal Rights

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board ("EAB") within thirty (30) days after service of this Order, or the

EAB elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: July 29, 2004
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order and Initial Decision**, dated July 29, 2004, was sent this day in the following manner to the addressees listed below:

Maria Whiting-Beale
Legal Staff Assistant

Dated: July 29, 2004

Original and One Copy by Pouch Mail to:

Lydia A. Guy
Regional Hearing Clerk (3RC00)
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy By Pouch Mail To:

Rodney Travis Carter, Esquire
Assistant Regional Counsel
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy By Certified Mail to:

Charles F. Speer, Esquire
Speer Law Firm
The Stilwell Building
104 W. 9th Street, Suite 305
Kansas City, MO 64105