

2010 MAY 10 PM 2: 56

ENVIR. APPEALS BOARD

May 10, 2010

Via HAND DELIVERY

Clerk

EPA

1341 G Street, NW

Suite 600

Washington, DC 20005

NOTICE OF APPEALS CONTENTS COVERING LETTER

Dear Environmental Appeals Board Clerk:

Enclosed please find for timely filing today:

1. Notice of Appeal for Docket No. CWA-08-2009-0006 (1 page);
2. Respondent's/Appellant's Brief in Support of Notice of Appeal (7 pages);
3. A set of copies of all documents for filing.

Kindly accept these documents for filing and time-stamp a copy presented for our records.

Very truly yours,



William Lowrance

Attorney

Enclosures

Douglas C. Allen
Attorney at Law
153 Main Street
P.O. Box 873
Shelby, MT. 59474
Telephone: (406) 424-8020
Facsimile: (406) 434-5522

ENVIR. APPEALS BOARD

2010 MAY 10 PM 2:56

RECEIVED
U.S. E.P.A.

ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

| | | |
|-----------------------|---|-----------------------------|
| IN THE MATTER OF: | * | |
| | * | Docket No. CWA-08-2009-0006 |
| FULTON FUEL COMPANY | * | |
| 127 Main Street | * | NOTICE OF APPEAL |
| Shelby, Montana 59474 | * | |


Respondent Fulton Fuel Company hereby appeals from:

Default Initial Decision and Order dated the 8th day of April, 2010 and filed 2010 April 9, issued by Elyana R. Sutin, regional Judicial Office, refusing to accept and file the Answer filed or tendered by Respondent, and refusing to set aside the default of respondent Fulton Fuel Company; and

Default Initial Decision and Order dated and filed the 17th day of March, 2010, ordering Respondent Fulton Fuel Company to pay a penalty or fine of \$32,176.00.

The above Orders are contrary to the record and law applicable to this case and were entered by the United States Environmental Protection Agency without jurisdiction and are contrary to Precedent of the United States Supreme Court.

Respectfully submitted on this 10th day of May, 2010.



Douglas C. Allen
Attorney for Fulton Fuel Company

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2010, I served original and true and correct copies by courier to the following personas and agencies:

Environmental Appeals Board
United States Environmental Protection Agency
Suite 600, 1341 G. Street, NW
Washington D.C. 20005
(Via Hand Delivery)

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop Street
Denver, CO. 80202-1129
(Via Federal Express)

Marc D. Weiner
Enforcement Attorney
1595 Wynkoop Street
Denver, CO. 80202-1129
(Via Federal Express)

William Lopera for
Douglas C. Allen

Douglas C. Allen
Attorney at Law
153 Main Street
P.O. Box 873
Shelby, MT. 59474
Telephone: (406) 424-8020
Facsimile: (406) 434-5522

ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

| | | |
|-----------------------|---|--------------------------------|
| IN THE MATTER OF: | * | |
| | * | Docket No. CWA-08-2009-0006 |
| FULTON FUEL COMPANY | * | |
| 127 Main Street | * | RESPONDENT'S/APPELLANT'S BRIEF |
| Shelby, Montana 59474 | * | IN SUPPORT OF NOTICE OF APPEAL |
| | * | |

TABLE OF CONTENTS

| | |
|-----------------------------|---|
| Table of Contents | 2 |
| Issues Presented for Review | 3 |
| Statement of Case | 4 |
| Argument | 5 |
| Conclusion | 7 |
| Certificate of Service | 8 |

ISSUES PRESENTED FOR REVIEW

Did the Environmental Protection Agency act in excess of its jurisdiction and err in imposing a fine or penalty upon Fulton Fuel Company for a small oil spill in the waters of a seasonal creek which runs dry each year and does not reach navigable waters of the United States; and

Did the Regional Hearing Office err in entering a default, imposing a fine or penalty upon Fulton Fuel Company, and refusing to set aside the Default where good cause existed for setting aside the Default and the Answer and Affidavit on file demonstrate the United States Environmental Protection Agency has no jurisdiction in this case.

STATEMENT OF THE CASE

On February 29, 2004, a small crude oil release occurred from a fiberglass flow line buried in rock several feet below Fred and George Creek. The spill which was measured at 6 to 10 barrels was immediately discovered by Fulton Fuel Co. which immediately commenced, sustained and paid for remediation, testing and restoration of all environmental aspects of that spill.

This was all done with instructions and approval of the Montana Department of Environmental Quality. (See Response to the United States Environmental Protection Agency, filed by then attorney of Fulton Fuel Co., Renee Coppock.)

Fred and George Creek meanders through rugged hill country in rural northern Toole County, Montana. It's a small seasonal creek which runs dry each year below the site of the spill. It is not even remotely navigable and it's waters do not reach any navigable stream. (Affidavit of William M. Fulton in the record)

Subsequent to the spill, Fulton Fuel Co. retained an attorney, Renee Coppock of the Crowley Fleck Law Firm, 500 Transwestern Plaza II, 480 North 31st Street, Billings, Mt. 49101, to handle all legal matters pertaining to environmental issues with local, state and federal governments arising out of the spill. She corresponded with the EPA and furnished a "Response to United State Environmental Protection Agency Expedited Request for Fulton Fuel Crude Oil Release into Fred and George Creek, Toole County, Montana, dated October 3, 2007". (See Response exhibit 10 and Affidavit of William M. Fulton, Jr.)

Fulton Fuel Company believed that Renee Coppock was handling all legal matters arising out of the EPA's Complaint and was not advised until December 21, 2009, that Ms. Coppock had not appeared in this matter. (Affidavit of William M. Fulton Jr.)

ARGUMENT

The EPA has no jurisdiction in this case.

The Orders appealed from assert liability based on Sections 33 USC 1321(b) and subsections which prohibit the discharge of oil into or upon navigable waters of the United States.

The Orders also predicate liability for a storage facility alleged to violate spill prevention rules described in Section 112.1 of 40 CFR which provided in part:

“3. The facility must be geographically located such that there is a reasonable expectation of discharge into or upon navigable waters of the United States or adjoining shorelines.”

This is not the case here. No spill occurred at the storage facility which is located some distance away from the spill at a place lower than Fred and George Creek. Had a spill occurred, it would not have reasonably been expected to reach navigable waters of the United States.

The United States Supreme Court has made it abundantly clear that the United States Environmental Protection Agency has no jurisdiction in this case. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 US 159 (2001), The Supreme Court construed the “Clean Water Act” under which the EPA is proceeding here. The Court held there is no jurisdiction under the Act where there is no nexus between the waters involved and navigable waters of the United States. The Court said:

The term “navigable” has at least the import of a showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which reasonably be so made.

In *John A Rapanos v. United States Army Corps of Engineers*, 547 U.S. 715 (2006), four Justices were of the view that the phrase “waters of the United States” (i) includes only relatively permanent standing or flowing bodies of water, and (ii) does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall; (c) only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that there is not clear demarcation between “water” and wetlands are “adjacent to” such waters and are covered by the CWA”.

Fulton Fuel Company's Default should be set aside.

Fulton's Answer was filed before the Regional Hearing Office adjudicated a default. The Answer clearly stated meritorious defenses that the EPA had no jurisdiction, the spill was caused by a third party, and was not preventable by Fulton Fuel Company.

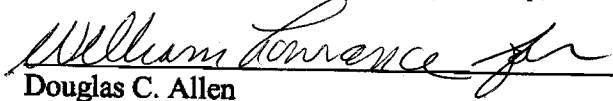
Fulton Fuel Company hired counsel. Renee Coppock, who indeed filed a response to the EPA, but inexplicably did not file a formal response to the EPA's complaint, and did not notify Fulton Fuel Company she was not defending the action.

Where a respondent retains counsel who withdraws without notice, a resulting default should be set aside, *Montana Bank of Roundup v. Benson* 220 Mont 410, 717 P.2d6 (1986).

CONCLUSION

The Orders appealed from should be set aside and this case should be dismissed for lack of jurisdiction.

Respectfully submitted this 8th day of May, 2010.



Douglas C. Allen

Attorney for Fulton Fuel Company

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2010, I served original and true and correct copies by courier to the following persons and agencies:

Environmental Appeals Board
United States Environmental Protection Agency
Suite 600, 1341 G. Street, NW.
Washington D.C. 20005
(Via Hand Delivery)

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop Street
Denver, CO. 80202-1129
(Via Federal Express)

Marc D. Weiner
Enforcement Attorney
1595 Wynkoop Street
Denver, CO. 80202-1129
(Via Federal Express)

William Lawrence
William Lawrence
for Douglas C. Allen