

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

FILED
2009 MAY 26 AM 9:36
REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of:)
)
T Jordan Towing, Inc.,) Docket No. SWDA-06-2008-5100
)
Respondent.)

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 9006 of the Solid Waste Disposal Act, as amended (“SWDA”), 42 U.S.C. § 6991e, for violations of Section 9003 of the SWDA, 42 U.S.C. § 6991b, and regulations promulgated pursuant thereto. The proceeding is governed by procedures set forth in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”) codified at 40 C.F.R. Part 22. Complainant, Director of the Multimedia Planning and Permitting Division of United States Environmental Protection Agency Region 6, has filed a Motion for Default Order (“Motion for Default”) seeking a default order finding Respondent, T Jordan Towing, Inc., liable for the violations of the SWDA alleged in the Complaint, Compliance Order and Notice of Opportunity for Hearing (“Complaint”) filed in this matter, finding the Order to be final and enforceable, and assessing a civil penalty in the amount of \$66,774.03 against the Respondent. Pursuant to the Consolidated Rules and the record in this matter and for the reasons set forth below, the Complainant’s Motion for Default is hereby **GRANTED**. Respondent is found to be in default because of its failure to file an answer to the Complaint. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent’s right to contest such factual allegations. Respondent is found to have violated

requirements of Subchapter IX of the SWDA, 42 U.S.C. §§ 6991 – 6991i. The injunctive relief proposed is consistent with the record in this proceeding and the Act. A penalty of \$66,774.03 is consistent with the record in this proceeding and the Act.

BACKGROUND

On March 10, 2008, Complainant filed the Complaint against Respondent in this matter. Section VIII of the Complaint, entitled “Notice of Opportunity for Hearing,” provides information concerning Respondent’s obligations with respect to responding to the Complaint. Among other things, paragraph 61 of Section VIII of the Complaint specifically states that “. . . Respondent shall file a written answer to this Complaint with the Regional Hearing Clerk for EPA Region 6, and serve the written answer on the Complainant, not later than thirty (30) days after service of this Complaint on Respondent.” Paragraph 62 of Section VIII of the Complaint states that “The failure of Respondent to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.” Section IX of the Complaint, entitled “Default Order,” states that “If Respondent fails to file an answer within thirty (30) days after the date of service of this Complaint and serve the parties with a copy of the answer, Respondent may be found to be in default after motion pursuant to 40 C.F.R. § 22.17.”

The Certificate of Service attached to the Complaint includes a certification that a copy of the Complaint and 40 C.F.R. Part 22 were deposited with the U.S. Postal Service, first-class postage prepaid, certified mail, return receipt requested, on March 10, 2008, addressed to:

Tom Jordan
Registered Agent
T Jordan Conoco
5317 Mansfield Highway
Fort Worth, Texas 76119.

On May 15, 2008, Complainant filed Complainant's Proof of Service of Process, in which Complainant reported that the service of the Complaint by mail was unsuccessful, but that the Complaint was personally served on Tom Jordan on April 24, 2008. An affidavit by the process-server, Mr. Blake Edwards, stating that Mr. Edwards had personally left a copy of the Complaint with Tom Jordan, Registered Agent, at 7400 Calmar Court, Fort Worth, Texas, was attached to Complainant's Proof of Service of Process. According to the Certificate of Service attached to Complainant's Proof of Service of Process, a copy of Complainant's Proof of Service of Process was served on Respondent on May 15, 2008 by first-class mail addressed to:

Mr. Tom Jordan, Registered Agent
T Jordon Conoco
5317 Mansfield Highway
Fort Worth, Texas 76119

Based on the date the Complaint was served, the due date for Respondent's answer was May 27, 2008. As of the date of this Order, the Respondent has not filed an answer to the Complaint or any other document in connection with this matter with the Regional Hearing Clerk.

On August 1, 2008, Complainant filed its Motion for Default. The Certificate of Service attached to the Motion for Default shows that a copy of the Motion for Default was served on the Respondent on August 1, 2008, by first-class U.S. certified mail addressed to:

Mr. Tom Jordan, Registered Agent
T Jordon Conoco
5317 Mansfield Highway
Fort Worth, Texas 76119

and by first-class U.S. mail addressed to:

Haithom Al-Diab
a.k.a. Mr. Tom Jordan, Registered Agent

T Jordan Conoco
7400 Calmar Court
Fort Worth, Texas 76112.

As of the date of this order, the Respondent has not filed an answer to the Complaint or a response to the Motion for Default or any other document in connection with this matter with the Regional Hearing Clerk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact and conclusions of law:

1. The Complaint was filed with the Regional Hearing Clerk on March 10, 2008.
2. T Jordan Towing, Inc., doing business as T Jordan Conoco, is the Respondent in this case.
3. On April 24, 2008, the Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).
4. Respondent was required to file an answer to the Complaint within 30 days of the service of the Complaint. 40 C.F.R. § 22.15(a).
5. Respondent did not file an answer to the Complaint within 30 days of receipt and has not filed an answer as of the date of this Initial Decision and Default Order.
6. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

7. On August 1, 2008, Complainant filed its Motion for Default Order and served it on the Respondent.

8. Complainant's Motion for Default Order was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

9. Respondent was required to file any response to the Motion for Default Order within 15 days of service. 40 C.F.R. § 22.16(b).

10. Respondent has not filed a response to Complainant's Motion for Default Order as of the date of this Initial Decision and Default Order.

11. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

12. EPA has approved Texas' UST program pursuant to section 9004 of the SWDA, 42 U.S.C. § 6991c. (40 C.F.R. § 282.93).

13. The Texas Commission on Environmental Quality has promulgated regulations that meet or exceed EPA's regulations at 40 C.F.R. Part 280 at Title 30, Chapter 334 of the Texas Administrative Code ("TAC").

14. Upon approval and authorization of a State UST program, EPA retains authority to exercise its inspection and enforcement authority under Sections 9005 and 9006 of the Act, 42 U.S.C. §§ 6991d and 6991e.

15. In this action, EPA is enforcing the authorized State regulations.

16. Notice of this action was given to the State prior to the issuance of the Complaint pursuant to Section 9006(a)(2) of the Act, 42 U.S.C. § 6991e(a)(2).

17. Respondent was incorporated on December 4, 2000, in the State of Texas.

18. At all relevant times, Respondent is a Texas corporation and a “person” as defined at 30 TAC § 334.2(76) (40 C.F.R. § 280.12) and Section 9001(5) of the Act, 42 U.S.C. § 6991(5).

19. According to the registration forms submitted by Tom Jordan to TCEQ, T Jordan Conoco was the owner and/or operator of the following facility (hereinafter referred to as the “Facility”) at the time of the EPA inspection in September 2006:

<u>NO.</u>	<u>STATE ID#</u>	<u>NAME</u>	<u>ADDRESS</u>	<u>CITY</u>
1	62153	T Jordan	5317 Mansfield Hwy.	Ft. Worth, TX

20. At all relevant times, Respondent was the “owner” and/or “operator” of the three “USTs” and “UST systems” located at the Facility as those terms are defined at 30 TAC §§ 334.2(70), (73), (114), and (115) (40 C.F.R. § 280.12) and Sections 9001(3), (4), and (10) of the Act, 42 U.S.C. §§ 6991(3), (4), and (10).

21. At all relevant times, Respondent owned and/or operated three UST systems: one UST system which contained diesel gasoline, one regular UST system that contained regular gasoline, and one UST system that contained premium gasoline.

22. At all relevant times, Respondent stored and sold gasoline, diesel lubricants, and other petroleum products to the public at the Facility.

23. At all relevant times, the three USTs which are the subject of the Complaint in this case routinely contained greater than *de minimis* concentrations of a “regulated substance” as that term is defined in 30 TAC § 334.2(91) (40 C.F.R. § 280.12) and Section 9001(7) of the Act, 42 U.S.C. § 6991(7).

24. At all relevant times, 40 C.F.R. § 280.12 defined “existing tank system” as “a tank system used to contain an accumulation of regulated substances or for which installation commenced on or before December 22, 1988.”

25. At all relevant times, 30 TAC § 334.2(61) (40 C.F.R. § 280.12) defined “new” UST system as a UST system installed after December 22, 1988.

26. At all relevant times, the USTs at the Facility were “new” USTs as defined in 30 TAC § 334.2 (40 C.F.R. § 280.12).

27. Pursuant to regulations at 30 TAC § 334.7 (40 C.F.R. § 280.22), Respondent submitted documentation to the TCEQ to register USTs at the Facility.

28. On September 14, 2006, a duly authorized EPA representative (the “inspector” or “inspectors”) conducted an inspection at the Facility.

29. At all relevant times, 30 TAC § 334.45 (40 C.F.R. § 280.20(b)), required owners and operators of new UST systems to ensure that piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with 30 TAC § 334.45(c)(1) (40 C.F.R. § 280.20(b)).

30. During the inspection of the Facility on September 14, 2006, an EPA inspector observed that Respondent failed to properly design, construct, and protect underground piping (flex joints under dispensers and/or pump manifolds) from corrosion, as specified in 30 TAC § 334.49(c)(4) (40 C.F.R. § 280.20(b)(2)), for the three USTs at the Facility.

31. Beginning five years before the filing of the Complaint and continuing to on or about September 14, 2006, when EPA inspectors observed that there was no cathodic protection on the flex joints under the dispensers and/or pump manifolds, Respondent failed to properly

design, construct, and protect metal piping from corrosion for the three tanks at the Facility in violation of 30 TAC § 334.49(c)(4) (40 C.F.R. § 280.20(b)(2)).

32. At all relevant times, 30 TAC § 334.44(a) (40 C.F.R. § 280.20(c)), required all new USTs to comply with new UST system spill and overfill prevention equipment requirements specified in 30 TAC § 334.51 (40 C.F.R. § 280.20(c)).

33. During the inspection of the Facility on September 14, 2006, an EPA inspector observed that there were no flapper valves, a device in the fill tube of the UST which prevents tank overfill, on the three new USTs.

34. Based on an examination of Respondent's records during the inspection of the Facility, the EPA inspectors determined that three new USTs did not have the overfill prevention equipment specified in 30 TAC § 334.51 (40 C.F.R. § 280.20(c)).

35. Beginning five years before the filing of the Complaint and continuing to on or about September 14, 2006, when EPA inspectors observed that the tanks did not have overfill protection equipment for the three tanks at the facility, Respondent was in violation of 30 TAC § 334.51 (40 C.F.R. § 280.20(c)).

36. At all relevant times, 30 TAC § 334.50(a)(1) (40 C.F.R. § 280.40(a)), required that operators of petroleum UST systems provide a method, or combination of methods, of release detection for USTs.

37. The Facility's UST registration form submitted to TCEQ indicated that the method of release detection in use at the Facility was an automatic tank gauging method ("ATG").

38. During the inspection of the Facility on September 14, 2006, an EPA inspector observed that the Facility did not have an ATG method in place.

39. Based on an examination of Respondent's records during the inspection of the Facility, EPA inspectors determined that Respondent had failed to employ a method of release detection adequate for the three USTs that meet the requirements of 30 TAC § 334.50(a)(1) (40 C.F.R. § 280.40(a)).

40. From on or about September 14, 2005, to on or about September 14, 2006, Respondent failed to provide an adequate release detection method for the three USTs at the Facility in violation of 30 TAC § 334.50 (40 C.F.R. § 280.40(a)).

41. At all relevant times, 30 TAC § 37.815 (40 C.F.R. § 280.93), required that all owners or operators of petroleum UST systems demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs.

42. At all relevant times, 30 TAC § 37.815(a) (40 C.F.R. § 280.93(a)), required that owners or operators of petroleum USTs that are located at petroleum marketing facilities or that handle an average of more than 10,000 gallons of petroleum per month based on annual throughput for the previous calendar year, must provide financial responsibility of at least \$1 million per occurrence.

43. At all relevant times, 30 TAC § 37.815(b) (40 C.F.R. § 280.93(b)), required that owners or operators of 1 to 100 petroleum UST systems demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs in the annual aggregate amount of \$1 million.

44. At all relevant times, 30 TAC § 37.875(a) (40 C.F.R. § 280.111), required that owners or operators must maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under 30 TAC Chapter 37, Subchapter I (40 C.F.R. Part 280, Subpart H).

45. At all relevant times, petroleum was sold and transferred to the public at the Facility and, thus, the Facility was a "petroleum marketing facility" as defined by 30 TAC § 334.2(77), 40 C.F.R. § 280.92.

46. At all relevant times, Respondent owned and operated 1 to 100 USTs at the Facility.

47. The three USTs at the Facility were installed on or about December 1, 1999.

48. Based on an examination of Respondent's records during the inspection of Respondent's Facility, EPA inspectors determined that Respondent did not have insurance coverage or another allowable mechanism or combination of allowable mechanisms listed in 30 TAC § 37.820 (40 C.F.R. § 280.94) to demonstrate financial responsibility under 30 TAC Chapter 37, Subchapter I (40 C.F.R. Part 280, Subpart H).

49. Beginning five years before the filing of the Complaint and continuing thereafter to September 14, 2006, the date that EPA inspectors observed that the Facility did not have insurance coverage, Respondent failed to demonstrate financial responsibility in the amount of \$1 million per occurrence and in the annual aggregate amount of \$1 million with respect to the three UST systems at the Facility in violation of 30 TAC § 37.815 (40 C.F.R. § 280.93).

50. Respondent violated requirements of a State program approved pursuant to section 9004 of the SDWA, 42 U.S.C. § 6991c.

51. Respondent violated requirements of Subchapter IX of the SWDA, 42 U.S.C. §§ 6991 – 6991i.

52. The Complaint includes a Compliance Order issued to Respondent pursuant to Section 9006 of the Act, 42 U.S.C. § 6991e.

53. The Compliance Order was served on Respondent with the Complaint on April 24, 2008.

54. Pursuant to Section 9006(b) of the SWDA, 42 U.S.C. § 6991e(b), and 40 C.F.R. § 22.37(b), the Compliance Order automatically becomes a final order unless, no later than 30 days after the order is served, the Respondent requests a hearing.

55. The Respondent has not requested a hearing in this matter as of the date of this Order.

56. The actions required by the Compliance Order are consistent with the record of this proceeding and the Act.

57. The Compliance Order is in effect and Respondent is required to comply with its terms.

58. Pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), and the Adjustment of Civil Penalties for Inflation, 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 for each tank for each day of violation.

59. The civil penalty of \$66,774.03 proposed in the Complaint and requested in the Motion for Default is not inconsistent with Section 9006 of the SWDA, 42 U.S.C. § 6991e, and the record in this proceeding.

DISCUSSION OF REMEDY

According to 40 C.F.R. § 22.17(c), “[w]hen 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.” 40 C.F.R. § 22.17(c) also states, “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.”

The Compliance Order

A Compliance Order included with the Complaint requires performance of the following actions:

1. Not later than sixty days from the date of Respondent’s receipt of the Complaint, Respondent shall correct the violations alleged in the Complaint, bring the UST systems at the Facility into full compliance with 30 TAC Chapter 334, Subtitle I of the Act, and 40 C.F.R. Part 280.
2. Documentation demonstrating that compliance has been achieved shall be submitted to:

Tracie Donaldson
Underground Storage Tank Section
Multimedia Planning and Permitting Division
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

The Motion for Default requested a finding that the Compliance Order is final and enforceable. The Compliance Order was served on Respondent with the Complaint on April 24, 2008. Pursuant to Section 9006(b) of the SWDA, 42 U.S.C. § 6991e(b), and 40 C.F.R. § 22.37(b), the Compliance Order automatically becomes a final order unless, no later than 30 days

after the order is served, the Respondent requests a hearing. The Respondent has not requested a hearing in this matter as of the date of this Order. The actions required by the Compliance Order are consistent with the record of this proceeding and the Act. The Compliance Order is in effect and Respondent is required to comply with its terms.

The Penalty

The relief proposed in the Complaint and requested in the Motion also includes the assessment of a total civil penalty of \$66,774.03 for the alleged violations. With respect to penalty, the Consolidated Rules provide that the Presiding Officer shall determine the amount of the 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.”

40 C.F.R. § 22.27(b).

The statutory factors I am required to consider in determining the amount of the civil penalty are the seriousness of the violation and any good faith efforts of the Respondent to comply with applicable requirements. Section 9006(c) of the SWDA, 42 U.S.C. § 6991e(c). I have examined Complainant's penalty calculations as set forth in the Complaint and considered the narrative summary explaining the reasoning behind the penalty proposed for the violations alleged in the Complaint as set forth in Declaration of Tracie A. Donaldson attached to Complainant's Motion for Default. I have also considered the provisions of the “U.S. EPA Penalty Guidance for Violations of UST Regulations,” OSWER Directive 9610.12, November 14, 1990 (“UST Penalty Guidance”). I find that the Gravity component of the penalty

calculation takes the seriousness of each violation into account. With respect to the second statutory factor, the record contains no evidence of good faith efforts on the part of Respondent to comply with the applicable requirements.

Pursuant to 40 C.F.R. § 22.17(c), “[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” The Complainant proposes to assess a total civil penalty of \$66,774.03 for the alleged violations as follows: Count I - \$17,230.51; Count II - \$17,230.51; Count III - \$17,900.54; and Count IV - \$14,412.47. After considering the UST Penalty Guidance, the statutory factors, and the entire record in this case, I find the civil penalty proposed is consistent with the record of this proceeding and the Act.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

Respondent must comply with the terms of the Compliance Order.

Respondent is assessed a civil penalty in the amount of \$66,774.03.

Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier’s check payable to “Treasurer, United States of America,” and mailed to:

Regional Hearing Clerk (6C)
U.S. EPA Region 6
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

The case name and docket number appearing in the caption (In the Matter of T Jordan Towing, Inc., Docket No. SWDA-06-2008-5100) shall be typed or clearly written on the check to ensure

proper credit.

Respondent shall mail a copy of the check to:

Lorena S. Vaughn
Regional Hearing Clerk (6RC-D)
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Tracie Donaldson
Underground Storage Tank Section (6PD-U)
Multimedia Planning and Permitting Division
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733


Rebekah Reynolds
RCRA Legal Enforcement Branch (6RC-ER)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c).

This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated this 26th day of May 2009.



MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk, do hereby certify that a true and correct copy of the foregoing Order of the Initial Decision and Default Order for Docket No. SWDA 06-2008-5100 was provided to the following persons on the date and in the manner stated below:

Mr. Tom Jordan
Registered Agent
T Jordan Conoco
5317 Mansfield Highway
Fort Worth, Texas 76119

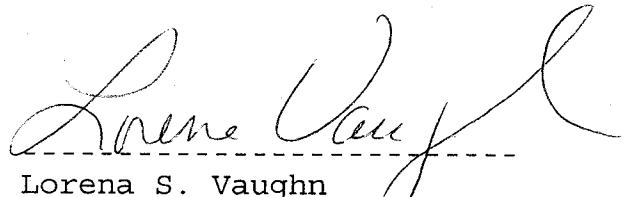
CERTIFIED MAIL

Haithom Al-Diab
a.k.a, Mr. Tom Jordan
Registered Agent
T Jordan Conoco
7400 Calmar Court
Fort Worth, Texas 76112

Eurika Durr
Environmental Appeals Board
U.S. Environmental Protection Agency
607 14th Street, N.W.
Suite 500
Washington, D.C. 20005

Rebekah Reynolds
U.S. Environmental Protection Agency
Office of Regional Counsel
1445 Ross Avenue
Dallas, Texas 75202-2733

HAND DELIVERED



Lorena S. Vaughn
Regional Hearing Clerk

May 26, 2009
Date