UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	)	
	)	
B & A PETROLEUM CORP.	)	**Docket Nos. RCRA-07-2010-0019**
B & K PETROLEUM CORP.	)	**RCRA-07-2010-0020**
M & A PETROLEUM CORP.	)	**RCRA-07-2010-0021**
d/b/a Infinite Oil	)	**(Not consolidated)**
	)	
Respondent.	)	
	)	

ORDER TO DISMISS THREE MOTIONS FOR DEFAULT WITH PREJUDICE

This proceeding arises under the authority of section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e. It is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits (Consolidated Rules or Part 22), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND AND PROCEDURAL HISTORY

On April 2, 2010, Complainant, U.S. Environmental Protection Agency, Region 7 (EPA) initiated this proceeding by issuance of three complaints to Respondents B&A Petroleum Corporation, B&K Petroleum Corporation and M&A Petroleum Corporation, all doing business as Infinite Oil (Respondent).[1] The complaints alleged multiple violations of the Solid Waste Disposal Act, 42 U.S.C. § 6901 et seq., regulations promulgated thereunder, and authorized regulations of the State of Nebraska.[2] Specifically, the alleged violations are for Underground Storage Tanks (USTs).[3] No answers were filed by Respondent.

On May 27, 2011, Complainant filed motions for default order in all three actions. After various

[1] B&A Petroleum Corporation, B&K Petroleum Corporation and M&A Petroleum Corporation are registered to do business in the state of Nebraska. The Registered Agent for all three corporations is Mohammed Ali located at 215 N. Prospect Ave., Streamwood, Illinois, 60107. Service of all documents were sent to this address.

[2] The Solid Waste Disposal Act is commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended, and will be referred to as "RCRA" throughout this matter.

[3] In addition, the State of Nebraska was granted final authorization to administer a state UST program in lieu of the Federal UST program, effective September 18, 2002. The Nebraska UST program's authorization and implementing regulations (159 Neb. Admin. Code), are enforceable requirements of Subtitle I of RCRA, and are enforceable by EPA pursuant to section 9006 of RCRA, 42 U.S.C. § 6991e.

supplements by Complainant to the record, the Presiding Officer at the time[4] ruled on the Motion for Default Order in B&A Petroleum, (Docket No. RCRA-07-2010-0019), February 23, 2012. The motion was denied due to multiple flaws in the Complaint.

The flaws indentified in B&A Petroleum implicated similar flaws in the B&K Petroleum and the M&A Petroleum cases. As such, Complainant chose to issue amended complaints in all three matters. Amended Complaints were filed in B&A Petroleum (Docket No. RCRA-07-2010-0019), on March 29, 2012; in B&K Petroleum (Docket No. RCRA-07-2010-0020), on April 30, 2012; and in M&A Petroleum (Docket No. RCRA-07-2010-0021), on April 30, 2012.[5] Again, Respondent filed no answers to any of the amended complaints.

On June 27, 2012, Complainant filed its Second Motion for Default Order against B&K Petroleum, (Docket No. RCRA-07-2010-0020) and M&A Petroleum, (Docket No. RCRA-07-2010-0021). On July 5, 2012, the Second Motion for Default was denied against B&K Petroleum, (Docket No. RCRA-07-2010-0020), due to defects with the Amended Complaint.[6] To date, no further action by Complainant to remedy the Amended Complaint has been taken.

On August 17, 2012, Complainant filed a Second Motion for Default Order against B&A Petroleum (Docket No. RCRA-07-2010-0019). At present, there are two outstanding Second Motions for Default Order in the B&A Petroleum (Docket No. RCRA-07-2010-0019) and M&A Petroleum (Docket No. RCRA-07-2010-0021) cases.

II. CURRENT STATUS

As the new Presiding Officer in this matter, I have done a thorough review of the record. Based on this review, I confirm the decisions of the previous RJO and continue to find flaws with all three actions.

B&A Petroleum:

The Second Motion for Default Order filed on August 17, 2012, addresses whether proof of service of the Amended Complaint was adequate as requested by the previous RJO; however, there are still inaccuracies with the Amended Complaint. The Amended Complaint contains incorrectly cited statutory provisions. For example, 42 U.S.C. § 6991(1) is cited instead of the correct citation, 42 U.S.C. § 6991(10), for the definition of "underground storage tank".

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[4] On December 4, 2012, this matter was re-assigned to the undersigned EPA Region 8 Regional Judicial Officer (RJO) upon the retirement of the Region 7 RJO assigned to this matter.

[5] The Amended Complaints were successfully served on Respondent. Proof of service is in the record showing delivery of the B&A Petroleum Amended Complaint on 4/5/2012 and the B&K and M&A Petroleum Amended Complaints on 5/3/2012. In an Order to Show Cause dated 6/8/12, RJO Patrick, ordered Complainant to show the manner in which service was given for the B&A Petroleum Amended Complaint. On 7/5/2012, Complainant filed a Report of Service of Amended Complaint showing service on that day.

[6] The defects in B&K Petroleum related to the number of counts alleged in relation to the penalty proposed. In addition, the memorandum in support of the motion contained contradictory statements regarding the amount of the penalty sought, and the declaration attached as an exhibit to the memorandum contained a contradictory statement of the amount of penalty sought.

See, Amended Complaint ¶¶ 6, 16, 22. Similar citation errors occur in paragraphs, 3, 7, 9, 17, 77, 92).[7] These flaws call into question the adequacy of the factual allegations including whether the UST's are an "existing UST system" or "petroleum systems". See, Amended Complaint, ¶¶ 15, 25).

Paragraph 33 of the Amended Complaint is also problematic. The USTs at the 13th Street facility were installed in 1986. The Amended Complaint concludes that 159 Neb. Admin. Code 5-001.02 is "therefore the requirement applicable to the 13th Street Facility" without proper analysis of why only§ 5-001.02 is the only applicable requirement. According to the statutory language of § 5-001, *all* three sections (5-001.01-.03) are applicable to the 13th Street Facility. These three requirements (of which a system is supposed to comply with at least one) are applicable to *existing systems* (i.e. systems that were installed on or before January 1, 1989). Since the USTs at the 13th Street Facility were installed in 1986, they are existing systems. Therefore, all three requirements are applicable to the Facility.

The Amended Complaint states that "159 Neb. Admin. Code 5-001.01… require[s] that the facility must meet the upgrading requirements of 159 Neb. Admin. Code 5-002 – 004". See, Amended Complaint, p. 8. My reading of the Nebraska Regulations shows that §5-001.02 is the correct provision, not § 5-001.01. Section 5-001.02 states that an existing system is supposed to comply with "[t]he upgrading requirements in §§002. through 004." See, 159 Neb. Admin. Code 5-001.02. In addition, the Amended Complaint states that "40 C.F.R. § 280.21(a)(1) appl[ies] to UST Systems *installed after* December 22, 1988…" However, § 280.21(a)(1) states " Not later than December 22, 1998, all existing systems UST systems must comply with one of the following requirements: (1) New UST system performance standards under § 280.20". See, 40 C.F.R. § 280.21(a)(1). Therefore, "all existing UST systems" must comply with 280.21(a)(1) not later than December 22, 1998." There is no analysis as to why this provision does not apply in this instance.

Lastly, Paragraph 33 tries to explain that 40 C.F.R. § 280.21(a)(3) is inapplicable here. The Amended Complaint states that "159 Neb. Admin. Code 5-001.03 and 40 CFR § 280.21(a)(3) appl[ies] to UST Systems that are going through 'Closure' activities and, or, Corrective Action". See, Amended Complaint, p. 8. However, (a)(3) does not apply to Systems that are *going through* Closure activities. It provides that existing systems may choose to *comply with* "[c]losure requirements under subpart G of this part, including applicable requirements for corrective action under subpart F". See, 40 C.F.R. § 280.21(a)(3). Therefore, this provision is an option for Respondent. The Amended Complaint concludes that "40 C.F.R. § 280.21(a)(2), therefore *is* the requirement applicable to the 13th Street Facility". See, Amended Complaint, p. 8, ¶ 33. This conclusion is inconsistent with the facts. All three sub-provisions are applicable to the Facility. All three are applicable to an "existing UST system". See, 40 C.F.R. § 280.21(a). Since the 13th Street USTs are existing UST systems, all three requirements are applicable to the Facility.

[7] In addition, Complainant incorrectly cites to the relevant Nebraska regulations related to the UST violations alleged in the Amended Complaint. (See, Amended Complaint, page 2 and ¶¶ 4, 17, 30, 33, 40, 71, 73).

B&K Petroleum:

The July 5, 2012, Order on Complainant's Motion for Default Order clearly sets forth the defects with the Amended Complaint and the Second Motion for Default Order . These include:

1. The incorrect reference in paragraph 100 of the Amended Complaint. The Amended Complaint alleges 16 counts of violation, but paragraph 100 references 17 counts (Counts I through XVII).

2. The discrepancy in the proposed penalty. There is no record of how the Agency reached the Amended Complaint's proposed penalty of $141,360. This is the same penalty amount that was sought in the initial Complaint, even though the Amended Complaint alleges one less violation than the initial Complaint.

3. The inconsistent pleading of the penalty. The Amended Complaint seeks $141,360 in paragraph 100, but $127,976 in paragraph 101. The amended Motion for Default Order also states several different amounts. The introduction asks for $127,976, paragraph 13 asks for $162,522, and Exhibit 3 states (in paragraph 4) that the penalty sought is $127,976. Additionally, paragraph 16 of the Second Motion for Default Order asks the Presiding Officer to admit Exhibit 3 (declaration outlining how the Agency calculated the civil penalty set forth in the Amended Complaint) as evidence in support of Complainant's request for the penalty assessment set forth in the Amended Complaint and in the Second Motion for Default Order. However, these amounts are not consistent with each other, as explained above.

M&A Petroleum:

The Amended Complaint continues to contain defects in counts XIII and XVI with respect to the regulations alleged to have been violated (Count XIII) and the facility alleged to have been in violation (Count XVI). In addition, the procedural history in this matter shows a pattern of disregard to court orders by Complainant.

1. On March 15, 2012, the RJO issued a Notice to Parties Regarding Further Proceedings. This Notice reflected Complainant's intent to file an amended complaint in B & A Petroleum (Docket No. RCRA-07-2010-0019). The intent to file an amended complaint was in response to the RJO's February 23, 2012 ruling on Complainant's motion for default order (for B & A). In the Notice, the RJO stated that "the issues addressed in the February 23, 2012 ruling may also implicate the motions for default order in [B & K] and [M & A]. Therefore, decision regarding the pending motions in all of the above captioned cases [B & A], [B & K], and [M & A] is deferred, pending further action by the parties". The Complainant was ordered to provide a status report on the three proceedings by April 10, 2012.
2. On June 8, 2012, the RJO ordered Complainant to file a status report on all three proceedings, a schedule for any additional filings the Complainant intends to pursue, and a demonstration that the Complainant was pursuing prosecution or resolution of these proceedings as expeditiously as possible. Complainant was order to file this information no later than June 15, 2012.

3. On June 18, 2012, the RJO submitted an Order to Complainant to Show Cause, noting that Complainant had not met its June 15 deadline as ordered by the June 8, 2012 Order. The RJO also noted Complainant's 14-day delay in filing its status report as ordered by the March 15, 2012 Order.
4. On June 21, 2012, Complainant filed a Response to the Order to Show Cause and a statement of the status of the proceedings. The RJO decided to allow the proceeding to move forward; however, stated, "Complainant is expected to strictly adhere to any deadlines which may be established in these proceedings in the future".
5. Complainant's Second Motion for Default Order followed on June 27, 2012. However, as stated above, the Motion still has errors.

Given the maze of issues, both substantive and procedural, in all three matters the Presiding Officer does not believe the Complainant has met its burden to support a Motion for Default under the Part 22 Rules.

III. DISCUSSION

Section 22.17 of the Consolidated Rules provides in part:

> (a) *Default.* **A party may be found to be in default:** after motion, upon failure to file a timely answer to the complaint, upon failure to comply with the information exchange requirements of § 22.19(a) **or an order of the Presiding Officer;** or upon failure to appear at a conference or hearing. 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 right to contest such factual allegations. **Default by complainant constitutes a waiver of complainant's right to proceed on merits of the action, and shall result in the dismissal of the complaint with prejudice.**
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> (b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
>
> (c) *Default order.* When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless **the record shows good cause why a default order should not be issued.** If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. **The relief proposed in the complaint or in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.** For good cause shown, the Presiding Officer may set aside a default order.

40 C.F.R. § 22.17. (emphasis added).

Thus, pursuant to the Rules of Practice, the Presiding Officer has discretion in applying § 22.17(a), and even upon a finding of default, need not issue the order if the record shows good cause. Issuance of such an order is not a matter of right, even where a party is technically in default. See, *Lewis* v. *Lynn*, 236 F.3d 766 (5th Cir. 2001). This broad discretion is informed by the type and the extent of any violations and by the degree of actual prejudice to the Complainant. See, *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11,1997). Default is generally disfavored as a means of resolving EPA enforcement proceedings. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005) (stating principle); *In re Thermal Reduction Co.*, 4 E.A.D.128, 131 (EAB 1992) (same). In close cases, doubts are typically resolved in favor of the defaulting party so that adjudication on the merits, the preferred option, can be pursued. As discussed below, under the circumstances here, a default order in B&A Petroleum (Docket No. RCRA-07-2010-0019) and M&A Petroleum (Docket No. RCRA-07-2010-0021) is unwarranted.

While Respondent has completely disregarded these actions, Complainant is not without blame. When making determinations regarding default, the Environmental Appeals Board favors a review on the "totality of the circumstances". *In Re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992). Here, the Respondent has expended no effort or expense in preparing answers or responding to any orders from the Presiding Officer. The Agency has not delayed in prosecuting the action, but has shown a substantial *lack of diligence* in prosecuting the action. In this regard, no prejudice is imposed upon either party.

Conversely, Respondent should be held accountable for any violations that are supported by the evidence; however, Complainant has not met its burden here. In bringing forth a case against a respondent, the Rules of Practice place the burden of presentation and persuasion on the Complainant to prove that "the relief sought is appropriate". See, 40 C.F.R. § 22.24(a). Each matter of controversy is adjudicated under the preponderance of the evidence standard. See, 40 C.F.R. §22.24(b). As such, Complainant's burden of proof as to the requested relief is less demanding in a default case than in a contested case. See, 63 Fed. Reg. 9464, 9470 (Feb. 25, 1998)(Proposed Rule).This does not mean, however, that Complainant is released from the requirement to make a *prima facie* case in regard to the appropriateness of the proposed penalty, as well as to liability. See *id.* at 9470.

As stated in Rule 22.17(a), "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". Thus, in determining whether to issue a default order, the facts in a complaint are considered admitted and taken as true. The facts deemed admitted must set forth the prima facie elements necessary to establish the violations alleged in a complaint. As noted in RJO Patrick's February 23, 2012 Order in the B&A Petroleum matter, "[b]ecause the complaint does not allege necessary facts to establish the violations alleged….I am unable to grant the motion for default order as to these counts".[8] Judge Biro also concurred in this position by stating, "[i]f, however, Complainant has failed to state allegations of fact in the Complaint that support the elements of the violations

[8] The February 23, 2012 Order addresses only B&A Petroleum, however, it is noted the ruling applies to all three actions after the RJO clarified the Order "may implicate the motions for default order in RCRA-07-2010-0020 and RCRA-07-2010-0021". See, March 15, 2012 Notice to Parties Regarding Future Proceedings.

alleged, then a default order should not be issued..". *In the Matter of Ag-Air Flying Services, Inc.*, FIFRA Docket No. 10-2005-0065 (ALJ Biro, Jan. 26, 2006). Therefore, prejudice against Respondent is possible in granting default orders in these three cases for inaccurate Amended Complaints.

I find this particularly egregious when Complainant who, seeking the relief, bares the responsibility for moving the matter forward. Section 22.17 (a) provides that "[a] party may be found to be in default . . . upon failure to comply with . . . an order of the Presiding Officer," and that "default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and *shall result in the dismissal of the complaint with prejudice*". (emphasis added). Complainant is not in default in these matters, at this juncture, and an automatic dismissal of the Amended Complaints with prejudice is not the basis for dismissal. However, Complainant's lack of due diligence in presenting its cases, its disregard of the previous Presiding Officer's Orders, and under the totality of the circumstances, it is not a stretch for this Presiding Officer to dismiss with prejudice for good cause.

This leaves the question of whether there is good cause to allow Complainant to remedy the deficiencies yet again. Section 22.14(c) of the Rules of Practice allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed, and otherwise 'only upon motion granted by the Presiding Officer....'. Complainant has not requested to file a second amended complaint in B&A Petroleum after the Motion for Default Order was denied. The Rules of Practice do not illuminate the circumstances when amendment of the complaint is appropriate. The EAB has offered guidance by consulting the Federal Rules of Civil Procedure (FRCP) as they apply in analogous situations. The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice so requires". Fed. R. Civ. P. 15(a). However, in considering a motion to amend under Rule 15(a), Courts have held that leave to amend shall be freely given *in the absence* of any apparent or declared reason, such as undue delay, *bad faith* or dilatory motive on the movant's part, *repeated failure to cure deficiencies by previous amendment*, undue prejudice, or futility of amendment. See, *Foman v. Davis*, 371 U.S. 178, 182 (1962). With respect to B&A Petroleum (Docket No. RCRA-07-2010-0019) and M&A Petroleum (Docket No. RCRA-07-2010-0021), "fairness" and "a balancing of the equities" dictate these matters be vacated for failure to present a prima facie case. Given the numerous attempts afforded the Complainant to cure deficiencies, I find no good cause to allow further amendments.

Accordingly, for the reasons stated above, I find Complainant has not made a prima facie case in the three Amended Complaints nor met its burden of proof to support default orders according to Section 22.17(a). Pursuant to Part 22, RCRA-07-2010-0019, RCRA-07-2010-0020, and RCRA-07-2010-0021, are hereby **Dismissed With Prejudice**.[9]

So ORDERED this 23rd day of January, 2013.

Elyana R. Sutin
Regional Judicial Officer
EPA, Region 8

[9] Pursuant to 40 C.F.R. §§ 22.17 and 22.27(c), respectively, this Order Dismissing the Amended Complaints With Prejudice constitutes an Initial Decision that shall become the Final Order of the Agency unless appeal is taken pursuant to 40 C.F.R. § 22.30 or the EAB elects *sua sponte*, to review this decision.

IN THE MATTER OF B & A Petroleum Corp., B& K Petroleum Corp. and M & A Petroleum Corp. d/b/a Infinite Oil, Respondent
Docket Nos. RCRA-07-2010-0019; RCRA-07-2010-0020; and RCRA-07-2010-0021 (Not consolidated)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

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Dated: 1/31/13

Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7