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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6

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REGIONAL HEARING OFFICE
EPA REGION VI

IN THE MATTER OF:)
)
JONES REALTY APPEALS BOARD)
)
Jones Realty Corporation)
Little Rock, Arkansas,)
)
)
ADEQ I.D. NO. 01000029,)
)
)
Respondent.)
_____)

Docket No. SWDA-06-2006-5301

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, also known as the Underground Storage Tank Program. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

BACKGROUND

On March 30, 2006, the United States Environmental Protection Agency, Region 6 ("Complainant" or "EPA") filed a Complaint, Compliance Order and Notice of Opportunity for Hearing charging Respondent, Jones Realty Corporation ("Jones Realty" or "Respondent"), with violations of RCRA and the regulations at 40 CFR Part 280, Subpart D.¹ EPA is enforcing the authorized State regulations and pursuant to Section 9006(a)(2), 42 U.S.C. § 6991(e)(2), notice of this action was given to the State of Arkansas prior to the issuance of the Complaint.

In broad terms, the Complaint alleged that Respondent violated subchapter IX the Underground Storage Tank ("UST") program by failing to conduct release detection testing and monitoring, corrosion protection and failing to have financial assurance for two USTs at its Jones Mart 19 facility ("Facility") owned and operated by Respondent in accordance with 40 CFR §§ 280.31, 280.40, 280.41(a), 280.43 and 280.93. For these alleged violations, Complainant

¹ Pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c and 40 C.F.R. Part 281, the EPA Administrator granted the State of Arkansas authorization to administer the Underground Storage Tank program on February 14, 1995 (60 Fed. Reg. 10331) and it was effective on April 25, 1995. The approved State regulations were published in the Federal Register on January 18, 1996 (61 Fed. Reg. 1214) and are listed at 40 C.F.R. § 282.53. The Arkansas Department of Environmental Quality ("ADEQ") adopted EPA's regulations at 40 CFR Part 280 in its entirety, under the authority of the Arkansas Code Annotated (A.C.A. § 8-7-801 et. seq., and the Petroleum Storage Tank Trust Fund Act (A.C.A. § 8-7-901 et. seq.), in ADEQ Regulation 12. All references to Regulation 12 shall mean section 12.104(A) of the ADEQ regulations incorporating the Federal Regulations.

initially sought a civil administrative penalty in the amount of \$28,463 against Respondent. Complainant considered the statutory penalty factors in Section 9006(c) of RCRA and the EPA 1990 Civil Penalty Guidance for Violations of UST Regulations.

Specifically, the Complaint alleged that Respondent failed to: (1) provide monthly records or adequate release detection for two USTs in violation of Arkansas Regulation 12 § 280.40(a) [40 C.F.R. § 280.40(a)] and demonstrate that monthly release detection monitoring of the tanks was conducted as required by 12 § 280.45(b) [40 C.F.R. § 280.45(b)]; (2) provide records that suction piping was tested every three years or that monthly release detection monitoring was conducted on two USTs in violations of Arkansas Regulation 12 § 280.41(b)(2) [40 C.F.R. § 280.41(b)(2)]; (3) install/provide spill and overflow equipment/protection for two USTs in violation of Arkansas Regulation 12 § 280.21(d) [40 C.F.R. § 280.21(d)]; (4) comply with impressed current cathodic protection system inspection standards required on two USTs in violation of Arkansas Regulation 12 § 280.31(c) [40 C.F.R. § 280.31(c)]; (5) failed to comply with testing requirements for cathodic protection systems associated with two USTs in violation of Arkansas Regulation 12 § 280.31(b)(2) [40 C.F.R. § 280.31(b)(2)]; and (6) provide adequate coverage for financial assurance required on two USTs in violation of Arkansas Regulation 12 § 280.93 [40 C.F.R. § 280.93].

The Complaint also sets forth information concerning Respondent's obligations with respect to responding to the Complaint, including filing an Answer. Section VI of the Complaint, Notice and Opportunity for Hearing, provides details on how to prepare an Answer and states, "Respondent shall file a written Answer to the Complaint with the Regional Hearing Clerk, Region 6, no later than thirty (30) days after the service of this Complaint." (Complaint, p. 16). The Complaint further states, "Failure of Respondent, to admit, deny, or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation." (Complaint, p. 17). Last, Section VII of the Complaint states:

If Respondent fails to file an Answer within thirty (30) days after the date of service of this Complaint, **Respondent may be found to be in default pursuant to 40 C.F.R. § 22.17**. For purposes of this action, default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing under 40 C.F.R. § 22.15 concerning such factual allegations...

(Complaint, p. 18)(emphasis added).

The Certificate of Service attached to the Complaint shows that a copy of the Complaint together with a copy of the Consolidated Rules was placed in the United States mail by certified mail, return receipt requested, on March 30, 2006. A properly executed certified mail receipt was signed by Steve Jones, Respondent, on April 13, 2006. The returned certified mail receipt is proof of service of the above referenced Complaint. An Answer was not filed thirty days after service of the Complaint.

In Complainant's Memorandum of Law Supporting Complainant's Motion for Default Order ("Memo in Support"), the Declaration of Tracie A. Donaldson, an Enforcement Officer for EPA Region 6, states Complainant made contact with Respondent approximately 18 months after an Answer was due in October, 2007. Ms. Donaldson's Declaration states Respondent "informed [EPA counsel] that he did not intend to file an answer or enter into settlement negotiations with EPA and that he understood that EPA intended to proceed with a Motion for Default." (See, p.2 of Donaldson Decl., Attachment B of Memo in Support). To date, an Answer has not been filed in this matter.

FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact :

1. Jones Realty Corporation is an Arkansas corporation doing business in the State of Arkansas at the time of the violations.²
2. Respondent owned and/or operated USTs at the Jones Mart No. 19 facility during the time of EPA's inspection on July 24, 2002.
3. The Respondent's business is located at 123 West 2nd Street, Dewitt, Arkansas.
4. Steven W. Jones is the Registered Agent for Jones Realty Corporation.
5. Respondent is in the business of providing fuel to the public at this retail facility.
6. According to ADEQ records, Respondent submitted documentation to ADEQ registering the two USTs at this facility.
7. On or about July 24, 2002, EPA inspected the facility including an inspection of the USTs and a review of records at the facility and Respondent's office.
8. During the inspection, EPA's inspector verified that each tank had at least 2 inches of product in the tanks.

² Jones Realty was incorporated in the State Arkansas on September 19, 1989; however, incorporation was revoked on December 31, 2003.

9. At the time of inspection, the method of release detection in use was not known since no records were available related to the facility and the facility was closed approximately one week prior to the inspection.
10. On November 5, 2004, Respondent provided documentation demonstrating the vapor monitoring method was used as the release detection method at the facility.
11. Respondent provided monthly monitoring records for January, February, March and April 2000, but could not provide any monthly monitoring records for the remainder of 2000, and all of 2001 and 2002.
12. Based on a review by EPA of Respondent's records, Respondent failed to provide adequate release detection for the two USTs at Jones Mart # 19 to demonstrate that monthly release detection monitoring of the tanks was conducted for the period of July 24, 2001 (one year prior to the inspection), to the date of the inspection on July 24, 2002.
13. According to the EPA inspector and information provided by the Respondent dated November 5, 2004, the facility utilized suction piping.
14. Suction piping for this facility is required to have either a three-year tightness test or monthly monitoring to satisfy release detection. Respondent stated in information provided November 5, 2004 that the vapor monitoring method was used to conduct monthly testing.
15. Respondent provided monthly monitoring records for January, February, March and April 2000, but could not provide any monthly monitoring records for the remainder of 2000, and all of 2001 and 2002 to demonstrate release detection on suction piping was conducted.
16. Respondent failed to demonstrate release detection on suction piping was conducted for the period of July 24, 2001 (one year prior to the inspection), to the date of the inspection on July 24, 2002.
17. At the time of the inspection, Respondent failed to install overfill prevention equipment on the two USTs.

18. At the time of the inspection, Respondent failed to maintain records to show it was operating its impressed current cathodic protection system properly by inspecting every 60 days.
19. Based on the inspection of July 24, 2002, only four test readings were taken on cathodic protection systems at the facility: December 7, 1999, January 3, 2000, February 5, 2000 and March 8, 2000.
20. Respondent failed to maintain records demonstrating the testing of the cathodic protection system after installation and then every three years thereafter, or July 25, 1999 and July 25, 2002.
21. Respondent chose to use the State Trust Fund to provide financial assurance coverage for the two USTs.
22. According to State records, Respondent failed to pay the State Trust Fund fees from June 30, 2002 to February 19, 2004, during the period when the facility was being sold to a new owner.
23. Respondent also failed to provide adequate financial assurance from June 30, 2002 to January 2, 2004, the date when the new owner paid the required fees to the State Trust Fund.
24. The Complaint was filed with the Regional Hearing Clerk and mailed to the Respondent on March 30, 2006.
25. A properly executed return receipt shows that Respondent received a copy of the Complaint on April 13, 2006. 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 Order.
26. On November 9, 2007, Complainant filed a Status Report. The Status Report states that on October 31, 2007, Complainant mailed a letter to Respondent extending to Respondent additional time to settle this matter.

27. The Status Report also states that on November 7, 2007, Complainant's attorney spoke via telephone to Respondent who verified that he received the letter and stated he did not intend to file an Answer to the Complaint.
28. On December 20, 2007, Complainant filed its Motion for Default Order and properly served it on Respondent.
29. Respondent has not filed a response to Complainant's Motion for Default Order as of the date of this Order.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based on the record before me, I make the following conclusions of law:

30. EPA has approved Arkansas' UST program pursuant to section 9004 of the SWDA, 42 U.S.C. § 6991(c). (40 C.F.R. § 282.53).
31. Pursuant to Regulation 12.104, ADEQ incorporated by reference the federal regulations codified at 40 C.F.R. § 280.10 through § 280.74 and 40 C.F.R. § 280.90 through § 280.116.
32. Respondent is a "person" as defined in Arkansas Regulation 12 at 12.103(B)(15). [40 C.F.R. § 280.12].
33. Respondent is the "owner" and/or "operator" of USTs located at the facility as those terms are defined in Arkansas Regulation 12 at 12.103(B)(13)-(14). [Section 9001 of SWDA, 42 U.S.C. § 6991 and 40 C.F.R. § 280.12].
34. Respondent violated Arkansas Regulation 12, at 12 § 280.40(a) [40 C.F.R. § 280.40(a)], by failing to provide adequate release detection for two USTs at the facility.
35. Respondent violated Arkansas Regulation 12, at 12 § 280.41(b)(2) [40 C.F.R. § 280.41(b)(2)], by failing to conduct release detection on suction piping connected to two USTs at the facility.

36. Respondent violated Arkansas Regulation 12, at 12 § 280.21(d) [40 C.F.R. §280.21(d)], by failing to provide overfill equipment for two USTs at the facility.
37. Respondent violated Arkansas Regulation 12, at 12 § 280.31 [40 C.F.R. §280.31], by failing to maintain records demonstrating the testing of the cathodic protection systems for two USTs at the facility.
38. Respondent violated Arkansas Regulation 12, at 12 § 280.93 [40 C.F.R. §280.93], by failing to maintain financial assurance for two USTs at the facility.
39. Respondent violated the requirements of a State program approved pursuant to section 9004 of SWDA, 42 U.S.C. § 6991c.
40. Respondent violated the requirements of Subchapter IX of SWDA, 42 U.S.C. §6991- 6991i, 40 C.F.R. § 280.10 through § 280.74 and 40 C.F.R. § 280.90 through § 280.116. and Arkansas Regulation 12.
41. Pursuant to section 9006(d)(2) of SWDA, 42 U.S.C. § 6991e(d)(2), Respondent is liable for civil penalties not to exceed \$10,000 for each tank for each day of violation.
42. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).
43. 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).
44. 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).
45. Complainant's Motion for Default was served properly on Respondent. 40 C.F.R. § 22.5(b)(2).
46. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b).

47. 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).
48. The civil penalty of \$27,750 as proposed in the Motion for Default is consistent with section 9006(d)(2) of SWDA, 42 U.S.C. § 6991e(d)(2), and the record in this proceeding.

DISCUSSION OF PENALTY

The relief proposed in the Motion for Default includes the assessment of a total penalty of \$ 27,750.00 for the alleged violations.³ The Consolidated Rules provide that the Presiding Officer shall determine the amount of the civil penalty:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, 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.

40 C.F.R. § 22.27(b).

The statutory factors that this court must 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 the applicable requirements as set forth in 42 U.S.C. § 6991e(c). The U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12, November 14, 1990, also was consulted by Complainant in calculating the penalty. (See, Memo in Support). I, therefore, considered this guidance in determining the penalty amount.

Under the penalty policy, two factors are considered in the gravity-based component: the potential for harm and the extent of deviation from a statutory or regulatory requirement. A matrix has been developed in which these two criteria form the axes and then they are adjusted based on the degree of the violation (e.g., major, moderate or minor). The gravity-based component consists of four elements:

1. **Matrix Value** – based on potential for harm and deviation from the requirement;
2. **Violator-Specific Adjustments to the Matrix Value** - based on violator's cooperation, willfulness, history of noncompliance, and other factors;
3. **Environmental Sensitivity Multiplier** - based on the environmental sensitivity associated with the location of the facility; and,

³ The original Complaint proposed a penalty of \$28, 463.00. This original proposed penalty was based on the calculation of six violations comprised of \$27,750.00 in gravity and \$713.00 in economic benefit. The Declaration of Ms. Tracie A. Donaldson indicates the proposed penalty was recalculated and Complainant no longer seeks a penalty for economic benefit. The proposed penalty of \$27,750.00 now being assessed is based on gravity only. See, Memo in Support, Attachment B.

4. **Days of Noncompliance Multiplier** - based on the number of days of noncompliance.

The penalty policy, Appendix A, has a guide to determining the appropriate gravity level for a list of certain violations of the UST requirements. The gravity-based component then incorporates adjustments that reflect the specific circumstances of the violation, the violator's background and actions, and the environmental threat posed by the situation. The policy also addresses how to calculate economic benefit, the second component of the penalty. No economic benefit was assessed in this matter.⁴

Complainant used the matrix values in Appendix A for each of the six violations in the Complaint. In addition, for the adjustments reflecting the specific circumstances of the violations, the violator and the environmental threat, Complainant made no adjustments to the matrix values. With respect to the final adjustment, days of non-compliance, adjustments were made by using a table in the penalty policy that identifies a multiplier for a specific amount of days of non-compliance. The matrix value was multiplied by the adjustments resulting in the gravity-based penalty for each violation. (See, Memo in Support, Attachment C). They are as follows:

Count 1	Failure to Conduct Monthly Monitoring	\$7,500
Count 2	Failure to Test Suction Piping	\$7,500
Count 3	Failure to Provide Overfill Protection	\$4,500
Count 4	Failure to Test Impressed Current System	\$3,000
Count 5	Failure to Test Cathodic Protection System	\$4,500
Count 6	Failure to Provide Financial Assurance	\$750

I examined Complainant's penalty calculations as set forth in the Complaint and the Memo in Support of the Motion for Default and considered the narrative explaining the reasoning behind the penalty proposed in Tracie A. Donaldson's Declaration attached to the Memo in Support.⁵ I

⁴ The penalty policy states, "the economic benefit component 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." All penalties assessed must include the full economic benefit unless the benefit is determined to be "incidental" (i.e., less than \$100). Although the economic benefit in this matter was \$713.00, there is no documentation showing how this number was derived. Therefore, no assessment of economic benefit is being made.

⁵ Attachment A of the Complaint has a penalty worksheet for Count 6 that is not consistent with Count 6 as alleged in the Complaint or Attachment C of the Memo in Support of the Motion for Default. Count 6 in Attachment A of the Complaint alleges \$ 4,500 for Failure to Investigate and Confirm a Suspected Release within 7 Days of a Suspected Release. Count 6 of the Complaint and the Motion for Default alleges Failure to Have Financial Assurance Coverage. This court assumed that the penalty worksheet for Count 6 in Attachment A of the Complaint

find the penalty takes the serious of the violation into account. The matrix values used for each count in the Complaint were appropriate. With respect to the second statutory factor, the record contains no evidence of Respondent's good faith efforts to comply with the applicable requirements. To the contrary, there is evidence in the record that Respondent has purposely chosen not to comply with the requirements. (See, Memo in Support, Declaration of Tracie A. Donaldson, p. 2).

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." After considering the statutory factors, the UST Penalty Policy and the entire record before me, I find the civil penalty proposed is consistent with the record of this proceeding and the SWDA.

DEFAULT ORDER⁶

In accordance with section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, and based on the record and the Findings of Fact set forth above, I hereby find that Respondent is in default and liable for a total penalty of **\$27,750.00**.

IT IS THEREFORE ORDERED that Respondent, Jones Realty Corporation shall, within thirty (30) days after this order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **\$27,750.00**. Payments can be made in the following manner:

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Respondent shall note on the check the title and docket number of this Administrative action.

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727

was incorrectly attached and was not considered in the penalty analysis. Therefore, only the penalty worksheet for Count 6 in the Motion for Default was considered.

⁶ Pursuant to 40 C.F.R. § 22.17(c), Respondent may file a Motion to set aside the default order for good cause.

SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental
Protection Agency"

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

**Respondent shall serve a photocopy of the check or confirmation of wire transfer on the
Regional Hearing Clerk at the following address:**

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

and to:

Terry Sykes
Associate Regional Counsel
U. S. Environmental Protection Agency Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Each party shall bear its own costs in bringing or defending this action.

Should Jones Realty fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

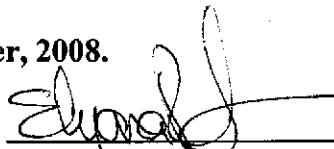
This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

SO ORDERED This 2nd Day of September, 2008.



Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk for the Region 6 office of the Environmental Protection Agency, do hereby certify that a TRUE AND CORRECT copy of the Default Initial Decision and Order for SWDA 06-2006-5301 as served upon the parties on the date and in the manner set forth below:

Steve W. Jones
Jones Realty Corporation
P.O. Box 25620
Little Rock, Arkansas 72221

U.S. First Class Mail
Return Receipt Requested

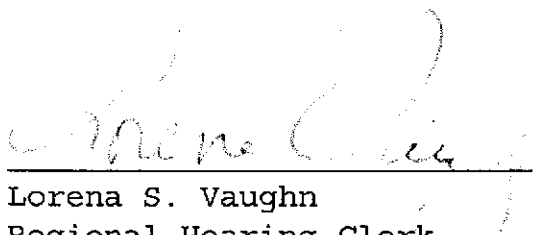
Terry Sykes
Assistant Regional Counsel
Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

HAND-DELIVERED

Rebekah Reynolds
Assistant Regional Counsel
Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

HAND-DELIVERED

DATE: 9-9-08



Lorena S. Vaughn
Regional Hearing Clerk