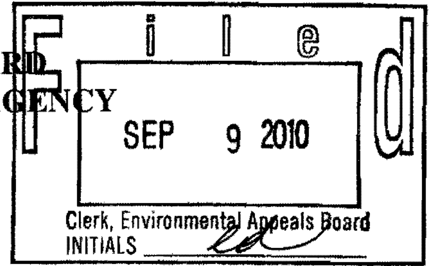
BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)	
Fulton Fuel Company	)	CWA Appeal No. 10-03
Docket No. CWA-08-2009-0006	)	

FINAL DECISION AND ORDER

I. *Statement of the Case*

On February 19, 2009, U.S. Environmental Protection Agency ("EPA") Region 8 (the "Region") filed a complaint against Fulton Fuel Company ("Fulton") requesting a civil administrative penalty for Fulton's discharge of approximately six to ten barrels of oil from Fulton's facility into the Fred and George Creek in Toole County, Montana and for Fulton's failure to have a Spill Prevention Control and Countermeasure ("SPCC") Plan for its facility in violation of Clean Water Act ("CWA") section 311(b), 33 U.S.C. § 1321(b) and 40 C.F.R. §§ 110.3, 112.3, 112.7, 112.9, and 112.10. On March 8, 2010, more than eight months after the complaint was hand delivered by the Toole County Sheriff to Fulton's registered agent for service of process and after several deadlines passed for Fulton to show cause for its defaults, Fulton filed an answer to the complaint.[1]

---

[1] Because Fulton filed its answer after the RJO's last deadline for Fulton to explain its conduct, the RJO did not accept the answer and excluded it from the record due to its untimely filing. Default Initial Decision and Order at 2-3 (Apr. 8, 2010).

Before the Environmental Appeals Board at this time is Fulton's notice of appeal and supporting brief filed on May 10, 2010, from two Default Initial Decision and Orders issued by Regional Judicial Officer Elyana R. Sutin ("RJO"). In the first Default Initial Decision and Order, dated March 17, 2010 ("First Default Decision"), the RJO found Fulton in default for its failure to timely file an answer to the complaint. The RJO found that "[a] cogent and reasoned response has never been given," and that "[t]o date, no document has been filed on time * * * other than the first Notice of Appearance." First Default Decision at 5. The RJO also found Fulton liable for the discharge of oil into the Fred and George Creek and for failure to have an SPCC Plan, and the RJO assessed a civil administrative penalty against Fulton in the amount of $32,176. In the second Default Initial Decision and Order, dated April 8, 2010 ("Second Default Decision"), the RJO denied Fulton's motion to set aside the First Default Decision. The RJO found that Fulton's statements in its motion and supporting documents "do not comport with the record." Second Default Decision at 2.

Fulton argues in its appeal that: (1) the RJO's finding of default should be "set aside;" and (2) "EPA has no jurisdiction in this case." Respondent's/Appellant's Brief in support of Notice of Appeal at 5-6. The Region has filed a response brief contending that the Board should uphold the RJO's First and Second Default Decisions.

II. *Issue on Appeal*

Did the RJO err in finding Fulton in Default and in concluding that Fulton failed to show good cause for setting aside the default?

III. *Summary of Decision*

As explained below, Fulton's four-sentence appellate argument for setting aside the RJO's finding of default is unpersuasive and must be rejected. Fulton has made no attempt in its appellate brief to address the reasons the RJO gave for finding that Fulton's explanations for its more than eight-month delay in filing an answer to the complaint "do not comport with the Record." Second Default Decision at 2. Fulton also has not shown error in the RJO's conclusion that Fulton's January, 2010 response to the RJO's order to show cause "provided no information as to why [Fulton] had failed to respond to the Complaint, Motion for Default, or the Orders to Show Cause." First Default Decision at 3. And, Fulton has not addressed its continued failure to meet deadlines once counsel belatedly entered appearance on Fulton's behalf. First Default Decision at 5. Fulton also has not demonstrated that there is a strong probability it would prevail on any defenses to the violations and penalty and, in particular, the Board concludes that Fulton's untimely challenge to EPA's jurisdiction over this matter is not an alternative basis for relieving Fulton of the consequences of its default and its failure to show good cause.

IV. *Governing Law and Standard of Review*

This proceeding is governed by EPA's Consolidated Rules of Practice, 40 C.F.R. part 22. 40 C.F.R. § 22.38(a) ("This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under * * * section 311(b)(6) of the Clean Water Act."). Under the part 22 rules, a party's failure to adhere to procedural requirements may be grounds for a finding of default. Specifically, a "party may be found to be in default: after motion, upon failure to file a timely answer to the complaint," and "[d]efault 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." 40 C.F.R. § 22.17(a).

The regulations direct that "[w]hen the Presiding Officer [the RJO here] finds that default has occurred, [she] 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." *Id.* § 22.17(c) (emphasis added). Further, after default has been entered, "[f]or *good cause* shown, the Presiding Officer may set aside a default order." *Id.* (emphasis added). Thus, the issue of "good cause" informs both the inquiry whether a default order should be entered in the first place and whether, once entered, a default order should be set aside. *See In re Pyramid Chem. Co.,* 11 E.A.D. 657, 661-62 (EAB 2004). In applying the good cause standard, the Board has endorsed the general principle disfavoring default and observed that "when fairness and balance of the equities so dictate, a default order will be set aside." *In re Thermal Reduction Co.,* 4 E.A.D. 128, 131 (EAB 1992); *accord In re Las Delicias Cmty.*, SDWA Appeal No. 08-07, slip op. at 8 n.7 (EAB Aug. 17, 2009), 14 E.A.D. __; *In re Four Strong Builders, Inc.,* 12 E.A.D. 762, 766 (EAB 2006); *In re Rybond, Inc.,* 6 E.A.D. 614, 616 (EAB 1996).

On appeal, the Board has traditionally applied a "totality of the circumstances" test to determine whether a default order was appropriate, or whether a motion to set aside a default order has been properly denied. *See In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005); *Pyramid Chem.*, 11 E.A.D. at 661; *Rybond*, 6 E.A.D. at 624-25; *Thermal Reduction*, 4 E.A.D. at 131.

Factors considered under the "totality of the circumstances" may include whether a procedural requirement was indeed violated, whether that violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the

procedural requirement. *See JHNY,* 12 E.A.D. at 384; *Pyramid Chem.,* 11 E.A.D. at 661-62; *In re Jiffy Builders, Inc.,* 8 E.A.D. 315, 319-20 & n.8 (EAB 1999); *Rybond,* 6 E.A.D. at 625. The Board has also considered whether the defaulting party would likely succeed on the substantive merits if a hearing were held. *See JHNY,* 12 E.A.D. at 384; *Pyramid Chem.,* 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 319; *Rybond,* 6 E.A.D. at 628 & n.20. In other words, as explained in *Rybond,* the Board may consider whether the administrative action in question "would have had a different outcome had there been a hearing." 6 E.A.D. at 625. It is the defaulting party's burden in this context "to demonstrate that there is more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem.*, 11 E.A.D. at 662; *Jiffy Builders*, 8 E.A.D. at 322.

In close cases, doubts are typically resolved in favor of the defaulting party so that adjudications on the merits, the preferred option, can be pursued. *Thermal Reduction*, 4 E.A.D. at 131 (citing treatise on federal practice and procedure); *see In re Neman*, 5 E.A.D. 450, 454-60 (EAB 1994) (vacating default order where amended complaint not properly served on defaulting party). Nevertheless, the Board has not hesitated to affirm default orders in cases where circumstances clearly indicate that the imposition of default is warranted. *See, e.g., JHNY*, 12 E.A.D. at 385-93; *Pyramid Chem.*, 11 E.A.D. at 664-68, 675-82; *B&L Plating, Inc.*, 11 E.A.D. at 191-92; *Jiffy Builders, Inc.*, 8 E.A.D. at 320-21; *Rybond*, 6 E.A.D. at 625-38. In particular, the Board accords substantial deference to the presiding officer in managing the trial proceedings and, in so doing, to take appropriate action to prevent abuse of process. "'Our rules depend on the presiding officer to exercise discretion throughout an administrative penalty

proceeding.'" *JHNY*, 12 E.A.D. at 385 (quoting *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1997)); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 650 (EAB 2002).

V. *Analysis*

The Board concludes that Fulton's appeal does not establish grounds for reversing the RJO's entry of default against Fulton. The RJO correctly found that Fulton defaulted by its extensive delay in filing an answer to the complaint and by its failure to timely file any substantive pleading. Specifically, Fulton filed an answer to the complaint more than eight months after the answer first became due and after the expiration of the RJO's last deadline for Fulton to show good cause for its default. Fulton also failed to respond to the Region's motion for default judgment; Fulton failed to respond to the RJO's first and second orders to show cause and to supplement the record; and Fulton also filed a late response to the final opportunity the RJO granted Fulton to provide a reason or justification for its numerous defaults. Although Fulton did ultimately file an answer to the complaint after the RJO's final deadline for Fulton to explain its conduct, Fulton has provided no adequate explanation for its untimeliness. Moreover, the record also includes information suggesting that Fulton sought to avoid service of the RJO's orders in this case. Specifically, two envelopes the RJO sent by certified mail to Fulton were returned marked with the notation "refused."

More specifically, the record shows the following chronology of document service and response in this case:

- The Region filed the complaint on February 19, 2009.
- On February 20, 2009, the Region attempted to serve the complaint on Fulton by certified mail sent to William M. Fulton, Jr. ("Mr. Fulton") at the address on file

with the Montana Secretary of State for Mr. Fulton as Fulton's agent for service of process. That envelope was returned with a stamp indicating that it was unclaimed and with a handwritten alternate address.

- On February 20, 2009, the Region also attempted to serve Fulton by mailing the complaint by certified mail to Mr. Richard L. Beatty, one of the attorneys who represented Fulton when Fulton complied with orders predating this administrative penalty action that required Fulton to clean up the spilled oil.[2] On February 23, 2009, Mr. Beatty signed for, and accepted, the envelope containing the complaint. However, subsequently, Mr. Beatty filed a letter in this case stating that he was not retained to represent Fulton in this matter. Mr. Beatty also stated that he had "delivered the Complaint to William Fulton, President of Fulton Fuel Company and briefly discussed its contents" and "was advised at that time that [Mr. Fulton] intended to retain an attorney more knowledgeable in environmental matters." Letter from Richard L. Beatty to the RJO (filed Jan. 5, 2010).

- On March 23, 2009, the Region made a second attempt to serve the complaint on Fulton by certified mail sent to Mr. Fulton at both the address used for the first attempt and at the address hand-written on the returned envelope. These March 23 mailings were also returned stamped as unclaimed.

---

[2] In 2004, the Montana Department of Environmental Quality issued an order requiring Fulton to clean up the oil Fulton had spilled into the Fred and George Creek. In 2006, the U.S. EPA issued to Fulton a request for information concerning the oil spill, which Fulton responded to in 2007, nearly two years before this administrative penalty action was commenced by the filing of the complaint in February, 2009.

- On May 22, 2009, the complaint was hand delivered to Mr. Fulton by Patrick T. Kellegher of the Toole County Sheriff's office. Based on this service date, Fulton's answer became due on Monday, June 22, 2009. 40 C.F.R. § 22.15(a).
- When Fulton did not timely file an answer to the compliant, the Region filed, on July 9, 2009, a Motion for Default Judgment and Order. The Region initially attempted to serve the Motion for Default Judgment and Order on Fulton by certified mail sent to Mr. Fulton, but that envelope was returned as "unclaimed." As a result, the Region requested service by the Toole County Sheriff's office, which hand delivered the Motion for Default Judgment and Order to Mr. Fulton on August 18, 2009. Fulton never filed a response to the Region's motion.
- On August 20, 2009, the RJO issued an Order to Show Cause and Order to Supplement the Record. The RJO set September 30, 2009 as a deadline for Fulton to show cause why it should not be held in default. The order warned that a failure by Fulton to respond to the order could result in Fulton being held liable for the full amount of the proposed civil penalty of $32,500. The order also directed the Region to provide additional information on how it calculated the proposed penalty. The RJO served this first order to show cause on Mr. Fulton by certified mail, return receipt requested. The mailing was returned marked "unclaimed."
- Fulton never filed a response to the RJO's first order to show cause. On September 9, 2009, the Region filed the Declaration of Jane Nakad as its response

to the RJO's request for additional information regarding the Region's penalty analysis. The Region served a copy on Mr. Fulton by first class mail.

- On November 20, 2009, the RJO issued her Second Order to Supplement the Record. Among other things, this Order requested that Mr. Beatty confirm whether he represented Fulton Fuel Company in the administrative penalty action. The Order set December 21, 2009, as a deadline for responses. The RJO served the second order on Mr. Fulton by certified mail, return receipt requested. The mailing was returned marked "refused."
- On December 21, 2009, an unsigned notice of appearance and motion for additional time was filed by Douglas C. Allen on behalf of Fulton. The motion requested that Fulton be granted an extension of time through December 30, 2009, to supplement the record and show cause why it should not be held in default.
- On December 23, 2009, the RJO issued an Order granting an extension of time through December 30, 2009, for Fulton to respond to the motion for default and the order to show cause. Fulton did not file a response by December 30, 2009.
- On January 4, 2010, Fulton filed its Response to Order to Supplement the Record and to Show Cause. Fulton's January 4 response included a number of arguments explaining why Fulton believed it should not be held liable, but the response did not include an answer to the complaint, or provide an explanation for Fulton's failure to file an answer or respond to the motion for default or explain Fulton's delay in responding to the order to show cause.

- On January 14, 2010, the RJO held a status conference by telephone and instructed the parties to file status reports regarding any settlement discussions no later than January 29, 2010. On January 28, 2009, the Region filed a status report. On January 29, 2010, Fulton faxed a status report (which was subsequently filed on February 1, 2010), and Fulton requested that the RJO allow at least 30 more days for the filing of "a motion or further response."
- On February 2, 2010, in response to Fulton's request for 30 additional days to file "a motion or further response," the RJO entered an order setting a deadline of March 3, 2010, for Fulton to show cause why a default order should not be issued. Fulton did not file any response to the February 2, 2010 Order before the March 3, 2010 deadline.
- On March 8, 2010, Fulton finally filed its answer to the complaint, along with an affidavit of William M. Fulton, Jr. and a motion opposing issuance of default. That motion was styled a "Motion to Set Aside Default and to Set Hearing on the Merits."

By the time Fulton finally filed its answer on March 8, 2010, five days after the last deadline the RJO set, and without a thorough and candid explanation for its extensive delay, the RJO clearly had become weary of Fulton's conduct. In its March 8, 2010 filing, Fulton offered only a cursory explanation for its more than eight-month delay in filing an answer to the complaint. Fulton did not provide a full, candid explanation – Fulton asserted, without much factual support or detail, that it "hired counsel, other than its present counsel and reasonably

believed such hired counsel was meeting EPA claims and complaints." Fulton's Motion to Set Aside Default at 3.

In her March 17, 2010 First Default Decision, the RJO stated "[t]he Respondent's lack of consideration in addressing court documents and not taking seriously court deadlines partially forms the basis for ruling on the motion [for default] at this juncture." First Default Decision at 4 n.10. The RJO found that a "default has occurred." *Id.* at 5. The RJO explained that "[o]nce Respondent retained an attorney to represent it in this matter, the court provided ample time and opportunity to allow Respondent and its attorney to explain why the Complainant and the court were ignored," but a "cogent and reasoned response has never been given." *Id.* at 5. The Board finds no error in these determinations – the record clearly supports the RJO's findings.

Following the initial finding of default, the RJO treated Fulton's March 8 filing as a pleading to set aside the default.[3] The RJO considered Fulton's rationale for why the company had engaged in extensive delay and repeatedly missed ordered deadlines. The RJO rejected Fulton's assertion concluding that Fulton's "statements do not comport with the Record." Second Default Decision at 2. On appeal, Fulton does not dispute the untimeliness of its answer, or offer an explanation for its untimeliness that specifically addresses Fulton's failure to respond

---

[3] The RJO observed that Fulton's "Motion to Set Aside Default" was an untimely response to the show cause orders because Fulton filed it after the RJO's last deadline for Fulton to show good cause for its defaults. First Default Decision at 4; Second Default Decision at 2. The RJO also observed that Fulton's "Motion to Set Aside Default" was premature when filed because the RJO had not yet issued her First Default Decision. Second Default Decision at 2. After receiving Fulton's motion on March 8, 2010, the RJO proceeded to issue her First Default Decision on March 17, 2010, stating that the Region would be allowed through March 23, 2010, to respond to Fulton's motion to set aside.

earlier when Mr. Fulton received two separate hand-deliveries of the complaint and motion for default by the Toole County Sheriff's office, or that addresses Mr. Fulton's refusal to take certified mail delivery from the RJO in November, 2009. Instead, Fulton merely asserts to this Board, like it did to the RJO, that it hired an attorney, 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 motion." Fulton's Appellate Brief at 6.

Although Fulton's submissions to the RJO did demonstrate that Fulton was represented by Renee Coppock during the cleanup process ordered in 2004 by the Montana Department of Environmental Quality and that Ms. Coppock had a role in providing Fulton's response in 2007 to EPA's request for information concerning the oil spill, Fulton's submissions provided no evidence that Fulton had in fact retained Renee Coppock to represent Fulton in this penalty proceeding. What is unexplained by Fulton's appellate brief, and the briefs and affidavit it submitted to the RJO, is why Fulton believed it was represented in this administrative penalty matter by any attorney before Mr. Allen filed an unsigned notice of appearance on December 21, 2009. No attorney filed a notice of appearance in this proceeding before that date. Fulton has provided no specific details identifying when it discussed this case with Renee Coppock. Fulton has not identified any communication between Fulton and Ms. Coppock (or any other attorney) regarding this case generally, nor specifically that Fulton delivered the complaint to counsel and requested representation after Mr. Fulton received hand delivery of the complaint from the Toole County Sheriff's office. Fulton's pleadings also do not explain what Fulton did, after Mr. Fulton was personally served with the Region's Motion for Default, to ensure that its counsel was aware

of the motion and would respond and correct the default. Fulton's assertion that it believed it was represented by counsel, without supporting details regarding its communication with counsel, is simply insufficient and unpersuasive at this stage of the proceeding to establish good cause for setting aside Fulton's default.[4]

In addition, at this stage of the proceeding, Fulton cannot be relieved of its default by the scant information Fulton submitted as allegedly demonstrating that it has "meritorious defenses." Fulton's Appellate Brief at 6. In this context, Fulton's burden is to demonstrate it has "more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem.*, 11 E.A.D. at 662.

From Fulton's pleading filed on January 4, 2010, it is apparent that Fulton admits it was the owner of property that included an oil storage facility with associated "flow lines," one of which passed under the Fred and George Creek, and that, on February 29, 2004, an oil leak was detected from that flow line, which discharged between six to ten barrels of oil into the Fred and George Creek and surrounding area. *See* Fulton Fuel Company's Response to Order to

[4] The Board has on several occasions held that "under our case law governing default determinations, the neglect of a party [by that] party's attorney does not excuse an untimely filing"; instead, "an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney's failings." *Pyramid Chem.*, 11 E.A.D. at 667; *accord Four Strong Builders*,12 E.A.D. at 770; *JHNY*, 12 E.A.D. at 382-83 & n.15; *Jiffy Builders*, 8 E.A.D. at 320-21; *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 105-06 (CJO 1990). Disputes between lawyers and clients generally provide no basis for the requisite good cause showing to reverse a default, as the administrative litigation process cannot reasonably be "held hostage" to such disputes. *JHNY*, 12 E.A.D. at 382 & n.15 (good cause for default not established by unsupported claim of financial difficulties affecting respondent's ability to continue to retain counsel). In the present case, however, Fulton has not even established that it retained counsel to represent it in this case, much less shown that the defaults are the fault of counsel rather than Fulton. A failure to retain counsel or otherwise respond in this case, where Fulton's agent for service of process received two hand deliveries – of the complaint and the motion for default – is inexcusable.

Supplement the Record and to Show Cause. Thus, the essential facts that give rise to Fulton's liability – that an oil spill occurred from a facility Fulton owned and that the spill discharged into the Fred and George Creek – is undisputed. Fulton also has never asserted that it had an SPCC Plan for its facility.

Fulton's late-filed answer, which the RJO ultimately did not accept, alleges that Fulton should not be found liable because the flow line was constructed by Fulton's predecessor and that the flow line does not fall within the definition of a "facility" under the applicable statute and regulations. *See* Answer at 1-2; *see also* Fulton's Motion to Set Aside Default at 2-3 (citing 33 U.S.C. § 1321(f)). These contentions do not sustain Fulton's burden to demonstrate a "strong probability" that litigating the defense will produce a favorable outcome." *Pyramid Chem.*,11 E.A.D. at 662. Liability is imposed on the "owner, operator, or person in charge," 33 U.S.C. § 1321(b)(6)(A), and as noted above, Fulton has admitted it is the owner of the property and flow line. Fulton's reference to the prior owner's construction of the flow line and to 33 U.S.C. § 1321(f), which limits liability for cleaning up of a spill caused "solely" by the acts of a third party, does not establish a potentially meritorious defense because Fulton had a duty as owner and operator to perform "flowline maintenance to prevent discharges from each flowline." 40 C.F.R. § 112.9(d)(3) (2004).[5] Fulton has provided no information explaining why it believes the leak was caused "solely" by the initial installation of the flow line, rather than by Fulton's failure to adequately maintain the flow line. In addition, Fulton's contention that the flow line is

[5] This provision, which was applicable at the time of the spill in 2004, was subsequently amended to make the flowline maintenance requirements more detailed. *See* Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule Requirements – Amendments, 73 Fed. Reg. 74,236, 74,304 (Dec. 5, 2008).

not within the definition of a "facility" is wholly without merit – the regulations unambiguously state that "an oil production facility means all structures * * * *piping* (including but not limited to *flowlines or gathering lines*), or equipment * * * located in a single geographic oil or gas field." 40 C.F.R. § 112.2 (emphasis added).[6]

Fulton's late-filed answer also alleges that EPA does not have jurisdiction. Answer at 1. Fulton amplified this contention in its Motion to Set Aside Default and in its appellate brief where Fulton argues that EPA lacks jurisdiction because the Fred and George Creek is not "navigable waters of the United States." *See* Motion to Set Aside Default at 2; Fulton's Appellate Brief at 5. This contention also is insufficient to sustain Fulton's burden to demonstrate there is "more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem.*, 11 E.A.D. at 662. The regulations define "navigable waters" as including "(a) [a]ll waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce * * * (c) [a]ll other waters such as intrastate lakes, rivers, streams (*including intermittent streams*), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce * * * (d) [a]ll impoundments of waters otherwise defined as navigable waters under this section; [and] (e) *[t]ributaries of waters identified in paragraphs (a) through (d) of this section* * * *." 40 C.F.R. § 110.1 (emphasis added).[7]

---

[6] Minor wording changes were made to this definition in 2008. *See* 73 Fed. Reg. at 74,299

[7] The statute defines the term "navigable waters" as "waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7).

The complaint alleges that "Fred and George Creek is a tributary to Miners Coulee, which flows into Canada and into the Milk River, a perennial international water. The Milk River flows into the United States and into the Missouri River, a perennial interstate water." Complaint at ¶ 12. Although Fulton's late-filed answer generally denies this allegation and Fulton argues on appeal that it has a meritorious defense, Fulton has provided few factual details supporting its contention. Fulton has provided no references to geological maps or records that would show that the Fred and George Creek is not a tributary to Miners Coulee, the Milk River and ultimately the Missouri River. Moreover, Fulton has, itself, described the Fred and George Creek as a "small seasonal stream which runs dry each year about one mile below the site of the spill." Fulton Fuel Company's Response to Order to Supplement the Record at 2-3. Because the regulatory definition specifically mentions "intermittent streams," and "tributaries" of otherwise included waters, Fulton's own description of the Fred and George Creek augurs against its own argument, rather than sustaining its burden of showing a strong probability that, if allowed to litigate the issue, Fulton would prevail in arguing that the Fred and George Creek is not an intermittent stream within the meaning of § 110.1(c) and is not a tributary of Miners Coulee, a tributary of the Milk River, a tributary of the Missouri River.

Fulton's appellate arguments regarding the Supreme Court's opinions in *Rapanos v. United States,* 547 U.S. 715 (2006), also do not establish that Fulton has a strong probability of establishing a meritorious defense challenging EPA's jurisdiction to regulate Fulton's oil discharge or Fulton's failure to have an SPCC Plan. *Rapanos* dealt with a dispute regarding whether four "wetlands" were sufficiently connected to "waters of the United States" to fall within Congress' grant of regulatory authority to EPA. It did not deal with an "intermittent

stream" of the type specifically mentioned in the regulatory definition applicable here. Moreover, Fulton fails to acknowledge that the plurality opinion authored by Justice Scalia, upon which Fulton relies, expressly states "we do not necessarily exclude [from EPA's regulatory jurisdiction] *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5.[8] As noted above, Fulton has itself described the Fred and George Creek as a "seasonal stream" and, accordingly, Fulton has not demonstrated that it has a strong probability of prevailing under the test articulated in the plurality opinion authored by Justice Scalia.

Moreover, Fulton has not identified any facts it would rely on to establish that the Fred and George Creek does not meet Justice Kennedy's "significant nexus" test for EPA's regulatory authority. *Id.* at 759, 780. The Court of Appeals for the Ninth Circuit, which has jurisdiction over Montana, has concluded that Justice Kennedy's concurring opinion "provides the controlling rule of law." *Northern Cal. River Watch v. City of Healdsburg,* 496 F.3d 993, 999-1000 (9th Cir. 2007). Thus, Fulton simply has not brought forward information, facts, or evidence sufficient to establish "more than a mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome" on its contention that EPA does not have regulatory jurisdiction. *Pyramid Chem.*, 11 E.A.D. at 662.

---

[8] Justice Scalia stated further "we have no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States." 547 U.S. 732 n.5. In addition, the *Rapanos* case involved the addition of dredge or fill to a wetland, rather than the addition of a pollutant, in this case oil, to a seasonal stream. In *Rapanos*, Justice Scalia drew a distinction between the addition to a wetland of dredge or fill that is intended to stay put and the "discharge into intermittent channels of any pollutant *that naturally washes downstream*" and expressed the view that the plurality opinion would not likely affect enforcement cases involving pollutants that flow downstream. *Rapanos,* 547 U.S. at 743.

In addition, as noted above, the Board gives deference to presiding officers in managing trial-level proceedings to prevent abuse of process. *JHNY*, 12 E.A.D. at 384-85. Here, the record not only evidences a clear pattern of failure to comply with the RJO's deadlines, it also evidences Mr. Fulton's rejection of the RJO's certified mail deliveries in November, 2009. The RJO, thus, had substantial reason to state that "[t]he Respondent's lack of consideration in addressing court documents and not taking seriously court deadlines partially forms the basis for ruling on the motion [for default] at this juncture." First Default Decision at 4 n.10. Fulton's pleadings and appellate brief do not address the RJO's concern. Fulton does not explain why Mr. Fulton, who is designated Fulton's Registered Agent, failed to pick up, and refused, numerous certified mail deliveries of pleadings and orders in this case. Fulton's failure to provide any adequate explanation for its conduct is further reason for the Board to sustain the RJO's default decision as an appropriate step in managing the RJO's docket.

Finally, the Board rejects any suggestion that the RJO did not have subject matter jurisdiction to decide this case (or that the RJO was required to fully consider the jurisdictional issue Fulton raised at whatever stage Fulton raised it). In *In re Adams*, 13 E.A.D. 310, 319 (EAB 2007), the Board observed that "the authority to regulate under the CWA is distinct from the subject matter jurisdiction that defines a tribunal's authority to adjudicate a claim." Jurisdiction to adjudicate this matter is not dependent upon a finding of discharge into navigable waters (or proximity to navigable waters for purposes of an SPCC plan) as required for EPA to regulate the specific activity. Instead, the subject matter jurisdiction of the RJO and the Board for this proceeding is provided by CWA section 311(b)(6), 33 U.S.C. § 1321(b)(6), which establishes administrative penalty assessment authority for violations of section 311, and by the

Consolidated Rules of Practice, promulgated at 40 C.F.R. part 22, which specify the administrative adjudicatory process for the assessment of any penalty under CWA section 311(b)(6). *See, e.g., Adams,* 13 E.A.D. at 320 (discussing subject matter jurisdiction for violations of CWA section 404).

The Board's distinction between, on the one hand, the Board's and the RJO's subject matter jurisdiction to decide administrative penalty matters arising under the CWA and, on the other hand, EPA's jurisdiction to regulate specific activity impacting navigable waters, is consistent with the Supreme Court's treatment of "the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy" in the federal courts. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006). The Supreme Court has held that federal court subject matter jurisdiction is primarily defined by 28 U.S.C. §§ 1331 and 1332 and that the provisions of other law applicable to specific claims are generally treated as elements of the claim for relief, rather than defining the tribunal's jurisdiction. *Id.*, at 513-14.

VI. *Conclusion and Order*

For the foregoing reasons, the Board concludes, based on the totality of the circumstances discussed above, that Fulton failed to demonstrate why the Board should set aside the RJO's finding of default, and the Board hereby affirms the RJO's First and Second Default Decisions. The RJO's First Default Decision provides a full analysis of the liability findings and penalty determination.

Accordingly, Fulton Fuel Company is assessed a penalty of $32,176. Fulton Fuel Company shall, within 30 days of the service of this Final Decision and Order, pay the entire amount of the civil penalty by cashier's check or certified check payable to the Treasurer, United

States of America (unless the Region agrees to a different payment schedule). The check should contain a notation of the name and docket number of this case. 40 C.F.R. § 22.31(c). Fulton shall remit payment to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Failure to pay the penalty within the prescribed time may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.[9]

Dated: September 9, 2010

ENVIRONMENTAL APPEALS BOARD

By: Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

[9] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Final Decision and Order in the matter of Fulton Fuel Company, CWA Appeal No. 10-03, were sent to the following persons in the manner indicated:

U.S. First Class Mail:

William C. Allen
153 Main Street
P.O. Box 873
Shelby, MT 59474

William Lowrence
1320 Old Chain Bridge Road
Suite 200
McLean, VA 22101

U.S. EPA Pouch Mail:

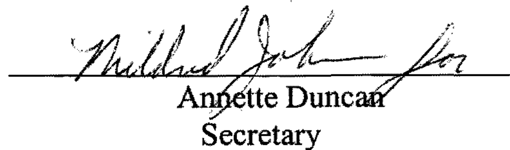
Marc D. Weiner (MC– 8ENF-L)
Enforcement Attorney
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

Tina Artemis (MC-8RC)
Regional Hearing Clerk
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

U.S. EPA Interoffice Mail:

Jim Vinch (MC-2243A)
Water Enforcement Division
U.S. EPA
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460-0001

Dated: SEP - 9 2010



Annette Duncan
Secretary