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ENVIR. APPEALS BOARD

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

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REGIONAL HEARING CLERK
EPA REGION VI

In the Matter of:	)	
	)	
New Lift, Inc.,	)	Docket No. CWA-06-2005-4807
	)	
Respondent.	)	

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321, as amended, for violations of Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112. The proceeding is governed by 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, Chief of the Response and Prevention Branch, Superfund Division, United States Environmental Protection Agency Region 6, has filed a Motion for Default and a Memorandum in Support of Motion for Default and Motion for Assessment of Penalties seeking a default order finding Respondent, New Lift, Inc., liable for violations of the CWA alleged in the Administrative Complaint ("Complaint") filed in this matter and assessing a civil penalty in the amount of $11,000.00 against Respondent. Pursuant to the Consolidated Rules and the record in this matter, and for the reasons set forth below, the Complainant's Motions are hereby **GRANTED.**

BACKGROUND

Complainant filed the Complaint against Respondent in this matter on March 17, 2005. The Certificate of Service attached to the Complaint includes a certification that a copy of the Complaint, together with a copy of the Consolidated Rules, was sent by certified mail, return

receipt requested, on March 17, 2005, to Mr. Mark Cook, identified in the Certificate of Service as Respondent's owner. A certified mail return receipt (green card) attached to Complainant's Motion for Default, shows that an article was received by Mark Cook on March 19. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Complaint may be presumed under the Consolidated Rules. 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). As of the date of this Order, Respondent has not filed an answer to the Complaint with the Regional Hearing Clerk. 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).

On May 4, 2005, 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 by certified mail, return receipt requested, on May 4, 2005. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b). As of the date of this Order, Respondent has not filed a response to the Motion of Default with the Regional Hearing Clerk. 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).

On October 27, 2005, the Presiding Officer issued an Order Finding Respondent in Default and for Further Proceedings. In the Order, the Presiding Officer found the Respondent to be in default for failure to file a timely answer, that Respondent's default constitutes, for

purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. The Presiding Officer also ordered that Complainant file its response to the Order, including a memorandum that sets forth the elements of the violations alleged in the Complaint and demonstrates that the facts alleged in the Complaint establish each element and its Motion for Assessment of a Penalty, including all necessary supporting documentation, on or before November 30, 2005. The Order specifically provided that Respondent would have 15 days after service of Complainant's response to file its response, if any, to Complainant's filing.

On November 30, 2005, Complainant filed its Memorandum in Support of Motion for Default and Motion for Assessment of Penalty ("Memorandum and Motion") arguing that the Complainant has established a prima facie case of liability against Respondent and seeking a default order against Respondent finding Respondent liable for the violations alleged in the Complaint and seeking the assessment of a civil penalty of $11,000.00. As of the date of this Order, Respondent has not filed a response to the Complainant's Memorandum and Motion with the Regional Hearing Clerk. Respondent's failure to respond to the Memorandum and Motion is deemed to be a waiver of any objection to the granting of the relief requested in the Memorandum and Motion. 40 C.F.R. § 22.16(b).

FINDINGS OF FACT

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:

1. Respondent is a corporation organized under the laws of Oklahoma with a place of business located at 304 Flynn Road, Branson, Missouri 65616.

2. Respondent is the owner/operator, within the meaning of section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of an onshore oil production facility located in Section 17, Township 25, Range 17 in Nowata County, Oklahoma ("Facility"), which is located approximately 500 feet from a tributary to Lake Oolagah.

3. The Facility has an aggregate above-ground storage capacity greater than 1320 gallons of oil in containers each with a shell capacity of at least 55 gallons.

4. Lake Oolagah is a navigable water of the United States within the meaning of 40 C.F.R. § 112.2 and section 502(7) of the CWA, 33 U.S.C. § 1362(7).

5. Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products located at the Facility.

6. The Facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112.2, Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.

7. The Facility is an onshore facility within the meaning of section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

8. The Facility is therefore a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity (hereinafter referred to as an "SPCC-regulated facility").

9. Respondent's predecessors began operating the Facility prior to August 16, 2002.

10. Respondent began operating the Facility on an unknown date in March, 2004, and has continued to operate it since that date.

11. Pursuant to 40 C.F.R. § 112.3, the owner or operator of an SPCC-regulated facility must prepare a written SPCC plan in accordance with 40 C.F.R. § 112.7 and any other applicable section of 40 C.F.R. Part 112.

12. On July 2, 2004, EPA inspected the Facility.

13. At the time of the EPA inspection, Respondent had failed to prepare an SPCC plan for the Facility.

14. At the time of the EPA inspection, Respondent had failed to maintain the secondary containment as evidenced by eroded walls and Respondent's failure to remove accumulated oil from secondary containment promptly.

15. The Complaint was filed with the Regional Hearing Clerk on September 21, 2004.

16. A copy of the Complaint was mailed to Respondent by certified mail, return receipt requested, on March 17, 2005.

17. A return receipt shows that Respondent received a copy of the Complaint on March 19, 2005.

18. Respondent did not file an answer to the Complaint within 30 days of receipt of the Complaint, and has not filed an answer as of the date of this Order.

19. On May 4, 2005, Complainant filed its Motion for Default and served it on the Respondent.

20. Respondent did not file an response to Complainant's Motion for Default within 15 days of service and has not filed a response to the Motion for Default as of the date of this Order.

21. On October 27, 2005, the Presiding Officer issued an Order Finding Respondent in Default and for Further Proceedings which, among other things, found Respondent in default for failure to file a timely answer to the Complaint, required Complainant to file a memorandum setting forth the elements of the violations alleged in the Complaint and demonstrating that the facts alleged in the Complaint establish each element and a Motion for Assessment of Penalty on or before November 30, 2005. The Order also specifically stated that Respondent would have 15 days after service of Complainant's response to the Order to file its response, if any.

22. On November 30, 2005, Complainant filed its Memorandum in Support of Motion for Default and Motion for Assessment of Penalty and served it on Respondent.

23. Respondent did not file a response to Complainant's Memorandum in Support of Motion for Default and Motion for Assessment of Penalty within 15 days of service and has not filed a response to the Memorandum is Support of Motion for Default and Motion for Assessment of Penalty as of the date of this Order.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I reach the following conclusions of law:

24. Respondent is a "person" as defined at sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

25. The regulation at 40 C.F.R. § 112.3 is a regulation issued under section 311(j) of the CWA, 33 U.S.C. § 1321(j).

26. Respondent is subject to the requirement to prepare an SPCC plan in 40 C.F.R. § 112.3.

27. Respondent violated 40 C.F.R. § 112.3 by failing to prepare an SPCC plan for the Facility.

28. Pursuant to section 311(b)(6)(B)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(B)(i), Respondent is liable for a civil penalty in an amount not to exceed $11,000 per day for each day during which violation continues, up to a maximum of $32,500.

29. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

30. 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).

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

32. 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).

33. Complainant's Memorandum in Support of Motion for Default and Motion for Assessment of Penalty was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

34. Respondent's failure to respond to the Memorandum in Support of Motion for Default and Motion for Assessment of Penalty is deemed to be a waiver of any objection to the granting of the Motion for Default and the Motion for Assessment of Penalty. 40 C.F.R. § 22.16(b).

35. The civil penalty of $11,000.00 requested in the Memorandum in Support of Motion for Default and Motion for Assessment of Penalty is not inconsistent with section 311(b) of the CWA, 33 U.S.C. § 1321(b), and the record in this proceeding.

DISCUSSION OF PENALTY

The relief requested in the Memorandum in Support of Motion for Default Motion for Assessment of Penalty includes the assessment of a total civil penalty of $11,000.00 for the alleged violation. 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 or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8).

In considering this case in light of the statutory factors, I have considered the findings of fact and conclusions of law above, the narrative summary explaining the reasoning behind the penalty requested set forth in the Declaration of Bryant Smalley attached to Complainant's

Memorandum in Support of Motion for Default and Motion for Assessment of Penalty (Exhibit 8), and the entire record in this case.

In his calculation of the proposed penalty, Mr. Smalley, using the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act ("Penalty Policy") as guidance, considered the statutory factors enumerated above. In assessing the seriousness of the violation, Mr. Smalley considered that the storage capacity of the Facility is approximately 44,100 gallons and that the Facility had no SPCC plan and inadequate secondary containment. Mr. Smalley also considered the potential environmental impact of a worst case discharge from the facility, including that Lake Oolagah is a navigable water and serves as a wild fowl refuge, but that it is unknown if an actual or potential drinking water source is near the Facility. Finally, Mr. Smalley considered the length of the violation, over two months prior to the inspection and over 19 months since the inspection. After considering all of this information, Mr. Smalley concluded that a penalty of over $20,000.00 would be appropriate given the seriousness of the violation.

Mr. Smalley, using the BEN computer model and relying on his experience in SPCC cases to help develop appropriate inputs, calculated that the economic benefit to the Respondent resulting from the violation resulting from the violation was less than $1,000.00.

Mr. Smalley considered Respondent's degree of culpability did not warrant increasing ro decreasing the penalty.

There is no evidence in the record that Respondent has paid any other penalty to EPA or other government agencies for the violation involved in this case, and Mr. Smalley made no adjustment in his penalty calculation for this factor.

There is no evidence in the record that the Respondent has a history of prior violations of the SPCC regulations, and Mr. Smalley made no adjustment in his penalty calculation for this factor.

There is no evidence in the record that Respondent took any steps to minimize or mitigate the effects of the violation or of any potential discharge from the Facility or that Respondent has taken actions necessary to come into compliance with the SPCC regulations, and Mr. Smalley made no adjustment in his penalty calculation for this factor.

There is no evidence in the record that the economic impact of the proposed penalty will render Respondent unable to continue in business, and Mr. Smalley made no adjustments in his penalty calculation for this factor.

Mr. Smalley made no adjustments in his penalty calculation for any other matters as justice may require. I considered Respondent's general recalcitrance in its dealings with EPA in this matter as a factor that could support an increase in the penalty in this case.

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 $11,000.00 for the violation alleged in the Complaint. After considering 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 CWA.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

(1) Respondent is assessed a civil penalty in the amount of $11,000.00.

(a) 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 "Oil Spill Liability Trust Fund," and mailed to:

OPA Enforcement Coordinator (6SF-RC)
EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, shall accompany the check.

(b) Respondent shall mail a copy of the check to:

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

and to:

Ed Quinones
Senior Assistant Regional Counsel (6RC-S)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

(2) 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 7th day of February 2006.

Michael C. Barra

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 Initial Decision and Default Order for Class I - CWA 06-2005-4807 was provided to the following on the date and in the manner stated below:

Eurika Durr — CERTIFIED MAIL
U.S. Environmental Protection Agency
Clerk of th e Board
Environmental Appeals Board (MC1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Mark Cook
New Lift, Inc.
304 Flynn Road
Branson, MO 65616

Edwin M. Quinones — INTEROFFICE MAIL
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Lorena S. Vaughn
Regional Hearing Clerk

2-7-06
Date