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

IN THE MATTER OF	)	
	)	
Fulton Fuel Company	)	CWA App. 10-(03)
127 Main Street	)	
Shelby, Montana 59474	)	
	)	
Appellant	)	
	)	
Docket No. CWA-08-2009-0006	)	

COMPLAINANTS' RESPONSE BRIEF

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COMPLAINANT'S RESPONSE BRIEF

I. Introduction

Complainant, U.S. Environmental Protection Agency (EPA or the Complainant), through counsel, respectfully submits this response to the appeal brief filed by Fulton Fuel Company (Respondent or Appellant) on May 10, 2010. This matter involves an Initial Decision and Order issued by Regional Judicial Officer Elyana R. Sutin (RJO) on March 17, 2010, holding Respondent in default and liable for a penalty of $32,176. Additionally, the RJO issued a subsequent Initial Decision and Order on April 8, 2010 denying Respondent's Motion to Set Aside Default and set Hearing on Merits. Complainant hereby files this response pursuant to 40 C.F.R. § 22.30(a)(2) of the Consolidated Rules of Practice (Consolidated Rules) for an Order from the Environmental Appeals Board (EAB) upholding and affirming the RJO's Initial Decisions and Orders. The grounds for upholding the RJO's Initial Decisions and Orders are as follows: (A) the Respondent was properly served under Montana State Law and the Consolidated Rules; (B) the purported defenses are insufficient as a matter of law

because (1) the Respondent had a duty to answer the complaint, (2) jurisdiction is proper under the Clean Water Act because Fred and George Creek is a "water of the United States" and (3) Respondent was required to establish and implement a Spill Prevention Control and Countermeasure Plan (SPCC Plan); and (C) the determination of civil liability was proper.

II. Statutory and Regulatory Provisions

The Federal Water Pollution Control Act of 1972 (the CWA or the Act) provides the foundation for this case. *See* 33 U.S.C. § 1251. The primary objective of the Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The purpose of § 311 of the Act, 33 U.S.C. § 1321, is to deter conduct causing spills or discharges of oil and hazardous substances into waters under the jurisdiction of the United States. See, e.g., *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978). Section 311(b)(1) of the Act, 33 U.S.C. § 1321(b)(1), sets forth a congressional policy "that there should be no discharge of oil . . . into or upon the navigable waters of the United States."

The term "discharge" is defined as including "any spilling, leaking, pumping, pouring, emitting, emptying or dumping" except as in compliance with a permit under § 402 of the CWA and under certain other conditions not pertinent to this case. § 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2); 40 C.F.R. § 117.3. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), prohibits "the discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines" and other waters of the United States in quantities that have been determined may be harmful to the public health or welfare or the environment of the United States. For purposes of § 311(b)(3)

and (b)(4) of the Act, 33 U.S.C. §§ 1321(b)(3) and (b)(4), discharges of oil into or upon the navigable waters of the United States which may be harmful to the public health or welfare or the environment of the United States include discharges of oil that "(a) violate applicable water quality standards or (b) cause a film or sheen upon or discoloration of the surface or the waters or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. § 110.3.

III. Deference to Agency Interpretation under *Chevron* and *Seminole Rock*

This case presents a threshold question as to what waters are covered under EPA regulations, and in particular, how a court might interpret the regulations. Because that question involves the interpretation of a regulation, principles of statutory construction lay the foundation for this discussion.

A. *Chevron* deference to EPA's interpretation of regulations

> When a case involves an agency's interpretation of a statute it administers, this court uses the two-step approach announced in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See, S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 824 (10th Cir. 2000). Under this approach, when Congress has addressed the precise question at issue, we give effect to the express intent of Congress. *Id.* (citing *Chevron*, 467 U.S. at 842-43). "If the statute is silent or ambiguous, however, we defer to the agency's interpretation" so long as it is permissible. *Id.* (citing *Chevron*, 467 U.S. at 843-44).

United States v. Hubenka, 438 F.3d 1026, 1031 (10th Cir. 2006)(affirming defendant's conviction and applying *Chevron* deference to the Corps of Engineer's and EPA's interpretation of the term "navigable waters" under the Act.); *See, Natural Resources Defense Counvil v. U.S.E.P.A.*, 542 F.3d 1235, 1250 (9th Cir. 2008).

When Congress passed the Act, it expressed broad goals but generally left it to the EPA to promulgate regulations to achieve these goals.[1] As stated above, one of the principal provisions of the Act prohibits the discharge of oil "into or upon navigable waters of the United States." § 311(b)(1) of the Act, 33 U.S.C. 1321(b)(1). Congress' failure to further define the meaning of "waters of the United States" implies that Congress delegated policy-making authority to the agencies charged with administering the Act, namely the EPA and the Army Corps of Engineers. *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007); *See also Chevron, supra,* 467 U.S. 837, 844 (holding that congressional delegation to an agency may be implicit). *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of authority." *United States v. Meade Corp.*, 533 U.S. 218, 226-27 (2001); *See also, Arizona Public Service Co. v. EPA*, 562 F.3d 1116 (10th Cir. 2009)("an agency is entitled to substantial deference when it acts pursuant to an interpretation of its own regulation.")

B. *Seminole Rock* deference to EPA's interpretation of regulations

"Regulations promulgated by an agency exercising its congressionally granted rule-making authority . . . carry the force of law. *Been v. O.K. Industries, Inc.* 495 F.3d 1217, 1226 (10th Cir. 2007). Consequently, "[i]n addition to this deference to an agency's construction of statutes, we also owe deference to its construction of its own regulations." *HRI, Inc. v. EPA*, 198 F.3d 1224, (10th Cir. 2000). When the issue involves an agency's interpretation of its own regulation, as opposed to its interpretation of a

[1] § 501(a) of the Act, 33 U.S.C. 1361(a), explicitly authorizes the Administrator of the EPA to "prescribe such regulations as are necessary to carry out his functions under this chapter."

governing statute, some courts have determined that even greater deference is to be accorded. *Bowles v. Seminal Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *See also Auer v. Robbins,* 519 U.S. 452, 461 (1997). "Agency interpretations of their own regulations have been afforded deference by federal reviewing courts for a very long time and are sustained unless 'plainly erroneous or inconsistent' with the regulation. It is sometimes said that this deference is even greater than that granted an agency interpretation of a statute it is entrusted to administer" *United States v. Kanchanalak*, 192 F.3d 1037, 1046 (D.C. Cir. 1999)(affirming conviction for false statements and upholding FEC interpretation of its regulation.) "This requirement of binding deference to agency interpretations of their own regulations, unless 'plainly erroneous or inconsistent with the regulation,' is known as *Seminole Rock* deference." *Kentuckians for the Commonwealth, Inc. v. Rivenbaugh*, 317 F.3d 425, 439 (4th Cir. 2003).

IV. Procedural History

Pursuant to § 308 of the Act, 33 U.S.C. § 1318, the EPA has authority to request information pertinent to carrying out its responsibilities under the CWA. Accordingly, on May 15, 2006, the EPA served Respondent with a § 308 Expedited Information Request (Information Request) regarding the status of a release of crude oil. The Information Request notified Respondent that the EPA was also investigating the status of the facility with regard to the regulations promulgated at 40 C.F.R. § 112 (SPCC regulations) governing non-transportation facilities. Pursuant to § 309 of the Act, 33 U.S.C. § 1319, Respondent was advised that a failure to comply within thirty (30) days could result in administrative and civil penalties of up to $32,500 per day. Despite the immediacy set forth in the Letter, a response was not received until November 7, 2007. Richard L.

Beatty and Renee Coppock both served as legal representatives of Fulton in discussions regarding the information request only.

On February 19, 2009, EPA filed an Administrative Complaint and Opportunity to Request Hearing, charging Respondent with violating § 311 of the Act, 33 U.S.C. § 1321, as amended by the Oil Pollution Act of 1990. Specifically, the Complaint alleged that on or about February 29, 2004, Respondent discharged approximately ten barrels (420 gallons) of crude oil into the Fred and George Creek (hereinafter the Creek) and upon adjoining shorelines. In addition, the Complaint charged Respondent with violating 40 C.F.R. § 112.3 for failure to prepare and implement an SPCC plan for the period of February 29, 2004 through January 2005.

On February 20, 2009, EPA sent its Complaint via certified mail to William M. Fulton, as the registered agent of Fulton Fuel Co., at 127 Main Street, Shelby, Montana 59474. Respondent refused to accept service at this address and provided an alternative handwritten address of P.O. Box 603, Shelby, Montana 59474. (Exhibit A) On March 23, 2009, EPA again mailed the Complaint via certified mail to both the aforementioned addresses. Once again Respondent did not accept service, and the documents were returned to Complainant. (Exhibit B) On May 22, 2009, the Toole County Sherriff's Office (Sheriff) served the Complaint along with the Consolidated Rules on Respondent. (Exhibit C) Pursuant to 40 C.F.R. § 22.15(a), Respondent was required to file an answer within 30 days after receipt of the Complaint. Respondent failed to file an answer by June 22, 2009, and on July 9, 2009, Complainant moved for the entry of a Default Order. On July 10, 2009, EPA mailed the Motion for Default via certified mail to Respondent. Once again Respondent refused to accept the certified mail and was subsequently served

by the Sheriff on August 18, 2009. (Exhibit D) An Order to Show Cause and Order to Supplement the Record was issued by the RJO on August 20, 2009, requesting both parties take action by September 30, 2009. Complainant was ordered to supplement the record with additional information on the penalty calculation, and Respondent was ordered to show cause why it should not be held in default or be subject to the full amount of the proposed penalty. Complainant timely complied with the order by submitting the Declaration of Jane Nakad, an EPA representative responsible for calculating penalties for violations of § 311of the Act, 33 U.S.C. § 1321. Respondent failed to comply with the Order to Show Cause.

The Court issued a Second Order to Supplement the Record on November 20, 2009 requesting additional information from Complainant and directing Respondent and/or Respondent's attorney to supplement the record no later than December 21, 2009. Complainant complied with the Order and submitted a Supplemental Declaration of Jane Nakad. On December 21, 2009, the last day to comply with the Court's Order, Counsel for the Respondent, Mr. Douglas C. Allen, filed a Notice of Appearance and Motion for Additional Time to Supplement the Record and Respond to the Order to Show Cause. On December 23, 2009, the Court granted the Motion for Additional Time, and Respondent was ordered to address the Motion for Default and the Order to Show Cause no later than December 30, 2009. On January 7, 2010, the Court ordered a conference call be set for January 14, 2010 to discuss the status of the matter and possible settlement opportunities. On January 29, 2010, Respondent requested an order setting an extended deadline for a motion to be filed and an additional thirty (30) days for settlement discussions. The Court granted Respondent's request and ordered that, if settlement

could be reached, a consent agreement was to be filed by February 24, 2010. In the event an agreement could not be reached, the Court further ordered Respondent to show cause why a default should not be entered by March 3, 2010. Consistent with Respondent's untimely pleading practice, the deadline was missed. On March 4, 2010, Complainant received the overdue Motion to Set Aside Default from a fax machine belonging to Mr. Beatty, Respondent's prior counsel in the information request discussions, who alleges to have no involvement in the penalty matter. (Exhibit E) Upon review of the faxed document, Complainant discovered that it was incomplete because it did not contain a supporting affidavit. After receiving the hard copy via regular mail, on March 8, 2010 (postmarked on March 6, 2010), it became apparent that the Affidavit in Support was not included because it was not signed until March 5, 2010, two days after it was due. On March 17, 2010, RJO Sutin issued an Initial Decision and Order holding that Respondent was in default and liable for a total penalty of $32,176. Additionally, the RJO issued a subsequent Initial Decision and Order on April 8, 2010 denying Respondent's Motion to Set Aside the Default and set a Hearing on Merits.

V. Argument

A. Service of Process on Respondent Was Proper When Carried Out in Accordance With the Laws of Montana and the Consolidated Rules

A copy of the signed original complaint, along with the Consolidated Rules, shall be served upon respondent, a domestic corporation, by serving "an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive process"40 C.F.R. §§ 22.5(b)(1)(i), (ii)(A); *See also*, MONT. CODE ANN 25-20 RULE 4D (2010)("a copy of the summons and complaint [must be personally served upon] the registered agent . . . named on the records of the secretary of state). The

records of the Montana Secretary of State indicate that William M. Fulton is the registered agent of Fulton Fuel Co.[2] (Exhibit F) As stated above, on February 20, 2009, EPA sent its Complaint via certified mail to Respondent at 127 Main Street, Shelby, Montana 59474. Respondent refused to accept service at this address and provided an alternative handwritten address of P.O. Box 603, Shelby, Montana 59474. (Exhibit A) On March 23, 2009, EPA again mailed the Complaint via certified mail to both the aforementioned addresses. Once again William M. Fulton, the registered agent for Respondent, did not accept service, and the documents were returned to Complainant. (Exhibit B) On May 22, 2009, the Administrative Complaint along with the Consolidated Rules, were personally served on the Respondent by the local Sherriff. (Exhibit C)

On February 23, 2009, as a precautionary measure, the Complaint was delivered to Respondent's last known legal representative, Mr. Beatty. (Exhibit G) Mr. Beatty acknowledged that he delivered the Complaint to Mr. Fulton and discussed the contents therein. (Exhibit H) Notwithstanding the serious allegations contained in the Complaint, Respondent did not file an answer to the Complaint or request a hearing, as provided for in the governing rules. *See* 40 C.F.R. 22.15 (requirements for answer).[3] In an effort to avoid additional motion practice, on April 28, 2009, the undersigned attempted to contact Mr. Beatty and Ms. Coppock by electronic mail to determine if either attorney would be entering an appearance and/or if they could assist in communicating with Respondent.

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[2] Montana Secretary of State, *available at https://app.mt.gov/cgi-bin/bes/besCertificate.cgi?action=detail&bessearch=D053211&trans_id=besa10068232705026b00* (last visited March 10, 2010) (listing Fulton Fuel Co. as active corporation and William M. Fulton as the registered agent).

[3] The Regional Judicial Officer shall "rule on all motions filed or made before an answer to the complaint is filed." 40 C.F.R. 22.16(c). Complainant's motion for Default was prompted by Respondent's failure to file an answer to the complaint, thus jurisdiction was proper to rule on the motion for default.

(Exhibit I) The undersigned did not receive a response to the email communications. Sometime after, the undersigned discussed the matter by telephone with both attorneys and learned that neither represented the Respondent in the penalty proceeding. As noted, Respondent failed to file an answer within thirty (30) calendar days (by June 22, 2009) and thus was in default pursuant to 40 C.F.R.§ 22.15(a).

The Consolidated Rules provide that "a party may be found to be in default: after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). Furthermore, "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." *Id.* On July 9, 2009, Complainant filed a Motion for Default, which was mailed certified to Respondent and Mr. Beatty on July 10, 2009. Mr. Beatty accepted the certified mail on July 13, 2009. (Exhibit J) However, William M. Fulton, registered agent of Fulton Fuel Co., once again refused to accept the certified mail. On August 18, 2009, the Sheriff served Respondent with the Motion for Default. (Exhibit D)

On August 20, 2009, an Order to Show Cause to Supplement the Record was issued by the RJO, directing Respondent to show cause, on or before September 30, 2009, why it should not be held in default. Again, Respondent failed to reply. The Court issued a Second Order to Show Cause to Supplement the Record on November 20, 2009, directing Respondent and/or Respondent's attorney to supplement the record by December 21, 2009.[4] The aforementioned Orders to Show Cause were served

[4] On December 21, 2009, Counsel for the Respondent, Douglas C. Allen, filed a Notice of Appearance and Motion for Additional Time to Supplement the Record and Respond to the Order to Show Cause, which the Court granted. Respondent filed its response on January 4, 2010. On February 2, 2010, the Court issued an

exclusively upon Richard L. Beatty. (Exhibit K) Those Orders to Show Cause were also contemporaneously mailed certified to William M. Fulton, Respondent's registered agent, but were returned as unclaimed.

Respondent's challenge to the Default Judgment is outrageous and makes no logical sense. As noted earlier, William M. Fulton, the registered agent of Fulton Fuel Co., was properly served with the Complaint, Consolidated Rules and the Motion for Default. Despite informing the Respondent multiple times in the aforementioned documents, Respondent failed to file an Answer within thirty (30) calendar days and also failed to respond to Complainant's Motion for Default. As the registered agent, Respondent has a fiduciary duty to accept and respond to legal documents on behalf of the corporation. There is no reason why Respondent should now be excused for failing to obey the procedures of the Consolidated Rules. A failure to uphold the RJO's Initial Decisions and Orders would improperly permit the Respondent to benefit from this wrongful conduct and set an improper precedent among the regulated community that ignorance and avoidance of the Consolidated Rules is acceptable. Therefore, it is respectfully requested that the EAB hold that service was properly made in accordance with the law and affirm the RJO's Initial Decisions and Orders.

B. The Purported Defenses are Insufficient as a Matter of Law because: (1) The Respondent had a Duty to Answer the Complaint; (2) Jurisdiction was Proper, (3) Respondent was Required to Prepare and Implement a Spill Prevention Control and Countermeasure Plan.

When the presiding authority over a matter—the RJO in this case—finds that default has occurred, it "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

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Order Allowing 30 Days Additional Time For Settlement and Order to Either Submit Consent Agreement or Show Cause Why Default Order Should Not Be Filed.

should not be issued." 40 C.F.R. § 22.17(c)(emphasis added); *See also*, MONT. CODE ANN RULE 55 (2010)(default judgment rule). In determining good cause, the decision maker shall consider the totality of the circumstances presented. *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992); accord *In re Rybond, Inc.*, 6 E.A.D. 614, 616 (EAB 1996)(affirming default judgment where respondent had made conscious decision to discontinue services of legal counsel). The factors to be considered under a totality of circumstances are "the alleged procedural omission that prompted the default order, considering such issues as whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement." *In re JHNY, Inc.*, 12 E.A.D. 372 (EAB 2005). The defaulting party must demonstrate a strong likelihood of success on the merits by presenting evidence that there is a strong probability, more than the mere possibility, that litigating the defense would be successful. *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 322 (EAB 1999).

1. The Respondent had a Duty to Answer the Complaint and Failure to Respond Does Not Amount to Excusable Neglect

As set forth in the Affidavit, Respondent wishes to set aside the default because "he does not handle legal matters for Fulton Fuel Company." (Affidavit of William M. Fulton ¶ 6) (Exhibit L) Respondent explains that attorney Renee Coppock was hired "to handle all legal matters pertaining to environmental issues with local, state and federal governments arising out of the spill" and that she was expected to address "all legal matters arising . . . out of the Administrative Complaint and file any legal papers required and participate in any hearings to he held herein." (Respondent's Affidavit ¶¶ 5-6) Respondent has alleged that it cannot be held liable for a third party's failure to act. Such

statements, when made in reference to legal counsel, are without legal significance and are not sufficient to set aside the default. *See In re Pyramid Chemical Co.*, 11 E.A.D. 657 (EAB 2004).

The complaint in *Pyramid Chemical Co.*, was served on the corporation by certified mail to a registered officer of the corporation. *Id.* Respondent had until July 18, 2003 to file an answer. *Id.* The Motion for Default was served on August 18, 2003, and the Board issued the Order to Show Cause, which was served on October 16, 2003. *Id.* On October 30, 2003, more than three months after the Answer was due, the Respondent's attorney filed a notice of appearance and its first document - the Motion for Extension of Time. *Id.* Respondent's motion was granted, and Respondent requested the Board deny the Motion for Default. *Id.* In particular Respondent asserted that he believed corporate counsel in the Netherlands was addressing the complaint and therefore it was irrelevant whether an officer of the corporation had received notice of the motions. *Id.* In affirming the Default, the Board pointed out that Respondent personally received both the Complaint and the Motion and was aware of the delinquency and could have responded directly to the Board. *Id.* Pursuant to Board precedent, an attorney stands in the shoes of his client, and ultimately the attorney's failings are the client's responsibilities. *See, e.g.*, *Jiffy Builders* 8 E.A.D. at 321; *See also*, *Link v. Wabash R.R. Co.*, 370 U.S. 634 n.10 (1962)(a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the [defense] of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice).

As stated above, on May 22, 2009, the Sherriff personally served the Complaint on Fulton, by serving the registered agent of the corporation. The Complaint and the Consolidated Rules annexed thereto clearly informed Respondent of the duty to file the Answer, within thirty (30) calendar days (by June 22, 2009). Respondent was also advised that a failure to file the Answer may result in a default judgment, including a civil penalty. Despite the numerous warnings, the Respondent did not file the Answer, and Complainant filed a Motion for Default Judgment. When received, the Motion for Default put Respondent on notice a third time that the Answer was overdue and the Court would issue a default judgment if no action was taken. Respondent attempts to place the blame on prior counsel, Renee Coppock, because "he believed she was handling the Administrative Complaint." (Respondent's Affidavit ¶ 6) As noted above, Ms. Coppock has never entered an appearance in this penalty proceeding nor filed any statements in this proceeding. In fact there is nothing in the record from Ms. Coppock to suggest that she was ever retained to represent Respondent in this administrative penalty proceeding. In light of the precedent of the EAB, Respondent's attempted shift of blame to Ms. Coppock is irrelevant to the purpose of setting aside the RJO's decisions. Therefore, the RJO's Initial Decisions and Orders must be upheld because the proper remedy for the Appellant's alleged prior attorney's nonfeasance is in an action for malpractice.

2. The Fred and George Creek is a "water of the United States" Within the Meaning of the Act and the Commerce Clause Because it is a Direct Tributary to Miners Coulee, the Milk River and the Missouri River.

Section 502(7) of the Act, 33 U.S.C. 1352(7), defines "navigable waters" as "waters of the United States, including the territorial seas." "Navigable waters" is further defined in 40 C.F.R. § 110.1 as follows: "*[n]avigable waters* means the waters of the

United States . . . [t]he term includes . . . interstate waters, including interstate wetlands . . . All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . tributaries of [interstate] waters . . . including adjacent wetlands." The Senate Report accompanying the 1972 CWA states that "navigable waters" means: the navigable waters of the United States, portions thereof, *tributaries thereof.* S. Rep. No. 92-414, at 77 (1971), *reprinted in,* 1972 U.S.C.C.A.N. 3668, 3742-43 (emphasis added). Senator Edmund Muskie, the principal author of the CWA explained that in 1972

> "[m]any of the Nation's navigable waters were severely polluted and major waterways near the industrial and urban areas were unfit for most purposes. Rivers were the prime sources of pollution of coastal waters and oceans. And many lakes and confined waterways were aging rapidly under the impact of increased pollution. River, lakes, and streams were being used to dispose of man's wastes rather than to support man's life and health." S. Rep. No. 103-257, at 3 (1994), *reprinted in* 1994 WL 184553 (Leg.Hist.).

Congress thus recognized that restricting CWA jurisdiction to those relatively few waterways that actually support navigation, e.g., the waterways that are navigable-in-fact or meet the traditional definition of "navigable waters" would make it impossible to achieve the objectives of the CWA. *See Rapanos v. United States*, 547 U.S. 715, 767-68 (2006). In *United States v. Riverside Bayview Homes*, the Supreme Court noted that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. 121, 133 (1985)(unanimous decision); see *International Paper Co. v. Ouellette,* 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").

In *Riverside*, the issue was whether landowners could discharge fill material into wetlands adjacent to navigable bodies of water and their tributaries without first obtaining a permit from the Army Corps of Engineers. *Riverside*, 474 U.S. at 123. The Corps construed the CWA to cover all freshwater wetlands that were adjacent to other covered waters. *Id.* at 124. *Riverside* concerned a non-navigable wetland consisting of 80 acres of low-lying marshland adjacent to but not regularly flooded by Black Creek, which was a navigable waterway. *Id.* at 311. In upholding the Corps assertion of jurisdiction, the Court stated "[w]e cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States- based as it is on the Corps' and EPA's technical expertise-is unreasonable." *Id.* In addressing only wetlands adjacent to navigable waters, the Supreme Court expressly left open the issue of isolated wetlands.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159 (2001), the Court considered the Corps' jurisdiction over an abandoned sand gravel pit mining operation and ponds, that were not wetlands and not adjacent to a body of open water. *Id.* at 162, 164, 167-68. Asserting jurisdiction pursuant to the "Migratory Bird Rule", the Corps argued that the isolated ponds were "waters of the United States" (and thus navigable waters under the Act) because they were used as habitat by migratory birds. *Id.* at 167. The Court refused to grant *Chevron* deference to the Corps' interpretation of the Migratory Bird Rule because its assertion over non-navigable, isolated, intrastate wetlands would invoke the outer limits of Congress' power over interstate commerce "by permitting federal encroachment upon a traditional state power." *Id.* at 172-73. Thus the Court held that the Corps did not have jurisdiction because the plain text of the statute did not permit the action and there

was no showing of a "significant nexus between wetlands and navigable waters" as established in *Riverside*. *Id.* at 167-68. Several federal courts have emphasized that the holding in *SWANCC* is limited to striking down the Migratory Bird Rule as a basis for jurisdiction under the CWA.[5]

More recently, in a 4-4-1 decision, the Supreme Court construed "waters of the United States" in *Rapanos*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters. *See Rapanos*, 547 U.S. at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. *See id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J. concurring in the judgment); *Id.* at 793 (Stevens, J, dissenting). Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' [such as] streams," that are connected to traditional navigable waters, *Id.* at 739, 742. The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. A commonsense approach must be used in determining whether federal

[5] *See Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001)(intermittently flowing canal that directly entered into a navigable body of water qualified as "waters of the United States"); *United States v. Buddy*, 138 F. Supp. 2d 1282, 1284-88 (D. Mont. 2001)(non-navigable tributary of non-navigable tributary of a navigable-in-fact and interstate river qualified as "waters of the United States"); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 86 (E.D.N.Y. 2001)(pond and stream are "waters of the United States" where pond was flowing into well-defined stream, which was a tributary to a navigable-in-fact lake *even if* the pond and stream were non-navigable) *United States v. Interstate General Company*, 152 F. Supp. 2d 843, 847 (D. Md. 2001)(refusing to extend *SWANCC* to exclude jurisdiction over all waters not adjacent to a navigable-in-fact body of water).

jurisdiction exists as it does not appear and evaporate along with the water. *Id.* at 733 n. 6. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting). Justice Kennedy interpreted the term "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment)(citing *SWANCC supra* at 167). In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters," may be sustained "by showing adjacency alone." *Id.* at 780.

Because no opinion in the *Rapanos* decision commanded a majority of the Jusitices, it is oftentimes difficult to determine which standard of jurisdiction applies in a given case. Under the rule of *Marks v. United States*, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Green v. Haskell County Board of Commissioners*, 568 F.3d 784, 807 n. 17 (10th Cir. 2009)(citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). However, in *Rapanos* there is no rationale that could arguably be said to be "narrower" than any other rationale. Therefore, the lower courts, in attempting to apply *Marks* to determine the controlling legal standard in *Rapanos*, have not always been consistent. For example, both the Seventh and the Ninth circuits concluded that Justice Kennedy's concurrence controls and adopted the "significant

nexus" test. See *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007)*("River Watch II")*; *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006). On the other hand, the First Circuit concluded that "the United States may elect to prove jurisdiction under either" Justice Scalia's plurality test or Justice Kennedy's significant nexus test. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006).

Under Justice Kennedy's standard, "significance" is determined with reference to the CWA's purpose - to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); *Rapanos*, 547 U.S. at 780. (Kennedy, J., concurring). In light of the fact that the CWA is concerned with downstream water quality, he explicitly disagreed with the plurality's requirement of permanent standing water or continuous flow for a period of some months. *Id.* at 769. (Kennedy, J., concurring). He explained that the plurality's requirements could not reasonably be applied to areas in the west because "the merest trickle, if continuous, would count as 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not." *Id.* "In fact, he put it thusly: 'the dissent is correct to observe that an intermittent flow can constitute a stream, in the sense of a current or course of water or other fluid, flowing on the earth, while it is flowing. It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams'". *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007)(citing *Rapanos* 547 U.S. at 770)(Kennedy, J., concurring). Justice Kennedy's opinion was to remand *Rapanos* to the Court of Appeals for consideration of the "nexus" requirement. *Id.* at 787. Pursuant to *Rapanos*, although the evidence of the downstream effects of a

particular discharge may demonstrate "nexus" between the tributary and the traditional navigable waters into which it flows, a discharge-specific showing is unnecessary. That point is established by the issues that Justice Kennedy would have the lower courts address on remand, namely, the general connections between the wetlands and waters at issue, not the particular effects that the defendant's conduct would have had. *See Id.* at 783-87.

It is important to note that, unlike *Rapanos*, which involved landowners placing fill into wetlands on their property, this case involves Respondents discharging crude oil into Fred and George Creek, a tributary to Miners Coulee, which flows into Canada and into the Milk River, a perennial international water. The Milk River flows back into the United States and into the Missouri River, a traditionally navigable water. The question of whether an intermittent stream which eventually empties into a traditionally navigable water that is a water of the United States can, by itself, be a water of the United States was most recently addressed in *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007). There the Defendant worked to reroute and reshape Teton Creek, in Alta, Wyoming, which only flows for approximately two months per year during spring run-off. *Id.* at 986-87. In an effort to reroute and reshape the Creek, heavy equipment machinery was used to redeposit material within the creek and to erect log and gravel structures. *Id.* at 987. The Court explicitly stated that the *Rapanos* decision did not undercut their analysis in determining whether an intermittent stream is a water of the United States. *Id.* at 989. Rather, the Court relied on its prior analysis in holding that "even if [the alleged polluter] succeeds, at certain times, in preventing the canals from exchanging any water with the local streams and lakes, that does not prevent the canals from being 'waters of the United

States' . . . even tributaries that flow intermittently are 'waters of the United States.") *Id.* (citing *Headwaters*, 243 F.3d at 534). The Court held that the Teton Creek remained subject to federal jurisdiction, despite man-made severances, which made the portion in question dry during much of the year. *Moses*, *supra*, at 991.

In the instant action, Respondent's unsupported statement in Mr. Fulton's affidavit that the Creek is a non-navigable small seasonal stream running dry for portions of each year is insufficient. Jurisdiction[6] under the Act does not require a constant flow of water;

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[6] Although it is not clear from its brief, Respondent may also be arguing that EPA, and the RJO who entered the default judgment in this case, did not have "subject matter jurisdiction" or authority to hear the present action because the alleged discharges of oil did not enter a "water of the United States" as required to support a violation of 33 U.S.C. § 1321(b)(3). Respondent's Brief at 5. In presenting this challenge to the EAB, Respondent may be confusing the subject matter jurisdiction or authority of the RJO to hear a case with federal regulatory "jurisdiction" over waters under the CWA. The former, however, does not depend on the latter.

The subject matter jurisdiction of the RJO and the EAB in this proceeding is provided by CWA section 311(b)(6), 33 U.S.C. § 1321(b)(6), which establishes administrative penalty authority for violations of section 311(b)(3), and by the Consolidated Rules, which specifies the administrative adjudicatory process for the assessment of any Class I penalty under section 311(b)(6)(B)(i). 40 C.F.R. §§ 22.1(a)(6), 22.4(c)(1). These jurisdictional provisions do not require, as an element of establishing the RJO's subject matter jurisdiction over a case, that the Agency demonstrate that it has regulatory authority over a particular water body under the Clean Water Act.

Instead, Respondent's argument – whether EPA may bring claims for violations of section 311(b) of the CWA even if the alleged discharges are not "into or upon the navigable waters of the United States" – goes to the merits of those claims, and has nothing to do with the RJO's subject matter jurisdiction or authority to hear the claims. Here, the RJO's jurisdiction to hear this case is not dependent on whether the discharges made it to waters of the United States that are the subject of EPA's regulatory authority. In *Sierra Club v. City and County of Honolulu*, 2008 U.S. Dist. LEXIS 64262 (D. Hi. 2008), the defendant argued that the district court lack subject matter jurisdiction over a CWA citizens suit alleging violations of an NPDES permit for sewer overflows because they did not discharge to "waters of the United States" as that term has been interpreted by the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006). In rejecting defendant's argument, the court reasoned:

> Whether or not Plaintiffs can prove violations of the CWA based upon violations of NPDES permit terms that prohibit ground-only spills, goes to the merits of Plaintiffs' claim, not to the jurisdiction of this Court. Indeed, "[i]t is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.

Sierra Club, at *37. Therefore, the court held, the court's subject matter jurisdiction cannot be defeated by the possibility that the plaintiff would not be able to prove that discharges of pollutants reached waters of the United States. Likewise, in the present case, Respondent's argument that there is no Clean Water Act jurisdiction over the water bodies at issue in this case does not affect the RJO's or EAB's jurisdiction or

it simply requires that the body of water at issue be a "water of the United States." On November 9, 2004, the Army Corps of Engineers issued a preliminary jurisdictional determination finding that the Fred and George Creek is a "water of the United States" because it is a "tributary to Miners Coulee, a tributary of the international Milk River; hence a tributary of the interstate and navigable Missouri River." (Exhibit M) Photographs submitted by Hydro Solutions Inc. (the environmental contractor used by Respondent in cleanup of the spill) indicate that the Creek has flowing water at least during the months of March, May and June, thereby indicating at least seasonal flows. The photographs also demonstrate that in December, 2005, nine months after the discharge, the Creek had snow and ice in its bed and oil on its shorelines. (Exhibit N) Therefore, it is likely that the Creek is relatively permanent under the plurality standard.

Furthermore, the Creek is hydrologically connected to Miners Coulee, the Milk River and to the traditionally navigable Missouri River. The Creek provides flow to the downstream waters, and it has the capacity to transport pollutants, such as the spilled oil, to downstream waters thereby potentially affecting the physical, chemical or biological integrity of those waters. Here the evidence is such that a reasonable fact finder could conclude that the Creek is subject to the CWA because it has a "significant nexus" to downstream waters, including the Missouri River into which it flows and therefore it is "likely to play an important role in the integrity of [that] aquatic system." *See Rapanos* 547 U.S. at 781 (Kennedy, J., concurring). Accordingly, the Creek has a significant nexus with a traditionally navigable water, and is therefore a "navigable water of the

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authority to hear this case. *See also United States v. Sea Bay Development Corp.*, 2007 WL 1169188 (E.D. Va. April 18, 2007)(concept of Clean Water Act jurisdiction is separate and distinct from jurisdiction of a tribunal to hear a case); *In re: J. Phillip Adams*, 2007 EPA App. LEXIS 24 (June 29, 2007)(defendant's entitlement to exemption in § 404(f) does not affect the ALJ's or EAB's jurisdiction to hear the case).

United States" subject to federal regulation in the event Appellant is allowed to put forward such an argument after being held in default.

3. Respondent Owned and Operated an "Onshore Facility" and was required to Establish a Spill Prevention Control and Countermeasure Plan

Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), directs the President, *inter alia*, to establish "[p]rocedures, methods and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges." Subsequently, the EPA promulgated the SPCC regulations which established certain procedures, methods and requirements upon each owner and operator of a non-transportation-related onshore facility engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, which due to its location, could reasonably be expected to discharge oil into or upon the navigable waters of the United States in such quantity as EPA has determined may be harmful to the public health or welfare or the environment of the United States. 40 C.F.R. §§ 112.1(b), 112.3(a)(1). In promulgating 40 C.F.R. § 110.3, which implements § 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), EPA has determined that discharges of harmful quantities include oil discharges that cause a film, sheen upon, or discoloration of the surface of the water or adjoining shorelines.[7]

Respondent defends this action by accusing the EPA of confusing the flowline, which caused the oil spill, with a storage tank located some distance away from the spill. Clearly it is the Respondent who is confused and not the EPA. The SPCC Regulations

[7] Samples collected by Mr. Larry Alheim of the Montana Department of Environmental Quality revealed that water sample #5 found C9-C10 Aromatics at 282 ppb which exceeds DEQ's Risk-Based Screening Level (RBSL) of 50 ppb and soil sample #2 found benzene at 1.6 ppm, which exceeds the RBSL of 0.05 ppm. (Exhibit O)

unambiguously state that "an oil production facility means all structures . . . *piping* (including but not limited to *flowlines* or gathering lines), or equipment . . . used in the production, extraction, recovery, lifting, stabilization, separation or treating of oil , or associated storage or measurement, and located in a single geographical oil or gas field. 40 C.F.R.§112.2 (emphasis added).

The flowline at issue was an integral part of Respondent's oil production facility because it was a *pipe* which transported oil from a well to a tank battery at the facility. The flowline was three inches in diameter and was located directly beneath the bed of the Creek. The elevation of the flowline break is approximately 3750-3800 feet, and the confluence to Miner's Coulee is approximately 3519 feet, resulting in a down-gradient elevation of 231-281 feet. Based solely upon the Respondent's intimate familiarity with the geographical structure and elevation of the property, Respondent must have known that a discharge could potentially reach a navigable water of the United States. Therefore, the Respondents failure to prepare and implement an SPCC plan violated the Act and Respondent is subject to the proposed penalty.[8]

C. The Determination of Liability and Penalty Following Default was Proper because Civil Administrative Actions Brought Pursuant to § 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), are Subject to Strict Liability and Therefore Acts/Omissions of Third Parties are Irrelevant to Liability.

In terms of the relief granted, upon a finding of default, "the 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." 40 C.F.R. § 22.17(c). Under §

[8] The subsequent owner/operator of the facility, MCR LLC, has entered into an Agreement with the EPA whereby it acknowledged the duty to prepare and implement a written SPCC plan for the facility at issue and paid a civil penalty in the amount of fifty thousand ($50,000.00) dollars. MCR's immediate replacement of the deteriorated flowlines at the facility illustrates that the Respondent failed to adequately maintain them. (Exhibit P)

22.27(b) of the Consolidated Rules, "[t]he 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. . . If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint . . . or motion for default, whichever is less." 40 C.F.R. § 22.27(b). The courts have made it clear that notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. *Katzson Brothers Inc. v. U.S. EPA*, 839 F.2d 1396, 1400-01 (10th Cir. 1988)(noting administrative law judge does not simply rubber-stamp complainant's penalty proposal, or any portion thereof, but must make an independent review.) Also, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. *In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996).

Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), authorizes the Administrator to bring a civil action against "any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (i) from which oil . . . is discharged . . . or (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section . . . may be assessed a class I or class II civil penalty by . . . the Administrator." In accordance with § 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8),

> "[i]n determining the amount of a civil penalty under paragraphs (6) and (7), the Administrator, the Secretary or the court . . . shall consider 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."

In the instant action, pursuant to the Second Order to Supplement the Record issued by the RJO on November 20, 2009, Complainant supplemented the record with respect to its proposed penalty. On December 17, 2009, Complainant filed the Supplemental Declaration of Jane Nakad, an EPA representative responsible for calculating penalties for violations of §§ 311(b)(3) and (j) of the Act, 33 U.S.C. §§ 1321(b)(3), 1321(j). Ms. Nakad addressed the eight statutory factors and supported the proposed penalty of $11,445 (including $455 in economic benefits) with regard to the discharge of oil into the Fred and George Creek. In addition, her statutory analysis supported the proposed penalty of $21,055 (including $8,731 in economic benefits). RJO Sutin, using her own analysis of the relevant factors and agency guidance, concluded a penalty of $32,176 was the appropriate penalty. Respondent now challenges liability pursuant to § 311(f) of the Act, 33 U.S.C. § 1321(f), because the flowlines were installed by the previous property owner, Western Natural Gas. (Respondents Motion) (Exhibit Q) Respondent further alleges that the location and situation of the flow line was impossible to determine or detect and therefore the leak occurred from the acts and omissions of Western Natural Gas. (Respondent's Affidavit ¶ 3) The Respondent's reliance on § 311(f) of the Act is incorrect. Complainant is seeking penalties in the proceeding under §§ 311(b)(6) and (j) of the Act and is not seeking removal costs under § 311(c) of the Act. Therefore, any acts or omissions of a third party are not valid defenses to liability in the event Appellant is allowed to put forward such a defense after being held in default.

VI. Conclusion

Jurisdiction is proper under the Act, Appellant is subject to SPCC regulations, Appellant is in Default for failing to answer the Complaint and Motion for Default and Appellant has failed to set forth grounds to overturn the RJO's Initial Decisions and Orders. Therefore, the EAB should affirm the RJO's Initial Decisions and Orders and require that the Appellant pay administrative penalties in the amount of thirty two thousand one hundred seventy six ($32,176) dollars.

Respectfully Submitted,

Dated: May 24, 2010

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In the Matter of Fulton Fuel Company
CWA App. 10-(03)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the **Complainant's Response Brief** in the matter referenced above was delivered in the following manner to:

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Environmental Appeals Board
United States Environmental Protection Agency
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Ms. Tina Artemis (Mail Code: 8RC)
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

One copy via U.S. First Class Mail to:

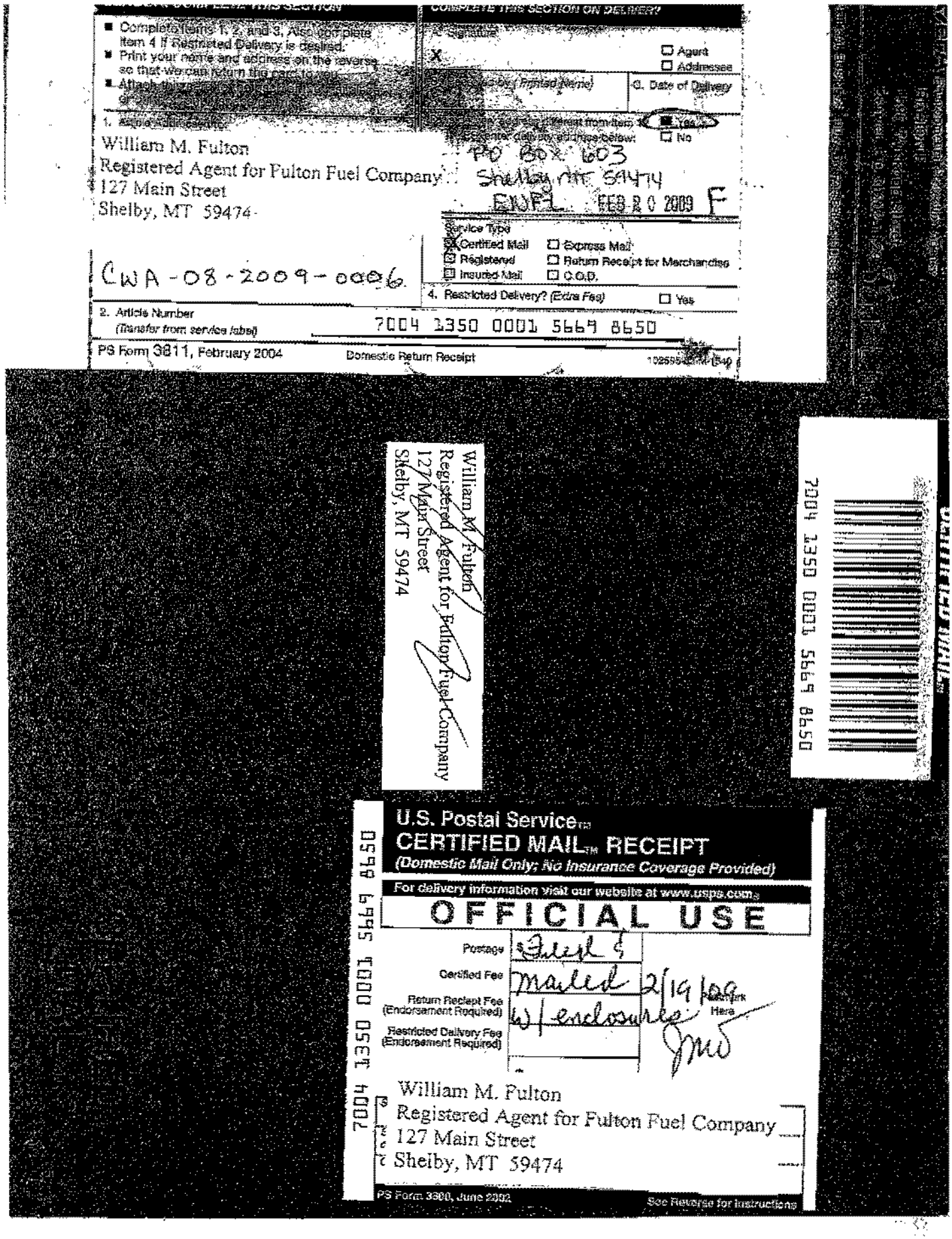
Douglas C. Allen
Attorney for Respondent/Appellant
P.O. Box 873
153 Main Street
Shelby, Montana 59474

May 24 2010
Date

Judith McTernan
Judith McTernan

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit A



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In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit B

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Restricted Delivery Fee (Endorsement Required)	Returned to Sender

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REGISTERED AGENT FOR FULTON FUEL COMPANY
127 MAIN STREET #603
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SHELBY, MONTANA 59474

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REGISTERED AGENT FOR FULTON FUEL COMPANY
127 MAIN STREET #603
P.O. BOX 603
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127 MAIN STREET #603
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United States Environmental Protection Agency
Region 8
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Denver, CO 80202-1129
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In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit C

*** RETURN OF SERVICE ***

IN THE MONTANA DISTRICT COURT FOR ENFORCEMENT ATTY COUNTY

CASE NAME: Personal

US ENVIRONMENTAL PROTECTION AG
VS
FULTON,WILLIAM M. JR

CASE NO: CV-09-161

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STATE OF Montana

SHERIFF COUNTY

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- ☐ Modification/Application and Notice
- ☐ Order to Show Cause
- ☐ Order Filed
- ☐ Writ
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TOTAL :	0.00

DONNA MATOON, SHERIFF
SHERIFF County, Montana

Patrick T. Kelleghe

PATRICK T KELLEGHER
Signature Title

Fees charged to/paidby Atty/Party: US ENVIRONMENTAL PROTECTION AG

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit D

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1. Article Addressed to:

Mr. William M. Fulton, Jr., Registered Agent
Fulton Fuel Company
127 Main Street
P.O. Box 603
Shelby, MT 59474

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☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

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Mr. William M. Fulton, Jr., Registered Agent
Fulton Fuel Company

*** RETURN OF SERVICE ***

IN THE MONTANA DISTRICT COURT FOR COUNTY

CASE NAME: Personal

US EPA

VS

FULTON,WILLIAM M. JR

CASE NO: CV-09-293

NOTICE RECEIVED: 08/11/09

STATE OF Montana

SHERIFF COUNTY

I certify that I served a copy of: ORDER/PETITION

- ☐ Petition and Original Notice
- ☐ Modification/Application and Notice
- ☐ Order to Show Cause
- ☐ Order Filed _____
- ☐ Writ _____
- ☐ Other _____

Served BILL FULTON at 127 MAIN SHELBY, MT 59474 on 08/18/09 14:10

NOTE:(Diligent Search, etc.)

Processing :	0.00
Mileage :	0.00
Trust/Copy :	0.00
MISC. :	0.00
TOTAL :	0.00

Fees charged to/paidby Atty/Party: US EPA

DONNA MATOON, SHERIFF
SHERIFF County, Montana

SUPPOVIST, JEFF
Signature

Title

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit E

DOUGLAS C. ALLEN
Attorney at Law
P. O. Box 873
153 Main Street
Shelby, MT 59474

(406) 424-8020
(406) 434-5522 (fax)

FACSIMILE TRANSMITT/

DATE: 3/4/2010 TIME: 4:00

TO: EPA 4

ATTENTION: Marc Weiner

FAX NUMBER: 303 - 312 - 7202

IF YOU DO NOT RECEIVE ALL OF THE FOLLOWING PAGES, PLEASE CALL (406) 424-8020. THANK YOU!

Total number of pages, including this cover page: 9

Comments:

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit F

MONTANA SECRETARY OF STATE LINDA MCCULLOCH

Business Entity Search

Instructions | Search Tips | Feedback

Data Current as of...

If you are ordering a Certificate of Fact or Certificate of Existence, please make sure the Foreign/Domestic Corporation or Limited Liability Company is in "Good Standing".
Enter the name of the business, and check to see whether their annual report was filed in the current year.

We are not able to provide a Certificate of Fact or Certificate of Existence unless the current annual report is filed.

If you would like to purchase a Certificate of Existence for this business entity, select the button below.
You will be assessed a $5.00 fee for this service.

Get Certificate of Existence

If you would like to purchase information on the principals (i.e., officers, directors, members, managers, partners, etc) associated with this entity, select the button below. You will be assessed $2.00 for each search you perform.

Get Principals

If you would like to purchase a Certificate of Fact for this business entity, select the button below. You will be assessed a $15.00 fee for this service.

Get Certificate of Fact

Do another Search

Search

Name: FULTON FUEL COMPANY
ID #: D053211
Type: GENERAL BUSINESS
Jurisdiction State: MT
Status: ACTIVE
Status Reason: GOOD STANDING

Status Dates

Expiration Date:
Date of Incorporation: 08/31/1961
Last AR Filed: 04/07/2009
Suspension:
Inactive Date:
Diss/Widthdr/Revoke:

Additional Info

Term: PERP
Shares: 5000.00
Purpose Code: GAS,OIL,PETROLEUM-GENERAL

Agent

Registered Agent: WILLIAM M FULTON
Address 1: 127 MAIN STREET
Address 2: BOX 603
City: SHELBY
State: MT
Zip: 59474-0000

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit G

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$ Filed
Certified Fee	Mailed
Return Receipt Fee (Endorsement Required)	W/ Enclosures
Restricted Delivery Fee (Endorsement Required)	2/19/09 JMS
Total Postage & Fees	$

Postmark Here

Richard L. Beatty
Attorney at Law
153 Main Street
Shelby, MT 59474

PS Form 3800, June 2002 — See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Richard L. Beatty
Attorney at Law
153 Main Street
Shelby, MT 59474

CWA-08-2009-0006

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☒ Agent ☐ Addressee

B. Received by (Printed Name) R Beatty — C. Date of Delivery 2/23

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

ENF-2 FEB 20 '09 G

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Transfer from service label)* 7004 1350 0001 5669 9459

PS Form 3811, February 2004 — Domestic Return Receipt — 102595-02-M-1540

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit H

RICHARD L. BEATTY

ATTORNEY AT LAW

153 MAIN STREET
P. O. BOX 904
SHELBY, MT 59474

Telephone: (406) 434-5518
Fax: (406) 434-5522
E-mail: beatlaw@3rivers.net

December 21, 2009

Honorable Elyana Sutin, Regional Judicial Officer (8RC)
U.S. Environmental Protection Agency, Region VIII
1595 Wynkoop St.
Denver, CO 80202-1129

Re: *In the Matter of Fulton Fuel Company*
Docket No. CWA-08-2009-0006

Dear Judge Sutin:

I received counsel Weiner's letter of December 17, 2009 addressed to you and the Supplemental Declaration of Jane Nakad in the mail this date. In Mr. Weiner's letter it appears that you had requested information as to my status and I am responding to that so that both you and Mr. Weiner will be apprised of that status.

As Counsel stated, I represented Fulton Fuel Company in certain discussions regarding the Clean Water Act Response, and in that respect had telephone conversations with Counsel Weiner and Jane Nakad as to how to respond to the request. Sometime later, the Complaint in the above stated matter was sent to me via certified mail. I accepted the certified mail as I always do with any matters of importance sent to me in that fashion. However at that time I was not, and presently am not, the agent for service of process for Fulton Fuel Company. Therefore my receipt of that Complaint should not be construed as service upon that company as I am without authority to accept such service.

After reviewing the contents of the certified mail I delivered the Complaint to William Fulton, President of Fulton Fuel Company and briefly discussed its contents. I was advised at that time that he intended to retain an attorney more knowledgeable in environmental matters than I. Mr. Weiner contacted me sometime subsequent to that occasion inquiring as to why Fulton Fuel Company had not accepted its certified mail. My recollection is that Mr. Fulton had been out of town for an

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit I

Fulton Fuel and William Fulton

Marc Weiner to: Reneé Coppock, Dick Beatty 04/28/2009 03:42 PM

Bcc: Jane Nakad

Reneé and Dick:
Never heard back from either of you about your client, the administrative penalty complaint (APO) that was sent and received by certified mail by you, Dick, and whether there was interest from your client in working out a penalty resolution to this matter. If I do not hear from either of you by the end of this week - I will assume that your client has no interest in pursuing that route. There are many more potential CWA OPA SPCC violations for the facilities and tank batteries that were sold by Fulton Fuel than were cited in the APO.
Sincerely,
Marc

Marc Weiner
Enforcement Attorney and Legal Internship Coordinator
U.S. EPA, Region 8 (Mail Code: 8ENF-L)
1595 Wynkoop St.
Denver, CO 80202-2466
Tel: (303) 312-6913
Fax: (303) 312-7202

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit J

Filter Fuel Motion for Default J/o Cert 08-2009

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Richard L. Beatty, Esq.
153 Main Street
P.O. Box 904
Shelby, MT 59474

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☑ Addressee

B. Received by (Printed Name) R Beatty

C. Date of Delivery 7/13

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

JUL 10 2009

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☑ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

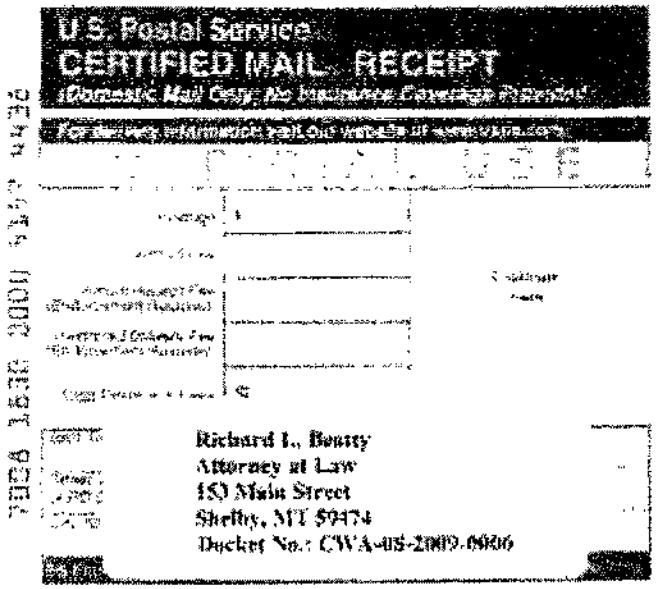
4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7008 1830 0000 5157 1819

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

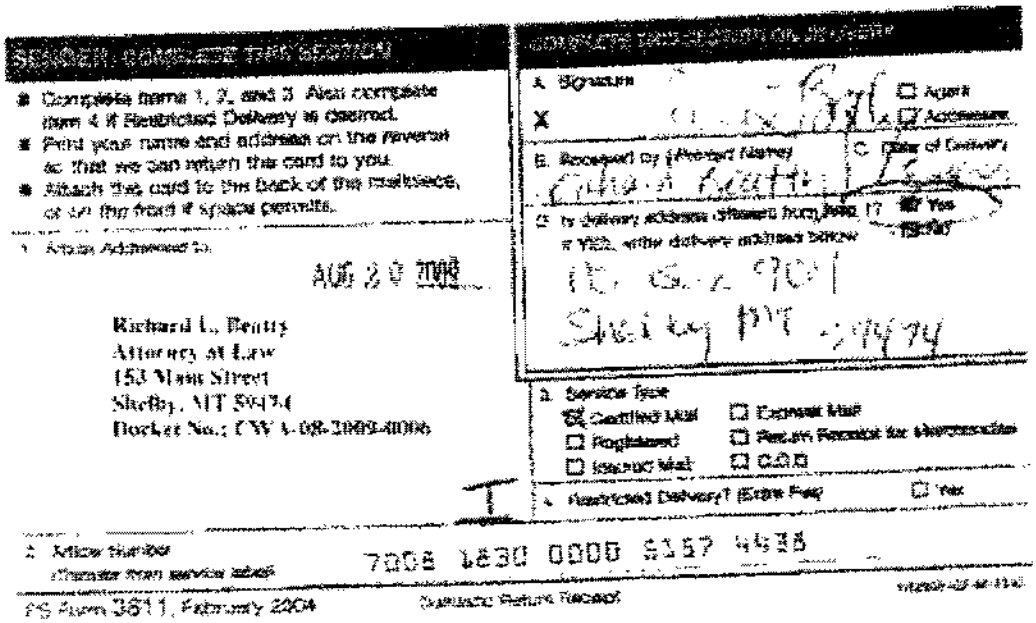
Exhibit K



U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

7008 1830 0000 5157 4938

Richard L. Beatty
Attorney at Law
153 Main Street
Shelby, MT 59474
Docket No.: CWA-08-2009-0006



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

AUG 20 2009

Richard L. Beatty
Attorney at Law
153 Main Street
Shelby, MT 59474
Docket No.: CWA-08-2009-0006

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☑ Addressee

B. Received by (Printed Name) Cathy A Beatty C. Date of Delivery 8/20/09

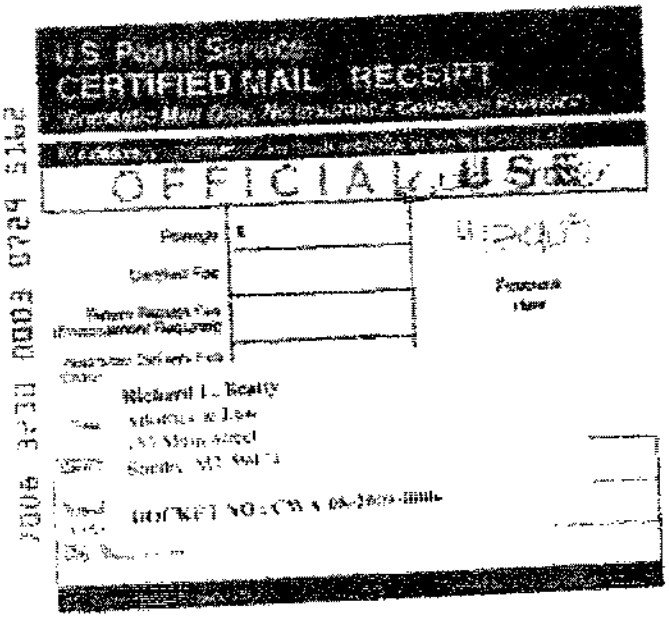
D. Is delivery address different from item 1? ☑ Yes
If YES, enter delivery address below:
PO Box 701
Shelby MT 59474

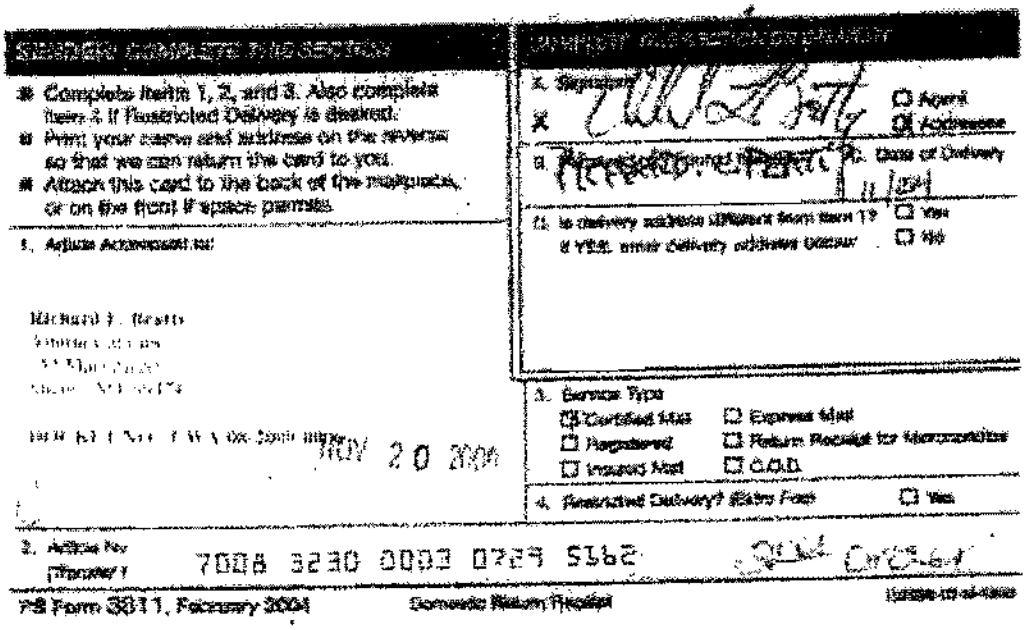
3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7008 1830 0000 5157 4938

PS Form 3811, February 2004 Domestic Return Receipt


U.S. Postal Service
CERTIFIED MAIL RECEIPT
OFFICIAL USE
Postage
Certified Fee
Return Receipt Fee
Restricted Delivery Fee
Total Postage & Fees
Richard L. Beatty
7008 3230 0003 0729 5162


SENDER: COMPLETE THIS SECTION
Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.
1. Article Addressed to:
Richard L. Beatty
NOV 20 2006
COMPLETE THIS SECTION ON DELIVERY
A. Signature
Agent
Addressee
B. Received by (Printed Name)
C. Date of Delivery
D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No
3. Service Type
Certified Mail
Express Mail
Registered
Return Receipt for Merchandise
Insured Mail
C.O.D.
4. Restricted Delivery? (Extra Fee) Yes
2. Article Number (Transfer from service label)
7008 3230 0003 0729 5162
PS Form 3811, February 2004
Domestic Return Receipt

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit L

Douglas C. Allen
Attorney at Law
153 Main Street
P.O. Box 873
Shelby, MT 59474
Telephone: (406) 424-8020
Facsimile: (406) 434-5522

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	*
	* Docket No. CWA-08-2009-0006
FULTON FUEL COMPANY	*
127 Main Street	* AFFIDAVIT OF WILLIAM M.
Shelby, MT 59474	* FULTON, JR.

State of Montana)
:ss
County of Toole)

William M. Fulton, Jr. Being first duly sworn states:

1. I am the President of Fulton Fuel Company, the Respondent in these proceedings.

2. On February 29, 2004 a small crude oil release occurred from a fiberglass flowline buried in rock several feet underground under Fred and George Creek in Toole County, Montana. The facts concerning the nature of the spill and demonstrating the rapidly initiated, sustained and successful response and remediation measures implemented and paid for by Fulton Fuel Company are set forth by Fulton Fuel Company's Response to Order to Supplement the record and to Show Cause filed herein on or about January 4, 2010. The facts set forth therein and demonstrated through the exhibits attached thereto are true and correct to the best of my knowledge, information and belief.

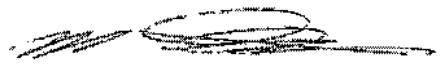
3. The small flowline from which the spill occurred was installed several feet underground by Western Natural Gas Company of Shelby, Montana in a bed of rock. Prior to the leak which occurred, the location and situation of the flowline was impossible to determine or detect by Fulton Fuel Company. The leak which occurred was caused by acts and omissions of Western Natural Gas Company some years prior to acquisition of the property by Fulton Fuel Company.

4. I am personally acquainted with the geography and topography in the area of the Sweetgrass Hills where Fred and George Creek meanders through rugged hill country in rural northern Toole County, Montana. Fred and George Creek is a small seasonal creek which runs dry each year below the site of the spill. It is not even remotely navigable and its waters do not reach any navigable stream. Fulton Fuel Company's storage tank facility was located some distance away from the spill at a place lower than Fred and George Creek. No spill occurred from that storage facility. Had one occurred it could not have reasonably been expected to reach navigable waters of the United States.

5. Subsequent to the spill which occurred February 29, 2004, Fulton Fuel Company retained an attorney, Renee Coppock of the Crowley Fleck Law Firm, 500 Transwestern Plaza II, 490 North 31st Street, Billings, Montana 59101, to handle all legal matters pertaining to environmental issues with local, state and federal governments arising out of the spill. Ms. Coppock arranged for and monitored the remedial, testing and reporting activities of Hydro Solutions Inc., corresponded with state and federal agency's and was involved in all aspects of Fulton Fuel Company's

legal, remedial, and restoration actions discussed in Fulton Fuel Company's Response to Order to Supplement the Record and to Show Cause herein and demonstrated through the exhibits attached thereto.

6. Specifically Renee Coppock was involved in communications, including telephone conferences with EPA officials involved in this case, and I am informed and believe and therefore state that she received a copy of Hydro Solutions, Inc. "Response to United States Environmental Protection Agency Expedited Information Request for Fulton Fuel Crude Oil Release Into Fred and George Creek, Toole County, Montana, dated October 3, 2007. That Response sets forth facts pertaining to allegations now set forth in the Administrative Complaint in this case and is attached to this Affidavit marked Exhibit 10. I do not handle any legal matters for Fulton Fuel Company. I believed that Renee Coppock transmitted Exhibit 10 to the EPA and was handling all legal matters arising out of the EPA's investigation and Administrative Complaint and would file any legal papers required and participate in any hearings to be held herein. I believed such facts to be true until I was advised on December 21, 2009 by Douglas C. Allen that Renee Coppock had not appeared in this matter at which time I requested and authorized Mr. Allen to appear and represent Fulton Fuel Company in this matter.



Subscribed and sworn to before me this 5th day of March, 2010.

(SEAL)

Tennile Frydenlund
Print Name Tennile Frydenlund
Notary Public for the State of MT
Residing at Shelby MT 59474
My commission expires 07/25/2012

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2010, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Marc D. Weiner
Enforcement Attorney
1595 Wynkoop Street
Denver, CO 80202-1129

Tina Artemis
Regional Hearing Clerk
US Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Fax: (303)-312-6859

Douglas C. Allen

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit M

JURISDICTIONAL DETERMINATION
U.S. Army Corps of Engineers

Revised 8/13/04

DISTRICT OFFICE: Omaha District - Montana Office

FILE NUMBER: 2004 90 737

PROJECT LOCATION INFORMATION:
State: MT
County: Toole
Center coordinates of site (latitude/longitude):
Approximate size of area (parcel) reviewed, including uplands: ½ acre
Name of nearest waterway: Fred and George Creek
Name of watershed: Milk River

JURISDICTIONAL DETERMINATION
Completed: Desktop determination ☒ Date: 09 November 2004
Site visit(s) ☐ Date(s):

Jurisdictional Determination (JD):

☒ Preliminary JD - Based on available information, ☒ *there appear to be* (or) ☐ *there appear to be no* "waters of the United States" and/or "navigable waters of the United States" on the project site. A preliminary JD is not appealable (Reference 33 CFR part 331).

☐ Approved JD – An approved JD is an appealable action (Reference 33 CFR part 331).
Check all that apply:

☐ *There are* "navigable waters of the United States" (as defined by 33 CFR part 329 and associated guidance) within the reviewed area. Approximate size of jurisdictional area:

☐ *There are* "waters of the United States" (as defined by 33 CFR part 328 and associated guidance) within the reviewed area. Approximate size of jurisdictional area:

☐ *There are "isolated, non-navigable, intra-state* waters or wetlands" within the reviewed area.
☐ Decision supported by SWANCC/Migratory Bird Rule Information Sheet for Determination of No Jurisdiction.

BASIS OF JURISDICTIONAL DETERMINATION:

A. **Waters defined under 33 CFR part 329 as "navigable waters of the United States":**
☐ The presence of waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

B. **Waters defined under 33 CFR part 328.3(a) as "waters of the United States":**
☐ (1) The presence of waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
☐ (2) The presence of interstate waters including interstate wetlands[1].
☐ (3) The presence of other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce including any such waters (check all that apply):
☐ (i) which are or could be used by interstate or foreign travelers for recreational or other purposes.
☐ (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
☐ (iii) which are or could be used for industrial purposes by industries in interstate commerce.
☐ (4) Impoundments of waters otherwise defined as waters of the US.
☒ (5) The presence of a tributary to a water identified in (1) – (4) above.
☐ (6) The presence of territorial seas.
☐ (7) The presence of wetlands adjacent[2] to other waters of the US, except for those wetlands adjacent to other wetlands.

Rationale for the Basis of Jurisdictional Determination (applies to any boxes checked above). *If the jurisdictional water or wetland is not itself a navigable water of the United States, describe connection(s) to the downstream navigable waters. If B(1) or B(3) is used as the Basis of Jurisdiction, document navigability and/or interstate commerce connection (i.e., discuss site conditions, including why the waterbody is navigable and/or how the destruction of the waterbody could affect interstate or foreign commerce). If B(2, 4, 5 or 6) is used as the Basis of Jurisdiction, document the rationale used to make the determination. If B(7) is used as the Basis of Jurisdiction, document the rationale used to make adjacency determination:* Fred and George Creek is tributary to MINERS Coulee, A tributary of the international ~~and~~ ~~later~~ MILK River, thence a tributary of the interstate and Navigable Missouri River

Lateral Extent of Jurisdiction: (Reference: 33 CFR parts 328 and 329)

☒ Ordinary High Water Mark indicated by:
- ☒ clear, natural line impressed on the bank
- ☐ the presence of litter and debris
- ☐ changes in the character of soil
- ☒ destruction of terrestrial vegetation
- ☐ shelving
- ☐ other:

☒ High Tide Line indicated by:
- ☐ oil or scum line along shore objects
- ☐ fine shell or debris deposits (foreshore)
- ☐ physical markings/characteristics
- ☐ tidal gages
- ☐ other:

☐ Mean High Water Mark indicated by:
☐ survey to available datum; ☐ physical markings; ☐ vegetation lines/changes in vegetation types.

☐ Wetland boundaries, as shown on the attached wetland delineation map and/or in a delineation report prepared by:

Basis For Not Asserting Jurisdiction:

☐ The reviewed area consists entirely of uplands.
☐ Unable to confirm the presence of waters in 33 CFR part 328(a)(1, 2, or 4-7).
☐ Headquarters declined to approve jurisdiction on the basis of 33 CFR part 328.3(a)(3).
☒ The Corps has made a case-specific determination that the following waters present on the site are not Waters of the United States:
- ☐ Waste treatment systems, including treatment ponds or lagoons, pursuant to 33 CFR part 328.3.
- ☐ Artificially irrigated areas, which would revert to upland if the irrigation ceased.
- ☐ Artificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- ☐ Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- ☐ Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States found at 33 CFR 328.3(a).
- ☐ Isolated, intrastate wetland with no nexus to interstate commerce.
- ☐ Prior converted cropland, as determined by the Natural Resources Conservation Service. Explain rationale:
- ☐ Non-tidal drainage or irrigation ditches excavated on dry land. Explain rationale:
- ☐ Other (explain):

DATA REVIEWED FOR JURSIDICTIONAL DETERMINATION (mark all that apply):

- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant.
- ☒ Data sheets prepared/submitted by or on behalf of the applicant.
  - ☐ This office concurs with the delineation report, dated , prepared by (company):
  - ☐ This office does not concur with the delineation report, dated , prepared by (company):
- ☐ Data sheets prepared by the Corps.
- ☐ Corps' navigable waters' studies:
- ☐ U.S. Geological Survey Hydrologic Atlas:
- ☒ U.S. Geological Survey 7.5 Minute Topographic maps: "Fry Lakes" USGS Quad
- ☐ U.S. Geological Survey 7.5 Minute Historic quadrangles:
- ☐ U.S. Geological Survey 15 Minute Historic quadrangles:
- ☐ USDA Natural Resources Conservation Service Soil Survey:
- ☐ National wetlands inventory maps:
- ☐ State/Local wetland inventory maps:
- ☐ FEMA/FIRM maps (Map Name & Date):
- ☐ 100-year Floodplain Elevation is: (NGVD)
- ☒ Aerial Photographs (Name & Date): Submitted by Applicant on 15 Dec 2004
- ☐ Other photographs (Date):
- ☐ Advanced Identification Wetland maps:
- ☐ Site visit/determination conducted on:
- ☐ Applicable/supporting case law:
- ☐ Other information (please specify):

PREPARER _____ DATE 09 Nov 2004

[1] Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology).

[2] The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

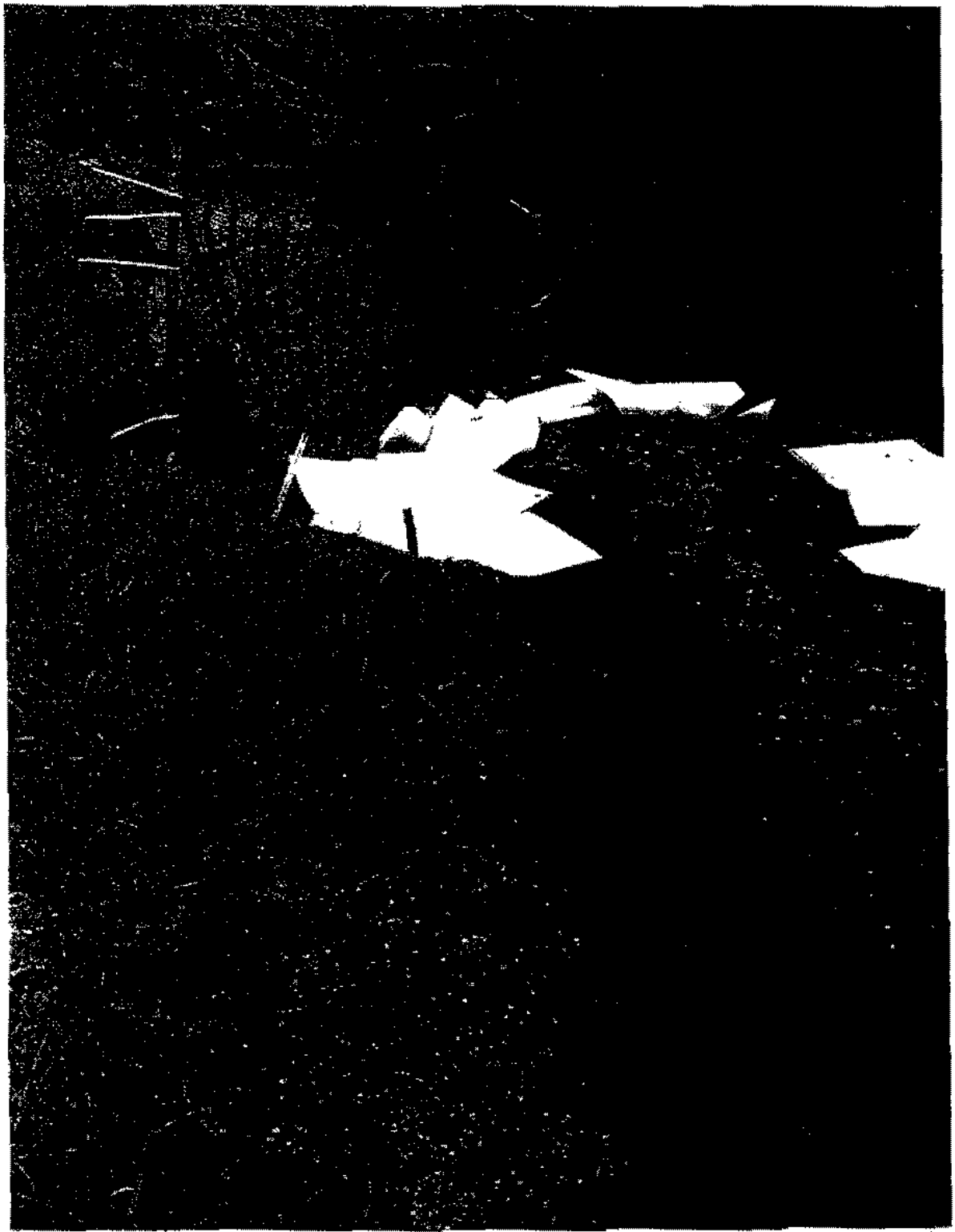
Exhibit N

View to the south of the flowing stream at the approximate southern end of the planned excavation area. The ground disturbance (center left) was caused by the excavation of the fiberglass pipe in order to seal off the ends to prevent further release.
Photo taken: June 17, 2004

View to the northeast of the flowing stream at the approximate mid-point of the planned excavation area. Crude 'staining' is also visible along the bank immediately above the water line (far right and bottom left of photo).
Photo taken: June 17, 2004

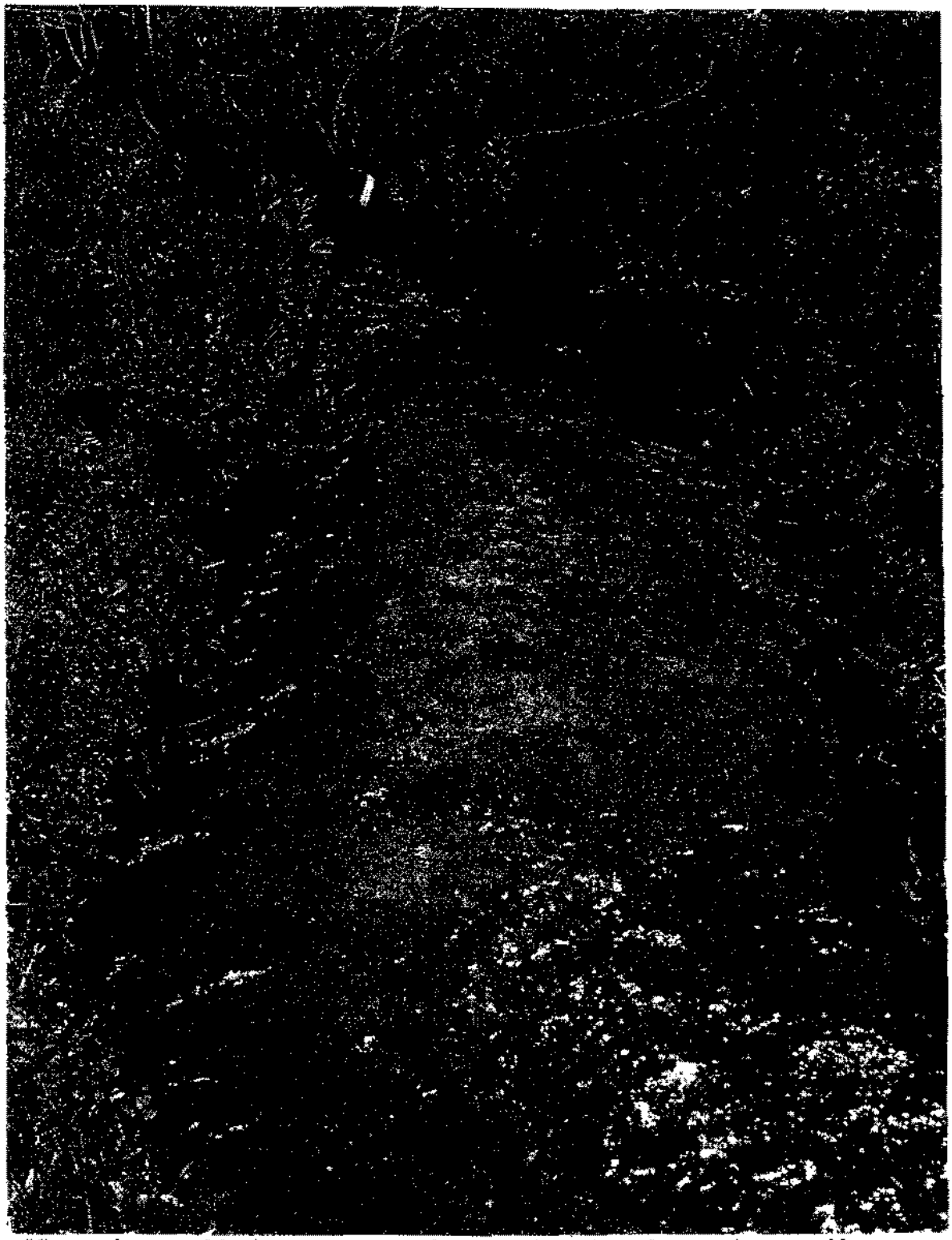
View to the north of the flowing stream at the north end of the planned excavation area. Note the padding in place as countermeasure to the crude release. Crude 'staining' is also visible along the bank immediately above the water line.
Photo taken: June 17, 2004

View to the east of the flowing stream at the north end of the planned excavation area. Note the padding in place (far left of photo) as countermeasure to the crude release. Crude 'staining' is also visible along the bank immediately above the water line.
Photo taken: June 17, 2004

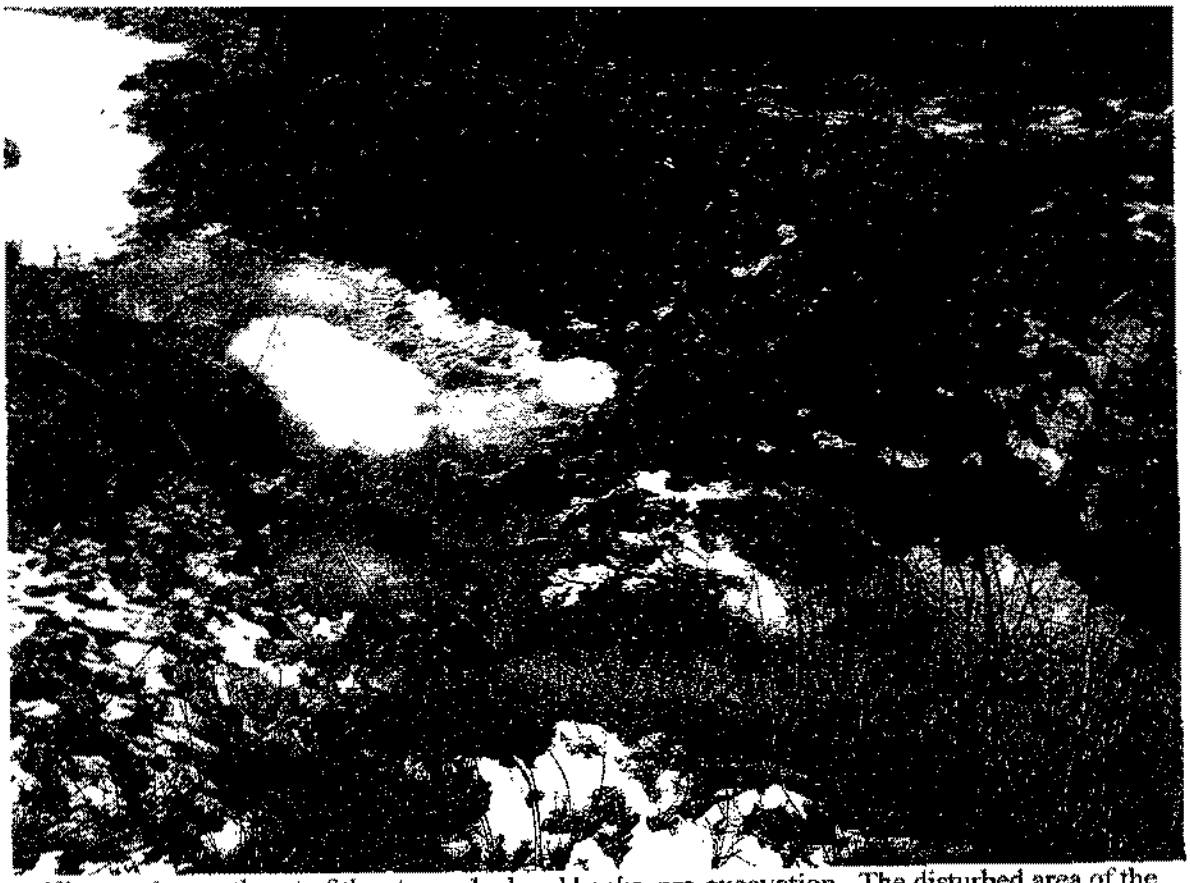


View to the north of the flowing stream at the north end of the planned excavation area. Note the padding in place as countermeasure to the crude release. Crude 'staining' is also visible along the bank immediately above the water line.
Photo taken: June 17, 2004

View of the flowing stream to the west of the planned excavation area. Note some residual evidence of the crude release along the banks just below the grass line.
Photo taken: June 17, 2004

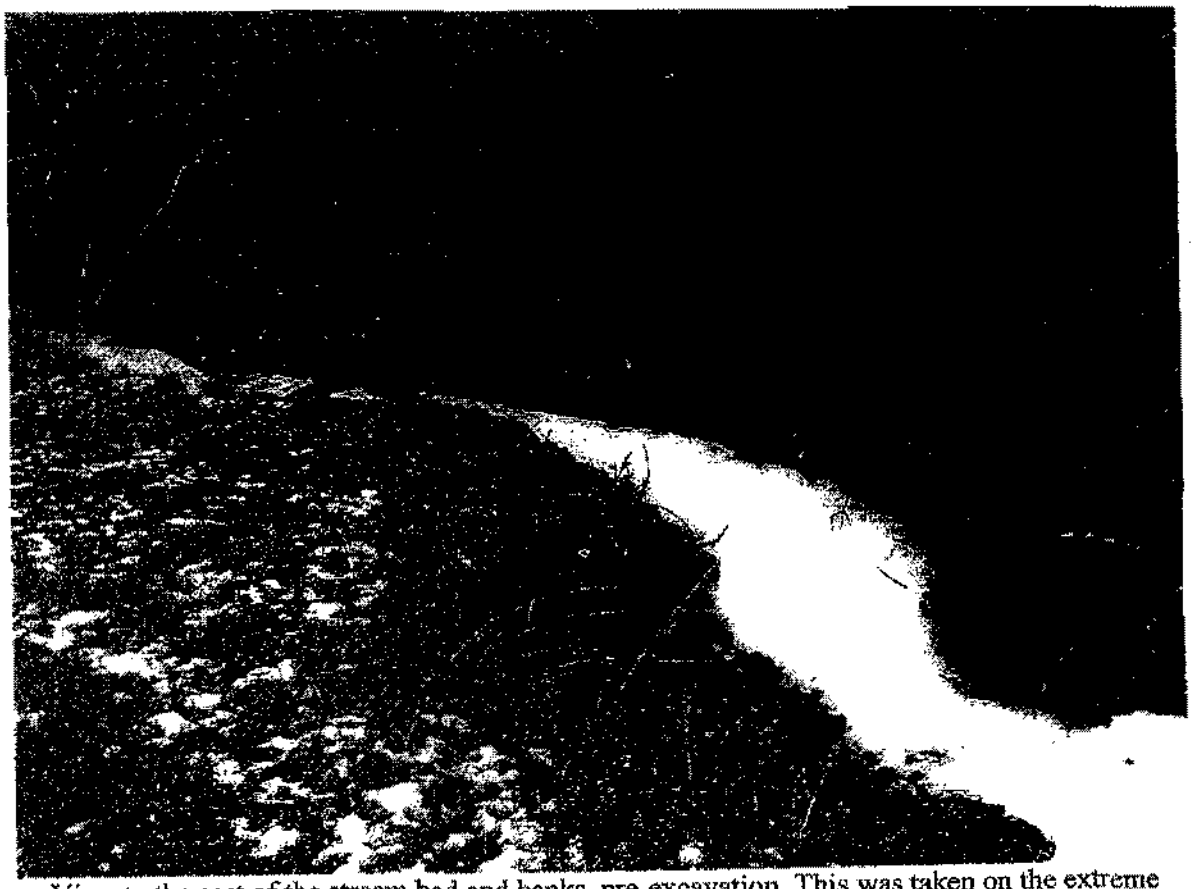


View to the east of the flowing stream to the north of the planned excavation area. Note some residual evidence of the crude release on the surface along the banks just below the grass line.
Photo taken: June 17, 2004



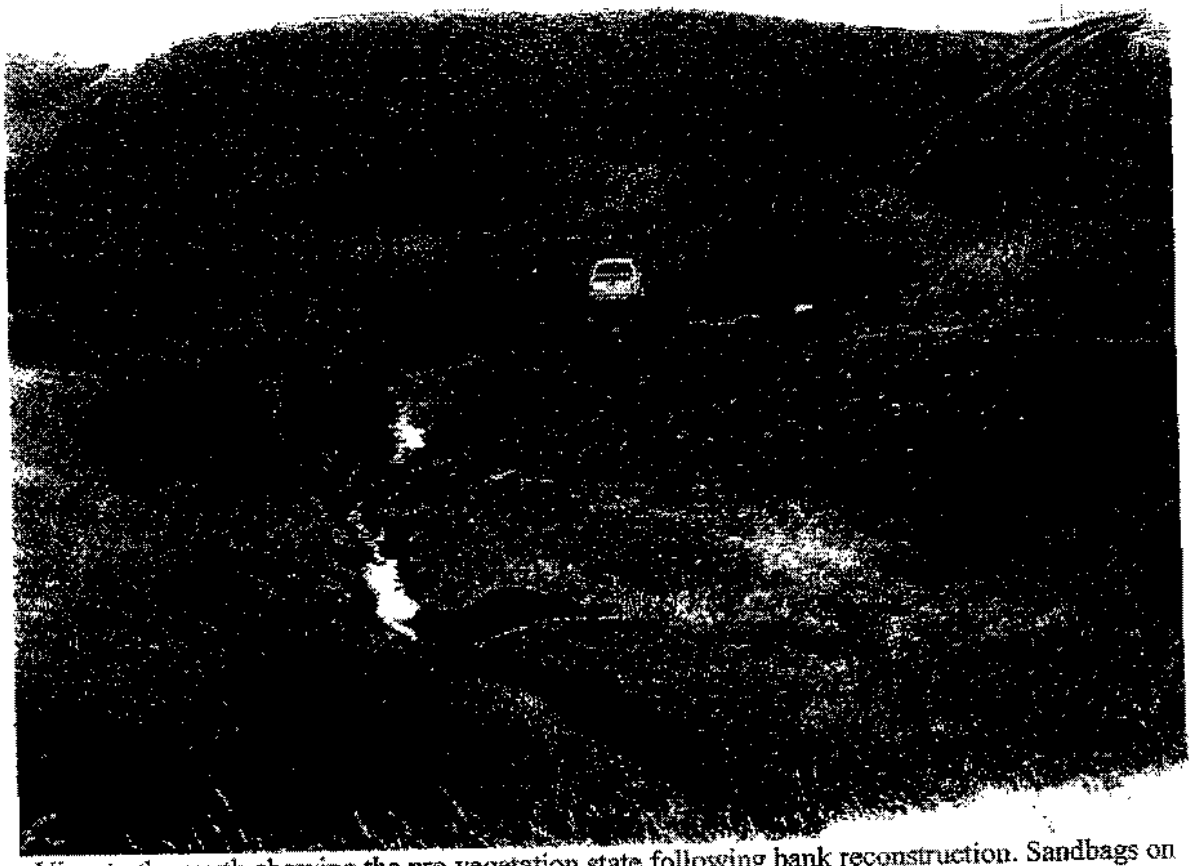
View to the southeast of the stream bed and banks, pre-excavation. The disturbed area of the banks is where the fiberglass pipeline was excavated and capped on either end to prevent any additional release from residual crude in the lines.
Photo taken: December 10, 2004

View to the east of the stream bed and banks, pre-excavation. This photo was taken on the south end of the expected area of excavation. Note some residual evidence of the crude release on the surface along the banks just above the snow.
Photo taken: December 10, 2004



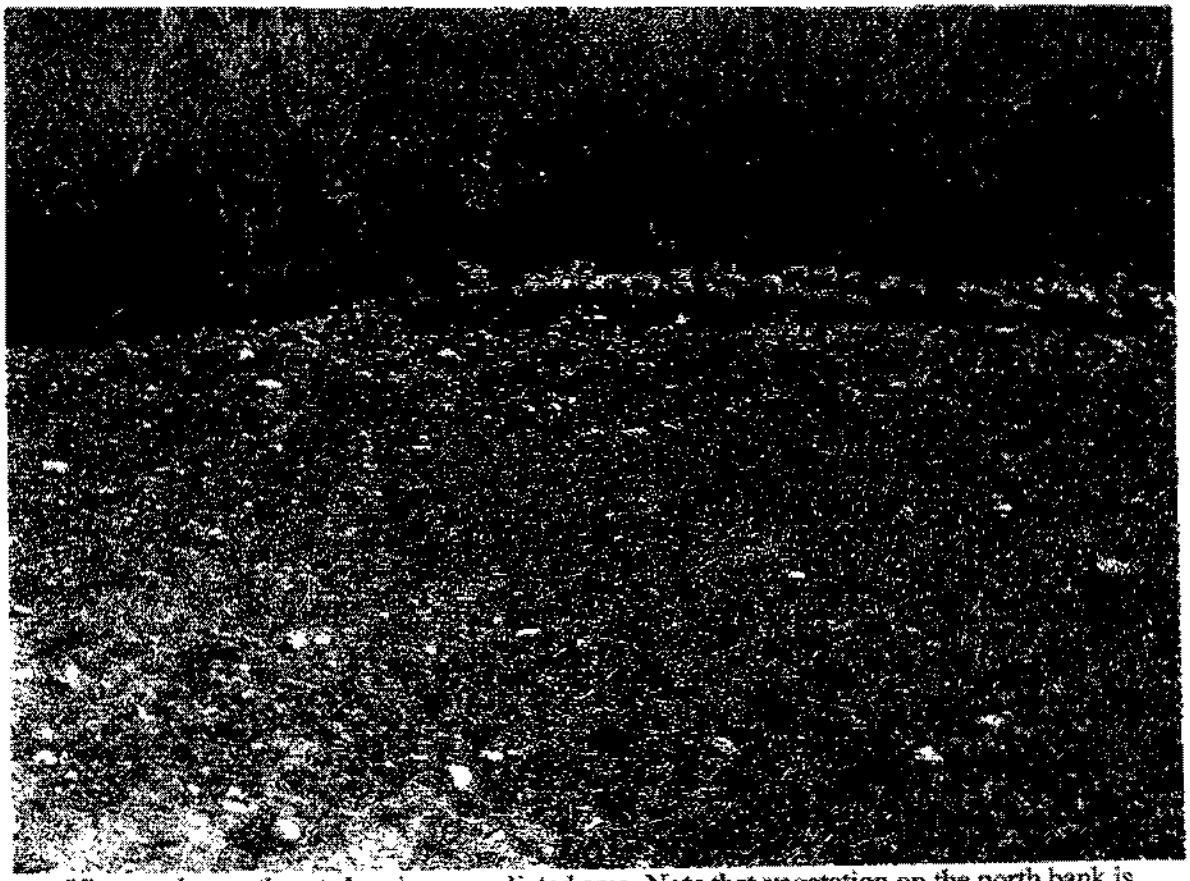
View to the east of the stream bed and banks, pre-excavation. This was taken on the extreme north end of the area that was selected to be excavated. Note some residual evidence of the crude release on the surface along the banks just above the snow.
Photo taken: December 10, 2004

View to the north showing the pre-vegetation state following bank reconstruction. Sandbags on the east bank of the stream were placed in March 2005.
Photo taken: March 15, 2005



View to the south showing the pre-vegetation state following bank reconstruction. Sandbags on the east bank of the stream were placed in March 2005.
Photo taken: March 15, 2005

View to the southeast showing remediated area just below culvert. Note that vegetation on both banks (north and south) is beginning to fill in where topsoils were replaced after the excavation and bank reconstruction. Also note the stream cuts beginning to develop.
Photo taken: May 4, 2006



View to the southeast showing remediated area. Note that vegetation on the north bank is beginning to fill in where topsoils were replaced after the excavation and bank reconstruction.
Photo taken: May 4, 2006

View to the east showing remediation area just east of the culvert. Note that vegetation is filling in on the north bank after the excavation and bank reconstruction.
Photo taken: May 4, 2006

View of the southeast bank of the stream, showing remaining residual crude in remediated area.
Photo taken: May 4, 2006

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit O

Montana Department of
ENVIRONMENTAL QUALITY

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.state.mt.us

Judy Martz, Governor

COPY

BILL

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

April 20, 2004

Mark Hesla
Fulton Fuel Company
127 Main Street
Shelby, MT 59474

Re: Notice of Violation Letter for the Fulton Crude Oil Release into Fred and George Creek, Toole County, Montana (CVID #7972)

Dear Mr. Hesla:

The Montana Department of Environmental Quality (DEQ) Enforcement Division was notified on March 3, 2004 of the release of approximately 6 or more barrels of crude oil into Fred and George Creek located in Township 37N, Range 2E, southwest quarter of Section 14, which was discovered on February 29, 2004. The spill is located on the property of Brian Ratzburg. This site was referred to the DEQ Remediation Division, Groundwater Remediation Program on April 12, 2004.

Crude oil was released from a Fulton Fuel Company (FFC) 2-inch flow line directly above Fred and George Creek. Approximately one mile of total stream length has been impacted with either free product or sheen. The creek is spring fed, and flows year round near the source. The creek does go dry further down the drainage. Absorbent booms and pads were placed at various locations along the creek to intercept crude, filter creek water, and prevent contamination from migrating further downstream. A siphon dam was installed, which may have been of limited effectiveness due to inappropriate construction. Two vacuum trucks were brought in to flush and capture free product. Mr. Larry Alheim of DEQ collected soil and water samples, which indicated surface water contamination as high as 315 parts per million (ppm) extractable petroleum hydrocarbons (EPH) in Sample #4, and soil (sediments?) contamination as high as 15,400 ppm EPH in Sample #2. Volatile petroleum hydrocarbons (VPH) analysis of water sample #5 found C9-C10 Aromatics at 282 ppb which exceeds DEQ's Risk-Based Screening Level (RBSL) of 50 ppb for this fraction. VPH analysis of Soil Sample #2 found benzene at 1.6 ppm, which exceeds the RBSL 0.05 ppm for surface soil.

It is a violation of the Montana Water Quality Act (WQA) to cause pollution of any state waters, or to place or cause to be placed wastes where they will cause pollution of any state waters. Section 75-5-605(1)(a), MCA. The release of crude oil at the above-described location

constitutes a violation of the WQA. Because FFC is the owner/operator of the flow line from which the release occurred, DEQ hereby issues to FFC a violation letter pursuant to Section 75-10-617(1)(a), MCA.

At this time, DEQ requires that FFC complete the following actions:

1. Collect surface water samples and collocated sediment samples. These samples should be analyzed for EPH screen and VPH. If the EPH screen produces a Total Extractable Hydrocarbon (TEH) value of 300 ppb or greater in water, or 50 ppm or greater in sediments, then EPH fractionation must be run, and the sample must also be analyzed for polynuclear aromatic hydrocarbons (PAHs) by EPA Method 8270. Sediment samples must also be analyzed for total organic carbon. All sediment sample results need to be reported on a dry-weight basis (the laboratory will need to be instructed to do this). Please be aware that samples to be submitted for VPH must not be composited in the field. Samples must represent worst-case conditions in the stream bed and bank at several points along the contaminated portion of the stream, and at least one set of samples must be collected from downstream of the area where work has occurred to document clean downstream conditions. Also, collect "background" sediment/soil and water samples upstream of the release, because natural sediment samples and some stream water can contain large amounts of organic matter that may be reflected in the EPH screen. These sampling results will serve as a "baseline" for comparison to later sample results.

2. Compare results of surface water sampling to WQB-7 Numeric Water Quality Standards, selecting the most conservative of the Aquatic Life Standards or the Human Health Standards.

3. Compare the results of soil sampling to appropriate RBSLs.

4. Compare the results of sediment sampling to Washington State Department of Ecology Freshwater Sediment Quality Values. A qualified environmental professional may also perform a risk assessment to generate site-specific cleanup levels, which would need to be reviewed and approved by DEQ.

5. Determine the vertical and lateral extent of contaminated soil and sediment. Generate a map of the impacted length of the creek, and document areas of contamination on this map. Sample results can be documented on this map as well. A photographic log of creek conditions must be maintained.

6. It may be possible to remove areas of stained soil and sediment by careful digging with hand-tools, especially if the creek goes dry during some portion/s of the year. If remedial excavation is employed for cleaning up soil contamination, confirmation samples must be collected from the excavated areas. At least one composite confirmation sample must be collected for every 25' x 25' of surface area in the excavation. Professional judgment may dictate the collection of additional samples. These samples must be analyzed for EPH screen and VPH. If the EPH screen produces a TEH value of 50 ppm or greater, then EPH fractionation must be run, and the sample must also be analyzed for PAHs by EPA Method 8270. At other sites where petroleum products have impacted surface water and streambeds and banks,

DEQ has required the generation of a Site-Specific Risk Assessment that addresses threats to both human and ecological receptors. However, if FFC can clean up the crude in the creek to "non-detect" or background levels, the drafting of a Site-Specifc Risk Assessment may not be necessary.

7. FFC may propose alternative remediation strategies, which must be reviewed and approved by DEQ.

8. Properly manage all excavated contaminated soil. If the volume of the petroleum-contaminated soil exceeds 1600 cubic yards, then the soil must be transported to, and managed at, an existing licensed landfarm or a licensed Class II landfill. If the volume of contaminated soil does not exceed 1600 cubic yards, then it may be managed at a one-time landfarm registered with DEQ's Waste Management Section or a licensed Class II landfill. Please let me know if you would like a copy of DEQ's *"Guidelines for Registered Landfarming of Hydrocarbon Contaminated Soils."* If you have any questions please contact George Scriba of DEQ's Permitting and Compliance Division, Waste Management Section at (406) 444-1434. If contaminated soil needs to be stockpiled, it should be placed on plastic sheeting and bermed to prevent runoff.

9. DEQ is not requiring the installation of groundwater monitoring wells at this time. However, if it is determined that crude has migrated into subsurface soil, DEQ may require the installation of an appropriate number of monitoring wells to determine whether or not groundwater has been impacted. There may be perched or shallow groundwater in the area of the creek. Monitoring wells must be surveyed for location and elevation by a licensed surveyor, and tied to an established USGS datum.

10. Conduct a survey of potential receptors within one-half mile downgradient of the site and collect water samples, if appropriate, from these receptor points.

11. If the siphon dam is not functioning properly, it must be reconstructed or fixed. Booms and absorbent pads must be placed to capture contamination until DEQ determines that these can be removed. Booms, pads, and dams must be monitored at least weekly to ensure that they are functioning appropriately. Replace booms and pads as necessary. Surface water samples must be collected at least once a month to document whether or not contamination is moving downstream.

12. FFC must work with the property owner regarding issues such as fencing of the contaminated area to keep out cattle, ensuring that the property owner's cattle have access to adequate water supplies, and other issues that may arise.

13. FFC must ensure that all necessary permits are secured prior to conducting work in the streambed or on the stream banks. FFC should contact the local Conservation District for a 310 permit prior to conducting excavation activities in the creek. FCC should contact the DEQ's Permitting and Compliance Division, Water Protection Bureau to obtain a 318 permit if a short-term activity may cause unavoidable short-term violations of state water quality standards. If Fred and George Creek flows into navigable waters, FCC may need to obtain a 404 permit of the Army Corp of Engineers.

14. FFC must submit information detailing the following information about Fred and George Creek: human uses of the creek, habitat types adjacent to the creek, animal uses of the creek, endangered and/or threatened species that may use the creek as habitat, flow characteristics of the creek (average flow volumes during different times of the year), eventual discharge point of the creek, and any other pertinent information.

15. Submit a report to DEQ that contains a description of the release and the initial remedial response actions conducted at the site, all analytical results, a map of the site, and photographs taken of the site, and a discussion of data quality. If soil samples have been collected, the locations of these should be indicated on a map. If an excavation has occurred, the boundaries of the excavation should be indicated on a map and the confirmation sample locations should be indicated as well. Any nearby receptors should also be indicated on the site map. Finally, the report should include any recommendations for future remedial actions.

FFC must send written notification to DEQ within two weeks of receipt of this certified letter stating its commitment to conduct the actions outlined in items 1 though 15 (above). A work plan and tentative schedule of implementation that addresses items 1 though 15 (above) must accompany the letter of commitment. The work plan should include all relevant standard operating procedures (SOPs), or reference these if DEQ has a copy the SOPs on file.

If FFC fails to comply with the requirements of this violation letter, DEQ is required by Section 75-5-617(2), MCA, to issue an administrative order or commence a civil action requiring compliance, which may include the assessment of penalties of up to $25,000.00 per day of violation. In addition, a civil action may result in the assessment of DEQ's costs.

Please contact me at (406) 841-5062 or lalvey@state.mt.us if you have any questions concerning the requirements of this letter.

Sincerely,

Laura Alvey
Groundwater Remediation Program
Remediation Division

cc: Jane Amdahl, DEQ Legal Unit
Chad Anderson, DEQ Enforcement Division
Toole County Sanitarian, 226 1st Street South, Shelby, MT 59474
Sarah Shepherd, Toole County Conservation District, 1125 Oilfield Avenue, Shelby, MT 59474
Brian Ratzburg, HC 51 Box 269, Galata, MT 59474

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit P

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No.: CWA-08-2009-0020

IN THE MATTER OF MCR, LLC Shelby, Montana Respondent.	)	**COMPLAINT AND CONSENT AGREEMENT** (Proceeding to Assess Class II Civil Penalty Under Section 311 of the Clean Water Act)

The United States Environmental Protection Agency, Region 8 (EPA or Complainant), and MCR, LLC (Respondent) by its undersigned representatives, hereby consent and agree as follows:

A. PRELIMINARY MATTERS

1. This Complaint and Consent Agreement (CCA) is issued to Respondent for violating section 311(j)(5) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1321(j)(5), and the implementing regulations at 40 C.F.R. part 112.

2. The undersigned EPA, Region 8 officials have been properly delegated the authority to issue this CCA under the authority vested in the Administrator of EPA by section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. §1321(b)(6)(B)(ii) to bring an action for civil administrative penalties against a respondent who has violated, or is in violation of, a requirement or prohibition of the CWA or its implementing regulations.

3. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action

part that "any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by ... the Administrator."

15. The facilities did not have written SPCC plans nor did they have adequate SPCC implementation and containment measures to prevent unauthorized discharges of oil to waters of the United States.

16. Respondent failed to prepare and implement written SPCC plans in accordance with the regulations at 40 C.F.R. §§ 112.7, 112.9 and 112.10 as required by 40 C.F.R. § 112.3.

17. Respondent's failure to prepare and implement written SPCC plans in accordance with the regulations at 40 C.F.R. §§ 112.7, 112.9 and 112.10 from September 1, 2004, through the date of this CCA for its facilities, constitutes violations of 40 C.F.R. § 112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C), of the Act.

18. As alleged in the preceding Paragraphs, and pursuant to section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii) and 40 C.F.R. § 19.4, the Respondent is liable for civil penalties.

C. COMPLIANCE SCHEDULE

1. Respondent agrees to prepare and implement written SPCC plans for all facilities listed in Attachment 1 to bring them into compliance with applicable requirements of 40 C.F.R. part 112 and section 311 of the Act, 33 U.S.C. § 1321, by no later than August 31, 2010.

2. Respondent agrees to prepare and submit an interim report to EPA documenting the compliance measures completed by July 31, 2009. A second interim report will be submitted to

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.

4. Respondent consents to the issuance of a Final Order and consents for the purposes of settlement to the payment of the civil penalty of fifty thousand dollars ($50,000) in the manner described below:

a. **Payment is due within thirty (30) calendar days from the date written on the Final Consent Order**, issued by the Regional Judicial Officer, that adopts this CCA. If the due date falls on a weekend or legal federal holiday, then the due date becomes the next business day. The date the payment is made is considered to be the date processed by the Bank described below. Payments received by 11:00 AM. EDT are processed on the same day, those received after 11:00 AM are processed on the next business day.

b. The payment in paragraph D.2, supra, shall be made by remitting a cashier's or certified check, including the name and docket number of this case, referencing "Oil Spill Liability Trust Fund-311," for the amount, **payable to the "Environmental Protection Agency,"** to:

CHECK PAYMENTS:

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

ON LINE PAYMENT:

WWW.PAY.GOV

Enter sfo 1.1 in the search field. Open form and complete required fields.

A copy of the check, or wire transfer, shall be sent simultaneously to:

Jane Nakad (8ENF-UFO)
U.S. EPA Region 8
Technical Enforcement Program
1595 Wynkoop St.
Denver, CO 80202-1129

and

Tina Artemis
Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop
Denver, CO 80202-1129

c. Payment of the penalty in this manner does not relieve Respondent of its obligations to comply with the requirements of the Act and the implementing regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

E. TERMS AND CONDITIONS

1. Failure by Respondent to comply with any of the terms of this CCA shall constitute a breach of the CCA and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.

2. Nothing in this CCA shall be construed as a waiver by the EPA or any other federal entity of its authority to seek costs or any appropriate penalty associated with any collection action

6. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this CCA.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8, Office of Enforcement, Compliance and Environmental Justice, Complainant.**

Date: 6/30/09

Eddie A. Sierra, Acting Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice

Date: June 26, 2009

Marc Weiner, Enforcement Attorney
U.S. EPA, Region 8
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466
Tel. (303) 312-6913

**MCR, LLC
Respondent.**

Date: June 17 2009 By:

Gary McDermott, Authorized Agent for Respondent

In the Matter of: MCR, LLC
Docket No. CWA-08-2009-0020

Attachment 1
SPCC Containment Schedule

MC LC

SPCC Containment Schedule

3/16/2009	County	Previous Owner	Containment Requirements	Scheduled Timeframe	2009 May	June	July	Aug	Sep	Oct	April	May	June	July	Aug	Sep	Oct
Field	State = MT																
Plan 1																	
MINERS COULEE OIL FIELD																	
Miners Coulee Compressor Site	Toole	Fulton Producing	Add Containment	May-09													
J Fey #1-9	Toole	New Facility	Containment Complete	N/A													
McCutcheon #8x-9	Toole	New Facility															
McCutcheon #3-9	Toole	New Facility	Containment Complete	N/A													
McCutcheon #11-9x	Toole	New Facility															
FRED & GEORGE CREEK FIELD																	
Fey #3-2	Toole	will be a new facility	Portable Tank on location until Fey-3 completed to determine if economical						Pending								
Fey-Vessels #2-3	Toole	Fulton Producing	Tanks will be decommissioned														
Sunburst A Sand Unit	Toole	Fulton Producing	Present Containment needs to redressed - add for waste oil tank	May-09													
Sunburst "B" Sand Unit (Main)	Toole	Fulton Producing	Add Containment	Jun-09													
SE Sunburst "B" Sand Unit	Toole	Fulton Producing	Containment Complete	N/A													
SW Sunburst "B" Sand Unit	Toole	Fulton Producing	Add Containment	Jun-09													
SASU Injection Station	Toole	Fulton Producing	Oil Spill Contingency Plan	Jun-09													
Fey A 15-28	Toole	Fulton Producing	Tanks will be decommissioned	Sep-09													
Fey K 3-4	Toole	Fulton Producing	Tanks will be decommissioned	Sep-09													
Fey E 2-33	Toole	Fulton Producing	Tanks will be decommissioned	Sep-09													
NORTH FRED & GEORGE FIELD																	
North Sunburst B Sand Unit	Toole	Fulton Producing	Add Containment	Jul-09													
US 14x-11 (Federal)	Toole	Fulton Producing	Portable Tank on location until Fey-3 is completed to determine if economical														
A Fey 31x-12	Toole	Fulton Producing	Tanks will be decommissioned														
Prichard Creek Unit	Toole	Fulton Producing	Add Containment	Jul-09													
ARCH APEX FIELD																	

MC LLC

SPCC Conta ant Schedule

3/16/2009 Field	County State = MT	Previous Owner	Containment Requirements	Scheduled Timeframe	May	June	July	Aug	Sep	Oct	April	May	June	July	Aug	Sep	Oct
					2009						[redacted]						
Beaudoin A 13-5	Toole	Fulton Producing	Tanks will be decommissioned														
Fey 44-4	Toole	Fulton Producing	Add Containment	Aug-09													
WEST BUTTE																	
Berthelote 4-9	Toole	New Location	Containment Complete	N/A													
Berthelote 22-8	Toole	Fulton Producing	Add Containment	Aug-09													
Berthelote 43-8	Toole	Fulton Producing	Tanks will be decommissioned	Aug-09													
Berthelote 43-8A	Toole	New Facility	Oil Spill Contingency Plan - Add Containment	Aug-09													
Federal 41-8 & 42-8	Toole	Fulton Producing	Add Containment	Oct-09													
Plan 2																	
WEST WHITLASH FIELD																	
Sutton A 1	Toole	Fulton Producing	Potential to lay new flowlines [illegible] decommission tank battery	Sep-09													
Sutton 1, 2 & Sutton 4B	Toole	Fulton Producing	Add containment	Aug-09													
Sutton #15-2	Toole																
Sutton 33-2R	Toole	Fulton Producing	Add containment	Aug-09													
WHITLASH FIELD																	
Whitlash Compressor Site	Liberty	Fulton Producing	Add Fuel Tank Containment	Oct-09													
Whitlash East State Swift UNIT	Liberty	Fulton Producing	Containment Complete														
Demarest 33-30	Liberty	Fulton Producing	Add Containment	Oct-09													
Demarest 14x-29	Liberty	Fulton Producing	Add Containment	Oct-09													
Iverson 32-9	Liberty	Fulton Producing	Potential to lay flowline [illegible] and decommission tanks	Oct-09													

MC' LC

SPCC Contai.. nt Schedule

3/16/2009 Field	County State = MT	Previous Owner	Containment Requirements	Scheduled Timeframe	2009 May	June	July	Aug	Sep	Oct	April	May	June	July	Aug	Sep	Oct
Iverson 42-9 & 12X 10	Liberty	Fulton Producing	[redacted]	Oct-09													
Government 23-2	Liberty	Fulton Producing	[redacted]	Sep-09													
State 44x-2	Liberty	Fulton Producing	[redacted]	Sep-09													
Wallace 1 & 14-3-4	Liberty	Fulton Producing	Add Containment - Portable tank upgrade	Sep-09													
Wallace 13x-1 & 32-2	Liberty	Fulton Producing	[redacted]	Sep-09													
Wallace 13-2	Liberty	Fulton Producing	[redacted]	Sep-09													
Wallace 14x-3	Liberty	Fulton Producing	[redacted] decommissioned.	Sep-09													
Wallace 33-2	Liberty	Fulton Producing		Sep-09													
Wallace 43-2	Liberty	Fulton Producing	Add Containment - Shared Battery - Complete Facility Modifications to lay new flowlines from existing tank batteries as identified	Sep-09													
Schaefer 22X-13	Liberty	Fulton Producing	Add Containment	Jun-10													
Brown "A" 4,5,7	Toole	Fulton Producing	Add Containment	Oct-09													
A Iverson 21x-9, 31x-9-1	Liberty	Fulton Producing	Add Containment - Modify TB for additional flowlines from existing														

MCP LLC

SPCC Conta ent Schedule

					2009												
3/16/2009 Field	County State = MT	Previous Owner	Containment Requirements	Scheduled Timeframe	May	June	July	Aug	Sep	Oct	April	May	June	July	Aug	Sep	Oct
31x-9-2, 41x-9			batteries as identified	May-10													
CS Iverson #2	Liberty	Fulton Producing	Containment Complete														
CJ Iverson A6	Liberty	Fulton Producing	[illegible]	Sep-09													
CJ Iverson C11	Liberty	Fulton Producing	Add Containment	Oct-09													
Mahoney [illegible]	Liberty	Will be new facility	Portable tanks- Wells are waiting on Frac jobs to determine if economical to produce - will complete well and determine tank battery size										Pending				
Hicks [illegible]	Liberty	Will be new facility	Wells are waiting on Frac jobs to determine if economical to produce - will complete well and determine tank battery size														
"Old" Wallace 9,10,12&13	Liberty	Fulton Producing	Add additional containment	Apr-10													
"New" Wallace 13, 14, 23-3 & 44x-4	Liberty	Fulton Producing	Containment Complete														

MC LC

SPCC Contai..ent Schedule

3/16/2009					2009						2010						
Field	County State = MT	Previous Owner	Containment Requirements	Scheduled Timeframe	May	June	July	Aug	Sep	Oct	April	May	June	July	Aug	Sep	Oct
Whitlash East Schafer Unit	Liberty	Will be new facility	New Tank Battery will be built for the Schafer Unit at Schafer B6 and add required containment	Work begins 4/1/2010													
Bingham Schafer 42-14A	Liberty	Fulton Producing	Tanks will be decommissioned and flowlines will be routed to Schafer B6	Work begins 4/1/2010													
Bingham Schafer 33x-14	Liberty	Fulton Producing	Tanks will be decommissioned and flowlines will be routed to Schafer B6	Work begins 4/1/2010													
Schaefer 1	Liberty	Fulton Producing	Tank will be decommissioned	Jul-09													
Schaefer A-1	Liberty	Fulton Producing	Tank will be decommissioned	Aug-09													
Schaefer B6	Liberty	Fulton Producing	See above at Whitlash East Schafer Unit	Work begins 4/1/2010													
Schaefer B4	Liberty	Fulton Producing	Potentially by flowline to existing battery and decommission tanks	Work begins 4/1/2010													
FLAT COULEE FIELD																	
Flat Coulee Unit	Liberty	Breck Operating	Containment Complete														
State-Darrow #5-18	Liberty	Breck Operating	Containment Complete														
Plan 3																	
PONDERA FIELD																	
Pondera County																	
E. M. Erickson Lease	Pondera	Breck Operating	Containment Complete	N/A													
Freda Battery	Pondera	Breck Operating	Containment Complete	N/A													
Walston Battery	Pondera	Breck Operating	Containment Complete	N/A													
NECO-Rice Lease	Pondera	Fulton Producing	Containment Complete	N/A													
W. DuBois	Pondera	Fulton Producing	Tanks will be decommissioned	Jul-09													

MCP LLC

SPCC Containment Schedule

3/16/2009					2009						2010						
Field	County State = MT	Previous Owner	Containment Requirements	Scheduled Timeframe	May	June	July	Aug	Sep	Oct	April	May	June	July	Aug	Sep	Oct
Jones "A"	Pondera	Fulton Producing	Tank will be decommissioned	Jul-09													
Jones-Sec. 6	Pondera	Fulton Producing	Containment Complete	N/A													
Jones-Sec. 18	Pondera	Fulton Producing	Current Containment needs to be redressed	Aug-09													
Philipps-Sec. 5	Pondera	Fulton Producing	Containment Complete	N/A													
Teton County																	
Connole Battery	Teton	Breck Operating	Current Containment needs to be redressed	Aug-09													
Rice "C" Lease	Teton	Breck Operating	Current Containment needs to be redressed	Aug-09													
Teton "A" Lease	Teton	Breck Operating	Containment Complete	N/A													
Jones Yard	Pondera	Fulton Producing	Add Fuel Tank Containment	Sep-09													
Breck Yard	Pondera	Breck Operating	Add Fuel Tank Containment	Sep-09													

In the Matter of Fulton Fuel Company
CWA App. 10-(03)
Complainant's Response Brief

Exhibit Q

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	*
	* Docket No. CWA-08-2009-0006
FULTON FUEL COMPANY	*
127 Main Street	* RESPONDENT'S MOTION TO SET ASIDE
Shelby, MT 59474	* DEFAULT AND TO SET HEARING ON
	* THE MERITS

INTRODUCTION

The Environmental Protection Agency (EPA) has made a Motion for Default Judgment and Order against Respondent Fulton Fuel Company assessing a fine of $32,500.00.

In response Fulton Fuel Company filed its Response to Order to Supplement the Record and to Show Cause on January 4, 2010 together with evidence in exhibits attached.

Respondent hereby files its Motion to Set Aside any Default that may have been heretofore executed and requests this matter be set for hearing on the merits. In support Respondent is filing herewith an Answer of Fulton Fuel Company and Request for Hearing, and an Affidavit of the President of Fulton Fuel Company, William M. Fulton Jr.

MEMORANDUM IN SUPPORT OF THE MOTION

An Order of Default may not yet have been entered in this case. If not Respondent requests that its Answer be filed. If Default is deemed already to be entered, Respondent requests that

Company which buried the flowline in rock several feet below ground, and that the spill was as to Fulton Fuel Company, an unavoidable accident are defenses recognized by the Act. See 33 USC §1321 (f).

3. Any default against Respondent should be set aside on grounds of excusable neglect.

a. Fulton Fuel Company hired counsel, other than its present counsel and reasonably believed such hired counsel was meeting EPA claims and complaints.

The record now before the Regional Judicial Officer in this case demonstrates:

1) Fulton Fuel Company promptly discovered a small 6 to 10 barrel oil spill and immediately commenced, sustained and paid for remediation, testing and restoration of all environmental effects of that spill;

2) That Attorney Renee Coppock of the Crowley Fleck law firm of Billings, Montana, was retained by Fulton Fuel Company to handle all legal matters pertaining to environmental issues with local, state and federal governments;

3) That attorney Coppock arranged for and monitored the remedial, testing and reporting activities of Hydro Solutions Inc., corresponded with state and federal agencies, including the EPA and filed the Response to the United States Environmental Protection Agency, which underlies this case, with the EPA; and

4) Fulton Fuel Company was unaware that attorney Coppock had not entered an appearance in this matter until December 21, 2009. See Affidavit of William M. Fulton, Jr.

CONCLUSION

It is respectfully submitted that the Regional Judicial Officer should not enter a Default Order, or should set aside any Default Order heretofore granted; and further that Respondent be granted a hearing on the merits with an opportunity to refute the erroneous jurisdictional and factual allegations of the EPA.

Respectfully submitted this 4th day of March, 2010.

Douglas Allen by TF
Douglas C. Allen
Attorney for Fulton Fuel Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2010, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Marc D. Weiner
Enforcement Attorney
1595 Wynkoop Street
Denver, CO 80202-1129

Tina Artemis
Regional Hearing Clerk
US Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
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T Frydenlund