

FILED
JUN 30 AM 11:15
REGIONAL HEARING CLERK
EPA REGION VI

Docket No. CWA-06-2009-4808

BACKGROUND

The Complainant filed the Complaint against Respondent in this matter on September 8, 2009. The section of the Complaint entitled "Opportunity to Request a Hearing," consisting of

paragraphs 29 through 32 of the Complaint, provides information concerning Respondent's obligations with respect to responding to the Complaint. Paragraph 29 of the Complaint specifically states in part:

Default constitutes an admission of all facts alleged in this Complaint and a waiver of your right to a hearing on such factual allegations. In order to avoid default in this matter, you must within 30 days after receipt of this Complaint either (1) settle this matter with the Complainant; (2) file a written statement with the Regional Hearing Clerk . . . that you agree to pay the proposed penalty in this Complaint, and subsequently pay the proposed penalty no later than 60 days after receiving this Complaint, or (3) file both an original and one copy of a written Answer to this Complaint with [the Regional Hearing Clerk].

The Certificate of Service attached to the Complaint includes a certification that a copy of the Complaint¹ was sent by certified mail, return receipt requested, on September 8, 2009, addressed to Richard O. Bertschinger, 6417 Grandmark Drive, Nichols Hills, Oklahoma. A certified mail return receipt (green card) filed with the Regional Hearing Clerk shows that an article was signed for at the address indicated in the Certificate of Service on September 10, 2009. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Complaint may be presumed under the Consolidated Rules.

Respondent has not filed an answer to the Complaint as of the date of this order.

On April 13, 2010, Complainant filed a Status Report in which Complainant reported that Complainant did not consider settlement of the matter likely, and that Complainant intended to file a motion for default.

On June 2, 2010, Complaint filed its Motion for Default. The Certificate of Service

¹It should be noted that the Certificate of Service states that the document being served is a "Consent Agreement and Final Order." This appears to be a clerical error.

attached to the Motion for Default shows that a copy of the Motion for Default was served on Respondent by first class mail on June 2, 2010.

As of the date of this order, Respondent has not filed an answer to the Complaint or a response to the Motion for Default with the Regional Hearing Clerk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact and conclusions of law:

1. The Complaint was filed with the Regional Hearing Clerk on September 8, 2009.
2. A copy of the Complaint was mailed to Respondent by certified mail, return receipt requested, on September 8, 2009.
3. A return receipt shows that Respondent received a copy of the Complaint on September 10, 2009.
4. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).
5. Respondent did not file an answer to the Complaint within 30 days of receipt of the Complaint and has not filed an answer as of the date of this order.
6. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).
7. On June 2, 2010, Complaint filed its Motion for Default and served it on the Respondent by first class mail.

8. Complainant's Motion for Default was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).
9. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b).
10. Respondent did not file a response to Complainant's Motion for Default within 15 days of service and has not filed a response to the Motion for Default as of the date of this order.
11. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).
12. Respondent is in default for failure to file a timely answer to the Complaint. 40 C.F.R. § 22.17(a).
13. Respondent is a corporation organized under the laws of Oklahoma with a place of business located at 6417 Grandmark Drive, Oklahoma City, Oklahoma.
14. Respondent is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.
15. Respondent is the owner, within the meaning of section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of an onshore oil production facility, the Wooten Tank Battery, located approximately 450 feet North of EW 144 Road and NS 351 Road on the east side of 351, Konawa, Seminole County, Oklahoma ("Facility").
16. The Facility has an aggregate above-ground storage capacity greater than 1320 gallons (approximately 29,568) of oil in containers each with a shell capacity of at least 55 gallons.
17. Respondent is engaged in drilling, producing, gathering, storing, processing, refining,

- transferring, distributing, using or consuming oil or oil products located at the Facility.
18. The Facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112.2, Appendix A, as incorporated by reference within 40 C.F.R. § 112.2.
 19. The Facility is an onshore facility within the meaning of section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.
 20. Drainage from the Facility travels approximately 500 feet to the south, where it enters an unnamed tributary of Negro Creek, then east approximately half a mile to Negro Creek, then southeast to the Canadian River.
 21. Negro Creek and the Canadian River are navigable waters of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
 22. The Facility is a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity (hereinafter referred to as an "SPCC-regulated facility").
 23. The Respondent began operating the Facility prior to August 16, 2002.
 24. The Facility has been in operation since before approximately 1950.
 25. Pursuant to Section 311(j)(1)(C) of the CWA, E.O. 12777, and 40 C.F.R. 112.1, Respondent, as the owner of an SPCC-regulated facility, is subject to the SPCC regulations at 40 C.F.R. Part 112.
 26. The SPCC regulations at 40 C.F.R. Part 112 are regulations issued under section 311(j) of the CWA, 33 U.S.C. § 1321(j).
 27. Pursuant to 40 C.F.R. § 112.3 Respondent is required to prepare a written SPCC plan in

accordance with 40 C.F.R. § 112.7 and any other applicable section of 40 C.F.R. Part 112.

28. On February 6, 2008, EPA inspected the Facility.
29. At the time of the EPA inspection, Respondent had failed to prepare an SPCC plan for the Facility in accordance with 40 C.F.R. § 112.7.
30. Respondent's failure to develop an SPCC plan for the Facility violated 40 C.F.R. § 112.3(d).
31. Pursuant to 40 C.F.R. § 112.9(c)(3), Respondent is required to periodically and on a regular schedule visually inspect each container of oil for deterioration and maintenance needs.
32. Pursuant to 40 C.F.R. § 112.9(d)(1), Respondent is required to periodically and on a regular schedule visually inspect all above ground valves and piping associated with transfer operations for the general conditions of flange joints, valve glands and bodies, drip pans, pipe supports, pumping well polish rod stuffing boxes, bleeder and gauge valves, and other such items.
33. During the February 6, 2008, inspection, EPA found that Respondent had failed to visually inspect oil storage containers, as well as valves and piping associated with transfer operations. This was based upon the condition of the oil containers as well as oil staining around the base of the oil storage containers and below the valves and connecting line flanges.
34. Respondent's failure to provide periodic visual inspections of the oil storage containers and valves and piping associated with transfer operations violated 40 C.F.R. § 112.9(c)(3)

and 40 C.F.R. § 112.9(d)(1).

35. Respondent's violations of the SPCC Regulations described above constitute violations of regulations issued under section 311(j) of the CWA, 33 U.S.C. § 1321(j).
36. Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), authorizes EPA to assess a Class I civil penalty for violations of any regulations issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j).
37. Respondent may be assessed a Class I civil penalty under Section 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), up to \$11,000 per violation up to a maximum Class I penalty of \$32,500 pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.
38. The Consolidated Rules of Practice provide, with respect to penalty assessment where a Respondent has been found in default, that the relief proposed in the Complaint 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).

ORDER FOR FURTHER PROCEEDINGS

In its Motion, Complainant stated that it intends to file a motion for the assessment of civil penalty coupled with documentary evidence in support of such assessment.

Complainant shall file its motion for the assessment of civil penalty coupled with supporting documentary evidence on or before July 30, 2010.


Respondent shall have 15 days after service of Complainant's response to file its response, if any, to Complainant's filing.

Since this Order does not resolve all outstanding issues and claims in this proceeding, it

does not constitute an initial decision under the Consolidated Rules.

IT IS SO ORDERED.

Dated this 30th day of June 2010.



MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

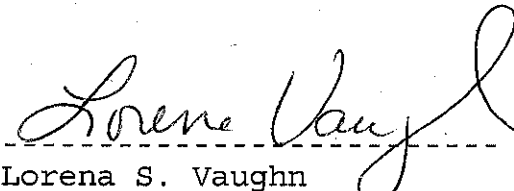
I, Lorena S. Vaughn, the Regional Hearing Clerk, do hereby certify that a true and correct copy of the foregoing Order Finding Respondent in Default and For Further Proceedings for Docket No. Class I - 06-2009-1815 was provided to the following persons on the date and in the manner stated below:

Mr. Richard O. Bertschinger
Bertschinger Oil Co.
6417 Grandmark Drive
Nichols Hills, OK 73116-6534

CERTIFIED MAIL

Edwin Quinones
U.S. Environmental Protection Agency
Office of Regional Counsel
1445 Ross Avenue
Dallas, Texas 75202-2733

HAND DELIVERED


Lorena S. Vaughn
Regional Hearing Clerk

6-30-10
Date

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