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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 6 REGIONAL HEARING CLERK EPA REGION VI DALLAS, TEXAS

In the matter of:

East Texas Salt Water Disposal Company Kilgore, Texas

RESPONDENT

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Docket No. CWA-06-2014-1751

RESPONDENT'S ANSWER TO ADMINISTRATIVE COMPLAINT AND REQUEST FOR HEARING

RESPONDENT'S ANSWER TO ADMINISTRATIVE COMPLAINT AND REQUEST FOR HEARING

COME NOW, East Texas Salt Water Disposal Company ("Respondent"), through its undersigned counsel, and files this Answer to Administrative Complaint and Request for Hearing in the above-captioned matter.

STATEMENT OF LEGAL AUTHORITY AND JURISDICTION

1. Respondent was served with an Administrative Complaint ("Complaint") in the above-captioned matter dated April 23, 2014, by Complainant, U.S. Environmental Protection Agency ("EPA") Region 6 ("Complainant"). The Regional Judicial Officer granted an initial unopposed request for an extension to move the deadline to file an answer and request a hearing in the above-captioned matter to August 18, 2014, in order to facilitate settlement negotiations. The Regional Judicial Officer granted a second unopposed request for an extension to move the deadline to November 17, 2014.

2. Respondent hereby files this Answer to Administrative Complaint and Request for Hearing ("Answer") to contest material facts alleged and the appropriateness of the proposed penalty in the Complaint.

3. This Answer is timely filed.

4. Accordingly, Respondent has timely filed this pleading, has standing and has answered and requested a hearing under the applicable procedures.

RESPONSE TO SECTION I OF ADMINISTRATIVE COMPLAINT

Section I of the Administrative Complaint is EPA's statement of its alleged statutory authority to bring the subject action, and thus requires no admission or denial from Respondent. To the extent that a response is necessary, Respondent denies that the Administrative Complaint qualifies as a Class II Administrative Complaint given that EPA states that this matter is not governed by Section 554 of the Administrative Procedure Act. Respondent further denies that (i) it violated the Clean Water Act and the regulations promulgated thereunder and (ii) it should be ordered to pay a civil penalty.

RESPONSES TO SPECIFIC ALLEGATIONS

Respondent responds below to the remainder of EPA's allegations in the Administrative Complaint. Respondent's responses are organized according to the same paragraph numbers used by EPA in the Administrative Complaint.

1. Admitted.

2. Respondent admits that it owned or operated salt water disposal facilities at all relevant times. Respondent is without knowledge regarding the Facility designations used by EPA, or whether such facility designations properly refer to Respondent's facilities, or whether the listed locations accurately refer to Respondent's facilities. Such allegations are thus deemed denied. Respondent notes that EPA lists two different locations for the same alleged facility: TXU011002. One or both locations must be described in error.

3. Denied.

4. Denied.

5. The first sentence of Paragraph 5 is EPA's statement of law that requires no admission, denial, or explanation, and, in the alternative, is denied. The Respondent denies EPA's assertion in the second sentence to Paragraph 5.

6. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 6, and thus they are deemed denied.

7. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 7, and thus they are deemed denied.

8. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 8, and thus they are deemed denied.

9. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 9, and thus they are deemed denied.

10. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 10, and thus they are deemed denied.

11. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 11, and thus they are deemed denied. Respondent notes that the location ascribed to the facility discussed in this Paragraph is different from the location ascribed to this same facility in Paragraph 9. One or both alleged locations must be described in error.

12. Paragraph 12 is EPA's statement of law that requires no admission, denial, or explanation, and, in the alternative, is denied.

13. Denied.

14. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 14, and thus they are deemed denied.

15. Respondent is without knowledge or information sufficient to form a belief as to the truth of the statements in Paragraph 15, and thus they are deemed denied.

16. Respondent denies that the penalty proposed by Complainant in Paragraph 16 is based in law and fact or is reasonable, for the reasons set forth herein. To the extent that additional response from Respondent is necessary, Respondent denies the statements in Paragraph 16.

17. Respondent denies that Complainant's proposed penalty was calculated in accordance with statutory factors under the Clean Water Act and applicable policy, for the reasons set forth herein.

18. Paragraph 18 states EPA's description of its enforcement specifications and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

19. Paragraph 19 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

20. Paragraph 20 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

21. Paragraph 21 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

22. Paragraph 22 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

23. Paragraph 23 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

24. Paragraph 24 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

25. Paragraph 25 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

26. Paragraph 26 states EPA's conclusions of law and its explanations of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

27. Paragraph 27 states EPA's conclusions of law and its explanation of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

28. Paragraph 28 contains EPA's statements of policy that require no admission, denial, or explanation, and, in the alternative, are denied.

29. Paragraph 29 states EPA's conclusions of law and its explanation of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

30. Paragraph 30 states EPA's conclusions of law and its explanation of EPA's policies that require no admission, denial, or explanation, and, in the alternative, are denied.

STATEMENT OF LEGAL DEFENSES

1. Respondent disputes that Respondent's facilities constitute "point sources."
2. Respondent disputes that its facilities were the source of the discharges or the pollutants that EPA allegedly observed.
3. Respondent disputes that any alleged discharges were into "waters of the United States."

4. Respondent disputes that EPA's alleged measurements of total soluble salts were accurate and reliable.

5. Respondent asserts that one or more of the discharges that EPA allegedly observed were caused by acts of God, acts of third parties for which Respondent is not responsible, and/or other causes for which Respondent is not responsible.

6. Although Respondent denies EPA's alleged violations, with respect to such alleged violations, EPA misstates the penalties EPA may seek to assess. In Paragraph 13, Complainant states that, under Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), as modified by 40 C.F.R. Part 19, Respondent is liable for a Class II penalty in an amount not to exceed \$16,000 per day for each day during which a violation occurs or continues, up to a maximum of \$187,500. In accordance with 40 C.F.R. Part 19, the maximum total Class II penalty for violations occurring through December 6, 2013, is \$177,500, while the maximum total Class II penalty for violations occurring after December 6, 2013 is \$187,500. In Paragraphs 6 through 11 of the Complaint, Complainant states that the alleged violations occurred on May 17, 2013; June 26, 2013; August 6, 2013; and August 7, 2013. As all alleged violations occurred before December 6, 2013, the EPA misstates the maximum total Class II penalty that EPA theoretically could seek, which is limited to \$177,500. 78 Fed. Reg. 66643 (November 6, 2013). In addition, given that EPA has alleged six discrete unauthorized discharges, at \$16,000 per event, the maximum penalty that EPA could recover in a Class II administrative proceeding is \$96,000. However, this is not a Class II penalty proceeding, and Complainant's application of Class II penalties to Respondent's alleged violations is inappropriate. In Section I and Paragraphs 13 and 18 of the Complaint, Complainant indicates its intent to assess penalties in accordance with Section 309(g)(2)(B) of the Clean Water Act and rules related to administrative

proceedings *not* governed by Section 554 of the Administrative Procedure Act, 40 C.F.R. §§ 22.50 through 22.52. Under both the Clean Water Act and implementing regulations the assessment of Class II penalties *are* governed by Section 554 of the Administrative Procedure Act. 33 U.S.C. § 1319(g)(2)(B). Pursuant to 33 U.S.C. § 1319(g)(2)(A) and 40 C.F.R. § 22.50, only a Class I penalty is not subject to Section 554 of the Administrative Procedure Act. As the Complainant states in Paragraph 18 that EPA has elected that these proceedings shall not be governed by Section 554 of the Administrative Procedure Act, Complainant may only pursue the assessment of Class I penalties. Accordingly, in accordance with 40 C.F.R. Part 19, the maximum total Class I penalty that EPA may pursue, with respect to its alleged violations, is \$37,500.

7. In Paragraph 16, Complainant proposes to assess Respondent a penalty of \$100,100. As explained above, and subject to Respondent's denial of the alleged violations, based on Complainant's averments that these proceedings are not subject to Section 554 of the Administrative Procedure Act, Complainant may seek the assessment only of Class I penalties, with the maximum total Class I penalty being \$37,500. Moreover, based on EPA's allegations, the proposed penalty is excessive, unreasonable, and not in accordance with the prescribed statutory factors and EPA's Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) ("Penalty Policy"). As such, Respondent's proposed penalty assessment is not based in law or fact and is unreasonable.

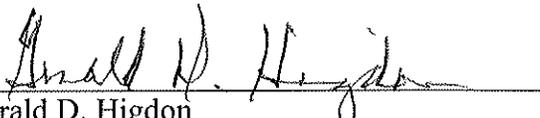
8. Respondent reserves the right to assert other defenses to the Administrative Complaint in the future.

PRAYER FOR RELIEF

1. WHEREFORE, Respondent prays for the following relief:
 - a. A hearing on the matters addressed in the Administrative Complaint and this Answer;
 - b. A declaration that the penalty proposed in the Complaint is invalid for the reasons set forth in this answer; and
 - c. Such other relief as the Presiding Officer deems appropriate.

Respectfully Submitted,

LOCKE LORD LLP


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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, RESPONDENT'S ANSWER TO ADMINISTRATIVE COMPLAINT AND REQUEST FOR A HEARING was sent to the following persons, in the manners specified:

Original and one copy via courier:

Regional Hearing Clerk (6RC-D)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

One copy via CMRRR and e-mail:

Ms. Ellen Chang-Vaughan (6RC-EW)
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
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e-mail: Chang-Vaughan.Ellen@epa.gov



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