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7 UNITED STATES
8 ENVIRONMENTAL PROTECTION AGENCY
9 BEFORE THE ADMINISTRATOR

10 In the Matter of:

11 JOSEPH OH

12 and

13 HOLLY INVESTMENT, LLC

14 Respondents.
15

Docket No. RCRA-10-2011-0164

**REOPEN CASE AND SET ASIDE
DEFAULT ORDER OF AUGUST 3, 2012**

16
17 **RELIEF REQUESTED**

18 1. Joseph Oh and Holly Investment, LLC pursuant to 40 C.F.R. § 22.27(c)(1)(3)
19 moves the United States Environmental Protection Agency before the administration to one,
20 reopen the case as captioned above and two, move to set aside Default Order that constitutes
21 an initial decision.
22

23 2. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order
24 forty-five (45) days after its service upon the parties. The Respondents Motion is based on
25 F.R.C.P. 60(b) relief is requested on the basis of excusable neglect.
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BACKGROUND AND FACTS

3. Joseph Oh and Holly Investment, LLC will not recite the background and facts for the purpose of this motion. Attached herein by reference are the Default Order and Initial Decision which include 13 pages, pages 1 through 7 are an accurate recital of the facts which demonstrate neglect and inadvertence by Respondent from EPA request timelines and remittance of papers and pleadings. It appears from the record Respondents are in default for good cause.

4. It also appears from the record that Mr. Joseph Oh and Holly Investment, LLC were completely disconnected from the hearing deadlines and phone conferences. The majority of the communication was transmitted through Mr. Tift and later through the chapter 11 bankruptcy attorney but almost never directly with the Respondent Joseph Oh. ¹

5. Mr. Joseph Oh speaks very little English, although Mr. Tift can understand what Mr. Oh is saying it typically requires a translator to interpret what Tift or others and trying to communicate. This is typically not a problem when significant lead time is granted but it creates difficulties when a response is needed on any shortened time scenario. The Court should reopen the case and vacate the Order of Default for the reasons demonstrated as set forth below.

6. Mr. Joseph Oh is a Korean immigrant who speaks limited English. From the period of November 13, 2009 to May 14, 2012 Joseph Oh did not operate the Grocery and Deli that covered the two underground storage tanks. The store was operated by Helen and Chan Ho a management team who were eager to purchase the Grocery and Deli. The facts stated in the Declaration of Joseph Oh that Helen Ho and Chan Ho kept the EPA warning and

¹ The EPA did transmit by electronic means all requests and timelines as well as by mail it appears from the record

1 notices originally hidden from Joseph Oh as well as other critical business operations that
2 resulted in much of Mr. Oh's financial instability and eventually lead to him filing personal
3 bankruptcy and bankruptcy on multiple corporations of his.

4 7. Upon receipt of the EPA Complaint Mr. Oh directed Helen Ho to work with Mr.
5 Tift to attempt to satisfy the requirements of the EPA Complaint.² It appeared the corrections
6 were in the near future as stated by Helen and Chan Ho the management team in place at the
7 Grocery and Deli. The management team reassured Mr. Oh and Mr. Tift that corrections were
8 to be made and that passing the leak test would be possible, also the five corrections of
9 violations of Section 9003 of the Solid Waste Disposal Act would be handled. The buck was
10 passed and a company was hired and contracted resulting in some of the violations being
11 corrected. The evidence of those corrected violations was never presented to the EPA because
12 the Grocery and Deli and Mr. Oh could never tender payment to the correction company NW
13 Tank and Environmental Services Inc. This action severally prejudiced the Respondent as
14 they could not complete payment to secure proof that some corrections were in fact resolved
15 (attached as **exhibit B** is true and accurate correspondence between NW Tank and
16 Environmental Services Inc. and Respondent).

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20 8. On March 21, 2012 Respondent Mr. Oh was forced to file personal bankruptcy
21 chapter 11.

22 9. The chapter 11 bankruptcy brought about a new set of problems for Mr. Oh as all
23 expenses and professional fees need to be pre approved by the Court, this further tightened
24 Mr. Oh's ability to respond and participate in the EPA Complaint.
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28 ² Mr. Tift and Mr. Oh are hotel partners on the Rainer Inn.

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EVIDENCE RELIED UPON

16. The Declaration of Gregory Tift, the Declaration of Joseph Oh, the Exhibits herein, and the case file itself.

AUTHORITY AND ARGUMENT

RESPONDENT SEEKS RELIEF FROM JUDGMENT ON GROUNDS OF EXCUSABLE NEGLIGENCE

Respondents are Entitled to Relief From the Order of EPA Based Upon Mistake, Inadvertence and Excusable Neglect.

17. Default judgments are not favored in law. As such, CR 60(b)(1) provides that the Court may set aside any order or final judgment obtained as a result of mistake, inadvertence, or excusable neglect.³

18. In ruling on an F.R.C.P. 60(b) motion, the Court should exercise its authority liberally to preserve the substantial rights of the parties and to ensure that justice is done.

19. In ruling on a motion to set aside a judgment, the Court considers four facts: 1) whether there is evidence to support a defense to the claim; 2) failure to respond was occasioned by mistake, inadvertence, surprise or excusable neglect; 3) the moving party acted with due diligence after notice of the default judgment; and 4) no hardship will result to the opposing party. Under all four elements the facts of this case favor an order to vacate judgment and allow Respondent to apply for waiver of penalty inability to pay.

20. Excusable neglect is an equitable determination, and requires the court to take into account all of the relevant circumstances, including the reason for delay, the length of the delay and its potential impact on the proceedings, the danger of prejudice to the nonmoving

³ Respondent has cited Federal Rules of Civil Procedure in their Motion as the Plaintiff is the United States EPA (US Government Plaintiff)

1 party, and whether the moving party acted in good faith. *Pioneer Investment Servs. Co. v.*
2 *Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993). In Oh's case the factors weigh
3 in favor of an order to reopen the hearing and set aside default for the purpose of setting aside
4 the penalty of \$48,078.00.

5 A. Respondent meets the criteria of whether there is evidence to support a
6 defense to the claim. Respondent Mr. Oh is in bankruptcy so clearly there is
7 evidence that Respondents insolvency should be considered to reduce or
8 eliminate the penalty.

9 B. The facts demonstrate as stated in the foregoing that meet the criteria that
10 Respondents failure to respond was occasioned by mistake, inadvertence,
11 surprise, or excusable neglect.

12 C. The Respondent acted with due diligence after Notice of Default. Upon being
13 notified of the default Respondent immediately filed the initial pleading to
14 reopen the case on August 17, 2012. The Respondent moved quickly to file
15 this motion and to clarify the record.

16 D. Prejudice to opposing parties and prejudice to Respondent. There is no
17 prejudice to either party as the EPA mission statement ⁴ and the Default
18

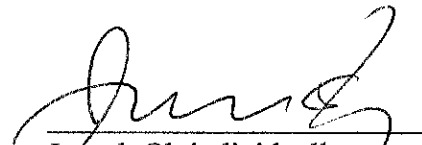
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23 ⁴ Our Mission. The mission of EPA is to protect human health and the environment. EPA's purpose is to ensure
24 that: all Americans are protected from significant risks to human health and the environment where they live, learn
25 and work; national efforts to reduce environmental risk are based on the best available scientific information;
26 federal laws protecting human health and the environment are enforced fairly and effectively; environmental
27 protection is an integral consideration in U.S. policies concerning natural resources, human health, economic
28 growth, energy, transportation, agriculture, industry, and international trade, and these factors are similarly
considered in establishing environmental policy; all parts of society – communities, individuals, businesses, and
state, local and tribal governments – have access to accurate information sufficient to effectively participate in
managing human health and environmental risks; environmental protection contributes to making our communities
and ecosystems diverse, sustainable and economically productive; and the United States plays a leadership role in
working with other nations to protect the global environment.

1 Order are not compromised by an order reopening and setting aside the default of the penalty
2 only. The Respondent as demonstrated is in chapter 11 reorganization bankruptcy which
3 includes the Grocery and Deli. Respondent is actively executing the compliance order (page
4 12 ¶ 1 through 9).

5 **CONCLUSION**

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7 20. Pursuant to 40 C.F.R. § 22.16(a) and § 22.28(a) good cause and supporting
8 evidence exists to reopen the case and set aside default. Respondent takes the position that the
9 proposed penalty should be reduced or eliminated or inability to pay. Respondent's Motion
10 should be approved and there is no just reason to deny.
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15 Submitted this 16th day of September 2012

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19 Joseph Oh individually
20 FBO Holly Investment, LLC
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CERTIFICATE OF SERVICE

In the Matter of Joseph Oh and Holly Investment, LLC, No. RCRA-10-2011-0164, I hereby certify that a copy of Reopen Case and Set Aside Default Order was sent to the following persons in the manner specified on the date below:

A true and correct copy of each document, by mail and electronic mail to

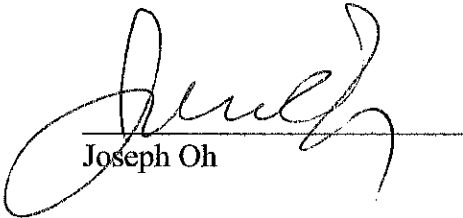
Deborah Hillsman
U.S. Environmental Protection Agency, Region 10
Office of Compliance and Enforcement
1200 Sixth Avenue, Suite 900
Mailstop: OCE-082
Seattle, WA 98101

Candace Smith, Regional Hearing Clerk
U.S. EPA Region X
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Katherine Griffith, Compliance Officer
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Mailstop: OCE-082
Seattle, WA 98101

Honorable M. Lisa Buschmann, Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Mail Code 1900 L
Washington, DC 20460

Dated: 09/17/2012



Joseph Oh

