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LETTER TO DALLAS JOLLEY BANKRUPTCY ATTORNERY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
REGIONAL COUNSEL

July 12, 2012

Via Electronic Mail: dallas@jolleylaw.com

COPY

Dallas W. Jolley, Jr.
Attorney at Law
4707 S Junett St Ste B
Tacoma, Washington 98409

Re: In the Matter of: Joseph Oh and Holly Investment, LLC
EPA Administrative Complaint and Compliance Order
Docket No. RCRA-10-2011-0164

Dear Mr. Jolley:

This letter is in follow-up to our telephone conversation on June 19, 2012, concerning the U.S. Environmental Protection Agency (EPA) administrative hearing against Joseph Oh and Holly Investment, LLC scheduled to begin on August 14, 2012. As I indicated during our telephone conversation, EPA filed an Administrative Complaint and Compliance Order against Mr. Oh and Holly Investment, LLC on September 28, 2011, alleging violations of federal underground storage tank (UST) requirements at the Totem Grocery & Deli (facility). During our conversation, you asked me what needs to be done to bring the USTs at the facility into compliance. Following is a brief summary of the actions that must currently be taken to bring the USTs at the facility into compliance with UST requirements. This summary is based on the information EPA has concerning the current status of the USTs at the facility – that the 8,000 gallon tank (Tank #1) is currently being used and the 10,000 gallon tank (Tank #2) has not been used since about August 2009 and may currently be empty.

The UST Piping for Tanks #1 and #2 Must be Upgraded by Assuring that the Metal Flex Connectors in the Turbine Sumps for each UST is Protected from Corrosion

Although the UST piping at the facility is primarily constructed of fiberglass-reinforced plastic, the flex connectors on the sections of piping in each of the turbine sumps and at each of the dispensers is made up of metal that is in contact with the ground. The piping upgrade requirements in 40 C.F.R. § 280.21(c) state that metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a nationally recognized association or independent testing laboratory and must meet the requirements of § 280.20(b)(2)(ii), (iii), and (iv). 40 C.F.R. § 280.20(b)(2) describes the methods that can be used to provide corrosion protection for metal piping in new UST systems, and allows the use of field-installed cathodic protection systems designed by a corrosion expert under § 280.20(b)(2)(ii), impressed current systems designed to allow determination of current operating status under§ 280.20(b)(2)(iii), and cathodic protection systems operated and

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the diameter of Tank #1 is 95 inches and therefore, the minimum level of product to conduct a valid leak test is about 17 inches. Mr. Oh's representative has informed EPA that Mr. Oh has been unable to fill Tank #1 to the minimum level needed to obtain valid leak tests. However, during the September 14, 2009 inspection, the EPA inspector observed that the three ATG leak test report slips provided for Tank #1 showed failures for all three leak tests even when the tank contained greater than the 17 inches of product needed to conduct a valid leak test. This reflects that there may be some other problem besides too little fuel in the tank. The facility must assure that it follows the other requirements for conducting a valid leak test described in the summary (e.g., waiting time, test period, etc.), in addition to having at least 17 inches of product in the tank. If all the requirements for conducting a valid test are being followed, but the ATG is still showing failed leak tests, then further investigation of Tank #2's leak test failures may be warranted (including, but not limited to, following the release investigation and confirmation steps described in 40 C.F.R. § 280.52).

There are other methods that can be used to meet the tank release detection requirements besides the use of an ATG. One method that does not require a minimum level of product in the tank is "Statistical Inventory Reconciliation" (SIR). This method would require the facility to send inventory data to a SIR service provider to conduct a leak analysis. The SIR data analysis must be completed using the required data from the facility every 30 days and the analysis must show passing results. Also, a copy of each report must be maintained for at least one year. You should note that there is an initial start up cost and a monthly service fee for this service.

The 10,000 gallon UST (Tank #2) Must be Permanently Closed Unless an Extension is Applied for and Granted

Pursuant to 40 C.F.R. § 280.70(a), release detection is not required for a tank that is temporarily closed and is empty (i.e., contains no more than one inch of residue). That may be the current status of Tank #2, though a contractor from Northwest Tank & Environmental Services, Inc. reported in August 2011 that the unused tank (Tank #2) had 3.5 inches of product at the bottom that needed to be pumped out. However, whether Tank #2 is empty or not for release detection purposes may no longer matter because this UST is now subject to permanent closure requirements. Information provided by facility representatives reflect that Tank #2 has been temporarily closed since August 2009, and 40 C.F.R. § 280.70(c) requires that any UST that is not upgraded to meet the new UST performance standards must be permanently closed after 12 months. Because the piping connected to Tank #2 is not cathodically protected at the turbine sump, this UST does not meet the new performance standards and is considered to be a substandard UST. Because this substandard UST has been temporarily closed for more than 12 months, it must now be permanently closed in accordance with §§ 280.71–280.74, unless the implementing agency (in this case, EPA) provides an extension of the 12-month temporary closure period. As also reflected in 40 C.F.R. § 280.70(c), owners and operators must complete a site assessment in accordance with § 280.72 before such an extension can be applied for. Therefore, EPA would not consider extending the time for Tank #2 to remain in temporary closure unless a site assessment is conducted and Mr. Oh (or any successor in interest to the UST) applies for an extension.

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maintained in accordance with § 280.31 or guidelines established by the implementing agency under § 280.20(b)(2)(iv).

Facility records reflect that in 2003, sacrificial anodes were installed and tested at the facility providing corrosion protection for the metal flex connectors at each of the two dispensers. But there is no evidence that sacrificial anodes or any other form of corrosion protection has ever been installed or otherwise provided for the metal flex connectors at each of the two turbine sumps. One option for correcting this violation is to have sacrificial anodes installed at the turbine sumps similar to what was done for the metal flex connectors at the dispensers, with follow-up testing six months after installation and every three years thereafter. Another option is to isolate the metal flex connectors from the ground by having a "boot" installed. These are just two options, among those available to correct the problem. Mr. Oh should contact a qualified service provider or consultant to determine the best way to provide corrosion protection for the metal flex connectors in the turbine sumps at the facility and to assure that the work is conducted by persons who are qualified to conduct the work. EPA must be provided with documentation that the work has been completed including test results, when applicable. This is a longstanding violation of the UST regulations that must be corrected immediately for the piping for both USTs at the facility unless the USTs are permanently closed in accordance with EPA regulations in 40 C.F.R. §§ 280.71 - 280.74.

The Tank(s) Must be Monitored for Releases Every 30 Days as Documented by Passing Leak Test Reports from the Automatic Tank Gauge

40 C.F.R. § 280.41(a) requires that tanks be monitored at least every 30 days for releases using one of the methods described in 40 C.F.R. § 280.43(d) through (h). The release detection method the facility uses is an Incon TS 1000, which is a type of automatic tank gauge (ATG). ATGs are described in 40 C.F.R. § 280.43(d). Under § 280.43(d)(1) an ATG's automatic product level monitor test must be able to detect a 0.2 gallon per hour leak rate from any portion of the tank that routinely contains product. A leak test must be conducted at least every 30 days and a passing result must be obtained in order to meet the monthly release detection requirement. Also a copy of each leak test must be maintained for at least one year pursuant to the recordkeeping requirements in 40 C.F.R. § 280.45. As reflected in the discussion of Tank #2 on p.3 below, release detection is not required for empty USTs that have been placed in temporary closure.

From a review of the facility's records, it is apparent that the facility has not obtained passing monthly leak tests for either tank since at least September 18, 2008, and this is a violation of the release detection requirements of 40 C.F.R. § 280.41(a). Mr. Oh should consult with a qualified service provider or other consultant to determine the reason he has been unable to obtain monthly passing leak tests from his ATG. A third-party evaluation of the Incon TS-1000 establishes the requirements for using this type of ATG to meet the release detection requirement. A summary description of the third party evaluation published by the National Work Group on Leak Detection Evaluations (NWGLDE) is enclosed with this letter. As reflected in the summary, a minimum product level is required when conducting the monthly leak test and this minimum level is based on the diameter of the tank. Facility records indicate

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These are the primary compliance issues that Mr. Oh and Holly Investment, LLC must address in order to bring the USTs at the facility into compliance with the UST regulations. However, you should note that annual line tightness testing and automatic line leak detector testing for each UST is due again in August 2012, along with renewal of the insurance policy by November 2012. Further, annual certification and other requirements contained in the ATG manufacturer's instructions must also be complied with.

Please contact me at 206-553-1810 or at hilsman.deborah@epa.gov if you have any questions concerning this letter or if you decide to represent Mr. Oh and Holly Investment, LLC in the EPA administrative enforcement action. It is not too late to attempt to negotiate a settlement of the EPA case prior to the administrative hearing, but the window of opportunity to do so is quickly closing. Meanwhile, the parties must continue to prepare for the hearing in Seattle beginning on August 14th and proceeding, as needed, through August 17th, in accordance with the Administrative Law Judge's orders.

Sincerely,

Deborah E. Hilsman
Assistant Regional Counsel

Enclosure

cc: w/enclosure via email:

Joseph Oh
Greg Tift
Brad Goergen, Graham & Dunn, P.C. (Attorney for Saehan Bank)
Katherine Griffith, EPA

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

COPY

In the Matter of:	)	
	)	
Joseph Oh	)	
	)	
and	)	**Docket No. RCRA-10-2011-0164**
	)	
Holly Investment, LLC	)	
	)	**Dated: August 21, 2012**
Respondents.	)	

ORDER ON RESPONDENT'S SUBMISSION DATED AUGUST 17, 2012 AND NOTICE OF DEADLINE SET BY 40 C.F.R. § 22.27(c)

On August 3, 2012, a Default Order and Initial Decision was entered against the Respondents in this matter and served on all parties. On August 20, 2012, the undersigned received a document from Respondents captioned: "Reopen Case and Set Aside Default Order of August 3, 2012." The document is dated August 17, 2012. In the document, Respondents state that they move "to one, reopen the case . . . and two, move to set aside Default Order [sic] that constitutes an initial decision[.]" Reopen Case and Set Aside Default Order of August 3, 2012 at 1. Respondents then quote language from 40 C.F.R. §§ 22.27 and 22.28, and close the document with the following statement: "Within 15 days Joseph Oh will submit additional information as requested and present good cause to reopen case [sic]." *Id.* at 2.

Under the applicable procedural rules, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules"), the Default Order and Initial Decision "shall become a final order 45 days after its service upon the parties . . . ." 40 C.F.R. § 22.27(c). In this case, the Default Order and Initial Decision will become final on September 17, 2012. However, a party may prevent a decision from becoming final by, *inter alia*, filing a motion "to reopen the hearing" or a motion "to set aside" a default order. 40 C.F.R. § 22.27(c).

Under the Rules, all motions not made orally on the record at hearing must "[s]tate the grounds therefor, with particularity" and "[b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." 40 C.F.R. § 22.16(a). Similarly, a motion to reopen a hearing must "state the specific grounds upon which relief is sought." 40 C.F.R. § 22.28(a). Respondents' August 17, 2012 document does not provide any factual grounds to support the requested relief, but instead indicates that such grounds will be provided in a later filing. It

In the Matter of Joseph Oh and Holly Investment, LLC, Respondents
Docket No.RCRA-10-2011-0164

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Order On Respondent's Submission Dated August 17, 2012 And Notice Of Deadline Set By 40 C.F.R. § 22.27(c)**, issued by M Lisa Buschmann, Administrative Law Judge, in Docket No. RCRA-10-2011-0164, were sent to the following parties August 21, 2012, in the manner indicated:

Maria Whiting - Desk for
Knolyn Jones
Legal Staff Assistant

Original and One Copy By Regular Mail To:

Candace Smith
Regional Hearing Clerk
U.S. EPA, Region X
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

Copy By Regular Mail And E-Mail To:

Deborah E. Hilsman, Esquire
Assistant Regional Counsel
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Greg Tift
Email: ipwcci@mail.lawguru.com

therefore does not satisfy the criteria for a motion set forth in 40 C.F.R. § 22.16(a) or 22.28(a), and does not have the legal effects identified in 40 C.F.R. § 22.27(c)(1)–(4).

Accordingly, the relief requested in the Respondents' submission dated August 17, 2012 is hereby **DENIED.** Respondents may renew their request by filing a motion, in accordance with the Rules, to set aside the Default Order and Initial Decision before it becomes final on September 17, 2012.

The parties are hereby notified that, absent an appropriate motion submitted in accordance with the Rules, or an action by the Environmental Appeals Board in this matter, the Default Order and Initial Decision served on August 3, 2012 will become a final order on September 17, 2012.

M. Lisa Buschmann
Administrative Law Judge

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of: JOSEPH OH and HOLLY INVESTMENT, LLC Respondents.	Docket No. RCRA-10-2011-0164 **REOPEN CASE AND SET ASIDE DEFAULT ORDER OF AUGUST 3, 2012**

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

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals

Joseph Oh
4905 70th Ave W
University Place, WA 98466

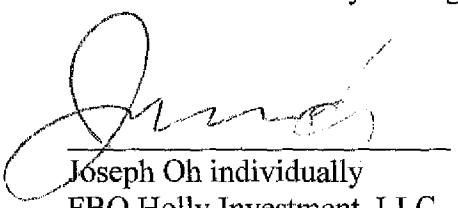
Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 220.30(b).

Pursuant to 40 C.F.R. § 22.28(b)

> *Disposition of motion to reopen a hearing. Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.*

Within 15 days Joseph Oh will submit additional information as requested and present good cause to reopen case.

Submitted this 17th day of August 2012



Joseph Oh individually
FBO Holly Investment, LLC