



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
1595 WYNKOOP STREET
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

December 14, 2007

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Dave Williams, Manager
West Dakota Service
202 Frontage Road
New Town, ND 58763

Re: In the Matter of the Three Affiliated Tribes and Yolanda Bears
Tail, Individually, White Shield Ree Store Facility
Docket No. **RCRA-08-2008-0003**
Complaint and Notice of Opportunity for Hearing

Dear Mr. Williams:

The U.S. Environmental Protection Agency Region 8 (EPA) is issuing you, individually, and the Three Affiliated Tribes (Tribes) the enclosed Complaint and Notice of Opportunity for Hearing (Complaint) for alleged underground storage tank (UST) violations at the West Dakota Service facility (facility) in New Town, North Dakota. The Complaint is issued pursuant to section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e.

EPA alleges in the Complaint that the Tribes as facility owner, and you as facility operator, failed to comply with the federal UST regulations codified at 40 C.F.R. Part 280, subpart D, for three USTs located at the facility in violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c). Specifically, the Complaint alleges failure to provide adequate release detection method as required by 40 C.F.R. § 280.40(a). EPA proposes a total penalty of \$13,369 for the violations alleged.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an Answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file a written Answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:



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

If you do not file an Answer by the applicable deadline, you will have defaulted and each allegation in the Complaint may be deemed to be admitted as true. You will have waived your right to appear in this action for any purpose and will also have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the presiding officer may then find you liable and assess against you a civil penalty of up to \$11,000 for each tank for each day of violation.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people on my staff regarding this matter are Amy Swanson and Francisca Chambus. Ms. Swanson is in our Legal Enforcement Program and can be reached at (303) 312-6906. Ms. Chambus is in our Underground Storage Tank Program and can be reached at (303) 312-6782.

We urge your prompt attention to this matter.

Sincerely,



Sharon Kercher, Director
Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

Consolidated Rules of Civil Practice, 40 C.F.R. Part 22
Complaint and Notice of Opportunity for Hearing, with Exhibits 1 and 2

cc w/ all enclosures:

Marcus Wells, Jr., Chairman
Fort Berthold Tribal Business Council
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763

Elton Spotted Horse, Director
Environmental Division
Three Affiliated Tribes
204 W. Main Street
New Town, ND 58763

Delvin Wolf, UST Technician
Environmental Division
Three Affiliated Tribes
204 W. Main Street
New Town, ND 58763

Damon Williams, Attorney
Legal Department
Three Affiliated Tribes
404 Frontage Road
New Town, ND 58763

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 DEC 14 10 11 AM

IN THE MATTER OF:)	Docket No. RCRA-08-2008-0003
)	
The Three Affiliated Tribes)	COMPLAINT AND NOTICE OF
and Dave Williams, individually,)	OPPORTUNITY FOR HEARING
)	
(West Dakota Service)	
211 Main Street,)	
New Town, ND 58763))	
EPA ID Number 3010011))	
)	
Respondents.)	

AUTHORITY

This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency (EPA) by section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e. The Administrator has properly delegated this authority to the undersigned EPA officials. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules) set forth at 40 C.F.R. Part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

1. Subtitle I of RCRA, RCRA §§ 9001 - 9010, 42 U.S.C. §§ 6991 - 6991i, authorizes EPA to regulate the installation and use of “underground storage tanks” which contain “regulated substances.”
2. EPA has jurisdiction over this matter pursuant to RCRA § 9006, 42 U.S.C. § 6991e.

3. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes EPA to promulgate regulations setting forth requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment. EPA has promulgated such regulations at 40 C.F.R. Part 280, subpart D.

4. Petroleum, and any fraction thereof, is a regulated substance as defined at RCRA § 9001(2), 42 U.S.C. § 6991(2).

5. EPA is the “implementing agency” as that term is used at 40 C.F.R. § 280.12.

6. The Three Affiliated Tribes and Mr. Dave Williams (hereafter referred to collectively as “Respondents”) own and/or operate three STIP 3 tanks installed at West Dakota Service in June 1989. West Dakota Service is a former gas station and convenience store owned by the Three Affiliated Tribes and operated by Mr. Williams located at 211 Main Street, New Town, ND, within the exterior boundaries of the Fort Berthold Indian Reservation. The Three Affiliated Tribes use the underground storage tanks at West Dakota Service to store fuel for the Tribes’ fleet vehicles. One 4,000 gallon tank contains diesel, one 8,000 gallon tank contains premium unleaded gasoline, and one 8,000 gallon tank contains unleaded gasoline.

7. Respondent Three Affiliated Tribes is a “municipality” and therefore a “person” as defined by section 1004 of RCRA, 42 U.S.C. § 6903.

8. Respondent Dave Williams, Manager of the West Dakota Service, is a “person” as defined by section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

9. Respondents are “owners” or “operators” within the respective meanings of RCRA §§ 9001(3) and (4), 42 U.S.C. §§ 6991(3) and (4), and 40 C.F.R. § 280.12, of three “underground storage tank systems” (“USTs” or “tanks”) as defined by RCRA § 9001(10), 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.

10. Respondents’ tanks meet the performance standards for new USTs described in 40 C.F.R. § 280.20.

11. Respondents were provided advance notice of a planned UST inspection at the facility by an EPA representative at least four working days prior to the inspection. Facility representative Dave Williams was provided a list of documents that needed to be available on site for the inspection, including but not limited to the last 12-months of leak detection records.

12. On June 7, 2005, EPA inspector Christopher Guzzetti (the inspector), accompanied by Delvin Wolf, Three Affiliated Tribes UST Coordinator, conducted an inspection at the facility with the consent of the facility representative Mr. Dave Williams to determine compliance with RCRA Subtitle I and the EPA regulations relating to USTs.

13. The facility uses automatic tank gauging (ATG) as the leak detection method for the tanks.

14. At the time of the inspection, the facility did not have monthly monitoring leak detection records available for the tanks for the last 12 months. The facility representative stated that the tanks need to be at least 60 percent full in order for the ATG

to perform a valid leak test, and to run a leak test the Tribe would have to purchase more fuel than they need.

15. At the conclusion of the inspection, the inspectors informed the facility representative that the facility was out of compliance and explained the violations. The inspectors completed a “Notice of Inspection” form which was signed by and left with the facility representative.

16. Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), states in pertinent part that any owner or operator of an UST who fails to comply with any requirement or standard promulgated by the Administrator under section 6991b of this title shall be subject to a civil penalty not to exceed \$11,000 for each tank for each day of violation.

17. As alleged herein and pursuant to section 9006(d)(2) of RCRA, 42 U.S.C. 6991e(d)(2), and 40 C.F.R. § 19.4, Respondents are liable for civil penalties up to \$11,000 per day per tank during which the violation continues.

18. Paragraphs 1 through 18 are incorporated by reference in the count listed below as fully recited herein.

COUNT 1
Failure to provide adequate leak detection

19. In accordance with 40 C.F.R. § 280.40(a), owners and operators of new and existing UST systems must provide a method, or a combination of methods, of leak detection that: (1) can detect a release from any portion of the tank and the connected underground piping that routinely contains product; (2) is installed, calibrated, operated, and maintained in accordance with the manufacturer’s instructions, including routing

maintenance and service checks for operability or running condition; and (3) meets the performance requirements in 40 C.F.R. §§ 280.43 or 280.44.

20. By not maintaining 60 percent or more fuel in the tanks, Respondents were unable to perform valid leak tests on tanks 1, 2 and 3 using ATG for the 12 month period prior to the inspection in June 2005, and continuing.

21. Respondents' failure to provide adequate leak detection for the three (3) UST systems beginning June 2004 constitutes a continuing violation of 40 C.F.R. § 280.40(a)(2) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

PROPOSED CIVIL PENALTY

RCRA § 9006(d)(2)(C), 42 U.S.C. § 6991e(d)(2)(C), authorizes the assessment of a civil penalty of up to \$11,000 for each UST for each day of violation. Based upon the facts alleged in this Complaint and taking into account the factors prescribed by statute, i.e., the seriousness of the violations and any good faith efforts by Respondents to comply with the applicable requirements, Complainant proposes to assess a civil penalty of \$13,369 as follows:

COUNT	VIOLATION	PROPOSED PENALTY
Count 1	Failure to provide adequate leak detection, 40 C.F.R. § 280.40(a)(2)	\$13,369

TOTAL PROPOSED PENALTY: \$13,369

The proposed civil administrative penalty above has been calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990) (Exhibit 1). This policy is used by EPA to provide a rational and consistent

application of the statutory factors to the facts and circumstances of a specific case. The Penalty Calculation Worksheets for the alleged RCRA UST violation in support of the assessment of civil penalties proposed in this Complaint are attached hereto (Exhibit 2).

TERMS OF PAYMENT

If Respondents do not contest the findings and penalty proposal set forth above, this action may be resolved by paying the proposed penalty in full. If such payment is made within thirty (30) calendar days of receipt of this Complaint, then no Answer need be filed. For more time for payment, Respondents may file a statement agreeing to pay the penalty within thirty (30) days of receipt of the Complaint, then pay the money within sixty (60) days of such receipt. Payment is to be made by sending a certified or cashier's check payable to "Treasurer, United States of America," to:

EPA Region 8
(Regional Hearing Clerk)
Mellon Bank
P.O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to:

Amy Swanson, Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8 (8ENF-L)
1595 Wynkoop Street
Denver, Colorado 80202-1129

Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in RCRA § 9006(b), 42 U.S.C. § 6991e(b), a respondent has the right to request a public hearing within thirty (30) calendar days after this Complaint is served.

If you (1) contest the factual claims made in this Complaint; (2) wish to contest the appropriateness of the proposed penalty; or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with 40 C.F.R §§ 22.15 and 22.37 within thirty (30) calendar days after this Complaint is received.

Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state all facts and circumstances, if any, which constitute grounds for defense; (3) state the facts intended to be placed at issue; and (4) specifically request an administrative hearing, if desired. The denial of any material fact or the raising of any affirmative defense in your Answer shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this Complaint constitutes an admission of the undenied allegations.

The answer and one copy must be sent to the EPA Region 8 Regional Hearing Clerk (8RC), 1595 Wynkoop St., Denver, Colorado 80202-1129, and a copy must be sent to the enforcement attorney listed below.

IF YOU FAIL TO REQUEST A HEARING, YOU MAY WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

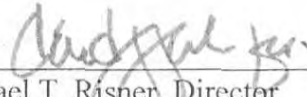
IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

SETTLEMENT CONFERENCE

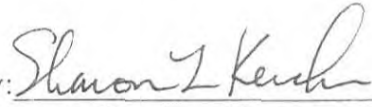
EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set forth above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in 40 C.F.R. Part 22. If a settlement can be reached, its terms shall be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the regional judicial officer. A request for a settlement conference or any questions that you may have regarding this Complaint should be directed to the attorney listed below.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

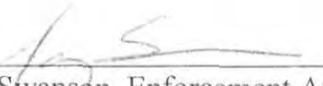
Date: 13 December 2007

By: 
Michael T. Risner, Director
Legal Enforcement Program

Date: 14 December 2007

By: 
Sharon L. Kercher, Director
Technical Enforcement Program

Date: December 14, 2007

By: 
Amy Swanson, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop St. (8ENF-L)
Denver, CO 80202-1129
Telephone: 303/312-6906
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits 1 and 2 were hand-carried to the Regional Hearing Clerk, EPA, Region 8, 1595 Wynkoop Street, Denver, Colorado, and that a true copy of the same was mailed by certified mail to:

Marcus Wells Jr., Chairman
Fort Berthold Tribal Business Council
404 Frontage Road
New Town, ND 58763

and to:

Dave Williams, Manager
West Dakota Service
202 Frontage Road
New Town, ND 58763

Date: 12 | 17 | 07

By: Judith M. McTernan