UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	)	
	)	
Stockton Oil Company, Inc.	)	
	)	
Battlefield Express Center Facility	)	
Crow Agency, MT 59022	)	**Docket No. RCRA-08-2008-0007**
	)	
EPA ID NO. 2020002,	)	
	)	
Respondent.	)	
	)	

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, also known as the Underground Storage Tank Program. 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" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

BACKGROUND

On July 15, 2007, the United States Environmental Protection Agency, Region 8 ("Complainant" or "EPA") filed a Complaint and Notice of Opportunity for Hearing charging Respondent, Stockton Oil Company, Inc. ("Stockton" or "Respondent"), with violations of RCRA and the regulations at 40 CFR Part 280, Subpart D. Pursuant to 42 U.S.C. § 6991e, EPA has jurisdiction over this matter.

The Complaint alleged that Respondent violated subchapter IX the Underground Storage Tank ("UST") program by failing to do annual line tightness tests or perform monthly monitoring on pressurized piping on three tanks at its Battlefield Express Center Facility ("Facility") since July, 2004 in accordance with 40 CFR §§ 280.41(b)(i) and 280.44(a)-(c). For this alleged violation, Complainant seeks a civil administrative penalty in the amount of $41,511 against Respondent.

The Complaint also sets forth information concerning Respondent's obligations with respect to responding to the Complaint, including filing an Answer. The Complaint, Notice and Opportunity for Hearing, provides details on how to prepare an Answer and states:

If you (1) contest the factual claims made in the 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.

(Complaint, p. 7)(emphasis added).

The Complaint further states, "[f]ailure to deny any of the factual allegations in this Complaint constitutes an admission of the undenied allegation." (Complaint, p. 8). Last, the Complaint states:

> 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 TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURUSANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.**

(Complaint, p. 8)(emphasis added).

The Certificate of Service attached to the Complaint shows that a copy of the Complaint together with a copy of the Consolidated Rules was placed in the United States mail by certified mail, return receipt requested, to Mr. Mykel Stockton, Registered Agent for Stockton Oil Company, on July 17, 2008. A properly executed certified mail receipt was signed by Cheryl Lingohr on July 21, 2008. The returned certified mail receipt is proof of service of the above referenced Complaint. An Answer was not filed thirty days after service of the Complaint.

Stockton Oil Company is in good standing according to the Montana Secretary of State, and therefore, is an entity capable of filing the Answer.[1] It does not appear from the record that Complainant has made any further attempts to contact Respondent. On January 13, 2009, this court issued an Order to Show Cause and Order to Supplement the Record. The Order stated:

> Respondent is ORDERED on or before **January 30, 2009**, to show cause why it should not be held in default and to answer the Complaint. **Failure on the part of Respondent Stockton Oil Company, Inc. to file a timely response to this Order could subject it to assessment of the full amount of the proposed civil penalty of $41,511**. (emphasis not added).

Mr. Mykel Stockton, Registered Agent for Stockton Oil Company, signed the certified mail, return receipt requested card on January 16, 2009. To date, an Answer has not been filed in this matter.

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[1] Stockton Oil Company was incorporated in the State Montana in 1966 and is in good standing.

FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact :

1. Stockton Oil Company is a Montana corporation doing business in the State of Montana at the time of the violations.

2. Respondent owns and/or operates three 10,000 gallon fiberglass USTs at the Battlefield Express Center, a gas station and convenience store.

3. The Respondent's facility is located at the junction Highway 221 and I-90 in Big Horn County, Montana within the exterior boundaries of the Crow Indian Reservation.

4. Mykel Stockton is the Registered Agent for Stockton Oil Company.

5. Respondent is in the business of providing fuel to the public at this retail facility.

6. Two tanks are compartmentalized. One tank contains 6,000 gallons of plus and 4,000 gallons of premium gasoline. The other compartmentalized tank contains 6,000 gallons diesel #2 and 4,000 gallons of dyed diesel. The third tank is a single 10,000 gallon tank containing unleaded gasoline. All three tanks were installed in February 2000.

7. On August 27, 2007, Respondent was provided advance notice by EPA Representative Christopher Guzetti regarding a planned UST inspection at the facility. The facility operator, Marla Jeffers, was informed of 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.

8. On or about September 12, 2007, EPA inspectors arrived at the facility to conduct the inspection to determine compliance with RCRA Subtitle I and the UST regulations. EPA rescheduled the inspection for September 13, 2007 upon learning the facility operator was not prepared for the inspection.

9. On September 13, 2007, EPA inspected the facility including an inspection of the USTs and a review of records at the facility and Respondent's office. EPA was accompanied by representatives from the Crow Tribe Environmental Program.

10. During the inspection, EPA's inspector verified that the Enviroflex piping was pressurized and double-walled and the facility operator stated that an automatic tank gauge (ATG) was used for monthly leak detection on the tanks.

11. At the time of the inspection, leak detection records, provided by Respondent, showed one passing test per month for all the tanks from October 2006 through September 2007.

12. At the time of the inspection, the sump sensors, the piping leak detection continuous monitoring connected to the ATG, were raised to avoid contact with liquids rendering them ineffective for the purpose of performing piping leak detection.

13. At the time of the inspection, none of the three raised sump sensors set off the ATG alarm when inverted by a facility representative to perform a function test.

14. Upon conclusion of the inspection, the inspector informed Respondent that the facility was not in compliance, explained the violations and provided a Notice of Inspection signed by the inspector. The Notice of Inspection was left with the facility operator.

15. Respondent has failed to perform an annual line tightness test on the pressurized pipe since July 8, 2004.

16. Respondent raised the sump sensors for the unleaded, premium and plus sumps thereby not performing leak detection on the piping.

17. The Complaint was filed with the Regional Hearing Clerk on July 15, 2008 and properly mailed to the Respondent on July 17, 2008.

18. An Order to Show Cause and Order to Supplement the Record was filed on January 13, 2009 and received by Respondent January 16, 2009.

19. Respondent has failed to file an Answer and failed to respond to the Order to Show Cause why it should not be held in default.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based on the record before me, I make the following conclusions of law:

20. EPA is authorized to regulate the installation of USTs containing regulated substances pursuant to Subtitle IX of RCRA, sections 9001-9010, 42 U.S.C. §§ 6991-6991i.

21. EPA has jurisdiction over this matter pursuant to RCRA §9006, 42 U.S.C.§6991e.

22. Section 9003(c)(1) authorizes EPA to promulgate regulations including 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.

23. Petroleum, and any fraction thereof, is a regulated substance as defined at RCRA §9001(6) and (7), 42 U.S.C. §6991(6) and (7).

24. EPA is the "implementing agency" as that term is used in 40 C.F.R. §280.12.

25. Respondent is a "person" as defined in section 9001(5) of RCRA, 42 U.S.C. §6991(5) and 40 C.F.R. §280.12.

26. Respondent is an "operator" of "UST"s located at the facility as those terms are defined in Section 9001(3) of RCRA, 42 U.S.C. §6991(3); 40 C.F.R. §280.12; Section 9001(10) of RCRA, 42 U.S.C. §6991(10); and, 40 C.F.R. § 280.12.

27. Respondent's UST systems meet the performance standards for new USTs described in 40 C.F.R. §280.20.

28. In accordance with 40 C.F.R. §280.41(b)(1)(i), underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector.

29. In accordance with 40 C.F.R. §280.44, leak detection shall be conducted by a method "which alerts the operator to the presence of a leak." An annual line tightness test or monthly monitoring must be conducted.

30. Respondent's failure to perform monthly monitoring or have an annual line tightness test on the pressurized piping for the three tanks since July 8, 2004 constitutes a violation of 40 C.F.R. §280.41(b)(1)(ii) and Section 9003(c) of RCRA, 42 U.S.C. §6991b(c), for the period July 8, 2005 through September 13, 2007.

31. 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 $10,000 for each tank for each day of violation.[2]

[2] The civil monetary inflation rule authorizes the assessment of a civil penalty of up to $11,000 for each UST for each day of violation for non-compliance with the Act. 40 C.F.R. §19.4.

32. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. §22.5(b)(1).

33. Respondent was required to file an Answer to the Complaint within 30 days of the service of the Complaint. 40 C.F.R. §22.15(a).

34. 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).

35. Complainant's Motion for Default was served properly on Respondent. 40 C.F.R. §22.5(b)(2).

36. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. §22.16(b).

37. Respondent's failure to respond to the Motion for Default is deemed a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

38. The Order to Show Cause and Order to Supplement the Record was served properly on Respondent. 40 C.F.R. §22.6.

39. Respondent was required to file its response to the Order to Show Cause on January 30, 2009 in order to avoid a waiver of its rights to proceed in this matter. 40 C.F.R. §22.17(a).

40. The civil penalty of $41,511 as proposed in the Motion for Default is consistent with section 9006(d)(2) of SWDA, 42 U.S.C. §6991e(d)(2), and the record in this proceeding.

DISCUSSION OF PENALTY

The relief proposed in the Motion for Default includes the assessment of a total penalty of $41,511 for the alleged violations.[3] The Consolidated Rules provide that the Presiding Officer shall determine the amount of the civil penalty:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. 40 C.F.R. §22.27(b).

[3] The proposed penalty was based on the calculations done by Christopher Guzzetti, an EPA inspector in the UST Program. See, Declaration of Christopher Guzzetti filed January 30, 2009.

The statutory factors that this court must consider in determining the amount of the civil penalty are the seriousness of the violation and any good faith efforts of the Respondent to comply with the applicable requirements as set forth in 42 U.S.C. § 6991e(c). In addition, Section 9006(e), incentive for performance, states that the compliance history of an owner or operator and any other factor the Administrator considers appropriate may be taken into account by EPA in determining the terms of a civil penalty. 42 U.S.C. §6991e(e). The U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12, November 14, 1990 (penalty policy), also was consulted by Complainant in calculating the penalty. (See, Memo in Support). I, therefore, considered this guidance in determining the penalty amount.

The penalty in this matter has two components, gravity and economic benefit. The penalty policy considers two factors for the gravity-based component: the potential for harm and the extent of deviation from a statutory or regulatory requirement. A matrix has been developed in which these two criteria form the axes and then they are adjusted based on the degree of the violation (e.g., major, moderate or minor). The gravity-based component consists of four elements:

1. **Matrix Value** – based on potential for harm and deviation from the requirement;
2. **Violator-Specific Adjustments to the Matrix Value** - based on violator's cooperation, willfulness, history of noncompliance, and other factors;
3. **Environmental Sensitivity Multiplier** - based on the environmental sensitivity associated with the location of the facility; and,
4. **Days of Noncompliance Multiplier** - based on the number of days of noncompliance.

The penalty policy, Appendix A, has a guide to determining the appropriate gravity level for a list of certain violations of the UST requirements. The gravity-based component then incorporates adjustments that reflect the specific circumstances of the violation, the violator's background and actions, and the environmental threat posed by the situation. Complainant used the matrix values in Appendix A to identify the violation in Count 1 of the Complaint, failure to have an annual line tightness test or perform monthly monitoring on pressurized piping, 40 C.F.R. §280.41(b)(1)(ii). This violation is considered "Major" for both potential for harm and extent of the deviation.

In addition, adjustments reflecting the specific circumstances of the violations, the violator and the environmental threat were considered. Complainant made adjustments to the matrix value by applying a multiplier of 1.5 because this facility is in Indian Country. Complainant increased the initial gravity amount by 25% for each of the following : the degree of willfulness and or negligence and a history of noncompliance for similar violations.[4] With respect to the final adjustment, days of non-compliance, adjustments were made by using a table in the penalty policy that identifies a multiplier for a specific amount of days of non-compliance.

[4] Mr. Guzzetti states the increase is based on an Expedited Enforcement Compliance Order and Settlement Agreement entered into by Respondent for $300.00 for the same violation in July, 2004.

The multiplier was 4.0 based on 2.5 years of non-compliance from July 8, 2005-September 13, 2007. The matrix value was multiplied by the adjustments resulting in the gravity-based penalty for each violation. (See, Declaration of Christopher Guzzetti). The calculation is as follows:

Count 1: Failure to Perform Annual Line Tightness Testing or Monthly Monitoring on Pressurized Piping

Gravity = $ 4,500 x .25 x .25 x 1.5 x 4

Total Gravity = $ 40,500

The UST policy also addresses how to calculate economic benefit, the second component of the penalty. The penalty policy states, "the economic benefit component represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance." All penalties assessed must include the full economic benefit unless the benefit is determined to be "incidental" (*i.e.*, less than $100). (See, penalty policy p.8). In this matter, economic benefit was calculated by addressing the operation and maintenance costs the Respondent would have incurred had it performed the required annual line tightness testing or monthly monitoring on pressurized piping. Using the BEN model to calculate economic benefit, both avoided costs, the failure to conduct line tightness testing on three lines ($900), and delayed costs, the cost of the line tightness testing ($450), were included. Based on the 785 days of violation, the Interest Rate, and Marginal Tax Rate, a total of $1,011 economic benefit was assessed to eliminate any savings enjoyed by the Respondent for its failure to comply with the regulations. (See, Declaration of Christopher Guzzetti, Exhibit 2). Therefore, a total penalty of $41,511 was assessed by Complainant in this matter.

I examined Complainant's penalty calculations as set forth in the Complaint and the Memo in Support of the Motion for Default and considered the narrative explaining the reasoning behind the penalty proposed in Christopher Guzzetti's Declaration. I find the penalty takes the serious of the violation into account. The matrix values used for each count in the Complaint were appropriate. With respect to the statutory factor relating to Respondent's compliance history and its efforts to comply with the applicable requirements, there is evidence in the record that Respondent has not taken its obligations seriously. Respondent's receipt of a Compliance Order and Settlement Agreement for the same violations in 2004, is evidence of its disregard for complying with the UST regulations. Therefore, the penalty amount of $41,511 is appropriate.

Pursuant to 40 C.F.R. § 22.17(c), "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." After considering the statutory factors, the UST Penalty Policy and the entire record before me, I find the civil penalty proposed is consistent with the record of this proceeding and the SWDA.

DEFAULT ORDER[5]

In accordance with section 22.17 of the Consolidated Rules, 40 C.F.R. § 2.17, and based on the record and the Findings of Fact set forth above, I hereby find that Respondent is in default and liable for a total penalty of **$41,511.00.**

IT IS THEREFORE ORDERED that Respondent, Stockton Oil Company shall, within thirty (30) days after this order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **$41,511.00.** Payments can be made in the following manner:

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Respondent shall note on the check the title and docket number of this Administrative action.

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

[5] Pursuant to 40 C.F.R. § 22.17(c), Respondent may file a Motion to set aside the default order for good cause.

Should Stockton Oil Company fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. §3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. In this matter, this Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party appeals the Initial Decision to the Environmental Appeals Board; (2) a party moves to set aside a default order that constitutes an initial decision; or (3) the Environmental Appeals Board elects to review the Initial Decision on its on initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. §22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to §22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to §22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

SO ORDERED This 3rd Day of March, 2009.

Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT ORDER** in the matter of **STOCKTON OIL COMPANY, INC., BATTLEFIELD EXPRESS CENTER FACILITY; DOCKET NO.: RCRA-08-2008-0007** was filed with the Regional Hearing Clerk was filed on March 5, 2009.

Further, the undersigned certifies that a true and correct copy of the document was delivered via e-mail to Amy Swanson, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail and e-mailed on March 5, 2009, to:

Mr. Mykel Stockton, Registered Agent for
Stockton Oil Company, Inc.
1607 4th Avenue North
Billings, MT 59101-0000

Hand delivered to:

Honorable Elyana R. Sutin
Regional Judicial Officer
U. S. Environmental Protection Agency – Region 8
1595 Wynkoop Street (8RC)
Denver, CO 80202-1129

March 5, 2009

Tina Artemis
Paralegal/Regional Hearing Clerk

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