

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

**Docket No. CWA-08-2007-0025**

**Docket No. CWA-08-2007-0026**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>Burke Oil Company, Inc., d/b/a</b>	)	
<b>Presho Oil Company</b>	)	<b>MOTION TO FILE COMPLAINANT'S</b>
	)	<b>PROPOSED FINDINGS OF FACT,</b>
	)	<b>EXHIBITS AND TESTIMONY</b>
<b>Burke Oil Company, Inc.</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

Complainant, United States Environmental Protection Agency, Region 8 (EPA), by its undersigned attorney, files this MOTION TO FILE COMPLAINANT'S PROPOSED FINDINGS OF FACTS, EXHIBITS, AND TESTIMONY, pursuant to 40 C.F.R. § 22.19(b)(2). This motion is made in lieu of filing joint stipulations following Complainant's good faith, but unsuccessful, efforts to engage Respondent in stipulating to undisputed facts, exhibits, and testimony as ordered by the Honorable Barbara A. Gunning, Chief Administrative Law Judge, in the Order Postponing Hearing issued September 26, 2008. The reasons in support of this motion are set forth below. Although the proposed facts are not stipulated to by both parties, the findings proposed by Complainant EPA simplify the issues and, as such, provide a benefit to the Trier of fact consistent with 40 C.F.R. 22.19(b)(2).

1. The undersigned on behalf of the Complainant electronically provided Respondent's Counsel Steve Fox with draft Joint Stipulations of Facts, Exhibits, and Testimony for review and input on November 6, 2008. Complainant previously provided these same joint stipulations of facts, exhibits, and testimony for the Presho facility as part of a proposed stipulation document pertaining to both the Presho and Chamberlain facility, on September 23, 2008, prior to the Chamberlain matter settling.
2. On September 26, 2008, Complainant prepared, and Respondent concurred, on the filing of Stipulations of Exhibits and Testimony pertaining to the Presho facility only. The exhibits and testimony proposed in Complainant's proposed findings include the exhibits and testimony stipulated to by the parties in that

document, in addition to additional exhibits identified by Complainant in its Supplemental Prehearing Exchange filed September 30, 2008.

3. The undersigned on behalf of the Complainant reminded Respondent's Counsel Steve Fox in an e-mail dated December 9, 2008, of the requirement to file Joint Stipulations on or before December 30, 2008, and requested that Mr. Fox provide EPA with suggested revisions to allow adequate time to negotiate, sign, and file the document by Tuesday, December 23, 2008, after which the undersigned would be away from the office until after the filing deadline of December 30, 2008, imposed by the Judge.
4. On December 22, 2008, the undersigned phoned Mr. Fox to inquire as to the status of his review of the Joint Stipulations sent on November 6, 2008. The undersigned left a message for Mr. Fox to return her call. Mr. Fox returned Complainant's call that same afternoon and left a message. The undersigned again attempted to reach Mr. Fox at approximately 11:00 am MST on December 23, 2008, leaving a message for him to phone as soon as possible.
5. As of Tuesday, December 30, 2008, Complainant had not received any electronic or telephonic communication regarding this issue from Mr. Fox. After phoning Mr. Fox at approximately 2:30 pm MST on December 30<sup>th</sup>, and learning that Mr. Fox was out of the office for the remainder of the day, the undersigned opted to file this Motion and Complainant's Proposed Findings of Facts, Exhibits, and Testimony to comply with the Judge's Order Postponing Hearing.

Respectfully submitted,

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8**

Date: 12/30/08

Michelle Marie For

Amy Swanson, Enforcement Attorney

U.S. EPA, Region 8

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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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Docket No. CWA-08-2007-0025

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IN THE MATTER OF:	)	
	)	
Burke Oil Company, Inc., d/b/a	)	
Presho Oil Company	)	
	)	
Burke Oil Company, Inc.	)	
	)	
Respondent.	)	
	)	

COMPLAINANT'S PROPOSED  
FINDINGS OF FACT, EXHIBITS  
AND TESTIMONY

The following Proposed Findings of Fact, Exhibits and Testimony are submitted by the Complainant to simplify the issues in Docket No. CWA-08-2007-0025 (In the Matter of Burke Oil Company, Inc., d/b/a Presho Oil Company) in accordance with 40 C.F.R. § 22.19(b)(2).

**FACTS**

**Company Information**

1. Respondent Burke Oil Company, Inc., (d/b/a/ Presho Oil Company) ("Burke Oil" or "Respondent"), is a corporation organized and existing under the laws of the State of South Dakota and is authorized to do business in the State of South Dakota. (Cmpl. Admin. Comp., ¶ 2)

**Presho Oil Facility**

2. Burke Oil owns and operates the Presho Oil Facility as a retail fuel business located at 500 East Highway 16, Presho, South Dakota. (Cmpl. Admin. Comp. ¶ 4; Cmpl. Ex. 8)
3. Burke Oil stores, transfers, distributes, uses, or consumes oil or oil products at the Presho facility. (Cmpl. Admin. Comp. ¶ 7; Cmpl. Exs. 5, 8)
4. EPA conducted a Spill Prevention Control and Countermeasure (SPCC) inspection at the Presho facility on September 12, 2006. (Cmpl. Admin. Comp. ¶ 18; Cmpl. Ex. 5, 8)

5. At the time of the inspection, one 14,000 gallon tank containing gasoline; three 12,600 gallon tanks containing diesel; one 5,500 gallon tank containing diesel; two 2,000 gallon tanks containing diesel, and diesel and gasoline; one 500 gallon tank containing kerosene; and one 265 gallon tank containing used oil were at the Presho facility in addition to a 265 gallon tank of unknown product. (Cmpl. Admin. Comp. ¶ 5; Cmpl. Ex. 5)
6. As of the date of Respondent's Answer (October 23, 2007), one 2,000 gallon tank, the 500 gallon kerosene tank, and the 265 gallon tank containing an unknown product had been removed from the Presho facility. (Resp. Ans. ¶ 1)
7. The Presho facility's oil storage capacity totaled at least 62,065 gallons at the time of the inspection. (Cmpl. Admin. Comp. ¶ 5; Cmpl. Exs. 5, 8)
8. A ditch adjacent to E. Highway 16 runs along the south side of the facility. (Cmpl. Admin. Comp. ¶ 10; Cmpl. Ex. 8)
9. The area in the vicinity of the facility slopes approximately 1.5% slope to the North. (Cmpl. Ex. 5)
10. The property gradient is 1.5%. (Cmpl. Ex. 5)
11. The distance from the ditch in front of the facility to its intersection with an unnamed tributary of Medicine Creek is approximately 1/3 of a mile (or 500 meters). (Cmpl. Admin. Comp. ¶ 10; Cmpl. Exs. 5, 8)
12. The total distance a discharge containing oil from the facility would travel to Medicine Creek by way of the ditch is approximately 5/8 mile. (Cmpl. Ex. 8)
13. Medicine Creek contains water year-round. (Cmpl. Admin. Comp. ¶ 10; Cmpl. Ex. 20)
14. According to the 2008 South Dakota Integrated Report for Surface Water Quality Assessment, Medicine Creek's uses include Fish/Wildlife propagation, irrigation, limited contact recreation, and warm water marginal fish life, with an approved Total Maximum Daily Load for Fecal and Total Suspended Solids as of August 30, 2006. (Cmpl. Ex. 40)
15. There is an elevation loss of approximately 20 meters from the facility to Medicine Creek. (Cmpl. Exs. 5, 19)
16. Medicine Creek discharges into the Missouri River approximately 28 miles northeast of the facility. (Cmpl. Admin. Comp. ¶ 10)

17. The Missouri River contains water year-round and is a navigable water. (Cmpl. Ex. 40)
18. Respondent has a SPCC Plan for the Presho facility dated April 10, 2003, prepared by RESPEC. (Cmpl. Ex. 1)
19. The Presho facility's total oil storage as listed in the 2003 SPCC Plan is 62,065 gallons.
20. The Presho facility's 2003 SPCC Plan cites, in part, the following areas of nonconformance with 40 C.F.R. Part 112: no fencing; no secondary containment around the loading/unloading rack; no system to prevent vehicle departure before complete disconnect of transfer lines while fueling vehicles; and no secondary containment around the 265 gallon, two 2,000 gallon and 500 gallon tanks. (Presho facility SPCC Plan; Cmpl. Ex. 5; Cmpl. Ex. 8)
21. EPA identified the following SPCC implementation deficiencies at the Presho Facility at the time of its inspection (Cmpl. Admin. Comp. ¶ 19; Cmpl. Exs. 5, 6, 8, 9):
  - a. No secondary containment for the loading/unloading rack (40 C.F.R. § 112.7(h)(1));
  - b. No secondary containment for the two 2,000 gallon tanks, the 500 gallon tank, a 265 gallon tank, and the 15 drums of oil located inside the storage building (40 C.F.R. § 112.7(c) and 112.8(c)(2));
  - c. Inadequate secondary containment for 6 bulk tanks (40 C.F.R. § 112.8(c)(2));
  - d. No physical barrier or signage at loading rack to prevent vehicle departure before completing disconnect of the transfer lines while fueling vehicles (40 C.F.R. § 112.7(h)(2));
  - e. No fencing (40 C.F.R. § 112.7(g)(1));
  - f. Undiked drainage not contained in accordance with 40 C.F.R. § 112.8(b)(3);
  - g. Failure to maintain written documentation of inspections in accordance with 40 C.F.R. § 112.7(e);
  - h. Visible discharges of oil not promptly corrected and/or removed in accordance with 40 C.F.R. § 112.8(c)(10);
  - i. Failure to lock master flow and drain valves in accordance with 40 C.F.R. § 112.7(g)(2);
  - j. Failure to have properly designed pipe supports in accordance with 40 C.F.R. § 112.8(d)(3);

- k. Failure to maintain written documentation of training and/or annual briefings in accordance with 40 C.F.R. § 112.7(f)(1) and (f)(3); and
  - l. Spill reports failed to contain required information in accordance with 40 C.F.R. § 112.7(a)(4);
22. The SPCC plan for the Presho facility had the following deficiencies at the time of the inspection (Cmpl. Admin. Comp. ¶ 20; Cmpl. Exs. 5, 6, 8, 9):
- a. SPCC plan diagram and narrative does not include inside oil storage containers and shows nonexistent tanks (40 C.F.R. 112.7(a)(3)(I)).
23. In a letter from Respondent's Professional Engineer Geo Tek to Mr. Robert Burke on behalf of the Respondent dated February 22, 2008, the secondary containment for the 2,000 gallon horizontal tank and the bulk plant is noted as inadequate.
24. The Presho facility has not revised its SPCC plan since 2003. (Cmpl. Ex. 11)

### EXHIBITS

The Parties stipulate to the admission into evidence of the following documents, reserving the right to argue the meaning, effect and/or weight of such at hearing. These documents were originally filed in Complainant's Prehearing Exchange and Complainant's Supplemental Prehearing Exchange and identified as the following Complainant's Exhibits:

- 5. US EPA Inspection Report, 40 CFR 112, Spill Prevention, Control and Countermeasures, prepared by James E. Peterson for Presho Oil, Inspection No. S06099, Inspection Date September 12, 2006, Report Date September 14, 2006 (with attached maps, diagrams, and Photo Log).
- 6. US EPA Region 8 SPCC Plan Review Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, September 13, 2006.
- 7. US EPA Region 8 SPCC Facility Inspection Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, September 13, 2006.
- 8. US EPA SPCC Field Inspection and Plan Review Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, signed March 16, 2007.
- 9. SPCC Compliance Inspection Report and handwritten regulatory information noticing inspection of SPCC #S06099 with Jim Kotz on September 13, 2006, signed by Jim Peterson.

10. SPCC Compliance Status Report as of 12/12/2006, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, Inspection Date September 12, 2006. Report Date September 14, 2006.
17. Color copy of topographic map depicting area 498 kilometres west of Minneapolis, Minnesota, on 8.5 x 11 inch paper, image courtesy of US Geological Survey, <http://terraserver-usa.com>, dated March 3, 2008.
18. Color copy of Microsoft Virtual Earth picture of Presho Oil Facility, and surrounding area, <http://maps.live.com>, dated July 13 and September 4, 2007.
19. Flow chart table depicting Presho site elevation change from site to creek draining into Medicine Creek.
20. USGS 06442500 Medicine Creek at Kennebec, SD
21. Color copy of Microsoft Virtual Earth picture of Presho, Lyman, South Dakota, <http://maps.live.com>, dated March 4, 2008.
25. Letter from Melissa Payan, EPA, to Bob Burke notifying Mr. Burke of SPCC inspections and identified violations at the Presho Oil Facility, Burke Oil Chamberlain Facility, and the Burke Oil Wheat Growers Facility, with attached copies of SPCC Compliance Status Summaries, dated December 18, 2006.
26. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (May 31, 2007).
27. Letter from Bob Burke, Burke Oil, to Donna Inman, EPA, dated June 12, 2007.
28. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 1, 2007).
29. Letter from Bob Burke, Burke Oil, to Donna Inman, EPA, with attached copies of Integrity Tests for Presho Oil and Pictures of Presho Bulk Plant, dated October 3, 2007.
30. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 11, 2007).
31. Letter from Amy Swanson, EPA, to Robert Burke, Burke Oil, dated October 29, 2007.

32. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 31, 2007).
33. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (November 8, 2007).
34. Letter and attached Affidavit and Photos from Steve Fox, Larson, Sundall, Larson, Schaub & Fox, to Amy Swanson, EPA, and attachments, dated November 28, 2007.
35. Letter and attached Affidavit and Photos from Steve Fox, Larson, Sundall, Larson, Schaub & Fox, to Amy Swanson, EPA, dated December 20, 2007.
36. US EPA Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (Office of Enforcement and Compliance Assurance, August 1998).
37. EPA statement detailing its penalty calculation
39. City of Presho, Lyman County, South Dakota, Basic Road Map.
40. The 2008 South Dakota Integrated Report for Surface Water Quality Assessment, Prepared by South Dakota Department of Environment and Natural Resources, Steven M. Pirner, Secretary.
41. Resume or curriculum vitae for Donna Inman, Complainant's expert witness.
42. Spill Prevention, Control, and Countermeasures Plan for Presho Oil, 934 East 9<sup>th</sup> Street, prepared by RESPEC, April 10, 2003.
43. Letter from GeoTek Engineering and Testing Services, Inc., to Burke Oil Company, re: Spill Containment Area-Presho Oil Co., dated February 22, 2008.
44. Color copy of three topographic maps combined, depicting area 7 kilometres west of Presho, South Dakota; 3 kilometres northeast of Presho, South Dakota; and 4 kilometres west of Kennebec, South Dakota, on 8.5 x 11 inch sheets of paper, image courtesy of US Geological Survey, <http://terraserver-usa.com>, dated September 11, 2008.
45. Approved Jurisdictional Determination Form, U.S. Army Corps of Engineers, prepared for Medicine Creek, report completion date December 28, 2007.
46. Project Summary Sheet for Medicine Creek Watershed Project.



47. Phase I Watershed Assessment Final Report and TMDL, Brakke Dam, Lyman County, South Dakota, prepared by South Dakota Water Resources Assistance Program, Division of Financial and Technical Assistance, South Dakota Department of Environment and Natural Resources, April 2004.
48. Total Maximum Daily Load for Ammonia in Medicine Creek near Kennebec, South Dakota, developed in accordance with Section 303(d) of the federal Clean Water Act, prepared by South Dakota Department of Environment and Natural Resources, 2006.
49. Water Quality Monitoring Station for South Dakota Department of Environment and Natural Resources, Surface Water, Page 13 of 23, September 24, 2008.

### Testimony

The parties stipulate to hear testimony from the witnesses named in the parties' respective Prehearing Exchanges based on the stated scope of testimony. All witnesses listed by the Respondent and Complainant, respectively, shall be treated as lay witnesses and the scope of their testimony shall be limited accordingly to factual information and observations only. Complainant anticipates calling all of the witnesses identified in Complainant's Prehearing Exchange. The parties reserve the right at hearing to object to and/or cross examine individual factual statements and/or conclusions made by each witness, as well as argue the meaning, effect and/or weight of such testimony.

WHEREFORE, the undersigned submit that the foregoing stipulations of facts, exhibits and testimony individually and collectively portray that which they describe in an accurate and truthful manner, and are relevant and admissible as evidence at the hearing in this matter.

**FOR COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 8**

Date: 12/30/08 By: Michele Marx for  
Dana J. Stotsky  
Amy Swanson  
U.S. EPA Region 8  
1595 Wynkoop Street (8ENF-L)  
Denver, Colorado 80202-1129

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on December 30, 2008, the original and one copy of the MOTION and COMPLAINANT'S PROPOSED FINDINGS OF FACTS, EXHIBITS, AND TESTIMONY CONSOLIDATE and MEMORANDUM IN SUPPORT were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

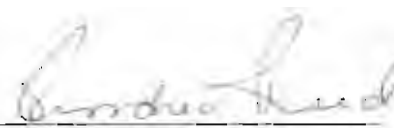
Via pouch mail and facsimile to:

The Honorable Barbara A. Gunning  
Administrative Law Judge  
Office of Administrative Law Judges (Mail Code 1900L)  
1200 Pennsylvania Avenue, N.W.  
Denver, CO 80202-1159  
Washington, DC 20460  
Facsimile: (202) 565-0044

Via regular mail and facsimile to:

Steve Fox, Esquire  
Larson, Sundall, Larson, Schaub & Fox, P.C.  
P.O. Box 547  
Chamberlain, SD 57325  
Facsimile: (605) 734-5669

12/30/2008  
Date

  
Andrea Reed