UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

In the Matter of:	)	
	)	
B & A Petroleum Corporation	)	
d/b/a Infinite Oil	)	**Docket No. RCRA-07-2010-0019**
1349 Park Avenue	)	
Omaha, Nebraska 68105	)	

Respondent

RULING ON COMPLAINANT'S MOTION FOR DEFAULT ORDER

I. Background and Procedural History

Complainant, the Director, Air and Waste Management Division, Region 7, filed an Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing ("complaint") in this proceeding on April 2, 2010, alleging violations of provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6901, et seq., specifically Subtitle I, 42 U.S.C. §§ 6991-6991i[1], regulations promulgated by the Environmental Protection Agency ("EPA") thereunder, and authorized regulations of the State of Nebraska.[2] The complaint was issued pursuant to section 9006 of RCRA, 42 U.S.C. § 6991e, and this proceeding is governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22. The complaint was served on Respondent's registered agent on April 21, 2010.[3] Pursuant to Rule 15(a), 40 C.F.R. § 22.15(a), any answer to the complaint was required to be filed within 30 days thereafter, in May

[1] The Solid Waste Disposal Act is commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended, and will be referenced herein as "RCRA".

[2] The state of Nebraska was granted final authorization to administer a state UST program in lieu of the Federal UST program, effective September 18, 2002. Through this authorization, the Nebraska program and implementing regulations (Title 159 of the Nebraska Administrative Code – "159 Neb. Admin. Code") are enforceable requirements of Subtitle I of RCRA, and are enforceable by EPA pursuant to section 9006 of RCRA, 42 U.S.C. § 6991e.

[3] See, Exhibit 1 to Complainant's "Memorandum in Support of Motion for Default Order as to Liability and Penalty", page 2, entitled "Proof of Delivery".

2010.[4] On June 13, 2011, Complainant filed and served a Motion for Default Order as to Liability and Penalty ("motion"). Finally, on July 28, 2011, pursuant to an order to supplement the record, Complainant filed and served Complainant's Response to Order to Supplement Record ("supplemental motion"). The supplemental motion, which also contained an additional copy of the June 13, 2011 motion, was delivered to respondent on July 29, 2011.[5]

II. Discussion

Rule 22.17(a)[6] provides, in relevant part, that a party may be found in default for failure to file an answer to a complaint, or failure to comply with an order of the Presiding Officer. Rule 22.17(c) states, in relevant part:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice.

Rule 22.16(b) provides, in relevant part, that a response to a motion filed in a proceeding must be filed within 15 days after service of such motion, unless otherwise provided by the Presiding Officer. Rule 16(b) also states as follows: "Any party who fails to respond within the designated period waives any objection to the granting of the motion."[7]

Respondent did not file any answer or other response to the complaint within the time frame provided in the Consolidated Rules or at any time thereafter. Respondent did not file any

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[4] Rule 22.7(c), 40 C.F.R. § 22.7(c), provides that the time allowed for responsive filings is extended by five days where a document is served by first class mail or commercial delivery service, as was the complaint in this case (although the additional five days is not available where a document is served by overnight or same-day delivery).

[5] Complainant explained in the supplemental motion that the June 13, 2011 motion was a "replacement" for a motion filed May 27, 2011, the latter containing an incorrect docket number for the proceeding. Complainant also explained that attempts to deliver the May 27, 2011 motion and the June 13, 2011 replacement motion, which corrected the docket number, were unsuccessful. The June 13, 2011 "replacement" motion was included as an exhibit to the July 28, 2011 supplemental motion, which was received by Respondent on July 29, 2011. Supplemental motion at ¶ 2-3. This Ruling relates to the June 13, 2011 motion.

[6] 40 C.F.R. § 22.17(a). For brevity, references herein to a specified "Rule" are to the corresponding provisions in 40 C.F.R. Part 22, without specifying the C.F.R. citation in every instance.

[7] The Environmental Appeals Board has instructed, however, that this provision does not create an independent basis to grant a motion, and does not require that the non-moving party respond to the motion. Rather, its purpose is merely to "clear the path for a ruling on the motion", if a responsive pleading is not filed. See, In the Matter of Asbestos Specialists, Inc., 4 E.A.D. 819, 825 (October 6, 1993).

response to Complainant's June 13, 2011, motion for default or to the July 28, 2011 supplemental motion.

Rule 22.17(a) provides, in relevant part: "Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." Thus, in determining whether to issue a default order, the facts stated in the complaint are deemed admitted and taken as true. However, the facts deemed admitted must set forth the prima facie elements necessary to establish the violations alleged in the complaint. As Chief Judge Biro has stated: "If, however, Complainant has failed to state allegations of fact in the Complaint that support the elements of the violation alleged, then a default order should not be issued." In the Matter of Ag-Air Flying Services, Inc., FIFRA Docket No. 10-2005-0065 (ALJ, Jan. 27, 2006).

The August 2, 2009 complaint in this proceeding alleges twelve counts of violation of various requirements of RCRA, the regulations promulgated under RCRA, and the regulations promulgated by the authorized state agency for Nebraska. I have determined, as summarized below, that the complaint fails to state necessary factual allegations which support the violations alleged for the following counts:

Count II – 13th Street facility - The complaint alleges a violation of 40 C.F.R. § 280.21(c) and 159 Neb. Admin. Code 5-003, because the facility had failed to install "corrosion protection" on "flex connectors" on the facility's piping. The specific requirement in those provisions, to the extent that they apply to regulated piping, is that "metal piping" must be "cathodically protected". There is no allegation that the piping at the facility is "metal piping", within the meaning of this requirement. In addition, section 280.21(a) states that compliance with section 280.21(b)-(d) is one of three alternative means of compliance with that section (i.e., the new UST system performance standards, the upgrading requirements in section 280.21(b)-(d), or the closure requirements). The complaint lacks a sufficient factual basis to establish that Respondent is subject to section 280.21(c) and the authorized state rule.

Count III – 13th Street facility - The complaint alleges a violation of 40 C.F.R. § 280.44(a) and 159 Neb. Admin. Code 7-005.01 because Respondent failed to conduct an annual leak detector test as required by those provisions. Section 280.44(a) and the state rule equivalent are testing requirements for facilities subject to the pressurized piping requirements in section 280.41(b)(1) and the state rule equivalent. There is no allegation in Count III that Respondent's piping at issue with respect to this count was pressurized piping or that it was subject to the requirements of section 280.41(b)(1) and the authorized state rule.[8]

Count IV – 13th Street facility - The complaint alleges a violation of 40 C.F.R. § 280.41(b)(1) and 159 Neb. Admin. Code 7-002.02A because Respondent failed to conduct an

[8] Applicability of this section is alleged in Count IV, as discussed below, with respect to the piping system at issue in Count IV, in connection with another alleged violation. However, these other allegations are not incorporated by reference, and I decline to make inferences, with respect to Count III, regarding facts which are not contained or referenced therein, particularly where there is no allegation that the piping system referenced in Count III is the same system as referenced in Count IV.

"annual line tightness test" for the year prior to the inspection. Section 280.41(b)(1)(ii), and the state equivalent, require either an annual line tightness test or monthly monitoring. There is no allegation in Count IV that Respondent failed to conduct monthly monitoring, an essential element of a prima facie case.

Count VIII – Park Avenue facility - The complaint alleges a violation of 40 C.F.R. § 280.31(d) and 159 Neb. Admin. Code 6-002.04 because Respondent "failed to provide records of the operation and maintenance of corrosion protection equipment". Section 280.31(d), and the state rule equivalent, provide that for UST systems using cathodic protection, records of the operation of cathodic protection "must be maintained."[9] Count VIII contains no allegation that the UST system used cathodic protection, or that Respondent failed to "maintain" the records required by those provisions.

Count IX – Park Avenue facility - The complaint alleges a violation of 40 C.F.R. § 280.41(a) and 159 Neb. Admin. Code 7-002.01 because Respondent failed to monitor tanks for releases at least every 30 days. Section 280.41(a) requires that tanks must be monitored at least every 30 days unless the exceptions enumerated in that section apply. Count IX contains no allegations that the exceptions do not apply.

Count X – Park Avenue facility - The complaint alleges a violation of 40 C.F.R. § 280.41(b)(1), and 159 Neb. Admin. Code 7-002.01, because Respondent failed to conduct an "annual line tightness test". As with Count IV for the 13th Street facility discussed above, there is no allegation in Count X that Respondent failed to conduct monthly monitoring, a permissible alternative means of compliance set forth in the applicable rules.

Count XI – Park Avenue facility - The complaint alleges a violation of 40 C.F.R. § 280.44(a) and 159 Neb. Admin. Code 7-005.01 because Respondent failed to conduct an annual leak detector test as required by those provisions. The complaint fails to establish a prima facie case for the violation alleged in this count for the reasons stated in the discussion of Count III, above, relating to a similar alleged violation at the 13th Street facility.

Because the complaint does not allege necessary facts to establish the violations alleged in the counts described above, I am unable to grant the motion for default order as to these counts. Since Complainant may elect to amend the complaint in response to this ruling, and may do so as a matter of right pursuant to Rule 22.14(c), I will defer a ruling with respect to the other counts in the complaint, pending further action by Complainant as described below, so as not to bifurcate the various counts at issue in the proceeding. I reach this result with some reluctance, in light of Respondent's total disregard for its obligations in this proceeding, and Respondent is

[9]Section 280.31(d), and equivalent state rule, state that such records must be maintained in accordance with section 280.34. The latter section requires, among others, that certain records must be provided to the implementing agency upon request. While it may be posited that Respondent violated section 280.31(d) because it failed to maintain records in accordance with section 280.34 (i.e., that it did not provide records upon request), there are no allegations of fact in this count by which to make this linkage.

advised that it should not infer from this decision that it will not be found liable and ordered to pay a penalty as appropriate. However, as previously discussed, Complainant is obligated to make a prima facie showing with respect to the elements of the violations alleged in order to prevail on a motion for default order.

Order

Complainant's Motion for Default Order as to Liability and is hereby denied. Complainant is directed to file a notice, within 10 days of service of this order, advising whether it will amend the complaint, request a decision based on the complaint already filed, or otherwise respond to this ruling. If Complainant elects to file an amended complaint, Complainant's notice will propose an anticipated date by which the amendment will be filed.

SO ORDERED, this 22nd day of February, 2012.

Robert L. Patrick
Regional Judicial Officer, Region 7

IN THE MATTER OF B & A Petroleum Corporation d/b/a Infinite Oil, Respondent
Docket No. RCRA-07-2010-0019

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Ruling on Complainant's Motion for Default Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Raymond Bosch
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Overnight UPS Delivery (signature required) to:

Mohammed Ali
B & A Petroleum Corporation
d/b/a Infinite Oil
215 N. Prospect Ave
Streamwood, Illinois 60107-4103

Dated: 2/23/12

Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7