

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8 2016 AUG -8 PM 2: 56

IN THE MATTER OF:)	Docket No. RCRA-08-2016-0005
)	EPA REGION VIII
The Three Affiliated Tribes,)	HEARINGS CLERK
)	ADMINISTRATIVE ORDER ON
(Nishu Store),)	CONSENT
)	
Respondent.)	

INTRODUCTION

The United States Environmental Protection Agency, Region 8 (EPA) and the Three Affiliated Tribes (Tribes) enter into this Administrative Order on Consent (Consent Order) to resolve noncompliance with subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 42 U.S.C. §§ 6991 - 6991i, at the Tribally owned and operated Nishu Store.

JURISDICTION

1. Subtitle I of RCRA, 42 U.S.C. §§ 6991 - 6991i, authorizes the EPA to regulate the installation and use of “underground storage tanks” (“USTs” or “tanks”) which contain “regulated substances” as defined by section 9001(2) of RCRA, 42 U.S.C. § 6991(2).
2. The EPA has jurisdiction over this matter pursuant to RCRA section 9006, 42 U.S.C. § 6991e.
3. The EPA retained authority to operate the UST Program on Indian lands when EPA approved the State of North Dakota’s UST Program in 1991. No other governmental authority has applied for and been approved to administer the program on the Fort Berthold Reservation (Reservation).
4. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes the 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. The EPA has promulgated such regulations at 40 C.F.R. part 280, subpart D.

5. The EPA enters into and issues this Consent Order under the authority vested in the EPA Administrator by section 9006(a) of RCRA, 42 U.S.C. § 6991e,(a) which has been delegated to the undersigned EPA official.

6. This Consent Order, including all attachments, submittals and other documentation required by this Consent Order, are entered into voluntarily by and between the EPA and the Tribes. The Tribes agree not to contest the EPA's authority or jurisdiction to issue this Consent Order in this or in any subsequent proceeding to enforce the terms of this Consent Order. This Consent Order constitutes an enforceable agreement between the Tribes and the EPA.

7. The Tribes neither admit nor deny the findings, legal conclusions or determination of the Consent Order.

8. The EPA and the Tribes recognize that the actions taken by the Tribes in accordance with this Consent Order including, but not limited to, entering this Consent Order, do not constitute an admission of any liability or violations of RCRA subtitle I, its implementing regulations or any other requirements by the Tribes.

PARTIES BOUND

9. This Consent Order binds the Tribes, its elected officials, officers, directors, operators, managers, employees, successors and assigns.

10. The Tribes' undersigned signatory certifies to his authority to execute this

Consent Order and legally bind the Tribes to the terms of this Consent Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

13. The Tribes are a federally recognized tribe under section 104 of the Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a, and 81 Fed. Reg. 5019, 5023 (January 29, 2016).

14. The Tribes are a “municipality” and therefore a “person” as defined by sections 1004(13) and (15) and 9001(5) of RCRA, 42 U.S.C. §§ 6903(13) and (15) and 6991(5).

15. The Tribes are an “owner” or “operator” within the respective meanings of sections 9001(3) and (4) of RCRA, 42 U.S.C. §§ 6991(3) and (4), and 40 C.F.R. § 280.12, of “USTs” as defined by section 9001(10) of RCRA, 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.

16. At all times relevant to this Consent Order, the Tribes owned and/or operated one double-walled 12,000 gallon compartmentalized STIP 3 UST at the Nishu Store (formerly known as the White Shield Ree Store) located at 10 Sesame Frontage Road, White Shield, North Dakota, on Indian lands within the exterior boundaries of the Reservation. One 8,000 gallon compartment contained unleaded gasoline. The other compartment contained 4,000 gallons of diesel fuel. The UST was installed on November 6, 2002. All lines were double-walled flex piping. On December 8, 2015, Nishu Store informed the EPA that the facility’s UST was permanently closed and replaced with two new USTs. However, on March 11, 2016, Nishu

Store informed the Tribes' Environmental Division that the old tank was not permanently closed and that its compartments still contained fuel. The Nishu Store also stated that the new tanks and piping were not connected to the automatic tank gauge (ATG).

17. The Nishu Store, including the USTs, are owned and operated by the Tribes as a convenience store and gas station.

18. The Tribes' USTs meet the performance standards for new USTs described in 40 C.F.R. § 280.20.

19. The Tribes were provided advance notice of a planned UST inspection at the Nishu Store by an EPA representative at least four working days prior to the inspection. A representative for the store was mailed 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.

20. On April 15 and 16, 2014, the EPA inspector, Francisca Chambus, accompanied by Blair Baker of the Three Affiliated Tribes, Westen Knutson of the Indian Health Service and Brendon Shine, a NOWCC EPA Contractor, inspected the Nishu Store to determine compliance with RCRA subtitle I and the EPA regulations relating to USTs.

21. The Nishu Store manager consented to and accompanied the EPA inspector on the inspection.

22. At the time of the Nishu Store inspection on April 16, 2014, the inspector learned that the UST's ATG had been off since approximately January 23, 2014. When the ATG was turned on during the inspection and the UST leak test history for the past 12 months printed, no results were available for the compartment containing diesel from October 2013 through April 2014. The unleaded compartment had no test results for the months February through April

2014. Both spill buckets contained water. The fill pipes had butterfly valves. The sumps contained sump sensors but they were inoperable since they were immersed in water and the ATG was turned off.

23. Following the inspection, the Nishu Store submitted proof to the EPA on May 14, 2014, that the UST's sumps had been cleaned and drained, and committed to contact the North Dakota Petroleum Tank Release Compensation Fund (Fund) to determine the status of the Nishu Store's financial responsibility.

24. On December 8, 2015, the Nishu Store informed the EPA that the UST was removed and replaced with two new USTs.

25. On March 3, 2016, the Fund informed the EPA that the Nishu Store was in "inactive" status since no financial responsibility fees had been paid since 2012.

26. On March 11, 2016, the Nishu Store informed the Tribes' Environmental Division that the original UST was not permanently closed and still contained fuel. The Nishu Store also stated that the two new USTs and piping were not connected to an ATG system.

27. At the conclusion of the inspections, the inspector informed the Nishu Store representative that the Store was out of compliance and explained the violations. The inspectors completed a "Notice of Inspection" form which was signed by and left with the Nishu Store.

FINDINGS OF VIOLATIONS

Failure to Maintain Corrosion Protection

28. 40 C.F.R. § 280.31(a) requires that owners and operators maintain and operate continuously corrosion protection for metal components of their UST systems.

29. 40 C.F.R. § 280.31(b)(1) requires that all cathodic protection systems be tested within six months of installation and at least every three years thereafter or according to another reasonable time frame established by the EPA.

30. The Nishu Store UST was last tested for cathodic protection on December 7, 2007.

31. The Tribes' failure to test the Nishu Store UST's cathodic protection system by December 7, 2010, and thereafter in accordance with 40 C.F.R. § 280.31(b)(1) constitutes a violation of 40 C.F.R. § 280.31 and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

Failure to Conduct Tank and Piping Release Detection

32. 40 C.F.R. § 280.41 requires owners and operators of UST systems to provide release detection for tanks and piping every 30 days.

33. The Tribes notified EPA on December 8, 2015, that two new USTs were installed at the Nishu Store.

34. The two new UST systems at the Nishu Store do not have tank and piping release detection systems.

35. The Tribes' failure to provide release detection for the Nishu Store's two new USTs within 30 days of installation and thereafter constitutes a violation of 40 C.F.R. § 280.41 and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

Failure to Obtain Financial Responsibility

36. 40 C.F.R. § 280.93(a) requires UST owners and operators to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily

injury and property damage caused by accidental releases arising from the operation of petroleum tanks.

37. The Tribes' preferred mechanism for demonstrating financial responsibility is the Fund. Annual tank registration fees for coverage by the Fund are due by June 30th for the following fiscal year (July 1 through June 30).

38. Financial responsibility for the Nishu Store expired on June 30, 2012.

39. The Tribes' failure to have valid financial responsibility for the Nishu Store USTs since July 1, 2012, constitutes a violation of 40 C.F.R. § 280.93(a) and section 9003(c) of RCRA, 42 U.S.C. § 6991b(c).

Failure to Submit New UST Notification Form

40. 40 C.F.R. § 280.22(a) requires that an owner submit notice of an UST system's existence to the implementing agency within 30 days of bringing the UST into use. Owners must use the form in appendix I of 40 C.F.R. part 280 in accordance with 40 C.F.R. § 280.22(c).

41. The Tribes notified EPA on December 8, 2015, that they installed two new USTs at the Nishu Store.

42. The Tribes did not submit a new UST notification form to EPA for the two new USTs at the Nishu Store in within 30 days of installation or anytime thereafter.

43. The Tribes' failure to submit a new UST notification form for the Nishu Store's two new USTs constitutes a violation of 40 C.F.R. § 280.22(a) and section 9002 (a) of RCRA, 42 U.S.C. § 6991b(c).

COMPLIANCE ORDER

Based on the foregoing Findings of Violations, and pursuant to section 9006(a) of RCRA, 42 U.S.C. § 9661(e)(a), the Tribes agree and are hereby ORDERED to perform the following:

44. Effectively immediately, the Tribes shall comply with the tank and piping release detection requirements at 40 C.F.R. 280.41 and provide monthly release detection reports for the Nishu Store within 30 days of the effective date of this Consent Order and maintain monthly release detection reports for the Nishu Store every 30 days thereafter.

45. Within 90 days of the effective date of this Consent Order, the Tribes shall obtain appropriate financial responsibility for all tanks at the Nishu Store in accordance with 40 C.F.R. § 280.93(a) and the “Dollars and Sense, Financial Responsibility Requirements For Underground Storage Tanks” pamphlet (Exhibit 1) from either method below and submit the policy declaration page or Fund certificate to EPA no later than 15 days thereafter:

1. Purchasing a private petroleum cleanup insurance policy or
2. Contacting the North Dakota Petroleum Tank Release Compensation Fund for financial responsibility. [If you choose this option, you may obtain this information by contacting Jeff Bitz, Program Director at 701.328.9600 or by visiting their website at <http://www.state.nd.us/ndins/programs/details.asp?ID=103>]

46. Within 60 days of the effective date of this Consent Order, the Tribes shall direct the contractor who installed the new USTs at the Nishu Store to complete the notification form at <http://www.epa.gov/sites/production/files/2015-07/documents/updated-form.pdf> in accordance with 40 C.F.R. § 280.22(a) and submit a copy of the form to EPA no later than 15 days thereafter.

47. Within 60 days of the effective date of the Consent Order, the Tribes shall perform cathodic protection testing for the USTs at the Nishu Store in accordance with 40 C.F.R. § 280.31(a) and submit the cathodic protection test results to EPA no later than 15 days thereafter.

48. The Tribes must submit all forms, reports and other information required under this Consent Order to:

Francisca Chambus, UST Enforcement Coordinator
Underground Storage Tank Program (8P-R)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
Email: Chambus.francisca@epa.org
Fax: (303) 312-6341

GENERAL PROVISIONS

49. The Tribes' failure to fully implement all requirements of this Consent Order in the manner and time period required shall be deemed a violation of this Consent Order.

50. This Consent Order constitutes the entire agreement and understanding of the parties concerning settlement of the above-captioned action and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Consent Order. This Consent Order, however, will not prohibit, prevent, or otherwise preclude the EPA from taking whatever action(s) it deems appropriate to enforce RCRA subtitle I in any manner and will not prohibit, prevent, or otherwise preclude the EPA from enforcing this Consent Order in subsequent administrative proceedings. Nothing in this Consent Order constitutes a waiver, suspension or modification of the requirements of RCRA

subtitle I, or the rules and regulations promulgated thereunder, which remain in full force and effect. Issuance of this Consent Order is not an election by the EPA to forgo any civil or administrative action otherwise authorized under the law.

51. Violations of applicable requirements of RCRA subtitle I under section 9003 of RCRA, 42 U.S.C. § 6991b, may subject the Tribes to a civil penalty not to exceed \$16,000 for each tank for each day of violation, as assessed by a United States district court, under section 9006(d)(1), 42 U.S.C. § 6991e(d)(1), and 40 C.F.R. § 19.4. Violations of any term of this Consent Order may subject the Tribes to an administrative penalty of up to \$37,500 for each day of continued noncompliance, after notice and opportunity for a hearing, under section 9006(a)(3) of RCRA, 42 U.S.C. § 6991e(a)(3).

52. This Consent Order does not relieve the Tribes of any responsibilities or liabilities established pursuant to any applicable local, tribal or federal law.

53. The Tribes waive any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that the Tribes may have with respect to this Consent Order, including any right of judicial review under section 9006(b) of RCRA, 42 U.S.C. § 6991e(b).

54. This Consent Order may be amended or modified by written agreement of the EPA and the Tribes.

55. Except for any data, reports, records, documents, and information required by this Consent Order, the Tribes (1) may assert business confidentiality claims under 40 C.F.R. part 2, Subpart B for any other information (in whatever form) provided to the EPA or (2) may assert that such information is privileged as recognized by and consistent with federal law.


EFFECTIVE DATE

56. This Consent Order shall become effective upon official filing with the EPA Region 8 Regional Hearing Clerk, and will remain in effect until the EPA provides the Tribes written notice that the Consent Order, its terms and conditions, have been fully complied with.

IT IS SO AGREED AND ORDERED:

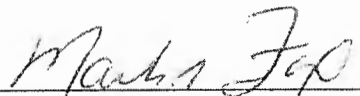
**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.**

Date 8/3/16

By: 
Suzanne J. Bohan
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

**THREE AFFILIATED TRIBES,
Respondent.**

Date: 7-26-16

By: 
The Honorable Mark Fox
Chairman