

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket No. CWA-08-2007-0025
Docket No. CWA-08-2007-0026

2008 SEP 26 AM 10:37
EPA REGION VIII
HEARING CLERK

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

**STIPULATIONS OF EXHIBITS
AND TESTIMONY**

Pursuant to the Order Scheduling Hearing issued by Administrative Law Judge Barbara A. Gunning on August 20, 2008, directing the parties to confer and stipulate to those facts, exhibits and testimony which are not genuinely in dispute, the parties hereby stipulate to the exhibits and testimony identified below. At the present time, the parties have not stipulated to facts. The parties just this week have been able to reach a settlement on all claims involving the Chamberlain facility and intend to forward by September 26, 2008, a completed "Partial Consent Agreement" to the Regional Judicial Officer for review, and assuming approval, a Final Order. The Respondent this week also has committed to finalizing any operational changes to return the Presho facility to compliance. Subject to the Respondent achieving compliance at the Presho facility with any and all applicable requirements, the parties intend to continue settlement negotiations to resolve the outstanding Presho facility outside of litigation. Should a hearing be required to resolve any unsettled claims involving the Presho facility, the parties will endeavor to file a joint set of stipulated facts to focus the hearing on only those matters which can only be resolved after a hearing.

EXHIBITS

The Parties stipulate to the admission of the following documents into evidence, reserving the right to argue the meaning, effect and/or weight of such at hearing:

1. US EPA Inspection Report, 40 CFR 112, Spill Prevention, Control and Countermeasures, prepared by James E. Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, Inspection Date September 14, 2006, Report Date December 7, 2006 (with attached aerial photo, topographic map photo, and Photo Log).

2. US EPA Region 8 SPCC Plan Review Checklist, prepared by James E. (aka "Jim") Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, September 14, 2006. US EPA Region 8 SPCC Facility Inspection Checklist, prepared by Jim Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, September 14, 2006.
3. US EPA SPCC Field Inspection and Plan Review Checklist, prepared by Jim Peterson for the Burke Oil facility located at 1200 E King Street in Chamberlain, SD, signed March 27, 2007.
4. 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).
5. US EPA Region 8 SPCC Plan Review Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, September 13, 2006.
6. US EPA Region 8 SPCC Facility Inspection Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, September 13, 2006.
7. US EPA SPCC Field Inspection and Plan Review Checklist, prepared by Jim Peterson for Presho Oil, Inspection No. S06099, signed March 16, 2007.
8. SPCC Compliance Inspection Report and handwritten regulatory information noticing inspection of SPCC #SO6099 with Jim Kotz on September 13, 2006, signed by Jim Peterson.
9. SPCC Compliance Status Report as of 12/2/2006, prepared by Jim Peterson for the Burke Oil-Chamberlain Facility, Inspection No. S06100, Inspection Date September 14, 2006, Report Date December 7, 2006.
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.
11. Color copy of Microsoft Virtual Earth picture of Burke Oil-Chamberlain Facility, and surrounding area, <http://maps.live.com>, dated September 4, 2007.
12. Flow chart/table depicting Chamberlain site elevation change from site to creek draining into American Creek.
13. USGS, Chamberlain Site (4 pages)

14. Color copy of topographic map depicting area 4 kilometers south of Chamberlain, South Dakota, on 8.5 x 11 inch paper, image courtesy of US Geological Survey, <http://terraserver-usa.com>, dated March 3, 2008.
15. Color copy of topographic map depicting area 5 kilometres south of Chamberlain, South Dakota, on 8.5 x 11 inch paper, image courtesy of US Geological Survey, <http://terraserver-usa.com>, dated March 3, 2008.
16. 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.
17. 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.
18. Flow chart/table depicting Presho site elevation change from site to creek draining into Medicine Creek.
19. USGS 06442500 Medicine Creek at Kennebec SD
20. Color copy of Microsoft Virtual Earth picture of Presho, Lyman, South Dakota, <http://maps.live.com>, dated March 4, 2008.
21. Fax Cover sheet and attached copy of the SPCC Compliance Inspection Report and handwritten regulatory information regarding Burke Oil Chamberlain from Burke Oil to Jim Peterson, EPA.
22. Record of Communication prepared by Jim Peterson regarding Burke Oil-Chamberlain and Wheat Growers (undated).
23. Undated letter from Robert Burke, Burke Oil, to Mr. Peterson, EPA, and copies of Attachment C, Weekly Facility Inspection Checklists consisting of two pages, dated October 2, 2006, for Wheat Growers Plant, Burke Oil Fuel Plant, respectively.
24. 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.
25. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (May 31, 2007).

26. Letter from Bob Burke, Burke Oil, to Donna Inman, EPA, dated June 12, 2007.
27. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 1, 2007).
28. 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.
29. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 11, 2007).
30. Letter from Amy Swanson, EPA, to Robert Burke, Burke Oil, dated October 29, 2007.
31. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (October 31, 2007).
32. EPA Record of Communication prepared by Donna Inman regarding conversation with Robert Burke, Burke Oil (November 8, 2007).
33. Letter and attached Affidavit and Photos from Steve Fox, Larson, Sundall, Larson, Schaub & Fox, to Amy Swanson, EPA, and attachments, dated November 28, 2007.
34. Letter and attached Affidavit and Photos from Steve Fox, Larson, Sundall, Larson, Schaub & Fox, to Amy Swanson, EPA, dated December 20, 2007.
35. 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).
36. EPA statement detailing its penalty calculation.
37. City of Chamberlain, Brule County, South Dakota, Basic Road Map.
38. City of Presho, Lyman County, South Dakota, Basic Road Map.
39. 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.

40. Resume or curriculum vitae for Donna Inman, Complainant's expert witness.

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 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:
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8

Date: 9/26/08

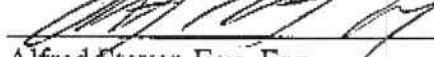
By:



Dana J. Stotsky
Amy Swanson
U.S. EPA Region 8
1595 Wynkoop Street (8ENF-L)
Denver, Colorado 80202-1129

**FOR RESPONDENT:
BURKE OIL COMPANY, INC.**

Date: 9-25-08

By: 
Alfred Steven Fox, Esq.
Larson, Sundall, Larson, Schaub,
& Fox, P.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 26, 2008, the original and one copy of the STIPULATIONS OF FACTS, EXHIBITS AND TESTIMONY 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 delivered as follows:

Via pouch mail to:

The Honorable Barbara A. Gunning
Office of Administrative Law Judges
Administrative Law Judge
Office of Administrative Law Judges (Mail Code 1900L)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

And via regular mail to:

Steve Fox, Esq.
Larson, Sundall, Larson, Schaub & Fox, P.C.
P.O. Box 547
Chamberlain, SD 57325

Date: 9/26/08

By: 