

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6

FILED

2010 JUN -2 AM 9: 30

IN THE MATTER OF:

BERTSCHINGER OIL CO.
Seminole County, Arkansas

Respondent.

MOTION FOR DEFAULT

REGIONAL HEARING CLERK
EPA REGION VI

Proceeding to Assess Class I Civil Penalty
Clean Water Act Section 311 for
SPCC Violation

Docket No. CWA-06-2009-4808

MOTION FOR DEFAULT AND MEMORANDUM
IN SUPPORT OF MOTION FOR DEFAULT

Pursuant to 40 C.F.R. 22.17, the Complainant files this Motion for Default and Memorandum in Support of Motion for Default in the above action. Complainant reserves the right to seek civil penalties in a separate motion for assessment of civil penalty coupled with documentary evidence in support of such motion for assessment of civil penalty. In support of this Motion for Default, Complainant states and argues as follows:

I. PROCEDURAL BACKGROUND

1. **Governing Procedures.** This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. § 22.1 *et seq.*

2. **Filing of the Complaint.** In accordance with 40 C.F.R. §§ 22.5(a) and 22.14, on September 8, 2009, the original Complaint and one copy was filed with, and received by, the Regional Hearing Clerk, EPA Region 6.

3. **Service of the Complaint.** In accordance with 40 C.F.R. § 22.5(b), on September 8, 2009, the Complainant delivered a copy of the Complaint, via certified mail with return receipt

requested, to the Respondent.

4. **Proof of Service.** On September 10, 2007, Respondent received a copy of the Complaint as evidenced by the original green, return-receipt filed with the Hearing Clerk.

5. **Answer to the Complaint.** The Respondent has not filed an answer to the complaint.

6. **Status Report.** The Presiding Judicial Officer issued a Status Report on March 22, 2010, ordering Complainant to file a report on the status of the matter. On April 13, 2010, Complainant filed its Status Report with the Hearing Clerk stating that it intends to file a motion for default by May 31, 2010.

II. STATUTORY REQUIREMENTS

9. Section 311(b)(6)(B)(i) of the Clean Water Act (“Act”), 33 U.S.C. § 1321(b)(6)(B)(i), as amended by the Oil Pollution Act of 1990, authorizes the Administrator of EPA to issue an Administrative Complaint for failing to comply with Spill Prevention Control and Countermeasure regulations set forth at 40 C.F.R. Part 112 under the authority of Section 311(j) and other provisions of the Clean Water Act, 33 U.S.C. § 1321(j) and 33 U.S.C. 1251 *et seq.* (“SPCC regulations”). Section 311(b)(6)(A)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(A)(ii), authorizes the assessment of a Class 1 civil penalty by the Administrator for a any owner, operator or person in charge of any onshore facility who fails or refuses to comply with any regulation issued under Section 311(j) of the Act, 33 U.S.C. § 1321(j), to which that owner, operator, or person in charge is subject. Pursuant to Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. § 19.4, Respondent is liable for civil penalties up to \$11,000 per violation, up to a maximum of \$32,500.

10. Section 311(j) of the Act, 33 U.S.C. § 1321(j) authorizes EPA to promulgate

regulations establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from onshore facilities, and to contain such discharges.

III. ELEMENTS OF VIOLATIONS

11. **Prima Facie Case - Liability.** In order for a default order to be entered against the Respondent, the Presiding Officer must conclude the Complainant has established a prima facie case of liability against the Respondent. *See In re Atkinson*, 1998 WL 422231, Docket No. RCRA-9006-VIII-97-02 (EPA Region VIII). Under 40 C.F.R. § 22.17(a), to establish a prima facie case, the Complainant must establish by a preponderance of the evidence that each element of the violation has occurred. *See In re Haydel*, 2000 WL 436240, Docket No. CWA-VI-99-1618 (EPA Region VI). In order to find liability when a Respondent is in default, the Complainant need only show that it pled a prima facie case in its complaint, not submit evidence proving a prima facie case. *See In re Haydel*, 2000 WL 436240, Docket No. CWA-VI-99-1618 (EPA Region VI). As per the factual allegations outlined in the Complaint (*See* Complaint No. CWA 06-2007-4808), the Respondent violated 40 C.F.R. 112.3 as promulgated under Section 311(j) of the Act, 33 U.S.C. § 1321(j). Specifically, the following elements of the Complainant's cause of action have been met:

a. Respondent is a corporation and a "person" as defined by Section 311(a)(7) and 502((5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2. (Complaint No. CWA 06-2009-4808, Paragraph 7).

b. Respondent is the owner and/or operator of an onshore oil production facility, the Wooten Tank Battery, within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. §

1321(a)(6), and 40 C.F.R. §112.2, located in Konawa, Seminole County, Oklahoma (“the facility”). Drainage from the facility flows approximately 500 feet to the South to where it enters an unnamed tributary of Negro Creek; thence East, for approximately half a mile, to Negro Creek; thence Southeast to the Canadian River. (Complaint No. CWA 06-2009-4808, Paragraph 8).

c. Negro Creek and the Canadian River are navigable waters of the United States within the meaning of 40 C.F.R. 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7). (Complaint No. CWA 06-2009-4808, Paragraphs 8 and 10).

d. Respondent’s facility has an aggregate above-ground storage capacity greater than 1320 gallons of oil in containers each with a shell capacity of at least 55 gallons. (Complaint No. CWA 06-2009-4808, Paragraph 9).

e. Prior to August 16, 2002, Respondent began operating, and has since continually operated, the facility for drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products located at the facility. (Complaint No. CWA 06-2009-4808, Paragraphs 11 through 16).

f. The facility is a non-transportation-related facility within the meaning of 40 C.F.R. § 112.2, Appendix A, as incorporated by reference within 40 C.F.R. 112.2, and is an onshore facility within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2. (Complaint No. CWA 06-2009-4808, Paragraphs 11 through 14).

g. Due to the facility’s drainage being approximately 500 feet away from the unnamed creek that flows into Negro Creek, and approximately half mile away from Negro Creek, the facility could reasonably be expected to discharge oil to a navigable water of the

United States or its adjoining shorelines in a harmful quantity (“an SPCC-regulated facility”).
(Complaint No. CWA 06-2009-4808, Paragraphs 8 through 15).

h. Respondent’s facility is subject to the SPCC regulations implemented pursuant to Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C) and is therefore “an SPCC-regulated facility.” (Complaint No. CWA 06-2009-4808, Paragraph 15).

i. Pursuant to Section 311(j) of the Act, 33 U.S.C. § 1321(j), and 40 C.F.R. § 112.3, the owner or operator of an SPCC-regulated facility must prepare a written SPCC plan in accordance with 40 C.F.R. § 112.7 and any other applicable section of 40 C.F.R. Part 112.
(Complaint No. CWA 06-2009-4808, Paragraph 18).

j. On February 6, 2008, EPA inspected the facility and found that Respondent had failed to prepare an SPCC plan for the facility in accordance with the requirements of 40 C.F.R. § 112.7. (Complaint No. CWA 06-2009-4808, Paragraphs 19).

k. Respondent’s failure to prepare an SPCC plan in accordance with the requirements of 40 C.F.R. § 112.7 violated 40 C.F.R § 112.3, subjecting Respondent to civil penalties of up to \$11,000 per violation, up to a maximum of \$32,500, pursuant to Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. § 19.4. (Complaint No. CWA 06-2009-4808, Paragraphs 20 and 21).

l. 40 C.F.R. § 112.9(c)(3) requires that the owner or operator of an SPCC-regulated on-shore production, periodically and on a regular schedule, visually inspect each container of oil for deterioration and maintenance needs. 40 C.F.R. § 112.9(d)(1) requires that the owner or operator of an SPCC-regulated onshore production facility, periodically and on a regular schedule, visually inspect all aboveground valves and piping associated with transfer

operations for the general conditions of flange joints, valve glands and bodies, drip pans, pipe supports, pumping well polish rod stuffing boxes, bleeder and gauge valves, and other such items. (Complaint No. CWA 06-2009-4808, Paragraphs 23 and 24).

m. On February 6, 2008, EPA inspected the facility and found that Respondent had failed to visually inspect oil storage containers as well as valves and piping associated with transfer operations. During the inspection, EPA observed the condition of the oil containers as well as oil staining around the base of the oil storage containers and below the valves and connecting line flanges. (Complaint No. CWA 06-2008-4808, Paragraph 25).

n. Respondent's failure to provide periodic visual inspections of the oil storage containers and valves and piping associated with transfer operations violated 40 C.F.R. § 112.9(c)(3) and 112.9(d)(1), subjecting Respondent to civil penalties of up to \$11,000 per violation, up to a maximum of \$32,500, pursuant to Section 311(b)(6)(B)(i) of the Act, 33 U.S.C. § 1321(b)(6)(B)(i), and 40 C.F.R. § 19.4. (Complaint No. CWA 06-2009-4808, Paragraphs 26 and 27).

12. Respondent's Admission of Facts Alleged. As per 40 C.F.R. § 22.17(a), failure of the Respondent to file a timely answer to the complaint may constitute a default. 40 C.F.R. § 22.17(a) further provides that a 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. As stated above, Respondent failed to file a timely answer to the complaint. Thus, the Respondent is in default pursuant 40 C.F.R. § 22.17(a) and should be found in default by the Regional Judicial Officer. Further, by virtue of such default, Respondent has admitted all of the facts alleged in the complaint. *See In re Palimere, et al*, 2000


WL 33126605, Docket No. RCRA-III-9006-050 (EPA Region III). (Respondent's default constitutes an admission of facts alleged; therefore, the complainant need not submit evidence to prove a prima facie case on liability for a default order).

13. Finding of Respondent Liability. Subsequently, under 40 C.F.R. § 22.16(c), the Complainant EPA requests the Presiding Judicial Officer issue a Default Order against the Respondent, Bertschinger Oil Company, finding the Respondent liable for violations of the Clean Water Act, as amended by the Oil Pollution Act of 1990, as previously stated.

THEREFORE, in accordance with 40 C.F.R. § 22.1 *et seq.*, the Complainant moves that, based on the aforementioned facts and law, the Regional Judicial Officer issue a Default Order in this matter.

Respectfully submitted,

Date: 6/2/10


Edwin M. Quinones for Complainant
Assistant Regional Counsel
U.S. EPA Region 6, 6RC-S
1445 Ross Avenue
Dallas, TX 75202
(214) 665-8035

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Complainant's Motion for Default was mailed on June 2, 2010, by regular First Class U.S. Mail to the following:

Mr. Richard O. Bertschinger
Bertschinger Oil Co.
6417 Grandmark Drive
Nichols Hills, OK 73116-6534

Date: June 2, 2010



Edwin M. Quinones
Assistant Regional Counsel
Region 6, 6RC-S
1445 Ross Ave.
Dallas, TX 75202
(214) 665-8035