UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF Stockton Oil Company, Inc., Battlefield Express Center Facility Junction Hwy. 212 and I-90 Crow Agency, MT 59022 EPA ID Number 2020002 Respondent.	Docket No. RCRA-08-2008-007 **MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT**

Introduction

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by Complainant, the United States Environmental Protection Agency, Region 8 (EPA), in accordance with 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

Background

Respondent Stockton Oil Company, Inc. (Respondent), owns and operates three 10,000 gallon fiberglass underground storage tanks (USTs) at the Battlefield Express Center Facility (facility) in Big Horn County, Montana, within the exterior boundaries of the Crow Indian Reservation. The facility is a for-profit gas station and convenience store.

EPA inspected the facility on September 13, 2007, for compliance with the UST regulations set forth at 40 C.F.R. Part 280. During the inspection, the EPA inspector determined that the Respondent had failed to conduct annual line tightness testing or perform monthly monitoring on the pressurized piping since July 8, 2004, as required by 40 C.F.R. § 280.41(b)(1)(ii). At the time of the inspection, the sump sensors for the tanks were raised to avoid contact with any liquid in the tanks, rendering them ineffective for the purpose of performing piping leak detection.

The Complainant filed a Complaint and Notice of Opportunity for Hearing against the Respondent under section 9006 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, on July 15, 2008. The Complaint charges Respondent for failing to comply with 40 C.F.R. § 280.41(b)(1)(ii) for the three USTs located at the facility for the period July 8, 2005, through September 13, 2007. The Complaint proposes a penalty of $41,511 for the violation alleged. EPA previously issued the Respondent an Expedited Enforcement Compliance Order and Settlement Agreement in the amount of $300.00 for the very same violation in July 2004.

The Respondent did not file an answer or otherwise respond to the Complaint. According to the domestic Return Receipt for the Complaint, an authorized representative for the Respondent received and signed for the Complaint on July 21, 2008. The Respondent has made no effort to contact EPA regarding the Complaint since its receipt. A default order and the assessment of a civil penalty is necessary to compel the Respondent to comply, and to uphold the EPA UST Program's regulatory authority and integrity.

Standard for Finding Default

The regulation governing default in the Consolidated Rules of Practice is found at § 22.17 of the Rules of Practice, 40 C.F.R. § 22.17. Section 22.17(a) of the Rules of Practice provides as follows:

> A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; ...or upon failure to appear at a conference or hearing...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.

Additionally, § 22.17(b) provides that when a default motion requests the assessment of a civil penalty, the moving party must specify the penalty and give the legal and factual grounds for the relief requested.

40 C.F.R. § 22.17(c) provides 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...The relief proposed in the complaint...shall be ordered unless the requested relief is clearly inconsistent with the Act.

Argument

I. Respondent Failed to File an Answer

40 C.F.R. § 22.17(a) provides in pertinent part: "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . ." 40 C.F.R. § 22.15(a) specifies that an "answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint."

The EPA filed the Complaint in this matter on July 15, 2008. In accordance with 40 C.F.R. § 22.5(b)(1) (Filing, service, and form of all filed documents; business confidentiality claims), the Complaint along with a copy of the Consolidated Rules were served on Respondent by certified mail, return-receipt requested. The return-receipt prepared by the United States Postal Service and completed by an authorized representative for the Respondent indicates that the Respondent received the Complaint on July 21, 2008. In accordance with 40 C.F.R. § 22.5(b)(1), Respondent's thirty-day timeframe for filing an answer expired on or about August 18, 2008. Respondent failed not only to file a timely answer, but failed to file an answer altogether.

Previous EPA administrative tribunals considering the issue of default support waiving a respondent's rights and assessing the proposed penalty amount in situations similar to the instant case. When a respondent does not file an answer, it presents no evidence to contradict the alleged violations, and respondent waives its right to contest them. In the Matter of: James Bond, Owner, Bond's Body Shop, Docket Nos. CWA-08-2004-0047 and RCRA-08-2004-0004 (January 11, 2005, Chief ALJ Susan L. Biro); In the Matter of: Alvin Raber, Jr., and Water Enterprises Northwest, Inc., Docket No. SDWA-10-2003-0086 (July 22, 2004, RJO Alfred C. Smith).

Respondent was warned of the consequences for failing to file a timely answer in the Complaint and the accompanying cover letter. The Complaint includes specific, highlighted language, regarding Respondent's right to request a hearing and file an answer. Additional language included in the Complaint specifies the potential consequences for not filing an answer,

including a possible default judgment and assessment of a penalty. The cover letter emphasizes the need for a timely answer, and provides information on how to file an answer.

Despite such warning, the Respondent intentionally chose not to comply with the answer requirements set forth in the Consolidated Rules, and made no effort to seek an order from the Presiding Officer granting an extension of time in which to file his answer. Such failure to respond provides an appropriate basis for finding the Respondent in default.

II. Respondent's Default is Willful and Obstructive

In the case at hand, there is ample support in the case file for finding that Respondent's default is willful and obstructive. The Respondent was cited for the very same violation in 2004, after an EPA inspector observed that the sump sensors were bent upwards to avoid contact with any liquid. Although the Respondent paid the citation and provided the outstanding line tightness test results for the piping, no effort was made to maintain or keep fully-operational the USTs' sump sensors or Automatic Tank Gauge (ATG) alarm. During the 2007 inspection, the inspector once again observed that the sump sensors were and ATG alarm were disabled from monitoring leak detection on the piping as required by regulation.

Despite being on notice of the noncompliance since at least the date of the inspection, the Respondent has not contacted EPA staff regarding efforts to resolve the alleged violation or compliance issues at the facility. Further, the Respondent has not filed any documents pertaining or otherwise responded to this proceeding since being served with the Complaint over four months ago. Respondent's non-responsiveness to EPA's Complaint prevents EPA's UST Program from implementing its program fairly and effectively.

The case file clearly presents sufficient evidence to compel a conclusion of law in Complainant's favor. The uncontested factual evidence set forth in the administrative record in this matter, including the inspector's report, demonstrates that the Respondent failed to comply with 40 C.F.R. § 280.41(b)(1)(ii), establishing Complainant's Prima Facie Case. No evidence has been produced by the Respondent to rebut the Complainant's findings

III. Threat of Harm Posed by Respondent's Inaction

If the facility fails to regularly monitor for leaking petroleum products it puts the immediate area surrounding the site and any nearby groundwater at serious risk of contamination. Such negligent disregard for public health and safety cannot be condoned. A default order holding the Respondent accountable for its inaction and negligent disregard for the UST regulations, EPA's regulatory authority, and the Part 22 administrative hearing procedures is necessary to ensure adequate environmental protection.

There are many hazards posed by gasoline released from underground storage tanks. Any release poses an immediate threat of fire or explosion from vapors or the liquid itself. Some of the common constituents of gasoline can dissolve into groundwater, which in an aquifer flows towards areas of lower pressure such as wells, springs, and surface waters.

Human exposure to gasoline can irritate the central nervous system through vapor exposure and any level exposure to benzene, an ingredient in gasoline, is a cancer risk. Benzene is a listed as a hazardous waste under RCRA at EPA no. F005. 40 C.F.R. 261.31 (2006). No safe threshold of exposure exists for benzene. These threats to human health can occur by inhalation or ingestion. See In the Matter of: Euclid of Virginia, Inc., Docket No. RCRA-3-2002-0303 at 19-24 (2006).

IV. Legal and Factual Grounds in Support of the Penalty Sought

The legal authority for assessing a penalty for alleged violations of RCRA subtitle I and the UST regulations is set forth at RCRA § 9006(d)(2), 40 U.S.C. § 6991e(d)(2), and 40 C.F.R. § 19.4. Section 9006(d)(2) authorizes the assessment of a civil administrative penalty not to exceed $11,000 per day for non-compliance with any requirement or standard promulgated by the Administrator under RCRA § 9003, 42 U.S.C. §6991b.

Section 9006(e) of RCRA, 42 U.S.C. § 6991e(e), sets forth the applicable statutory penalty factors to consider in assessing a penalty, including the compliance history of the facility operator and any other factor the Administrator considers appropriate. EPA uses the "U.S. EPA Penalty Guidance for Violations of UST Regulations" (Penalty Policy) to apply the statutory penalty factors in a fair and consistent manner. The Penalty Policy includes both a gravity and economic benefit component. Gravity is a monetary value reflective of the seriousness of the violations and the population at risk. Factors including the degree of willfulness/negligence, history of noncompliance and duration are considered in determining the gravity component of a penalty. The Penalty Policy's initial gravity component for noncompliance with 40 C.F.R. § 280.41(b)(1)(ii) classifies the Potential for Harm and Extent of Deviation as "Major."

EPA increased the initial gravity amounts in accordance with the Penalty Policy based on the degree of willfulness/negligence factor (0.25), and history of noncompliance factor involving similar violations (0.25) for an adjusted gravity amount. The Respondent's previous field citation history warrants these increases. The days of noncompliance multiplier (4.0) was increased in accordance with the Penalty Policy, starting at 2.5 for one year and adding 0.5 for each additional 6 months of noncompliance. The environmental sensitivity multiplier (1.5) was

also increased because the Facility is in Indian country.

In addition to gravity, EPA calculated an economic benefit component of $1,011 which consists of the costs of operator expenses the Respondent would have incurred had it performed the required monthly monitoring on pressurized piping. By including these costs in the penalty, the economic benefit enjoyed by Respondent for not complying with the regulations is eliminated. The gravity and economic benefit components, plus a standard increase for pleading purposes, combine for a total civil penalty of $41,511.

Courts have readily imposed penalties in default actions where the requested relief is consistent with the Act.. See In the Matter of: Sector Peep Hoyas Community, Docket No. SDWA-02-2—3-8261 (2005), In the Matter of: John Gateaux, Docket No. SDWA-06-2003-1590 (2003), In the Matter of: W.N. Bunch, W.N. Bunch Water System, Docket No. SDWA-3-99-002 (2000).

Conclusion

Respondent failed to file an answer to the Complaint. For the reasons set forth above, Complainant requests that the Presiding Officer find the Respondent in default and issue a default order assessing the proposed penalty amount of $41,511