UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

In the Matter of:	)	
	)	
Bertschinger Oil Co.,	)	Docket No. CWA-06-2009-4808
	)	
Respondent.	)	

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under Section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321, as amended, for violations of Oil Pollution Prevention regulations set forth at 40 C.F.R. Part 112. The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP") codified at 40 C.F.R. Part 22. Complainant, Chief of the Response and Prevention Branch, Superfund Division, United States Environmental Protection Agency Region 6, filed a Motion for Default and Memorandum in Support of Motion for Default on June 2, 2010. The Presiding Officer issued a Order Finding Respondent in Default and for Further Proceedings on June 30, 2010, in which Respondent was found to have violated regulations issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j). On July 28, 2010, Complainant filed a Motion for Assessment of Civil Penalty seeking a civil penalty in the amount of $22,000.00 against Respondent. Pursuant to the CROP and the record in this matter and for the reasons set forth below, the Complainant's Motion is hereby **GRANTED**.

BACKGROUND

The Complainant filed the Complaint against Respondent in this matter on September 8, 2009. The Certificate of Service attached to the Complaint includes a certification that a copy of

the Complaint[1] was sent by certified mail, return receipt requested, on September 8, 2009, addressed to Richard O. Bertschinger, 6417 Grandmark Drive, Nichols Hills, Oklahoma. A certified mail return receipt (green card) filed with the Regional Hearing Clerk shows that an article was signed for at the address indicated in the Certificate of Service on September 10, 2009. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in this case suggests that it was not properly executed, thus proper service of the Complaint may be presumed under the CROP. Respondent was required to file an answer to the Complaint within 30 days of the service of the Complaint. 40 C.F.R. § 22.15(a). As of the date of this Order, Respondent has not filed an answer to the Complaint with the Regional Hearing Clerk. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver or Respondent's right to a hearing on such factual allegations.

On April 13, 2010, Complainant filed a Status Report in which Complainant reported that Complainant did not consider settlement of the matter likely, and that Complainant intended to file a motion for default. The Certificate of Service attached to the Status Report includes a certification that a copy of the Status Report was mailed to the Respondent by first class mail on April 13, 2010.

On June 2, 2010, Complaint filed its Motion for Default and Memorandum in Support of Motion for Default ("Motion for Default"). The Certificate of Service attached to the Motion for Default includes a certification that a copy of the Motion for Default was served on Respondent

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[1]It should be noted that the Certificate of Service states that the document being served is a "Consent Agreement and Final Order." This appears to be a clerical error.

by first class mail on June 2, 2010. Respondent was required to file a response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b). As of the date of this Order, Respondent has not filed a response to the Motion for Default with the Regional Hearing Clerk. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

On June 30, 2010, the Presiding Officer issued an Order Finding Respondent in Default and for Further Proceedings. In the Order, the Presiding Officer found the Respondent to be in default for failure to file a timely answer, that Respondent's default constitutes, for purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. The Presiding Officer also ordered Complainant to file its motion for the assessment of civil penalty coupled with supporting documentation on or before July 30, 2010. The Order specifically provided that Respondent would have 15 days after service of Complainant's response to file its response, if any, to Complainant's filing. The Certificate of Service attached to the Order includes a certification that a copy of the Order was mailed to the Respondent by certified mail on June 30, 2010.[2] A certified mail return receipt (green card) filed with the Regional Hearing Clerk shows that the Order was signed for at the address indicated in the Certificate of Service on July 6, 2010.

Complainant filed its Motion for Assessment of Civil Penalty ("Motion for Assessment") on July 28, 2010, seeking the assessment of a civil penalty of $22,000.00 against the Respondent. The Certificate of Service attached to the Motion for Assessment includes a

[2]It is noted that the docket number reference in the Certificate of Service is not the docket number for this case, however, that appears to be a clerical error.

certification that a copy of the Motion for Assessment was served on Respondent by regular mail on July 28, 2010. As of the date of this Order, Respondent has not filed a response to the Motion for Assessment with the Regional Hearing Clerk. Respondent's failure to respond to the Motion for Assessment is deemed to be a waiver of any objection to the granting of the relief requested in the Motion for Assessment. 40 C.F.R. § 22.16(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to sections 22.17(c) and 22.27(a) of the CROP, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact and conclusions of law:

1. The Complaint was filed with the Regional Hearing Clerk on September 8, 2009.
2. A copy of the Complaint was mailed to Respondent by certified mail, return receipt requested, on September 8, 2009.
3. A return receipt shows that Respondent received a copy of the Complaint on September 10, 2009.
4. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).
5. Respondent did not file an answer to the Complaint within 30 days of receipt of the Complaint and has not filed an answer as of the date of this order.
6. Respondent's failure to file an answer to the Complaint constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

7. On June 2, 2010, Complaint filed its Motion for Default and served it on the Respondent by first class mail.

8. Complainant's Motion for Default was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

9. Respondent was required to file any response to the Motion for Default within 15 days of service. 40 C.F.R. § 22.16(b).

10. Respondent did not file a response to Complainant's Motion for Default within 15 days of service and has not filed a response to the Motion for Default as of the date of this order.

11. Respondent's failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion for Default. 40 C.F.R. § 22.16(b).

12. On June 30, 2010, the Presiding Officer issued an Order Finding Respondent in Default and for Further Proceedings which, among other things, found Respondent in default for failure to file a timely answer to the Complaint and required Complainant to file a motion for assessment of civil penalty on or before July 30, 2010. The Order also specifically stated that Respondent would have 15 days after service of Complainant's response to the Order to file its response, if any, to Complainant's filing.

13. A copy of the Order was mailed to Respondent by certified mail, return receipt requested, on June 30, 2010.

14. A return receipt shows that Respondent received a copy of the Order on July 6, 2010.

15. The Order was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

16. On June 28, 2010, Complainant filed its Motion for Assessment and served it on Respondent by regular mail.

17. Respondent did not file a response to Complainant's Motion for Assessment within 15 days of service and has not filed a response as of the date of this Order.

18. Complainant's Motion for Assessment was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

19. Respondent was required to file any response to the Motion for Assessment within 15 days of service.

20. Respondent did not file a response to Complainant's Motion for Assessment within 15 days of service and has not filed a response to the Motion for Assessment as of the date of this order.

21. Respondent's failure to respond to the Motion for Assessment is deemed to be a waiver of any objection to the granting of the Motion for Assessment. 40 C.F.R. § 22.16(b).

22. Respondent is a corporation organized under the laws of Oklahoma with a place of business located at 6417 Grandmark Drive, Oklahoma City, Oklahoma.

23. Respondent is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

24. Respondent is the owner, within the meaning of section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of an onshore oil production facility, the Wooten Tank Battery, located approximately 450 feet North of EW 144 Road and NS 351 Road on the east side of 351, Konawa, Seminole County, Oklahoma ("Facility").

25. The Facility has an aggregate above-ground storage capacity greater than 1320 gallons (approximately 29,568) of oil in containers each with a shell capacity of at least 55 gallons.

26. Respondent is engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products located at the Facility.

27. 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.

28. The Facility is an onshore facility within the meaning of section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.

29. Drainage from the Facility travels approximately 500 feet to the south, where it enters an unnamed tributary of Negro Creek, then east approximately half a mile to Negro Creek, then southeast to the Canadian River.

30. 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 CWA, 33 U.S.C. § 1362(7).

31. The Facility is a non-transportation-related onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines in a harmful quantity (hereinafter referred to as an "SPCC-regulated facility").

32. The Respondent began operating the Facility prior to August 16, 2002.

33. The Facility has been in operation since before approximately 1950.

34. Pursuant to Section 311(j)(1)(C) of the CWA, E.O. 12777, and 40 C.F.R. 112.1, Respondent, as the owner of an SPCC-regulated facility, is subject to the SPCC regulations at 40 C.F.R. Part 112.

35. The SPCC regulations at 40 C.F.R. Part 112 are regulations issued under section 311(j) of the CWA, 33 U.S.C. § 1321(j).

36. Pursuant to 40 C.F.R. § 112.3 Respondent is required to 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.

37. On February 6, 2008, EPA inspected the Facility.

38. At the time of the EPA inspection, Respondent had failed to prepare an SPCC plan for the Facility in accordance with 40 C.F.R. § 112.7.

39. Respondent's failure to develop an SPCC plan for the Facility violated 40 C.F.R. § 112.3(d).

40. Pursuant to 40 C.F.R. § 112.9(c)(3), Respondent is required to periodically and on a regular schedule visually inspect each container of oil for deterioration and maintenance needs.

41. Pursuant to 40 C.F.R. § 112.9(d)(1), Respondent is required to periodically and on a regular schedule visually inspect all above ground 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.

42. During the February 6, 2008, inspection, EPA found that Respondent had failed to visually inspect oil storage containers, as well as valves and piping associated with transfer operations. This was based upon 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.

43. 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 40 C.F.R. § 112.9(d)(1).

44. Respondent's violations of the SPCC Regulations described above constitute violations of regulations issued under section 311(j) of the CWA, 33 U.S.C. § 1321(j).

45. Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), authorizes EPA to assess a Class I civil penalty for violations of any regulations issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j).

46. Respondent may be assessed a Class I civil penalty under Section 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), up to $11,000 per violation up to a maximum Class I penalty of $32,500 pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

47. The CROP provide, with respect to penalty assessment where a Respondent has been found in default, that the relief proposed in the Complaint shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. 40 C.F.R. § 22.17(c).

48. The civil penalty of $22,000.00 requested in the Motion for Assessment is not inconsistent with Sections 311(b) of the CWA, 33 U.S.C. § 1321(b), and the record in this proceeding.

DISCUSSION OF PENALTY

The relief requested in the Motion for Assessment includes the assessment of a total civil penalty of $22,000.00 for the alleged violations. With respect to penalty, the CROP provide that the Presiding Officer shall determine the amount of the civil penalty

> . . . based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

The statutory factors I am required to consider in determining the amount of the civil penalty are

> . . . the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8).

In considering this case in light of the statutory factors, I have considered the findings of fact and conclusions of law above, the narrative summary explaining the reasoning behind the penalty requested set forth in the Declaration of Bryant Smalley attached to Complainant's Motion for Assessment (Exhibit 8), and the entire record in this case.

In his calculation of the proposed penalty, Mr. Smalley, using the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act ("Penalty Policy") and the Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule as guidance, considered the statutory factors enumerated above.

In assessing the seriousness of the violation, Mr. Smalley considered that the storage capacity of the Facility is approximately 29,586 gallons and that it is approximately 500 feet away from an unnamed creek that flows into Negro Creek, a navigable water of the United States. He also considered that the Facility had no SPCC plan and no schedule for periodic visual inspections of containers, valves, and piping, increasing the risk of a catastrophic spill from the facility, and that the inspection report in this case included reports of loose oil and oil stains at the base of the above-ground storage tanks and by valve and piping connections. Mr. Smalley also considered the potential environmental impact of a worst case discharge from the facility, including the significant impact that a discharge of the total capacity of the facility would have on Negro Creek and the Canadian River, both navigable waters. He also noted that it is unknown if an actual or potential drinking water source is near the Facility. Finally, Mr. Smalley considered the length of the violation be undetermined, but there is no information to indicate that Respondent has come into compliance. After considering all of this information, Mr. Smalley concluded that a penalty of over $33,410.00 would be appropriate given the seriousness of the violation.

Mr. Smalley considered Respondent's degree of culpability warranted increasing the penalty 35 percent.

Mr. Smalley, using the BEN computer model and relying on his experience in SPCC cases to help develop appropriate inputs, calculated that the economic benefit to the Respondent resulting from the violation resulting from the violations to be approximately $1991.00 .

There is no evidence in the record that Respondent has paid any other penalty to EPA or other government agencies for the violation involved in this case, and Mr. Smalley made no adjustment in his penalty calculation for this factor.

There is no evidence in the record that the Respondent has a history of prior violations of the SPCC regulations, and Mr. Smalley made no adjustment in his penalty calculation for this factor.

There is no evidence in the record that Respondent took any steps to minimize or mitigate the effects of the violation or of any potential discharge from the Facility or that Respondent has taken actions necessary to come into compliance with the SPCC regulations, and Mr. Smalley made no adjustment in his penalty calculation for this factor.

There is no evidence in the record that the economic impact of the proposed penalty will render Respondent unable to continue in business, and Mr. Smalley made no adjustments in his penalty calculation for this factor.

Mr. Smalley made no adjustments in his penalty calculation for any other matters as justice may require.

Mr. Smalley calculated a total penalty amount of $47,095.24, however he reduced the penalty amount for the case to $22,000.00, or $11,000.00 per violation.

Pursuant to 40 C.F.R. § 22.17(c), "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the

record of the proceeding or the Act." The Complainant proposes to assess a total civil penalty of $22,000.00 for the violations alleged in the Complaint. After considering the statutory factors, and the entire record in this case, I find the civil penalty proposed is consistent with the record of this proceeding and the CWA.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

a. Respondent is assessed a civil penalty in the amount of $22,000.00.

i. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "**Environmental Protection Agency**," and noting on the check "**OSTLF-311**" and docket number "**CWA-06-2009-4808**."

If you send your check by U.S. Postal Service, address the payment to:

U.S. Environmental Protection Agency
Fines & Penalties
P.O. Box 979077
St. Louis, MO 63197-9000

If you send your check by private delivery service, address the payment to:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

ii. Respondent shall mail a copy of the check to:

Lorena S. Vaughn
Regional Hearing Clerk (6RC-D)
U.S. Environmental Protection Agency

Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

and to:

Ed Quinones
Senior Assistant Regional Counsel (6RC-S)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

b. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated this 26th day of August 2010.

MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, the Regional Hearing Clerk, do hereby certify that a true and correct copy of the Initial Decision and Default Order for Class I - CWA 06-2009-4804 was provided to the following on the date and in the manner stated below:

Richard O. Bertschinger — CERTIFIED MAIL
Bertschinger Oil Co.
6417 Grandmark Dr.
Nichols Hills, OK 73116-6534

Edwin Quinones — INTEROFFICE MAIL
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

Lorena S. Vaughn
Regional Hearing Clerk

8-26-10
Date