UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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IN THE MATTER OF:	)	
	)	
Fulton Fuel Company	)	**Docket No. CWA-08-2009-0006**
	)	
a Montana Corporation	)	**Proceeding under Subsection 311(b)(6) of**
	)	**the Clean Water Act, 42 U.S.C. § 1321(b)(6)**
Respondent.	)	
	)	

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of section 311(b)(6) of the Clean Water Act, as amended by the Oil Pollution Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6), and 40 C.F.R. §§ 112.3, 112.7, 112.9, and 112.10. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits ("Consolidated Rules" or "Part 22"), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND

Fulton Fuel Company ("Fulton Fuel" or "Respondent") is a Montana Corporation[1] that owned and operated an oil production facility known as the North Sunburst B Sand Unit ("facility"). The facility is located on the North Fred and George Creek Field in Toole County, Montana. The facility is a non-transportation related onshore facility that includes at least one 250 barrel crude oil tank, three producing oil wells and several flowlines. Respondent produced, stored, transferred, distributed, used and consumed oil or oil products at the facility between February, 2004 and January, 2005. In January, 2005, the facility was sold to another entity. (See, Complaint, p.5).

On February 29, 2004, Respondent discharged approximately 10 barrels (420 gallons) of oil from its facility into and upon the Fred and George Creek and its adjoining shorelines. Fred and George Creek is a tributary of Miners Coulee, which flows into Canada and into the Milk River, an international water. The Milk River flows into the United States and into the Missouri River. Oil stains on the banks of the Fred and George Creek as well as oil sheens were observed and documented by photograph on June 17, 2004; August 31, 2004; December 10, 2004; August 30, 2005; September 29, 2005; and May 4, 2006. (See, Complaint, p.3).

At the time of the oil spill on February 29, 2004 and through January, 2005, Respondent did not have a Spill Prevention Control and Countermeasure (SPCC) Plan for the facility as required by 40 C.F.R. Part 112. (See, Complaint, p. 5). An SPCC plan is required to implement

1 According to the Montana Secretary of State website, Fulton Fuel Company is a company in good standing and has been incorporated since 1981.

pollution prevention measures such as inspections, facility flowline maintenance and keeping records to avoid oil spills.

Complainant initiated this administrative action on February 19, 2009[2], alleging that Respondent violated Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6) , and 40 C.F.R. §§ 112.3, 112.7, 112.9, and 112.10 for the discharge of approximately 10 barrels of oil into navigable waters and adjoining shorelines and for failure to prepare and implement a SPCC plan. Respondent declined service of the Complaint[3]; however, Respondent's attorney, Mr. Richard L. Beatty, accepted service on February 23, 2009. (See, Motion for Default, p. 2). Counsel for EPA contacted Respondent's counsel on several occasions to discuss Respondent's failure to accept and answer the Complaint. Counsel for Respondent stated on one occasion he had discussed the Complaint with Respondent and later stated he was not sure he could reach his client.[4] Complainant made further attempts to re-send the Complaint without success. [5] On May 22, 2009, the Complaint was hand-delivered and served on Respondent by the Montana Toole County Sheriff. (See, Montana District Court Return of Service).

The Complaint iterates Respondent's obligations with respect to responding to the Complaint, including filing an Answer. (See, Complaint, pp. 9-10). Specifically, the Complaint states, "IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED PENALTY WITHIN THE THIRTY (30) CALENDAR DAY TIME LIMIT, A DEFAULT JUDGEMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT." (emphasis in original document). In addition, Respondent is given notice that "[f]ailure to admit, deny, or explain any material factual allegation in this complaint will constitute an admission of the allegation." (See, Complaint, p. 9).

Respondent failed to file an Answer as required by 40 C.F.R. § 22.15. On July 9, 2009, Complainant moved for the entry of a Default Order against Fulton Fuel and the assessment of a penalty of $32,500. (See, Complainant's Memorandum in Support of Motion for Default (Memo in Support)). On August 18, 2009, the Motion for Default was hand served by the Montana

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2 The statute of limitations for filing a civil action under the Clean Water Act is 5 years from when the claim first accrued. 28 U.S.C. § 2462. The spill occurred on February 29, 2004. The Complaint was filed on February 19, 2009, just under the 5 year limitation.

3 The address used by EPA, 127 Main Street, Shelby, Montana, 59474 is the same address listed with the Montana Secretary of State. Respondent provided an alternative address on the declined return receipt.

4 40 C.F.R. § 22.5(b)(1) requires Complainant to serve a copy of the signed original of the Complaint on Respondent or a representative authorized to receive service on Respondent's behalf. Where Respondent is a domestic corporation, Complainant shall serve "an officer, partner, a managing or general partner, or any other person authorized by appointment or by Federal or State law to receive service of process." 40 C.F.R. § 22.5(b)(1)(ii)(A). There is no evidence in the record that Mr. Beatty is the registered agent or authorized representative in this matter.

5 On March 23, 2009, EPA sent the Complaint to Respondent, via certified mail, to both the address provided on the declined return receipt and the official address listed with the Montana Secretary of State. The Complaints were returned to EPA unclaimed by Respondent from both addresses.

Sheriff. (See, Montana District Court Return of Service). On August 20, 2009, an Order to Show Cause and Order to Supplement the Record was issued by this court requesting both parties to take action by September 30, 2009. Complainant was ordered to supplement the record with additional information on the penalty calculation either through a declaration or affidavit of an Agency employee. Respondent was ordered to show cause why it should not be held in default or be subject to the full amount of the proposed penalty. (See, First Order to Show Cause, p. 3). Complainant complied with the Order. Respondent did not respond.[6]

On November 20, 2009, a Second Order to Supplement the Record was issued by this court. The Order requested Complainant to substantiate its proposed penalty and Respondent to confirm whether it was represented by counsel, as mentioned in several of Complainant's pleadings, by December 21, 2009. On December 17, 2009, Complainant filed its Supplemental Declaration regarding its proposed penalty. Respondent filed a Notice of Appearance, Motion of Fulton Fuel Company for Additional Time to Supplement the Record and Respond to Order to Show Cause on December 21, 2009. Respondent, for the first time in this proceeding, engaged in the process through an attorney and stated that there was a misunderstanding regarding who was representing Respondent. Counsel for Respondent, Mr. Douglas C. Allen, asked for additional time to sort through the issues and respond to the Motions to Show Cause. On December 23, 2009, this court granted Respondent's Motion for Additional Time and ordered an extension of time to December 30, 2009.

On January 4, 2010, Respondent filed Fulton Fuel's Response to Order to Supplement the Record and Show Cause.[7] Respondent provided no information as to why it had failed to respond to the Complaint, Motion for Default or the Orders to Show Cause. On January 5, 2010, the Regional Hearing Clerk received a letter addressed to the court, dated December 21, 2009, from Mr. Richard Beatty, previous counsel for Fulton Fuel, indicating that he has had no contact with Mr. Fulton since June, 2009, and that Fulton Fuel Company has not retained him to represent it in this matter.[8] On January 7, 2010, this court issued an Order to Schedule Status Conference Call. The Order scheduled a conference call with the parties for January 14, 2010, and also encouraged the parties to discuss settlement. After the status conference call on January 14, 2010, this court granted an additional two weeks for the parties to discuss settlement and asked for a status report by January 29, 2010. On January 28, 2010, Complainant filed a Status Report indicating that the parties had not been able to reach settlement. On January 29, 2010, via facsimile, Respondent filed a Status Report indicating that the parties had not been able to reach settlement. Respondent's original Status Report was filed on February 1, 2010. Respondent also asked for an additional 30 days for settlement discussions. On February 2, 2010, this court issued an Order Allowing 30 Days Additional Time for Settlement and Order to Either Submit

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6 The Order to Show Cause and Order to Supplement the Record was mailed by certified mail on August 20, 2009, to both addresses listed for Respondent as well as Respondent's attorney identified in the Motion for Default. The Orders sent to Respondent were returned, unclaimed, to EPA from both addresses. Respondent's attorney signed a green card indicating receipt on August 24, 2009.

7 Respondent's pleading was dated and signed by Mr. Allen on December 31, 2009. The cover letter was dated December 29, 2009. The documents were not received by the Regional Hearing Clerk until January 4, 2010. Pursuant to 40 C.F.R. 22.5, "A document is filed when it is received by the appropriate Clerk."

8 Mr. Beatty's letter was filed on January 5, 2010 and is considered part of the record.

Consent Agreement or Show Cause why Default Order Should not be Filed. The Order granted the motion for additional time up to February 24, 2010, for settlement discussions and a consent agreement to be filed. The Order also stated if an agreement was not reached by February 24, 2010, Respondent must show cause why a default order should not be issued. The show cause response was to be filed by March 3, 2010.

On March 8, 2010, the Regional Hearing Clerk received and filed Respondent's Motion to Set Aside Default and to Set Hearing on the Merits and Respondent's Answer and Request for Hearing.[9] Respondent's motion requested that "its Answer be lodged pending an Order of the Court on the pending motion." The Answer has been filed and is part of the record; however, this court has not determined whether it will accept the Answer. Complainant has 15 days after service, March 23, 2010, to respond to Respondent's Motion to Set Aside Default and to Respondent's Answer and Request for Hearing. See, 40 C.F.R. § 40.22.16(b). Therefore, the court will not rule on the Motion and the Answer until all response periods have passed.[10]

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Consolidated Rules). Section 22.17 of the Consolidated Rules provides in part:

> (a) *Default*. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . . 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. . .
>
> (b) *Motion for default*. A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.
>
> (c) *Default order*. When the Presiding Officer finds that a 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 under these Consolidated Rules of Practice. The relief proposed in the complaint or in the motion for default 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.

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9 Respondent's pleadings were dated and signed by Mr. Allen on March 4, 2010, a day after the court deadline without any explanation for the delay. The documents were not received by the Regional Hearing Clerk until March 8, 2010. A facsimile cover sheet with no attachments was received at the EPA Regional Office on March 4, 2010. The Regional Hearing Clerk called Mr. Allen's Office on March 5, 2010 to inform him that three copies of the fax cover sheet were received but no other documents. No return phone call was received.

10 As discussed below, the court is moving forward on the Motion for Default that has been pending for 8 months. The Respondent's lack of consideration in addressing court documents and not taking seriously court deadlines partially form the basis for ruling on the motion at this juncture.

II. DEFAULT ORDER

This presiding officer has determined that a default has occurred and moving forward on the Motion for Default, which has been pending before the court for the last 8 months, is prudent at this juncture. Complainant has made numerous attempts to communicate with Respondent and ensure that Respondent received the Complaint and its Motion for Default, including having the documents served by the County Sheriff, and those attempts were ignored. Furthermore, all court documents were returned, unsigned, by Respondent with the exception of documents sent to Mr. Richard Beatty. Mr. Beatty has informed this court that he does not represent Respondent in this action. Once Respondent retained an attorney to represent it in this matter, the court provided ample time and opportunity to allow Respondent and its attorney to explain why the Complainant and the court were ignored. A cogent and reasoned response has never been given. In addition, when documents were ultimately filed in this proceeding, Respondent and its attorney were lax in meeting deadlines. In particular, the clerk's office has received several documents where the pleading is dated after the court deadline and the cover letter is dated the day of the deadline. To date, no document has been filed on time pursuant to either a court order or 40 C.F.R. § 22.5 other than the first Notice of Appearance. This court has provided a reasonable time frame for Respondent to resolve the Complaint and provide any information that could bear on the Motion for Default. It is appropriate to now rule on the pending motion.

III. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact:

1. Respondent Fulton Fuel Company is a Montana Corporation that owned and operated an oil production facility known as the North Sunburst B Sand Unit at all times relevant to the Complaint.

2. The North Sunburst B Sand Unit, is located in the North Fred and George Creek Field in Toole County, Montana.

3. The North Sunburst B Sand Unit facility included at least one 250 barrel (10,500 gallon) crude oil tank, three producing oil wells, and several flowlines.

4. From February 29, 2004 to January 2005, Respondent produced, stored, transferred, distributed, used or consumed oil or oil products at the facility.

5. On or about February 29, 2004, Respondent discharged approximately 10 barrels (420 gallons) of oil from its facility into or upon Fred and George Creek and its adjoining shorelines.

6. Fred and George Creek is a tributary of Miners Coulee, which flows into Canada and into the Milk River, an international water. The Milk River flows into the United States and into the Missouri River, a perennial interstate water.

7. The spill on February 29, 2004, caused a sheen upon the surface of Fred and George Creek and a sludge emulsion was deposited beneath the surface of Fred and George Creek and its adjoining shorelines.

8. Oil stains on the banks of the Fred and George Creek as well as oil sheens were observed and documented by photograph on June 17, 2004; August 31, 2004; December 10, 2004; August 30, 2005; September 29, 2005; and May 4, 2006.

9. The oil spill in and upon the Fred and George Creek and the sludge emulsion beneath the surface of the creek and on its adjoining shorelines was in a quantity that is considered harmful.

10. The North Sunburst B Sand Unit facility is a non-transportation related onshore facility which can reasonably be expected to discharge oil to a navigable water of the United States or its adjoining shorelines.

11. As a non-transportation related onshore facility, owners or operators must prepare a SPCC plan in accordance with the rules set forth at 40 C.F.R. part 112.

12. At the time of the February 29, 2004 discharge of oil, the facility had crude oil storage capacity of at least 10,500 gallons.

13. The facility did not have a written SPCC plan at the time of the discharge through January 2005 when the facility was sold to another entity.

14. Without a written SPCC plan, the facility was deficient in showing it had implemented the requirements to conduct inspections, adequately maintain flow lines and keep records as required by 40 C.F.R. § 112.7(e).

15. On May 15, 2006, EPA sent a Clean Water Act § 308 Expedited Information Request to Respondent.

16. On September 12, 2006, EPA sent an additional letter regarding Respondent's failure to respond to the information request of May 15, 2006.

17. On October 3, 2007, Respondent responded to the information request over one year after it was sent.

18. On February 19, 2009, EPA filed its Administrative Complaint and Opportunity to Request a Hearing (Docket No. CWA-08-2009-0006).

19. On February 20, 2009, EPA sent the Complaint, via certified mail, to Respondent and Respondent's attorney. Respondent's attorney, Mr. Richard L. Beatty, accepted service on February 23, 2009.

20. Respondent declined service of the Complaint claiming EPA had the incorrect address.

21. On March 23, 2009, EPA re-sent the Complaint to Respondent, via certified mail, to the address provided by Respondent who then declined service at the alternative address.

22. On May 22, 2009, the Complaint was hand delivered and served on Respondent by Patrick T. Kellegher of the Sheriff's Office in Sheriff County, Montana.

23. Respondent had until June 22, 2009 to file an Answer to the Complaint.

24. Respondent did not file an Answer within 30 days or by June 22, 2009.

25. Complainant filed a Motion for Default Judgment and Order and Memo in Support on July 9, 2009. The Motion seeks the assessment of a $32,500 penalty.

26. An Order to Show Cause and Order to Supplement the Record (Order) was issued on August 20, 2009, requesting responses from both parties by September 30, 2009.

27. On August 27, 2009, Complainant filed proof of the August 18, 2009, personal service of the Motion for Default with the Hearing Clerk.

28. Pursuant to the August 20, 2009, Order, Complainant filed a declaration on September 9, 2009.

29. The Order was returned unclaimed by Respondent from both addresses. Counsel for Respondent accepted service of the Order on August 24, 2009.

30. Respondent has provided no response to the Motion for Default or the August 20, 2009 Order.

31. A Second Order to Supplement the Record was filed on November 20, 2009.

32. Pursuant to the November 20, 2009 Order, Complainant filed a supplemental declaration on December 17, 2009.

33. Respondent filed a Notice of Appearance, Motion of Fulton Fuel Company for Additional Time to Supplement the Record and Respond to Order to Show Cause on December 21, 2009.

34. On December 23, 2009, this court granted Respondent's Motion for Additional Time and ordered an extension of time to December 30, 2009.

35. On January 4, 2010, Respondent filed Fulton Fuel's Response to Order to Supplement the Record and Show Cause.

36. On January 7, 2010, an Order to Schedule Status Conference Call was issued scheduling a conference call with the parties for January 14, 2010, and also encouraging the parties to discuss settlement.

37. On January 14, 2010, this court granted two weeks for the parties to discuss settlement and asked for a status report by January 29, 2010.

38. On January 28, 2010, Complainant filed a Status Report indicating that the parties had not been able to reach settlement.

39. On January 29, 2010, via facsimile, Respondent filed a Status Report indicating that the parties had not been able to reach settlement.

40. On February 2, 2010, this court issued an Order Allowing 30 Days Additional Time for Settlement and Order to Either Submit Consent Agreement or Show Cause why Default Order Should not be Filed.

41. On March 8, 2010, Respondent's Motion to Set Aside Default and to Set Hearing on the Merits and Respondent's Answer and Request for Hearing was filed.

42. Respondent's Answer was received over eight months past the due date.

IV. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following conclusions of law:

43. Respondent, Fulton Fuel, Inc. is a corporation and therefore a "person" with the meaning of 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.

44. The discharge of oil into or upon the navigable waters of the United States or the adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare of the environment of the United States is prohibited pursuant to section 311(b)(3) of the Act, 33 U.S.C. §1321(b)(3).

45. Pursuant to 40 C.F.R. § 110.3, for purposes of section 311(b)(3) and (b)(4) of the Act discharges of oil include discharges that (1) violate applicable water quality standards or (2) cause a film or a sheen upon or discoloration of the surface of

water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

46. Crude oil is an oil with in the meaning of "oil" pursuant to section 311(a)(1) of the Act, 33 U.S.C. §1321(a)(1).

47. Pursuant to sections 311(a)(6) and (10) of the Act, 33 U.S.C. §1321(a)(6) and (10) Respondent meets the definition of "owner or operator" and "onshore facility" as those terms are defined in the Act.

48. Pursuant to 40 C.F.R. § 112.2 the facility was a "non-transportation related" onshore facility as that term is defined.

49. Respondent's discharge of oil from its facility into or upon Fred and George Creek and its adjoining shorelines was in a quantity that has been determined to be harmful pursuant to 40 C.F.R. § 110.3 and violated section 311(b)(3) of the Act, 33 U.S.C. §1321(b)(3).

50. Pursuant to 40 C.F.R. § 112.1(b) owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities…into or upon navigable waters of the United States and its adjoining shorelines… must meet the requirements of this part including the oil pollution prevention requirements of this part 112.

51. Pursuant to 40 C.F.R. § 112.3 owners or operators of onshore and offshore facilities subject to part 112 shall prepare a Spill Prevention, Control and Countermeasure (SPCC) plan in writing and in accordance with the applicable sections of part 112, including sections 112.7, 112 9 and 112.10.

52. Respondent's failure to prepare and implement an SPCC plan in writing and in accordance with the regulations at 40 C.F.R. §§ 112.7, 112.9 and 112.10 from February 29, 2004, through and including January 1, 2005, constitutes violations of 40 C.F.R. § 112.3 and sections 311(b)(6) and 311(j)(1)(C) of the Act, 33 U.S.C. §1321(b)(6) and §1321(j)(1)(C).

53. 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, the Respondent is liable for civil penalties of up to $32,500.

54. Pursuant to 40 C.F.R. § 22.5(b)(1), Complainant has demonstrated that it has complied with the service requirements.

55. 40. C.F.R. § 22.5(b)(1)(iii) provides that service of a complaint is complete when an affidavit of the person making person service is filed with the Regional Hearing Clerk.

56. 40 C.F.R. § 22.14 provides that an answer to a complaint must be filed within thirty (30) days after service of the complaint.

57. 40. C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint.

58. This default constitutes an admission, by Respondent, of all facts alleged in the Amended Complaint and a waiver, by Respondent, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

V. ASSESSMENT OF ADMINISTRATIVE PENALTY

Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), authorizes the Administrator to bring a civil action if any person discharges oil in violation of section 311(b)(3) or for any person who fails or refuses to comply with a regulation issued under subsection (j). 33 U.S.C. §§ 1321(b)(3) and (j). The Administrator may assess a Class I civil penalty of up to $11,000 per violation with a maximum for all violations not to exceed $27,500 for violations occurring between January 30, 1997 and March 15, 2004. For violations that occur on or after March 15, 2004 the dollar amounts the Administrator may assess are $11,000 per violation with a maximum for all violations not to exceed $32,500. (See, 40 C.F.R. Part 19). In the instant case, Respondent is subject to penalties up to $27,500 for the February 29, 2004 oil spill and $32,500 for failure to prepare and implement an SPCC plan from the time of the discharge through January, 2005, when the facility was sold.

The Consolidated Rules provide in pertinent part that:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

The courts have made it clear that, notwithstanding a Respondent's default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. See, *Katson Brothers Inc., v. U.S. EPA*, 839F.2d 1396 (10th Cir. 1988), *U.S. v. DiPaolo*,

466 Fed. Supp. 2d 476, 484 (S.D.N.Y., 2006). Moreover, the Environmental Appeals Board ("EAB" or "Board") has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. See, *In Re City of Marshall*, 10 E.A.D. 173,189 (EAB, 2001); *Rybond, Inc.*, RCRA (3008) Appeal No 95-3, 6 E.A.D. 614 (EAB, 1996).

Section 311(b)(8), 33 U.S.C. §1321(b)(8), of the Act requires EPA to take into account the following factors in assessing a civil penalty: the seriousness of the violation, the economic benefit to the violator resulting from the violations, the degree of culpability, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any of the violator's efforts to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator and any other factors as justice may require. 33 U.S.C. §1321(b)(8).

As noted above, Consolidated Rule § 22.17(b) provides that when a motion for default requests the assessment of a penalty, the movant must state the legal and factual grounds for the penalty requested. A conclusory allegation that the penalty was calculated in accordance with the statutory factors or penalty policy is insufficient. *See, Katzson Bros. Inc. v. U.S. EPA,* 839 F.2d 1396, 1400 (10th Cir. 1988). Submission of an affidavit by a person responsible for calculating the penalty, explaining how the category of harm/extent of deviation was arrived at and the underlying factual basis for the gravity-based and multi-day penalty components, is one way of establishing the factual basis for the proposed penalty.

The Agency filed a declaration on September 9, 2009 (Nakad Declaration #1) indicating how the penalty was calculated in this matter. On December 17, 2009, a supplemental declaration provided additional information on the penalty calculation (Nakad Declaration #2). The second declaration states that only the CWA statutory factors were used in calculating the penalty and no penalty policy. It appears the penalty was not evaluated in conjunction with the policy, "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act," dated August, 1998 ("Penalty Policy").[11] While the Penalty Policy is not explicitly used in this

11 The Penalty Policy is considered guidance for establishing appropriate penalties for settlement of civil administrative and judicial actions and not a penalty pleading policy. Therefore, the Agency is not required to use the policy as the basis for its penalty. The Presiding Officer is expected to consider any penalty guidelines issued under the Act (See, 40 C.F.R. § 22.27(b)); however, the policy also is not binding on this Court. See, *In Re Employer's Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 761 (EAB, 1997). The policy is instructive in evaluating the statutory factors in assessing the penalty.

matter it is used implicitly in several instances; and therefore, this court will apply it generally in its analysis of the penalty.[12] Therefore, the statutory factors are evaluated, in conjunction with the Penalty Policy, to create gravity and economic benefit components to the penalty.[13] This court has reached the following decision regarding the penalty:

Gravity:

Oil Spill - The seriousness of the discharge is relative to the duration of the discharge and the environmental impact. Respondent discharged approximately 10 barrels of crude oil. According to Jane Nakad's September 9, 2009 declaration, the spill "was deemed to be moderate" because the discharge impacted one mile of Fred and George Creek but did not effect any endangered species or sensitive ecosystems. (See, Nakad Declaration #1, p.2). The discharge created an oil sheen and discoloration on the surface of Fred and George Creek and a sludge or emulsion was found beneath the creek's surface and its adjoining shorelines and vegetation. (See, Complaint, p. 3). The Penalty Policy suggests that for a 10 barrel discharge that is moderate in severity, $6,000- $12,000 is appropriate. Based on Complainant's statement that photographs exist from June, 2004; August 2004; December 2004; August 30, 2005; September 2005; and May, 2006; documenting the oil sheen and sludge and that one mile of the creek was impacted, a $10,000 amount is appropriate for the seriousness of the violation. (See, Nakad Declaration #2, p. 3).

Furthermore, Respondent appears to have considerable culpability with no evidence of efforts to minimize the effects of the discharge. The Complaint states that "[t]here was an addition made to the penalty for culpability due to the inadequate response and mitigation of the discharge since oil staining of Fred and George Creek and its banks occurred periodically for at least twenty-six (26) months after the discharge." (See, Complaint, p. 6). In addition, Respondent is a seasoned oil and gas operator who has operated oil and gas production facilities in Montana since 1969. As Complainant points out, Respondent should be familiar with the actions necessary to address a spill. (See, Nakad Declaration #1, p.3 and Nakad Declaration #2, p. 4). A 10% increase for culpability and for inadequate response has been applied to the penalty for a total of $11,000.

There is no known history of prior violations. Therefore, no adjustment to the penalty was made for this statutory factor (Nakad Declaration #2, p. 4).

Failure to Prepare and Implement SPCC Plan - The seriousness of the SPCC violations, like the discharge, depends on the risk posed to the environment and encompasses the extent of the violation, the likelihood of a spill, the duration and the sensitivity of the environment around the

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12 For example, both the Motion for Default and the September 9, 2009, Declaration of Jane Nakad address the violations as "moderate" which is a term of art in the Penalty Policy to address the severity of the violation. Moderate is not defined in the Act or the implementing regulation.

13 Four of the statutory factors (seriousness, culpability, mitigation efforts, history of violations) are considered the gravity component of the penalty. The factors, other penalties incurred, other matters as justice may require and economic impact of the penalty on the violator, are considerations that can adjust the gravity component based on specific circumstances in the matter. Economic benefit is the expenses the Respondent would have incurred had it complied with the Act and its implementing regulations.

facility. The regulations require a facility with greater than 1,320 gallons of oil and the potential to discharge oil to a navigable water to prepare and implement an SPCC plan. Clearly, Respondent meets both requirements by virtue of the February 29, 2004 discharge to Fred and George Creek and the fact that the facility housed at least one 250 barrel (10,500 gallon) crude oil tank, three producing oil wells, and several flowlines which contained oil at the time of the discharge. (See, Complaint, pp.3 and 5). Complainant further notes that "the Facility has been in operation since 1969 without an SPCC Plan" (See, Nakad Declaration #2, p.5) and the Facility "has creeks within its boundaries and has flowlines spanning those creeks posing a high potential to discharge to waters of the United States." (See, Nakad Declaration #2, p.5).

Respondent's lengthy failure to prepare and implement an SPCC plan and conduct and document periodic inspections and maintenance flowlines directly resulted in the discharge of oil into Fred and George Creek. This court considers the lack of an SPCC plan to be moderate non-compliance for the severity of the violation. (See, Motion for Default, p. 6 and Nakad Declaration #2, p. 5-6). The Penalty Policy suggests that for a 10,500 gallon tank with moderate noncompliance a range from $3,000- $8,000 is appropriate for the seriousness of the violation.[14] Based on the above analysis, $8,000 is appropriate.

Respondent's culpability and lack of effort to mitigate are substantial and warrant an increase in the amount of the penalty for this violation. The Agency informed Respondent of the requirements to prepare and implement an SPCC plan for the facility after the discharge. (See, Nakad Declaration #1, p.3). In addition, after the spill in February of 2004, it would be appropriate to ensure that inspections and maintenance were increased, and at a minimum, measures in place to know how and when to inspect and do maintenance. (See, Nakad Declaration #2, p.7). The complete disregard of Respondent to practice prevention after a spill such as the one that occurred warrants a 50% increase for a total of $12,000. Furthermore, Respondent never complied with the SPCC requirements prior to selling the property in 2005. Therefore Respondent's conduct does not merit a downward adjustment in the penalty for mitigation.

As stated above, there is no known history of prior violations so no adjustment to the penalty was made for this statutory factor. (See, Nakad Declaration #2, p.6).

Economic Benefit:

Oil Spill – Complainant states that Respondent derived an economic benefit of $445 for the failure to inspect, document inspections, and maintain or replace flowlines at the facility which caused the discharge of oil into the Fred and George Creek. (See, Nakad Declaration #2, p.3). Ms. Nakad states that she used two parameters and the BEN Model to calculate economic benefit.[15] The parameters were: 1) one-tenth the estimated cost to replace all corroded flowlines

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14 Minor noncompliance, as described in the Penalty Policy, does not seem to apply in this matter as it was intended to address violations where an SPCC plan exists but is either not being followed or appropriately updated. That is not the case here, so moderate noncompliance is appropriate.

15 The standard method for calculating the economic benefit resulting from a violator's delayed or avoided compliance is through the use of EPA's BEN Model (See, Penalty Policy, p. 16).

at the facilities purchased by the successor company (one-tenth of $200,000); and, 2) a period of non-compliance from the date of the discharge until September 29, 2009. (See, Nakad Declaration #2, p.3-4). The court agrees that the 2 parameters to calculate economic benefit were reasonable. Therefore, an economic benefit of $445 is appropriate.

Failure to Prepare and Implement SPCC Plan - Complainant states that Respondent derived an economic benefit of $8,731 for its failure to prepare an SPCC plan. (See, Nakad Declaration #2, p. 6). Complainant used three parameters to input into the BEN model. The parameters were as follows: 1) the cost of the successor company to prepare an SPCC plan ($12,500); 2) an estimated average annual recurring cost for reviewing the plan, conducting annual spill prevention briefings and inspections ($1,000); and 3) a five-year period of non-compliance. (See, Nakad Declaration #2, p. 6). The court agrees that the three parameters to calculate economic benefit were reasonable. Therefore, an economic benefit of $8,731 is appropriate.

Adjustments to Gravity:

There is no evidence that the penalty should be adjusted due to the economic impact on the Respondent. Respondent provided no evidence of inability to pay the penalty nor has it argued hardship of any kind. (See, *In Re Crown Central*, CWA-08-2000-06. p. 65). Accordingly, this court made no adjustment to the penalty for economic impact on the Respondent. *Id.* at 65.

Last, both the Penalty Policy and Section 311(b)(8) allow the presiding officer to consider "other matters as justice may require." (See, 33 U.S.C. § 311(b)(8) and the Penalty Policy, p. 15). In general, federal courts and the EAB interpret the Clean Water Act's mandate to consider "other matters as justice may require" to be a catch-all provision that provides the decision maker discretion to weigh evidence or information not explicitly listed under the Act. See, *e.g. Pound v. Airosol Co., Inc.*, 498 F.3rd 1089, 1096 (10th Cir. 2007); *In Re Sprang & Company*, 6 E.A.D. 226, 250 (EAB, 1995). This factor is meant to "operate as a safety mechanism when necessary to prevent an injustice." *Sprang*, at 250. These cases also suggest that the use of the justice factor should not be routine. There is no new evidence in the record to adjust the penalty for this factor.

Therefore, the following penalties have been determined by this court based on the information provided:

Oil Spill:	$11, 445
Failure to Prepare and Implement SPCC Plan:	$20, 731
	$32, 176

DEFAULT ORDER

In accordance with 40 C.F.R. § 22.17(c), "the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." Based on the record, the Findings of Fact set forth above, the statutory factors, the Penalty Policy and the information in Complainant's declarations regarding

economic benefit and economic impact on the violator, this court is awarding close to the full amount of the penalty proposed in the Complaint. I hereby find that Respondent is in default and liable for a total penalty of **$32,176.00.**

IT IS THEREFORE ORDERED that Respondent, Fulton Fuel, Company shall, within thirty (30) days after this Order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **$32,176.00** in any of the following:

COLLECTION INFORMATION

CHECK PAYMENTS:

US Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

US Environmental Protection Agency
FOIA and Miscellaneous Payments
Cincinnati Finance Center
PO Box 979078
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental Protection Agency "

OVERNIGHT MAIL:

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

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required fields.

Respondent shall note on the check the title and docket number of this Administrative action.

Respondent shall serve a photocopy of the check on the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Each party shall bear its own costs in bringing or defending this action.

Should Respondent fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its on initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, **RESPONDENT WAIVES ITS RIGHT TO JUDICIAL REVIEW.**

SO ORDERED This 17th Day of March, 2010.

Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER** in the matter **FULTON FUEL COMPANY; DOCKET NO.: CWA-08-2009-0006** was filed with the Regional Hearing Clerk on March 17, 2010.

Further, the undersigned certifies that a true and correct copy of the documents were delivered Marc Weiner, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt requested on March 17, 2010, to:

Attorney for Respondent:

Douglas C. Allan
Attorney at Law
P. O. Box 873
Shelby, MT 59474

Respondent:

Mr. William M. Fulton, Jr., Registered Agent
Fulton Fuel Company
127 Main Street
P.O. Box 603
Shelby, MT 59474

And

Mr. Richard L. Beatty, Esq.
153 Main Street
P.O. Box 904
Shelby, MT 59474

March 17, 2010

Tina Artemis
Paralegal/Regional Hearing Clerk

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Fulton Fuel Company
P. O. Box 603
Shelby, MT 59474

March 17, 2010

Tina Artemis
Paralegal/Regional Hearing Clerk