UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

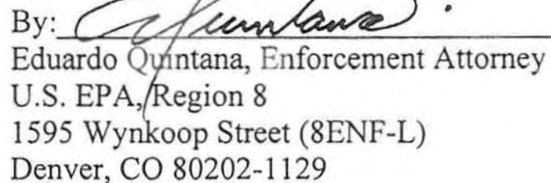
IN THE MATTER OF	)	Docket No. SDWA- 08-2007-0088
	)	
Gordon Poppins	)	
dba Gordy's Garage	)	**COMPLAINANT'S MOTION FOR DEFAULT**
27096 SD Highway 17	)	
Tea, SD 57064	)	
EPA ID #SD50000-06838,	)	
	)	
Respondent.	)	

Complainant, United States Environmental Protection Agency, Region 8 (EPA), by its undersigned counsel, files this MOTION FOR DEFAULT pursuant to 40 C.F.R. § 22.17. Complainant seeks a default order finding the Respondent liable for the violations alleged in the Complaint and Notice of Opportunity for Hearing (Complaint) filed in this matter on September 17, 2007. Complainant also seeks the assessment of the penalty proposed in the Complaint in the amount of $5,000. This request for a default order and assessment of penalties is based on Respondent's failure to file a timely answer to the Complaint, and subsequent waiver of Respondent's right to contest all facts alleged in the Complaint.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8

Date: 8/11/2010



By: ______________________
Eduardo Quintana, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop Street (8ENF-L)
Denver, CO 80202-1129

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the MOTION FOR DEFAULT and MEMORANDUM IN SUPPORT were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1159

Via regular mail:

Gordon Poppins
dba Gordy's Garage
27096 SD Highway 17
Tea, SD 57064

8/11/2010
Date

Judith M. McTernan
Signature

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 AUG 11 PM 3:10

IN THE MATTER OF: Gordon Poppens dba Gordy's Garage 27096 SD Highway 17 Tea, SD 57064 EPA ID #SD50000-06838, Respondent.	))))))))))	Docket No. SDWA- 08-2007-0088 **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 (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, Gordon Poppens (Respondent) is an individual and doing business in the State of South Dakota as Gordy's Garage (facility), a sole proprietorship. At the time of the issuance of the Complaint, Respondent operated a Class V Injection Well defined as a "Motor Vehicle Waste Disposal Well."

EPA inspected the facility on April 5, 2005. During that inspection, EPA determined that Respondent operated a "Motor Vehicle Waste Disposal Well," defined by 40 C.F.R. § 144.81(16) as follows: "motor vehicle waste disposal wells that receive or have received fluids

from vehicular repair or maintenance activities, such as an auto body repair shop, automotive repair shop, new and used car dealership, specialty repair shop (e.g., transmission and muffler repair shop), or any facility that does any combustion engine repair/maintenance work." Respondent's motor vehicle waste disposal well (well) is regulated by the Underground Injection Control (UIC) requirements of 40 C.F.R. §§ 124, 144 and 146. By letter dated June 27, 2005, and pursuant to 40 C.F.R. § 144.12(c) & (d), EPA directed Respondent to either obtain a permit for the well or close the well by October 24, 2005. On August 22, 2005, an EPA representative contacted Respondent by phone and Respondent indicated that he intended to close the well.

On August 22, 2006, an authorized EPA employee again inspected the facility with the consent of Respondent to determine if the well had been closed. The inspection revealed that Respondent had not closed the well and continued to own and operate the well. By letter dated March 27, 2007, EPA informed Respondent that the facility was in violation of EPA regulations and instructed him to close the well within thirty days of receipt of the letter. The letter also informed Respondent that pursuant to 40 C.F.R. § 144.88(b), all owners and operators of motor vehicle waste disposal systems that existed prior to the April 5, 2000 ban of construction of new motor vehicle waste disposal systems were required to have submitted a completed permit application or have completed the closure of the motor vehicle waste disposal system by January 1, 2007. Respondent failed to reply to that letter.

On September 17, 2007, EPA filed a Penalty Complaint for violations of the Safe Drinking Water Act (SDWA). The Complaint proposed a penalty of $42,120 and issued a Compliance Order, which ordered Respondent to submit a well closure plan(s) and to close or retrofit the well by October 31, 2007. Respondent received the Complaint on September 20, 2007. On or about October 26, 2007, an EPA employee attempted to contact Respondent by

phone, was unable to do so, and left a message underscoring the importance that Respondent call EPA. Respondent returned this phone call on October 31, 2007. That same day, EPA returned the phone call. Respondent was reminded that his answer was overdue, was told about what steps he could take to reduce the amount of the penalty. Respondent indicated the he had contractors on-site at that moment allegedly working on closing the well.

On November 19, 2007, EPA again contacted Respondent to inform him that EPA had not received his answer to the Complaint. During this discussion, the parties established a date for a settlement negotiation call. On November 29, 2007, EPA began settlement negotiations by phone with Respondent. Respondent indicated that the well was closed and asserted inability to pay the penalty. EPA requested documentation of closure, in the form of receipts and photos, which Respondent agreed to provide as soon as he received them. On that same day, EPA mailed a "Request for Financial Information" to Respondent to support his claim of inability to pay.

EPA called Respondent on December 7, 2007 and Respondent confirmed that he had received the Request and was working on a reply. EPA received an incomplete reply consisting of several years of tax returns on December 10, 2007 and the information was insufficient to determine whether Respondent's claim was justified. EPA mailed a second Request for the additional information needed to document inability to pay on December 18, 2007 and gave Respondent more time to respond. EPA never received a reply. EPA phoned Respondent four times between the end of December 2007 and the end of February 2008 to request confirmation of closure and to follow up on the request for financial information. In a letter dated March 11, 2008, EPA informed Respondent of EPA's intent to pursue default judgment against Respondent. On March 12, 2008, EPA received from Respondent photos and an invoice to

document closure of the Class V well and a response to the Compliance portion of EPA's Order, a response that EPA that was due in October 2007.

In a letter dated August 22, 2008, EPA restated its desire to reach a settlement regarding the Penalty and, for the third time, sent the documents required to complete the claim of inability to pay. Respondent returned an incomplete "Inability to Pay Form" on September 2, 2008. Respondent did not provide any additional information and wrote on the form that he was "done with this situation."

On October 28, 2009, the undersigned filed a Substitution of Counsel Motion which included a cover letter once again encouraging Respondent to reach a resolution with EPA. The cover letter indicated that EPA would pursue a default judgment if neither a settlement nor an answer to the Compliant was filed by Respondent. EPA sent a copy of the Complaint, the Consolidated Rules of Practice (CROP), and a copy of the answer and default provisions of the CROP among other documents.

Although the Respondent appears to have taken appropriate actions to eventually achieve compliance with the SDWA UIC requirements, it is critical to the credibility of the program and to maintaining fairness amongst the regulated community that EPA collect a penalty for the violations alleged in the Complaint. Despite substantial time, effort and patience, EPA has been unsuccessful thus far in addressing the Complaint with the Respondent. Based on Respondent's non-responsiveness, a default order is necessary to fully resolve the Complaint, and the violations and proposed penalty set forth therein.

Standard for Finding Default

The regulation governing default in the Consolidated Rules of Practice is found at section 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 that "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."

EPA filed the Complaint in this matter on September 17, 2007. 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 indicates that the Complaint was received on September 20, 2007. In accordance with 40 C.F.R. § 22.5(b)(1), Respondent's thirty-day timeframe for filing an answer expired on October 20, 2007. In this instance, 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, and has been repeatedly reminded of the consequences since the filing of the Complaint. 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 significance of filing a timely answer, and provides information on how to file an answer.

Despite such warning, Respondent failed to comply with the answer requirements set forth in the Consolidated Rules, and/or failed 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.

Despite being on notice of the noncompliance since at least the date of the August 22, 2006 inspection, Respondent did not document to EPA its return to compliance until March 12, 2008. Respondent has not filed any documents to contest the factual evidence in the September 19, 2007 Complaint. Further, Respondent has not responded to EPA's repeated offers to negotiate a settlement, and has not provided the necessary information to adequately determine its ability to pay the proposed penalty. Respondent's non-responsiveness to EPA's Complaint prevents EPA from implementing its UIC Program fairly and effectively and encourages others to deliberately obstruct and avoid EPA's enforcement process.

The case file presents sufficient and clear evidence to compel a conclusion of law in Complainant's favor. The uncontested factual evidence set forth in the Compliant and this pleading, 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 Complainant's findings.

III. Prima Facie Case of Liability

A default order is appropriate when EPA has established a prima facie case of liability against Respondent. A prima facie case is shown by establishing jurisdiction and facts sufficient

to conclude Respondent violated the SDWA. EPA has jurisdiction over Respondent as the agency responsible for monitoring Respondent's compliance with the SDWA. The facts underlying Respondent's noncompliance with the well closure requirements listed in the Complaint establishing a prima facie case of liability are clearly demonstrated by the Complaint and this Memorandum in Support of Motion for Default.

When a Respondent fails to file an answer, the Respondent 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). The strict language set forth in 40 C.F.R. § 22.17(a) for not filing an answer, and the number of administrative decisions consistently enforcing this language, support a waiver of Respondent's rights and imposition of the proposed penalty amount in this matter.

IV. Threat of Harm Posed by Respondent's Inaction

Respondent's motor vehicle waste disposal system was located above underground sources of drinking water (USDWs), including, but not limited to, unconsolidated sand and gravel aquifers approximately 100 feet below land surface. Respondent failed to either permit or close this disposal system after receiving a letter from EPA dated June 27, 2005 directing such action. Further, after being informed by EPA in a March 27, 2007 Notice of Noncompliance that motor vehicle waste disposal wells were banned and must be closed, Respondent failed to timely close his system. Finally, after receiving an Order to close the system, Respondent still failed to comply with the timeline for closure provided in the Order. By operating an endangering, banned class of UIC well, Respondent's actions risked contaminating the immediate area

surrounding the facility and the underlying underground source of drinking water. Such negligent disregard for public health and safety cannot be condoned. A default order holding the Respondent accountable for his inaction and negligent disregard for the SDWA, EPA's regulatory authority, and the Part 22 administrative hearing procedures is necessary to ensure environmental protection.

By failing to timely respond to EPA's permit or close letter, to EPA's notice of noncompliance, and to both the compliance and penalty components of the Complaint, Respondent has potentially set an example to other businesses in the area that EPA enforcement and penalty action can be postponed or avoided through recalcitrance and obstructive behavior in the enforcement process. If EPA fails to collect an adequate penalty, other businesses could be compelled to take similar obstructive actions, thereby risking impacts to additional resources including underground sources of drinking water.

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

The legal authority for assessing a penalty for alleged violations of the SWDA is set forth at, 42 U.S.C. § 300h-2, and 40 C.F.R. § 19.4. For an administrative proceeding, the Act authorizes the assessment of a civil administrative penalty of up to $11,000 per day of violation, for each violation of the Act, up to a maximum of $157,500. 42 U.S.C. § 300h-2(c)(1).

The Act, sets forth the applicable statutory penalty factors to consider in assessing a penalty, including the seriousness of the violation, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. § 42 U.S.C. § 300h-2(c)(4)(B). EPA considers statutory factors in

determining the gravity component of a penalty including: seriousness of the violation, economic impact on the violator, duration of violation, history of previous violations, the degree of cooperation in the process, and the degree of willfulness/negligence.

The Complaint alleges that Respondent was in violation of the following EPA regulations and therefore the SDWA. 42 U.S.C. § 300h-2(c)(1):

- owning, operating, and maintaining a Class V disposal facility which, through injection activity, allow the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part 142 or may otherwise adversely affect the health of persons; 40 C.F.R. § 144.12(a) and 40 C.F.R. § 144.82(a)(1),

- repeatedly failing to close or retrofit the Class V disposal system in a manner that would keep contaminants from entering a USDW; 40 C.F.R. § 144.12(c)(1) and (2), and 40 C.F.R. § 144.88(b) within the deadlines given by EPA, and

- for operating a motor vehicle waste disposal system after the January 1, 2007 ban of all motor vehicle waste disposal wells. 40 C.F.R. § 144.88(b).

VI. Gravity of the Violation

Operating a banned motor vehicle waste disposal well is considered a "most serious" violation by the UIC Program and closing such wells is a national priority. Further, the waste fluids associated with vehicular repair work may contain organic and inorganic chemicals in excess of maximum contaminant levels and other chemicals, such as heavy metals and volatile organic compounds which pose risks to human health. 40 C.F.R. § 144.81(16).

Respondent was first informed of its non-compliance via a June 27, 2005 letter which ordered Respondent to either seek a permit for, or close the Class V motor vehicle waste disposal

well by October, 2005. All unpermitted motor vehicle waste well disposal operations have been banned, by regulation, since January 1, 2007. Additionally, Respondent was again reminded by letter dated March 27, 2007 to permit or close its banned motor vehicle waste disposal within 30 days of receipt of that letter. EPA did not receive documentation of compliance until March 12, 2008, the duration of the violation was significant - exceeding two years after being ordered to comply with the law. Nevertheless, EPA significantly reduced the duration factor because Mr. Poppens was injured for a portion of that time.

In calculating the penalty amount that EPA plead in the Complaint, EPA increased the initial gravity amounts due to Respondent's degree of non-cooperation and the degree of willfulness/negligence factor. Respondent's lack of cooperation with EPA's process and Respondent's consistently missed deadlines, combined with the degree of control Respondent had to comply with the law, the foreseeability of events leading to violation, and the lack of precautions taken to avoid violation resulted in penalty increases. Nevertheless, Respondent was granted a substantial penalty reduction due to its small business size.

In addition to gravity, EPA calculated an economic benefit component of $76 which addresses the deferred costs of permanently closing the well. By including these costs in the penalty, the economic benefit enjoyed by Respondent for not complying with the regulations is eliminated. As a result of the gravity and economic benefit components combined, EPA proposed a total penalty of $42,120 in the Complaint.

The penalty proposed in the Complaint is consistent with the applicable statutory factors. 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. EPA has spent a considerable amount of time and resources in this matter. However, based on the limited and incomplete financial data submitted to document an inability to pay claim, EPA is willing to significantly reduce the penalty sought in 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 a penalty amount of $5,000.