UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Donald F. Strickland	)	
2425 Legion Road	)	RCRA-UST-04-2010-0001
Fayetteville, North Carolina 28306	)	
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

This is a proceeding under authority of section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as RCRA), 42 U.S.C. § 6991e. 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"), codified at 40 C.F.R. Part 22.

BACKGROUND

Complainant, Director, RCRA Division, U.S. Environmental Protection Agency ("EPA"), Region 4, filed an Administrative Complaint and Compliance Order ("Complaint") on January 12, 2010, and served it upon Respondent, Donald F. Strickland, that same date via First Class Mail, Return Receipt Requested. Complainant alleged that Respondent violated certain provisions of Subtitle I of RCRA, 42 U.S.C. § 6991 *et seq.*, EPA's regulations promulgated thereunder at 40 C.F.R. Part 280, and the State of North Carolina's Underground Storage Tank (UST) program, as authorized by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c. Section V of the Complaint, entitled "Opportunity to Request a Hearing," provides information concerning Respondent's obligations with respect to responding to the Complaint. Specifically

the Complaint states, in bold type, **"Respondent's failure to file a written Answer within (30) days of receipt of this Complaint may result in the filing of a Motion for Default and the issuance of a Default Order. Default by the Respondent constitutes, for purposes of the pending proceedings, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Any penalty assessed in the Default Order shall become due thirty (30) days after the Default Order becomes final."** The cover letter attached to the Complaint similarly notifies Respondent of his obligation to answer the Complaint or risk being found in default. Respondent's signature on the Return Receipt indicates he received the Complaint on January 23, 2010. However, to date, Respondent has neither filed an answer to the Complaint nor any other document in response thereto.[1]

On May 27, 2010, Complainant, filed a Motion for Default ("Motion") pursuant to Section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, seeking an order against Respondent assessing a civil penalty in the amount of $8,520 and ordering the performance of injunctive relief. Thereafter, on July 15, 2010, counsel for Complainant filed a Status Update notifying this tribunal that the US Postal Service returned to him a copy of the Motion for Default that had been sent to Respondent on May 27, 2010, as "unclaimed" mail, and that he was resending the documents via Federal Express. Shortly thereafter, on July 29, 2010, Counsel for Complainant filed another Status Update notifying the undersigned that the documents re-sent via commercial overnight delivery were returned because the receiver refused delivery.

On August 30, 2010, the undersigned issued an Order to Supplement Record, requiring Complainant to: 1) provide further legal and factual grounds for the proposed penalty; 2) provide copies of the return receipts for the Motion for Default sent to Respondent on May 27, 2010, and re-sent on July 15, 2010; and 3) explain why Complainant was seeking injunctive relief in light

[1] See Affidavit of Patricia Bullock, Regional Hearing Clerk, Exhibit D to Motion for Default.

of the provisions at Section 9006(b) of RCRA, 42 U.S.C. 6991e(b), and Section 22.37(b) of the Consolidated Rules, 40 C.F.R. § 22.37(b), pertaining to a compliance order automatically becoming a final order, unless no later than 30 days after the order is served, the Respondent requests a hearing.

On September 30, 2010, along with the Response to the Order to Supplement Record ("Complainant's Supplement"), Complainant provided copies of return receipts for the Motions including a tracking report for the one sent via UPS on July 15, 2010, indicating "Receiver stated they did not order and refused this delivery." [2] Complainant also submitted additional information in support of the proposed penalty. Lastly, Complainant confirmed that the injunctive relief sought - compliance with regulatory leak detector and line tightness requirements, and certification of such compliance - was that contained in the Compliance Order. Therefore, relying upon the aforementioned RCRA and Consolidated Rules provisions, Complainant withdrew the request for injunctive relief. At this time, Complainant seeks issuance of an Order finding Respondent in default and assessing the $8,520 penalty.

On January 6, 2011, the undersigned issued a Second Order to Supplement Record, requiring that Complainant submit an affidavit, certificate or other evidence explaining and supporting the specific penalty sought for Count III of the Complaint. In particular, Complainant had neither previously addressed the number of days of the alleged violation nor what, if any, economic benefit resulted from delayed or avoided compliance. On January 20, 2011, Complainant submitted a Response to Second Order to Supplement Record ("Second Supplement"), providing the requisite supporting documentation.

[2] Similarly, Respondent's copy of the undersigned's Order to Supplement Record was returned unopened.

DEFAULT ORDER PROVISIONS

Section 22.17 of the Consolidated Rules, provides in pertinent part, as follows:

> (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.

FINDINGS OF FACT AND 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 findings of fact and conclusions of law:

1. Section 9003 of RCRA, 42 U.S.C. § 6991b, requires EPA to promulgate regulations governing underground storage tanks (USTs) containing regulated substances. Pursuant to that provision, EPA promulgated 40 C.F.R. Part 280.
2. Effective August 14, 2001, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. § 282.83, EPA authorized North Carolina to administer a state UST management program in lieu of the 40 C.F.R. Part 280 federal UST program.
3. The North Carolina Department of Environment and Natural Resources (NCDENR) enforces the state UST program, as set forth at N.C. GEN. STAT. §§ 143-

215.3(a)(15), 143-215.94T, 143B-282(a)(2)h; and 15A N.C. ADMIN. CODE 2N.0101 *et seq.*

4. Pursuant to the authority at 9006 of RCRA, 42 U.S.C. § 6991e, EPA is authorized to take an enforcement action whenever it identifies a violation of any requirement of the federal UST program or an authorized state UST program. Therefore, the provisions of North Carolina's program are enforceable by EPA.[3]
5. Complainant gave prior notice to NCDENR of the issuance of this action in accordance with Section 9006of RCRA, 42 U.S.C. § 6991e(a)(2).
6. Respondent is a "person" as defined in Section 9001 of RCRA, 42 U.S.C. § 6991(1)(B)(5); (40 C.F.R. § 280.12); and 15A N.C. ADMIN. CODE 2N.0203.
7. On June 25, 2009, a representative of EPA Region 4 inspected a facility owned by Respondent and located at 2425 Legion Road in Fayetteville, North Carolina ("facility").
8. At the time of the inspection, Respondent was the "owner" and/or "operator" of three "USTs," as those terms are defined in Section 9001 of RCRA, 42 U.S.C. §§ 6991(3), (4), and (10); (40 C.F.R. § 280.12); and 15A N.C.ADMIN. CODE 2N.0203.
9. The three USTs were installed in May 2006 and included one 10,000 gallon double walled fiberglass tank, one 4000 gallon double walled fiberglass tank, and one 2500 gallon double walled fiberglass tank.
10. At the time of the inspection, Respondent was using the 10,000 gallon tank and the 4000 gallon tank to store gasoline, and the 2500 gallon tank to store kerosene.

[3] Once approved, state UST regulations operate in lieu of the federal UST regulations. 42 U.S.C. § 6991c(d)(2). *In re Euclid of Virginia, Inc.* 13 E.A.D 616, 621 n.2 (EAB 2008). Parenthetical references to federal regulations are provided to the extent they are incorporated by reference by, and/or correspond to, the State regulations.

11. Gasoline is a petroleum product, and is a "regulated substance," as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991(7); (40 C.F.R. § 280.12); and 15A N.C. ADMIN. CODE 2N.0203.

12. Kerosene is a petroleum product, and is a "regulated substance," as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991(7); (40 C.F.R. § 280.12); and 15A N.C. ADMIN. CODE 2N.0203.

13. At the time of the inspection, all three USTs at the facility were connected to underground pressurized piping that routinely contained regulated substances.

14. At the time of the inspection, Respondent had no record of the last annual test of the operation of the facility's automatic line leak detectors for the underground piping that routinely contained regulated substances.

15. At the time of the inspection, Respondent had no record of the last annual line tightness test for the facility's underground piping that routinely contained regulated substances.

16. On June 25, 2009, during the course of EPA's inspection, Respondent was issued a Request for Information pursuant to RCRA Section 9005, 42 U.S.C. § 6991d ("Information Request").

17. The Information Request required Respondent to reply to EPA by July 14, 2009.

18. The Respondent failed to timely reply to the Information Request.

19. Pursuant to 15A N.C. ADMIN. CODE 2N.0505, (40 C.F.R. § 280.44(a)), owners and operators of USTs must conduct an annual test of the operation of automatic line leak detectors for underground piping that routinely contains regulated substances.

20. At the time of the June 25, 2009, inspection, the facility's most recent annual test of the operation of its automatic line leak detectors for underground piping was conducted on January 22, 2008.

21. Respondent failed to conduct an annual test of the operation of the facility's automatic line leak detectors for underground piping on or before January 22, 2009.

22. Respondent violated Section 9003 of RCRA, 42 U.S.C. § 6991b; (40 C.F.R. § 280.44(a)); and 15A N.C. ADMIN. CODE 2N.0505.

23. Pursuant to 15A N.C. ADMIN. CODE 2N.0502, 2N.0505, (40 C.F.R. §§ 280.41(b)(1)(ii), 280.44(b)), owners and operators of USTs must conduct an annual line tightness test or perform monthly monitoring of underground pressurized piping that routinely contains regulated substances.

24. At the time of the June 25, 2009, inspection, the facility's most recent annual line tightness test of underground pressurized piping that routinely contains regulated substances was conducted on January 22, 2008.

25. At the time of the June 25, 2009, inspection, monthly monitoring of underground pressurized piping that routinely contains regulated substances was not being performed.

26. Respondent violated Section 9003 of RCRA, 42 U.S.C. § 6991b; (40 C.F.R. §§ 280.41(b)(1)(ii), 280.44(b)); and N.C. ADMIN. CODE 15A 2N.0502, 2N.0505.

27. Pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d; (40 C.F.R. § 280.34); and N.C. ADMIN. CODE 15A 2N.0405, owners and operators of UST systems must cooperate fully with inspections, monitoring, and testing conducted by the

implementing agency, as well as requests for document submission, testing, and monitoring by the owner or operator.

28. Respondent failed to timely reply to the information request issued by EPA pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d.

29. Respondent violated Section 9005 of RCRA, 42 U.S.C. § 6991d; (40 C.F.R. § 280.34); and N.C. ADMIN. CODE 15A 2N.0405.

30. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

31. Respondent was required to file an answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).

32. 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 rights to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

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

34. Respondent was required to file any response to the motion within 15 days of service. 40 C.F.R. § 22.16(b).

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

DETERMINATION OF REMEDY

Section 22.27(b) of the Consolidated Rules provides 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).

In his Response to Order to Supplement Record, Complainant attached an Affidavit of Jason Poe, a Compliance and Enforcement Officer of the UST Section of the U.S. EPA Region 4 RCRA Division (Response Exhibit A), along with Mr. Poe's documentation of his June 25, 2009, inspection of Respondent's facility that is the subject of this matter (Response Exhibit A1), and the penalty calculation work sheets used to calculate the penalty (Response Exhibit A2).

Section 9006 of RCRA, 42 U.S.C. § 6991e(d), authorizes EPA to assess a civil penalty of up to Ten Thousand Dollars ($10,000) per tank for each day of violation of any requirement promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991(b). Pursuant to the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), and the regulations set forth at 40 C.F.R. Part 19(Adjustment of Civil Monetary Penalties for Inflation), for violations occurring on and after January 13, 2009, the statutory maximum penalty for each tank for each day of violation is Sixteen Thousand Dollars ($16,000).[4] In this case the relief proposed in the Complaint and requested in the Motion is assessment of a penalty of $8,520, against Respondent. Complainant indicates that it based its proposed penalty upon a) the facts alleged above; b) those factors which EPA must consider pursuant to Section 9006e(e) of RCRA, 42 U.S.C. § 6991e(e) – the seriousness of the violations and any good faith efforts to comply with applicable requirements; and c) the "November 14, 1990, U.S. EPA Penalty Guidance for Violations of UST Requirements ("Penalty Guidance"), which implements the aforementioned statutory factors set forth in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), as well as an

[4] See Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75340-46 (Dec. 11, 2008)

economic benefit component, a gravity-based component, and a determination as to whether adjustments were required to reflect the specific facts of this case. See Exhibits A, A1, and A2 attached to Complainant's Supplement. I have determined that the penalty sought by Complainant is appropriate for the reasons discussed below.

Counts I, Failure to Comply with Line Leak Detector Requirements and Count II, Failure to comply with line tightness requirements:

Failure to ensure function of release detection of the facility's underground piping involved testing of both its line leak detector and line tightness systems. These violations comprise Counts I and II in the Complaint, respectively, and are assessed separately for penalty purposes as well. The requirements are best described as follows:

1) Failure to provide adequate line leak detector system for underground piping, provides that, "Automatic line leak detectors are designed to alert the operator of the presence of a leak by restricting or shutting off flow of regulated substances through piping if leaks of 3 gallons an hour or more are detected. **An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements**"; (emphasis added) 40 C.F.R. § 280.44 (a)

2) Failure to provide adequate line tightness testing system for underground piping system, provides that, "Underground pressurized piping that routinely contains regulated substances must be monitored for releases. An annual line tightness test must be capable of detecting a 0.1 gallon per hour rate at one and one-half times the operating pressure." 40 C.F.R. § 280.44(b)

Mr. Poe's report of his June 25, 2009, inspection indicates that no records were shown indicating the last annual product line tightness test and functionality test of the mechanical line leak detectors. Mr. Poe's penalty calculation worksheet indicates that the requirement to provide an annual leak detector was January 22, 2009. However, compliance was not achieved until July 13, 2009. Although a separate penalty calculation worksheet is provided for Counts I and II, the calculations and assessments are identical. EPA considered the potential for harm and extent of deviation from the regulations was major for both of these violations. The environmental

sensitivity multiplier applied was "low," because the facility was not in an environmentally sensitive area. The number of days used for non-compliance for each annual testing requirement was 172.

In considering the statutory factors and the UST Guidance, I am in agreement with Complainant's penalty assessment. The penalty assessed should ensure that the penalty deters potential violators and consists of two components: Economic Benefit and Gravity.

Gravity Component:

The gravity component, which is aimed at penalizing current and/or past noncompliance while deterring potential violators, consists of a matrix value, violator-specific adjustments, an environmental sensitivity multiplier and days of non-compliance.[5]

Release detection itself, and testing functionality of release detection equipment on hand is crucial to the UST program. "Failure to regularly ensure that release detection equipment functions properly unquestionably threatens the UST regulatory scheme and program." *In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip. op. at 23 (EAB July 10, 2009), 14 E.A.D. ___. This is also reflected in Appendix A of the Penalty Guidance which contains a chart of "Matrix Values for Selected Violations of Federal Underground Storage Tank Regulations." These assigned values take into consideration the deviation from requirement and the potential for harm, with a "matrix value" developed in which these two criteria form the axes. It is appropriate to rely upon the values contained in the table in Appendix A in determining the base penalty amounts for these violations. See *In re Euclid of Virginia, Inc.*, 13 E.A.D. 616, 692 (EAB, 2008). Appendix A, Subpart D, specifically directs that release detection violations,

[5] RCRA sets a maximum penalty on a per tank basis. However, for violations pertaining to piping the unit of assessment -- per tank or entire facility- depends on whether the piping is associated with more than one tank. See Penalty Guidance § 3.1. All tanks were connected to the underground piping; therefore Complainant appropriately assessed the penalty on the entire facility, rather than a per tank basis.

referring to 40 C.F.R. § 280.44(a) and (b), are considered Major for both "deviation from requirement" and "potential for harm." A major extent of deviation is one in which the "violator deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance. " A major potential for harm is one in which the violation "causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program." The Penalty Guidance, taking into consideration these factors, determines that these particular regulatory violations should be considered "major" for both categories, and as such they fall on the Matrix axis in the "Major" category for determining the gravity component. These gravity levels set a base penalty of $2130, appropriately used by Complainant. [6]

Environmental Sensitivity Factor: This factor takes into consideration the "adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release." Penalty Guidance p. 20. Complainant appropriately considered this element and determined that the environmental sensitivity was low, noting there were "few receptors" and that the facility was not located in an environmentally sensitive area.

Days of Non-compliance: This multiplier is rather straightforward. The Penalty Guidance lists particular "days of noncompliance multipliers" (DNM) based upon the number of days a violator has failed to comply. Again, Complainant correctly used a DNM of 1.5 for Respondent's 172 days of noncompliance, as that is assigned to days of noncompliance ranging from 91 to 180. The gravity based penalty of $2130 multiplied by the DNM of 1.5, amounts to $3195.

[6] The $1500 matrix values contained in the 1990 Guidance document are revised to incorporate the adjustment of penalties for inflation, explaining why Complainant's calculation of the gravity component for each of these violations is $2130.

Adjustments: The last consideration in the gravity component is to determine whether violator-specific adjustments should be made to the base penalty based upon various factors under the Guidance. Complainant made no adjustments, nor is there any basis in the record for doing so, for any of those factors - degree of cooperation, degree of willfulness or negligence, history of noncompliance or other unique factors.

Economic Benefit:

As explained in the Penalty Guidance, the penalty assessed in a complaint must include an economic benefit component in addition to the gravity component. The economic benefit component is intended to remove any significant economic benefit the violator may have gained, thereby also serving too deter repeat violations as well as violations by others. All penalties assessed must include the full economic benefit unless the benefit is determined to be "incidental," or less than $100. Penalty Guidance, p. 8. Complainant's calculations for economic benefit for the two leak detection violations are identical as well. For both regulatory leak detection violations, expenditures were "delayed" rather than avoided. Costs considered "delayed" are expenditures that have been deferred by the violation but will be incurred to achieve compliance." Penalty Guidance, p. 8. Delayed costs are estimated using local, comparable costs and amounts to the return on investment that could have been earned on the money not spent. For both violations, factoring the delayed cost into the necessary calculations, the economic benefit component was $10.18 well under the limit for "incidental" limit set out in the guidance, and therefore, rightfully excluded from the penalty sought and assessment by the undersigned.

Based upon a review of the record, the statutory factors and UST Penalty Guidance, I find Complainant's proposed penalty of $6390, for the violations contained at Counts I and II of the Complaint, to be appropriate.

Count III – Failure to reply to the Information Request issued by EPA pursuant to Section 9005 of RCRA, 42, U.S.C. § 6991d:

At the time of the facility inspection on June 25, 2009, an Information Request was left with Mr. Strickland asking that records for the last line tightness test and line leak detector test be sent to the EPA Region 4 office no later than July 14, 2009. Exhibit A-1 to Second Supplement. Respondent's failure to timely reply to this request constitutes the violations contained at Count III of the Complaint.

Gravity Component:

Initially, Complainant did not submit a penalty calculation worksheet for this violation. However, in his first Affidavit, Mr. Poe indicated reliance upon Appendix A of the Penalty Guidance and explained that potential for harm and extent of deviation for failure to respond to information was based on the underlying record keeping violations already covered in Counts I and II.[7] Indeed, Appendix A, notes that for such Reporting and Recordkeeping violations (corresponding to 40 C.F.R. § 280.34) "see appropriate regulatory section (e.g., reporting of releases will be under Subpart D)." Therefore, as Complainant correctly determined and as discussed more fully above, potential for harm and the extent of deviation from the regulations for Counts 1 and 2 was "major;" therefore, pursuant to the penalty matrix, the penalty sought for the failure to submit the pertinent records is similarly "major" and assessed at $2,130.

[7] Footnote 1 to Poe Affidavit. The subsequently submitted penalty worksheets reflect that Complainant assessed the gravity of this violation to be major.

Environmental Sensitivity Factor: Complainant appropriately considered this element and determined that the environmental sensitivity was low, noting "few receptors" and explaining that the facility was not located in an environmentally sensitive area.

Days of Non-compliance: In response to the Second Order to Supplement the Record, Complainant submitted both a second Affidavit of Jason Poe, as well as a Penalty Computation Worksheet explaining the DNM used and sufficiently explaining its basis. Although the Respondent's full response was received 100 days after the due date, (corresponding to the Penalty Guidance DNM of 1.5 for days numbering 91-180), Respondent had contacted Mr. Poe and attempted to send the information via facsimile much earlier, on July 20, 2009. Complainant used the DNM of 1, appropriate for achieving compliance within 0- 90 days. Specifically, Mr. Poe writes, ". . . Respondent called me on July 20, 2009, and indicated that he would attempt to fax me the information. Although I did not receive all of the required information until October 23, 2010, I determined, pursuant to the UST Penalty Policy, that because Respondent made a good faith effort to send me the information within 90 days of the requirement, a DNM of 1 was more appropriate." Exhibit A to Second Supplement. I find it appropriate that Mr. Poe considered and used the date Respondent contacted him and attempted to fax the requisite information as the date of compliance for penalty calculation purposes, and that doing so was neither inconsistent with RCRA nor the UST Penalty Guidance.

Adjustments: One such available adjustment is for a party's good faith efforts to achieve compliance (under "degree of cooperation/noncooperation"). Penalty Guidance § 3.2 As noted above, in calculating the DNM Mr. Poe referred to Respondent's attempt to fax information as a good faith effort; however, considering this violator-specific good faith for base penalty adjustment purpose would be incorrect in two respects: The Penalty Guidance specifically notes

1) that downward adjustments are not to be made if the good faith efforts consist of coming into compliance; and 2) the maximum allowable adjustment for this factor is an increase up to 50% or a decrease down 25%. However, when reviewing Mr. Poe's Affidavit in conjunction with the calculation worksheets it is apparent that, notwithstanding use of the phrase "good faith," Mr. Poe did not make any adjustment for Respondent's degree of cooperation. To the contrary, Mr. Poe entered "1" for the DNM, noting the July 20, 2009, date, and "$0" for all "Violator-Specific Adjustments to Matrix Value," including degree of cooperation. Therefore, I conclude that for this violation, Complainant correctly made no adjustments nor is there any basis in the record for doing so, for any of the violator-specific factors - degree of cooperation, degree of willfulness or negligence, history of noncompliance or other unique factors.

Economic Benefit:

Regarding economic benefit for violations alleged in Count III, in the Second Supplement Mr. Poe attests that the economic benefit was $0, because there were no avoided or delayed costs resulting from Respondent's late submittal of the information requested. This is reflected in Mr. Poe's computation worksheet as well.

Based upon my review of the record, the statutory factors and UST Penalty Guidance, I find Complainant's proposed penalty of $2130 is appropriate for the violation contained at Count III of the Complaint.

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." Based on my consideration of the relevant statutory factors and UST Penalty Guidance in light of the record in this proceeding, I have determined that the proposed penalty of $8,520 should be assessed.

DEFAULT ORDER

Respondent is hereby ORDERED, as follows:

1. Respondent is assessed a civil penalty in the amount of $8,520.

2. 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 "Treasurer, United States of America," and shall send the check to the following address by U.S. Postal Service:

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

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
U.S. EPA, Region 4
61 Forsyth St.
Atlanta, Georgia 30303

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, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). 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: Feb. 16, 2011

Susan B. Schub

Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Initial Decision and Default Order, in the Matter of Donald F. Strickland, Docket No., RCRA-UST-2010-0001, on the parties listed below in the manner indicated:

Certified Mail –
Return Receipt Requested:
Donald F. Strickland
2425 Legion Road
Fayetteville, North Carolina 28306

Via Intra-Office Mail:
Alfred R. Politzer, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Date: 2-16-11

Patricia A. Bullock
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 4
61 Forsyth Street, S.W.
Atlanta, GA 30303
404/562-9511