UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
GOODMAN OIL COMPANY,	)	
and	)	**Docket No. RCRA -10-2000-0113**
GOODMAN OIL COMPANY OF LEWISTON,	)	
	)	
	)	
Respondents.	)	

ORDER DENYING MOTION TO REOPEN HEARING

I. Background

An Initial Decision after hearing was issued in this proceeding on January 30, 2003, finding Respondents liable for their failure to conduct inventory control for underground storage tanks (USTs or tanks) containing petroleum at several of their gasoline service stations, as alleged in Counts 7 through 14 of the Amended Complaint. By such failure, Respondents were held to have violated the regulatory requirements of 40 C.F.R. §§ 280.41(a) and 280.43, which were promulgated under Section 9003 of the Resource Conservation and Recovery Act (RCRA). Prior to the issuance of the Initial Decision, Respondents were found liable for several other violations of the regulatory requirements for USTs, in an Order on Complainant's Motion for Partial Accelerated Decision, dated August 22, 2001. For these violations, the Initial Decision assessed a total civil penalty of $105,716 against Goodman Oil Company (Goodman), and a total civil penalty of $27,875 against Goodman Oil Company of Lewiston (Goodman Lewiston).

On February 24, 2003, Respondents submitted a Motion to Reopen the Hearing (Motion) pursuant to Section 22.28(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22. Through this Motion, Respondents seek to introduce additional evidence and testimony, in order to have findings of liability reversed, or to have penalties substantially reduced, as to inventory control violations alleged in Counts 7, 8, 9, 11, 13 and 14 of the Amended Complaint. Complainant opposed the Motion on March 17th (Response), and Respondents submitted a Reply on March 25, 2003.

The Rules of Practice, 40 C.F.R. Part 22, provide at section 22.28(a) that a motion to reopen a hearing must "(1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing."

II. Relevant Regulatory Provisions

The regulations governing inventory control provide in pertinent part:

> (a) *Tanks*. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h) . . . .

40 C.F.R. § 280.41.

Section 280.43(a) provides in turn, in pertinent part, as follows:

> Each method of release detection for tanks used to meet the requirements of §280.41 must be conducted in accordance with the following:
> (a) *Inventory control*. Product inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis in the following manner:
> (1) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;
> * * * *
> (3) The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory before and after delivery;
> * * * *
> (5) Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of 6 cubic inches for every 5 gallons of product withdrawn; and
> (6) The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch at least once a month.

III. Arguments of the Parties

Respondents move to reopen the hearing to introduce into the record additional documents concerning the USTs at five of Goodman's service stations, and to present further testimony concerning three of the four USTs at the Goodman Lewiston's Bulk Plant.

Goodman was held liable in Count 7 for violating 40 C.F.R. § 280.43(a) by failing to record the amount of product in the tanks (take "stick readings") each operating day in April, June and July 1999, and failing to measure water levels in the tanks in June and July 1999 at the service station at 16th and State Streets. Goodman now seeks to introduce fuel delivery invoices showing that water levels in the USTs at the 16th and State service station were measured on April 12, June 5 and 19, and July 3 and 23, 1999. Goodman also seeks to introduce the stick readings which were called in from the station to Goodman's main office, fuel delivery invoices, and daily computer records used

by Mr. Lamberson to perform inventory reconciliation for the USTs at the 16th and State station for April, June and July 1999.

As to Counts 8, 9, 13 and 14, Goodman was found liable for violating 40 C.F.R. § 280.43(a) by failing to perform inventory reconciliation within a reasonable period of time following certain months at the Collister, Homedale Tiger Mart, Weiser and Nampa Exxon service stations, respectively. These findings were based in part on the fact that Goodman's inventory control forms for many of those months did not include inventory reconciliation figures, and on the lack of testimony or evidence establishing that the inventory reconciliation was performed within 30 days after each month at issue, notwithstanding Mr. Lamberson's reconstructed inventory reconciliation documents which were prepared after this proceeding was initiated. In addition, as to Counts 9 and 14, for the Collister and Weiser Exxon stations, respectively, Goodman was found to have failed to record stick readings on weekends and holidays.

Goodman now seeks to introduce the stick readings that were called into Goodman's main office, fuel delivery invoices, and station records that were used by Mr. Lamberson to perform inventory reconciliations for the USTs at these stations. Goodman claims that these documents establish that contemporaneous inventory control records existed and were used to perform timely inventory reconciliations.

As to Count 11, Goodman Lewiston was found liable for violating 40 C.F.R. § 280.43(a) for failure to conduct inventory control for the "Plus" tank at the Bulk Plant for certain months between December 1998 and November 1999, and for failure to record stick readings each operating day for the other months during that time period. In addition, Goodman Lewiston was found liable for failing to conduct inventory control for three non-operating USTs at the Bulk Plant, in which stick readings were required to be taken monthly, under 40 C.F.R. § 280.43(a)(1). Goodman Lewiston seeks to introduce testimony of Dean Sorbel, who was responsible for inventory control at the Bulk Plant, to establish that stick readings were taken of the three non-operating USTs at least once per month during the relevant time period.

In support of their Motion, Respondents argue that the proposed new evidence is not cumulative, as it supports testimony in the record of Mr. Lamberson, that he relied upon contemporaneous inventory control documents to perform inventory reconciliations, and of Mr. Sorbel, that he took stick readings of the non-operating USTs at least monthly during the relevant time period.

Respondents assert that good cause exists for their failure to present the delivery invoices showing water measurements at the hearing in that neither the Amended Complaint nor the EPA's penalty calculation included any allegation that Goodman failed to conduct the water level measurements. As good cause for failure to introduce called-in stick readings, delivery invoices, computer reports, and other station records supporting Mr. Lamberson's inventory control and reconciliation, Respondents assert that EPA did not challenge Mr. Lamberson's reconstructed inventory reconciliation calculations and did not request that the documents supporting those calculations be produced, so Respondents were not on notice that they needed to produce them. As

good cause for Respondents' failure to introduce testimony concerning Mr. Sorbel's inventory control for the three non-operating USTs, Respondents assert that EPA did not allege in the Amended Complaint or in penalty calculations that Goodman Lewiston violated the temporary closure requirements for those USTs, or failed to take stick measurements, but merely alleged that the computer system was not capable of detecting a release.

In its Response, Complainant contends that Respondents have not shown good cause for why the evidence was not adduced at the hearing, that the evidence is not "new," and that it should have little, if any, impact on the determinations of liability and the penalties.

Complainant asserts that the evidence of record shows that EPA had specifically requested from Respondent documentation that UST water levels were being checked monthly in a letter to Goodman dated July 9, 1999 (Complainant's Exhibit 30 and in an Information Request issued on November 3, 1999 (Complainant's Ex. 142, p. 3). Complainant asserts further that EPA's witness Gary McRae had testified at the hearing concerning the significance of the requirement to measure water levels in the tanks, and that Mr. Lamberson had testified about water level measurements. Transcript (Tr.) 384-385, 608, 870.

As to the other documents Respondents seek to introduce, Complainant asserts that, prior to the date the Amended Complaint was filed, Goodman was on notice that timeliness of inventory reconciliation was at issue, but Goodman at the hearing simply relied on testimony of Mr. Lamberson and on his memoranda and reconstructed inventory reconciliation prepared for purposes of this litigation. Complainant emphasizes that Goodman had ample opportunities to provide other inventory control documentation before and during the hearing. Complainant points out that Goodman stipulated to the fact that it was not able to locate records documenting inventory control for June and July 1999 for USTs at the 16th and State Exxon station. Joint Exhibit A ¶ 25.

As to the additional proposed testimony of Mr. Sorbel, Complainant argues that Goodman Lewiston never provided any documentation showing that inventory control was conducted on the three non-operating USTs during the relevant time period. Mr. Sorbel testified for several hours at the hearing, and Respondents' counsel had ample opportunity to present Mr. Sorbel's testimony as to those USTs.

Complainant argues that if this hearing is reopened, it could set a precedent for reopening administrative hearings for counsel to ask questions that may have been forgotten at hearing, and to reargue a case in a more convincing fashion. Complainant points out that Respondents have not yet complied with certain UST regulatory and information request requirements, and urges that this case should be expeditiously moved forward.

IV. Discussion and Conclusion

Rule 22.28(a) of the Consolidated Rules of Practice requires a showing that the "new evidence . . . is not cumulative" and of good cause why such new evidence "was not adduced at the

hearing." EPA's Administrative Law Judges have long held that "motions to reopen a hearing are not lightly to be granted" and "cannot be used as a means for correcting errors in strategy or oversights at hearing," due to the policies of finality in litigation and of avoiding exposure of the prevailing party to the risk of having a favorable decision overturned in the absence of substantial reasons. *Ketchikan Pulp Company,* 1996 EPA ALJ LEXIS 10 (ALJ, Order Denying Respondent's Motion to Reopen Hearing, Sept. 5, 1996); *N.O.C., Inc., T/A Noble Oil Co. (NOC)*, 1983 EPA ALJ LEXIS 4 * 35, nn. 13, 15 (ALJ, Order Denying Motion to Reopen Hearing, May 16, 1983), *aff'd*, 1 E.A.D. 977 (CJO 1985)*; see also*, *F & K Plating Company*, 1986 EPA ALJ LEXIS 24 (ALJ, Order Denying Motion to Reopen Hearing, June 13, 1986), *aff'd,* 2 E.A.D. 443 (CJO 1987); *Boliden-Metech. Inc.,* EPA Docket. No. TSCA-I-1098 (ALJ, Order Denying Motion to Reopen Hearing, Nov.15, 1989), *aff'd*, 3 E.A.D. 439 (CJO, Nov. 21, 1990); *Ashland Chemical Co.*, 1987 EPA ALJ LEXIS 12 (ALJ, Order Denying Motion to Reopen Hearing, Sept. 29, 1987).

The first criterion under Section 22.28 is whether the evidence sought to be offered is "new evidence." This term may not be limited to evidence which did not exist at the time of hearing, but could be construed to include "newly discovered evidence." *See, e.g., Ketchikan Pulp Company, supra* (testimony that could have been prepared before the hearing or before the post hearing briefing period expired was not "newly discovered evidence"). The term "newly discovered evidence" appears in Federal Rule of Civil Procedure 60(b)(2), which provides, in pertinent part: "on motion . . the court may relieve a party . . . from a final judgment, order or proceeding for . . . newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial" under Rule 59(b). The term "newly discovered evidence" in Fed. R. Civ. Proc. 60(b)(2) has been interpreted as "evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant." *United States v. 27.93 Acres of Land*, 924 F.2d 506, 516 (3rd Cir. 1991).

Thus, if the movant could have offered the evidence at the hearing, but the issue addressed by the evidence was not raised until after the hearing, the evidence may be admitted after the hearing. *Chempace Corp.*, 1998 ALJ LEXIS 123 (ALJ, Order Granting Motion to Supplement the Record, Nov. 3, 1998)(Where a factual discrepancy between respondent's financial statement and witness' testimony regarding a stock purchase was not raised until complainant's post-hearing brief, and authenticity of the stock purchase agreement was unchallenged, the agreement was admitted into evidence upon respondent' motion to supplement the record, which was filed with its post-hearing brief). However, if the evidence would be introduced to address an issue upon which the movant had notice prior to or at the hearing, a motion to reopen the hearing may be denied. *Ketchikan Pulp, supra* (Where respondent moved to reopen hearing to introduce expert testimony on an issue which respondent had notice in a pleading on a motion for accelerated decision and in testimony at hearing, evidence was not newly discovered; respondent not only should have known the issue might be crucial and presented testimony thereon in preparation for hearing, but also failed to object to complainant's testimony on the issue at hearing, or to request leave to present it at hearing or in post-hearing brief.).

Here, the Amended Complaint charged Goodman with failure to properly conduct inventory control. This broad allegation would encompass a failure to comply with any one component of

inventory control, as well as a failure to comply with the time limitations of inventory control. The regulations at 40 C.F.R. §§ 280.41(a) and 280.43 require inventory reconciliation to be conducted on a monthly basis, and require, *inter alia,* that stick readings be recorded each operating day and that tank water measurements be taken monthly. Thus, Goodman knew or should have known prior to the hearing that daily stick readings, monthly tank water measurements, and monthly inventory reconciliation, being part of the monthly inventory control requirements set forth in the regulations, were at issue. The monthly inventory forms used by Goodman included spaces marked for "level of water," "stick inventory" and inventory reconciliation for the month. *See e.g.*, Complainant's Exhibits 45, 50, 53, 58; Respondents' Exhibits1 through 8. The fact that inventory reconciliation figures, water measurements and some stick readings were absent from Goodman's inventory control forms showed *prima facie* that monthly inventory control was either not done or not done properly. Where Goodman claimed in response that monthly inventory reconciliation was done, it should have known to produce sufficient evidence to show not only that inventory reconciliation was, in fact, done, but that it was done in accordance with the regulations, *i.e.* on a monthly basis, with each component of inventory control being met.

Simply relying on Mr. Lamberson's testimony as to performing inventory reconciliation, and on his reconstructed inventory reconciliation prepared for litigation, Goodman took the risk not only that his credibility might be questioned, but also that his testimony would not clearly indicate that all inventory reconciliation at issue was performed timely.[1] Complainant stipulated only to the authenticity and not the veracity of the content of the reconstructed inventory control documents. Joint Exhibit A p. 9. In the Initial Decision, it was found that the testimony and evidence did not state or reasonably support an inference that inventory control was performed within thirty days after each month at issue. Prior to, during, or immediately after the hearing, Goodman could have furnished the documents needed to corroborate or clarify Mr. Lamberson's testimony, but chose not to do so. Goodman cannot undo its strategy or correct this oversight by reopening the hearing.

As to the additional testimony of Mr. Sorbel, there is no documentary evidence in the record indicating that stick measurements were taken of the three non-operating USTs at the Bulk Plant. Therefore, Respondents rely merely on Mr. Sorbel's testimony that the measurements were taken monthly. The Initial Decision noted that his general testimony as to measuring product in the tanks monthly was construed to include the three USTs at the Bulk Plant. Initial Decision, n. 5. However, it was found not credible with respect to those three USTs. *Id.* slip op. at 49-50. Specific testimony that he took stick measurements in those tanks would be cumulative. Furthermore, it would not be given much weight, particularly when it could have been elicited at the hearing but is

[1] The memorandum prepared by Mr. Lamberson, dated April 13, 2001, which discussed the reconstructed inventory control records for the Weiser Exxon, regarding Count 14, alleges that "timely review of records occurred monthly." Respondents' Exhibit 31. This suggests that Goodman knew in April 2001 that timeliness of reconciliation was at issue in this proceeding. However, it was found not sufficient, along with Mr. Lamberson's testimony, to establish by a preponderance of the evidence that inventory reconciliation was, in fact, completed timely each month.

only now being offered after the Initial Decision has been issued. "[U]nsupported self-serving testimony is generally entitled to little weight." *F & K Plating Company*, 2 E.A.D. 443, 449 (CJO 1987). Further testimony specific to the three USTs would not affect the findings of liability or the penalty as to Count 11.

Furthermore, Goodman has not shown that any inferences drawn in the Initial Decision as to inventory control were unwarranted and, therefore, cannot reopen the hearing on that basis. *See, New Waterbury, Ltd.* 5 E.A.D. 529, 544 (EAB 1994)(citing 66 C.J.S. New trial § 36 (1950)(emphasis added)("[i]f an unwarranted inference receives the blessing of the presiding officer, . . . grounds exist for reopening the hearing on the question of whether the fact inferred is true.").

It is concluded that Respondents have not shown that the proposed evidence is new, have not shown that the proposed testimony is not cumulative, and have not shown that they had good cause for not adducing the proposed testimony and evidence at hearing.

Accordingly, **IT IS ORDERED THAT:**

1. Respondents' motion to reopen the hearing is **DENIED**.

2. Goodman shall pay the full amount of the $105,716 penalty assessed in the Initial Decision within 60 days of the date that the Initial Decision becomes final. Goodman Lewiston shall pay the full amount of the $27,875 penalty assessed in the Initial Decision within 60 days of the date that the Initial Decision becomes final. Pursuant to 40 C.F.R. § 22.27(c) and 22.28(b), the Initial Decision shall become the Final Order of the Agency forty-five days after service upon the parties of this Order Denying Motion to Reopen the Hearing, unless an appeal is taken pursuant to 40 C.F.R. § 22.30 or the Environmental Appeals Board elects *sua sponte* to review the Initial Decision. An appeal must be filed within thirty (30) days after service of this Order upon the parties. 40 C.F.R. § 22.30(a).

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 10, 2003
Washington, D.C.