

7/18/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Harley Brown (Brown's Valley	)	Docket No. RCRA-UST-VIII-90-02
Grocery),	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION

The complaint in this proceeding under Section 9006a of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e(a) and 40 C.F.R. § 280.11, issued June 29, 1990, charged Respondent, Harley Brown, with a violation of the "Interim Prohibition" for underground storage tanks. Specifically, the complaint asserts that the underground storage tanks and piping installed and used by Respondent lacked cathodic protection to prevent corrosion.<sup>1/</sup> For this alleged violation, Complainant proposes to assess Respondent a civil penalty of \$15,071 as permitted by the Act. Section 9006, 42 U.S.C. § 6991e(d)(2)(C).

Respondent owned and operated a store and filling station known as Brown's Valley Grocery in Hays, Montana. Respondent personally installed, sometime between late 1985 and early 1986,<sup>2/</sup>

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<sup>1/</sup> "Underground storage tank" is defined as "any one or combination of tanks (including underground pipes connected thereto). . ." 42 U.S.C. § 6991(1). Therefore, the interim prohibition requirements apply to Respondent's tanks as well as the attached piping.

<sup>2/</sup> Although the record is not clear as to the date the tanks were installed, the evidence suggests that it was subsequent to the May 7, 1985, effective date of the "interim prohibition".

one 6,000 gallon and three 4,000 gallon underground storage tanks for the purpose of containing leaded and unleaded gasoline for retail sale.<sup>3/</sup> The installed tanks were made of bare steel coated with tar and estimated to be at least ten years old. The attached pipes were of an undetermined age (used) and made of galvanized steel. Respondent claims that during the period of operation, the tanks were filled intermittently and since December 1988 have remained empty.

The complaint in this matter alleged a violation for failure to provide cathodic protection for underground storage tanks and pipes attached thereto.<sup>4/</sup> Section 6991b(g) states:

(1) Until the effective date of the standards promulgated by the Administrator under subsection (e) of this action and after one hundred and eighty days after November 8, 1984, no person may install an underground storage tank for the purpose of storing regulated substances unless such tank (whether of single or double wall construction)--

(A) will prevent releases due to corrosion or structural failure for the operational life of the tank;

(B) is cathodically protected against corrosion, constructed of noncorrodible material, steel clad with a noncorrodible material, or designed in a manner to prevent the release or threatened release of any stored substance; and

(C) the material used in the construction or lining of the tank is compatible with the substance to be stored.

(2) Notwithstanding paragraph (1), if soil tests conducted in accordance with ASTM Standard G57-78, or

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<sup>3/</sup> 42 U.S.C. § 6991(2)(B) classifies petroleum as a "regulated substance".

<sup>4/</sup> Complainant indicates the possibility of assessing separate violations for failure to provide cathodic protection for the tanks and the piping. The definition of "underground storage tank", supra note 1, however, considers the tanks and piping as one entity. This precludes enforcement as two distinct offenses.

another standard approved by the Administrator, show that soil resistivity in an installation location is 12,000 ohm/cm or more (unless a more stringent standard is prescribed by the Administrator by rule), a storage tank without corrosion protection may be installed in that location during the period referred to in paragraph (1).

Complainant alleges that a lack of cathodic protection in and of itself violates the technical standards of 42 U.S.C. § 6991b(g)(B) and 40 C.F.R. § 280.11.<sup>5/</sup>

Respondent's letter - answer, filed in August 1990, did not deny that the tanks and piping lacked cathodic protection. Instead, Respondent claimed the tanks in question to be empty, with no future use intended or desired. Respondent also expressed an interest in removing the tanks immediately.

In accordance with a prehearing exchange ordered by the ALJ, Complainant filed all necessary materials on February 14, 1991. Complainant subsequently filed a supplemental prehearing exchange on July 18, 1991, wherein the proposed penalty was reduced from \$18,500 to \$15,071 as a result of the interim publication of the final "U.S. EPA Penalty Guidance for Violations of UST Regulations". Respondent retained counsel on February 2, 1992. After an order of the ALJ granting additional time, on March 16, 1992, Respondent also filed prehearing exchange materials.

On October 20, 1993, Complainant filed a Motion for Partial Accelerated Decision on the issue of liability pursuant to 40 C.F.R. § 22.20 and a memorandum in support thereof (motion).

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<sup>5/</sup> The inspection report does not contain any evidence that an actual release of product into the environment has occurred at the site.

The motion asserts that Respondent's answer failed to admit, deny or explain any of the material factual allegations of the complaint as required by 40 C.F.R. § 22.15. Complainant argues that the answer did not respond to the assertion that Respondent owned and operated underground storage tanks without cathodic protection. As a result, Complainant contends that no genuine issue of material fact exists with respect to Respondent's liability and therefore Complainant is entitled to judgment as a matter of law.

A conflict in interest led counsel for Respondent to withdraw on October 28, 1993. Respondent proceeded without counsel and attempted to file an answer to the motion for accelerated decision on December 16, 1993. The document submitted was instead a supplemental prehearing exchange and did not address the allegations of Complainant's Motion for Accelerated Decision.

#### D I S C U S S I O N

Citing Rule 22.15(d) of the Consolidated Rules of Practice (40 C.F.R. Part 22), Complainant argues that by failing to deny or explain each of the factual allegations in the complaint, Respondent has admitted liability for the violation alleged, i.e., installation and operation of underground storage tanks without the cathodic protection designed to prevent corrosion. Nevertheless, it is within the sound discretion of the court or ALJ to determine the effect such a deficient pleading will have on the outcome of the case. In the Matter of Fairview Machine Company, Docket No. EPCRA-I-92-1011 (Order, January 27, 1993).

The deficient answer to the Complaint as well as the ineffective response to the motion for accelerated decision do not require a finding in favor of Complainant. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing matter is presented."<sup>6/</sup> It is concluded that a genuine issue of material fact does exist and therefore Complainant's Motion for Accelerated Decision will be denied.

The major cause of releases from underground storage tanks is reported to be corrosion. 52 Fed. Reg. 12666 (April 17, 1987). Corrosion is the process of unprotected metal breaking down in the underground environment into its natural form of soft ore. Whenever bare steel is placed in the ground, conditions are ripe for the gradual process of corrosion to begin. Id. at 12667.

The language of Section 6991b(g)(B) and 40 C.F.R. § 280.11 ("interim prohibition"), as quoted previously, unambiguously allows four techniques for corrosion prevention, only one of which is cathodic protection.<sup>7/</sup> "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979).

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<sup>6/</sup> See, Notes of the Advisory Committee on Rules to the 1963 Amendment to Rule 56.

<sup>7/</sup> New performance standards applicable to underground storage tanks installed after December 22, 1988, specify that only fiberglass-reinforced plastic, steel with cathodic protection or steel-fiberglass-reinforced-plastic composite are acceptable construction materials. 40 C.F.R. § 280.20.

Therefore, the starting point for all statutory interpretation is to review the plain language of the provision itself. American Tobacco Co v. Patterson, 456 U.S. 63, 68 (1982).

The Complaint charges Respondent with a violation of the provision for failing to install tanks specifically having cathodic protection. Complainant, however, neglected to review the remainder of the provision to determine if the corrosion prevention criteria had been met by an alternate means. Complainant did not investigate the effect tar has on the corrosion of steel tanks. "Steel UST systems can be protected against corrosion by applying a coating of noncorrodible material, such as . . . coal tar epoxy". Underground Storage Tanks; Technical Requirements, 52 Fed. Reg. 12664 (April 17, 1987).

It may well be that the tar covered steel tanks at issue here comply with the definition of "steel clad with a noncorrodible material". According to Webster's Third New International Dictionary 413 (1986), definitions of "clad" range from "covered" or "clothed" to "overlaid on one or both sides with a metal coating of a different composition to promote electrical conductivity or corrosion resistance". Because the legislative history, the preamble to the regulation and the provision itself are silent on the intended meaning, the term is ambiguous and some room for interpretation exists.

Complainant will presumably argue that the second definition indicating a need for metallic bonding was the intended meaning for "clad". This would, in fact, be the only reasonable interpretation

of the term if the statute or regulation read "noncorrodible metal" rather than "noncorrodible material". (emphasis added). The plain meaning of the term "material", however, leaves available options other than metals with which to cover the tanks. "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." Satellite Broadcasting Co., Inc. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987). See also General Electric Company v. U.S. E.P.A., No. 93-1807, 53 F.3d 1324 (D.C. Cir. May 12, 1995). If "clad" were intended to mean only metal bonded to metal, a precise definition is needed so as to provide sufficient public notice.

The inspection conducted by Complainant was based mostly on interviews with Respondent and is devoid of any actual physical assessment of the condition of Respondent's underground storage tanks and piping. As a result, there is no record of the thickness or completeness of the tar coating, which could enhance potential noncorrosive properties of the tar.

If coating rather than bonding is the requisite standard and, if tar is in fact a "noncorrodible material" and completely covered the tanks, then Respondent would not be in violation of the provision, despite the lack of cathodic protection.<sup>8/</sup> Because these

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<sup>8/</sup> The pipes attached to the tar covered steel tanks not only lacked cathodic protection but apparently were not coated in any manner. Therefore, the pipes are likely to be in violation of the provision.


are factual matters upon which the record is unclear, Complainant has not demonstrated entitlement to judgment in its favor.

For the above reasons, Complainant's motion for an accelerated decision as to liability will be denied. The extent of Respondent's compliance with the Act and the potential inability of Respondent to pay are matters for consideration in determining an appropriate penalty, if the penalty issue is reached.<sup>2/</sup>

O R D E R

Complainant's motion for accelerated decision on liability is denied.

Dated this 15<sup>th</sup> day of July 1995.

  
Spencer T. Nissen  
Administrative Law Judge

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<sup>2/</sup> The attention of the parties is invited to the President's memorandum Regulatory Reform - Waiver of Penalties and Reduction of Reports, 60 Fed. Reg. 20621 (April 26, 1995) and E.P.A.'s implementation thereof, Interim Policy on Compliance Incentives for Small Businesses, 60 Fed. Reg. 32675 (June 23, 1995).



CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION, dated July 18, 1995, in re: Harley Brown (Brown's Valley Grocery), Dkt. No. RCRA-UST-VIII-90-02, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondent and Complainant (see list of addressees).

*Helen F. Handon*

Helen F. Handon  
Legal Staff Assistant

DATE: July 18, 1995

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