

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Rex Guice and) Docket No. RCRA (9006) VIII-95-01
Four "G" Enterprises,)
 Respondents)

INITIAL DECISION

By: Carl C. Charneski
 Administrative Law Judge

Issued: September 30, 1997
 Washington, D.C.

Appearances

For Complainant: Sheldon H. Muller, Esq.
 U.S. Environmental Protection
Agency
 Region 8
 Denver, CO

For Respondent: Rex Guice
 Laramie, WY

I. Introduction

The U.S. Environmental Protection Agency ("EPA") brings this action pursuant to Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. § 6991e.⁽¹⁾ Respondents Rex Guice and Four "G" Enterprises are charged with two counts of violating Section 9003(c) of RCRA, 42 U.S.C. § 6991b(c). The violations allegedly occurred in connection with a

petroleum spill at respondents' facility. Count 1 charges respondents with failing to contain and immediately clean up a petroleum spill of less than 25 gallons as required by 40 CFR 280.53(b). Count 2 charges respondents with failing to report the spill to the appropriate state agency within 24 hours as required by 40 CFR 280.50(a).

EPA seeks civil penalties totaling \$20,254 for the two alleged RCRA violations. Section 9006(d), 42 U.S.C. § 6991e(d).⁽²⁾ EPA also seeks an order directing that respondents comply with the Agency's directive to clean up the spill area, to take immediate steps to prevent future petroleum spills, and to provide EPA with written verification of this corrective action.

A hearing was held in this matter in Cheyenne, Wyoming, on September 18, 1996. Rex Guice appeared on behalf of himself and Four "G" Enterprises. For the reasons set forth below, respondents are found liable for the two RCRA violations alleged in the EPA complaint, and a civil penalty totaling \$6,004, the penalty initially sought by EPA, is assessed. Furthermore, respondents are directed to obey the terms of the EPA Compliance Order set forth in the administrative complaint regarding the cleanup of the petroleum spill area.

II. Facts

Rex Guice has been in the gasoline station business for twenty-two years. He owns three gasoline stations in Laramie, Wyoming. Tr. 289. One of these stations is the "Gunslinger 66." At approximately 8:00 p.m. on Friday, August 5, 1994, a diesel fuel spill occurred at the Gunslinger 66. See Jt. Ex. 1, Stips. 7 & 8. The petroleum spill was caused by a vehicle backing into a diesel fuel pump. As a result of this accident, the pump was severed below the fire valve, thus allowing diesel fuel to spill onto both the paved and unpaved portions of the station area. Tr. 31, 40, 256-57; Compl. Exs. 3.2-3.11 & 7.1-7.6. The Laramie Fire Department estimated that 20 gallons of diesel fuel had spilled at the Gunslinger 66 station. Compl. Ex. C-1.⁽³⁾

The station attendant on duty at the time of the diesel spill shut off the electricity to the fuel pumps, sprayed the spill with water, and then closed the station for the night. Tr. 257-59.⁽⁴⁾ Rex Guice was not present when the spill occurred. In fact, Guice didn't learn of the spill until he arrived at the station at approximately 9:30 a.m. the next morning, Saturday, August 6. Tr. 260.

The Gunslinger 66 station was open for business when Guice arrived on Saturday morning. The gasoline pumps on fuel islands, other than the one containing the damaged diesel fuel dispenser, were available for use by the public. Tr. 290, 304-06; see Compl. Ex. 4. In fact, the record shows that except for Friday evening, when the station attendant determined on his own to shut down the station, during the events of this case the Gunslinger 66 station conducted normal business operations. Normal business operations included the sale of petroleum products.

When Rex Guice arrived at the station on Saturday, his son, Doug, was already in the process of repairing the damaged diesel fuel pump. Tr. 263-68. Before assisting his son in repairing the pump, Rex Guice attempted to contact the Wyoming Department of Environmental Quality ("WDEQ") by telephone. Tr. 261, 288. He called a Laramie telephone number that Doug had taken from WDEQ letterhead. No one answered the telephone at the WDEQ office and Rex Guice assumed, therefore, that the state agency was closed for the weekend. Tr. 261; Ans. at 2.

Following this attempt to contact the WDEQ, Rex Guice joined his son in repairing the diesel pump. Tr. 262-68. At approximately noon on Saturday, August 6, the Laramie Fire Department responded to the Gunslinger 66 diesel spill. Compl. Ex. 1. As noted earlier, the fire department advised Rex Guice that due to environmental regulations the spill could not be flushed with water. *Id*; Tr. 55, 57-58.

Rex and Doug Guice worked on the diesel pump until approximately 11:00 p.m. on Saturday evening. Tr. 266-68. When Rex Guice left the Gunslinger 66 station on Saturday night, the repairs had been completed and a new diesel pump had been installed. Tr. 268. As of that time, however, no cleanup effort had been initiated. It was Rex Guice's intention to return to the station on Sunday morning, August 7, to begin the cleanup of the spilled diesel fuel. Doug Guice, however, was scheduled to be out of town on Sunday and, therefore, unable to assist his father in the cleanup operation. Tr. 268. When Sunday morning arrived, Rex Guice was ill and unable to travel to the station to begin cleaning up the diesel spill. Tr. 268-71.

The WDEQ became involved in this matter on Sunday, August 7, after Diana Grant, a senior analyst with the Water Quality Division of the WDEQ, received an anonymous telephone message regarding a diesel spill. Grant recounted the telephone message as follows: "I hope you're the woman that works in underground

storage tanks because you should see the diesel mess at the Guice place." Grant deduced that the anonymous caller was referring to Rex Guice's Gunslinger 66 station. Tr. 24, 28-29.

After receiving this message, Grant proceeded to the Gunslinger 66 station on Sunday, August 7. As Grant approached the Gunslinger 66, but before she could even see the station, she was "overwhelmed by the smell of hydrocarbon product." Tr. 29. When Grant arrived at the Gunslinger 66 station, she observed people and vehicles passing directly through large petroleum puddles with the diesel contaminant being tracked throughout the station area and onto Adams Street, an adjacent public thoroughfare. Tr. 29-39. After photographing the Gunslinger 66 fuel spill, Grant called Rex Guice and informed him of his legal obligation to notify the WDEQ when a diesel spill occurs, as well as his legal obligation to clean up the spill immediately. Tr. 40-42; Compl. Exs. 3.1-3.11.

Claiborne Rowley, Grant's supervisor at the WDEQ, likewise examined and photographed the Gunslinger 66 spill area later in the day on Sunday, August 7. Tr. 42, 153-58, 165; Compl. Exs. 7.1-7.6. Rowley had proceeded to the station at the request of Grant. Rowley described his observations at the Gunslinger 66 station as follows:

... [A]s I drove up, I noticed the odor of diesel fuel and then another thing that came to mind quite quickly is that the vehicles were driving through the spilled fuel that hadn't been blocked off and that kind of bothered me. Then, of course, the fact that there was nothing being done at that point to clean up the spill.

Tr. 153.

Rex Guice began to clean up the diesel fuel spill on Monday, August 8, more than two and one-half days after the accidental fuel release. Tr. 271. Early that morning, WDEQ representatives Grant and Rowley again visited the Gunslinger 66 station and observed Guice in the initial stages of cleanup. Grant and Rowley reminded Guice of proper cleanup procedures, including the need to excavate any contaminated soil. Tr. 44, 158-59, 162.

The cleanup effort at the Gunslinger 66 station consisted of Rex Guice and his eight-year-old grandson spreading sand over the spill and collecting the contaminated sand.

Rex Guice testified that he and his grandson collected 11 buckets of sand, each of which contained almost 5 gallons. An additional thin layer of sand was subsequently spread over the contaminated area by respondents. This sand was allowed to remain on the ground for several weeks. Tr. 274-76.

Roland Peterson of the WDEQ subsequently visited the Gunslinger 66 station on August 16, 1994, as did Diana Grant on August 23, 1994. On August 16, Peterson observed soil stained areas, with no signs of the contaminated soil being excavated. Tr. 189-192; Compl. Ex. 8. On August 23, Grant also observed that there were no signs of the contaminated soil being excavated. Grant testified: "I observed that the unpaved portions of the parking lot still had not been excavated and the paved portion, that had been impacted by the spill had not been cleaned up or excavated." Tr. 58. See Compl. Ex. 5.

Thereafter, EPA filed a complaint against respondents alleging the two violations of the Resource Conservation and Recovery Act at issue in this case. In the complaint, EPA also issued a Compliance Order directing that respondents: (1) immediately clean up the spill area of the station; (2) take immediate steps to prevent any further accidental release of petroleum; and (3) provide EPA with written verification of this corrective action.

III. Discussion

A. Liability

Subtitle 1 of the Resource Conservation and Recovery Act, RCRA §§ 9001-9010, 42 U.S.C. § 6991, authorizes EPA to regulate the installation and use of underground storage tanks ("USTs"), as defined in RCRA Section 9001(1), that contain "regulated substances," as defined in RCRA Section 9001(2).

Jt. Ex.1, Stip. 1. Section 9003 of RCRA authorizes EPA to promulgate regulations setting forth requirements for taking corrective action in response to a release from a UST, as well as the requirements for reporting such releases and the corrective action taken. *Id.*, Stip. 3. EPA has promulgated the regulations referred to in RCRA Section 9003 at 40 CFR Part 280, Subparts E and F. *Id.*, Stip. 4.

Respondents Rex Guice and Four "G" Enterprises are "persons" within the meaning of RCRA Section 9001(6) and 40 CFR 280.12. *Id.*, Stips. 5 & 6. Also, both Rex Guice and Four "G" Enterprises are "owners" and, or "operators," of an underground storage tank located at the Gunslinger 66 station in Laramie, Wyoming, within

the meaning of RCRA Sections 9001(3) and (4), and 40 CFR 280.12. *Id.*, Stips. 7 & 8.

As noted, respondents Rex Guice and Four "G" Enterprises are charged with two counts of violating the Resource Conservation and Recovery Act. Count 1 charges a violation of 40 CFR 280.53(b) for failing to contain and immediately clean up a spill of less than 25 gallons. Count 2 charges a violation of 40 CFR 280.50(a) for failing to notify the state implementing agency, the WDEQ, within 24 hours of the spill. The evidence in this case supports a finding that respondents violated Sections 280.50(a) and 280.53(b) as alleged by EPA.

1. Failure to Contain and Immediately Clean Up the Spill

Section 280.53(b) in part requires that "[o]wners and operators of UST systems must contain and immediately clean up a spill or overflow of petroleum that is less than 25 gallons." Here, it is undisputed that respondents are the owners and, or operators, of an underground storage tank system at the Gunslinger 66 station. It is also undisputed that approximately 20 gallons of diesel fuel spilled from this UST system at approximately 8:00 p.m. on Friday, August 5. Finally, no containment or cleanup action was taken by respondents until Monday morning, August 8, two-and-one-half days after the diesel spill.

EPA contends that respondents' failure to contain the spilled diesel fuel and their failure to immediately clean up the spill constituted a violation of RCRA. As to the "containment" issue, respondents argue that the diesel fuel was indeed "contained" within the meaning of Section 280.53(b), because the spill was limited to the Gunslinger 66 station area. This argument, however, must fail. The testimony of both Grant and Rowley, as well as the photographs taken by them, support a finding that the spill was not contained. Other than replacing the damaged diesel fuel dispenser, no steps were taken by respondents prior to Monday, August 8, to contain the spill.⁽⁵⁾ Respondents did nothing to prevent the spread of the 20 or so gallons spilled. This resulted in the diesel being tracked by vehicles and people throughout the Gunslinger 66 station area, as well as onto Adams Street.

Diana Grant of the WDEQ testified that as she approached the Gunslinger 66 station, sometime after 3:00 p.m. on Sunday, August 7, she was "overwhelmed" by the smell of the spilled diesel fuel at the station. Tr. 29. Indeed, Grant observed "heavy black staining" in the Gunslinger 66 parking lot area, as

well as around the pump islands and extending into adjacent Adams Street. Tr. 29-30. Grant also observed customers driving and walking through the diesel fuel spill area. Tr. 30.

Grant's description of the Gunslinger 66 diesel fuel spill is corroborated by the photographs which she took during her August 7 visit. For example, complainant's Exhibits 3.2 and 3.3 show a puddle of diesel fuel, approximately three to four feet in length, in front of the pump island, as well as a diesel fuel discoloration on the concrete pad in front of the fuel dispensers. In addition, these photographs show a tract of unpaved area behind the diesel pumps, with fuel stains. See Tr. 34-35. Complainant's Exhibits 3.4 through 3.11 similarly show puddles of diesel fuel and the tracking of that spilled fuel throughout the Gunslinger 66 station area and into Adams Street.

Grant wasn't the only government witness to testify as to the contaminated spill area at Gunslinger 66. Claiborne Rowley, a WDEQ employee who, as noted, has participated in 20 to 30 cleanup operations involving spilled or leaking petroleum, similarly described the conditions at the Gunslinger 66 station as of Monday morning, August 8. Like Grant, Rowley detected the odor of diesel fuel as he approached the station. Tr. 153. Rowley also observed vehicles driving through the spill, adding that "there was nothing being done at that point to clean up the spill." *Id.* In addition, like Grant, Rowley took photographs at the Gunslinger 66 station during his August 8 visit. Those photographs support his description of the fuel spill conditions at the station and they are consistent with both the testimony of, and the photographs taken by, Grant. See Compl. Exs. 7.1 through 7.6; see also, Tr. 155-58.

In addition to supporting EPA's claim that respondents failed to contain the diesel spill, the onsite observations and photographs of Grant and Rowley likewise support the Agency's claim that the spill was not immediately cleaned up. Respondents' explanation for the two and one-half day delay in initiating the cleanup is that the cleanup was begun as soon as was "physically possible." Given the particular facts of this case, however, respondents' explanation is not an adequate defense to the charged Section 280.53(b) violation.

The fact of the matter is that from the time that Rex Guice first learned of the diesel spill on Saturday morning, August 6, until late that evening, respondents' total effort was spent on replacing the damaged diesel dispenser. During this period of time, the Gunslinger 66 station conducted business as usual and

continued to sell fuel at its other undamaged fuel islands. Customers and their vehicles were allowed to travel in and about the diesel spill area. There were no restrictions. Respondents made no effort during this time either to begin clean up operations or to prevent exposing the public to the petroleum spill.

While this court finds that respondents' reaction to the diesel spill did not measure up to the duty imposed upon them by the applicable regulations, it will not engage in telling the respondents what they should have done. This court is not prepared to tell the respondents who among their employees should have been assigned to clean up the spill, whether they should have closed the station altogether to allow for a comprehensive cleanup, or whether the respondents should have contacted an outside firm such as Bird O'Donnell to perform the environmental cleanup.⁽⁶⁾ The fact remains that *nothing* was done to clean up the Friday, August 5, spill until Monday morning, August 8. Clearly, this lack of response violates Section 280.53(b)'s mandate that petroleum spills be contained and immediately cleaned up.⁽⁷⁾

2. Failure to Notify the Implementing Agency Within 24 Hours of a Spill

Section 280.50 is titled, "Reporting of suspected releases." 40 CFR 280.50. Section 280.50(a) requires that owners and operators of USTs are to notify the state implementing agency of a release of a regulated substance within 24 hours of the release. The implementing state agency in this case is the WDEQ. Jt. Ex. 1, Stip. 13. Also, diesel fuel is a regulated substance as defined at RCRA Section 9001(2), and 40 CFR 280.12. *Id.*, Stip. 9. Accordingly, in order to comply with Section 280.50's reporting requirements, respondents in this case were to have notified the WDEQ of the diesel fuel accidental release within 24 hours of the spill.

Whether measuring from the fuel spill on the evening of Friday, August 5, or Rex Guice's actual notice of the spill on the morning of Saturday, August 6, it is clear that the state implementing agency didn't receive notice of the spill within the prescribed 24 hours. In fact, the WDEQ didn't learn of the Gunslinger 66 spill until Sunday, August 7, and then not from respondents, but from an anonymous caller.

Respondents seek to avoid liability as to this Section 280.50(a) violation on the ground that Rex Guice acted in good faith. In

that regard, respondents point to Guice's attempt, albeit unsuccessful, to contact the WDEQ on Saturday morning, August 6. Guice testified that before assisting his son in replacing the damaged diesel fuel dispenser he attempted to telephone the WDEQ to report the spill. Guice telephoned the WDEQ office in Laramie, Wyoming, the city in which the Gunslinger 66 station is located.

Again, respondents' actions fall short of complying with the applicable regulation. Fairly read, Section 280.50(a) requires notification within 24 hours of a petroleum spill. Despite having been in the gasoline station business for 22 years, and despite owning 3 gasoline stations in Laramie, Wyoming, Rex Guice didn't know the number of the state implementing agency to call in the event of an accidental petroleum release. See Tr. 289. Guice called the Laramie office of the WDEQ to report the spill. The proper WDEQ office to call to report "weekend" and "after hours" petroleum spills, however, is the WDEQ Cheyenne office, and not its Laramie office. Respondents should have known the correct WDEQ office to contact under the circumstances of this case.

Moreover, WDEQ employee Patricia Burns testified that respondents were mailed a copy of the April, 1994, issue of the Wyoming M.U.S.T. (Management of Underground Storage Tanks) newsletter that set out the emergency telephone number to be called after regular business hours, or on weekends, to report problems associated with underground storage tanks. Tr. 196-200; Compl. Ex. 10.2 at 6. In addition, Appendix II to 40 CFR Part 280 lists agencies designated to receive Part 280 notification, with corresponding telephone numbers. The WDEQ is listed under the heading of Wyoming. Further, the telephone number provided for the WDEQ in Appendix II is the same telephone number that serves as the "after hours" and weekend emergency number for the state agency.

It would be contrary to the remedial purpose of the Resource Conservation and Recovery Act, as well as to the Part 280 implementing regulations, to acknowledge respondents' attempt to contact the wrong WDEQ office as a valid defense and thereby so easily relieve them of their notification responsibilities. Given the extent of Rex Guice's involvement in the petroleum marketing business, and given the availability of the proper WDEQ emergency telephone number in the Wyoming M.U.S.T. and the Code of Federal Regulations, respondents should have known the correct WDEQ number to call in the event of an emergency.

Accordingly, for these reasons, it is held that EPA has established a violation of 40 CFR 280.50(a).

B. Civil Penalty

In assessing a civil penalty for a violation of the Resource Conservation and Recovery Act, we begin with the statute. First, RCRA mandates that "[a]ny owner or operator of an underground storage tank who fails to comply with any requirement or standard shall be subject to a civil penalty not to exceed \$10,000 for each tank for each day of violation." RCRA § 9006(d)(1), 42 U.S.C. § 6991e(d)(1). Second, the penalty shall be "reasonable" while "taking into account the *seriousness of the violation* and any *good faith efforts* to comply with the applicable requirements." RCRA § 9006(c)(1), 42 U.S.C. § 6991e(c)(1) (*emphasis added*).

In calculating the proposed civil penalty in this case, EPA specifically relied on its "Penalty Guidance for Violations of UST Regulations." Compl. Ex. 20. By use of this penalty policy, EPA determined a base penalty by analyzing the seriousness of the violation and the respondents' deviation from applicable regulatory requirements. EPA then multiplied this figure to reflect the violation's potential harm to the environment and the number of days of noncompliance. Finally, EPA considered adjustments to the penalty based on any good faith efforts made by respondents, any financial gain afforded respondents due to delayed compliance, and any other case-specific considerations.

Using the RCRA Section 9006(c)(1) penalty criteria, a total penalty of \$6,004 is assessed for the two violations. Of this amount, \$4,504 is assessed for Count I, and \$1,500 is assessed for Count II. This is the penalty amount sought by EPA in the complaint.

1. Failure to Contain and Immediately Clean Up a Spill

Due to the seriousness of the spill and respondents' lack of good faith, EPA's initial proposed penalty of \$4,504 for the Section 280.53(b) violation is justified. The seriousness of this violation stems from its defeat of the remedial regulatory goals. Within RCRA, the underground storage tank clean up regulations minimize health and environmental harm inflicted by petroleum spills by ensuring that spills of less than 25 gallons are contained and cleaned up immediately. This prevents the escalation of an otherwise manageable situation.

In this case, however, respondents' actions produced the opposite result. As depicted in the WDEQ photographs and the testimony of WDEQ representatives Grant and Rowley, respondents' failure to take immediate steps to clean up the spill resulted in the dispersal of diesel fuel throughout the Gunslinger 66 station area and onto Adams Street as well.

As for the hazards resulting from the delayed clean up, neglecting to immediately take action allowed direct human and environmental contact with the diesel. For example, Grant took photographs showing large petroleum puddles in station areas where people walked. Compl. Exs. 3.6 & 3.8. Under these conditions, contact with the spill was maximized, thus increasing the risk to human health. Likewise, the standing puddles and dispersed stains, coupled with respondents' failure to properly excavate contaminated soil, allowed fuel to seep into the paved and unpaved portions of his driveway. Compl. Exs. 3.4, 3.5, 3.9, & 3.10. In this manner, the likelihood of soil and groundwater contamination increased. Furthermore, if it had rained, lack of proper containment would have allowed fuel to be washed into the storm sewer, thereby resulting in greater environmental harm.

Similarly, the record in this case underscores respondents' negligence in failing to comply with the cited containment and cleanup regulation. First, prior to the release, Rex Guice should have informed his employees as to the proper containment and clean up procedures in the event of a fuel spill. Instead, the initial response of the station attendant on duty at the time of the August 5 spill was simply to wash down the spill with water. (The attendant, however, did close down the station.) This likely resulted in dispersing the fuel spill and increasing the area of contamination.

Second, upon the release of the diesel fuel, Rex Guice failed to take even the most basic containment and cleanup action. He could have cordoned off the contaminated area, or closed the station, to minimize human contact with the spill, as well as minimizing its spread. Instead, Rex Guice spent the entire day following the release helping his son in replacing the damaged fuel dispenser. It was only after being warned by WDEQ officials that Guice engaged in any clean up at all.

In addition, considering the "immediacy" of the regulatory cleanup requirements, Guice could have sought the aid of a professional contractor. While respondents dispute the WDEQ's assertion that the firm of Bird O'Donnell was available to clean

up the diesel spill, the fact is that Guice didn't even attempt to contact this or any other contractor. Instead, Guice proceeded upon a plan to clean up the diesel spill himself. As the facts of this case establish, this plan didn't work.

Finally, the court declines EPA's invitation to more than triple the civil penalty assessed for this violation by taking into account the additional days of noncompliance. See Compl. Br. at 21. Given the enforcement of EPA's Compliance Order, discussed *infra*, it is determined that the penalty initially sought by EPA is the appropriate sanction. EPA is incorrect in asserting that the facts adduced at the hearing warrant a higher penalty for Count 1. EPA got the penalty correct the first time -- *i.e.*, in the complaint.

2. Failure to Notify the Implementing Agency Within 24 Hours of a Spill

Failing to notify the implementing agency of a petroleum spill within 24 hours is a serious violation that justifies EPA's initial proposed penalty of \$1,500. This regulation is aimed at promoting timely involvement by EPA, as well as the state implementing agency, in monitoring the containment and cleanup of petroleum releases.

Respondents' failure to notify the WDEQ within the time prescribed by Section 280.50(a) is the result of its negligence. The facts of this case, as discussed earlier, show that respondents should have been aware of the emergency WDEQ telephone number.

Regarding the good faith penalty criterion, neither an increase nor a decrease is warranted here. Rex Guice's claim that the penalty should be reduced because he attempted to call the WDEQ office in Laramie is unpersuasive. Respondents had a legal obligation to satisfy the petroleum spill notification requirements, which they failed to meet. The fact that they may have attempted to notify the wrong WDEQ office does not, under the facts of this case, warrant a penalty reduction.

EPA's post-hearing argument that the penalty for the Section 280.50(a) violation should be increased is also unpersuasive. In seeking an upward adjustment, the Agency relies upon the testimony of EPA witness Suzanne Stevenson. Compl. Br. at 22. Stevenson testified that given the testimony in this case, she should have used a higher "environmental sensitivity multiplier" in calculating EPA's proposed penalty for this violation. Tr.

240. Nonetheless, while Stevenson held the opinion that a higher penalty should have been proposed for the Section 280.50(a) violation, she failed to articulate why a higher environmental sensitivity multiplier should be used in assessing a penalty for a reporting violation. Accordingly, EPA's request for an upward adjustment of its original proposed penalty is rejected.

C. Compliance Order

RCRA Section 9006 provides for the issuance of Compliance Orders. 42 U.S.C. § 6991e. EPA has issued a Compliance Order in this case directing respondents to take certain corrective action relative to the clean up of the diesel spill at issue. See EPA complaint.

The record evidence supports EPA's issuance of the Compliance Order. In that regard, in taking issue with the adequacy of respondents' sand-related cleanup effort, WDEQ representative Rowley testified that substantially more cleanup work should have been performed by respondents. Rowley testified (as did Grant) that the contaminated soil should have been excavated. Depending upon the amount of paved and unpaved areas contaminated, Rowley estimated that between 10 to 15 cubic yards of soil should have been unearthed by respondents. Tr. 162.⁽⁸⁾

Given the testimony of Rowley and Grant concerning the scope of the diesel fuel spill, and given Rowley's experience in petroleum spill cleanup matters,⁽⁹⁾ this court agrees with the WDEQ's and EPA's position that the contaminated soil should have been excavated by respondents. In addition, the record in this case also supports the excavation estimates provided by Rowley as being a reasonable approximation as to the scope of the cleanup effort needed at the Gunslinger 66 station.

In sum, given the findings in this case sustaining the Section 280.50(a) and 280.53(b) violations alleged by EPA, and given the fact that EPA has established that the diesel spill at the Gunslinger 66 station has not been adequately cleaned up by respondents (and that an adequate cleanup requires the removal of the contaminated soil), EPA's Compliance Order is upheld.

ORDER

Accordingly, for the foregoing reasons, it is held that Rex Guice and Four "G" Enterprises violated the Resource Conservation and Recovery Act as alleged in Counts 1 and 2 of the complaint. Specifically, respondents violated 40 CFR

280.50(a) and 280.53(b). A total civil penalty of \$6,004 is assessed for these violations pursuant to RCRA Section 9006(d). 42 U.S.C. § 6991e(d). Of this amount, \$4,504 is assessed for Count I, the Section 280.53(b) violation, and \$1,500 is assessed for Count 2, the Section 280.50(a) violation.

Payment of the civil penalty shall be made within 60 days of the date of this order by mailing, or presenting, a cashier's or certified check made payable to: Treasurer of the United States of America, U.S. EPA Region VIII (Regional Hearing Clerk), Mellon Bank, P.O. Box 360859M, Pittsburgh, Pennsylvania, 15251.

Furthermore, pursuant to RCRA Section 9006, 42 U.S.C. § 6991e, respondents are ordered to perform the activities set forth in the EPA Compliance Order. Specifically, as directed by EPA, respondents are to take the following actions upon receipt of this order:

1. Immediately clean up the spill and overfill area at the Gunslinger 66 gas station in accordance with EPA requirements set forth at 40 CFR 280.60-280.67.
2. Take immediate steps to prevent any further release of petroleum at the facility in accordance with the requirements set forth at 40 CFR 280.60-280.67.
3. Provide EPA with written verification of the corrective action undertaken as directed by the Compliance Order within forty (40) days, or as otherwise directed by EPA. [\(10\)](#)

Carl C. Charneski
Administrative Law Judge

1. EPA's jurisdiction over this matter has been stipulated. Jt. Ex. 1, Stip. 2.
2. In the complaint, EPA sought a civil penalty totaling \$6,004. In its post-hearing brief, however, EPA requests a higher penalty of \$20,254. EPA submits that the higher proposed penalty is supported by "the evidence adduced at the hearing." Compl. Br. at 24.
3. Others estimated that as many as 50 gallons, or more, of diesel fuel had spilled. Tr. 41, 152. For purposes of this case,

however, the exact number of gallons spilled is not important. It is sufficient that the size of the spill comprised at least 20 gallons.

4. The Laramie Fire Department subsequently advised the respondents that water was not to be applied to the fuel spill due to environmental concerns. Compl. Ex. C-1.

5. On Monday, August 8, respondents spread sand over the spill area as part of their cleanup effort.

6. While Rex Guice was of the opinion that Bird O'Donnell was too busy to engage in a clean up operation at the Gunslinger 66 station, WDEQ's Diana Grant testified that this firm was registered with the state agency for environmental cleanup activities and that, if notified, it would have been able to respond to the spill in this case. Tr. 307.

7. Respondents Rex Guice and Four "G" Enterprises not only failed to clean up the diesel spill immediately, but as discussed in the Compliance Order section, *infra*, once initiated they failed to adequately clean up the spill.

8. According to Rowley, 10 cubic yards of soil would be equivalent to approximately 32 55-gallon drums of material. Fifteen cubic yards of soil would be equivalent to approximately 47 55-gallon drums of material. Tr. 162. This is considerably more than the 11 5-gallon buckets of sand removed by respondents.

9. Rowley has participated in between 20 to 30 petroleum spill cleanup operations. Tr. 163.

10. Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 CFR 22.30, or unless the EAB elects to review this decision *sua sponte*, it will become a final order of the EAB. 40 CFR 22.27(c).