UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) | |
| | ) | |
| GEORGE ATKINSON, | ) | |
| GEORGE'S BRITISH PETROLEUM, | ) | DOCKET NO. |
| | ) | RCRA-(9006)-VIII-97-02 |
| RESPONDENT | ) | |

**ORDER TO SHOW CAUSE**

This action was commenced on May 30, 1997, by the filing of a complaint pursuant to Section 9006 of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6991(e)(a)), by the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice for Region VIII, U.S. EPA ("Complainant"), against George Atkinson, [d/b/a] George's British Petroleum ("Respondent"), alleging that the Respondent violated the Technical Standards and Corrective Action Requirements For Owners and Operators of Underground Storage Tanks (USTs) promulgated under Section 9003 of the Act and appearing at 40 CFR Part 280. Specifically, the one count complaint alleged that Respondent had failed to respond to a confirmed release of a petroleum substance as required by 40 CFR § 280.60 and to replace a cracked compression fitting on blowback copper tubing on a turbine pump for an unleaded gasoline tank as required by 40 CFR § 280.33. For these alleged violations, it was proposed to assess Respondent a penalty of $13,700.

Respondent George Atkinson, appearing pro se, filed a letter-answer by facsimile, dated August 25, 1997, denying the existence of the mentioned inspection and leak and asserting that Complainant lacked jurisdiction to enforce Solid Waste Disposal Act provisions with respect to Respondent. Although it is not clear, the assertion that EPA lacked jurisdiction is apparently based upon the fact that Respondent's facility is located on an Indian reservation. Respondent asserted that the penalty was inappropriate and excessive, and requested a hearing upon material issues. The case was forwarded to the Office of Administrative Law Judges on August 26, 1997, and the undersigned was designated to preside on September 17, 1997.

On September 29, 1997, the ALJ issued a pre-hearing order, directing that, in the absence settlement, the parties exchange specified prehearing information on or before November 21, 1997. In addition to lists of anticipated witnesses, summaries of their expected testimony and copies of documents or exhibits expected to be

offered in evidence, Complainant was directed to furnish, inter alia, the factual basis for the allegation that there was a release of a regulated substance at Respondent's facility, that Respondent was notified thereof and failed to take any action to correct or address the alleged leak. Complainant complied with the prehearing order by filing its prehearing exchange on the date specified, November 21, 1997. Among documents included in Complainant's submission is a report of an EPA inspection of Respondent's facility conducted on January 22, 1997, together with its attachment a report of an inspection of Respondent's facility conducted in 1996 by the Montana DEQ.

Among items of information Respondent was directed to furnish was the factual basis for the denial of the allegation that EPA conducted an inspection of its facility on January 22, 1997, and for the denial of the allegation that there was a release of a regulated substance from its facility and that Respondent failed to respond thereto.(1) Respondent was also directed to furnish data such as copies of income tax returns or financial statements, if it were contending that the proposed penalty would jeopardize its ability to continue in business. Respondent did not comply with the September 29 order and, indeed, has made no response of any kind thereto to the date of this order.

On March 23, 1998, Complainant, noting Respondent's failure to file a response to the prehearing order, moved for a default order pursuant to Section 22.17 of the Rules of Practice (40 CFR Part 22). To date, Respondent has not filed a response to Complainant's motion for default.

## Discussion

Under the Consolidated Rules of Practice, "[a] party may be found in default ... after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer." 40 CFR § 22.17(a). A finding of default by the respondent "constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." Id.

The ALJ must conclude that Complainant has established a prima facie case of liability against each respondent before granting a motion for default.(2) To establish a prima facie case, Complainant must present evidence that "is sufficient to establish a given fact ... which if not rebutted or contradicted, will remain sufficient ... to sustain judgment in favor of the issue which it supports, but which may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990). It is not sufficient for Complainant to demonstrate that a violation has occurred, Complainant must also establish that each respondent named in the complaint is a party responsible for the violation.

Respondent is clearly in default. Moreover, Complainant's prehearing exchange sets forth evidence which prima facie demonstrates the violations alleged in the complaint. A default order, however, is a harsh remedy and Respondent should and will be given one more opportunity to contest the violation and the penalty. The law favors resolution of cases on their merits, whenever possible, and default, being a "drastic remedy," will not necessarily be granted merely because a party is technically in default.(3) Rather, Respondent will be ordered to show cause, if any there be, why it has failed to comply with the September 29, 1997, prehearing order, and why it should not be held in default. Additionally, Respondent is directed to concomitantly submit its prehearing exchange. Should Respondent fail to comply with this order, it will be found in default.

## Order

Respondent is ordered to show cause, if any there be, on or before **July 24, 1998**, why it should not be held in default for failure to comply with the prehearing order, dated September 29, 1997. Respondent's response to this order shall be accompanied by the information specified in the September 29 order.

Dated this 30th day of June 1998.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge

1. The complaint alleged that the January 22 inspection was conducted with the consent of Respondent and, inasmuch as the inspection report indicates that the inspection was conducted in Respondent's absence, it may be that the denial was directed to the inspection being consensual, rather than to the fact of the inspection.

2. A default order must include "findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed." 40 CFR § 22.17(c).

3. See, e.g., Hoops Agri-Sales Co., I.F.& R.-VII-1233C-93P (ALJ, Dec. 1, 1994) (denying motion for default because the respondent had a possible full defense to Count I, a good faith defense to Count II and a defense to the magnitude of any penalty; and allowing respondent another opportunity to comply with the prehearing requirement); In re Environmental Control Systems, Inc., I.F.& R.-III-432-C (ALJ, July 13, 1993) ("The general rule both in federal courts and administratively is that default judgments are not favored and that cases should be decided on their merits whenever possible.").