UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
JAMES BOND, OWNER,	)	**Docket No. CWA-08-2004-0047 &**
BOND'S BODY SHOP,	)	**RCRA-08-2004-0004**
	)	
Respondent.	)	

ORDER ON DEFAULT

I. Background

The Complaint initiating this proceeding was issued on June 10, 2004, pursuant to Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. § 6928(a), and Section 311(b)(6)(B)(i) of the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6)(i), as amended by the Oil Pollution Act of 1990, against Respondent, James Bond, who owns a maintenance garage and shop and/or diesel repair facility known as "Bond's Body Shop." The Complaint charges Respondent with three counts of violating RCRA, and regulations promulgated thereunder, and one count of violating the CWA, and implementing regulations. The Complaint proposes a penalty of $52,019 for these alleged violations, and includes a Compliance Order.

Respondent, through counsel, filed an Answer to the Complaint on August 16, 2004, denying the alleged violations and requesting a hearing. Pursuant to 40 C.F.R. § 22.19(a), a Prehearing Order was issued on September 14, 2004, requiring Complainant to file its Prehearing Exchange by November 5, 2004 and Respondent to file his Prehearing Exchange by November 26, 2004. Complainant filed a timely Prehearing Exchange.[1] On November 5, 2004, Respondent's counsel filed a Notice of Withdrawal from Representation of Respondent, stating that all further documents in this matter should be served on Respondent, personally, "at his last known address as listed in the Administrative file." To date, Respondent has not filed a Prehearing Exchange or otherwise responded to the Prehearing Order.

An Order to Show Cause was issued on December 6, 2004, requiring Respondent to show good cause, on or before December 17, 2004, why he failed to submit his prehearing

[1] Complainant also timely submitted a "Supplemental Prehearing Exchange" in lieu of a rebuttal prehearing exchange on or about December 8, 2004.

exchange and why a default order should not be issued against him. The Order to Show Cause was mailed to Respondent at the post office box address shown on the Complaint and in the Notice of Withdrawal from Representation. To date, Respondent has not filed any response to the Order to Show Cause.

II. Discussion

The Consolidated Rules of Practice, 40 C.F.R. part 22, provide that:

> A party may be found to be in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer. * * *
> 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. * * *
> 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 . . . The relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the Act.

40 C.F.R. § 22.17.

Respondent was served with a copy of the Rules along with service of the Complaint. Respondent was warned of the consequences of failure to file a timely prehearing exchange in the Prehearing Order, which stated:

> If the Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, the Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. **The Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of the Complainant's Witnesses, can result in the entry of a default judgment against it.** . . . **THE MERE PENDENCY OF SETTLEMENT NEGOTIATIONS OR EVEN THE EXISTENCE OF A SETTLEMENT IN PRINCIPLE DOES NOT CONSTITUTE A BASIS FOR FAILING TO STRICTLY COMPLY WITH THE PREHEARING EXCHANGE REQUIREMENTS. ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, OR AN ORDER OF THE JUDGE, EXCUSES NONCOMPLIANCE WITH FILING DEADLINES**.

Despite such warning, Respondent has failed to comply with the information exchange requirements (the prehearing exchange) set forth in the Prehearing Order, and/or failed to seek an order from the Presiding Judge granting an extension of time in which to file his prehearing exchange. *See,* 40 C.F.R. §§ 22.7(b); 22.19(a)("In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange"). In addition, Respondent failed to respond in any way to the Order to Show Cause.

Such failures to respond provide a basis for finding Respondent in default. However, the decision as to whether to find a party in default is a matter within the Presiding Judge's discretion.

It is noted that there is no return receipt in the file showing that the Order to Show Cause was received by Respondent.[2] The possibility that Respondent did not receive it, and /or that other documents issued in this proceeding were not received by Respondent, is not sufficient reason, however, to decline a finding of default. The Rules provide that service of documents is complete upon mailing. 40 C.F.R. § 22.7(c). Thus, non-receipt of the papers does not affect validity of service. *See,* 4A C. Wright and A. Miller, Federal Practice and Procedure § 1148 (2d ed. 1987)("Since service is complete upon mailing, nonreceipt . . . of the papers generally does not affect its validity, although nonreceipt may justify a finding of excusable neglect" which may be considered if the respondent defends against a finding of default.).

It is observed that, in view of their harshness, default orders are not favored by the law and as a general rule cases should be decided on their merits whenever possible. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). A default judgment is a harsh and disfavored sanction reserved only for the most egregious behavior. *Lacy v. Sitel Corp.*, 227 F.3d 290 (5th Cir. 2000); *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983)("'the extreme sanction of a default judgment must remain a weapon of last, rather than first, resort, . . . which should only be imposed upon a serious showing of willful default." (citations omitted).

Complainant did not move for default, a sizable penalty is proposed, and Respondent is currently unrepresented by counsel. In some such cases, a default order which assesses the proposed penalty is not warranted.[3]

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[2] The only address in the case file for Respondent is a post office box number, which would explain why no certified mail receipt was returned. There is no street address in the case file. His facility, Bond's Body Shop, is described in the case file merely as lying north of Highway 2 approximately ½ mile west of Browning, Montana, and within the boundaries of the Blackfeet Indian Reservation. He was served personally with the Complaint by Blackfeet Tribal Court Process Server.

[3] A default order under the Rules does not require the assessment of a penalty. The Rules provide at 40 C.F.R. § 22.17(c) that a default order may be issued "as to any or all parts of the proceeding." Thus, a default order may be issued as to liability only.

In the case at hand, however, there is ample support in the case file for finding that Respondent's default is willful and egregious. Respondent has been on notice since his attorney was served with the Prehearing Order, dated September 14, 2004, of his obligation to file a prehearing exchange by November 26, 2004. To date, six weeks later, and three weeks after his response to the Order to Show Cause was due, Respondent has not filed any documents in this proceeding nor made any contact with the undersigned's office since his attorney's Notice of Withdrawal of Counsel. Respondent has even not responded to a message recently left by the undersigned's staff on Respondent's voice mail regarding the status of the case.

Further, the file indicates that even before the Complaint was filed, Respondent was not cooperative in resolving the compliance issues at his facility. Respondent did not cooperate with officials of EPA and the Blackfeet Environmental Office after their initial visit to his facility on July 1, 2003. A Trip Report and Inspection Report memorializing the initial visit states that upon the suggestion of taking photographs of the facility, Mr. Bond "became belligerent and insisted that no pictures be allowed," that he warned William Old Chief, Hazardous Waste Coordinator of the Blackfeet Environmental Office "[n]ot to come out to the property alone." Complainant's Prehearing Exchange Exhibit ("CX") 5, 6. Mr. Bond was not present at a subsequent inspection conducted on July 23, 2003, because attempts to reach Mr. Bond had failed. *Id.* Thereafter, Respondent repeatedly failed to respond to efforts of the Blackfeet Environmental Office to assist Respondent in avoiding issuance of a complaint by bringing the facility into compliance. CX 15 (Letter dated September 11, 2003 from Mr. Old Chief, stating: "we have on many occasions tried to contact you at home, at your business and at different work sites that you were conducting business at. All to no avail.").[4]

Soon after Respondent's counsel filed an Answer to the Complaint on August 16, 2004, Respondent's counsel reported to Complainant's counsel on October 4, 2004 that he was having difficulty reaching Respondent, his client, according to a Status Report filed by Complainant.

Thus, in addition to Respondent's failure to respond to the Prehearing Order and Order to Show Cause, documents in the case file support a finding that Respondent is not making any effort to resolve the allegations of violation or compliance issues at his facility. For failure to comply with the Prehearing Order requiring submission of prehearing exchange documents, the Respondent is hereby found to be in default. In accordance with Rule 22.17(a), this constitutes an admission of the facts alleged in the Complaint and results in the assessment of the penalty of $52,019 proposed within.

The following Findings of Fact and Conclusions of Law are based upon the Complaint, and Complainant's Prehearing Exchange.

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[4] After the Complaint was issued, Respondent in his Answer stated that he "did approach the Blackfeet Environmental Office for help in addressing the alleged violations, but he received no cooperation" and "did seek compliance help" therefrom but was "essentially denied." However, Respondent has not provided any details or documents in support of such assertions.

III. Findings of Fact and Conclusions of Law

1. Respondent, James Bond, is an individual doing business within the exterior boundaries of the Blackfeet Indian Reservation in the State of Montana.

2. Respondent is a "person" as defined in Section 1004(15) of RCRA, and Sections 311(a)(7) and 502(5) of the CWA.

3. Respondent owns and operates a maintenance garage and shop and/or diesel repair facility referred to as "Bond's Body Shop," "Jim's Diesel Repair" or "Bond's Diesel Repair," located approximately one half mile west of the Town of Browning, Montana.

4. Respondent is an "owner" and an "operator" of an "onshore facility" within the meaning of 40 C.F.R. § 260.20 and Sections 311(a)(6) and (10) of the CWA.

5. The facility is a "non-transportation related" "onshore facility" within the meaning of 40 C.F.R. § 112.2.

6. The facility consists of a large L-shaped building with two garage bays. The facility is unfenced and the surrounding property is unpaved.

7. Respondent performs diesel and heavy equipment repairs at the facility which include, but are not limited to: oil changes, battery replacements, body and engine repairs, fluid changes (coolant and hydraulic fluids).

8. Respondent stores, transfers, distributes, uses or consumes oil or oil products at the facility.

9. Diesel fuel, gasoline and hydraulic oils are oils within the meaning of "oils" as defined at Section 311(a)(1) of the CWA.

10. Respondent's operations and processes at the facility generate "solid waste" within the meaning of Section 1004(27) of RCRA and 40 C.F.R. § 261.2.

11. Solid waste generated at the facility includes, but is not limited to, lead-acid batteries, scrap metal, non-drained oil filters, unknown liquids and spent aerosol cans.

12. Respondent's operations and processes at the facility generate "used oil" within the meaning of Section 1004(36) of RCRA.

13. Respondent's operations and processes at the facility generate "hazardous waste" within the meaning of Section 1004(5) of RCRA and 40 C.F.R. § 261.3.

14. Hazardous waste generated at the facility includes, but is not limited to, lead-acid batteries.

15. Respondent is a generator of hazardous waste within the meaning of Section 1004(6) of RCRA.

16. The facility includes one diesel storage tank with a capacity of 10,000 gallons.

17. The facility has a total above-ground storage capacity greater than 1,320 gallons.

18. The facility drains into Willow Creek, a perennial stream, located approximately one half mile to the north.

19. Willow Creek is a "navigable water" and a "water of the United States" within the meaning of Section of 502(7) of the CWA.

20. On July 1, 2003, as part of a reservation waste generation inventory, authorized EPA representative Susan Zazzali, and William Old Chief, Hazardous Waste Coordinator of the Blackfeet Environmental Office, conducted an unannounced visit at the facility, consisting of a walk around the facility's exterior and a look inside the building.

21. The July 1, 2003 visit was conducted with Respondent's consent and participation.

22. At the time of the visit on July 1, 2003, the facility was littered with defunct vehicles, heavy equipment, barrels, plastic jugs, containers, lead-acid batteries and miscellaneous debris.

23. At the time of the July 1, 2003 visit, containers of used oil and unknown liquids were found in several outdoor locations in and around the facility.

24. There were approximately 20 unlabeled containers of used oil at the facility.

25. All used oil containers were stored at the facility in a manner permitting a release to the environment.

26. Approximately 10 spills of used oil were on the ground at various locations in and around the facility.

27. Approximately 5 locations of spent lead acid batteries were at the facility.

28. Approximately 30 lead acid batteries were stored outside of the facility in a manner that could release into the environment.

29. Susan Zazzali and William Old Chief conducted a follow up RCRA Compliance Evaluation Inspection ("inspection") at the facility on July 23, 2003, which included a physical inspection of

the facility.

30. Respondent was notified of, but not present at, the inspection on July 23, 2003.

31. At the time of the inspection on July 23, 2003, the facility's exterior was in the same condition as observed on July 1, 2003, and referenced above.

32. At the time of the inspection on July 23, 2003, the area inside the facility's northern garage bay was filled to capacity with equipment, tools and drums in a state of total disarray.

33. At the time of the inspection on July 23, 2003, several containers of used oil and batteries were found under a green tarp outside the northern garage bay.

34. Batteries, drums and spent aerosol cans were observed inside the facility's southern garage bay on July 23, 2003.

35. The facility's southern garage bay roof was partially collapsed on July 23, 2003.

36. The contents of the southern garage bay were covered in pigeon droppings on July 23, 2003.

37. On July 23, 2003, the inspectors found a former underground storage tank (UST) located above ground outside the southern garage bay. The UST appeared capable of holding product with a valve on the eastern end of the tank attached to a hose that may have historically dripped into a shallow excavation.

38. Section 3008(a) of RCRA states in pertinent part that any person who violates any requirement of the subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $27,000 for each violation and that each day of violation shall constitute a separate violation.

39. On or about September 15, 2003, an authorized EPA inspector entered the facility to inspect it for compliance with the CWA and the oil pollution prevention regulations set forth in 40 C.F.R. Part 112 (known as the Spill Prevention Control and Countermeasure (SPCC) regulations.

40. At the time of the September 15, 2003 inspection, the facility had a total oil storage capacity of approximately 10,000 gallons.

41. The following SPCC implementation measures were found to be deficient at the time of the September 15, 2003 inspection:

a. No secondary containment for the diesel storage tank;
b. Bulk containers not engineered to prevent a discharge;
c. Master flow and drain valves not secured;

d. Aboveground valves, piping and appurtenances not inspected regularly;
e. Facility not fully fenced and/or locked;
f. No secondary containment for portable containers;
g. Unremediated visible oil spills on the ground; and
h. Undiked areas do not drain into pond, lagoon or catchment basin.

42. Section 311(b)(6)(A) of the CWA states in pertinent part that any owner, operator or person in charge of any offshore facility who fails or refuses to comply with any regulations issued under subsection (j) of that section, may be assessed a civil penalty.

COUNT 1

43. Respondent failed to determine whether the solid waste generated at his facility and subsequently stored on-site in drums, jugs and other containers described in paragraphs 20 through 37, was "hazardous waste" as required by and in accordance with 40 C.F.R. § 262.11.

44. Respondent's failure to perform hazardous waste characterizations or determinations for the solid waste materials generated at the facility constitutes a violation of 40 C.F.R. § 262.11 and Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

COUNT 2

45. Respondent failed to determine the quantity of hazardous waste generated at his facility per calendar month in accordance with 40 C.F.R. § 261.5(c), so he was unable to properly determine his generator status and related time frame for storing hazardous waste on-site.

46. Respondent's failure to determine the quantity of hazardous waste generated at his facility by calendar month constitutes a violation of 40 C.F.R. § 261.5 and Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

COUNT 3

47. Respondent failed to store used oil in tanks, containers or units subject to regulation under 40 C.F.R. Parts 264 or 265, failed to label or clearly mark with the words "Used Oil" the containers and aboveground tanks used to store used oil, and failed to perform the requisite cleanup steps outlined in 40 C.F.R. § 279.22(d) for releases of used oil.

48. Respondent's failure to comply with the used oil requirements constitutes a violation of 40 C.F.R. § 279.22 and Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

COUNT 4

49. Due to its location, Respondent's facility could reasonably be expected to discharge oil to a

navigable water of the United States or its adjoining shoreline that may either: (1) violate applicable water quality standards; or (2) cause a film or sheen or discoloration of the surface water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

50. The facility is subject to the oil pollution prevention requirements of 40 C.F.R. Part 112, pursuant to Section 311(j) of the CWA and its implementing regulations.

51. Respondent failed to implement an SPCC plan in accordance with the regulations at 40 C.F.R. §§ 112.7 and 112.8 as required by 40 C.F.R. § 112.3.

52. Respondent's failure to implement an SPCC plan for the facility in accordance with the regulations at 40 C.F.R. §§ 112.7 and 112.8 from September 15, 2003 through and including June 1, 2004 (a duration of approximately 260 days) constitutes a violation of 40 C.F.R. § 112.3 and Section 311(j)(1)(C) of the CWA, 33 U.S.C. § 1321(j)(1)(C).

PENALTY

53. For failure to perform a hazardous waste determination, in violation of 40 C.F.R. § 262.11, and for failure to properly conduct an inventory, in violation of 40 C.F.R. § 261.5(c), an appropriate penalty is $12,500. This penalty considers the statutory factors in Section 3008(a) of the seriousness of the violation and any good faith efforts to comply, and is based on an assessment of the violations as having a moderate deviation from the regulatory requirements and moderate potential for harm, and based on 30 days of violation, as calculated under the RCRA Civil Penalty Policy (October 1990)(CX 7).

54. For failure to comply with used oil requirements,, in violation of 40 C.F.R. § 279.22(a), an appropriate penalty is $20,000. This penalty considers the statutory factors in Section 3008(a) of the seriousness of the violation and any good faith efforts to comply, and is based on an assessment of the violations as having a minor deviation from the regulatory requirements and moderate potential for harm, and based on 30 days of violation, as calculated under the RCRA Civil Penalty Policy (October 1990) (CX 7).

55. For failure to implement and SPCC plan in accordance with 40 C.F.R. § 112.7 and 112.8, an appropriate penalty is $19,519. This penalty considers the statutory factors of Section 311(b)(8) of the CWA of the seriousness of the violations, the economic benefit to Respondent resulting from the violation, the degree of culpability, any history of prior violations, the nature, extent, and degree of success of any efforts of the Respondent to minimize or mitigate the effects of the discharge, the economic impact on the violator and any other matters as justice would require. This penalty is based on an assessment that Respondent had eight SPCC implementation deficiencies, that there is a moderate potential impact on the environment considering the perennial stream one half mile to the north, no history of violations, no economic benefit, a

duration of eight months, Respondent's refusal to accept correspondence from EPA, other environmental problems, and no effort to correct the violations. CX 8.

56. The penalty of $59,019 proposed in the Complaint is not clearly inconsistent with RCRA and the CWA or the record of this proceeding.

PENALTY ORDER[5]

Pursuant to 40 C.F.R. § 22.17, and based on the record in this matter and the preceding Findings of Fact, I hereby find that Respondent is in default and liable for a total penalty of $52,019.

IT IS THEREFORE ORDERED that Respondent James Bond shall, within thirty (30) days after this order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of $52,019. Such payment shall be sent to:

U.S. Environmental Protection Agency
Region 8 Hearing Clerk
P.O. Box 360859
Pittsburgh, PA 15251

A transmittal letter, identifying the subject case and EPA docket number plus Respondent's name, and complete address, shall accompany such payment. A copy of the check and transmittal letter shall be delivered or mailed to the Regional Hearing Clerk at the following address:

U.S. Environmental Protection Agency, Region 8
Regional Hearing Clerk
999 18th St., Suite 300
Denver, CO 80202-2466

[5] **Pursuant to 40 C.F.R. § 22.17(c), Respondent may file a Motion to set aside the default order for good cause.** This Order on Default constitutes an initial decision, and an initial decision becomes a final order forty-five (45) days after its service upon the parties unless it is appealed to or reviewed *sua sponte* by the EAB, or a party moves to set aside the Default Order. 40 C.F.R. §§ 22.17(c) and 22.27(c). An appeal of an initial decision must be filed within **thirty (30) days** of service of the initial decision, as provided in 40 C.F.R. § 22.30.

COMPLIANCE ORDER

IT IS FURTHER ORDERED THAT:

1. Respondent shall immediately comply with RCRA and its implementing regulations including, but not limited to, those requirements set forth in 40 C.F.R. Parts 261, 262, 279, and those requirements specifically required in this Compliance Order.

2. Within fifteen (15) days of receipt of this Order, Respondent shall comply with the regulations governing the management of used oil including, but not limited to:

a. Covering and storing all containers of used oil in a manner to prevent spills;
b. Properly labeling all containers of used oil in accordance with 40 C.F.R. § 279.22(c)(1);
c. Excavating and disposing of all spills of used oil and soils stained with used oil at a licensed solid waste landfill;

3. Within thirty (30) days of receipt of this Order, Respondent shall submit to EPA an inventory of all containers of used oil and spent batteries. The inventory shall include a photograph and description of each container, the volume and location.

4. Within forty -five (45) days of receipt of this Order, Respondent shall properly remove and recycle (or remove for recycling) all used oil. Respondent shall ensure that all used oil is transported by a licensed used oil transporter.

5. The inventory, manifests and all other reports or documents required to be submitted under this Order shall be mailed to:

Susan Zazzali, Environmental Engineer
U.S. EPA
Region 8 Montana Office
Federal Building
10 West 15th Street, Suite 3200
Helena, MT 59626

Gerald Wagner, Director
Environmental Program
Blackfeet Nation, Blackfeet Environmental Office
P.O. Box 2029
Browning, MT 59417

6. Respondent is hereby advised that pursuant to RCRA § 3008(c), respondents who fail to achieve compliance within the time specified in a compliance order are liable for an additional civil penalty of up to $27,500 for each day of continued noncompliance.

Susan L. Biro
Chief Administrative Law Judge

Dated: January 11, 2005
Washington, D.C.