UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	
Central Bus Co., Inc.,	**)**	
Estate of Salvatore DiPaolo, Sr.,	**)**	**Docket No. RCRA-02-2003-7501**
and Salvatore DiPaolo, Jr.	**)**	
	)	
Respondents	**)**	

DEFAULT ORDER

I. Introduction

This proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e, and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22. On April 1, 2003, the United States Environmental Protection Agency, Region II ("EPA" or "Complainant") filed a Complaint against Central Bus Co., Inc., Estate of Salvatore DiPaolo, Sr., and Salvatore DiPaolo, Jr. ("Respondents") alleging violations of RCRA and its implementing regulations for underground storage tanks found at 40 C.F.R. Part 280. EPA filed a Motion for Default Order on February 23, 2004. For the reasons that follow, the Court issues this Default Order finding Respondents liable for the violations alleged in the Complaint and assessing a civil penalty of $80,317.

II. Findings of Fact

1. Respondent Central Bus Co., Inc. ("Central Bus Co.") is a corporation organized pursuant to the laws of the State of New York. Respondent Salvatore DiPaolo, Jr. ("DiPaolo") is the sole officer and President of Central Bus. Co. and owns 100% of the company's stock.

2. Respondents Central Bus Co. and Estate of Salvatore DiPaolo, Sr. ("Estate") own two 3000 gallon underground storage tank ("UST") systems containing diesel fuel for motor vehicles located at 845 Nepperhan Avenue, Yonkers, NY (the "facility").

3. Respondents Central Bus Co. and DiPaolo operate the UST systems located at the facility.

4. The two UST systems located at the facility were installed in 1984.

5. Pursuant to 42 U.S.C. § 6991d(a), an authorized representative of Complainant inspected the facility to determine Respondents' compliance with RCRA and 40 C.F.R. Part 280 on June 21, 2001, May 21, 2002, and June 7, 2002.

6. Pursuant to 42 U.S.C. § 6991d(a), Complainant sent an information request letter to Respondents Central Bus Co. and DiPaolo to determine their compliance with RCRA and 40 C.F.R. Part 280 on July 15, 2002. Complainant received two responses to the information request letter from Respondents dated September 19 and 20, 2002 and signed by Respondent DiPaolo.

7. From April 15, 1998 through April 15, 2003, Respondents did not provide a method or combination of methods of release detection for the two UST systems located at the facility to determine whether diesel fuel had been released from the UST systems.

8. From December 22, 1998 through April 15, 2003, the two UST systems located at the facility did not have spill or overfill prevention equipment, retrofitted corrosion protection systems, interior lining, cathodic protection, and had not been replaced or closed.

9. On April 1, 2003, Complainant filed a Complaint, Compliance Order, and Notice of Opportunity for Hearing alleging that Respondents violated RCRA and its implementing regulations for underground storage tanks found at 40 C.F.R. Part 280. Specifically, Count I of the Complaint alleged that Respondents failed to provide a method of release detection for two UST systems located at the facility from April 15, 1998 through April 15, 2003 in violation of 40 C.F.R. § 280.40(a).[1] Count II alleged that Respondents failed to comply with the performance standards or closure requirements for the two UST systems located at the facility from December 22, 1998 through April 15, 2003 in violation of 40 C.F.R. § 280.21. For these alleged violations, Complainant sought a total civil penalty of $80,317.

10. Complainant considered the statutory factors regarding the seriousness of the violations and any good faith efforts to comply in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), in determining the amount of the proposed penalty for Respondents' alleged violations of the UST requirements. The penalty amount for each count was calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations dated November 1990 ("UST Penalty Policy").

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[1] Count I of the Complaint states that Respondents' failure to provide a method of release detection constitutes a violation of 40 C.F.R. Part 280, Subpart D. Within this Subpart, the particular requirement that owners and operators of UST systems provide a method of release detection is found at Section 280.40(a).

11. On May 30, 2003, Respondents filed an Answer which denied the allegations in the Complaint, raised several affirmative defenses, and requested a hearing.

12. On July 18, 2003, the Court issued a Prehearing Order requiring the parties to file their initial prehearing exchanges by September 19, 2003. Complainant filed its prehearing exchange on September 18, 2003. No prehearing exchange was received from Respondents.

13. On September 25, 2003, counsel for Respondents informed the Court that he had withdrawn his representation of Respondents as of September 15, 2003. Respondents' counsel also stated that he had forwarded the Complaint, Answer, and Complainant's prehearing exchange documents to his client and directed him to hire another attorney or proceed *pro se*.

14. On November 13, 2003, the parties participated in a telephone conference call with the Court. During the conference, the Court extended the deadline for Respondents' prehearing exchange to November 21, 2003. The Court issued an Order Memorializing Oral Order on November 14, 2003 reaffirming this deadline.

15. As of this date, Respondents have not filed an initial prehearing exchange.

III. Conclusions of Law

1. Pursuant to 40 C.F.R. § 22.17(a), Respondents are found to be in default for failing to comply with the prehearing exchange requirements in 40 C.F.R. § 22.19(a) and two orders issued by the Court. Default by Respondents constitutes, for purposes of this proceeding, an admission of all facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations.

2. Respondents have failed to show good cause why a default order should not be issued.

3. Respondents are "persons" as defined by 42 U.S.C. § 6991 and 40 C.F.R. § 280.12.

4. Respondents are "owners" and "operators" of two existing "underground storage tank" systems as those terms are defined by 42 U.S.C. § 6991 and 40 C.F.R. § 280.12.

5. Respondents failed to provide a method or combination of methods of release detection for the two UST systems from April 15, 1998 through April 15, 2003 in violation of 40 C.F.R. § 280.40(a).

6. Respondents failed to ensure that the two UST systems complied with the performance standards in 40 C.F.R. § 280.20, the upgrading requirements in 40 C.F.R. § 280.21(b)-(d), or the closure requirements in 40 C.F.R. Part 280, Subpart G from December 22, 1998 through April 15, 2003 in violation of 40 C.F.R. § 280.21.

7. The civil penalty of $80,317 proposed by Complainant for the violations alleged in the Complaint is consistent with the statutory penalty criteria in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), the UST Penalty Policy, and the record in this proceeding.

IV. Discussion

Section 22.17(a) of the Rules of Practice provides that a party may be found to be in default "upon failure to comply with the prehearing exchange requirements of § 22.19(a) or an order of the [ALJ]." 40 C.F.R. § 22.17(a). Furthermore, Section 22.19(g) states that where a party fails to provide prehearing information, "the [ALJ] may, in his discretion...[i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g). For the purposes of the pending proceeding, default by respondent constitutes "an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a).

Given Respondents' failure to comply with the Prehearing Order issued on July 18, 2003 and the Order Memorializing Oral Order issued on November 14, 2003, the Court finds that default is fully appropriate in this matter. *See In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999) ("the [ALJ] unquestionably has the authority to issue a default order for failure to comply with a Prehearing Order, particularly where, as here, noncompliance has occurred more than once"). Accordingly, Respondents are deemed to have admitted the facts alleged in the Complaint and have waived the right to a hearing. *See* 40 C.F.R. § 22.17(a). Furthermore, Respondents have not made any effort in their filings with the Court to show good cause why a default order should not be issued. *See* 40 C.F.R. § 22.17(c).

The civil penalty proposed in the Complaint is consistent with the record in this proceeding and the statutory penalty criteria in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c). The Penalty Computation Worksheet attached to the Complaint and Complainant's Prehearing Exchange demonstrate that the penalty for Counts I and II was calculated in accordance with the UST Penalty Policy by determining an economic benefit component, gravity-based component, and then applying several adjustments to the gravity-based component to reflect the specific circumstances of the violation, the violator's background and actions, and the environmental threat posed by the situation. The proposed penalty of $80,317 is entirely reasonable given that Section 9006(d)(2) of RCRA provides that violators of UST requirements "shall be subject to a civil penalty not to exceed $10,000[2] for each tank for each day of violation." 42 U.S.C. § 6991e(d)(2).

[2] The Debt Collection Improvement Act of 1996 authorizes a 10% adjustment for inflation, or a maximum civil penalty of $11,000, for administrative penalties assessed under Section 9006(d)(2) of RCRA. 31 U.S.C. § 3107; 40 C.F.R. Part 19.

ORDER

Respondents are found to be in default and, accordingly, are found to have violated the requirements for underground storage tanks in 40 C.F.R. Part 280 as alleged in Counts I and II of the Complaint. A civil penalty in the amount of $80,317 (Eighty thousand three hundred seventeen dollars) is assessed against the Respondents, Central Bus Co., Inc., Estate of Salvatore DiPaolo, Sr., and Salvatore DiPaolo, Jr. Payment of the full amount of the civil penalty assessed shall be made within 30 (thirty) days after this Default Order becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check made payable to the "Treasurer, United States of America" and mailed to:

U.S. Environmental Protection Agency, Region II
Regional Hearing Clerk
Mellon Bank
P.O. Box 360188 M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondents' name and address, must accompany the check. Failure of the Respondents to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty.

This Default Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. § 22.27(c), an Initial Decision shall become a final order 45 (forty-five) days after its service upon the parties and without further proceedings unless: (1) a party moves to re-open the hearing within 20 (twenty) days after service of the Initial Decision pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this decision within 30 (thirty) days after the Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the EAB elects, upon its own initiative, to review the Initial Decision pursuant to 40 C.F.R. § 22.30(b).

So ordered.

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William B. Moran
United States Administrative Law Judge

Dated: April 27, 2004
Washington, D.C.