

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
MICHAEL McDONALD,) **Docket No. SWDA-06-2007-5601**
)
Respondent.)

**ORDER ON COMPLAINANT’S MOTION FOR DETERMINATION
OF WHETHER LETTER MAY BE FILED AS AN ANSWER**

By Motion dated November 28, 2007, Complainant, the Environmental Protection Agency, Region 6 (EPA), moves for determination of whether a letter submitted to it by Respondent Michael McDonald may be filed as an “Answer.” To date, no response to the Motion has been received. For the reasons stated below, the Motion is hereby granted.

Background

On August 22, 2007, EPA initiated this action by filing an Administrative Complaint and, prior to any response thereto being received, on August 28, 2007, filed a “First Amended Administrative Complaint” (hereinafter “Complaint”).¹ The Complaint charges Respondent in two Counts with violating Section 9006(d)(2)(A) of the Solid Waste Disposal Act (42 U.S.C. § 6991e(d)(2)(A)) (the “Act”), and certain regulations implementing the Act set forth in 40 C.F.R. Part 280, regarding monitoring and inspecting underground storage tanks (USTs). Specifically, the Complaint alleges that Respondent was the “operator” of “USTs,” containing “regulated substances” (*e.g.* petroleum), as defined in the Act (42 U.S.C. §§ 6991(3),(7),(10) and/or regulations (40 C.F.R. § 280.12), at a facility called the “Big Chief Trading Post,” located in San Ysidro, New Mexico, and that Respondent failed to monitor said USTs for releases (Count 1) and failed to inspect the USTs’ impressed cathodic protection system (Count 2) as required by the Act, 42 U.S.C. § 6991(e)(d)(2)(A), and applicable regulations, 40 C.F.R. §§ 280.40(e), 280.31(c). For these two violations, the Complaint proposes an aggregate penalty of \$13,503.

The Complaint was personally served on the Respondent by the United States Marshal’s Service on October 15, 2007. *See*, Complainant’s Proof of Service dated November 28, 2007. EPA’s counsel subsequently received from Respondent a signed, but undated, handwritten letter (“Respondent’s Letter”) apparently responding to the Complaint in which Respondent denies

¹ Complainant was not required to seek leave before amending the Complaint as the applicable Rule, 40 C.F.R. § 22.14(c), provides that “[t]he complainant may amend the complaint once as a matter of right at any time before the answer is filed.”

that “he has” an impressed cathodic protection system and alleges that the equipment *was* inspected each year. Further, Respondent’s Letter alleges that he was unaware that he was in violation in that during the last “visit” he was not told that anything was “wrong” and that he is “receiving environmental and technical assistance through the UST Program.” Motion, Attachment D.²

Purportedly, by correspondence dated November 13, 2007, Complainant advised Respondent that his Letter did not meet the requirements for an “Answer” to an Administrative Complaint as set forth in the applicable Rules, 40 C.F.R. Part 22, but that “Complainant would assume the letter was his Answer and would file it with the Regional Hearing Clerk, provided that EPA did not receive an Answer meeting the requirements of 40 C.F.R. Part 22 within five days of Respondent’s receipt of [EPA’s] letter.” Motion at 2.³ EPA asserts in its Motion that, to date, it has not received a response to its correspondence or a more formal “Answer” from Respondent. *Id.*

The record does not reflect whether Complainant has filed Respondent’s Letter with the Regional Hearing Clerk. However, the Motion suggests that the Letter has not been so filed in that the Motion represents that Complainant “does not oppose a determination that Respondent’s letter may be filed as an Answer.” Motion at 2. As indicated above, no response to the Motion, filed now some six weeks ago, has been received from Respondent.

Discussion

In the Complaint, EPA advised Respondent that if he contested “any material fact upon which this Complaint is based [or] contends the amount of the proposed penalty is inappropriate,” he “must file a written answer” with the Regional Hearing Clerk within 30 days of service. Complaint at 6-7. Further, in accordance with the applicable Rule, 40 C.F.R. § 22.15, the Complaint advised Respondent that “[t]he answer shall clearly and directly admit, deny or explain each of the factual allegations set forth in this Complaint” and state “the circumstances or arguments which are alleged to constitute the grounds of defense,” “the facts which Respondent disputes,” the basis for opposing any proposed relief,” and “whether a hearing is requested.” Complaint at 7. It further noted that failure to file an Answer may constitute grounds for default. *Id.*

Respondent’s Letter fails to meet the requirements of Rule 22.15(b) regarding directly responding to each and every allegation in the Complaint, and does not contain any specific

² The Motion alleges at 2 that EPA’s counsel received Respondent’s Letter at its offices in Dallas Texas on “September 22, 2007.” However, the document is date stamped as having been received on “October 31, 2007” by “EPA Region VI” “[indecipherable] Waste Section 6PD/U.” *See*, Motion, Attachment D. “September 22, 2007” appears to be the date the postage stamp on the envelope was cancelled by the Postal Service in Albuquerque, New Mexico.

³While the Motion indicates that its letter to Respondent is attached thereto, it was not in fact attached to the copy of the Motion received by the undersigned .

request for a hearing. However, it does indicate that Respondent disputes certain material facts alleged in the Complaint and arguably raises grounds for defense.

Therefore, particularly in light of the fact that Complainant does not seek default and has no objection to the Respondent's Letter being filed as his "Answer" in this case, the Complainant's Motion is hereby granted and Respondent's Letter, date stamped as having been received by the Agency on October 31, 2007, shall be received and filed by the Regional Hearing Clerk in this matter.

This matter is hereby referred back to the Senior Hearing Clerk of the Office of Administrative Law Judges for processing in the ordinary course.

Susan L. Biro
Chief Administrative Law Judge

Dated: January 14, 2008
Washington, D.C.