BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: COWBOY OIL COMPANY, Pocatello, Idaho, Respondent.	)))))))))	DOCKET NO. RCRA-10-2003-0057 ADMINISTRATIVE COMPLAINT AND COMPLIANCE ORDER

I. JURISDICTION

1.1. This is an administrative action instituted pursuant to Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6991e, to enforce underground storage tank regulations at 40 C.F.R. Part 280. These regulations were promulgated under the authority of Sections 2002, 9002, and 9003 of RCRA, 42 U.S.C. §§ 6912, 6991a, and 6991b. Complainant is the Unit Manager of the Groundwater Protection Unit, United States Environmental Protection Agency, Region 10 ("EPA"), who has been delegated the authority to initiate this action. Respondent is Cowboy Oil Company.

1.2. Pursuant to Section 9006(d) of RCRA, and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22 ("Part 22"), Complainant hereby proposes the assessment of a civil penalty against Cowboy Oil Company ("Respondent") and the issuance of a compliance order to Respondent for violation of the underground storage tank regulations.

II. ALLEGATIONS

2.1. Respondent owns and operates a wholesale and retail facility at 2806 South 5th Avenue, Pocatello, Idaho 83201 ("the facility").

2.2. The facility has six underground storage tanks ("USTs" or "tanks") which, at times relevant to this Complaint, contained petroleum with at least 10% of the volume of the tanks beneath the surface of the ground.

2.3. Tank #1 is a 50,000-gallon steel UST which, at times relevant to this Complaint, held diesel.

2.4. Tank #2 is a 50,000-gallon steel UST which, at times relevant to this Complaint, held diesel.

2.5. Tank #3 is a 50,000-gallon steel UST which, at times relevant to this Complaint, held gasoline.

2.6. Tank #4 is a 50,000-gallon steel UST which, at times relevant to this Complaint, held gasoline.

2.7. Tank #5 is a 10,000-gallon composite (steel with fiberglass reinforced-plastic) UST which, at times relevant to this Complaint, held gasoline.

2.8. Tank #6 is a 10,000-gallon composite UST which, at times relevant to this Complaint, held diesel.

2.9. Tanks 1, 2, 3, and 4 were installed in 1983. The dates Tanks 5 and 6 were installed are unknown.

2.10. On May 20, 1998, EPA inspected the facility and issued a field citation to Respondent for inadequate operation of inventory control in violation of 40 C.F.R. § 280.43(a); failure to conduct tank tightness testing on an annual basis in violation of 40 C.F.R. § 280.41(a)(2); failure to comply with financial responsibility requirements in violation of 40 C.F.R. § 280.93(a); failure to ensure proper operation of cathodic protection system in violation of 40 C.F.R. § 280.31(b); and failure to provide adequate line tightness testing for pipes in violation of 40 C.F.R. § 280.44(b). The field citation proposed a penalty payment of $1,050 to settle the matter so long as Respondent corrected the violations.

2.11. To date, EPA has neither received a check for the penalty, nor been provided with any evidence that Respondent has corrected the violations.

2.12. On May 16, 2001, an EPA inspector inspected the facility, accompanied by an inspector from the Idaho Department of Environmental Quality (DEQ).

2.13. Respondent did not document the use of any method of financial assurance for the six USTs.

2.14. The inspectors observed that no spill prevention equipment was installed on Tanks 1, 2, 3, and 4.

2.15. The inspectors observed that no overfill devices were installed on Tanks 5 and 6.

2.16. On September 12, 2002, Respondent's representative, Roger Hancock, informed EPA of a suspected leak from an UST at the facility. EPA referred the report of the suspected release to DEQ which has primary responsibility for responding to actual or potential UST petroleum releases under a cooperative agreement with EPA.

2.17. DEQ subsequently reported to EPA that followup soil sampling indicated there was significant contamination beneath the tanks and that Respondent has been ordered to address this contamination.

2.18. The USTs at the facility were placed in temporary closure on October 11, 2002.

III. VIOLATIONS

FINANCIAL RESPONSIBILITY

3.1. **REGULATION: 40 C.F.R. § 280.93(a)** requires owners or operators of petroleum USTs to demonstrate that they have an approved financial responsibility mechanism for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs. Pursuant to 40 C.F.R. § 280.91(c), all petroleum marketing firms owning 13-99 USTs at more than one facility were required to comply with the financial responsibility requirements by April 26, 1991. Pursuant to 40 C.F.R. § 280.95, an owner or operator must have a tangible net worth of at least $10 million to use self-insurance as a financial responsibility mechanism.

3.2. **COUNT 1**: From at least May 20, 1998, to the present date, Respondent owned six USTs at the facility and at least seven USTs at a second facility in Pocatello. Respondent has failed to demonstrate that it meets the financial responsibility requirements of § 280.93(a) for the USTs at this facility from at least May 20, 1998, to the present date. Accordingly, Respondent has been in violation of RCRA Section 9003 and the implementing regulation at 40 C.F.R.§ 280.93(a) from at least May 20, 1998, to the present date.

CORROSION PROTECTION FOR TANKS

3.3. **REGULATION: 40 C.F.R. § 280.31(b)(1)** requires that all cathodic protection systems be tested for corrosion within six months of installation and at least every three years thereafter.

3.4. **COUNT 2**: Respondent failed to conduct all the cathodic protection tests required for the operation and maintenance of cathodic protection systems on Tanks 1, 2, 3, and 4. Accordingly, Respondent is in violation of RCRA Section 9003 and the implementing regulation at 40 C.F.R. § 280.31(b)(1) from at least June 15, 2001, to the present for Tanks 1, 2, 3, and 4.

SPILL AND OVERFILL UPGRADE

3.5. **REGULATION: 40 C.F.R. § 280.20(c)(1)(i)** requires that the tanks in a petroleum UST system have installed by December 22, 1998, spill prevention equipment such as a spill catchment basin that will prevent release of product to the environment when the transfer hose is detached from the fill pipe.

3.6. **COUNT 3:** Respondent failed to install spill prevention equipment on Tanks 1, 2, 3, and 4. Accordingly, Respondent violated RCRA Section 9003 and the implementing regulation at 40 C.F.R. § 280.20(c)(1)(i) for Tanks 1, 2, 3, and 4 from at least December 22, 1998, through October 11, 2002, when the tanks were placed in temporary closure.

3.7. **REGULATION: 40 C.F.R. § 280.20(c)(1)(ii)** requires that the tanks in a petroleum UST system have installed by December 22, 1998, overfill prevention equipment that will (A) automatically shut off flow into the tank when the tank is no more than 95 percent full; or (B) alert the transfer operator when the tank is no more than 90 percent full by

restricting the flow into the tank or triggering a high-level alarm; or (C) restrict flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

3.8. **COUNT 4:** Respondent failed to install overfill prevention equipment on Tanks 5 and 6. Accordingly, Respondent violated RCRA Section 9003 and the implementing regulation at 40 C.F.R. § 280.20(c)(1)(ii) for Tanks 5 and 6 from at least December 22, 1998, through October 11, 2002, when the tanks were placed in temporary closure.

FAILURE TO PROVIDE FOR RELEASE DETECTION CAPABLE OF DETECTING A RELEASE FROM TANKS

3.9. **REGULATION: 40 C.F.R. § 280.41(a)** requires that the tanks in a petroleum UST system be monitored every 30 days for releases using one of the methods listed in 40 C.F.R. § 280.43(d) through (h), except that UST systems that meet the performance standards in 40 C.F.R. § 280.20 or 280.21 could use monthly inventory control (conducted in accordance with 40 C.F.R. § 280.43(a) or (b)) and annual tank tightness testing (conducted in accordance with 40 C.F.R. § 280.43(c)) until December 22, 1998 when the tanks were to be upgraded under 40 C.F.R. § 280.21 or until 10 years after the tank is installed or upgraded under § 280.21 (b), whichever is later.

3.10. **COUNT 5**: Respondent reports that it uses inventory control as its monthly monitoring method for Tanks 1, 2, 3, and 4, using the measurements of volume of product in each tank provided by an automatic tank gauging (ATG) system. However, Respondent's ATG system has not been third-party certified for use on a tank with a 50,000-gallon capacity and therefore could not be used to provide a reliable indication of the volume of product in Tanks 1, 2, 3, and 4. Also, monthly inventory data was missing for Tanks 1, 2, 3, and 4 from July 2001 to August 2002. Further, Respondent had no records showing that it has ever reconciled its monthly inventory records or conducted water level checks as required under 40 C.F.R. § 280.43(a) for use of the inventory control method. Accordingly, Respondent violated RCRA Section 9003 and the implementing regulation at 40 C.F.R. § 280.41(a) for

Tanks 1, 2, 3, and 4 from at least July 13, 2000, when records indicate Respondent began using the ATG, through October 11, 2002, when the USTs were placed in temporary closure and presumably were emptied.

IV. COMPLIANCE ORDER

4.1. Based on the foregoing findings, Respondent is hereby ordered to comply with the following requirements pursuant to Section 9006(a) of RCRA, 42 U.S.C. § 6991e(a). Within 30 days of the effective date of the Final Compliance Order, Respondent Cowboy Oil must do the following.

A. For all USTs owned and/or operated by Respondent, Respondent must:

(i) describe the status of each UST by indicating whether the tank is currently being used to dispense product, currently being used to store product, currently in temporary closure, or permanently closed;

(ii) indicate the quantity in inches and gallonage of any petroleum product currently in each tank, describing how this information was obtained, the date this information was obtained, and the name and telephone number of the person who determined the quantity in the tank; and

(iii) provide the maintenance records of cathodic protection of all tanks in use. The cathodic protection records must be submitted bi-monthly for a period of 12 months after the effective date of this order. These records must include the name and telephone number of the person conducting the monitoring.

B. For all temporarily-closed tanks owned and/or operated by Respondent, Respondent must provide the following to EPA:

(i) date the tank was last used ;

(ii) quantity in inches and gallonage of petroleum product;

(iii) for all tanks that have one inch or more product in them, the monthly monitoring records for all months the tanks were in temporary closure;

(iv) the maintenance records of cathodic protection for all temporarily-closed tanks (the cathodic protection records, including the name and telephone number of

the person conducting the monitoring, must be submitted bi-monthly for a period of 12 months after the effective date of this Order);

(v) the name and phone number of the person who capped and secured all lines pumps, manways, and ancillary equipment except the vent lines and the date that this occurred; and a statement for each facility that has temporary closed tanks of exactly what procedures and steps were taken to temporarily close each tank.

(vi) a schedule for when the tanks will be permanently closed or brought back into service.

C. Respondent must provide documentation that it has upgraded or permanently closed the tanks at 2806 South 5th Avenue, in Pocatello, Idaho. The documentation must include a site assessment and demonstrate that Respondent has met all requirements of either 40 C.F.R. § 280.21, if upgrading the tanks, or 40 C.F.R. § 280.71, if permanently closing the tanks.

D. Respondent must provide proof of financial responsibility for the USTs at this facility.

E. Respondent must notify EPA of all suspected releases from USTs at facilities owned and/or operated by Respondent Cowboy Oil Company for the past two years, and conduct an investigation into why the suspected releases occurred and submit the results of that investigation to EPA. If no explanation for a suspected release is apparent, then Respondent must conduct a systems test as described in 40 C.F.R. § 280.52(a) for each suspected release and submit copies of the test results to EPA.

F. For all USTs that continue to contain petroleum product, Respondent must begin submitting monthly release detection records and continue submitting such records for a period of twelve months after the effective date of this Order. These records must include the name and telephone number of the person conducting the monitoring.

4.2. All submissions and notifications Respondent is directed to provide in the

Compliance Order must be furnished to the following EPA contact:

Gary McRae
U.S. Environmental Protection Agency, Region 10
Idaho Operations Office
1435 North Orchard
Boise, Idaho 83702.

4.3. If Respondent fails to comply with any requirement of this Order, Section 9006(a) of RCRA, 42 U.S.C. §6991e (a), and 40 C.F.R. Part 19 provide that Respondent shall be liable for a civil penalty of not more than $27,500 for each day of continued noncompliance.

V. PROPOSED CIVIL PENALTY

5.1. Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d), and the Civil Monetary Inflation Adjustment Rule codified at 40 C.F.R. Part 19 under the authority of the Debt Collection Improvement Act of 1996, authorize a civil penalty of up to $11,000 per tank for each day of violation for any owner or operator of an UST who fails to comply with any requirement or standard promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991b. Based upon the seriousness of the violations cited in this Complaint, EPA proposes that Respondent be assessed the following penalty calculated in accordance with the final U.S. EPA Penalty Guidance for Violations of UST Regulations (UST Penalty Guidance), a copy of which accompanies this Complaint. The gravity component of each violation contains a 1.1 multiplier to account for the 10% increase in the penalty amount pursuant to the Civil Monetary Inflation Rule at 40 C.F.R. Part 19.

5.2. The penalty proposed for the violations alleged in this Complaint under the UST Penalty Policy is $118,291 as calculated in the UST Penalty Computation Worksheets attached to this Complaint as Attachment 1 and summarized below.

Violation Count #	Regulation	Penalty Amount
Financial Responsibility		
(1) 40 C.F.R. § 280.93(a)	Failure to comply with financial responsibility	**$11,535**

Corrosion Protection (2) 40 C.F.R. § 280.31(b)(1)	Failure to ensure that cathodic protection system is tested at least every three years after the six-month installation testing	**$4,995**
Tank Upgrade (3) 40 C.F.R. § 280.20(c)(1) (4) 40 C.F.R. § 280.20(c)(1)	Failure to install spill prevention system Failure to install overfill prevention system	**$42,339** **$15,862**
Release Detection for Tanks (5) 40 C.F.R. § 280.41(a)(1)	Failure to provide release detection method capable of detecting a release from tank that routinely contains product	**$43,560**
TOTAL		**$118,291**

VI. OPPORTUNITY TO REQUEST A HEARING

6.1. Respondent has the right to file an Answer requesting a hearing on any material fact contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon request, the Presiding Officer may hold a hearing for the assessment of these civil penalties, conducted in accordance with the provisions of the Part 22 Rules and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. A copy of the Part 22 Rules accompanies this Complaint.

6.2. Respondent's Answer, including any request for hearing, must be in writing and must be filed with:

Carol Kennedy
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, ORC-158
Seattle, WA 98101

VII. FAILURE TO FILE AN ANSWER

7.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days after service of this Complaint.

7.2. In accordance with 40 C.F.R. § 22.15, Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondent has any knowledge. Respondent's Answer must also state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondent intends to place at issue; and (3) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegation contained herein constitutes an admission of the allegation.

VIII. INFORMAL SETTLEMENT CONFERENCE

8.1. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settling this matter. To request such a settlement conference, Respondent should contact:

Deborah Hilsman
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101
(206) 553-1810

8.2. Note that a request for an informal settlement conference does not extend the thirty (30) day period for filing a written Answer to this Complaint, nor does it waive Respondent's right to request a hearing.

8.3. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any *ex parte* (unilateral) discussion of the merits of any action with the EPA Regional Administrator, Environmental Appeals Board Member, Administrative Law Judge, or any person likely to advise these officials in the decision of this case.

ISSUED AT SEATTLE this _____day of _____, 2003.

_____

MARIE JENNINGS, Acting Manager
Groundwater Protection Unit
Office of Water

CERTIFICATE OF SERVICE

I hereby certify that the originals of the foregoing Complaint, Docket Number RCRA-10-2003-0057 and Attachment 1, UST Penalty Computation Worksheets, and one true and correct copy have been filed with the Region 10 Hearing Clerk at:

Carol Kennedy
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

I also certify that true and correct copies of the Complaint and Attachment (with accompanying copies of the Consolidated Rules of Practice, UST Penalty Guidance and the May 9, 1997 memorandum on "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule"), and the Notice of SEC Registrant's Duty to Disclose Environmental Legal Proceedings were sent by Certified Mail, Return Receipt Requested, to:

Dale D. Hancock, Registered Agent
Cowboy Oil Company
261 Valleyview
Pocatello, Idaho 83201

_____ _____

DATE NAME

_____

TITLE

CONCURRENCE PAGE

I also certify that true and correct copies of the Complaint and Attachment (with accompanying copies of the Consolidated Rules of Practice, UST Penalty Guidance and the May 9, 1997 memorandum on "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule"), and the Notice of SEC Registrant's Duty to Disclose Environmental Legal Proceedings were sent by Certified Mail, Return Receipt Requested, to:

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Cowboy Oil Company
261 Valleyview
Pocatello, Idaho 83201

_____ _____

DATE NAME

_____

TITLE

CONCURRENCES						
Initials:						
Name:	G. McRae	D. Hilsman	M. Silver			
Date:						