

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Morning Star Enterprises,) Docket No. RCRA-(9006)-VIII-93-03
Inc. and Petrolane, Inc.,)
)
Respondents)

Order Denying Motion for Partial Accelerated
Decision Or, Alternatively, Motion
For Order To Show Cause

This proceeding under Section 9006(a) of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6991e), was commenced on February 25, 1993, by the filing of a complaint charging Respondents, Morning Star Enterprises, Inc. (Morning Star) and Petrolane, Incorporated, as owners and/or operators of two underground storage tanks (USTs) at 100 Main, Forsyth, Montana, with violations of the Act and regulations. Specifically, Respondents were alleged to have failed to use an authorized method of leak detection for the USTs, which assertedly routinely contained diesel fuel, as required by 40 CFR §§ 280.40 and 280.41(a). Counts III and IV alleged that Respondents had failed

to perform a line tightness test or to perform monthly monitoring on underground piping, which allegedly conveyed diesel fuel by suction, as required by 40 CFR §§ 280.40 and 280.41(b)(2). For these alleged violations, it was proposed to assess Respondents a penalty totaling \$15,108.

Respondent, Petrolane, answered, denying that it was the owner or operator of USTs and related piping systems at the location identified in the complaint, denying any knowledge of the date the tanks were installed, their capacity, and whether the tanks routinely held petroleum products. Petrolane denied ever owning or operating the tanks and related piping systems identified in the complaint, alleged that Morning Star was the sole owner and operator of the tanks and piping systems, and denied any responsibility for compliance with RCRA or other regulations. Petrolane requested a hearing.

Morning Star answered, denying that it was the owner or operator of the underground tanks at issue, admitting that one of the tanks was of 1,000 gallon capacity and that the other had a capacity of 500 gallons, but alleged that it lacked information sufficient to form a belief as to when the tanks were installed and whether the tanks routinely contained petroleum products. As an affirmative defense, Morning Star alleged that Petrolane was the owner and operator of the tanks. As evidence of good faith, Morning Star asserted that it had the tanks removed as soon as it became aware of a potential problem with compliance and/or contamination, notwithstanding that it was not the owner or

operator of the tanks. Morning Star moved that the complaint be dismissed and requested a hearing.

By a letter, dated May 20, 1993, the ALJ directed the parties to exchange specified prehearing information. Complainant's prehearing exchange indicates that the genesis of this proceeding was an inspection of Petro Lane, 100 Main, Forsyth, MT, conducted by representatives of EPA on September 1, 1992 (C's Preh. Exh. 4). Although the name of Morning Star Enterprises appears immediately beneath the title "UNDERGROUND STORAGE TANK INSPECTION REPORT", the typewritten portion of the report indicates that the facility address is the same as that of the facility owner Petrolane.^{1/} The report reflects that Bill Ridenour, the person in apparent charge of the facility, was the individual contacted by the inspectors. Mr. Ridenour, however, is reported to have stated that he merely used the garage and was neither the owner nor operator. He is quoted as stating that Morning Star and Petrolane owned and operated the facility. The inspectors contacted Morning Star and Petrolane by telephone and concluded that tank release detection and line tightness tests were not performed by the regulatory deadline, December 22, 1990.

Morning Star initially responded to the ALJ's order under date of July 2, 1993. Attached to this submission was a

^{1/} Handwriting of undetermined origin at the top of the checklist portion of the report is as follows: Morning Star Enterprises general Contractor, Lame Deer, MT Bill Ridenour-Operator/ Petrolane-Forsyth, MT 356-2246 [Dave Guenther] Jean Sooktis, Exec. Secretary.

Notification for Underground Storage Tanks, signed by Tom W. Trusler, President of Morning Star, on May 7, 1986, which was apparently received by the Montana Department of Health and Environmental Services on May 9, 1986 (Exh. A). This document identifies Morning Star Enterprises Inc., Lame Deer, Montana, as the owner of two underground storage tanks, one of 500-gallon capacity and the other of 1,000-gallon capacity, at the Lame Deer location. The tanks are specified to be in use for the storage of diesel [fuel] and the estimated age of both tanks is 20 years. This document was submitted for the purpose, inter alia, of establishing that Morning Star had complied with the notification requirement of § 9002 of the Act (42 U.S.C. § 6991a). Attached as Exhibit B is a Notification of Underground Storage Tanks submitted by Petrolane Gas Services, Forsyth, Montana, which identifies Petrolane as the owner of two underground storage tanks, one of 500-gallon capacity and one of 1,000-gallon capacity, which are located at Morning Star Enterprises, Lame Deer, Montana. This notification was signed by David A. Guenther, District Manager, on March 12, 1990, and stamped as received by the Montana Department of Health and Environmental Services on March 13, 1990. The larger tank is indicated to be in use for the storage of diesel and the smaller tank is indicated to be in use for the storage of gasoline.

On May 21, 1993, an entity identified as QFB Partners and its subsidiaries, including Petrolane, announced that it had filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the

United States Bankruptcy Court for the Southern District of New York (press release enclosed with letter from counsel for Petrolane, dated May 27, 1993). The press release stated that upon approval of the proposed "prepackaged plan of reorganization", Petrolane will be owned by AmeriGas, Inc., a wholly-owned subsidiary of UGI Corporation, and holders of Petrolane's 13½% Senior Subordinated Debentures due 2001. Also enclosed with the mentioned letter, was a copy of a restraining order issued by the Bankruptcy Court, which purported to enjoin the commencing or continuation of, inter alia, any judicial or administrative proceeding for the assessment or recovery of any claim against the debtors arising before the filing of the Chapter 11 cases. The order stated, however, that it did not affect the exceptions to the automatic stay in § 362 of the Bankruptcy Code. By a letter, dated September 2, 1993, on the letterhead of Surban Propane (Quantum), Brian W. Klemm, identified as counsel, stated that the Bankruptcy Court had confirmed Petrolane's Plan of Reorganization and that effective July 15, 1993, ownership and management of Petrolane had been transferred to AmeriGas, Inc. Mr. Klemm requested that he be permitted to withdraw as counsel of record for Petrolane and that Thomas Jackal, UGI Corporation, Valley Forge, PA, be substituted.

Under date of November 19, 1993, Petrolane through its counsel, Thomas M. Jackal, submitted its prehearing exchange. Mr. Jackal stated that this matter was one of many transferred from former management of Petrolane to present management and that the requirement for this submission had been overlooked. He moved that

the late filing be accepted.^{2/} Included as prospective witnesses for Petrolane were David A. Guenther, former district manager of Petrolane's Forsyth, Montana, district; Charles Harris, former owner of Harris Oil Company, which sold certain assets to a corporate predecessor of Petrolane in 1980; and James Durham, currently the Petrolane district manager in Forsyth, Montana. Mr. Guenther was expected to testify that at the time he signed the notification form he had no independent knowledge of the ownership of the tanks and that he signed it based upon the representation of Tom W. Trusler, President of Morning Star, that Petrolane owned the tanks and upon advice from State environmental officials that the owner of the tanks was required to sign the form. Mr. Harris was expected to testify that Harris Oil Company installed the tanks at issue and that these tanks were not among assets sold to Petrolane. Attached as Exhibit "1" is a copy of an agreement of sale, dated May 1980, and assertedly signed on June 4, 1980, whereby Charles and Faye Harris d/b/a Harris Oil Company agreed to sell and Petrolane-Eastern Solar Gas agreed to buy assets described in the agreement. Items listed include light oil tanks, bulk plant tanks, LPG tanks, two motor vehicles and buildings and improvements located on land leased from the Burlington Northern Railway Company. Mr. Durham was expected to testify that, other than the Notification of Underground Storage Tank form completed by

^{2/} This motion is granted.

Mr. Guenther, Petrolane has no records of owning an underground storage tank [or tanks] at Lame Deer, Montana.

On February 17, 1994, Complainant filed a Motion For Partial Accelerated Decision On Liability, alleging that there was no genuine issues of material fact as to the violations and that Complainant was entitled as a matter of law to judgment as to liability against both Respondents. Complainant alleged that Petrolane was liable as owner of the tanks and that Morning Star was liable as operator of the tank systems. According to Complainant, none of its allegations has been significantly rebutted by any evidence from either Respondent and all that remains is a determination of whether both or only one Respondent is liable.

In an accompanying memorandum supporting its motion, Complainant relies primarily upon the notification forms filed by Petrolane and Morning Star and upon an alleged lack of evidence to the contrary in the Respondents' prehearing exchanges. Petrolane's ownership is allegedly established by the notification form signed by Mr. Guenther on March 12, 1990, which is prior to the December 22, 1990, effective date of the regulations assertedly violated. Complainant points out that the form has the block checked indicating that it is an amendment of a prior notification, thus showing that Petrolane was aware of the notification filed by Morning Star. Complainant says that the purchase agreement with the Harris's shows only that the USTs were not included in the sale

to Petrolane in 1980^{3/} and that, if Mr. Harris has any information as to the status of the title of the USTs in 1990 when Petrolane submitted the notification, such information should have been included in Petrolane's prehearing exchange.

According to Complainant, Morning Star's status as operator of the UST systems is established by the fact that Morning Star was operating the systems at the time of the inspection on September 1, 1992, that Morning Star's president, Mr. Tom Trusler, was knowledgeable about the tanks and their operation, informing the inspectors, inter alia, that dip sticks were used to check product levels, and lastly, upon receipt of the complaint, Morning Star had the tanks removed.

Neither Morning Star nor Petrolane has responded to the motion. Under date of March 22, 1994, Complainant filed a motion for an order granting its motion for a partial accelerated decision or, alternatively, an order to show cause why such an order should not be issued. Complainant pointed out that Respondents had failed to respond to the motion within the ten days allowed by Rule 22.16(b) (40 CFR Part 22), plus the five additional days allowed by Rule 22.07(c), where a pleading or document is served by mail, and that neither Respondent had moved for an extension of time. Under Rule 22.16(b) failure to respond to a motion in a timely fashion, may be deemed a waiver of any objection to granting the motion.

^{3/} Arguably, the USTs were included in "buildings and improvements" (purchase and sale agreement, Item 6, p. 2) transferred to Petrolane by the Harris's.

DISCUSSION

At the outset, it should be noted that the complaint identifies the USTs which are allegedly in violation of tank release detection and line tightness testing requirements as being located in Forsyth, Montana. The tanks referred to in the Underground Storage Tank Notification forms submitted by Morning Star and Petrolane, upon which Complainant primarily relies for its assertion that Petrolane is the owner and Morning Star the operator of the tanks, are, however, located at the business address of Morning Star in Lame Deer, Montana. This mistake or confusion may account for Respondents' denial that they are the owner or operator of the tanks identified in the complaint. Be that as it may, the facts in this regard are not clarified by the inspection report, which states that the facility owner is Petrolane and that the facility address is 100 Main, Forsyth, Montana. This state of affairs would, without more, justify denial of Complainant's motions. Certain other matters, however, warrant a brief discussion.

As Complainant points out, Rule 22.16(b) (40 CFR Part 22) provides in part that "(i)f no response [to the motion] is filed within the designated time period, the parties may be deemed to have waived any objection to the granting of the motion". The operative word here is "may" and it is well settled that failure to file a timely response does not warrant granting a motion in every

instance.^{4/} In short, the matter is committed to the sound discretion of the ALJ and it is my conclusion that granting Complainant's motion is not warranted in this instance, because of factual matters which are disputed or unclear. In any event, the ALJ can always elect to hear the evidence and this case cries out for an evidentiary hearing where, as a minimum, evidence relating to the matters listed below may be presented.

Firstly, are the USTs allegedly in violation located in Forsyth or Lame Deer, Montana. Secondly, is it reasonable to conclude that the USTs were included in "buildings and improvements" in the purchase and sale agreement between the Harris's and the corporate predecessor of Petrolane. If the answer to this question is in the negative, by what transaction or process did Morning Star acquire title to the USTs and thus file a notification as owner in 1986. Was the notification submitted by Petrolane in 1990 a mistake and, if so, is Petrolane bound by that mistake. Although the latter is a legal issue, the facts concerning the alleged representations by Morning Star and State environmental officials must be explored to assure its proper resolution. Because of confusion as to the location of the USTs at issue, alleged admissions by Respondents that tank release detection and line tightness tests were not performed are not

^{4/} See, e.g., Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 EAD 819 (EAB, October 6, 1993) (improper to grant motion to dismiss because of complainant's failure to file a timely response where it was clear that complainant opposed the motion).

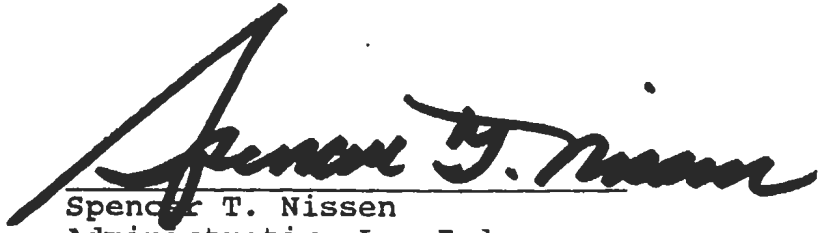
operative and, of course, the amount, if any, of an appropriate penalty remains at issue.

In view of the foregoing, Complainant's motions for a partial accelerated decision, or, alternatively, for an order to show cause will be denied.

ORDER

Complainant's motions for a partial accelerated decision as to liability, or, alternatively, for an order to show cause are denied.^{5/}

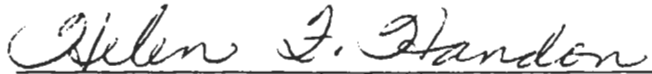
Dated this 18th day of January 1996.


Spencer T. Nissen
Administrative Law Judge

^{5/} In the near future, I will telephonically contact counsel for the purpose of scheduling a hearing on this matter, which will be held in Billings or other suitable location in Montana.

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION OR, ALTERNATIVELY, MOTION FOR ORDER TO SHOW CAUSE, dated January 18, 1996, in re: Morning Star Enterprises, Inc. and Petrolane, Inc., Dkt. No. RCRA-(9006)-VIII-93-03, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondents and Complainant (see list of addressees).



Helen F. Handon
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DATE: January 18, 1996

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