

IN THE DISTRICT COURT OF DODGE COUNTY, NEBRASKA

COPY

STATE OF NEBRASKA, ex rel.,)
MICHAEL J. LINDER, Director)
NEBRASKA DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
Plaintiff,)
v.)
ROBERT HOOPS)
Defendant.)

CASE NO. _____

PETITION

COMES NOW the Nebraska Department of Environmental Quality (hereinafter the "Department" or "Plaintiff"), who institutes this action through Don Stenberg, Attorney General, and alleges and states as follows:

1. The Plaintiff is the agency of the State of Nebraska charged with the duty, pursuant to Neb. Rev. Stat. §81-1504(1) (Reissue 1999), of exercising exclusive supervision, administration and enforcement of the Environmental Protection Act, Neb. Rev. Stat. §81-1501 (Cum. Supp. 2000) *et seq.* and all rules and regulations promulgated there under.

2. At all times material to this action, the Defendant, Robert Hoops was the owner and operator of a bulk fuel storage facility commonly known as Hoops Agri-Sales Company, located at Highway 30 and Cedar Street, North Bend, Nebraska (the "Site"), in an area generally described as the NW ¼, SW ¼, NW ¼ Section 7, Township 17 North, Range 6 East, of the 6th P.M., Dodge County, Nebraska. At the Site, as part of his business, Defendant filled, dispensed, and sold gasoline, diesel oil and fuel oils from aboveground petroleum storage tanks.

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3. On June 28, 2001 and August 7, 2001, the State Fire Marshal detected petroleum contamination in the soil at the Site beneath and surrounding Defendant's tanks and between Defendant's tanks and a residence where drinking water contaminated with petroleum has been found. On or about August 24, 2001, the Department sent a letter by certified mail to Defendant notifying him that as a result of the State Fire Marshal's and the Department's investigation of petroleum contaminated drinking water at the residence at 610 Spruce Street, Defendant's Site was determined to be the source of the petroleum contamination. Defendant was further informed that he was the "responsible person" pursuant to Title 126 Chapter 18, section 004.01, and as such, was required to complete an investigation to determine all of the affected environment and to fully assess and remediate the impacts of the release. Defendant received the letter on September 4, 2001, as evidenced by his signature on the return receipt. Defendant has failed to conduct any investigation or to submit the information required.

4. The Director of the Department is authorized pursuant to Neb. Rev. Stat. §81-1507 (Reissue 1999), to issue and serve written complaints upon an alleged violator and order that necessary corrective action be taken. A Complaint, Compliance Order and Notice of Opportunity for Hearing (hereinafter "Order") in Department Case Number 2372 was issued by the Director of the Department on April 18, 2002, and was served upon the Defendant on April 22, 2002 by certified United States mail, return receipt requested.

5. Defendant did not file an Answer, request a hearing, or respond in any manner to the Order. Neb. Rev. Stat. §81-1507(1)

provides that such Order shall become final in the absence of a request for hearing made within thirty days after the date such Order is served.

6. The Order became final on May 22, 2002. A true and accurate copy of this Order has been attached as Exhibit 1 and is incorporated herein as if fully set forth.

7. The Order required Defendant to monitor, investigate and remediate a release of oil into or upon the land and waters of the State of Nebraska caused by Defendant. Defendant has not complied with the final Order of the Director.

8. Neb. Rev. Stat. §81-1508.02(1)(b) makes it unlawful for any person to violate any order of the director.

9. Neb. Rev. Stat. §81-1508.02(2) provides that any person who violates §81-15-1508.02(1) shall be subject to a civil penalty of no more than \$10,000 per day. In a case of a continuing violation, each day shall constitute a separate offense.

10. Upon the court's finding that Defendant is violating the Order, Plaintiff requests that the court issue an injunction pursuant to Neb. Rev. Stat. §81-1508(2) (Reissue 1999).

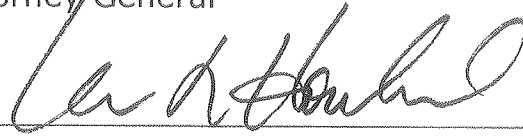
WHEREFORE, the Plaintiff prays that judgment be entered in favor of the Plaintiff and against the Defendant in the form of civil penalties as provided in Neb. Rev. Stat. § 81-1508.02(2) for violation of the Order, and further that an injunction be entered requiring Defendant to immediately and completely comply with the Order, and that all costs of this action be taxed to the Defendant.

STATE OF NEBRASKA, ex rel.,

MICHAEL J. LINDER, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Plaintiff

By DON STENBERG, #14023
Attorney General

By

A handwritten signature in black ink, appearing to read "William L. Howland", written over a horizontal line.

William L. Howland, #11941
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
(402) 471-2682
Attorney for Plaintiff

¼, SW ¼, NW ¼ Section 7, Township 17N, Range 6E, Dodge County, Nebraska. Respondent's business mailing address is 341 West 9th Street, North Bend, Nebraska 68649. Respondent's residential mailing address is P.O. Box 420, North Bend, Nebraska 68649. At the Site, as part of his business, Respondent filled, dispensed and sold gasoline, diesel oil and fuel oils from aboveground petroleum storage tanks.

2. On or about June 28, 2001, water testing of a residential water service line located next to and downgradient with respect to groundwater flow from Respondent's Site demonstrated the presence of gasoline constituents in the water being delivered through the residential tap. The address of the residence is 610 Spruce Street, North Bend, Nebraska, and the residence is owned by Douglas Hoops, who is the son of the Respondent. Petroleum contamination of the soil beneath and surrounding Respondent's tanks and between Respondent's tanks and the residence was detected with field instruments by the State Fire Marshal on June 28, 2001 and August 7, 2001.

3. On or about August 24, 2001, the NDEQ sent a letter by certified mail to Respondent. Respondent received the letter on September 4, 2001, as evidenced by his signature on the return receipt, and was notified that as the result of the State Fire Marshal's and the NDEQ's investigation of petroleum contaminated drinking water at the residence at 610 Spruce Street, Respondent's Site was determined to be the source of the petroleum contamination. Respondent was further informed that he was the "responsible person" pursuant to Title 126 Chapter 18, section 004.01, and as such, was required to complete an investigation to determine all of the affected environment and to fully assess the impacts of the release. Respondent was further informed that he was to follow the procedures of Title 118 to complete the investigation. Respondent was notified that he was required to submit to the NDEQ a Pre-Investigation Assessment Work Plan Form on or before September 28, 2001. Respondent failed and refused to submit the information required.

4. On or about October 17, 2001, the NDEQ sent a Five Day Warning Letter to Respondent via certified mail. Respondent received the letter on October 18, 2001, as evidenced by his wife's signature on the return receipt. Respondent, by the Five Day Warning Letter, was warned that he had failed to meet the requirement to submit a Pre-Investigation Assessment Work Plan Form on or before September 28, 2001. The Letter established a compliance date of five days from the date of receipt the letter for Respondent to respond to the NDEQ. Respondent was further advised that said Letter would be the NDEQ's last attempt at voluntary compliance, and that Respondent's failure to meet compliance dates could adversely affect Respondent's eligibility for reimbursement in accordance with Title 200 Nebraska Administrative Code. Respondent failed and refused to respond.

5. On or about November 6, 2001, the NDEQ again sent the same Five Day Warning Letter described above in paragraph 4 to Respondent via certified mail. Respondent received the letter on November 7, 2001, as evidenced by his wife's signature on the return receipt. Respondent failed and refused to respond.

6. Respondent has, to the date of this Complaint, failed and refused to submit the required Pre-Investigation Assessment Work Plan Form, or, in any other way, to comply with the request of the NDEQ, despite the repeated attempts of NDEQ to obtain voluntary compliance pursuant to Neb. Rev. Stat. §81-1510.

7. Title 126 Chapter 18, section 001.01 provides:

No person shall release, cause to be released or allow the release of an oil or hazardous substance or residuary products thereof, into, or upon the waters or land of the state, except in quantities, and at times and locations, or under circumstances and conditions as the Department approves.

8. Title 126 Chapter 1, section 036 defines "release" to mean:

"Release" means, but is not limited to, any discharging, spilling, leaking,

pumping, emitting, emptying, or dumping of oil or hazardous substances upon land, beneath the surface of the land, or into waters of the State, either by accident or otherwise.

9. Title 126 Chapter 1, section 030 defines "oil" to mean:

"Oil" means oil of any kind or in any form, including, but not limited to:
030.01 Petroleum, fuel oil, oil refuse and oil mixed with wastes other than dredged spoil

10. Respondent's gasoline and diesel fuel released from his tank system are "oil" as defined by Title 126 Chapter 1, section 030.

11. Respondent, in violation of Title 126 Chapter 18, section 001.01, has released oil into or upon the waters or land of the state, and such violation is continuing.

12. As a result of the release of petroleum at Respondent's Site, "oil" as defined by Title 126 Chapter 1, section 030, has entered the ground, has contaminated the soil, has entered the public drinking water line in North Bend, Nebraska and has potentially entered the ground water. Respondent is violating Title 126 Chapter 18, sections 004 "Investigation" and 005 "Remedial Action", provide in part:

004.01 When a release occurs, it shall be the duty of the responsible person to determine all of the affected environment and to provide other pertinent information deemed necessary by the Department to fully assess the impacts of the release, including but not limited to the names and addresses of adjacent landowners and existing water users. The release investigation shall be conducted in a timely and diligent manner and in accordance with a schedule established by the Department.

...

005.01 At any time after notification of a release, the Department may

require the responsible person to develop and submit a written remedial action plan in accordance to a schedule and format established by the Department.

005.02 The remedial action plan is subject to the Department's review and approval.

005.03 Upon approval of the remedial action plan or as directed by the Department, the responsible person shall implement the plan and any modifications pursuant to a schedule and in a format established by the Department.

005.04 Remedial action of an oil or hazardous substance release shall proceed in a timely and diligent manner and in accordance with a schedule established by the Department. Actions such as, by not limited to, environmental monitoring and limiting public access may be included as remedial action responsibilities.

005.05 Cleanup shall be to the extent which will prevent a hazard to human health, safety, and the land and waters of the state. Remedial action for groundwater shall be performed pursuant to the requirements in Title 118 *Ground Water Quality Standards and Use Classification*.

13. Title 126 Chapter 1, section 038 defines "responsible person" to mean:

"Responsible Person" means any person producing, handling, storing, transporting, refining, or disposing of an oil or hazardous substance when a release occurs, either by accident or otherwise. This includes carriers and any other person in control of an oil or hazardous substance when a release occurs, whether they own the oil or hazardous substances or are operating under a lease, contract, or other agreement with the legal owner thereof.

14. Respondent was handling or storing an oil when a release occurred and is the "responsible person", as defined by Title 126 Chapter 1, section 038, for the

purpose of conducting the release investigation in a timely and diligent manner as is required by Title 126 Chapter 18, section 004.01.

15. The "remedial action" Respondent may be required to conduct pursuant to Title 126 Chapter 18, section 005, is defined by Title 126 Chapter 1, section 037 to mean "any immediate or long-term response to a release or suspected release of an oil or hazardous substance, including ... site investigation, drilling, cleanup, restoration, mitigation, and any other action which the Department determines is reasonable and necessary."

16. Alternatively, Title 126 Chapter 18, section 007.02 establishes the NDEQ's authority to require potentially responsible persons to conduct investigations. Respondent is a potentially responsible person pursuant to Title 126 and is, required by Title 126 Chapter 18, section 007.02 to investigate as ordered by the NDEQ.

17. Respondent, by failing and refusing to conduct a release investigation in a timely and diligent manner as required by Title 126 Chapter 18, section 004.01, and section 007.02 is in violation of Neb. Rev. Stat. §81-1506(1).

COMPLIANCE ORDER

18. IT IS HEREBY ORDERED that, within thirty (30) days of receipt of this Compliance Order, Respondent shall submit to NDEQ for review, a Pre-Investigation Assessment Work Plan Form (Attachment A).

19. IT IS FURTHER ORDERED that within thirty (30) days of receipt from NDEQ of its approval of the Pre-Investigation Assessment Work Plan Form, Respondent shall submit to NDEQ the completed Site Investigation Work Plan Form.

20. IT IS FURTHER ORDERED that within sixty (60) days of receipt from NDEQ of its approval of the Site Investigation Assessment Work Plan Form, Respondent shall submit to NDEQ his complete RBCA Tier I Assessment Report, which shall include at a minimum, the information outlined in "Risk-Based Corrective

Action (RBCA) at Petroleum Release Sites: Guidance Document for Tier 1/Tier 2 Assessments & Reports", February 2002.

21. IT IS FURTHER ORDERED that Respondent shall:

- a. Conduct any further investigation of the release in accordance with Title 118 Appendix B (Attachment B), if determined necessary by NDEQ, and submit timely reports thereof;
- b. Conduct any remedial action determined necessary by NDEQ after review of all investigatory reports;
- c. Conduct any monitoring of the site as determined necessary by NDEQ; and
- d. Submit written reports of all monitoring, investigation, and remedial action activity in a format and pursuant to a schedule established by NDEQ after review of all reports.

22. Information required to be submitted under this Order shall be sent to:

John K. Fogerty, Geologist
Water Quality Division
Nebraska Department of Environmental Quality
P.O. Box 98922
Lincoln, Nebraska 68509-8922
Telephone number (402) 471-4230

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

23. This Order shall become final, pursuant to Neb. Rev. Stat. §81-1507(1), unless Respondent files an answer and requests, in writing, a hearing no later than thirty days after receipt of this Order. Failure to answer within thirty days shall be deemed an admission of the allegations of the Complaint.

24. A written answer to the Complaint, Compliance Order and Notice of Opportunity for Hearing must conform to the requirements of Title 115 Nebraska Administrative Code, *Rules of Practice and Procedure*, Chapter 7 (Attachment C). The answer and request for hearing may be filed by mail to: Michael J. Linder,

Director, State of Nebraska Department of Environmental Quality, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or may be delivered to the Department's Lincoln office located at 1200 N Street, Suite 400, Lincoln, Nebraska.

SETTLEMENT CONFERENCE

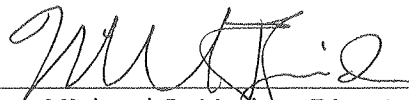
25. Whether or not Respondent requests a hearing, an informal conference may be requested. To request a settlement conference, please write to Lisa Buechler, Attorney, Nebraska Department of Environmental Quality, P.O. Box 98922, Lincoln, Nebraska 68509-8922, or, if an attorney represents you, have your attorney make such request.

26. A request for settlement conference does not extend the thirty (30) day period during which a written answer and request for hearing must be submitted or otherwise delay the final effective date of this Order.

INJUNCTIVE RELIEF AND PENALTY PROVISIONS

27. The NDEQ reserves the right to pursue enforcement in the proper court of law for injunctive relief or to seek civil or criminal penalties for any violations that are the subject of this Complaint, Compliance Order and Notice of Opportunity for Hearing. Nothing in this Complaint, Compliance Order and Notice of Opportunity for Hearing precludes the NDEQ from pursuing such enforcement.

April 18 2002
Date


Michael J. Linder, Director
NEBRASKA DEPARTMENT OF
ENVIRONMENTAL QUALITY

AFFIDAVIT

STATE OF NEBRASKA
COUNTY OF LANCASTER

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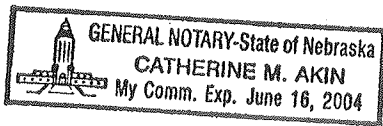
The undersigned, being first sworn on oath deposes and says that she is an employee of the Nebraska Department of Environmental Quality and that on the 19th day of April, 2002, the undersigned served an exact copy of the foregoing Complaint, Compliance Order, and Notice of Opportunity for Hearing by regular United States mail, first class, postage prepaid, and certified with return receipt requested addressed as follows:

Robert Hoops
P.O. box 420
North Bend, Nebraska 68649

Lisa Buechler

Affiant

Subscribed and sworn to before me, a Notary Public, on the 19th day of April, 2002.



Catherine M. Akin

Notary Public



Nebraska Department of Environmental Quality LUST/RA Section

Pre-Investigation Assessment Work Plan Form

The Department has developed this document to simplify the petroleum release site investigation work plan review process. The completed form must be signed and dated by representatives of both the responsible party and the consulting firm selected to perform the work.

The LUST program requires that a pre-investigation assessment, including a site visit, be conducted prior to conducting an initial site investigation. The purposes of this assessment are to:

1. Conduct an on-site reconnaissance to determine potential source areas and potential complications for sampling the source areas;
2. Locate any on-site water supply wells and basements;
3. Conduct an on-site utilities survey as an aid in determining potential site complications;
4. Determine the appropriate sampling and/or drilling locations to obtain the information required in the Department's *Risk-Based Corrective Action (RBCA) at Petroleum Release Sites: Guidance Document for Tier 1 Assessments and Reports* document;
5. Prepare a site diagram (to scale) showing the potential source area(s), selected sampling and/or drilling locations, and on-site water supply wells, basements, and utilities;
6. Prepare a proposed cost estimate for the planned site investigation; and
7. Prepare a separate, per-well cost estimate for additional monitoring wells to be installed if free product is encountered.

Estimated total cost for conducting the pre-investigation assessment: \$ _____

You must receive written notification from the Department before the pre-investigation assessment may begin.

Site name: *Robert Hoops*
NDEQ release number: *SP#062901-DB-1130*

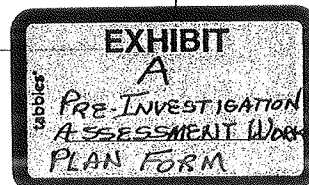
_____ *Responsible party signature* _____ *date*

_____ *Consultant company name*

_____ *Consultant mailing address or P.O. Box* _____ *Consultant signature*

_____ *Consultant city, state, and ZIP code* _____ *Consultant name (printed)* _____ *date*

The completed form should be mailed to NDEQ, NDEQ LUST/RA Section, Box 98922, Lincoln NE 68509-8922. ~~on or before~~ . The form may also be faxed to (402) 471-2909, with the signed original following by mail.



NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

TITLE 118 - GROUND WATER QUALITY STANDARDS
AND USE CLASSIFICATION

REVISED EFFECTIVE DATE: June 18, 2001

MIKE JOHANNIS
GOVERNOR



DEPARTMENT OF ENVIRONMENTAL QUALITY

TITLE 115 - RULES OF PRACTICE AND PROCEDURE

EFFECTIVE DATE *Aug 1, 1993*

E. BENJAMIN NELSON
GOVERNOR

