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IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO

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STATE OF OHIO, ex rel.	:	
Plaintiff	:	CASE NO. 10-CV-0625
vs.	:	
JOSEPH MONESKEY	:	FINAL JUDGMENT ENTRY
Defendant	:	

This case was tried to the court on October 24, 2011 on the amended complaint of plaintiffs, State of Ohio (“State”) and Petroleum Underground Storage Tank Release Board (“Board”) against defendant. The State claims the defendant has violated certain rules issued by the State Fire Marshall’s Bureau of Underground Storage Tank Regulations (“BUSTR”). The State further claims that as a result of the violations, the environment has been endangered. The Board claims that the defendant has failed to pay certain fees that he is required to pay to the Board. Plaintiffs are seeking injunctive relief and monetary penalties.

The court makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. Defendant Joseph Moneskey is a person, as that term is defined in R.C. 1.59 and 3737.01(E) and Ohio Adm. Code 1301:7-9-02(B)(43), who owns the real property located at 13182 Shank Road, Doylestown, Wayne County, Ohio 44230 (the “Site”).<sup>1</sup>

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<sup>1</sup> Defendant’s Answer to Amended Complaint, ¶¶1, 2.

Defendant Moneskey has owned the Site during all periods from September 13, 2005 through the present.<sup>2</sup>

2. Five underground storage tank (“UST”) systems, as that term is defined in R.C. 3737.87(P) and Ohio Adm. Code 1301:7-9-02(B)(66), (67) and (68), are located at the Site.<sup>3</sup> The five UST systems located at the Site contain gasoline, diesel fuel and kerosene, which are “petroleum” as defined in R.C. 3737.87(J) and Ohio Adm. Code 1301:7-9-02(B)(44).<sup>4</sup>

3. The petroleum contained within the UST systems is a “regulated substance,” as that term is defined in R.C. 3737.87(L) and Ohio Adm. Code 1301:7-9-02(B)(49).<sup>5</sup>

4. On August 16, 2006, the Bureau of Underground Storage Tank Regulations (“BUSTR”) performed an inspection of the Site and determined that there was water in three of the USTs at the Site, indicating a suspected release.<sup>6</sup> On November 27, 2006, December 26, 2007 and May 27, 2009, BUSTR issued Notices of Violation to Defendant Moneskey informing him of his duty under Ohio Adm. Code 1301:7-9-13(F) to perform a tightness test.<sup>7</sup> Defendant Moneskey finally performed a tightness test on the UST systems at the Site on October 11, 2010, and reported the results to BUSTR, through counsel, on December 28, 2010.<sup>8</sup>

5. One of the UST systems at the Site failed the October 11, 2010 tightness test, which demonstrated there a leak was occurring in the UST system.<sup>9</sup>

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<sup>2</sup> Defendant’s Answer to Amended Complaint, ¶1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Plaintiff’s Exhibits 2, 3.

<sup>7</sup> Plaintiff’s Exhibits 4, 5, 6.

<sup>8</sup> Plaintiff’s Exhibit 9.

<sup>9</sup> Plaintiff’s Exhibit 9, facsimile p. 13/14.

6. The UST system which failed the tightness test was in operation during the test and remains in operation.<sup>10</sup>

7. The location of suspected releases from the UST systems at the Site are not known.<sup>11</sup>

8. The five UST systems at the Site were out of service from some time prior to June 22, 2009 to some time after August 19, 2010.<sup>12</sup>

9. For a UST system that is out of service for over twelve months, Ohio Adm. Code 1301:7-9-12(I) requires owners and operators of petroleum UST systems to perform a closure assessment, even if the UST system is returned to service.<sup>13</sup> Also, Ohio Adm. Code 1301:7-9-12(J) requires that a closure assessment report be provided as to such UST systems.<sup>14</sup>

10. Defendant Moneskey admitted that he has not performed a closure assessment for the five UST systems at the Site<sup>15</sup>; it is undisputed that no closure assessment has been performed for the UST systems at the Site.<sup>16</sup>

11. When a UST system is placed back into service after being out of service for over twelve months, in addition to the requirement to perform a closure assessment, the owner of the UST system must comply with the provisions set forth in Ohio Adm. Code 1301:7-9-12(E)(6).

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<sup>10</sup> Testimony of David Biskner – Transcript p. 28 lines 1-5; Plaintiff's Exhibit 9.

<sup>11</sup> Testimony of David Biskner – Transcript p. 28 line 16 through p. 29 line 7.

<sup>12</sup> Transcript pp. 69-74; Transcript pp. 80-82; Plaintiff's Exhibit 16, Response to Request for Admission No. 2; Plaintiff's Exhibit 16, Response to Request for Admission No. 2.

<sup>13</sup> Ohio Adm. Code 1301:7-9-12(I).

<sup>14</sup> Ohio Adm. Code 1301:7-9-12(J).

<sup>15</sup> Testimony of Joseph Moneskey – Transcript p. 143 lines 2-8.

<sup>16</sup> Testimony of Joseph Moneskey – Transcript p. 143 lines 2-8; Testimony of Lynne Caughell - Transcript p. 93 line 20 through p. 94 line 2, Transcript p. 98 lines 1-6.

12. When Defendant Moneskey placed the UST systems at the Site back into service some time between August 19, 2010 and October 11, 2010, Defendant Moneskey failed to comply with the requirements of Ohio Adm. Code 1301:7-9-12(E)(6). The UST systems at the Site failed the tightness test performed on October 11, 2010.<sup>17</sup> In addition, Defendant Moneskey was not in compliance with registration and financial responsibility requirements set out in Ohio Adm. Code 1301:7-9-04 and 1301:7-9-05.<sup>18</sup>

13. Defendant Moneskey as the owner of the underground storage tanks, is the person responsible for the annual tank fees set by the Board. Defendant Moneskey has been out of compliance for years with regulations applicable to the Board. He owes \$74,000 in outstanding fees.

### **CONCLUSIONS OF LAW**

1. Pursuant to R.C. 3737.87(H) “owner” includes any person who holds a legal, equitable or possessory interest of any kind in an underground storage tank system or the property on which the UST system is located. Defendant Moneskey admits that he owns the property where the UST systems that are the subject of this case are located, Defendant Moneskey is an “owner”, as that term is defined in R.C. 3737.87(H) and Ohio Adm. Code 1301:7-9-02(B)(41), of the five UST systems located at the Site.

2. Pursuant to R.C. 3737.87(N), a “responsible person” means the person who is the owner or operator of an underground storage tank system. As Defendant Moneskey is the owner of the UST systems located at the Site, he is a “responsible person” as that term is defined in R.C. 3737.87(N).

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<sup>17</sup> Plaintiff's Exhibit 9, facsimile p. 13/14.

<sup>18</sup> Testimony of Starr Richmond – Transcript pp. 102-112, 116-117; Plaintiff's Exhibits A through K.

3. From August 16, 2006 until December 28, 2010, Defendant Moneskey failed to perform a tightness test as required by Ohio Adm. Code 1301:7-9-13(F).<sup>19</sup> Based on the evidence and testimony in this case, Defendant Moneskey is liable as to Count One of Plaintiffs' Amended Complaint. Pursuant to R.C. 3737.882(C)(2), Defendant Moneskey is liable to Plaintiff State of Ohio for a civil penalty of up to ten thousand dollars (\$10,000.00) per day for each of the 1596 days of violation.

4. The Site failed the tightness test performed at the Site on October 11, 2010 and as reported to BUSTR on December 28, 2010; this failed test demonstrated there was a leak in one of the UST systems at the Site.<sup>20</sup>

5. Pursuant to Ohio Adm. Code 1301:7-9-13(F)(3)(a), when a UST system fails a tightness test, the owner or operator of the UST system must perform a site check. Pursuant to Ohio Adm. Code 1301:7-9-13(F)(3)(b), there are three options available to an owner to perform a site check: 1) remove the UST system or a portion of the UST system that is the potential source of the suspected release in accordance with Adm. Code 1301:7-9-13, 2) collect a minimum of three samples from the native soil immediately below the source of the suspected release and comply with the other sampling and reporting requirements set forth in this rule, or 3) conduct a Tier 1 source investigation pursuant to Ohio Adm. Code 1301:7-9-13(H). As the UST system which failed the tightness test has remained in operation, and as the location of the suspected releases is not known, the only available option for Defendant Moneskey to perform a site check is to conduct a Tier 1 source investigation.<sup>21</sup>

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<sup>19</sup> Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 9; Testimony of David Biskner, p. 13 line 10 through p. 27 line 5.

<sup>20</sup> Plaintiff's Exhibit 9, facsimile p. 13/14.

<sup>21</sup> Testimony of David Biskner – Transcript p. 28 line 1 through p. 29 line 10.

6. Ohio Administrative Code 1301:7-9-12(E) requires owners and operators of a UST system to take certain steps for UST systems out-of service for more than twelve months. When a UST system has been out-of-service for more than twelve months, the owner and operator are required to either 1) close the tank in place, 2) return the tank to service pursuant to the requirements set forth in paragraph E(6) of this rule, 3) permanently remove the tank or 4) perform a change-in service. Defendant Moneskey's five UST systems at the Site were out-of-service from some time prior to June 22, 2009 to some time after August 19, 2010, a period of more than twelve months, and then placed back into service.<sup>22</sup> Pursuant to Ohio Adm. Code 1301:7-9-12(E)(6), when a UST system that has been out-of-service for more than twelve months is placed back into service, the system must meet requirements including, but not limited to the following: 1) the UST system must pass a tightness test pursuant to Ohio Adm. Code 1301:7-9-07(F) within seven days of going back into service; and 2) the UST system must be in compliance with registration and financial responsibility requirements set out in Ohio Adm. Code 1301:7-9-04 and 1301:7-9-05. Defendant Moneskey failed to comply with the requirements of Ohio Adm. Code 1301:7-9-12(E)(6). The UST systems at the Site failed the tightness test performed on October 11, 2010.<sup>23</sup> The UST systems at the Site are also not in compliance with registration and financial responsibility requirements set out in Ohio Adm. Code 1301:7-9-04 and 1301:7-9-05.<sup>24</sup> Pursuant to R.C. 3737.882(C)(2), Defendant Moneskey is liable to Plaintiff State of Ohio for a civil

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<sup>22</sup> Testimony of Robert McGarry - Transcript pp. 69-74, pp. 80-82; Plaintiff's Exhibit 16, Response to Request for Admission No. 2; Plaintiff's Exhibit 16, Response to Request for Admission No. 2.

<sup>23</sup> Plaintiff's Exhibit 9, facsimile p. 13/14.

<sup>24</sup> Testimony of Starr Richmond - Transcript pp. 102-112, 116-117; Plaintiff's Exhibits A through K.

penalty of up to ten thousand dollars (\$10,000.00) per day for each of day of violation, including days of violation subsequent to filing of the Amended Complaint.

7. Ohio Adm. Code 1301:7-9-12(I) requires owners and operators of petroleum UST systems to perform a closure assessment as to a UST that has been out-of-service in excess of twelve (12) months, even if the tanks are placed back into service. Ohio Adm. Code 1301:7-9-12(J) requires that a closure assessment report based on such assessment be provided to BUSTR. It is undisputed that no closure assessment has been performed for the UST systems at the Site.<sup>25</sup> Since June 23, 2010, Defendant Moneskey has failed to comply with the requirements of Ohio Adm. Code 1301:7-9-12(I) and (J) for the UST systems at the Site.<sup>26</sup> Pursuant to R.C. 3737.882(C)(2), Defendant Moneskey is liable to Plaintiff State of Ohio for a civil penalty of up to ten thousand dollars (\$10,000.00) per day for each of day of violation, including days of violation subsequent to filing of the Amended Complaint.

8. In considering what an appropriate penalty in this case would be, the Court has considered the holding in *State of Ohio ex rel. Brown v. Dayton Malleable, Inc.*<sup>27</sup> In *Dayton Malleable*, the Supreme Court outlined factors that should be reviewed by a court in assessing penalties. These factors include: 1) harm and/or the risk of harm to human health and/or the environment; 2) recalcitrance or indifference to the requirements of the law; 3) economic benefit for delayed compliance; 4) extraordinary enforcement costs;

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<sup>25</sup> Testimony of Joseph Moneskey – Transcript p. 143 lines 2-8; Testimony of Lynne Caughell - Transcript p. 93 line 20 through p. 94 line 2, Transcript p. 98 lines 1-6.

<sup>26</sup> *Id.*

<sup>27</sup> *State of Ohio ex rel. Brown v. Dayton Malleable, Inc.* (1979), Montgomery C.P., 13 ERC 2189 (see copy, Attachment A); 1981 Ohio App. LEXIS 12103, 1 Ohio St. 3d 151 (1982). See also, *State of Ohio v. Tri-State Group, Inc., et al.*, 7<sup>th</sup> Dist. No. 03 BE 61, 2004-Ohio-4441 at ¶99-116; *State of Ohio v. Basinger*, 7<sup>th</sup> Dist. No. 09 MA 119, 2010-Ohio-4870 at ¶42-69.

and 5) deterrence to defendants, as well as others, from future violations of law.<sup>28</sup> In order to be an effective deterrent, the civil penalty must be large enough to hurt the offender.<sup>29</sup> A civil penalty must be large enough to serve as a deterrent not only to the Defendant, but also to the rest of the regulated community. In *State ex rel. Brown v. Howard*, the Franklin County Court of Appeals determined that the General Assembly had decided that the strong economic sanction of a civil penalty is a necessary enforcement tool to deter future violations.<sup>30</sup> Consistent with this long-standing Ohio case law on environmental civil penalties, a number of courts have considered the question of an appropriate civil penalty. In *State ex rel. Rogers v. Elbert*, the Ninth District followed a similar analysis as the *Howard* court had.<sup>31</sup> In *Elbert*, the court noted that, although the determination of a penalty is within the informed discretion of the court, a nominal penalty was insufficient to meet the purposes of environmental statutes designed to promote compliance and deter violations.<sup>32</sup>

9. Based on the evidence and testimony offered in the instant matter, Defendant Moneskey is liable for Counts One, Two, and Three of Plaintiffs' Amended Complaint. Pursuant to R.C. 3737.882(C)(2), Defendant Moneskey is liable to Plaintiff State of Ohio for a civil penalty of up to ten thousand dollars (\$10,000.00) per day per violation.

10. The first of the factors established by the Supreme Court in *State ex. rel Brown v. Dayton Malleable, Inc.* for determination of an appropriate civil penalty is risk of harm.<sup>33</sup> In the case at hand there is a significant risk of harm. Despite suspected releases dating

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<sup>28</sup> *Dayton Malleable*, 13 ERC at 2192-95, 1981 Ohio App. LEXIS 12103 at 8-9, and 1 Ohio St.3d 151 at 157-58.

<sup>29</sup> *State ex rel. Brown v. Howard* (1981), 3 Ohio App.3d 189 at, 191-92, 444 N.E.2d 469.

<sup>30</sup> *Id.*

<sup>31</sup> *State ex rel. Rogers v. Elbert*, 180 Ohio App.3d 284, 2008-Ohio-6746, 905 N.E.2d 235, ¶59-65

<sup>32</sup> *Elbert* at ¶62-64.

<sup>33</sup> *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151; 438 N.E.2d 120; 1982 Ohio LEXIS 723.



back to 2006, Defendant Moneskey refused to perform a required tightness test on the UST systems at the Site until October 11, 2010. The Site failed the tightness test, demonstrating that there is a leak in one of the UST systems at the Site. Further, Defendant Moneskey continues to refuse to perform a required closure assessment and a required Tier I source investigation at the Site, to determine location and extent of releases from his UST systems.

11. Regarding the second factor set out by the Supreme Court in *Dayton Malleable*, Defendant Moneskey has demonstrated indifference, or even outright defiance, to the requirements of the law. He continues to refuse to perform a required site check and a required closure assessment for his UST systems.

12. Regarding the third *Dayton Malleable* factor, Defendant Moneskey has benefited economically by refusing to spend funds necessary to perform a Tier I source investigation and a closure assessment.

13. Regarding the fourth *Dayton Malleable* factor, in pursuing this litigation as to Defendant Moneskey, Plaintiff State of Ohio has incurred extraordinary enforcement costs.

14. Consistent with other cases with similar facts, and consistent with the civil penalty factors set out by the Supreme Court in *Dayton Malleable*<sup>34</sup>, the Court finds that Defendant Moneskey should pay a total civil penalty of ninety-nine thousand seven hundred forty dollars (\$99,740), as set out below:

- a. Forty dollars (\$40) per day for the 1596 days of violation for failure to perform a tightness test, for a civil penalty of \$63,840 for Count One;

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<sup>34</sup> *Id.*

- b. Twenty dollars (\$20) per day for the 435 days of violation (through December 19, 2011) for failure to properly manage out-of service UST systems, for a civil penalty of \$8,700 for Count Two;
- c. Fifty dollars (\$50) per day for the 544 days of violation (through December 19, 2011) for failure to perform a closure assessment, for a civil penalty of \$27,200 for Count Three.

### **ORDER**

The court renders final judgment on the amended complaint as follows:

1. Defendant Moneskey shall conduct a Tier 1 Source Investigation for the Site pursuant to Ohio Adm. Code 1301:7-9-13(F), and submit a Tier I Report pursuant to Ohio Adm. Code 1301:7-9-13(H), within ninety (90) days of entry of judgment. The Tier I Source Investigation must be of sufficient scope and detail as necessary to also satisfy the requirement to perform a closure assessment for the UST systems located on the Site pursuant to Ohio Adm. Code 1301:7-9-12(I), and the Tier I Report must also satisfy the requirements for a closure report pursuant to Ohio Adm. Code 1301:7-9- (J);
2. Defendant Moneskey shall take the required response action if any free product is discovered in the course of closure assessment and/or corrective actions in accordance with Ohio Adm. Code 1301:7-9-13(G)(3);
3. Defendant Moneskey shall conduct any necessary corrective actions where additional corrective actions are deemed necessary in accordance to Ohio Adm. Code 1301:7-9-13;
4. Pursuant to R.C. 3737.882(C)(2), Defendant Moneskey shall handle all petroleum contaminated soils generated from closure assessment and/or corrective

actions and/or assessments undertaken with respect to the UST systems in accordance to Ohio Adm. Code 1301:7-9-16;

5. Defendant Moneskey shall immediately cease violating R.C. Chapter 3737 and the rules adopted thereunder;

6. Defendant Moneskey shall pay to the Treasury of the State of Ohio a total civil penalty of ninety-nine thousand seven hundred forty dollars (\$99,740);

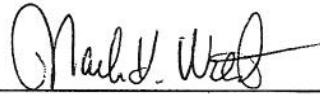
7. Defendant Moneskey shall pay reasonable attorney fees of Plaintiff State of Ohio in the amount of nine thousand dollars (\$9,000);

8. Defendant Moneskey shall pay all court costs.

9. Defendant Moneskey shall pay to the Board the outstanding fees of \$74,000 and submit the affidavit and demonstrate compliance with BUSTR's rules under OAC 3737-1-04.1.

10. The Court shall retain jurisdiction of this suit for the purpose of making any Order or Decree the Court may deem necessary at any time to enforce and administer Defendant's compliance with, and to carry out, this Court's judgment.

IT IS SO ORDERED.



Mark K. Wiest, Judge

Dated: 3/20/12

**JOURNALIZED**

**MAR 22 2012**

TIM NEAL, CLERK  
WAYNE COUNTY, OHIO