

**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

EDWARD AND THERESA WASHINES,
DA STOR AT LILLIE’S CORNER

Wapato, Washington

Respondents.

DOCKET NO. RCRA-10-2014-0100

**COMPLAINANT’S POST-HEARING
BRIEF**

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COMPLAINANT’S POST-HEARING BRIEF

Complainant, the Director of the Office of Compliance and Enforcement of Region 10 of the United States Environmental Protection Agency (EPA), through its undersigned attorneys and pursuant to the Presiding Officer’s *Post-Hearing Scheduling Order*, dated April 21, 2015, hereby files *Complainant’s Post-Hearing Brief*. For the reasons explained as follows, Complainant respectfully requests that the Presiding Officer enter an initial decision finding Edward and Theresa Washines, and Da Stor at Lillie’s Corner (Respondents) liable for the alleged violations of the Underground Storage Tank regulations in 40 C.F.R. part 280, promulgated under Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6991-6991m, assessing a penalty of \$66,176 for violations accrued through January 13, 2015, and ordering Respondents to document continued compliance with piping release detection and financial responsibility requirements.

I. Introduction

This is a case about long-term mismanagement of three underground storage tank (UST) systems at a gasoline station, Da Stor at Lillie’s Corner, despite EPA’s efforts to assist

Respondents in coming into compliance with the law. Complainant filed a Complaint on April 30, 2014, and an Amended Complaint on February 12, 2015. Respondents have admitted and stipulated to liability on Counts 1 through 4 and 7 through 9 of the Amended Complaint. Counts 1 through 4 allege that Respondents failed to conduct release detection for their underground piping that routinely conveys regulated substances under pressure, in violation of 40 C.F.R. §§ 280.41(b)(1)(i)-(ii) and 280.44(a)-(b). Counts 5 and 6 allege Respondents failed to install and maintain corrosion protection for steel piping that routinely contained regulated substances and was in contact with the ground, in violation of 40 C.F.R. §§ 280.20 and 280.31. Respondents deny liability for Counts 5 and 6. Counts 7 through 9 allege that Respondents failed to demonstrate financial responsibility for their UST systems, in violation of 40 C.F.R. § 280.93. Respondents have not contested and have stipulated to Complainant's proposed penalty of \$21,136 for Counts 1 through 4 and \$20,055 for Counts 7 through 9, as calculated through Respondents' return to compliance, on January 13, 2015.

An administrative hearing was held on liability and penalty for Counts 5 and 6 on Tuesday, April 7, 2015. Complainant presented evidence at hearing that, as alleged in Counts 5 and 6, Respondents failed to install and maintain corrosion protection¹ for steel piping that was part of their UST systems, where that piping routinely contained regulated substances and was in contact with the ground, in violation of 40 C.F.R. §§ 280.20 and 280.31, for a period of at least May 1, 2009, to February 13, 2013. Complainant also presented evidence demonstrating that Complainant's proposed penalty of \$24,985 is appropriate for Counts 5 and 6, in accordance

¹ "Cathodic protection" is defined as "a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current." 40 C.F.R. § 280.12. The regulations within 40 C.F.R. part 280 refer to "corrosion protection" and "cathodic protection" interchangeably.

with the statutory penalty factors and the applicable UST penalty guidance. Therefore, Complainant requests a total penalty of \$66,176 be assessed against Respondents.

Regulatory Background

Section 9003(a) of RCRA directs EPA to “promulgate release detection, prevention, and corrective regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment.” RCRA § 9003(a), 42 U.S.C. § 6991b(a). Under this authority, EPA developed regulations governing the installation, operation, maintenance, and closure of underground storage tanks, codified at 40 C.F.R. part 280, and these regulations constitute the “requirement[s] or standard[s] promulgated by [EPA] under section 6991b of this title [RCRA § 9003].” The Environmental Appeals Board (EAB) described the intent behind the UST regulations in the following manner:

The UST regulations are part of a comprehensive regulatory program for USTs implementing Subtitle I of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6992[m]. The UST regulations, authorized by RCRA § 9003, 42 U.S.C. § 6991b and promulgated in 1988, are designed to prevent, detect, and clean up releases from USTs containing petroleum and other regulated substances. In describing this comprehensive regulatory program, the preamble to the UST regulations emphasized that of the nation’s then 700,000 UST systems, “10 to 30 percent” had “leaked or [were] presently leaking,” constituting an “important threat to the nation’s groundwater resources.” 53 Fed. Reg. 37,082, 37,097 (Sept. 23, 1988). Furthermore, the preamble to the UST regulations identified USTs lacking the types of protective features discussed below as a leading cause of tank failure contributing to this threat. (Citations omitted.)

One of the most important features of the UST regulations is the requirement for UST owners and operators to phase in modern design, construction, and installation standards for the purpose of preventing releases of regulated substances from USTs due to corrosion, overspilling, and overfilling. To this end, the UST regulations require that owners and operators of USTs installed after December 22, 1988, (“new UST systems”) adhere to certain “performance standards.” For “existing UST systems” (those whose installation began before the above date), the regulations require that owners and operators either meet the performance standards for new USTs or upgrade their USTs not later than December 22, 1998. Upgrading can be accomplished by adding to

USTs certain protective features, such as linings for tanks and pipes, corrosion protection, and equipment to prevent overspilling and overfilling.

In re Carroll Oil Company, RCRA (9006) Appeal No. 01-2, 10 EAD 635, 638-39 (EAB 2002).

II. Complainant Established Each Element of Its Prima Facie Case

Complainant's evidence, presented in Complainant's Exhibits (CX) 1 through 44, the *Joint Set of Stipulated Facts, Exhibits, and Testimony* (JX-1), and the testimony of Charlotte Boulind-Yeung and Katherine Griffith, establish each claim alleged in the Amended Complaint, as follows:

A. Respondents admit liability for Counts 1-2

Counts 1-2 allege that Respondents violated 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a) when they failed to conduct an annual test of the operation of each automatic line leak detector (ALLD). Amended Complaint at ¶ 3.17. "Underground piping that conveys regulated substances under pressure must ... [b]e equipped with an automatic line leak detector [ALLD] conducted in accordance with § 280.44(a)" and "[a]n annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements." 40 C.F.R. §§ 280.41(b)(1)(i), 280.44(a).

Respondents admit and stipulate they are owners and/or operators of three UST systems, in which the UST system piping regularly conveys regulated substances. Answer to Amended Complaint at ¶¶ 1.1, 1.2, and 1.3; JX-1 at I.3, I.18. Respondents also admit and stipulate their UST systems have two pressurized lines, each of which is in contact with the ground and equipped with an ALLD. Answer to Amended Complaint at ¶¶ 1.1 and 1.4; JX-1 at I.17, I.18.

Furthermore, Respondents admit and stipulate they are liable for failing to conduct an annual test of the operation of each ALLD, in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and

280.44(a) from at least May 1, 2009, through October 15, 2009; October 16, 2010, through August 1, 2012; August 2, 2013, through August 26, 2013; and August 27, 2014, through October 12, 2014, as specified in Violation 1, Counts 1-2. Answer to Amended Complaint at ¶ 1.9, JX-1 at I.9.

B. Respondents admit liability for Counts 3-4

Counts 3-4 allege that Respondents violated 40 C.F.R. §§ 280.41(b)(1)(ii) and 280.44(b) when they failed to monitor each pressurized line through an annual line tightness test (LTT) or other approved methods. Amended Complaint at ¶ 3.18. “Underground piping that conveys regulated substances under pressure must ... [h]ave an annual line tightness test conducted in accordance with § 280.44(b)” or monthly through vapor monitoring, ground-water monitoring, interstitial monitoring, or other approved methods. 40 C.F.R. §§ 280.41(b)(1)(ii), 280.43(e)-(h), 280.44(b)-(c).

Respondents admit and stipulate they are owners and/or operators of three UST systems, with two pressurized lines that convey regulated substances under pressure. Answer to Amended Complaint at ¶¶ 1.1 and 1.4; JX-1 at I.3, I.17, I.18. Furthermore, Respondents admit and stipulate they are liable for failing to monitor each pressurized line through an annual LTT or other approved methods, in violation of 40 C.F.R. §§ 280.41(b)(1)(ii) and 280.44(b) from at least May 1, 2009, through October 15, 2009; October 16, 2010, through August 1, 2012; August 2, 2013, through August 26, 2013; and August 27, 2014, through October 12, 2014. Answer to Amended Complaint at ¶ 1.9; JX-1 at I.10.

C. Respondents are liable for Counts 5-6

Count 5 alleges that Respondents violated 40 C.F.R. § 280.20 when they failed to equip piping that routinely contains regulated substances and is in contact with the ground with cathodic protection. Amended Complaint at ¶ 3.23. As explained below, Complainant has met its burden of production and persuasion in proving Respondents are liable for failing to meet the requirement that “piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory,” in violation of 40 C.F.R. § 280.20, from at least May 1, 2009, through February 13, 2013. 40 C.F.R. § 280.20, 280.20(b).

Count 6 alleges that Respondents violated 40 C.F.R. § 280.31 when they failed to operate and maintain corrosion protection systems that continuously provided corrosion protection to the metal components of their UST systems that routinely contain regulated substances and are in contact with the ground. Amended Complaint at ¶ 3.24. As explained below, Complainant has met its burden of production and persuasion for proving Respondents are liable for failing to ensure “[a]ll corrosion protection systems [were] operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground,” in violation of 40 C.F.R. § 280.31, from at least May 1, 2009, through February 13, 2013. 40 C.F.R. § 280.31, 280.31(a).

1. Respondents’ UST systems are “new tank systems”

According to the UST regulations, a new tank system is “a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced

after December 22, 1988.” 40 C.F.R. § 280.12. This definition contains three components:

(a) “a tank system;” (b) “that will be used to contain an accumulation of regulated substances;” and (c) “for which installation has commenced after December 22, 1988.”

Respondents’ three UST systems meet all three components in the definition of a “new tank system.” Respondents admit and stipulate they are the owners and/or operators of three “tank systems” and that the tank systems are “used to contain an accumulation of regulated substances.” Answer to Amended Complaint at ¶ 1.1, 1.2, 1.3; JX-1 at I.3, I.7, I.8. Respondents also admit the tank systems were installed in 1990, which is after December 22, 1988. Answer to Amended Complaint at ¶ 1.2; JX-1 at I.5. Therefore, Respondents do not dispute any of the three components used to define a new tank system in 40 C.F.R. § 280.12. For these reasons, pursuant to the definition in 40 C.F.R. § 280.12, Respondents’ UST systems are “new tank systems.”

2. Respondents’ UST systems are subject to the performance standards for new UST systems

A plain reading of 40 C.F.R. § 280.20 confirms that Respondents’ tank systems are subject to the performance standards for new UST systems. The first sentence of 40 C.F.R. § 280.20 states:

In order to prevent releases due to structural failure, corrosion, or spills and overfills *for as long as* the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements. (emphasis added)

This sentence identifies the purpose of the regulation, who is regulated, and what is required.

The performance standards for new UST systems are designed to (1) prevent structural failure

and corrosion throughout the operational life² of the new UST system, apply to (2) all owners and operators of new UST systems, who (3) must meet those performance standards.

Respondents do not dispute that their UST systems have been operational since at least May 1, 2009. JX-1 at I.2-7. As Respondents have not properly closed their UST systems under 40 C.F.R. part 280, subpart G, their UST systems remain in their operational life. Respondents also do not dispute that they are the operators of the UST systems at Da Stor at Lillie's Corner (Facility). JX-1 at I.2. Therefore, Respondents are subject to the requirements enumerated in 40 C.F.R. § 280.20.

Respondents claim that because they did not design, construct, or install their new tank systems, the performance standards for new tank systems within 40 C.F.R. § 280.20 do not apply to their tank systems. Answer to Amended Complaint at ¶¶ 1.3, 1.10. Respondents contend that because the prior owner installed the tank systems at the Facility, Respondents are not liable. However, Respondents provide no support for this claim, nor is it supported by the text of 40 C.F.R. § 280.20. Whether Respondents designed, constructed, or installed their new UST systems is not relevant to whether the performance standards for new UST systems apply to their UST systems. *See* Transcript of Proceedings (Tr.) at 171:15-19. All owners and operators of new UST systems must meet the performance standards specified in 40 C.F.R. § 280.20.

Respondents claim that the performance standards for new tank systems only regulate owners and operators of a new tank system until the design, construction, and installation of the new tank system is complete. On the contrary, the first sentence of 40 C.F.R. § 280.20 states the performance standards apply “for as long as the UST system is used to store regulated

² “Operational life refers to the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under Subpart G.” 40 C.F.R. § 280.12.

substances.” Accepting Respondents’ contention that the performance standards do not apply to subsequent owners and operators would necessarily entail ignoring the explicit purpose of the standards to apply “as long as the UST system” is operational.

Moreover, the regulation requires the UST piping to be “properly designed, constructed, and protected from corrosion” 40 C.F.R. § 280.20(b). The term “protected” only has meaning if the requirement extends beyond the point of installation. Holding otherwise would lead to the absurd result that corrosion protection on piping is only required at the moment of installation. *See* Tr. at 36:21-37:14 (discussing the need for post-installation maintenance).

Furthermore, Respondents’ interpretation ignores the operational requirements within 40 C.F.R. § 280.20, which can only be satisfied *after* the new tank system has been placed into service. For example, all owners and operators of new UST systems are required to meet the spill and overflow prevention requirements in 40 C.F.R. § 280.20(c). An owner or operator can either install appropriate equipment, or control their methods for filling the UST to ensure they do not transfer more than 25 gallons at one time. 40 C.F.R. § 280.20(c)(2)(ii). This makes it clear that 40 C.F.R. § 280.20(c)(2)(ii) can regulate the activity of owners and operators of new UST systems during the operational life of the new UST system, and demonstrates that 40 C.F.R. § 280.20 can continue to have regulatory effect on owners and operators well after the design, construction, and installation of a new UST system is complete.

The requirements of 40 C.F.R. § 280.20 apply to operations of the UST system and are not merely demonstrative requirements for when a UST system is brought into service. *See* Tr. at 171:9-22. As an example of the ongoing requirements, owners and operators of steel UST systems are required to maintain records of the operation and maintenance of their corrosion protection systems. 40 C.F.R. § 280.31. Owners and operators of new UST systems with

cathodic protection must maintain those cathodic protection systems to demonstrate compliance with the cathodic protection standards in 40 C.F.R. § 280.20(a)-(b). 40 C.F.R. § 280.31(d). Similarly, owners or operators of any new UST system in temporary closure for more than 12 months must permanently close that UST system if it no longer meets the performance standards in 40 C.F.R. § 280.20. 40 C.F.R. § 280.70(c). Each of these examples, 40 C.F.R. §§ 280.20(c)(2)(ii), 280.31(d) and 280.70(c), establish that the performance standards in 40 C.F.R. § 280.20 remain in effect during the operational life of the UST system.

The plain language of 40 C.F.R. § 280.20, as well as the context of the performance standards within 40 C.F.R. part 280, demonstrates that 40 C.F.R. § 280.20 continues to apply after design, construction, and installation of a new UST system is complete. Therefore, Respondents' UST systems are subject to the performance standards within 40 C.F.R. § 280.20.

3. Respondents are included among “all owners and operators” for purposes of the performance standards for new UST systems

As owners and/or operators of new tank systems, Respondents are required to ensure their new tank systems meet the performance standards for new UST systems in 40 C.F.R. § 280.20. The first sentence of 40 C.F.R. § 280.20 states:

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, *all owners and operators* of new UST systems must meet the following requirements. (emphasis added)

The performance standards for new UST systems (1) are designed to prevent structural failure and corrosion throughout the entire operational life of the UST, and (2) apply to *all* owners and operators of new UST systems. Thus, in order to effectuate the plain meaning of 40 C.F.R. § 280.20, both original owners and all subsequent owners of new USTs must be bound by the performance standards. To hold otherwise would not only vitiate the purpose of the entire

section, but ignore the key phrase: “all owners and operators.” It is axiomatic that every part of a law or regulation is presumed to have some effect and should not be treated as meaningless unless absolutely necessary. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Adopting Respondents’ view would necessarily violate this canon of statutory interpretation.

Congress required EPA to “promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment.” RCRA § 9003(a), 42 U.S.C.

§ 6991b(a). All owners and operators of UST systems covered by RCRA Subtitle I are regulated under 40 C.F.R. part 280. Pursuant to Section 9003(b) of RCRA, 42 U.S.C. § 6991b(b), the UST regulations in 40 C.F.R. part 280 distinguish between new tank systems and existing tank systems, a distinction relevant only for determining to which set of performance standards the owners and operators must adhere, not whether owners and operators of UST systems are subject to regulation at all. *See* 40 C.F.R. §§ 280.20, 280.21.

The EAB’s decision in *In re Carroll Oil Company* reinforces the plain reading of 40 C.F.R. § 280.20. The EAB noted that the performance standards are “one of the most important features of the UST regulations.” *In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, 10 EAD 635, 638-39 (EAB 2002). The EAB went on to state that the “UST regulations require that owners and operators of USTs installed after December 22, 1988, (‘new UST systems’) adhere³ to certain ‘performance standards.’” *Id.* at 639. The EAB’s reading of 40 C.F.R. § 280.20 makes clear that owners and operators of new UST systems are bound to observance of the performance standards for new UST systems, not merely that a new UST

³ **Adhere:** “1: to give support or maintain loyalty, 2: to be consistent : ACCORD, 3: to hold fast or stick by or as if by gluing, suction, grasping, or fusing, 4: to bind oneself to observance <adhere to the rules>” Webster’s Ninth New Collegiate Dictionary 56 (1986).

system must meet the performance standards upon installation. Consistent with the EAB's decision in *In re Carroll Oil Company*, Respondents' new UST systems must meet the performance standards in 40 C.F.R. § 280.20.

Despite the express language of 40 C.F.R. § 280.20, Respondents assert that the performance standards for new UST systems are only enforceable against the owners and operators who originally designed, constructed, or installed the UST system, and do not apply to any subsequent owners or operators. Answer to Amended Complaint at ¶ 3.1. Respondents' assertion conflicts with provisions of 40 C.F.R. § 280.20 that are only applicable during the operational life of new UST systems, conflicts with the language used by the EAB in *In re Carroll Oil Company*, and conflicts with the plain meaning of "all owners and operators," as used in both 40 C.F.R. § 280.20 and RCRA § 9003(a). As previously discussed, the performance standards for new tank systems regulated under 40 C.F.R. § 280.20 continue to apply to all owners and operators throughout the operational life of the UST system, and are not limited to the original owners and operators during the period of design, construction, and installation.

For the reasons stated above, Respondents are within the group of "all owners and operators of new UST systems" and are subject to the requirements of 40 C.F.R. § 280.20.

4. *In re Norman C. Mayes* supports Complainant's position that the performance standards in 40 C.F.R. § 280.20 apply to Respondents' tank systems

Respondents rely upon *In re Norman C. Mayes*, 12 EAD 54 (2005), at 55, to support the assertion that 40 C.F.R. § 280.20 can only be enforced against the people who designed, constructed, or installed Respondents' tank systems, because any protective technologies required under 40 C.F.R. § 280.20 must be incorporated at the time of installation. Answer to Amended Complaint at ¶ 3.1. That reliance is misplaced. No violation of the performance standards for new UST systems specified in 40 C.F.R. § 280.20 was alleged in the *Mayes* case

because all of the USTs in *Mayes* were installed before the UST regulations came into effect. Furthermore, it is erroneous to state the EAB indicated the obligations of 40 C.F.R. § 280.20 were limited to the time of installation. The EAB’s statement on the obligations of owners at the time of installation⁴ is silent about the obligations of owners after installation.

In *In re Norman C. Mayes*, the Board found the notification and release detection requirements of the UST regulations were *continuing* obligations. *In re Norman C. Mayes*, at 73. The EAB concluded the notification requirement found in 40 C.F.R. § 280.22 is a continuing obligation because the requirement is “central to the entire UST program.” *Id.* at 70. The notification requirements and the performance standards for new UST systems are located in the same subpart of the UST regulations. 40 C.F.R. part 280, subpart B. The EAB’s decision in *In re Norman C. Mayes* is controlling; just as the notification requirements of 40 C.F.R. § 280.22 are continuing obligations, the tank performance standards of 40 C.F.R. § 280.20 are also continuing obligations.

5. Respondents are liable for violating 40 C.F.R. § 280.20

The regulations provide that “[a]ll owners and operators of new UST systems” with “piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory.” 40 C.F.R. § 280.20, 280.20(b).

⁴ In *Mayes*, the EAB stated the obligation at the time of installation as “[n]ew UST systems, whose installation commenced or will commence after December 22, 1988, must incorporate protective technologies at the time of installation.”

In the case at hand, Respondents are the owners and operators of new UST systems (JX-1 at I.3, I.5) which includes piping that routinely contains regulated substances (JX-1 at I.18) and is in contact with the ground (JX-1 at I.17). More specifically, the evidence shows that the siphon line connecting Tank #1 and Tank #2 is piping that routinely contains regulated substances and is in contact with the ground. Tr. at 54:19-55:9. As such, Respondents were required to properly protect the siphon line from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory. 40 C.F.R. § 280.20(b).

However, Respondents failed to ensure the metal piping of their UST system was properly protected from corrosion in accordance with an appropriately recognized code of practice. JX-1 at I.25, I.26; *see* Tr. at 131:1-8. Evidence presented at hearing demonstrated that Respondents did not provide cathodic protection for the siphon line until February 13, 2013, when Pacific Environmental Services Company added a sacrificial anode to the siphon line. JX-1 at I.27; *see* Tr. at 66:21-25, 130:16-131:8. Thus, Respondents were in violation of the requirements of 40 C.F.R. § 280.20(b) until February 13, 2013, when they added a “field-installed cathodic protection system[] . . . designed by a corrosion expert.” 40 C.F.R. § 280.20(b)(2)(ii). JX-1 at I.27.

Complainant has, therefore, met its burden of production and persuasion to show that Respondents are liable for failing to equip corrosion protection for steel piping that routinely contain regulated substances and is in contact with the ground, in violation of 40 C.F.R. § 280.20, from at least May 1, 2009, through February 13, 2013, as specified in Violation 2, Count 5.

6. Respondents' liability for violating 40 C.F.R. § 280.20 is irrespective of Complainant's knowledge of the Respondents' UST systems or Respondents' ignorance of their own UST systems

Respondents argue that they should not be held responsible for violating 40 C.F.R. § 280.20(b), because it took EPA several years to determine the siphon line manifolding two of the USTs was constructed of unprotected steel. Tr. at 75:1-77:19. Complainant does not deny that it lacked knowledge of the intricacies of Respondents' UST systems for several years. EPA's knowledge of Respondents' UST systems, however, is not a prerequisite to the applicability of RCRA or its implementing regulations. Tr. at 80:21-81:10. EPA administers the UST regulations for over half a million USTs throughout the country—knowledge of every one of these systems is an impossibility. 53 Fed. Reg. 37,082, 37,097 (Sept. 23, 1988). Indeed, Respondents' knowledge of their own system is not a prerequisite to the applicability of RCRA. Reading into the regulations a knowledge element would incent current and potential owners and operators of UST systems to remain ignorant of their UST systems in an effort to shield themselves from future liability. This is contrary to Congress's intent in passing Subtitle I of RCRA and to EPA's intent in promulgating the UST regulations. *See In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-2, 10 EAD 635, 638-39 (EAB 2002) (explaining that the UST regulations are intended to detect, prevent, and clean up releases from underground storage tanks).

Respondents' counsel argued at hearing that the regulations did not explicitly require Respondents to determine if the siphon line was comprised of bare steel. Tr. at 87:18-24; 211:6-25. Respondents' argument can only be interpreted in two ways: (1) ignorance of the law and of one's own UST system is an affirmative defense to liability or (2) Complainant should have allowed the siphon line to remain unprotected until a leak formed and a release triggering the

requirements for release reporting and cleanup in 40 C.F.R. part 280, subparts E-F occurred. Both arguments are untenable. The simple facts are that the steel siphon line routinely contained a regulated substance, was buried in contact with the ground, and lacked cathodic protection, from the start of Respondents' tenure as owners and/or operators of the USTs at the Facility until February 13, 2013.

Respondents' intimated at hearing that because EPA did not notify Respondents of the need to protect the siphon line from corrosion, Respondents' should not be held liable for failing to do so. Tr. at 80:21-81:14. Respondents' argument might have merit if EPA made ad hoc UST requirements for each individual facility. However, EPA promulgated regulations applicable to all UST systems that explicitly require all piping that routinely contains a regulated substance and is in contact with the ground be protected from corrosion. 40 C.F.R. §§ 280.20(b), 280.21(c). Thus, in promulgating the regulations, EPA has informed not only Respondents, but all owners and operators of UST systems, of the requirements for operating USTs.

7. Respondents are liable for violating 40 C.F.R. § 280.31

The UST regulations provide that “[a]ll owners and operators of new UST systems with corrosion protection must” ensure “[a]ll corrosion protection systems [are] operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.” 40 C.F.R. §§ 280.31, 280.31(a).

The regulations do not explicitly define the term “corrosion protection system.”

Charlotte Boulind-Yeung, an Environmental Protection Specialist with 15 years of experience in UST regulatory compliance, provided the following definition during colloquy with the Court:

Judge Coughlin: “[B]ased on your practical experience, what does that mean, corrosion protection system?”

Ms. Boulind-Yeung: “It’s a system that has been installed with the underground storage tanks to prevent corrosion of specific components of that [UST] system.”

Judge Coughlin: “What does the system include? What comprises the system?”

Ms. Boulind-Yeung: “The tanks and the piping that are underground.”

Based on the definition proffered by Ms. Boulind-Yeung, the sole corrosion protection system on Respondents’ steel UST systems was comprised of the three components of sti-P3[®] tanks: (1) dielectric coating on the tanks, (2) anodes on the tanks, and (3) isolation bushings to prevent electrical interference from the turbine.⁵ Tr. at 37:15-38:8; CX-12, CX-13; JX-1 at I.14, I.15. However, as Ms. Boulind-Yeung testified, Respondents’ corrosion protection system did not protect the siphon line from corrosion. Tr. at 54:19-55:9. Therefore, Respondents’ corrosion protection system was not sufficient to continuously prevent corrosion of the metal components that routinely contain gasoline and were in contact with the ground. Tr. at 38:9-17; 176:10-178:1.

Prior to February 13, 2013, Respondents failed to operate and maintain their corrosion protection systems to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground. Respondents came into compliance with 40 C.F.R. § 280.31 on February 13, 2013, when Respondents retrofitted the corrosion protection system for their steel UST systems by installing a sacrificial anode to provide corrosion protection for the siphon line. Answer to Amended Complaint at ¶ 1.13; CX-13; JX-1 at I.27; *see* Tr. at 138:21-139:1, 163:2-5.

⁵ Sti-P3[®] refers to Steel Tank Institute “Specification for STI-P3 System of External Corrosion Protection of Underground Storage Tanks,” at 40 C.F.R. § 280.20(a)(2)(iv)(A). See also Tr. at 37:19-38:8.

Respondents are liable for failing to properly operate and maintain corrosion protection for steel piping that routinely contains regulated substances and is in contact with the ground, in violation of 40 C.F.R. § 280.31, from at least May 1, 2009, through February 13, 2013, as specified in Violation 2, Count 6.

D. Respondents admit liability for Counts 7-9

Counts 7-9 allege that Respondents violated 40 C.F.R. § 280.93 when they failed to demonstrate financial responsibility for their UST systems. Amended Complaint at ¶ 3.29. As required by the UST regulations, “[o]wners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks.”

40 C.F.R. § 280.93(a).

Respondents admit and stipulate they are owners and/or operators of three petroleum USTs. Answer to Amended Complaint at ¶ 1.1, 1.2; JX-1 at I.3-I.8; Tr. at 183:8-13. Furthermore, Respondents admit and stipulate they failed to demonstrate financial responsibility for any of their petroleum USTs, in violation of 40 C.F.R. § 280.93 from at least May 1, 2009, through April 22, 2010; April 24, 2011, through April 22, 2012; April 24, 2013, through May 1, 2013; and May 2, 2014, through January 13, 2015. Answer to Amended Complaint at ¶ 3.29, JX-1 at I.11.

III. The Proposed Penalty of \$66,176 Should be Assessed

EPA may assess a civil penalty against any owner or operator of a UST who fails to comply with, *inter alia*, the regulations codified at 40 C.F.R. part 280. RCRA § 9006(d)(2),

42 U.S.C. § 6991e(d)(2). RCRA § 9006(e) sets forth the factors which may be taken into account in determining the terms of a civil penalty for violations of the underground storage tank regulations. RCRA § 9006(e) states: “Both of the following may be taken into account in determining the terms of a civil penalty under [RCRA § 9006(d)]: (1) The compliance history of the owner or operator in accordance with this subchapter . . . (2) any other factor the Administrator considers appropriate.”

EPA has incorporated these considerations into Office of Solid Waste and Emergency Response (OSWER) Directive 9610.12 (Directive). CX-36. Complainant used this Directive in determining the appropriate penalty for each of the violations alleged in this case. Tr. at 133:9-17. The goals of the Directive are: (1) encourage timely resolution of environmental problems; (2) support fair and equitable treatment of the regulated community; and (3) deter potential violators from future violations. *Id.* at 10 of 87; Tr. at 134:2-22. Complainant proposed a civil penalty of \$64,823 in the Amended Complaint, for Respondents’ violations accrued through December 2, 2014. At hearing, EPA proposed a civil penalty of \$66,176,⁶ for violations accrued through January 13, 2015, when Respondents returned to compliance. Complainant’s penalty calculation is set forth in CX-44. As explained in CX-44, Complainant calculated the proposed penalty after applying the Directive. Complainant has met its burdens of production and persuasion with respect to the appropriateness of the penalty proposed at hearing.

⁶ Complainant calculated a penalty of \$64,823 in the First Amended Complaint because Respondents were still in violation for Counts 7-9 as of December 2, 2014. Complainant’s proposed penalty of \$66,176 is calculated through January 13, 2015, when Respondents came into compliance for Counts 7-9. *See*, JX-1 at I.13; CX-44.

A. Respondents have stipulated to the penalty amount for Counts 1 through 4

Respondents have stipulated that the appropriate penalty for Violation 1, Counts 1 through 4 is \$21,136. Complainant documented the rationale for arriving at this figure in CX-44.⁷

B. Complainant has met its burden of production and persuasion with respect to the penalty for Counts 5 and 6

The Directive achieves the three aforementioned goals by, first, removing any significant economic benefit that the violator may have gained from noncompliance and, second, charging an additional amount called the “gravity based component,” based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law. *Id.* at 10 of 87.

1. Economic Benefit

As detailed within the Directive, a violator can accrue an economic benefit from noncompliance in the form of avoided costs, which are periodic operational expenditures that should have been incurred but were not, or delayed costs, which are expenditures that have been deferred by the violation. CX-36 at 14 of 87. The Directive provides two methods for calculating the economic benefit derived from a violation: (1) the rule-of-thumb method and (2) the BEN computer model. CX-36 at 10 of 87; Tr. at 134:23-135:5. The rule-of-thumb method is comprised of equations within the Directive: one for avoided costs and one for delayed costs. CX-36 at 15-17 of 87; Tr. at 134:23-135:5. The Directive explains that the BEN Model should be used if the rule-of-thumb equation estimates an economic benefit of over \$10,000. CX-36 at 17 of 87; Tr. at 135:6-10.

⁷ Complainant calculated a \$21,138 penalty in CX-44, but proposed a \$21,136 penalty for Violation 1. The difference is the result of rounding after dividing the calculated penalty for Violation 1 into four equal counts.

In this instance, failure to install corrosion protection is a delayed cost. Tr. at 135:2-4. The Directive provides a rule-of-thumb equation for calculating the delayed cost. CX-26 at 20 of 87. Complainant used this equation to calculate the economic benefit Respondents derived from failing to install corrosion protection on the siphon line. CX-44 at 4 of 6, Tr. at 140:14-17.

Using the equation, Complainant determined that the economic benefit Respondents derived when it delayed incurring the cost necessary to protect the siphon line was \$3,921. Complainant determined this figure by inputting the cost of coming into compliance, known as the delayed expenditure, an interest rate, and the number of days of non-compliance into the equation. CX-36 at 20 of 87. The delayed expenditure in this case was the cost of installing and testing a sacrificial anode on the siphon line. CX-11; Tr. at 137:19-139:3. The delayed expenditure totaled \$15,939. Complainant used the interest rate of 6.5 percent based on the guidance in the Directive. Tr. at 140:18-24. EPA determines the number of days of non-compliance by calculating the number of days in which Respondents were out of compliance with the regulation, limited by the general five-year federal statute of limitations. 18 U.S.C. § 3282. For Counts 5 and 6, the calculated number of days of non-compliance began on May 1, 2009, five years prior to the date the Complaint was filed, and ended on February 13, 2013, the date Respondents came into compliance with the corrosion protection requirements. CX-36 at 4 of 6; Tr. at 141:1-19. The number of days totaled 1,385. Therefore, the Directive indicates that assessing an economic benefit component of \$3,921 within the penalty for Violation 2, Counts 5 and 6 is appropriate.

2. Gravity-Based Component

Under the Directive, a gravity-based component for each violation is determined using an equation comprised of the matrix value, violator-specific adjustments, environmental sensitivity

multiplier, and the days of noncompliance multiplier. CX-36 at 22 of 87; Tr. at 141:24-142:8. EPA assigns values to those components based on the Directive and then multiplies those values together to arrive at the gravity-based component for the violation. CX-36 at 22 of 87; Tr. at 142:12-14.

The matrix value is comprised of two criteria: (1) the actual or potential for harm and (2) the extent of deviation from the statutory or regulatory requirement. CX-36 at 22 of 87; Tr. at 142:15-21. The actual or potential for harm criteria assess the likelihood that the violation could or did result in harm to human health or the environment or has or had an adverse effect on the regulatory program. CX-36 at 23 of 87; Tr. at 143:13-18. Different violations present different likelihoods of harm to human health and the environment. Tr. at 143:19-21. The Directive allows EPA to account for those different likelihoods by assigning one of three levels for the actual or potential for harm criteria: major, moderate, or minor. Tr. at 143:19-23.

The extent of deviation criteria assess the extent to which the violation deviates from the statutory or regulatory requirements. CX-36 at 22 of 87; Tr. at 142:22-25. There are varying levels in which a person can deviate from the statute and regulations. Tr. at 143:1-3. The extent of deviation criteria accounts for this variance by allowing EPA to assign one of three levels for the extent of deviation: major, moderate, or minor. CX-36 at 22 of 87; Tr. at 143:7-12.

EPA uses the narrative guidance within the Directive and the matrix in Appendix A of the Directive to select the appropriate level for both criteria. Failure to provide corrosion protection on metal piping that is in contact with the ground and routinely contains gasoline creates a risk that the piping will degrade and release gasoline into soil and groundwater. Tr. at 147:8-16. Respondents also completely deviated from the requirement to provide corrosion protection to the siphon line. Tr. at 147:3-7. Accordingly, for Count 5, failure to provide any

cathodic protection for metal piping, EPA assigned a moderate level for potential for harm and a major level for extent of deviation. CX-44 at 4 of 6; Tr. at 146:19-147:2. These levels correspond to a matrix value of \$1,060 in the penalty matrix. CX-36 at 26; Tr. at 149:16-24.

For Count 6, failure to maintain corrosion protection for metal piping, Complainant also considered the potential for harm and the extent of deviation. Failing to maintain corrosion protection includes a failure to test metal components and the corrosion protection system.

Without testing there is a risk, as here, that the corrosion protection system is not adequately protecting all metal components of the UST system. Tr. at 148:11-19. This risk can lead to the piping developing holes and allow regulated substances to contaminate soils and underground sources of drinking water. *Id.* Respondents did not operate and maintain a corrosion protection system to continuously provide corrosion protection to the siphon line. Tr. at 148:7-12.

Complainant assigned a major level for potential for harm and major level for extent of deviation. CX-44 at 4 of 6; Tr. at 148:1-6. These selections were in accordance with Appendix A. *Id.* These levels correspond to a matrix value of \$2,130 in the penalty matrix. CX-36 at 26; Tr. at 150:3-7.

The Directive provides four violator specific adjustments to adjust the matrix value: (1) degree of cooperation or noncooperation; (2) degree of willfulness or negligence; (3) history of noncompliance; and (4) other unique factors. CX-36 at 27; Tr. at 151:1-7. For the reasons explained below, Complainant adjusted both Counts 5 and 6 upward by 20%, 10% for degree of willfulness or negligence and 10% for a history of non-compliance. CX-36 at 4 of 6; Tr. at 155:13-156:2.

The degree of willfulness or negligence factor takes into account the culpability of the violator. CX-36 at 28 of 87; Tr. at 151:4-8. The Directive provides several factors for EPA to

consider in determining the appropriate percentage to increase the penalty for willfulness or negligence. These factors include whether the violator knew of the legal requirement that was violated, how much control the violator had over the events constituting the violation, and whether the violator made any good faith efforts to comply. CX-36 at 28 of 87; Tr. at 152:12-24. In this case, Respondents was repeatedly made aware of the requirement to provide and maintain corrosion protection on bare metal piping. Tr. at 159:9-160:1; CX-24; CX-27; CX-29 – CX-33. Respondents also had complete, exclusive control over the maintenance of the USTs at the Facility. Despite this knowledge and control, Respondents postponed coming into compliance for several years. CX-11; Tr. at 137:19-138:6; 162:16-163:5.

In particular, Respondents rebuffed Complainant's attempts to assist Respondents in complying with the cathodic protection requirements. For example, on June 12, 2008, Charlotte Boulind-Yeung, inspector for Complainant, contacted Respondents to remind Respondents of the need to inspect the siphon line between Tank #1 and Tank #2 for adequate cathodic protection. CX-21; Tr. at 42:19-44:18. Ms. Boulind-Yeung offered compliance assistance to Respondents, which was not accepted. Complainant again contacted Respondents on August 14, 2009, October 14, and October 20, 2009, both via telephone and email. CX-23 – CX-26, and CX-28. On August 14, 2009, and October 20, 2009, Complainant again informed Respondents of the need to assess the cathodic protection for steel piping manifolding Tank #1 and Tank #2. *Id.* On January 4, 2010, Complainant reminded Respondents of the need to assess cathodic protection for the steel piping manifolding Tank #1 and Tank #2. CX-27. Complainant again reminded Respondents of the requirements on April 9, April 12, April 26, and May 18, 2010. CX-30 – CX-33. Respondents did not assess the steel siphon line until January 30, 2013, and did not cathodically protect the siphon line until February 13, 2013. Therefore, Respondents' degree of

willfulness or negligence in the violations justifies a 10% upward adjustment to the gravity-based component.

The history of noncompliance factor adjusts the matrix value to account for the violator's history of noncompliance with the statute and regulations. CX-36 at 29 of 87. The Directive provides several factors for EPA to consider in determining the appropriate percentage to increase the penalty for a history of noncompliance. These include the number of previous violations, the seriousness of the previous violations, and the similarity of the previous violations. CX-36 at 29 of 87.

Complainant inspected Respondents' Facility on September 13, 2006, and noted several violations of the UST regulations. CX-3. The violations included failure to maintain financial assurance, 40 C.F.R. § 280.93; failure to monitor tanks for releases every 30 days, 40 C.F.R. § 280.41(a); failure to perform a LTT, 40 C.F.R. § 280.41(b)(1)(ii); and failure to test the ALLDs, 40 C.F.R. § 280.44(a). Complainant issued an Expedited Enforcement Compliance Order and Settlement Agreement (field citation) to Respondents on September 21, 2006. CX-7; Tr. at 156:8-13. The field citation noted violations of 40 C.F.R. § 280.44(a) for failure to perform line leak detection; 40 C.F.R. § 280.45 for failure to maintain release detection monitoring; and 40 C.F.R. § 280.111 for failure to provide a method of financial responsibility. CX-7; Tr. at 156:16-22. The field citation required Respondents to pay a monetary penalty and demonstrate they were in compliance within 30 days.

Respondents failed to demonstrate compliance with all the violations noted on the field citation within 30 days of signing. In lieu of initiating a formal enforcement action against Respondents, on May 8, 2007, Complainant mailed a letter to Respondents reminding Respondents of the obligation to correct the violations. CX-15. The May 8, 2007, letter allowed

Respondents until July 31, 2007, to correct the continuing violations. Despite the extension of time to come into compliance, Respondents again failed to demonstrate compliance by July 31, 2007. Complainant subsequently mailed Respondents another letter on August 13, 2007, reiterating the need to come into compliance immediately. CX-16. Respondents failed to respond to the August 13, 2007, letter. As demonstrated by the field citation issued on September 21, 2006, and the failure to bring those violations into compliance, Respondents' prior history of noncompliance with the statute and regulations justifies a 10% upward adjustment to the gravity-based component.

The Directive also provides for an adjustment to the matrix value using the Environmental Sensitivity Multiplier. CX-36 at 30 of 87. The purpose of the environmental sensitivity multiplier is to account for the potential site-specific impacts that could be caused by the violation. *Id.* EPA can multiply the matrix value by 2, 1.5, or 1 depending on the sensitivity of the applicable environment. Katherine Griffith testified that the Facility was an area of environmental sensitivity because of a drinking water well on site. Tr. at 163:20-164:21. Despite this sensitivity, Complainant assigned a value of 1 for the Environmental Sensitivity Multiplier. Tr. at 164:22-25.

Finally, the Directive provides for an adjustment to account for the number of days of noncompliance. CX-36 at 31 of 87; Tr. at 165:19-166:1. Respondents failed to install, operate, or maintain corrosion protection on the siphon line from at least May 1, 2009, until Respondents installed a sacrificial anode for the siphon line on February 13, 2013. CX-11; Tr. at 137:19-139:3. The number of days of noncompliance totals 1,385 which equates to a multiplier of 5.5. CX-36 at 31 of 87; Tr. at 166:7-16; CX-44 at 4 of 6.

Multiplying the elements together for Count 5, failure to install corrosion protection, yields a penalty of \$6,996. Tr. at 167:1-5; CX-44 at 4 of 6. Multiplying the elements together for Count 6, failure to operate and maintain corrosion protection, yields a penalty of \$14,058. Tr. at 167:6-9; CX-44 at 4 of 6. Therefore, the appropriate gravity-based component is \$21,054. Adding the economic benefit component of \$3,931 yields an appropriate penalty for Violation 2, Counts 5 and 6 of \$24,985.

C. Respondents have stipulated to the penalty amount for Counts 7 through 9

Respondents have stipulated that an appropriate penalty for Violation 3, Counts 7 through 9 is \$20,055. Complainant documented the rationale for arriving at this figure in CX-44.

IV. The Proposed Compliance Order Should be Imposed

EPA may issue Compliance Orders to any person who is in violation of, *inter alia*, the regulations codified at 40 C.F.R. part 280. RCRA § 9006(a), 42 U.S.C. § 699le(a). As a result of Respondents' noncompliance with the piping release detection and financial responsibility requirements, Complainant proposed a Compliance Order requiring Respondents to document continued compliance with those requirements. Complaint at ¶ 4.1; Amended Complaint at ¶ 4.1. Respondents does not dispute imposition of the compliance tasks proposed by Complainant. Answer to Amended Complaint at ¶ 2.1.

Complainant respectfully requests a Compliance Order requiring Respondents to submit copies of the next two sets of annual LTTs and ALLD tests to EPA, each within 30 calendar days of completion of each test. Complainant also requests a Compliance Order requiring Respondents to submit copies of the current financial assurance used to satisfy 40 C.F.R.

part 280, subpart H, for each tank at the Facility within 30 days of the issuance of the order,⁸ and copies of the next method of financial assurance used to satisfy 40 C.F.R. part 280, subpart H at the Facility within 30 days of the expiration of the current method of financial assurance.

As discussed above and at hearing, Respondents failed to conduct required release detection for underground piping that regularly conveys regulated substances under pressure, in violation of 40 C.F.R. §§ 280.41(b)(1)(i)-(ii) and 280.44(a)-(b) over a period of at least 896 days, 46 days of which occurred after the Complaint was filed. Tr. at 16:19-24. Respondents also failed to demonstrate financial responsibility for any of their three USTs, in violation of 40 C.F.R. § 280.93, over a period of at least 987 days, 257 days of which occurred after the Complaint was filed. Tr. at 17:17-20.

Complainant believes a Compliance Order is warranted and appropriate under the facts and circumstances of this case. Respondents did not dispute the proposed Compliance Order. Answer to Amended Complaint at ¶ 2.1. Complainant makes this recommendation in response to violations of piping release detection and financial responsibility requirements, and notes that Respondents continued to violate those requirements after the Complaint was issued.

V. Conclusion

For the reasons set forth above, Complainant respectfully requests that the Presiding Officer issue an Initial Decision finding the Respondents liable for each violation alleged in the Amended Complaint and imposing a civil penalty of \$66,176 for Respondents' violations of RCRA. Complainant also respectfully requests that the Presiding Officer include a Compliance

⁸ Complainant has a copy of Respondents' current insurance policy for underground storage tank pollution liability. CX-43. As a result, it would not be necessary to require a copy of the method currently used to satisfy 40 C.F.R. part 280, subpart H, at the Facility if a Compliance Order is issued before January 14, 2016.

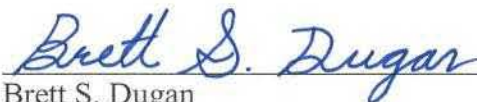
Order, as described above, requiring Respondents to document their compliance with piping release detection and financial responsibility requirements,

Respectfully submitted this 4th day of June, 2015.



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