UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Aylin, Inc.; Rt. 58 Food Mart, Inc.; Franklin Eagle Mart Corp.; Adnan Kiriscioglu; 5703 Holland Road Realty Corp.; 8917 South Quay Road Realty Corp.; and, 1397 Carrsville Highway Realty Corp.,	)	**Docket No. RCRA-0302-13-0039**
	)	
	)	
	)	**Proceeding under Section 9006 of the Resource Conservation an and Recovery Act, as amended, 42 U.S.C. Section 6991e**
	)	
	)	
Respondents.	)	

RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY AND MEMORANDUM OF LAW

I. RELIEF REQUESTED

The Director of the Land and Chemicals Division of the United States Environmental Protection Agency – Region III's (the "Complainant") Motion for Partial Accelerated Decision on Liability and Memorandum of Law ("Motion") may only be granted upon a showing of evidence "so strong and persuasive that no reasonable [finder of fact] is free to disregard it." *In re Consumers Scrap Recycling, Inc.,* CAA Appeal No. 02-06, 2004 EPA LEXIS 1 at*40 (EAB 2004). As explained herein by Respondents Aylin, Inc.; Rt. 58 Food Mart, Inc.; Franklin Eagle Mart Corp.; Adnan Kiriscioglu; 5703 Holland Road Realty Corp.; 8917 South Quay Road Realty Corp.; and, 1397 Carrsville Highway Realty (the "Respondents"), the Complainant fails to meet

this standard articulated by the Environmental Appeals Board ("EAB"), and its Motion must be denied.

As discussed more fully herein, Complainant has failed to make its required, threshold showing to be entitled to accelerated decision as to liability. Many of Complainant's facts are genuinely disputed by the Respondents or are immaterial to the allegations in the First Amended Complaint and the instant Motion.[1] Summary judgment – or here, partial accelerated decision on liability -- is a drastic remedy, available only where there are no material facts genuinely in dispute and should not be used to short-circuit litigation by deciding disputed facts without permitting parties to reach a trial or a hearing on the merits.

II. PROCEDURAL MATTERS

In addition to the Complainant's Motion, there are three other motions currently pending before the Tribunal: (1) Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement Their Prehearing Exchanges to Add a Witness; (2) Complainant's Second Supplemental Exchange; and, (3) Complainant's Second Motion to Compel Discovery and Impose Sanctions.

Complainant attaches to its Motion sworn statements from its inspector, Andrew Ma, and from the Virginia Department of Environmental Quality's ("VADEQ") Leslie Beckwith. Respondents, through the above-referenced motion, seek to depose Mr. Ma and Ms. Beckwith. Respondents will not restate in this pleading their arguments in support of their motion.

[1] In contravention of the Presiding Officer's Prehearing Order, entered on November 5, 2013, counsel for the Complainant did not consult with counsel for the Respondents concerning the filing of its Motion for Partial Accelerated Decision on Liability and Memorandum of Law. Respondents do not consent to the relief requested in the Motion.

However, the Respondents believe their pending motion is not mooted by Complainant's Motion.

III. LEGAL STANDARD

A. Motions for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Section 22.20(a) of the Rules of Practice authorizes the presiding officer to:

> [R]ender an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [s]he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Techs., Inc.,* 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002). Pursuant to Rule 56(a) of the FRCP, a tribunal "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Consequently, federal court rulings on motions for summary judgment provide guidance for adjudicating motions for accelerated decision. *See*, *e.g., Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom*., *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir.1994), *cert. denied*, 513 U.S. 1148 (1995).

In assessing materiality for summary judgment purposes, the U.S. Supreme Court has held that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1985). Accordingly, a factual dispute is genuine if a finder of fact could reasonably find in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 252. The Supreme Court has held that the party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. *Adickes v. S. H. Kress & Co.,* 398 U.S.144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party.

Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). In support of, or in opposition to, a motion for summary judgment, a party must cite to particular parts of materials in the record, such as documents, affidavits or declarations, and admissions, or show that the materials cited do not establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56 (c) (1)

The Supreme Court has found that, once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson,* 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 290 (1968)). Thus, a party opposing a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *See*

Bickford, Inc., EPA Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, *8 (ALJ, Nov. 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). Of course, if the moving party fails to meet its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

In the context of proceedings under the Rules of Practice, "a party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing." *In re Harpoon*, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52 (August 4, 2003) citing *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, at 22-23,2002 EPA ALJ LEXIS 57 (September 9, 2002).

The evidentiary standard of proof in this case, as well as all other cases governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether a genuine factual dispute exists, the presiding officer must consider -- as the finder of fact -- whether he or she could reasonably find for the non-moving party under the "preponderance of the evidence" standard. Accordingly, a party moving for accelerated decision must establish by citing to particular parts of materials in the record that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the presence of a genuine issue of material fact by proffering

probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

A motion for summary judgment puts a party – here, the Complainant -- to its proof as to those claims on which it bears the burdens of production and persuasion. For the complainant to prevail on its motion for accelerated decision where there is an affirmative defense, as to which respondent ultimately bears such burdens, the complainant initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corp.*, 275 F.3d at1103. If the complainant makes this showing, then respondent as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying "specific facts" from which a reasonable finder could find in its favor by a preponderance of the evidence. *Id.*

While the Tribunal may look to the record in deciding a motion for accelerated decision, the burden of coming forward with the evidence in support of their respective positions rests squarely upon the litigants. *See Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (noting that judges "are not archaeologists").

Importantly, even if the finder of fact believes that summary judgment – or here, partial accelerated decision as to liability -- is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial or the hearing. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

B. Motions to Strike or Failure to State a Claim

Section 22.20(a) of the Rules of Practice state:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he

> requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions to dismiss under § 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the FRCP, and case law interpreting that rule provides guidance in addressing a respondent's motion. *See Asbestos Specialists, Inc.,* 4 E.A.D. 819, 827 (EAB 1993). Under the federal rules, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

To survive a motion to dismiss, the factual allegations in a complaint must be enough to "state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts that would entitle it to relief). A claim has "facial plausibility" when the factual allegations "allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The "plausibility standard" requires the complaint to present "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 557). The allegations must cross "the line between possibility and plausibility of 'entitlement to relief.'" *Id*.

In determining whether a complaint fails to state a claim, only the facts alleged in the complaint are considered, along with attached documents or matters as to which judicial notice may be taken. *Tellabs, Inc. v. Makar Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). However, the allegations in the complaint are to be taken as true, and all inferences are drawn in favor of the plaintiff. *Liphatech Inc.*, Docket No. FIFRA-05-2010-0016, 2010 EPA ALJ LEXIS 27, at

*18 (ALJ, Dec. 29, 2010). *See also Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

IV. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Overview

Congress responded in 1984 to the increasing threat to groundwater posed from leaking underground storage tanks ("USTs") by adding Subtitle I to the Solid Waste Disposal Act ("SWDA"). Pub. L. No. 98-616, 98 Stat. 3221 (1984). The SWDA is commonly referred to as the "Resource Conservation and Recovery Act" or "RCRA." RCRA Subtitle I mandated that EPA develop -- to a "protect human health and the environment" standard -- a comprehensive regulatory program for USTs storing petroleum or certain hazardous substances. 42 U.S.C. §§6991-6991(i).

In 1986, Congress amended RCRA Subtitle I with the creation of the "Leaking Underground Storage Tank Trust Fund" to help implement the UST cleanup program and pay for cleanups at sites where the UST owner or operator is unknown, unwilling, or unable to respond, or which require emergency action. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Importantly, Congress intended for the Environmental Protection Agency's ("EPA") UST program to be implemented at the state level. RCRA Subtitle I authorizes states, including the Commonwealth of Virginia, to adopt and implement regulatory programs "no less stringent" than the federal UST program. 42 U.S.C. §6991c. According to the statute, the federal UST program's regulatory framework has three basic segments: (1) technical standards for UST

system design, installation, operation, upgrades, release detection and closure; (2) reporting and corrective action requirements for UST releases; and, (3) financial responsibility requirements. Congress intentionally contrasted the federal UST program under RCRA Subtitle I with RCRA Subtitle C compliance for hazardous wastes (42 U.S.C. §§6901 et seq.) and the draconian liability standard under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§9601 et seq.).

In 2005, the Energy Policy Act further amended RCRA Subtitle I, requiring states receiving Subtitle I money from EPA to meet certain requirements regarding UST operator training; enforcement inspections; delivery prohibition; secondary containment; financial responsibility for UST manufacturers and installers; public records; and state compliance reports on government-owned USTs. Pub. L. No. 109-58, 119 Stat. 594 (2005).

B. Regulatory Overview

In 1988, EPA promulgated its UST regulations at 40 C.F.R. Part 280, setting forth minimum standards for *new* UST systems, and requiring "owners" and "operators" of *existing* UST systems to upgrade, replace, or close them by December 22, 1998. 53 Fed. Reg. 37082 (1988). Owners and operators who chose to upgrade or replace their existing UST systems during the ten-year phase-in period had to ensure these systems included spill and overfill prevention devices and steel tanks, piping and certain components were protected from corrosion. *Id.*

In addition, after the effective date of the 1988 regulations, owners and operators were required to report and clean up releases from their USTs. *Id.* Owners and operators also were required by EPA's 1988 regulations to monitor their UST systems for releases using release

detection (phased in through 1993, depending on when their UST systems were installed). *Id.* Further, UST owners and operators were required to demonstrate financial responsibility (phased in through 1998) to ensure they have the financial resources to pay for cleaning up releases. *Id.*

In 1988, EPA also promulgated regulations for state program approval ("SPA"). 40 C.F.R. Part 281. Because RCRA Subtitle I envisions the states as the primary implementers of the UST program, EPA established a process where state programs could operate in lieu of the federal program, if states met certain requirements and obtained SPA from EPA. The state program approval regulations describe the minimum requirements states must meet so their UST programs can be approved and operate in lieu of the federal program. *Id.*

In 2005, the Energy Policy Act further amended RCRA Subtitle I, requiring states receiving Subtitle I money from EPA to meet certain requirements. EPA subsequently developed grant guidelines for states regarding operator training; inspections; delivery prohibition; secondary containment; financial responsibility for manufacturers and installers; public records; and, state compliance reports on government-owned USTs.

Last July, EPA promulgated the first significant changes to the federal UST regulations since 1988. 80 Fed. Reg. 41566 (July 15, 2015). The revisions were intended by EPA to strengthen the 1988 regulations by increased emphasis on the proper operation and maintenance of UST systems. In many respects, last year's federal UST regulation changes parallel certain key portions of the Energy Policy Act of 2005, including: adding secondary containment requirements for new and replaced tanks and piping; adding operator training requirements; adding periodic operation and maintenance requirements for UST systems; adding requirements to ensure UST system compatibility before storing certain biofuel blends; removing past

deferrals for emergency generator tanks, airport hydrant systems, and field-constructed tanks; and, updating industry and consensus codes of practice. CX-144.

In its 2015 UST regulatory changes, EPA also updated the SPA requirements in 40 CFR Part 281. As a currently SPA-approved state, the Commonwealth of Virginia has three years (October 2018) to reapply to EPA in order to retain its SPA status. Importantly, UST owners and operators in Virginia must continue to follow their state requirements until the Virginia Department of Environmental Quality ("VADEQ") changes its requirements or until Virginia's SPA status changes. http://www.epa.gov/ust/revising-underground-storage-tank-regulations-revisions-existing-requirements-and-new.

C. Virginia's UST Program

VADEQ implements the federal UST program under Article 9 of State Water Control Law. Article 9 authorizes VADEQ to receive UST notifications, receive federal grant funds, develop regulations, conduct cleanups, and provide overall supervision of UST activities in the Commonwealth. VADEQ's technical requirements for USTs – "Underground Storage Tanks: Technical Standards and Corrective Action Requirements" -- are set forth at 9 VAC §§ 25-580 *et seq*. VADEQ's financial responsibility requirements for USTs – "Virginia Petroleum Underground Storage Tanks Financial Responsibility Requirements Regulation" – are set forth at 9 VAC §§ 25-590 *et seq*. Virginia housing law Section 36-99.6 provides for local code officials to permit and inspect UST installations, upgrades, repairs, and closures in support of VADEQ's program. VADEQ's last amendments to its UST technical regulations became effective on September 15, 2010, and incorporate the federal Energy Policy Act of 2005 requirements of secondary containment, delivery prohibition, and operator training.

Under RCRA Subtitle I, UST owners and operators must demonstrate their ability to pay for cleanup and third party damages in the event of contamination, releases or spills from their UST systems. EPA established the financial assurance amount at $1 million per occurrence for owners with less than 100 USTs and $2 million per occurrence for owners with more than 100 USTs.

The Virginia Petroleum Storage Tank Fund ("Fund") was created by the Virginia Legislature, in part, to assist the Commonwealth's owners and operators in meeting the federal UST financial assurance requirements. Under VADEQ's regulations, UST owners and operators in the Commonwealth meet the overwhelming majority of their UST financial responsibility requirement through the EPA-approved Fund. They are responsible for demonstrating financial responsibility for only a *small* portion of the federally-mandated per occurrence requirement. The amount of financial responsibility not covered by the Fund is determined on a sliding scale by calculating the total annual gallons pumped through all of the VADEQ-regulated USTs owned and operated in Virginia. The amount of financial responsibility determined on the sliding scale is the amount – or deductible -- that must be paid by an UST owner or operator before reimbursement from the Fund is allowed. Importantly, this also is the amount of financial responsibility the UST owner or operator must demonstrate to operate its USTs legally in Virginia.

EPA gave SPA to VADEQ's UST program in 1998. 63 Fed. Reg. 51528 (1998). Since that time, the Commonwealth's UST program and regulations have operated in lieu of the federal program. Owners and operators in states, such as Virginia, that have an EPA-approved UST program do not have to deal with two sets of statutes and regulations that may be conflicting. EPA retains the ability under 40 C.F.R. Part 281 to take enforcement actions in states with SPA,

including Virginia. EPA, however, is required to enforce the approved state UST regulations, not the federal UST regulations. Where EPA finds a violation of an approved state UST regulation, it becomes a violation of RCRA Subtitle I for purposes of assessing civil penalties.

This interplay of EPA enforcing VADEQ'S UST regulations is important in this case before the Tribunal. The Complainant is alleging violations of VADEQ's UST regulations by the Respondents. However, for the RCRA Subtitle I program to operate as intended by Congress, EPA should take into account VADEQ's interpretations and guidance for its UST technical and financial responsibility regulations in exercising is prosecutorial discretion. UST owners and operators in Virginia, including the Respondents, are closer to the VADEQ on a day-to-day basis and are required to comply with the EPA-approved VADEQ's UST regulations and priorities. They should not be subject to possibly shifting EPA interpretations of VADEQ's UST regulations. If the state implementation of the federal UST program is to operate as intended by Congress, then EPA needs to give deference to state interpretations of and guidance to the regulated community on their own UST regulations.

V. THE FACILITIES AND THE RESPONDENTS

The three retail gasoline outlets (the "Facilities") subject to this proceeding are:

(1) Pure Gas Station, located at 5703 Holland Road, Suffolk, Virginia 23437 (the "Pure Facility"). The real estate at the Pure Facility is owned by 5703 Holland Road Realty Corp. The Pure Facility, including the UST systems, is operated by Aylin, Inc. Respondent Adnan Kiriscioglu is the sole shareholder of both 5703 Holland Road Realty Corp. and Aylin, Inc.

(2) Rt. 58 Food Mart, located at 8917 South Quay Road, Suffolk, Virginia 23437 (the "Rt. 58 Facility"). The real estate at the Rt. 58 Facility is owned by 8917 S. Quay Road Realty Corp. The Rt. 58 Facility, including the UST systems, is operated by Rt. 58 Food Mart, Inc. Respondent Adnan Kiriscioglu is the sole shareholder of both 8917 S. Quay Road Realty Corp. and Rt. 58 Food Mart, Inc.

(3) Franklin Eagle Mart, located at 1397 Carrsville Highway, Franklin, Virginia 23851 (the "Franklin Facility). The real estate at the Franklin Facility is owned by 1397 Carrsville Highway Realty Corp. The Franklin Facility, including the UST systems, is operated by Franklin Eagle Mart Corp. Respondent Adnan Kiriscioglu is the sole shareholder of both 1397 Carrsville Highway Realty Corp. and Franklin Eagle Mart Corp.

A map at CX-43; EPA 1116 shows the location of the Facilities in the Tidewater area of Southern Virginia. Photographs of the Facilities are at CX-12, EPA 0080; CX-21, EPA 260; and, CX-29, EPA 310, respectively. At the time of Complainant's inspection of the Facilities in March 2010, the Pure Facility, Rt. 58 Facility and Franklin Facility were not dispensing motor fuels (gasoline and diesel fuel) to the public. The Facilities have been closed and the UST systems out of operation since 2013.[2]

The record in this proceeding shows that Respondent Adnan Kiriscioglu is the corporate officer and/or sole shareholder of 23 retail gasoline outlets.[3] In addition to the three Facilities in Southeast Virginia, he owns one location in Pennsylvania, and the remaining 18 retail outlets are roughly evenly divided between New Jersey and New York. Mr. Kiriscioglu resides in New York State. A small staff of three, including Mr. Kiriscioglu's daughter, Ezgi Kiriscioglu, assists in the day-to-day operations of the 23 retail gasoline outlets from a back office at one of the stations located in North Bergen, New Jersey.

Mr. Kiriscioglu's "business model" has the real estate at each of the 23 locations owned by a separate real estate corporation. He is the sole shareholder and corporate officer for each real estate corporation. Then, a separate marketing corporation operates each of the 23 locations, including the dispensing and retail sale of motor fuels to the public. Mr. Kiriscioglu is the sole shareholder and corporate officer of each marketing corporation. Motor fuels sold from the 23

[2] The Facilities have been and continue to be offered for sale or lease since they were closed.
[3] Mr. Kiriscioglu is a partner in two additional retail outlets in New York State.

locations are purchased by each marketing corporation from and delivered by third-party wholesalers or "jobbers." The day-to-day activities at each of the 23 locations are conducted by employees under the supervision of a manager. To simplify payroll practices and reporting, including insurance and required withholdings, the employees at all 23 locations in the four states are paid from a company, Technic Management, Inc. ("Technic"), that is owned by Mr. Kiriscioglu. Each of the 23 facilities reimburse Technic for their employee costs.

The small staff at the North Bergen, New Jersey location provides a range of support services to the managers and employees at each of the 23 locations, including, but not limited to, "back office" accounting and, when necessary, coordination of UST compliance activities.

Since the inception of this matter, the Complainant has misunderstood this business model, including its repeated allegations that the Respondents, particularly Mr. Kiriscioglu, operate under "New Jersey Petroleum Organization" or "NJPO." The Respondents have consistently described to the Complainant that the corporate name for each of the marketing companies operating the New Jersey locations has "NJPO" in the name. There is no umbrella corporate entity, including fictitious name registration, called "New Jersey Petroleum Organization" or "NJPO" in Virginia, Pennsylvania, New York or New Jersey. Mr. Kiriscioglu does not hold himself out personally as "NJPO." Because there are common vendors for goods and services across the 23 locations, many of these vendors adopted the "NJPO" moniker for their contacts and communications with the 23 locations and the staff in the North Bergen, New Jersey. Over time, and to simplify the contacts and communications back to the vendors, certain employees email addresses and a fax heading contain "NJPO."[4] This limited use of "NJPO" by persons other than Mr. Kiriscioglu to ease dealings with vendors, including for roughly half of

[4] Mr. Kiriscioglu's email address does not contain "NJPO."

the 23 locations located in New Jersey with "NJPO" in their corporate names, cannot be used by the Complainant to imply that Mr. Kiriscioglu is operating some "shadow" corporation or entity.

The Respondents also have been frustrated by the Complainant's continued failure to recognize and understand that Mr. Kiriscioglu's "business model" is common within the petroleum marketing industry. Since 2007, there have been seismic shifts in the petroleum marketing industry, as the major oil companies, such as ExxonMobil, Shell, ConocoPhillips, and BP, have exited the ownership and direct operation of retail outlets "flying their flags." http://www.nacsonline.com/YourBusiness/FuelsReports/GasPrices_2013/Pages/WhoSellsGas.aspx. These oil companies, while retaining their brand presence "on the street," typically have sold geographical blocks of their outlets to wholesale distributors, many of whom have rationalized their assets, selling off locations to retailers (or for other uses) that do not fit within their strategic plans. According the above-cited data from the National Association of Convenience Stores, a little over nine percent of the convenience stores in the U.S. are operated by operators of between 10 and 50 locations. The legal structure of the Facilities and the other 19 locations – that is, owned and operated by corporations controlled by Mr. Kiriscioglu as sole shareholder and corporate officer for the real estate and marketing operations -- are not out of the ordinary in petroleum marketing industry for all times relevant under the First Amended Complaint.

VI. Analysis

Regulators sometimes can carry their zeal too far. That is the situation here where the Complainant has and continues to fail to understand the structure and the operation of Mr. Kiriscioglu's businesses and the significant changes in the petroleum marketing industry over the past decade. Instead, the Complainant, throughout this proceeding and in its instant Motion, tries to weave a narrative that is disingenuous and attempts to create a lot of smoke where there is no

fire. As set forth below, Respondents assert that genuine disputes as to material facts exist throughout Complainant's Motion. Respondents produce below some evidence that places the Complainant's evidence in question and raises a question of fact for the hearing.

A. Respondent Adnan Kiriscioglu is Not an "Operator" of the USTs at the Facilities

Notwithstanding the Presiding Officer's decision at page 20 in her August 10, 2015 Order on Motions ("Order") that a genuine issue of material fact exists as to whether Respondent Adnan Kiriscioglu is an "operator" of the USTs at the Facilities, the Complainant (1) subsequently failed to cure pleading defects as to Mr. Kiriscioglu in its First Amended Complaint; and (2), attempts to take another "bite" out of the "litigation apple" by continuing to assert erroneously that Mr. Kiriscioglu should lose his status as a corporate officer and be found *personally* liable for any of the alleged violations in the First Amended Complaint because he:

> [E]xercised active and pervasive control over the overall operations of the Facilities and maintained the ultimate authority or the right to exercise control over the UST's day-to-day operations of such Facilities, including managing resources and personnel to achieve compliance with UST regulatory requirements.

Motion at 22, 23 and 27.[5]

Respondents apologize in advance to the Presiding Officer that Mr. Kiriscioglu's status as an "operator" of the USTs at the Facilities is being reargued at this time, rather than being left to development at the hearing as the Respondents understand the Presiding Officer's Order. However, because the Complainant takes on the issue again its Motion, attempting to portray Mr. Kiriscioglu as the "Wizard of Oz," the Respondents are compelled to the object and to respond in kind.

[5] Complainant totally ignores in its Motion the Presiding Officer's holding as to Mr. Kiriscioglu in her Order. Based on the Presiding Officer's Order, the issue of whether Mr. Kiriscioglu is an "operator" of the USTs at the Facilities should be left for the hearing, currently scheduled to begin on April 25, 2016.

Those portions of the First Amended Complaint asserting that Mr. Kiriscioglu *personally* violated the VADEQ's UST regulations are without foundation and should be dismissed as a matter of law. These allegations cannot state a claim upon which relief can be granted, because the Complainant has failed to plead in its First Amended Complaint – filed after the Presiding Officer's Order -- all of the material elements necessary to establish *personal* liability as to Mr. Kiriscioglu.

In the alternative, if it is determined that Complainant has met its burden to plead in the First Amended Complaint all of the elements necessary to establish a prima facie case that Mr. Kiriscioglu is *personally* responsible for the alleged violations as an "operator" of the USTs at the Facilities, then genuine issues of material fact remain and that portion of the Complainant's Motion as to Mr. Kiriscioglu should be denied by the Presiding Officer.

Complainant does not allege in its First Amended Complaint the predicate facts necessary to reach its bald legal conclusion that Mr. Kiriscioglu is an "operator" under VADEQ's UST regulations and is *personally* liable for the alleged violations. The First Amended Complaint fails to allege the critical elements of the claim that Mr. Kiriscioglu should lose his protection as an officer or shareholder of the corporate Respondents.

As set forth more fully above, motions for partial accelerated decision under the Rules of Practice are analogous to motions to dismiss under Rule 12(b)(6) of the FRCP. *See e.g., In re Bug Bam Products, LLC v. Flash Sales, Inc.,* Docket No. FIFRA-09-2009-0013, 210 WL 1816755, at *2 (ALJ, April 23, 2010). Dismissal is warranted for failure to state a claim when the plaintiff fails to lay out allegations respecting all the material elements necessary to sustain recovery under its legal theory. *Id.* (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 562 (2007).

For purposes of a motion to dismiss, the allegations set forth in the Complainant's First Amended Complaint are assumed to be true. However, allegations that are conclusions of law and unwarranted deductions of fact are not admitted as true. *Id.* (citing *Associated Builders, Inc. v. Alabama Power Co.,* 505 F.2d 97, 100 (5th Cir. 1974)).

In this case, even assuming that all of the allegations in the First Amended Complaint are true, such assumed facts still do not establish that Mr. Kiriscioglu is *personally* liable. Complainant has not alleged facts sufficient to "pierce the corporate veil" as to Mr. Kiriscioglu under the VADEQ's UST regulations. Moreover, even after the Presiding Officer's discussion of *Southern Timber Prod., Inc. D/B/A Southern Pine Wood Preserving Co., and Brax Batson* ("*Southern Timber II*"), 3 E.A.D. 880 (EAB 1992) in her Order, the Complainant did not amend its Complaint to plead any of the factors set forth by the EAB in *Southern Timber II* that rise to the level of "active and pervasive" control by Mr. Kiriscioglu personally as opposed to his role as a corporate officer of the corporate Respondents.[6] The Complainant merely asserts in its First Amended Complaint that Mr. Kiriscioglu is an "operator" and then names him in each of alleged violations without setting forth anything further to show how he exercised "active and pervasive control" of the USTs at the Facilities in his personal, rather than corporate, capacity. This leaves it up to the Respondents and the Presiding Officer to make unnecessary deductions of fact from the First Amended Complaint.

The Complainant could have remedied its pleading defects as to Mr. Kiriscioglu when it filed its First Amended Complaint. It did not. The Presiding Officer, in her Order, and citing

[6] As discussed more fully below, Respondents believe that the Complainant improperly applies the criteria set forth in *Southern Timber II.*

EAB cases as part of the legal standard, discussed that pleading deficiencies in the first instance can be cured by amending the complaint:

> Therefore, as a general rule, dismissal with prejudice under the Agency's rules should rarely be invoked in the first instance of a pleading deficiency in the complaint; instead, it should be reserved for repeat occasions or where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.

Order at 12.

Complainant does not allege in its First Amended Complaint sufficient facts to establish its legal conclusions as to Mr. Kiriscioglu. Complainant could have, but did not, more carefully draft its First Amended Complaint. Absent these predicate facts, the First Amended Complaint fails to plead the elements necessary to obtain relief as to Mr. Kiriscioglu. Therefore, Complainant has not met its burden to plead a prima facie case with respect to Mr. Kiriscioglu as an "operator" of the USTs at the Facilities under VADEQ's regulations and, therefore, has failed to state a claim with respect to Mr. Kiriscioglu's *personal* liability for the alleged violations.

Turning to the Motion, and repeating the quote set forth above, Complainant contends that Mr. Kiriscioglu is personally liable as an "operator" of the USTs because he:

> [E]xercised active and pervasive control over the overall operation of the Facilities and maintained the ultimate authority or the right to exercise control over the UST's day-to-day operations of such Facilities, including managing resources and personnel to achieve compliance with UST regulatory requirements.

Mot. at 22, 23 and 27.

The Respondents do not want to engage in an extended law school colloquy with the Complainant over the fiduciary responsibilities of corporate officers, such as Mr. Kiriscioglu. However, in a corporate environment, officers are expected to use appropriate care and diligence

when acting on behalf of their corporation. For example, they should exercise reasonable prudence in ensuring that the corporation complies with applicable environmental regulations, such as those promulgated for USTs by VADEQ. Part of this due care is adequately hiring and supervising staff. Further, under the "business judgment rule," a corporate officer may not held liable for business decisions made in good faith and with reasonable care that turn out to harm the corporation's interests. Typically, the courts will defer to erroneous business judgments, provided that the officers or directors did not show gross negligence in their review and decision-making process. Without the business judgment rule in place, many individuals would be unwilling to serve as officers and directors, and individuals, such as Mr. Kiriscioglu, might be reluctant to take commercial risks as small businesses.

In this case, despite the necessary detailed textual and factual evaluation of the underlying VADEQ UST regulations, along with Congress' intent when it enacted RCRA Subtitle I to be distinct and separate from RCRA Subtitle C and CERCLA, the Complainant essentially wants the Tribunal to impose strict liability on Mr. Kiriscioglu as a corporate officer based on essentially ad hoc judicial assessments of how blameworthy he should be for having been neglectful in allowing the alleged violations, if proven, to occur. This appears to be the same criteria used by the Complainant in its exercise of prosecutorial discretion at the outset of this case. At both stages, there is a real peril, not to mention a lack of inherent stability and predictability, in this kind of regime for UST owners and operators, particularly those that are small businesses with limited resources.

VADEQ's UST regulations define "operator" to mean "any person in control of, having responsibility for, the daily operation of the UST system." 9 VAC § 25-580-10. While both EPA and VADEQ do not elaborate further on the definition, it appears that the EAB has not decided

the issue of whether a corporate officer can be personally liable as an "operator" under either the federal or EPA-approved state UST regulations. *See Carroll Oil Company,* 8 E.A.D. 635 (2002).

Complainant, as noted by the Presiding Officer in her Order, relies on *Southern Timber II,* where the EAB conducted a review of the case law, considered a host of factors, and concluded that "operator" status could be found where an officer exercises "active and pervasive control over the overall operation of the facility." *Southern Timber II* at 895-96 (citing cases).

Here, Complainant must establish that Mr. Kiriscioglu is an *operator* of the *USTs*, not the *operator* of the *Facilities*, before individual liability for the alleged violations in the First Amended Complaint can attach to him.[7] However, in relying on *Southern Timber II,* a condition precedent is for the Complainant first to establish the entire universe of "operational" duties and activities associated with the USTs under the VADEQ UST regulations in order to know whether the fraction attributed to Mr. Kiriscioglu as a corporate officer is large enough to be considered "active and pervasive control over the overall operation" of the USTs at the Facilities. *In the Matter of Carbon Injection Systems, et al.,* Docket No. RCRA-05-2011-009, at 30 (currently on appeal to the EAB on other grounds). Complainant in its Motion wholly fails to "inventory" such "operational duties" associated with the USTs at the Facilities and then apply them to Mr. Kiriscioglu.

This issue simply requires further development at the hearing. VADEQ's definition of "operator" includes the phrase "daily operation of the underground storage tank." Although VADEQ's UST regulations do not literally require interaction with the UST each and every day,

[7] Throughout its Motion, Complainant drifts from the required issue of UST regulatory compliance as opposed to other activities associated with the Facilities. The non-UST activities are not relevant to determining liability for the alleged violations in this proceeding.

"daily" implies at least some *continuous* level of activity as opposed to some other irregular or infrequent action with respect to the USTs at the Facilities.

It is well established that to determine the common meaning of a term, a court may utilize its own understanding of the term, as well as dictionaries and scientific authorities. *See, e.g. Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) ("To determine a term's common meaning, a court may consult 'dictionaries, scientific authorities, and other reliable information sources.'").

Complainant, in its Motion at page 20, references *Shell Oil Co. v. Meyer,* 705 N.E. 2d 962 (Ind. 1998) for the proposition that there can be more than one UST "operator," with one person "controlling" the day-to-day activities associated with the UST and another person "responsible" for those activities. The court in Meyer did consult dictionary definitions in reaching is findings. However, *Meyer* is distinguishable from this proceeding. In *Meyer,* the question was whether two major oil companies – Shell Oil and Union 76 – were "operators" under Indiana's UST regulations. *Meyer* did not turn on the question of whether the "corporate veil" would be pierced to hold a corporate officer of those companies personally liable as someone who "controls" or who is "responsible" for the daily operation of the USTs.

Ultimately, the question before the Tribunal as to whether Mr. Kiriscioglu is liable individually as an "operator" turns on (1) what constituted the daily operation of the USTs at the Facilities; (2) who did these things, (3) in what capacity was that person acting, and (4) who is responsible for that person's actions in that capacity. Simply, while Mr. Kiriscioglu, as the corporate officer for the corporate Respondents, retained the practical ability (and legal obligation) to determine how the Facilities were and are operated, the issue here is whether Mr. Kiriscioglu had the requisite contact with the "daily operation of the underground storage tank"

at the Facilities to support personal liability under the First Amended Complaint. Complainant simply has failed to meet its burden in its Motion, particularly when viewed in the context of the presiding officer's determination in *Carbon Injection.*

Genuine disputes as to material facts as to Mr. Kiriscioglu include:

(1) Complainant spends over a page in its Motion (pp. 23-24) discussing the Respondents' use of another company, Technic Management, Inc. ("Technic"). Notwithstanding Respondents' objection as to relevance, Complainant fails to connect how Technic demonstrates that Mr. Kiriscioglu *personally* exercised active and pervasive control over the USTs at the Facilities.

In Mr. Kiriscioglu's December 18, 2014 deposition, Mr. Kiriscioglu clearly sets forth the purposes of Technic. CX-93, EPA 1528-30. The set up of Technic is commonly referred to by employers, human resource professionals, and governmental agencies (*e.g.,* U.S. Department of Labor) as a "professional employer organization" ("PEO"). Employers use PEOs to outsource employee benefits, payroll and workers' compensation, recruiting, and other matters. The PEO, such as Technic, hires the client company's employees, thus becoming their employer-of-record for tax and insurance purposes, but also is a "joint employer" or "co-employer."

"Joint employment" or "co-employment" is recognized by governmental agencies. *See, e.g.* 29 CFR 825.106 (joint employment under the Family and Medical Leave Act). The use of Technic for 23 retail outlets located in four jurisdictions, as stated by Mr. Kiriscioglu in his deposition, saves time and staff that would be used to prepare payroll and administer benefits plans. CX-148, EPA 1531-32. Further, it may reduce legal liabilities or obligations to employees that employers, such as the corporate Respondents, would otherwise have. The PEO's client companies also may be able to offer a better overall package of employee benefits, and thus attract more skilled employees, including those with environmental compliance experience. The

use of this legal arrangement by the corporate Respondents has no relevance as to whether Mr. Kiriscioglu personally has active and pervasive control of the USTs at the Facilities.

(2) Mr. Kiriscioglu *personally* retained authority for overseeing tank release detection, tank cathodic protection, piping release detection, piping cathodic protection and record management for environmental compliance at all the Facilities. Motion at 25.

The documents and evidence cited by the Complainant do not support its assertion that Mr. Kiriscioglu personally exercised active and pervasive control of the USTs at the facilities. In his deposition, Mr. Kiriscioglu had the following exchange with Complainant's counsel:

> Q. So with respect to these that I just read to you that was in response to your response to our Interrogatories, how much of the oversight did you perform on a day-to-day basis with respect to the three managers?
>
> A. There were times, especially with Tamer and Osman since they have experience in all areas, maybe weeks I wouldn't talk to them. In case of emergency, they'll reach me.
>
> Q. If there was need to perform maintenance work on the dispenser or the underground storage tanks, was that something they had to clear for you?
>
> A. No. The other problem, you know who to call because we have accounts with all these vendors, I'm not going to change your hose, if anything leaks, Crompco comes in and there's a problem, immediately they'll call the maintenance.
>
> Q. So in actuality then, these managers that worked for Technic Managament were the ones that were *responsible* for the day-to-day operation of these three facilities; is that correct?
>
> A. That's correct.

CX-148, EPA 1541-42 [Emphasis added].

(3) Mr. Kiriscioglu *personally* trained his employees and managers at the Facilities. Motion at 25.

The deposition testimony cited by the Complainant does not have Complainant's counsel asking Mr. Kiriscioglu whether he personally trained the managers in any or all aspects of environmental compliance activities. CX-148, EPA 1579. The question of training is a general

one, and Mr. Kiriscioglu's response similarly is general in nature. Moreover, Complainant ignores the following exchange between Complainant and Mr. Kiriscioglu in his deposition:

> Q. And where did Mr. Arklan get the requisite knowledge with respect to doing environmental compliance?
>
> A. He has been in the industry a long time in Long Island, New York. And time to time if I need to feed with the information with the articles, we were feeding to him. He's actually gas attendant in Long Island. He became a manager. He's been in the industry at least before – he started with me at least probably five years, maybe more.
>
> Q. With respect to Osman Mehter and Kim Bonin, your other managers, they're also employees of Technic Management, correct?
>
> A. Yes.
>
> ****
>
> Q. Now, when these managers started with your company, to manage these three facilities, sir, did you provide them with any training with respect to the operation of the underground storage tanks?
>
> A. Myself, not. Like I said, Tamar had gas station experience, starting pumping gas, managing stations for Getty in Long Island. And Osman had a gas station, his own. He's been in the business I want to say more than 10, 15 years. Except Kimberly, Kimberly was working at Franklin when Osman decided to leave. And short period of time she tried to manage. She learned probably from Osman. She gets to the point, she couldn't run it anymore. We closed the sites.

CX-148, EPA 1534-35.

(4) Respondent Kiriscioglu *personally* maintains the authority to control the UST service vendors from his principal office in North Bergen, New Jersey. Motion at 26.

While Mr. Kiriscioglu testified that he hired Crompco to provide UST services, in part, because of the vendor's ability to provide services in Virginia, Pennsylvania, New York and New Jersey, his testimony does not support Complainant's assertion:

> Q. So when your office – by the way, is it your office that notifies Crompco to do a service for them?
>
> A. No.

Q. Who is it?

A. We have the agreement that as the time comes for the fire department, EPA, they were doing it, they will follow up.

Q. Let's assume that it was not a routine test, compliance test.

A. We call in.

Q. Who calls in? You?

A. No, manager. If the manager is new, doesn't know anything, calls the office and who should I call.

Q. Any your office would call for that service?

A. Or give the number. These names given by Crompco for the locations to make life easier. Instead of inputting the corporation name, they just put –

CX-148, EPA 1585-86.

(5) Respondent conducts business as "New Jersey Petroleum Organization" or "NJPO." Motion at 26-27.

Again, Respondents object to the relevance, even if true. However, Complainant's counsel questions Mr. Kiriscioglu over some 12-pages in the deposition (CX-148, EPA 1585-98) about "NJPO." Mr. Kiriscioglu's responses are consistent with the Respondents' contention since the inception of this proceeding that the Respondents, including Mr. Kiriscioglu, do not conduct business under the name "New Jersey Petroleum Organization" or "NJPO."

Absent from the sworn statement of EPA's Andrew Ma attached to the Complainant's Motion is any indication of his interaction with Mr. Kiriscioglu on the matters covered by the First Amended Complaint. If Mr. Kiriscioglu had the active and pervasive control asserted by Complainant in its Motion, one would think that Mr. Kiriscioglu and Mr. Ma would have had numerous conversations after Mr. Ma's inspections of the Facilities and both before and after the commencement of this proceeding. There is nothing in the record of this proceeding cited by the Complainant to evidence that Mr. Kiriscioglu was the Respondents' point of contact for any or

all UST compliance matters other than his name and signature attached to forms required by VADEQ in his capacity as the corporate officer.

As set forth above, genuine disputes of material fact exist as to whether Mr. Kiriscioglu is an "operator" of the USTs at the Facilities which would subject him to personal liability for the alleged violations in the First Amended Complaint. Complainant has failed to establish in its Motion the entire universe of "operational" duties and activities under the VADEQ UST regulations in order to know whether the fraction attributed to Mr. Kiriscioglu in his personal capacity is large enough to be considered "active and pervasive control over the overall operation" of the USTs at the Facilities. Accordingly, Respondents respectfully request that the Presiding Officer deny Complainant's motion for partial accelerated liability of the issue of whether Mr. Kiriscioglu is an "operator."

B. A Genuine Dispute of Material Fact Exists as to Whether the Three Real Estate Respondents are "Owners" of the USTs at the Facilities for Purposes of the VADEQ UST Regulations

Respondents do not concede that the three real estate corporations -- 5703 Holland Road Realty Corp.; 8917 South Quay Road Realty Corp.; and, 1397 Carrsville Highway Realty -- are the "owners" of the USTs at the Facilities for purposes of compliance with VADEQ's UST regulations. Complainant relies on Mr. Kiriscioglu's deposition testimony for its position. Motion at 16-19.

Notwithstanding Mr. Kiriscioglu's deposition testimony, a genuine dispute of material fact exists because VADEQ historically has considered the landowner to be the UST owner only in those cases where (1) the registered owner and the landowner are the same; or, (2) the UST is not registered with VADEQ. CX-96, EPA 1944. Neither situation applies here. Stated differently, VADEQ distinguishes between the landowner and the "registered owner" of the USTs. *Id.*

VADEQ considered the owner listed on the tank notification or registration form as dispositive because the Agency considered the registration form a reflection of the parties' intent to separate the UST from the land for purposes of regulatory compliance. *Id.*

Here, the USTs have been continuously registered with the VADEQ in the names of the Pure Facility, Rt. 58 Facility and Franklin Facility – the marketing corporations – instead of the three real estate corporations that own the land. CX-10, EPA 050-53; CX-20, EPA 237-40; CX-28, EPA 489090. VADEQ says it will pursue UST compliance in the following order based on the documents, evidence and facts of the individual case: (1) Registered UST Owners, (2) UST Operators, and (3) Landowners. CX-96, EPA 1944.

Based upon these distinctions made by VADEQ, and the actual UST notifications submitted by the Respondents to VADEQ, a genuine dispute of material fact exists with respect to which corporate Respondent is the "owner" of the USTs at each of the facilities for purposes of compliance with VADEQ's UST regulations. The issue of ownership of the USTs should be developed further at the hearing.

C. Genuine Disputes of Material Fact Exist That Respondents Failed to Provide Release Detection for the USTs at Each Facility

Respondents agree with the Complainant that Counts II, VIII and XIII of the First Amended Complaint allege that the Respondents failed to provide release detection for the USTs at the Pure, Rt. 58 and Franklin Eagle Mart locations, respectively. Respondents, however, dispute Complainant's assertion that:

> (1) Respondents Aylin, Inc., Adnan Kiriscioglu, and 5703 Holland Road Realty Corp. failed to monitor each UST at the Pure Gas Station for releases at least every 30 days as required by 9 VAC 25-580.140.1 from April 1, 2008, through May 31, 2011;

> (2) Respondents Rt. 58 Food Mart, Inc., Kiriscioglu and 8917 South Quay Road Realty Corp. failed to monitor each UST at the Rt. 58 Facility for releases at least every thirty days as required by 9 VAC 25-580.140.1 from April 1, 2008, through July 25, 2011; and,
>
> (3) Respondents Franklin Eagle Mart Corp., Kiriscioglu and 1397 Carrsville Highway Realty Corp. failed to monitor each UST at the Franklin Facility for releases at least every thirty days as required by 9 VAC 25-580.140.1 from April 1, 2008, through July 25, 2001**.**

Motion at 38-39. Genuine disputes of material fact exist with respect to each of the above assertions.

9 VAC § 25-580-130 requires that UST owners and operators must provide a method, or combination of methods, of release detection that can detect a release from any portion of the tank and the connected underground piping that routinely contains product. 9 VAC § 25-580-140 requires that tanks be monitored at least every 30 days for releases using one of the allowable methods in 9 VAC § 25-580-160, including "automatic tank gauges" ("ATGs") and "other methods," which has been interpreted by VADEQ to include "statistical inventory reconciliation" ("SIR").

As an initial matter, and under the VADEQ's UST regulations (as well as the federal UST regulations), tank owners and operators can use more than one the allowable methods available under 9 VAC § 25-580-160 to satisfy their monthly compliance with the UST release detection mandate of 9 VAC § 250-580-140. It is possible for UST owners and operators to use ATG one month, and SIR the next one. There is no requirement under the VADEQ's UST regulations that owners and operators are bound to one method of release detection.

Complainant in its First Amended Complaint alleges that the Respondents selected ATG as their *sole* method of release detection for the Facilities and then failed to use this method on a monthly basis. In its Motion, Complainant notes that the Respondents' manager, Tamar Arklan, indicated that the Respondents use SIR for UST release detection. Motion at 31-32.

Complainant also cites a contractor's response that SIR is used for "internal corporate records." *Id.* at 34.

Complainant acknowledges in its Motion that VADEQ allows SIR to be conducted in-house. Motion at 37; RX-10, Aylin 000254. The genuine dispute of material fact is whether Respondents' records satisfy VADEQ's requirement for SIR that it can detect a 0.2 per hour leak rate or a release of 150 gallons within a month with a probability of detection of 95% and a probability of false alarm of 5%. 9 VAC § 25-580-160.8. Complainant supports its contention that Respondents did not demonstrate this allowable leak rate for SIR solely through a handful of paragraphs in the sworn statements of Messrs. Ma and Cignatta attached to the Motion and which have not been subject to cross-examination.

Because VADEQ allows SIR to be conducted in-house, as well as by a third-party vendor, there is a genuine dispute that arises out of VADEQ's Petroleum Storage Tank Compliance Manual. RX-10. VADEQ's manual sets forth how a state inspector determines whether SIR has been performed during a "formal" compliance inspection. RX-10, Aylin 000270-000271.

Included in the compliance check is:

> Additonally, the inspector has conducted the required daily measurements and record keeping. To allow the vendor to perform SIR properly, the owner must provide the same categories of information as are required for [Inventory Control]

RX-10, Aylin 000270. Respondents have provided their daily measurements used for SIR for all times covered under the First Amended Complaint in RX-2 through RX-9.

The other element of SIR is the 0.2 gallons per hour leak rate specified in 9 VAC § 25-580-160.8. VADEQ, unlike EPA, does not specify how the detection rate is to be verified, such

as by a third party like the National Work Group for Leak Detection Evaluation. VADEQ tells its inspectors to review the two most recent months' SIR reports to determine if the 0.2 gallons per hour leak rate was met. RX-10, Aylin 000270. At a minimum, Messrs. Ma and Cignatta's assertions should be subject to cross-examination.

In addition, when Mr. Ma conducted his March 2010 inspection of the Facilities, he pulled ATG tapes, which provide stored electronic information for the Facilities. At least one tape shows three, passing monthly release detection for Tank R1 (diesel fuel) at the Franklin Facility in 2009. CX-29, EPA 524,

Despite promises by the Complainant, Respondents have not had the opportunity to take the oral examination of Mr. Ma. Similarly, Complainant promised, but has never provided, Mr. Cignatta's expert report prior to filing its Motion. Even if the Presiding Officer finds that Complainant has made out a prima facie case as to the three release detection counts, she should deny Complainant's Motion and allow the release detection issue to be more fully developed at hearing.

D. Genuine Disputes of Material Fact Exist as to Monitoring Piping for Releases and Conducting Annual Tests of Automatic Line Leak Detectors

Mr. Kiriscioglu testified in his deposition that the Facilities were closed at various times since 2008. CX-148, EPA 1608-09. Mr. Ma, in his affidavit attached to Complainant's Motion indicated that the Facilities were not selling motor fuels at the time of his inspection in March 2010. Ma Affidavit ¶¶ 24, 34, 45.

A genuine dispute of material fact exists as to whether Respondents were required to conduct annual line tests during the periods in which the Facilities were not selling motor fuels. Under 9 VAC §25-580-140(C)(2), if the piping does not routinely contain "regulated

substances," then no release detection is required. Even though a tank might not be "empty," piping release detection is treated separately. Codes of practice require that UST piping runs be sloped so that any product in the piping travels back to the tank when active pumping is not occurring. When the Facilities were not selling motor fuels, there was no product in the piping that could be released into the environment. Because the piping did not routinely contain "regulated substances," no line tightness tests or monthly monitoring was required in accordance with 9 VAC 25-580-140.2.

E. Genuine Dispute of Material Fact Exist as to Piping Cathodic Protection

Genuine disputes of material fact exist with respect to whether Respondents failed to provide cathodic protection for the metal components for metal flex connectors under the two dispensers at the Pure Facility. While Respondents undertook repairs and/or modifications to the cathodic protection system at the Pure Facility, including sacrificial anodes (Amended Answer ¶70), it does not mean that they concede liability for the alleged violation.

VADEQ defines "UST system" or "tank system" to mean an "underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any." 9 VAC § 25-580-10. Dispensers on the pump islands at the Facilities are not "underground ancillary equipment." Flex connectors are used to connect the underground piping to the dispensers. The question becomes where does the UST system stop, including for the requirement to provide cathodic protection for those metallic components that routinely contain "regulated substances" and are "in contact with the ground" for regulatory compliance purposes 9 VAC § 25-580-90.

Mr. Ma's inspection report included photographs. Photo #21 purports to show "[m]etal fittings for the piping under the dispenser appear to be in contact with the soil." CX-12, EPA

100. Respondents dispute that, even if they "appear to be contact with the soil, these "metal fittings" are not "*underground* ancillary equipment." These fittings sit above ground and are not part of the UST system as defined by VADEQ.[8]

Similarly, genuine disputes of material fact exist as to Complainant's contention with respect to the Rt. 58 Facility and the Franklin Facility. First, the testers' reports cited by the Complainant indicate the lack of cathodic protection at the dispensers and sumps. Turbine sumps are designed to provide access to the turbine area above the UST. The turbine or "submersible turbine pump" ("STP") sits on top of the UST at the bottom of the sump and is used to pump the motor fuels from the UST to customers' vehicles. The turbine area of the sump may house the STP, piping, line leak detector and other equipment. Generally, the lid to cover the sump is three to four feet in diameter. Metal components in sumps do not need cathodic protection because they are not "in contact with the ground." Mr. Ma's inspection photos confirm that, even if the sump had water or debris, the sumps are not designed or intended for the STP or other components to be "in contact with the ground." CX-21, EPA 271-72; CX-29, EPA 513. To the extent that water, debris or even small amounts of dirt may accumulate in the sump, it does not alter the fact that metal components in a sump are not intended to be or routinely "in contact with the ground" and, therefore, do not require cathodic protection.

Similarly, Mr. Ma's inspection photos contradict the tester's findings for the Rt. 58 Facility. In the caption to photo #15, Mr. Ma indicates "fiberglass piping going into the ground." CX-21, EPA 274.

[8] Notwithstanding Respondents' position, Respondents did add cathodic protection to these metal components of the dispenser.

As the record indicates, the three Facilities were acquired after the 1998 UST upgrade deadline. Subsequent to the acquisitions, VADEQ conducted "formal" compliance inspections of the facilities. The issue of corrosion protection for the swing joints or metal components in the sumps was never raised by the VADEQ inspectors as a problem. CX-11; CX-15; CX-24; CX-31. If the state inspections prior to EPA's March 2010 inspections had revealed an issue with respect to the corrosion protection of the components at issue at the Facilities, the Respondents would have immediately corrected the issue at that time, totally avoiding the alleged violations by EPA.

The Presiding Officer should deny Complainant's Motion as to cathodic protection because genuine disputes of material fact exist whether the metal components were "in contact with the ground," triggering the need for corrosion protection.

F. Genuine Dispute of Material Fact Exist with Respect to UST Financial Responsibilty

The Complainant, until pointed out by the Respondents, misunderstood VADEQ's financial responsibility regulations for petroleum USTs. 9 VAC §§ 25-590-10 *et seq.* The Complainant then contorts and distorts the operation of UST financial responsibility in Virginia in its Motion to cover its pleading defects in the First Amended Complaint.

Virginia's UST financial responsibility regulation allows tank owners and operators to use the Virginia Petroleum Storage Tank Fund ("Fund") as the primary means for meeting nearly all of their $1Million/$2Million federal financial demonstration requirement incorporated into VADEQ's UST regulations. 9 VAC § 25-590-10. Thus far, EPA has accepted the Fund as suitable demonstration of an owner or operator's financial responsibility for the amount above the sliding scale financial responsibility requirement set forth in 9 VAC § 25-590-210. While

this is recognized in the sworn statement of VADEQ'S Leslie Beckwith attached to the Motion, the Complainant does not address in its Motion that, based on annual gallonage throughputs at the Facilities, the Respondents were required to demonstrate the ability to pay $5,000 per occurrence for taking corrective action, and $15,000 per occurrence for compensating third parties, with an annual aggregate of $20,000. 9 VAC §25-590-210(C)(1)(a). The Fund covers $980,000 of the required UST financial assurance.

Respondents dispute whether they have failed to provide UST financial assurance. They believe that worst case, that they may be responsible for a recordkeeping violation. VADEQ does not require that UST owners or operators submit current evidence of UST financial responsibility to VADEQ until "within 30 days after the owner or operator identifies or confirms a release from an underground storage tank required to be reported under 9 VAC 25-580-220 or 9 VAC 25-580-240." 9 VAC §25-590-150A. Unless VADEQ requires an UST owner or operator to submit evidence of financial assurance under 9 VAC §25-590-150E, the obligation involves recordkeeping under 9 VAC § 25-590-160.

Ms. Beckwith's sworn statement does not track her office's financial responsibility and leaps to a conclusion. Respondents have requested the opportunity to depose Ms. Beckwith. Complainant intends to call Ms. Beckwith to testify at the hearing. The Presiding Officer should deny the Complainant's Motion as to financial responsibility in order for the issue to be more fully developed at the hearing.

G. The Complainant Has Failed to Show the Absence of Evidence in its Motion for the Affirmative Defenses Asserted by the Respondents

For the Complainant to prevail on its Motion where the Respondents have asserted affirmative defenses in their Answer to the First Amended Complaint, as to which Respondents ultimately bears such burdens, the Complainant has failed to show in its Motion that there is an absence of evidence in the record for the affirmative defenses. *Rogers Corp.*, 275 F.3d at1103. If the Complainant made this requisite showing, then Respondents as the non-movants bear the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying "specific facts" from which a reasonable finder could find in their favor by a preponderance of the evidence. *Id.* Because the Complainant has not met its burden in the Motion, Respondents' affirmative defenses must be left undisturbed for the hearing.

VII. CONCLUSION

For the foregoing reasons, Complainant's Motion should be denied. Issues of liability require hearing and resolution by the Presiding Officer. Even if liability is decided on an accelerated basis for some or all of the counts in the First Amended Complaint, the amount of any civil penalty must be resolved by the hearing as opposed to a motion for partial accelerated decision. *See In re John A. Biewer Co. of Toledo, Inc*., RCRA (3008) Appeal Nos. 10-01 & 10-02,2013 EPA App. LEXIS 13 at *15 (EAB 2013) (accelerated decision not appropriate as to amount of penalty where disputes of fact remained).

Dated: January 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that Respondents' foregoing Response to Complainant's Motion for Partial Accelerated Decision as to Liability and Memorandum of LawNotice of Deposition, nwas transmitted via electronic mail and via first-class mail, postage prepaid to the following addressees:

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Date: January 19, 2016

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