

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III**

|                       |   |                        |
|-----------------------|---|------------------------|
| In the Matter of:     | ) | U.S. EPA Docket Number |
| 930 Port Street, Inc. | ) | RCRA-03-2021-0090      |
|                       | ) |                        |
| RESPONDENT,           | ) |                        |
|                       | ) |                        |
| Easton Point          | ) |                        |
| 930 Port Street       | ) |                        |
| Easton, MD 21601      | ) |                        |
|                       | ) |                        |
| FACILITY.             | ) |                        |

**RESPONDENT 930 PORT STREET, INC.’S PREHEARING EXCHANGE STATEMENT**

Pursuant to 40 C.F.R. § 22.19 and the Presiding Officer’s Prehearing Order of June 24, 2021, Respondent, 930 Port Street, Inc., (“Respondent” or “930 Port Street”) hereby submits this Prehearing Exchange Statement in the above-captioned matter. Respondent respectfully reserves its right to supplement this Prehearing Exchange in accordance with 40 C.F.R. § 22.19(f).

**I. SECTION I OF THE PREHEARING ORDER**

Section 1 of the Presiding Officer’s Prehearing Order dated June 24, 2021, provides that all parties are to submit (A) a list of all expert and other witnesses, a brief summary of the expected testimony, as well as (B) copies of all documents and a list of exhibits intended to be introduced into evidence, and (C) a statement specifying the amount of time needed to present its direct case.

Respondent states as follows:

**A. Witnesses**

Respondent expects to call the following witnesses to testify on behalf of Respondent in the hearing in this matter. Respondent respectfully reserves the right to supplement the list of fact

and expert witnesses in Respondent's Prehearing Exchange and/or to seek leave of the Court to present in written or affidavit form, all or part of the testimony of some of the witnesses.

Respondent also reserves the right to supplement the summaries of various witnesses' testimony to add additional evidence. To the extent that the parties can agree on stipulations and narrow the issues, or the issues are narrowed by accelerated decision, the number of witnesses, and/or length of their testimony, may be reduced.

**Tim Miller, Owner and President of 930 Port Street, Inc.**

Mr. Miller is the President of 930 Port Street. Mr. Miller will testify to the facts surrounding the ownership and operation of Respondent's facility as alleged in the Administrative Complaint. Mr. Miller will testify as to electronic communications with the Environmental Protection Agency ("EPA), the Maryland Department of the Environment ("MDE") and other persons relating to the issues alleged in the Administrative Complaint.

Mr. Miller is will further testify that at all times relevant to the Administrative Complaint, 930 Port Street, complied with COMAR § 26.10.05.02(B), by performing the required release detection testing on underground storage tanks ("UST") numbers 1, 2, 3, 4, and 5, and did so in a good faith and timely manner. Mr. Miller will also testify that at all times relevant to the Administrative Complaint, the method of release detection selected by 930 Port Street was automatic tank gauging, which is in compliance with COMAR § 26.10.05.04(E). Mr. Miller will testify that, at all times relevant to the Administrative Complaint, 930 Port Street has performed all of the necessary, monthly release detection tests for all USTs.

Mr. Miller will also testify that at all times relevant to the Administrative Complaint, 930 Port Street performed all required annual automatic tank gauging for USTs Nos. 1-5 in accordance with COMAR § 26.10.05.04(E) and did so in a timely manner. Mr. Miller will testify that, at all

times relevant to the Administrative Complaint, 930 Port Street has performed all of the necessary, material, annual automatic tank gauging tests for all USTs.

Mr. Miller will also testify that at all times relevant to the Administrative Complaint, 930 Port Street performed all required monthly monitoring on underground piping for USTs Nos. 1-5 in accordance with COMAR § 26.10.05.05(C) and did so in a timely manner. Mr. Miller will testify that, at all times relevant to the Administrative Complaint, 930 Port Street has performed all of the necessary, monthly underground piping monitoring tests for all USTs.

Mr. Miller will testify that at all times relevant to the Administrative Complaint there has never been a release or suspected release from any of 930 Port Street's USTs. Mr. Miller will also testify that after the timeframe in which Complainant alleged a release from UST No. 3, Respondent performed necessary tightness testing to re-evaluate UST No. 3, upon which no leak or release was found. If there was in fact a release from UST No. 3, the leak would have been present when Respondent re-evaluated the tank, but since it was not, Respondent asserts there was never any release in UST No. 3, and any alleged release is due to the misreading of equipment or inactivity in UST No. 3 falsely reporting as a release/leak.

Mr. Miller will also testify that at all times relevant to the Administrative Complaint, 930 Port Street performed all required cathodic protection system testing for USTs Nos. 1-5 in accordance with COMAR § 26.10.04.02(D)(1) and did so in a timely manner. Mr. Miller will testify that, at all times relevant to the Administrative Complaint, 930 Port Street has performed all of the necessary, cathodic protecting system tests for all USTs.

Mr. Miller will also testify that when contacted by Melissa Toffel for further information or documentation regarding any alleged UST violations, Mr. Miller worked diligently and quickly to provide Ms. Toffel with the information she requested. Mr. Miller will further testify as to 930

Port Street's financial matters, financial hardships, and ability, or inability, to pay any civil penalties assessed by EPA.

**Paul H. Hayden, P.G., L.R.S., R.S.M,  
Vice President, The Brownfield Redevelopment Group – Geo-Technology Associates,  
Inc.**

Mr. Hayden is a toxicologist and a Vice President with Geo-Technology Associates, Inc. ("GTA"), chief of the Brownfield Redevelopment Group for with over 25 years of experience. Mr. Hayden works with clients to facilitate the voluntary cleanup process in conjunction with regulatory agencies to complete the redevelopment of Brownfield and in-fill sites. Specifically, Mr. Hayden's experience includes site assessments, installation of monitoring, recovery, and supply wells, collecting groundwater, soil (environmental and geotechnical), and vapor samples for laboratory analysis, evaluating monitoring and supply/production well data, and preparation of risk assessments and preparation of reports for the client and regulatory agencies. Mr. Hayden has numerous years of experience addressing underground storage tank compliance, remediation and regulatory enforcement matters in Maryland, as well as extensive knowledge of MDE's processes and procedures. Mr. Hayden will testify as to any relevant regulatory compliance matters in relation to underground storage tank monitoring, testing, and suspected releases as alleged in the Administrative Complaint.

Mr. Hayden will refute both the report and testimony offered by Complainant's toxicologist, Kristen Keteles. Mr. Hayden will further testify that there are no human health or environmental harms in a potential release of petroleum products at 930 Port Street, nor have there been any releases whatsoever from 930 Port Street. Mr. Hayden will also testify that the petroleum release caused by Southern States Cooperative, Inc., 801 Port St, Easton, MD 21601, that occurred

on or about May 11, 2021, which is completely separate and unrelated to 930 Port Street, caused no long-term impacts on the Tred Avon River and the surrounding environment.

**Kyle Nelson, Operations and Project Manager of Clean Fuel Associates**

Mr. Nelson is the Operations and Project Manager of Clean Fuel Associates, a company that provides fuel storage tank cleaning and fuel filtration services to 930 Port Street. Mr. Nelson has over 25 years of experience in environmental compliance services Underground Storage Tank and Aboveground Storage Tank petroleum industry. Mr. Nelson will testify that he and Clean Fuel Associates are the third-party consultant/contractor that samples and performs testing for 930 Port Street. Mr. Nelson will testify regarding any alleged mechanical issues with any of 930 Port Street’s underground storage tanks and associated equipment during the time relevant to the Administrative Complaint, as well as, low product volume, climate factors, and pump readings during the tightness testing periods discussed in the Administrative Complaint. Mr. Nelson will also address any and all questions from Complainant regarding alleged “fails,” to release detection and tightness testing, offering testimony as to the low product in the underground storage tanks which caused the “fail” readings, as well as other matters as alleged in the Administrative Complaint.

**B. All Exhibits Intended To Be Introduced Into Evidence**

|             |  |
|-------------|--|
| <b>RX 1</b> | June 17, 2016 Letter from J.D. Rellek Co., Inc. to Kyle Nelson regarding cathodic protection survey completed on June 17, 2016.  |
| <b>RX 2</b> | March 21, 2018 Letter from J.D. Rellek Co., Inc. to Tim Miller regarding cathodic protection testing completed on March 8, 2018.   |
| <b>RX 3</b> | Reply email dated May 22, 2019, from Melissa Toffel to Tim Miller (3:23pm EST) acknowledging receipt of copies of tests sent by Mr. Miller; email dated May 22, 2019, from Tim Miller to Melissa Toffel (3:17pm EST) sending requested additional testing information.               |
| <b>RX 4</b> | Email dated July 12, 2018, from Melissa Toffel to Tim Miller (2:46pm EST) requesting additional testing information that EPA does not have record of; reply email dated July 24, 2018, from Tim Miller to Melissa Toffel (9:47am EST) responding to Ms. Toffel’s questions regarding |

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|              | additional testing and letting her know he will look for additional documentation; reply email dated July 24, 2018, from Melissa Toffel to Tim Miller (9:54am) offering two-week extension to Mr. Miller to respond to her previous email since Mr. Miller was on vacation; reply email dated August 8, 2018 from Mr. Miller to Melissa Toffel (1:16pm EST) asking whether Ms. Toffel needs leak tests from the veeder root; reply email dated August 8, 2018, from Melissa Toffel to Tim Miller (1:23pm EST) confirming what information she needs; reply email dated August 8, 2018, from Tim Miller to Melissa Toffel (2:11pm EST) Mr. Miller confirming he is looking for passing tests. |
| <b>RX 5</b>  | Email dated June 18, 2019, from Tim Miller to Melissa Toffel (10:02am EST) informing Melissa Toffel line leak and line tightness testing has been scheduled.   |
| <b>RX 6</b>  | Email dated April 30, 2019 from Melissa Toffel to Tim Miller (3:55pm) requesting a conference call with Mr. Miller to discuss EPA's Show Cause Letter.   |
| <b>RX 7</b>  | Email dated August 23, 2018, from Tim Miller to Melissa Toffel (1:00pm EST) asking Ms. Toffel if she would like additional testing receipts Mr. Miller located.  |
| <b>RX 8</b>  | Email dated November 5, 2019, from Louis Ramalho to Tim Miller (10:17pm) setting forth Mr. Steinmetz determination of 930 Port Street's inability to pay the proposed penalty in 2019.   |
| <b>RX 9</b>  | Email dated July 25, 2019, from Tim Miller to Melissa Toffel (12:50pm EST) providing additional documentation for testing on UST No. 4.  |
| <b>RX 10</b> | Product Line Test Reports performed on March 23, 2018.   |
| <b>RX 11</b> | MDE UST System Compliance Inspection Report dated May 1, 2015.   |
| <b>RX 12</b> | MDE UST System Compliance Inspection Report from inspection on February 14, 2018.  |
| <b>RX 13</b> | Clean Fuel Associates Invoice dated August 9, 2016.  |
| <b>RX 14</b> | Clean Fuel Associates Invoice dated August 9, 2016.  |
| <b>RX 15</b> | Clean Fuel Associates Invoice dated September 6, 2016.   |
| <b>RX 16</b> | February 12, 2017 Fuelmaster Transaction Listing   |
| <b>RX 17</b> | August 13, 2020 Leak Test receipts for USTs Nos. 1, 3, 4.  |
| <b>RX 18</b> | December 10, 2020 and December 31, 2020 Leak Test receipts for USTs Nos. 1, 2, 3, 4, 5.  |
| <b>RX 19</b> | Product Line Test Reports performed March 23, 2018.  |

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| <b>RX 20</b> | Leak Detector Test Reports performed July 26, 2016.  |
| <b>RX 21</b> | Leak Detector Test Reports performed September 1, 2016.  |
| <b>RX 22</b> | Leak Detector Test Receipts from August 21, 2017 (UST 4), June 19, 2017 (UST 4), August 6, 2018 (UST 4), July 30, 2018 UST 4), February 27, 2017 (UST 3), February 20, 2017 (UST 3), January 2, 2017 (UST 2), July 12, 2017 (UST 2), July 3, 2017 (UST 5), June 19, 2017 (UST 5), July 30, 2018 (UST 5), July 23, 2018 (UST 5), October 2, 2017 (UST 1), November 6, 2017 (UT 1), May 7, 2018 (UST 1), April 2, 2018 (UST 1), August 6, 2018 (UST 1), April 14, 2017 (UST 2), June 19, 2017 (UST 2), July 30, 2018 (UST 2), July 12, 2018 (UST 1-5), July 10, 2016 (UST 1-5), July 13, 2016 (UST 1-5), June 11, 2010 (UST 1-5), November 29, 2009 (UST 1-5), February 14, 2010 (UST 1-5), December 31, 2009 (UST 1-5), September 11, 2009 (UST 1-5). |
| <b>RX 23</b> | Fuel Master Transaction Listing dated February 12, 2017.   |
| <b>RX 24</b> | Leak Detector Test Receipts from February 11, 2021 for USTs No. 1-5.   |
| <b>RX 25</b> | Atlas Fuel Solutions, Inc. Invoice for Tank Testing, dated December 26, 2017.  |
| <b>RX 26</b> | Leak Detector Test Receipt from January 28, 2021 for UST No. 5.  |
| <b>RX 27</b> | Fuel master Transaction Listing dated June 18, 2017.   |
| <b>RX 28</b> | Leak Detector Test Receipt from June 27, 2016 (USTs 1-5), June 26, 2016 (USTs 1-5), June 24, 2016 (USTs 1-5); June 28, 2016 (USTs 1-5).  |
| <b>RX 29</b> | Leak Detector Test Receipt from November 12, 2020 (UST 3), November 5, 2020 (UST 1), November 5, 2020 (UST 2), November 5, 2020 (UST 5), November 5, 2020 (UST 4).   |
| <b>RX 30</b> | Leak Detector Test Receipt from November 26, 2020 for USTs 1-5.  |
| <b>RX 31</b> | Leak Detector Test Receipt from October 1, 2020 for USTs 1-5.  |
| <b>RX 32</b> | Leak Detector Test Receipt from January 2, 2017 (UST 2), November 28, 2016 (UST 2), December 19, 2016 (UST 2)  |
| <b>RX 33</b> | Leak Detector Test Receipt from May 28, 2018 for USTs 1-5.   |
| <b>RX 34</b> | Fuel Master Ledger dated September 1, 2017.  |
| <b>RX 35</b> | Leak Detector Test Receipt from September 24, 2020 for USTs 1-5.   |
| <b>RX 36</b> | Leak Detector Test Receipt from May 7, 2018 for USTs 4-5.  |

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| <b>RX 37</b> | Alert Technologies Tank Explorer Results dated December 26, 2017.   |
| <b>RX 38</b> | Leak Detector Test Receipt from July 12, 2016 (USTs 1-5), July 10, 2016 (USTs 1-5), July 13 2016 (USTs 1-5), January 7, 2019 (UST 1), December 24, 2018 (UST 1), November 19, 2018 (UST 1), August 20, 2018 (UST 3), July 2, 2018 (UST 3), June 18, 2018 (UST 3), April 27, 2018 (UST 1-5), October 29, 2019 (UST 5), November 2, 2018 (UST 5), December 15, 2018 (UST 5), January 7, 2019 (UST 4), December 31, 2018 (UST 4), November 5, 2018 (UST 4), October 29, 2018 (UST 4), September 10, 2018 (UST 4), August 27, 2018 (UST 4). |
| <b>RX 39</b> | Freedom of Information Act Appeal dated January 29, 2021.   |
| <b>RX 40</b> | Freedom of Information Act Appeal September 13, 2021.   |
| <b>RX 41</b> | Freedom of Information Act Request dated March 12, 2020.  |
| <b>RX 42</b> | Freedom of Information Act Appeal dated June 9, 2020.   |
| <b>RX 43</b> | Curriculum Vitae of Paul H. Hayden, P.G., L.R.S., R.S.M.  |
| <b>RX 44</b> | *CONFIDENTIAL BUSINESS INFORMATION*   |
| <b>RX 45</b> | *CONFIDENTIAL BUSINESS INFORMATION*   |
| <b>RX 46</b> | *CONFIDENTIAL BUSINESS INFORMATION*   |
| <b>RX 47</b> | *CONFIDENTIAL BUSINESS INFORMATION*   |
| <b>RX 48</b> | *CONFIDENTIAL BUSINESS INFORMATION*   |
| <b>RX 49</b> | *CONFIDENTIAL BUSINESS INFORMATION*   |
| <b>RX 50</b> | “Major Spill At Easton Point, Hundreds of Gallons Leak Into Tred Avon,” The Star Democrat, May 11, 2021.  |
| <b>RX 51</b> | “Major Easton Point Oil Spill, Hundreds of Gallon Seep Into Tred Avon,” OLT News, May 11, 2021.   |

### C. Time To Present Case

Respondent estimates that one (1) day is needed to present its case in response to Complainant’s case. Respondent does not foresee the need for an interpreter for any of its witnesses.



## **II. SECTION II OF THE PREHEARING ORDER**

Section 2 of the Presiding Officer's Prehearing Order provides that Respondent shall submit (A) a copy of any documents in support of the denials made in its Answer; (B) a copy of any documents in support of any asserted affirmative defenses and an explanation of the arguments in support of any such affirmative defenses; (C) all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and (D) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

### **A. A Copy of All Documents In Support Of The Denials Made In Respondent's Answer**

As required by the Prehearing Order, in its document production, Respondent has provided copies of all documents that support the denials it made in its Answer, RX 1- RX 51.

### **B. Documents In Support Of The Affirmative Defenses And Explanation of the Arguments In Support of Respondent's Answer**

As required by the Prehearing Order, in its document production, Respondent has provided copies of all documents that support the affirmative defenses it made in its Answer. Additionally, Respondent is required to set forth an explanation of each affirmative defense, and thus, states as follows:

FIRST DEFENSE: The Complaint fails to state a claim upon which relief can be granted against Respondent.

ARGUMENT IN SUPPORT OF FIRST DEFENSE: Complainant has failed to provide sufficient facts to supports Count I of the Administrative Complaint "Failure to Perform Release Detection on USTs," Count II of the Administrative Complaint "Failure to Perform Automatic

Line Leak Detector Testing Annually on USTs,” Count II “Failure to Perform Line Tightness Testing or Monthly Monitoring On Piping For USTs,” Count IV “Failure to Report Suspected Release From UST No.3,” Count V “Failure to Investigate a Suspected Release from UST No. 3,” and Count VI “Failure to Test Cathodic Protection Systems on USTs.” Furthermore, Complainant does not set forth any viable claims, nor has Complainant set forth why the Complainant is entitled to relief. Therefore, Complainant does not allege any facts sufficient to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

SECOND DEFENSE: Complainant’s allegations are barred by laches and/or waiver.

ARGUMENT IN SUPPORT OF SECOND DEFENSE: The allegations Complainant sets forth in its Administrative Complaint, are alleged violations dating back to 2016, and primarily span the years 2016-2018. Meanwhile, Complainant has sat idle and procrastinated on bringing these alleged violations in the form of an Administrative Complaint and now, in 2021, has decided to do so. This is an unreasonable and unjustifiable delay. Thus, Respondent argues that Complainant should be barred from raising all six counts in its Administrative Complaint due to an unreasonable delay in pursuing the claim.

FOURTH DEFENSE: Complainant’s allegations are not supported by substantial evidence.

ARGUMENT IN SUPPORT OF FOURTH DEFENSE: Complainant’s allegations are entirely unsupported by substantial evidence. “Substantial evidence” is defined as setting forth such relevant evidence as a “reasonable mind” might accept as adequate to “support a conclusion.” *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Complainant’s Administrative Complaint makes very specific factual allegations without providing any further information supporting the dates and types of alleged violations. The documents in Respondent’s prehearing exchange, Bates

Numbered RX1-RX51, illustrate that at all time relevant to the Administrative Complaint, Respondent was in compliance with all applicable UST regulations.

FIFTH DEFENSE: Complainant's undefined civil penalty assessment constitutes an abuse of discretion.

ARGUMENT IN SUPPORT OF FIFTH DEFENSE: Complainant has failed to include a civil penalty assessment in the Administrative Complaint, which prevents Respondent from understanding the severity of Complainant's assertions, and further deprives Respondent of the right to respond to the proposed penalty. Furthermore, while Complainant cites to 40 C.F.R. 22.14(a)(4)(ii) as its justification for not providing a specific penalty amount, Complainant fails to acknowledge that it has not complied with 40 C.F.R. 22.14(a)(4)(ii) in its entirety. 40 C.F.R. 22.14(a)(4)(ii), states, that "[w]here a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint," must be made. In the section of the Administrative Complaint titled "Proposed Civil Penalty," Complainant does not include (1) the numbers of violations, (2) the number of days of each violation, nor (3) a recitation of the statutory penalty authority applicable for each violation alleged in the Administrative Complaint. Therefore, Complainant has failed to properly plead a proposed civil penalty, which puts Respondent at a clear disadvantage.

SIXTH DEFENSE: Complainant failed to provide all responsive documents under Respondent's FOIA Request (EPA-R3-2020-003627) which precludes Respondent's ability to form a full defense in this case.

ARGUMENT IN SUPPORT OF SIXTH DEFENSE: On March 12, 2020, Respondent sent its first Freedom of Information Act (“FOIA”) request to Complainant requesting the opportunity to review and obtain copies of all records and information in the possession of the Complainant relating to the Complainant’s allegations of violations of the Maryland Underground Storage Tank (UST) program, as well as any federal claims, on the property located at 930 Port Street, Easton, Maryland 21602, from 2015 to present. To date, and after three subsequent appeals of Complainant’s FOIA decisions, (copies of documents are Bates Numbered RX 39-RX 42, Complainant has yet to provide Respondent with all relevant documents that Respondent is entitled to and allow Respondent an ability to defend itself. Respondent’s most recent FOIA appeal was submitted on September 13, 2021 due to EPA’s failure again to produce non-exempt information. Without the opportunity to review and rely upon the document requested in its FOIA Request, Complainant is preventing Respondent from forming a complete defense in this case.

SEVENTH DEFENSE: Complainant, by filing this Complaint against Respondent and not against other facilities similarly situated, illustrates bias and harassment towards Respondent, thereby violating Respondent’s Due Process rights.

ARGUMENT IN SUPPORT OF SEVENTH DEFENSE: Respondent is aware that Complainant has not harassed other similarly situated facilities in the same manner, i.e. by filing an Administrative Complaint, and Complainant continues to hide the documentation which unequivocally supports Respondent’s defense by failing to provide information on any EPA UST enforcement actions, besides 930 Port Street, Inc. and/or Easton Point facility, which were in the pool of documents Complainant reviewed under Respondent’s FOIA Request.

EIGHTH DEFENSE: Complainant's claims are barred on the grounds that they were brought for improper motive, arise out of malice or ill will, and amount to an abuse of Complainant's discretion.

ARGUMENT IN SUPPORT OF EIGHTH DEFENSE: Respondent reiterates its argument as set forth in the above seven affirmative defenses.

NINTH DEFENSE: Complainant's claims are barred by estoppel because they are arbitrary, capricious and inconsistent with other actions and inactions of the U.S. EPA that involve the same underground storage tank equipment that is the subject of the administrative proceeding.

ARGUMENT IN SUPPORT OF NINTH DEFENSE: Respondent reiterates its argument as set forth above in the argument in support of the Seventh Defense.

TENTH DEFENSE: Complainant's claims are barred by the doctrine of selective enforcement.

ARGUMENT IN SUPPORT OF TENTH DEFENSE: Respondent reiterates its argument as set forth above in the argument in support of the Seventh Defense.

ELEVENTH DEFENSE: After the timeframe in which Complainant alleged a release from UST No. 3, Respondent performed tightness testing to re-evaluate UST No. 3, upon which no leak or release was found. If there was in fact a release from UST No. 3, the leak would have been present when Respondent re-evaluated the tank, but since it was not, Respondent asserts there was never any release in UST No. 3, and any alleged release is due to the misreading of equipment or inactivity in UST No. 3 falsely reporting as a release/leak.

ARGUMENT IN SUPPORT OF ELEVENTH DEFENSE: Respondent's Eleventh Affirmative Defense clearly sets forth Respondent's argument within the defense itself, that, after the timeframe in which Complainant alleged a release from UST No. 3, in both Counts IV and V

of the Administrative Complaint, Respondent performed tightness testing to re-evaluate UST No. 3. After performing this testing, no leak or release was found. If there was in fact a release from UST No. 3, the leak would have been present when Respondent re-evaluated the tank. Thus, Respondent asserts there was never any release in UST No. 3. Respondent also clarifies that, while there was never any release in UST No. 3., any alleged release may have been due to the misreading of equipment or inactivity in UST No. 3 falsely reporting as a release/leak.

TWELFTH DEFENSE: Complainant's claims are barred by a violation of Respondent's right to due process.

ARGUMENT IN SUPPORT OF TWELFTH DEFENSE: Since Complainant has not properly, fully, or timely responded to Respondent's FOIA Requests and subsequent appeals, Respondent's rights to due process have been violated because Respondent does not have all available documents, that Respondent is rightfully entitled to, to support and defend its case.

### **C. All Relevant Factual Information To The Assessment Of A Penalty**

Respondent respectfully requests that this Court take into consideration all of the facts and argument set forth in Section II (B) of Respondent's Prehearing Exchange when assessing any penalty.

Particularly, Respondent adopts and reincorporates its statements above herein.

### **D. Factual and Legal Position For Why Penalty Should Be Reduced Or Eliminated**

Respondent takes the position that the penalty should be eliminated for all of the reasons set forth in Respondent's twelve affirmative defenses and articulated in Section II(B) of Respondent's Prehearing Statement.

With respect to the civil penalty assessment factors, first and foremost, Respondent received no economic benefit from any of the alleged noncompliance. Any allegations of failures

in the Administrative Complaint, if any in fact existed, were remedied promptly and timely by Respondent. However, in all other times relevant to the Administrative Complaint there were no failures at all. Respondent earned no economic benefit from the alleged non-compliance. Therefore, the factor of “economic benefit” within Complainant’s civil penalty assessment should not be given any weight.

Additionally, the gravity-based component, if it is going to be applied at all, should not be applied with a multiplier of any value. Complainant’s allegations in Count VI and V of the Administrative Complaint are purely incorrect, and Respondent has denied these allegations in its Answer, as there has never been a release or suspected release from any of Respondent’s underground storage tanks. Furthermore, all of the allegations for failure to test or monitor, occurred months before Complainant brought these issues to Respondent’s attention. For example, in the Administrative Complaint, Complainant asserts in Count II, paragraph 24, that “Respondent failed to test annually the automatic line leak detectors from September 1, 2017, until March 23, 2018 for USTs Nos. 1 and 3.” While Respondent denies this allegation in its Answer, Complainant sat on its hands regarding these alleged violations and did not bring them to the attention of Respondent months and years later, which exemplifies the definition of untimely. Due to the nature of the allegations, and the fact that the automatic line leak detector testing is required annually, it is impossible for Respondent to go back and produce testing records in response to allegations that occurred in the past. If an annual test is missed, a test can be performed in a subsequent year, but said test does not make up for the previous annual deadline that was missed. Respondent cannot go back to September 1, 2017 and recreate documents to toll the clock. It is simply unfair for Complainant to collect a penalty based on large multipliers under the civil penalty assessment, solely because Complainant unnecessarily kept the clock running. Therefore, the multiplying

factors discussed in Complainant's gravity-based analysis should be inapplicable if not completely disregarded.

Importantly, as evidenced in Respondent's document production (RX 3- RX 9), Respondent does not have a history of non-compliance and worked diligently with Melissa Toffel, at EPA, to provide the agency with any and all documentation requested regarding the subject matter in the Administrative Complaint.

Furthermore, Respondent argues that the proposed penalty should be reduced or eliminated on the ground of inability to pay. Respondent has already provided to Complainant the requested 2021 Corporate Debtor Form, Profit and Loss Statements from 2017-2020, Profits and Loss Statements from January-July 2021, 2018 Tax Returns and 2019 Tax Returns. All of these documents are currently being considered by Complainant as Respondent has noted its inability to pay on multiple occasions, due to the losses and generally reduced profits of Respondent as illustrated over the past four years. This is especially compounded by COVID-19 and the resulting economic shutdowns. Respondent has also submitted all of the relevant documents reflecting its inability to pay to this Court under separate cover, because of business confidentiality, pursuant to the Prehearing Order and 40 C.F.R. Part 2.



Respectfully submitted,

**BAKER, DONELSON, BEARMAN,  
CALDWELL, AND BERKOWITZ, PC**

DocuSigned by:

*Ashley Cullinan*

Charles R. Schaller (AIS# 9106200250)

Ashley P. Cullinan (AIS# 2001220051)

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*Attorneys for 930 Port Street, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 1st day of October, 2021, a copy of the foregoing Respondent 930 Port Street Inc.'s Prehearing Exchange Statement was served via electronic mail and/or the OALJ E-Filing system, on the following:

Christine Donelian Coughlin  
Administrative Law Judge

Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave., NW  
Washington, DC 20004  
[Angeles.Mary@epa.gov](mailto:Angeles.Mary@epa.gov)

Louis F. Ramalho  
Sr. Assistant Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103  
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DocuSigned by:  
*Ashley Cullinan*  
CEBC9EF54F7E49A...  
Ashley P. Cullinan