UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Andrew B. Chase, a/k/a Andy Chase,	)	
Chase Services, Inc., Chase Convenience	)	**Docket No. RCRA-02-2011-7503**
Stores, Inc., and Chase Commercial	)	
Land Development, Inc.,	)	
	)	**Dated: June 20, 2013**
Respondents.	)	

INITIAL DECISION

I. Procedural Background

This proceeding was initiated on April 7, 2011 by the Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("Complainant" or "EPA") filing a Complaint, Compliance Order and Notice of Opportunity for Hearing against the Respondents. The Complaint, filed pursuant to Section 9006 of the Solid Waste Disposal Act, as amended (the "Act" or "SWDA"), 42 U.S.C. § 6991, charges Respondents, as owners and/or operators of underground storage tanks ("USTs") at six retail gasoline stations, with 21 counts of violating regulatory requirements for UST release detection, prevention and correction. These regulatory requirements, codified at 40 C.F.R. Part 280, were promulgated by the Environmental Protection Agency pursuant to Section 9003(a) of the Act. In the Complaint, Complainant proposed a total penalty of $232,838.63 for the alleged violations.

Respondents submitted an Answer to the Complaint, denying the alleged violations and disputing the amount of the penalty. After several extensions of time were granted, the parties filed prehearing exchanges and stipulations. In their prehearing exchange, Respondents asserted, *inter alia,* financial hardship and inability to pay the penalty, but did not submit any proposed exhibits except for documentation of leak detector testing. A hearing was scheduled and later, upon motion, rescheduled to commence on July 17, 2012 in Plattsburgh, New York. The parties submitted Joint Stipulations on March 22, 2012 ("Stips").

Complainant filed a motion for accelerated decision as to Respondents' liability for Counts 1 through 19 and 21 of the Complaint, and Respondents filed an opposition to the motion. By Order on Complainant's Motion for Partial Accelerated Decision, dated June 21, 2012, ("June 21 Order"), the motion was granted and Respondents were found liable for the

violations alleged in Counts 1 though 16, 18, 19 and 21, but the motion was denied as to Count 17.

Upon motion filed by Complainant to compel production of financial records, to which Respondents failed to respond, an Order dated May 11, 2012 was issued, ordering Respondents to serve the requested documents on Complainant. Subsequently, Complainant filed a motion to preclude Respondents from producing documents relevant to financial hardship or inability to pay the penalty, on grounds that Respondents failed to submit the documents. Respondents filed a response to the motion, but did not submit the requested financial documents. By Order dated June 28, 2012 ("June 28 Order"), the motion was granted, precluding Respondents from presenting any evidence or information as to inability to pay or financial hardship.

On July 10, 2012, the parties submitted a Joint Motion to Cancel Hearing and for the Court to Issue an Initial Decision Based on the Written Record. In the motion, the parties stated that they knowingly and willingly relinquished and waived their right to an oral hearing, and they moved to cancel the oral hearing, requesting a decision on the written record as to any penalty for each of the violations found in the June 21 Order. The motion was made upon seven conditions agreed by the parties, including a briefing schedule for submission of papers, that the June 28 Order remain fully in effect, that documents in the prehearing exchange may be incorporated by reference in the papers submitted, and that declarations, affidavits, and statements of fact and exhibits in support thereof may be submitted if the declarant or affiant was identified in the prehearing exchange or if leave to submit such statement is granted by the undersigned. The parties also agreed to the condition that Complainant does not seek to obtain a judgment on liability or a penalty assessment on Counts 17 and 20 of the Complaint. An Order issued on July 13, 2012 ("July 13 Order") granted the motion, accepted and incorporated the seven conditions in the motion, cancelled the hearing, and set a briefing schedule.

By letter dated July 20, 2012, Complainant informed Respondents and the undersigned that the proposed penalty in the Complaint, $232,838.63, was "not properly tabulated" and thus calculated in error, and that the total proposed penalty should have read $276,078.63. Because Complainant does not seek assessment of penalties for Counts 17 and 20, the proposed penalties for those counts subtracted from the corrected proposed penalty yields a total proposed penalty of $265,211.63, Complainant states, which is the penalty it now seeks in this proceeding.

Complainant submitted a Memorandum of Law, dated August 9, 2012 ("EPA's Brief"), in support of ordering the injunctive relief and penalties Complainant seeks for the violations found in the June 21 Order. Enclosed with EPA's Brief is a Declaration of Paul M. Sacker, dated August 9, 2012 ("Sacker Decl.") and Exhibit A attached thereto. Respondents filed a Response Brief dated August 29, 2012 ("Respondents' Brief"or "Resp. Brief") with no enclosures. The Respondents' Brief included a request to reconsider the ruling in the June 28 Order precluding introduction of financial hardship information. On September 24, 2012, Complainant submitted a Memorandum in Reply to the Respondents' Brief ("Reply Brief"), with an enclosed Declaration of Gail B. Coad, dated September 21, 2012 ("Coad Declaration"). On September 28,

2012, Complainant filed a Motion to Supplement its Reply Brief to revise a paragraph in the Coad Declaration, with an enclosed Supplemental Declaration of Gail B. Coad, dated September 28, 2012 ("Supp. Coad Decl.").

On October 18, 2012, the due date for any response to the Motion to Supplement, the record closed. The substantive issues remaining for decision in this proceeding are the amount of any penalty to assess for the violations alleged in Counts 1 through 16, 18, 19 and 21 of the Complaint. The pending procedural issues are addressed below.

II. Complainant's Motion to Supplement Reply Brief

Complainant moved to supplement its Reply Brief to correct and clarify Paragraph 11 of the Coad Declaration, which paragraph provides information as to sales of properties owned by Respondents. The Supplemental Declaration of Gail B. Coad includes a revised Paragraph 11 and a statement that her edits to Paragraph 11 do not affect in any way her conclusion in the Coad Declaration.

Respondents did not file any response to the Motion to Supplement within the time period provided in the applicable procedural rules, 40 C.F.R. part 22. 40 C.F.R. §§ 22.16(b), 22.7(c) (a response to a motion must be filed within 15 days after service of the motion, plus five additional days where the motion is not served by overnight mail). Respondents have not objected to Complainant's motion to supplement its Reply Brief, and no prejudice would result from granting the motion. Accordingly, Complainant Motion to Supplement Reply Brief is **GRANTED**.

III. Motion to Reconsider

A. Parties' Arguments

Respondents' Brief includes a request to reconsider the ruling in the June 28 Order restricting the introduction of information as to financial hardship. Respondents request that they be allowed to submit such evidence, arguing that their "financial condition is an unalterable fact" and that a penalty beyond their means to pay will only force them into bankruptcy. Resp. Brief at 2. Pointing out that the violations occurred between 2006 and 2009 and that the Complaint was not filed until April 2011, Respondents assert that at the time of the Complaint, the companies owning and operating the stations had run into financial hardship. They assert further that all but one of the stations were sold, that Respondents no longer have any interest in those stations, and that "any net proceeds received from the sale were relatively minimal, and none of the named corporations are in operation." *Id.* at 1. Respondents argue that "[n]one of the Respondent corporations have any financial ability to pay any amount of fine," that imposing the penalties after many of the stations have been sold "poses incredible financial hardship upon Andrew

Chase individually," and that he "does not have the capacity to pay the fines." *Id* at 2. They argue further that a penalty that "recognizes the Respondents' financial condition better insures that EPA will be paid." *Id.* at 2. They refer to tax returns which they allege were submitted to EPA in March 2012, and assert that on June 14, 2012, a copy of the Individual Ability to Pay Claim was forwarded to EPA. *Id.*

In response, EPA submits that it would be inappropriate to reconsider the ruling in the June 28 Order for several reasons. First, the July 13 Order accepted the conditions listed in the Joint Motion to Cancel Hearing, which included the condition that the June 28 Order shall remain fully operative. Second, Respondents never sought interlocutory appeal or reconsideration of the June 28 Order before filing their Brief, and in any event, they maintain the right to request appellate review after the initial decision herein. Third, Respondents had ample warning from this Tribunal of their burden of proof on the issue of inability to pay or financial hardship, and of the consequences of failing to submit to EPA financial documents requested, and nevertheless they disregarded such notice and failed to submit financial documents in their Prehearing Exchange, to supplement their Prehearing Exchange, or to submit to EPA the financial documents requested. Reply Brief at 19-25.

Furthermore, EPA asserts that Respondents failed to meet their burden on proof on a claim of inability to pay the penalty or financial hardship, and that Respondents failed to provide documentation in support of such a claim despite ample opportunity to do so. EPA points out that Respondents did not quantify the amount they received from sale of the stations or what the money was used for, and did not provide any declaration or affidavit of Mr. Chase or anyone else with responsibility for his financial affairs. Therefore, EPA argues, Respondents' unsupported and unverifiable assertions should be disregarded. Reply Brief at 5-6. Narrating in detail EPA counsel's requests in June through August 2012 for financial information from Respondents, EPA asserts that they have not provided the documentation it sought, and that the documents Respondents had submitted earlier do not provide sufficient information to support a conclusion that they would be unable to pay the proposed penalty or would suffer financial hardship. *Id.* at 7-12.

In support, EPA provides the Declaration of Gail B. Coad. a consultant with Industrial Economics, Incorporated, who provides financial analysis services, and who assessed the financial capability of Respondents. She stated in her Declaration, as amended by her Supplemental Declaration, that Respondents sold four gas station properties in 2009 and 2011, that gross sales proceeds from the sales totaled over $5.79 million, and that Respondents sold an additional fifth gasoline station operation in 2009. She stated further that Mr. Chase's company Belmont LM continues to operate a station and convenience store in Lyon Mountain, New York, with a market value of $165,000. She also stated that on June 1, 2012, Mr. Chase offered his home for sale for $1.99 million including furniture and vehicles, and that in March 2011, he incorporated a new ATM servicing business. She opined that, based on publicly available information, Mr. Chase appears to be able to pay the proposed penalty. She stated further that the tax returns and other financial data that Respondents provided were incomplete and did not

include all supporting schedules, and that the documentation was inconsistent internally and was inconsistent with public documents. Furthermore, she stated that the documents did not describe Respondents' current situation. She opined that, based on her many years of experience evaluating financial situations of individuals and companies, she does not have a sufficient basis to conclude that the proposed penalty of approximately $263,000 should be reduced for ability to pay concerns. Coad Decl.

B. Discussion and Conclusion on Motion to Reconsider

The applicable procedural rules, 40 C.F.R. Part 22 ("Rules of Practice"), refer only to reconsideration of a final order, and do not refer to motions to reconsider an interlocutory order. If such a motion is to be entertained nonetheless, then federal case law may provide guidance. The power to reconsider an interlocutory order is committed to the discretion of the court, and the law of the case doctrine may guide that discretion. *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). The doctrine does not limit the court's discretion and its application varies depending on the context. *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148-49 (2nd Cir. 1999). However, "in deciding a motion to reconsider, the court must not reevaluate the basis upon which it made a prior ruling if the moving party is simply 'rearguing' a prior claim." *Brainware, Inc. v. Scan-Optics, Ltd.*, Civ. No. 3:11cv755, 2012 U.S. Dist. LEXIS 1166009 (E.D. Va., Aug. 16, 2012).

The June 28 Order included a detailed discussion of the facts and rationale supporting the ruling therein precluding Respondents from presenting any evidence or information as to inability to pay or financial hardship. As stated in the June 28 Order, Respondents failed to provide any documentation as to inability to pay in response to the Order dated May 11, 2012, despite being clearly warned of the consequences of failure to do so and of their burden of proof to show inability to pay. In response to Complainant's motion to preclude Respondents from introducing evidence as to financial hardship, the Respondents finally submitted some financial documents, but as discussed in the June 28 Order, they were insufficient. The Respondents do not assert that there are any errors of fact or law in the ruling, and do not assert that there were any changes in relevant law or factual circumstances since the ruling. Respondents simply reiterate arguments made in their response to the motion to preclude, namely that they had run into financial hardship and that the penalty would pose "incredible" financial hardship on Mr. Chase, and plead for reconsideration based upon vague statements of their counsel that a penalty beyond their means would force them into bankruptcy, and that net proceeds from property sales were relatively minimal. These statements are not evidence and thus carry no evidentiary weight. *Gans v. Gray*, 612 F. Supp. 608, 619 (E.D. Pa. 1985)(mere statements made in counsel's briefs are not evidence for purposes of supporting or opposing motion for summary judgment); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995)(counsel's statements are not evidence). The time for Respondents to submit financial information in this proceeding has long passed. Their argument that a smaller penalty "better insures that EPA will be paid" completely misses the purposes for which penalties are imposed, which purposes are discussed below with

respect to the Penalty Policy.

Moreover, even if the documents attached to Respondents' response to EPA's motion to preclude were considered, they are not sufficient to establish that the Respondents are unable to pay the proposed penalty, for the reasons stated in the Coad Declaration, which I find to be persuasive. Additionally, an inference could be drawn from Respondents' failure to submit complete documentation at the appropriate times in this proceeding, that the information requested by EPA but not submitted would be adverse to Respondents' claim of inability to pay. 40 C.F.R. § 22.19(g).

Accordingly, Respondents' request to reconsider the ruling in the June 28 Order is **DENIED**.

IV. Statutory and Regulatory Provisions Governing Penalty Assessment

Section 9003 of the Act, 42 U.S.C. § 6991b, authorizes the Environmental Protection Agency ("Agency") to promulgate release detection, prevention, and correction regulations applicable to all owners and operators of USTs as necessary to protect human health and the environment. A UST is defined in Section 9001 of the Act as "any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances," that is, petroleum or hazardous substances defined in 42 U.S.C. § 9601(14). 42 U.S.C. §§ 6991(7), 6991(14). Section 9006 of the Act authorizes the Agency, if it determines that any person is in violation of any requirement of the Act, to issue a compliance order, and any owner or operator of a UST who fails to comply with any requirement or standard promulgated under Section 9003 of the Act "shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." 42 U.S.C. §§ 6991e(a) and 6991e(d)(2). According to Section 9006(c) and (e) of the Act, the penalty assessed must be determined as "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements," the "compliance history of an owner or operator in accordance with [the provisions of the Act governing USTs or a program approved thereunder]," and "[a]ny other factor the Administrator considers appropriate." 42 U.S.C. § 6991e(c) and (e).

Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the Agency promulgated regulations that, as applied to penalties under Section 9006 of the SWDA, increase the maximum penalty to $11,000 for violations occurring between January 30, 1997 and January 12, 2009, and increase the maximum penalty to $16,000 for violations occurring thereafter. 40 C.F.R. § 19.4.

Under the Rules of Practice, EPA has the burdens of presentation and persuasion that the relief sought is appropriate, and following EPA's prima facie case, Respondents have the burden of presenting "any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24. The Rules of Practice provide that the Administrative Law Judge ("ALJ") "shall

determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

V. Penalty Policy

The Agency issued the "U.S. EPA Penalty Guidance for Violations of UST Requirements," dated November 14, 1990 ("Penalty Policy"), and on April 6, 2010, the Agency issued a guidance document entitled "Revision to Adjusted Penalty Policy Matrices Issued on November 16, 2009" ("Revised Matrices Guidance") which adjusted the penalty matrices in the Penalty Policy to account for the increased penalties under the Federal Civil Penalties Inflation Adjustment Act and 40 C.F.R. § 19.4.

The Penalty Policy states (at section 1.3) that penalty assessment methodology is intended to encourage timely resolution of environmental problems, support fair and equitable treatment of the regulated community, and deter potential violators from future violations. Deterrence is achieved by removing any significant economic benefit the violator may have gained from noncompliance (the "economic benefit component"), and by charging an additional amount (the "gravity-based component") to penalize the violator for not obeying the law.

The economic benefit component consists of avoided costs, which are the expenditures which should have but were not incurred by the violator, and delayed costs, which are the expenditures which were deferred by the violation. It is calculated with the Agency's software program called "BEN."

The gravity-based component is calculated in four steps. The first step is to determine a value from a matrix, which is based on two criteria forming the axes of the matrix: (1) the extent of deviation from the requirement, and (2) the probability of actual or potential harm to human health or the environment and/or the adverse effect on the regulatory program. The levels assigned under each criterion are major, moderate and minor. Appendix A of the Penalty Policy lists selected types of UST violations and provides a guide for assessing the levels of extent of deviation and potential for harm. Penalty values for violations occurring after March 15, 2004 are provided in the Revised Matrices Guidance.

The second step is to apply violator-specific adjustments to the matrix value. Four such adjustment factors are listed in the Penalty Policy: (1) degree of cooperation/noncooperation, (2) degree of willfulness or negligence, (3) history of noncompliance, and (4) other unique factors.

The first factor includes consideration of the violator's good faith efforts in response to enforcement actions. The matrix value may be reduced by as much as 25 percent if the violator goes beyond what is minimally required to comply with requirements closely related to the initial harm; no reduction is made for merely coming into compliance. The matrix value may be

increased as much as 50 percent for lack of cooperation with enforcement officials.

Consideration of the second adjustment factor, which may increase or reduce the matrix value by up to the same percentages, includes how much control the violator had over events constituting the violation, the foreseeability of such events, whether the violator made good faith efforts to comply and/or took reasonable precautions against such events, and whether the violator knew or should have known of hazards associated with the conduct. The Penalty Policy provides that if the violator knew of the legal requirement violated, the penalty may be adjusted upward; lack of knowledge does not support a decrease in the penalty.

As to the third adjustment factor, history of noncompliance, the matrix value may be increased by up to 50 percent for violations of any environmental regulation, unless the current violation was "caused by factors entirely out of control of the violator."

As a final adjustment, the matrix value may be increased up to 50 percent or decreased up to 25 percent for the fourth factor, "other unique factors," to account for unanticipated factors that arise in a particular case.

After making any violator-specific adjustments, the third step is to apply an Environmental Sensitivity Multiplier ("ESM"), which takes into account adverse environmental effects the violation may have had considering the sensitivity of the local area to potential damage posed by a release. Factors considered are the amount of petroleum potentially released, toxicity of petroleum, and potential hazards from a potential release, such as explosion, geologic site features, and likelihood of contaminating a river, drinking wells or wetlands, proximity to schools, and ecological or aesthetic value. The ESM is 1.0 for low value, 1.5 for moderate ESM, and 2.0 for a high ESM.

The fourth and final step is to apply a Days of Noncompliance Multiplier ("DNM"), by which the adjusted matrix value multiplied by the environmental sensitivity multiplier are then multiplied. This factor takes into account the number of days of noncompliance, and is assigned a value of 1 for violations lasting up to 90 days, 1.5 for the next 90 days, 2.0 for days 181 through 270, and 2.5 for days 271 through 365; beyond that time for each 6 month period the value increases by 0.5.

VI. Parties' Briefs and Evidence

Complainant seeks the assessment of the penalties it proposes for the violations of Counts 1 through 16, 18, 19 and 21 of the Complaint. In addition, Complainant seeks an order directing and enjoining Mr. Chase, to the extent he continues to own and operate USTs at Station I as identified in the Complaint, to comply with all applicable requirements set forth in 40 C.F.R. Part 280, including 40 C.F.R. §§ 280.41(b)(1)(ii), 280.41(b)(1)(i), 280.44(a), and 280.20(c)(1)(ii) as incorporated into 40 C.F.R. Section 280.21. In support, Complainant submits its Brief and the Declaration of Paul M. Sacker.

Complainant points out the purposes of the UST regulations:

> These final standards for UST systems are designed to reduce the number of releases of petroleum and hazardous substances, increase the ability to quickly detect and minimize the contamination of soil and ground water by such releases, and ensure adequate cleanup of contamination. To do this, the standards in some way must affect every phase of the life cycle of a storage tank system: Selection of the tank system, installation, operation and maintenance; closure and disposal, and cleanup of the site in cases of product release.

53 Fed. Reg. 37082, 37096 (Sept. 23, 1988).

Complainant asserts that the proposed penalties were developed in accordance with the Penalty Policy. Complainant also asserts that the totality of the circumstances, where Respondents owned and operated 19 USTs at six service stations, Mr. Chase was involved in the UST business for many years, and there were long periods of noncompliance with many regulatory requirements even after EPA gave express notice of regulatory noncompliance, underscores the need and importance for the assessment of the proposed penalties. Complainant points out Mr. Sacker's conclusion in his Declaration that the violations were serious, and the fact that the record does not show evidence of actual harm from any of the violations is not relevant because it is the potential for harm that is important, and proof of actual harm need not be proven to assess a substantial penalty. EPA's Brief at 43 (citing *V-1 Oil Company*, 8 E.A.D. 729, 755 (EAB 2000). Complainant urges that the circumstances of Respondents' violations "call for penalties with 'teeth,' penalties that 'sting.'" EPA's Brief at 43. EPA argues that it is well established that a penalty should deter violations not just by the defendant but against others who might commit similar violations. *Id.* at 44 (citing *inter alia United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D. S.C. 1988), *aff'd in part, vacated in part,* 865 F.2d 1261 (4th Cir. 1988)). Complainant argues that deterrence is of particular importance in the context of USTs given the large number of them throughout the country, pointing out that the Agency, when promulgating the UST regulatory requirements in Part 280, acknowledged that there were over 2 million UST systems estimated to be located at over 700,000 facilities nationwide. *Id.* (citing 53 Fed. Reg. 37082, 37083, 37095 (Sept. 23, 1988). Complainant also points out that releases from the piping associated with USTs "occur twice as often as tank releases." and therefore release detection "is an essential backup measure to prevention." 53 Fed. Reg. 37082, 37088, 37142 (Sept. 23, 1988). *Id.* at 33.

Accompanying EPA's Brief is the Declaration of Paul M. Sacker, dated August 9, 2012, with the Penalty Policy attached as Exhibit A. Mr. Sacker was identified as a witness in Complainant's Prehearing Exchange Statement. He asserts in his Declaration that he is an environmental engineer at EPA who inspected two of the gasoline stations at issue, reviewed inspection reports and other documentation relevant to this case, and calculated the proposed penalties. In his Declaration, Mr. Sacker refers to specific documents in EPA's Prehearing Exchange and thereby incorporates them by reference into EPA's papers in support of the relief

requested, and thus offered them into the written record of this case. The Sacker Declaration, along with the other evidence offered into the record by Complainant, is addressed in more detail with respect to each count of violation below.

In their Brief, Respondents assert that five of the six service stations at issue were sold prior to the date the Complaint was served, and that none of the corporate Respondents are in operation. As noted above, Respondents point out that the violations occurred between 2006 and 2009 but that the Complaint was not filed until April 2011. Respondents argue that the penalties "do not appear to be in any way related to any actual harm due to any leak or contamination" and that "[i]t is undisputed that no such leak or contamination has occurred as a result of the violations." Resp. Brief at 2. Finally, Respondents observe that the Penalty Policy allows for adjustments to be made to the proposed penalty, including up to 80 percent of the gravity-based component. Respondents simply urge that an 80 percent reduction of the proposed gravity-based penalty should be implemented in this case.

In its Reply Brief, Complainant notes an implicit laches defense in Respondents' Brief and the lack of any facts to show actual prejudice as a result of any delay in filing the Complaint. Complainant asserts that in any event, laches is irrelevant to the penalty determination, citing, *inter alia, United States v. Summerlin*, 310 U.S. 414, 416 (1940)("It is well settled that the United States is not . . . subject to the defense on laches in enforcing its rights"). In response to the assertion of no actual harm resulting from the violations, Complainant points out rulings of the Environmental Appeals Board ("EAB") and federal courts that EPA need not provide proof of actual harm to assess a substantial penalty, and that a violation may be serious based on its potential for harm, regardless of whether actual harm occurred. Reply Brief at 17, citing, *inter alia, V-1 Oil Company,* 8 E.A.D. 729, 755 (EAB 2000); *Ram, Inc.*, RCRA (9006) Appeal No, 08-01 & 08-02, 2009 WL 2050079 * 14 (EAB 2009); *United States v. Smithfield Foods, Inc.,* 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff'd in part, rev'd on other grounds,* 191 F.3d 516 (4th Cir. 1999), *cert. denied,* 531 U.S. 813 (2000).

VII. Discussion and Conclusions as to Respondents' Arguments

Respondents' request for an 80 percent reduction of the penalty is apparently based on the Penalty Policy's provision of an 80 percent reduction in the context of settlement, where the respondent demonstrated that it is unable to pay the penalty or that it will preclude it from achieving compliance. Not only have Respondents failed to make such a demonstration, but this provision is not for determination of a penalty by the administrative law judge. There is no other provision in the Penalty Policy for reducing the penalty by 80 percent; violator-specific adjustments allow only for a maximum 25 % decrease for each of three adjustments, and such adjustments are discussed below with respect to each count of violation. Respondents did not submit any affidavit, declaration, or exhibit to offer into evidence, and except for the reference to the Penalty Policy, did not incorporate by reference in their Brief any document in the prehearing exchange. Therefore, there is no basis for an 80 percent reduction of the penalty.

As to the relationship of penalties to actual harm to the environment and an absence of leak or contamination as a result of the violations, owners and operators of USTs are not relieved of substantial penalties by the fortuitous circumstance of lack of evidence of any petroleum leak or contaminated soil. For an egregious violation, such as where actual harm to the environment has been found, the Act at Section 9006 authorizes penalties of $10,000 *per day* for each violation. EPA has set out in the Penalty Policy matrices of penalties much smaller than that, reflecting the *potential* for harm, defined as "the extent to which the owner/operator's actions resulted in, or were likely to result in, a situation that *could* cause harm to human health or the environment." Penalty Policy, § 3.1.2 (emphasis added). The highest level for the "potential for harm" criterion under the Penalty Policy, i.e. "major potential for harm," is described as a violation that "causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial effect on the regulatory program." *Id.* Even where both the potential for harm and the extent of deviation from the regulatory requirement are at the highest level, the matrix value set in the Penalty Policy is only $1,500, far less than the statutory maximum.

The fact that Complainant alleges violations between 2006 and 2009 but that the Complaint was not filed until April 2011 does not provide any basis for reducing the penalty. Respondents argue that five of the six service stations at issue were sold prior to the date the Complaint was served, and that none of the corporate Respondents are in operation. However, Respondents have not shown any evidence of how the fact that the Complaint was not filed until after they ceased operations or sold stations resulted in prejudice to Respondents, even if such prejudice could be considered in assessing a penalty, an issue which is not necessary to decide here.

VIII. Findings of Fact, Conclusions of Law, and Discussion

For purposes of this Initial Decision on the penalty, the evidence of record of this case includes the following documents: the Sacker Declaration dated August 9, 2012, and Exhibit attached thereto; the Coad Declarations dated September 21 and September 28, 2012; and all documents in EPA's Prehearing Exchange that are referenced in EPA's Brief, Reply Brief and accompanying Declarations. In addition, the Joint Stipulations dated March 22, 2012 are admitted as evidence. Other documents, or portions thereof, that were filed in this proceeding and referenced in EPA's Brief, Reply Brief and accompanying Declarations are admitted into evidence as specified in the discussions below. The following Findings of Fact are based on the evidence of record, and include facts previously found as stated in the June 21 Order .

General Findings of Fact and Conclusions of Law

1. Respondents Chase Services, Inc. ("CSI"), Chase Convenience Stores, Inc. ("CCS"), and Chase Commercial Land Development, Inc. ("CCLD") (collectively, "corporate Respondents"), are for-profit corporations organized under the laws of the State of New York. Andrew B. Chase

("Mr. Chase") is the chairman or chief executive officer of each of the corporate Respondents. Stips ¶¶ 3-6.

2. A retail gasoline and convenience store business known as Chase's Mobil at 3851 Route 374, Lyon Mountain, New York ("Station I") had four USTs on the premises during the times relevant to the Complaint. Stips ¶¶ 7, 8; June 21 Order pp. 3-4.

3. A retail gasoline and convenience store business at 654 Bear Swamp Road, Peru, New York ("Station II") had three USTs on the premises. Stips ¶¶ 7, 10. At all times relevant to the Complaint, the station and USTs were owned by CCS, and Mr. Chase was the operator of the USTs. Stips ¶ 9; June 21 Order p. 12.

4. A retail gasoline and convenience store business at 1785 Military Turnpike Road, Unit 10, Plattsburgh, New York ("Station III") had two USTs on the premises during the times relevant to the Complaint. Stips ¶¶ 7, 12. The USTs were owned and operated by Mr. Chase during the times relevant to the Complaint. . June 21 Order p. 12, 15.

5. A retail gasoline and convenience store business at 4340 Route 3, P.O. Box 975, Redford, New York ("Station IV") had four USTs on the premises. Stips ¶¶ 7, 14. The station and USTs were owned by CSI from 1995 through July 24, 2009. Stips ¶¶ 13, 15; June 21 Order p. 5. At all times relevant to the Complaint, Mr. Chase was the operator of the USTs. June 21 Order p. 12, 16.

6. A retail gasoline and convenience store business at 936 Route 374, Dannemora, New York ("Station V") had four USTs on the premises. Stips ¶¶ 7, 17. Station V and the USTs at Station V were owned by CCLD from at least 2001 through July 24, 2009. Stips ¶¶ 16, 18; June 21 Order p. 6. At all times relevant to the Complaint, Mr. Chase was the operator of the USTs. June 21 Order p. 12, 16.

7. A retail gasoline and convenience store business at 7155 Route 9, Plattsburgh, New York ("Station VI") had five USTs on the premises. Stips ¶¶ 7, 19. At all times relevant to the Complaint, Mr. Chase was the owner and operator of the USTs. June 21 Order pp. 18, 20-22.

8. Duly designated representatives of EPA conducted an inspection of Stations II, III, IV, V and VI on August 26, 2008, an inspection of Station VI again on August 24, 2010, and inspections of Station I on April 24, 2009 and August 24, 2010. Stips ¶¶ 20-22.

9. All of the tanks referenced above were in use at the time of each of the inspections of the respective Stations, with the exception of Tank # 008 at Station I. Stips ¶¶ 20-22, 24-27.

10. EPA issued information request letters to Mr. Chase on or about April 1, 2009, October 5, 2009, September 7, 2010 and November 29, 2010 seeking information on all UST facilities owned or operated by him, and/or CSI and any affiliated entities. Stips ¶ 23.

11. Paul M. Sacker has a Bachelor of Engineering degree in chemical engineering, and is an environmental engineer in EPA's Underground Storage Tank Team who has been involved in UST work for approximately 15 years. His duties include conducting inspections, preparing information request letters, evaluating responses to them, reviewing inspection reports of UST inspections conducted by others, and training EPA employees in understanding and applying the UST regulations. He is experienced in calculating penalties for UST enforcement actions using EPA's UST penalty guidelines, the UST Penalty Calculator program and the BEN model. Sacker Decl. ¶¶ 1, 4- 6, 7, 9.

12. Mr. Sacker personally inspected two of the gasoline stations at issue in this case (Stations I and VI), reviewed reports prepared by Jeffrey Blair (who conducted inspections of all of the gasoline stations at issue in this case), reviewed documents filed by Respondent with the State of New York, prepared documents EPA sent to Mr. Chase seeking information, and calculated the proposed penalties in this case. Sacker Decl. ¶ 3.

13. Mr. Sacker followed the Penalty Policy in calculating the penalties. Sacker Decl. ¶¶ 21-33, 35-39, 41, 42.

14. Complainant did not have any record of any of the Respondents' noncompliance with any environmental laws prior to the filing of the Complaint. Sacker Decl. ¶ 14.

15. EPA determines the earliest possible date of any violation as five years prior to the date the complaint was filed. Therefore, in this case, the earliest violations assessed are April 2006. Sacker Decl. ¶ 15.

16. Mr. Sacker calculates the economic benefit component of the penalties using the BEN program, with which he determined the costs avoided or deferred by the Respondents' failure to comply with each particular requirement. Sacker Decl. ¶¶ 16, 20. The economic benefit calculated by the BEN program may be less than the amount of avoided expenditures and costs, reflecting inflation rates, pro-rated time periods, and/or the fact that an expenditure was deferred rather than avoided. Sacker Decl. ¶ 20.

17. Determining which Environmental Sensitivity Multiplier value to use for UST cases is based on the location of groundwater supplies in relation to the facility. A Geographic Information System ("GIS") mapping program is used in EPA Region 2 to determine whether the facility is located over or near drinking water supplies of underground water bodies. When a facility is not located over a significant groundwater supply, the ESM is assigned a value of 1. When a facility is located atop a primary aquifer, the assigned ESM is 1.5, because primary aquifers are vulnerable or fragile water bodies that may be used for drinking water supplies or crop irrigation. When the facility overlies a New York State Source Water Protection Area, the assigned ESM is 2, because such waters are within the contribution zone for drinking water intake and are highly sensitive and vulnerable to contamination. Sacker Decl. ¶ 33.

18. Mr. Sacker entered into a computer program the numbers representing the matrix value adjusted by the adjustment factors, ESM and Days of Noncompliance Multiplier and economic benefit component, and the program generated the initial target penalty figure. The computer program adheres to the steps set forth in the Penalty Policy and generates a spreadsheet showing the steps of developing the penalty. Sacker Decl. ¶ 38. The penalty calculation spreadsheets Mr. Sacker generated through the computer program were included in EPA's Prehearing Exchange. *Id.*

A. Station I

1. Findings of Fact and Conclusions of Law

1. Of the four USTs located at Station I, three were designated as follows:

   (a) Tank # 006A, with a capacity of 11,000 gallons;
   (b) Tank # 006B, with a capacity of 4,000 gallons, which along with Tank #006A constituted a "new tank system"under 40 C.F.R. § 280.12 and a petroleum UST system for purposes of 40 C.F.R. § 280.41; and
   (c) Tank # 008, with a capacity of 550 gallons. Stips ¶¶ 7, 8, 29, 32, 68.

2. Tank # 008 was installed on or about October 1, 1988, was temporarily out of service after April 2008 and was emptied, removed from service, and permanently closed in November 2009. Stips ¶¶ 8, 36. For at least two years prior to and through on or about April 30, 2008, Tank # 008 was being used to store kerosene. Stips ¶ 34. The tank was constructed of steel, carbon steel and iron. Stips ¶ 37.

3. Tank # 008 was equipped with a whistler valve which creates a sound which stops when the overfill is reached. June 21 Order p. 9.

4. Tank # 008 contained 31.5 inches of kerosene residue at the time of the April 2009 inspection of Station I. Sackler Decl. ¶ 115.

5. UST nos. 006A and 006B were installed at Station I on May 1, 1999. Sackler Decl. ¶ 54. They remained at the Station until at least March 22, 2012. Stips ¶ 8. At all times relevant to the allegations in the Complaint regarding Station I, the underground piping for each of Tank nos. 006A and 006B at Station I routinely contained and was used to convey gasoline under pressure, and each of the two lines was equipped with an automatic line leak detector ("ALLD"). Stips ¶¶ 30, 33.

6. EPA requested "monthly monitoring records or evidence of a line tightness test conducted in the past twelve months" for Tank nos.006A and 006B in information request letters of April 2009, October 2009 and September 2010, and Mr. Sacker requested such information again in emails to Mr. Chase in January 2010, and November 2010 and in his August 2010 inspection of

Station I. Sacker Decl. ¶ 112; Sacker Declaration, dated February 10, 2012 ("Sacker Feb. 2012 Decl."), ¶ 58, in support of Motion for Partial Accelerated Decision. Mr. Chase did not produce evidence of such records or testing. Sacker Decl. ¶ 112.

7. Tests of the ALLDs were conducted on April 22, 2009 and September 7, 2010. Sacker Decl. ¶ 54.

8. Station I does not overlie any environmentally sensitive area . Sacker Decl. ¶ 34.

9. Mr. Chase was the owner and operator of the USTs at Station I. June 21 Order pp. 8-9, 21-22.

2. Discussion as to owner and operator of USTs at Station I

As found in the June 21 Order (at 8-9), Complainant provided documentation showing that Mr. Chase is the owner and operator of the USTs at Station I, including a Petroleum Bulk Storage Application dated January 2010 and certificate dated October 3, 2008. Ms. Coad stated in her Declaration that Bellmont L.M. Inc. owns and/or operates Station I, and that Mr. Chase is a principal of Bellmont L.M. Inc. Coad Decl. ¶¶ 8, 13. The statement of Ms. Coad as to ownership of the *station* is not inconsistent with a finding that Mr. Chase was the owner and/or operator of the *USTs* at the station. To date, Respondents have not provided any documentation indicating that Mr. Chase was not the owner or operator of the USTs at Station I for any time periods of the alleged violations. It is concluded that during all times relevant to the Complaint, Mr. Chase was the owner and operator of the USTs at Station I. June 21 Order pp. 8-9, 21-22.

3. Discussion as to references in Sacker Declaration

In several instances his August 2012 Declaration, Mr. Sacker referred to his Declaration dated February 10, 2012 in support of Complainant's Motion for Partial Accelerated Decision. These references raise the question as to whether the latter Declaration should be admitted as evidence. As noted above, one of the conditions the parties agreed to in support of their motion for determination based on the written record, which condition was adopted in the July 13 Order, is that documents previously submitted *in the prehearing exchange* need only be referenced in any papers submitted for the written hearing record, to be deemed incorporated by reference into such submission. However, this condition does not preclude me from admitting into evidence other documents filed in this proceeding which were incorporated by reference in the papers submitted for the written hearing record. Mr. Sacker's February 2012 Declaration states that it was made under penalty of perjury, and Respondents have had full opportunity to submit evidence and argument in response to it, but have not presented any evidence or argument which suggests that any statements in the February 2012 Declaration should not be admitted into evidence. Therefore, the statements in Mr. Sacker's February 10, 2012 Declaration ("Sacker Feb. 2012 Decl.") that were referenced in his Declaration dated August 9, 2012 are admitted in

evidence.

4. Violations found at Station I

In the June 21 Order, Respondent Mr. Chase was found liable for violating the following regulatory provisions at Station I with regard to Tank nos. 006A and 006B:

Count 1: 40 C.F.R. § 280.41(b)(1)(ii) (failure to conduct release detection on piping)
Count 2: 40 C.F.R. § 280.44(a) (failure to conduct annual tests of ALLDs)

Also in the June 21 Order, Mr. Chase was found liable for violating the following regulatory provisions with respect to Tank # 008:

Count 3: 40 C.F.R. § 280.21(d) as it incorporates § 280.20(c)(1)(ii) (failure to comply with overfill prevention requirements)
Count 4: 40 C.F.R. § 280.70(a) (failure to maintain release detection on temporarily closed tank)
Count 5: 40 C.F.R. § 280.31(b)(1) (failure to maintain cathodic protection)
Count 6: 40 C.F.R. § 280.70(b) (failure to cap and secure temporarily closed tank)
Count 7: 40 C.F.R. § 280.70(c) (failure to permanently close tank)

With respect to Tank no. 006A and 006B, the relevant regulatory provisions state as follows, in pertinent part:

§ 280.41 Requirements for petroleum UST systems.

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:
* * *
(b) *Piping.* Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:

(1) *Pressurized piping.* Underground piping that conveys regulated substances under pressure must:
(i) Be equipped with an automatic line leak detector conducted in accordance with § 280.44(a), and
(ii) Have an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c) .
(2) *Suction piping.* * * * *

40 C.F.R. § 280.44 Methods of release detection for piping.
Each method of release detection for piping used to meet the requirements of § 280.41

must be conducted in accordance with the following:

(a) *Automatic line leak detectors.* Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of 3 gallons per hour . . . . An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.
(b) *Line tightness testing.* A periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate . . . .
(c) *Applicable tank methods.* Any of the methods in § 280.43(e) through (h) may be used if they are designed to detect a release from any portion of the underground piping . . . .

With respect to Tank # 008, the relevant regulatory provisions state as follows, in pertinent part:

40 C.F.R. § 280.20 Performance standards for new UST systems.

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements.
* * * *
(c) *Spill and overfill prevention equipment.* (1) Except as provided in paragraph (c)(2) of this section [proper alternative equipment as determined by the agency, or UST systems filled by transfers of no more than 25 gallons at one time], to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:
(i) * * *
(ii) Overfill prevention equipment that will:
(A) Automatically shut off flow into the tank . . .
(B) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high level alarm; or
(C) Restrict flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank . . . .

40 C.F.R. § 280.21 Upgrading of existing UST systems.
* * * *
(d) *Spill and overfill prevention equipment.* To prevent spilling and overfilling associated with product transfer to the UST system, all existing UST systems must comply with new UST system spill and overfill prevention equipment requirements specified in § 280.20(c).
* * * *

40 C.F.R. § 280.31 Operation and maintenance of corrosion protection.

All owners and operators of steel UST systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances:
* * * *
(b) All UST systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:
(1) *Frequency.* All cathodic protection systems must be tested within 6 months of installation and at least every 3 years thereafter . . . .
* * * *

40 C.F.R. § 280.70 Temporary closure.

(a) When an UST system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with § 280.31, and any release detection in accordance with subpart D [unless the system is empty, so that no more than 2.5 centimeters (one inch) of residue or 0.3 percent by weight of the total capacity of the UST system remain in the system].

(b) When an UST system is temporarily closed for 3 months or more, owners and operators must also comply with the following requirements:
(1) Leave vent lines open and functioning; and
(2) Cap and secure all other lines, pumps, manways, and ancillary equipment.

(c) When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21, *except that* the spill and overfill equipment requirements do not have to be met. * * * *.

5. Count 1

As found in the June 21 Order, Mr. Chase failed to either have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 006A and 006B at Station I between April 24, 2008 and December 15, 2010, in violation of 40 C.F.R. § 280.41(b)(1)(ii), as alleged in Count 1 of the Complaint.

Complainant's Calculation

For the costs Mr. Chase avoided by his noncompliance with Section 280.41(b)(1)(ii), Mr. Sacker calculated an economic benefit of $374 by entering into the BEN program an estimated

cost of $100 for conducting an annual line tightness test for each of the two lines. Sacker Decl. ¶ 96.

Referring to Appendix A of the Penalty Policy, Mr. Sacker assigned a "major" level of extent of deviation and "major" level of potential for harm for the failure to conduct line tightness testing, yielding a matrix value of $1,500, for Count 1. Under the Revised Matrices Guidance, he increased this value for inflation to $1,930 for violations from March 15, 2004 until January 12, 2009, and to $ 2,120 for violations thereafter. Sacker Decl. ¶¶ 24, 46, 94, 97; Complainant's Prehearing Exchange Exhibit ("CX") 2, 4. He assessed the violation on a per-line basis. Sacker Decl. ¶ 94.

Mr. Sacker stated that release detection requirements represent core components to the regulatory scheme to prevent releases and alert the owner to a release to minimize it. Sacker Decl. ¶¶ 105, 106. He stated further that the potential for release, increased by the length of time of non-compliance and the large size of the USTs at issue, 15,000 gallons, demonstrate a pronounced lack of good faith effort to comply with the requirements, considering that much of his failure "consisted of simply not doing anything," and that he had notice of the requirement since at least April 2009 when EPA conducted the inspection and sent him information request letters. Sacker Decl. ¶¶ 111, 112. Mr. Sacker did not adjust the penalty for any of the penalty adjustment factors. Sacker Decl. ¶ 97.

He found a total of 966 days of noncompliance, starting with the date 12 months prior to the August 24, 2009 inspection and ending on the date of Mr. Chase's last response to an information request letter, in which he failed to provide evidence of a line tightness test or monthly monitoring records. Sacker Decl. ¶ 95. He noted that if monthly monitoring is done, records of it are required to be kept for at least 12 months, and that, despite his statement in his February 2012 Declaration that a line tightness test for December 10, 2010 was received, EPA has no line tightness test on record for Station I. Sacker Decl. ¶¶ 93, 95.

He divided the 966 days of noncompliance into two time periods to apply the DSM. He explained that if a violation period crosses the two inflation periods, starting prior to January 12, 2009 and ending after that date, "a proportional rate is used which considers how many days of violation occurred during each period." Sacker Decl. ¶ 24. Therefore, he calculated a DSM of 2 multiplied by the matrix value of $1,930 for the period of April 24, 2008 to January 12, 2009, then a DSM of 2.5 multiplied by the matrix value of $2,120 for the remainder of the period. Sacker Decl. ¶ 97. Mr. Sacker pointed out that the Revised Matrices Guidance misprinted the value in the "major-major" cell of the penalty matrix as $2,130 when it should read $2,120, based on the calculation described in the Guidance. Sacker Decl. ¶ 46; CX 4, Attachment C, Exhibit 4B. With an ESM of 1, Mr. Sacker calculated a gravity based penalty figure of $18,320. Sacker Decl. ¶ 97. Adding the economic benefit component to the gravity based penalty yielded a penalty of $18,694. Sacker Decl. ¶¶ 98, 104; CX 31.

Discussion and Conclusion

Mr. Sacker's calculation of $374 for the economic benefit of noncompliance is reasonable, considering an estimated avoided cost of $100 for conducting annual line tightness test for the two lines over the two and a half year period.

The Penalty Policy, Appendix A Subpart D, assigns a "major" extent of deviation and "major" potential for harm for a violation of Section 280.41(b), described in Subpart D as "[f]ailure to use any underground piping monitoring method." Subpart D also assigns major extent of deviation and potential for harm for violation of Section 280.44, described as "[f]ailure to use any release detection for underground piping." These descriptions do not exactly fit the circumstances of the violation. For monitoring pressurized piping, Section 280.41(b) requires both an ALLD system (Section 280.41(b)(1)(i)) and annual line tightness tests (Section 280.41(b)(1)(ii)). Section 280.44(a) requires an ALLD system with specified features and that is tested annually. The piping for Tanks 006A and 006B was equipped with ALLD monitoring systems. Although as found in Count 2 the ALLDs were not tested annually prior to April 2009, they were tested in April 2009 and on September 7, 2010, and there is no evidence that the ALLDs failed, were otherwise inadequate or lacked the specified features. An inference can be drawn that the ALLDs were functioning properly for some of the time period at issue in Count 1. For the period of time prior to April 2009, a separate penalty is assessed in Count 2 to account for the failure to test the ALLD systems. It is noted that Subpart D categorizes even a failure to provide adequate line tightness testing system for piping as "major" extent of deviation and potential for harm. However, a penalty must reflect a difference in extent of deviation and potential for harm between a failure to have *any* effective line monitoring, and a failure to conduct annual line tightness testing where the lines are equipped with ALLDs that were functional during the relevant time. Therefore, the values representing extent of deviation and potential for harm for Count 1will be reduced to dollar amounts below "major" extent of deviation and potential for harm but significantly above "moderate" extent of deviation and potential for harm.

The Penalty Policy matrix provides a matrix value of $1500 for major extent of deviation and potential for harm ("major-major") and $500 for moderate extent of deviation and potential for harm ("moderate-moderate"). The value best representing the extent of deviation and potential for harm for the violation in Count 1 considering that matrix is $1,200. The Revised Matrices Guidance provides that for violations that occurred after March 15, 2004 and through January 12, 2009, the matrix values are increased by 1.2895. Multiplying that number by $1,200 yields a figure of $1,547, which will be rounded to the nearest ten to $1,550. For violations thereafter, the Revised Matrices Guidance provides that the matrix values are increased by 1.4163. Multiplying that number by $1,200 yields a figure of $1,700.

Appendix A of the Penalty Policy indicates that the unit assessment for a violation of Section 280.41(b) should be applied to piping, and that the assessment depends on whether the piping is associated with one tank or more than one tank. Where the piping was associated with

each tank and was equipped with an ALLD for each tank, it is appropriate to assess a separate violation for the piping for each tank, representing an additional risk. Therefore the figures for the respective time periods are doubled to $3,100 and $3,400 respectively, to account for the two lines.

The next step is to consider whether any violator-specific adjustments should be made to the matrix values. As to the degree of cooperation or noncooperation, the Penalty Policy at § 3.2.1 provides that a decrease in the penalty will be made only where the respondent's cooperative behavior goes "beyond what is minimally required to comply with the requirements that are closely related to the initial harm addressed." There is no evidence that Mr. Chase did so. As to the degree of willfulness or negligence, or the culpability and intentions in committing the violation, there is no evidence supporting a decrease or increase in the penalty, such as the degree of control Respondent Chase had over the events constituting the violation, the foreseeability of such events, whether he made good faith efforts to comply and/or took reasonable precautions against such events, or whether he knew or should have known of the hazards associated with the conduct. With regard to "other unique factors," defined as "unanticipated factors that may arise on a case-by-case basis," there is no evidence to support either an upward or downward adjustment for this factor.

Therefore, the value of $3,100 is multiplied by a DSM of 2 for the period of April 24, 2008 to January 12, 2009, and a value of $3,400 is multiplied by a DSM of 2.5 for the remainder of the violation. Accepting the ESM of 1, the total gravity based penalty is $14,700. Adding the economic benefit component of $374 yields a penalty of $15,074 for Count 1.

6. Count 2

As found in the June 21 Order, Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector for underground piping of Tank nos. 006A and 006B at Station I from May 2006 until April 22, 2009 and from April 22, 2010 to September 7, 2010, in violation of 40 C.F.R. §§ 280.44(a) and 280.41(b)(1)(i), as alleged in Count 2 of the Complaint.

Complainant's Calculation

For Count 2,the economic benefit of noncompliance was calculated by Mr. Sacker through the BEN program with an estimated annual cost of $150 for ALLD testing for each line. Sacker Decl. ¶ 51. For the first period, from May 2006 to April 2009, he calculated an economic benefit of $741, and for the second period, $75. Sacker Decl. ¶¶ 55, 56.

He stated that a failure to conduct annual tests for the operation of ALLDs as required is classified as a "major" extent of deviation and "major" potential for harm, according to Appendix A of the Penalty Policy, yielding a matrix value of $1,930 for violations from March

15, 2004 until January 12, 2009, and $2,120 for violations thereafter. Sacker Decl. ¶¶ 24, 46; CX 4.

He explained that an annual ALLD test "had to be conducted by May 1st of each of the following years" after tank installation on May 1, 1999, because "[t]he first annual test . . . had to occur within, and no later than, one year after the installation date, with each subsequent test required to be conducted within one calendar year thereafter." Sacker Decl. ¶¶ 49, 54. Therefore, Mr. Sacker calculated the first period of noncompliance as 1,088 days, from the first annual testing due date on May 1that occurred within the five year period prior to the Complaint, until the date an ALLD test was conducted on April 22, 2009. *Id.* He selected the the matrix value of $1,930 for the entire period because most of it occurred before January 12, 2009. Sacker Decl. ¶ 55. He then doubled that figure to account for the two lines, and multiplied it by a DNM of 4.5, yielding a figure of $17,370. *Id.* He calculated the second period starting from April 22, 2010, on the basis that it was the due date for the next test, one year after the last testing. Sacker Decl. ¶ 56. He concluded that the second period of noncompliance continued until September 7, 2010, the date the next ALLD test was conducted. This period of 139 days of noncompliance, with a matrix figure of $2,120, was multiplied by a DNM of 1.5, resulting in a figure of $6,360. Sacker Decl. ¶¶ 54, 56. Sacker Decl. ¶¶ 48-50, 54-56.

Mr. Sacker did not adjust the gravity based penalty for any violator-specific adjustments on the basis that he had no evidence that would warrant such adjustments. Sacker Decl. ¶¶ 55, 56. He stated that a properly functioning automatic leak detector is a key aspect to ensuring that leaks from pipes attached to USTs are detected and immediately responded to, and that piping is an important source of releases from UST systems. Sacker Decl. ¶ 76. He explained that the ALLD is at the interface of the tank and its piping and is intended to shut off the pump on the UST as soon as a release is detected in a pipe through pressure drop, and the annual test of the ALLD ensures that it can detect a release. Sacker Decl. ¶ 77. He considered the significance of the violation in terms of the tanks at issue at Station I having a capacity of 15,000 gallons, and the extended time Mr. Chase neglected the regulatory requirements. Because Mr. Chase showed no evidence that he ever conducted ALLD tests from the time he took over operation of the USTs at the facility and the time of EPA's inspections, and he failed to do so again after the test was performed in April 2009, Mr. Sacker concluded that Mr. Chase made no good faith effort to comply. Sacker Decl. ¶ 79, 82, 83, 87- 89.

Adding $6,360 and $17,370, considering the ESM of 1, resulted in a gravity based component of $21,430. Sacker Decl. ¶ 86. Adding the economic benefit of noncompliance figures to the gravity based figures resulted in a total penalty of $24,546. Sacker Decl. ¶¶ 55-57; CX 32.

Discussion and Conclusion

Section 280.44(a) requires "[a]n annual test of the operation of the leak detector . . .

conducted in accordance with the manufacturer's requirements." The term "annual" is not defined in the regulations, and there is no particular date set in the regulations as to when the ALLD testing is to be conducted. The regulations do not specify that testing must be conducted within 12 months of the last due date for testing, or every 12 months. Complainant does not point to any other authority supporting its view on this issue. Therefore, it is appropriate to interpret the term "annual" according to the common dictionary definition: "reckoned by the year . . .; covering the period of one year: based on a year; occurring, appearing, made, done or acted upon every year or once a year." *Webster's 3rd New International Dictionary,* unabridged, p. 88 (Merriam-Webster 2002). Under this definition, where an ALLD test was conducted in April 2009 and again in September the next year, there is no basis for assessing a penalty for the time between April 2010 and September 2010 merely on the basis that the test was not conducted within 12 months of the last test. Accordingly, it is appropriate to assess a DNM of 4.5, and the economic benefit of $741, that Mr. Sacker calculated for the first period, from May 2006 to April 2009.

Appendix A Subpart D of the Penalty Policy assigns "major" extent of deviation and "major" potential for harm for violation of Section 280.44(a) described as "[f]ailure to provide adequate line leak detector system for underground piping." The term "adequate" is reasonably interpreted as meeting the requirements of Section 280.41(b)(1)(i): that piping be equipped with an ALLD in accordance with Section 280.44(a), which in turn includes two requirements: (1) that the ALLD alert the operator to the presence of a leak by restricting or shutting off the flow or triggering an alarm and that it detect leaks of 3 gallons per hour and (2) that an annual test of the operation of ALLD be conducted. The piping was equipped with ALLDs, and there is no evidence that they did not meet the requirements of Section 280.44(a) for method of alert or standard of detection. Accordingly, the circumstances of the violation meets the Penalty Policy's definition (at § 3.1.1) of a "moderate" extent of deviation: "significantly deviates from the requirement of the regulation . . ., but to some extent has implemented the requirement as intended [such as] improperly constructed cathodic protection."

However, given the failure to conduct tightness testing on the piping as found with respect to Count 1, the potential for harm for failure to test the ALLDs is "major." The appropriate matrix value under the Revised Matrices Guidance is therefore $1,290 for each line, or $2,580.

As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment. The value of $2,580 is multiplied by the 4.5 DNM and 1 ESM, resulting in a gravity based penalty of $11,610. Adding the economic benefit component of $741 results in a penalty of $12,351 for Count 2.

7. Count 3

Mr. Chase was found in the June 21 Order to have failed to meet the overfill protection

equipment requirements of 40 C.F.R. § 280.20(c)(1)(ii) on Tank # 008, by providing only a whistler valve from April 1, 2006 through April 30, 2008.

Complainant's Calculation

The economic benefit of noncompliance was calculated by Mr. Sacker as $236, through entering into the BEN program a one-time non-depreciable estimated cost of $600, based on going rates, for installation of an overfill device, that Mr. Chase avoided during the period of violation. Sacker Decl. ¶ 148.

Mr. Sacker stated that a failure to meet overfill protection equipment requirements is classified as a "major" extent of deviation and "moderate" potential for harm, under Appendix A of the Penalty Policy, yielding a matrix value of $750, which is increased to $970 for violations from March 15, 2004 until January 12, 2009. Sacker Decl. ¶¶ 151; CX 4.

He asserted that this violation actually existed since December 22, 1998, "based on what [he] had received, and had not received, from Respondents," but chose April 1, 2006 as the date the violation started and April 30, 2008 as the date it ended. Sacker Decl. ¶ 149. He noted that the Complaint alleged the violation occurred "at least two years prior to and through April 30, 2008," when it was placed in temporary closure. *Id.* He assessed a DNM of 4.0 based on 761 days of noncompliance. Multiplying the matrix value of $970 by a DNM of 4.0, representing 761 days of noncompliance, resulted in a figure of $3,880. Sacker Decl. ¶¶ 149.

He did not adjust the gravity based penalty for any violator-specific adjustments on the basis that he had no evidence that would warrant such adjustments. Sacker Decl. ¶¶ 151. He noted that Tank # 008 was required to be upgraded with overfill protection since December 22, 1998 according to 40 C.F.R. § 280.20(c)(1), but the start date for the violation was the date five years prior to issuance of the Complaint, under the policy of Region 2 not to assess penalties for violations earlier than five years prior to issuance of the complaint. Sacker Decl. ¶¶ 15, 147, 149. He explained that overfill prevention equipment is intended to prevent harm to workers, fuel deliverers and customers at retail gas stations; to prevent spills of fuel entering the environment and perhaps contaminating water supplies, water bodies, or residences; and avoid the danger of explosion or fire if overfilled product comes in contact with static electricity or a spark, such as from a cell phone. Sacker Decl. ¶¶ 158, 159. Mr. Sacker stated that the lengthy period of noncompliance reveals Mr. Chase's disregard of regulatory requirements and lack of good faith efforts to comply. Sacker Decl. ¶¶ 162, 163.

Considering the ESM value of 1 for Station I, Mr. Sacker calculated a gravity based component of $3,880. Sacker Decl. ¶ 151. Adding the economic benefit of noncompliance figure of $236 to the gravity based figure resulted in a total penalty of $4,116 for Count 3. Sacker Decl. ¶ 152; CX 33.

Discussion and Conclusion

Appendix A of the Penalty Policy assigns a "major" extent of deviation and "moderate" potential for harm either for a violation of Section 280.20(c)(1) or 280.21(d), described as failure to install any overfill prevention system, or for a violation of Section 280.20(c)(1)(ii), described as "[i]nstallation of inadequate overfill prevention equipment in a new tank." Tank #008 was required under Section 280.21(d) to be upgraded to have spill and overfill prevention equipment as is required for new tanks. The whistler valve which only stops when overfill is reached is inadequate overfill prevention in light of the standards of Section 280.20(c)(1)(2), which require automatic shut off, restriction of product flow or high level alarm prior to overfilling. The violation alleged in Count 3 meets the descriptions in Appendix A, and therefore the appropriate matrix value is as Mr. Sacker proposed, $ 970.

As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 3.

The parties stipulated that Tank # 008 was being used to store kerosene "for at least two years prior to and through April 30, 2008," when it was placed in temporary closure. Stip. ¶34. While it may be inferred that the whistler valve was the only overfill protection ever installed on Tank # 008, there is no evidence establishing that the tank was in fact storing kerosene for more than two years. The duration of the violation is best represented as two years, with a DNM of 3.5.

The Penalty Policy provides at § 3.3 that the ESM is based on the actual or potential impact that a release would have on the local environment and public health, and that factors considered in assessing the ESM include the amount of petroleum potentially or actually released, such as the size and number of tanks that were involved in the violation as they relate to the potential volume of materials released. The fact that Tank #008 has only a 550 gallon capacity, and had 31.5 inches of kerosene residue in it when after it was taken out of service should be taken into account in assessing the ESM. Where the ESM is assessed as 1 considering the potential harm to human or environmental receptors, the ESM should be reduced further to account for the size of the tank and volume of petroleum substance in the tank at relevant times. In the circumstances of this case, the ESM will be assessed as 0.5.

The matrix value multiplied by the DNM is $3,395. Multiplying this figure by an ESM of 0.5 results in a gravity-based penalty of $1,698. Adding the economic benefit of $236 calculated by Mr. Sacker yields a penalty of $1,934 for Count 3.

8. Count 4

As found in the June 21 Order, Mr. Chase failed to continue release detection after Tank # 008 at Station I was temporarily closed in April 30, 2008 until it was required to be permanently closed by April 2009, in violation of 40 C.F.R. § 280.70(a).

Complainant's Calculation

Mr. Sacker originally calculated a penalty based on the violation continuing until the tank was closed in November 2009, but determined that April 29, 2009 was the date the violation ended, which is the final date the tank could remain in temporary closure, and considered the violation thereafter until November under Count 7. He recalculated the penalty accordingly. Sacker Decl. ¶ 118; see CX 34.

He calculated a $104 economic benefit of noncompliance by entering into the BEN program an estimated avoided annual recurring cost of $120 for conducting release detection for the tank. Sacker Decl. ¶ 119.

He stated that the Penalty Policy suggests that the appropriate gravity based penalty for violations covered by 40 C.F.R. § 280.70 is in Subpart G, which pertains to out of service USTs and closure. He assessed the failure to continue release detection in a temporarily closed tank a "major" extent of deviation from regulatory requirements and a "major" potential for harm. Sacker Decl. ¶ 117. Based on 365 days of noncompliance and a total DNM of 2.5, for the period before January 12, 2009, Mr. Sacker assessed the matrix value at $1,930 and a DNM of 2.0. For the remainder of the days of noncompliance, he assessed the matrix value at $2,120 with a DNM of 0.5, resulting in a figure of $4,920. Sacker Decl. ¶ 120.

He made no further adjustments as he had no evidence warranting any violator specific adjustments to the penalty. Sacker Decl. ¶ 120. Stating that Tank # 008 contained 31.5 inches of kerosene residue during the April 2009 inspection of Station I, Mr. Sacker asserted that although the tank was taken out of service, release detection was necessary. Sacker Decl. ¶ 115, 135. The fact that it was not operating indicates that it is less likely to be monitored and observed for leaks than an operating tank, and that it is just as vulnerable to corrosion as any other tank. Sacker Decl. ¶ 136, 137.

With the ESM assessed as 1, the gravity based component was calculated as $4,920. Sacker Decl. ¶ 120. Adding the economic benefit component to the gravity based component resulted in a total penalty of $ 5,024. Sacker Decl. ¶ 121; CX 34.

Discussion and Conclusion

Appendix A of the Penalty Policy does not list a violation of Section 280.70(a), but Subpart G lists violations of Sections 280.72, failure to measure for presence of a release before permanent closure, or failure to begin corrective action if contamination is discovered. Subpart G also lists violations of 280.74, failure to maintain closure records or change-in-service records for at least 3 years. For each of those listed violations, Subpart G assigns a "major" extent of deviation and potential for harm, i.e. "major-major." For an operating tank, failure to provide release detection for tanks also is assessed as "major-major," as set out in Subpart D of Appendix A. Mr. Sacker's assessment for the violation alleged in Count 4 is appropriate, as it is reasonably

equivalent to these violations for purposes of assessing the extent of deviation and potential for harm.

There is no evidence in support of any violator specific adjustments to the penalty. The method of calculating the penalty with the DNM of 2.5 divided between the time periods under the Revised Matrices Guidance is an appropriate method of assessing the duration of the violation and the effect of inflation.

However, as with Count 3, the ESM must take into account the relatively small size of Tank #008 and the volume of kerosene residue therein. Therefore, the figure of $4,920 multiplied by an ESM of 0.5 results in a gravity based component of $2,460. Adding the $104 economic benefit component, the resulting penalty is $2,564 for Count 4.

9. Count 5

As to Count 5, Mr. Chase was found liable in the June 21 Order for failure to conduct triennial testing of the cathodic protection system of Tank # 008 from June 2008 until it was required to be permanently closed in April 2009, in violation of 40 C.F.R. § 280.70(a).

Complainant's Calculation

Mr. Sacker set the beginning date of the violation based on the fact that Tank # 008 was required to have cathodic protection by December 12, 1998, and within six months was required to conduct the first corrosion protection test, that is, by June 22, 1999, and subsequent tests every three years thereafter. Thus the first due date within the 5 year period prior to the Complaint for corrosion protection test was June 22, 2008. Sacker Decl. ¶ 122.

He assessed failure to maintain cathodic protection in a temporarily closed tank as as a "major" extent of deviation from regulatory requirements and a "moderate" potential for harm. Sacker Decl. ¶ 117. Based on 312 days of noncompliance and a total DNM of 2.5, for the period before January 12, 2009, he assessed the matrix value at $1,930 and a DNM of 2, and for the remainder of the days of noncompliance, he assessed the matrix value at $2,120 with a DNM of 0.5.

He made no further adjustments as he had no evidence warranting any violator specific adjustments to the penalty. Sacker Decl. ¶ 124. He explained that a temporarily closed tank is vulnerable to corrosion as an operating tank, and if testing is not conducted, the likelihood increases of corrosion protection not being maintained, and of structural integrity being compromised. Sacker Decl. ¶ 137. With the ESM assessed as 1, the gravity based component was calculated as $2,470. Sacker Decl. ¶ 124.

He calculated a $67 economic benefit of noncompliance by entering into the BEN

program an estimated avoided recurring cost of $300 every three years for conducting a corrosion protection test for the tank. Sacker Decl. ¶ 123. Adding this component to the gravity based component resulted in a total penalty of $ 2,537. Sacker Decl. ¶ 125; see, CX 35.

Discussion and Conclusion

The assessment of a "major" extent of deviation and "moderate" potential for harm for failure to ensure that cathodic protection system is tested every three years for temporarily closed tanks is consistent with the assessments in Appendix A Subpart C for failure to ensure such testing for tanks that are in operation, under 40 C.F.R. § 280.31(b). The duration of the violation was less than one year but because the violation was ongoing from years prior to the first calculated date of violation, the assessment in Appendix A Subpart C for failure to meet one 3-year test under Section 280.31(b) as "moderate" extent of deviation and "minor" potential for harm does not apply.

There is no evidence supporting any violator-specific adjustment to the penalty. Mr. Sacker's calculation of the gravity based penalty is accepted except that the ESM assessed is 0.5, for the same reasons stated regarding Counts 3 and 4. The resulting gravity based penalty is $1,235. Adding the $67 economic benefit component, the penalty for Count 5 is $1,302.

10. Count 6

As found in the June 21 Order, Mr. Chase is liable for a violation of 40 C.F.R. § 280.70(b) by his failure to cap and secure Tank # 008 from July 30, 2008, the time three months after it was temporarily closed, until it was permanently closed on November 30, 2009.

Complainant's Calculation

The regulatory provision at 40 C.F.R. § 280.70(b) requires tanks that have been closed for three months or more to be capped and secured. Mr. Sacker therefore calculated the duration of the violation from the date three months after Respondents reported the tank was placed in temporary closure.

For the violation in Count 6, Mr. Sacker calculated a $9 economic benefit of noncompliance by entering into the BEN program an estimated one-time non-depreciable cost of $ 50 for buying and installing locks to secure and cap the tank and associated lines. Sacker Decl. ¶ 127.

He categorized the violation alleged in Count 6 as a "major" extent of deviation from regulatory requirements and a "moderate" potential for harm. Sacker Decl. ¶ 117. Based on 489 days of noncompliance and a total DNM of 3, for the period before January 12, 2009, he assessed

the matrix value at $1,930 and a DNM of 1.5, and for the remainder of the days of noncompliance, he assessed the matrix value at $2,120 with a DNM of 1.5. Sacker Decl. ¶ 128.

He made no further adjustments as he had no evidence warranting any violator specific adjustments to the penalty. Sacker Decl. ¶ 124. He explained that a temporarily closed tank creates a risk that it may be accidentally filled or used in a way that increases the risk of a release, and the risk of overfilling or spilling is increased because overfill and spill protection is not required to be maintained for temporarily closed tanks. Sacker Decl. ¶ 138.

With the ESM assessed as 1, the gravity based component was calculated as $3,045. Sacker Decl. ¶ 124. Adding this component to the gravity based component resulted in a total penalty of $ 3,054. Sacker Decl. ¶ 125, 126; CX 36.

Discussion and Conclusion

Mr. Sacker's calculation of the gravity based penalty is accepted except that the ESM assessed is 0.5, for the same reasons stated regarding Counts 3 through 5. The resulting gravity based penalty is $1,523. Adding the $ 9 economic benefit component, the penalty for Count 6 is $ 1,532.

11. Count 7

Mr. Chase was found liable in the June 21 Order for his failure from April 30, 2009 to November 30, 2009, to either permanently close Tank # 008 or have it inspected for proper operation by a qualified cathodic protection tester, in violation of 40 C.F.R. § 280.70(c).

Complainant's Calculation

Mr. Sacker stated that the violation commenced on April 30, 2009, which is one year after the tank was reported to be in temporary closure, when under Section 280.70(c) it was required to be closed. The violation continued until the tank was finally closed. Sacker Decl. ¶ 130.

He calculated a $56 economic benefit from the delayed expenditure, by entering into the BEN program an estimated one-time non-depreciable cost of $5000 for permanently closing a UST lines. Sacker Decl. ¶ 131.

He categorized failure to permanently close a tank that was temporarily closed for one year is categorized as a "major" extent of deviation from regulatory requirements and a "major" potential for harm. Sacker Decl. ¶ 117. Based on 215 days of noncompliance, which occurred after January 12, 2009, Mr. Sacker assessed the matrix value at $2,120 with a DNM of 2. *Id.*

He made no further adjustments as he had no evidence warranting any violator specific

adjustments to the penalty. Sacker Decl. ¶ 132. He explained that the assumption behind the requirement to permanently close a tank if performance requirements are not met is that the longer a tank fails to meet these requirements the greater the likelihood of tank corrosion and leakage. He explained further that a temporarily closed tank that is not used for a long time may be forgotten, especially if purchased by a new owner. Sacker Decl. ¶ 139.

With the ESM assessed as 1, the gravity based component was calculated as $4,240. Sacker Decl. ¶ 132. Adding the economic benefit component of $56 to the gravity based component resulted in a total penalty of $ 4,296. Sacker Decl. ¶¶ 125, 133; CX 37.

Discussion and Conclusion

For a tank that is taken out of service but not permanently closed until a few months after it is required to be closed, the potential for harm from the failure to permanently close it on time is mostly accounted for by failures to meet the various requirements for temporarily closed tanks. Here, the penalties for Counts 5 and 6 partially account for this potential for harm. The remaining risk could be accounted for by an additional penalty for the violation in Count 4, to cover the additional 7 months of failure to conduct release detection from April to November 2009. A penalty for that additional period of time would be approximately $1,100, so the penalty for Count 7 should approximate that amount.

Therefore, the potential for harm for delaying the permanent closure of Tank #008 is "moderate." With a "major" extent of deviation, the matrix figure is $1,060. This figure multiplied by a DNM of 2 and a ESM of 0.5, as assessed for the other violations concerning Tank #008, results in a gravity based penalty of $1060. Adding the economic benefit component, the penalty for Count 7 is $1,116.

B. Station II

In the June 21 Order, Respondents Mr. Chase and CCS were found liable for violating 40 C.F.R. § 280.44 and § 280.41(b)(1)(i) at Station II for failure to conduct an annual test of the operation of the ALLDs on the piping each of Tank nos. 001A, 001B and 002 from September 1, 2006 until April 6, 2009, as alleged in Count 8.

1. Findings of Fact and Conclusions of Law

1. The USTs at Station II are designated as follows:

(a) Tank # 001A, with a capacity of 11,000 gallons;
(b) Tank # 001B, with a capacity of 4,000 gallons; which along with Tank #001A constituted a "new tank system" under 40 C.F.R. § 280.12 ;
(c) Tank # 002, with a capacity of 12,000 gallons, which constituted a "new tank

system" under 40 C.F.R. § 280.12. Stips ¶¶ 7, 9, 10, 11, 29.

2. As of at least August 26, 2008, for each of Tank nos. 001A and 001B at Station II had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 38.

3. As of at least August 26, 2008, Tank # 002 at Station II had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 39.

4. As of at least September 1, 2006, underground piping for each of Tank nos. 001A, 001B and 002 at Station II was equipped with an ALLD. Stips ¶ 40.

5. The tanks were installed on or about September 1, 1998. Stips ¶ 28. CCS was required to conduct annual tests for the underground piping for each of Tank nos. 001A, 001B and 002 at Station II. Stips ¶ 41.

6. Tests of the ALLDs were conducted on April 6, 2009. Sacker Decl. ¶ 58.

7. Station II overlies a primary aquifer. Sacker Decl ¶ 34.

2. Complainant's Calculation of Penalty for Count 8

The economic benefit of noncompliance was calculated through the BEN program to be $970, based on an estimated annual cost for each line of $150 to conduct ALLD testing and the three lines at issue. Sacker Decl. ¶¶ 51, 59. Mr. Sacker stated that the ALLDs were required to be tested one year after they were installed September 1, 1998, and every year thereafter, so the violation commenced on September 1st five years prior to the Complaint until the ALLDs were tested on April 6, 2009. Sacker Decl. ¶¶ 15, 48, 58.

As with Count 2, Mr. Sacker assessed the failure to conduct annual tests for the operation of ALLDs as a "major" extent of deviation and "major" potential for harm. Sacker Decl. ¶ 46. He assessed a matrix value of $1,930 for violations from September 1, 2006 until January 12, 2009, with a DNM of 4.0, and a matrix value of $2,120 with a DNM of 0.5 for the violations from the latter date to April 6, 2009. Sacker Decl. ¶ 59; CX 4.

Mr. Sacker stated that the gravity based penalty was not adjusted further for the violator-specific factors, because he had no evidence warranting any adjustment. Sacker Decl. ¶ 59. He asserted that the significance of the violation is magnified when there are several tanks holding a significant amount of fuel and noncompliance extends for an extended period of time. The gasoline tanks at issue at Station II had a combined capacity of 15,000 gallons and the diesel tank having a capacity of 12,000 gallons, and Mr. Chase and CCS neglected the regulatory requirements for at least two and a half years. Mr. Sacker points out that ALLD tests were not

conducted until almost nine months after the time of EPA's inspections, and after EPA issued information request letters. Sacker Decl. ¶ 79, 82, 83, 87, 88.

Adding together the matrix figures multiplied by the DNM, Mr. Sacker multiplied the result by an ESM of 1.5 for the fact that Station II overlies a primary aquifer, resulting in a gravity based component of $39,520. Sacker Decl. ¶¶ 34, 59. Adding the economic benefit component to the gravity based component, Mr. Sacker assessed a penalty of $40,480 for Count 8. CX 38.

3. Discussion and Conclusion as to Count 8

The piping on each of Tanks 001A, 001B, and 002 was equipped with ALLDs, and there is no evidence that the ALLDs did not meet the requirements of Section 280.44(a) for method of alert or standard of detection. Accordingly, as with Count 2, the circumstances of the violation meet the Penalty Policy's definition (at § 3.1.1) of a "moderate" extent of deviation.

There is no evidence of any failure to perform tightness testing or monthly monitoring under Section 280.44(b) or (c) for the pressurized piping at Station II. Therefore, the circumstances of Count 8 fit the Penalty Policy's definition (at § 3.1.2) of a "moderate" potential for harm: "causes or may cause a situation resulting in a significant risk to human health and the environment," for example "a tank that fails to meet tank corrosion standards (because it could result in a release, although the use of release detection is expected to minimize the potential for continuing harm from the release)."

As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 8. The violation continued for 949 days, or 2 years and 7 months, which occurred prior to January 12, 2009 except for three months.

The matrix value under the Revised Matrices Guidance of $650 for each line, or $1,950, for the entire period of violation and a DNM of 4.0 (representing 2 ½ years of noncompliance) best represents the gravity of the violation in Count 8. With an ESM of 1.5, the resulting gravity based penalty is $ 11,700. Adding the economic benefit component of $970 calculated by Mr. Sacker results in a penalty of $ 12,670 for Count 8.

C. Station III

1. Findings of Fact

1. The USTs at Station III are designated as follows:

(a) Tank # 001, with a capacity of 11,000 gallons; and
(b) Tank # 002, with a capacity of 4,000 gallons. Stips ¶¶ 7, 12, 28, 29, 46.

2. Tank nos. 001 and 002 were constructed of steel/carbon steel/iron, were used to store gasoline, and were a "steel UST system[] with corrosion protection . . . used to store [a] regulated substance[]" within the meaning of 40 C.F.R. § 280.31. Stips ¶¶ 42, 43.

3. The tanks were installed on November 1, 1995. Sackler Decl. ¶ 61.

4. Each of the two tanks were equipped with a cathodic protection system since at least May 1, 2008 until at least April 6, 2009. Stips ¶ 44.

5. Each of the tanks had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 45.

6. Each of the tanks constituted a "new tank system" under 40 C.F.R. § 280.12, and, with their underground piping constituted a petroleum UST system for purposes of 40 C.F.R. § 280.41. Stips ¶ 46.

7. Mr. Chase provided to EPA release detection records for monthly monitoring of the pressurized piping on the tanks from January 2008 and later, but did not provide any records of release detection for the pressurized piping conducted for the period from August 2007 through December 2007. Sacker Decl. ¶ 195.

8. The underground piping for each of the tanks was equipped with an ALLD. Stips ¶ 47.

9. A corrosion protection test for the two USTs was conducted on April 6, 2009. Sacker Decl. ¶ 168.

10. Mr. Chase never provided any evidence of a corrosion protection test being conducted prior to July 2009. Sacker Decl. ¶ 176.

11. Tests of the ALLDs were conducted on April 6, 2009. Sacker Decl. ¶ 61.

12. Station III overlies a primary aquifer. Sacker Decl. ¶ 34.

2. Violations at Station III

In the June 21 Order, Respondent Mr. Chase was found liable for the following violations alleged in the Complaint, regarding the two USTs at Station III:

> Count 9: 40 C.F.R. § 280.31(b) (failure to conduct triennial testing of the cathodic protection system)
>
> Count 10: 40 C.F.R. § 280.44 and § 280.41(b)(1)(i) (failure to conduct annual tests of the

operation of the ALLDs)

Count 11: 40 C.F.R. § 280.45 (failure to maintain release detection records for the underground piping).

3. Count 9

As alleged in Count 9 of the Complaint, Mr. Chase is liable for failure to conduct triennial testing of the cathodic protection system of the two USTs at Station III in violation of 40 C.F.R. § 280.31(b) from May 1, 2008 until April 6, 2009.

Complainant's Calculation

Mr. Sacker calculated the first date of violation based on the first required test being six months after the date the tanks were installed (May 1, 1996), tests being required every three years thereafter, and May 1, 2008 being the first test required within the five year period prior to issuance of the Complaint. Sacker Decl. ¶¶ 165, 166. The violation continued from that date until April 6, 2009, when a corrosion protection test for the USTs was conducted. Sacker Decl. ¶ 168.

Failure to conduct triennial testing of cathodic protection is classified as a "major" extent of deviation and "moderate" potential for harm. Sacker Decl. ¶ 167; CX 4. Based on 341 days of noncompliance and total DNM of 2.5, Mr. Sacker assessed a matrix value of $ 970 and the DNM of 2.0 for the period from May 1, 2008 until January 12, 2009, and a matrix value of $ 1,060 and the DNM of 0.5 for the remainder of the period. Sacker Decl. ¶¶ 168, 170. He doubled the resulting figure of $2,470 to account for the two tanks.

Mr. Sacker stated that the resulting penalty was not adjusted further for the violator-specific factors, because he had no evidence warranting any adjustment. Sacker Decl. ¶¶ 170. He asserted that USTs with metallic structures in contact with soil are very vulnerable to corrosion. For corrosion protection, the USTs were equipped with sacrificial anodes, which are made with more negative electrochemical potential than the metal of the tank, so they corrode more quickly than, and instead of, the tank Sacker Decl. ¶ 165. Without conducting regular testing, the tank operator may not notice that a sacrificial anode has corroded to the point it no longer protects the tank. Sacker Decl. ¶ 173. Mr. Sacker also considered the total capacity of gasoline in the two tanks, 15,000 gallons, the 11 month duration of violation, and that the longer the requirement for testing was not met, the more likely tank corrosion or other problems with UST structural soundness would have occurred. Sacker Decl. ¶¶ 174. Moreover, Mr. Sacker noted that the Part 280 regulations require owners or operators to maintain the last two corrosion protection tests, and "the fact that Mr. Chase never provided any evidence of a test conducted prior to July 2009 indicates he may never have addressed this requirement." Sacker Decl. ¶ 176.

Multiplying the figure of $4,940 by an ESM of 1.5 for Station III , due to the fact that it

overlies a primary aquifer, resulted in a gravity based component of $ 7,410. Sacker Decl. ¶ 33, 34, 170.

To calculate the economic benefit of noncompliance, the costs avoided by not conducting timely tests, Mr. Sacker entered into the BEN model $600, the estimated avoided annual cost to test two tanks, divided by three, as the tests were required every three years, resulting in an economic benefit of $ 150. Adding the gravity based component yielded a total penalty of $7,560 for Count 9. Sacker Decl. ¶¶ 169, 171; CX 39.

Discussion and Conclusion

For a violation of Section 280.31(b)(1), failure to ensure that the cathodic protection system is tested every three years, Appendix A Subpart C of the Penalty Policy assigns a "major" extent of deviation and "moderate" potential for harm. Mr. Sacker stated that Mr. Chase never provided any evidence of a corrosion protection test being conducted prior to July 2009. Sacker Decl. ¶ 176. As discussed regarding Count 5, the duration of the violation was less than one year but because the violation was ongoing from years prior to the first calculated date of violation, the assessment in Appendix A Subpart C for failure to meet one 3-year test under Section 280.31(b) as "moderate" extent of deviation and "minor" potential for harm does not apply.

Appendix A Subpart C provides that a violation of Section 280.31(b)(1) is assessed on either a per-tank or per-facility basis. The Penalty Policy at Section 3.1 explains that penalties wil be assessed on a per-tank basis if the specific requirement or violation is clearly associated with one tank. There was a separate cathodic protection system installed on each tank and therefore a per-tank unit of violation is assessed.

Mr. Sacker's rationale and calculation of the penalty is accepted . There is no evidence to support any violator-specific adjustment with respect to Count 9. The gravity based penalty is $7,410. Adding the $ 150 economic benefit component, the penalty for Count 9 is $ $7,560 .

4. Count 10

In the June 21 Order, Mr. Chase was found liable for failure to conduct an annual test of the operation of the automatic line leak detectors on the two USTs at Station III from November 1, 2006 until April 6, 2009, in violation of 40 C.F.R. § 280.44 and § 280.41(b)(1)(i), as alleged in Count 10 of the Complaint.

Complainant's Calculation

The economic benefit of noncompliance was calculated by Mr. Sacker to be $604, based on an estimated annual cost for each line of $150 to conduct ALLD testing, and the two lines at issue. He stated that the ALLDs were required to be tested one year after they were installed

November 1, 1995, and every year thereafter, so the violation commenced on November 1st five years prior to the Complaint and continued until the ALLDs were tested on April 6, 2009. Sacker Decl. ¶ 61.

As with Counts 2 and 8, Mr. Sacker assessed the failure to conduct annual tests for the operation of ALLDs as a "major" extent of deviation and "major" potential for harm. Sacker Decl. ¶ 46. He assessed the matrix value as $1,930 with a DNM of 4.0 for the whole period of violations, because most of the period occurred before January 12, 2009. Sacker Decl. ¶ 62; CX 4.

Mr. Sacker stated that the resulting penalty was not adjusted further for the violator-specific factors, because he had no evidence warranting any adjustment. Sacker Decl. ¶ 62. He asserted that the significance of the violation is magnified when there are several tanks holding a significant amount of fuel and noncompliance extends for an extended period of time. The gasoline tanks at issue at Station III had a combined capacity of 15,000 gallons, and Mr. Chase neglected the regulatory requirements for nearly two and a half years. Mr. Sacker points out that no ALLD tests were conducted until nearly nine months after the time of EPA's inspections, and after EPA issued information request letters. Sacker Decl. ¶¶ 79, 82, 83, 87, 88.

The matrix value was doubled for piping on the two tanks, then multiplied by the DNM of 4, and then multiplied the result by an ESM of 1.5, resulting in a gravity based component of $23,160. Sacker Decl. ¶¶ 34, 62. Adding the gravity based component yielded a total penalty of $23,764 for Count 10. Sacker Decl. ¶¶ 51, 62, 63; CX 40.

Discussion and Conclusion

As with Stations I and II, the piping on each of the two tanks at Station III was equipped with an ALLD, and there is no evidence that the ALLDs did not meet the requirements of Section 280.44(a) for method of alert or standard of detection. There is no evidence of any failure to monitor the piping for releases under Sections 280.41(b)(1)(ii) at Station III, although there were no records thereof for a four month period from August through December 2007. Therefore, the circumstances of Count 10 fit the Penalty Policy's definitions (at §§ 3.1.1 and 3.1.2) of a "moderate" extent of deviation and a "moderate" potential for harm.

As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 10.

The violation continued for 888 days, or 2 years and 5 months, which occurred prior to January 12, 2009 except for three months. The matrix value under the Revised Matrices Guidance of $650 for each line, or $1,300, multiplied by a DNM of 4 represents the gravity of the violation in Count 10. With an ESM of 1.5, the resulting gravity based penalty is $ 7,800. Adding the economic benefit component of $604 calculated by Mr. Sacker results in a penalty of $ 8,404 for Count 10.

5. Count 11

In the June 21 Order, Mr. Chase was found liable for failure from August 26, 2007 to the end of December 2007, to maintain release detection records for the underground piping of the two USTs at Station III, in violation of 40 C.F.R. § 280.45, as alleged in Count 11 of the Complaint. The regulations provide at 40 C.F.R. § 280.45 as follows:

> **§ 280.45 Release detection recordkeeping.**
> All UST system owners and operators must maintain records in accordance with § 280.34 * * * * .
> (b) The results of any sampling, testing, or monitoring must be maintained for at least 1 year * * * * .

Complainant's Calculation

Mr. Sacker stated that August 26, 2007 was one year prior to the inspection, and Mr. Chase never provided evidence of release detection records for the pressurized piping from that August through December 2007, but only made release detection records for pressurized piping available starting in January 2008. Sacker Decl. ¶ 195.

He categorized the violation of the recordkeeping requirement as "moderate" extent of deviation and "minor" potential for harm, and assessed on a per-facility basis. Sacker Decl. ¶ 193 and Exhibit A. He assessed the matrix value as $ 130 and the DNM as 1.5 for the 128 days of noncompliance, under the Revised Matrices Guidance, as they occurred before January 12, 2009. Sacker Decl. ¶ 196; CX 4.

He adjusted the penalty by an additional 5 % for "unique factors" for every additional tank or line after the first tank that requires release detection, to reflect the significance of not maintaining records for multiple components. Given the two pressurized lines at Station III, he increased the matrix value by 5%. Sacker Decl. ¶¶ 194, 197.

He explained that the violation is significant in that the records give the owner or operator the means to check whether there are releases from the piping, and give EPA the means to insist on compliance with and confirm whether the owner or operator is complying with monitoring requirements, which may help deter releases. Sacker Decl. ¶ 200. Mr. Sacker asserted that Mr. Chase lacked good faith where EPA sent information requests to him requesting records for the piping, but he ignored them, focusing instead on records for tanks. Sacker Decl. ¶ 202.

Multiplying the matrix value by the DNM of 1.5, Mr. Sacker then multiplied the result by an ESM of 1.5 for the fact that Station III overlies a primary aquifer, resulting in a gravity based component of $ 307.13. Sacker Decl. ¶¶ 34, 198.

The economic benefit of noncompliance was calculated by Mr. Sacker to be $33, based on an estimated $10 per month for labor and supplies to generate and maintain records. Adding the gravity based component yielded a total penalty of $ 340.13 for Count 11. Sacker Decl. ¶¶ 194, 196, 199; CX 41.

Discussion and Conclusion

According to the Penalty Policy Appendix A Subpart D, the violation of "failure to maintain every record of release detection monitoring" is classified as a "moderate" extent of deviation and "minor" potential for harm, as assessed by Mr. Sacker. Other than the assessment for "other unique factors" as proposed by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 11. Mr. Sacker's rationale and calculation of the penalty for Count 11 is accepted, but will be rounded to the nearest dollar. Accordingly, the penalty for Count 11 is $ 340.

D. Station IV

1. Findings of Fact

1. The following USTs were located at Station IV from the date they were installed through July 24, 2009:

(a) Tank # 001A, with a capacity of 9,000 gallons;
(b) Tank # 001B, with a capacity of 3,000 gallons, which along with Tank #001A constituted a "new tank system" under 40 C.F.R. § 280.12;
(c) Tank # 003A, with a capacity of 10,000 gallons; and
(d) Tank # 003B, with a capacity of 5,000 gallons, which along with Tank #003A constituted a "new tank system" under 40 C.F.R. § 280.12. Stips ¶¶ 7, 13, 14, 15, 29.

2. Tank nos. 001A and 001B were installed on or about June April 1, 1992. Stips ¶ 28. As of at least August 26, 2008, Tank # 001A contained and was being used to store diesel fuel. Stips ¶ 48.

3. Since at least April 1, 2006, Tank # 001A had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 49.

4. Tank nos. 003A and 003B were installed on or about June 3, 2003. Stips ¶ 28. Since at least June 1, 2006, Tank nos. 003A and 003B had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 50.

5. During the inspection on August 26, 2008, the inspector observed that the shut-off valve on Tank #001A intended to provide overfill protection, was "damaged and non-functional" in that the flapper valve was missing such that it would be unable to prevent the tank from being

overfilled. June 21 Order at 18.

6. In response to the April 2009, August 2009, January 2010 and September 2010 information request letters, Mr. Chase did not provide evidence of repairs to the overfill device on Tank #001A. June 21 Order at 18.

7. Mr. Chase provided to EPA release detection records for monthly monitoring of the pressurized piping on the tanks from January 2008 and later, but did not provide any records of release detection for the pressurized piping conducted for the period from August 2007 through December 2007. Sacker Decl. ¶ 195.

8. The underground piping for each of Tank nos. 001A, 003A and 003B was equipped with an ALLD. Stips ¶ 51.

9. The ALLDs on Tank nos. 001A, 003A and 003B were tested on April 6, 2009. Sacker Decl. ¶¶ 64, 65.

10. CSI conducted release detection monitoring for the underground piping for each of Tank nos. 001A, 003A and 003B. Stips ¶ 53.

11. Station IV overlies a New York State Source Water Protection Area. Sacker Decl. ¶ 34.

12. Respondents CSI and Mr. Chase sold Station IV on July 24, 2009. Sacker Decl. ¶ 153, 162.

2. Violations at Station IV

In the June 21 Order, Respondents CSI and Mr. Chase were found liable for the following violations alleged in the Complaint regarding Station IV:

> Count 12: 40 C.F.R. § 280.20(c)(1)(ii) (overfill protection equipment requirements on Tank # 001A)
>
> Count 13: 40 C.F.R. § 280.44 and § 280.41(b)(1)(i) (failure to conduct annual tests of the operation of the ALLDs on Tank nos. 001A, 003A, 003B)
>
> Count 14: 40 C.F.R. § 280.45 (failure to maintain release detection records for the underground piping on Tank nos. 001A, 001B, 003A and 003B)

3. Count 12

Mr. Chase and CSI were found in the June 21 Order to have failed to meet the overfill protection equipment requirements of 40 C.F.R. § 280.20(c)(1)(ii) on Tank # 001A at Station IV

since August 26, 2008.

Complainant's Calculation

The economic benefit of noncompliance was calculated by Mr. Sacker as $114, through entering into the BEN program a one-time non-depreciable estimated cost of $600, based on going rates, for installation of an overfill device, which cost Mr. Chase avoided during the period of violation. Sacker Decl. ¶ 154.

Mr. Sacker pointed out that a failure to meet overfill protection equipment requirements is classified as a "major" extent of deviation and "moderate" potential for harm, according to Appendix A of the Penalty Policy. Sacker Decl. ¶ 148; CX 4. He set the start date for the violation as the day of the EPA inspection when the overfill device was observed to be broken. Sacker Decl. ¶ 153. He set the end date as July 24, 2009, the date the facility was sold, and therefore he calculated 333 days of noncompliance and a total DNM of 2.5. *Id.* ¶ 153, 155

He stated that the penalty calculation computer model increased the matrix value to $970 for the violations from August 26, 2008 until January 12, 2009, and Mr. Sacker multiplied that by a DNM of 1.5. The computer model increased the matrix value to $1,060 for the period of violations thereafter, which he multiplied by a DNM of 1.0. Sacker Decl. ¶¶ 155.

Mr. Sacker did not adjust the gravity based penalty for any violator-specific adjustments on the basis that he had no evidence that would warrant such adjustments. Sacker Decl. ¶¶ 155. As with Count 3, he explained that overfill prevention equipment is intended to prevent harm to workers, fuel deliverers and customers at retail gas stations; to prevent spills of fuel entering the environment and perhaps contaminating water supplies, water bodies, or residences; and avoid the danger of explosion or fire if overfilled product comes in contact with static electricity or a spark, such as from a cell phone. Sacker Decl. ¶¶ 158, 159. Mr. Sacker stated that Mr. Chase and CSI failed to comply even after EPA issued the April 2009 information request letter, until Station IV was sold in July 2009, indicating lack of good faith efforts to comply. Sacker Decl. ¶¶ 162, 163.

Mr. Sacker assigned an ESM value of 2 for Station IV, as it overlies a New York State Protection Area, yielding a gravity based component of $5,030. Sacker Decl. ¶ 34, 161. Multiplying the matrix values by the DNM values, and multiplying the sum by an ESM of 2 yielded a gravity based figure of $5,030. Adding the economic benefit of noncompliance figure of $114 resulted in a total penalty of $5,144. Sacker Decl. ¶ 156; CX 42.

Discussion and Conclusion

Appendix A of the Penalty Policy assigns a "major" extent of deviation and "moderate" potential for harm for violation of Section 280.20(c)(1), described as "[f]ailure to install any overfill prevention system" or for violation of Section 280.20(c)(1)(ii), described as

"[i]nstallation of inadequate overfill prevention equipment in a new tank." The violation alleged in Count 12 is equivalent to these descriptions.

The matrix values and DNM values assessed and the calculations by Mr. Sacker are accurate, and there is no evidence to support any violator-specific adjustment with respect to Count 12. The matrix values multiplied by the DNM values, multiplied by the ESM of 2, added to the economic benefit of $ 114 yields a penalty of $ 5,144 for Count 12, as calculated by Mr. Sacker.

4. Count 13

In the June 21 Order, Mr. Chase and CSI were found liable for failure to conduct an annual test of the operation of the ALLDs at Station IV on UST # 001A from at least April 1, 2006 until April 6, 2009, and on UST nos. 003A and 003B from June 1, 2006 until April 6, 2009, in violation of 40 C.F.R. § 280.44 and § 280.41(b)(1)(i), as alleged in Count 13 of the Complaint.

Complainant's Calculation

Mr. Sacker calculated an economic benefit of noncompliance for the piping associated with the diesel tank at $376, and for the two lines associated with the gasoline tanks at $710, based on an estimated annual cost for each line of $150 to conduct ALLD testing. Sacker Decl. ¶¶ 51, 65, 66.

As with Counts 2, 8 and 10, Mr. Sacker assessed the failure to conduct annual tests for the operation of ALLDs as a "major" extent of deviation and "major" potential for harm. Sacker Decl. ¶ 46. He stated that the ALLD on the diesel Tank # 001A piping was required to be tested one year after it was installed April 1, 1992, and every year thereafter, so the violation for that tank commenced on April 1st five years prior to the Complaint and continued until the ALLDs were tested on April 6, 2009. For the gasoline tanks, UST nos. 003A and 003B, the violation commenced on June 1, 2006, three years after the date they were installed, and continued until ALLD testing on April 6, 2009. Sacker Decl. ¶ 64.

For the line attached to the diesel tank (001A), Mr. Sacker multiplied the matrix value of $1,930 by the DNM of 4.0 for the period of violations from April 1, 2006 until January 12, 2009, and the matrix value of $2,120 by a DNM of 0.5 for the period of violations thereafter. Sacker Decl. ¶ 64; CX 4. Adding these figures together, Mr. Sacker multiplied the result by an ESM of 2 for the fact that Station IV overlies a New York State Source Water Protection Area, resulting in a gravity based component of $ 19,490. Sacker Decl. ¶¶ 34, 65.

For the lines attached to the gasoline tanks, Mr. Sacker multiplied the matrix value of $1,930 by the DNM of 4.0 for the whole period of violations from June 1, 2006 until January 12,

2009. Mr. Sacker multiplied the result by an ESM of 2, resulting in a gravity based component of $34,740. Sacker Decl. ¶¶ 34, 66.

Mr. Sacker stated that the penalties were not adjusted for the violator-specific factors, because he had no evidence warranting any adjustment. Sacker Decl. ¶¶ 65, 66. At Station IV, there were several tanks holding a significant amount of fuel and noncompliance extends for an extended period of time. The gasoline tanks at issue at Station IV had a combined capacity of 15,000 gallons, and Tank 001 held 9,000 gallons of diesel fuel, and Mr. Chase neglected the regulatory requirements about three years. Mr. Sacker points out that no ALLD tests were conducted until almost nine months after the time of EPA's inspections, and after EPA issued information request letters. Sacker Decl. ¶¶ 79, 82, 83, 87, 88.

Adding the gravity based and economic benefit components for the diesel tank ($19,866) and for the gasoline tanks ($35,450) resulted in a total penalty of $55,316 for Count 13. Sacker Decl. ¶ 67; CX 43.

Discussion and Conclusion

As with Stations I, II and III, the piping on each of UST nos. 001A, 003A and 003B at Station IV was equipped with an ALLD, and there is no evidence that the ALLDs did not meet the requirements of Section 280.44(a) for method of alert or standard of detection. The piping on each of these tanks was monitored for releases under Sections 280.41(b)(1)(ii). Therefore, the circumstances of Count 13 fit the Penalty Policy's definitions (at §§ 3.1.1 and 3.1.2) of a "moderate" extent of deviation and a "moderate" potential for harm. As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 13.

The violation regarding the piping on the diesel tank continued for 1,102 days, or 3 years and about a week, which occurred prior to January 12, 2009 except for three months. The matrix value under the Revised Matrices Guidance of $650 multiplied by a DNM of 4.5, representing three years under the Penalty Policy, reflects the appropriate gravity for the violation regarding Tank # 001A. With an ESM of 2.0, the resulting gravity based penalty is $ 5,850. Adding the economic benefit component of $ 376 calculated by Mr. Sacker results in a penalty of $ 6,226 for the violation regarding Tank # 001A.

For the lines attached to the gasoline tanks, the violation continued for 1,041 days, or two years and about 10 months, which occurred prior to January 12, 2009 except for three months. The matrix value of $650 is doubled to represent the two lines, to $1300. The DNM of 4.0 as calculated by Mr. Sacker, is applied for the period of violation, and the result is multiplied by an ESM of 2.0, yielding a gravity based penalty of $ 10,400. Adding the economic benefit component of $ 710 calculated by Mr. Sacker results in a penalty of $ 11,110 for the violations regarding Tank nos. 003A and 003B.

Adding the penalties for the piping on the diesel tank and the gasoline tanks, the total penalty for Count 13 is $ 17,336.

5. Count 14

As concluded in the June 21 Order, Mr. Chase and CSI were found liable for their failure, from August 26, 2007 to the end of December 2007, to maintain release detection records for the underground piping of UST nos. 001A, 001B, 003A and 003B at Station IV, in violation of 40 C.F.R. § 280.45, as alleged in Count 14 of the Complaint.

Complainant's Calculation

Mr. Sacker calculated the starting and ending dates of the violation as he did for Count 11: August 26, 2007 was one year prior to the inspection, and Mr. Chase never provided evidence of release detection records for the pressurized piping from that August through December 2007, but only made release detection records for pressurized piping available starting in January 2008. Sacker Decl. ¶ 195.

Mr. Sacker assessed the violation as "moderate" extent of deviation and "minor" potential for harm, on a per-facility basis, as in Count 11. Sacker Decl. ¶ 194 and Exhibit A. He assessed the matrix value as $ 130 under the Revised Matrices Guidance, and the DNM as 1.5 for the 128 days of noncompliance. Sacker Decl. ¶ 196; CX 4.

Mr. Sacker stated that he adjusted the penalty by an additional 5 % for "unique factors" for every additional tank or line from the first tank that requires release detection, to reflect the significance of not maintaining records for multiple components. Given the three pressurized lines at Station IV, he increased the matrix value by 10%. Sacker Decl. ¶¶ 194, 197.

As with Count 11, he explained the significance of the violation of failure to maintain release detection records. Sacker Decl. ¶ 200. Mr. Sacker considered Mr. Chase lacked good faith where EPA sent information requests to him requesting records for the piping, but he ignored them and focused on records for tanks. Sacker Decl. ¶ 202.

Multiplying the adjusted matrix value by the DNM of 1.5, Mr. Sacker then multiplied the result by an ESM of 2 for the fact that Station IV overlies a New York State Protection Area, resulting in a gravity based component of $ 429. Sacker Decl. ¶¶ 34, 198, 199.

The economic benefit of noncompliance was calculated by Mr. Sacker to be $33, based on an estimated $10 per month for labor and supplies to generate and maintain records. Adding the gravity based component yielded a total penalty of $ 462 for Count 14. Sacker Decl. ¶¶ 194, 196, 199; CX 44.

Discussion and Conclusion

Other than the assessment for "other unique factors" as proposed by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 14. Mr. Sacker's rationale and calculation of the penalty for Count 14 is accepted, and accordingly, the penalty for Count 14 is $ 462.

E. Station V

1. Findings of Fact

1. The four USTs, installed at Station V on or about November 1, 2001, are known as:

(a) Tank # 001A, with a capacity of 10,000 gallons;
(b) Tank # 001B, with a capacity of 5,000 gallons, which along with Tank #001A constituted a "new tank system" under 40 C.F.R. § 280.12;
(c) Tank # 002A, with a capacity of 6,000 gallons; and
(d) Tank # 002B, with a capacity of 2,000 gallons, which along with Tank #002A constituted a "new tank system" under 40 C.F.R. § 280.12. Stips ¶¶ 7, 16, 17, 18, 28, 29.

2. Since at least November 1, 2006, Tank nos. 001A and 001B had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 54.

3. Since at least November 1, 2006 Tank no. 002A had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 55.

4. As of at least August 26, 2008, underground piping for each of Tank Nos. 001A, 001B and 002A was equipped with an ALLD. Stips ¶ 56.

5. CCLD conducted release detection monitoring for the underground piping of Tank nos. 001A, 001B and 002A. Stips ¶ 57.

6. Mr. Chase provided to EPA release detection records for monthly monitoring of the pressurized piping on the tanks from January 2008 and later, but did not provide any records of release detection for the pressurized piping conducted for the period from August 2007 through December 2007. Sacker Decl. ¶ 195.

7. Tests of the ALLDs were conducted on April 6, 2009. Sacker Decl. ¶ 68.

8. Station V does not overlie any sensitive area . Sacker Decl. ¶ 34.

2. Violations found at Station V

In the June 21 Order, Respondents CCLD and Mr. Chase were found liable for the following two counts of violation alleged in the Complaint regarding Station V:

> Count 15: 40 C.F.R. § 280.44 and § 280.41(b)(1)(i) (failure to conduct annual tests of the operation of the ALLDs on Tank nos. 001A, 001B, 002A)
>
> Count 16: 40 C.F.R. § 280.45 (failure to maintain release detection records for the underground piping on Tank nos. 001A, 001B, 003A and 002B).

3. Count 15

Mr. Chase and CCLD were found in the June 21 Order liable for failure to conduct an annual test of the operation of the ALLDs on UST nos. 001A, 001B and 002A at Station V from November 1, 2006 until April 6, 2009, in violation of 40 C.F.R. § 280.44 and § 280.41(b)(1)(i), as alleged in Count 15 of the Complaint.

Complainant's Calculation

Mr. Sacker calculated an economic benefit of noncompliance for the piping associated with the three lines at $906, based on an estimated annual cost for each line of $150 to conduct ALLD testing. Sacker Decl. ¶¶ 51, 69.

As with Counts 2, 8, 10 and 13, Mr. Sacker assessed the failure to conduct annual tests for the operation of ALLDs as a "major" extent of deviation and "major" potential for harm. Sacker Decl. ¶ 46. He determined the matrix value to be $1,930, and multiplied it by three for each of the three lines.

He stated that annual testing of the ALLDs was required within one year, and on the same date each following year of the date the tanks were installed, November 1, 2001, and thus determined that the violations commenced on November 1, 2006 and ended when the ALLDs were tested on April 6, 2009. He multiplied the matrix value by a DNM of 4.0 for the 888 days of violation, resulting in a figure of $ 23,160. Sacker Decl. ¶¶ 68, 69; CX 4.

He stated that the resulting penalty was not adjusted further for the violator-specific factors, because he had no evidence warranting any adjustment. Sacker Decl. ¶ 69. For Count 15, there were several tanks holding a significant amount of fuel and noncompliance extends for an extended period of time. The gasoline tanks at issue at Station V had a combined capacity of 15,000 gallons, and the diesel tank had a capacity of 6,000 gallons, and Mr. Chase neglected the regulatory requirements for nearly two and a half years. Mr. Sacker points out that no ALLD tests were conducted until nearly nine months after the time of EPA's inspections, and after EPA

issued information request letters. Sacker Decl. ¶¶ 79, 82, 83, 87, 88.

Assessing an ESM of 1, on the basis that Station V does not overlie any sensitive area, Mr. Sacker calculated a gravity based component of $ 23,160. Sacker Decl. ¶¶ 34, 69. Adding the gravity based and economic benefit components resulted in a total penalty of $24,066 for Count 15. Sacker Decl. ¶ ¶ 67, 70; CX 45.

Discussion and Conclusion

The piping on each of UST nos. 001, 001B and 002A at Station V was equipped with an ALLD, and there is no evidence that the ALLDs did not meet the requirements of Section 280.44(a) for method of alert or standard of detection. CCLD conducted release detection monitoring for the piping on these USTs. Therefore, the circumstances of Count 15 fit the Penalty Policy's definitions of a "moderate" extent of deviation and a "moderate" potential for harm. As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 15.

The violation continued for 888 days, or 2 years and 5 months, which occurred prior to January 12, 2009 except for three months. The matrix value under the Revised Matrices Guidance of $650 for each of the three lines, or $1,950, multiplied by a DNM of 4.0 represents the gravity of the violation in Count 15. With an ESM of 1, the resulting gravity based penalty is $7,800. Adding the economic benefit component of $906 calculated by Mr. Sacker results in a penalty of $ 8,706 for Count 15.

Count 16

Complainant's Calculation

Mr. Sacker calculated a penalty of $247.50 for the failure of Mr. Chase and CCLD from August 26, 2007 to the end of December 2007 to maintain release detection records for the underground piping of UST nos. 001A, 001B, 003A and 002B at Station V, in violation of 40 C.F.R. § 280.45, as alleged in Count 16 of the Complaint. Sacker Decl. ¶ 199. Section 280.45(b) requires the UST owner or operator to maintain results of any sampling, testing or monitoring for at least one year. Sacker Decl. ¶ 192. Mr. Sacker calculated the starting and ending dates of the violation as he did for Count 11; August 26, 2007 was one year prior to the inspection, and Mr. Chase never provided evidence of release detection records for the pressurized piping from that August through December 2007, but only made release detection records for pressurized piping available starting in January 2008. Sacker Decl. ¶ 195.

Mr. Sacker stated that the violation of the recordkeeping requirement as alleged is categorized as "moderate" extent of deviation and "minor" potential for harm, and assessed on a per-facility basis. Sacker Decl. ¶ 194 and Exhibit A. Mr. Sacker assessed the matrix value as $

130 and the DNM as 1.5 for the 128 days of noncompliance, as they occurred between March 14, 2004 and January 12, 2009. Sacker Decl. ¶ 196; CX 4.

Mr. Sacker adjusted the penalty by an additional 5 % for "unique factors" for every additional tank or line from the first tank that requires release detection, to reflect the significance of not maintaining records for multiple components. Given the three pressurized lines at this Station, he increased the matrix value by 10%. Sacker Decl. ¶¶ 194, 197.

As with Counts 11 and 14, he explained the significance of the violation. Sacker Decl. ¶ 200. Mr. Sacker considered Mr. Chase to have lacked good faith where EPA sent information requests to him requesting records for the piping, but he ignored them and focused on records for tanks. Sacker Decl. ¶ 202.

Multiplying the adjusted matrix value by the DNM of 1.5, Mr. Sacker then multiplied the result by an ESM of 1, resulting in a gravity based component of $ 214.50. Sacker Decl. ¶¶ 34, 198, 199. The economic benefit of noncompliance was calculated by Mr. Sacker to be $33, based on an estimated $10 per month for labor and supplies to generate and maintain records. Adding the gravity based component yielded a total penalty of $ 247.50 for Count 16. Sacker Decl. ¶¶ 194, 196 199; CX 44.

Discussion and Conclusion

Other than the assessment for "other unique factors" as proposed by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 16. Mr. Sacker's rationale and calculation of the penalty for Count 16 is accepted, except that it is rounded up to the nearest dollar. Accordingly, the penalty for Count 16 is $ 248.

F. Station VI

1. Findings of Fact

1. At Station VI the following five USTs were installed on or about December 31, 2007 and existed at the station through at least March 22, 2012:

(a) Tank # 1, with a capacity of 10,000 gallons, which constituted a "new tank system" under 40 C.F.R. § 280.12;
(b) Tank # 2A, containing off-road diesel fuel, with a capacity of 5,000 gallons;
(c) Tank # 2B, containing kerosene, with a capacity of 6,000 gallons, which along with Tank #2A constituted a "new tank system" under 40 C.F.R. § 280.12;
(d) Tank # 3A, with a capacity of 2,000 gallons; and.
(e) Tank # 3B, with a capacity of 2,000 gallons, which along with Tank #3A constituted a "new tank system" under 40 C.F.R. § 280.12. Stips ¶¶ 7, 19, 28, 29, 65, 66.

2. As of at least August 26, 2008 and August 24, 2010, Tank #1 had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 60.

3. As of at least August 26, 2008, each of Tank nos. 3A and 3B had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 61.

4. As of at least August 26, 2008, the underground piping for each of Tank nos. 1, 3A and 3B was equipped with an ALLD. Stips ¶ 62.

5. Mr. Sacker conducted an inspection of Station VI on August 24, 2010. Sackler Decl. ¶ 99.

6. The ALLDs were tested on September 7, 2010. Sackler Decl. ¶ 71.

7. Interstitial monitoring is conducted by checking for fluid in the pressurized pump sump, and the presence of petroleum product in the sump indicates a possible leak in the piping. Sacker Feb. 2012 Decl. ¶ 135. At the time of the August 24, 2010 inspection, an automatic tank gauge ("ATG"), which detects fluid in the sumps, was being used for electronic interstitial monitoring on all of the USTs at Station VI. *Id.* ¶ 136 (referenced in Sacker Decl. ¶ 99).

8. Mr. Sacker generated a printout of the monitoring data from the ATG, which indicated that the sensors for all of the sumps were registering "fuel alarm." During the inspection, Mr. Sacker notified the store manager of the station to immediately investigate the alarms or to report a spill to the New York State Department of Environmental Conservation ("NYSDEC") spill hotline. *Id.* ¶ 137 (referenced in Sacker Decl. ¶ 99).

9. The EPA and State of New York agreed that the NYSDEC is the agency to which owners and operators of USTs are required to report suspected releases from USTs. *Id.* ¶ 148 (referenced in Sacker Decl. ¶ 179).

10. During the inspection, Mr. Sacker observed that the sumps for Tank nos. 1, 3A and 3B were filled to capacity with what appeared to be water, and the sumps for Tank nos. 3A and 3B contained "an organic-appearing substance on the surface," which indicated to Mr. Sacker that liquid had been present in the sumps for a significant amount of time. *Id.* ¶ 138 (referenced in Sacker Decl. ¶ 99). The presence of liquid in the sumps "could and likely would interfere with the alarm sensors by giving false positives" alarm of a leak, or masking an actual leak in the piping. *Id.* ¶ 139 (referenced in Sacker Decl. ¶ 99).

11. Mr. Sacker asked the store manager of the station for copies of monthly release detection monitoring records or line tightness testing records for the piping for UST nos. 1, 3A and 3B. The records were never provided to EPA. *Id.* ¶ 140 (referenced in Sacker Decl. ¶ 99).

12. In an information request letter sent to Mr. Chase in September 2010, EPA stated that during the inspection no records of electronic interstitial monitoring of the three USTs were available

for the prior 12 months, and requested that he submit evidence of interstitial monitoring for the past year. In a response in October 2010, Mr. Chase did not provide electronic records, but provided handwritten observation logs for the submersible pumps, indicating that manual interstitial monitoring was being used as release detection monitoring for the piping on Tank nos. 1, 3A and 3B. The handwritten logs indicated that the sumps were "dry" for the previous 12 months, including on the day of the August 24, 2010 inspection . *Id.* ¶ 141-142 (referenced in Sacker Decl. ¶ 99). Therefore, the records were erroneous. *Id.,* Sackler Decl. ¶ 111, 112.

13. In the October 2010 response, Mr. Chase did not provide any records for electronic interstitial monitoring, but he did provide a receipt indicating work conducted on the sumps and sensors after the inspection. The receipt indicated that the sensors had been reacting to water in the sump pits. Based on that information and his observations at the inspection, Mr. Sacker concluded that there was no reliable manual interstitial monitoring in place to detect releases from the piping on Tank nos. 1, 3A and 3B. *Id.* ¶ 142-143, 147 (referenced in Sacker Decl. ¶ 99)

14. By email dated November 3, 2010, and information request letter sent to Mr. Chase in November 2010, Mr. Sacker requested electronic records of release detection or line tightness tests since August 2009. *Id.* ¶ 144-145 (referenced in Sacker Decl. ¶ 99). Mr. Chase's response of December 15, 2010 did not address monthly monitoring or line tightness tests. Mr. Sacker concluded that the electronic interstitial monitoring equipment had not been maintained properly and was not being conducted properly. *Id.* ¶ 147 (referenced in Sacker Decl. ¶ 99).

15. Station VI does overlie any sensitive area. Sacker Decl. ¶ 34.

2. Violations found at Station VI

In the June 21 Order, Mr. Chase was found liable for the following three counts of violation alleged in the Complaint regarding Station VI:

> Count 18: 40 C.F.R. § 280.44 and § 280.41(b)(1)(i) (failure to conduct annual tests of the operation of the ALLDs on Tank nos. 1, 3A and 3B)
>
> Count 19: 40 C.F.R. § 280.41(b)(1)(ii) (failure to conduct monthly monitoring in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 1, 3A and 3B)
>
> Count 21: 40 C.F.R. § 280.52. (failure to report that sensors for Tank nos. 2A and 2B were in alarm, and to immediately investigate whether the alarm involved a release).

3. Count 18

As found in the June 21 Order, Mr. Chase is liable for failure to conduct an annual test of

the operation of the ALLD for the piping of Tank nos. 1, 3A and 3B at Station VI from December 31, 2008 through September 7, 2010, in violation of 40 C.F.R. § 280.44(a) and 280.41(b)(1)(i), as alleged in Count 18 of the Complaint.

Complainant's Calculation

Mr. Sacker calculated a $501 economic benefit of noncompliance for the piping associated with the three lines, based on an estimated annual cost for each line of $150 to conduct ALLD testing. Sacker Decl. ¶¶ 51, 72.

As with Counts 2, 8, 10, 13 and 15, Mr. Sacker assessed the failure to conduct annual tests for the operation of ALLDs as a "major" extent of deviation and "major" potential for harm. Sacker Decl. ¶ 46. The violation commenced on December 31, 2008, which was the due date for the first ALLD tests after the tanks were installed December 31, 2007, and ended on the date the ALLD tests were conducted on September 7, 2010. Sacker Decl. ¶ 71.

For each of the three lines, Mr. Sacker determined the matrix value to be $1,930 and multiplied it by a DNM of 1 for the period of violations from December 31, 2008 through January 12, 2009, and for the remaining period, the matrix value was $2,120 with a DNM of 2.5. Sacker Decl. ¶ 72; CX 4. Adding these figures together resulted in a figure of $ 21,690. Sacker Decl. ¶¶ 34, 72.

Mr. Sacker stated that the resulting penalty was not adjusted further for the violator-specific factors, because he had no evidence warranting any adjustment. Sacker Decl. ¶ 72. For Count 18, there were several tanks holding a significant amount of fuel and noncompliance extends for an extended period of time. The tanks at issue at Station VI had a combined capacity of 14,000 gallons. Mr. Sacker points out that Mr. Chase neglected the regulatory requirements for over 21 months, even after Mr. Chase had express notice of ALLD test requirements. Sacker Decl. ¶¶ 79, 82, 83, 87, 89.

Station VI does overlie any sensitive area and therefore was assigned an ESM value of 1. Sacker Decl. ¶ 34. Considering the ESM of 1, the gravity based component was $ 21,690, which was then added to the economic benefit component, resulting in a total penalty of $22,191 for Count 18. Sacker Decl. ¶ 73; CX 48.

Discussion and Conclusion

The piping on each of UST nos. 1, 3A and 3B at Station VI was equipped with an ALLD, and there is no evidence that the ALLDs did not meet the requirements of Section 280.44(a) for method of alert or standard of detection, or that there was any malfunction in the ALLDs. Therefore, the facts concerning Count 18 fit the Penalty Policy's definition of a "moderate" extent of deviation from the regulatory requirements of Section 280.41(b) and 280.44(a).

Mr. Sacker found during the August 24, 2010 inspection that the methods of release detection used, manual and electronic interstitial monitoring, "were inadequately operated" on the piping on UST nos. 1, 3A and 3B. Sacker Decl. ¶ 99. He stated that "the evidence indicated the violation went back at least 12 months" prior to the inspection, that is, from August 24, 2009, and continued until after the ALLD test was conducted in September 2010. *Id.* This failure to properly monitor the piping increases the potential for harm for failure to test the ALLDs, as leaks could continue, undetected, during all of the time the ALLDs were not tested. Therefore, the potential for harm is "major." As found by Mr. Sacker, there is no evidence to support any violator-specific adjustment with respect to Count 18.

The violation continued for one year and 8 months, nearly all of which occurred after January 12, 2009, and therefore the appropriate matrix value under the Revised Matrices Guidance is $1,420 for each of the three lines, and the DNM is 3.5. With an ESM of 1.0, the resulting gravity based penalty is $ 14,910. Adding the economic benefit component of $ 501 calculated by Mr. Sacker results in a penalty of $ 15,411 for Count 18.

4. Count 19

In the June 21 Order, Mr. Chase was found liable for failure from August 24, 2009 to December 15, 2010, to conduct monthly monitoring in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 1, 3A and 3B at Station VI, in violation of 40 C.F.R. § 280.41(b)(1)(ii), as alleged in Count 19 of the Complaint.

Complainant's Calculation

Mr. Sacker calculated an economic benefit of $15 for Mr. Chase's avoided costs by his noncompliance, inputting into the BEN program a one-time non-depreciable cost of $600 for repairing the sump sensors to conduct release detection for the piping and cleaning the sump pits. Sacker Decl. ¶ 100.

Mr. Sacker stated that failure to conduct monthly monitoring on pressurized piping has a "major" extent of deviation and "major" potential for harm under the Penalty Policy, Appendix A. Therefore he selected the matrix value, increased for inflation, of $ 2,120, and tripled it to account for the three lines. Sacker Decl. ¶¶ 94, 101; CX 4.

He did not adjust the penalty for any of the penalty adjustment factors. He considered that Mr. Chase violated core requirements in the regulatory scheme and that there was a potential for release of vast amounts of toxic and flammable motor fuel into the environment, given the length of time of non-compliance, the fact that three lines were involved and the large size of the USTs at issue, a total capacity of 27,000 gallons. Mr. Sacker pointed out that Mr. Chase had express written notice of the requirement for release detection monitoring since at least April 2009, and was so advised on at least six occasions. Mr. Sacker considered also that not only did

Mr. Chase provide records with erroneous information in response to the September 2010 request for information, but in response to the December 2010 information request, he failed to address the issue of line tightness testing or monthly monitoring at Station VI . Sacker Decl. ¶¶ 108- 112.

Mr. Sacker stated that "the evidence indicated that this violation went back at least 12 months prior to [the] August 24, 2010 inspection." Sacker Decl. ¶ 99. He assessed the violation as continuing until December 15, 2010, the date of Mr. Chase's last response to an information request letter concerning release detection monitoring for the piping at Station VI, in which he "did not adequately provide evidence of repairs to release detection system for the pressurized piping." *Id.* Thus he found 479 days of noncompliance, and applied a DSM of 3.0. Considering the ESM of 1, he calculated a gravity based component of $19,080. Sacker Decl. ¶¶ 34, 101. Adding the economic benefit component to the gravity based penalty yielded a penalty of $ 19,095 for Count 19. Sacker Decl. ¶ 102, 104; CX 49.

Discussion and Conclusion

Appendix A of the Penalty Policy assigns "major" extent of deviation and potential for harm to a violation of Section 280.41(b), described as "failure to use any underground piping monitoring method," or to violation of Section 280.44(c) "[i]nadequate use of applicable tank [piping] release detection methods." The piping at Station VI complied with the requirement of Section 280.41(b)(1)(i) to have piping equipped with ALLDs. In addition, there is evidence of manual and electronic interstitial monitoring being conducted at Station VI at the time of the August 2010 inspection, although the sumps were filled with water on at least that day. Sacker Decl. ¶ 99. These circumstances fall somewhere between the definitions in the Penalty Policy (at § 3.1.1) of "moderate" extent of deviation (that the violator "significantly deviates from the requirement of the regulation . . . but to some extent has implemented the requirement as intended" such as installing improperly constructed cathodic protection) and "major" extent of deviation (that the violator "deviates . . . to such an extent that there is substantial noncompliance" such as installing a bare steel tank without cathodic protection). However, given the significant penalty assessed as to Count 18 for failure to conduct annual testing of ALLDs, it is appropriate to assess a "moderate" extent of deviation for Count 19.

As found in Count 18, the ALLDs were not tested until September 7, 2010. Where the monitoring for releases was not effective, and there was no assurance that the ALLDs were functioning inadequately, Count 19 is assessed "major" potential for harm. Thus, according to the Penalty Policy, the appropriate matrix value is $ 1,420. No adjustments to the penalty are warranted, particularly where Mr. Chase did not provide evidence of repairs to the release detection system, and there is no evidence that he took reasonable precautions against the problems with the monitoring.

The matrix value is multiplied by three for the number of lines, multiplied by 3.0 for the DNM, and considering the 1.0 ESM, the gravity based penalty is $12,780. Adding the $15

economic benefit results in a penalty of $ 12,795 for Count 19.

5. Count 21

Mr. Chase was found liable in the June 21 Order for failure to report within 24 hours from August 24, 2010 to the New York State Department of Environmental Conservation (NYSDEC) that sensors connected to or associated with UST nos. 2A and 2B were in alarm, and to immediately investigate whether the alarm involved a release of regulated substances from the USTs, in violation of 40 C.F.R. § 280.52.

Complainant's Calculation

Mr. Sacker noted that August 24, 2010 was the date 24 hours after he notified Mr. Chase and the facility that the sump sensors for release detection of the pressurized piping were in alarm, and that the facility did an investigation into the potential release on August 26, 2010. Sacker Decl. ¶ 181. Failure to conduct monthly monitoring on pressurized piping has a "major" extent of deviation and "major" potential for harm under the Penalty Policy, Appendix A, yielding a matrix value increased for inflation according to the Revised Matrices Guidance to $ 2,120. Sacker Decl. ¶ 183; CX 4. He noted that the violation was assessed on a per-facility basis. . Sacker Decl. ¶ 180.

For two days of noncompliance, the DSM was 1. Sacker Decl. ¶ 183. Mr. Sacker assessed an ESM of 1, reflecting the fact that Station VI did not overlie any sensitive area. Sacker Decl. ¶¶ 34, 183.

Mr. Sacker did not adjust the penalty for any of the penalty adjustment factors. One tank, containing off-road diesel fuel, had a capacity of 6,000 gallons and the other, holding kerosene, had a capacity of 2,000 gallons. Sacker Decl. ¶ 178. He stated that it is important that the state agency be given prompt notice of a suspected release, as the state is part of the overall scheme to govern management of solid waste, including management of tanks. Sacker Decl. ¶ 185. He explained that a suspected release must be investigated immediately so corrective measures may be taken and preventative measures be taken to ensure no recurrence. Sacker Decl. ¶ 186. He asserted that although he had given express notice to Mr. Chase of the sensor alarm, he did not comply until after the 24 hour period, and such dereliction of duty should be evaluated in light of his experience owning and operating USTs. Sacker Decl. ¶ 187.

Mr. Sacker discerned no economic benefit from the violation, so the total penalty assessed for Count 21 was $2,120. Sacker Decl. ¶ 102, 178, 179; CX 51.

Discussion and Conclusion

There is no evidence to support any violator-specific adjustment with respect to Count 21. Mr. Sacker's rationale and calculation of the penalty for Count 21 is accepted, and therefore the penalty for Count 21 is $2,120.

IX. Ultimate Conclusion as to Penalty

Adding the penalties for the counts of violation, the total penalties assessed for each station are as follows:

Station I (Counts 1 through 7):	$35,873
Station II (Count 8):	$12,670
Station III (Counts 9 through 11):	$16,304
Station IV (Counts 12 through 14):	$22,942
Station V (Counts 15 and 16):	$ 8,954
Station VI (Counts 18, 19 and 21):	$30,326

Mr. Chase is liable for penalties regarding Stations I, III and VI, Counts 1 through 7, 9 through 11, and 18, 19 and 21, which total $82,503.

Mr. Chase and CCS are jointly and severally liable for the penalty of $12,670 for Count 8, regarding Station III.

Mr. Chase and CSI are jointly and severally liable for the penalties for Counts 12 through 14, regarding Station IV, which total $22,942.

Mr. Chase and CCLD are jointly and severally liable for the penalties for Counts 15 and 16, regarding Station V, which total $8,954.

The aggregate penalty for all violations for which Respondents are found liable is $127,069.

X. Discussion Regarding Compliance Order

Complainant seeks an order directing Mr. Chase, "to the extent he still owns and/or operates the underground storage tank systems at Station I, comply with all 40 C.F.R. part 280 requirements applicable to such ownership and/or operation of said UST systems, including compliance with the following provisions . . . 40 C.F.R. § 280.41(b)(1)(ii); 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i), and 40 C.F.R. § 280.20(c)(1)(ii), as incorporated into 40 C.F.R. § 280.21." EPA's Brief at 5-6.

The Act provides at Section 9006(a)(1) that the Agency "may issue an order requiring compliance within a reasonable time period." 42 U.S.C. § 6991e(a)(1). The Compliance Order in the Complaint proposed that within thirty days of the effective date of the Compliance Order, to the extent not already completed, Respondent Andrew B. Chase be require comply with release detection requirements of 40 C.F.R. § 280.41(b)(1)(ii) for the underground pressurized piping for UST nos. 006A and 006B at Station I, or cease operation and permanently close such tanks in accordance with 40 C.F.R. Part 280 Subpart G, and in addition, to "maintain compliance with all other applicable requirements of 40 C.F.R. part 280 for each UST system" at Station I. Although the Compliance Order also proposed compliance with regulatory provisions with regard to USTs at Station VI, Complainant in its Brief indicates that it does not seek compliance with regard to Station VI, presumably because it was sold.

There is no evidence that Station I was sold by Respondents, and no evidence of current compliance with all applicable provisions of 40 C.F.R. Part 280. Accordingly, Respondent Andrew B. Chase is ordered to comply with the following Compliance Order.

XI. Compliance Order

Pursuant to authority of Section 9006 of the Solid Waste Disposal Act, 42 U.S.C. §6991e, Respondent Andrew B. Chase shall:

1) Within thirty (30) days of the effective date of this Initial Decision, comply with, to the extent he has not already done so, the release detection requirements of 40 C.F.R. § 280.41(b)(1)(ii) for the underground piping that conveys regulated substances under pressure for UST nos. 006A and 006B at Service Station I, or in the alternative, to cease operation and permanently close such USTs in accordance with the closure and associated requirements set forth in 40 C.F.R. Part 280 Subpart G.

2) Maintain compliance with all other applicable requirements of 40 C.F.R. part 280 for each UST system at Service Station I, including but not limited to the requirements for release detection and monitoring in 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i), and requirements for overfill protection in 40 C.F.R. § 280.20(c)(1), as incorporated into 40 C.F.R. § 280.21.

3) Within forty-five (45) days of the effective date of this Initial Decision, submit to EPA written notice of compliance (accompanied by a copy of appropriate supporting documentation) or non-compliance with the provisions of this Compliance Order. If Respondent Andrew B. Chase is in non-compliance with a particular requirement(s), such notice shall state the reason(s) for such non-compliance and shall provide a schedule for achieving expeditious compliance with such requirement(s). Such notice shall contain the following certification:

I certify that the information contained in this written notice and the accompanying supporting documentation is true, accurate and complete to the best of my knowledge and belief. As to the identified portions of this response for which I am unable personally to verify their truthfulness, accuracy and/ or completeness, I certify that this response and all accompanying supporting documentation were prepared in accordance with a system designed to assure that qualified personnel gather and evaluate the information submitted. I am aware that there are significant penalties for submitting false, misleading and/or incomplete information, and such penalties might include criminal fines and imprisonment for knowing violations.

Signatures: _____
Name: _____
Title: _____
Date: _____

The notice required pursuant to this Compliance Order (including any accompanying supporting documentation) shall be sent to:

Paul Sacker, Acting Team Leader
RCRA Compliance Branch-UST Team
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency- Region 2
290 Broadway, 20th Floor
New York, New York 10007-1866

ORDER

1. Respondent Andrew B Chase is hereby assessed an aggregate civil penalty of $82,503 for violating regulations promulgated under the Solid Waste Disposal Act as alleged in Counts 1 through 7, 9-11 and 18, 19 and 21 of the Complaint.

2. Respondents Andrew B. Chase and Respondent Chase Convenience Stores, Inc. are hereby assessed jointly and severally a civil penalty of $12,670 for violating regulations promulgated under the Solid Waste Disposal Act as alleged in Count 8 of the Complaint.

3. Respondents Andrew B. Chase and Respondent Chase Services, Inc. are hereby assessed jointly and severally a civil penalty of $22,942 for violating regulations promulgated under the Solid Waste Disposal Act as alleged in Counts 12, 13 and 14 of the Complaint.

4. Respondents Andrew B. Chase and Respondent Chase Commercial Land Development, Inc. are hereby assessed jointly and severally a civil penalty of $8,954 for violating regulations promulgated under the Solid Waste Disposal Act as alleged in Counts 15 and 16 of the Complaint.

5. Respondent Andrew B. Chase shall comply with the above Compliance Order, which shall become final and take effect forty-five (45) days after the date of service of this Initial Decision, unless an appeal is filed as provided below.

6. Payment of the full amount of these civil penalties shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by one of the following methods:

   a) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

      U.S. Environmental Protection Agency
      Fines and Penalties
      Cincinnati Finance Center
      P.O. Box 979077
      St. Louis, MO 63197-9000

   b) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed by overnight mail to:

      U.S. Bank
      Government Lockbox 979077
      U.S. EPA Fines & Penalties
      1005 Convention Plaza
      Mail Station SL-MO-C2-GL

St. Louis, MO 63101

c) Wire transfer to the Federal Reserve Bank of New York as follows:
Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT Address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

d) Through Automated Clearinghouse (ACH):
U.S. Treasury REX / Cashlink Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking

e) Debit card or credit card online payment:
https://www.pay.gov/paygov
Enter SFO 1.1 in the search field
Open form and complete required fields.

7. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondents' names and address(es), must accompany the check.

8. If Respondents fail to pay the penalties within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

9. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

In the Matter of ***Andrew B. Chase, a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc.,*** **Respondents.**
Docket No. RCRA-02-2011-7503

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Initial Decision,** were sent to the following parties on this 20th day of June 2013, in the manner indicated:

Knolyn R. Jones
Staff Assistant

Original and One Copy by Electronic and Pouch Mail to:

Karen Maples
Regional Hearing Clerk
US EPA, Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Electronic and Pouch Mail to:

Lee A. Spielmann, Esq.
Assistant Regional Counsel
Waste and Toxic Substances Agency
U.S. EPA / Region II
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Electronic and Regular Mail to:

Thomas W. Plimton, Esq.
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Plattsburgh, NY 12901

Dated: June 20, 2013
Washington, DC