

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029



In the Matter of:)
)
 Chester Aytch)
 34 Pritchard Lane)
 Sicklerville, NJ 08081;)
)
 5631 Corporation)
 1313 N. 52nd Street)
 Philadelphia, Pennsylvania 19131;)
)
 RESPONDENTS)
)
 58th Street Sunoco)
 5744 Woodland Avenue)
 Philadelphia, Pennsylvania 19143;)
)
 and)
)
 Woodland Sunoco)
 5200 Woodland Avenue)
 Philadelphia, Pennsylvania 19143;)
)
 FACILITIES)

Complainant's Initial
Prehearing Exchange

U.S. EPA Docket Number
RCRA-03-2009-0322

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Pursuant to Rule 22.19(a) of the Consolidated Rules of Practice Governing the
 Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action
 Orders, and the Revocation/Termination or Suspension of Permits (“Consolidated Rules of
 Practice”), 40 C.F.R. § 22.19(a) , and the Presiding Officer’s Order of April 2, 2010,
 Complainant submits this Initial Prehearing Exchange in the above-captioned matter.

I. WITNESSES

Complainant may call any and/or all of the following witnesses at a hearing of the above-captioned matter. In addition, should Respondents' Initial Prehearing Exchanges or Reply Prehearing Exchanges, or other investigation and discovery, reveal the need for further witnesses, Complainant respectfully reserves the right to supplement this list of witnesses upon adequate notice to this tribunal and Respondents, and to call such witnesses at the hearing of this matter.

Complainant notes that some of the testimony described below may be rendered unnecessary by stipulations or by dispositive motions. It is Complainant's intent to promote judicial efficiency by resolving all of the issues with regard to liability via stipulations or via a motion for accelerated decision. It is Complainant's belief that liability for most of the violations alleged in this matter can be demonstrated by Respondents' responses to formal information requests from EPA, and that the remaining violations are supported by facts on which there is no legitimate factual dispute. Complainant will attempt to work with Respondents to agree on stipulations to liability and/or to undisputed facts which will allow the Presiding Officer to efficiently resolve any legal questions regarding the alleged violations. Complainant requests that the Presiding Officer schedule the litigation of this matter with sufficient time for the parties to negotiate stipulations and to file and rule on dispositive motions, which Complainant believes will ultimately result in a faster resolution of this matter.

A. Marie Owens, EPA, Region III

Ms. Owens, the Underground Storage Tank Enforcement Program Team Leader for EPA's Region III office, may be called as a witness both as to the facts of Respondents'

violations and to explain the calculation of the penalty to be sought by Complainant. Ms. Owens conducted inspections of the 58th Street Sunoco Facility on June 12, 2008, August 15, 2008, and September 11, 2008, and conducted an inspection of the Woodland Sunoco Facility on September 11, 2008. Ms. Owens will testify, if necessary, to her findings and observations during these inspections, as summarized in Complainant's Exhibits 6-12 and 22-23. In addition to the observations summarized in these documents, Ms. Owens' testimony will include additional details with regard to the lack of spill and overfill protection for the kerosene UST at the 58th Street Sunoco Facility, detail which was not included in the inspection documents because its importance was not apparent until well after the inspections, when EPA received further information about the Facility. Specifically, Ms. Owens will testify that at the time of her inspections on June 12, 2008 and August 15, 2008, the only accessible fill port for the kerosene UST was not equipped with either spill or overfill prevention equipment. During her September 11, 2008, inspection, the current operator of the facility showed her another fill port (which he claimed to be the "primary" fill port) which was equipped with both spill and overfill protection equipment. The alleged primary fill port had been obscured during Ms. Owens' previous two visits to the Facility. Ms. Owens will testify that there was nothing to indicate to her, or to anyone delivering fuel to the Facility, that the fill port observed by Ms. Owens during her first two inspections was not to be used to fill the kerosene UST, and nothing to prevent the UST from actually being filled through such fill port.

Ms. Owens may also testify, if necessary, to authenticate Complainant's information request letters to Respondents (Complainant's Exhibits 13, 15, 16, 24 and 26) and Respondents' responses thereto (Complainant's Exhibits 14, 16, 25 and 27).

Ms. Owens may testify to discussions with and statements made by Respondent Chester Aytch during a meeting with EPA on May 1, 2009¹. During this meeting Mr. Aytch told Ms. Owens that he had been the operator of the two facilities in question when the facilities were still owned by Sunoco. During this time frame he had filled out inventory forms which Sunoco had asked him to fill out, and sent the forms to Sunoco, who in turn sent them to Simmons Corporation ("Simmons"), who used them to generate monitoring results utilizing "statistical inventory reconciliation" also known as "SIR." Mr. Aytch said that he purchased the facilities from Sunoco around 2000, at which point Sunoco told him that he no longer should send the inventory forms to Sunoco. He continued to fill out and save the forms, but did not send them to Simmons. However, following an inspection in 2007 by the Pennsylvania Department of Environmental Protection ("PADEP") he began sending the forms to Simmons and paying for SIR to be conducted. He received his initial SIR results from Simmons in October, 2007.

At the meetings, Mr. Aytch told Ms. Owens that he still owned the two facilities in question, but he had sold the gas station businesses to a new operator, Mr. Rathnaker Reddy Patlola, as of August, 2008. According to Mr. Aytch, he had already provided, in response to

¹ The May 1, 2009 meeting was in response to a letter from EPA to Respondents which served both as an information request and as an invitation to discuss settlement. At the meeting, the parties primarily discussed factual issues with regard to Respondents' compliance with the UST regulations. Consistent with 40 C.F.R. § 22.22(a)(1), Ms. Owens will *not* testify as to any statements regarding settlement made by either party at the May 1, 2009 meeting.

EPA's information requests, all the records he had with regard to compliance at the two facilities prior to the transfer of the businesses to the new operator. However, at the May 1, 2009 meeting Mr. Aytch promised to send EPA additional documentation regarding compliance with the UST regulations subsequent to the transfer to the new operator. On May 5, 2009, Ms. Owens followed up on this promise with an e-mail to Mr. Aytch confirming the documentation he had agreed to provide. *See* Complainant's Exhibit 29. Mr. Aytch never responded to this e-mail or provided the promised documentation to EPA.²

Ms. Owens will also testify to her analysis of the alleged inventory control records submitted to EPA by Respondents. To the extent that Respondents attempt to argue that its alleged use of inventory control is a mitigating factor with regard to the penalty to be assessed in this matter³, Ms. Owens' testimony will testify that Respondents (1) failure to complete the section of the inventory sheets which compares the monthly over/under to the monthly standard, and (2) failure to report to the state or take any other action for months where the monthly over/under exceeded the monthly standard, negates whatever minimal environmental benefit might have been gained by Respondents' use of inventory control sheets, and demonstrates that Respondents use of the inventory sheets was not a good-faith effort to comply with the tank release detection requirements.

² Some of the documentation requested of Mr. Aytch was eventually sent to EPA by the current operator, Mr. Patlola, in response to information requests sent directly to Mr. Patlola.

³ Inventory control is no longer an acceptable method of tank release detection for the USTs in question in this matter, and therefore Respondents' claim to have conducted inventory control is not relevant to the determination of liability. At most, Respondents' alleged use of inventory control is relevant only to the penalty assessment.

Ms. Owens may also testify that the violations in this matter substantially harm the UST regulatory program, and may also present Complainant's proposed penalty calculations, to the extent that the Presiding Officer wishes Complainant to present its proposed penalty calculations via a live witness.⁴

B. Jack Hwang, EPA, Region III

Mr. Hwang is a hydrologist with EPA Region III. He will testify as an expert witness with regard to the relative sensitivity of the environment in the vicinity of the violations, as detailed in his expert report, attached as Complainant's Exhibit 31.

C. Elizabeth Ann Quinn, EPA, Region III

Ms. Quinn is a toxicologist with EPA Region III. She will testify as an expert witness with regard to the relative sensitivity of the environment in the vicinity of the violations, as detailed in his expert report, attached as Complainant's Exhibit 33.

II. EXHIBITS

58th Street Sunoco Facility

1. Registration of Storage Tanks, dated March 17, 1998
2. Report for third-party inspection of 58th Street Sunoco Facility on August 22, 2000
3. Report for third-party inspection of 58th Street Sunoco Facility on September 15, 2003

⁴ It is clearly appropriate for witnesses to testify to the facts which are to be considered in the penalty assessment, and to present expert testimony with regard to the seriousness of the violations. However, it is Complainant's position that that the proposed penalty itself, and the calculations that go into it, is argument, not evidence, and thus both Complainant's proposed penalty and Respondents' response thereto are more appropriately presented as argument in the parties' post-hearing briefs. Nonetheless, if the Presiding Officer prefers that Complainant present its proposed penalty using a live witness, Ms. Owens will be available to do so.

4. Report for third-party inspection of 58th Street Sunoco Facility on September 7, 2005
5. Report for third-party inspection of 58th Street Sunoco Facility on September 7, 2007
6. Report for EPA inspection of 58th Street Sunoco Facility on June 12, 2008
7. Correction to EPA Inspection Report, dated June 30, 2008
8. Notes of Marie Owens for EPA inspection of 58th Street Sunoco Facility on June 12, 2008
9. Report for EPA site visit to 58th Street Sunoco Facility on August 15, 2008
10. Notes of Marie Owens for site visit to 58th Street Sunoco Facility on August 15, 2008
11. Report for EPA site visit to 58th Street Sunoco Facility on September 11, 2008
12. Notes of Marie Owens for site visit to 58th Street Sunoco Facility on September 11, 2008
13. Information request letter regarding 58th Street Sunoco Facility, from EPA to Chester Aytch, dated June 27, 2008
14. Response to information request regarding Woodland Sunoco Facility, from Chester Aytch to EPA, certification signed on July 10, 2008
15. Information request letter regarding 58th Street Sunoco Facility, from EPA to Chester Aytch, dated June 27, 2008
16. Information request letter regarding 58th Street Sunoco Facility, from EPA to Chester Aytch, dated September 24, 2008
17. Response to information request regarding 58th Street Sunoco Facility, from Chester Aytch to EPA, postmarked October 3, 2008, certification signed on July 10, 2008

Woodland Sunoco Facility

18. Notice of Violation sent from PADEP to Chester Aytch, dated September 12, 2003
19. Report for third-party inspection of Woodland Sunoco Facility on September 7, 2005
20. Notice of Violation sent from PADEP to Chester Aytch, dated November 3, 2005

21. Report for PADEP inspection of Woodland Sunoco Facility on April 11, 2007
22. Report for EPA inspection of Woodland Sunoco Facility on September 11, 2008
23. Notes of Marie Owens for EPA inspection of Woodland Sunoco Facility on September 11, 2008
24. Information request letter regarding Woodland Sunoco Facility, from EPA to Chester Aytch, dated September 26, 2008
25. Response to information request regarding Woodland Sunoco Facility, from Chester Aytch to EPA, postmarked October 7, 2008

Both Facilities

26. Show cause/information request letter from EPA to Chester Aytch and 5631 Corporation, dated April 22, 2008
27. Response to information request, submitted by Chester Aytch to EPA at meeting on May 1, 2009
28. Notes of Marie Owens for meeting with Chester Aytch on May 1, 2009
29. E-mail from Marie Owens to Chester Aytch on May 5, 2009
30. Resume of Jack Huang
31. Expert Report of Jack Huang
32. Expert Report of Elizabeth Ann Quinn (with resume)
33. U.S. EPA Penalty Guidance for Violations of UST Regulations, November 1990
34. Modifications to EPA's Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (pursuant to the Debt Collection Improvement Act of 1996 (effective October 1, 2004)), dated September 21, 2004

III. PROPOSED PENALTY

Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant did not propose a specific penalty in the Complaint. Pursuant to 40 C.F.R. § 22.19(a)(4), where the Complaint does not propose a specific penalty, a penalty is to be proposed within 15 days after Respondent files its Prehearing Exchange. However, the Presiding Officer's Order of April 2, 2010 required Complainant to include a proposed penalty in Complainant's Prehearing Exchange, and Complainant therefore tentatively proposes a penalty of \$340,183, as explained in more detail below. This proposed penalty does not include a component to account for the economic benefit gained by Respondents by virtue of their noncompliance with the UST regulations. Complainant is still evaluating economic benefit, and will detail the additional penalty for economic benefit in a supplemental statement, to be filed, consistent with 40 C.F.R. § 22.19(a)(4), within 15 days after Respondent filed its Prehearing Exchange.

This proposed penalty has been determined in accordance with the penalty factors set forth in Section 9006(c) and (e) of RCRA. 42 U.S.C. § 6991e(c) and (e), require EPA to take into account the seriousness of the violation, any good faith efforts to comply with the applicable requirements, the compliance history of the owner and operator, and any other appropriate factors. In developing the proposed penalty, Complainant will take into account the particular facts and circumstances of this case with specific reference to EPA's November 1990 "U.S. EPA Penalty Guidance for Violations of UST Regulations" ("UST Penalty Guidance"), included as Complainant's Exhibit 34, and the "Modifications to EPA's Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (pursuant to the Debt Collection Improvement

Act of 1996 (effective October 1, 2004)),” dated September 21, 2004 (“2004 Penalty Policy Inflation Modification”), included as Complainant’s Exhibit 35. These policies provide a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases.

Count 1

Count 1 involves the failure to provide tank release detection for the 58th Street Sunoco Facility. This violation began greater than five years prior to the filing of the Complaint in this matter, but the penalty calculation begins on September 30, 2004 due to the applicable statute of limitations. For the four fuel tanks at the Facility, the violation continued until October 30, 2007, when Respondents obtained their first statistical inventory reconciliation (“SIR”) reports from Simmons Corp. For the waste oil tank at the Facility, the violation continued until August 22, 2008, when the oil in the tank was pumped out to below one inch.

Tank release detection is one of the most important elements of the UST regulations because it ensures that regulated substances are not released into the environment in large quantities. Under the Penalty Policy the failure to conduct tank release detection in a proper manner is generally considered a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This assessment is reasonable in this case. Respondents were not performing any of the allowable methods of tank release detection for the entire period of noncompliance. While Respondents apparently were filling out inventory control worksheets during the period of violation, inventory control was a temporary method of compliance which was not allowed on Respondents’ tanks at any time after

December 22, 1998. Inventory control is a much less sensitive and accurate method of release detection than the alternatives still allowed in the regulations. Moreover, while Respondents filled out inventory control worksheets, they did not even address the line on the worksheet which called on the user to compare the potential calculated losses to the monthly standard which would apply to tanks still eligible to use inventory control. Moreover, on a number of occasions Respondents' numbers showed that the losses exceeded that standard, and yet Respondent did not report a presumptive release to the state or take any other action other than continuing to fill in the worksheets for the next month. Respondents' use of the worksheets was thus no more than a perfunctory act which had no value in detecting releases. Respondents' inaction thus created a high risk that significant releases would go undetected.

Under the Penalty Policy the base penalty is \$1,500 for a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation. The maximum base penalty is far below the statutory maximum penalty, and thus the Penalty Policy contemplates a series of adjustments to the penalty to properly and completely address the statutory penalty factors.

In this case, Complainant proposes that the base penalty be multiplied by a "days of noncompliance multiplier" ("DNM") to account for the continuation of the violation. For the four fuel tanks the DNM is 5.0, for more than 3 years of violation. For the waste oil tank the DNM is 5.5, for almost 4 years of violation. The use of a DNM for extended violations yields a

much lower penalty than would be generated if the base penalty was simply multiplied by the number of days of violation.

In addition, Complainant proposes that the penalty be increased by an “environmental sensitivity multiplier” (“ESM”) of 1.50, to account for the relative sensitivity of the environment surrounding the Facility in terms of both human health and ecological considerations. The violations involved five tanks with a total capacity of 35,000 gallons, located in an area with moderately permeable soils and high groundwater levels. The available soil and groundwater data for the sites by themselves indicate a significant likelihood of groundwater contamination in the event of a release. Moreover, an earlier release at this location in fact resulted in regulated substances reaching groundwater, providing direct evidence of a high risk of groundwater contamination in the case of a release. In addition, the area is highly urbanized, and is therefore likely to contain extensive utility trenching and other preferential pathways of exposure to the relatively dense human population in the ¼ mile radius surrounding the facility. However, there appears to be areas within the ¼ mile radius which has limited population, and thus an ESM of 1.5 is proposed (as opposed to the higher ESM of 1.75 proposed for the Woodland Sunoco Facility, as explained below).

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. Respondents were aware that the previous owner of the Facility, Sunoco, had contracted with Simmons Corp. for SIR services prior to transferring the Facility to Respondents in 1998. Respondents filled out a form every month which specifically stated that it

“must be mailed to Simmons . . . by the 2nd day of the following month.” Regardless of Respondents’ level of sophistication, Respondents could not possibly have believed under these circumstances that it had no regulatory obligations beyond filling out the Simmons form each month and putting the form in Respondents’ files. Moreover, Respondents’ other facility, the Woodland Sunoco Facility, was inspected by an inspector from the Commonwealth of Pennsylvania in 2005, at which Respondents were unable to provide the state with any records for tank release detection. Even after this inspection, Respondents did not take any steps to come into compliance with the tank release detection requirements. Only after another Pennsylvania inspection in 2007 did Respondent finally contract with Simmons for SIR services.

Although Respondents were clearly negligent in failing to comply with the regulations, Complainant has given Respondents the benefit of the doubt, and has assumed for the time being that this negligence is of a “normal” level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 1 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1500
Environmental Sensitivity Multiplier:	1.50

Fuel Tanks

Dates of Noncompliance:	September 30, 2004 to October 30, 2007
Days of Noncompliance:	1125
Days of Noncompliance Multiplier:	5.0
Violator Specific Adjustments:	None at this time

Matrix Value x # of USTs x Days of Noncompliance Multiplier x ESM x Inflation
 $\$1500 \times 4 \text{ USTs} \times 5.0 \text{ DNM} \times 1.50 \text{ ESM} \times 1.2895 \text{ Inflation} = \$58,027$

Fuel Tanks Penalty **\$58,027**

Waste Oil Tank

Dates of Noncompliance: September 30, 2004 to August 22, 2008

Days of Noncompliance: 1422

Days of Noncompliance Multiplier: 5.5

Violator Specific Adjustments: None at this time

Matrix Value x # of USTs x Days of Noncompliance Multiplier x ESM x Inflation
 $\$1500 \times 1 \text{ UST} \times 5.5 \text{ DNM} \times 1.50 \text{ ESM} \times 1.2895 \text{ Inflation} = \$15,957$

Economic Benefit - Manual Tank Gauging, de minimis

Waste Oil Tank Penalty **\$15,957**

Total Count 1 Penalty **\$73,984**

Count 2

Count 2 involves the failure to provide periodic line release detection for the 58th Street Sunoco Facility. Respondents performed line tightness testing on September 24, 2003, but did not perform tightness testing again until September 7, 2005. Respondents thus were in violation of the periodic line release detection requirements beginning on September 24, 2004, but the calculation of the penalty for the violation begins on September 30, 2004 due to the applicable statute of limitations. This violation continued until testing was again performed on September 7, 2005. The violation resumed one year later, on September 7, 2006, and continued until testing was again performed on October 2, 2007. Although there are five USTs at the Facility, the violation applies only to three piping runs. The two regular-grade tanks are manifolded, and thus

have only one piping run between them, while the waste oil tank does not have associated underground piping.

Line release detection is also an extremely important elements of the UST regulations, particularly where, as here, regulated substances are conveyed in underground piping under pressure. The requirement for monthly monitoring or an annual line tightness test helps ensure that line failures do not lead to the release of large quantities of regulated substances into the environment.

Under the UST Penalty Guidance the failure to conduct periodic line release detection in a proper manner is generally considered a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This assessment is reasonable in this case. Respondent clearly did not have an annual tightness testing program, and it appears that testing was performed only when specifically prompted by a regulatory agency. The Testing on September 7, 2005 occurred immediately after an inspection of the Woodland Sunoco Facility by a state inspector on the same day, while the October 2, 2007 testing occurred after a state inspection of the 58th Street Sunoco Facility on September 7, 2007. Respondents' failure to provide a method of line release detection created a high risk that significant releases would go undetected until environmental harm had occurred.

Under the Penalty Policy the base penalty is \$1,500 for a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation. The

DNM is calculated by adding together the total days of noncompliance, 732 days, for a DNM of 3.5. As discussed under Count 1, above, the ESM for this Facility is 1.50.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. Respondents appeared to have conducted testing only in response to state inspections, and had no program whatsoever to ensure that testing was done annually or monthly in accordance with the regulations. Respondents' violations were at least negligent, if not willful. As with Count 1, above, Complainant has given Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 2 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1500
Environmental Sensitivity Multiplier:	1.50
Dates of Noncompliance:	September 30, 2004 to September 6, 2005 = 348 days September 7, 2006 to October 1, 2007 = 390 days
Days of Noncompliance:	342+390= 732 days
Days of Noncompliance Multiplier:	3.5
Violator Specific Adjustments:	None at this time
Matrix Value x # of piping runs x Days of Noncompliance Multiplier x ESM x Inflation	
\$1500 x 3 piping runs x 3.5 DNM x 1.50 ESM x 1.2895 Inflation	\$30,464
Total Count 2 Penalty	\$30,464

Count 3

Count 3 involves the failure to conduct operational testing of the line leak detectors for the underground piping at the 58th Street Sunoco Facility. Respondents performed operational testing on September 24, 2003, but did not perform tightness testing again until September 7, 2005. Respondents thus were in violation of the annual operational testing requirement beginning on September 24, 2004, but the calculation of the penalty for the violation begins on September 30, 2004 due to the applicable statute of limitations. The violation continued until testing was again performed on September 7, 2005. The violation resumed one year later, on September 7, 2006. For the two gasoline tank piping runs, the violation continued until testing was again performed on October 2, 2007. For the kerosene tank piping an operational test was not conducted until after the transfer of operations to a new operator on August 1, 2008.

Line release detection is one of the most important elements of the UST regulations, particularly where, as here, regulated substances are conveyed in underground piping under pressure. The requirement for annual operational tests on continuous line leak detectors (which continuously operate to detect high rate or “catastrophic” leaks) is an essential requirement that ensures that the line leak detectors are capable of performing their critical function of preventing massive short-term releases of the pressurized substances in the underground piping.

Under the UST Penalty Guidance the failure to conduct line release detection operational testing is generally considered a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This assessment is reasonable in this case. Respondent clearly did not have an annual operational testing program,

and performed testing only when specifically prompted by a regulatory agency. The testing on September 7, 2005 occurred immediately after an inspection of the Woodland Sunoco Facility by a state inspector on the same day, while the October 22, 2007 testing occurred after a state inspection of the 58th Street Sunoco Facility on September 7, 2007. Conditions did not allow testing of the kerosene tank line leak detector on October 22, 2007, but Respondents made no effort to ensure that testing actually occurred. Respondents' failure to provide operational testing created a high risk that significant releases would go undetected until environmental harm had occurred.

Under the Penalty Policy the base penalty is \$1,500 for a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation. The DNM is calculated by adding together the total days of noncompliance. For the gasoline tank line leak detectors the total days of noncompliance was 765 days, for a DNM of 4.0. For the kerosene tank line leak detectors the total days of noncompliance was 1036 days, for a DSM of 4.5. As discussed under Count 1, above, the ESM for this Facility is 1.50.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. Respondents appeared to have conducted testing only in response to state inspections, and had no program whatsoever to ensure that testing was done annually in accordance with the regulations. Respondents' violations were at least negligent, if not willful. As with the other counts, above, Complainant has given Respondents the benefit of the doubt,

and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 3 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1500
Environmental Sensitivity Multiplier:	1.50

Gasoline Tank Piping

Dates of Noncompliance:	September 30, 2004 to September 6, 2005 = 348 days
	September 7, 2006 to October 22 2007 = 411 days
Days of Noncompliance:	354+411= 765 days
Days of Noncompliance Multiplier:	4.0

Violator Specific Adjustments: None at this time

Matrix Value x # of line leak detectors x Days of Noncompliance Multiplier x ESM x Inflation	
\$1500 x 3 LLDs x 4.0 DNM x 1.50 ESM x 1.2895 Inflation =	\$34,817

Gasoline Piping Penalty \$34,817

Total Gasoline Piping Penalty: \$34,817

Kerosene Tank Piping

Dates of Noncompliance:	September 30, 2004 to September 6, 2005 = 342 days
	September 7, 2006 to August 1, 2008 = 694 days
Days of Noncompliance:	342+694 = 1036 days
Days of Noncompliance Multiplier:	4.5

Violator Specific Adjustments: None at this time

Matrix Value x # of line leak detectors x Days of Noncompliance Multiplier x ESM x Inflation	
\$1500 x 1 LLD x 4.5 DNM x 1.50 x ESM x 1.2895 Inflation =	\$13,056

Kerosene Piping Penalty \$13,056

Total Count 3 Penalty \$47,873

Count 4

Count 4 involves the failure to test the cathodic protection system for the underground metal pipe fittings on the underground piping at the 58th Street Sunoco Facility. There is no evidence that Respondents tested this cathodic protection system at any time prior to May 22, 2008. Due to the applicable statute of limitations, the violation is calculated as beginning on September 30, 2004.

Periodic inspection of cathodic protection systems is necessary to ensure that the system is still adequately protecting the steel equipment, thus reducing the risk that corrosion will lead to a release of regulated substances. Under the UST Penalty Guidance, the failure to ensure that a cathodic protection system is inspected within 6 months after installation and every three years thereafter is generally considered a major deviation from the statutory and regulatory program with a moderate potential for harm to the environment and/or the regulatory program. This assessment is reasonable in this case, where no testing at all was performed until after state and EPA inspections. Respondents' failure to test the cathodic protection system created at least a moderate risk that the system would fail to protect the piping from releases due to corrosion.

Under the Penalty Policy the base penalty is \$750 for a major deviation from the statutory and regulatory program with a moderate potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation. The DNM is calculated by using the total days of noncompliance, 1331 days, for a DNM of 5.5. As discussed under Count 1, above, the ESM for this Facility is 1.50.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. As with the other violations, Respondents appeared to have conducted cathodic protection testing only in response to state inspections, and had no prior program to ensure that testing was done. Respondents' violations were at least negligent, if not willful. As with the other counts, above, Complainant has given Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 4 penalty is as follows:

Potential for Harm/Extent of Deviation	Moderate/Major
Per UST Matrix Value:	\$750
Environmental Sensitivity Multiplier:	1.50

Dates of Noncompliance:	September 30, 2004 to May 22, 2008
Days of Noncompliance:	1331 days
Days of Noncompliance Multiplier:	5.5

Violator Specific Adjustments: None at this time

Matrix Value x # of piping runs x Days of Noncompliance Multiplier x ESM x Inflation	
\$750 x 3 piping runs x 5.5 DNM x 1.50 ESM x 1.2895 Inflation	\$23,936

Total Count 4 Penalty \$23,936

Count 5

Count 5 involves the failure to provide spill prevention equipment for the "secondary" fill port associated with the kerosene tank at the 58th Street Sunoco Facility. There is no evidence

that this fill port ever had spill prevention equipment. Due to the applicable statute of limitations, the violation is calculated as beginning on September 30, 2004, and is calculated as if it continued only until August 1, 2008, when a new operator took over the day-to-day operations of the facility.

Spill prevention is an important safeguard in preventing releases of regulated substances into the environment. Spill prevention prevents the buildup of chronic small spills, and serves as a critical backup if overfill prevention equipment were to malfunction. Under the UST Penalty Guidance the failure to install spill prevention equipment is a major deviation from the regulatory requirements, with a major potential for harm to the environment and the regulatory program. This assessment is reasonable in this case, where no spill prevention equipment was present. Although another fill port for this UST was in fact equipped with spill prevention equipment, there was nothing to prevent a delivery driver from using the “secondary” port until this port was capped and locked by the new operator. Respondents’ failure to properly equip this fill port created a high risk that routine spills would be release to the environment instead of being captured by a spill catchment basin or “spill bucket.”

Under the Penalty Policy the base penalty is \$1,500 for a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation. The DNM is calculated by using the total days of noncompliance, 1401 days, for a DNM of 5.5. As discussed under Count 1, above, the ESM for this Facility is 1.50.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. As with the other counts, above, Complainant has given Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 5 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1,500
Environmental Sensitivity Multiplier:	1.50

Dates of Noncompliance:	September 30, 2004 to August 1, 2008
Days of Noncompliance:	1401 days
Days of Noncompliance Multiplier:	5.5

Violator Specific Adjustments: None at this time

Matrix Value x # of USTs x Days of Noncompliance Multiplier x ESM x Inflation	
\$1,500 x 1 UST x 5.5 DNM x 1.50 ESM x 1.2895 Inflation	\$15,957

Total Count 5 Penalty \$15,957

Count 6

Count 6 involves the failure to provide overfill prevention equipment for the "secondary" fill port associated with the kerosene tank at the 58th Street Sunoco Facility. There is no evidence that this fill port ever had overfill prevention equipment. Due to the applicable statute of limitations, the violation is calculated as beginning on September 30, 2004, and is calculated as if

it continued only until August 1, 2008, when a new operator took over the day-to-day operations of the facility.

Overfill prevention is an important safeguard in preventing releases of regulated substances into the environment. Errors are often made in determining the pre-filling level of fuel in a tank, resulting in less-than-expected room in the tank accept a delivery. Without overfill prevention equipment, there is a significant risk that a tank will be overfilled, thus releasing regulated substances to the environment. Under the UST Penalty Guidance the failure to provide overfill prevention equipment is a major deviation from the regulatory requirements, with a moderate potential for harm to the environment and the regulatory program. This assessment is reasonable in this case, where no overfill prevention equipment was present. As discussed under Count 5, above, another fill port for this UST was in fact equipped with overfill prevention equipment, but there was nothing to prevent a delivery driver from using the "secondary" port until this port was capped and locked by the new operator.

Under the Penalty Policy the base penalty is \$750 for a major deviation from the statutory and regulatory program with a moderate potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation. The DNM is calculated by using the total days of noncompliance, 1401 days, for a DNM of 5.5. As discussed under Count 1, above, the ESM for this Facility is 1.50.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. As with the other counts, above, Complainant has given

Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 6 penalty is as follows:

Potential for Harm/Extent of Deviation	Moderate/Major
Per UST Matrix Value:	\$750
Environmental Sensitivity Multiplier:	1.50

Dates of Noncompliance:	September 30, 2004 to August 1, 2008
Days of Noncompliance:	1401 days
Days of Noncompliance Multiplier:	5.5

Violator Specific Adjustments: None at this time

Matrix Value x # of USTs x Days of Noncompliance Multiplier x ESM x Inflation	
\$1,500 x 1 UST x 5.5 DNM x 1.50 x ESM x 1.2895 Inflation	\$15,957

Total Count 6 Penalty \$15,957

Count 7

Count 7 involves the failure to provide tank release detection for the Woodland Sunoco Facility. This violation began greater than five years prior to the filing of the Complaint in this matter, but the penalty calculation begins on September 30, 2004 due to the applicable statute of limitations. The violation continued until October 30, 2007, when Respondents obtained their first statistical inventory reconciliation ("SIR") reports from Simmons Corp.

As discussed under Count 1, above, under the Penalty Policy the failure to conduct tank release detection in a proper manner is generally considered a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory

program. This assessment is reasonable in this case. Respondents were not performing any of the allowable methods of tank release detection for the entire period of noncompliance. While Respondents apparently were filling out inventory control worksheets during the period of violation, inventory control was a temporary method of compliance which was not allowed on Respondents' tanks at any time after December 22, 1998. Also, as described under Count 1, above, Respondents' use of inventory control worksheets was thus no more than a perfunctory act which had no value in detecting releases. Respondents' inaction thus created a high risk that significant releases would go undetected.

The DNM is calculated by using the total days of noncompliance, 1126 days, for a DNM of 5.0. In addition, Complainant proposes that the penalty be increased by an ESM of 1.75. The violations involved three tanks with a total capacity of 26,000 gallons. Based on available information for the 58th Street Sunoco Facility, located only a few blocks away, it appears that the Woodland Sunoco Facility is in an area with moderately permeable soils and high groundwater levels. Due to the proximity of the Woodland Sunoco Facility to the 58th Street Sunoco facility, the two sites were rated similarly for ESM, except that dense population surrounds the Woodland Sunoco Facility in all directions, and Complainant proposes an ESM of 1.75 for the facility, as opposed to the 1.50 multiplier proposed for the 58th Street Sunoco Facility.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. As with the other counts, above, Complainant has given

Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 7 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1500
Environmental Sensitivity Multiplier:	1.75

Dates of Noncompliance:	September 30, 2004 to October 30, 2007
Days of Noncompliance:	1126
Days of Noncompliance Multiplier:	5.0

Violator Specific Adjustments: None at this time

Matrix Value x # of USTs x Days of Noncompliance Multiplier x ESM x Inflation
 $\$1500 \times 3 \text{ USTs} \times 5.0 \text{ DNM} \times 1.75 \text{ ESM} \times 1.2895 \text{ Inflation} = \$50,774.$

Total Count 7 Penalty \$50,774

Count 8

Count 8 involves the failure to provide periodic line release detection for the Woodland Sunoco Facility. Respondents performed line tightness testing on June 22, 2000, but did not perform tightness testing again until September 7, 2005. Respondents thus were in violation of the periodic line release detection requirements beginning on June 22, 2001, but the calculation of the penalty for the violation begins on September 30, 2004 due to the applicable statute of limitations. This violation continued until tightness testing was again performed on September 7, 2005. The violation resumed one year later, on September 7, 2006, and continued until October

30, 2007, when Respondents began using SIR as a method of both tank and line release detection.

As discussed under Count 2, above, under the UST Penalty Guidance the failure to conduct periodic line release detection in a proper manner is generally considered a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This assessment is reasonable in this case. Respondent clearly did not have an annual tightness testing program, and it appears that testing was performed only when specifically prompted by a regulatory agency. The line tightness testing on September 7, 2005 occurred immediately after an inspection of the Woodland Sunoco Facility by a state inspector on the same day. Respondents did not again conduct line tightness testing, and thus continued in violation until Respondents began using SIR on October 30, 2007, following state inspections of the Woodland Sunoco Facility on April 11, 2007 and the 58th Street Sunoco facility on September 7, 2007. Respondents' failure to provide a method of line release detection created a high risk that significant releases would go undetected until environmental harm had occurred.

Under the Penalty Policy the base penalty is \$1,500 for a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation.

The DNM is calculated by using the total days of noncompliance, 761 days, for a DNM of 4.0. As discussed under Count 7, above, the ESM for this Facility is 1.75.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. As with the other counts, above, Complainant has given Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 8 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1500
Environmental Sensitivity Multiplier:	1.75

Dates of Noncompliance:	September 30, 2004 to September 6, 2005 = 342 days
	September 7, 2006 to October 30, 2007 = 419 days
Days Of Noncompliance:	342 + 419 = 761 days
Days of Noncompliance Multiplier:	4.0

Violator Specific Adjustments: None at this time

Matrix Value x # of piping runs x Days of Noncompliance Multiplier x ESM x Inflation	
\$1500 x 3 piping runs x 3.5 DNM x 1.75 ESM x 1.2895 Inflation	\$35,542

Total Count 8 Penalty \$35,542

Count 9

Count 9 involves the failure to conduct operational testing of the line leak detectors for the underground piping at the Woodland Sunoco Facility. Respondents performed operational testing on June 22, 2000, but did not perform tightness testing again until September 7, 2005. Respondents thus were in violation of the annual operational testing requirement beginning on

June 22, 2001, but the calculation of the penalty for the violation begins on September 30, 2004 due to the applicable statute of limitations. The violation continued until testing was again performed on September 7, 2005. The violation resumed one year later, on September 7, 2006. For the premium gasoline tank and kerosene tank piping runs, the violation continued until testing was again performed on May 22, 2008. For the regular gasoline tank piping run, the violation continued until testing was again performed on June 3, 2008.

As discussed under Count 3, above, under the UST Penalty Guidance the failure to conduct line release detection operational testing is generally considered a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This assessment is reasonable in this case. Respondent clearly did not have an annual operational testing program, and performed testing only when specifically prompted by a regulatory agency. The testing on September 7, 2005 occurred immediately after an inspection of the Woodland Sunoco Facility by a state inspector on the same day, while the testing in May and June, 2008 occurred following state inspections of the Woodland Sunoco Facility on April 11, 2007 and the 58th Street Sunoco facility on September 7, 2007. Respondents' failure to provide operational testing created a high risk that significant releases would go undetected until environmental harm had occurred.

Under the Penalty Policy the base penalty is \$1,500 for a major deviation from the statutory and regulatory program with a major potential for harm to the environment and/or the regulatory program. This base penalty is increased by 28.95% to account for inflation.

The DNM is calculated by using the total days of noncompliance, 965 days for the premium and kerosene tanks and 977 days for the regular tank, for a DNM of 4.0 for all tanks. As discussed under Count 7, above, the ESM for this Facility is 1.75.

Complainant does not propose any adjustment to the penalty with regard to the other factors set forth in the Penalty Policy, although an upward adjustment on the basis of enhanced culpability was considered. As with the other counts, above, Complainant has given Respondents the benefit of the doubt, and has assumed for the time being that Respondents' negligence is of a "normal" level, thus warranting neither an increase nor a decrease in the base penalty. Complainant reserves the right to ask for an additional penalty enhancement if the evidence of negligence or willfulness elicited in discovery or at hearing so warrants.

In summary, the calculation for the Count 9 penalty is as follows:

Potential for Harm/Extent of Deviation	Major/Major
Per UST Matrix Value:	\$1500
Environmental Sensitivity Multiplier:	1.75

Premium and Kerosene Piping

Dates of Noncompliance: September 30, 2004 to September 6, 2005 = 342 days
 September 7, 2006 to May 21, 2008 = 623 days
 Days of Noncompliance: 342+623= 965 days
 Days of Noncompliance Multiplier: 4.5

Violator Specific Adjustments: None at this time

Matrix Value x # of line leak detectors x Days of Noncompliance Multiplier x ESM x Inflation
 \$1500 x 2 LLDs x 4.5 DNM x 1.75 ESM x 1.2895 Inflation = \$30,464

Gasoline Piping Penalty \$30,464

Regular Piping

Dates of Noncompliance: September 30, 2004 to September 6, 2005 = 342 days
 September 7, 2006 to June 2, 2008 = 635 days
 Days of Noncompliance: 342+635= 977 days
 Days of Noncompliance Multiplier: 4.5
 Violator Specific Adjustments: None at this time

Matrix Value x # of line leak detectors x Days of Noncompliance Multiplier x ESM x Inflation
 $\$1500 \times 1 \text{ LLDs} \times 4.5 \text{ DNM} \times 1.75 \text{ ESM} \times 1.2895 \text{ Inflation} = \$15,232$

Regular Piping Penalty **\$15,232**

Total Count 9 Penalty: \$45,696

IV. PAPERWORK REDUCTION ACT

Complainant does not believe that the provisions of Section 3512 of the Paperwork Reduction Act ("PRA") apply to this case. Most importantly, the violations alleged in this matter do not involve the collection of information or the maintenance of records. For most of the provisions allegedly violated by Respondents, the federal regulations which are equivalent to the state program provisions at issue do not, in their entirety, involve "collections of information" as defined under the PRA. These provisions include 40 C.F.R. §§ 280.20(c), 280.21(c), 280.21(d), 280.41(a), and 280.41(b).

Three of the regulations involved are, in part, subject to the PRA, although the particular portions of those regulations alleged to have been violated do not relate to collections of information. Moreover, these regulations, 40 C.F.R. §§ 280.20(b), 280.31(b) and 280.40, appear to be covered under OMB Control No. 2050-0068. *See* 40 C.F.R. § 9.1. During the time periods of the alleged violations, it appears that EPA's information collection requests, ICR Nos. 1360.07 and 1360.08, were approved by OMB without lapse. It also appears that EPA's display

of OMB's approval and its notification that collections of information need not be complied with because such display were published at 40 C.F.R. Part 9 during the relevant time periods.

V. LOCATION OF HEARING

Complainant, Respondents and Respondents' Counsel are all based in Philadelphia, and therefore a hearing in Philadelphia would be convenient for all parties.

Respectfully submitted,

6/4/10

Date



BENJAMIN D. FIELDS

Senior Assistant Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I hand-delivered the original and one copy of the attached Complainant's Initial Prehearing Exchange to the Regional Hearing Clerk, and caused copies to be mailed as follows:


Via UPS Overnight to:

Paul Boni
Law Offices of Paul Boni, P.C.
Constitution Place, Suite 1109
325 Chestnut Street
Philadelphia, Pennsylvania 19106

Via Pouch Mail to:

Hon. Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
1200 Pennsylvania Ave., N.W.
Mail Code 1900L

6/4/10
Date



Benjamin D. Fields
Senior Assistant Regional Counsel