

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II

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REGIONAL HEARING
CLERK

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: 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.
: Proceeding Under Section 9006 of the
: Solid Waste Disposal Act, as amended.
: -----X

Honorable Susan L. Biro,
Presiding Officer

Docket Number:
RCRA-02-2011-7503

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Complainant, the Director of the Division of Enforcement and Compliance Assistance ("DECA") of the United States Environmental Protection Agency ("EPA" or "Agency"), Region 2, herewith submits the following initial prehearing exchange pursuant to the "Prehearing Order," dated November 23, 2009, as modified by this Court's "Order Granting Motion for Additional Time for Filing Prehearing Exchange," dated July 12, 2011, as subsequently amended, and pursuant to 40 C.F.R. § 22.19(a).

PRELIMINARY STATEMENT

Complainant commenced this administrative action pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6991e (referred to collectively as the "Act"). The Complaint, Compliance Order and Notice of Opportunity for Hearing (the "complaint"), served on April 7, 2011, alleges 21 counts against a number of Respondents (not all Respondents are named in each of the counts): Andrew B. Chase, a natural person, and three corporate respondents, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc. The Complaint alleges various violations of the regulations EPA promulgated pursuant to the Act, which regulations govern the design, construction, installation, operation, maintenance and closing of underground storage tanks ("USTs"), 40 C.F.R. Part 280. The

violations are alleged to have occurred at six retail gasoline/service stations owned/operated by one or more of the respondents; of the six stations, the Complaint further alleges that only Service Stations I and VI were, at the time of issuance, still owned and operated by any of the respondents (Andrew B. Chase). Counts 1 through 7 pertain to Service Station I (in Lyon Mountain, New York); count 8 pertains to Service Station II (in Peru, New York); counts 9, 10 and 11 pertain to Service Station III (on Military Turnpike Road in Plattsburgh, New York); counts 12, 13 and 14 pertain to Service Station IV (in Redford, New York); counts 15 and 16 pertain to Service Station V (in Dannemora, New York); and counts 17, 18, 19, 20 and 21 pertain to Service Station VI (on Route 9 in Plattsburgh, New York).

The following table summarizes the violations:

Service Station/Count	UST(s) at issue	40 CFR Part 280 requirement violated	Violation summary – failure to:	Proposed penalty for count
I/1	006A & 006B	280.41(b)(1)(ii)	Provide annual tightness tests/monthly monitoring	\$18,694
I/2	006A & 006B	280.44(a)	Annually test automatic line leak detector	\$24,546
I/3	008	280.21(d)	Provide overfill protection –existing tank	\$4,116
I/4	008	280.70(a)	Continue release detection-temp. closed tank	\$7,181
I/5	008	280.70(a)	Conduct triennial testing cathodic protection – temp. closed tank	\$2,539
I/6	008	280.70(b)	Cap & secure temp. closed tank	\$3,054
I/7	008	280.70(c)	Permanently close tank	\$4,296
II/8	001A, 001B & 002	280.44(a)	Annually test automatic line leak detector	\$40,480

III/9	001 & 002	280.31(b)	Conduct triennial testing cathodic protection	\$7,560
III/10	001 & 002	280.44(a)	Annually test automatic line leak detector	\$23,764
III/11	001 & 002	280.45	Maintain records release detection	\$340.13
IV/12	001A	280.20(c)(1)(ii)	Provide overfill prevention	\$5,144
IV/13	001A, 003A & 003B	280.44(a)	Annually test automatic line leak detector	\$55,316
IV/14	001A, 001B, 003A & 003B	280.45	Maintain records release detection	\$462
V/15	001A, 001B & 002A	280.44(a)	Annually test automatic line leak detector	\$24,066
V/16	001A, 001B, 002A & 002B	280.45	Maintain records release detection	\$247.50
VI/17	2A	280.20(c)(1)(ii)	Provide overfill prevention	\$3,692
VI/18	1, 3A & 3B	280.44(a)	Annually test automatic line leak detector	\$22,191
VI/19	1, 3A & 3B	280.44(c)	Provide adequate monthly monitoring for lines	\$19.095
VI/20	1	280.45	Maintain records release detection	\$7,175
VI/21	2A & 2B	280.50	Report to NYSDEC & investigate	\$2,120
Total Penalty	XXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	\$232,838.63

The following summarizes which respondent is alleged to be liable for the respective count:

- a) For each of **counts 1 — 7, counts 9 — 11 and counts 17 — 21**, Respondent Andrew B. Chase is solely liable for the violations alleged in said counts.
- b) For **count 8**, Respondent Andrew B. Chase and Respondent Chase Convenience Stores, Inc., are jointly and severally liable for the violations alleged in said count.
- c) For **counts 12 — 14**, Respondent Andrew B. Chase and Respondent Chase Services, Inc., are jointly and severally liable for the violations alleged in said counts.
- d) For **counts 15 and 16**, Respondent Andrew B. Chase and Respondent Chase Commercial Land Development, Inc., are jointly and severally liable for the violations alleged in said counts.

The Complaint is based upon a series of inspections EPA conducted of the various service stations on August 26, 2008, April 24, 2009 and August 24, 2010, and the information about their operations that was learned then. Further, the Complaint is also based upon responses provided to a number of EPA "Information Request Letters" (IRLs), which were sent between April 2009 and November 2010.

On or about June 6, 2011, Respondents timely filed an Answer in which predicate and background allegations are admitted but allegations alleging or otherwise going to the issue of liability are denied; denials are either outright or premised on Respondents' alleged lack of sufficient knowledge and information. More specifically, with reference to the Complaint, Respondents have admitted the following: paragraphs 26-31; 35, 38; 39; 40(a); 42; 45; 46; 47(a); 49; 50; 51(a); 53; 55; 56; 58; 60; 64-69; 74-76; 81-83; 92; 101; 103; 111; 120; 141; 144; 152-54; 162-65; 185; 195; 196; 199; 220; 221; 224; 244; 245; 254; 255; 258; 269; 270; 294; and 295. Respondents make qualified admissions for each of the following paragraphs: 145; 200; 212; and 237.

In addition, the Answer asserts three "affirmative defenses": Respondent Andrew B. Chase never owned or operated any of the service stations; Respondents dispute that various tests required for the stations' UST systems had not been performed; and Respondents dispute the amount of the proposed penalty. Respondents have also requested that a hearing on the issues raised be held.

The parties held an informal settlement conference on August 11, 2011, and subsequent thereto they have on occasion discussed settlement. To date, no settlement has been reached, but efforts to seek a settlement continue.

COMPLAINANT'S WITNESSES

EPA anticipates that it might call all (or some) of the following witnesses:

1. Paul Sacker, an environmental engineer with EPA, Region 2, based at EPA's New York City Office; he is assigned to the Division of Enforcement and Compliance Assistance. Mr. Sacker conducted two inspections in August 2010 (of Service Stations I and VI). Mr. Sacker received his bachelor's degree in Chemical Engineering from the City College of New York, has been employed by EPA for over 23 years and has been involved with the UST program for over 14 years. His expected testimony likely will cover the various aspects of his involvement in the development of this proceeding to date, including the following: a) his two inspections in August 2010, including what he observed and otherwise learned about the service stations' operations and ownership status and each facility's history; b) how he decided to inspect these two stations; c) his preparation for these inspections; d) his involvement in the preparation and/or review of the reports for these inspections; e) his preparation of the information request letters (IRLs) EPA sent to Respondents (noted in paragraph 60 of the Complaint); f) his review, analysis and evaluation of the various responses Respondents submitted to the IRLs (noted in paragraph 61 of the Complaint); g) his determinations and conclusions as to which violations existed or might have existed at each service station; h) his knowledge, as well as his analysis and conclusions, as to the seriousness of the alleged violations and any good faith efforts by Respondents to comply with the applicable 40 C.F.R. Part 280 requirements and prohibitions; i) his involvement in the drafting and development of the Complaint (including compliance order provisions, and the necessity for them); j) his involvement, role and responsibility in the development and finalization of the proposed penalty (including the economic benefit calculation, for each count and how each comports with statutory requirements and EPA guidelines for their development; k) his discussion of adjustment factors to the proposed penalty; l) his evaluation, analysis and conclusions as to the appropriateness of the penalty sought; and m) his view of the overall significance of the violations alleged in this proceeding. In addition, Mr. Sacker is expected to

provide background information, including his knowledge of the UST regulations, the UST program and how it is enforced in Region 2, his knowledge of the applicable penalty policy(ies) and how these were used in the development of the penalty herein.¹ Mr. Sacker is also expected to provide background and explanatory information on many of the documents EPA would seek to introduce into evidence at an eventual hearing.

2. Jeffrey K. Blair of Polu Kai Services, LLC, headquartered in Falls Church, Virginia, with a field office in Smethport, Pennsylvania. Mr. Blair performed UST field inspector for EPA, Region 2, and he is a geologist by training (he received his bachelor's degree in geology from the University of Pittsburgh). Mr. Blair conducted a number of inspections (either alone or with Mr. Sacker) in August 2008, April 2009 and August 2010; he has inspected each of the six service stations at issue in this proceeding. His testimony is expected to cover his involvement in the development of this case, including the following: a) what he observed and otherwise learned during his various inspections of the service stations; b) his preparation for those inspections; c) the inspection reports that he wrote, including his findings and conclusions; d) his overall recommendations regarding the service stations; and e) his knowledge of the scope, magnitude of the violations he observed and the basis for his evaluations and conclusions regarding such violations. His testimony should also include background information, including his knowledge and familiarity with UST regulations and how the UST program is enforced in Region 2.

3. Dennis McChesney, UST team leader and a supervisor in Region 2's Division of Enforcement and Compliance Assistance, at EPA's New York City Office. Mr. McChesney is expected to testify as to how the penalty sought comports with applicable statutory factors and is

¹ EPA might wish to designate, in accordance with Rule 615 of the Federal Rules of Evidence, Mr. Sacker as a representative of the Agency. While no decision has been made, EPA wishes to provide notice to this Court and Respondents of this possibility. While the Federal Rules of Evidence, obviously, do not govern this Part 22 proceeding, Part 22 case law recognizes that it provides guidance in areas for which no express provision of Part 22 exists.

consistent with applicable Agency penalty guidelines, and the importance of securing the injunctive relief EPA is seeking. His testimony should also include a background discussion of EPA guidance for the development of penalties for UST violations, and an overview of Region 2's UST enforcement program and the significance of Agency UST enforcement activities, including in the present case.

4. Gail Coad, principal in Industrial Economics, 2067 Massachusetts Avenue, Cambridge, Massachusetts. Ms. Coad is expected to testify to an evaluation and discussion of the financial situation of Respondent Andrew B. Chase based on a preliminary analysis.² EPA is contemplating moving at hearing to qualify Ms. Coad as an expert witness in financial analysis. A copy of her resume is included as an exhibit hereto.

EPA reserves the right to call or not to call any of the aforementioned potential witnesses. The listing of the expected scope of the testimony of each witness is not intended to limit EPA's right to modify or otherwise expand upon the scope and extent of the testimony of each such witness, where appropriate, including in response to matters to be set forth in Respondents' prehearing exchange. In addition, as this litigation proceeds, if EPA deems it necessary, it might move to list additional witnesses; if the Agency needs to supplement its witness list, it will provide the requisite notice to this tribunal and Respondents.

COMPLAINANT'S EXHIBITS

² EPA wishes to note that Respondents' Answer does not assert an ability to pay the proposed penalty or other financial hardship.

EPA anticipates offering into evidence the following documents and records, copies of which are annexed hereto and will be identified as “Complainant's Exhibit,” with each exhibit numbered with the following Arabic numerals:

1. “U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990,” available on the Internet at the following URL:³

<http://www.epa.gov/oust/directiv/od961012.htm>

2. September 21, 2004 memorandum, “Modifications to EPA Penalty Policies to Implement the civil Monetary Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004,” from Thomas V. Skinner, Acting [EPA] Assistant Administrator, to Regional Administrators

3. December 29, 2008, “Amendment to EPA’s Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009),” from Grant Y. Nakayama, Assistant Administrator, to Regional Administrators

4. April 6, 2010, “Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009,” from Rosemarie A. Kelley, Director of the Waste and Chemical Enforcement Division of EPA’s Office of Civil Enforcement, to Regional Counsels, Regional Division Directors and Regional Enforcement Directors

³ In an effort to save paper and because the UST penalty policy is readily available on the Internet, a copy of this policy will not be provided here in an effort. EPA will provide a hard (paper) copy if directed to do so by the Court or if Respondents so request. Pursuant to 40 C.F.R. § 22.27(b), this Court is required to “consider any civil penalty guidelines under” the statute pursuant to which the proceeding is being prosecuted.

5. August 26, 2008 inspection report (and accompanying documentation) for Service Station II in Peru, New York

6. August 26, 2008 inspection report (and accompanying documentation) for Service Station III in Plattsburgh, New York (on Military Turnpike Road)

7. August 26, 2008 inspection report (and accompanying documentation) for Service Station IV in Redford, New York

8. August 26, 2008 inspection report (and accompanying documentation) for Service Station V in Dannemora, New York.

9. August 26, 2008 inspection report (and accompanying documentation) for Service Station VI in Plattsburgh, New York (on Route 9)

10. April 24, 2009 inspection report (and accompanying documentation) for Service Station I in Lyon Mountain, New York

11. August 24, 2010 inspection report (and accompanying documentation) for Service Station I in Lyon Mountain, New York

12. August 24, 2010 inspection report (and accompanying documentation) for Service Station VI in Plattsburgh, New York (on Route 9)

13. April 1, 2009 EPA Information Request Letter to Andrew B. Chase

14. April 22, 2009 Paul Sacker “Note to File”

15. October 5, 2009 EPA Information Request Letter to Andrew B. Chase

16. January 7, 2010 e-mail, at 3:10 PM, from Paul Sacker to chasesmobil@gmail.com

17. January 27, 2010 e-mail, at 12:33 PM, from Paul Sacker to chasesmobil@gmail.com

18. January 27, 2010 e-mail, at 4:27 PM, from Paul Sacker to chasesmobil@gmail.com

19. September 7, 2010 EPA Information Request Letter to Andrew B. Chase

20. November 3, 2010 e-mail, at 3:04 PM, from Paul Sacker to Andrew Chase

21. November 29, 2010 EPA Information Request Letter to Andrew B. Chase

22. Andrew B. Chase response to EPA Information Request Letter, received June 16, 2009 (which includes six separate New York State Department of Environmental Conservation “Petroleum Bulk Storage” certificates, as follows: dated October 3, 2008 for Service Station I; dated August 18, 2008 for Service Station II; dated November 29, 2005 for Service Station III; dated February 1, 2007 for Service Station IV; dated September 29, 2006 for Service Station V; and dated February 22, 2008 for Service Station VI)

23. Andrew B. Chase response to EPA Information Request Letter, dated December 8, 2009

24. Andrew B. Chase response to EPA Information Request Letter, dated January 18, 2010

25. January 27, 2010 Paul Sacker "Note to File"

26. Fax from Andy Chase to Paul Sacker, February 4, 2010

27. Chase Services, Inc., response to EPA Information Request Letter, November 2, 2010

28. Fax from Andy Chase to Paul Sacker, December 15, 2010

29. E-mail communications between EPA and the New York State Department of Environmental Conservation:

- a) January 7, 2010, at 1:46 PM
- b) January 7, 2010, at 3:58 PM
- c) January 28, 2010, at 11:30 AM
- d) March 5, 2010, at 11:45 AM
- e) August 25, 2010, at 12:36 PM
- f) January 26, 2011, at 2:48 PM
- g) January 26, 2011, at 3:08 PM

30. June 22, 2010 e-mail from Jackson Schad to "gbc" [Gail B. Coad]

31. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for count 1

32. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 2

33. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 3

34. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 4

35. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 5

36. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 6

37. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 7

38. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 8

39. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 9

40. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 10

41. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 11

42. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 12

43. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 13

44. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 14

45. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 15

46. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 16

47. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 17

48. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 18

49. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 19

50. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 20

51. EPA Penalty Computation Worksheet, together with the economic benefit component (derived from EPA's Economic Benefit program, a/k/a "BEN analysis), for Count 21

52. "Andrew Chase Servicves [sic], Inc. Summary of Violations//Violations Cited," as of March 31, 2011

53. New York State Department of State, Division of Corporations, Entity Information for the following: Chase Services, Inc; Chase Commercial Land Development, Inc.; Chase Convenience Stores, Inc.; and Chase Properties, Inc.

54. D&B Business Information Report for the following: Chase Services, Inc. (for Service Station III); Chase Services, Inc. (for Service Station IV); Chase Convenient Stores, Inc.; and Chase Commercial Land Dev[elopment]

55. September 15, 2010 Memorandum from Gail Coad *et al.* to Paul Sacker and Rebecca Jamison of EPA, Region 2, re "Andrew Chase, Ability-to-Pay Analysis"

56. August 13, 2002 Memorandum of Agreement between New York State Department of Environmental Conservation and EPA that sets forth each entity's respective role in the implementation of the UST program in New York State

57. Resume of Gail Coad

Complainant may request this Court to take judicial notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

PLACE FOR HEARING

EPA believes New York City would be an appropriate place for hearing, given its ready accessibility to all who would be involved in the hearing (this Court, Respondents and their counsel, Complainant and her witnesses). EPA believes it would need approximately three or four days to present its direct case. Nothing in this matter to date indicates a need for translation services.

RESPONSE TO PARAGRAPH 2 OF THE PREHEARING ORDER

(A) Copy of inspection reports referenced in paragraphs 55-62: see Complainant's Exhibits 13-21, copies of EPA information request letters and responsive documentation

(B) Documents in support of factual allegations (exhibits refer to Complainant's Exhibits set forth above):⁴

Paragraph 32: Legal conclusion based on information re status of respondents; exhibit 53

Paragraph 33: NYS DEC Petroleum Bulk Storage certificates, exhibit 22

Paragraphs 34, 36-37, 40-41, 43-44, 47-48, 51-52 and 54: information re the status of the service stations and the USTs at each such facility, see exhibit 22

Paragraphs 61 and 62: Respondents' responses to EPA information request letters, see exhibits 22-28

Paragraph 63: see exhibit 22 for a listing of the Petroleum Bulk Storage certificates

⁴ The references to the exhibits is not intended to mean the listed exhibit(s) is the sole basis for EPA's allegation; other listed exhibits may provide similar information. In addition, a significant basis of what EPA alleges is based on the various inspections, and the Court is generally directed to exhibits 5-12, the eight reports listed as separate items of potential evidence.

(hereinafter PBS certificates)

Paragraph 70: legal conclusion based on regulatory definition; underlying factual information from relevant PBS certificate, exhibit 22

The remaining paragraphs listed in this section of the Prehearing Order make allegations of specific failures by a respondent(s) to comply with applicable UST regulations, and thus violations. The bases for these allegations are EPA's inspections of the six service stations (see exhibits 5-12) and the information Respondents provided in their information request letter responses (see exhibits 22-28). At an eventual hearing (if these matters remain in contention at that point), EPA's witnesses are anticipated to discuss at length what they observed and why many of these observations support the violations alleged in the Complaint, and further, EPA witness Paul Sacker is expected to testify the extent to which Respondents' various responses to EPA's information request letters provide another and/or a supporting basis for the violations alleged in the Complaint.

(C) Narrative on derivation of proposed penalty

Complainant's Exhibits 31-51 provide the detail as to how the penalty for each count was calculated, and each exhibit additionally provides the basis by which EPA determined the economic benefit component of each proposed penalty. At hearing, if necessary, EPA witness Paul Sacker is expected to testify as how the penalty for each count was derived, *e.g.*, the basis for each determination, the factual underpinning for each penalty sought, the justification for each penalty sought in light of mandatory statutory factors and applicable EPA guidance. The following discussion is intended to give an overview.

As noted in paragraph 6 of the Complaint, Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A), provides that the "owner or operator of an underground storage tank who fails to

comply with[] any requirement or standard promulgated by the [EPA] Administrator under section 6991b of this title [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.” This provision has been impacted by subsequent penalty adjustment provisions promulgated pursuant to law passed by Congress, such that EPA is authorized to obtain, pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), up to \$11,000 for any violation occurring between January 30, 1997 and January 12, 2009, and up to \$16,000 for any violation occurring after January 12, 2009.⁵ Section 9006(c) of the Act, 42 U.S.C. § 6991e(c), authorizes the assessment of a penalty “which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.” Further, as noted in paragraph 8 of the Complaint, Section 9006(e) of the Act, 42 U.S.C. § 6991e(e), lists two factors that “may be taken into account in determining the terms of a civil penalty under [Section 9006(d), 42 U.S.C. § 6991e(d)]: (1) [t]he compliance history of an owner or operator in accordance with this subchapter [Subchapter IX, 42 U.S.C. §§ 6991 - 6991i] [and] (2) [a]ny other factors the Administrator [of EPA] considers appropriate.

In accordance with these statutory directives, EPA has developed guidelines to implement the mandated factors. These guidelines are titled, “U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990,” and it is available on the Internet at the following URL: <http://www.epa.gov/oust/directiv/od961012.htm>

The goals behind the policy are three-fold: to encourage the timely and prompt resolution of environmental problems, to support a fair and equitable treatment of the person subject to UST

⁵ As noted in paragraph 7 of the Complaint, the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), has authorized EPA to promulgate regulations that, *inter alia*, would increase the maximum penalty EPA might obtain pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), to \$11,000 for any violation occurring between January 30, 1997 and January 12, 2009, and to \$16,000 for any violation occurring after January 12, 2009. EPA has done so, and these regulations are codified at 40 C.F.R. Part 19.

regulation and to deter potential violators from future non-compliance. Section 1.3 of the policy. With regard to deterrence, there are two salient prongs embedded in the policy by which EPA seeks to effect that objective: by removing any significant economic benefit a violator might have gained from its non-compliance (referred to as the “economic benefit component”) and charging an additional amount based on the nature and circumstances surrounding the specific violation in order to penalize (through the assessment of a civil penalty) for the failure to comply with an applicable UST requirement or prohibition.⁶ In addition, the policy provides for adjustments “to take into account legitimate differences between similar cases.” Further, “under this methodology, the gravity-based component incorporates adjustments that reflect the specific circumstances of the violation, the violator’s background and actions, and the environmental threat posed by the situation.” Section 1.3. The sum of the economic benefit component and the gravity-based component yields the initial penalty amount listed in an administrative complaint; the adjustment factors are to be applied subsequent to the initiation of the proceeding.

The economic benefit component, which “represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance,” consists of avoided costs and delayed costs. The former consist of the periodic operation and maintenance expenditures that should have been incurred but were not as a result of the non-compliance, while the latter consist of expenditures deferred but must be incurred to attain compliance. One of the methods to determine the economic benefit component (which was utilized in this proceeding, see exhibits 31 through 51) is software known as BEN. This system “uses a financial analysis technique known as ‘discounting’ to determine the net present value of economic gains from noncompliance” (Section 2.1). This system provides an evaluation based upon 12 specific factors or inputs, such as a violator’s initial capital investment, non-depreciable expenditures and

⁶ Of course, the amount of any given penalty for a specific violation is subject to, and cannot exceed, the maximum amount permitted by statute.

operation/maintenance costs.

Under the penalty guidelines, avoided costs represent avoided expenditures added to the interest to the money potentially earned because the money had not been spent. The calculus of determining avoided costs involved avoided expenditures, estimated based on comparable costs, interest (defined as the equity discount), the number of days in which non-compliance has occurred and the marginal tax rate, which varies depending on the size of the business. Delayed costs involve the delayed expenditures multiplied by the appropriate interest rate multiplied by the number of days of noncompliance, a number then divided by 365 (for the number of days in a year; this denominator is also utilized in the avoided cost calculation).

The attached BEN sheets, along with the expected testimony of EPA witness Paul Sacker, will provide the precise details as to how these guidelines were referenced for each count of the complaint.

The gravity-based component, the second prong of the initial penalty target, and the one aimed to deter future violations, is made up of four elements: the matrix value, the violator-specific adjustments to the matrix, the environmental sensitivity multiplier (ESM) and the days of noncompliance multiplier (DSM). The matrix value is based on the potential for harm and the violator's deviation from the applicable regulatory requirement; whereas the former involves a determination as to the extent to which the applicable requirement was not followed, the latter assesses the likelihood that a violation could or did result in harm to human health and the environment (and/or has or has had a deleterious impact on the regulatory program). EPA uses a matrix to determine the most appropriate level of each factor, with classifications of major, moderate and minor (for both extent of deviation and actual/potential harm). As these terms convey, it is a graduated scale, with the most serious violations (from either the extent of deviation perspective or the actual/potential for harm perspective) rated as major. For example, where there is substantial noncompliance, that is classified as a major extent of deviation; with significant deviation where the violator has to a limited extent complied, there is a moderate

classification; a minor deviation involves a slight level of noncompliance, where most of the requirement has been met. As for potential for harm, major involves a substantial or continuing risk to human health or the environment or a substantial impact on the ability of the regulatory program to function as intended; moderate involves a lesser degree of risk, significant but to a lesser degree than substantial; and minor potential involves a relatively low risk of harm to human health or the environment, or to the regulatory program. There is room for judgment in these determinations. Mr. Sacker's testimony will explain the gravity-based determinations for each of the counts, and what factors were considered and how each was weighed.

After the matrix value has been determined, the guidelines indicate that violator-specific adjustments be made. These include the violator's degree of cooperation or non-cooperation (allowing for between a 50% increase and a 25% decrease), a violator's degree of willfulness or negligence (also allowing for between a 50% increase and a 25% decrease), the violator's history of noncompliance (allowing for up to only a 50% increase) and other unique factors (again allowing for between a 50% increase and a 25% decrease). Each of these factors is fact and circumstance specific, with very few absolutes; the one exception is that no downward adjustment is to be given if the good faith efforts to comply with a requirement primarily consist of coming into compliance. As for willfulness/negligence, among the circumstances to be considered are the extent to which the violator had control over the events constituting the violation, the foreseeability of events constituting the violation, whether the violator knew or should have known of the hazards associated with its violative conduct and whether the violator knew of the legal requirement that was violated. The history of noncompliance involves an amalgam of considerations: the number of previous violations, the seriousness of the prior violations, the duration of prior violations; the similarity of present violations to prior ones and the violator's response to the previous violations. The "other unique factors" provision enables EPA to consider factors that do not fall into specifically delineated categories.

Another possible adjustment to the matrix value based on the potential of a site-specific

impact is the environmental sensitivity multiplier or ESM, which “takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release.” Section 3.3. It differs from the potential for harm consideration because that consideration weighs the probability that a release or other harmful event would occur because of the violation whereas the ESM looks to the actual or potential impact of such a release once it did in fact occur. It is a relative measure of the sensitivity of the environment in which an UST tank(s) is located, and such sensitivity is evaluated as low, moderate or high. Some of the factors considered in making an ESM determination include the amount of petroleum or other substance released or that might have been released; the toxicity of the material that was or might have been released; the potential hazard presented by such a release; the geologic features of the area that might affect the extent of the release or exacerbate its harmful effects or otherwise make remediation more difficult; the possibility that a release might contaminate local waterways or drinking water supplies or environmentally sensitive areas such as wetlands, and the overall ecological or aesthetic value of the areas that might have been impacted. For example, the ESM might be deemed high where a tank holding petroleum substances might pollute the local drinking water or where a large area would be harmed, or if the quantity of petroleum were so great that the extent of damage would be substantial. For a low ESM, the number 1 is assigned; for a high ESM, 2 is the multiplier.

The days of noncompliance multiplier adjusts the matrix value to take account of the time duration of the noncompliance. Up to 90 days, the DNM value is one, between 91 and 180 days it is 1.5, from 181 days to 270 days, it is 2.0 and for 271 days to one year, the number is 2.5; for each additional six months, 0.5 is added.

In summary, the gravity-based component is determined by the matrix value multiplied by the violation specific adjustments, further multiplied by the ESM and then multiplied by the days of noncompliance multiplier. In his expected testimony, Mr. Sacker will discuss the application of the penalty guidelines to each of the counts, and he will discuss those exhibits

revealing how EPA used such guidelines to develop each penalty.

(D) Paperwork Reduction Act

The PRA presents no legal impediment to EPA seeking or obtaining penalties or injunctive relief for any of the counts in this case.

Under the PRA, if the collection of information (as defined in 44 U.S.C. § 3502) is not in compliance with specified requirements, “no person shall be subject to any penalty for failing to comply with a collection of information” 44 U.S.C. § 3512. Where a regulation requires the collection of information from private parties, the PRA mandates that EPA and other federal agencies, *inter alia*, to obtain Office of Management and Budget (“OMB”) approval in advance for that collection. *See* 44 U.S.C. § 3501 *et. seq.* OMB assigns a control number to the information request embodied in the regulation. The “collection of information” is defined in the PRA to include the “obtaining . . . , soliciting, or requiring the disclosure . . . or opinions regardless . . . of form or format, calling for . . . answers to identical questions posed . . . to ten or more persons.” This definition embraces a regulation that requires that a person submit or maintain information. The PRA bars EPA from collecting any penalties or obtaining injunctive relief for failure to comply with an information collection requirement if the Agency has not *obtained* OMB approval of that Information Collection Request (“ICR”) and properly *displayed* an OMB control number for that collection of information. *See e.g., In Re Billy Yee*, 10 EAD 1 (EAB 2001) (“[u]nder the PRA, the only exception to the enforceability that otherwise obtains in the event of OMB approval of an ICR is established by the “public protection” provision, which states that, if an agency fails to display a valid OMB control number along with a disclaimer that no response is required without the OMB control number, then no respondent may be penalized for failure to comply”) (*citations omitted*). The Environmental Appeals Board has held that publication of OMB control numbers within 40 C.F.R. Part 9 constitutes adequate display. *In re: EK Associates, L.P., d/b/a EKCO/Glaco, and EK Management Corp.*, 8 EAD 468 (EAB 1999). OMB approval has to be renewed every three years.

For the regulations EPA is seeking to enforce in the instant proceeding, proper display was made.

The following counts allege violations of UST requirements that do not implicate the concerns or trigger the protections of the PRA insofar as these allege violations of substantive provisions: (1) counts 1 and 19: failure to conduct either an annual line tightness test or monthly monitoring (40 C.F.R. § 280.41(b)(1)(ii)); (2) counts 2, 8, 10, 13, 15 and 18: failure to conduct an annual test of the operation of the automatic line leak detector (40 C.F.R. § 280.44(a)); (3) counts 3, 12 and 17: the failure to provide required overfill prevention equipment (40 C.F.R. § 280.21(d), 40 C.F.R. § 280.20(c)(1)(ii));⁷ (4) count 4: failure to maintain release detection for a temporarily closed tank (40 C.F.R. § 280.70(a)); (5) counts 5 and 9: failure to conduct triennial testing of the cathodic protection system (40 C.F.R. § 280.70.(a), 40 C.F.R. § 280.31(b)); (6) count 6: failure to cap and secure a temporarily closed UST (40 C.F.R. § 280.70(b)); and (7) count 7: failure either to permanently close an UST or to have a required inspection for proper operation by a qualified cathodic protection tester (40 C.F.R. § 280.70(c)). Thus, for these 16 counts, the PRA defense is not available to Respondents, as the provisions these counts allege were violated constitute substantive requirements that do not implicate the concerns of Section 3512; for these 16 counts, Respondents are not being charged with a paperwork violation.

See generally the discussion on the PRA in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990). As the Court noted, “the public is protected under the Paperwork Reduction Act from *paperwork* regulations not issued in compliance with the Act...” 494 U.S. at 40 (emphasis added). Although, however, Congress, subsequent to the *Dole* decision, amended the PRA, the amendments did not change this focus. *See also In re SCA Chemical Services Inc.*, 1994 TSCA LEXIS 79 (Judge Lotis), *In Re: TRW, Inc.*, 1995 TSCA LEXIS 8 (Judge Head).

Even if any of the above requirements were construed to implicate the concerns of

⁷ Count 3 pertains to an “existing tank” system while counts 12 and 17 pertain to a “new tank system.” The definitions are found in 40 C.F.R. § 280.12.

Section 3512, the requisite approval and display of the UST regulations did occur, as noted in the discussion below.

Section 3512 of the PRA would only apply to violations that involve recordkeeping requirements. In this proceeding, there are five such counts: (1) counts 11, 14, 16 and 20, each alleging a violation of 40 C.F.R. § 280.45, the failure to maintain records of release detection monitoring; and (2) count 21, alleging a violation of 40 C.F.R. § 280.50, the failure to report to the New York State Department of Environmental Conservation a suspected release of a regulated substance. There has been no lapse or display problem with the OMB control number assigned to the ICR for either of the record-keeping requirements in the UST regulations, including 40 C.F.R. §§ 280.45 and 280.50 (OMB Control No. 2050-0068); the Information Collection Request (“ICR”) number was 1360.

The periods of violations alleged in the Complaint are August 2007 through December 2007 for counts 11, 14 and 16; August 2009 through December 2010 for count 20; and August 2010 for count 21. The OMB control number is displayed at 40 C.F.R. Part 9. OMB approval of this ICR was received on January 24, 2005 and such approval ran through January 31, 2008. *See* 70 Fed. Reg. 8090 (February 17, 2005). On July 25, 2007, EPA published in the Federal Register a Notice of its intent to submit to OMB for approval a continuing ICR relating to underground storage tanks (OMB Control Number 2050-0068). *See* 72 Fed. Reg. 40852-3 (July 25, 2007). A website maintained by OMB (www.reginfo.gov) indicates this Federal Register notice is considered a 60-day notice for purposes of 5 C.F.R. § 1320.10(e)(2). EPA filed a Notice of Renewal on December 13, 2007 that it had forwarded the ICR to OMB for approval and renewal. *See* 72 Fed. Reg. 70837 (December 13, 2007). OMB did not act on the ICR package until March 2, 2008, when it approved the ICR for three years; it expired on March 31, 2011. *See* 73 Fed. Reg. 14244 (March 17, 2008). Pursuant to 5 C.F.R. § 1320.10(e)(2), an Agency may continue to conduct or sponsor the collection of information while a submission is

pending at OMB.⁸

Based on the foregoing, the ICR received an automatic month-by-month extension for February 2008. Prior to expiration of that OMB control number in March 2011, EPA submitted a request to renew an existing approved collection. (76 Fed. Reg. 11775). On August 10, 2010, EPA published in the Federal Register a Notice that it intended to submit to OMB a continuing ICR relating to underground storage tanks (OMB Control Number 2050-0068). *See* 75 Fed. Reg. 48325 (August 10, 2010). EPA filed a Notice on March 3, 2011, indicating that it had forwarded this ICR to OMB for renewal. *See* 76 Fed. Reg. 11775 (March 3, 2011). OMB granted temporary extensions for six months after March 31, 2011 until that OMB control number was finally approved on September 7, 2011 for another three years, with a new expiration date of September 30, 2014. (76 Fed. Reg. 63295).

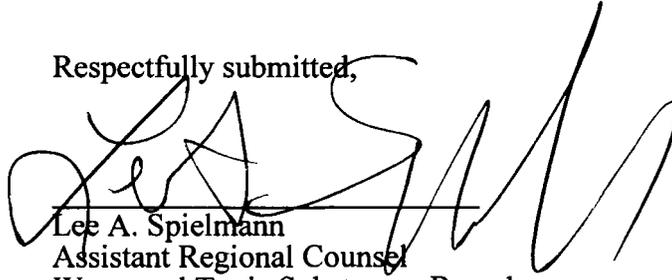
http://reginfo.gov/public/do/PRAViewICR?ref_nbr=201103-2050-001

Thus, the UST regulations had a valid OMB control number and was properly approved and displayed at 40 C.F.R. Part 9 for the times relevant to the allegations made in the Complaint. Similarly, at this time, there is no bar to the injunctive relief being sought in this case. The PRA does not represent a viable defense for Respondents and it should not serve as a bar to preclude EPA from obtaining injunctive relief or the civil penalties for past violations being sought.

⁸ As long as the submission was made to OMB sixty days prior to the previous expiration, OMB's system will grant the automatic extension. EPA's sixty day notice was published in the July 25, 2007 Federal Register. OMB also liberally grants temporary extensions of ICRs even if they are not submitted sixty days before the expiration.

Dated: November 10, 2011
New York, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lee A. Spielmann', written over a horizontal line.

Lee A. Spielmann
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In re Andrew B. Chase et al.
Docket No. RCRA-02-2011-7503

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "COMPLAINANT'S INITIAL PREHEARING EXCHANGE," dated November 10, 2011, together with the attached exhibits, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and One Copy ¹
By Inter-Office Mail:

Office of Regional Hearing Clerk
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

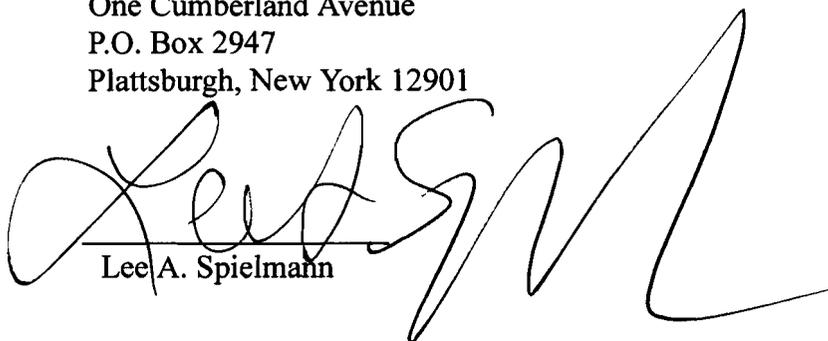
Copy by Pouch Mail:

Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900 L
Washington, DC 20460

Copy by Certified Mail,
Return Receipt Requested:

Thomas W. Plimpton, Esq.
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One Cumberland Avenue
P.O. Box 2947
Plattsburgh, New York 12901

Dated: November 10, 2011
New York, New York



Lee A. Spielmann

¹ With the agreement of the Regional Hearing Clerk, to save on paper usage, the copy given to the RHC does not include the exhibits; these have been attached to the original.