

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

In the Matter of:)	
)	Administrative Complaint, Compliance
T. Bradley Lam)	Order and Notice of Opportunity for
d/b/a Lam's Lumber Company)	Hearing
4761 Constitution Highway)	
Barboursville, Virginia 22923)	
)	U.S. EPA Docket Number
RESPONDENT)	RCRA-03-2008-0354
)	
D's Market)	
5515 Spotswood Trail)	Proceeding Under Section 9006 of the
Barboursville, Virginia 22923)	Resource Conservation and Recovery
)	Act, as amended, 42 U.S.C. Section
and)	6991e
)	
Lam's Lumber)	
4761 Constitution Highway)	
Barboursville, Virginia 22923)	
)	
FACILITIES)	

**ADMINISTRATIVE COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY FOR HEARING**

I. INTRODUCTION

This Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") is issued by the United States Environmental Protection Agency ("EPA" or "Complainant"), pursuant to Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to hereafter as "RCRA"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil

Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. Part 22.

EPA hereby notifies T. Bradley Lam (“Lam” or “Respondent”) that EPA has determined that Respondent has violated certain provisions of Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991*i*, and the Virginia state underground storage tank (“UST”) program, as authorized by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991*c*. Section 9006(a)-(d) of RCRA, 42 U.S.C. § 6991*e*(a)-(d) authorizes EPA to take an enforcement action whenever it is determined that a person is in violation of any requirement of RCRA Subtitle I, EPA’s regulations thereunder, or any regulation of a state underground storage tank program which has been authorized by EPA. Under Section 9006(d) of RCRA, 42 U.S.C. § 6991*e*(d), EPA may assess a civil penalty against any person who, among other things, violates any requirement of the applicable federal or state UST program.

Effective October 28, 1998, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991*c*, and 40 C.F.R. Part 281, Subpart A, the Commonwealth of Virginia was granted final authorization to administer a state UST management program *in lieu* of the Federal underground storage tank management program established under Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991*i*. The provisions of the Virginia UST management program, through these final authorizations, are enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991*e*. Prior to the effective date of federal authorization of the Virginia UST management program, the provisions of the federal UST program, at 40 C.F.R. Part 280, were applicable to USTs/UST systems

located in Virginia such provisions were enforced by EPA against owners and operators of USTs/UST systems for violations of the federal UST program during that time period.

Virginia's authorized UST program regulations are set forth in the Virginia Administrative Code, Title 9, Agency 25, Chapter 580, Sections 10 *et seq.*, and will be cited hereinafter as 9 VAC 25-580-10, *et seq.*

To the extent that factual allegations or legal conclusions set forth in this Complaint are based on provisions of the Virginia authorized UST management program regulations, those provisions are cited as authority for such allegations or conclusions.

EPA has given the Commonwealth of Virginia prior notice of the issuance of this Complaint in accordance with Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991e(a)(2).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a "person" as defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10.
2. At all times relevant to the violations alleged in this Complaint, Respondent has been the "owner" and/or "operator," as those terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10, of "underground storage tanks" ("USTs") and "UST systems" as those terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10, located at two facilities in Virginia, as set forth below.

A. D'S MARKET FACILITY**COUNT 1**

3. From at least May, 2000 through at least the date of this Complaint, Respondent has been the "owner" and/or "operator," as those terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10, of a number of "USTs" and "UST systems," as those terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10, located at D's Market, 5515 Spotswood Trail, Barboursville, Virginia (the "D's Market Facility"), including the specific USTs at issue in this Complaint, consisting of the following:

- a. A 10,000-gallon UST ("Tank D-1");
- b. An 8,000-gallon UST ("Tank D-2");
- c. A 6,000-gallon compartmentalized UST ("Tank D-3"); consisting of:
 - (1) A 4,000-gallon compartment (referred to herein as "Tank D-3A"),
and
 - (2) A 2,000-gallon compartment (referred to herein as "Tank D-3B").

4. At all times relevant to the violations set forth in this Count, Tanks D-1 and D-2 have been used to store gasoline, which is a petroleum product and is a "regulated substance," as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10.

5. At all times relevant to the violations set forth in this Count, Tank D-3A has been used to store on-road diesel fuel, which is a petroleum product and is a "regulated substance," as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10.

6. At all times relevant to the violations set forth in this Count, Tank D-3B has been used to store kerosene, which is a petroleum product and is a “regulated substance,” as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10.

7. At all times relevant to the violations set forth in this Count, Tanks D-1, D-2, D-3A and D-3B have each been part of a “petroleum UST system” as that term is defined in 9 VAC 25-580-10.

8. Pursuant to 9 VAC 25-580-130, owners and operators of new and existing USTs and UST systems must provide a method or combination of methods of release detection monitoring that meets the requirements described in that section. Pursuant to 9 VAC 25-580-310.1, release detection is required unless the UST system is “empty,” which is defined in 9 VAC 25-580-310.1, respectively, as when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters or one inch of residue, or 0.3 percent by weight of the total capacity remains in the system.

9. At all times relevant to the violations set forth in this Count, Tanks D-1, D-2, D-3A and D-3B have routinely contained greater than 1 inch of regulated substances and 0.3 percent by weight of the total capacity, and thus have not been “empty” as defined in 9 VAC 25-580-310.1.

10. Pursuant to 9 VAC 25-580-140.1, tanks which are part of a petroleum UST system must be monitored at least every 30 days for releases using one of the methods listed in 9 VAC 25-580-160.4 through .8, except that in certain circumstances UST systems may be monitored using a combination of inventory control and tank tightness testing in compliance with the

requirements of 9 VAC 25-580-160.1 through .3, and tanks with a capacity of 550 gallons or less may use weekly tank gauging conducted in accordance with 9 VAC 25-580-160.2.

11. From at least five years prior to the date of this Complaint through at least January 31, 2008, Tanks D-1, D-2, D-3A and D-3B were not monitored in compliance with any of the methods set forth in 9 VAC 25-580-160.1 through .3 and .5 through .8.

12. Elements of an automatic tank gauging ("ATG") system have apparently been present at the D's Market Facility for at least five years prior to the date of this Complaint. However, this ATG system has not been operational and capable of generating valid tank release detection monitoring results from at least five years prior to the date of this Complaint through at least the date of this Complaint.

13. From at least five years prior to the date of this Complaint through at least January 31, 2008, Respondent violated 9 VAC 25-580-130 and 140.1 by failing to provide a method or methods of tank release detection for the UST systems designated as Tanks D-1, D-2, D-3A and D-3B at the D's Market Facility which meet the requirements referenced in such regulations.

COUNT 2

14. The allegations of Paragraphs 1 through 13 of this Complaint are incorporated herein by reference.

15. Pursuant to 9 VAC 25-580-140.2.a(1), underground piping which is part of a petroleum UST system, routinely contains regulated substances and conveys regulated substances under pressure must be equipped with an automatic line leak detector, in accordance with 9 VAC 25-

580-170.1, respectively. Pursuant to 9 VAC 25-580-170.1, the operation of the automatic line leak detector must be tested annually in accordance with the manufacturer's instructions.

16. At all times relevant to the violations set forth in this Count the underground piping associated with Tanks D-1 and D-2 has routinely contained regulated substances and conveyed regulated substances under pressure.

17. From at least five years prior to the date of this Complaint through at least February 1, 2008, Respondent did not test operation of the line leak detectors for the pressurized underground piping associated with Tanks D-1 and D-2.

18. From at least five years prior to the date of this Complaint through at least February 1, 2008, Respondent violated 9 VAC 25-580-140.2 and 170.1 by failing to test the operation of the line leak detectors for Tanks D-1 and D-2 at the D's Market Facility.

COUNT 3

19. The allegations of Paragraphs 1 through 18 of this Complaint are incorporated herein by reference.

20. Pursuant to 9 VAC 25-580-140.2.a(2), underground piping which is part of a petroleum UST system, routinely contains regulated substances and conveys regulated substances under pressure must have an annual line tightness test conducted in accordance with 9 VAC 25-580-170.2, or have monthly monitoring conducted in accordance with 9 VAC 25-580-170.3, which in turn allows the use of the monthly monitoring methods set forth in 9 VAC 25-580-160.5 through .8, so long as the method used is designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

21. From at least five years prior to the date of this Complaint through at least the date of this Complaint, the underground piping associated with Tanks D-1 and D-2 has not been monitored in accordance with any of the methods referenced in 9 VAC 25-580-170.3.

22. From at least five years prior to the date of this Complaint through at least February 1, 2008, line tightness tests were not performed on the underground piping associated with Tanks D-1 and D-2.

23. From at least five years prior to the date of this Complaint through at least February 1, 2008, Respondent violated 9 VAC 25-580-130 and 140.2.a(2) by failing to provide annual or monthly methods of release detection for the underground piping associated with the Tanks D-1 and D-2 at the D's Market Facility which meet the requirements referenced in such regulations.

COUNT 4

24. The allegations of Paragraphs 1 through 23 of this Complaint are incorporated herein by reference.

25. Pursuant to 9 VAC 25-590-30 and 9 VAC 25-590-40, owners and operators of petroleum UST systems are required, with exceptions not here relevant, to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs. Subject to the limitations set forth in 9 VAC 25-590-50, an owner or operator may demonstrate financial responsibility using any of the mechanisms set forth in 9 VAC 25-590-60 through 9 VAC 25-590-110 and 9 VAC 25-590-250. In addition, pursuant to 9 VAC 25-590-210, the Virginia Petroleum Storage Tank Fund will be used for costs in excess of the financial

responsibility requirements specified under 9 VAC 25-590-210.B, up to \$1 million per occurrence.

26. From at least five years prior to the date of this Complaint through at least October 9, 2007, Respondent did not demonstrate financial responsibility for any of the USTs at the D's Market Facility, for the amounts set forth in 9 VAC 25-590-210.B, by any of the methods set forth in 9 VAC 25-590-60 through 9 VAC 25-590-110 or 9 VAC 25-590-250.

27. From at least five years prior to the date of this Complaint through at least October 9, 2007, Respondent violated 9 VAC 25-590-30 and 9 VAC 25-590-40 by failing to demonstrate financial responsibility for the USTs at the D's Market Facility.

B. LAM'S LUMBER

COUNT 5

28. The allegations of Paragraphs 1 through 27 of this Complaint are incorporated herein by reference.

29. From August, 1998 through at least the date of this Complaint, Respondent has been the "owner" and/or "operator," as those terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10, of a number of "USTs" and "UST systems," as those terms are defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10, located at Lam's Lumber, 4761 Constitution Highway, Barboursville, Virginia (the "Lam's Lumber Facility"), including the specific USTs at issue in this Complaint, consisting of a 15,000-gallon compartmentalized UST ("Tank L-1"); consisting of two compartments:

- a. A 12,000-gallon compartment (referred to herein as “Tank L-1A”),
and
- b. A 3,000-gallon compartment (referred to herein as “Tank L-1B”).

30. At all times relevant to the violations set forth in this Count, Tank L-1A has been used to store on-road diesel fuel, which is a petroleum product and is a “regulated substance,” as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10.

31. At all times relevant to the violations set forth in this Count, Tank L-1B has been used to store off-road diesel fuel, which is a petroleum product and is a “regulated substance,” as that term is defined in Section 9001 of RCRA, 42 U.S.C. § 6991, and 9 VAC 25-580-10.

32. At all times relevant to the violations set forth in this Count, Tanks L-1A and L-1B have each been part of a “petroleum UST system” as that term is defined in 9 VAC 25-580-10.

33. At all times relevant to the violations set forth in this Count, Tanks L-1A and L-1B have routinely contained greater than 1 inch of regulated substances and 0.3 percent by weight of the total capacity, and thus have not been “empty” as defined in 9 VAC 25-580-310.1.

34. From at least five years prior to the date of this Complaint through at least January 31, 2008, Tanks L-1A and L-1B were not monitored in compliance with any of the methods set forth in 9 VAC 25-580-160.1 through .8.

35. From at least five years prior to the date of this Complaint through at least January 31, 2008, Respondent violated 9 VAC 25-580-130 and 140.1 by failing to provide a method or methods of tank release detection for the UST systems designated as Tanks L-1A and L-1B at the Lam’s Lumber Facility which meet the requirements referenced in such regulations.

COUNT 6

36. The allegations of Paragraphs 1 through 35 of this Complaint are incorporated herein by reference.

37. At all times relevant to the violations set forth in this Count the underground piping associated with Tanks L-1A and L-1B has routinely contained regulated substances and conveyed regulated substances under pressure.

38. From at least five years prior to the date of this Complaint through at least the February 1, 2008, Respondent did not test the operation of the line leak detectors for the pressurized underground piping associated with Tanks L-1A and L-1B.

39. From at least five years prior to the date of this Complaint through at least February 1, 2008, Respondent violated 9 VAC 25-580-140.2 and 170.1 failing to test the operation of the line leak detectors for Tanks L-1A and L-1B at the Lam's Lumber Facility.

COUNT 7

40. The allegations of Paragraphs 1 through 39 of this Complaint are incorporated herein by reference.

41. From at least five years prior to the date of this Complaint through at least the date of this Complaint, the underground piping associated with Tanks L-1A and L-1B has not been monitored in accordance with any of the methods referenced in 9 VAC 25-580-170.3.

42. From at least five years prior to the date of this Complaint through at least February 1, 2008, line tightness tests were not performed on the underground piping associated with Tanks L-1A and L-1B.

43. From at least five years prior to the date of this Complaint through at least February 1, 2008, Respondent violated 9 VAC 25-580-130 and 140.2.a(2) by failing to provide annual or monthly methods of release detection for the underground piping associated with the Tanks L-1A and L-1B at the Lam's Lumber Facility which meet the requirements referenced in such regulations.

COUNT 8

44. The allegations of Paragraphs 1 through 43 of this Complaint are incorporated herein by reference.

45. From at least five years prior to the date of this Complaint through at least October 9, 2007, Respondent did not demonstrate financial responsibility for any of the USTs at the Lam's Lumber Facility, for the amounts set forth in 9 VAC 25-590-210.B, by any of the methods set forth in 9 VAC 25-590-60 through 9 VAC 25-590-110 or 9 VAC 25-590-250.

46. From at least five years prior to the date of this Complaint through at least October 9, 2007, Respondent violated 9 VAC 25-590-30 and 9 VAC 25-590-40 by failing to demonstrate financial responsibility for the USTs at the Lam's Lumber Facility.

COUNT 9

47. The allegations of Paragraphs 1 through 46 of this Complaint are incorporated herein by reference.

48. Pursuant to Section 9002(a)(3), 42 U.S.C. § 6991a(a)(3), and 9 VAC 25-580-70.A, any owner who brings an UST system into use after May 8, 1986, must, within 30 days of bringing such UST into use, submit to the appropriate state agency (in this case, the Virginia Department

of Environmental Quality) a notice of the existence of such tank. Pursuant to 9 VAC 25-580-70.A, the notice to the Virginia Department of Environmental Quality (“VADEQ”) must be in the form prescribed in Appendix I to the Virginia UST program regulations. Further, 9 VAC 25-580-70.A requires that a notice be submitted to VADEQ within 30 days after any change in ownership, tank status or substance stored, or any physical changes to the tank/piping systems.

49. Respondent arranged for the installation of Tanks L-1A and L-1B at the Lam’s Lumber Facility, which installation took place some time in August, 1998.

50. Respondent did not send VADEQ a notice of the existence of Tanks L-1A and L-1B at the Lam’s Lumber Facility, in the form prescribed in Appendix I to the Virginia UST program regulations, until November 16, 2007.

51. From at least September 30, 1998 to at least November 16, 2007 Respondent violated 9 VAC 25-580-70.A, by failing to properly notify VADEQ of the existence of Tanks L-1A and L-1B at the Lam’s Lumber Facility.

III. COMPLIANCE ORDER

A. Within fifteen (15) days after the effective date of this Compliance Order, Respondent must ensure that each UST and UST system identified in the Findings of Fact and Conclusions of Law, above, is in compliance with the tank release detection requirements of 9 VAC 25-580-130 and 140.1. As an alternative, for any of these UST systems Respondent may ensure, within fifteen (15) days after the effective date of this Compliance Order, that such UST is taken temporarily out of service and all regulated substances removed so that the UST is

“empty” as defined in 9 VAC 25-580-310.1, until such time as methods of tank and/or line release detection are performed.

B. Within sixty (60) days after the effective date of this Compliance Order, Respondent shall submit to EPA a report detailing all measures taken to comply with Paragraph A of this Compliance Order and providing written documentation that Respondent has corrected all of the violations set forth in this Complaint, including, but not limited to, a description of and documentation of the method of tank release detection for each UST alleged herein to be in violation of the tank release detection requirements, or documentation of the temporary and/or permanent closure of a given UST.

C. Where the applicable regulations allow more than one option for compliance, such Report shall clearly indicate the regulatory citation for each option which Respondent claims is being utilized at each facility.

D. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Compliance Order shall be certified by Respondent, as provided in 40 C.F.R. § 270.11(a). Respondent's certification shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is true, accurate, and complete. As to [the/those] identified portions of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature:

Name: T. Bradley Lam

E. All documents and reports to be submitted pursuant to this Compliance Order shall be sent to the following persons:

- (1) Documents to be submitted to EPA shall be sent certified mail, return receipt requested, or by overnight delivery with signature verification, to:

Stacie L. Peterson
RCRA Compliance and Enforcement Branch
Mail Code 3WC31
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

and

Benjamin D. Fields
Senior Assistant Regional Counsel
Mail Code 3RC30
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

- (2) One copy of all documents submitted to EPA shall be sent by regular mail to the following state contact:

Mr. Russ Ellison
Virginia Department of Environmental Quality
Office of Spill Response & Remediation
629 E Main Street
P.O. Box 10009
Richmond, VA 23240-0009

F. The term "days" as used herein shall mean calendar days unless specified otherwise.

G. Respondent is hereby notified that failure to comply with any of the terms of this Compliance Order may subject Respondent to the imposition of a civil penalty of up to \$32,500 for each day of continued noncompliance, pursuant to Section 9006(a)(3) of RCRA, 42 U.S.C. § 6991e(a)(3), the Debt Collection Improvement Act of 1996 ("DCIA"), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19.

IV. CIVIL PENALTY

Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), provides in relevant part that any owner or operator of an underground storage tank who fails to comply with any requirement promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991b, or any requirement or standard of a State program authorized pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, shall be liable for a civil penalty not to exceed \$10,000 for each tank for each day of violation. Pursuant to the DCIA and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 61 *Fed. Reg.* 69360 (December 31, 1996), codified at 40 C.F.R. Part 19, violations which occur subsequent to

January 30, 1997 are subject to a new statutory maximum penalty of ten percent greater than the prior statutory maximum, or \$11,000 per violation per day.

Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific penalty at this time, but will do so at a later date after an exchange of information has occurred. *See* 40 C.F.R. § 22.19(a)(4).

For purposes of determining the amount of any penalty to be assessed, Section 9006(c) and (e) of RCRA, 42 U.S.C. § 6991e(c) and (e), requires 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"), 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 ("Penalty Policy Inflation Modification"), copies of which are enclosed with this Complaint. These policies provide a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases.

As a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will consider, among other factors, facts or circumstances unknown to Complainant at the time of issuance of the Complaint that become known after the Complaint is issued. In

particular, EPA will consider, if raised, Respondent's ability to pay as a factor in adjusting the civil penalty. The burden of raising the issue of inability to pay rests with Respondent.

Violations

Pursuant to Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), EPA proposes the assessment of a civil penalty of up to \$11,000 per day against Respondent for each of the violations alleged in this Complaint. This does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), an explanation of the number of and severity of violations is given below.

COUNT 1

Failure to Provide Tank Release Detection – D's Market

Respondent failed to provide tank release detection for Tanks D-1, D-2, D-3A and D-3B from at least five years prior to the date of this Complaint through at least January 31, 2008.

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 UST Penalty Guidance 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. In this instance there is no reason to deviate from that assessment.

Depending on the information to be produced by Respondent in the litigation of this matter, Complainant will consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and

Respondent's level of culpability. In addition, Complainant may increase the base penalty by a multiplier to account for relative sensitivity of the environment affected by the violation. At the present time it does not appear that Respondent has a prior history of similar violations, and thus Complainant does not expect to make an upward adjustment based on this factor.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the tank release detection requirements. At the present time it appears that Respondent plans to come into compliance by upgrading or replacing the inoperable ATG system at the D's Market Facility. Thus the economic benefit will likely be calculated as the benefit Respondent realized by delaying the expenditures for this work.

COUNT 2

Failure to Test Line Leak Detectors – D's Market

Respondent did not conduct line leak detector testing for the piping associated with Tanks D-1 and D-2 until February 1, 2008. Respondent was thus in violation of the line leak detector testing requirement from at least five years prior to the date of this Complaint until February 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 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. There does not at this time appear to be any reason to deviate from that assessment.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the line leak detector testing requirements. In this instance it appears that Respondent completely avoided the cost of at least five annual line leak detector tests.

COUNT 3

Failure to Perform Periodic Line Release Detection – D's Market

Respondent has never performed a monthly method of line release detection for the piping associated with Tanks D-1, and D-2, and did not conduct annual line tightness testing until February 1, 2008. Respondent was thus in violation of the periodic line release detection requirement from at least five years prior to the date of this Complaint until February 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 monthly monitoring or an annual line tightness test helps ensure

that small 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 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. There does not at this time appear to be any reason to deviate from that assessment.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the periodic line release detection requirements. In this instance it appears that Respondent completely avoided the cost of at least five annual line tightness tests.

COUNT 4

Failure to Provide Assurance of Financial Responsibility – D's Market

Until October 9, 2007, Respondent did not have any form of financial assurance for the D's Market Facility for the deductible amounts not covered by the Virginia Petroleum Storage Tank Fund. Respondent was thus in violation of the financial assurance requirement from at least five years prior to the date of this Complaint until October 9, 2007.

Financial assurances are a key element of the UST regulatory system, ensuring that there are adequate resources available to properly address any releases which have occurred or will

occur in the future. Under the UST Penalty Guidance the failure to provide financial assurance is generally considered a major deviation from the regulatory requirements, with a moderate potential for harm to the environment and the regulatory program. In this instance, however, a significant portion of the necessary financial assurance is, by operation of law, automatically covered by the Virginia Petroleum Storage Tank Fund. Respondent's violation, therefore, essentially consists of the failure to provide assurances for the applicable "deductible" not covered by the Fund. It thus may be appropriate to reduce the classification of the violation to a "moderate" deviation from the regulatory program, even though the partial compliance with the financial assurance requirements was not the result of any efforts on the part of Respondent.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the financial assurance requirements. In this instance it appears that Respondent completely avoided the cost of carrying a letter of credit for at least four years.

COUNT 5

Failure to Provide Tank Release Detection – Lam's Lumber

Respondent failed to provide tank release detection for Tanks L-1A and L-1B from at least five years prior to the date of this Complaint through at January 31, 2008.

As with Count 1, above, under the UST Penalty Guidance 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. In this instance there is no reason to deviate from that assessment.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent’s degree of cooperation with EPA and Respondent’s level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the tank release detection requirements. At the present time it appears that Respondent plans to come into compliance by installing an ATG system at the Lam’s Lumber Facility. Thus the economic benefit will likely be calculated as the benefit Respondent realized by delaying the expenditures for this work.

COUNT 6

Failure to Test Line Leak Detectors – Lam’s Lumber

Respondent did not conduct line leak detector testing for the piping associated with Tanks L-1A and L-1B until February 1, 2008. Respondent was thus in violation of the line leak detector testing requirement from at least five years prior to the date of this Complaint until February 1, 2008.

As with Count 2, above, under the UST Penalty Guidance the failure to conduct 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. There does not at this time appear to be any reason to deviate from that assessment.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the line leak detector testing requirements. In this instance it appears that Respondent completely avoided the cost of at least five annual line leak detector tests.

COUNT 7

Failure to Perform Periodic Line Release Detection – Lam's Lumber

Respondent has never performed a monthly method of line release detection for the piping associated with Tanks L-1A and L-1B, and did not conduct annual line tightness testing until February 1, 2008. Respondent was thus in violation of the periodic line release detection requirement from at least five years prior to the date of this Complaint until February 1, 2008.

As with Count 3, above, under the UST Penalty Guidance the failure to conduct periodic line release detection 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. There does not at this time appear to be any reason to deviate from that assessment.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the periodic line release detection requirements. In this instance it appears that Respondent completely avoided the cost of at least five annual line tightness tests.

COUNT 8

Failure to Provide Assurance of Financial Responsibility – Lam's Lumber

Until October 9, 2007, Respondent did not have any form of financial assurance for the Lam's Lumber Facility for the deductible amounts not covered by the Virginia Petroleum Storage Tank Fund. Respondent was thus in violation of the financial assurance requirement from at least five years prior to the date of this Complaint until October 9, 2007.

Under the UST Penalty Guidance the failure to provide financial assurances is generally considered a major deviation from the regulatory requirements, with a moderate potential for harm to the environment and the regulatory program. As discussed with regard to Count 4, above, the automatic coverage provided by the Virginia Petroleum Storage Tank Fund may make it appropriate to reduce the classification of the violation to a "moderate" deviation from the regulatory program. Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation

with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the financial assurance requirements. In this instance it appears that Respondent completely avoided the cost of carrying a letter of credit for at least four years.

COUNT 9

Failure to Notify – Lam's Lumber

Tanks L-1A and L-1B at the Lam's Lumber Facility were installed in August, 1998, but Respondent did not send VADEQ a notice of the existence of these USTs until November 16, 2007.

UST notifications are a very important element in the UST regulatory program. Regulatory agencies will not normally be aware of the existence of a regulated UST in the absence of notification, and thus will not be able to inspect the UST to ensure compliance with the substantive UST requirements. In addition, the notification form requires information which greatly simplifies the task of inspecting and evaluating an UST. Under the UST Penalty Guidance the failure to provide an initial notification is generally considered a major deviation from the regulatory requirements, with a major potential for harm to the environment and the regulatory program. There does not at this time appear to be any reason to deviate from that assessment.

Complainant will further consider whether it is appropriate to make either upward or downward adjustments to the penalty based on Respondent's degree of cooperation with EPA and Respondent's level of culpability, and may increase the base penalty by a multiplier to account for relative sensitivity of environment affected by the violation.

Further, a penalty component will be added to reflect the economic benefit gained by Respondent by failing to comply with the notification requirements, to the extent that any such benefit is identified.

V. OPPORTUNITY TO REQUEST A HEARING

Respondent has the right to request a hearing to contest any matter of law or material fact set forth in this Complaint and Compliance Order, the appropriateness of any penalty, or the terms of the Compliance Order. **To request a hearing, Respondent must file a written Answer to the Complaint with the Regional Hearing Clerk, *within thirty (30) days of receipt of this Complaint, at the following address:***

**Regional Hearing Clerk
Mail Code 3RC00
U.S. EPA Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint of which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation, the Answer should so state. The Answer should contain: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief;

and (4) a statement as to whether a hearing is requested. The denial of any material fact or the raising of any affirmative defense shall be construed as a request for a hearing. All material facts not denied in the Answer will be considered as admitted.

If Respondent fails to file a written Answer within (30) days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. Failure to file a written Answer may result in the filing of a Motion for Default Order imposing the penalties herein and ordering compliance with the terms of the Compliance Order without further proceedings.

Any hearing requested by Respondent will be conducted in accordance with the provisions of the Consolidated Rules of Practice. A copy of these rules is enclosed with this Complaint.

A copy of Respondent's Answer and all other documents that Respondent files in this action should be sent to the attorney assigned to represent EPA in this matter, as follows:

Benjamin D. Fields
Senior Assistant Regional Counsel
Mail Code 3RC30
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029.

VI. SETTLEMENT CONFERENCE

Complainant encourages settlement of the proceedings at any time after issuance of the Complaint if such settlement is consistent with the provisions and objectives of RCRA. Whether or not a hearing is requested, Respondent may request a settlement conference with the

Complainant to discuss the allegations of the Complaint and the amount of the proposed civil penalty. A request for a settlement conference does not relieve Respondent of its responsibility to file a timely Answer.

The procedures in the Consolidated Rules of Practice for quick resolution of a proceeding do not apply in this case because a specific penalty is not proposed and the Complaint seeks a compliance order. *See* 40 C.F.R. § 22.18(a).

In the event settlement is reached, the terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Complaint and its right to appeal the proposed Final Order accompanying the Consent Agreement.


If you wish to arrange a settlement conference, please contact Benjamin D. Fields, Senior Assistant Regional Counsel, at (215) 814-2629. Please note that a request for a settlement conference does not relieve Respondent of its responsibility to file an Answer within thirty (30) days following its receipt of this Complaint.

SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

The following Agency offices and officers, and their staffs, are designated as the trial staff to represent the Agency as a party in this case: U.S. EPA, Region III, Office of Regional Counsel; U.S. EPA, Region III, Waste & Chemicals Management Division; and the EPA Assistant Administrator for Enforcement and Compliance Assurance. Commencing from the

date of the issuance of this Complaint until issuance of a final agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, nor the Regional Judicial Officer, may have an *ex parte* communication with the trial staff or any representative of the Respondent on the merits of any issue involved in this proceeding. Please be advised that the Consolidated Rules of Practice prohibit any unilateral discussion or *ex parte* communication of the merits of a case with the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, or the Regional Judicial Officer after issuance of a Complaint.

Date: 6/18/08



Abraham Ferdas, Director
Waste and Chemicals Management
Division

CERTIFICATE OF SERVICE

I hereby certify that on the date below I hand-delivered the original and one copy of the attached Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, and caused a true and correct copy to be sent via Federal Express to:

T. Bradley Lam
d/b/a Lam's Lumber Company
4761 Constitution Highway
Barboursville, Virginia 22923

6/23/05
Date



Benjamin D. Fields
Senior Assistant Regional Counsel