

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

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.

Hon. Susan L. Biro, Presiding Officer

Docket No. RCRA-02-2011-7503

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2011 AUG 15 P 12:32
REGIONAL HEARING
CLERK

STATUS REPORT/MOTION TO EXTEND PREHEARING EXCHANGE DEADLINES

Pursuant to the directive in this Court's contained in the July 18, 2011 "Order Granting Motion To Extend Deadlines Set Forth in Prehearing Order," Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA), through her attorney, hereby submits the following status report. Further, in light of the circumstances outlined below, Complainant requests that this Court grant the parties an extension of three-months' time for the filing of the prehearing exchange, or, if the Court is unable to grant such relief, then to allow the parties an additional two months before requiring that the prehearing exchange process occur. Respondents' counsel has authorized the undersigned to state that he consents to the relief herein being sought. For the reasons set forth below, EPA submits that good cause exists for granting this motion.

Background

While much of this background has already been stated in EPA's earlier (July 12th) motion, the information will be repeated here to expedite this Court's consideration of the matter.

This is an administratively proceeding commenced under authority of Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6991e, in which EPA seeks a civil penalty of approximately \$233,000 against various respondents for alleged violations that arose in connection with the operation of various upstate New York gasoline stations; the violations pertain to the underground storage tanks (USTs) at six retail gasoline stations, of which, the complaint further alleges, Respondents presently own only two. The complaint, issued March 31, 2011, alleges 21 counts against the various owners and operators of the 40 C.F.R. Part 280 regulations.¹ Respondents timely filed their answer on or about June 6, 2011.² They dispute liability, dispute the proposed and request a hearing. More specifically, the answer denies that the individual named respondent, Andrew B. Chase, ever owned or operated any of the six service stations where EPA alleges the violations arose. Respondents also dispute the allegations regarding the failure to comply with the substantive UST requirements.³ To date, other than the

¹ Because some of the owners/operators were not involved with certain stations, not all 21 counts are alleged against each respondent. *See* the table and accompanying explanatory material on pages 39 and 40 of the complaint.

² On May 9, 2011, the Regional Judicial Officer of EPA, Region 2, granted respondents' request for an extension of time.

³ For example, regarding the station identified as Service Station I, paragraph 125 of the answer states:

Respondents dispute that at service station I there was a failure to conduct annual rightness tests/provide monthly monitoring; that they failed to test operation of automatic line leak detector; that they failed to provide overfill protection for the existing tank system; that they failed to maintain release detection, failed to maintain cathodic protection, failed to cap and secure, temporarily, closed UST; and that they failed to permanently close UST.

See also paragraph 130 of the answer:

issuance of the Prehearing Order, there have been no litigation developments, *e.g.*, there has been no substantive motion practice, there has been no movement toward the development of an evidentiary record, and this Court has not set a date for a hearing.

Settlement Conference

On August 11, 2011, the parties held a settlement conference via phone. Respondents, through counsel, discussed the status of the corporate respondents, future plans regarding the service stations that Respondents had not previously sold, and raised points concerning the potential impact of the proposed penalty. Respondents disputed some of the predicate allegations set forth in the complaint and also raised issues regarding ownership and operation of the service stations. In addition, issues of present compliance/non-compliance were explored with regard to the two service stations that EPA's complaint alleges Respondents presently own and operate.

In light of the arguments Respondents made, EPA requested, and Respondents, through counsel, have agreed to provide documentation concerning the potential financial impact of the proposed penalty on future business operations, concerning the question of the present ownership and operation of Service Stations I and VI and concerning Respondents' compliance with substantive UST requirements for such stations. Because EPA wishes to evaluate the potential

Respondents also dispute that at service station VI there was a failure to provide overfill protection for a new tank system; that there was a failure to test operation of automatic line leak detector, that there was a failure to conduct annual tightness tests or provide monthly monitoring release detection; that there was a failure to maintain records of release detection; and that there was a failure to report an[d] immediately investigate suspected release.

Of the six service stations in question, the complaint alleges present ownership and operation (by Respondent Andrew B. Chase) only for stations I and VI.

merit of the various factual arguments Respondents raised and to determine whether they are supported in the documentation Respondents have agreed to provide, neither party felt it appropriate to discuss settlement numbers; any such discussion of proposed settlement offers and responsive counter-offers, it was felt, should await another day, after EPA has received and has an opportunity to have such documentary information analyzed. For EPA to be in a position to make any reasonable and equitable offer, it first needs to ascertain whether the documentation Respondents will supply substantiates the arguments and positions they made during the settlement conference.

Motion to Extend Time for Filing Prehearing Exchange

As explained above, concrete settlement talks, with actual dollar figures considered, await EPA's receipt and evaluation of the promised documentation; without them, the negotiations would be proceeding in a vacuum. Based on the estimates of counsel and the experience of the undersigned, it likely will be something in the neighborhood of between (and this represents a rough approximation, and not any specific schedule to which the parties agreed) three to four weeks before such documentation will be produced, and additional time will be needed for a comprehensive evaluation.⁴

The prehearing order, as modified by the amending one of July 18th, directs that, if by that time no settlement has been reached, Complainant submit her initial prehearing exchange by September 16, 2011; Respondents must file their prehearing exchange some three weeks later, on October 7, 2011, and then any rebuttal prehearing exchange must be filed two weeks subsequent, on October 21, 2011. Additionally, this order states, "If the case settles, the parties are directed

⁴ EPA might send such documents to an outside analyst.

to file a fully-executed Consent Agreement and Final Order no later than **September 16, 2011**" (emphasis in original), and, if the settlement has not been fully effected, the parties must commence the prehearing exchange process. Page 2 of the July 18th order.

Given the document exchange to which the parties have agreed, the likely time needed for their production and the concomitant time required for a comprehensive analysis, it is virtually certain that the parties would not be able to reach a settlement within the schedule established by the Court for prehearing exchange. Moreover, both parties wish to discuss and explore settlement options without having to concern themselves with upcoming litigation deadlines, a consideration whose salience is amplified because both parties believe this case is readily amenable to a negotiated settlement.

Given this concatenation of circumstances, the undersigned requests that the Court grant a three-month extension of time to the above-referenced prehearing exchange deadlines. Under this extended schedule, the parties thus have until December to reach a settlement, and, if none is reached, Complainant must file her initial prehearing exchange by December 16, 2011, Respondents must file their prehearing exchange by January 6, 2012, and Complainant's rebuttal must be filed no later than January 20, 2012. In the alternative, if the Court is unwilling to grant a three-month extension, the undersigned then requests that it grant a two-month extension, with the following schedule for the filing of prehearing exchanges: Complainant's initial by November 18, 2011; Respondents' prehearing exchange by December 9, 2011; and EPA's rebuttal by December 23, 2011.⁵

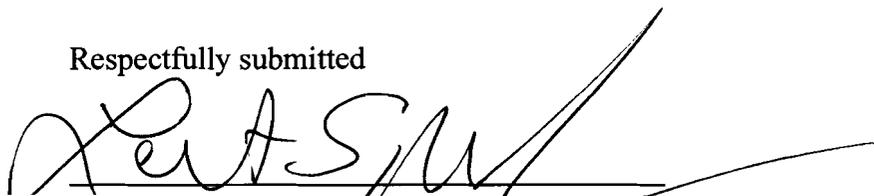
⁵ The three-month extension is being sought because of concern that the period in question encompasses the time between the Thanksgiving holiday and the end-of-year holidays.

Complainant submits that the circumstances demonstrate that the good cause requirement of 40 C.F.R. § 22.7(b) exists for the granting of this motion. Both parties concur in the extension(s) sought. This case is relatively new, and there have been no substantive litigation developments; no evidentiary record has been developed. Based on the discussion held during the August 11th conference, it appears there is a significant likelihood of the parties attaining a negotiated settlement, which would obviously obviate the necessity of their filing a prehearing exchange. Because this request is, in essence, a joint request by Complainant and Respondents, neither side will suffer prejudice if the Court were to grant the relief (either prong) sought.

Therefore, EPA respectfully moves this Court, pursuant to 40 C.F.R. §§ 22.4(c)(2), 22.7(b), 22.16(a) and 22.19(a), for an order: **a)** vacating so much of the July 18th order as directed the parties to file their prehearing exchanges by the dates therein set (and quoted above); and **b)** extending the deadline for the parties to file their prehearing exchanges in accordance with the three-month extension (or, in the alternative, two-month extension) schedule proposed on page 5, above.

Dated: August 12, 2011
New York, New York

Respectfully submitted

A handwritten signature in black ink, appearing to read "Robert A. Smith", written over a horizontal line. The signature is stylized and extends to the right of the line.

212-637-3222

FAX: 212-637-3199

TO: Honorable Susan L. Biro
Chief Administrative Law Judge
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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 "STATUS REPORT/
MOTION TO EXTEND PREHEARING EXCHANGE DEADLINES," dated August 12, 2011,
in the above-referenced proceeding in the following manner to the respective addressees listed
below:

Original and One Copy
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

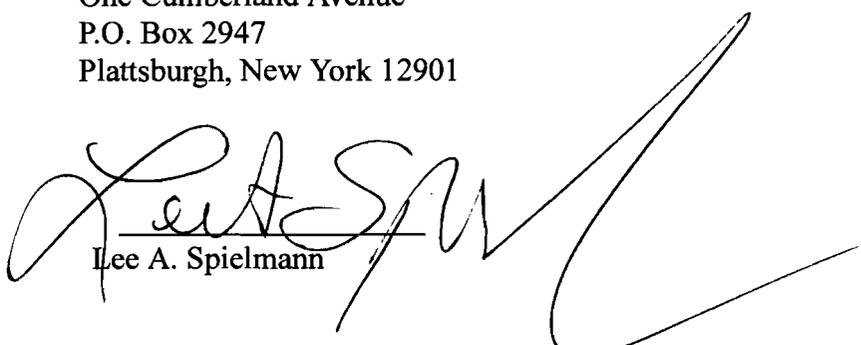
Copy by Fax Transmission,
202-565-0044, and Pouch Mail:

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

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Dated: August 12, 2011
New York, New York


Lee A. Spielmann