UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)
	)
	)
Carroll Oil Company, Inc.	) Docket No.: RCRA-8-99-05
d/b/a Western 66	)
I-25 and U.S. Route 30	)
Cheyenne, Wy 82003	)

Respondent.

Initial Decision

In this administrative proceeding under the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. § 6991e, the Respondent, Carroll Oil Company, Inc., d/b/a Western 66, ("Carroll Oil") has been charged with failing to comply with the regulatory provision found at 40 CFR 280.70(c), involving underground storage tanks, ("USTs"). That regulation requires permanent closure of a UST within twelve months of a temporary closure.[1]

Three such USTs were originally involved in this litigation; one with an 8,000 gallon capacity and two USTs, each with a 6,000 gallon capacity. All three held gasoline. As the Respondent has conceded liability in this matter,[2] acknowledging that the tanks were taken out of active use on or about

[1]The full text of the section provides: (c) When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in § 280.20 for new UST systems or the upgrading in § 280.21 *except that* the spill and overfill equipment requirements do not have to be met. Owners and operators must permanently close the substandard UST systems at this 12-month period in accordance with §§ 280.71- 280.74 *unless* the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with § 280.72 before such an extension can be applied for.

[2]At the outset of the hearing, Respondent formally conceded liability. Tr. 6.

September 10, 1991, and that none of the tanks have ever been permanently closed, only two issues remain. The first is Complainant EPA's Motion for Reconsideration of the Court's Order denying an earlier filed Motion to Amend the Complaint, and the second is the determination of an appropriate civil penalty. EPA has proposed a civil penalty of $19,500.

EPA's Motion for Reconsideration

Background:

The Complaint in this matter was originally filed on June 28, 1999. Nine months later, on March 31, 2000, EPA filed a Motion to Amend the Complaint, seeking to add two new Respondents: Pershing Service Inc. ("Pershing") and Neil R. Carroll, President of Carroll Oil, individually. Four days later, on April 3, 2000, EPA mailed a copy of its Motion to the Respondent and to the Court. The Court received the Motion on April 6, 2000, eight days before the cut-off date for motions. In its Motion,[3] EPA stated that receipt of new information, dated December 31, 1999, was the basis for seeking the addition of Pershing. The new information, *which EPA had in its possession as of January 20, 2000,* was a submission to the state of Wyoming in which, by EPA's interpretation, Neil R. Carroll notified that Pershing Service, Inc., and not Carroll Oil Company, was the owner of the underground storage tanks ("USTs") at the Western 66 Facility ("Facility"). EPA's interpretation was derived from a check copy and an Above/Underground Storage Tank Registration Invoice on which Mr. Carroll had crossed out Carroll Oil Company, Inc. and written in 'Pershing Service' as the owner of the USTs in question and Mr. Carroll's notation on the invoice that "Pershing Service, Inc. has owned this station the last nine years."

As to the basis for adding Mr. Carroll, individually, as a Respondent, EPA was motivated to "ensure that all potential owners and/or operators be included in [the] action." EPA justified the inclusion of Mr. Carroll because of his "service throughout the history of the Facility's operations as *president of Carroll Oil Company* and personal participation in, control of and/or responsibility for the Facility's daily operations, including but not limited to the underground storage tanks." Motion at 2. (emphasis added). In support of Mr. Carroll's inclusion, EPA points to UST Notification Forms Mr. Carroll completed, dated September 29, 1992 and November 19, 1999, in which he identifies himself as the "Contact Person in Charge of Tanks, and by his signature on the 1992 form in the block for "Name and Official Title of owner or owner's authorized representative." EPA then related that as it had "received conflicting and confusing information from the Respondent as to whether Carroll Oil ... Pershing ...

[3]EPA, presuming its motion would be granted, amended the caption of the case from its initial state: "In the Matter of Carroll Oil Company, Inc. d/b/a Western 66, I-25 and U.S. Route 30, Cheyenne, WY 82003," and added *on its own*: PERSHING SERVICE,INC. AND NEIL R. CARROLL, as Respondents. The Court took note of EPA's unilateral action at the outset of the hearing. Tr. 7-8.

and/or Neil Carroll is the actual owner and/or operator of the USTs..." it is necessary to name all three ... in order to carry out justice and ensure that an accurate determination be made on the merits." *Id.* at 3.

Carroll Oil Company, Inc. filed its objection to the Motion on April 27, 2000. The objection, which was filed late,[4] was then followed by a Motion for an Extension to permit the late filed Motion.[5] In its opposition, Respondent stated that Carroll Oil and Pershing Service are not the same company and do not own the same property. Respondent explained that, in 1992, Pershing purchased from Carroll Oil a service station located on Pershing Boulevard in Cheyenne, Wyoming, but that the Pershing station is not part of this suit. Respondent maintains that Neil Carroll's note on the December 31, 1999 check was intended to inform the state of Wyoming that bills for the station and tanks on Pershing Boulevard should be sent to Pershing Service, not Carroll Oil. Regarding the June 1999 note that stated "Pershing Service, Inc. has owned this station the last 9 years," Respondent maintains that the statement referred to the Pershing Boulevard station and not to the station and USTs involved in this proceeding.

After hearing oral argument on these issues, the Court issued an order from the bench, permitting consideration of Respondent's late-filed opposition and denying EPA's Motion to Amend the Complaint.[6] EPA made no offer of proof and the hearing proceeded on the issue of the appropriate penalty. Thereafter, on June 19, 2000, EPA filed its Motion for Reconsideration.
Respondent, Carroll Oil, filed an objection to the Motion, noting that the Court has ruled once on this matter and that the Motion for Reconsideration does not provide new information or evidence for consideration.

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[4]Carroll Oil's response was due by April 24th. Instead it was filed three days later, on April 27th.

[5]In a conference call held on April 28, 2000, the Court stated that, given the particular circumstances of the case, it would be receptive to an out-of-time motion seeking the extension. EPA objected to the Court's consideration of the late-filed Motion on the grounds that such consideration would "unfairly prejudice" the complainant. During the April 28th conference call, EPA requested, and the Court agreed, that it hear oral arguments on these issues at the outset of the hearing. The Court pointed out that, while the procedural rules apply to the proceedings, overall fairness is a consideration as well. This includes, where possible, hearing both sides of an issue. The Court noted that had an unforgiving standard been applied, EPA's subpoena of Mr. Lucht would have been denied, as EPA cited the wrong section and did not comply with the requirements of Section 22.19(e). Tr. 11-12.

[6]The Court also stated that, even if it had not considered the Respondent's late-filed motion, it would have denied, on independent grounds, EPA's Motion to Amend the Complaint. Tr. at 38-39.

The Motion for Reconsideration

In its Motion for Reconsideration, EPA, after noting that the Court cited ten independent reasons for denying the Motion to Amend the Complaint, challenges each of the reasons cited. The Court's reasons, and EPA's arguments against them, follow.

The Court noted in its ruling that at the time EPA filed the complaint it was aware that Carroll Oil was in delinquent standing under the laws of Wyoming as of June 24, 1999 and that EPA became aware of the possibility that Pershing Service and/or Neil Carroll might be an owner and/or operator of the cited USTs at least by January 20, 2000.

In its Motion for Reconsideration, EPA states that Respondent's delinquent status only means that it had failed to file its annual report with the Secretary of State, that such delinquency is completely unrelated to naming additional respondents and that it did not put EPA on notice that the company was experiencing economic hardship. As to its awareness in January of potential additional respondents, EPA views two months as a short delay and notes that in any event it met the Court's deadline for filing motions.

To the Court's observation that EPA waited until March 31, 2000 to amend the Complaint, despite awareness of Carroll Oil's delinquent status since the filing of the Complaint, some ten and a half months earlier, and despite having concerns about additional possible owners or operators over two months before filing the Motion to Amend, EPA responds that "Part 22 does not provide a standard for when a complaint may be amended" and that such leave should be "freely granted" to ensure a fair and accurate decision. EPA Motion at 9-10.

The Court rejects EPA's indiscriminate view that a motion submitted before a filing deadline cannot be rejected for reasons relating to the timing of the submission. To the contrary, as the cases cited by the Court at the hearing reflect, a ruling may consider when the motion is submitted, along with what the motion seeks to achieve and the imminency of the hearing.

In denying the Motion, the Court took note that EPA did not avail itself of the additional discovery provisions set forth in Part 22 of the procedural rules. EPA's Motion for Reconsideration declares that it was precluded from using the discovery provisions to investigate the relationship of Carroll Oil to Pershing Services or to Neil Carroll and, in any event, it requested Carroll Oil to voluntarily supply additional financial information. EPA overstates the limitations of discovery. Under Section 22.19(e) of the Procedural Rules, entitled "*Other discovery*," nothing restricted EPA from seeking, through application to the Court, more detail regarding Carroll Oil's financial relationships or the status of related entities. *See*: In re: Spitzer Great Lakes, Ltd., TSCA Appeal No. 99-3,, 2000 WL 893127 (EPA EAB, June 30, 2000) and In the Matter of 1836 Realty Corporation, Dkt. No. CWA 2-1-98- 1017, 1999 WL 362869 (E.P.A., April 8, 1999).

In its ruling the Court also noted that the EPA Motion did not aver that Carroll Oil is a "sham corporation," nor was it seeking, in the motion amendment, to pierce the corporate veil. To these observations, EPA responds that it is not necessary, in seeking the amendment, to make such assertions, as EPA sought to add Pershing Service and Neil Carroll "as 'persons' based on their respective roles pertaining to Western 66 Facility USTs." Therefore, as EPA sees it, it was inappropriate for the Court to refer to this as a ground in its denial of the Motion.

The short response to this objection is that the Court was identifying some of the legitimate grounds for adding respondents and noting for the record that EPA's Motion was not based on such grounds.

As a separate basis for denying the Motion, the Court also took note that EPA's Motion to Amend did not include copies of the documents it relied upon in support of its position. Rather, they were included only within EPA's first supplemental prehearing exchange and without calling the documents, or their alleged significance, to the Court's attention. The effect of this was that the Court did not examine the documents until the day of the hearing.

In response to this observation, EPA contends that it "provided an ***expansive*** description of these documents and their importance ... in the Motion to Amend." EPA also states that it listed the documents in the supplemental exchange and referenced them a second time along with "a full explanation as to their meaning," in its objection to Respondent's motion for an extension to respond. EPA Motion at 12. (emphasis added). EPA neglects to mention, however, that the Part 22 Procedural Rules provide that Motions shall "*[b]e accompanied* by any affidavit, certificate, *other evidence* or legal memorandum relied upon," and that it did not comply with the rule in filing its motion. 40 C.F.R. § 22.16 Motions. (emphasis added). In the Court's view, this consideration alone amounts to a sufficient deficiency to deny the Motion.

Further, EPA's "*expansive*" description is contained within little better than a page of its three page Motion in which it refers to the check copy and the tank registration notice. While declaring Pershing and Neil Carroll as owners and/or operators, EPA conceded, in a footnote, that the Respondent's 1999 UST Notification Form "*as well as in all previous correspondence and communication to the Complainant*, Carroll Oil Company, Inc., has been identified as the USTs owner at the Western 66 Facility." Motion to Amend at 2. (emphasis added).

None of these documents were attached to the Motion to Amend the Complaint. In fact EPA did not even submit the documents it relied upon to support the Motion to Amend until its Supplemental Prehearing Exchange, filed eleven days later. It is also noteworthy that the Supplemental Exchange made no reference to the earlier filed Motion to Amend. EPA asserts that it "again referenced [the] documents and provided a full explanation as to their meaning in its Objection to Respondent's Motion for an Extension of Time to File." Motion for Reconsideration at 12. This document, sent via facsimile to the Court on May 10, 2000, *only eight days before the hearing commenced*, devotes a page to the

issue and represents the first time EPA connected the documents (i.e. the check and the registration invoice) sent on April 11th with its Motion to Amend. Turning to the merits of the Motion, EPA describes Neil Carroll's handwritten notes on the check copy and the tank registration invoice as "*strong evidence* that Pershing Service ...is the owner of the Western 66 Facility USTs." As for naming Neil Carroll as "operator" of the USTs, EPA asserts that Neil Carroll is the "sole proprietor" of Carroll Oil Company and that he "exercised direct and total control over the USTs as well as all other operational and equipment aspects of the facility." In support of this assertion, EPA points to the UST notification form (Stipulated Exhibit No. 16.), because Neil Carroll listed himself as the "Contact Person in Charge of Tanks." EPA Motion at 12-14.

On these procedurally flawed and substantively slender reeds, and in the face of conceding that the financial relationship between Neil Carroll, Pershing Service and Carroll Oil is "unclear," EPA bases its Motion to Amend the Complaint.

In denying the Motion to Amend the Complaint, the Court concluded that, upon balance, the Motion should be denied. While EPA downplays the significance of its knowledge of Carroll's delinquent status since the time of the original filing of the Complaint, the Court believes, and EPA's last minute scrambling confirms, that Carroll's financial health was eventually recognized as questionable. Certainly this became unarguable as of January 20, 2000. Yet EPA adopted a casual attitude and did nothing until two months later and followed this by waiting three more days before sending notification, by regular mail, to the Respondent and the Court. As already pointed out, even this eleventh hour Motion was deficient under the procedural rules, since the documents EPA relied upon were not even sent to the Court until eleven days following the deficient Motion. Even then, no connection between the documents and the Motion was drawn until May 10th, barely a week before the hearing. Assuming, for the sake of argument, that the documents were enough to justify amending the Complaint, it was clear that, having already convened, the hearing would have to be postponed. Yet EPA never sought a postponement, leaving the Court uncertain whether EPA's action was attributable to a strategy to throw new respondents into the litigation without sufficient time to prepare or was simply explained as ineptness, reflective of a last minute realization of a problem with their case.

At the time it announced its ruling, the Court referred to several cases and noted that EPA would not be precluded, in the collection phase of this litigation, from applying any applicable corporate veil piercing or parent corporation liability theories. In one of the cases referred to, In the Matter of Taylor-McIlhenny Operating Co.,Inc, Respondent, Dkt. No. OPA 09-95-01, , 1997 WL 1189484 (E.P.A., February 4, 1997), ("Taylor-McIlhenny"), the administrative law judge determined that the Complainant had waited "virtually until the eve of the scheduled hearing" to make its motion seeking to add certain individuals who were corporate officers. As in this case, in Taylor-McIhenny, EPA had been fully aware of the corporate officers since the inception of the proceeding. The Court determined there that the undue delay, requiring the filing of answers and causing the entire prehearing discovery process to begin anew, were reason enough to deny the motion. Significantly, the denial of the motion was made even though the hearing date had not been set. Here, the situation was obviously more egregious, as the

hearing date had been set and was fast approaching. The Taylor-McIhenny Court also noted that if it could be shown subsequently that individuals did anything improper, such as strip the corporation of its assets, such actions could be dealt with in the collection phase.

Other Courts have recognized that government delay in filing motions seeking to add third party defendants may not be excusable in given circumstances. See United States v. New Castle County, 116 F.R.D. 19 (US Dist. Ct. Del.1987) where the court, in denying a motion to name third party defendants, considered that the government had long before been aware of the individuals it sought to add and had long ago had information implicating them, along with the fact that the amendments came at a time "*nearing* the eve of trial." 116 F.R.D. at 24. (emphasis added)

Given EPA's renewed Motion, some additional comments are in order. It bears emphasis to note that the Court denies the Motion on independent grounds; procedurally, because of the last minute timing and defective nature of the Motion and, substantively, because there was an insufficient record basis presented to support granting the Motion in any event.[7]

While it is true that motions to amend pleadings are liberally granted, this is not unqualified. Courts have recognized that such motions are properly denied where they are made on the eve of trial and the effect of the motion would be to "greatly expand the scope of the hearing or alter the nature of the defenses..." City of Orlando, Florida, Dkt. No. CWA 04-501-99, 1999 WL 778575 (E.P.A., August 24, 1999). See also In the Matter of Everwood Treatment Co., Inc and Cary W. Thigpen, Dkt. No. RCRA-IV-92-15-R, 1993 EPA ALJ Lexis 273 (EPA July 28, 1993) ("Everwood") denying an amendment because it was brought too near the scheduled trial date.[8] In that case, the Motion to

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[7]Alternatively, EPA, applying the rationale set forth In re New Waterbury (TSCA Appeal No. 93-2, 5 EAD 529, (E.P.A. October 20, 1994) ("New Waterbury"), advanced another theory to look to others in order to collect the penalty it seeks, by considering Pershing Service's assets for "inability to pay purposes." Under this theory, EPA may look to related companies in assessing a respondent's inability to pay claim. However, there are several problems with this approach in this case. New Waterbury was a TSCA case and, unlike this case, ability to pay is a statutory penalty criteria in such cases. Further, in distinction from TSCA litigation, EPA concedes that under the UST policy there is no statement regarding its ability to look to other companies. In any event, once a case has gone beyond the settlement stage, the policy no longer considers ability to pay. As EPA has argued, if the Court departs from the penalty proposal, it may look only to the statutory criteria and ability to pay is not one of them. Beyond these reasons, there is no evidence of a subsidiary, general partner, or limited partner relationship between Carroll Oil and Pershing Services, as there was in New Waterbury. In fact there is no evidence in this record concerning the financial health of Pershing or its financial relations to Carroll Oil.

[8]Another factor courts consider is whether the hearing date has been set. For example, in Chem-Met Services, Inc., Dkt. No. RCRA V-W-011-92, (E.P.A. April 15, 1993), that court, in

Amend was brought nearly two months, not weeks, before the trial and there was no indication that the motion did not comply with the procedural rules. The Court noted that it is "well settled that belated claims which change the nature of the litigation are not favored." Accordingly it observed that "amendments to pleadings offered on the eve of trial which would substantially expand the scope of the trial or alter the nature of defenses have been rejected. *Id.* at *13. See also In the Matter of Briggs & Stratton Corp.,[9] TSCA Dkt. No. V-C-001
-002-003, (E.P.A., June 17, 1980), where an amendment to the complaint, offered twenty days prior to trial, was rejected and Evans v. Syracuse City School District, 704 F.2d 44, (2nd Cir. 1983) where the Court's *permitting* an amendment to the answer six days before trial was reversed as an abuse of discretion. Deasy v. Hill, 833 F.2d 38, 43 (4th Cir. 1987) is also consistent with the ruling here. Involved there was a denial of a motion to amend the complaint where the motion was made immediately before trial and three months after the facts became available to the plaintiff. The denial was based on undue delay. Similarly, in Campbell v. Ingersoll Milling Machine Co., 893 F.2d 925 (7th Cir. 1990), a motion to amend which sought to add new legal theories was denied when it was made three weeks prior to trial.

The Environmental Appeals Board has recognized the authority exercised here. It has observed that a judge may bar late claims[10] where the delay in raising them interferes with the judge's "duty to conduct an efficient adjudication, or where there is evidence of prejudice to the opposing party." The Board has expressly noted that "[a]voidance of undue delay is contemplated by the regulatory obligations at 40 C.F.R. § 22.04(c). Prejudice is usually manifested by a lack of opportunity to respond or *need for additional pre-hearing fact-finding and preparation that cannot be readily accommodated.*" In re Lazarus, Inc., 7 E.A.D. 318, 1997 WL 603524 (E.P.A. September 30, 1997)(emphasis added). Certainly the facts in this case demonstrate the kind of prejudice that concerned the Board in Lazarus.

Although the matter is fully disposed of on the procedural basis described above, the Court notes that

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allowing the complaint to be amended, took into consideration that the trial date had not yet been set. However it noted that "belated claims which change the nature of litigation are not favored" and that "amendments to pleadings which are offered on the eve of trial and which would substantially expand the scope of the trial or alter the nature of defenses have been rejected." 1993 WL 256543 (E.P.A.) Here, in contrast, the case already had been set for hearing.

[9]Cf. In the Matter of James E. Yonge/ NOH, Inc., Respondent, 1995 WL 1080533 (E.P.A.), Dkt. No. CWA-IV-94-522, Oct. 12, 1995, where a motion to amend the complaint, filed before any prehearing exchanges, supports a conclusion that no undue prejudice exists in granting the motion. In contrast, here the prehearing exchange had occurred some four months before the motion to amend the complaint was filed.

[10]Although the Board was specifically dealing with a judge's authority to bar untimely defenses, the principle applies with equal force to motions filed shortly before trial.

the Motion is flawed substantively as well. EPA, while conceding that Carroll Oil owns the Western 66 facility, paradoxically maintains that Pershing has owned the USTs at that location for the past nine years. Thus, it seeks to add Pershing Oil as a Respondent on the basis that Pershing owns the USTs located at the Western 66 facility. In support of this assertion, EPA relies upon the aforementioned check and invoice that it included with its April 11, 2000, First Supplemental Prehearing Exchange. EPA maintains that the check was issued by Pershing on Carroll Oil's behalf and in support of that assertion it contends that the invoice clearly addresses the Western 66 facility and lists the identifying facility number of 1329. Further, EPA notes that Carroll Oil's name was crossed out on the invoice and that a handwritten notation asserted that Pershing had owned *the station* for the previous nine years. Last, it notes that another written notation indicates that Pershing is responsible for the payments. While acknowledging Mr. Carroll's explanation that the notations on the check and invoice were referring to the Pershing station and not the Western 66 facility, it argues that Mr. Carroll had referred interchangeably to the Western 66 facility and ID Number 1329. Tr. 17. From this, EPA concludes that Mr. Carroll had long been telling the State of Wyoming that Pershing owned the USTs at the Western 66 site.

Carroll Oil presents a different interpretation to these documents. It asserts that Mr. Carroll's notations on the check and invoice indicate only that he was informing Wyoming that Pershing Service, not Carroll Oil, was the owner of the USTs on Pershing Boulevard.[11] Of course, the Pershing Boulevard station and its USTs are not involved in this litigation. Only the USTs located at the Western 66 location are in issue.

The Court inquired of counsel for the Respondent whether the USTs in issue are registered with the State of Wyoming and Respondent's counsel affirmed that they were, with each of the tanks separately registered with the state. Significantly, counsel for Carroll Oil also represented that the papers registering these USTs with the state of Wyoming reflect that Carroll Oil Company Inc. is the owner. Tr. 28. Certainly the two documents EPA relies upon, the invoice and check, do not on their face support the conclusion that EPA urges the Court to reach. The documents are susceptible to the interpretation Carroll Oil urges as well. In addition, stipulated exhibit 4, dated June 9, 1998, a record from the State of Wyoming, lists Carroll Oil Company Inc. as the owner of the Western 66 USTs.

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[11]Curiously, EPA "strenuously object[ed]" to Carroll Oil Company's offering of the warranty deed reflecting that Carroll Oil did indeed transfer the Pershing Boulevard station to Pershing Oil. EPA objected to this document's introduction despite the fact that it set the record straight by confirming Carroll Oil's contention that it had sold the Pershing Boulevard service station property to Pershing Oil and that it was available to anyone, including EPA, as a public record. By EPA's own characterization, it viewed the document as "extremely significant to the case," in the sense that it undercut EPA's contention that Pershing owned the Carroll's USTs at the Western 66 location. The Court views EPA's objection to this document as nothing more than an attempt to block facts which support the Respondent's contention.

Stipulated Exhibits 6 and 7, also reflecting official letters from Wyoming's Department of Environmental Quality, reflect the same assertion: Carroll Oil is the registered owner of the USTs located at the Western 66 facility.[12]

The Court notes that the Wyoming records, which have been admitted into the record, do not support EPA's position and that no obstacle prevented EPA from acquiring copies of the official state records of ownership for the USTs involved here. Such records would have resolved the matter with finality. Clearly, on this record, EPA has failed to demonstrate under the preponderance standard that Pershing owns the USTs which are the subject of this litigation.

As mentioned, EPA also seeks to add Mr. Neil Carroll, individually, as a respondent in this matter, on the basis of his personal contact and authority over the USTs. EPA asserts that it may look to Mr. Carroll as the president or director and as the sole stockholder of Carroll Oil. Further EPA claims that Carroll Oil is a "sole proprietorship" and, consequently, it may look to Mr. Carroll individually for liability purposes.[13] It contends that Mr. Carroll has made controlling decisions regarding the Western 66 facility's operation, including compliance and maintenance for the subject USTs. EPA argues that showing Mr. Carroll's direct control over Carroll Oil is a basis to establish personal liability, and that it is unnecessary to show that he received a salary from either Carroll Oil or Pershing Service to demonstrate this. Although acknowledging that Carroll Oil and Pershing Services are corporations, EPA nevertheless asserts that Mr. Carroll's position as the sole officer of the corporation is a determinative element.[14]

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[12]Mr. Carroll was admittedly lax in informing the State of Wyoming that Carroll Oil had sold the Pershing Station to Pershing Services, allowing the state to continue to bill Carroll after that sale. That laxity, however, does not translate into a resolution of the UST ownership question.

[13]EPA Counsel stated: "The fact Mr. Carroll has operated or organized Carroll Oil Company as a sole proprietorship, in EPA's opinion, means we can look to him for his direct control, if, in fact it exists, for liability purposes, which is what we're doing now. Tr. 14-15. EPA appears to confuse that a sole proprietorship is a distinct business form from a corporation or partnership. The cited passage also reveals that EPA was effectively attempting to conduct discovery about the financial relationships, if any, between the Respondent, Pershing and Mr. Carroll during the course of the trial. Obviously, as the trial commences, it is too late to conduct discovery. Last, as to Mr. Carroll, personally, EPA cannot even make the claim that the 'new' evidence it had hoped to use to bring Pershing into the case has anything to do with Mr. Carroll's individual liability. EPA had long known that Mr. Carroll's name was listed as the contact person, yet in filing the Complaint it listed only Carroll Oil Company, Inc. as the owner and operator.

[14]For EPA's Counsel, it seems the niceties of business forms are no obstacle. Instead Counsel for EPA seems unconcerned that "[t]he corporate structure is an artificial construct of the law, a substantial purpose of which is to create an incentive for investment by limiting exposure to personal liability." N.L.R.B. v. Greater Kansas City Roofing, 2 F.3d 1047, 1051. Nor does EPA recognize

EPA argues, without support for the claim, that the distinction between Mr. Carroll and Carroll Oil is "extremely slight and hard to differentiate." Tr. 15.

Even at the stage of calculating the penalty EPA was laboring under the misconception that Carroll Oil was a sole proprietorship. Tr. 163-164. Although the witness conceded that it was operating under a misconception, it did not appear to trouble EPA that Carroll Oil was a corporation, as counsel's next question proceeded to inquire about the agency's delving into Mr. Carroll's personal assets: "Okay. So is it safe or fair to assume or state then, when reviewing sole proprietorship for ability-to-pay purposes, that you do consider individual records of board members, directors?" Tr. 164.

It is troublesome that EPA's witness indicated that several of the Respondent's tax returns indicated that it was affiliated with another company or had a parent-subsidiary relationship.
"On several tax return statements, the respondent stated that the company is affiliated with another company, or is involved in the parent-subsidiary relationship. We do not have the specifics of that, other than it was noted on several tax years returns."[15] Tr. 170. When the Court inquired into the basis for the claim, EPA referred to Exhibit 25, at page 2, line 4 of Schedule B. But the information was far less certain than the Agency implied as the information could mean as little as two corporations having the same officer. Tr. 173.

EPA persisted with its unfounded assertion of a parent-subsidiary relationship. "[T]he agency understands that the respondent did mark in its tax returns that it was involved in some type of parent-subsidiary relationship, whereas the respondent stated in this narrative that there was no such relationship." Tr. 190. The Court made note of this unfair characterization:

> The Court: "Is that a fair characterization, Miss Golden? You keep saying there was a parent-subsidiary relationship, but also didn't you tell me it also could be affiliation, which might mean they have shared a director?"

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that it is a "basic premise that a corporation and its stockholders are presumed separate and distinct, whether the corporation has many stockholders or only one." United Phosphorus, Ltd. v. Midland Fumigant, Inc, 1997 WL 756602 (D.Kan.,1997)
When the Court inquired why EPA was confused about Carroll Oil's business form, the answer was disconcerting. "[O]ftentimes small companies that are run by one person, where there's one person serving as the director, also taking care of all the different board positions from president to secretary. It is, in fact, run as a sole proprietorship and that was the basis for which EPA initiated questioning from the individual perspective rather than from the corporate." Tr.182**.**

[15]Of course this assertion, and the fact they were considering this at the time of the penalty calculation, belies the Agency's claim that it only became aware of Carroll Oil's possible relationship with other companies in January 2000.

The Witness: "That is true."

The Court: "Shared officers?"

The Witness: "Yes, that is true."

The Court: " Then when you characterize it, let's fairly characterize it. Don't limit to one of several or two of several possibilities, okay?"

Tr. 190-191.

Assertions aside, the support EPA submits for holding Mr. Carroll personally liable is he listed himself as the contact person in charge of the tanks on the UST identification forms for 1992 and 1999. As mentioned, EPA knew of this fact from the outset. Thus, unlike its claim of new information regarding Pershing's relation to Carroll Oil, EPA's grounds for adding Mr. Carroll at the eleventh hour are even weaker, having waited until just before trial to seek to add him, individually. On this record[16] there is no evidence establishing that Neil Carroll exercised actual control over the operations at Western 66 or that he had sufficient personal involvement over the USTs.

The Court notes that the EAB has expressed concern over the circumstances in which the Agency seeks liability against individuals in RCRA matters. In Southern Timber Products, Inc., d/b/a Southern Pine Wood Preserving Company and Brax Batson, 3 E.A. D. 371,, 1990 WL 303833 (E.P.A. Nov. 13, 1990), ("Southern Timber")[17] EPA had sought to hold a corporate officer personally liable in connection with his role in the ineffective closure of a surface wastewater impoundment. The Board, in noting that the applicable rules for 40 C.F.R. Part 265 apply only to owners and operators of the facility, observed that Southern Pine, not Batson, was the owner and that *the record* did not support the conclusion that Batson was the operator. In the Board's view, Batson's actions, in which he played a significant role in decisions regarding the closure attempt, did not make him the facility operator, as the facts indicated that the most reasonable conclusion was that the corporation itself was the facility operator. Noting its reluctance to impose "sweeping liability upon a corporate officer absent more compelling evidence that the officer is the owner or operator of the facility as defined by the rules," the Board considered the Agency's action appeared to have been driven by the corporation's insolvency,

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[16]It bears repeating that EPA made no offer of proof in this proceeding.

[17]Subsequently, the Board revisited its holding in the context of an Order on EPA's Motion for Reconsideration in the same case, but it held to its initial decision and noted that if EPA wished to apply a broader definition of the term "operator" than the existing regulatory definition's application to owners and operators, and to extend the definition to include other persons, the proper procedure to follow is to amend the RCRA rules. Southern Timbers, 3 E.A.D. 880, 1992 WL 82626 (E.P.A. February 28, 1992.)

and it went on to advise that "[a]bsent circumstances that justify a piercing of the corporate veil, the Agency may not reach beyond a corporate operator to impose liability for violations of Part 265 upon a corporate officer."

Applying Southern Timber to this case, it is noted that the Part 280 standards also apply to "owners and operators" and that an "operator" refers to a "person in control of, or having responsibility for, the daily operation of the UST system." 40 C.F.R. § 280.12. Thus, on substantive grounds, the Court finds that the record does not support a conclusion that Mr. Carroll is the operator. Only Carroll Oil Company, Inc., as the Complaint itself identifies, is the operator.

Determination of an Appropriate Penalty

EPA's Post-Hearing Brief

In support of the proposed penalty of $19,500 and the imposition of a compliance order for the USTs which have been not been permanently closed at the Western 66 facility, EPA maintains that the penalty it seeks is reasonable and appropriate, upon consideration of the RCRA statutory factors of seriousness of the violation and good faith efforts to comply, as evaluated under the UST penalty policy. EPA notes that Carroll Oil presented no contrary evidence regarding the penalty other than its economic hardship, the consideration of which it views as "inappropriate" because it is not a statutory penalty factor under RCRA. EPA takes this position even though it considers it "appropriate" to consider economic hardship in settlement discussions, as the penalty policy "expand[s] consideration of the statutory factors" by evaluating "economic benefit, gravity and settlement." EPA Brief at 5. Alternatively, EPA maintains that, even if the obstacles to considering economic hardship are disregarded, Respondent failed to demonstrate an inability to pay in any event.

Assessing the twin statutory penalty factors, EPA views the violation to be serious because the USTs have been in temporary closure status for about eight years beyond the permissible period of 12 months. Recasting the same facts from another angle, EPA notes that Carroll Oil has been on notice of the requirement for those many years. Taking yet another perspective of these core facts, EPA notes that Carroll Oil has failed to "upgrade, permanently close and/or perform site assessments for any of the three USTs..." *Id*. at 6. In EPA's view this created a "grave potential for harm and risk to human health and the environment in that the existence and/or extent of contamination remains unknown. *Id*. As EPA sees it, Carroll Oil's failure to correct these matters amounts to a "lack of responsibility" which is also inconsistent with good faith. *Id*.

Addressing the application of its penalty policy, EPA relates that the gravity based component of a penalty is made up of several subfactors: the 'matrix value,' violator specific adjustments, an 'environmental sensitivity multiplier,' and the days of noncompliance multiplier. The 'matrix value' breaks down further into the potential for harm and the extent of deviation and each of these is further

categorized into 'major,' 'moderate,' or 'minor.' The facts related above caused EPA to rate both matrix values as 'major,' with the 'extent of deviation' value so categorized because the violation was substantial, long-lasting and continuing while the 'potential for harm' factor received that designation because of "the importance of the regulation that Respondent violated." *Id*. at 9. "Respondent's failure to permanently close the tanks or perform site assessments to determine the existence and extent of contamination, and the age and composition of the tanks," factors which "individually and collectively, pose a serious threat to human health and the environment," prompted the 'major' designation. *Id*. Upon examining the "violator-specific adjustment factors"of cooperation, willfulness or negligence, violation history, and 'unique' factors, EPA concluded that a 10% upward adjustment was warranted, based on Carrroll Oil's "lack of cooperation." This in turn rested on the fact that the violation had continued since September 1992 and Respondent's failure to respond to an EPA information request. (See stip. Ex. 10)

The "environmental sensitivity multiplier," or "ESM," allows EPA to consider "potential site-specific impacts that could be caused by the violation." In this instance, because it lacked environmental sensitivity information, EPA's calculation used the lowest possible value, a "1," and then considered, along with other unspecified considerations, the amount of petroleum "*potentially* released, toxicity of petroleum, *potential* hazards presented by a *potential* release and *potential* human or environmental receptors." *Id*. at 10-11. (emphasis added) To all of this, EPA then includes the "days of noncompliance multiplier." All of these adjustment factors resulted in a total gravity figure of $11,550 which when added to the $7,950 economic benefit,[18] produced the $19,500 penalty EPA proposes.[19]

Beyond the mechanics of applying its policy to this case, EPA also addresses in its brief, the reasonableness of its proposed penalty, the assessment of which rests upon its assumption that the Respondent could pay the penalty. This conclusion was based upon Carroll Oil's failure to provide sufficient evidence that it could not pay. Upon reviewing the information it had, EPA concluded that Carroll Oil was still "an active corporation" and that its "delinquent standing" had no bearing on its financial condition. *Id*. at 12. In fact, EPA concluded that it could have sought a much higher penalty by considering other related violations and taking a more severe view of Carroll's lack of cooperation and the willfulness it perceived in this violation.

EPA notes that the UST penalty policy "automatically categorizes" violations of 40 C.F.R. §

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[18]EPA believes that the Respondent gained an economic benefit of $7,950, a figure it derived by calculating the delayed expenditure and multiplying that by an interest rate of 10.6 % (reflecting the average weighted cost of capital) and the number of days of violation and then dividing that figure by the number of days in a year. EPA Brief at 8.

[19]EPA's witness, Ms. Young, revealed that she was not advised of any information after her first penalty calculation. As a result, she never saw Respondent's tax returns for 1991, 1992, 1994, or 1996 through 1998. Tr. 118.

280.70(c) as "major" for extent of violation and potential for harm. At the same time, EPA notes that the principal objective of the regulations is to "identify and contain existing contamination and to prevent releases from UST systems..." *Id*. at 14. Citing In the Matter of V-1 Oil Company,[20] RCRA Appeal No. 99-1,, 2000 WL 291421, Feb. 25, 2000, ("V-1 Oil") for the proposition that a failure to close such tanks poses significant health and environmental risks, EPA argues that the potential for harm is enough to consider the violation serious. Drawing additional parallels to V-1 Oil, EPA considered the age and composition of the tanks, that they were unlined, not fiberglass reinforced nor double-walled or cathodically protected, all as factors contributing to the violation's seriousness, along with the tanks' location in a commercial zone, amidst an area with a fluctuating groundwater table.

EPA also considered the "substantial period of noncompliance" as significantly contributing to the seriousness of the harm. Analogizing to V-1 Oil again, EPA notes that while "V-1 stalled for years in complying," Carroll's transgression is greater because a longer period of noncompliance has transpired. In EPA's view, Respondent's failure to comply with the regulations after all this time, despite multiple notices of its noncompliance and its awareness that product still remained in the tanks, makes the violation particularly egregious. *Id*. at 16. EPA also complains that "there is no way of determining the actual risks that the tanks pose" because the Respondent never did tank testing or a site assessment. Adopting the view of EPA witness Lucht, the agency asserts the real issue "isn't the amount of residue left in the bottom" but rather the "*amount of product that leaked out of the tank for the roughly 20 years when it was in operation*." *Id*. at 17. (emphasis added).

All of this seriousness is heightened, in EPA's view, by the revelation at the hearing that there is a fourth tank at the Facility, a 500 gallon waste oil tank, a situation over which "the agency has no way of knowing how much product initially was in the tank and the extent of any subsequent leakage."[21] *Id*. at 17-18.

Comparing the situation yet again to V-1 Oil, EPA also rails against Carroll Oil's lack of good faith, asserting that Respondent "has not attempted ANY good faith efforts to comply but rather flagrantly disregarded the UST closure regulations despite [many] notification[s]" and Mr. Carroll's longstanding awareness of the regulatory requirements. EPA Brief at 18. (emphasis in original). EPA also refers to

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[20]The Environmental Appeals Board's decision in V-1 Oil Company , RCRA Appeal No. 99-1,, 2000 WL 291421, Feb. 25, 2000 ("V-1 Oil") addressed the same standard at issue here, 40 C.F.R. § 280.70 (c), although distinctly different issues were involved. In V-1 Oil the Respondent had raised affirmative defenses of equitable estoppel and lack of fair notice and had asserted that the administrative law judge did not consider its good faith.

[21]As EPA deems the Respondent's identification that there is a fourth tank at the site to be a "new factor significantly increasing the seriousness for harm," the Court construes this as a conformance of the Complaint to the new facts and accordingly the fourth tank has been considered in the assessment of the penalty.

Respondent's outstanding state tank fees, its failure to file forms and to otherwise comply with WDEQ's technical requirements and disregarding the state's compliance orders, as evidence of "bad faith" on its part.[22]

Turning to the proposed penalty of $19,500, EPA argues for its reasonableness by again referring to V-1 Oil and the $25,000 penalty imposed there. Viewing Carroll Oil's violation as more serious by comparison, EPA reiterates that the period of noncompliance was shorter for V-1 Oil and that, unlike Carroll's tanks, the tanks in V-1 ultimately were removed from the ground.[23]

Given the foregoing, EPA asserts that, as it "gave adequate consideration of the statutory factors in calculating its proposed penalty, the presiding officer is bound to follow the agency's penalty computation." *Id*. at 21. However it also argues that, even if the Court looks to the statutory factors alone, the same conclusion would be reached. To support this view, EPA relies once more upon the administrative law judge's analysis in V-1 Oil, noting yet again that in assessing $25,000, the judge was faced with a comparatively less serious violation, as only two tanks were involved, the period of noncompliance was less (five years V-1 Oil as compared to more than eight years in this litigation), and Carroll Oil's "intentional disregard of the regulations." *Id*. at 21-22.

Last, EPA maintains that the Court may not consider Respondent's inability to pay claim, as it is not recognized in the statute nor permissible to consider under the UST penalty policy, except for settlement purposes.[24] Even if these reasons were to be ignored, EPA maintains that Carroll Oil failed to meet its burden and demonstrate an inability to pay. In this instance the information submitted by Carroll Oil was insufficient for EPA to determine whether there was an inability to pay. EPA also points to Carroll Oil's assets of $404,375, when its ceased operating in 1991. It notes that between 1992 and 1997, Respondent's assets were about $300,000, and that in 1998 the amount dropped to $140,213. Beyond these arguments, EPA asserts that economic hardship should not be a basis for reducing a penalty when "a violator *refuses* to correct a violation." *Id*. at 27.

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[22]As further evidence of Respondent's lack of good faith, EPA also maintains that Mr. Carroll, as the President of Carroll Oil, provided "erroneous answers to questions regarding the Company's financial relationship to other companies." *Id*. at 19, citing to the transcript at pgs. 222- 224.

[23]Although EPA relied extensively upon V-1 Oil to support its proposed penalty, it is noted that the administrative law judge in that case also departed from the Agency's penalty policy computation. That decision, including the judge's departure from the Policy, was upheld by the EAB.

[24]Inconsistently, EPA then contradicts itself by asserting that the Court cannot consider Carroll's inability to pay claim "unless the presiding officer adopts EPA's rationale and applies the UST policy." *Id*. at 22. However, properly applying the policy would prevent such consideration beyond the settlement stage, a fact EPA seems to realize later in the same brief.

Respondent's Post-Hearing Brief

Respondent urges the Court to depart from the penalty proposed by EPA. Noting that, by its own terms, the 1990 EPA penalty guidance is intended for guidance only and not intended to create rights, Respondent notes that EPA also reserved for itself, in the guidance document, the ability to "act at variance with [it] at any time and without public notice." Respondent's First Post-Hearing Brief at 4. Given that the policy is not substantive or procedural law, Respondent urges the Court to depart from it and also to consider its inability to pay.

Carroll notes that the property in issue is held as a secured interest through a mortgage deed to Phillips 66 Company ("Phillips"). Carroll Oil still owes $153,998 to Phillips on that mortgage and on that basis, asserts that EPA should be looking to Phillips as the holder of the secured interest on the property.

Discussion

The Environmental Appeals Board has made it clear that a judge has the discretion to assess a penalty different in amount from the penalty requested in the complaint as long as the reasons for the departure are adequately explained. The Board has recognized that "[u]ltimately, ... any penalty assessed must 'reflect a reasonable application of the statutory penalty criteria to the facts of the particular violations.'" In re: Predex Corporation, FIFRA Appeal No. 97-8,, 7 E.A.D. 591, 1998 WL 284965 (E.P.A. May 8, 1998) ("Predex"), quoting from In re: Employers Ins. of Wausau, 6 E.A.D. 735, 758, (EAB 1997). (In Predex the Board upheld the judge's penalty reduction to a zero dollar amount from the $7,000 sought by EPA.) The Board, which has "approved deviation from the penalty policies on numerous occasions" has done so in recognition of the fact that "policies serve as guidelines that need not be rigidly followed." In re: Ocean State Asbestos Removal, Inc. 7 E.A.D. 522,, 1998 WL 214543 (E.P.A March 13, 1998.), ("Ocean State"). Further, the Board will not substitute its judgment for that of the judge "absent a showing that the [judge] has committed an abuse of discretion or a clear error in assessing a penalty." *Id*.

For the reasons which follow, the Court departs from the EPA penalty policy and imposes a penalty of $ 3,500; $1,000 for each of the three USTs originally identified and $500 for the tank Respondent identified at the hearing. In assessing the seriousness of the violation EPA, after noting that the USTs here have been in temporary closure status for over eight years, repackages that fact from several vantage points. It points out that Carroll Oil has been on notice of that fact for nearly as many years, and that Carroll Oil did nothing to correct this situation for those years. This extended period of time, in EPA's estimation, created a "grave situation" for harm and risk to human health and the environment. In applying the "matrix value" of its policy, EPA again emphasizes the long-lasting and continuing nature of the violation and the Respondent's failure to permanently close the tanks. It also levied a 10% increase

to its penalty calculation because it viewed Carroll Oil's failure to permanently close the tanks as evidencing a lack of cooperation. This produced a gravity total of $11,550. When the economic benefit of noncompliance of $7,950 was added to this, EPA reached its total proposed penalty of $19,500.

The Environmental Appeals Board has emphasized that "EPA's adjudicative officers must refrain from treating [a] ... Penalty Policy as a rule and must be prepared to re-examine the basic propositions on which the Policy is based ..." In re Employers Ins. of Wausau, 6 E.A.D. 735, 761 (EAB 1997). The Court does so in this instance. There are several problems with the application of the penalty policy in this instance. First, EPA did not consider, because it never determined, the actual gravity attendant with the violation. It is inconsistent for the Agency to assert that the violation poses a serious threat to human health and the environment without determining the quantity and nature of product that actually remained in the tank. In short, EPA's assertions of serious gravity are severely undercut by its subsequent inaction. The Agency's concern was so minimal that it never returned to the site to accomplish the simple task of measuring the amount of remaining product. Thus it is not correct, as the Agency asserts, that it had "no way of determining the actual risks that the tanks pose." Further, EPA engages in pointless speculation[25] by asserting that the real issue is not the amount of residue left in the bottom of the tanks, but rather the "amount of product that leaked out of the tank for the roughly 20 years when it was in operation." The violation here pertains to a failure to permanently close tanks and has nothing to do with leaks that may have occurred during the years preceding the temporary closure. In addition to the immateriality, in this proceeding, of the tanks' condition during the years of operation, there is absolutely no evidence that product leaked out during those years nor in the years after the temporary closure. Never discerning the nature or amount of the remaining liquid in the tanks amounts to a significant flaw in the Agency's evaluation of the actual gravity involved. This failure is inconsistent with the policy's announced principal objective of identifying and containing existing contamination and to prevent releases from UST systems.

EPA also considered the "substantial period of noncompliance" as significantly contributing to the seriousness of the harm. However, in the Court's view, it is inadequate to evaluate this consideration in a vacuum. A measured assessment of the period of noncompliance cannot ignore a respondent's ability to come into compliance. In the same vein, the Court considers the application of the policy to be flawed by EPA's conclusion that Carroll Oil failed to make any good faith efforts to comply and flagrantly disregarded compliance with the closure regulations despite many notifications because it did not realistically consider whether Carroll had the financial means to do so. Despite becoming aware of the tax liens and the mortgage deed on the property, EPA made no conclusions about this information because they considered it to be incomplete.[26] Tr. 170.

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[25]EPA's witness, Ms. Young, revealed that she had never seen any documents that Carroll had filed with the state of Wyoming prior to 1991 regarding the condition of the tanks. Tr. 119.

[26]Although EPA noted that there was a precipitous drop in Carroll Oil's assets between 1997 and 1998, the Court accepts Mr. Carroll's explanation that the distributions were attributable to

The same defect in analysis exists with EPA's conclusion that Carroll derived an economic benefit of nearly $8,000. EPA's analysis, by not facing the reality that Carroll Oil has been out of business since 1992 has an otherworldly sense to it. Counsel's castigation of Respondent's continual failure over many years to do what the regulation requires ignores this fact and proceeds as if the corporation was a healthy concern. Yet, in reality, EPA has been fully aware of Carroll's condition in extremis, as evidenced by its eleventh hour attempt to add other respondents

Thus, the Court concludes that, as applied by EPA in this instance, the basic propositions of the Policy did not yield an appropriate penalty.

Determination of an appropriate penalty under the statute.

The Court agrees with EPA that, under the statute, there are only two criteria for determining the penalty: seriousness of the violation and good faith efforts to comply. Accordingly, the Court may not consider a Respondent's ability to pay in assessing an appropriate penalty.

EPA takes the position that, when measured by the statutory penalty criteria, the proposed penalty remains equally justified.[27] It notes that in both V-1 Oil and here the companies stalled for years without complying with the UST regulations. The Agency argues that Carroll's situation is more egregious, as a longer period of non-compliance has been involved, there were only two tanks involved in V-1 Oil and they were eventually removed, and because Carroll flagrantly disregarded the closure regulations.

However, as with the deficient analysis under the Policy, the statutory analysis also ignores that Carroll Oil Company lacked the wherewithal to remove the USTs. The EPA witness spoke with Carroll

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reduction of inventory, that no cash or liquid assets were involved, and that all actions were done at the instructions of the Company's accountant. Tr. 209, 215-217.

[27]Curiously, EPA maintains that UST violations are "too serious for issuing a field citation." EPA Brief at 14. This claim is at odds with EPA's action in V-1 Oil where, initially a $300 citation was issued. Alleging a violation of the same section cited here, EPA "issued to V-1 an "Expedited Enforcement Compliance Order and Settlement Agreement," otherwise known as a "field citation ... [and sought] permanent closure of the underground storage tanks, as well as a $300 penalty." Initial Decision at 1999 WL 118254, January 29, 1999. The assertion is also inconsistent with the UST penalty policy which indicates that the use of field citations is being explored with the manner of their use to be determined. U.S. EPA Penalty Guidance for Violations of UST Regulations, November 1990 at p.26.

after the inspection and was informed that the company had gone "belly up" and the witness understood that to mean that the Respondent had no money. Tr. 100. Certainly EPA was not laboring under the impression that Carroll was genuinely an "active corporation" after its witness noted during the inspection that the "windows and doors were boarded up ... and the dispensers were removed." Tr. 120. Further, EPA concedes that Carroll Oil had no gross sales or earnings from 1992 to the present. Tr. 175, 196.

By not fairly considering whether Carroll Oil had the financial resources to comply with the UST closure requirements, EPA's statutory analysis of the Respondent's good faith was incomplete. Given that Carroll Oil had long been defunct, there can be no realistic assessment that the corporation failed to act in good faith. Thus Carroll Oil's situation is notably distinguishable from that in V-1 Oil, where the Board noted that the Respondent failed to offer a sufficient explanation for its long delay in complying with the regulation. Accordingly, the Court determines that the penalty should not be increased or decreased on account of this factor.

So too, EPA's analysis of the gravity, under the statute, did not realistically assess the actual harm presented. EPA's witness conceded that it was possible that the amount of residue might have been "quite small" and that the only way to know the extent of the residue would be to use a dip stick. Tr. 112. As mentioned, EPA never bothered to perform that measurement.

If the tanks were drained to within 1" of the bottom, Mr. Lucht estimated that the amount of product would be less than twenty gallons. Accordingly, examining the gravity from the perspective that there was a small amount of product in each tank with no evidence that there has been any leakage, the statutory consideration of gravity[28] can be viewed as minimal[29].

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[28]While the policy's assessment of gravity considers the "harm to the program" that may occur if others, seeing one party not complying with the program, may then be tempted to follow suit. There is no indication that, as a statutory consideration, Congress considered anything other than the conventional notion of gravity as the degree of actual harm posed by the violation. Further, the premise of the policy that others may be tempted to ignore the regulatory requirements is doubtful where the violator is not complying because it is out of business.

[29]Although EPA attempted in its recall of witness Lucht to present additional evidence of gravity with the witness' testimony about the area's hydrology, it was obvious that this consideration had not dawned on EPA when it calculated the penalty, but was an afterthought prompted by questions by the Court. Even with this late consideration, Mr. Lucht qualified his gravity assessment because it rested upon an assumption that the nearby groundwater was *in fact* at a 15' depth and that there would have to be leaks from the tanks and the leaks would need to be severe enough. Tr. 144-147.

Despite EPA's frequent comparisons to V-1 Oil , in the Court's view the hazard presented in that case is distinguishable. In V-1 Oil the Respondent had filled up the tanks with water in an attempt to change their use but instead a mixture of the residual petroleum product and water was created, arguably presenting a more serious situation. In contrast, Carroll Oil attempted to remove all the product and then left the tanks in their near empty state. For the reasons expressed, on this record, the Court considers the gravity presented by the USTs to be minimal. The penalty imposed in this decision reflects, on this record, a realistic evaluation of the statutory criteria.

The Compliance Order

EPA has requested a compliance order requiring correction of the violative condition within 30 days of issuance of a final decision. If adopted the Court would be ordering that the USTs (including the aforementioned fourth tank) be cleaned, with the removal of all liquid and sludge and that the tanks then be removed or filled with inert material. Further, EPA's proposed order would require the Respondent to conduct a site assessment within 60 days of the final decision and the performance of all corrective action. Last, EPA would have the Order provide that Respondent is to pay all outstanding late fees.

The Court cannot help but observe that the corrective action EPA seeks through the sought after Order is not unlike its penalty demands, in that both requests ignore the reality that Carroll Oil is a boarded up facility, not an ongoing concern, and that it has been in such defunct state since 1992. Other tribunals have recognized that neither law nor equity authorizes a court to order a useless act or a futile order. *See* In re McClendon, 116 F. 3d 484, 1997 WL 305789, **2 (9th Cir. 1997), Pfeiffer v. Marion Center Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990), Bowen Engineering v. Estate of Reeve, 799 F. Supp. 467, 489 (1992). In Woodlands Ltd. v. Nationsbank, N.A and Westwood Insurance, 164 F.3d 628, 1998 WL 682156, ** 5 (4th Cir. 1998), the Court of Appeals taking note of defendant Westwood's financial demise, observed that fact presented a threshold question of whether it had the capability of granting relief, as Westwood had "effectively ceased to exist." The Court was concerned about the possibility of issuing a "useless order." This concern has been recognized in the environmental arena as well. In Ehrlich v. Reno, 1994 WL 613698, * 12 (E.D.Pa 1994), the court, in supporting EPA's ability to gain financial information concerning potentially responsible parties in a CERCLA matter, recognized the value of such information in order to avoid the specter of EPA issuing "a futile cleanup order to a PRP who lacks the money to pay for it..." The subject of useless orders was also addressed in Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp.1132, 1140, (E.D. Pa 1193) the court, noting that the defendant had already filed certain Form R's, observed that it would be pointless to order the defendant to file those forms for the years in which EPCRA violations were alleged.

Thus, the Court declines to enter such a compliance order because it is clear that it would be a

nullity.[30]

ORDER

A civil penalty in the amount of $3,500 is assessed against the Respondent, Carroll Oil Company, Inc. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

Mellon Bank
EPA Region 8
Regional Hearing Clerk
P.O. Box 360859
Pittsburgh, PA 15251-6859

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a);

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[30] Although the Court declines to issue the compliance order because it would be of no effect, it urges Mr. Carroll to do personally what he cannot be ordered to do legally by examining his personal assets and the assets of his other business enterprises and determining if he can voluntarily tap into assets from those businesses. Facing a fine that is considerably less than the amount EPA sought may allow Mr. Carroll to reconsider whether there may now be funds he can apply to permanently close the tanks. The estimate of the cost for Carroll Oil Company to come into compliance and have the tanks removed was between $18,000 to $20,000. Tr. 134. One avenue the Court hopes Mr. Carroll may explore is whether, in the spirit of civic duty, he may be able to voluntarily provide the funds in arrearage for the Wyoming DEQ UST corrective action and financial responsibility program, as outlined by Mr. Lucht at the hearing. Tr. 124-128.

(2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b), to review the Initial Decision.

William B. Moran
United States Administrative Law Judge

Dated: April 30, 2001

In the Matter of Carroll Oil Company, Inc., Respondent
Docket No. RCRA-8-99-05

CERTIFICATE OF SERVICE

I hereby certify that the **Initial Decision**, dated April 30, 2001 was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 30, 2001

Original By Regular Mail to:

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CERTIFIED MAIL RETURN RECEIPT REQUESTED:

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