BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
Andrew B. Chase a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc.,	
Respondents.	
Docket No. RCRA-02-2011-7503	

APPEAL BRIEF

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INTRODUCTION

Andrew B. Chase a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc. and Chase Commercial Land Development ("Appellant") appeal from an Initial Decision of Administrative Law Judge, M. Lisa Buschmann, issued June 20, 2013, assessing a civil penalty of $127,069.00, for violations of the Solid Waste Disposal Act. For the reasons stated below, the Administrative Law Judge erred in her Decision.

ISSUES PRESENTED FOR REVIEW

A. The Administrative Law Judge erred in awarding penalties for Counts 1, 2, 18 and 19 of the Complaint.

B. The Administrative Law Judge erred in refusing to consider Respondent's financial condition in making her award.

C. The Administrative Law Judge erred in not further reducing the amount of the penalties.

FACTUAL AND PROCEDURAL BACKGROUND

The United States Environmental Protection Agency filed its Complaint on April 7, 2011, containing 21 counts against several different Respondents. The Counts in the Complaint concern several gas stations owned by the Respondents, which are referred to in the Complaint as Service Stations #I - #VI. The Complaint improperly alleged that Service Station 1 was owned by Andrew Chase, individually. As set forth in the Answer, that Service Station was owned by Belmont, Inc., which the EPA failed to include as a Respondent in this action.

The allegations in the Complaint concern alleged violations dating back as early as 2006. During that five year period, prior to the EPA filing its Complaint, five of the six Service Stations were sold. The remaining Service Station, Service Station #1 located in Lyon Mountain, New York, is no longer operated by Belmont, Inc. It is instead leased to and operated by an unrelated third party.

Complainant submitted a Motion for Accelerated Decision as to Respondents' liability, and this Motion was granted in part in a Decision dated June 21, 2012. The parties agreed to cancel a hearing and to have the initial decision based upon the written record. The parties subsequently filed written submissions. The Administrative Law Judge made her Initial Decision on June 20, 2013. Respondents sought, and were granted, an extension of time to file their Notice of Appeal and Brief to August 26, 2013.

ARGUMENT

POINT I

THE ADMINISTRATIVE LAW JUDGE ERRED IN AWARDING PENALTIES FOR COUNTS 1, 2, 18 and 19 OF THE COMPLAINT

Of the six Service Stations at issue, five were sold prior to service of the Complaint, Compliance Order and Notice of Opportunity for Hearing. The only station not sold was Service Station I, with an address of 3851 Route 374 in Lyon Mountain, New York. Many of the alleged violations referred to in the Complaint concern issues that occurred as early as 2006 and ending in 2009. The Complaint incorrectly alleged that Service Station I in Lyon Mountain, New York is owned by Andrew Chase individually. That Service Station is actually owned by Belmont, Inc. a New York State Corporation.

Counts 1 and 2 of the Complaint, which relate to the Lyon Mountain facility, concern allegations that (1) there was a failure to provide annual tightness tests/monthly monitoring, and (2) annual test of line leak detector. However, Adirondack Energy and Paragon Environmental Construction, Inc. performed leak detector testing at the Lyon Mountain facility in 2009, 2010 and 2011 and found those tanks tested to have passed. Copies of those leak detector testing forms were previously submitted to the Administrative Law Judge. The Administrative Law Judge should have found that Counts 1 and 2 did not warrant any penalty.

Service Station VI, located at 7155 Route 9, Plattsburgh, New York, and previously owned by Respondent, Chase Services, Inc., was sold prior to service of the Complaint, Compliance Order, and Notice of Opportunity for Hearing. Count 18 and 19 relate to Service Station VI, and allege that there was a (18) failure to annually test the automatic line leak detector, and (19) provide adequate monthly monitoring for lines. Contrary to those allegations, Paragon Environmental Construction, Inc. performed leak detector testing at the Service Station VI. A copy of the 2011 inspection was previously provided to the Administrative Law Judge and part of the record. This demonstrates that those tanks at that facility passed. As a result of the evidence the Administrative Law Judge should have found that Counts 18 and 19 did not warrant any penalty.

POINT II

THE ADMINISTRATIVE LAW JUDGE ERRED IN REFUSING TO CONSIDER RESPONDENTS' FINANCIAL CONDITION IN MAKING HER AWARD

Despite their investigation, the EPA chose not to file this action until April 2011. By the time the EPA actually filed this Complaint, the various companies owning and operating the stations at issue, had run into financial hardship. Each of the stations, but for Lyon Mountain, had been sold, and Mr. Chase and the companies no longer have any ownership interest in those stations. Due to the financial conditions of the stations at the time of the sale, any net proceeds received from the sale were relatively minimal (as demonstrated in the tax returns provided to the EPA), and none of the named corporations are in operation. None of the Respondent corporations have any financial ability to pay any amount of fine.

While it is recognized that the fine calculations are statutory, the amount of the fines in this case are unnecessarily burdensome on Respondents. To impose the fines requested years after the fact and years after many of the stations have been sold, in fact, poses incredible financial hardship

upon Andrew Chase, individually (The corporate Respondents are no longer in business).

Respondents respectfully request that this Court revise the Initial Decision and consider the financial information showing financial hardship. It is ultimately to neither parties' benefit to ignore such evidence. The Respondents' financial condition is an unalterable fact. A penalty that is so large that it is beyond the financial means of the Respondents to pay, will only force the Respondents into bankruptcy, and prevent the EPA from being paid. On the other hand, a penalty that recognizes the Respondents' financial condition better insures that the EPA will be paid.

On or about March 26, 2012, the EPA was forwarded copies of the 2008 and 2009 tax returns for Chase Commercial Properties, the 2008 and 2009 tax returns for Chase Convenience Stores, the 2008 and 2009 tax returns for Chase Services, the 2008 tax return for Belmont, Inc., the IRS payment notice for Andrew Chase, individually, for the 2009 tax year, and New York State Department of Taxation Notice of Adjustment for Andrew Chase, individually. On June 14, 2012, a copy of the Individual Ability to Pay Claim (Financial Data Request Form) was forwarded to the EPA.

The purpose of exchanging the financial information provided the EPA with the opportunity to analyze the information which demonstrated the Respondents' very limited financial means to pay any penalties assessed in this matter. The EAB should consider the financial information submitted and revise the penalties to reflect the economic realities of the Respondents.

POINT III

THE ADMINISTRATIVE LAW JUDGE ERRED IN NOT FURTHER REDUCING THE AMOUNT OF THE PENALTIES

The U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990, specifically allows for adjustments to be made to the proposed penalty, including up to 80% of the "gravity-based component." In this case, the gravity-based component of

the amount requested by the EPA was $256,955.63 of the penalty. An 80% reduction of this should have been implemented in this case.

It is undisputed that no environmental contamination occurred as a result of any of the violations at any of the Service Stations. In addition, the calculated economic benefit to Respondents was minimal when compared with the gravity-based component of the penalty. The original gravity-based component was $256,955.63 of the total penalty. Even though the Administrative Law Judge reduced certain of the gravity-based components so that the total gravity-based penalty for all of the Counts is now $125,006.63, that penalty is still excessive when viewed against the economic benefit to Respondents. The Administrative Law Judge calculated the economic benefit in each of the Counts to total only $5,656.00. The amount of the revised penalty still grossly exceeds the calculated economic benefit and still imposes a devastating financial, and unmeetable burden upon Respondents.

The EPA chose to file an all-encompassing Complaint involving alleged violations over an almost five year period. Prior to the Complaint being filed, the Respondent sold all but one of their Service Stations. This deprived Respondents of the opportunity to resolve some or all of the violations through remediation efforts or other agreements concerning a change in the manner in which the Service Stations were operated. It has also deprived Respondents of the ability to pay the penalties through economic revenue from the Service Stations. Respondents' Corporations are out of business and hold no assets. Mr. Chase, as reflected in the financial information provided to the EPA, does not have the financial resources to pay this excessive penalty, as he no longer has the Service Stations to generate income from which to make payments.

ALTERNATIVE CONCLUSIONS OF FACT and LAW

Respondents respectfully request that the Initial Decision be modified and include alternate

conclusion of law whereby Respondents are not responsible for any penalties for Counts 1, 2, 18 and 19, thereby reducing the penalties by a total of $63,820.00. In addition, or in the alternative, the Board should reduce the gravity-based components to the maximum allowed of 80%.

CONCLUSION

For the aforestated reasons, Respondents respectfully request that the Initial Decision be modified.

Respectfully submitted,

STAFFORD, PILLER, MURNANE, PLIMPTON, KELLEHER & TROMBLEY PLLC

By: _____

Thomas W. Plimpton, Esq.
Attorneys for ANDREW B. CHASE a/k/a ANDY CHASE, CHASE SERVICES, INC., CHASE CONVENIENCE STORES, INC., and CHASE COMMERCIAL LAND DEVELOPMENT
Office and P. O. Address
One Cumberland Avenue
P. O. Box 2947
Plattsburgh, New York 12901-0269
(518) 561-4400

DATED: August 22, 2013.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appeal Brief 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., were served by United States First Class Mail on the following persons this 22nd day of August, 2013.

Original and One Copy	Clerk of the Board U.S. Environmental Protection Agency Environmental Appeals Board 1201 Constitution Avenue, NW U.S. EPA East Building, Room 3334 Washington, D.C. 20004
Two Copies	Lee A. Spielmann, Esq. Assistant Regional Counsel Office of Regional Counsel U.S. Environmental Protection Agency, Region 2, 290 Broadway, 16th Floor New York, New York 10007-1866

Thomas W. Plimpton, Esq.
Attorneys for ANDREW B. CHASE a/k/a ANDY CHASE, CHASE SERVICES, INC., CHASE CONVENIENCE STORES, INC., and CHASE COMMERCIAL LAND DEVELOPMENT
Office and P. O. Address
One Cumberland Avenue
P. O. Box 2947
Plattsburgh, New York 12901-0269
(518) 561-4400 (phone)
(518) 561-4848

Date: August 22, 2013.