UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Amerimart Development Company, Inc., Qual-Econ Lease Co., Inc., MJG Enterprises, Inc., and Clear Alternative of Western NY, Inc. (dba G&G Petroleum)	)	**Docket No. RCRA-02-2012-7501**
	)	
	)	
Respondents	)	

DEFAULT ORDER AND INITIAL DECISION

I. Background

This proceeding was initiated on July 16, 2012, with the filing of a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("First Complaint") by the Director of the Office of Compliance and Enforcement for the United States Environmental Protection Agency Region 2, ("Complainant" or the "Region"), against respondents Amerimart Development Company, Inc. ("Amerimart"), Commercial Realty Fund II ("Commercial"), Qual-Econ Lease Co., Inc. ("Qual-Econ"), MJG Enterprises, Inc. ("MJG Enterprises"), and Clear Alternative of Western NY, Inc. (dba G&G Petroleum) ("G&G Petroleum") (collectively "Respondents"). The First Complaint alleges that Respondents owned and/or operated eight facilities at which underground storage tanks ("USTs") containing petroleum are installed. The First Complaint charges Respondents in thirty-three counts with violations of Section 9003 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b, and the regulations codified at 40 C.F.R. Part 280. The First Complaint proposed a total penalty of $582,803.

A copy of the First Complaint was sent to each named Respondent, via certified mail, return receipt requested. On September 25, 2012, The Slater Law Firm, PLLC, filed an Answer on behalf of Respondents Amerimart, Qual-Econ, MJG Enterprises, and G&G Petroleum, and a separate Answer on behalf of Commercial. The Answers denied liability for all alleged violations, and raised several affirmative defenses, including preclusion of liability through the statute of limitations. The Answers also requested a hearing on the allegations of the First Complaint, pursuant to 40 C.F.R. § 22.15(c).

On October 18, 2012, Chief Administrative Law Judge Susan L. Biro issued an order initiating alternative dispute resolution ("ADR") and appointing Administrative Law Judge Barbara A. Gunning as the ADR neutral. The order directed that "the ADR process [would] automatically terminate on December 17, 2012," but could be extended up to 60 days and "in no

event [would] ADR continue for longer than 4 months." On November 21, 2012, Judge Gunning, issued a report recommending that ADR be continued for another month, with a termination date of January 18, 2013, which Chief Judge Biro approved. On December 19, 2012, Judge Gunning issued an order returning this matter to the Chief Administrative Law Judge for reassignment to another ADR neutral, due to Judge Gunning's impending retirement. On December 19, 2012, Judge Biro appointed Administrative Law Judge M. Lisa Buschmann as the ADR neutral, and scheduled ADR to terminate on January 18, 2013.

On January 22, 2013, Judge Buschmann issued a report recommending the ADR process be continued until February 19, 2013. The report indicated the parties had developed a framework for a final settlement, but had yet to finalize the terms. On February 14, 2013, Judge Bushmann filed a second report, this time recommending the ADR process be terminated and the case assigned to a judge for resolution through litigation.

On February 15, 2013, Judge Biro appointed herself to preside over the proceeding. On February 25, 2013, Judge Biro issued an Initial Prehearing Order instructing the parties to file a fully-executed Consent Agreement and Final Order ("CAFO") no later than March 25, 2013. On March 11, 2013, the parties filed a joint motion requesting the ADR neutral be reappointed and the parties be given forty-five days to reach a final settlement. The joint motion was granted on March 22, 2013, and the termination date for ADR was set as May 6, 2013.

On May 9, 2013, Judge Buschmann filed a report recommending the ADR process again be terminated. The report stated the parties had reached a settlement and were in the process of drafting a CAFO. Judge Buschmann further recommended the case be held in abeyance to give the parties time to finalize the settlement. On May 10, 2013, Judge Biro again appointed herself to preside over the proceeding. On May 17, 2013, Judge Biro issued an Initial Prehearing Order directing the parties to submit a CAFO memorializing their settlement no later than July 19, 2013. The order directed the parties to file a joint status report if a CAFO could not be executed by July 19, 2013. On July 10, 2013, Complainant filed a status report and a motion for an extension of time. In the motion, Complainant requested until September 2, 2013, to amend the Complaint to remove Commercial, and until September 17, 2013, for the remaining parties to file a fully executed CAFO. On July 11, 2013, Judge Biro issued an order granting the requested extension.

On August 1, 2013, Complainant filed a status report averring that an agreement had been reached between the parties on the final language of the CAFO. On August 22, 2013, Complainant filed a "Motion to Amend Complaint," and an "Amended Complaint, Compliance Order and Notice of Opportunity for Hearing" (the "Amended Complaint" or the "Complaint") removing references to Commercial and updating such allegations to instead identify operation and ownership by Amerimart. Complainant indicated that Respondents' counsel had agreed to accept Service of Process of the Complaint "on behalf of (and in lieu of) each of the Respondents." Status Rep. at 2 (Aug. 22, 2013). A copy of the Amended Complaint was sent to the Slater Law Firm via First Class Mail. On August 27, 2013, Judge Biro granted the "Motion

to Amend Complaint," and allowed Respondents to file an amended answer within twenty-one days. Respondents did not file an answer to the Complaint.

On September 17, 2013, Complainant filed a status report and a joint motion requesting additional time for settlement negotiations. In the report, Complainant wrote that Respondents' counsel had informed Complainant that "the principals of each of the Respondents had conceptually approved of the terms and language of the CAFO," with the exception of one provision therein. Status Rep. & Jt. Mot. for Ext. of Time at 1 (Sept. 16, 2013). Thus, the parties requested an extension of time until September 30, 2013, to file a fully executed CAFO. The request was granted, and the parties were directed to file either a joint status report or a fully executed CAFO no later than September 30, 2013.

In a letter dated September 27, 2013, Attorney Craig A. Slater, of the Slater Law Firm, informed this Tribunal that he would withdraw as counsel for all Respondents, effective upon receipt. The letter stated that Respondent Amerimart signed the CAFO, but Respondents Qual-Econ, MJG Enterprises, and G&G Petroleum would not. The letter directed that all further notices or pleadings should be served directly to each Respondent. On September 30, 2013, Complainant filed a status report restating that there was no settlement to the case.

On October 22, 2013, the undersigned was designated to preside over this matter. On October 24, 2013, the undersigned issued a Prehearing Order directing the parties to prepare and file prehearing exchanges of information ("Prehearing Exchange"). Each party was instructed to include, among other things, the following with its Prehearing Exchange:

> (A) a list of the names of any witnesses the party intends to call at the hearing, or a statement that no witnesses will be called. . . .
>
> (B) copies of all documents, records, and other exhibits the party intends to introduce into evidence. . . .
>
> (C) a statement indicating where the party wants the hearing to be held, and how long the party will need to present its case. *See* 40 C.F.R. §§ 22.21(d), 22.19(d).

Prehearing Order (Oct. 24, 2013), at 2. Additionally, Respondents were instructed to include the following with their Prehearing Exchange:

> (A) copies of any documents in support of the denials made in the Answer;
>
> (B) all factual information Respondents consider relevant to the assessment of a penalty and any supporting documentation;

> (C) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position; and
>
> (D) confirmation of the current address of record for service of process for each Respondent.

Id. at 3. Respondents were ordered to file their Prehearing Exchange no later than December 27, 2013. The Prehearing Order also included the following warning in underlined print:

> Each Respondent is hereby notified that its failure to either comply with the prehearing exchange requirements set forth herein or to state that it is electing only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against it.

Id. at 4. The Prehearing Order additionally contained the following instruction, in italicized print, regarding the filing of any dispositive motion:

> If either party intends to file any dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a), it shall be filed within 30 days after the due date for Complainant's Rebuttal Prehearing Exchange.

Id. at 7. Copies of the Prehearing Order were served on each Respondent via regular mail at its last known address, which was the address where the First Complaint had been served. *See* 40 C.F.R. § 22.5(c)(4) (requiring parties to promptly notify the Tribunal of address changes, and authorizing service to a party's last known address). Further, copies were also sent to additional addresses for Qual-Econ, MJG Enterprises, and G&G Petroleum that Complainant had provided. The copy sent to Respondent G&G Petroleum at its last known address was returned by the Postal Service marked: "Return to Sender, Attempted, Unable to Forward." No other copies were returned.

On November 26, 2013, Respondent Amerimart filed a motion indicating that it (and it alone) had retained new counsel, and requesting that it be given additional time to prepare and submit its Prehearing Exchange. Amerimart further indicated that it had been unable to reach a representative for the other Respondents in this case, and that telephone messages left for the principal of the other Respondents on November 25 and 26, 2013, had not been returned. The motion was granted by order dated December 3, 2013. Copies of the order were served on Qual-Econ, MJG Enterprises, and G&G Petroleum by regular mail at their addresses of record, and at the additional addresses previously provided by Complainant. The copy sent to MJG Enterprises

at its additional address was returned marked: "Return to Sender, No Such Number, Unable to Forward." The copy sent to Respondent G&G Petroleum at its last known address of record was returned and marked: "Not Deliverable as Addressed, Unable to Forward." No other copies were returned.

Complainant timely filed its Initial Prehearing Exchange on January 3, 2014, providing a revised additional address for MJG Enterprises in the certificate of service. Amerimart timely filed its Prehearing Exchange on January 22, 2014. Respondents Qual-Econ, MJG Enterprises, and G&G Petroleum did not file Prehearing Exchanges or otherwise respond to the Prehearing Order on or before the January 27, 2014 filing deadline.

On February 4, 2014, the undersigned issued an Order to Show Cause directing Qual-Econ, MJG Enterprises, and G&G Petroleum to show good cause, on or before February 14, 2014, explaining why they failed to file Prehearing Exchanges in violation of the Prehearing Order and the order of December 3, 2013, and why a default order should not be entered against them. Respondents were warned that "a party may be found to be in default upon failure to comply with an order of the presiding Administrative Law Judge," per Section 22.17(a) of the Consolidated Rules of Practice. Order to Show Cause at 1 (Feb. 4, 2014). The Order to Show Cause was served on Qual-Econ, MJG Enterprises, and G&G Petroleum by both Certified Mail and regular mail at their addresses of record, and at the alternative addresses previously provided by Complainant, including a new alternative address for Qual-Econ. As to Qual-Econ, copies of the Order to Show Cause sent by Certified Mail were returned marked: "Return to Sender, Unclaimed." As to MJG Enterprises, copies of the Order to Show Cause sent by Certified Mail were returned marked: "Return to Sender, Unclaimed." As to G&G Petroleum, copies of the Order to Show Cause sent by regular and Certified Mail to its last known address of record were returned by the Postal Service and marked, respectively, as follows: "Return to Sender, Attempted—Not Known, Unable to Forward" and "Return to Sender, Unclaimed." The copy of the Order to Show Cause sent to G&G Petroleum's alternative address by Certified Mail was returned marked: "Return to Sender, Unclaimed."

On February 6, 2014, Complainant filed its Rebuttal Prehearing Exchange together with a motion requesting that the deadline for filing dispositive motions be extended from March 10, 2014, to June 9, 2014. The requested extension was denied by order on February 10, 2014.

Respondents Qual-Econ, MJG Enterprises, and G&G Petroleum did not file a response to the Order to Show Cause, or otherwise contact the Office of Administrative Law Judges, on or before February 14, 2014, as directed in the Order to Show Cause.

On February 26, 2014, Complaint filed a Motion for Default Judgment on Liability (the "Motion for Default") against Qual-Econ, MJG Enterprises, and G&G Petroleum. With the Motion, Complainant also filed a motion requesting the deadline for filing additional dispositive motions be extended by thirty days to allow it to file a motion seeking default with respect to the penalty in this matter. On February 28, 2014, the undersigned issued an order staying the deadline for filing additional dispositive motions pending resolution of the Motion for Default.

On March 31, 2014, Complainant filed notice that it had entered into a fully-executed CAFO with Amerimart, resolving all claims against that Respondent only. Copies of the CAFO were served on Qual-Econ, MJG Enterprises, and G&G Petroleum.

On May 21, 2014, Complainant filed a Motion for Default Judgement on Penalty and Injunctive Relief (the "Penalty Motion"), with the following supporting materials: a Memorandum in Support of Complainant's Motion for Default Judgment Assessing Penalties and Ordering Injunctive Relief ("Penalty Memo"); the First Declaration of Paul Sacker ("First Sacker Declaration"); the Second Declaration of Paul Sacker ("Second Sacker Declaration"); and revised penalty calculation worksheets and charts marked as Complainant's Exhibit 70 ("CX 70"). The Penalty Motion proposes that a penalty of $61,085 be assessed against Qual-Econ, a penalty of $113,980 be assessed against MJG Enterprises, and a penalty of $115,175 be jointly assessed against Qual-Econ and G&G Petroleum, for a total collective penalty of $290,241. Penalty Mot. at 1; Penalty Mem. at 10–11. The Penalty Motion also requests that a Compliance Order be issued directing Qual-Econ and G&G Petroleum to bring their facilities into compliance with the UST regulations. Penalty Mot. at 2; Penalty Mem. at 24–27; First Sacker Decl. at 27–28. To date, neither Qual-Econ, nor MJG Enterprises, nor G&G Petroleum have filed a response to either the Motion for Default or the Penalty Motion.

II. Entry of Default

In the Motion for Default, Complainant requests that a default be entered against Qual-Econ, MJG Enterprises, and G&G Petroleum, and a default order be issued finding Qual-Econ liable for the violations alleged in Counts 5 through 11 and 27 through 33, MJG Enterprises liable for the violations alleged in Counts 23 through 26, and G&G Petroleum liable for the violations alleged in Counts 27 through 33.

The Consolidated Rules of Practice (the "Rules") provide:

> A party may be found in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's rights to contest such factual allegations.

40 C.F.R. § 22.17(a). The Rules further provide:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

40 C.F.R. § 22.17(c). The Environmental Appeals Board ("EAB") has explained that, though there is a strong preference in the law for cases to be resolved on their merits, the Rules provide for default as an essential tool to prevent litigants from abusing the administrative litigation process. *Fulton Fuel Co.*, CWA Appeal No. 10-03, 2010 EPA App. LEXIS 41, **7–8 (EAB, Sept. 9, 2010) (citing *JHNY, Inc.*, 12 E.A.D. 372, 385–93 (EAB 2005)).

This matter was initiated on July 16, 2012, almost two years prior to the date of this Order. Respondents Qual-Econ, MJG Enterprises, and G&G Petroleum answered the First Complaint with the benefit of counsel, and with counsel spent almost a year attempting to reach a settlement to resolve the allegations against them. When their counsel presented them with a final negotiated agreement, they refused to accept its terms, as was their right. However, following the termination of ADR, neither Qual-Econ, nor MJG Enterprises, nor G&G Petroleum have participated in the ensuing litigation.

Respondents Qual-Econ, MJG Enterprises, and G&G Petroleum were ordered to file Prehearing Exchanges of information no later than January 27, 2014. They failed to do so, in violation of both the Prehearing Order and the requirements of 40 C.F.R. § 22.19(a). Qual-Econ, MJG Enterprises, and G&G Petroleum also disregarded the undersigned's Order to Show Cause and did not by February 14, 2014, show why there was good cause to excuse their failure to comply with the Prehearing Order or the prehearing exchange requirements of 40 C.F.R. § 22.19(a). To date, Qual-Econ, MJG Enterprises, and G&G Petroleum have not filed Prehearing Exchanges, filed changes of address, or otherwise contacted this Tribunal to explain or remedy their failure to comply with the undersigned's orders. The record, taken as a whole, does not show good cause why a default should not be entered against Qual-Econ, MJG Enterprises, and G&G Petroleum. *See* 40 C.F.R. § 22.17(c).

Respondents Qual-Econ, MJG Enterprises, and G&G Petroleum are hereby found to be in default for their failure to comply with the Prehearing Order, the Order to Show Cause, or the prehearing exchange requirements of 40 C.F.R. § 22.19(a). Default constitutes an admission of all facts alleged in the Complaint and a waiver of Qual-Econ, MJG Enterprises, and G&G Petroleum's rights to contest such factual allegations. 40 C.F.R. § 22.17(a). The facts alleged within the Complaint will be examined to determine if the admissions establish that Qual-Econ, MJG Enterprises, and G&G Petroleum are liable for the violations alleged.

III. Assessment of Liability

A. Counts 5 through 9: Super Stop Service Station at 1545 Broadway, Buffalo, New York

To be liable for the violations alleged to have occurred at the Super Stop Service Station, located at 1545 Broadway, Buffalo, New York ("1545 Broadway"), Qual-Econ must have been an owner or operator of the UST systems associated with that facility during the relevant time period. An owner is defined as "any person who owns a UST system used for storage, use or dispensing of regulated substances." 40 C.F.R. § 280.12. An operator is defined as "any person

in control of, or having responsibility for, the daily operations of the UST system." *Id.* The Complaint[1] alleges that Qual-Econ "owned and/or operated and continue(s) to own and/or operate two petroleum UST systems (9000 and 3,000 gallon [sic] USTs) located at 1545 Broadway, Buffalo, NY." Compl. ¶ 117; *see id.* at ¶¶ 119, 121, 133 (describing documents showing Qual-Econ's ownership or control of USTs at the facility).

Count 5 of the Complaint alleges Qual-Econ failed to use overfill prevention equipment between at least July 1, 2007, and May 11, 2010, for the new tank systems at the Super Stop Service Station in violation of 40 C.F.R. § 280.20(c)(1)(ii). Compl. ¶¶ 134–35. Section 280.20(c)(1)(ii) requires owners and operators of new UST systems to equip each system with overfill prevention equipment meeting specific performance standards. 40 C.F.R. § 280.20(c)(1)(ii)(A)–(C). To establish a violation of 40 C.F.R. § 280.20(c)(1)(ii), Complainant must establish: (1) The USTs located at the facility are "new UST systems," as defined by Section 280.12; (2) The UST systems at the facility store a "regulated substance" as defined by Section 280.12; and (3) The UST systems were not equipped with spill and overfill prevention equipment meeting one of three categories listed in Section 280.20(c)(1)(ii).

A new UST system is defined as a "tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988." 40 C.F.R. § 280.12. Regulated substances include "[p]etroleum . . . that is liquid at standard conditions of temperature and pressure," including motor fuels. *Id.* "Both of the UST systems at" 1545 Broadway "were installed subsequent to 1988," and were used to contain gasoline.[2] Compl. ¶ 123; *see id.* at ¶¶ 117, 139, 155. The USTs located at 1545 Broadway were therefore new UST systems used to store a regulated substance within the meaning of 40 C.F.R. § 280.12. Qual-Econ was therefore required to use spill and overfill prevention equipment in conjunction with the UST systems as set forth in 40 C.F.R. § 280.20(c)(1). "Between at least July 1, 2007 and May 11, 2010 there was no overfill device for the 9,000 and 3,000 gallon tanks" at 1545 Broadway. Compl. ¶ 134; *see id.* at ¶¶ 125–33 (describing inspections and documents establishing lack of overfill prevention).

The facts alleged in the Complaint, and admitted by Qual-Econ through the entry of default, establish that Qual-Econ was in violation of 40 C.F.R. § 280.20(c)(1)(ii) for a period beginning July 1, 2007, and ending May 11, 2010, as alleged in Count 5. However, the Complaint was not filed, and this action was not commenced, until July 16, 2012, five years and fifteen days after the first date of violation alleged. The general statute of limitations, codified at 28 U.S.C. § 2462, precludes actions for "the enforcement of any civil fine, penalty, or forfeiture . . . unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2464. Application of a statutory limitations period is typically a waivable affirmative defense that a respondent must affirmatively raise and prove at hearing. *See* 40 C.F.R. §§ 22.15(b) (must

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[1] All references and citations to the "Complaint" refer to the Amended Complaint unless otherwise noted.

[2] The undersigned notes that gasoline is a petroleum product that is a liquid under standard conditions and is commonly used as a motor fuel.

raise any defenses in answer), 22.24(a) (respondent has burden of presentation and persuasion for affirmative defenses); Fed. R. Civ. P. 8(c) (listing statute of limitations as an affirmative defense); *Lazarus, Inc.*, 7 E.A.D. 318, 333 (EAB 1997) ("[M]atters required to be included in the answer may be waived."). Here, Respondents did raise the statute of limitations as a defense in their Answer to the First Complaint and, though the default against Qual-Econ acts as an admission of the facts alleged in the Complaint, the Complaint shows on its face that fifteen days of violation fall outside the limitations period. Under the circumstances, finding Qual-Econ liable for the violations admittedly occurring between July 1, 2007, and July 15, 2007, would not be consistent with the law. Therefore, Qual-Econ is liable for the violation alleged in Count 5, for the period of July 16, 2007, through May 11, 2010.

Count 6 of the Complaint alleges Qual-Econ failed to inspect the cathodic protection system of the UST systems between at least December 1, 2008, and March 19, 2010, in violation of 40 C.F.R. § 280.31(b)(1), and also failed to "maintain records of the results of testing from the last two triennial inspections of the two UST systems" in violation of 40 C.F.R. § 280.31(d)(2). Compl. ¶¶ 149–51. To establish a violation of Section 280.31(b)(1), Complainant must show: (1) The UST systems at the facility are steel tanks; (2) The USTs are equipped with cathodic protection;[3] (3) The USTs contain regulated substances; and (4) The cathodic protection systems were not tested for proper operation within six months of installation, and at least every three years thereafter, by a qualified cathodic protection tester.[4] 40 C.F.R. § 280.31(b)(1). To establish a violation of Section 280.31(d)(2), Complainant must show "[t]he results of testing from the last two" triennial inspections have not been maintained and made available. 40 C.F.R. § 280.31(d)(2); *see* 40 C.F.R. § 280.34 (reporting and recordkeeping requirements).

The two USTs at 1545 Broadway "are steel tanks that have sacrificial anodes for corrosion protection and use piping with metallic components to deliver gasoline to dispensers." Compl. ¶ 139. The USTs "were installed on June 1, 1999 and were equipped with a cathodic protection system at that time." *Id.* at ¶ 141. "Between at least December 1, 2008 and March 19, 2010 . . . Qual-Econ did not test the cathodic protection system of the two UST systems," and "did not maintain records of the results of testing from the last two triennial inspections of the two UST systems at" 1545 Broadway. *Id.* at ¶¶ 148–49; *see id.* at ¶¶ 141–47 (inspections and documentation showing lack of testing and recordkeeping). Qual-Econ therefore violated 40 C.F.R. §§ 280.31(b)(1) and 380.31(d)(2), and is liable for a period beginning December 1, 2008, continuing through March 19, 2010, as alleged in Count 6.

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[3] Cathodic protection is defined as a "technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell." 40 C.F.R. § 280.12.

[4] A cathodic protection tester is defined as a person who can demonstrate an understanding of the principles and measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. 40 C.F.R. § 280.12. A cathodic protection tester "must have an education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems." *Id.*

Count 7 of the Complaint alleges Respondent Qual-Econ failed to conduct annual line tightness tests or monthly monitoring for pressurized piping of the two UST systems at 1545 Broadway between July 1, 2007, and October 14, 2008, in violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), 280.41(b)(1)(ii), and 280.45(b). Compl. ¶¶ 161–62. To establish a violation of Section 280.41(b)(1)(ii), the Complainant must show: (1) The USTs at 1545 Broadway are equipped with "[u]nderground piping that routinely contains regulated substances;" (2) The underground piping "conveys regulated substances under pressure;" and (3) The underground piping did not "[h]ave an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c)."[5] 40 C.F.R. § 280.41(b)(1)(ii). Sections 280.34(b)(4), 280.34(c), and 280.45(b) require the owner or operator of a UST system to "maintain records . . . demonstrating compliance," on site or readily available for production, including "[t]he results of any sampling, testing, or monitoring . . . for at least 1 year." 40 C.F.R. § 280.45(b)–(c); *see* 40 C.F.R. § 280.34(b)(4) (referring to § 280.45).

"The two UST systems" at 1545 Broadway "had underground piping that routinely contained product and [were] used to convey gasoline under pressure." Compl. ¶ 155. "Between at least July 1, 2007 and October 14, 2008, . . . Qual-Econ failed to have either an annual line tightness test conducted . . . or monthly monitoring conducted . . . for the pressurized piping of the" UST tank systems at 1545 Broadway. *Id.* at ¶ 159. Qual-Econ also "failed to maintain records demonstrating annual line tightness test[ing] or monthly monitoring for the pressurized piping for the two UST systems" at 1545 Broadway for the same period. *Id.* at ¶ 160. Qual-Econ therefore violated 40 C.F.R. §§ 280.34(b)(4), 280.34(c), 280.41(b)(1)(ii), and 280.45(b), as alleged in Count 7. Consistent with 28 U.S.C. § 2462, Qual-Econ is therefore liable for the violation alleged in Count 7 for a period beginning July 16, 2007, and ending October 14, 2008.

Count 8 of the Complaint alleges Qual-Econ failed to conduct an annual test of the operation of the automatic line leak detectors ("ALLDs") for pressurized piping of the two UST systems at 1545 Broadway between June 1, 2008, and October 14, 2008, in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), and failed to maintain records of annual ALLD tests for at least one year in violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b). Compl. ¶¶ 177–78. To establish a violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), the Complainant must prove: (1) The UST systems at 1545 Broadway are equipped with ALLDs; and (2) The operation of the ALLD was not tested annually "in accordance with the manufacturer's requirements." 40 C.F.R. § 280.44(a).

"As of June 1, 1999 the piping for the two USTs" at 1545 Broadway "was equipped with [ALLDs]." Compl. ¶ 169. "[A]n annual test of the operation of the" ALLDs for the UST systems at 1545 Broadway was conducted "for the first time, on October 14, 2008." *Id.* ¶ 174. "Between at least June 1, 2008 and October 14, 2008, . . . Qual-Econ did not conduct annual tests of the operation of the ALLDs for the pressurized piping of UST systems" at 1545 Broadway.

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[5] Section 280.44(b) states that "[a] periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure." 40 C.F.R. § 280.44(b). Section 280.44(c) provides for further testing alternatives.

Id. at ¶ 175. During that same period, Qual-Econ also "did not maintain any records demonstrating that annual tests of the operation of the ALLDs had been conducted on the pressurized piping of the UST systems" at 1545 Broadway. *Id.* at ¶ 176. Qual-Econ therefore violated the testing requirements of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), and the recordkeeping requirements of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), from June 1, 2008, to October 14, 2008, as alleged in Count 8.

Count 9 of the Complaint alleges that between July 1, 2007, and April 1, 2010, Qual-Econ failed to maintain the results of at least one year of monitoring for releases from the two USTs at 1545 Broadway, in violation of 40 C.F.R. §§ 280.34(b), 280.34(c), and 280.45(b). Compl. § 186. Section 280.43 requires owners or operators of USTs to employ specified methods of release detection for the tanks. *See* 40 C.F.R. § 280.43 ("Methods of release detection for tanks."). Sections 280.34(b), 280.34(c), and 280.45(b) require the owner or operator of a UST system to "maintain records . . . demonstrating compliance," on site or readily available for production, including "[t]he results of any sampling, testing, or monitoring . . . for at least 1 year." 40 C.F.R. § 280.45(b); *see* 40 C.F.R. § 280.34(b)(4) (referring to § 280.45). "Between at least July 1, 2007 and April 1, 2010, [Qual-Econ] did not maintain results/records of release detection monitoring for the two tanks at" 1545 Broadway. Compl. ¶ 185. Qual-Econ therefore failed to comply with the recordkeeping requirements of 40 C.F.R. §§ 280.34(b), 280.34(c), and 280.45(b), and consistent with 28 U.S.C. § 2462, is liable for the violations alleged in Count 9 for a period from July 16, 2007, through April 1, 2010.

B. Counts 10 through 11: Amerimart-Amherst Service Station at 5565 Millersport Highway, Amherst, New York

"Qual-Econ [has] owned and/or operated, and continued to own and/or operate two petroleum UST systems (a 10,000 gallon gasoline UST and a 8,000 gallon gasoline UST . . .) at the Amerimart-Amherst facility" at 5565 Millersport Highway, Amherst, New York ("5565 Millersport Highway"). Compl. ¶ 188. The USTs "were installed on December 1, 1999," and are constructed of fiberglass-coated steel for gasoline storage. *Id.* ¶¶ 195–96. "[I]nventory control records for" the 8,000 gallon UST incorrectly showed that the UST had a volume of 6,000 gallons, and this "led to inaccurate results using the inventory control method for release detection." *Id.* ¶¶ 200–02. The USTs at 5565 Millersport Highway "have been in temporary closure" as provided in 40 C.F.R. § 280.70 "since at least . . . August 13, 2008," but were not emptied of product until October 1, 2009. *Id.* at ¶¶ 203–05.

Count 10 of the Complaint alleges Qual-Econ failed to perform accurate release detection monitoring of the UST systems at 5565 Millersport Highway between July 1, 2007, and October 1, 2009, in violation of 40 C.F.R. § 280.41(a) and, after August 13, 2008, of 40 C.F.R. § 280.70(a). Compl. ¶¶ 213–14. Count 10 also alleges that Qual-Econ failed to maintain documentation of the results of release detection for at least one year in violation of 40 C.F.R. §§ 280.34(b), 280.34(c), and 280.45(b). *Id.* at ¶ 215. To establish a violation of 40 C.F.R. § 280.41(a), Complainant must show the USTs were not "monitored at least every 30 days for releases using one of the methods listed in [40 C.F.R.] § 280.43(d) through (h)," subject to

exceptions not here relevant. 40 C.F.R. § 280.41(a). To establish a violation of 40 C.F.R. § 280.70(a), Complainant must show that release monitoring was not performed after the USTs had been closed, but before they had been emptied of product. To establish a violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), Complainant must show Qual-Econ did not "maintain records . . . demonstrating compliance," on site or readily available for production, including "[t]he results of any sampling, testing, or monitoring . . . for at least 1 year." 40 C.F.R. § 280.45(b)–(c); *see* 40 C.F.R. § 280.34(b)(4) (referring to § 280.45).

Qual-Econ failed to perform release detection monitoring on the USTs at 5565 Millersport Highway between July 1, 2007, and October 1, 2009. Compl. ¶¶ 209–11, 213–14. Qual-Econ therefore violated the release monitoring requirements of 40 C.F.R. § 280.41(a) during that period, as alleged in Count 10. The USTs were closed, but not emptied of product, between August 13, 2008, and October 1, 2009, and Qual-Econ therefore violated the monitoring requirements set forth in 40 C.F.R. § 280.70(a) during that period as alleged in Count 10. Consistent with 28 U.S.C. § 2462, Qual-Econ is therefore liable for the violations alleged in Count 10 for a period beginning July 16, 2007, and ending October 1, 2009. Qual-Econ also failed to maintain records of its release detection monitoring for the USTs between July 1, 2007, and October 1, 2009. *Id.* at ¶ 212. Qual-Econ therefore violated the recordkeeping requirements of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b) during that period as alleged in Count 10, and, consistent with 28 U.S.C. § 2462, is liable for the days of violation beginning July 16, 2007 and through October 1, 2009.

Count 11 of the Complaint alleges Qual-Econ failed to cap and secure the temporarily closed USTs at 5565 Millersport Highway between November 13, 2008, and February 1, 2010, in violation of 40 C.F.R. § 280.70(b). To establish a violation of Section 280.70(b), the Complainant must show: (1) the USTs were temporarily closed; (2) for a period of three months or more; and (3) Qual-Econ failed to leave vent lines open and functioning while capping and securing "all other lines, pumps, manways and ancillary equipment." 40 C.F.R. § 280.70(b).

The USTs at 5565 Millersport Highway were temporarily closed on August 13, 2008. Compl. ¶ 218. The USTs remained closed on November 13, 2008, at which time they were required to be capped as specified in 40 C.F.R. § 280.70(b). *Id.* at ¶¶ 218–19. Qual-Econ did not cap and secure the dispensers and lines associated with the USTs until February 2010. *Id.* at ¶¶ 220–22. Qual-Econ therefore violated 40 C.F.R. § 280.70(b) from November 13, 2008, until February 1, 2010, as alleged in Count 11.

C. Counts 23 through 26: Herrscher's Express Mart at 4291 Maple Road, Amherst, New York

"MJG Enterprises [has] been the owner[] and/or operator[] of three petroleum UST systems (two 8,000 gallon gasoline USTs . . . and a 2,500 gallon diesel fuel UST . . .) at a retail gasoline station, Herrscher's Express Mart ("Herrscher's")," at 4291 Maple Road, Amherst, New York ("4291 Maple Road"). Compl. ¶ 432; *see id.* at ¶¶ 433–36 (describing documents showing

MJG Enterprises' interest in USTs at 4291 Maple Road). The UST systems were installed on August 1, 1986, and had piping with metal components. *Id.* at ¶¶ 438, 442.

Count 23 of the Complaint alleges that from August 14, 2008, through March 30, 2010, MJG Enterprises failed to upgrade or close the existing UST systems at 4291 Maple Road in violation of 40 C.F.R. § 280.21. *Id.* at 452. Section 280.21 required all existing UST systems to meet, no later than December 22, 1998, either the new UST system performance standards set forth in 40 C.F.R. § 280.21, upgrade requirements specified in § 280.21, or closure requirements set forth in 40 C.F.R. Part 280, Subparts G and F. 40 C.F.R. § 280.21(a). An existing UST system is one that was installed prior to December 22, 1988. 40 C.F.R. § 280.12. Both the new UST system performance standards and the upgrade requirements command that existing UST systems with metallic components be equipped with corrosion protection. 40 C.F.R. §§ 280.20(a)–(b), 280.21(b)(2), (c). To establish the violation of Section 280.21 alleged in Count 23, Complainant must prove: (1) The UST systems at 4291 Maple Road were installed prior to December 22, 1988; (2) The UST systems had "[m]etal piping that routinely contain[ed] regulated substances and [was] in contact with the ground;" and (3) The UST systems' metal piping was not equipped with corrosion protection after December 22, 1998.

The three UST systems at 4291 Maple Road were installed on August 1, 1986. Compl. ¶ 438. They were therefore existing tank systems subject to the December 22, 1998 upgrade requirements of 40 C.F.R. § 280.21. On August 14, 2008, EPA inspectors "found evidence that the piping for the three USTs had metallic components that were not protected from corrosion," and Respondent Amerimart subsequently confirmed that the UST systems' pipes had not been upgraded with corrosion protection. Compl. ¶¶ 442, 445. The UST systems were in use on August 14, 2008. *Id.* at ¶ 443. Cathodic corrosion protection was installed on March 30, 2010. *Id.* ¶ 448. The UST systems' metal pipes did not have corrosion protection between August 14, 2008, and March 30, 2010, and MJG Enterprises was therefore in violation of 40 C.F.R. § 280.21 during that period, as alleged in Count 23.

Count 24 of the Complaint alleges Respondent MJG Enterprises failed to provide mandatory release detection monitoring for the USTs between July 1, 2007, and June 30, 2012, in violation of 40 C.F.R. §§ 280.41(a) and 280.43(d)–(h), and failed to maintain records of the release detection monitoring in violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b). *Id.* at ¶¶ 471–72. Section 280.41(a) requires owners and operators of petroleum UST systems to monitor tanks for releases every thirty days through either automatic tank gauging, vapor monitoring, ground-water monitoring, interstitial monitoring, or other methods meeting certain performance standards and approved by the implementing agency, as described in 40 C.F.R. § 280.43(d) through (h). Specifically, Count 24 alleges that MJG Enterprises employed an inadequate ground water monitoring system that did not comply with the requirements of 40 C.F.R. § 280.43(f)(7). That section provides:

> Ground-water monitoring. Testing or monitoring for liquids on the ground water must meet the following requirements:

(1) The regulated substance stored is immiscible in water and has a specific gravity of less than one;
(2) Ground water is never more than 20 feet from the ground surface and the hydraulic conductivity of the soil(s) between the UST system and the monitoring wells or devices is not less than 0.01 cm/sec (e.g., the soil should consist of gravels, coarse to medium sands, coarse silts or other permeable materials);
(3) The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ground-water conditions;
(4) Monitoring wells shall be sealed from the ground surface to the top of the filter pack;
(5) Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;
(6) The continuous monitoring devices or manual methods used can detect the presence of at least one-eighth of an inch of free product on top of the ground water in the monitoring wells;
(7) Within and immediately below the UST system excavation zone, the site is assessed to ensure compliance with the requirements in paragraphs (f)(1) through (5) of this section and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and
(8) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

40 C.F.R. § 280.43(f).

The allegations in the Complaint establish that MJG Enterprises employed groundwater monitoring as the release detection method for the USTs at 4291 Maple Road. Compl. ¶¶ 454–58. On October 11, 2008, Respondents produced groundwater monitoring records covering the period of September 2007 through September 2008. *Id.* ¶ 456. In 2010, monitoring wells numbered 2 through 6 were installed, and well number 7 was installed in 2011. *Id.* at ¶ 460. No site assessment was performed in connection with the installation of wells 2 through 7. *Id.* at ¶ 461. During an inspection conducted on August 4, 2011, Respondents could not "provide records of release detection monitoring for the twelve" preceding months. *Id.* at ¶ 459. To the extent records were kept, monitoring logs provided the results from one monitoring well and/or the combined results of two wells, but separate logs were not kept for each well. *Id.* at ¶ 463. The uncontested allegations in the Complaint show that "no acceptable method of release detection" had been operated at 4291 Maple Road as of February 22, 2012, and that MJG Enterprises "did not conduct proper monitoring for releases from the UST systems" between July 1, 2007, and June 30, 2012. *Id.* at ¶¶ 468–69. MJG Enterprises also failed to "maintain records

of release detection for the UST systems" for the same period. *Id.* at ¶ 471. MJG Enterprises therefore violated the release detection monitoring requirements of 40 C.F.R. §§ 280.41(a) and 280.43(d)–(h), and the recordkeeping requirements of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), as alleged in Count 24. Consistent with 28 U.S.C. § 2462, MJG Enterprises is liable for those violations falling between July 16, 2007, and June 30, 2012.

Count 25 of the Complaint alleges MJG Enterprises failed to conduct annual line tightness tests or monthly monitoring for pressurized piping of the three UST systems at 4291 Maple Road between July 1, 2007, and August 7, 2008, and again between August 7, 2009, and February 1, 2010, in violation of 40 C.F.R. § 280.41(b)(1)(ii), and failed to comply with the recordkeeping requirements of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b) during those same two periods. Compl. ¶¶ 485–86, 487–89. To establish a violation of Section 280.41(b)(1)(ii), Complainant must show: (1) The USTs at 4291 Maple Road are equipped with "[u]nderground piping that routinely contains regulated substances;" (2) The underground piping "conveys regulated substances under pressure;" and (3) The underground piping did not "[h]ave an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c)." 40 C.F.R. § 280.41(b)(1)(ii).

The UST systems at 4291 Maple Road had underground piping that routinely contained gasoline and diesel fuel under pressure. *See* Compl. ¶¶ 432, 442, 476–77. Line tightness tests were performed on August 7, 2008, but were not conducted prior to that date. *Id.* at ¶¶ 478–79. "[N]o other line tightness tests or release detection monitoring for pressurized piping were conducted between August 7, 2008 and February 1, 2010." *Id.* at ¶ 482. MJG Enterprises also did not maintain records of annual line tightness tests or monthly monitoring for the periods of July 1, 2007, to August 7, 2008, and August 7, 2009, to February 1, 2010. *Id.* at ¶¶ 487–88. MJG Enterprises therefore violated 40 C.F.R. § 280.41(b)(1)(ii), and 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), as alleged in Count 26. Consistent with 28 U.S.C. § 2462, MJG Enterprises is liable for the violations occurring between July 16, 2007, and August 7, 2008, and between August 7, 2009, and February 1, 2010.

Count 26 alleges Respondent MJG Enterprises failed to conduct an annual test of the operation of the ALLDs for the pressurized piping of the three UST systems between December 22, 2007, and August 7, 2008, and again between August 7, 2009, and February 1, 2010, in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), and failed to maintain records of annual ALLD tests for at least one year in violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b). *Id.* at ¶¶ 501–05. To establish a violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), Complainant must prove: (1) The UST systems are equipped with ALLDs; and (2) The operation of the ALLD was not tested annually "in accordance with the manufacturer's requirements." 40 C.F.R. § 280.44(a).

The UST systems at 4291 Maple Road were equipped with ALLDs as of December 22, 1998. Compl. ¶ 493. The first ALLD test was performed on August 7, 2008. *Id.* at ¶¶ 495–96. Another ALLD test was not performed until February 1, 2010. *Id.* at ¶ 498. MJG Enterprises did not conduct the required ALLD tests between December 22, 2007, and August 7, 2008, and

between August 7, 2009, and February 1, 2010. *Id.* at ¶¶ 499–500. MJG Enterprises also did not maintain records of ALLD testing during those periods. *Id.* at ¶¶ 503–04. MJG Enterprises therefore violated 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), and 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), as alleged in Count 26.

D. Counts 27 through 33: G&G Petroleum Facility at 1531–1543 Niagara Street, Buffalo, New York

Qual-Econ and G&G Petroleum "have been the owners and/or operators of UST systems at the G&G Petroleum retail gasoline facility . . . located at 1531–1543 Niagara Street, Buffalo," New York ("1531-1543 Niagara Street"). *Id.* at ¶ 507; *see id.* at ¶¶ 508–12 (describing documents establishing ownership and operation).

Count 27 alleges that from July 19, 2009, until June 30, 2012, Qual-Econ and G&G Petroleum failed to comply with information request letters ("IRLs") in violation of RCRA Section 9005, 42 U.S.C. § 6991d, and 40 C.F.R. § 280.34. Compl. ¶ 530. Section 9005 of RCRA requires the owners and operators of USTs to, "upon request of any [duly designated] officer, employee or representative of the Environmental Protection Agency . . . furnish information relating to such tanks, their associated equipment, [and] their contents, . . . [and] permit such officer at all reasonable times to have access to, and to copy all records relating to such tanks." 42 U.S.C. § 6991d(a). Section 280.34 similarly requires owners and operators of UST systems to "cooperate fully with . . . requests for document submission . . . pursuant to section 9005" of RCRA. 40 C.F.R. § 280.34.

The Region sent an IRL to Michael J. Geiger, vice president of G&G Petroleum and chairman and sole owner of Qual-Econ, on June 8, 2009, and the IRL was received by Mr. Geiger on June 19, 2009. Compl. ¶¶ 515, 517–18. "The First IRL required an answer within thirty (30) calendar days of receipt of the letter, or a request for additional time to respond within ten (10) days of receipt of the letter." *Id.* at ¶ 521. The Region did not receive a response to the IRL or a request for additional time. *Id.* at ¶ 522–23, 529. "On August 11, 2009 [the Region] issued a second IRL to Michael Geiger concerning the G&G Petroleum facility." *Id.* at ¶ 524. "The Second IRL was not accepted at the facility address where the first IRL had been accepted," and "was returned to [the Region] unopened." *Id.* at ¶¶ 526–27. The Region issued a third IRL on September 23, 2009, "this time sending it directly to the facility, at 1531–1543 Niagara in Buffalo, NY. The third notice was returned to EPA Region 2's office unopened." *Id.* at ¶ 528. Qual-Econ and G&G Petroleum failed to respond to the Second and Third IRLs. *Id.* at ¶ 529. By failing to respond to any of the IRLs, Qual-Econ and G&G Petroleum are liable for the violations of 42 U.S.C. § 6991d and 40 C.F.R. § 280.34 alleged in Count 27.

Count 28 alleges that Qual-Econ and G&G Petroleum failed to meet performance standards for new UST systems between October 21, 2008 and August 18, 2001, in violation of 40 C.F.R. § 280.20(a). Compl. ¶ 545. Section 280.20(a) requires owners and operators of new UST systems that routinely contain regulated substances to protect "any portion underground that routinely contains product" against corrosion using one of the manners specified in 40

C.F.R. § 280.20(a)(1) through (5). 40 C.F.R. § 280.20(a). To prove a violation of Section 280.20(a), Complainant must show: (1) The USTs at 1531–1543 Niagara Street were installed after 1988; (2) The USTs routinely contained regulated substances; and (3) Portions of the USTs that routinely contained regulated substances underground were not equipped with adequate corrosion protection.

Qual-Econ and G&G Petroleum owned or operated four USTs at 1531–1543 Niagara Street. Compl. ¶¶ 507–08, 510, 533. Each UST was constructed of double-wall steel and they were installed below ground after 1988. *Id.* at ¶¶ 533–34, 538. Two of the USTs contained gasoline, one contained diesel fuel, and one contained kerosene. *Id.* at ¶¶ 533, 539. All of the USTs were in use during inspections conducted on October 21, 2008, April 21, 2010, and August 18, 2011. *Id.* ¶¶ 538, 541. The New York State Department of Environmental Conservation Petroleum Bulk Storage ("NYSPBS") Registration Certificate for the USTs indicated they were equipped "with 'jacketing' for external corrosion protection," but "jacketing" is not a method of corrosion protection authorized under 40 C.F.R. § 280.20(a). *See id.* at ¶ 542. Further, "inspectors were unable to find evidence of corrosion protection" for the USTs, and Qual-Econ and G&G Petroleum were unable to "provide any records that the tanks had corrosion protection equipment." *Id.* at ¶¶ 541, 543. "Between at least October 21, 2008 and August 18, 2011, [Qual-Econ and G&G Petroleum] did not have corrosion protection for the" USTs at 1531–1543 Niagara Street. *Id.* at ¶ 544. Qual-Econ and G&G Petroleum therefore violated 40 C.F.R. § 280.20(a) during that time period and are liable as alleged in Count 28.

Count 29 alleges Qual-Econ and G&G Petroleum failed to meet the performance standards for new UST systems as required by 40 C.F.R. § 280.20(b) between October 21, 2008, and August 18, 2011. *Id.* at ¶ 556. Section 280.20(b) requires "piping that routinely contains regulated substances and is in contact with the ground must be . . . protected from corrosion . . . as specified" in § 280.20(b)(1) through (4). 40 C.F.R. § 280.20(b). The piping of the UST systems at 1531–1543 Niagara Street were constructed of steel, were in contact with the ground, routinely contained regulated substances, and did not have corrosion protection when inspected on October 21, 2008, April 21, 2010, and August 18, 2011. Compl. ¶¶ 548–52, 554–55. Qual-Econ and G&G Petroleum therefore violated 40 C.F.R. § 280.20(b) between October 21, 2008, and August 18, 2011, and are liable as alleged in Count 29.

Count 30 alleges Qual-Econ and G&G Petroleum failed to use overfill protection equipment on three of the UST systems at 1531–1543 Niagara Street between October 21, 2008, and August 18, 2011, in violation of 40 C.F.R. § 280.20(c)(1)(ii). *Id.* at ¶ 565. Section 280.20(c)(1)(ii) requires owners and operators of new UST systems to use

> [o]verfill prevention equipment that will:
>
> (A) Automatically shut off flow into the tank when the tank is no more than 95 percent full; or

(B) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high-level alarm; or

(C) Restrict flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

40 C.F.R. § 280.20(c)(1)(ii).

During inspections on October 21, 2008, and April 21, 2010, inspectors "found no evidence of overfill prevention on the four UST systems," but were informed on April 21, 2010, that the UST systems had "a 'vent whistle' for overfill protection." Compl. ¶¶ 560–61. Vent whistles do not meet the performance standards set by 40 C.F.R. § 280.20(c)(1)(ii). During an inspection performed on August 18, 2011, "the inspectors did not observe any overfill prevention equipment on" three of the four USTs. Compl. ¶ 564. Qual-Econ and G&G Petroleum are therefore liable for the violations of 40 C.F.R. § 280.20(c)(1)(ii) that occurred with regard to three of the USTs at 1531–1543 Niagara Street from October 21, 2008, to August 18, 2011, as alleged in Count 30.

Count 31 alleges Qual-Econ and G&G Petroleum failed to conduct annual line tightness tests or conduct monthly monitoring for pressurized piping on the four USTs systems at 1531–1543 Niagara Street in violation of 40 C.F.R. § 280.41(b)(1), and to maintain records of that testing or monitoring in violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b). Compl. ¶¶ 591–95. To establish a violation of Section 280.41(b)(1)(ii), the Complainant must show: (1) The USTs were equipped with "[u]nderground piping that routinely contains regulated substances;" (2) The underground piping "convey[ed] regulated substances under pressure;" and (3) The underground piping did not "[h]ave an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c)." 40 C.F.R. § 280.41(b)(1)(ii).

The four UST systems at 1531–1543 Niagara Street "routinely contained and were used to convey" gasoline, diesel fuel, and kerosene, all regulated substances, under pressure. Compl. ¶¶ 533, 569–70. The Region's October 21, 2008 inspection revealed that neither annual line tightness testing nor monthly monitoring had been performed on the pressurized piping of the four UST systems at 1531–1543 Niagara Street. *Id.* at ¶¶ 572–73. Line tightness testing was performed on the UST systems containing gasoline on October 29, 2008, and on the USTs containing diesel fuel and kerosene on December 30, 2008. *Id.* at ¶¶ 576–77. As of August 13, 2011, no further line tightness tests or monthly monitoring had been performed on the UST

systems.[6] *Id.* at ¶¶ 580–81, 582–86; Penalty Mem. at 11; First Sacker Decl. at 22; CX 70. Qual-Econ and G&G Petroleum were also not able to produce any records of annual line tightness testing or monthly release detection monitoring during the inspections on October 21, 2008, April 21, 2010, or August 18, 2011. Compl. at ¶¶ 574–75, 578, 581. Qual-Econ and G&G Petroleum therefore were in violation of 40 C.F.R. § 280.41(b)(1)(ii) for failing to perform annual line tightness testing or monthly release monitoring on the UST systems containing gasoline between October 21, 2007, and October 29, 2008, and between October 29, 2009, and August 13, 2011, as alleged in Count 31. Qual-Econ and G&G Petroleum were also in violation of 40 C.F.R. § 280.41(b)(1)(ii) for failing to perform annual line tightness testing or monthly release monitoring on the UST systems containing diesel fuel and kerosene between October 21, 2007, and December 30, 2008, and between December 30, 2009, and August 13, 2011, and are liable as alleged in Count 31. Finally, Qual-Econ and G&G Petroleum violated the recordkeeping requirements of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), as alleged in Count 31.

Count 32 alleges that Qual-Econ and G&G Petroleum failed to test the operation of the UST systems' ALLDs in violation of 40 C.F.R. § 280.41(b)(1)(i), and to maintain records of those tests in violation of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b). Compl. ¶¶ 616–19, 624. Section 280.41(b)(1)(i) requires "underground piping that conveys regulated substances under pressure" to be equipped with an ALLD meeting the requirements of 40 C.F.R. § 280.44(a). 40 C.F.R. § 280.41(b)(1)(i). Section 280.44(a) requires in part that ALLDs be tested annually to ensure proper operation. 40 C.F.R. § 280.44(a).

All of the UST systems at 1531–1543 Niagara Street were equipped with ALLDs as of May 21, 1994. Compl. ¶ 599. The ALLDs for the UST systems containing gasoline were tested for the first time on October 29, 2008, while the ALLDs for the UST systems containing diesel fuel and kerosene were tested for the first time on December 29, 2008. *Id.* at ¶¶ 605–06. The ALLDs were tested again on August 13, 2011. First Sacker Decl. at 24; CX 70. Qual-Econ and G&G Petroleum were also not able to produce any records of ALLD testing during inspections on October 21, 2008, April 21, 2010, or August 18, 2011. Compl. at ¶¶ 602, 607, 610, 620–23. Qual-Econ and G&G Petroleum therefore were in violation of 40 C.F.R. § 280.41(b)(1)(i) for failing to perform annual ALLD testing on the UST systems containing gasoline between May 21, 2008, and October 29, 2008, and between October 29, 2009, and August 13, 2011[7], as alleged in Count 32. Qual-Econ and G&G Petroleum were also in violation of 40 C.F.R. § 280.41(b)(1)(ii) for failing to perform annual line tightness testing or monthly release monitoring on the UST systems containing diesel fuel and kerosene between May 21, 2008, and

[6] The Complaint alleged that the violations continued through August 18, 2011, but Complainant avers in the materials supporting its Penalty Motion that the violations continued only until August 13, 2011. First Sacker Decl. at 22-23.

[7] The Complaint alleged that the violations continued through August 18, 2011, but Complainant avers in the materials supporting its Penalty Motion that the violations continued only until August 13, 2011. First Sacker Decl. at 24.

December 29, 2008, and between December 29, 2009, and August 13, 2011[8]. Finally, Qual-Econ and G&G Petroleum's violated the recordkeeping requirements of 40 C.F.R. §§ 280.34(b)(4), 280.34(c), and 280.45(b), and are liable as alleged in Count 32.

Count 33 alleges Qual-Econ and G&G Petroleum failed to maintain the results of at least one year of monitoring for releases from the UST systems at 1531–1543 Niagara Street, in violation of 40 C.F.R. §§ 280.34(b), 280.34(c), and 280.45(b). Compl. ¶ 636. During the inspections on October 21, 2008, April 21, 2010, and August 18, 2011, inspectors found evidence that interstitial monitoring for releases was being performed on all four UST systems. *Id.* at ¶¶ 626, 631, 633–34; *see* 40 C.F.R. § 280.43(g) (listing interstitial monitoring as an acceptable form of release detection). However, from October 21, 2007, to April 21, 2010[9], Qual-Econ and G&G Petroleum did not maintain records pertaining to the interstitial monitoring or other release detection activity. Compl. ¶¶ 627–29, 631, 634–35; First Sacker Decl. at 25–26; CX 70. Qual-Econ and G&G Petroleum therefore failed to comply with the recordkeeping requirements of 40 C.F.R. §§ 280.34(b), 280.34(c), and 280.45(b), and are liable as alleged in Count 33.

E. Conclusion on Liability

On the basis of the facts admitted within the record, Qual-Econ Lease Co., Inc., is liable for the violations of RCRA Section 9003, 42 U.S.C. § 6991b, and the regulations at 40 C.F.R. Part 280, alleged in Counts 5 through 11, except the first day of violation for Counts 5, 7, 9, and 10, is July 16, 2007, rather than July 1, 2007. MJG Enterprises, Inc., is liable for the violations of RCRA Section 9003, 42 U.S.C. § 6991b, and the regulations at 40 C.F.R. Part 280, alleged in Counts 23 through 26, except that the first day of violation for Counts 24 and 25 is July 16, 2007, rather than July 1, 2007. Qual-Econ Lease Co., Inc., and Clear Alternative of Western NY, Inc. (dba G&G Petroleum) are jointly liable for the violations of RCRA Sections 9003 and 9005, 42 U.S.C. §§ 6991b, 6991d, and the regulations at 40 C.F.R. Part 280, alleged in Counts 27 through 33, as alleged, except the last day of violation for Counts 31 and 32 is August 13, 2011, rather than August 18, 2011, and the last day of violation for Count 33 is April 21, 2010, rather than August 18, 2011. This resolves all of the Counts remaining in this matter.

IV. Assessment of Penalty

The Rules that govern this proceeding require that when a default "order resolves all outstanding issues and claims," then "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record or the

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[8] The Complaint alleged that the violations continued through August 18, 2011, but Complainant avers in the materials supporting its Penalty Motion that the violations continued only until August 13, 2011. First Sacker Decl. at 24.

[9] The Complaint alleged that the violations continued through August 18, 2011, but Complainant avers in the materials supporting its Penalty Motion that the violations continued only until August 13, 2011. First Sacker Decl. at 25-26.

proceeding or the" statute giving rise to the proceeding. 40 C.F.R. § 22.17(c). RCRA Section 9006, 42 U.S.C. § 6991e, provides that when the EPA Administrator or her designee "determines that any person is in violation of any requirement" of RCRA's UST provisions, she "may issue an order requiring compliance within a reasonable specified time period." 42 U.S.C. § 6991e(a)(1). Section 9006 also provides that "[a]ny owner or operator of [a UST] who fails to comply with . . . any requirement or standard promulgated by the Administrator under [S]ection 6991b . . . shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." 42 U.S.C. § 6991e(d). The maximum allowable penalty has since been increased pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-358 to 1321-380 (codified at 31 U.S.C. § 3701 note), to reflect inflation. *See* Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643, 66,643–44 (Nov. 6, 2013) (adjusting maximum penalties for inflation). For violations occurring after March 15, 2004, through January 12, 2009, the Administrator may assess a civil penalty of up to $11,000 per tank per day of violation. 40 C.F.R. § 19.4. The number increases to $16,000 for violations occurring after January 12, 2009, through December 6, 2013. *Id.*

When assessing a civil penalty under RCRA's UST provisions, Section 9006(e) allows the Administrator to take account of the owner or operator's compliance history, and "[a]ny other factor the Administrator considers appropriate."[10] 42 U.S.C. § 6991e(e). The Rules further provide that the Presiding Officer in an administrative enforcement action—

> shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

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[10] Under RCRA, if a respondent wishes to have its financial condition considered as a mitigating penalty factor, it must raise the issue and prove its inability to pay as an affirmative defense. *Carroll Oil Co.*, 10 E.A.D. 635, 662–63 (EAB 2002). Qual-Econ, MJG Enterprises, and G&G Petroleum have not raised their ability to pay the proposed penalty as an issue in this case or produced any evidence that would support such a claim.

EPA issued the "U.S. EPA Penalty Guidance for Violations of UST Regulations (OSWER Directive 9610.12)," dated November 14, 1990 ("Penalty Policy"), to guide the calculation of civil penalties assessed under RCRA Section 9006.[11] *See* Penalty Policy at ch. 1, introduction (available at http://www.epa.gov/oust/directiv/od961012.htm). Though the Penalty Policy is not binding upon the Presiding Officer, it must be considered and "should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002) (quoting *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002)). Complainant employed the Penalty Policy, as adjusted by the memoranda titled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004),"[12] and "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009),"[13] and "Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009,"[14] when calculating the penalty amounts proposed in the Penalty Motion and Penalty Memo.

After reviewing the Penalty Motion, Penalty Memo, the First and Second Declarations of Paul Sacker, and the calculations in CX 70, and after considering the penalty criteria set forth in RCRA Section 9006 and the Penalty Policy, the rationale Complainant sets forth in its Penalty Memo and the First and Second Declarations of Paul Sacker to support the proposed penalty is found persuasive, and is incorporated by reference into this Order. The penalty amounts proposed for Counts 5 through 11, 23, and 25 through 33, are not clearly inconsistent with the record or with RCRA. This is true even though Qual-Econ and MJG Enterprises are liable for a period of violation beginning fifteen days later than the date proposed in Counts 5, 7, 9, 10, and 25.

Under the Penalty Policy, when a violation persists for multiple days, as the violations in those Counts did, the appropriate penalty is calculated by first determining the penalty for the first day of violation, and then multiplying that amount by a "Days of Noncompliance Multiplier" ("DNM"). Penalty Policy at ch. 3. The DNM does not increase in a one-to-one ratio with the number of days of violation, but is instead calculated in intervals. *Id.* The DNM is "1.0" for the first ninety days of violation, and increases in stages to "2.5" by the end of the first year. *Id.* If the violation persists for more than a year, the DNM increases by "0.5" for each additional six-month period or fraction thereof. *Id.*

Changing the first date of violation for Counts 7 and 25 from July 1, 2007, to July 16, 2007, does not alter the DNM applied in those Counts, and as a result the final penalty for those

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[11] Complainant included a reference to the Penalty Policy as Exhibit 1 of its Prehearing Exchange.

[12] Complainant's Prehearing Exchange Exhibit 2.

[13] Complainant's Prehearing Exchange Exhibit 3.

[14] Complainant's Prehearing Exchange Exhibit 4.

Counts is unchanged. For example, in Count 7, the violation persisted until October 14, 2008. If the first date of violation was July 1, 2007, the violation persisted for one year, three months, and fourteen days, leading to a DNM of 3.0. Changing the first date of violation to July 16, 2007, would shorten the violation period to one year, two months, and twenty-nine days, but the DNM would still be 3.0.

Changing the first date of violation for Counts 5, 9, and 10 would also not alter the total DNM, but would require a larger portion of the DNM to be applied to the inflation-adjusted portion of the penalty, resulting in a higher penalty than the one proposed by Complainant. To illustrate, in Count 5, the total DNM is 4.5 regardless of whether first day of violation was July 1, 2007, or July 16, 2007. When Complainant calculated the proposed penalty under the assumption that the first day of violation was July 1, 2007, the violation persisted for one year, six months, and twelve days before the penalty amounts were adjusted upward for inflation on January 13, 2009. The DNM for this period was 3.5. Even though this period included only twelve days of the next six-month interval, Complainant applied the 0.5 DNM for that interval to the pre-inflation-adjusted penalty amount. The violation then persisted until May 11, 2010, one year, three months, and twenty-nine days after January 13, 2009. However, because the DNM-increase for the six-month interval beginning January 1, 2009, and ending July 1, 2009, had already been applied, the DNM was only increased by 1.0, and that 1.0 was applied to the inflation-adjusted penalty amount. If the penalty were calculated as though the violation began on July 16, 2007, the violation would have been in place for one year, five months, and twenty-eight days on January 12, 2009, so the DNM applied to the penalty for that period would be 3.0. The DNM for the next one year, three months, and twenty-nine days would be 1.5, applied entirely to the higher inflation-adjusted penalty amount. This would result in a higher total penalty than that proposed by Complainant, even though the total days of violation would be fewer.

It would be unreasonable to increase the amount of the penalty as a direct result of decreasing the period of liability, and such a result will not be adopted here. It is further noted that the penalties proposed under Counts 5 through 11, 23, and 25 through 33, are all significantly lower than the maximum allowed by law. The proposed penalties for these Counts are reasonable under the penalty criteria set forth in RCRA and the Penalty Policy, and in consideration of the record as a whole.

The penalty proposed for Count 24 is clearly inconsistent with the record, because the penalty calculation worksheet in CX 70 shows that Complainant applied an incorrect DNM for the period of violation beginning January 13, 2009. The total DNM for Count 24 should be 6.5, but Complainant applied a total DNM of 7.0. Applying the correct DNM, the penalty for Count 24, originally proposed as $43,227, is recalculated as $40,047, reflecting a decrease of $3,180. The record does not show any other basis for reducing the penalties under the circumstances.

For the foregoing reasons, Respondent Qual-Econ Lease Co., Inc. is assessed a civil penalty of $61,085, for Counts 5 through 11. Respondent MJG Enterprises, Inc., is assessed a civil penalty of $110,800, for Counts 23 through 26. Respondents Qual-Econ Lease Co., Inc.,

and Clear Alternative of Western NY (dba G&G Petroleum), are assessed a civil penalty of $115,176, jointly and severally, for Counts 27 through 33. Finally, Qual-Econ Lease Co., Inc., and Clear Alternative of Western NY (dba G&G Petroleum), are ordered to comply with the terms of the Compliance Order herein no later than forty-five (45) days after date this Initial Decision becomes a final order pursuant to 40 C.F.R. § 22.27(c).

ORDER

1. Respondents Qual-Econ Lease Co., Inc., MJG Enterprises, Inc., and Clear Alternative of Western NY (dba G&G Petroleum) are found in default for failing to comply with the Prehearing Order, the Order to Show Cause, and the prehearing exchange requirements of 40 C.F.R. § 22.19(a), and no good cause is shown why a default order should not be issued.

2. Respondent Qual-Econ Lease Co., Inc. is individually assessed a civil administrative penalty in the amount of $61,085.

3. Respondent MJG Enterprises, Inc., is individually assessed a civil administrative penalty in the amount of $110,800.

4. Respondents Qual-Econ Lease Co., Inc., and Clear Alternative of Western NY (dba G&G Petroleum) are jointly and severally assessed a civil administrative penalty in the amount of $115,176.

5. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the date on which this Initial Decision becomes a final order pursuant to Section 22.27(c) of the Rules of Practice, 40 C.F.R. § 22.27(c), by one of the following means:

   a. by submitting a cashier's check or a certified check in the amount of the penalty, payable to "Treasurer, United States of America," and mailed via U.S. Postal Service to:

      U.S. Environmental Protection Agency
      Fines and Penalties
      Cincinnati Finance Center
      P.O. Box 979077
      St. Louis, MO 63197-9000

      Primary Contact: Craig Steffen (513) 487-2091
      Secondary Contact: Molly Williams (513) 487-2076

b. by submitting a cashier's check or a certified check in the amount of the penalty, payable to "Treasurer, United States of America," and mailed via expedited delivery service (UPS, FedEx, DHL, etc.) to:

U.S. Environmental Protection Agency
Government Lockbox 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Primary Contact: Craig Steffen (513) 487-2091
Secondary Contact: Molly Williams (513) 487-2076

c. by one of the electronic methods described at the following Agency website: http://www.epa.gov/cfo/finservices/payment_instructions.htm[15]

6. A transmittal letter identifying the subject case and EPA docket number, RCRA-02-2012-7501, as well as Respondents' names and address(es), must accompany each check.

7. If Respondents fail to pay the penalties within the prescribed statutory period after the entry of the final order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

8. 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, unless (1) an appeal is taken to the Environmental Appeals Board within thirty (30) days after service of this Initial Decision pursuant to 40 C.F.R. § 22.30(a); (2) a party moves to set aside the default pursuant to 40 C.F.R. § 22.17(c); or (3) the Environmental Appeals Board elects to review this Initial Decision upon its own initiative pursuant to 40 C.F.R. § 22.30(b).

9. Respondents are hereby further ordered to comply with the following Compliance Order pursuant to Section 9006(a) of RCRA, 42 U.S.C. § 6991e(a).

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[15] Those methods include:
Vendor Express: Payers authorize their financial institutions to initiate an automated clearing house ("ACH") credit transaction to a unique routing number at the Federal Reserve Bank of Richmond.
Fedwire: Payers authorize a Financial Institution to initiate an electronic ("Fedwire") payment to the Federal Reserve Bank of New York ("FRBNY"). Generally, this is used for foreign payments.
Pay.gov: Payers can use their credit or debit cards to make payments. This option is only available for the following payment types—Superfund, fines and penalties, FOIA, travel, and miscellaneous fees.

COMPLIANCE ORDER

10. Respondent Qual-Econ Lease Co., Inc., shall, within forty-five (45) calendar days of the date this Initial Decision becomes a final order pursuant to 40 C.F.R. § 22.27(c), submit documentation showing that the violations of 42 U.S.C. § 6991b, and the regulations codified in 40 C.F.R. Part 280, described in Counts 5 through 11, have been remedied, and confirming that the facilities at 1545 Broadway, Buffalo, New York, and 5565 Millersport Highway, Amherst, New York, are in full compliance with the regulations codified in 40 C.F.R. Part 280.

11. Respondents Qual-Econ Lease Co., Inc., and Clear Alternative of Western NY, Inc., shall, within 45 calendar days of the date this Initial Decision becomes a final order pursuant to 40 C.F.R. § 22.27(c), submit documentation showing that the violations of 42 U.S.C. § 6991b, and the regulations codified in 40 C.F.R. Part 280, described in Counts 27 through 33, have been remedied, and confirming that the facilities at 1531–1543 Niagara Street, Buffalo, New York, are in full compliance with the regulations codified in 40 C.F.R. Part 280.

12. Any document that discusses, describes, demonstrates, supports any finding, or makes any representation concerning a Respondent's compliance or noncompliance with any requirements of this Compliance Order, submitted by either Respondent pursuant to this Compliance Order, shall be certified by a responsible corporate officer of the submitting Respondent. For the purpose of this Compliance Order, a responsible corporate officer is a president, secretary, treasurer, or vice-president of the Respondent in charge of a principal business function.

13. The certification provided by a responsible corporate officer shall be in the following form:

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

Signature: _____
Name: _____
Title: _____

14. All submissions required by this Compliance Order shall be mailed to the following address:

Dennis McChesney, Ph.D., Team Leader
UST Team, RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency -Region 2
290 Broadway, 20th Floor
New York, New York 10007-1866

SO ORDERED.

Christine D. Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: July 7, 2014
Washington, DC

In the Matter of Amerimart Development Company, Inc., Qual-Econ Lease Co., Inc., MJG Enterprises Inc., and Clear Alternative of Western NY, Inc. (d/b/a G & G Petroleum), Respondents.
Docket No. RCRA-02-2012-7501

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the **Default Order and Initial Decision**, dated July 7, 2014, issued by Administrative Law Judge Christine D. Coughlin, was sent this day in the following manner to the addressees listed below:

Mary Angeles
Lead Legal Assistant

Original and Copy by Hand Delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, OALJ
Mail Code 1900R
1200 Pennsylvania Ave., NW
Washington, DC 20460

Copy By Electronic and Certified Mail to Counsel for Complainant:

Bruce Aber, Esq.
Office of Regional Counsel
U.S. EPA, Region II
Waste & Toxic Substances Branch
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy by Electronic and Certified Mail to Counsel for Amerimart:

Brenda J. Joyce, Esq.
Counsel for Amerimart Development Co., Inc.
Bender & Bender LLP
68 Niagara Street
Buffalo, NY 14202

Copy by Certified and Regular Mail to Qual-Econ Lease Co., Inc. to the following:

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc..
14 Colonial Drive
Tonawanda, NY 14150

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.
P.O. Box 473
Grand Island, NY 14072

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.
105 Galileo Drive
Williamsville, NY 14221

Michael J. Geiger
c/o Qual-Econ Lease Co., Inc.
2320 West Oakfield Road
Grand Island, NY 14072

Copy by Certified and Regular Mail to MJG Enterprises, Inc. to the following:

Michael J. Geiger
c/o MJG Enterprises, Inc.
14 Colonial Drive
Tonawanda, NY 14150

Michael J. Geiger
c/o MJG Enterprises
105 Galileo Dr.
Williamsville, NY 14221

Copy by Certified and Regular Mail to Clear Alternative of Western NY, Inc. (d/b/a G&G Petroleum):

Peter G. Gerace
c/o Clear Alternative of Western, NY, Inc., (d/b/a G&G Petroleum)
3109 Delaware Ave.
Kenmore, NY 14217

Michael J. Geiger
Peter Gerace
c/o Clear Alternative of Western, NY, Inc., (d/b/a G&G Petroleum)
1543 Niagara Street
Buffalo, NY 14213

Copy by Interoffice Hand-Delivery to:

U.S. EPA, Environmental Appeals Board
Attn: Eurika Durr, Clerk of the Board
1201 Constitution Ave., NW, Mail Code 1103M
WJC Building East, Room 3322
Washington, DC 20004

Issued: July 7, 2014
Washington, DC