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

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.,	RCRA (9006) Appeal No. 13-04
Docket Number RCRA-02-2011-7503	

BRIEF OF APPELLEE/ CROSS-APPELLANT IN OPPOSITION TO
THE APPEAL OF APPELLANTS AND IN SUPPORT OF CROSS-APPEAL OF
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2

This brief is being submitted by appellee/cross-appellant (Complainant in the proceeding below), the Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 (the "Region"), pursuant to 40 C.F.R. § 22.30 and to the ORDER GRANTING, IN PART, MOTION FOR EXTENSION OF TIME AND ESTABLISHING NOVEMBER 15, 2013, AS NEW DEADLINE FOR RESPONSE AND/OR CROSS-APPEAL, dated October 22, 2013, of the Environmental Appeals Board ("EAB" or "Board").[1] The Region submits this brief: **a)** in opposition to the appellants' appeal from rulings

[1] The Board had issued two earlier but related orders. As discussed on page 1 of its October 22nd order:

> On July 16, 2013, the [Board] granted a motion for an extension of time to file a notice of appeal and brief that [appellants] had submitted in the above-captioned case. The Board extended [appellants' deadline until August 26, 2013, and also provided the [Region] the same number of additional days (i.e., 30) in which it could file a response to such appeal. The Region's response deadline was thus extended to October 15, 2013. Upon motion by the Region, the Board later modified the July 16, 2013 Order to clarify

contained in the "Initial Decision" of the Administrative Law Judge, the Honorable M. Lisa Buschmann, dated June 20, 2013 (hereinafter referred to as the "June 20th Initial Decision"), and **b)** in support of the Region's cross-appeal from rulings in the June 20th Initial Decision. The Region's Notice of Appeal accompanies this brief.

I. PRELIMINARY STATEMENT

Through their Notice of Appeal and Appeal Brief, each dated August 22, 2013, appellants (Respondents in the proceeding below) Andrew B. Chase, also known as Andy Chase (hereinafter "Mr. Chase"), Chase Services, Inc. (hereinafter "CSI"), Chase Convenience Stores, Inc. (hereinafter "CCS") and Chase Commercial Land Development, Inc. (hereinafter "CCLD"); (the latter three collectively referred to as the "corporate appellants" and all four entities are collectively referred to as "appellants")[2] appeal from a number of rulings in the June 20th Initial Decision. Appellants argue that Judge Buschmann (hereinafter the "ALJ") committed reversible error, as follows:

> The [ALJ] erred in awarding penalties for Counts 1, 2, 18 and 19 of the Complaint.
>
> The [ALJ] erred in refusing to consider Respondent's [sic] financial condition in making her award.
>
> The [ALJ] erred in not further reducing the amount of the penalties.

> that the additional time granted to the Region to file a response to the appeal also applied if the Region desired to file a cross-appeal. Both filings were due on October 15, 2013 [citations omitted].

The Board's "ORDER GRANTING MOTION TO MODIFY JULY 16, 2013 ORDER" was dated and filed on July 24, 2013.

[2] The acronyms used in this brief as shorthand identification of each of the appellants are the same as those employed in the June 20th Initial Decision, pages 11-12.

II. GOVERNING LEGAL AUTHORITY

The violations that the ALJ found against appellants in her June 21st PAD Order, and the corresponding penalties she assessed in the June 20th Initial Decision, were based on the regulatory provisions governing the installation, operation, maintenance and closure of underground storage tanks ("USTs") codified at 40 C.F.R. Part 280. EPA promulgated these regulations under the authority Congress gave the Agency. The relevant statutory and regulatory provisions will be discussed briefly below. The relevant rules of 40 C.F.R. Part 22, which provide the governing procedural provisions, will then be set forth.

A. Statutory Authority

The Region commenced and has prosecuted this administrative to assess civil penalties for violations of applicable regulatory requirements and standards, and also to require compliance with those requirements and standards, pursuant to Section 9006 of the Solid Waste Disposal Act, as amended (the Solid Waste Disposal Act, as amended, henceforth referred to as the "Act"), 42 U.S.C. § 6991e.

Pursuant to Section 9003(a) of the Act, the Administrator of EPA, by a date specified therein, was required to "promulgate release detection, prevention, and correction regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment." 42 U.S.C. § 6991b(a). The regulations promulgated pursuant to Section 9003(c) of the Act, 42 U.S.C. § 6991b(c), were required to include specified "requirements respecting all underground storage tanks," and such requirements pertained, *inter alia*, to the various facets of operating, maintaining and closing underground storage tanks. Section 9006 provides for the mechanisms for the enforcement of the substantive statutory

Page 1 of appellant's Appeal Brief. As discussed below, each of these arguments lacks merit and should be denied; this Board should dismiss each of these grounds for the appeal as insufficient as a matter of law.

Preliminarily, it should be noted that appellants are not appealing from any of the ALJ's rulings on liability, nor they dispute the factual bases for the declaration of such liability, as set forth in the ALJ's June 21, 2012 "ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION" (hereinafter the "June 21st PAD Order").[3] Further, appellants do not dispute the specific penalties that the ALJ assessed in her June 20th Initial Decision for Counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 21 of the Complaint.

As discussed below, the Region cross-appeals from the ALJ's rulings with regard to the following counts of the Complaint: Count 2; Counts 3 through 7; and Counts 2,[4] 8, 10, 13, 15 and 18.[5] The Region submits that, with regard to these counts, the ALJ wrongly assessed a penalty and that this Board should reinstate the penalty for such counts as the Region sought in its August 2012 memorandum of law submitted in the course of litigating the penalty question.[6]

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[3] The ALJ's rulings on liability are set forth below in a separate section.

[4] The Region is appealing the ruling regarding Count 2 on two separate bases.

[5] The Region is not appealing from the ALJ's rulings in the June 20th Initial Decision regarding Counts 1, 9,11,12,14, 16 and 21. Nor is the Region revisiting the ALJ's dismissal of Count 17 in the June 21st PAD Order (page 19 therein). In addition, the Region has not sought a ruling on either liability or penalty with regard to Count 20 of the Complaint. *See, e.g.*, note 3 (page 3) of the Region's August 9, 2012 memorandum of law submitted as part of the proceedings below litigating the penalty issue.

[6] In the ALJ's order of July 13, 2012, she granted the parties' joint motion to cancel the hearing, and the order further provided that the ALJ would decide the penalty question based on the written records, *i.e.* based on the parties' written submissions, including memoranda of law and affidavits.

provisions and their implementing standards and requirements that EPA has promulgated. EPA is authorized to proceed administratively or to initiate a proceeding in federal court. More specifically, Section 9006(a) of the Act, 42 U.S.C. § 6991e(a), provides:

> [W]henever on the basis of any information, the Administrator [of EPA] determines that any person is in violation of any requirement of this subchapter [Subchapter IX, 42 U.S.C. §§ 6991 - 6991i], the Administrator may issue an order requiring compliance within a reasonable specified time period or the Administrator may commence a civil action in the United States district court in which the violation occurred for appropriate relief....

Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A), authorizes penalties for violations of the requirements or standards EPA has promulgated pursuant to Section 9003 of the Act (42 U.S.C. § 6991b):

> Any owner or operator of an underground storage tank who fails to comply with...any requirement or standard promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the Act]...shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation.

Thus, a violator is subject to a penalty not just for each tank it owns or operates, but also for each day on which the violation occurred. The maximum amount of penalty per tank and per violation listed in the statute has been subsequently increased to account for inflation. Pursuant to a grant of authority given by Congress, EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, *inter alia*, increase the maximum penalty EPA might obtain pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), to $11,000 for any violation occurring between January 30, 1997 and January 12, 2009, and to $16,000 for any violation occurring after January 12, 2009.[7] *See*,

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[7] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations that are now codified at 40 C.F.R. Part 19, which, *inter alia*, increase the maximum penalty EPA might obtain pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), to

e.g., *In re Norman C. Mayes*, RCRA (9006) Appeal No. 04-01, 10 E.A.D. 54, 57 n.2 (EAB 2005), "[T]wo penalty-related congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation."

Under Section 9006(c) of the Act, 42 U.S.C. § 6991e(c), EPA may assess a civil penalty for an UST violation that EPA "determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." Besides the mandatory factors of seriousness of violation and good faith efforts to comply, EPA may consider, in determining an appropriate penalty for an UST violation, "[t]he compliance history of an owner or operator in accordance with this subchapter [Subchapter IX, 42 U.S.C. §§ 6991 - 6991i]" and "[a]ny other factors the Administrator [of EPA] considers appropriate." Section 9006(e) of the Act, 42 U.S.C. § 6991e(e).

The operative definitions applicable to these statutory provisions are found in Section 9001 of the Act, 42 U.S.C. § 6991.

This Board, in *In re Euclid of Virginia, Inc.*, RCRA (9006) Appeal 06-05 & 06-06, 13 E.A.D. 616,623-24 (EAD 2008), elaborated upon the purposes underlying Congressional enactment of the statutory provisions governing underground storage tanks and the broad scope of the objectives it sought to attain through this legislation:

> In 1976, Congress enacted RCRA [the Resource Conservation and Recovery Act] to better regulate the large and ever-increasing volume of solid and hazardous waste generated by individuals, municipalities, and businesses in the United States. RCRA restructured an existing statute, the Solid Waste Disposal Act of

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$11,000 for any violation occurring between January 30, 1997 and January 12, 2009, and to $16,000 for any violation occurring after January 12, 2009. *See, e.g.*, *In re Norman C. Mayes*, RCRA (9006) Appeal No. 04-01, 10 E.A.D. 54, 57 n.2 (EAB 2005), "[T]wo penalty-related congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation."

1965, as amended in 1970, to eliminate the purported 'last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes.' H.R. Rep. No. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239. In 1984, Congress amended RCRA to close loopholes it had identified, in that instance to address, among other things, accidental releases from USTs containing petroleum or other regulated substances. *See* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, tit. VI, § 601(a), 98 Stat. 3221, 3277-87 (1984) (codified as amended at RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i). As so amended, RCRA directed the EPA to promulgate release detection, prevention, and correction regulations for USTs, with the goal of protecting human health and the environment. RCRA § 9003, 42 U.S.C. § 6991b. EPA promulgated regulations on November 8, 1985, and September 23, 1988, which, as amended, are in effect today. *See* Notification Requirements for Owners of Underground Storage Tanks, 50 Fed. Reg. 46,602 (Nov. 8, 1985); Underground Storage Tanks – Technical Requirements, 53 Fed. Reg. 37,082 (Sept. 23, 1988) (codified as amended at 40 C.F.R. pt. 280).

Under the UST program created by Congress and implemented by EPA, owners of UST systems must, among other things: (1) implement spill and overfill control procedures; (2) provide for corrosion protection; (3) monitor tanks and underground piping for releases; (4) maintain records of release detection systems; (5) report accidental releases; (6) take corrective action in response to any such releases; (7) comply with requirements for appropriate temporary and permanent closure of USTs to prevent future releases; and (8) maintain evidence of financial responsibility for taking corrective action and compensating third parties in the event of accidental releases from USTs. RCRA §§ 9003(c)-(d), 42 U.S.C. §§ 6991b(c)-(d); 40 C.F.R. §§ 280.30-.230. 'New' UST systems, whose installation commenced or will commence after December 22, 1988, must incorporate protective technologies at the time of installation, while 'existing' UST systems, whose installation commenced on or before December 22, 1988, were required to have been upgraded by December 22, 1998, to incorporate all technological precautions needed to prevent, detect, and correct accidental releases of regulated substances, or, if not upgraded, permanently closed. RCRA §§ 9003(e)-(h), 42 U.S.C. §§ 6991b(e)-(h); 40 C.F.R. §§ 280.12, .20-.21.

B. Regulatory Authority

As noted above, Section 9003(a) of the Act, 42 U.S.C. § 6991b(a) enjoins EPA to "promulgate release detection, prevention, and corrective regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the

environment." The regulations EPA has developed governing the installation, operation, maintenance and closure of underground storage tanks have been promulgated under that authority. Further, as also previously noted, these regulations, intended to implement the statutory provisions and objectives of Sections 9002, 9003, and 9006 are codified at 40 C.F.R. Part 280, "Technical Standards And Corrective Action Requirements For Owners And Operators Of Underground Storage Tanks (UST). The applicability of the 40 C.F.R. Part 280 regulations is set forth in 40 C.F.R. § 280.10.[8] The applicable regulatory definitions are found in 40 C.F.R. § 280.12.

In the seminal *Euclid of Virginia* case, the Board discussed the protective and

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[8] Subpart B of the regulations is concerned with the design, construction, installation and notification procedures governing underground storage tank systems, with performance requirements and standards for "new UST systems" set forth in 40 C.F.R. § 280.20, provisions regarding the upgrading of "existing UST systems" set forth in 40 C.F.R. § 280.21 and notification requirements are set forth in 40 C.F.R. § 280.22. In Subpart C of 40 C.F.R. Part 280 are found the regulations governing the general operating requirements and standards with which owners and operators of USTs must comply, and sections within this subpart include 40 C.F.R. § 280.30, setting forth requirements and standards to ensure that spills or overfills from underground storage tanks do not occur; 40 C.F.R. § 280.31, setting forth the obligations imposed upon owners and operators of steel underground storage tank systems with corrosion protection (cathodic protection requirements are set forth in this section); and 40 C.F.R. § 280.34, setting forth requirements and standards for reporting and recordkeeping. This latter section reinforces the authority set forth in Section 9005 of the Act, 42 U.S.C. § 6991d, for owners and operators to provide information and records pertaining to their underground storage tanks. Subpart D concerns methods to detect any releases from underground storage tanks, and the specific sections within this subpart include 40 C.F.R. § 280.40, setting forth general release detection requirements and standards for all underground storage tank systems; 40 C.F.R. § 280.41, setting forth the requirements and standards specifically applicable to petroleum UST systems; 40 C.F.R. § 280.43, which sets forth methods to effect detection of releases from underground storage tanks; 40 C.F.R. § 280.44, which prescribes methods to effect detection of releases from the piping connected to underground storage tanks; and 40 C.F.R. § 280.45, listing the provisions with which owners and operators of underground storage tank systems must comply for release detection records. Subpart E includes 40 C.F.R. Part 280 regulations for the reporting of releases and investigating them, with 40 C.F.R. § 280.50 setting forth what owners and operators must do, *inter alia*, upon discovering that a suspected release from an underground storage tank has occurred, and 40 C.F.R. § 280.52 setting forth what owners and operators must do to properly investigate a release from an underground storage tank. Subpart G of the 40 C.F.R. Part 280 regulations prescribes the requirements for the underground storage tanks taken out of service and for their closure, with 40 C.F.R. § 280.70 concerned with the obligations of owners and operators concerning temporarily closed USTs.

prophylactic purposes behind the 40 C.F.R. Part 280 UST regulations (13 E.A.D. at 624):

> The UST regulations are part of a comprehensive regulatory program for USTs implementing Subtitle IX of RCRA, RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i. The UST regulations, authorized by RCRA § 9003, 42 U.S.C. § 6991b, and promulgated in 1988, are designed to prevent, detect, and clean up releases from USTs containing petroleum and other regulated substances. In describing this comprehensive regulatory program, the preamble to the UST regulations emphasized that of the nation's then-700,000 UST systems, '10 to 30 percent' had 'leaked or [were] presently leaking,' constituting an 'important threat to the nation's groundwater resources.' 53 Fed. Reg. at 37,097. Furthermore, the preamble to the UST regulations identified USTs lacking adequate protective features as a leading cause of tank failure contributing to this threat. *See id.* at 37,101 [footnote omitted, brackets in original].

The EAB has consistently recognized the importance of the UST regulations and their goal of preventing releases of the covered regulated substances (*e.g.*, gasoline and kerosene).[9]

The 40 C.F.R. Part 280 regulations constitute the "requirements or standards promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the

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[9] *See, e.g., In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, 10 EAD 635, 638-39 (EAB 2002):

> The UST regulations are part of a comprehensive regulatory program for USTs implementing Subtitle I of the Resource Conservation and Recovery Act ('RCRA'). The UST regulations, authorized by RCRA and promulgated in 1988, are designed to prevent, detect, and clean up releases from USTs containing petroleum and other regulated substances. ***
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> One of the most important features of the UST regulations is the requirement for UST owners and operators to phase in modern design, construction, and installation standards for the purpose of preventing releases of regulated substances from USTs due to corrosion, overspilling, and overfilling. To this end, the UST regulations require that owners and operators of USTs installed after December 22, 1988, ('new UST systems') adhere to certain 'performance standards.' For 'existing UST systems' (those whose installation began before the above date), the regulations require that owners and operators either meet the performance standards for new USTs or upgrade their USTs not later than December 22, 1998. Upgrading can be accomplished by adding to USTs certain protective features, such as linings for tanks and pipes, corrosion protection, and equipment to prevent overspilling and overfilling [citations omitted].

Act]" for purposes of Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A). Thus, a person's failure to comply with a regulatory requirement codified in 40 C.F.R. Part 280 constitutes a failure to comply with "any requirement or standard promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the Act]" for purposes of Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A) (*i.e.* for purposes of the statutory provision that states that any owner or operator of underground storage tanks who fails to comply with such requirements and standards "shall be subject to a civil penalty..."), which in turn constitutes a "violation of any requirement of this subchapter [Subchapter IX, 42 U.S.C. §§ 6991 - 6991i]" for purposes of Section 9006 of the Act, 42 U.S.C. § 6991e. Whenever there is an ongoing violation of a 40 C.F.R. Part 280 regulatory requirement regarding underground storage tank systems, Section 9006(a)(1) of the Act, 42 U.S.C. § 6991e(a)(1) provides, in part that EPA "may issue an order requiring compliance within a reasonable specified time period...."

The EAB has recognized that, in light of the importance of its enactment of the UST provisions, Congress intended that there be strict adherence to and compliance with the UST regulatory scheme for the operation of underground storage tanks:

> Congress enacted the UST provisions of RCRA to address the long-unacknowledged problem of UST systems leaking gasoline and other contaminants into the environment. *** Congress therefore directed EPA to promulgate release detection, prevention, and correction regulations applicable to all owners and operators of new and existing USTs, as necessary to protect human health and the environment. In doing so, Congress expressed its determination that USTs may no longer be used in the United States except in accordance with the comprehensive [UST] regulatory program.

In re Norman C. Mayes, RCRA (9006) Appeal No. 04-01, 12 E.A.D. 54, 67-68 (EAB 2005).

In promulgating the Part 280 regulatory requirements, EPA acknowledged some of the

difficulties it faced, including that "the regulatory universe is immense, including over 2 million UST systems estimated to be located at over 700,000 facilities nationwide." 53 *Fed. Reg.* 37082, 37083 (September 23, 1988). The purposes underlying EPA's promulgation of the UST regulatory standards underscore the need for effective enforcement of such rules (*id.* at 37096):

> [T]oday's final rule establishes comprehensive requirements for the management of a wide range of UST systems. These final standards for UST systems are designed to reduce the number of releases of petroleum and hazardous substances, increase the ability to quickly detect and minimize the contamination of soil and ground water by such releases, and ensure adequate cleanup of contamination. To do this, the standards in some way must affect every phase of the life cycle of a storage tank system: Selection of the tank system; installation, operation and maintenance; closure and disposal; and cleanup of the site in cases of product release.

It is against this statutory and regulatory backdrop that the appropriateness and importance of assessing the penalties against any given violator must be considered, and it is also within this context that the necessity for doing so must be evaluated.

C. The Board's Appellate Authority

The extent of the Board's authority to entertain appeals from rulings of the Presiding Officer is set forth in the 40 C.F.R. Part 22 rules of procedure. The Board's jurisdiction is codified at 40 C.F.R. § 22.30(c): "The parties' right of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction."[10] The extent of the EAB's substantive authority to decide appeals is found in 40 C.F.R. 22.30(f):

> The [EAB] shall adopt, modify, or set aside the findings of fact and

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[10] If the Board "determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of an adequate argument." 40 C.F.R. § 22.30(c).

> conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The [EAB] may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the [EAB] may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The [EAB] may adopt, modify or set aside any recommended compliance...order.... The [EAB] may remand the case to the Presiding Officer for further action.[11]

In a proceeding such as the instant one, where the Region is seeking to enforce regulatory requirements and proscriptions, the Board employs the *de novo* standard of review regarding both factual findings and legal determinations made by the Presiding Officer in the proceeding below. This is well established. *See, e.g., In re Vico Construction Corporation and Amelia Ventures Property, LLC*, CWA Appeal No. 05-10, 12 E.A.D. 298, 313 (EAB 2005), "In an enforcement proceeding, the Board thus review an ALJ's factual findings and legal conclusions *de novo*"; *In re CDT Landfill Corporation*, CAA Appeal No. 02-02, 11 E.A.D. 88, 101 (EAB 2003), "In Part 22 enforcement appeals, the Board generally reviews an ALJ's factual and legal conclusions on a *de novo* basis" (footnote omitted).[12] While this Board serves as the Agency's appellate tribunal, the deference it accords to the factual findings made by the administrative trial court (*i.e.* the

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[11] The EAB possesses authority "to review an initial decision on its own initiative." 40 C.F.R. § 22.30(b). To do so, the Board must file with the EAB Clerk "a notice of intent to review that decision" and it must serve that notice to the Regional Hearing Clerk, the Presiding Officer and the parties "within 45 days after the initial decision was served upon the parties." *Id.*

[12] This mirrors the standards in the federal courts. While "*de novo* review is review without deference" the term "clear error" or "clearly erroneous" constitutes "the standard under which appellate courts review a district court's factual findings." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168 (2nd Cir. 2001) (footnote omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948).

ALJ) is limited to those cases where the Board reviews an initial decision that was issued subsequent to an administrative hearing having been held pursuant to Subpart D of the 40 C.F.R. Part 22 regulations, 40 C.F.R. §§ 22.21 - 22.26. This principle has been consistently reaffirmed in EAB case law. As the Board explained in *Vico Construction*:

> Nonetheless, the Board generally defers to an ALJ's factual findings where those findings rely on witness testimony and where the credibility of the witnesses is a factor in the ALJ's decisionmaking. This approach recognizes that the ALJ is able to observe firsthand a witness's demeanor during testimony and is therefore in the best position to evaluate his or her credibility [citations omitted].

12 E.A.D. at 313. That the deference accorded to an ALJ's factual determinations in an initial decision is confined to those findings made in the course of an administrative evidentiary hearing is a principle firmly anchored in EAB jurisprudence.[13] Two corollaries flow from this principle. Deference need not be accorded by the Board to an ALJ's factual findings in an initial decision when they are based upon the parties written submissions, and the ALJ's legal determinations in an initial decision are reviewed *de novo*.[14]

III. THE UST PENALTY POLICY

To carry out the UST statutory provisions, EPA developed a guidance policy document for use in developing penalties for UST violations. This document, entitled "U.S. EPA Penalty

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[13] *See, e.g., CDT Landfill*, 11 E.A.D. at 100, n.23: "The Board, however, generally defers to an ALJ's factual findings where credibility of witnesses is at issue 'because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility[,]'" quoting *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

[14] In addition to a situation following a Part 22 evidentiary hearing, an ALJ may issue an initial decision in a default order (40 C.F.R. § 22.17(c)) or in a decision following a motion for accelerated decision (40 C.F.R. § 22.20(b)). What is determinative whether the ALJ ruling constitutes an initial decision is that it must "resolv[e] all outstanding issues in the proceeding." 40 C.F.R. § 22.3.

Guidance For Violations of UST Regulations OSWER Directive 9610.12 [dated] November 14, 1990" (referred to below as the "Penalty Policy"), is available on the Internet at http://www.epa.gov/oust/directiv/od961012.htm.[15] The Penalty Policy discusses its intended purposes on page 2:[16]

> This document provides guidance to [EPA]...Regional Offices on calculating civil penalties against owner/operators of underground storage tanks (USTs) who are in violation of the UST technical standards and financial responsibility regulations. The methodology described in this guidance seeks to ensure that UST civil penalties, which can be as high as $10,000 [subsequently increased] for each tank for each day of violation, are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance.

The goals underlying the Penalty Policy are three-fold: to encourage the timely and prompt resolution of environmental problems, to support a fair and equitable treatment of the person subject to UST regulation and to deter potential violators from future non-compliance. Section 1.3. There are two ways EPA seeks to attain the deterrence goal: by removing any significant economic benefit a violator might have gained from its non-compliance (referred to as the "economic benefit component") and charging an additional amount (termed the "gravity-based component) to penalize a violator's failure to comply with an applicable UST requirement

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[15] The penalty amounts in the Penalty Policy have been adjusted to account for inflation. As previously noted, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, authorized EPA to increase the maximum penalty per violation that could be obtained under the Act.

[16] In this section ("THE UST PENALTY POLICY"), citations to pages or sections,standing alone, indicate the reference is to the Penalty Policy. The discussion in this section is based on the discussion of the Penalty Policy found in the August 2012 declaration of Paul M. Sacker, which the Region served on August 9, 2012, in litigating the penalty question. That discussion is found in paragraphs 15 through 41 of his declaration, and the Penalty Policy was Exhibit A to that declaration.

or prohibition.[17] The Penalty Policy provides for adjustments "to take into account legitimate differences between similar cases." Further, "under this methodology, the gravity-based component incorporates adjustments that reflect the specific circumstances of the violation, the violator's background and actions, and the environmental threat posed by the situation." Section 1.3. The sum of the economic benefit component and the gravity-based component yields the initial penalty.

A. The Economic Benefit Component

The economic benefit component, which "represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance," consists of avoided costs and delayed costs. The former consist of the periodic operation and maintenance expenditures that should have been incurred but were not as a result of the non-compliance, while the latter consist of expenditures deferred but which must be incurred later to attain compliance. The economic benefit component is determined through computer software known as BEN. This system "uses a financial analysis technique known as 'discounting' to determine the net present value of economic gains from noncompliance" (Section 2.1). This system provides an evaluation based upon 12 specific factors or inputs, such as a violator's initial capital investment, non-depreciable expenditures and operation/maintenance costs. Avoided costs represent avoided expenditures added to the interest to the money potentially earned because the money had not been spent. Determining avoided costs involves avoided expenditures, interest (defined as the equity discount), the number of days

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[17] Of course, the amount of any given penalty for a specific violation is subject to, and cannot exceed, the maximum amount permitted by statute.

in which non-compliance has occurred and the marginal tax rate, which varies depending on the size of the business. Delayed costs involve the delayed expenditures multiplied by the appropriate interest rate multiplied by the number of days of noncompliance, a number then divided by 365 (this denominator is also utilized in the avoided cost calculation).

B. The Gravity-Based Component

The gravity-based component in the Penalty Policy consists of four elements: the matrix value, the violator-specific adjustments to the matrix, the environmental sensitivity multiplier (ESM) and the days of noncompliance multiplier (DSM). The gravity-based component is determined by the matrix value multiplied by the violation specific adjustments, further multiplied by the ESM and then multiplied by the days of noncompliance multiplier.

1. The Matrix Value

The matrix value is based on the potential for harm and the violator's extent of deviation from the applicable regulatory requirement. The Potential for Harm component assesses the likelihood that a violation could or did result in harm to human health and the environment (and/or has or has had a deleterious impact on the regulatory program), while the Extent of Deviation component involves a determination as to the extent to which the applicable requirement was not followed. EPA uses a matrix to determine the most appropriate level of each factor, with classifications of major, moderate and minor (for both extent of deviation and potential for harm). It is a graduated scale, with the most serious violations (from either the extent of deviation perspective or the actual/potential for harm perspective) rated as major. For example, where there is substantial noncompliance, that is classified as a major extent of

deviation. As for potential for harm, major involves a substantial or continuing risk to human health or the environment or a substantial impact on the ability of the regulatory program to function as intended; moderate involves a lesser degree of risk, significant but less than substantial; and minor potential involves a relatively low risk of harm to human health or the environment, or to the regulatory program.

2. Violator Specific Adjustments

After the matrix value has been determined, the next concern is violator-specific adjustments. These include the violator's degree of cooperation or non-cooperation (allowing for a range between a 50% increase and a 25% decrease), a violator's degree of willfulness or negligence (between a 50% increase and a 25% decrease), the violator's history of noncompliance (allowing for only up to 50% increase) and other unique factors (between a 50% increase and a 25% decrease). These are fact-specific; no downward adjustment is to be given if the good faith efforts to comply with a requirement consist of coming into compliance. As for willfulness/negligence, considerations include the extent to which the violator had control over the events constituting the violation, the foreseeability of events constituting the violation, whether the violator knew or should have known of the hazards associated with its violative conduct and whether the violator knew of the legal requirement that was violated. The history of noncompliance involves these considerations: the number of previous violations, the seriousness of the prior violations, the duration of prior violations; the similarity of present violations to prior ones and the violator's response to the previous violations. The "other unique factors" provision enables EPA to consider factors that do not fall into specifically delineated categories.

3. Environmental Sensitivity Multiplier (ESM)

The Environmental Sensitivity Modifier (ESM) "takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release." Section 3.3. It differs from the potential for harm consideration because potential for harm weighs the likelihood that the non-compliance could cause harm to human health or the environment, or to important aspects of the regulatory program. The ESM looks at the actual or potential impact that a release, once it has occurred, would have on the local environment. It is a relative measure of the sensitivity of the environment in which an UST tank(s) is located, and such sensitivity is evaluated as low, moderate or high. Factors considered in making an ESM determination include the amount of petroleum or other substance released or that might have been released; the toxicity of the material that was or might have been released; the potential hazard presented by such a release; the geologic features of the area that might affect the extent of the release or exacerbate its harmful effects or otherwise make remediation more difficult; the possibility that a release might contaminate local waterways or drinking water supplies or environmentally sensitive areas such as wetlands, proximity to sensitive populations and the overall ecological or aesthetic value of the areas that might have been impacted. For example, the ESM might be deemed high where a release from a tank holding petroleum substances would or might pollute the local drinking water or where a large area would be harmed. Under the Penalty Policy, the lowest ESM is classified as number 1; a moderate ESM is given the number 1.5 and for a high ESM, the number 2 is assigned.

4. Days of Noncompliance Multiplier (DNM)

The days of noncompliance multiplier adjusts the matrix value to take account of the time duration of the noncompliance — how long a violator failed to adhere to a regulatory (or statutory) requirement. Up to 90 days, the DNM value is one, between 91 and 180 days it is 1.5, from 181 days to 270 days, it is 2.0 and for 271 days to one year, the number is 2.5; for each additional six months, 0.5 is added.

C. The Penalty Policy and 40 C.F.R. Part 22 Case Law

Part 22 tribunals recognize the role and importance of the UST penalty guidance. It serves "as [the] starting point for implementing the statutory penalty factors." *Carroll Oil*, 10 E.A.D. at 669. The EAB has observed it is more than simply the starting point; penalty policies represents a means "to implement the statutory directive[s]" in determining an appropriate administrative penalty. *In re B&R Oil Company*, RCRA (3008) Appeal No. 97-3, 8 E.A.D. 39, 54 (EAB 1998). More specifically, the EAB has written in *In re William E. Comley, Inc. & Bleach Tek, Inc.*, FIFRA Appeal No. 03-01, 11 E.A.D. 247, 262 (EAB 2004), "[W]e have noted on numerous occasions that penalty policies serve to facilitate application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments." In *Euclid*, the EAB summarized the overall utility of the UST guidance:

> The EPA has developed guidelines for the implementation of these statutory factors. The *U.S. EPA Penalty Guidance for Violations of UST Regulations* has been developed for the calculation of civil penalties against owners/operators of USTs who...are in violation of the UST technical standards and financial responsibility regulations. The UST Penalty Policy seeks to ensure that UST civil penalties are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance. To deter the violator from repeating the violation, and to deter other potential violators from

> failing to comply, the penalty policy seeks to place the violator in a worse position economically than if the violator had complied on time. The policy document achieves deterrence by removing any significant economic benefit that the violator may have gained from non-compliance (referred to as the economic benefit component of the penalty) and by assessing an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law (referred to as the gravity-based component) [citation omitted].[18]

IV. FACTS OF THE PROCEEDING

An extensive evidentiary record was developed in the proceeding below. The facts of this proceeding — both predicate/ background facts, and upon which the ALJ declared liability and assessed penalties — have been established through, and/or otherwise found, through the following: the admissions appellants made in their Answer (served on or about June 6, 2011); the stipulations entered into by the parties on March 22, 2012; the information Mr. Chase provided (or failed to provide) to EPA in response to the Agency's Information Request letters (issued under authority of Section 9005(a) of the Act, 42 U.S.C. § 6991d(a)); the declaration of Jeffrey K. Blair, executed on January 25, 2012; the declaration of Paul Sacker, executed on February 10, 2012; and the declaration of Paul Sacker, executed on August 9, 2012.[19] The factual findings made by the ALJ were set forth in the June 21st PAD Order and the June 20th

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[18] Despite the utility of the Penalty Policy, as the EAB observed in *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal 95-6, 6 E.A.D. 735, 759 (EAB 1997), because a penalty policy "has never been subjected to the rule making procedures of the Administrative Procedure Act, [it] thus does not carry the force of law."

[19] The Blair and the February 2012 Sacker declarations were submitted as part of the Region's motion for partial accelerated decision seeking a judgment of liability; the August 2012 Sacker declaration was submitted as part of the Region's litigation of the penalty question.

Initial Decision,[20] with each decision referencing the evidentiary basis for them.[21] While this Board is respectfully referred to the evidentiary record developed during the proceedings before the ALJ, the following is intended as a capsule summary of the relevant facts for the Board's convenience.

In addition to Mr. Chase, there are three additional appellants (these are the corporate appellants), and each of these three was during all times relevant to the allegations in the Complaint a for-profit corporations organized under New York law. Mr. Chase played a prominent role in each of the corporate appellants, either as the chairman or the chief executive officer. Pages 11-12 of the June 20th Initial Decision.

There are six retail gasoline service stations/convenience stores in northern New York cited in this proceeding: 1) a station in Lyon Mountain, New York ("Station I"); 2) a station in Peru, New York ("Station II"); 3) a station on Military Turnpike Road in Plattsburgh, New York ("Station III"); 4) a station in Redford, New York ("Station IV"); 5) a station in Dannemora, New York (Station V); and 6) a station on Route 9 in Plattsburgh, New York ("Station VI"). At these stations there were varying numbers of underground storage tanks (USTs). To determine the 40 C.F.R. Part 280 regulatory compliance status of these USTs, EPA inspected Station I on April

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[20] As previously noted, appellants do not dispute or deny, nor do they seek to overturn, any of the factual findings of the ALJ in either the June 20th Initial Decision or the June 21st PAD. All of their arguments in the appeal concern the ALJ's assessment of the penalties and their efforts to invalidate those assessments. Nor has this Board filed a 40 C.F.R. § 22.30(b) notice indicating it wishes *sua sponte* to review any fact or issue in the June 20th Initial Decision; similarly, this Board has not elected to proceed with *sua sponte* review of any "issues raised, but not appealed by the parties." 40 C.F.R. § 22.30(c).

[21] Because no factual issues are in contention, see n.18, *supra*, and because these decisions reference the bases for their findings, citations in this section discussing the facts of the proceeding will be limited to the ALJ rulings.

24, 2009 and again on August 24, 2010; Stations II, III, IV, V and VI on August 26, 2008; and Station VI on August 24, 2010.[22] In addition to on-site inspections, EPA issued information request letters to Mr. Chase concerning the operation, maintenance and compliance status of these USTs on each of the following dates: April 1, 2009; October 5, 2009; September 7, 2010; and November 29, 2010. Page 12 of the June 20th Initial Decision.

The following is a summary listing of the USTs at these stations relevant to this proceeding (*i.e.* the USTs involved in the 40 C.F.R. Part 280 violations for which appellants were cited):

> At Station I: Tank 006A (with a capacity of 11,000 gallons) and Tank 006B (with a capacity of 4,000 gallons) were installed on May 1, 1998, and Tank 008 (with a capacity of 550 gallons) was installed on or about October 1, 1988. Tanks 006A and 006B held gasoline and Tank 008 held kerosene. The underground piping connected to Tanks 006A and 006B conveyed gasoline under pressure, while the piping of tank 008 relied upon suction (*i.e.* was not pressurized). Mr. Chase was the owner and operator of these tanks. Pages 14-15 of the June 20th Initial Decision.
>
> At Station II: Tanks 001A (with a capacity of 11,000 gallons), 001B (with a capacity of 4,000 gallons) and 002 (with a capacity of 12,000 gallons) were installed on or about September 1, 1998. Tanks 001A and 001B held gasoline, while Tank 002 held diesel fuel. The underground piping connected to each of these tanks was pressurized (*i.e.* conveyed their contents under pressure, as opposed to suction). Mr. Chase was the operator of these USTs; appellant CCS was the owner of these USTs. Pages 12, 30-31 of the June 20th Initial Decision.
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> At Station III: Tank 001 (with a capacity of 11,000 gallons) and Tank 002 (with a capacity of 4,000 gallons) were installed on November 1, 1995. Both tanks contained gasoline, and the underground piping connected to each of them was pressurized. Mr. Chase was the owner and operator of these tanks. Pages 12, 32-

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[22] The August 26, 2008 inspections of Stations II through VI were conducted by EPA contract employee Jeffrey K. Blair; Mr. Blair also conducted the inspection of Station I on April 24, 2009. Both Mr. Sacker and Mr. Blair conducted the August 24, 2010 inspection of Stations I and VI.

33 of the June 20th Initial Decision.

At Station IV: Tank 001A (with a capacity of 9,000 gallons was installed on or about April 1, 1992; Tank 003A (with a capacity of 10,000 gallons) and Tank 003B (with a capacity of 5,000 gallons) were installed on or about June 3, 2003. Tank 001A contained diesel fuel, and Tanks 003A and 003B contained gasoline. The underground piping connected to each of these three tanks was pressurized. Mr. Chase was the operator of these underground storage tanks, and CSI owned these USTs. Pages 12, 38-39 of the June 20th Initial Decision.

At Station V: Tank 001A (with a capacity of 10,000 gallons), Tank 001B (with a capacity of 5,000 gallons) and Tank 002A (with a capacity of 6,000 gallons) were installed on or about November 1, 2001. Tanks 001A and 001B held gasoline, and Tank 002A held diesel fuel. The piping connected to these tanks were pressurized. Appellant CCLD owned these USTs and Mr. Chase operated them. Pages 12, 44 of the June 20th Initial Decision.

At Station VI: Tank 1(with a capacity of 10,000 gallons), Tank 2A (with a capacity of 5,000 gallons), Tank 2B (with a capacity of 6,000 gallons), Tank 3A (with a capacity of 2,000 gallons) and Tank 3B (with a capacity of 2,000 gallons) were installed on or about December 31, 2007 and existed at the station through at least March 22, 2012. Tank 1 contained diesel fuel, Tank 2A contained (at the time of the August 2010 inspection of Station VI) off-road diesel, Tank 2B contained kerosene and Tanks 3A and 3B contained gasoline. Tank 1 had underground piping that used pressure to convey its diesel fuel contents, and Tanks 3A and 3B were also connected to underground piping that used pressure to convey the gasoline they held; each of Tanks 2A and 2B relied on suction to convey their contents. Mr. Chase owned and operated these five USTs at Station VI. Pages 12, 47-48 of the June 20th Initial Decision.

As noted on page 12 of the June 20th Initial Decision, of the 18 total USTs in the violations the ALJ found against appellants, 17 were in use throughout the period alleged in the Complaint, and one UST (Tank 008 at Station I) was temporarily taken out of service after April 2008 and was permanently closed in November 2009. Pages 12, 14 of the June 20th Initial

Decision.[23]

V. HISTORY OF THE PROCEEDING

The following provides highlights some of the key "litigation" documents in this proceeding, *i.e.* it provides a listing of the pleadings, significant orders issued and motions served. This overview provides a greater factual and chronological context to the arguments appellants raise on appeal. To the extent any of these documents is pertinent to an argument in opposition to appellants' appeal and/or in support of the Region's cross-appeal, they will be discussed in the relevant section.

The Complaint was issued in April 2011 and appellants (as respondents) timely answered in June 2011; one answer was filed on behalf of all respondents below. Chief Administrative Law Judge Susan Biro[24] issued a "Prehearing Order," dated July dated July 12, 2011. That order, *inter alia*, established a schedule for the submission of the parties' prehearing exchanges and their obligations in preparing the prehearing exchanges. Pursuant to amended order, the Region submitted its initial prehearing exchange on November 10, 2011, appellants submitted theirs prehearing exchange on or about December 2, 2011 and the Region submitted its rebuttal prehearing exchange on December 15, 2011. In February 2012, the Region moved for an accelerated decision on liability and appellants served their response on or about March 29, 2012;

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[23] Appellants admitted relinquishing their ownership interests in the USTs at the following stations on or about July 24, 2009: Station II (appellant CCS); Station IV (appellant CSI); and Station V (appellant CCLD). Paragraphs 7, 12 and 15, respectively, of the Answer.

[24] By "Order of Designation," dated July 6, 2011, Judge Biro was designated as the presiding Administrative Law Judge. By the "Order of Redesignation," dated January 31, 2012, Judge Buschmann was re-designated as the presiding Administrative Law Judge.

the Region filed its reply on April 5, 2012. On March 22, 2012, the ALJ issued her "Order on Complainant's Request for Time to File Non-Dispositive Motions." Also on March 22, 2012, the parties submitted to the ALJ joint stipulations of facts, exhibits and testimony.

On March 25, 2012, the Region filed a "Motion to Compel Production of Financial Records/To Preclude/To Draw Adverse Inference," to obtain an order to compel appellants to produce financial documentation. That motion noted that appellants had explicitly raised an inability to pay/financial hardship claim in their December 2, 2011 prehearing exchange. The ALJ ruled on that motion in her May 11, 2011 "Order on Complainant's Motions to Supplement Prehearing Exchange and to Compel Production of Documents, and Order Scheduling of Hearing." On June 15, 2012, the Region moved for an order to "preclud[e] Respondents from introducing or admitting documentation or information relevant to their claim of inability to pay/financial hardship into the record of the hearing scheduled to begin July 17, 2012, and...[to] draw[] the inference that the information contained in the financial documentation Respondents failed to produce in accordance with the requirements of the May 11th order would be adverse to said claim."

On June 21, 2012, the ALJ granted the Region's motion for partial accelerated decision for Counts 1 through 16, 18, 19 and 21, and denied the Region's motion for partial accelerated decision for Count 17 (identified herein as the June 21st PAD Order). On June 28, 2012, Judge Buschmann granted the Region's June 15th preclusion motion, the "Order on Complainant's Motion to Preclude Documentation and Draw Adverse Inference." The ALJ issued her next order on July 13, 2012, the "Order Granting Joint Motion to Cancel Hearing and for the Court to Issue an Initial Decision Based on the Written Record." The joint motion to which the order

referred had been submitted on July 10, 2012, and it contained seven stipulations and conditions to which the parties agreed, and which the ALJ accepted.

On June 20, 2013, the ALJ issued her Initial Decision.

VI. ALJ FINDINGS OF LIABILITY IN THE JUNE 20TH INITIAL DECISION

The ALJ found appellants (either Mr. Chase alone or in tandem with one of the corporate appellants) liable for Counts 1 through 16, 18, 19 and 21 of the Complaint, and these findings of liability were reiterated in the June 20th Initial Decision. These findings as set forth in the June 20th Initial Decision are reproduced below (with the page references to said decision):

Count 1 of the Complaint (page 18 of the June 20th Initial Decision):

> As found in the June 21 Order, Mr. Chase failed to either have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 006A and 006B at Station I between April 24, 2008 and December 15, 2010, in violation of 40 C.F.R. § 280.41(b)(1)(ii), as alleged in Count 1 of the Complaint.

Count 2 of the Complaint (page 21 of the June 20th Initial Decision):

> As found in the June 21 Order, Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector for underground piping of Tank nos. 006A and 006B at Station I from May 2006 until April 22, 2009 and from April 22, 2010 to September 7, 2010, in violation of 40 C.F.R. §§ 280.44(a) and 280.41(b)(1)(i), as alleged in Count 2 of the Complaint.

Count 3 of the Complaint (pages 23-24 of the June 20th Initial Decision):

> Mr. Chase was found in the June 21 Order to have failed to meet the overfill protection equipment requirements of 40 C.F.R. § 280.20(c)(1)(ii) on Tank # 008, by providing only a whistler valve from April 1, 2006 through April 30, 2008.

Count 4 of the Complaint (page 25 of the June 20th Initial Decision):

> As found in the June 21 Order, Mr. Chase failed to continue release

detection after Tank # 008 at Station I was temporarily closed in [sic] April 30, 2008 until it was required to be permanently closed by April 2009, in violation of 40 C.F.R. § 280.70(a).

Count 5 of the Complaint (page 27 of the June 20th Initial Decision):

As to Count 5, Mr. Chase was found liable in the June 21 Order for failure to conduct triennial testing of the cathodic protection system of Tank # 008 from June 2008 until it was required to be permanently closed in April 2009, in violation of 40 C.F.R. § 280.70(a).

Count 6 of the Complaint (page 28 of the June 20th Initial Decision):

As found in the June 21 Order, Mr. Chase is liable for a violation of 40 C.F.R. § 280.70(b) by his failure to cap and secure Tank # 008 from July 30, 2008, the time three months after it was temporarily closed, until it was permanently closed on November 30, 2009.

Count 7 of the Complaint (page 29 of the June 20th Initial Decision):

Mr. Chase was found liable in the June 21 Order for his failure from April 30, 2009 to November 30, 2009, to either permanently close Tank # 008 or have it inspected for proper operation by a qualified cathodic protection tester, in violation of 40 C.F.R. § 280.70(c).

Count 8 of the Complaint (page 30 of the June 20th Initial Decision):

In the June 21 Order, Respondents Mr. Chase and CCS were found liable for violation 40 C.F.R. § 280.44 and § 280.41(b)(1)(i) at Station II for failure to conduct an annual test of the operation of the ALLDs on the piping each of [sic] Tanks nos. 001A, 001B and 002 from September 1, 2006 until April 6, 2009, as alleged in Count 8.

Count 9 of the Complaint (page 34 of the June 20th Initial Decision):

As alleged in Count 9 of the Complaint, Mr. Chase is liable for failure to conduct triennial testing of the cathodic protection system of the two USTs at Station III in violation of 40 C.F.R. § 280.31(b) from May 1, 2008 until April 6, 2009.

Count 10 of the Complaint (page 35 of the June 20th Initial Decision):

In the June 21 Order, Mr. Chase was found liable for failure to conduct an

annual test of the operation of the automatic line leak detectors on the two USTs at Station III from November 1, 2006 until April 6, 2009, in violation of 40 C.F.R. § 280.44 and § 280.41(b)(1)(i), as alleged in Count 10 of the Complaint.

Count 11 of the Complaint (page 37 of the June 20th Initial Decision):

In the June 21 Order, Mr. Chase was found liable for failure from August 26, 2007 to the end of December 2007, to maintain release detection records for the underground piping of the two USTs at Station III, in violation of 40 C.F.R. § 280.45, as alleged in Count 11 of the Complaint.

Count 12 of the Complaint (pages 39-40 of the June 20th Initial Decision):

Mr. Chase and CSI were found in the June 21 Order to have failed to meet the overfill protection equipment requirements of 40 C.F.R. § 280.20(c)(1)(ii) on Tank # 001A at Station IV since August 26, 2008.

Count 13 of the Complaint (page 41 of the June 20th Initial Decision):

In the June 21 Order, Mr. Chase and CSI were found liable for failure to conduct an annual test of the operation of the ALLDs at Station IV on UST # 001A from at least April 1, 2006 until April 6, 2009, and on UST nos. 003A and 003B from June 1, 2006 until April 6, 2009, in violation of 40 C.F.R. § 280.44 and § 280.41(b)(1)(i), as alleged in Count 13 of the Complaint.

Count 14 of the Complaint (page 43 of the June 20th Initial Decision):

As concluded in the June 21 Order, Mr. Chase and CSI were found liable for their failure, from August 26, 2007 to the end of December 2007, to maintain release detection records for the underground piping of UST nos. 001A, 001B, 003A and 003B at Station IV, in violation of 40 C.F.R. § 280.45, as alleged in Count 14 of the Complaint.[25]

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[25] The Initial Decision on page 43 indicates liability was found regarding four tanks: 001A, 001B, 003A and 003B. This was also stated on page 39, under the heading, "Violations at Station IV." This is slightly in error; liability was only established for three tanks. Tank 001B should not have been listed. The extent of the liability was correctly noted on page 17 of the June 21st PAD Order, which states that EPA "has, however, shown that for a period including August 26, 2007 and the end of December 2007, Mr. Chase and CSI failed to meet the requirement to maintain release detection records for the underground piping of Tank nos. 001A, 003A and 003B at Station IV, in violation of 40 C.F.R. § 280.45." This reflected the correction the Region noted in its February 12, 2012 memorandum of law (submitted in support of EPA's motion for accelerated decision on liability). In footnote 5 to that memorandum (page 8), EPA noted that the tanks listings in paragraphs 212 and 213 of the Complaint

Count 15 of the Complaint (page 45 of the June 20th Initial Decision):

> Mr. Chase and CCLD were found in the June 21 Order liable for failure to conduct an annual test of the operation of the ALLDs on UST nos. 001A, 001B and 002A at Station V from November 1, 2006 until April 6, 2009, in violation of 40 C.F.R. § 280.44 and § 280.41(b)(1)(i), as alleged in Count 15 of the Complaint.

Count 16 of the Complaint (page 45 of the June 20th Initial Decision):

> In the June 21 Order, Respondents CCLD and Mr. Chase were found liable for *** 40 C.F.R. § 280.45 (failure to maintain release detection records for the underground piping on Tank nos. 001A, 001B, 003A [sic; should read "002A]" and 002B [at Station V])[26].

Count 18 of the Complaint (pages 49-50 of the June 20th Initial Decision):

> As found in the June 21 Order, Mr. Chase is liable for failure to conduct

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should not have included Tank 001B. Similarly, footnote 44 to the February 2012 memorandum of law (page 85) indicates Tank 001B should not have been included as part of the allegations of Count 14 because its piping relied on suction; this note concluded by stating that the Agency was "only seeking a judgment on liability for this count for tank systems 001A, 003A and 003B."

[26] The Initial Decision on each of pages 45 and 46 lists the violation found for Count 16 as involving four tanks — Tanks "001A, 001B, 003A and 002B." At this station, there was no Tank 003A; instead, in addition to Tanks 001A, 001B and 002B, there was a tank identified with " 002A." Paragraphs 38 and 39 of the Paul Sacker declaration of February 10, 2012. In addition, as in the situation discussed for Count 14 in note 24, *supra*, the violation the ALJ found for Count 16 only involved three tanks — Tanks 001A, 001B and 002A; there was no violation found in this count involving Tank 002B. The pertinent (and correct) finding of liability was set forth on page 17 of the June 21st PAD Order: "In support of Count 16, Complainant has shown that for a period including August 26, 2007 and the end of December 2007, Mr. Chase and CCLD failed to meet the requirement to maintain release detection records for the underground piping of Tank nos. 001A, 001B and 002B at Station V, in violation of 40 C.F.R. § 280.45." As with Count 14, this situation undoubtedly arose from an error in EPA's Complaint, an error the Agency's February 12, 2012 memorandum of law attempted to correct. Footnote 8 on page 5 of that memorandum noted that the reference in paragraphs 237 and 238 of the Complaint to Tank 002B should be deleted; footnote 45 on page 85 in the February 2012 memorandum provided a fuller explanation:

> As previously noted, and similar to the allegations pertaining to count 14, this count pleads violations for four tank systems, but this is an error. The allegations of this count do not implicate the piping of tank 002B, as it relies on suction and is not pressurized. Accordingly, Complainant is only seeking a judgment on liability for this count for tank systems 001A, 001B and 002A.

an annual test of the operation of the ALLD for the piping of Tank nos. 1, 3A and 3B at Station VI from December 31, 2008 through September 7, 2010, in violation of 40 C.F.R. § 280.44 and [§] 280.41(b)(1)(i), as alleged in Count 18 of the Complaint.

Count 19 of the Complaint (page 51 of the June 20th Initial Decision):

In the June 21 Order, Mr. Chase was found liable for failure from August 24, 2009 to December 15, 2010, to conduct monthly monitoring in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 1, 3A and 3B at Station VI, in violation of 40 C.F.R. § 280.41(b)(1)(ii), as alleged in Count 19 of the Complaint.

Count 21 of the Complaint (page 53 of the June 20th Initial Decision):

Mr. Chase was found liable in the June 21 Order for failure to report within 24 hours from August 24, 2010 to the New York State Department of Environmental Conservation (NYSDEC) that sensors connected to or associated with UST nos. 2A and 2B were in alarm, and to immediately investigate whether the alarm involved a release of regulated substances from the USTs, in violation of 40 C.F.R. § 280.52.

ARGUMENT

POINT I (OPPOSITION TO CHASE APPEAL)

THE ADMINISTRATIVE LAW JUDGE ACTED FULLY WITHIN THE SCOPE OF HER AUTHORITY IN DISREGARDING EXHIBITS SUBMITTED AS PART OF COUNSEL'S OPPOSITION TO THE REGION'S MOTION FOR PARTIAL ACCELERATED DECISION

Point I of the Appeal Brief (pages 2-3) asserts the ALJ erred in assessing penalties for the violations she found (in her June 21st PAD Order) for Counts 1, 2, 18 and 19. With regard to Counts 1 and 2 (both pertaining to Station I), the Appeal Brief states, in relevant part:

> Counts 1 and 2 of the Complaint...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 [Station I] 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.[27]

With regard to Counts 18 and 19, the Appeal Brief states:

> Counts 18 and 19 related to Service Station VI, and allege that there was a (18) failure to annual 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 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.[28]

As will be demonstrated below, these arguments are spurious and patently erroneous; each is devoid of any legal merit. Each of these arguments (pertaining to the individual counts) will be discussed separately.[29]

The Exhibit A Documentation Attached To The Plimpton Declaration Is Facially Irrelevant And Unconnected To The Violations Found For Count 1 Of The Complaint

As noted above, Count 1 alleges appellants' Respondents' failure to have an annual line

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[27] These documents were submitted as exhibits to counsel's declaration, "Declaration of Thomas W. Plimpton in Opposition to Complainants [sic] Motion for Partial Accelerated Decision," dated March 29, 2012 (hereinafter the "Plimpton declaration). The documents purportedly pertaining to Counts 1 and 2 were annexed as Exhibit A to Mr. Plimpton's declaration.

[28] The document referred to — pertaining to the 2011 inspection — was submitted as Exhibit B to the Plimpton declaration.

[29] The Appeal Brief asserts that the Complaint erroneously listed Mr. Chase as the owner of Station I. For purposes of Part 280 liability, ownership of a service station (as opposed to ownership of USTs) is not relevant. Both the underlying statute and the 40 C.F.R. Part 280 regulations make clear that responsibility, and ultimately liability, for violations is placed upon the owners (as well as operators) of the *underground storage tanks*. *See, e.g.*, 42 U.S.C. § 6991b(a), wherein it states that "[t]he Administrator [of EPA]...shall promulgate release detection, prevention, and correction regulations applicable to all *owners* and operators of *underground storage tanks*" (emphasis added). *See also* 40 C.F.R. § 280.10(a), where it states in relevant part that "[t]he requirements of this part apply to all owners and operators of an UST system as defined in [40 C.F.R.] § 280.12.

tightness test or to have monthly monitoring conducted for the period between April 24, 2008 and December 15, 2010. [[30]] The three documents annexed as Exhibit A to the Plimpton declaration **only concern**, however, testing of the automatic line leak detector; they do not demonstrate that annual line tightness test or monthly monitoring occurred, nor do they otherwise refer or pertain to annual line tightness testing or monthly monitoring. The Appeal Brief concedes that when it notes that "Adirondack Energy and Paragon Environmental Construction, Inc. performed *leak detector* testing at the Lyon Mountain facility in 2009, 2010 and 2011" and that "[c]opies of those *leak detector* testing forms were previously submitted...." (emphases added).

Thus none of the documents referenced in the Appeal Brief concern or reflect annual line tightness testing or monthly monitoring of the pressurized lines, which are separate and distinct requirements from the requirements for the annual testing of the operation of automatic line leak detectors.[31] On the face of these documents, and as Appeal Brief observes, these documents concern only automatic line leak detector testing.[32] Therefore, these documents are irrelevant and

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[30] The Plimpton declaration omits any reference to the respective time periods of violation alleged in each count. Count 1 alleges the violations occurred between April 24, 2008 and December 15, 2010, while count 2 alleges the violations occurred over two time periods: between May 1, 2006 and April 22, 2009, and between April 22, 2010 and September 7, 2010. Both counts pertain to the underground piping attached to those underground storage tanks at Service Station I identified as tank # 006A and tank # 006B. Paragraphs 71-79 of the complaint (count 1) and ; paragraphs 80 -86 of the complaint (count 2), respectively (Exhibit A to the Spielmann declaration).

[31] *Compare* paragraph 55 of the February 2012 Sacker declaration (discussing line tightness testing/monthly monitoring) with paragraph 59 of his February 2012 declaration (discussing automatic line leak detectors).

[32] For purposes of addressing the arguments raised in Point I of the Appeal Brief, the Region assumes that these documents are what they purport to be, but such assumption for purposes of this brief is not intended or to be construed as the Region accepting the validity or accuracy of any information or results set forth in such documents.

immaterial to the allegations set forth in count 1 of the Complaint. Consequently the ALJ was correct in her not having considered any of the Exhibit A documents to the Plimpton declaration when she assessed a penalty for Count 1.

The Dates Of The Tests Indicated In Exhibit A Of The Plimpton Declaration Render Such Documents Irrelevant To The Violations Found For Count 2 Of The Complaint

The ALJ found Mr. Chase failed to conduct annual testing of the operation of the automatic line leak detector (ALLDs) for the periods from May 2006 until April 22, 2009 and then from April 22, 2010 through September 7, 2010 (page 21 of the Initial Decision), as Count 2 of the Complaint alleges.

The dates of the three documents that constitute Exhibit A of the Plimpton declaration (the documents identified in the Appeal Brief as the Adirondack Energy and Paragon Environmental Construction, Inc. leak detector testing forms) are: **a)** April 22, 2009 (for the document denominated "Leak Detector/FTA EVALUATION CHART"; hereinafter the "FTA document"), **b)** September 7, 2010 (for the [first] document denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING"; hereinafter the "Estabrook 1 document") and **c)** August 23, 2011 (for the [second] document denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING"; hereinafter the "Estabrook 2 document"). Given these dates, these documents demonstrate the validity and accuracy of the Complaint's allegations, as confirmed by the ALJ in awarding the Region accelerated decision on liability for this count; none of these documents refutes or calls into question that these violations occurred as alleged in the Complaint.

The earliest document in the Plimpton declaration is the FTA document, indicating a test

on April 22, 2009, and this supports what EPA has maintained throughout this litigation: for the piping associated with tanks 006A and 006B at Service Station I, starting in May 2006, no annual testing of the ALLDs occurred **until** April 22, 2009 (the date of the FTA document). Given that the next submitted in the Plimpton declaration (the Estabrook 1 document) indicates ALLD testing on September 7, 2010, that document confirms what EPA has asserted throughout this proceeding — for the piping connected to those USTs, no testing of the operation of the ALLDs occurred between April 22, 2010 (one year following the April 22, 2009 date) through, and up until, September 7, 2010 the date of the Estabrook 1 document. That these were the only leak detector testing documents for these periods (May 2006 to April 22, 2009; April 22, 2010 to September 7, 2010) demonstrates that what EPA had alleged had in fact occurred: as the ALJ found, there was no annual ALLD testing for these tanks during the time periods EPA cited.

As for the third document in Exhibit A to the Plimpton declaration, Estabrook 2 document, this document on its face reveals that it is irrelevant and immaterial to any question of penalty or liability); that this document is inconsequential to any issue in this proceeding is palpably self-evident from the face of the document. The Estabrook 2 document is dated August 23, 2011, and there is no issue in Count 2 whether annual ALLD testing occurred subsequent to September 7, 2010. Simply put, the date of the test indicated on the Estabrook 2 document is beyond the time period of any violation alleged and found in Count 2 of the Complaint.

Thus the ALJ was correct in not having considered any of these three documents when she assessed a penalty for the ALLD testing violations she found for Count 2.[33]

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[33] While the Region disputes the arguments appellants put forth regarding Count 2, and maintains the ALJ was correct in not having considered the Exhibit A documents to the Plimpton declaration in her penalty assessment, the Region does dispute *on another ground* the penalty she

The Document Submitted As Exhibit B To The Plimpton Declaration Contains Data Beyond The Time Relevant To The Violations ALJ Found For Count 18 Of The Complaint

The ALJ found Mr. Chase failed to conduct annual testing of the operation of the automatic line leak detector for the period from December 31, 2008 through September 7, 2010 (pages 49-50 of the Initial Decision), as Count 18 of the Complaint alleges.

Exhibit B of the Plimpton declaration consists of one document, denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING," and it is dated August 23, 2011. The violation the ALJ found (reflecting the pertinent allegations of the Complaint) did not run through or include August 23, 2011; this date was outside the period of violation (as EPA alleged in the Complaint, as the ALJ found in her June 21, 2012 decision on liability). Thus, the operative period for the ALLD violations in this count ended nearly one year (more than 11 months) before the date of the "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING."

Exhibit B does not negate, refute or call into question the correctness or validity of the allegations of count 18 of the complaint, as confirmed by the ALJ having granted the Region a partial accelerated decision for this count. As with the argument above concerning the Count 2 violation, the date of the test indicated on the "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING" document is beyond the time period of any violation alleged and found in Count 18 of the Complaint, and thus any information it contains or any test results it might indicate have no bearing on the violation (whether its nature, extent, or otherwise) in Count 18.

Thus the ALJ was correct in not having considered this document when she assessed a penalty for the ALLD testing violations she found for Count 18.

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assessed for Count 2. That ground will be discussed below as part of the Region's cross-appeal.

The Document Submitted As Exhibit B To The Plimpton Declaration Contains Information Factually Irrelevant And Unconnected To The Violations Found For Count 19 Of The Complaint

With regard to Count 19, the ALJ found Mr. Chase liable for having failed to conduct monthly monitoring for the period August 24, 2009 through December 15, 2010 (page 51 of her June 20th Initial Decision).

Exhibit B of the Plimpton declaration, the Paragon Environmental Construction, Inc. "leak detector testing" document, dated August 23, 2011, is irrelevant and immaterial to count 19 on two separate grounds. While that document purports to be a record of automatic leak detector testing for the piping, the ALJ found a different violation in Count 19: the failure of Mr. Chase to properly conduct monthly monitoring of the piping.[34] Count 19 does not allege is a failure to conduct the annual ALLD testing, and the Appeal Brief in fact concedes that this document concerns "leak detector testing." Nothing in Exhibit B to the Plimpton declaration speaks to the violations at issue in this count; Exhibit B is simply not relevant to the violations the ALJ found for this count of the Complaint.

The second ground why Exhibit B is not relevant to count 19 is a matter of chronology. Given the operative period during which the violation occurred (from August 24, 2009 through to December 15, 2010), this document, pertaining to testing having purportedly taken place on August 23, 2011, is simply not relevant or pertinent; the date of this purported test is more than eight months after the period of the violations had ended. Thus, whatever testing information

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[34] While this count of the Complaint alleges Mr. Chase relied on interstitial monthly monitoring for the piping associated with Tank Nos. 1, 3A and 3B, such monitoring had not been properly conducted, and he never demonstrated another method of monthly monitoring had taken place; similarly Mr. Chase never demonstrated that an annual line tightness test had been conducted (had an annual line tightness test been conducted, that would have made moot the issue whether the interstitial monthly monitoring had been properly conducted).

Exhibit B might record is outside the period of the violation found (and alleged) for this count.

Accordingly, the ALJ was correct in not having considered this document when she assessed a penalty for the monthly monitoring violation found for Count 19.

There is no merit to any of the arguments appellants have tendered in Point I of their Appeal Brief: the penalties for each of Count 1, 2, 18 and 19 were assessed based on the violations the ALJ had earlier found, and Mr. Chase's compliance outside the period the Complaint alleges these violations occurred is neither relevant or significant for purposes of calculating the penalty for the duration of the violation. This Board should dismiss appellants' argument in Point I of their Appeal Brief and reject the relief appellant seeks through this part of their appeal.[35]

POINT II (OPPOSITION TO CHASE APPEAL)

THE ADMINISTRATIVE LAW JUDGE PROPERLY EXERCISED HER AUTHORITY IN REFUSING TO CONSIDER APPELLANTS' ALLEGED FINANCIAL CONDITION IN ASSESSING PENALTIES FOR THE PART 280 VIOLATIONS SHE PREVIOUSLY FOUND

The ALJ properly refused to consider the financial condition of appellants in assessing

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[35] Another, independent legal basis may exist for dismissing appellants' appeal in its entirety. In 40 C.F.R. § 22.30(a)(1), it provides that "[o]ne copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk." This rule further states, "Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer." The Certificate of Service for appellants' Appeal Brief, dated August 22, 2013, does not indicate service on the Regional Hearing Clerk.: In addition, the Certificate of Service for the Notice of Appeal, also dated August 22, 2013, does not state that it was served upon the Presiding Officer (Judge Buschmann) or the Regional Hearing Clerk. If this Board deems that these provisions (either or both) in 40 C.F.R. § 22.30(a)(1) as jurisdictional — *i.e.* a mandatory condition precedent to the exercise of this Board's appellate authority whenever a party seeks to obtain EAB review of an adverse initial decision — then dismissal of the Chase appeal in its entirety is warranted. *Compare United States v. Robinson*, 361 U.S. 220 (1960) (holding the filing of a notice of appeal under the Federal Rules of Criminal Procedure jurisdictional and concluding that a belated filing of such notice upon the District Court failed to confer jurisdiction over the sought-for appeals in the Court of Appeals).

penalties because appellants never formally introduced into this litigation proceeding any financial information. They had numerous opportunities to do so, but they, without any reason, rationale, justification or explanation, failed to comply with a deadline for the submission of such information. They had ample notice of this deadline, and they also had ample warning that if they failed to comply with that deadline, they faced the possibility of a preclusion order being entered against them. Under these circumstances, the ALJ rightly precluded them from introducing such evidence into the proceeding. Under all these circumstances, the ALJ was correct not to consider appellants' claim of inability to pay.[36]

Despite Having Received Express Warning, Appellants Forfeited Ample Opportunity To Formally Introduce Into This Litigation Documentation Related To Their Financial Condition

In their Appeal Brief, appellants request this Board to consider their argument concerning inability to pay/financial hardship (page 4): "Respondents respectfully request that this Court revise the Initial Decision and consider the financial information showing financial hardship." The circumstances surrounding this question—appellants' failure to heed the ALJ's warnings of future preclusion, appellants' failure to meet an ALJ deadline for the submission of the information appellants now want this Board to consider, appellants' failure to provide any reason, excuse, rationale, justification or other excuse for having failed to abide by the deadline

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[36] The Region maintains, as it has throughout this proceeding, that the ALJ rightly issued the preclusion order and that any financial information or documentation appellants sought to introduce into the record of this proceeding would be, and should be, inadmissible. Nothing in this brief is intended to signify that the Region has waived or relinquished (or is waiving or relinquishing) its objection to the admissibility of any such material; nor is anything herein intended to prejudice the Region's right to object to the admissibility of such material in light of the ALJ's preclusion order. Arguments in this brief are presented in support of the Region's position that, aside from the question of preclusion, appellants have still failed to provide financial information that the ALJ could have properly considered in assessing penalties.

established by the ALJ for them to provide financial information—demonstrate that it would be wholly unwarranted for the EAB to consider the financial information appellants belatedly proffer (and also wholly unwarranted for this Board to remand to the ALJ for her to consider such information). The circumstances in which appellants now find themselves are entirely of their own making, and certainly without some explanation as to their failure to heed the ALJ's warnings that appellants would be precluded if they failed timely to submit required financial information, it would be improper for this Board (or the ALJ) now to consider such financial documentation.

The history behind this proceeding tells the story of what appears to be, if not actually is, appellants' neglect of a pre-trial order to provide financial documentation.[37]

When the Complaint was served upon appellants in April 2011, a copy of the 40 C.F.R. Part 22 rules was enclosed. Those rules include the provision that, " The original and one copy of each document **intended to be part of the record** shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer..." (emphasis added). 40 C.F.R. § 22.5(a). The July 12, 2011 "Prehearing Order" further advised that "[e]ach party shall file with the Regional Hearing Clerk, serve on the opposing party, and serve on the [Presiding Officer] as part of its Initial Prehearing Exchange...copies of all documents and other exhibits intended to be introduced into evidence...." Item 1(B) of the July 12, 2011 Prehearing Order (footnote omitted). The July 2011 Order further informed appellants, in Item 3(C), of the following:

> [I]f Respondents intend to take the position that they are unable to pay the proposed penalty or that payment will have an adverse effect on their ability to

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[37] The orders and motions discussed in the next few paragraphs were referenced in the discussion above, in the section on the "History of the Proceeding."

> continue to do business, [they shall submit] a copy of any and all documents they intend to rely upon in support of such position....

In the March 22, 2012 "Order on Complainant's Request for Time to File Non-Dispositive Motions," the following admonition was given to appellants:

> Both parties are reminded that if Respondents seek to mitigate any imposed penalty based on their alleged inability to pay, they are alone charged with substantiating that defense, as they bear the burden of proof on it. *Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002).

The Region's March 25, 2012, "Motion to Compel Production of Financial Records/To Preclude/To Draw Adverse Inference" noted that appellants had explicitly raised an inability to pay/financial hardship claim in their December 2, 2011 prehearing exchange. In the ALJ's May 11, 2012 ruling on that motion, "Order on Complainant's Motions to Supplement Prehearing Exchange and to Compel Production of Documents, and Order Scheduling of Hearing," she did not then grant preclusion but instead expressly ordered that appellants "serve on the Complainant **on or before May 30, 2012**" (emphases in original) the following documents (page 8 of Judge Buschmann's May 11, 2012 order):

> 1. Copies of the three most recent years of signed and dated federal income tax returns for Respondent Andrew B. Chase and for each of the three named corporate respondents. The copies must be either signed and dated or accompanied by a certification that they are true and correct copies of the ones submitted to the Internal Revenue Service.
>
> 2. For each of the three named corporate Respondents, copies of complete financial statements for the three most recent past fiscal years prepared by an outside accountant, and such statements should include all balance sheets, statements of operations, retained earnings and cash flows.
>
> 3. For each of the three named corporate Respondents, copies of any financial projections developed for the years 2012 and 2013.
>
> 4. For each of the three named corporate Respondents, copies of the asset ledger

> for all assets owned during the three most recent years.
>
> 5. Copies of any other documents for any of the Respondents they deem relevant and supportive of the claim of inability to pay/financial hardship.
>
> 6. If any of the documents requested above do not exist, a statement of Respondents certifying to that fact with respect to each such document.

The May 11th order put appellants on express notice of the consequences if they failed to obey the order:

> If Respondents fail to timely submit to Complainant all of the information listed above, they may be deemed to have waived any claim of inability to pay a penalty or financial hardship, they may be precluded from introducing any documentation or information relevant to such claim in the record of this proceeding, and/or an inference may be drawn that any such information would be adverse to such claim.

On June 15, 2012, the Region moved for an order to "preclud[e] Respondents from introducing or admitting documentation or information relevant to their claim of inability to pay/financial hardship into the record of the hearing scheduled to begin July 17, 2012, and...[to] draw[] the inference that the information contained in the financial documentation Respondents failed to produce in accordance with the requirements of the May 11th order would be adverse to said claim." In her June 28, 2012 ruling on the Region's June 15th preclusion motion, Judge Buschmann observed that appellants had acknowledged that they had not complied with the directives of the May 11th order (page 3 of the June 28th order):

> Respondents do not deny that they failed to submit any documents to Complainant in response to the May 11 Order. They do not assert that all of these documents were previously supplied to Complainant. Instead, they rely on the attachment to the Opposition [to the Region's June 15th motion, dated June 25, 2012], and their assertion that certain ones were supplied to Complainant in March 2012, to defeat the [Region's June 15th] Motion.

After reviewing the documents appellants did supply to EPA, the ALJ noted that "[t]hese

documents do not meet the requirements of the May 11 Order." *Id.* Judge Buschmann accordingly held that preclusion was appropriate and warranted, and the June 28th order concluded (*id.* at 5):

> Accordingly, Complainant's Motion to Preclude Respondents from Introducing Documentation Relevant to Claim of Inability to Pay/Financial Hardship, and to Draw Adverse Inferences Thereto, is **GRANTED** with respect to precluding evidence as to inability to pay or financial hardship that may be presented by Respondents.
>
> **IT IS ORDERED THAT** any information or evidence presented by Respondents in support of any claim of inability to pay a penalty or financial hardship **shall not be admitted into evidence** in this proceeding [emphases in original].

The ALJ shortly thereafter issued her July 13, 2012 "Order Granting Joint Motion to Cancel Hearing and for the Court to Issue an Initial Decision Based on the Written Record." The joint motion to which the order referred had been submitted on July 10, 2012, and it contained seven stipulations and conditions to which the parties agreed,[38] which the ALJ accepted.[39] The sixth of those conditions/stipulations provided:

> Notwithstanding any provision set forth in each of the previously five numbered paragraphs, provisions of this order of this Court, denominated 'ORDER ON COMPLAINANT'S MOTION TO PRECLUDE

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[38] On page 1 of the July 10, 2012 "Joint Motion to Cancel Hearing and for the Court to Issue an Initial Decision Based on the Written Record," the motion provided:

> The parties so move on the express understanding that each of Complainant and Respondents, aware of her/their right to a hearing on the record pursuant to 42 U.S.C. § 6991e and 40 C.F.R. § 22.21, knowingly and willing relinquishes and waives such right to have a hearing held with regard to the issues remaining in contention in this proceeding. Further, this joint motion is made upon the parties agreement and acceptance of the following conditions [seven conditions set forth in separately numbered paragraphs].

[39] On page 1 of the ALJ's July 13, 2012 Order: "Each of the parties' seven requests, stipulations, and conditions listed in the Joint Motion appear reasonable and are accepted."

> DOCUMENTATION AND DRAW ADVERSE INFERENCE,' dated June 28, 2012, whereby 'all financial information and evidence that may be presented in support of any claim [by Respondents] of financial hardship or inability to pay' have been precluded from the hearing, shall remain fully operative and shall apply with full force and effect to all submissions Respondents shall make pursuant hereto [alteration in original].

These circumstances irrefragably demonstrate appellants had more than ample notice that they were required to submit specified financial documents to EPA and that, if they did not, they would be precluded from such documentation being incorporated into the record of the proceeding. Appellants then failed to provide the documents by the date set by the ALJ. Having never given any reason, justification, explanation or anything else that might excuse or exonerate their failing to meet this deadline, and with appellants having never moved for th ALJ to vacate, reconsider or rescind her preclusion order, this Board should unequivocally reject appellants' attempt to be given yet another opportunity to provide financial information. The very same reasons cogently articulated in the ALJ's June 28th preclusion order to bar their financial information from being admitted into evidence in this proceeding provide an equally applicable and valid rationale why their request for this Board to "revise the Initial Decision and consider the financial information showing financial hardship" (page 4 of the Appeal Brief) should be denied. The ALJ stated:

> Respondents failed to respond to the May 11 Order, despite the clear warning therein that if they fail to timely submit all of he information listed in the Order they may be sanctioned. In addition, they failed to explain their lack of response to the May 11 Order. The Opposition conveys their position that they have already demonstrated their financial condition and need not submit additional documentation despite being ordered to do so. Respondents therefore demonstrate a disregard for orders issued in this proceeding. In these circumstances, a sanction is clearly warranted.

Appellants seek for this Board to "revise the Initial Decision and consider the financial

information" (page 4 of the Appeal Brief). Though not explicitly stated, to the extent such a request arguably constitutes a *sub silentio* request for this Board to overturn the ALJ's June 28th preclusion order, the EAB should deny such request. Overturning that order would be directly contrary to the stipulations appellants entered on or about July 10, 2012, which were incorporated into the July 13, 2012 order canceling the hearing: the sixth stipulation provided that the June 28th order "shall remain fully operative." [40]

Appellants Never Attempted Or Sought Formally To Introduce Into The Record Of The Proceeding The Financial Information Documents They Provided To The Region

In their Appeal Brief, on page 4, appellants assert that they have previously provided to EPA various pieces of financial information:

> 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 the 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 [these documents identified in this paragraph will henceforth be referred to as the "Chase financials"].

Appellants never sought or attempted to formally introduce into the record of this proceeding the Chase financials. They never submitted these documents (in whole or in part) to the Regional Hearing Clerk for Region 2,[41] nor did they ever submit the Chase financials to the

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[40] Another reason exists for this Board not to disturb the June 28th preclusion order. Appellants' contumacious disregard of the ALJ's May 11th Order (containing "an appropriate conditional statement of sanction," pages 7-8) merits retaining the June 28th order in effect.

[41] For the Chase financials to have been part of the formal litigation record developed, appellants were required to have submitted them to the Regional Hearing Clerk of Region 2: As

Administrative Law Judge. As noted above, the July 2011 Prehearing Order required appellants, in Item 3(C), to provide documents in their prehearing exchange if they intended to claim an inability to pay the proposed penalty or that such payment would cause financial hardship. Appellants did not list in or attach to their prehearing exchange the Chase financials. They never moved to supplement their prehearing exchange with the Chase financials. Nor did they in any other way seek to introduce them into the formal record of this proceeding.

Appellants apparently are trying to argue that the transmittal by their counsel of the Chase financials to EPA counsel as part of the parties' efforts to settle the matter made these documents part of the formal record of this proceeding. There are several problems with this argument:

> 1. This did not comport with the requirement in the 40 C.F.R. § 22.5(a) and in the July 2011 Prehearing Order to file an original and one copy with the Regional Hearing Clerk.
>
> 2. What was provided to EPA counsel did not include three years of tax returns for the corporate appellants and did not include any tax return for Mr. Chase, two requirements of the May 2012 order of the ALJ.
>
> 3. Appellants never listed or attached to their prehearing exchange the Chase financials.
>
> 4. Appellants never moved to supplement their prehearing exchange to include the Chase financials (40 C.F.R. § 22.19(f)).

Thus the Administrative Law Judge did not err in not considering appellants' financial condition because, given the circumstances outlined above, there was nothing in the record for her to consider with regard to the alleged claim of inability to pay/financial hardship. Appellants never introduced or even tried to introduce into the proceeding's record the Chase financials and

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previously noted, 40 C.F.R. § 22.5(a) requires that "[t]he original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer...."

disregarded the directives in the ALJ's May 11th order. These grounds alone militate for dismissal of appellants' argument in Point II of their Appeal Brief.

The Financial Information Appellants Provided To EPA Was Inconclusive And Insufficient To Demonstrate Their Alleged Inability To Pay/Financial Hardship Claim, And Any Refusal By The Administrative Law Judge To Consider Those Documents Constituted, At Most, Harmless Error

As previously noted, appellants state that in March 2012/June 2012 they provided the Chase financials to EPA. Assuming, *arguendo*, that this documentation had been formally introduced in the record of the proceeding below, nonetheless even then any refusal by the Administrative Law Judge to consider such documentation in assessing penalties for the violations found constituted, at most, harmless error. This is so because that documentation is inconclusive and insufficient to demonstrate appellants' claim of an inability to pay/financial hardship. The Chase financials fall far short of providing full and accurate picture of the financial condition of appellants and whether they would be able to pay the (approximately) $263,000 penalty the Region sought below or whether an order requiring them to pay such penalty would result in their suffering financial hardship. That is the conclusion of the Region's financial expert, Gail Coad, who prepared a declaration on behalf of EPA (executed on September 21, 2012) that was provided as part of EPA's September 24, 2012 Reply to appellants' August 29th Response Brief (submitted as part of the parties' submissions litigating the penalty question).[42]

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[42] Ms. Coad, a principal in the Cambridge, Massachusetts, firm of Industrial Economics, Inc., a management and economic consulting firm, is the holder of an MBA from Stanford University. She conducted a financial evaluation of appellants. She has served as a financial consultant for nearly 25 years, and her resume was included with EPA's initial prehearing exchange. Paragraphs 1 through 3 of the Coad declaration.

Ms. Coad reviewed the documents appellants submitted to EPA and publicly available documentation in order to attempt to evaluate their inability to pay/financial hardship claim. From such documentation, she learned that their sale of four gas stations was consummated for over $5.1 million. In paragraph 11 of her declaration, she has stated:

> I determined the date and sales price for the four gas station properties previously owned by the corporate Respondents. On July 24, 2009, three of the properties were sold to R.L. Vallee Inc. for more than $4.7 million. The fourth property was sold to Mountain Mart 109 LLC for $1.05 million on November 10, 2011. Gross sales proceeds from the four properties totaled over $5.1 million. While the properties may have had outstanding mortgages or other obligations, that information is not publicly available, and was not provided in the pre-hearing exchange or in Respondents' Response dated August 29, 2012.

Further, from other publicly available information, Ms. Coad learned that Mr. Chase had been offering his home for sale and was seeking nearly two million dollars (paragraph 12 of her declaration), that the gasoline service station in Lyon Mountain, New York (Station I), had a market value of $165,000 (paragraph 13 of her declaration), and that in March 2011 Mr. Chase incorporated a business through which he installs and maintains automatic teller machines (ATMs) (paragraph 14 of her declaration). Based upon the totality of the publicly available information (such as tax records and other information available on or through the Internet), Ms. Coad has concluded that Mr. Chase does appear to be able to pay the $263,000 penalty (paragraph 15 of her declaration):

> Based on publicly available information, *Mr. Chase appears to be able to pay the proposed penalty of about $263,000.* As described above, Mr. Chase appears to have reaped substantial gains from the sales of his four gas stations, could reap substantial gains from the sale of his house and he has started a new business. While it is certainly possible that Mr. Chase is financially stressed, I do not have the public documentation that supports that conclusion [emphasis added].

Ms. Coad notes (paragraph 16 of her declaration) her conclusion that appellants have not provided any documentation for her to reach a different conclusion: "Further, in the context of this administrative case, Respondents have not provided any documentary basis in the pre-trial exchange or briefing process for me to conclude otherwise." Also in paragraph 16, she states that the Response Brief is inadequate to evaluate Respondents' claim: "The Respondents' Response Brief makes assertions about the severe hardship that the proposed penalty payment would impose on Mr. Chase without any factual or evidentiary back-up." She then references the documents Respondents submitted to EPA for settlement purposes and summarizes the various defects and deficiencies in these documents (*id.*):

> The Response Brief refers to documents Respondents provided in the context of settlement, including tax returns and other financial data. *I found that these documents were incomplete*. For example, the tax returns for the company Respondents did not include all supporting schedules which are necessary for me to understand the data. *The documentation was also internally inconsistent and inconsistent with public documents*. For example, Mr. Chase's estimate of the value of his home at 14 Klein Strasse on his Financial Data Request Form was much lower than the $1.99 million asking price for the property and also less than the County's assessed market value of $755,400. *Finally, the documents did not describe Respondents current situation.* For example, I was not able to trace the disposition of the substantial proceeds from the sale of the four gas stations [emphases added].

Paragraph 16 of her declaration then discusses some of the additional documentation still not provided:

> At my request, EPA has made follow-up requests for additional information necessary to better understand Respondents' financial situation, including settlement statements for the sold gas stations, recent credit card statements, and complete tax returns including all supplemental schedules. However, I have not yet seen documents fully responsive to these requests [[43]].

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[43] These requests were the EPA e-mails, discussed below (July 9, 2012; August 24, 2012; and August 28, 2012), and in at least one additional e-mail. The EPA e-mail of June 18, 2012, at 6:13

Ms. Coad's conclusion, based in part on her extensive experience in the financial evaluation field, is unequivocal: appellants did not demonstrate either they are unable to pay the penalty EPA has been seeking or that an order requiring such payment would cause them financial hardship (paragraph 17 of the Coad declaration):

> Based on my many years of experience in performing evaluations of companies and individuals' financial situations in the context of an environmental enforcement action, at this time *I do not have a sufficient basis to conclude EPA's*

PM, to counsel requested the information referred to in paragraph 16 of the Coad declaration. That e-mail stated:

> Thank you for sending the recent financial disclosure form. Our financial analyst has informed me that she needs much more information to draw any definite picture of Mr. Chase's financial situation. To do so, she needs the following items/information, which I ask that you have Mr. Chase provide as soon as possible:
>
> 1) The last three years of his personal income tax returns, complete with all schedules
>
> 2) Settlement sheets for the sale of the five gasoline stations sold in 2009 and 2011
>
> 3) Appraisals of the 14 Klein Strasse property, with an explanation for the basis of the $1.9 million asking price
>
> 4) Verification that Mr. Chase paid the IRS the nearly $220K amount due on taxes
>
> 5) Marketing materials regarding the sale of the 3851 Route 374 Lyon Mountain gas station
>
> 6) Copy of the 2011 federal income tax return fro Adirondack ATM Services, Inc.
>
> 7) The loan/mortgage documentation related to Mr. Chase's home, including the mortgage, and a copy of the most recent statement
>
> 8) Copy of the last thee months of the Citibank credit card statement
>
> 9) Provide the following re the financial data request form: page 4 (this was missing from the version you sent); clarify the estimate of the Cadillac (perhaps a zero was missing from the figure provided); whether Mr. Chase or a company owns the Infiniti.
>
> The sooner EPA receives this, the more quickly we will be able to discuss settlement in concrete terms. Given that the hearing begins in about four weeks, I again ask that you kindly expedite sending EPA these materials.

> *proposed penalty of about $263,000 should be reduced for ability to pay concerns* [emphasis added].

Given that the Chase financials provide an inconclusive and incomplete picture of the financial situation of appellants, that the ALJ did not consider such documentation in her penalty assessment (again, assuming they were part of the record so that she could have considered them) constitutes, at most, harmless error.

Moreover, under established EAB case law, where a person has failed to provide sufficient information for an expert evaluation of whether an inability to pay/financial hardship actually exists, significant penalties may be assessed (and will be upheld) against a violator despite the person having alleged that claim.

In an default action against appellants Willie P. Burrell and The Willie P. Burrell Trust (the latter referred to as the "WB Trust"), the EAB affirmed a Regional Judicial Officer's assessment of a penalty of nearly $90,000, and in doing so explained its rationale:

> Appellants did not provide the Region with any information regarding the WB Trust's inability to pay. The Region did not receive tax returns or other information on the assets and makeup of that trust. [D]ue to the lack of information, the Region's analyst could not make an accurate determination of the Trust's ability to pay.
>
> Willie Burrell and the WB Trust's claims that they lack an ability to pay are unsupported by specific evidence. Appellants were given the opportunity to provide such evidence but did not do so. They do not demonstrate that either entity has an inability to pay, and thus, such claims fall short.

In re Willie P. Burrell & The Willie P. Burrell Trust, TSCA Appeal 11-05, 15 E.A.D. __ (EAB 2012) (slip opinion at 25-26).[44]

This holding in the *Burrell* ruling and its underlying rationale should provide the

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[44] Available at www.epa.gov/eab.

operative governing principle: the Chase respondents had ample opportunity to provide specific factual evidence to support their inability to pay/financial hardship argument, but they failed to do so. Thus they failed to demonstrate that they had an inability to pay. Accordingly, for the same reasons as in the *Burrell* proceeding, appellants' financial claim falls short, and this Board should accordingly disregard appellants' request for it to "consider the financial information."

Appellants have fallen short of meeting their burden to prove the veracity and accuracy of their claim of inability to pay/financial hardship. Under such circumstances, that the ALJ did not consider what information appellants had provided constitutes, at most, harmless error. In addition, because appellants have failed throughout the proceeding below to meet their burden to substantiate their inability to pay/financial hardship claim, this Board should disregard such claim and deny it any weight. For all these reasons, it should dismiss appellants' contention that the ALJ "erred in refusing to consider Respondents' financial condition in making her award."

Appellants' Failure To Respond To Numerous EPA Requests For Additional Financial Information To Support Their Financial Hardship Claim Casts Doubt On The Claim's Validity

Notwithstanding that appellants provided to EPA counsel the Chase financials in March 2012/June 2012, as noted on page 4 of their Appeal Brief, that brief does not tell the entire story. In addition to the fact that what appellants failed to comply with a pre-trial order of the ALJ for the production of financial documents,[45] and never provided EPA counsel with all the documents identified in the May 11th order, the Appeal Brief omits stating what appellants have failed to provide EPA despite numerous Agency requests. On July 9th, at 10:34 PM, EPA made the

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[45] Further, as Judge Buschmann noted in her June 28th preclusion order, appellants were non-responsive to the directive contained in her May 11th Order: "These documents do not meet the requirements of the May 11 Order."

following request for documentation to appellants' counsel[46] after the latter had provided some information to EPA:

> 1) Six to 12 months of complete credit card statements
>
> 2) Six to 12 months of complete statements for Mr. Chase's two Wells Fargo accounts (Wells Fargo 1637 and Wells Fargo 7991)
>
> 3) Six to 12 months of complete statements for any other investment accounts Mr. Chase is currently maintaining
>
> 4) Six to 12 months of checking account statements for Mr. Chase's business and personal accounts.
>
> Please speak to Mr. Chase and forward these to me as soon as possible so that we can expedite the financial review.

Another e-mail from EPA on August 24th, at 2:36 PM, to appellants' counsel, Thomas Plimpton, stated, in part:

> Given what has been submitted to EPA to date, I have been told by the financial analyst that she is unable to determine whether a financial inability to pay exists. *** For the Agency to consider settling for a lower amount, it would need additional documentation to verify Mr. Chase's claims of financial hardship.
>
> As for the documentation we are seeking, I refer you to my July 9th e-mail (at 10:34 PM), in which I requested various statements, including six to 12 months for Mr. Chase's Wells Fargo accounts and other investment accounts.
>
> EPA is open to considering and discussing settlement, but for any significant reduction, the Agency must obtain documents that are necessary for a proper evaluation of Mr. Chase's overall financial situation. And we believe the documents requested in my July 9th e-mail are indeed needed for such an evaluation.

Four days later, on August 28, 2012, at 3:19 PM, EPA sent the following e-mail to Mr. Plimpton

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[46] During the proceedings below, appellants (then referred to as "Respondents") were represented by Thomas Plimpton of the Stafford, Piller, Murnane, Plimpton, Kelleher and Trombley law firm in Plattsburgh, New York. Appellant's appeal is being handled by Justin Meyer of that firm. References to "appellants' counsel" refer to Mr. Plimpton unless explicitly stated otherwise.

reiterating EPA's need to receive additional financial information in order to properly analyze appellants' claim of an inability to pay/financial hardship:

> In extensive discussions with our financial analyst, she has explained that, based upon the documentation Mr. Chase has to date submitted, she is unable to conclude whether an inability to pay exists. Specifically, the documentation received to date indicates Mr. Chase made a substantial amount of money from the sale of five of the gas stations, and she needs to know what became of that money in order to provide a definitive conclusion on whether an inability to pay in fact exists. Until EPA receives documentation concerning the money made from the sale of the gas stations, in keeping with Agency protocol we are constrained as to the extent of the flexibility we might exercise regarding possible settlement amounts. For the Agency to accept your offer of a settlement...we need documentation in support thereof, and to date we have not received such information.
>
> As I recently did, I refer you to my July 9th e-mail, the relevant portion of which I am attaching below and italicizing. EPA needs this documentation in order to consider Mr. Chase's inability to pay claim and to reach a decision as to how much of a penalty reduction is warranted for settlement purposes. We still need the information I requested on July 9th:
>
> *1) Six to 12 months of complete credit card statements*
>
> *2) Six to 12 months of complete statements for Mr. Chase's two Wells Fargo accounts (Wells Fargo 1637 and Wells Fargo 7991)*
>
> *3) Six to 12 months of complete statements for any other investment accounts Mr. Chase is currently maintaining*
>
> *4) Six to 12 months of checking account statements for Mr. Chase's business and personal accounts.*
>
> In your August 2nd e-mail to me (5:38 PM), there is no mention of investment accounts, nor does it provide any of the other documentation requested in the July 9th e-mail. Until we receive the information sought, EPA is unable to accept your offer of settlement for $XXX or some such offer. While the Agency is still interested in negotiating a settlement in this matter, to do so entails our receiving documentation necessary for our financial analyst to draw a comprehensive picture of Mr. Chase's financial situation, and to date we have not received that information. If, as Mr. Chase claims, he finds himself in a precarious financial situation, the Agency is willing to accommodate itself to those circumstances and consider an offer Mr. Chase might accept, but it first

> needs to receive documentation and records that in fact reveal an actual inability to pay exists; EPA is, however, unable to tender such an offer based on what it has up to now received from Mr. Chase.
>
> Please let me know if the information requested above (and in early July) will be forthcoming [emphases in original].

Thus, EPA has made a number of requests for specified financial information, and appellants have not provided the documentation EPA sought through its e-mail communications. The ongoing and steadfast failure of the appellants to provide the additional financial documentation needed for a proper evaluation of their inability to pay/financial hardship claim reinforce doubts about the validity and veracity of this purported claim. These doubts are further amplified by questions that inevitably arise. Why, for example, during the course of the litigation of the penalty question, did appellants never submit an affidavit/declaration from Mr. Chase, the person with presumably the most direct and reliable knowledge about his own and financial circumstances and those of the corporate appellants in which he served so prominently? Similarly, why was no affidavit/declaration produced from any accountant employed by Mr. Chase or any of the corporate respondents? If the urgency of their financial condition is as they claim, what then explains the failure of appellants to submit sworn documentation of someone with intimate personal knowledge of the pertinent financial circumstances?

All these doubts and attendant questions reinforce the proposition heretofore stated that, at most, that the ALJ did not consider the Chase financials was harmless error. All of which, in turn, reinforces the fact that the Administrative Law Judge unquestionably did not err in not having considered documents that were inconclusive and insufficient for the purpose for which appellants now claim she should have considered them. These grounds provide an additional basis for this Board to reject Point II of appellants' Appeal Brief.

The Administrative Law Judge Did Not Abuse Her Discretion In Refusing To Consider The Financial Documentation Appellants Had Provided To EPA

The Administrative Law Judge acted fully consonant with her authority in entering a preclusion order against appellants for their failure to have complied with her May 11th order. Under the circumstances of this proceeding, her entry of an order of preclusion against them was warranted and did not constitute an abuse of discretion. This Board has upheld the entry of sanctions where a respondent has failed to comply with a pre-trial order and, as in the instant proceeding, where a respondent has failed to provide an explanation for its failure to comply with a Presiding Officer's pre-trial order. *See, e.g., In re William E. Comley, Inc. & Bleach Tek, Inc.*, FIFRA Appeal No. 03-01, 11 EAD 247, 257 (EAB 2004), where the Environmental Appeals Board, upholding sanctions ordered by the Presiding Officer for respondents having failed to comply with a pre-trial order, observed:

> We also endorse the Region's view that the ALJ's sanction is justified in light of the Respondents' failure to provide any legitimate justification for refusing to provide the information required in the ALJ's discovery orders. In light of the Respondents being the parties most likely to possess detailed information touching on the issue of corporate succession, their failure to produce this information warrants an adverse ruling against them [citations omitted].

That a trial court has the authority to impose sanctions on a recalcitrant party for failing to obey its pre-trial orders is a principle that is well established and uniformly recognized. For example, as the Court of Appeals for the Eighth Circuit observed the following in *Burlington Northern Railroad Company v. Nebraska*, 802 F.2d 994, 1005 n.10 (8th Cir. 1986):

> Burlington Northern also challenges the district court's refusal to admit certified copies of arbitration awards permitting railroads to run trains without cabooses. The court excluded this evidence because the exhibits were not listed as intended evidence pursuant to the pretrial order. Burlington Northern argues that it

> did not include these exhibits in the pretrial report because the need to admit them did not arise until midtrial. It attempted to submit these exhibits only after the district court excluded Burlington Northern's witnesses' testimony as to the arbitration results.
>
> The district court may, in its discretion, exclude exhibits not disclosed in compliance with pretrial orders and such a ruling will be reversed on appeal only for abuse of discretion [citations omitted].

Indeed a trial court's possession, and when warranted by circumstances, exercise of that authority, are *sine qua non* if adjudicatory bodies — whether Article III federal courts or Article I administrative tribunals — are to carry out the tasks and functions for which they are responsible. The importance of this authority to be exercised — for a court to order and enforce sanctions against a party failing to comply with a pre-trial order — goes to the function that a pre-trial order serves to ensure that an adjudication proceeds in an orderly, efficient manner upon which the litigants may rely. *See, e.g., Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322, 1335 (8th Cir. 1985), where the court explained:

> The pretrial order measures the dimension of a lawsuit. Accordingly, a party may not offer evidence or advance theories during trial which violate the terms of a pretrial order [internal quotation marks, citations omitted].

The rationale underlying judicial insistence upon a litigant's compliance with a court's pre-trial orders, and the concomitant importance of enforcing sanctions against a party in violation of such orders, were succinctly summarized by the court in *United States v. First National Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981):

> Pretrial orders play a crucial role in implementing the purposes of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action.' Unless pretrial orders are honored and enforced, the objectives of the pretrial conference to simplify issues and avoid unnecessary

> proof by obtaining admissions of fact will be jeopardized if not entirely nullified. Accordingly, a party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms. Disregard of these principles would bring back the days of trial by ambush and discourage timely preparation by the parties for trial.

In the same way, the Presiding Officer's pre-trial orders and her authority to ensure compliance therewith are equally essential to a Part 22 adjudicatory proceeding to ensure "the maintenance of order and for the efficient, fair and impartial adjudication of issues arising" in such proceedings.[47]

Given these governing principles, the ALJ did not abuse her discretion in directing that preclusion be entered against appellants regarding financial documentation. It thus follows that she did not err — and indeed acted fully within the scope of her lawful authority — in refusing to consider appellants' claims about their financial condition. That she did not consider their financial condition was a consequence of appellants' own inaction in not introducing documents into the formal record of this proceeding and in not complying with the ALJ's May 11th pre-trial order.[48] Her sanction was appropriate, and the root of the problem facing appellants was wholly

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[47] 40 C.F.R. 22.4(c)(10).

[48] Beside the financial documentation appellants were precluded from entering into the record of this proceeding, the only other material of an evidentiary nature on appellants financial condition were the unsworn statements of counsel in his "Response Brief of Respondents," dated August 29, 2012 (the cover transmittal letter was erroneously dated March 29, 2012), submitted in the course of the parties litigating the penalty question in lieu of hearing. Such statements, as is uniformly acknowledged, are not entitled to any evidentiary weight. *See, e.g., Barcamerica Intern. USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 594 n.4 (9th Cir. 2002) ("[T]he arguments and statements of counsel are not evidence....") (internal citations, quotations omitted); *Randall v. United States*, 64 F.3d 101, 109 (2nd Cir. 1995) ("These statements, made by [plaintiff's] attorney did not purport to be made on personal knowledge [and] [a]s unsupported assertions they were inadequate to defeat a motion for summary judgment").

of their own making. The ALJ did not abuse her discretion, and she acted fully within her authority in refusing to consider appellants' alleged inability to pay/financial hardship claim.

For this and all the other reasons stated in opposition to appellants' Point II argument in their appeal, this Board should reject and disregard this argument in its entirety.

POINT III (OPPOSITION TO CHASE APPEAL)

THE ADMINISTRATIVE LAW JUDGE DID NOT ABUSE HER DISCRETION IN NOT FURTHER REDUCING THE AMOUNTS SHE ASSESSED FOR THE VIOLATIONS SHE EARLIER HAD FOUND

In Point III of their appeal, appellants argue that the ALJ "erred in not further reducing the amount of the penalty." Page 4 of their Appeal Brief. They raise a number of points, each of which, whether individually or collectively, lacks merit and warrants dismissal.

The Circumstances In This Matter Demonstrate Appellants Do Not Qualify For The 80% Reduction Set Forth In The Penalty Policy

Point III of the Appeal Brief asserts appellants should be the beneficiaries of an 80% reduction in the amount of the gravity-based component of the penalty. They state (pages 4-5 of the Appeal Brief):

> The U.S. EPA Penalty Policy 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 requested by the EPA was $256,955.63 of the penalty. An 80% reduction of this should have been implemented in this case.[49]

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[49] The (corrected) total amount of penalty the Region is seeking is $263,052.63. Paragraph 204 of the August 9, 2012 declaration of Paul Sacker.

On at least two separate grounds, appellants do not qualify for this reduction; each of these grounds provides a sufficient basis for this Board to reject this argument.

On page 23 of the Penalty Policy, under the heading, "Chapter 4. Settlement Adjustments," it states:

> After the initial penalty target figure has been presented to the potential violator in a complaint, additional adjustments may be made **as part of a settlement compromise**. All such adjustments are entirely within the discretion of Agency personnel. The burden is **always on the owner/operator to provide evidence supporting any reduction of the penalty** [underscored emphasis in original; bolded emphasis added].

Thus, this 80% reduction amount is not to be considered in a litigation context, but where the parties are reaching a negotiated settlement; this possibility is not intended where the parties have to resolve this proceding through the administrative adjudicatory mechanism. By the very terms of the Penalty Policy, which terms the Presiding Officer "shall consider" in making a penalty assessment,[50] this 80% reduction possibility is not part for her consideration where the parties have litigated the penalty issue. Appellants have either overlooked this, mis-read the policy or chose to ignore the Penalty Policy's clear directive that the possibility of an 80% reduction in the gravity-based component is intended and represents a viable option under the Penalty Policy's guidelines, "only as part of a settlement compromise."

In addition to the fact that the 80% reduction possibility comes into play only within the context of settlement negotiations, another reason exists to reject appellants' request for this 80% reduction. At the bottom of page 23, the Penalty Policy provides additional explanation that can

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[50] 40 C.F.R. 22.27(b).

leave no doubt that this possibility is available only when the violator has satisfactorily demonstrated its inability to pay. This paragraph states, in relevant part:

> The Agency should assume that the owner/operator is able to pay unless the owner/operator demonstrates otherwise. *** In cases where the owner/operator can successfully demonstrate: (1) that the company is unable to pay; or (2) that payment of all or a portion of the penalty will preclude the violator from achieving compliance, the following options may be considered....

The fifth option listed is "Reduction of 80 percent of the gravity-based component."

Thus, under these guidelines, a predicate consideration is that violator has "successfully demonstrate[d]" its inability to pay/financial hardship. As stated in greater detail in Point II, above, appellants —throughout the course of this entire litigation and in settlement discussions with the Region—have failed to do this. They had ample opportunity to provide to EPA evidence that supported their purported claim, but they never provided proper and sufficient documentation to corroborate their claim. As Ms. Coad noted, the Region's financial analysis expert, concluded in her September 21, 2012 declaration (submitted as part of the parties' litigation of the penalty question) with regard to the limited information appellants did submit, "I do not have a sufficient basis to conclude EPA's proposed penalty of about $263,000 should be reduced for ability to pay concerns." Under these circumstances, this reason alone — separate and apart from the settlement issue discussed above — militates against appellants being awarded an 80% reduction in the amount of the assessed gravity-based component.

Appellants Raise Other Arguments That Are Either Irrelevant, Legally Inconsequential Or Otherwise Legally Insufficient Or Inapposite

In Point III of their brief, Appellants assert, in support of their argument for greater

reduction in the amount of penalty assessed against them, a number of arguments that are devoid of legal or other merit, and the EAB should peremptorily dismiss these arguments.

The Absence of Environmental Harm Is Not Germane to the Penalty Issue

Appellants note that no environmental harm resulted from their violations of the Part 280 regulations. On page 5 of the Appeal Brief, it states, "It is undisputed that no environmental contamination occurred as a result at any of the Service Stations."

This argument represents a legally insufficient basis or rationale for any penalty reduction. To prevail on a penalty question for an UST Part 280 violation, the Region need not prove that actual harm resulted from a person's violations. This Board has so ruled on a number of occasions. For example, in *In re V-1 Oil Company*, RCRA (9006) Appeal No. 99-1, 8 E.A.D. 729, 755 (EAB 2000), the issue was whether a $25,000 penalty in an UST case involving a failure to comply with the requirement for the permanent closure of a tank was appropriate. In affirming the assessment of such a penalty even in the absence of evidence of any actual harm having occurred, the EAB explained:

> First, we agree with the Presiding Officer that the violation is serious. V-1 does not challenge the Presiding Officer's conclusion that the violation was 'serious' in its Appeal Brief. However, it asserts in its Proposed Alternative Findings of Fact that there is no evidence in the record indicating that its USTs caused environmental harm. This violation is serious because of its potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty [emphasis added, citations omitted]

This principle is well established in EAB case law. *See, e.g., In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, 14 E.A.D.__, 2009 WL 2050079 (EAB 2009), where the Board, in rejecting respondent's (Ram's) defense that EPA had failed to demonstrate actual

harm, observed that (at *14), when determining the amount of penalty, "'it is the *potential* in each situation that is important, not solely whether the harm has actually occurred[,]'" quoting the penalty policy for underground storage tanks, § 3.1.2 (emphasis in original); *In re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, 10 EAD 385, 401 (EAB 2002), "Thus we find no error in the Presiding Officer's holding on this point, as it is consistent with our prior decisions in which we affirmed penalty assessments based on their 'potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty'" (citations omitted); *In re Everwood Treatment Company, Inc. and Cary W. Thigpen*, RCRA (3008) Appeal No. 95-1, 6 E.A.D. 589, 603 (EAB 1996), *aff'd sub. nom, Everwood Treatment Co. v. EPA*, 1998 WL 1674543 (S.D. Ala. 1998), where the Board cited with approval the applicable penalty policy in support of the principle that a significant penalty may be warranted even in the absence of proof of actual environmental harm: "The policy applicable to this case, the 1990 Penalty Policy, also supports the conclusion that certain violations may have 'serious implications' for the RCRA program and can have a 'major' potential for harm regardless of their actual impact on humans and the environment" (citation omitted).[51]

Nor need the government demonstrate environmental harm has actually occurred when it seeks a civil penalty for violations of provisions protective of the environment. This is established in federal case law. *See, e.g., United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff'd in part, rev'd on other grounds*, 191 F.3d 516 (4th Cir. 1999),

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[51] Indeed, as the EAB has noted, failure to comply with the Part 280 UST regulations, as found in the proceeding below for 19 separate counts, "unquestionably threatens the UST regulatory scheme and program." *Ram*, 2009 WL 2050079, at *15.

cert. denied, 531 U.S. 813 (2000), "The court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect."[52]

Under longstanding EAB principles, no weight should be attached to appellants' claim that the absence of environmental harm should result in a further reduction in the amount of penalty the ALJ assessed against them. Their argument finds no support or basis in Part 22 EPA case law or in federal court decisions, and this Board should therefore attach no weight to this argument.

Appellants' Attempt Inferentially To Raise A Laches Argument Is A Legal Nullity

Appellants are seeking inferentially to raise a laches defense, and such a defense is legally invalid.

Page 5 of the Appeal Brief makes the following argument:

> 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 [sic; presumably Mr. Chase] 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

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[52] In other contexts, federal courts have stated that penalties need not be *per se* reduced in circumstances where evidence of actual harm is lacking. *See, e.g.., Capitol-Records, Inc. v. Thomas-Rasset*, _F.3d_, 2012 WL 3930988 (8th Cir. 2012), where the Court of Appeals noted (at * 7), "It makes no sense to consider the disparity between 'actual harm' and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate. There is no question that each of the penalties sought in this proceeding falls within the authorized statutory amount.

Service Stations.[53]

The sum of these statements is that appellants are inferentially seeking to raise a laches defense. It follows that they seek an additional reduction in the penalty amount assessed because of the Region's alleged dilatoriness in prosecuting the matter; their argument seems to be that this Board should keep bear this in mind in reviewing the ALJ's penalty determinations.[54] Factually, this implicit argument is without a basis: throughout this proceeding, appellants have failed to set forth or point to any facts in support of this implied assertion. Other than conclusory and unsupported boilerplate assertions, appellants have failed throughout the course of this proceeding to present anything that might have demonstrated they suffered actual prejudice as a consequence of this alleged delay on the Agency's part.[55]

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[53] This statement dovetails others made in the Appeal Brief. On page 1, it states, "The allegations in the Complaint concern alleged violations dating back as early as 2006." On page 3, appellants observe:

> 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,[sic] 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.

[54] There is no argument that the applicable statute of limitations had run prior to the commencement of the proceeding for any of the violations found. *See generally 3M (Minnesota Mining and Manufacturing) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

[55] *See, e.g.*, where the Appeal Brief makes a statement but does not point to anything that could substantiate that assertion: "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." Pages 3-4 of the Appeal Brief. Most telling in this regard is that in none of the litigation papers (such as those filed in opposition to EPA's motion for accelerated decision on liability, or in opposition to EPA's memorandum of law seeking the assessment of penalties) did appellants include an affidavit (or declaration) from Mr. Chase personally, the person most knowledgeable about his own financial circumstances and most intimately familiar with how the proposed penalty would impact him and his businesses.

There is, however, an even more salient argument to reject this line of argument. Even assuming *arguendo* that the facts in question give rise to a potential laches defense, any possible laches defense for a reduction in penalty should still be dismissed. Laches does not operate against the United States, a principle long embedded in federal jurisprudence: "It is well settled that the United States is not...subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940). As Justice Cardozo noted for the Court in *United States v. Mack*, "Laches within the term of the statute of limitations is not defense at law. Least of all is it a defense to an action by the sovereign." 295 U.S. 480, 489 (1935). This principle is uniformly recognized within the circuits and retains modern vitality. *See, e.g., Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) ("It is well established that the Government generally is exempt from the consequences of its laches"); *United States v. Angell*, 292 F.3d 333, 338 (2nd Cir. 2002) ("[L]aches is not available against the federal government when it undertakes to enforce a public right or protect the public interest"); and *United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991) ("The government is not subject to the defense of laches when enforcing its rights").

All of the arguments and issues in Point III lack any weight, credibility, or heft; they are all legally insufficient and thus this Board should disregard them. Accordingly, the arguments in Point III should fail.

POINT IV (CROSS-APPEAL ON COUNT 2)

BY ERRONEOUSLY CONSTRUING THE TERM "ANNUAL," THE ADMINISTRATIVE LAW JUDGE HAS WEAKENED THE PROTECTIONS OF THE 40 C.F.R. PART 280 REGULATIONS AND THEREBY EFFECTIVELY THWARTED ATTAINING THE OBJECTIVES UNDERLYING THOSE REGULATIONS

This argument concerns Count 2, for which Judge Buschmann found that the periods of violation lasted from May 2006 until April 22, 2009, and then from April 22, 2010 to September 7, 2010. The ALJ has erroneously construed the term "annual" as used in the Part 280 regulations requiring that owners/operators of underground storage tanks that convey regulated substances under pressure, test annually the operation of the automatic line leak detectors ("ALLDs") required to be connected to the piping associated with the tanks. Her construction is erroneous given the text of, and objectives underlying, the regulation; her construction is also erroneous pursuant to well-established and uniformly utilized principles of regulatory (statutory) interpretation.

The Administrative Law Judge Construed The Term "Annual" Contrary To Its Plain Meaning And In A Manner In Conflict With The Common Understanding Of Its Ordinary Usage

The ALJ defined the term "annual" using its common dictionary definition. She explained her rationale for doing so (June 20th Initial Decision, page 23):

> The term 'annual' is not defined in the regulations, and there is no particular date set in the regulations as to when the ALLD testing is to be conducted. The regulations do not specify that testing must be conducted within 12 months of the last due date for testing, or every 12 months. Complainant does not point to any other authority supporting its view on the issue. Therefore, it is appropriate to interpret the term 'annual' according to the common dictionary definition: 'reckoned by the year...; covering the period of one year: based on a year; occurring, appearing, made, done or acted upon every year or once a year.'

> *Webster's 3rd New International Dictionary*, unabridged, p. 88 (Merriam-Webster 2002) [alteration in original][56].

To this extent, the Region accepts the ALJ's analysis: given that the term "annual" is not defined in the Part 280 regulations, it is appropriate to discern the plain meaning and common understanding of the term. Further, the Region agrees that the analysis *begins* by determining how the term is defined. *But the analysis, if properly conducted to ascertain the appropriate meaning of the term "annual," cannot, and should not stop there; it must proceed to the next inexorably logical analytical step of defining the word "year," and this the Administrative Law Judge failed to do.* Therein lies the genesis of her flawed analysis; the root of her erroneous and flawed construction lies in the failure to define with precision and lexicological exactitude, precisely what is meant by the term "year." This error is further compounded by her reading the term "year" as *per se* synonymous with the more limiting and constrained term, "calendar year."

The definition of the term "year" is based on an objective criterion, and not an artificial designation based on the 12-month Gregorian calendar. The same source the ALJ used to define "annual" (Webster's 3rd New International Dictionary) provides these primary and paramount definitions (page 2648):

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56 As noted in the quote from page 23 of the Initial Decision, the ALJ stated that the Region did not "point to any other authority supporting its view on the issue." In the August 2009 Sacker declaration, the Region made clear it was seeking a separate penalty for each period, *i.e.* the May 2006 through April 2009 period, and the April 2010 through September 2010 period. Paragraphs 54-56 of his declaration. Thus appellants (as respondents in the proceeding below) had express notice that the Region was seeking a separate penalty assessment for each of the two periods. In their opposition papers to the Region seeking to assess a $263,000 penalty (dated August 29, 2012, submitted as part of the parties litigating the penalty question in lieu of hearing), appellants never contested EPA seeking penalties for each period. Thus the Region did not further address the issue. The issue concerning the proper interpretation of "annual" vis-a-vis the ALLD testing requirement first arose in the June 20th Initial Decision.

> [T]he period of about 365¼ solar days required for one revolution of the earth around the sun and generally indicated by the return of the sun to the same part of the sky or by the recurrence of the same seasons[;]
>
> [T]he time required for the apparent sun to return to an arbitrary fixed or moving reference point in the sky[.]

This definition of the term "year" comports with that given in other sources.[57]

Defining the term "annual" by reference to the term "year" is appropriate only if the latter is defined using its plain meaning as it is commonly understood in ordinary usage. Not doing so risks defining the term "annual" in a way that deviates from the plain meaning and is at variance with common understanding of the term. This is one salient flaw in how the ALJ interpreted the term "annual." Given that regulations, like statutes, are to be defined according to their plain meaning, the failure of the Administrative Law Judge to adhere to this cardinal principle of statutory/regulatory construction alone calls for overturning her ruling on the interpretation and application of the term "annual."

In addition, there are other, equally critical, flaws in her analysis of this term.

The Administrative Law Judge's Interpretation Of "Annual" Leads To Problematic Consequences That Would Erode The Protective Functions Of The Part 280 Regulations

The interpretation given to the word "annual" by the Administrative Law Judge leads to results that would frustrate the objectives underlying the 40 C.F.R. Part 280 regulations, and

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[57] *See, e.g.*, Webster's New Collegiate Dictionary (1979), at page 1348: "the period of about 365¼ solar days required for one revolution around the sun," and "the time required for the apparent sun to return to an arbitrary fixed or moving reference point in the sky"; The New Oxford American Dictionary (2001), at page 1955: "the time taken by a planet to make one revolution around the sun."

thereby frustrate the Congressional intent behind passage of the statute authorizing the promulgation of those regulations. Indeed, the ALJ's construction of the term vis-a-vis the requirement that the operation of automatic line leak detectors be annually tested well might lead to untenable consequences that could likely weaken the core protections 40 C.F.R. Part 280 is intended to provide.

The ALJ explained how her reading of the term "annual" impacts the assessment of a penalty for Count 2 (page 23 of the June 20th Initial Decision):

> Under this definition, where an ALLD test was conducted in April 2009 and again in September the next year, there is no basis for assessing a penalty for time between April 2010 and September 2010 merely on the basis that the test was not conducted within 12 months of the last test.

Thus, as noted above, she has construed "annual," for purposes of this testing requirement, to mean once a calendar year, *i.e.* one test for every 12-month period between January 1st and December 31st. She has dismissed the Region's position that, where the most recent test was conducted in April 2009 and then no test was conducted between April 2010 and September 2010, a separate penalty should be assessed for the latter period because the September 2010 test "was not conducted within 12 months of the last test." Rather, under the ALJ's interpretation, ALLD testing that occurred as late as December 31, 2010 would have presumably met the requirement for the follow-up annual test. It is this interpretation that contains the seeds to weaken the Part 280 protections by permitting fewer than one test per twelve-month period. Thus, the ALJ's construction should be rejected by this Board if only because of the untoward consequences that might ensue vis-a-vis Part 280 ALLD testing requirement, because of the potentially deleterious impact on Part 280 testing safeguards.

Under the ALJ's reading, this requirement for annual testing is satisfied during any two-year period simply if the two required tests fall within different calendar years. Thus, the scenario set out below would not run afoul of the Part 280 regulation (40 C.F.R. § 280.44(a)) as she interprets it.

> If an UST owner/operator conducted its first annual test on the operation of an ALLD on January 1, 2010 and then conducted the next annual test on December 31, 2011, that owner/ operator would have fulfilled the Part 280 annual ALLD testing requirement for that two-year period.

As this hypothetical shows, the ALJ's construction converts a once-every-12 month (as measured from the date of the last ALLD test) testing requirement into a biennial testing requirement. This interpretation would weaken the protective purpose behind requiring such annual testing to occur within 12 months of the most recent prior test.

The ALJ's reading would negate a central purpose of this testing requirement: to ensure the maximum protection to public health and the environment in the operation of underground storage tanks by requiring regularly scheduled ALLD operational testing. The interpretation given by Judge Buschmann weakens the ALLD testing requirement by allowing supposedly "annual" testing to occur as infrequently as once every (almost) 24-month period, and thus her reading, if allowed to stand, creates a loophole in these regulations. This interpretation is unreasonable, and it holds the potential for significantly disrupting EPA's efforts to ensure regular and recurrent ALLD testing. This interpretation likely would also undermine another provision concerned with release detection in pressurized piping connected to USTs: the provision in 40 C.F.R. § 280.41(b)(1)(ii) requiring line tightness testing at regular ("annual") intervals, thereby further endangering efforts to prevent leakage in pressurized piping from going

undetected.[58]

Regulations are to interpreted as statutes are. *See, e.g., Resnik v. Swartz*, 303 F.3d 147, 151 (2nd Cir. 2002) ("In interpreting an administrative regulation, as in interpreting a statute, we must begin by examining the language of the provision at issue"); *New York Currency Research Corp. v. Commodity Futures Trading Comm.*, 180 F.3d 83, 92 (2nd Cir. 1999) ("Construing a statute is similar to interpreting a statute; that is, we begin by examining its language"). As with statutory interpretation, regulations are to be interpreted according to their plain meaning. *See, e.g., Seinfeld v. Gray*, 404 F.3d 645, 649 (2nd Cir. 2005) (a regulation should be construed according to its plain meaning); *New York Currency Research*, 180 F.3d at 92 ("Our first task is to ascertain the plain meaning of [the rule]"). As with statutes, regulatory interpretations leading to absurd or untenable consequences do not are to be avoided. *See, e.g., Lopes v. Dept. of Social Services*, 696 F.3d 180, 188 (2nd Cir. 2012) (the plain meaning governs unless such an interpretation leads to absurd results); *Pacific Bell Telephone Company v. California Public Utilities Commission*, 621 F.3d 836, 848 (9th Cir. 2010) (the plain language does not control if it would lead to absure results, and a rule leads to such results if it is "patently inconceivable" that the agency intended such results"). Under these firmly established case law principles of interpretation, the ALJ's interpretation should not, as a matter of law, stand.

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[58] While the ALJ's holding is specific to the requirement for the annual testing of the operation of ALLDs, nothing in the ruling's rationale or anything else in the opinion would limit the reach of this holding or preclude this interpretation from being extrapolated to other Part 280 provisions such as 40 C.F.R. § 280.41(b)(1)(ii). Nor does anything in the June 20th Initial Decision bar its reasoning from being applied to other tests required to be regularly conducted (*e.g.*, 40 C.F.R. § 280.41(b)(2) prescribes that line tightness testing for suction piping occur every three years, and the question then becomes whether the three-year period means three calendar years or three years from the date of the most recent suction piping test.).

This Board should reverse the ALJ's construction of the term annual for purposes of the Part 280 requirement mandating there be annual testing for an underground storage tank's ALLD.

The Reading Of The Term "Annual" By The Administrative Law Judge Is Not Supported By The Text, The Purposes Behind Or The Objectives Underlying The Part 280 Regulations

As noted above, the ALJ defined "annual" vis-a-vis the term "year" but then failed to define the latter with any more precision, instead simply reading the latter as if synonymous with the term "calendar year." Besides the two flaws previously identified (such a reading is in derogation of the plain meaning of the term; such a reading might readily lead to less testing and thereby undermine the testing regime designed to identify problems early so that they can be corrected before harm occurs), a third flaw exists in her interpretation: there is no textual support for such a construction, either in the 40 C.F.R. Part 280 regulations, in the statutory provisions pursuant to which EPA promulgated those regulations, in the legislative history of the statute or the "legislative history" of the rules (*i.e.* the discussion in the Federal Register notices in which the draft and final rules were published).

Obviously, EPA was capable of defining "annual" as meaning on a "calendar year basis." Yet it did not do so, but now the ALJ has construed "annual" as if it were defined to mean "on a calendar year basis." To do so "is not to construe the [regulation] but to amend it."[59] And,

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[59] *Detroit Trust Co. v. Barlum S.S. Co.*, 293 U.S. 21, 38 (1934). A more recent application of the *Barlum* principle is illustrative.

In *Fedorenko v. United States,* the government sought to revoke petitioner's citizenship because he had served as an armed guard at a Nazi extermination camp. While admitting such service, petitioner claimed that he had served involuntarily. Under the law through which he obtained his entry visa, Section 2(a) made a person ineligible for such a visa if he had "assisted the enemy in persecuting civil

without any textual or background support justifying such a reading, this is improper. At the very least, regulations, like statutes, must be construed as closely as possible to the text of the provision. At the very least, the plain meaning of the text must be the presumptively operative one unless shown to be contrary to the intended objectives of the regulation, thus requiring an analysis and evaluation of the purposes and objectives underlying the provision and the regulatory scheme of which it is a part.

The ALJ's reading of the "annual" testing requirement finds no support in the Agency's discussion of the Part 280 regulations. Indeed it is in derogation of the importance of the ALLD testing required, as attested to by both the facts adduced in the proceeding below and the EPA's accompanying explanation of the Part 280 rules.

That importance is elaborated upon in a number of paragraphs in the August 2012 Sacker declaration (submitted in the course of the parties litigating the penalty question in lieu of a hearing). In paragraph 76, he discussed the importance of a properly functioning ALLD:

> A properly functioning automatic line leak detector is a key aspect to ensuring that underground storage tanks holding substances such as gasoline or diesel fuel are operated in an environmentally safe and responsible manner and that leaks from pipes connected to such tanks are detected and immediately responded to. An ALLD in proper working condition is a critical component to ensuring that UST systems are operated and maintained in compliance with the

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populations," while Section 2(b) made ineligible those who "voluntarily assisted the enemy forces" in combat operations. The lower courts construed Section 2(a) as excluding only those who had "voluntarily assisted the enemy in persecuting" civilians. The Supreme Court rejected that interpretation, noting that inserting the "voluntariness" limitation into Section 2(a) constituted an improper interpretation, as it amounted to amending the textual provision and not construing it. 449 U.S. 490, 511-13 (1981).

Fedorenko's analysis demonstrates that a codified provision of law should be interpreted as the text is written and that a judge construing text by inserting words of limitation runs the risk of improperly re-writing the provision.

> requirements set forth in 40 C.F.R. Part 280. An ALLD constitutes the first line of defense in preventing a release of the contents of an UST system that uses pressurized piping to deliver product to customers. Piping is an important source of releases that occur from UST systems, and an automatic line leak detector serves as a primary defense against leaking pipes and helps prevent releases from an underground storage tank's pressurized piping from getting into the environment.

In paragraph 77, he explained how automatic line leak detector fits into the overall regulatory scheme:

> As I have previously stated, in my February 10, 2012 declaration (paragraph 59), '[a]n automatic line leak detector is at the interface of a tank and its piping and is intended to shut off the pump associated with an UST as soon as a release is detected in a pipe through a pressure drop.' An ALLD must be designed to alert an operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm and must detect leaks of three gallons per hour at 10 pounds per square inch line pressure within one hour. The annual test of the operation of the leak detector required by 40 C.F.R. § 280.44(a) is necessary to ensure that the ALLD is indeed capable of detecting such a release. An ALLD that is not functioning properly, or fails to detect a drop in pressure while an UST is being used to pump product, such as gasoline or diesel fuel, to a customer, creates a significant risk that a leak will not be prevented. The risk of a release to the environment is greatest during the active use of the pressurized pump of an underground storage tank to deliver product to a customer, as the product is under pressure and is being forced through the system. A leak in the piping could potentially propel this product at high pressure into the environment, and this could occur repeatedly over the course of a day as the UST is accessed. An automatic line leak detector is essential to the responsible and environmentally safe operation of underground storage tank systems in which gasoline, diesel fuel, kerosene or the like is contained [alteration in original].

Mr. Sacker next (paragraph 78) discussed the need for ALLDs to operate properly and the attendant need that they be tested at least once a year:

> To serve this purpose, an ALLD must be in proper working order, and to ensure that, it must be tested at least once a year. If an automatic line leak detector is not tested regularly, there is an elevated risk that it will not function as intended, and this increases the risk that, were a leak to occur in a pressurized

> pipe, the material held by the associated tank would enter the environment. If an ALLD test is not tested regularly, the chances become that much greater, and, with such a failure, a whole series of adverse and potential dangerous consequences might follow from a leak of a substance like gasoline or diesel fuel.

Given these facts (and appellants have provided no evidentiary materials that would call into question or negate the evidence provided by Mr. Sacker), an interpretation that would allow one ALLD test to occur on January 1 of a given year and then allow the next test to occur on December 31st of the next year is manifestly inconsistent and contrary to the purpose behind ALLD testing and the protective functions served by a properly functioning automatic line leak detector.

The concerns articulated by Mr. Sacker dovetail with the Agency's statements in the formal rulemaking record. The September 23, 1988 Federal Register (in which the basic UST regulatory regime was finalized) notes that, "[t]o ensure a[]...minimum level of protection against catastrophic pressurized piping releases, the final rule includes the requirement that all pressurized piping have automatic line leak detectors that provide warning of 3 gallons per hour releases within an hour." 53 *Fed. Reg.* 37082, 37153 (September 23, 1988). The annual testing requirement was specifically inserted to address a problem identified by the regulated community. At 53 *Fed. Reg.* 37082, 37167, it states:

> The final rule also contains the requirement that all automatic line leak detectors be checked annually according to the manufacturer's requirements. This requirement was added in response to commenters' concern that line leak detectors can malfunction or be overridden by unwise operators. **The possible burden of an annual maintenance check is outweighed by the importance of detecting and stopping pressurized releases** [emphasis added].

Throughout this Federal Register notice, the Agency voices its concerns about pressurized

piping: At 37,088:

> Most releases do not come from the tank portion of UST systems, because piping releases occur twice as often as tank releases.

At 37,101:

> Information obtained by the Agency at the time of the proposal indicated that 20 to 30 percent of all reported releases are due to piping failures. EPA also suspected that pressurized piping systems, which are reportedly the most commonly used withdrawal system at new retail motor fuel installations, were responsible for the larger releases.
>
> Information obtained by EPA after publication of the proposal indicates that piping system failures are responsible for a much greater percentage (80 to 85 percent) of release incidents than previously thought. Public comments received by EPA confirmed the Agency's belief that failure of pressurized piping frequently results in large releases.

At 37,146:

> EPA's information on the causes of release clearly indicates that pressurized piping represents a major source of uncontrolled releases. *** EPA agrees with commenters who recommended a short phase-in schedule because this piping is a significant environmental hazard....

Thus, one conclusion reached was what "[r]elease detection is an essential backup measure to prevention, particularly for...pressurized piping because they are more prone to releases." *Id.* at 37,146."

As with the statements in the August 2012 Sacker declaration, given these pronouncements in the Federal Register, the ALJ's interpretation of "annual" with regard to the annual testing requirement for the operation of ALLDs should not pass muster. It defies logic that those

who promulgated these regulations, who expressed concerns about the problems associated with leaking pressurized piping and sought to provide maximum protection against such incidences, would countenance a regulation that would permit the aforementioned scenario, *i.e.* that a given ALLD test can occur on January 1st and the next one (the required subsequent test) need not be conducted until December 31st of the following year. Yet this scenario is permissible under the ALJ's construction. Against this backdrop of regulatory pronouncements, as well as the facts the Region presented through the Sacker declarations, this Board should reject the far too restrictive "calendar year" interpretation of the 40 C.F.R. § 280.44(a) regulation put forth by the Administrative Law Judge.

EPA Has Maintained A Longstanding Position That The Term "Annual" Should Not Be Construed As Synonymous With The Term "Calendar Year"

EPA has maintained a consistent, long-standing position that the term "annual" is not to be read as synonymous with the term "calendar year, and thus not to be read as constrictively as the ALJ has construed "annual." A March 7, 1993 memorandum from David W. Ziegele, the then-Director of the Office of Underground Storage Tanks at EPA headquarters, intended for all "UST/LUST Regional Program Managers," concerning "Regulatory Interpretation: Definition of 'Annual' As It Applies To Tightness Tests," discussed the word "annual" in two UST regulations: 40 C.F.R. §§ 280.41(a)(2) (monthly inventory controls and annual tank tightness testing) and 280.41(b)(1)(ii) (annual line tightness testing or monthly monitoring for pressurized piping). The memorandum was written in response to an inquiry from EPA, Region 4, "for clarification of the definition of 'annual' as it pertains to tank and line tightness testing." The memorandum stated its conclusion:

> 'Annual' as used in these two cites means on or before the same date of the following year. Other interpretations cannot be supported by the letter or intent of the regulations. Note that, per 280.40(c), '...all UST systems must comply with the release detection requirements of this subpart by December 22 of the year listed...' Therefore, for compliance, a tightness test must first be conducted within the annual time period before the compliance date, and again on or before the test date the year following the test.
>
> For example, if a tank was due for leak detection by December 22, 1990 and was tested back on January 1, 1990, it was in compliance on its deadline, but had to be retested by January 1, 1991, only a few days thereafter.

This EPA memorandum succinctly articulated EPA's interpretation, maintained since 1993, of the term "annual" as it is utilized in the Part 280 release detection regulations.

This memorandum was placed in the technical compendium of EPA's Office of Underground Storage Tanks, and it was posted on the Internet in late 1998/early 1999. EPA has not amended this memorandum or revised its position as to the reach of the term "annual" since 1993. *See* the following links:

http://www.epa.gov/oust/compend/rd16lh.pdf

http://epa.gov/swerust1/compend/adn28lh.pdf and

http://www.epa.gov/oust/compend/adn28lh.pdf [60]

While this memorandum does not address the regulation at issue in Count 2 (*i.e.* whether

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[60] This memorandum and Internet posting issue were not part of the proceedings below. As previously stated, appellants in the proceeding below (Respondents) never challenged or placed in contention the Region's calculation of the Count 2 penalty based on the view that the "annual" testing requirement meant that each succeeding test of the ALLD had to follow within one year of the prior test. Pursuant to 40 C.F.R. § 22.30(c), the Region is authorized to raise this issue before the EAB insofar as "[t]he parties' rights of appeal [and, by extension, cross-appeal] shall be limited to those issues raised during the course of the proceeding *and by the initial decision*" (emphasis added).

"annual" for purposes of the testing requirement for the operation of ALLDs must occur within 12 months of the most recent test or whether one test per calendar year suffices to meet the regulatory mandate), this memorandum cogently states EPA's position that, in another Part 280 context, the Agency construed the term "annual" to require the follow-up event to occur within 12 months of the most recent prior event.[61] Thus, under this reading for the annual ALLD testing requirement, if the most recent ALLD test occurred on July 1, 2013, the next annual test would have to take place by July 1, 2014. At the least, where such uncertainty might have surrounded the question as to how EPA would apply the Part 280 such annual testing requirements, that should have prompted appellants, as owners and operators of UST systems, to inquire of EPA about the Agency's intent with regard to the ALLD testing requirement. The longstanding existence of EPA's memorandum supports the other arguments on behalf of the Region's position that the ALJ's reading of "annual" in Count 2 should be overturned by this Board.

POINT V (CROSS-APPEAL ON COUNTS 3, 4, 5, 6 AND 7)

IN UTILIZING AN ENVIRONMENTAL SENSITIVITY MULTIPLIER (ESM) NOT FOUND IN THE PENALTY POLICY, THE ADMINISTRATIVE LAW JUDGE EFFECTIVELY AMENDED THE PENALTY POLICY, AND THEREBY EXCEEDED HER AUTHORITY

The Administrative Law Judge erred in Counts 3, 4, 5, 6 and 7 (pertaining to Station I) when she utilized an Environmental Sensitivity Multiplier ("ESM") that was not found in the Penalty Policy. In doing so, she exceeded her authority and that *ultra vires* exercise warrants this

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[61] The interpretation is this memorandum is consistent with this Board's *Euclid* ruling. There the Board upheld the ALJ's determination of violations in which the ALLD testing (referred to in the opinion as "line leak detector" testing) occurred over 12 months apart within two consecutive years. 13 E.A.D. at 661 n.80. Without discussion, the EAB affirmed the ALJ's assessment of penalties for these violations.

Board reversing her ruling in those counts on that issue.

The issue in these counts involved Tank No. 8, the temporarily closed and subsequently permanently closed underground storage tanks. The violations found were that Mr. Chase failed: **a)** to meet the overfill protection equipment requirements for this tank (Count 3; pages 23-24 of the June 20th Initial Decision); **b)** to continue release detection after Tank # 1 had been temporarily closed through to the time it had to be permanently closed (Count 4; page 25 of the June 20th Initial Decision); **c)** to conduct triennial testing of the cathodic protection system for this UST from June 2008 through to the time it had to be permanently closed (Count 5; page 27 of the Initial Decision); **d)** to cap and secure this UST from July 30, 2008 through to the time it was permanently closed in November 2009 (Count 6; page 28 of the June 20th Initial Decision); and **e)** either to permanently close this UST between April and November 2009 or to have it inspected for proper operation by a qualified cathodic protection tester (Count 7; page 29 of the June 20th Initial Decision). On page 25 of the June 20th Initial Decision, Judge Buschmann set forth her reasoning as to why the ESM should be reduced from the ESM value of 1 (which the Region used in calculating the penalties for each of these counts) to 0.5:

> The Penalty Policy provides at § 3.3 that the ESM is based on the actual or potential impact that a release would have on the local environment and public health, and that factors considered in assessing the ESM include the amount of petroleum potentially or actually released, such as the size and number of tanks that were involved in the violation as they relate to the potential volume of materials released. The fact that Tank # 008 had only a 550 gallon capacity, and had 31.5 inches of kerosene residue in it when after [sic] it was taken out of service should be taken into account in assessing the ESM. Where the ESM is assessed as 1 considering the potential harm to human or environmental receptors, the ESM should be reduced further to account for the size of the tank and volume of petroleum substance in the tank at relevant times. In the circumstances of this

case, the ESM will be assessed as 0.5.[62]

As noted in the above quoted excerpt, Section 3.3 of the Penalty Policy (page 20) discusses the ESM:

> In addition to the violator-specific adjustments discussed above, enforcement personnel may make a further adjustment to the matrix value based on potential site-specific impacts that could be caused by the violation. The environmental sensitivity multiplier takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release. This factor differs from the potential-for-harm factor...which takes into account the probability that a release or other harmful action would occur because of the violation. The Environmental sensitivity multiplier addressed here looks at the actual or potential impact that such a release, once it did occur, would have on the local environment and the public health [emphases in original].

The first step in the process is for enforcement personnel to ascertain what is the sensitivity of the local environment where a tank(s) is located, and, under the Penalty Policy, "the environmental sensitivity will be either low, moderate, or high." *Id.* On page 21 of the policy, there is a box labeled, "Determining The Environmental Sensitivity Multiplier." It indicates that a low environmental sensitivity is assigned a value of 1.0, a moderate sensitivity is assigned a 1.5 and a high sensitivity is assigned a value of 2.0. This value is then multiplied by the matrix value, the value of the violator-specific adjustments and the days of non-compliance multiplier to determine the gravity-based component of the penalty to be assessed. *Id.*

With the lowest ESM classified with a value of 1.0, this is a neutral factor; this value obviously cannot increase the value of the other factors when multiplied in. The other assigned

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62 This reasoning regarding the ESM for Count 3 was repeated for Count 4 (page 27 of the June 20th Initial Decision), Count 5 (page 28 of the June 20th Initial Decision), Count 6 (page 29 of the June 20th Initial Decision) and Count 7 (page 30 of the June 20th Initial Decision).

ESM values, by contrast, can only *increase* the amount of the gravity-based component; for example, with a value of 2, the ESM for high environmental sensitivity doubles the number derived from multiplying the matrix value by the violator-specific adjustments multiplied by the days of non-compliance multiplier. *As written in the Penalty Policy, the ESM can never lower the calculation of the product of the other three factors; either the ESM is neutral (i.e. it has no effect on the calculation of the penalty) or the ESM increases the penalty.*

The regulations require that the Presiding Officer, in assessing a penalty for any violation, "consider" any applicable penalty guidelines. At 40 C.F.R. 22.27(b), it states, in pertinent part:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer 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 [emphasis added][[63]].

EAB case law affirms that the 40 C.F.R. Part 22 rules "require that the ALJ consider any civil penalty guidelines issued under" the authorizing statute. *See, e.g., CDT Landfill*, 11 E.A.D. at 94. Thus the question turns on what is meant by the term "consider."

The term "consider" is defined as "to reflect on: think of with a degree of care or caution" and "to think of, regard, or treat in an attentive, solicitous or kindly way". Webster's 3rd New International Dictionary (unabridged), page 483.[64] Thus, the authority of the ALJ vis-a-vis the

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[63] In 40 C.F.R. § 22.3, the term "Act" is defined as "the particular statute authorizing the proceeding at issue." There is no question or issue in this proceeding the Penalty Policy was issued under the statute pursuant to which the Region has prosecuted this proceeding, 42 U.S.C. § 6991e.

[64] This is the plain meaning and common understanding of the term, and it is similarly defined in other dictionaries. *See, e.g.*, Webster's II New Riverside University Dictionary (1984), at page 301, defining consider as "To think about seriously. To regard as. To believe after deliberation: Judge.

Penalty Policy is confined to "think[ing] with a degree of care or caution," "to...regard[ing]...or treat[ing] [the policy] in an attentive [or] solicitous way," or "to think[ing] about [it] seriously" or "to bear in mind." While the ALJ is required to "consider" Agency penalty guidelines, this directive should not be construed to include the authority to re-write, amend, add to, modify or expand such penalty guidelines. An ALJ need not follow a penalty policy, but she is not free to re-draft such policies; she can disagree with a penalty policy and is free not to adopt its guidelines in the calculation of a proposed penalty under them, but she must use and analyze a penalty policy as it is written. An ALJ can disregard a penalty policy, but her discretionary authority goes only so far as to accept or reject a policy as it is written and the penalty amounts calculated under a policy's guidelines. Nowhere is an ALJ given the authority to re-write a penalty policy. Yet this is precisely what the ALJ did in the proceeding below for Counts 3,4,5, 6 and 7 when she used an ESM value not in the Penalty Policy but of her own creation. In doing so the ALJ abused her discretion — she went beyond the authority she possesses under the statutes authorizing her adjudicatory role and under the 40 C.F.R. Part 22 rules.

This Board should overturn those parts of the June 20th Initial Decision in Counts 3 through 7 where the ALJ invented a new ESM value of 0.5 to calculate the penalties under the Penalty Policy.

To take into account: bear in mind. *** To look at thoughtfully" (internal punctuation omitted).

POINT VI (CROSS-APPEAL ON COUNTS 8, 10, 13 AND 15)

IN ASSESSING PENALTIES FOR APPELLANTS' FAILURE ANNUALLY TO HAVE TESTED THE OPERATION OF THE AUTOMATIC LINE LEAK DETECTORS,

THE ADMINISTRATIVE LAW JUDGE MISAPPLIED THE PENALTY POLICY AND UNDERESTIMATED THE POTENTIAL FOR HARM FOR THESE VIOLATIONS

In a number of ways, the Administrative Law Judge has misapplied the Penalty Policy with regard to her assessments for the penalties for those violations involving appellants' failure to have annually tested the operation of the automatic line leak detectors. She misunderstood the distinctive role played by, and the significance of, the ALLD testing requirement in the overall Part 280 regulatory scheme. As a result, she did not properly assess the Potential for Harm associated with appellants' failure to perform the required ALLD testing.

Preliminarily, as previously discussed, this Board need not give the presumptively operative deference to factual findings of the Administrative Law Judge when such findings were not based upon the ALJ's taking witness testimony, observing witness demeanor or otherwise evaluating the credibility of witnesses. In this matter, as the parties had agreed to waive their opportunity for an evidentiary hearing, the June 20th Initial Decision was based on the parties' written submissions. Thus, the factual findings in the June 20th Initial Decision are not entitled to any deferential review by this Board. Concerning the extent of review of the penalty assessments by this Board, the governing principles are well established. *See, e.g., In re M.A. Bruder & Sons, Inc. d/b/a M.A.B. Paints, Inc.*, RCRA (3008) Appeal No. 01-04, 10 E.A.D. 598, 610 (EAB 2002) ("While the Board clearly has authority to review a penalty determination *de novo*, the Board has stated that we will generally not substitute our judgment for that of an ALJ absent a showing that the ALJ committed clear error or abused his or her discretion in assessing a

penalty"; footnote omitted); *In re Chempace Corporation*, FIFRA Appeal Nos. 99-2 & 99-3, 9 E.A.D. 119, 131 (EAB 2000) ("This Board generally will not substitute its judgment for that of a presiding officer when the penalty assessed falls within the range of penalties provided in the penalty guidelines, absent a showing that the presiding officer committed an abuse of discretion or a clear error in assessing the penalty"). These general principles notwithstanding, the EAB has rejected a penalty assessment made by an Administrative Law Judge when such assessment "was based on ALJ's misunderstanding as to how the penalty policy should be applied." *In re Morton L. Friedman and Schmitt Construction Company*, CAA Appeal 02-07, 11 E.A.D. 302, 341 (EAB 2004).

In Classifying The Count 8, 10, 13 And 15 ALLD Violations As Having A Moderate Potential For Harm, The Administrative Law Judge Improperly Conflated The Protections Afforded By ALLD Testing With Those Underlying Annual Line Tightness Testing/Monthly Monitoring

For these ALLD violations, the Region assigned a "MAJOR" potential for harm in accordance with the guidance provided by the Penalty Policy. Paragraph 46 of the August 2012 Sacker declaration, submitted as part of the parties' litigation of the penalty question. The reasoning behind the penalty proposed by the Region is more fully set forth in paragraphs 74 through 91 in the August 2012 Sacker declaration. For Counts 8, 10, 13 and 15, the ALJ rejected the Region's reasoning and lowered the matrix entry for "Potential for Harm" to "MODERATE." *See, e.g.*, page 32 of the June 20th Initial Decision, where the ALJ explained (for Count 8):

> There is no evidence of any failure to perform tightness testing or monthly monitoring under Section 280.44(b) or (c) for the pressurized piping at Station II. Therefore, the circumstances of Count 8 fit the Penalty Policy's definition (at § 3.1.2) of a 'moderate' potential for harm: 'causes or may cause a situation resulting in a significant risk to human health and the environment,' for example,

> 'a tank that fails to meet tank corrosion standards (because it could result in a release, although the use of release detection is expected to minimize the potential for continuing harm from the release).'

Her reasoning is similar in the penalty discussion relating to the potential for harm component for the ALLD violations at other stations (Counts 10, 13 and 15).[65] In determining the potential for harm resulting from the ALLD violations, the ALJ improperly conflated the leak detector requirements with the line tightness testing/monthly monitoring requirement.

The annual line tightness test/monthly monitoring represent testing procedures separate and different from the annual automatic line leak detector testing requirement. These tests serve different purposes. This emerges from the regulatory text. The ALLD is vital because it is intended to detect and quickly stop more substantial or catastrophic leaks, as can be seen from the requirements for ALLDs set forth in 40 C.F.R. § 280.44(a): "Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of 3 gallons per hour at 10 pounds per square inch line pressure within 1 hour." By contrast, the 40 C.F.R. § 280.44(b) provision concerning line tightness testing deals with much lower thresholds, and thus is concerned with smaller-scale leaks, the type that might not be detected by an automatic line leak detector: "A periodic testing 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."

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[65] *See* the following pages of the June 20th Initial Decision: for Count 10, page 36 ("There is no evidence of any failure to monitor the piping for releases under Sections [sic] 280.41(b)(1)(ii)"); Count 13, page 42 "The piping on each of these tanks was monitored for releases under Sections [sic] 280.41(b)(1)(ii)"); Count 15, page 46 "CCLD conducted release detection monitoring for the piping on these USTs."

Additional explanations going to the difference purposes served by the ALLD testing and the line tightness/monthly monitoring can be found in the Federal Register notice that published the final version of the UST regulations (53 *Fed. Reg.* 37,082 (September 23, 1988)) .

Under the heading "Immediate Detection of Large Leaks," and citing to the 40 C.F.R. § 280.41(b)(1)(i) provision concerning automatic line leak detectors,[66] the September 23, 1988 Federal Register discussed the protection specifically provided by automatic line leak detectors (53 *Fed. Reg.* At 37,153):

> At proposal, data received from state agencies indicated that piping was involved in 20 to 35 percent of all releases. Pressurized piping was also identified as the most common petroleum dispensing system at new installations. Documented cases raised the possibility of sudden large releases from these systems. These factors led the Agency to conclude that additional release detection was required for pressurized piping so that large-volume releases could be stopped as quickly as possible. The monthly monitoring frequency required for the tank was considered inadequate given the potential damage due to a release from pressurized piping. ***
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> ***
>
> *** **To ensure a[]...minimum level of protection against catastrophic pressurized piping releases, the final rule includes the requirement that all pressurized piping have automatic line leak detectors** that provide warning of 3 gallon per hour releases within an hour [emphasis added].

Under the heading "Additional Monitoring for Smaller Leaks," and citing to the 40 C.F.R. § 280.41(b)(1)(ii) provision concerning annual line tightness testing/monthly monitoring,[67] the September 23, 1988 Federal Register discussed how this type of release

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[66] That regulation provides that "[u]nderground piping that conveys regulated substances under pressure must [b]e equipped with an automatic line leak detector...."

[67] That regulation provides that "[u]nderground piping that conveys regulated substances under pressure must [h]ave an annual line tightness test...or have monthly monitoring...."

detection is intended to protect again smaller leaks (53 *Fed. Reg.* At 37,153-54):

> Commenters suggested the use of inventory control or line tightness testing in conjunction with flow restrictors, shutoff devices, or continuous monitors. The new causes-of-release information acquired since proposal shows even more strongly that piping is a major source of leaks from UST systems. Because of the importance of controlling pressurized piping releases, EPA agrees that additional release detection beyond the immediate detection...is necessary. **Flow restrictors may not detect small releases, so additional monitoring is necessary to detect these releases. Therefore, the final rule has been revised to require an annual line tightness test or monthly monitoring using one of the accepted methods for tank monitoring** [emphasis added].

These differences were further explained in the February 2012 Paul Sacker declaration (submitted as part of the Region's effort to obtain partial accelerated decision). *Compare* paragraph 55, where he states, "Under the UST [underground storage tank] regulations, such pressurized piping [*i.e.* pressurized piping used to convey a substance such as gasoline] must be monitored monthly for release detection or a line tightness test must be conducted once per year to demonstrate that the lines (pipes) are intact," with paragraph 59:

> An automatic line leak detector [ALLD] is at the interface of a tank and its piping and is intended to shut off the pump associated with an UST as soon as a release is detected in a pipe through a pressure drop. An ALLD does not monitor releases from the tank itself.

The ALLD testing requirement is distinct from the line leak problems intended to be addressed by line tightness testing/monthly monitoring. While, as noted above, the latter deals with the smaller-scale problem of releases, the ALLD plays a more prominent overall role in leak prevention. This was addressed in paragraph 76 of the August 2012 Sacker declaration (page 36):

> A properly functioning automatic line leak detector is a key aspect to

> ensuring that underground storage tanks holding substances such as gasoline or diesel fuel are operated in an environmentally safe and responsible manner and that leaks from pipes connected to such tanks are detected and immediately responded to. An ALLD in proper working condition is a critical component to ensuring that UST systems are operated and maintained in compliance with the requirements set forth in 40 C.F.R. Part 280. An ALLD constitutes the first line of defense in preventing a release of the contents of an UST system that uses pressurized piping to deliver product to customers. Piping is an important source of releases that occur from UST systems, and an automatic line leak detector serves as a primary defense against leaking pipes and helps prevent releases from an underground storage tank's pressurized piping from getting into the environment.

Mr. Sacker has further explained the importance of an automatic line leak detector in leak detection in paragraphs 77 and 78 of his August 2012 declaration (pages 36-38):

> *** An ALLD must be designed to alert an operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm and must detect leaks of three gallons per hour at 10 pounds per square inch line pressure within one hour. The annual test of the operation of the leak detector required by 40 C.F.R. § 280.44(a) is necessary to ensure that the ALLD is indeed capable of detecting such a release. An ALLD that is not functioning properly, or fails to detect a drop in pressure while an UST is being used to pump product, such as gasoline or diesel fuel, to a customer, creates a significant risk that a leak will not be prevented. The risk of a release to the environment is greatest during the active use of the pressurized pump of an underground storage tank to deliver product to a customer, as the product is under pressure and is being forced through the system. A leak in the piping could potentially propel this product at high pressure into the environment, and this could occur repeatedly over the course of a day as the UST is accessed. An automatic line leak detector is essential to the responsible and environmentally safe operation of underground storage tank systems in which gasoline, diesel fuel, kerosene or the like is contained.
>
> To serve this purpose, an ALLD must be in proper working order, and to ensure that, it must be tested at least once a year. If an automatic line leak detector is not tested regularly, there is an elevated risk that it will not function as intended, and this increases the risk that, were a leak to occur in a pressurized pipe, the material held by the associated tank would enter the environment. If an ALLD test is not tested regularly, the chances become that much greater, and, with such a failure, a whole series of adverse and potential dangerous

consequences might follow from a leak of a substance like gasoline or diesel fuel.

Failure to perform timely ALLD testing is appropriately characterized as having a "MAJOR" potential for harm . This classification fits the description in the Penalty Policy for "MAJOR" (page 17 of the Penalty Policy):

> The violation causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program. Examples are: (1) improperly installing a fiberglass reinforced plastic tank (because a catastrophic release may result); or failing to provide adequate release detection by the specified phase-in date (because without release detection a release may go unnoticed for a lengthy period of time with detrimental consequences).

Despite the salient and crucial differences between the different types of tests and their different purposes, the ALJ cited the appellants' conduct of line tightness testing/monthly monitoring to assess the potential for harm that ultimately results if an ALLD is not properly working. This improper conflation of two very different protective mechanisms intended to effect different specified objectives and implicating different parts of the overall regulatory scheme should not be allowed to determine the potential for harm for the ALLD violations. The ALJ having done so constitutes clear error that should be overturned.

CONCLUSION

For all the reasons set forth above, the Region respectfully requests that this Board: **1)** deny in all respects each of Points I, II and III of the appeal of appellants and issue a judgment so dismissing said appeal in its entirety; **b)** grant the Region judgment in its favor regarding its cross-appeal and issue judgment accordingly, as follows: 1) reverse the ruling of the ALJ regarding the interpretation of the term "annual" in Count 2, and further hold that said term, as

used in Count 2, means 12 months from the date of the last prior test; 2) reverse the ruling of the ALJ in Counts 3, 4, 5, 6 and 7 regarding the Environmental Sensitivity Multiplier ("ESM") and further hold that, for said violations, the correct ESM is 1.0; 3) reverse the ruling in Counts 8, 10, 13 and 15 of the ALJ regarding the matrix classification for the "potential for harm" and hold that a "MAJOR" classification for the potential for harm component for these counts is the appropriate one;[68] and **c)** grant the Region such other and further relief as this Board deems just, proper and lawful.[69]

Dated: November 14, 2013
New York, New York

Respectfully submitted

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[68] If the Board so directs, the Region will provide the amount of the revised penalty the Region is seeking for each of the counts from which ALJ rulings are being cross-appealed.

[69] Pursuant to 40 C.F.R. § 22.30(a)(1), the Region notes the following: "alternative issues regarding issue of law or discretion," to the extent the Region is seeking same, have been set forth in each of the three points of the Region's cross-appeal. As for "alternative findings of fact," except to the extent discussed in the third issue on cross-appeal (Point VI), the Region accepts the findings of the ALJ in the June 21st PAD order and the June 20th Initial Decision.

TO: The Environmental Appeals Board
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Clerk of the Environmental Appeals Board
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In re Andrew B. Chase et al.
RCRA (9006) Appeal No. 13-04

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "NOTICE OF APPEAL," dated November 14, 2013, and the "BRIEF OF APPELLEE/ CROSS-APPELLANT IN OPPOSITION TO THE APPEAL OF APPELLANTS AND IN SUPPORT OF CROSS-APPEAL OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2," dated November 14, 2013, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and One Copy
By UPS OVERNIGHT:

Clerk of the Environmental Appeals Board
U.S. Environmental Protection Agency
1201 Constitution Avenue, N.W.
U.S. EPA East Building, Room 3334
Washington, DC 20004

Copy by UPS OVERNIGHT:

The Environmental Appeals Board
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I further certify that I have this day caused to be sent the foregoing "NOTICE OF APPEAL," dated November 14, 2013, in the above-referenced proceeding in the following manner to the addressee listed below:

Copy by Pouch Mail:

Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900 L
Washington, DC 20460

Dated: November 14 2013
New York, New York

Lee A. Spielmann