IN RE NORMAN C. MAYES

RCRA (9006) Appeal No. 04-01

FINAL DECISION AND ORDER

Decided March 3, 2005

Syllabus

On March 29, 2004, Mr. Norman C. Mayes filed an appeal of an Initial Decision entered against him on February 27, 2004, by Administrative Law Judge ("ALJ") Barbara A. Gunning. The ALJ determined that Mr. Mayes violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, by failing to: (1) register two underground storage tanks ("USTs") on his property; (2) install and monitor release detection mechanisms on three USTs on his property; and (3) upgrade or permanently close three USTs on his property. Pursuant to RCRA section 9006(d), 42 U.S.C. § 6991e(d), the ALJ assessed an administrative penalty of $66,301 against Mr. Mayes for the violations.

In his appeal of the Initial Decision, Mr. Mayes argues that some of the violations are barred by the statute of limitations and that certain evidence admitted at the administrative hearing should have been excluded because it was gathered in contravention of his Fourth Amendment right to be free from unreasonable searches and seizures. Mr. Mayes also contends that the ALJ erred on a number of grounds in analyzing his liability for violating RCRA and in determining the appropriate penalty therefor.

Held: The Initial Decision is affirmed in all respects. With respect to the statute of limitations, the Environmental Appeals Board ("Board") finds that Region IV of the United States Environmental Protection Agency ("EPA") was not prejudiced by Mr. Mayes' late raising of the defense at the opening of the hearing, as both sides subsequently had opportunities to brief the issue before the ALJ, and the ALJ evaluated the issue on its merits. Thus the Board will consider this issue. Upon consideration, the Board holds that the legal duty to notify the authorities of the existence of an UST is a condition on the use of USTs and a continuing obligation that is necessary to implement the congressional ban on unregulated UST use. The Board also holds that the duty to provide release detection mechanisms for USTs is a condition on the use of USTs and an obligation that continues over the lifetime of the UST. Accordingly, the Board holds that failures to comply with these requirements constitute continuing violations that toll the statute of limitations.

Second, with respect to the search and seizure issues, the Board holds that the inspections conducted by EPA Region IV, the Tennessee Department of Environmental Conservation, and/or the Tennessee Department of Agriculture in March and November 2000 did not violate the Fourth Amendment. RCRA section 9005 authorizes warrantless searches of USTs and seizures of evidence therefrom, and, according to the Board, all three of Mr. Mayes' underground tanks qualified as USTs subject to such searches and seizures. The Board also finds that a totality of the circumstances demonstrates that Mr. Mayes voluntarily consented to the November 2000 inspection, and a typical reasonable person

would have understood that the scope of that consent extended to all three UST systems and other areas of the property that could substantiate or refute his claim that Tank #1 and #2 were unregulated "farm tanks" rather than regulated USTs.

Third, with respect to liability, the Board affirms the ALJ's findings that Mr. Mayes is liable, with respect to Tanks #1 and #2, for: (1) failing to notify the regulatory authorities of the existence of the two tanks, in violation of 40 C.F.R. § 280.22; (2) failing to provide release detection mechanisms for the tanks, in violation of 40 C.F.R. § 280.40; and (3) failing to upgrade or permanently close the tanks, in violation of 40 C.F.R. § 280.21. Mr. Mayes argued that these two tanks were "farm tanks" not subject to UST regulation, but the Board finds, to the contrary, that the Mayes property was not "devoted" to farming but rather was used as a commercial airport for many years. Furthermore, the Board finds no credible evidence in the record to suggest that Mr. Mayes used Tank #1 or #2 to support farming activities.

The Board also affirms the ALJ's finding that Mr. Mayes is liable, with respect to Tank #3, for: (1) failing to provide release detection mechanisms for the tank, in violation of 40 C.F.R. § 280.40; and (2) failing to upgrade or close the tank, in violation of 40 C.F.R. § 280.21. The Board rejects Mr. Mayes' contention that Tank #3 was empty and thus release detection mechanisms were not required. Instead, the Board finds that the preponderance of the evidence indicates that Tank #3 was not, in fact, empty, and, in any event, this defense is only applicable in situations where the UST is temporarily closed, which was not the case here. The Board also finds that Mr. Mayes raised no appeal of the ALJ's decision to find him liable for a 40 C.F.R. § 280.21 violation (i.e., failure to upgrade or permanently close the UST) rather than for the 40 C.F.R. § 280.70(c) closure-and-assessment violation that had been alleged in the Complaint. The Board notes that the ALJ has power to amend the pleadings to conform them to the evidence presented at the hearing and finds that such occurred in this case. The parties had full opportunity to litigate the bases for violations of both regulatory provisions cited and thus Mr. Mayes suffered no prejudice from the amendment.

Finally, the Board rejects Mr. Mayes' challenge to the penalty calculation, finding that he failed to demonstrate any clear error or abuse of discretion in the ALJ's analysis of the appropriate penalty. The Board therefore upholds the ALJ's assessment of a $66,301 penalty for the UST violations.

Before Environmental Appeals Judges Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Reich:

On March 29, 2004, Mr. Norman C. Mayes filed an appeal of an Initial Decision entered against him on February 27, 2004, by Administrative Law Judge ("ALJ") Barbara A. Gunning. The ALJ determined that Mr. Mayes violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, by failing to: (1) register two underground storage tanks ("USTs") on his property; (2) install and monitor release detection mechanisms on three USTs on his property; and (3) upgrade or permanently close three USTs on his property. Pursuant to RCRA section 9006(d), 42 U.S.C. § 6991e(d), the ALJ assessed an administrative penalty of $66,301 against Mr. Mayes for the violations.

In his appeal of the Initial Decision, Mr. Mayes contends that the ALJ erred on a number of grounds in analyzing his liability for violating RCRA and in determining the appropriate penalty therefor. Mr. Mayes also argues that some of the violations are barred by the statute of limitations and that certain evidence admitted at the administrative hearing should have been excluded because it was gathered in contravention of his Fourth Amendment right to be free from unreasonable government searches and seizures. For the reasons set forth below, we affirm the ALJ's Initial Decision in all respects.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

In 1976, Congress enacted RCRA in an effort 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 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 further loopholes it had identified, in that instance to address, among other things, accidental releases from USTs containing petroleum or other regulated substances.[1] *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 United States Environmental Protection

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[1] A study prepared for the benefit of Congress stated at that time:

> Underground storage tanks are seldom regulated. At present, [f]ederal regulation of storage tanks covers only above-ground tanks containing chemical wastes. And, if a tank is leaking, the Federal Government cannot under Superfund authority [i.e., the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675,] respond or clean up a spill if it involves petroleum products. * * *
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> * * * The tank storage of one of the most common groundwater contaminants-gasoline-is unregulated because it is not a waste product (and thus not under the authority of [the 1976 version of RCRA]), and spills of the fuel cannot be cleaned up under the Superfund law because it is a petroleum product.

Donald V. Feliciano, Environmental Policy Analyst, Congressional Research Service, *Leaking Underground Storage Tanks: A Potential Environmental Problem* (Jan. 11, 1984), *reprinted in* 130 Cong. Rec. S2026, S2028, S2030 (daily ed. Feb. 29, 1984).

Agency ("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. The resultant regulations, promulgated on November 8, 1985, and September 23, 1988, became effective on November 8, 1985, and December 22, 1988, respectively, and, 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 within certain time frames notify their state or local governments of the existence of their tanks, specifying the age, size, type, location, and uses of each tank. RCRA § 9002(a)(1), 42 U.S.C. § 6991a(a)(1); 40 C.F.R. § 280.22 & apps. I-II. Owners and operators of USTs also must, among other things: (1) implement spill and overfill control procedures; (2) install leak detection, inventory control/tank testing, or comparable systems to ensure timely discovery of leaks; (3) maintain records of release detection systems; (4) report accidental releases; (5) take corrective action in response to any such releases; (6) comply with requirements for appropriate temporary and permanent closure of USTs to prevent future releases; and (7) 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. Violations of RCRA UST program provisions are subject to civil fines of up to $10,000 ($11,000 now due to inflation[2]) per tank for the notification requirements promulgated pursuant to RCRA section 9002 and per day of violation for the other requirements promulgated pursuant to RCRA section 9003. RCRA § 9006(d), 42 U.S.C. § 6991e(d).

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[2] The statutory maximum penalties have been increased by 10 percent, to $11,000, in accordance with EPA regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996). *See* 40 C.F.R. pt. 19 (EPA's inflation-adjusted maximum penalties); Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121 (Feb. 13, 2004); 61 Fed. Reg. 69,360 (Dec. 31, 1996). These two penalty-related congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation.

B. *Factual and Procedural Background*

Mr. Norman C. Mayes owns and operates Powell Airport, a small commercial airport in Powell, Tennessee, on eighty-seven acres of land that has been in the Mayes family since 1949. Hearing Transcript ("Tr.") at 829, 894, 1012; Stipulation ("Joint Stip.") ¶ 2. Mr. Mayes originally built the airport in 1951 and leased it to third-party hobby pilots until late 1966, at which time the federal government began to construct Interstate 75 near the end of the airport's runway. Mr. Mayes took over operation of the airport at that time, modified the runway, and began a flight school by purchasing trainer airplanes and hiring flight instructors. Tr. at 831-34, 903; Joint Stip. ¶ 3. He also began an air charter service, which involved the commercial transport of people, automobile parts, and other items within the continental United States on an as-needed basis. Tr. at 834-36. In addition, Mr. Mayes leased airplanes and hangar space and sold aviation fuel to pilots flying in and out of Powell Airport. Tr. at 829-30, 997-98, 1002-03.

At all times relevant to this proceeding, Mr. Mayes' property contained a small office building, a barn and silo, several sheds, a 2,600-foot paved runway, two small airplane hangars, and the family residence. Tr. at 70, 76-78, 894-96; EPA Exhibits ("EPA Exs.") 6, 15, 32, 36; Mayes Exhibits ("Mayes Exs.") 3-5, 7-9. A strip of paved tarmac led from the airport office to the runway, and situated on that tarmac, approximately thirty to forty feet from the office, were two fuel dispensers and three fill ports for three steel storage tanks buried beneath the tarmac. Tr. at 76-78, 215, 243-44; EPA Exs. 4, 6, 15; Mayes Ex. 4. Tanks #1 and #2 were each 1,000-gallon tanks, and their fill port labels indicated they were used to store aviation-grade gasoline. Tank #3 was a 3,000-gallon tank, also used to store aviation fuel. Tr. at 117-18, 252-53; EPA Exs. 5-6, 15, 23, 26; Joint Stip. ¶¶ 6-8. Tanks #1 and #2 were installed in the mid- to late-1950s, and Tank #3 was installed no later than 1982. Tr. at 831; EPA Exs. 1-2.

The majority of Mr. Mayes' property is zoned agricultural, with a small area of commercial/agricultural zoning at the front of the property around the office building. Tr. at 339-42, 898; Mayes Ex. 6. The airplane hangars and runway are surrounded by open fields, from which two cuttings of hay are produced annually, depending on rainfall. Mr. Mayes sells his hay to third parties who bring their haying equipment to his property and cut, rake, bale, and remove the hay in exchange for the hay itself and a payment to Mr. Mayes of approximately $1,000 annually. Tr. at 807-15, 823-28, 842-50, 989-90; EPA Ex. 32 attach. 2. The property is also assigned a tobacco allotment from the United States Department of Agriculture ("USDA"),[3] which Mr. Mayes sells to other farmers each year for a

[3] Mr. John Austin, County Executive Director of the Knox County, Tennessee, Farm Services Agency within USDA, testified that "[t]obacco allotments were established in the [1930s]. And I as-
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few hundred dollars. Tr. at 850-54, 1030-34; EPA Ex. 32 attach. 3.

In April 1986, after Congress enacted the RCRA UST program and EPA promulgated initial regulations implementing the program, Mr. Mayes filed a "Notification for Underground Storage Tanks" form with the Tennessee Department of Environmental Conservation ("TDEC"), UST Division. In so doing, Mr. Mayes informed TDEC that he had a 3,000-gallon underground storage tank (i.e., Tank #3) in service at Powell Airport for the storage of aviation fuel. EPA Ex. 1. Mr. Mayes never notified TDEC or EPA of the existence or use of Tanks #1 and #2.

On August 27, 1997, TDEC telephoned Mr. Mayes to inquire about the status of Tank #3 and to determine whether a compliance inspection should be scheduled. Mr. Mayes informed TDEC that Tank #3 had been emptied in approximately April 1997 and was "temporarily out-of-service." As a consequence, TDEC opted not to schedule a compliance inspection at that time, as active UST facilities have priority over out-of-service USTs and Tank #3 purportedly was out of service. Tr. at 47-52; EPA Exs. 3, 12. Two and one-half years later, on March 17, 2000, Mr. Ryan Hyers of TDEC conducted a routine UST site inspection at Powell Airport to check on Tank #3. Tr. at 55-62, 239-45; EPA Exs. 4, 12. During the inspection (which was unannounced), TDEC discovered, for the first time, fill ports for Tanks #1 and #2 that indicated the tanks contained aviation gasoline. Tr. at 57-59, 241-42. Mr. Hyers proceeded to measure the contents of all three tanks and found that Tank #1 contained 35 inches of petroleum fuel product, Tank #2 contained 22 inches of petroleum fuel product and 5 inches of water, and Tank #3 contained 2 inches of petroleum fuel product and 6 inches of water. Tr. at 58, 242; EPA Ex. 4. Mr. Hyers made no contact with Mr. Mayes during the inspection, but Ms. Jane Roach, another TDEC inspector, telephoned Mr. Mayes later that same day. Tr. at 66-69, 245-47; EPA Ex. 5. Mr. Mayes explained that he had not registered Tanks #1 and #2 because he believed they were "farm tanks" exempt from UST regulation. He stated that he used the two tanks to fuel his tractors for farm use. Tr. at 67, 247; EPA Ex. 5.

On March 21, 2000, Mr. Hyers and Ms. Roach made another unannounced visit to Powell Airport, this time to evaluate Mr. Mayes' claim that his 1,000-gallon tanks were "farm tanks." The inspectors took photographs and, while observing an "old barn" and two tractors on the premises, found no evidence of frequent use of the barn for agricultural purposes. Tr. at 70-79, 248-54; EPA Ex. 6. The inspectors did not measure the contents of Tank #1, #2, or #3 on this visit, and

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(continued)
sume if anyone has one today, it was established then * * * [b]ecause tobacco is tied to the land." Tr. at 1034.

they again did not encounter Mr. Mayes or any other person associated with the Airport. Tr. at 248, 379.

In August 2000, in response to an annual invoice for UST registration fees for Tank #3, Mr. Mayes sent a letter to TDEC stating that Tank #3 had not had any fuel product stored in it for two years or longer. Tr. at 79-87; EPA Exs. 7-8. Instead, Mr. Mayes reported that Tank #3 was "filled with water at this time," and, therefore, he perceived "no reason to have to pay dues on something that is not benefit[t]ing anyone." EPA Ex. 8. TDEC responded with a letter informing Mr. Mayes that any USTs currently in use or temporarily out of use are assessed a fee, and any UST that is not properly closed is required by law to pay the fee. EPA Ex. 9.

A few weeks later, on September 18, 2000, Mr. Mayes telephoned Ms. Eugenia McCullough of TDEC and informed her that Tank #3 was no longer subject to UST regulations because he had converted the tank to storing Roundup®, an agricultural herbicide, for use on his farm. EPA Ex. 13; *see* EPA Exs. 11, 16, 18. After TDEC received further communications from Mr. Mayes in September and October 2000 regarding Tank #3, *see* EPA Exs. 11, 18, EPA Region IV mailed him a Request for Information pursuant to section 9005 of RCRA, 42 U.S.C. § 6991d. EPA Ex. 22. Mr. Mayes responded on November 21, 2000, reporting that Tank #1 was out of use, Tank #2 was used for agricultural purposes, and Tank #3 was temporarily closed. EPA Ex. 23. Mr. Mayes reported the "date of ownership" of all three tanks as 1987 and submitted an affidavit attesting that he had never stored herbicides or any other chemicals in Tank #1, #2, or #3. EPA Exs. 14, 23.

EPA Region IV subsequently contacted Mr. Mayes to schedule an UST facility inspection for November 28, 2000. Tr. at 469-73; EPA Exs. 24-25; Mayes Exs. 1-2. On that date, twelve inspectors from EPA, TDEC, and the Tennessee Department of Agriculture ("TDA"), the agency responsible for overseeing herbicide use, met Mr. Mayes, his wife Mrs. Ruth Mayes, and Mr. Jim Miller, an UST contractor hired by Mr. Mayes to assist him with the inspection, at Powell Airport. Tr. at 473-512; EPA Exs. 15-16, 26. The inspectors measured the contents of the underground tanks and found that Tank #1 contained 1¾ inches of petroleum fuel product and 25¼ inches of water, Tank #2 contained 31⅝ inches of aviation fuel and 2⅜ inches of water, and Tank #3 contained ⅝ inches of petroleum fuel product and 7⅜ inches of water. Tr. at 390-409, 486; EPA Exs. 15, 26. In addition, while one inspector interviewed Mr. and Mrs. Mayes in the office building, Mr. Miller escorted the inspectors around the facility so they could evaluate whether Tanks #1 and #2 qualified as "farm tanks." Tr. at 188, 482, 487; EPA Exs. 15-16, 26. The inspectors took samples from the fuel tanks of three tractors located in the airplane hangars, examined, with the assistance of Mr. Mayes, a plastic container of Roundup® also discovered in one of the hangars, and took photographs of the facility. Tr. at 494, 535-36, 975-76; EPA Exs. 15-16, 26. The

inspectors determined that two of the tractors contained diesel fuel and the third contained regular gasoline. They did not discover any farming equipment containing aviation fuel. EPA Exs. 15, 26.

On July 9, 2001, in the presence of EPA, TDEC, and Knox County fire department inspectors, the Jim Miller Excavating Company, Inc. removed Tanks #1, #2, #3, and the two fuel dispensers from the ground. Tr. at 128-37, 512-23; EPA Exs. 17, 27. The inspectors observed five to six small holes in the bottom of Tank #2 and several small holes near the fill port and on one side of Tank #3. Tr. at 130-31, 514, 520-21; EPA Exs. 17, 27. They also observed that liquid in the bottom of the Tank #3 excavation pit exhibited a petroleum sheen on the surface, and they detected petroleum vapors in the excavation area. Tr. at 515; EPA Exs. 17, 27. Soil and groundwater samples taken at the site revealed concentrations of benzene and Total Petroleum Hydrocarbons-Gasoline Range Organics in excess of UST closure assessment guidelines and/or drinking water supply cleanup levels. *See* Tr. at 135-37, 516-18; EPA Exs. 19-20, 27. The inspectors concluded that Tanks #1, #2, and #3 were single-wall steel tanks without release detection equipment and that it appeared a release or releases from the UST systems had occurred. EPA Ex. 27.

On March 25, 2002, EPA Region IV filed an administrative complaint ("Complaint") against Mr. Mayes, alleging violations of RCRA section 9003, 42 U.S.C. § 6991b, and the implementing regulations at 40 C.F.R. part 280, and seeking a civil penalty of $72,670 therefor. *See* Administrative Complaint & Compliance Order (Mar. 25, 2001) ("Admin. Compl."). Mr. Mayes answered on April 23, 2002, denying liability and raising affirmative defenses. *See* Answer to Administrative Complaint and Request for Hearing and Settlement Conference (Apr. 20, 2002) ("Answer"). The parties subsequently filed a number of motions, including three motions by Mr. Mayes to suppress evidence obtained in the March and November 2000 inspections, which he claimed was the fruit of unconstitutional searches and seizures conducted by the regulatory authorities without a warrant or his voluntary consent. *See* Initial Decision ("Init. Dec.") at 3-5. The ALJ denied all of Mr. Mayes' motions to suppress this evidence. Region IV subsequently reduced its penalty request to $66,666 because it determined it had slightly miscalculated the penalty. *See id*. at 5 & n.6.

On June 9-13, 2003, the ALJ held an administrative hearing regarding this case in Knoxville, Tennessee. On February 27, 2004, she issued an Initial Decision holding Mr. Mayes liable for violating RCRA and its implementing regulations and assessing a penalty of $66,301. *See* Init. Dec. On March 29, 2004, Mr. Mayes filed an appeal of the Initial Decision with the Environmental Appeals Board. *See* Appellate Brief of Respondent ("Appeal Br."). On May 20, 2004, Region IV filed a reply to Mr. Mayes' appeal. *See* Brief in Reply to Appellant Norman C. Mayes' Appeal ("Reply Br."). Mr. Mayes requested oral argument before the Board, Appeal Br. at 47, but, having reviewed the briefs and materials in the

administrative record, we do not believe oral argument would serve a useful purpose at this time. We therefore will decide the case on the record before us.

II. *DISCUSSION*

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside" the ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule."). In so doing, the Board will typically grant deference to an administrative law judge's determinations regarding witness credibility and the judge's factual findings based thereon. *See In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *In re Britton Constr. Co.*, 8 E.A.D. 261, 274 (EAB 1999).

As a preliminary matter, the Board will address two affirmative defenses raised by Mr. Mayes to preclude a finding of liability for certain alleged UST violations and to exclude certain evidence admitted at the administrative hearing. First, Mr. Mayes argues that his alleged failures to notify the authorities of the existence of Tanks #1 and #2 and to perform release detection on Tanks #1, #2, and #3 occurred more than five years prior to the filing of the Complaint in this case and thus prosecution of these alleged violations is barred by the statute of limitations. Second, Mr. Mayes contends that TDEC, TDA, and EPA violated his Fourth Amendment right to be free from unreasonable government searches and seizures, as these agencies searched his property in March and November of 2000 without a warrant or his voluntary consent and seized evidence later used against him before the ALJ. After considering, and ultimately rejecting, each of these defenses, we turn our attention to the arguments pertaining to Mr. Mayes' liability for the alleged UST violations. We conclude by evaluating penalty issues.

A. *Statute of Limitations*

We begin our analysis by examining Mr. Mayes' statute of limitations defense. Statutes of limitation are enacted by legislative bodies to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *see Rotella v. Wood*, 528 U.S. 549, 555 (2000) (policies advanced by statutes of limitation include "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential

liabilities"). While RCRA does not contain a statute of limitations, courts have held that in cases involving civil fines or penalties under RCRA, the general federal statute of limitations set forth at 28 U.S.C. § 2462 is applicable. *See United States v. Lockheed Martin Energy Sys., Inc.*, Nos. Civ.A.5:00CV-39-M, Civ.A.5:99CV-170-M, 2004 WL 2403114, at *17-19 (W.D. Ky. Sept. 30, 2004); *United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810, 818, 831 (N.D. Ohio 1999); *see also 3M Co. v. Browner*, 17 F.3d 1453, 1455-59 (D.C. Cir. 1994)(28 U.S.C. § 2462 applies to civil penalty cases brought in administrative proceedings); *Nixon-Egli Equip. Co. v. John A. Alexander Co.*, 949 F. Supp. 1435, 1439-40 (C.D. Cal. 1996) (28 U.S.C. § 2462 applies to RCRA suits seeking civil penalties but not RCRA citizen suits). The general federal statute provides that an action to enforce a civil penalty must be commenced within five years from the date when the claim first accrued. 28 U.S.C. § 2462. The parties do not dispute that this statute of limitations is applicable in this RCRA UST enforcement context.

The parties do dispute several other matters pertaining to the statute of limitations, including whether the defense is properly before the Board and whether several of the alleged violations are continuing in nature, thus tolling the limitations periods for the violations.

1. *Timing of Raising the Statute of Limitations Defense*

With respect to the first question, Region IV argues that Mr. Mayes failed to raise the statute of limitations defense in his Answer to the Complaint and therefore waived the defense. Reply Br. at 11-13 (citing *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1287 (7th Cir. 1977) ("A claim that the statute of limitations bars a lawsuit is an affirmative defense, and it must be pleaded or it will be considered waived."), *cert. denied*, 434 U.S. 1025 (1978)). Mr. Mayes orally raised the defense as a motion to dismiss at the outset of the hearing before the ALJ. Tr. at 8-11. The Region opposed the motion as untimely, Tr. at 11-12, but the ALJ took the motion under advisement, requested posthearing briefing on the matter, and subsequently decided the statute of limitations issue on its merits. Init. Dec. at 12-14; Tr. at 12-13.

Noting that the Consolidated Rules of Practice that govern this proceeding do not specifically address the timeliness of dispositive motions, Region IV now brings to our attention Rule 8(c) of the Federal Rules of Civil Procedure,[4] which

[4] Although the Federal Rules of Civil Procedure do not apply to these administrative proceedings, Region IV correctly notes that the Board has on occasion looked to the Federal Rules for guidance in situations where the Consolidated Rules of Practice, 40 C.F.R. part 22, are silent. *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 74 (EAB 2000) (examining summary judgment standard set forth in Fed. R. Civ. P. 56); *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999) (same); *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449-50 & n.20 (EAB 1999) (examining case law under Fed. R. Civ. P. 15(b) regarding amendment of pleadings to conform to the evidence).

requires that affirmative defenses, such as statutes of limitation, be set forth in responsive pleadings. *See* Fed. R. Civ. P. 8(c). Region IV contends, "Courts have long recognized that the purpose of this rule is to avoid surprise and undue prejudice to the plaintiff by providing it with notice and the opportunity to demonstrate why the defense should not prevail." Reply Br. at 12 (citing *Venters v. City of Delphi*, 123 F.3d 956, 967 (7th Cir. 1997)). The Region urges the Board to reject Mr. Mayes' defense as procedurally flawed, claiming that its untimely introduction deprived the Region of the opportunity to prepare factual and legal arguments to elicit relevant testimony before the ALJ. *Id.*

We are unpersuaded by Region IV's argument and allegations that it was prejudiced by the untimeliness with which this issue was raised. In her Initial Decision, the ALJ wrote that "[a]lthough this issue should have been raised in the Answer, the Complainant has been put on notice and both parties have had the opportunity to brief this issue."[5] Init. Dec. at 12. Accordingly, although Region IV may have been initially surprised, the Region subsequently had an opportunity to research and prepare arguments on the merits of the statute of limitations defense, and indeed the ALJ relied on that research and argumentation in her Initial Decision. *See, e.g., id.* at 13 (citing Region IV's Posthearing Brief at 13). In these circumstances, we cannot reasonably conclude that Region IV was unduly prejudiced due to lack of advance notice of the statute of limitations defense. *See, e.g., Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) (observing that "[i]t is well established * * * that failure to raise an affirmative defense by responsive pleading does not always result in waiver"; if no prejudice and if defense raised in "reasonable time," there is no waiver); *accord Carter v. United States*, 333 F.3d 791, 796 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1078 (2004); *Curry v. City of Syracuse*, 316 F.3d 324, 330-31 (2d Cir. 2003); *see also In re Lazarus, Inc.*, 7 E.A.D. 318, 329-35 (EAB 1997) (upholding ALJ's decision to entertain late-raised defense where no prejudice to complainant resulted from respondent's assertion of the defense); *cf. In re CDT Landfill Corp.*, 11 E.A.D. 88, 111-114 (EAB 2003) (affirming ALJ's decision to admit late-received evidence where no prejudice shown).

A lack of prejudice is particularly apparent where, as here, the argument is wholly or primarily dependent on law rather than fact. *See infra* Part II.A.2 (evaluating merits of statute of limitations defense on basis of legal considerations). In such a case, Region IV's contention that it suffered prejudice because it could not

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[5] The Consolidated Rules of Practice provide that a respondent may amend his answer upon motion granted by the ALJ. 40 C.F.R. § 22.15(e). The ALJ's statement, quoted in the text above, could be construed as granting such a motion and allowing amendment of Mr. Mayes' Answer (although admittedly he explicitly moved only to dismiss on statute of limitations grounds, not to amend his Answer). *See* Fed. R. Civ. P. 15(a) (trial courts may exercise discretion to allow an answer to be amended to assert an affirmative defense not raised in the initial answer); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 684-85 (3d ed. 2004) (same).

"elicit relevant testimony" (i.e., facts) at the hearing is not persuasive. The facts relevant to resolving this issue were never in contention, and so it is hard to see what "relevant testimony" could have been presented.[6] Therefore, we conclude that Mr. Mayes has not waived his statute of limitations defense.[7]

2. *Merits of the Statute of Limitations Defense: Continuing Violations*

As discussed above, the applicable statute of limitations provides a five-year period of time to initiate a civil penalty action, beginning on the date the claim "first accrued." 28 U.S.C. § 2462. One recognized exception to this general rule of accrual is the doctrine of "continuing violations," which provides that limitations periods for violations deemed to be continuing in nature do not begin to run until the unlawful course of conduct is completed. *In re Harmon Elecs., Inc.*, 7 E.A.D. 1, 22 (EAB 1997), *rev'd on other grounds sub nom. Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999). The question whether violations of the UST notification and release detection requirements are continuing in nature for statute of limitations purposes is one of first impression for the Board.

a. *Board Framework for Analyzing Nature of Violations*

In order to determine whether a violation is continuing in nature, the Board has established an analytical framework that involves, first, looking to the statutory language that serves as the basis for the specific violation at issue, including examination of legislative history as necessary, and, second, reviewing regulations and preambles in cases where the substance of a requirement is found in a regulation rather than the statute. *In re Newell Recycling Co.*, 8 E.A.D. 598,

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[6] In addition, under the Consolidated Rules of Practice, the ALJ has wide discretion to "[h]ear and decide questions of facts, law, or discretion * * * and * * * [d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice." 40 C.F.R. § 22.4(c). In accordance with this provision, and as part of her general management of the case at the hearing, the ALJ had discretion to decide whether to rule on the statute of limitations defense. Viewed in that light, and in the absence of any apparent prejudice, we will accord some deference to her decision to consider the defense.

[7] Moreover, we find that the ALJ issued an "adverse ruling" on the merits against Mr. Mayes by holding that the statute of limitations had *not* expired for any of the charges in the Complaint. Init. Dec. at 14; *see* 40 C.F.R. § 22.30(a). Under the Consolidated Rules, a party's right of appeal extends to issues raised by the initial decision as well as to issues raised during the course of the litigation. *See* 40 C.F.R. § 22.30(c) ("[t]he parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision"); *see also In re Veldhuis*, 11 E.A.D. 194, 204 (EAB 2003) (finding basis to reach normal farming exemption defense because addressed in initial decision), *appeal dismissed upon stipulation of parties*, No. 03-74235 (9th Cir. Mar. 8, 2004). The merits of this issue, therefore, are properly before us.

615-19 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001); *In re Lazarus, Inc.*, 7 E.A.D. 318, 366 (EAB 1997); *Harmon*, 7 E.A.D. at 22-23. This analysis focuses on discerning the intent and purpose of the particular legal requirements in question. In that regard, "[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame." *Lazarus*, 7 E.A.D. at 366-67 (footnotes omitted); *accord Newell*, 8 E.A.D. at 615-16.

The Board employed this analytical framework in *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997), a civil penalty case alleging violations of polychlorinated biphenyl ("PCB") regulations promulgated under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2692. The Board noted that Congress had instituted a ban on PCB use beginning in 1978, subject only to exceptional uses specifically authorized by EPA. EPA had promulgated regulations establishing an excepted use for PCB transformers, and conditions on that use included, among other things, requirements that PCB transformers be registered with local fire departments and that access portals to PCB transformers be marked to ensure safety during fires and other emergencies. By reviewing the statute, legislative history, and regulations and regulatory history, the Board determined that Congress intended the PCB ban to be permanent and therefore the conditions of use authorizations for excepted uses, such as PCB transformers, were continuing obligations necessary to effectively implement the congressional ban. 7 E.A.D. at 367-76. Accordingly, the Board held that failures to register PCB transformers and to mark PCB transformer access doors were continuing violations for statute of limitations purposes, as Congress had rendered unlawful the use of such transformers at any time after the imposition of the PCB ban in 1978 unless conducted in compliance with the conditions of authorized use.[8] *Id.*

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[8] Similarly, by analyzing statutory and regulatory language, purpose, and histories, the Board determined in *Harmon Electronics* and *Newell Recycling* that certain violations of RCRA and TSCA, respectively, were continuing in nature.

Briefly, in *Harmon*, we held that the hazardous waste management title of RCRA and its implementing regulations establish continuing obligations to: (1) operate hazardous waste management facilities in accordance with permits; (2) conduct groundwater monitoring at such facilities; (3) obtain and maintain financial assurance for closure and postclosure conditions at such facilities; and (4) refrain from transporting, treating, storing, or disposing of hazardous waste unless notification of facility existence is given to regulatory authorities in accordance with the law. 7 E.A.D. at 16-43. The Board held further that violations of these continuing obligations are continuing in nature and as such toll the general federal five-year statute of limitations. *Id.* (noting, among many other things, that purposes of RCRA to protect human health and the environment are thwarted if permits are not obtained).

In *Newell*, we held that the obligation to properly dispose of PCB-contaminated soil is continuing in nature and thus a failure to so dispose of the soil is a continuing violation that tolls the statute of limitations. 8 E.A.D. at 614-19.

In contrast, the Board held that a regulatory requirement to prepare and maintain annual records of PCB disposition did not create a continuing obligation. The statutory provision giving rise to this recordkeeping regulation directed EPA only to promulgate rules to "'prescribe methods for the disposal of [PCBs].'" *Id*. at 377 (quoting TSCA § 6(e)(1), 15 U.S.C. § 2605(e)(1)). The Board held that such disposal-related rules "are independent obligations and are not conditions on the use of PCBs. Thus, this requirement does not have the same nexus to the PCB ban as do the transformer registration requirement and the access door marking requirement." *Id*. at 377-78. Moreover, the Board found nothing in the regulations or regulatory history to indicate that the recordkeeping requirement was, on its own merits, anything more than a discrete obligation to be complied with by a date certain each year. *Id*. at 378-79; *cf. Newell*, 8 E.A.D. at 614-19 (finding PCB-contaminated soil disposal requirement, which is derived from same statutory provision as recordkeeping requirement examined in *Lazarus*, to be continuing in nature).

b. *Nature of Mr. Mayes' Alleged Violations*

Turning to the case before us, Mr. Mayes argues that his alleged failures to notify the authorities of the existence of Tanks #1 and #2 and to perform release detection on Tanks #1, #2, and #3 occurred more than five years prior to the filing of the Complaint in this case and thus such failures are no longer actionable.[9] Appeal Br. at 8-16. We disagree. In the course of reviewing the statutory and regulatory requirements and histories behind these alleged violations, we discovered clear evidence of a congressional ban on further unregulated uses of UST systems in this country. This ban is similar in important respects to the PCB ban analyzed in *Lazarus* and leads us to conclude, as in *Lazarus*, that the legal requirements at issue are continuing in nature, thus tolling the statute of limitations.

Congress enacted the UST provisions of RCRA to address the long-unacknowledged problem of UST systems leaking gasoline and other contaminants into the environment. In introducing the UST bill, Senator Durenberger observed, "[I]t is becoming increasingly apparent that pollution of the Nation's ground waters is a serious and growing problem. * * * Gasoline is one of the most common causes of ground water pollution, and much of this may be attributed to [USTs that] are leaking." 130 Cong. Rec. S2026, S2027 (daily ed. Feb. 29, 1984). A study prepared in 1984 for the benefit of Congress stated in this regard:

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[9] Mr. Mayes also disputes that he had any obligation to notify the authorities of the existence of Tanks #1 and #2 or to perform release detection on those tanks. Appeal Br. at 32-40 (arguing that tanks are farm tanks, not USTs, and thus are not subject to these requirements); *see infra* Part II.C.1.a (analyzing Mr. Mayes' farm tank defense).

> An estimated 1.4 million under-ground tanks in the United States store gasoline. An unknown additional number of tanks store a variety of petroleum products, other chemicals, or chemical wastes. Of the 1.4 million underground tanks storing gasoline, approximately 85 percent are made of steel with no corrosion protection and were buried over 20 years ago. Although few data exist, some petroleum industry experts estimate that 75,000-100,000 of these underground gasoline tanks may currently be leaking their contents into the ground and groundwater supplies, and perhaps up to 350,000 tanks may be leaking within the next five years. Congress has identified groundwater contamination as a major emerging issue, particularly because half of the United States population depends primarily on groundwater for drinking water.

Donald V. Feliciano, Environmental Policy Analyst, Congressional Research Service, *Leaking Underground Storage Tanks: A Potential Environmental Problem* (Jan. 11, 1984) (quoted in 130 Cong. Rec. at S2028); *accord* H.R. Conf. Rep. No. 98-1133, at 128 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5699 ("the Conferees believe [the leaking UST] problem has become one of national significance and requires federal legislation"). 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. RCRA § 9003(a), 42 U.S.C. § 6991b(a). In so doing, Congress expressed its determination that USTs may no longer be used in the United States except in accordance with the comprehensive regulatory program. *See id.* § 9006, 42 U.S.C. § 6991e(authorizing federal enforcement of UST program requirements); H.R. Conf. Rep. No. 98-1133, at 124 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5695 (discussing federal enforcement of UST provisions).

EPA implemented Congress' directive, noting the "clear need for comprehensive management of USTs *during their operating life*." Underground Storage Tanks; Technical Requirements, 53 Fed. Reg. 37,082, 37,083 (Sept. 23, 1988) (emphasis added). EPA identified several factors as unusual challenges in devising an effective regulatory scheme for USTs, such as the facts that "the regulated universe is immense, including over 2 million UST systems estimated to be located at over 700,000 facilities nationwide," and that "over 75 percent of the existing systems are made of unprotected steel, a type of tank system proven to be the most likely to leak and thus create the greatest potential for health and environmental damage." *Id.* Moreover, "most of the facilities to be regulated are owned and operated by very small businesses, essentially 'Mom and Pop' enterprises not accustomed to dealing with complex regulatory requirements." *Id.* In light of these and other factors, the Agency attempted to design a flexible, under-

standable, phased-in set of UST regulations that would bring all USTs in the country under the control of regulatory authorities. *Id*. EPA stated:

> [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.

53 Fed. Reg. at 37,096.

i. *Notice of Existence of Tanks #1 and #2*

The first order of business in regulating USTs is identifying where USTs are located and what substances they contain. To that end, both the statute and regulations specify that UST owners must notify the authorities of the existence of their UST systems, indicating the age, size, type, location, contents, and other particulars of such systems, within a certain amount of time, depending on the age and operational status of the UST system. *See* RCRA § 9002, 42 U.S.C. § 6991a; 40 C.F.R. § 280.22 & app. I.[10] On its face, the notification requirement could be construed as consisting of a one-time, discrete obligation that occurs (or fails to occur) by a date certain. This characterization could be perceived as gaining some support from the RCRA UST civil penalty provisions, which establish a one-time penalty of $10,000 for a failure to notify pursuant to RCRA section 9002, whereas violations of regulations promulgated pursuant to RCRA section 9003 may be assessed $10,000 *per day* of violation, thus evincing a potentially continuing nature for those violations. RCRA § 9006(d), 42 U.S.C. § 6991e(d); *see Newell*, 8 E.A.D. at 615 (per-day penalty provisions may provide evidence that Congress

[10] That Region IV did not cite RCRA § 9002, 42 U.S.C. § 6991a, in paragraph 40 of the Complaint (i.e., the failure to notify allegations), but only RCRA § 9003, 42 U.S.C. § 6991b, as its statutory basis for legal action does not mean we are precluded from considering § 9002 in evaluating the nature of the notification obligation designed by Congress.

For reference, RCRA § 9002 sets forth UST notification requirements, whereas RCRA § 9003 directs EPA to develop release detection, prevention, and correction regulations, which themselves contain notification requirements. 40 C.F.R. § 280.22 & app. I. In preparing the Complaint, Region IV cited RCRA § 9003 and 40 C.F.R. § 280.22 as the legal bases for bringing an enforcement action against Mr. Mayes for failure to notify with respect to Tanks #1 and #2.

contemplated possibility of continuing violations, but such provisions do not necessarily transform every violation into continuing violation); *Lazarus*, 7 E.A.D. at 368 (same).

In reality, however, the notification requirement is central to the entire UST program, as the authorities simply have no comprehensive way, other than the prescribed self-identification rule, to determine where over two million USTs are situated in the vast landscape of the United States. Congress recognized this fact and directed EPA to consult with state and local officials "to develop a notification form for operational and non-operational tanks." H.R. Conf. Rep. No. 98-1133, at 127 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5698; *see* RCRA § 9002(b)(2), 42 U.S.C. § 6991a(b)(2). Congress instructed states to "utilize and aggregate the data in the notification forms" to prepare inventories of USTs within each state's own borders. RCRA § 9002(c), 42 U.S.C. § 6991a(c). Moreover, Congress required states wishing to implement the federal UST program within their borders to "have a system for notification and tank inventory." H.R. Conf. Rep. No. 98-1133, at 127, *reprinted in* 1984 U.S.C.C.A.N. at 5698; *see* RCRA § 9004(a)(8), 42 U.S.C. § 6991c(a)(8).

By placing such importance on notification, Congress recognized that the ability of regulatory authorities to track UST systems throughout every phase of the UST life cycle, ensuring ongoing implementation of adequate release detection, prevention, and correction measures as Congress intended, would be severely compromised if the authorities did not know of the existence of such tanks in the first instance. *See, e.g.*, H.R. Conf. Rep. No. 98-1133, at 123, *reprinted in* 1984 U.S.C.C.A.N. at 5694; 130 Cong. Rec. at S2027 (statement of Sen. Durenberger) ("The bill * * * requires that an inventory of both operational and abandoned storage tanks be prepared so that we can ga[u]ge more accurately the full extent of the problem facing us. Tanks [that] are in operation would be required to register with the [s]tate in which they are located."). Accordingly, Congress made it unlawful to own USTs without submitting the requisite notice and went even further by prohibiting the sale of USTs without informing the new owner of his notification obligations.[11] RCRA §§ 9002, 9006(d), 42 U.S.C. §§ 6991a, 6991e(d); H.R. Conf. Rep. No. 98-1133, at 124, *reprinted in* 1984 U.S.C.C.A.N. at 5695.

In this regard, the UST notification requirement is very similar to the PCB transformer registration requirement in *Lazarus*. They serve a similar and funda-

[11] In addition, Congress made it unlawful for anyone depositing regulated substances into an UST from December 9, 1985, through May 9, 1987, to do so without "reasonably notify[ing] the owner or operator of such tank of the owner's notification requirements." RCRA § 9002(a)(5), 42 U.S.C. § 6991a(a)(5); *see* Notification Requirements for Owners of Underground Storage Tanks, 50 Fed. Reg. 46,602, 46,603 (Nov. 8, 1985).

mental purpose, to provide a mechanism for identifying the universe of sources of concern. Both the notification and the registration requirements are conditions precedent to the use or continued use of items (i.e., USTs containing regulated substances, PCB transformers) Congress had determined warranted comprehensive governmental regulation because of the hazards their unregulated use otherwise poses to human health and the environment. In both instances, Congress and/or EPA established specific deadlines by which parties must notify/register, and, as we found in *Lazarus*, we also find here that the obligation to notify/register necessarily continues beyond the deadline if the deadline is not met. *See Lazarus*, 7 E.A.D. at 367-72 (existence of registration deadline does not render failure to register by that deadline a noncontinuous violation, but rather violation is continuing in nature because registration is a condition on the use of PCB transformers). To conclude otherwise would produce an outcome difficult to reconcile with the policy objectives of the statute and regulations.[12] Moreover, the fact that the penalty provided by Congress for a failure to notify is a one-time rather than a continuing penalty, as mentioned above, carries little weight in determining the nature of the violation, as the statutory scheme as a whole reveals tank notification to be a prerequisite to the entire ongoing, lifetime UST regulatory program that is now mandatory for all UST use in the nation.[13]

Mr. Mayes argues that EPA reasonably should have known that Tanks #1 and #2 were not registered, as he had registered Tank #3 in the 1980s and "certainly TDEC would have made unannounced visits to the site" regarding that tank. Appeal Br. at 11-12. Mr. Mayes contends that the fill ports for Tanks #1 and #2 were in very close proximity to the Tank #3 fill port, and thus any inspector could not possibly have overlooked the existence of those tanks while inspecting Tank #3. *Id*. We reject this argument because it would inappropriately shift the tank notification requirement from the UST owner to the regulators, who would be charged, under such reasoning, with constant vigilance to detect new UST fill portals whenever inspecting a facility. Moreover, the state of EPA's reasonable

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[12] In such a scenario, a party legally responsible for USTs but disinclined to abide by the requirements of the UST program could potentially do nothing for five years, other than use his USTs (leaking or not), in the hope that any claims for failure to notify or perform release detection and so on would be barred by the statute of limitations. We have no reason to believe that Congress could have possibly intended that such a result could occur.

[13] It bears noting that, in any event, Region IV pled the notification violations as RCRA § 9003 violations, not RCRA § 9002 violations. *See* Admin. Compl. ¶ 40. The regulations implementing the RCRA notification requirement, 40 C.F.R. § 280.22, were derived in part from RCRA § 9002 authority and in part from RCRA § 9003 authority. *See* Underground Storage Tanks; Technical Requirements, 53 Fed. Reg. 37,082, 37,187 (Sept. 23, 1988); Notification Requirements for Owners of Underground Storage Tanks, 50 Fed. Reg. 46,602, 46,602 (Nov. 8, 1985). As noted earlier, continuing penalties are available on a per-day basis under RCRA § 9006(d)(2), 42 U.S.C. § 6991e(d)(2), for notification violations stemming from RCRA § 9003 requirements.

knowledge (or lack thereof) has no effect on the nature of the notification requirement as continuing or noncontinuing and thus is irrelevant in this context.

For these reasons, we hold the UST notification requirement to be a continuing obligation, necessary to implement the congressional ban on unregulated UST use.[14] Accordingly, Mr. Mayes' alleged failures to comply with the notification requirements for Tanks #1 and #2, if proved (*see infra* Part II.C.1), would be continuing violations of RCRA and the implementing regulations. As such, these alleged violations would not be time-barred by the statute of limitations.

ii. *Failure to Perform Release Detection on Tanks #1, #2, and #3*

The same result obtains with respect to Mr. Mayes' alleged failure to provide release detection mechanisms for Tanks #1, #2, and #3. This requirement, like the foregoing one, also has specific statutory and regulatory bases. The statute directs EPA to promulgate regulations that include "requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment." RCRA § 9003(c)(1), 42 U.S.C. § 6991b(c)(1); *see* H.R. Conf. Rep. No. 98-1133, at 123, *reprinted in* 1984 U.S.C.C.A.N. at 5694. The regulations, for their part, provide:

> Owners and operators of new and existing UST systems must provide a method, or combination of methods, of release detection that:
>
> (1) Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;
>
> (2) Is installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition; and
>
> (3) Meets the performance require-ments in § 280.43 or 280.44, with any performance claims and their manner of

[14] The ALJ also found that the notification requirement is a continuing obligation, as it supplies regulatory authorities with the ability to track UST systems and thereby ensure compliance with UST standards through inspections and other means on an ongoing basis. Init. Dec. at 14. Mr. Mayes did not address this finding in his appeal. *See* Appeal Br. at 7-16.

> determination described in writing by the equipment manufacturer or installer.

40 C.F.R. § 280.40(a); *see also id.* §§ 280.41-.42 (special release detection requirements for petroleum and hazardous substance UST systems). The regulations specify further that any releases must be immediately reported, *id.* §§ 280.40(b), .50, and any existing UST system that cannot apply release detection in conformance with these requirements must complete the closure procedures set forth at 40 C.F.R. sections 280.70 through 280.74 by the date upon which release detection would otherwise be required for such UST system. *Id.* § 280.40(d).

These provisions make clear that UST systems may be used only if they employ release detection mechanisms over the lifetime of the system. Unless the release detection mechanism covered the life of the UST, it could not satisfy the statutory mandate "to identify releases in a manner consistent with the protection of human health and the environment." This requirement, which Congress viewed as a primary mechanism for achieving the protective goals of the UST program, *see, e.g.*, H.R. Conf. Rep. No. 98-1133, at 123, 127, *reprinted in* 1984 U.S.C.C.A.N. at 5694, 5698, is plainly a condition on the use of USTs, as the UST must be closed if release detection is not present. We hold, therefore, the release detection requirements to be continuing obligations.[15] Accordingly, Mr. Mayes' alleged failures to provide release detection for Tanks #1, #2, and #3, if proved (*see infra* Parts II.C.1, II.C.2.a), would be continuing violations of RCRA section 9003 and the implementing regulations and would not be time-barred by the statute of limitations.

3. *Statute of Limitations Summary*

In sum, the alleged violations for failure to provide notice of existence of Tanks #1 and #2 and to perform release detection on Tanks #1, #2, and #3 are continuing in nature. The violations did not cease until July 9, 2001, the date Mr. Mayes had the tanks removed from the ground. Region IV brought its action against Mr. Mayes less than one year later, on March 25, 2002, so the allegations set forth in the Complaint fall well within the five-year statute of limitations. Accordingly, Region IV is not barred from maintaining an action for penalties as to these alleged violations.

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[15] The ALJ also found the release detection requirements to be continuing obligations, as UST owners/operators must ensure on an ongoing basis that their tanks are not releasing regulated substances into the environment, until such time as the tanks are properly closed. Init. Dec. at 14. Mr. Mayes did not address this finding in his appeal. *See* Appeal Br. at 7-16.

B. *Fourth Amendment and the Exclusionary Rule*

We turn next to Mr. Mayes' defense of illegal search and seizure. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Mr. Mayes contends that TDEC, TDA, and EPA violated the Fourth Amendment on November 28, 2000, by searching areas of his property beyond the immediate vicinity of the USTs-including the barn, airplane hangars, sheds, tractors, and farm equipment-without a warrant or his voluntary consent, and seizing evidence therefrom. Appeal Br. at 20-24. Mr. Mayes also argues that TDEC's earlier visits on March 17 and 21, 2000, involved unconstitutional warrantless searches and seizures of evidence from Tanks #1 and #2. *Id*. at 16-18. Mr. Mayes argues that the evidence so collected should be suppressed.[16] *Id*. at 17, 27.

1. *Principles of Fourth Amendment Jurisprudence*

It is well established that administrative inspections of private commercial property conducted for the purpose of enforcing regulatory statutes are subject to the Fourth Amendment's prohibition of unreasonable searches and seizures. *New York v. Burger*, 482 U.S. 691, 699-700 (1987); *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978). Under the Constitution, business owners possess legitimate expectations of privacy in properties used for commercial purposes. Accordingly, warrantless searches of businesses are as a general rule deemed unreasonable and thus unconstitutional. *See, e.g., Marshall*, 436 U.S. at 311-24; *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-77 (1970); *See v. City of Seattle*, 387 U.S. 541, 543-46 (1967); *Allinder v. Ohio*, 808 F.2d 1180, 1186-88 (6th Cir. 1987). This principle is true in the environmental context, as in many other contexts. *E.g., Reeves Bros., Inc. v. EPA*, 956 F. Supp. 676, 679 (W.D. Va. 1996) (those "who believe the

[16] This remedy, called the "exclusionary rule" (i.e., evidence collected by unconstitutional means-i.e., "tainted fruit"-is excluded) is imposed by courts in certain circumstances to protect constitutional rights and deter governmental agencies from engaging in unconstitutional searches and seizures in the future. *See, e.g., In re Boliden-Metech, Inc.*, 3 E.A.D. 439, 444 n.5 (CJO 1990) (citing *United States v. Leon*, 468 U.S. 897, 906 (1984) and *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 729 (9th Cir. 1989)).

Fourth Amendment to be inapplicable to the realm of environmental investigation * * * are sadly mistaken").

Notably, however, the United States Supreme Court has established several important exceptions to the general rule that a warrant must be secured prior to the search and seizure of commercial property. First, the Court has held that a business owner's expectation of privacy in commercial property is significantly less than an individual's expectation of privacy in his home. *Burger*, 482 U.S. at 700; *Donovan*, 452 U.S. at 598-99. The business owner's diminished expectation of privacy is "particularly attenuated" in "closely" or "pervasively regulated" industries, such as liquor or firearms sales, mining operations, vehicle dismantling activities, and the like. *Burger*, 482 U.S. at 700-01; *Donovan*, 452 U.S. at 598-600, 606; *United States v. Biswell*, 406 U.S. 311, 316-17 (1972); *Colonnade*, 397 U.S. at 77. As the Court has stated, "Certain industries have such a history of government oversight that no reasonable expectation of privacy * * * could exist for a proprietor over the stock of such an enterprise. * * * [W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation."[17] *Marshall*, 436 U.S. at 313. Accordingly, courts have upheld the constitutionality of various legislative schemes that authorize warrantless administrative searches of pervasively regulated industries, provided the legislation adequately protects business owners from unreasonable government intrusions by ensuring that inspection time, place, and scope are limited in similar fashion to a warrant.[18] *See, e.g.*, *Burger*, 482 U.S. at 699-712 (vehicle dismantling); *Donovan*, 452 U.S. at 599-606 (stone quarries); *Biswell*, 406 U.S. at 314-17 (firearms sales); *United States v. Mendoza-Gonzalez*, 363 F.3d 788, 793-94 (8th Cir. 2004) (commercial trucking); *United States v. V-1 Oil Co.*, 63 F.3d 909, 911-13 (9th Cir. 1995) (transportation of hazardous materials); *United States v. Branson*, 21 F.3d 113, 116-18 (6th Cir. 1994) (automobile parts and repair); *V-1 Oil Co. v. Wyoming*, 696 F. Supp. 578, 581-83 (D. Wy. 1988)

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[17] Importantly, it is the "pervasiveness and regularity of the federal regulation," and not the number of years a regulatory program has been in effect, "that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment." *Donovan*, 452 U.S. at 606. If it were otherwise and a long history of regulation were required, then "new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation." *Id.*

[18] Warrantless searches of pervasively regulated industries are permissible under three conditions: (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) the warrantless inspections must be 'necessary to further [the] regulatory scheme'"; and (3) "'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.'" *Burger*, 482 U.S. at 702-03 (quoting *Donovan*, 452 U.S. at 600, 602-03); *cf. Palmieri v. Lynch*, 392 F.3d 73 (2d Cir. 2004) (applying "special needs" doctrine to justify warrantless administrative search in nonpervasively-regulated industry context).

(USTs).[19]

Second, warrantless searches of commercial premises conducted with voluntary consent are not violations of the Fourth Amendment. *See, e.g.*, *United States v. Elkins*, 300 F.3d 638, 647-49 (6th Cir. 2002); *Thompson v. City of Lawrence*, 58 F.3d 1511, 1516 (10th Cir. 1995); *In re Litton Indus. Automation Sys., Inc.*, 5 E.A.D. 671, 674 (EAB 1995); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent"). As the Supreme Court has observed, "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Therefore, consensual searches have long been approved because "it is no doubt reasonable" for the government to conduct a search once given permission to do so. *Id*. at 250-51. When dealing with consent, two issues are frequently litigated: voluntariness and scope of consent. With respect to the former, courts have uniformly held that the question whether consent is voluntary is a matter of fact to be judged by a totality of all the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneckloth*, 412 U.S. at 223-34, 48; *Elkins*, 300 F.3d at 647-49; *United States v. Saadeh*, 61 F.3d 510, 517-19 (7th Cir. 1995); *Litton*, 5 E.A.D. at 674-76. As to the latter, courts have held that the scope of a search is generally defined by its expressed object, and the scope of an entity's consent to search is measured by a standard of "objective reasonableness," i.e., what the typical reasonable person would have understood by the communication between the government agents and the suspect. *Jimeno*, 500 U.S. at 251; *Walter v. United States*, 447 U.S. 649, 656 (1980); *Elkins*, 300 F.3d at 648; *United States v. Maldonado*, 38 F.3d 936, 940-42 (7th Cir. 1994); *Saadeh*, 61 F.3d at 518; *Riverdale Mills v. United States*, 337 F. Supp. 2d 247, 254-55 (D. Mass. 2004).

2. *Analysis*

We begin our analysis by examining Mr. Mayes' contention that TDEC's searches and seizures of evidence from Tanks #1 and #2 in March 2000 violated the Fourth Amendment because the tanks purportedly were "farm tanks" not subject to the UST program requirements. We then turn our attention to the question whether the November 28, 2000 searches and seizures accorded with the Fourth Amendment.

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[19] For examples of legislative schemes deemed insufficiently protective of individuals, see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316-24 (1978); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-77 (1970); *Allinder v. Ohio*, 808 F.2d 1180, 1186-88 (6th Cir. 1987).

a. *March 17 and 21, 2000 Inspections*

In view of the substantial federal interest in ensuring that public health, safety, and the environment are protected from the hazards of leaking USTs, Congress incorporated warrantless search and seizure authority into the RCRA UST program. Under RCRA section 9005(a), EPA and state environmental authorities possess broad inspection, monitoring, and testing powers, including authority:

> (1) to enter at reasonable times any establishment or other place where an underground storage tank is located;
>
> (2) to inspect and obtain samples from any person of any regulated substances contained in such tank;
>
> (3) to conduct monitoring or testing of the tanks, associated equipment, contents, or surrounding soils, air, surface water or ground water; and
>
> (4) to take corrective action.

RCRA § 9005(a), 42 U.S.C. § 6991d(a).

Pursuant to this statutory authority, TDEC inspectors entered Mr. Mayes' property on March 17 and 21, 2000, to examine Tank #3, which he had recently reported as "out of service" after years of operation. On the first visit, TDEC discovered, apparently for the first time, the existence of two additional USTs (Tanks #1 and #2) that had aviation fuel tags indicating they contained regulated substances. TDEC proceeded to measure and identify the contents of all three tanks. On the second visit, TDEC took photographs but did not measure the tanks. On both occasions, TDEC limited its inspection activities to the areas where the USTs were situated beneath the paved tarmac at Powell Airport, near the location of the aviation fuel pumps. TDEC had given no prior notice that it was coming, and neither Mr. Mayes nor any other person associated with the property appeared during these inspections. *See supra* Part I.B (reciting facts).

On appeal, Mr. Mayes hinges his Fourth Amendment claim with respect to these March 2000 inspections on the fact that the legal definition of "underground storage tank" explicitly excludes "farm tanks," which are tanks "of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes." RCRA § 9001(1)(A), 42 U.S.C. § 6991(1)(A); *accord* 40 C.F.R. § 280.12. Relying on this definition, Mr. Mayes contends that TDEC conducted an unlawful search and seizure of Tanks #1 and #2 pursuant to RCRA section 9005(a) because those tanks were "not underground storage tanks, but instead were farm tanks." Appeal Br. at 18.

In Part II.C.1.a below, we hold that, as a matter of law, Tanks #1 and #2 were USTs rather than "farm tanks" and accordingly were subject to regulation under the RCRA UST program.[20] Mr. Mayes' argument in this context therefore lacks merit and is rejected. In these circumstances, we need not examine Mr. Mayes' contention that we should exclude the evidence collected on March 17 and 21, 2000.

b. *November 28, 2000 Inspection*

Next, we turn to the November 28, 2000 inspection. On November 6, 2000, Region IV mailed a Notice of Inspection letter to Mr. Mayes informing him that EPA intended to conduct a compliance inspection of the Powell Airport UST facility "to protect human health and the environment from the effects of leaking [USTs]." Mayes Ex. 1. The letter encouraged Mr. Mayes to be present at the inspection; requested tank maintenance, repair, and leak detection records; and noted that "[a] sample of each tank's contents will be required and will be taken from each tank by EPA personnel during the inspection for subsequent laboratory analyses." *Id*. On November 14, 2000, EPA telephoned Mr. Mayes and his UST contractor, Mr. Jim Miller, to schedule the inspection, and Messrs. Mayes and Miller agreed during that conversation to the inspection of the underground tanks at the airport facility. EPA memorialized that conversation in a letter mailed to Mr. Mayes on November 20, 2000. Mayes Ex. 2.

As we explained in Part I.B above, on November 28, 2000, thirteen inspectors from TDEC, TDA, and EPA met Mr. Mayes, his wife, and Mr. Miller at Powell Airport. One of the inspectors from TDEC interviewed Mr. Mayes and his wife in the airport office while Mr. Miller escorted the other inspectors to the USTs and then around the property. The inspectors looked in Mr. Mayes' barn, sheds, and two airplane hangars, collected evidence from the fuel tanks of three tractors, and examined other storage containers and equipment. At one point, TDA had questions about a drum found in one of the hangars that contained the pesticide Roundup®,[21] and Mr. Mayes entered the hangar to discuss the drum's contents with the inspectors. On the basis of the evidence collected during this

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[20] In addition, we note that "[t]hose engaging in the business of storing and dispensing gasoline [from underground storage tanks] have chosen to engage in a pervasively regulated business" and as such possess diminished expectations of privacy in the underground tanks and their contents. *V-1 Oil Co. v. Wyoming*, 696 F. Supp. 578, 581-82 (D. Wy. 1988). Because Mr. Mayes does not challenge the sufficiency of RCRA § 9005(a) to serve in the place of a warrant, but simply claims his tanks were not "USTs" subject to warrantless searches under that provision, we need not examine the statute to see whether it conforms with the three-part test established by the U.S. Supreme Court for warrantless searches of pervasively regulated businesses. *See supra* note 18 (listing three prongs of test).

[21] As noted in Part I.B above, at one point Mr. Mayes told a TDEC employee that Tank #3 had been converted to storing Roundup®. This accounts for the presence of TDA in the inspection.

inspection, Region IV concluded that Tanks #1 and #2 were not "farm tanks" within the meaning of RCRA but rather were regulated USTs. EPA Ex. 26.

Mr. Mayes contends that in voluntarily consenting to the November 28, 2000 inspection, he did not also consent to searches and seizures of evidence from his barn, airplane hangars, sheds, tractors, and farm equipment. Appeal Br. at 20-24. Mr. Mayes points out that these items were situated hundreds of yards beyond "the underground storage tank facility" referenced in the notification letters as the subject of EPA's compliance inspection, and therefore he was not on notice that these areas or machinery would be investigated.[22] *Id*. at 20-21. Mr. Mayes also denies that Mr. Miller had any express or implied authority, as Mr. Mayes' agent, to consent to the expansion of the UST-specific search to these other areas. *Id*. at 22. Finally, Mr. Mayes asserts that he felt intimidated and coerced by the number of government inspectors present and the attire of several who were wearing white, full-length Tyvek suits for the inspection. *Id*. at 23-24; *see* Tr. at 540; EPA Exs. 15, 26 (photographs of inspectors). Consequently, Mr. Mayes claims that any implied consent ascribed to him as a result of his failure to object to the nature or extent of the inspection while it was in progress was not voluntary consent of the type needed to legitimize warrantless searches and seizures. Appeal Br. at 24.

Region IV strongly disputes Mr. Mayes' contentions in this regard. The Region brings to our attention the affidavits and testimony of several of the inspectors who visited Mr. Mayes' property on November 28, 2000 (i.e., Ms. Jane Roach and Mr. Steven Wilson of TDEC; Mr. Steven Burton of EPA), as well as the affidavit of Mr. Miller, Mr. Mayes' UST contractor. Reply Br. at 23-25; *see* Complainant's Response to Respondent's Motion in Limine to Suppress Certain Evidence Exs. 1-4 (May 2003) (affidavits). These materials indicate that Mr. Miller cautioned Mr. Mayes in advance to anticipate that the inspectors would want to view his tractors and surrounding property in order to evaluate his claim that Tanks #1 and #2 were unregulated farm tanks rather than regulated USTs. Affidavit of Jim Miller ¶¶ 2-3 (May 19, 2003); Reply Br. at 24. Mr. Steve Burton, the lead EPA inspector, testified that Mr. Mayes was cordial throughout the inspection, never indicating that he objected to any portion thereof, including the investigation that he personally witnessed of the drum of Roundup® pesticide in one of the airplane hangars. Tr. at 493-95, 497, 534-36, 975-96; Affidavit of Steven Burton ¶ 9 (May 27, 2003); *accord* Affidavit of Jane Roach ¶¶ 3-4, 10 (May 16, 2003); Affidavit of Steven Wilson ¶¶ 3, 5-6 (May 16, 2003). Mr. Burton also attested that if Mr. Mayes had withheld permission or objected to the site

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[22] Notably, when arguing a point in the liability context, Mr. Mayes takes the position that "all of the tanks, the former barn [since demolished for road construction], the hayfields, and the airstrip *are in very close proximity to each other*." Appeal Br. at 38 (emphasis added). Mr. Mayes cannot have it both ways.

investigation, he would have instructed all personnel to leave the property and then secured a search warrant. Affidavit of Steven Burton ¶¶ 3-5. Relying on these and other statements in the record, Region IV contends that Mr. Mayes' claim that he did not freely and voluntarily give consent is contradicted by every other eye-witness account. Reply Br. at 24. The Region also points out that Mr. Mayes did not object to any aspect of the site inspection until several weeks before the administrative hearing (which occurred more than two and one-half years after the November 2000 inspection). *Id*. at 25.

i. *Voluntariness of Consent*

The question whether Mr. Mayes' consent was voluntary is a matter of fact to be judged by a totality of all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 233, 248 (1973); *In re Litton Indus. Automation Sys., Inc.*, 5 E.A.D. 671, 674-76 (EAB 1995). In this case, there is ample evidence in the record to establish that Mr. Mayes did, in fact, voluntarily consent to the November 2000 search and seizures. Right from the beginning, in its initial Notice of Inspection letter to Mr. Mayes, EPA clearly stated, "A sample of *each tank*'*s* contents will be required and will be taken from *each tank* by EPA personnel during the inspection * * * ." Mayes Ex. 1, at 1 (emphasis added). A subsequent conference telephone call between Mr. Steve Burton of EPA and Messrs. Mayes and Miller, documented in a letter sent to Mr. Mayes, indicated their agreement to the inspection of each of the underground tanks. Mayes Ex. 2. EPA counsel questioned Mr. Burton about this telephone conversation at the hearing, inquiring, "Do you have reason to believe that Mr. Mayes understood the scope of your investigation, that is, to figure out if the unregistered underground storage tanks were in fact, quote, farm tanks, and also to figure out what was in the 3,000-gallon tank?" Tr. at 483. Mr. Burton responded:

> Yes. He absolutely did. And I point to the letter that I memorialized at the time, of our agreed time, of the date and the hour that we would be there, and [to] my inspection report, * * * [in which] I refer back to that conversation; because it was at that time, in that conversation, while he had Mr. Miller on the conference call, that he talked about that he was using [Tank #1] as a slop tank, a term I had never heard before in the UST program, but that he would pump contents out of [Tanks #2 and #3] into that, and that he had used [Tank #2] as a farm tank to fuel his tractors.

Tr. at 483-84; *see* EPA Ex. 26, at 5 (Burton inspection report summarizing conference call with Messrs. Mayes and Miller).

Mr. Miller did not testify at the hearing but stated the following in his affidavit:

> Before [the November 28, 2000] inspection, Mr. Mayes and I discussed the fact that Mr. Mayes was claiming that he used some of his [USTs] as farm tanks. I cautioned Mr. Mayes to be truthful when responding to the government, and warned him that the government inspectors would be looking to see if in fact Mr. Mayes used this property as a farm during that inspection. I advised him that the government inspectors would be looking in his tractors and around his property for evidence that Mr. Mayes was using the tanks as farm tanks.

Affidavit of Jim Miller ¶ 3. The truth of this statement appears to be borne out by Mr. Mayes' demeanor and conduct on the inspection day, which various other parties in attendance described as cordial, cooperative, calm, friendly, and not expressing objections of any kind to any aspects of the inspection. *Id*. ¶¶ 4, 6; Affidavit of Steven Burton ¶¶ 8-9, 16; Affidavit of Jane Roach ¶¶ 3-4, 6, 10; Affidavit of Steven Wilson ¶¶ 3, 5-6. Mr. Mayes even walked from the airport office to one of the airplane hangars, at the request of the TDA inspectors, to discuss the tank of Roundup® stored there, without suggesting that such activities exceeded the scope of the inspection as he understood it.

Mr. Mayes contends that he was intimidated by the number and aggressive demeanor of regulatory staff present at the inspection and therefore was afraid to object to any of their activities or requests.[23] The ALJ points out, however, that "inspectors from three government agencies appeared because of conflicting information provided by [Mr. Mayes] concerning the contents of the USTs at the facility." Init. Dec. at 16. While this is a valid point,[24] we find more instructive, for our purposes, the ALJ's conclusion that Mr. Mayes was not a credible witness, which led her to accord "little probative weight, if any," to his testimony and filings. *Id*. The ALJ is, of course, the finder of fact in these proceedings, and she has consistently ruled on the basis of all the evidence, including Mr. Mayes' testimony to the contrary, that his consent was voluntary. *See* Reply Br. at 21 n.10 (summarizing three ALJ orders denying Mr. Mayes' motions to suppress evidence); Init. Dec. at 15-17. We typically defer to a presiding officer's assessment of witness credibility and factual findings based thereon, as, unlike us, the presid-

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[23] We are unpersuaded by this argument, as it is unsupported by any evidence of objectively improper action on the part of the inspectors that would invalidate Mr. Mayes' consent. *See United States v. Elkins*, 300 F.3d 638, 648 (6th Cir. 2002) ("A defendant 'must show more than a subjective belief of coercion, but also some objectively improper action on the part of the police[,]' in order to invalidate consent.") (quoting *United States v. Crowder*, 62 F.3d 782, 787 (6th Cir. 1995)).

[24] Three of the 13 inspectors were TDA staff who presumably would not have attended the inspection if Mr. Mayes had not claimed at one time that he had changed the use of Tank #3 to agricultural pesticide storage. *See* EPA Ex. 26 (inspection report).

ing officer had the opportunity to observe witnesses testify and to evaluate their credibility. *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390, 402 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002). We find no reason not to defer to her findings here.

ii. *Scope of Consent*

"A consensual search is normally limited by the scope of the consent that supports it." *United States v. Elkins*, 300 F.3d 638, 648 (6th Cir. 2002) (citing *Walter v. United States*, 447 U.S. 649, 656-57 (1980)). As we mentioned above, the standard for measuring the scope of voluntary consent under the Fourth Amendment is that of "objective reasonableness," i.e., what the "typical reasonable person" would have understood from the communications between the government officials and the alleged offender. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *Walter*, 447 U.S. at 656; *Elkins*, 300 F.3d at 648; *United States v. Maldonado*, 38 F.3d 936, 940-42 (7th Cir. 1994); *United States v. Saadeh*, 61 F.3d 510, 518 (7th Cir. 1995); *Riverdale Mills v. United States*, 337 F. Supp. 2d 247, 254-55 (D. Mass. 2004).

In the instant case, we find that the "typical reasonable person" would have understood, simply from reading the two pre-search letters from EPA, that the inspectors intended to collect samples from all three underground tanks at Powell Airport, and not just from Tank #3. *See* Mayes Exs. 1-2. Furthermore, while EPA's initial Notice of Inspection letter and follow-up telephone call record letter did not explicitly specify that inspectors would investigate Mr. Mayes' barn, sheds, hangars, and farm equipment for evidence of farming activity, a reasonable person claiming that two of his tanks are "farm tanks" excluded from UST regulation surely would be aware that inspectors would be obliged to collect evidence to substantiate or refute such a claim to a regulatory exemption. This would necessitate determining whether the property appeared to be a working farm devoted to the production of crops or animals, whether the regulated substances stored in the purportedly exempt "farm tanks" were used in farming activities or for other purposes, and so on. Accordingly, in applying the standard of objective reasonableness to measure the scope of Mr. Mayes' consent to the inspection, we find no error in the ALJ's holding that "[i]nasmuch as [Mr. Mayes] had claimed Tanks #1 and #2 to be exempt from UST regulation as farm tanks, the inspectors were fully justified in examining the facility to determine whether this claimed exception was appropriate and met the regulatory requirements for such an exemption." Init. Dec. at 17.

iii. *Conclusion*

In sum, the totality of the circumstances demonstrate that Mr. Mayes voluntarily consented to the November 28, 2000 search, and a typical reasonable person would have understood that the scope of that consent extended to all three UST

systems and other areas of the property that could substantiate or refute the claim that Tanks #1 and #2 were unregulated "farm tanks" rather than regulated USTs. We therefore find that the November 28, 2000 searches and seizures did not violate the Fourth Amendment. Accordingly, we need not reach Mr. Mayes' contention that the evidence collected that day should be suppressed.

C. *Liability*

We turn our attention next to Mr. Mayes' contentions that the ALJ erroneously held him liable for RCRA UST program violations. We first address the arguments pertaining to Tanks #1 and #2 and then focus on the arguments regarding Tank #3.

1. *Tanks #1 and #2*

The ALJ held that Mr. Mayes violated three components of the RCRA UST program with respect to Tanks #1 and #2 by: (1) failing to notify the regulatory authorities of the existence of the two tanks, in violation of 40 C.F.R. § 280.22; (2) failing to provide release detection mechanisms for the tanks, in violation of 40 C.F.R. § 280.40; and (3) failing to upgrade or permanently close the tanks, in violation of 40 C.F.R. § 280.21. Init. Dec. at 28-29, 31, 35-36. On appeal, Mr. Mayes urges the Board to reverse these findings. Mr. Mayes does not deny that he failed to perform these actions with respect to Tanks #1 and #2, but he believes the tanks qualified as "farm tanks" and as such were exempt from RCRA UST regulation. Appeal Br. at 32-40, 42. Alternatively, Mr. Mayes argues that even if the tanks were not "farm tanks," he is not liable for failing to install and perform release detection on the two tanks (i.e., item (2) above) because the tanks were "empty" and thus release detection was not required. *Id*. at 40. We examine each of these defenses below.

a. *Farm Tanks*

RCRA and the implementing regulations define the term "underground storage tank" as "any one or combination of tanks" that is "used to contain an accumulation of regulated substances, and the volume of which * * * is 10 per centum or more beneath the surface of the ground." RCRA § 9001(1), 42 U.S.C. § 6991(1); *accord* 40 C.F.R. § 280.12. "Such term does not include any * * * farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes * * * ." RCRA § 9001(1)(A), 42 U.S.C. § 6991(1)(A); *accord* 40 C.F.R. § 280.12. A "farm tank," in its turn, is defined as "a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. 'Farm' includes fish hatcheries, rangeland and nurseries with growing operations." 40 C.F.R. § 280.12.

In arguments before the ALJ, Mr. Mayes took the position that his eighty-seven acre parcel is a tract of land devoted to the production of crops of hay, which are harvested two times per year for an annual income of around $1,000. *See* Init. Dec. at 24-25. Mr. Mayes also pointed out that USDA considers his property to be a "farm" and has for many years allocated it an annual tobacco allotment, which he has sold every year to other farmers for a few hundred dollars. In addition, Mr. Mayes believed the property's zoning as primarily agricultural constituted significant evidence of the farming character of the site. For these reasons, Mr. Mayes claimed that his Tanks #1 and #2 qualified as "farm tanks" pursuant to the definitions quoted above and thus were exempt from UST regulation. *Id*.

Region IV, for its part, took the opposite position. The Region argued that Mr. Mayes' property had been developed as "Powell Airport" more than fifty years ago and used as such ever since. Region IV maintained that Mr. Mayes charged landing fees, sold aviation fuel, rented airplanes and hangar space, and offered flight training classes and charter flights at the Airport. The mowing of hay, the Region contended, was primarily to keep the property looking well-groomed. In short, Region IV argued that Mr. Mayes' property was not "devoted to farming" as required by the UST regulations for the farm tank exemption. *Id*. at 25.

The ALJ examined all the facts in the record and identified the question whether Mr. Mayes "devoted" his fields to the production of hay, within the meaning of the UST regulations, as being pivotal to the resolution of the farm tank issue. Init. Dec. at 24-28. The ALJ found no specific definition of "devoted" in RCRA or the regulations, so she consulted a general-purpose dictionary to determine the "plain conventional meaning" of the word. *Id*. at 25. That dictionary defined "devoted" as "'to give or apply (one's time, attention, or self) entirely to a particular activity, pursuit, cause, or person.'" *Id*. at 26 (quoting *American Heritage Dictionary of the English Language* (4th ed. 2000)). On the basis of that definition and the evidence in the record, the ALJ held that Respondent's property was *not* devoted to the production of crops. *Id*. at 26-28. Instead, the ALJ found that Powell Airport had been "active and successful" since 1951 and that "[t]he number of airplanes present at the airport, either owned by him [i.e., ten to twelve at one time, Tr. at 830] or planes owned by others, speaks to the fact that the primary purpose of [Mr. Mayes'] land was an airport." *Id*. at 26-27. According to the ALJ, Mr. Mayes' charter and flight instruction businesses, combined with other income streams provided by hangar rentals, fuel sales, aerial photography, and the like, allowed him to make his living from his airport business. *Id.; see* Tr. at 976. By contrast, the ALJ found that Mr. Mayes admitted the primary purpose of hay cutting was to keep the airport looking tidy, as the income brought in by haying was small. Init. Dec. at 27 (citing Tr. at 849). The ALJ did not discuss the question whether the tanks were located on "farm property," which is another component of the regulatory definition of "farm tank," other than to observe that

the tanks were situated beneath the paved tarmac where the aviation fuel dispensers were located and thus were very convenient for airport use. *Id*. The ALJ concluded that Tanks #1 and #2 were not "farm tanks" but rather "fit squarely within the definition of [USTs]." *Id*. at 28.

On appeal, Mr. Mayes argues that the ALJ construed the term "devoted to" far too narrowly. He contends that the ALJ's interpretation would "preclude property from being a farm merely because it also contained the farmer's residence," because then "the farm would not be solely devoted to the production of crops and raising of animals but would also be used to provide shelter and a home to the farmer and his family." Appeal Br. at 39. This is an odd argument to receive from a litigant who quoted the full definition of "farm tank" to us in his appeal brief, *see id*. at 33; that definition plainly states that farm tanks are located on land devoted to crop production or animal raising "*and associated residences and improvements*." 40 C.F.R. § 280.12(emphasis added). It appears that in drafting the regulations, EPA anticipated the kind of argument raised by Mr. Mayes and preemptively accommodated it in the "farm tank" definition, so that homes and outbuildings associated with farming, on land devoted to farming activities, would not disqualify tanks buried under that land from being categorized as farm tanks.

Mr. Mayes also argues that under the definition of "devoted" employed by the ALJ and under an alternate definition, i.e., "[t]o set apart for a specific purpose or use," his property is, in fact, "devoted to" the production of hay. *Id*. at 38-39. Mr. Mayes claims that he performs the necessary tasks throughout the year to ensure a high yield of hay and "devotes himself to getting the hay cut twice a year." *Id*. at 39. Region IV counters by asserting:

> [Mr. Mayes'] property is not devoted to farming in that it is not given over entirely to farming. Nor is [Mr. Mayes'] property given over primarily to farming. It is not even given over secondarily to farming. Instead the harvesting of hay at [Mr. Mayes'] airport is merely a footnote to his operation of Powell Airport which has a long history as a busy commercial enterprise. [Mr. Mayes] allowed others onto his property to mow the hay, bale it, and take it away in exchange for a small payment. * * * [Mr. Mayes] benefitted from this arrangement because it enabled him to keep Powell Airport groomed and well maintained at no cost to him. * * *

Reply Br. at 32 (citations omitted). We are persuaded on the facts in the record that Region IV is correct in its characterization of Mr. Mayes' activities on his land.

As the ALJ rightly held, we look to the ordinary, contemporary, common meaning of a word used in a statute or regulation but not specifically defined therein. *E.g., In re Veldhuis*, 11 E.A.D. 194, 217 (EAB 2003), *appeal dismissed upon stipulation of parties*, No. 0374235 (9th Cir. Mar. 8, 2004); *In re Antkiewicz*, 8 E.A.D. 218, 236 n.14, 242 (EAB 1999); *In re Odessa Union Warehouse Co-op, Inc.*, 4 E.A.D. 550, 556 (EAB 1993). That the ALJ employed one dictionary definition and Mr. Mayes prefers another is unimportant, *see* Appeal Br. at 39; we can add a third,[25] and Congress and EPA may well have been using others.[26] The critical thing is to discern the ordinary sense of the term "devoted to," as used in the definition of "farm tank." In our view, the dictionary definitions all indicate that "devoted" means complete or at least substantial dedication of something to a certain purpose. We cannot say that, on the facts in the record, Mr. Mayes' haying activities meet this standard. As the Region contends, Mr. Mayes' eighty-seven acres are not used wholly or even primarily for haying; rather, the property has been used primarily as an airport for many years, with the hay production being at best incidental.

Notably, the fields that are hayed surround the Powell Airport runway, *see* EPA Ex. 32 attach. 1 (photographs of property); Mayes Exs. 3-9 (same), and therefore any trees or tall shrubs that happen to germinate among the timothy or alfalfa or clover or other plants that comprise the future hay in those fields obviously would have to be mowed down on a periodic basis to keep the runway sightlines clear and open. *See* Tr. at 996. In this regard, Mr. Mayes testified, under questioning from the ALJ, that he was required (presumably as a condition of his Federal Aviation Administration airport license) to keep the fields surrounding the runway cut to a certain level for safety reasons. Tr. at 977; *see also* Tr. at 978-79, 1003. This purpose is simultaneously accomplished with biannual hay mowing and as such adheres to the benefit of the airport operations, further undercutting Mr. Mayes' argument that his land was "devoted to" the production of hay.

Furthermore, EPA has provided guidance, relevant for our purposes, on the question of what constitutes a "farm." In comments on the draft UST regulations, one party had argued that tanks at golf courses serve essentially the same purpose as tanks at sod farms in that both types of tanks hold fuel used to develop and

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[25] A *Webster's* dictionary defines "devote" as, among other things but of most relevance here, "to attach the attention or center the activities of (oneself) wholly or chiefly on a specified object, field, or objective." Webster's Third New International Dictionary of the English Language 620 (1993).

[26] Mr. Mayes contends that there is no indication the federal government relied on the American Heritage Dictionary, Fourth Edition, definition of "devoted" when drafting the UST regulations. Appeal Br. at 39. The ALJ, of course, made no representation that the government did so. The precise dictionary used by various parties is irrelevant; what is important in construing statutes or regulations is discerning the commonly understood meaning of the word or phrase in question. In this instance, the ALJ did not err by relying on the American Heritage Dictionary definition of "devoted" in interpreting the meaning of the regulation.

maintain healthy sod and turf grass fields. Underground Storage Tanks; Technical Requirements, 53 Fed. Reg. 37,082, 37,117 (Sept. 23, 1988). Accordingly, the commenter urged the Agency to include golf course tanks within the "farm tank" exemption. *Id*. EPA responded as follows:

> The Agency does not agree that the similarities between sod farms and golf courses merit inclusion of tanks at golf courses within the farm tank exclusion. The Agency does not believe the term "farm" under section 9001 of RCRA, reasonably interpreted, includes golf courses or other places dedicated primarily to recreational, aesthetic, or other non-agricultural activities.

Id. In our view, the evidence establishes that Mr. Mayes' eighty-seven acre property is dedicated primarily to the recreational and non-agricultural activity of an airport, not to farming hay.[27] Consequently, the tanks cannot reasonably be categorized as "farm tanks."

One final point warrants mention before we move on to Mr. Mayes' contention that his tanks were "empty." Region IV argues, in a vein parallel to the point just mentioned, that "[i]mplicit in the regulatory 'farm tank' exemption is a nexus between an exempt tank and farming activity. If such a nexus were not required it would render the statutory exemption meaningless and would lead to absurd results." Reply Br. at 34. Although on this record we need not reach the "implicit nexus" issue to determine the status of Tanks #1 and #2, we nonetheless address it briefly here and find that its resolution on these facts bolsters our finding that Tanks #1 and #2 are USTs and not farm tanks.

At the outset, we accept that the nexus suggested by Region IV is sensible and consistent with congressional intent, as we fail to discern from the words of the statute and the legislative history any desire on the part of Congress to allow working farms to escape UST regulation for tanks used to fuel nonfarming-related noncommercial activities. After reviewing the record in this case, we find no evidence, other than Mr. Mayes' own testimony, *see* Tr. at 823-25, 872-77, 891, 900-01, that aviation fuel stored in Tanks #1 and #2 was ever used to conduct farm-related, noncommercial activities on Mr. Mayes' property. Instead, the evidence indicates that: (1) Mr. Mayes used Tank #1 as a waste or slop tank by pumping condensed water off the aviation fuel stored in Tanks #2 and #3 and into Tank #1, leaving that tank filled with an unuseable mixture of water and fuel, *see*,

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[27] Mr. Mayes' property is also not devoted to the growing of tobacco, as the tobacco allotment initially allocated to the property prior to its conversion to an airport is sold annually for a nominal sum of money, and no tobacco is actually grown on the property. Tr. at 850-54, 1030-34; EPA Ex. 32 attach. 3.

e.g., Tr. at 107-08, 263-66, 501, 916-18; EPA Exs. 15, 26; (2) Mr. Mayes used Tank #2 to fuel aircraft, *see, e.g.*, Tr. at 108, 265-66, 495, 556; (3) three tractors found on Mr. Mayes' property on November 28, 2000, contained either diesel fuel or automobile gasoline rather than aviation fuel, Tr. at 106, 114, 264-65, 274, 283-84, 492-93, 509; EPA Ex. 26; (4) Mr. Mayes engaged other parties, using their own fuel and equipment, to cut, rake, bale, and remove the hay from his fields, Tr. at 807-08, 819, 823-28, 842-50, 898-99; EPA Ex. 32 attachs. 1-2; and (5) three of Mr. Mayes' witnesses testified that they had never observed Mr. Mayes putting aviation fuel into his tractors, and no witness was offered to testify that such had ever been observed. Tr. at 991, 1000, 1009-10. In short, a preponderance of the evidence in the record establishes that Mr. Mayes used Tanks #1 and #2 for purposes unrelated to farming, whether commercial or non-commercial in nature. We therefore have no cause to alter our holding that Tanks #1 and #2 are not "farm tanks" but rather are regulated USTs.

In summary, we decline to overturn the ALJ's finding of liability for Mr. Mayes' failures to notify, perform release detection, and upgrade or close Tanks #1 and #2 on the ground that the tanks were "farm tanks."

b. *Empty*

Mr. Mayes also argues that Tanks #1 and #2 were "empty" and thus he cannot be held liable for the alleged release detection deficiencies, as release detection is not required, he claims, for empty tanks. Appeal Br. at 40. To make this argument, Mr. Mayes cites as his authority the UST regulations governing "temporary closure" of UST systems, which provide that such a system is considered to be "empty" when "all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system." 40 C.F.R. § 280.70(a).

There are a number of problems with this argument. First, Mr. Mayes appears to have raised this defense somewhat indirectly before the ALJ (if at all), and as a result the ALJ made no express ruling on it in her Initial Decision. *See* Init. Dec. at 18-19, 29-31; *see also* Tr. at 229-232 (testimony elicited by Mr. Mayes' attorney that EPA did not know whether Tanks #1, #2, and #3 were "empty" using the 0.3-percent-by-weight portion of the "empty" definition). As a party's rights of appeal are "limited to those issues raised during the course of the proceeding and by the initial decision," 40 C.F.R. § 22.30(c), and as it appears Mr. Mayes may have raised this defense to some extent during the course of the proceedings, we will entertain it.

Second, Mr. Mayes makes no attempt to show that Tanks #1 and #2 were ever temporarily closed, so that the "empty" provision he cites is relevant and applicable here. *See* Appeal Br. at 40. Instead, he asserts only that "the UST sys-

tem need not be in temporary closure for the 'empty' exemption to apply." *Id*. We address, and reject, this argument in Part II.C.2.a below with respect to Tank #3, and will not address it further in this context.

Third and finally, we note that under the Consolidated Rules of Practice that govern this proceeding, Mr. Mayes is assigned the burden of presenting evidence pertaining to any defenses he wishes to raise to the allegations of liability against him. 40 C.F.R. § 22.24(a). He is also assigned the burden of persuasion with respect to any affirmative defenses he chooses to raise, such as this one.[28] *Id*. We find that there is no evidence whatsoever in the record that Tanks #1 and #2 were ever "empty," under either the depth or weight components of the definition of the term relied upon by Mr. Mayes to raise this defense. *See* 40 C.F.R. § 280.70(a). Instead, the only evidence pertaining to tank contents shows both Tanks #1 and #2 contained more than one inch of residue in March and November of 2000, *see* Tr. at 58, 242, 486; EPA Exs. 4, 15, 26, and there is no evidence whatsoever regarding the weight of the material in the tanks at any time. Mr. Mayes' "empty" defense with respect to Tanks #1 and #2 therefore fails.

2. *Tank #3*

Next, the ALJ held that Mr. Mayes violated two components of the RCRA UST program with respect to Tank #3 by: (1) failing to provide release detection mechanisms for the tank, in violation of 40 C.F.R. § 280.40; and (2) failing to upgrade or close the tank, in violation of 40 C.F.R. § 280.21. Init. Dec. at 31-34, 36-39. On appeal, Mr. Mayes urges the Board to overrule the ALJ's findings. Mr. Mayes does not deny that he failed to perform these actions, but he argues that he is not liable for failing to install and perform release detection because Tank #3 was "empty" and thus release detection was not required. Appeal Br. at 40-42. Mr. Mayes also argues that Tank #3 was never temporarily closed, but

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[28] As we have explained in *In re New Waterbury, Ltd.* and subsequent cases, "'A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case.'" 5 E.A.D. 529, 540 (EAB 1994) (quoting 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994)); *accord In re Veldhuis*, 11 E.A.D. 194, 211-12 n.15 (EAB 2003), *appeal dismissed upon stipulation of parties*, No. 03-74235 (9th Cir. Mar. 8, 2004); *In re Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002); *In re Titan Wheel Corp.*, 10 E.A.D. 526, 530 n.10 (EAB 2002), *aff'd*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd*, No. 04-1221 (8th Cir. Nov. 23, 2004); *In re City of Salisbury*, 10 E.A.D. 263, 289 nn.38-39 (EAB 2002). In this case, Mr. Mayes' attempt to invoke an exemption to regulatory coverage is a matter outside Region IV's prima facie case and qualifies as an affirmative defense. *See United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) ("where one claims the benefits of an exception to the prohibition of a statute," one generally carries the burden of proving that it falls within the exception); *In re Capozzi*, 11 E.A.D. 10, 19-20 n.16 (EAB 2003); *In re Rybond, Inc.*, 6 E.A.D. 614, 637 & n.33 (EAB 1996); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 (CJO 1990) ("Generally, a statutory exception (or exemption) must be raised as an affirmative defense, with the burden of persuasion and the initial burden of production upon the party that seeks to invoke the exception.").

rather he had sought a change-in-service to an alternate, non-aviation fuel use for the tank, and in any event Tank #3 was empty. *Id*. at 42-45. We examine the "empty" and "closure/change-in-service" defenses in turn below.

a. *Empty*

In a provision of the UST regulations entitled "Out-of-Service UST Systems and Closure," EPA addressed the concept of "temporary closure" of UST systems, as follows:

> When an UST system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection * * * and any release detection * * * . [Release reporting and corrective action] must be complied with if a release is suspected or confirmed. However, release detection is not required as long as the UST system is empty. The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system.

40 C.F.R. § 280.70(a). Mr. Mayes argued before the ALJ that Tank #3 was empty and thus, pursuant to the foregoing regulation, he could not be held liable for failing to perform release detection on that tank. Init. Dec. at 31.

The ALJ rejected Mr. Mayes' arguments on several grounds. First, the ALJ noted that in response to Region IV's allegations in a different context (i.e., pertaining to failure to close Tank #3 and assess for releases), Mr. Mayes had "vehemently argue[d]" that Tank #3 was *not* temporarily closed. *Id.* at 33. Yet, in the context of these release detection allegations, Mr. Mayes advocated the application of an "empty" exclusion that appears, remarkably enough, *within* the temporary closure rules. *Id*. The ALJ found Mr. Mayes' position in this regard to be untenable, holding, "Single sentences contained within the regulation section cannot be read in a vacuum. This section must be read as a whole and the provisions for an empty tank are contextual to temporary closures." *Id*.

Second, the ALJ held that Tank #3 was not "empty," even as defined in the inapplicable temporary closure rules, on at least two of the days within the period of violation. *Id*. The ALJ observed that on March 17, 2000, TDEC inspectors determined that Tank #3 contained 2 inches of petroleum fuel product and 6 inches of water, while on November 28, 2000, the tank contained $^{5}/_{8}$ inches of fuel and $7^{3}/_{8}$ inches of water. *Id.; see* EPA Exs. 4, 15, 26. Mr. Mayes attempted to convince the ALJ that Region IV had failed to establish that Tank #3 was not empty under the weight component of the "empty" definition, i.e., that no more

than 0.3 percent by weight of the total capacity of the UST system remained in the system, but the ALJ was unpersuaded. She noted that EPA had added the 0.3-percent-by-weight provision to the regulation to accommodate large containers that are routinely transported and weighed (such as cargo tanks), *see* Init. Dec. at 34 (citing 47 Fed. Reg. 36,092, 36,093 (Aug. 18, 1982)),[29] and found that because Tank #3 was buried underground, it would be "virtually impossible" to weigh the tank and thereby determine its "empty" status pursuant to that method. *Id.*

On appeal, Mr. Mayes contends that Region IV cannot "unilaterally decide" that the depth rule, rather than the weight rule, applies to determine whether an underground tank is "empty" under 40 C.F.R. § 280.70(a). Appeal Br. at 42. Mr. Mayes asserts, "The evidence at trial showed that [Region IV] could not testify that [Tank #3] was not empty based on the definitions under 40 CFR section 280.70 * * * ; therefore, the exemption to the release detection requirement applies and [Mr. Mayes] is not in violation of this regulation." *Id.*

Mr. Mayes' arguments must fail. At the outset, we find it significant that, rather than challenging as erroneous the ALJ's ruling that the "empty" exemption must be read in the context in which it appears (i.e., temporary closure), Mr. Mayes baldly asserts, without support of any kind, that "the UST system need not be in temporary closure for the 'empty' exemption to apply." *Id.* at 41. Mr. Mayes cites no supporting authority for this argument because there is none to be found. Instead, it is very well settled that statutes and regulations must be read as a whole and single components may not be plucked out and applied wherever convenient. *See, e.g., King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (a "cardinal rule" of statutory construction is that "a statute is to be read as a whole"); *In re Brown Wood Preserving Co.*, 2 E.A.D. 783, 791 (CJO 1989) (holding that RCRA § 3008 regulations cannot be interpreted in isolation or parsed into unrelated regulatory components); *In re Hawaiian W. Steel, Ltd.*, 2 E.A.D. 675, 679 n.7 (Adm'r 1988) (reading RCRA § 3008 regulations as a whole). We therefore affirm the ALJ's ruling that the empty tank provision is "contextual to temporary closures," Init. Dec. at 72, and thus the "empty" exemp-

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[29] More specifically, in issuing the final UST regulations, EPA stated:

> The term "empty" is defined by incorporating the definition of "empty container" set forth in EPA regulations under Subtitle C of RCRA [i.e., 47 Fed. Reg. 36,092, as cited by the ALJ]. This definition requires all materials to be removed that can be removed using commonly employed practices. No more than 2.5 centimeters (one inch) of residue or 0.3 percent by weight of the total capacity of the tank can remain in the system. EPA believes that this definition is adequate to ensure that the regulated substances remaining in the tank will not pose an unreasonable risk to human health and the environment if a release occurs during the temporary closure period.

Underground Storage Tanks; Technical Requirements, 53 Fed. Reg. 37,082, 37,182 (Sept. 23, 1988).

tion is not available for use with respect to Tank #3, which Mr. Mayes contends was never temporarily closed.

Moreover, as set forth in detail in the Initial Decision, Region IV came forward with a prima facie case that Mr. Mayes had violated RCRA UST program requirements by failing to provide release detection mechanisms for Tank #3. *See* Init. Dec. at 31-34. At that point, the burden to present any defenses to liability shifted to Mr. Mayes, and the burden of persuasion with respect to any affirmative defenses also shifted to Mr. Mayes. 40 C.F.R. § 22.24(a); *accord In re Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002); *In re City of Salisbury*, 10 E.A.D. 263, 278-93 (EAB 2002); *In re BWX Techs., Inc.*, 9 E.A.D. 61, 73 & n.16 (EAB 2000). An argument that release detection is not required because a tank is empty is avoiding in nature and as such is an affirmative defense. *See supra* note 28 (discussing affirmative defenses and burdens of proof). Accordingly, in the event the "empty" exemption were applicable here (which we hold it is not), Mr. Mayes would have to carry the burdens of presentation and persuasion with respect to his argument that Tank #3 was empty to prevail on this defense.

This being the case, we find no evidence in the record showing Tank #3 to be "empty" in accordance with the 0.3-percent-by-weight provision championed by Mr. Mayes. That Region IV presented no evidence to demonstrate that Tank #3 was empty or not empty under the weight standard is irrelevant, despite Mr. Mayes' contentions to the contrary, *see* Appeal Br. at 27, 40-42; the Region satisfied its prima facie burden of showing the tank qualified as an UST and lacked release detection equipment. The burden of presenting a defense to liability shifted to Mr. Mayes, and it is no answer to contend that one's opponent should have carried that burden for one. We therefore affirm the ALJ's ruling that Mr. Mayes is liable for failing to perform release detection on Tank #3.[30]

b. *Closure*

Finally, Region IV alleged in the Complaint that Mr. Mayes failed to permanently close and assess the site for releases after twelve months of temporary closure of Tank #3, in violation of RCRA § 9003, 42 U.S.C. § 6991b, and 40

[30] The ALJ also observed that Mr. Mayes could not in any event use his "empty" defense to forestall liability for the years prior to the date he purportedly emptied the tank, during which time release detection methods should have been in place and functioning. Init. Dec. at 33. The ALJ is right to point out this important fact. As EPA noted in issuing the UST regulations, UST owners and operators are allowed to *discontinue* release detection if the tank is temporarily closed and is empty. 53 Fed. Reg. at 37,182. They are not excused from *ever even having* release detection mechanisms at all, which appears to be what Mr. Mayes is advocating. Such a reading of the regulations is nonsensical and the ALJ correctly rejected it.

C.F.R. § 280.70(c).[31] Admin. Compl. ¶ 42. After considering all the evidence, the ALJ held that the Region had failed to establish twelve months of temporary closure of Tank #3 and as a result had failed to make a prima facie case of violation of the cited requirements. Init. Dec. at 39. However, the ALJ noted that Mr. Mayes' "untruthful statements and misrepresentations of fact," in which he gave conflicting information to different regulators at different times about whether or not Tank #3 was in service, out of service, temporarily closed, filled with water, filled with Roundup®, had undergone a change in service, and so on, had misled Region IV in the drafting of the Complaint. *Id.; see, e.g., id.* at 19-23, 36-37; Appeal Br. at 42-45; Reply Br. at 41-45. The ALJ observed that independent of the 40 C.F.R. § 280.70(c) closure-and-assessment requirements cited by the Region, another provision of the UST regulations-40 C.F.R. § 280.21-specified that existing UST systems had to be upgraded or closed by December 22, 1998. The ALJ held Mr. Mayes to be in violation of this provision, as he had never upgraded Tank #3 and had not closed it until July 9, 2001, when he had the tank removed from the ground. Init. Dec. at 39. In so holding, the ALJ reasoned:

> [Mr. Mayes] is not prejudiced by this finding. Clearly, [Mr. Mayes] is aware of the regulatory requirements for the upgrading or closure of UST systems under 40 C.F.R. § 280.21 * * * [, as alleged for Tanks #1 and #2].[32] Secondly, the misstated charge * * * [regarding Tank #3] directly resulted from [Mr. Mayes'] intentional misstate-

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[31] The UST regulations provide:

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

40 C.F.R. § 280.70(c).

[32] Region IV charged 40 C.F.R. § 280.21 violations for Tanks #1 and #2 in the text of the Complaint, *see* Admin. Compl. ¶ 42 ("Respondent failed to upgrade or permanently close UST systems identified as tanks AV #1 and AV #2 prior to the December 22, 1998 deadline"), but did not specifically cite that regulation as authority for the enforcement action. *See id.* (citing RCRA § 9003, 42 U.S.C. § 6991b, and 40 C.F.R. § 280.70(c)). For the same reasons as set forth below with respect to Tank #3, we find that the ALJ did not err in implicitly amending the Complaint to correct this pleading deficiency and properly found violations of 40 C.F.R. § 280.21 with respect to Tanks #1 and #2. Mr. Mayes does not challenge this issue on appeal.

> ments of fact. Finally, leave to amend the pleadings is freely given when justice so requires.

Init. Dec. at 39 n.34 (citations omitted).

On appeal, Mr. Mayes raises no objection of any kind to the ALJ's decision to find him liable for a Tank #3 violation not charged in the Complaint-i.e., failure to upgrade or permanently close the tank, pursuant to 40 C.F.R. § 280.21. Instead, Mr. Mayes begins his appeal by disclaiming liability for a 40 C.F.R. § 280.70(c) violation (which the ALJ found *not* proven) and then expends the remainder of his argument claiming that the evidence in the record fails to establish Tank #3 as temporarily closed (with which the ALJ *agreed*; hence the foregoing finding of unproved liability). Appeal Br. at 42-45. This astonishing state of affairs-which consists of no appeal whatsoever of anything that actually happened below-colors our analysis of this issue.[33]

As a general matter, our procedural rules "depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding." *In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1997). The presiding officer is authorized to "[r]ule upon motions, * * * [a]dmit or exclude evidence, * * * [h]ear and decide questions of facts, law, or discretion, * * * and * * * [d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice." 40 C.F.R. § 22.4(c). This authority includes the power to grant motions to amend pleadings to conform to the evidence presented at the administrative hearing. *E.g., In re Carroll Oil Co.*, 10 E.A.D. 635, 646-52 (EAB 2002); *In re Richner*, 10 E.A.D. 617, 628 (EAB 2002); *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449-51 (EAB 1999). In *H.E.L.P.E.R.*, we noted that under Rule 15(b) of the Federal Rules of Civil Procedure,[34] district courts have discretion to treat pleadings as conforming to the evidence presented at trial. 8 E.A.D. at 449 (citing cases). The critical question is whether such amendment would unduly prejudice the opposing party. *Carroll Oil*, 10 E.A.D. at650 (discussing *Foman v. Davis*, 371 U.S. 178 (1962)); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.13 (EAB 1993); *In re Port of Oakland*, 4 E.A.D. 170, 205-07 (EAB 1992); *In re Yaffee Iron & Metal Co.*, 1 E.A.D. 719, 722 (JO 1982), *aff'd in part, vacated in part, & remanded on other grounds*, 774 F.2d 1008 (10th Cir. 1985).

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[33] If Mr. Mayes had appealed the ALJ's decision to take the action she did, we might, in theory at least, have arrived at a different outcome.

[34] As we noted in that case and above, *see supra* note 4, we are not bound by the Federal Rules of Civil Procedure in this administrative proceeding, but we nonetheless have found those rules to be instructive in some circumstances. *H.E.L.P.E.R.*, 8 E.A.D. at 449-50 n.20; *see, e.g., In re Rogers Corp.*, 9 E.A.D. 534, 545-55 (EAB 2000) (citing cases), *remanded on other grounds*, 275 F.3d 1096 (D.C. Cir. 2002); *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 502 (EAB 1999).

In the instant case, we note that the evidence necessary to establish a 40 C.F.R. § 280.70(c) violation differs from that required to prove a 40 C.F.R. § 280.21 violation primarily on the basis of the twelve months of temporary closure requirement of the former provision. Both regulations mandate closure or upgrading of existing UST systems, and liability may be proven by showing failures to perform these actions. At the hearing and in briefs submitted to the ALJ, the parties had full opportunity to litigate these various issues. *See, e.g.*, Init. Dec. at 19-23, 31-34, 36-39. Importantly, Mr. Mayes did not dispute that he had not upgraded or closed Tank #3 prior to the December 22, 1998 deadline specified in 40 C.F.R. § 280.21 for existing USTs, and he does not now dispute these points on appeal. Moreover, the administrative record is replete with the diverse array of conflicting statements from Mr. Mayes regarding the status of Tank #3,[35] which support the ALJ's determination that Region IV was misled by these statements in drafting the Complaint. In these circumstances, we affirm the ALJ's finding that Mr. Mayes did not suffer prejudice as a result of her exercise of discretion in amending the Complaint to conform it to the evidence. We accordingly affirm the ALJ's decision to hold Mr. Mayes liable for a violation of 40 C.F.R. § 280.21 with respect to Tank #3.

D. *Penalty*

Lastly, Mr. Mayes submits a number of largely conclusory arguments pertaining to the penalty calculation in this case. In so doing, Mr. Mayes raises no challenges of any kind to the ALJ's analysis of the penalty. Rather, he argues simply that Region IV calculated the proposed penalty arbitrarily and unfairly by refusing to grant penalty deductions on the basis of his cooperation, lack of willful violations, absence of prior noncompliance, and other unique factors. Appeal Br. at 45-46. He also argues that EPA's RCRA section 9006 penalty guidelines are "random and subjective" and thus no penalty should be assessed against him. *Id*. at 46.

Under the Consolidated Rules of Practice that govern this proceeding, a presiding officer is responsible for assessing a penalty based on the evidence in the record and the penalty criteria set forth in the relevant statute, and also considering any civil penalty guidelines issued by EPA under the statute. 40 C.F.R. § 22.27(b). The presiding officer must "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria" set forth in the statute. *Id*. In cases where a presiding officer has provided a reasonable explana-

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[35] The ALJ found that Mr. Mayes lacked credibility as a witness in this regard. The Board ordinarily defers to a presiding officer'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." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 552, 530 (EAB 1998); *accord In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390, 402 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002).

tion for the penalty assessment and the assessed amount falls within the range of penalties provided in the penalty guidelines, the Board generally will not substitute its judgment for that of the presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty. *In re Capozzi*, 11 E.A.D. 10, 32 (EAB 2003); *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 725 (EAB 2002); *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 702 (EAB 1995).

In this case, the ALJ prepared a reasonable explanation of her penalty assessment, *see* Init. Dec. at 47-50, and the assessed penalty falls within the range of penalties provided in the RCRA section 9006 penalty guidelines. *See id* at 40-50; EPA Ex. 29 (Office of Underground Storage Tanks, U.S. EPA, OSWER Dir. 9610.12, *U.S. EPA Penalty Guidance for Violations of UST Regulations* (Nov. 1990)); EPA Exs. 30-31 (penalty calculation worksheets). There has been no showing by Mr. Mayes of clear error or abuse of discretion in the ALJ's analysis in this regard. We therefore defer to the ALJ's determination of the appropriate penalty in this case.

III. *CONCLUSION*

For the foregoing reasons, we affirm the ALJ's findings of liability and assessment of penalty in this case. Accordingly, Respondent shall pay the full amount of the civil penalty assessed by the ALJ, $66,301, within thirty (30) days of receipt of this final order. Payment should be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency, Region IV
Attn: Regional Hearing Clerk
Post Office Box 360863M
Pittsburgh, Pennsylvania 15251

So ordered.