

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

In the Matter of:)	Motion for Default Order
)	
Silky Associates, LLC)	Docket No: RCRA-03-2018-0131
200 E Williamsburg Road)	
Sandston, VA 23150)	Proceeding Under Section 9006 of the
)	Resource Conservation and Recovery
Respondent,)	Act, as amended, 42 U.S.C. Section
)	6991e
Lucky Mart)	
200 E Williamsburg Road)	
Sandston, VA 23150)	
)	
Facility.)	

I. MOTION FOR DEFAULT

On July 24, 2018, an Administrative Complaint and Notice of Opportunity for Hearing (“Complaint”) was issued by the United States Environmental Protection Agency (“EPA”) Region III Land and Chemicals Division Director (“Complainant¹”) pursuant to Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively “RCRA”), 42 U.S.C. § 6991e; Virginia UST management program regulations set forth in the Virginia Administrative Code as “Underground Storage Tanks: Technical Standards and Corrective Action Requirements” (“VA UST Regulations”), 9 VAC § 25-580-10 *et seq.*²; and

¹ Due to a regional realignment that occurred subsequent to the issuance of the Complaint, the authority formerly delegated to Land and Chemicals Division Director now rests with the Enforcement and Compliance Assurance Division (“ECAD”) Division Director and the Chief of ECAD’s Air, RCRA and Toxics Branch. *See* 1200 TN RIII 207 (April 15, 2019).

² Effective October 28, 1998, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the Commonwealth of Virginia was granted final authorization to administer a state UST management program *in lieu* of the Federal UST management program established under RCRA Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991m. The provisions of the Virginia UST management program, through this final authorization, have become requirements of RCRA Subtitle I and are, accordingly, enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. A copy of the VA UST Regulations is attached as Exhibit P.

the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. Part 22. The respondent in this Complaint is Silky Associates, LLC (“Respondent”). A copy of the Complaint is attached as Exhibit A.

The Consolidated Rules of Practice permit service of a complaint to be made by certified mail with return receipt requested, and require a copy of the complaint (together with a copy of the Consolidated Rules of Practice) to be served on respondent or a representative authorized to receive service on respondent’s behalf, which for domestic or foreign corporations, partnerships, or unincorporated association is an officer, partner, a managing or general agent, or any other person by appointment of by Federal or State law to receive service of process. 40 C.F.R. §§ 22.5(b)(1)(i) and (ii)(A). On July 24, 2018, a copy of the Complaint was sent by certified mail with return receipt requested to “Lakhmir Bagga” (i.e., Respondent’s owner and Registered Agent) on behalf of “Silky Associates, LLC” (i.e., Respondent) at “200 E. Williamsburg Road Sandston, VA 23150” (i.e., Respondent’s business address). *See* Exhibit B (Screenshot of Virginia State Corporation Commission website). According to the certified mail return receipt “green card” which was filed in connection with Complainant’s Proof of Service on August 2, 2018, and the USPS.com online tracking verification system, the Complaint was received on July 26, 2018. *See* Exhibit C. The Complaint specifically informed Respondent of the requirement, found in Section 22.15(a) of the Consolidated Rules, that an Answer to the Complaint be filed within 30 days after service of the Complaint, and of the provision, found in Section 22.15(d) of the Consolidated Rules, that failure to respond by specific Answer will constitute an admission of the allegations made in the Complaint. Exhibit A, pages 18-19. As of the date of this Motion, Respondent has not filed an Answer to the Complaint. *See Order to Amend EPA’s*

Administrative Enforcement Docket (February 7, 2019), *Order of Remand* (December 10, 2018), *Order for Respondent to File Answer* (October 29, 2018), and *Respondent's Answer to the Complaint* (August 27, 2018) - Exhibits D, E, F and G, respectively. Complainant therefore, based on the discussion below, moves for an Order holding Respondent in default and imposing a penalty of \$186,095³.

II. DISCUSSION

Pursuant to 40 C.F.R. § 22.17(a), a party may be found to be in default upon failing to file a timely answer to the complaint. Pursuant to 40 C.F.R. § 22.17(a), default by a respondent constitutes an admission of all facts alleged in the complaint. Pursuant to 40 C.F.R. § 22.17(b), a motion for default must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

A. Violations Deemed Admitted as a Result of Default

The law and facts with regard to Respondent's violations of RCRA are set forth in detail in the Complaint, and this recitation is incorporated herein by reference. As detailed in the Complaint, Respondent failed to comply with a number of regulatory requirements applicable to five (5) underground storage tanks (i.e., UST-001, UST-002, UST-003, UST-004 and UST-005) and UST Systems at Respondent's Lucky Mart facility located at 200 E Williamsburg Road in Sandston, Virginia ("Facility"). In light of Respondent's default, the factual allegations

³ The Complaint filed in this matter contained a compliance order issued under Section 9006(a) of RCRA, 42 U.S.C. § 6991e(a), as permitted by 40 C.F.R. § 22.37(b) of the Consolidated Rules of Practice. As it has been determined that Respondent failed to request a hearing, the compliance order *automatically* became a final order on or about August 27, 2018 (i.e., 30 days after the compliance order was served) without the need for additional action by the Presiding Officer. *See* 40 CFR §§ 22.7 and 22.37(b); Exhibit E, page 2; Exhibit F, page 2 (finding that Respondent did not request a hearing).

supporting these alleged violations are deemed to be admitted. These violations include the following:

COUNT 1 - FAILURE TO PERFORM TANK RELEASE DETECTION

Failure to monitor UST-001, UST-002, UST-003 and UST-004 at least every 30 days for releases by automatic tank gauging or by any of the other release detection monitoring methods specified in 9 VAC § 25-580-160(4)-(8) from August 2016 through March 2017 in violation of 9 VAC § 25-580-140(1). Exhibit A at ¶¶ 20, 22-23; *See also* Exhibit P.

Failure to monitor UST-005 at least every 30 days for releases by automatic tank gauging or by any of the other release detection monitoring methods specified in 9 VAC § 25-580-160(4)-(8) from July 2016 through December 2017 in violation of 9 VAC § 25-580-140(1). Exhibit A at ¶¶ 21-23; *See also* Exhibit P.

COUNT 2 - FAILURE TO PERFORM AUTOMATIC LINE LEAK DETECTOR TESTING

Failure to perform an annual test of the automatic line leak detector on the underground piping associated with UST-001 from at least August 1, 2013 through September 19, 2017 in violation of 9 VAC § 25-580-140(2)(a)(1) and 9 VAC § 25-580-170(1). Exhibit A at ¶¶ 30 and 32; *See also* Exhibit P.

Failure to perform annual tests of the automatic line leak detectors on the underground piping associated with UST-002/UST-003 (manifolded), UST-004, and UST-005 from at least August 1, 2013 through November 5, 2013 and from November 6, 2014 through September 19, 2017 in violation of 9 VAC § 25-580-140(2)(a)(1) and 9 VAC § 25-580-170(1). Exhibit A at ¶¶ 31-32; *See also* Exhibit P.

COUNT 3 - FAILURE TO PERFORM PIPING RELEASE DETECTION

Failure to perform annual line tightness testing in accordance with 9 VAC § 25-580-170(2) or have monthly monitoring conducted in accordance with 9 VAC § 25-580-170(3) on the underground piping associated with UST-001 from at least August 1, 2013 through September 19, 2017 in violation of 9 VAC § 25-580-140(2)(a)(2). Exhibit A at ¶¶ 39 and 41; *See also* Exhibit P.

Failure to perform annual line tightness testing in accordance with 9 VAC § 25-580-170(2) or have monthly monitoring conducted in accordance with 9 VAC § 25-580-170(3) on the underground piping associated with UST-002/UST-003 (manifolded), UST-004 and UST-005 from at least August 1, 2013 through November 5, 2013 and from November 6, 2014 through September 19, 2017 in violation of 9 VAC § 25-580-140(2)(a)(2). Exhibit A at ¶¶ 40-41; *See also* Exhibit P.

COUNT 4 - FAILURE TO HAVE OVERFILL PREVENTION EQUIPMENT

Failure to use overfill prevention equipment that automatically shuts off flow into the tank when the tank is more than 95 percent full, or alerts the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high level alarm for the UST-001, UST-002, UST-003, UST-004 and UST-005 UST systems from at least August 1, 2013 through at least April 9, 2018 in violation of 9 VAC § 25-580-60(4) and 9 VAC § 25-580-50(3)(a)(2). Exhibit A at ¶¶ 49-50; *See also* Exhibit P.

COUNT 5 - FAILURE TO TEST CATHODIC PROTECTION SYSTEM

Failure to conduct 3-year tests of the cathodic protection system for the UST systems at the Facility from April 17, 2015 through December 5, 2017 in violation of 9 VAC § 25-580-90(2)(a). Exhibit A at ¶¶ 56-57; *See also* Exhibit P.

B. Civil Penalty

Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), provides, in relevant part, that any owner or operator of an underground storage tank who fails to comply with any requirement or standard of a State program approved pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, shall be liable for a civil penalty not to exceed \$10,000 for each tank for each day of violation. This amount has been adjusted pursuant to the Federal Civil Penalties Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, and most recently, by the Federal Civil Inflation Adjustment Act Improvement Act of 2015 by implementing Civil Monetary Penalty Inflation Adjustment Rules codified at 40 C.F.R. Part 19 such that *at the time of the Complaint*⁴ violations of RCRA Section 9006(d)(2), 42 U.S.C. § 6991e(d)(2), that occurred on or before November 2, 2015 were subject to a civil penalty not to exceed \$16,000 per day per violation, and violations that occurred after November 2, 2015 were subject to a civil penalty not to exceed \$23,426 per day per violation. *See* 78 Fed. Reg. 66643, 66648 (November 6, 2013) and 83 Fed. Reg. 1190, 1193 (January 10, 2018).

For purposes of determining the amount of any penalty to be assessed, Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), requires EPA to take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements. In developing a proposed penalty for the violations alleged in this Complaint, EPA has taken into account the particular facts and circumstances of this case with specific reference to EPA's November 1990 *U.S. EPA Penalty Guidance for Violations of UST Regulations*⁵ ("1990 UST Penalty Policy"), January 11, 2018 *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January*

⁴ *See* Declaration of Melissa Toffel, page 2, fn. 2.

⁵ *See* Declaration of Melissa Toffel, page 2, fn. 1.

15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule, and December 6, 2013 Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013) - Exhibits H, I, and J, respectively. See Declaration of Melissa Toffel, page 2, ¶5. These policies provide a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases. *Id.* at page 3, ¶6.

General Methodology:

To take into account the seriousness of the violations and any good faith efforts to comply with the applicable requirements as described in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), the 1990 UST Penalty Policy directs an initial penalty amount to be derived by adding an “Economic Benefit” component to a “Gravity-Based” component that can be expressed formulaically as:

$$\text{Initial Penalty Amount} = \text{Economic Benefit} + \text{Gravity-Based}$$

Where:

$$\text{Economic Benefit} = \text{Avoided Costs} + \text{Delayed Costs}$$

Avoided Costs = periodic operation and maintenance expenditures that should have been incurred, but were not

Delayed Costs = expenditures that have been deferred by the violations, but that have been paid

Enforcement personnel typically use a software program called BEN with various inputs, including costs and compliance dates, to calculate the economic benefit component.

$$\text{Gravity-Based} = \text{MV} \times \text{VSA} \times \text{\#T/P/F} \times \text{DNC} \times \text{ESM} \times \text{Inflation Adjustment}$$

MV (Matrix value): determined by assessing the extent to which the violation deviates from the statutory or regulatory requirement, and the actual or potential harm to human health, the environment and/or adverse effect on the regulatory program. The levels range from major, moderate and minor.

VSA (Violator-specific adjustment): adjustments, ranging from a 50% increase to a 25% decrease, based on the violator's cooperation or noncooperation, willfulness or negligence, history of noncompliance, and other factors.

T/P/F (Number of tank/piping systems or facilities in violation): determined based on whether penalties are assessed on a per tank/piping system or a facility-wide basis and on the number of tanks/piping systems or facilities in violation.

DNC: (Days of noncompliance multiplier): accounts for the duration of the violation, where a violation lasting 90 days or less has a multiplier of 1; a violation lasting more than 90 days but 180 days or less has a multiplier of 1.5; a violation lasting more than 180 days but 270 days or less has a multiplier of 2.0; a violation lasting more than 270 days but 365 days or less has a multiplier of 2.5; and for each 6 months (or fraction thereof) of duration thereafter, an additional 0.5 is added to the multiplier.

ESM: (Environmental sensitivity multiplier): accounts for the sensitivity of the local environment and public health to potential or actual leaks or releases from the tanks and piping at each facility, ranging from low to high. Under the of 1990 UST Penalty Policy, the environmental sensitivity multiplier cannot be used to decrease a penalty.

Inflation Adjustment: The Federal Civil Penalties Adjustment Act of 1990, amended by the Debt Collection Improvement Act of 1996, and the Federal Civil Inflation Adjustment Act Improvement Act of 2015 increased the statutory maximum penalty for violations of RCRA to account for inflation *at the time of the Complaint* from \$10,000 to \$16,000 per day per violation for violations occurring on or before November 2, 2015, and to \$23,426 per day per violation for violations occurring after November 2, 2015. *See Exhibits I and J*, respectively. The corresponding inflation adjustment factors are: 1.4163 for violations that occurred through December 6, 2013; 1.4853 for violations that occurred after December 6, 2013 through November 2, 2015; and 1.84767 for violations that occurred after November 2, 2015.

Explanation of the Penalty Calculation

COUNT I – Failure to Perform Tank Release Detection

Complainant did not add an economic benefit component to the penalty because Respondent had tank release detection equipment in place, and operation or maintenance costs

associated with running the test every 30 days are deemed to be minimal. Declaration of Melissa Toffel, pages 4-5, ¶8.

Respondent's failure to ensure that each UST at the Facility was monitored at least every 30 days for releases using one of the methods required by the federally authorized VA UST Regulations constitutes a major potential for harm because without release detection monitoring a release may go unnoticed with serious detrimental consequences. *Id.* It is a fundamental goal of the UST regulations to ensure that an UST does not release substances that may harm human health or the environment. *Id.* While Respondent installed release detection equipment, it failed to consistently operate such equipment for UST-001, UST-002, UST-003, UST-004 and UST-005 for extended periods of time. *Id.* As the mechanism established by EPA to ensure releases are prevented and minimized is the release detection program, Respondent's failure to comply with the tank release detection monitoring requirements presents a significant harm to, and a major deviation from the requirements of, the RCRA regulatory program. *Id.* Complainant followed the 1990 UST Penalty that designates this violation as a "major" extent of deviation from the requirements and "major" potential for harm, corresponding to a matrix value of \$1,500. *Id.* Based on Respondent's conduct and the available evidence, Complainant did not adjust the matrix value based on violator's conduct (i.e., no violator-specific adjustments). *Id.* at pages 3-4, ¶ 7.

Due to the independent obligation to monitor each of the tanks for releases and in accordance with the 1990 UST Penalty Policy, Complainant applied the matrix value on a per tank basis for each of Respondent's five (5) tanks at the Facility. *Id.* at pages 4-5, ¶8.

Complainant determined the noncompliance period for Tanks 1- 4 to range from approximately 226 – 240 days (i.e., from August 2016 through March 2017, based on the

dates Respondent conducted tank release detection in July 2016), corresponding to a days of noncompliance multiplier of 2.0. *Id.* Complainant determined the noncompliance period for Tank 5 to be approximately 546 days (i.e., from July 2016 through December 2017), corresponding to a days of noncompliance multiplier of 3.0. *Id.*

Due to the available evidence, Complainant did not increase the matrix value based on sensitivity of the environment (i.e., no environmental sensitivity multiplier). *Id.* at pages 3-4, ¶ 7.

As all the violations took place after November 2, 2015, Complainant applied the applicable inflationary adjustment for the violations is 1.84767. *Id.* at page 4-5, ¶ 8.

Complainant's penalty calculation can be expressed numerically as:

Tanks 1-4: \$1,500 x 4 USTs x 2.0 DNC x 1.84767	\$22,172
Tank 5: \$1,500 x 1 UST x 3.0 DNC x 1.8476	\$ 8,315
Total Count 1	\$30,487 <i>Id.</i>

COUNT 2 – Failure to Perform Automatic Line Leak Detector Testing

Complainant does not possess any evidence of the actual cost of Respondent's automatic line leak detector/line tightness testing and consequently used a conservative *estimated* cost of \$250, and noncompliance periods of August 1, 2013 through September 20, 2017 for piping associated with Tank 1, and of August 1, 2013 through November 6, 2013 and November 6, 2014 through September 20, 2017 for piping associated with Tanks 2, 4 and 5, as "inputs" to the BEN software program. *Id.* at page 5-8, ¶ 9. Complainant added an economic benefit component of \$678 for piping associated with Tank 1 and \$1,502 for piping associated with Tanks 2, 4 and 5, consistent with the BEN model calculations. *Id.*

It is critically important that facility owners and operators utilize effective methods of detecting releases from underground piping associated USTs, especially for piping that conveys

regulated substances under pressure. *Id.* The prevention and detection of leaks are the cornerstones of the UST regulatory program. *Id.* Respondent's failure to perform an annual test of the functionality of the line leak detectors for the underground piping associated with UST-001, UST-002/UST-003 (manifolded), UST-004 and UST-005 presented a substantial risk that a leak would go undetected. *Id.* Respondent's failure to comply with the automatic line leak detector testing requirements presents a significant harm to, and a major deviation from the requirements of, the RCRA regulatory program. *Id.* Complainant followed the 1990 UST Penalty Policy that designates this violation a "major" extent of deviation from the requirements and "major" potential for harm, corresponding to a matrix value of \$1,500. *Id.* Based on Respondent's conduct and the available evidence, EPA is not adjusting the matrix value based on violator's conduct (i.e., no violator-specific adjustments). *Id.* at pages 3-4, ¶ 7.

Due to the independent obligation to test each leak detector on annual basis and in accordance with the 1990 UST Penalty Policy, Complainant applied the matrix value for this violation type is applied on a per piping system basis for each of Respondent's four (4) piping systems at the Facility. *Id.* at pages 5-8, ¶9.

Complainant determined the noncompliance period for the piping associated with Tank 1 to be approximately 1,511 days (i.e., from August 1, 2013 (SOL) through the testing date of September 20, 2017), corresponding to a days of noncompliance multiplier of 6.0. *Id.* Complainant has determined that there were 128 days of violation that occurred through December 6, 2013, representing 9% (128/1,511) of the noncompliance period; 696 days of violation that occurred after December 6, 2013 through November 2, 2015, representing 46% (696/1,511) of the noncompliance period; and

687 days of violation that occurred after November 2, 2015 (687/1,511), representing 45% of the noncompliance period. *Id.*

Complainant determined the noncompliance period for the piping associated with Tanks 2, 4 and 5 to be approximately 1,146 days (i.e., from August 1, 2013 (SOL) through Respondent's line leak detector testing date of November 6, 2013 and from November 6, 2014 through Respondent's line leak detector testing date of September 20, 2017), corresponding to a days of noncompliance multiplier of 5.0. *Id.* Complainant has determined that there were 97 days of violation that occurred through December 6, 2013, representing 8% (128/1,146) of the noncompliance period; 362 days of violation that occurred after December 6, 2013 through November 2, 2015, representing 32% (362/1,146) of the noncompliance period; and 687 days of violation that occurred after November 2, 2015, representing 60% (687/1,146) of the noncompliance period. *Id.*

Due to the available evidence, Complainant did not increase the matrix value based on sensitivity of the environment (i.e., no environmental sensitivity multiplier). *Id.* at pages 3-4, ¶ 7.

Complainant applied the inflation adjustment factors of 1.4163 for violations that occurred through December 6, 2013; 1.4853 for violations that occurred after December 6, 2013 through November 2, 2015, and 1.84767 for violations that occurred after November 2, 2015. *Id.* at pages 5-8, ¶9. Complainant's penalty calculation can be expressed numerically as:

Tank 1:

Economic Benefit: \$678

Gravity: $\$1,500 \times 1\text{UST} \times 6.0\text{DNC} [(.09)(1.4163) + (.46)(1.4853) + (.45)(1.84767)] = \$14,779$

Tanks 2, 4 and 5:

Economic Benefit:

\$1,502

Gravity: $\$1,500 \times 3 \text{UST} \times 5.0 \text{DNC} [(.08)(1.4163) + (.32)(1.4853) + (.60)(1.84767)] = \$38,187$

Total Count 2

\$55,146 *Id.*

COUNT 3 – Failure to Perform Piping Release Detection

Complainant accounted for the economic benefit Respondent gained from this violation along with Count 2 as line tightness and line leak detector tests are often conducted at the same time. *Id.* at pages 8-10, ¶ 10.

As discussed above, it is critically important that facility owners and operators utilize effective methods of detecting releases from underground piping associated USTs, especially for piping that conveys regulated substances under pressure. *Id.* The prevention and detection of leaks are the cornerstones of the UST regulatory program. *Id.* Respondent's failure to perform an annual line tightness test or monthly monitoring of underground piping associated with UST-001, UST-002/UST-003 (manifolded), UST-004 and UST-005 presented a substantial risk that a leak would go undetected. *Id.* Complainant followed the 1990 UST Penalty Policy that designates this violation a "major" extent of deviation from the requirements and "major" potential for harm, corresponding to a matrix value of \$1,500. *Id.* Based on Respondent's conduct and the available evidence, EPA is not adjusting the matrix value based on violator's conduct (i.e., no violator-specific adjustments). *Id.* at pages 3-4, ¶ 7.

Due to the independent obligation to monitor each piping system for releases and in accordance with the 1990 UST Penalty Policy, Complainant applied the matrix value for this violation type on a per piping system basis for each of Respondent's four (4) piping systems at the Facility. *Id.* at pages 8-10, ¶10.

Complainant determined the noncompliance period for the piping associated with Tank 1 to be approximately 1,511 days (i.e., from August 1, 2013 (SOL) through Respondent's line tightness testing date of September 20, 2017), corresponding to a days of noncompliance multiplier of 6.0. *Id.* Complainant has determined that there were 128 days of violation that occurred through December 6, 2013, representing 9% (128/1,511) of the noncompliance period; 696 days of violation that occurred after December 6, 2013 through November 2, 2015, representing 46% (696/1,511) of the noncompliance period; and 687 days of violation that occurred after November 2, 2015 (687/1,511), representing 45% of the noncompliance period. *Id.*

Complainant determined the noncompliance period for the piping associated with Tanks 2, 4 and 5 to be approximately 1,146 days (i.e., from August 1, 2013 (SOL) through Respondent's line tightness testing date of November 6, 2013 and from November 6, 2014 through Respondent's line tightness testing date of September 20, 2017), corresponding to a days of noncompliance multiplier of 5.0. *Id.* Complainant has determined that there were 97 days of violation that occurred through December 6, 2013, representing 8% (97/1,146) of the noncompliance period; 362 days of violation that occurred after December 6, 2013 through November 2, 2015, representing 32% (362/1,146) of the noncompliance period; and 687 days of violation that occurred after November 2, 2015, representing 60% (687/1,146) of the noncompliance period. *Id.*

Due to the available evidence, Complainant did not increase the matrix value based on sensitivity of the environment (i.e., no environmental sensitivity multiplier). *Id.* at pages 3-4, ¶ 7.

Complainant applied the inflation adjustment factors of 1.4163 for violations that occurred through December 6, 2013; 1.4853 for violations that occurred after December 6, 2013 through November 2, 2015, and 1.84767 for violations that occurred after November 2, 2015. *Id.* at pages 8-10, ¶10. Complainant's penalty calculation can be expressed numerically as:

Tank 1:

Economic Benefit: \$ -----
 Gravity: $\$1,500 \times 1\text{UST} \times 6.0\text{DNC} [(.09)(1.4163) + (.46)(1.4853) + (.45)(1.84767)] = \$14,779$

Tanks 2, 4 and 5:

Economic Benefit: \$-----
 Gravity: $\$1,500 \times 3\text{UST} \times 5.0\text{DNC} [(.08)(1.4163) + (.32)(1.4853) + (.60)(1.84767)] = \$38,188$
Total Count 3 **\$52,967 *Id.***

COUNT 4 – Failure to Have Overfill Prevention Equipment

Complainant does not possess any evidence of the actual cost of the drop tubes used for overfill protection, and consequently used a conservative *estimated* cost of \$400 per drop tube. *Id.* at pages 10-11, ¶11. Complainant used this estimate together with a contractor invoice reflecting \$550 for labor to install the drop tubes, and a noncompliance period of August 1, 2013 through April 10, 2018, as “inputs” to the BEN software program. *Id.* Complainant added an economic benefit component of \$809 for installing drop tubes on the Tank 1, 2, 3, 4, and 5 UST systems consistent with the BEN model calculations. *Id.*

It is critically important that facility owners and operators utilize effective methods for preventing releases at the time product is being transferred to UST systems. *Id.* The prevention of releases is an important component of the UST regulatory program. *Id.* Respondent's failure to have equipment to prevent overfilling during the transfer of product on the UST-001, UST-002, UST-003, UST-004 and UST-005 UST systems presented a substantial risk of harm to human health or the environment associated with a release. *Id.* Complainant followed the 1990

UST Penalty Policy that designates this violation a “major” extent of deviation from the requirements and “moderate” potential for harm, which corresponds to a matrix value of \$750. *Id.* Based on Respondent’s conduct and the available evidence, EPA is not adjusting the matrix value based on violator’s conduct (i.e., no violator-specific adjustments). *Id.* at pages 3-4, ¶ 7.

Due to the independent obligation to have overfill protection equipment on each tank system and in accordance with the 1990 UST Penalty Policy, Complainant applied the matrix value for this violation type on a per tank system basis for each of Respondent’s five (5) tank systems at the Facility. *Id.* at pages 10-11, ¶11

Complainant determined the noncompliance period for Tanks 1, 2, 3, 4 and 5 to be approximately 1,713 days (i.e., from August 1, 2013 (SOL) through Respondent’s overfill installation dates of April 10 and 11, 2018), corresponding to a days of noncompliance multiplier of 6.5. *Id.* Complainant has determined that there were 128 days of violation that occurred through December 6, 2013, representing 7% (128/1,713) of the noncompliance period; 696 days of violation that occurred after December 6, 2013 through November 2, 2015, representing 41% (696/1,713) of the noncompliance period; and 889 days of violation that occurred after November 2, 2015 (889/1,713), representing 52% of the noncompliance period. *Id.*

Due to the available evidence, Complainant did not increase the matrix value based on sensitivity of the environment (i.e., no environmental sensitivity multiplier). *Id.* at pages 3-4, ¶ 7.

Complainant applied the inflation adjustment factors of 1.4163 for violations that occurred through December 6, 2013; 1.4853 for violations that occurred after

December 6, 2013 through November 2, 2015, and 1.84767 for violations that occurred after November 2, 2015. *Id.* at pages 10-11, ¶11. Complainant’s penalty calculation can be expressed numerically as:

Tank 1, 2, 3, 4 and 5:

Economic Benefit: \$809

Gravity: $\$750 \times 5\text{UST} \times 6.5\text{DNC} [(.07)(1.4163) + (.41)(1.4853) + (.52)(1.84767)] = \$40,680$

Total Count 4 \$41,489 *Id.*

COUNT 5 – Failure to Test Cathodic Protection System

Complainant used a contactor invoice reflecting \$350 to conduct the cathodic protection system testing, and a noncompliance period of April 17, 2015 through December 6, 2017 as “inputs” to the BEN software program. *Id.* at pages 11-13, ¶ 12. Complainant added an economic benefit component of \$27 for its late cathodic protection testing at the Facility consistent with the BEN model calculations. *Id.*

Cathodic protection systems must be tested for proper operation in order to prevent releases from steel UST that have corroded. *Id.* Especially due to the age of the UST systems at the Facility, Respondent’s failure to conduct 3 year testing of its cathodic protection system posed a major risk of harm to human health and the environment as demonstrated by Respondent’s December 6, 2017 cathodic protection test which showed a failing result. *Id.* Complainant followed the 1990 UST Penalty Policy that designates this violation a “major” extent of deviation from the requirements and “moderate” potential for harm, which corresponds to a matrix value of \$750. *Id.* Based on Respondent’s conduct and the available evidence, EPA is not adjusting the matrix value based on violator’s conduct (i.e., no violator-specific adjustments). *Id.* at page 3-4, ¶ 7. Complainant assessed the matrix value for this violation type on a per Facility basis. *Id.* at pages 11-13, ¶12.

Complainant determined the noncompliance period for the Facility to be approximately 964 days (i.e., from April 17, 2015 through Respondent's cathodic protection system test date of December 6, 2017), corresponding to a days of noncompliance multiplier of 4.5. *Id.* EPA has determined that there were 200 days of violation that occurred after December 6, 2013 through November 2, 2015, representing 21% (200/964) of the noncompliance period; and 764 days of violation that occurred after November 2, 2015 (764/964), representing 79% of the noncompliance period. *Id.*

Due to the available evidence, Complainant did not increase the matrix value based on sensitivity of the environment (i.e., no environmental sensitivity multiplier). *Id.* at pages 3-4, ¶ 7.

Complainant applied the inflation adjustment factors of 1.4853 for violations that occurred after December 6, 2013 through November 2, 2015, and 1.84767 for violations that occurred after November 2, 2015. *Id.* at pages 11-13, ¶12. Complainant's penalty calculation can be expressed numerically as:

Tanks 1, 2, 3, 4, and 5:

Economic Benefit:	\$27
Gravity: $\$750 \times 1\text{FAC} \times 4.5\text{DNC} [(.21)(1.4853) + (.79)(1.84767)] =$	\$5,979
Total Count 5	\$6,006 <i>Id.</i>

TOTAL PENALTY (\$30,487 + \$55,146 + \$52,967 + \$41,489 + \$6,006) = **\$186,095.00**

As the penalty factors under RCRA are limited to the "seriousness of the violation" and "good faith" efforts to comply, consideration of "ability to pay" is not part of EPA's prima facie burden in determining a penalty amount. *In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, slip op at 36-38 (EAB, July 31, 2002), citing *In re Cent. Paint & Body Shop, Inc.*, 2 E.A.D. 309, 313-14 (CJO 1987) ("RCRA, however, does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and Congress certainly knew how to

include such a factor in an environmental statute if it so desired. The logical conclusion is that ability to pay is not an element of EPA's proof.") (footnote omitted). The Environmental Appeals Board ("EAB") has clarified that a respondent must raise and prove "ability to pay" as an affirmative defense in RCRA matters, and that under the Consolidated Rules of Practice "the respondent has the burdens of presentation and persuasion for any affirmative defenses." *Id.*; 40 C.F.R. § 22.24. See also *In re Bil-Dry Corp.*, RCRA (3008) Appeal No. 98-4, slip op. at 50-51 (EAB, Jan. 18, 2001); *Cent. Paint*, 2 E.A.D. at 313-14. Complainant informed Respondent of its responsibility to raise and substantiate an 'ability to pay' claim in several filings in the course of this proceeding including in its July 24, 2018 Complaint (page 14), October 11, 2018 Pre-Hearing Exchange (page 8), and November 23, 2018 Rebuttal Pre-Hearing Exchange (page 1). To date, Respondent has not made a formal 'ability to pay' claim nor has it provided any substantiating documentation in its response to EPA's Complaint or other filings⁶ in this matter. Consequently, Respondent failed to meet its burden under 40 C.F.R. § 22.24 of the Consolidated Rules of Practice as set forth by the EAB to establish that it does not have an ability to pay EPA's proposed penalty.

Complainant acknowledges that Respondent informally expressed concern of its ability to pay a substantial penalty in settlement negotiations and provided supporting documentation including *U.S. Individual Income Tax Returns (Form 1040)* for years 2015, 2016 and 2017, and a partially completed *Collection Information Statement for Wage Earners and Self-Employed Individuals* ("CIS"). Despite repeated EPA attempts to elicit information omitted from its CIS,

⁶ Though it was represented that Respondent's principal had traveled to India to receive medical treatment he could not afford here in the U.S in an October 16, 2018 letter filed on behalf of Respondent on October 22, 2018, no ability to pay or financial hardship claims have been made in connection with the payment of a substantial penalty in any of Respondent's filings in this matter.

including a letter dated April 1, 2019 setting forth the specific information sought as well as an optional form in which to provide it, Respondent failed to provide the requested information. *See* Exhibit K. Based on the available information, Complainant's financial analysts was not able to conclude that Respondent is unable to pay the proposed penalty of \$186,095. *See* Declaration of Harry R. Steinmetz.

III. CONCLUSION

For the forgoing reasons the Regional Judicial Officer should issue a Default Order against Respondent ordering Respondent to pay a civil penalty of \$186,095.

Respectfully submitted,

Date

Jennifer M. Abramson
Senior Assistant Regional Counsel