UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Edward and Theresa Washines,	)	**Docket No. RCRA-10-2014-0100**
Da Stor At Lillie's Corner	)	
	)	
Respondents.	)	
	)	

INITIAL DECISION AND ORDER

Before: Christine Donelian Coughlin, Administrative Law Judge, U.S. EPA

Appearances:

For the Agency:
Christopher W. Bellovary, Esquire
Brett Dugan, Esquire
U.S. Environmental Protection Agency
Region 10
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For Respondents:
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PROCEDURAL SUMMARY

On April 30, 2014, the United States Environmental Protection Agency ("Agency" or "EPA"), Region 10, Director of the Office of Compliance and Enforcement ("Complainant"), initiated this proceeding by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Edward and Theresa Washines and Da Stor at Lillie's Corner (collectively, "Respondents") pursuant to Section 9006(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e(a). The Complaint alleges that Respondents committed three violations of the regulations set forth at 40 C.F.R. Part 280, which govern owners and operators of underground storage tanks ("USTs").[1] The Complaint divides the three alleged violations into nine counts, with Violation 1 consisting of Counts 1 through 4, Violation 2 consisting of Counts 5 and 6, and Violation 3 consisting of Counts 7 through 9. For these alleged violations, the Complaint proposed a total penalty of $57,092 and sought the issuance of a Compliance Order. On July 2, 2014, Respondents, through counsel, filed an Answer to the Complaint and requested a hearing on the charges against them. Thereafter, I was designated to preside over this proceeding.

In an order dated August 26, 2014, I directed the parties to engage in the prehearing information exchange process pursuant to section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45 ("Rules of Practice" or "Rules"). Following the parties' exchange of information, I granted Complainant's motions to amend the Complaint and provided Respondents with the opportunity to file an answer to the Complaint, as amended. Complainant subsequently filed an Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Amended Complaint"), and Respondents filed an Answer to Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Amended Answer"). I also granted Complainant's motions to amend its prehearing information exchange and supplement the amended prehearing information exchange.[2]

An evidentiary hearing was scheduled and conducted in this matter on April 7, 2015, in Yakima, Washington. The parties entered into a Joint Set of Stipulated Facts, Exhibits, and Testimony ("Joint Stipulations"), which was admitted into evidence as JX-1.[3] Pursuant to those Joint Stipulations, Respondents conceded liability for Violation 1, Counts 1 through 4 (Failure to

[1] Citations to the regulations at 40 C.F.R. Part 280 in this decision will be to the version effective as of December 22, 1988, which was applicable at the time of the alleged violations. The regulations have since been amended effective on October 13, 2015. *See* Revising Underground Storage Tank Regulations, 80 Fed. Reg. 41,566, 41,623 (July 15, 2015). The regulatory provisions at issue in this proceeding did not undergo substantive revision at that time.

[2] See Orders dated December 19, 2014 (Order Granting Complainant's Unopposed Motion For Leave to Amend the Complaint), February 11, 2015 (Order Granting Complainant's Unopposed Supplemental Motion For Leave to Amend the Complaint), February 23, 2015 (Order Granting Complainant's Unopposed Motion to Amend Complainant's Initial Prehearing Exchange), and March 18, 2015 (Order on Complainant's Unopposed Motion to Supplement Complainant's Amended Prehearing Exchange).

[3] Citations to the Joint Stipulations will be in the following format: "JX-1 ¶ (paragraph #)(statement #)." Stipulations are "judicial admission[s] binding on the parties making [them], absent special considerations." *Vallejos v. C.E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978).

Conduct Release Detection for Piping), and Violation 3, Counts 7 through 9 (Failure to Maintain Financial Responsibility), and Respondents do not challenge the penalties proposed by Complainant for such violations. As asserted in their Amended Answer, Respondents also do not dispute imposition of the Compliance Order sought by Complainant. That which remains in dispute, and which was the subject of the evidentiary hearing, is alleged Violation 2, Counts 5 and 6—namely, the alleged failure to properly install and maintain corrosion protection for steel piping, or more specifically, steel siphon line—from at least May 1, 2009, through February 13, 2013. Complainant proposed a total penalty for alleged Violation 2 of $24,985.

During the evidentiary hearing, the stipulated proposed exhibits for Complainant, marked as CX-1 through CX-42, were admitted into evidence, and the stipulated proposed exhibits for Respondents, marked as RX-1 through RX-10, were admitted into evidence. In addition, Complainant's proposed exhibits CX-43 and CX-44, were admitted into evidence without objection.[4] Complainant presented the testimony of two witnesses: Charlotte Boulind-Yeung, an Environmental Protection Specialist with the Groundwater Unit within Complainant's Office of Compliance and Enforcement, and Katherine Griffith, also an Environmental Protection Specialist with the Groundwater Unit within Complainant's Office of Compliance and Enforcement. Respondents presented the testimony of one witness, Respondent Edward Washines.

The Hearing Clerk of this Tribunal received the certified transcript of the hearing on April 16, 2015. The Hearing Clerk later emailed electronic copies of the transcript to counsel for the parties on April 20, 2015. On April 21, 2015, I issued a Post-Hearing Scheduling Order, which set forth various filing deadlines for any motions to conform the transcript to the actual testimony and for the submission of post-hearings briefs. On May 18, 2015, Complainant filed a Motion to Conform the Transcript, which I granted by Order dated May 27, 2015.[5] On June 4, 2015, Complainant timely filed its Post-Hearing Brief ("Compl. Post-Hrg Br."). Respondents did not file a post-hearing brief. Consequently, no reply briefs were filed.

FACTUAL SUMMARY

The following facts were either set forth in the Joint Stipulations or contained in the Transcript of Proceedings or exhibits admitted into evidence and deemed to be credible.

A. Admitted Violation 1, Counts 1-4, Failure to Conduct Release Detection for Piping

As reflected in the Joint Stipulations, Respondents concede liability and do not dispute the penalty proposed by Complainant with regard to Violation 1, consisting of Counts 1 through 4.

[4] See the Transcript of Proceedings at 139-140, 209. Hereafter, citation to the Transcript of Proceedings will be in the following format: "Tr. [page number]."

[5] All proposed changes were granted with the exception of one proposed change for line 16 of page 170 that contained text that did not appear to contain error(s).

Specifically, for Counts 1 and 2, Respondents admit that they failed to conduct an annual test for the operation of each automatic line leak detector ("ALLD"), in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a) from at least May 1, 2009, through October 15, 2009; October 16, 2010, through August 1, 2012; August 2, 2013, through August 26, 2013; and August 27, 2014, through October 12, 2014. JX-1 ¶ (I)(9). Respondents also do not dispute the proposed penalty for these violations, that is, $5,284 for each count, totaling $10,568 for Counts 1 and 2. JX-1 ¶ (I)(12).

For Counts 3 and 4, Respondents admit that they failed to monitor each pressurized line through an annual line tightness test ("LTT") or other approved method, in violation of 40 C.F.R. §§ 280.41(b)(1)(ii) and 280.44(b), from at least May 1, 2009, through October 15, 2009; October 16, 2010, through August 1, 2012; August 2, 2013, through August 26, 2013; and August 27, 2014, through October 12, 2014. JX-1 ¶ (I)(10). Respondents also do not dispute the proposed penalty for these violations, that is, $5,284 for each count, totaling $10,568 for Counts 3 and 4. JX-1 ¶ (I)(12). Thus, the total penalty assessed for Violation 1 is $21,136. *Id.*

B. Admitted Violation 3, Counts 7-9, Failure to Maintain Financial Responsibility

As reflected in the Joint Stipulations, Respondents concede liability and do not dispute the penalty proposed by Complainant with regard to Violation 3, consisting of Counts 7 through 9. Specifically, Respondents admit their failure to maintain financial responsibility, in violation of 40 C.F.R. § 280.93, from at least May 1, 2009, through April 22, 2010; April 24, 2011, through April 22, 2012; April 24, 2013, through May 1, 2013; and May 2, 2014, through January 13, 2015. JX-1 ¶ (I)(11). Respondents also do not dispute the penalty proposed by Complainant for Violation 3, Counts 7 through 9, "as calculated through December 2, 2014, at a total penalty of $18,702, or if calculated through January 13, 2015, at a total penalty of $20,055."[6] JX-1 ¶ (I)(13).

C. Alleged Violation 2, Counts 5 and 6, Failure to Properly Install and Maintain Corrosion Protection for Steel Piping

The parties agree that Respondents are "persons," as that term is defined by RCRA. JX-1 ¶ (I)(1).[7] Da Stor at Lillie's Corner ("Facility") is a gasoline service station located "within the external boundary of the Yakama Indian Reservation." JX-1 ¶ (I)(2). The land on which the Facility is located is Federal Indian Trust Property that is held in trust by the Bureau of Indian Affairs ("BIA") on behalf of the beneficiaries, which included Respondent Theresa Washines

[6] While it is concerning that the Amended Complaint in this matter, dated February 12, 2015, does not specify "through January 13, 2015," with regard to the proposed penalty calculation for Violation 3 and states only "through at least December 2, 2014," with regard to liability for Violation 3, the fact that Respondents admit liability through January 13, 2015, and do not dispute the penalty for this violation being calculated through January 13, 2015, removes any reservations I might otherwise have with regard to adjudicating a period of time beyond the date specified in the charging document, i.e., the Amended Complaint.

[7] Additionally, the Amended Complaint alleges, and Respondents admit in their Amended Answer, that Respondents Edward and Theresa Washines are individuals, that Respondent Da Stor at Lillie's Corner is a commercial entity organized under the laws of the Confederated Tribes and Bands of the Yakama Nation, and that each is a "person" within the meaning of RCRA. Amended Complaint ¶¶ 3.1, 3.2; Amended Answer ¶¶ 1.1, 1.2.

until her death on July 8, 2014. JX-1 ¶¶ (I)(2) and (3), CX-34, RX-10, Tr. 186. From at least May 1, 2009, until her death on July 8, 2014, Respondent Theresa Washines was both an owner and operator of the Facility and the three underground storage tanks ("USTs") located there. JX-1 ¶¶ (I)(2) and (3). Since at least May 1, 2009, her husband, Respondent Edward Washines, and Respondent Da Stor at Lillie's Corner have also been operators of the Facility and the three USTs. JX-1 ¶¶ (I)(2) and (3).

Each of the three USTs at the Facility was installed in 1990 by the Facility's previous operator. JX-1 ¶ (I)(5). Each UST is a "single wall, steel tank" that routinely contains gasoline, a type of petroleum that is a "regulated substance." JX-1 ¶¶ (I)(4), (7), and (8). In particular, each tank is a "sti-P3®," and was "equipped with corrosion protection in the form of sacrificial anodes" at all times relevant to this proceeding.[8] JX-1 ¶¶ (I)(14) and (15). In addition to the tanks, the UST system includes "piping," sometimes referred to as a "line" or "lines," that is comprised of one siphon, or suction, line and two pressurized lines, each of which is in contact with the ground. JX-1 ¶ (I)(17). The siphon line "is constructed of bare steel."[9] JX-1 ¶ (I)(20). The "piping" of the UST system at the Facility "regularly conveys regulated substances." JX-1 ¶ (I)(18). None of the USTs at the Facility, nor any of the associated piping, has impressed current cathodic protection.[10] JX-1 ¶ (I)(16).

The Business Lease that Respondents Theresa and Edward Washines entered into to lease the land on which the Facility is located from the various owners[11] required that they "comply with all applicable regulations contained in 40 CFR Parts (sic) 280 (attached) and as explained in EPA/530/UST-88/008 musts for USTs (also attached)." CX-34 at 1 and 8, Tr. 35-36. The referenced "Musts for USTs" is a compliance assistance document that summarizes the federal regulations pertaining to USTs to assist owners and operators with understanding applicable legal requirements, and is frequently distributed during an inspection. CX-35, Tr. 34-35. Among other things, the "Musts for USTs" document identifies the performance standards that USTs are required to meet, and in particular, it states that tanks (such as sti-P_3® tanks) and piping made of steel need to have a corrosion-resistant coating and cathodic protection. CX-35 at 18. Further, the "Musts for USTs" document expressly informs the owner and operator that "[g]alvanized steel is NOT a noncorrodible material" and that "[f]ederal rules require corrosion protection for USTs because unprotected steel USTs corrode and release product through corrosion holes." CX-35 at 18, Tr. 35. Although sti-P_3® tanks are manufactured to have "built-

[8] As explained at the hearing, "sti-P3®" tanks are equipped with built-in sacrifical anodes at the time they are manufactured. Tr. 37, 53.

[9] An inspection report documenting an inspection conducted in 1995 prior to Respondents' ownership and/or operation of the Facility identifies the piping material as "Dbl. Walled Piping (?)" *See* RX-4.

[10] As reiterated later in this decision, the term "cathodic protection" is defined by the applicable regulations as "a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current." 40 C.F.R. § 280.12. The regulations at 40 C.F.R. Part 280 refer to "cathodic protection" and "corrosion protection" interchangeably, as does this decision.

[11] Evidence in the record reflects that Respondent Mrs. Washines was one of more than 40 tribal members who owned the land, and that it was leased on behalf of these owners by BIA. *See* CX-4 at 1, CX-5 at 1, CX-34 at 1, Tr. 67-69.

in anodes" to protect the tanks, that corrosion protection does not extend to any of the piping associated with the UST system. Tr. 37-38. Consequently, any such piping, if made of a noncorrodible material, requires its own corrosion protection. CX-35 at 18, 23, Tr. 38.

On September 13 and 21, 2006, Jim Greeves ("Greeves"), an inspector for Region 10 of the Agency, conducted an inspection of the USTs at the Facility. CX-3, CX-17, Tr. 31-32. Greeves initiated the inspection on September 13, 2016, but stopped on account of Respondent Edward Washines appearing not to understand the requirements pertaining to USTs,[12] at which point Greeves began to provide compliance assistance. CX-3 at 4, CX-17, Tr. 31-32. Greeves noted in his report of the inspection, "Stopped inspection once I found out the owner [Respondent Mr. Washines] did not understand UST requirements. I provided UST handouts and told the owner what he should be doing." CX-3 at 4. As observed by Charlotte Boulind-Yeung, an inspector for Region 10 who later became involved with the Facility,[13] Greeves's report further reflected that as of September 13, 2016, "there was no financial responsibility for the underground storage tanks" (also referred to in Greeves's report as "UST insurance"), "no line tightness test or line leak detector test paperwork indicating those tests had been done within the last 12 months," and "no records of tank monitoring from the automatic tank gauge" since a passing test in the year 2000. Tr. 32-33 (referring to CX-3 at 1-5).

On September 21, 2006, Greeves returned to the Facility to complete the inspection he had initiated on September 13. CX-3. This visit included a visual inspection during which Greeves determined that at least some of the piping at the Facility consisted of galvanized steel. CX-3 at 1 and 4, CX-17, Tr. 32-34. Specifically, after observing the "sumps," Greeves "determined that the product lines [were] galvanized steel pipe." CX-3 at 4. He also determined that only the tanks, and not the piping, were equipped with cathodic protection. CX-3 at 3, Tr. 37-38.

As a result of this inspection, "EPA informed Respondents that the siphon line appeared to be galvanized steel pipe and that the existant [sic] corrosion protection equipped to the UST systems did not extend to the siphon line." JX-1 ¶ (I)(23). Finding that a number of instances of noncompliance remained since his initial visit on September 13, Greeves issued an Expedited Enforcement Compliance Order and Settlement Agreement on September 21, 2006, instructing Respondents to show proof of compliance within 30 days by providing (1) copies of line tightness tests and automatic line leak detection results; (2) copies of the next two months of tank leak test results; and (3) a copy of Respondents' UST insurance. CX-7, Tr. 32, 95. Greeves also

[12] Respondent Mr. Washines acknowledged his lack of experience in this field at the hearing, testifying as follows:

> We never owned a business before, not a gas station, and so [I] sought the assistance . . . of our field distributor . . . which was in charge of maintenance, maintaining our systems, our fuel systems, our registers inside the stores, our computer systems, and so forth. And so I asked questions of them as to what, you know, I might need to know, we might need to know in order to open Da Stor, but we were never told by anybody when we got the lease what we needed to do.

Tr. 187.

[13] See Tr. 26-29.

issued a field citation with a penalty amount of $450.[14] CX-17. Thereafter, in October 2006, Respondents conducted a cathodic protection test on the USTs, but did not conduct a cathodic protection test on the steel siphon line.[15] JX-1 ¶ (I)(24).

On May 2, 2007, Greeves called Respondents to follow up on the inspection, with no response. CX-17. Greeves subsequently mailed a letter dated May 8, 2007, as a follow-up to the September 2006 Expedited Enforcement Compliance Order and Settlement Agreement,[16] in which he listed the cited violations and directed Respondents to produce documentation rectifying the deficiencies that gave rise to the violations. CX-15. Greeves extended the original compliance deadline to July 31, 2007, and advised that "failure to comply with the field notice within the specified time frame may result in penalties as high as $11,000 per tank, per day for each violation." *Id.* He also provided a website where Respondents could "obtain general UST information and guidance," as well as his individual contact information for further compliance assistance. *Id.* After again receiving no response from Respondents, Greeves sent a "last chance letter" dated August 13, 2007, that reiterated the need for Respondents to produce documentation to rectify the cited violations and extended the deadline for compliance to September 14, 2007. CX-16, CX-17, Tr. 38-39. Yet again, Greeves received no response. CX-17. Finally, on September 20, 2007, Greeves visited the Facility only to find that the gas station had ceased operation, while the associated convenience store remained open. *Id.* Greeves subsequently prepared a memorandum dated September 24, 2007, in which he detailed his involvement with the Facility beginning with his initial inspection on September 13, 2006, and concluding with his visit to the Facility on September 20, 2007. CX-17, Tr. 39-40. He also noted his observations of galvanized steel piping at the Facility during his 2006 inspection. CX-17, Tr. 39-40.

In December 2007, Respondents' file was forwarded to Charlotte Boulind-Yeung ("Boulind-Yeung") for further action. Tr. 29, 39. Boulind-Yeung began her investigative work on the Facility with letters dated December 27, 2007, and May 27, 2008, to BIA that related the continued noncompliance at the Facility and the potential penalties for such noncompliance. CX-19, CX-20, Tr. 40-42. The letters advised that if the tanks were no longer in operation, regulatory closing requirements were to be followed. CX-19 at 2, CX-20 at 2-3, Tr. 40-42. They

[14] The Expedited Enforcement Compliance Order and Settlement Agreement, dated September 21, 2006, cited three violations: (1) Failure to conduct an annual line tightness test on UST piping (40 C.F.R. § 280.44(a)); (2) Failure to monitor tanks at least every 30 days (40 C.F.R. § 280.45); and (3) Failure to maintain copies of the financial assurance mechanism used to comply with the financial responsibility rule and certification in the required language (40 C.F.R. § 280.111). CX-7 at 1. Each violation was assessed a penalty of $150, totaling $450. *Id.*

[15] It is unclear as to why Respondents conducted cathodic protection tests only on the tanks and not on the steel siphon line in October 2006. In their Prehearing Brief, Respondents state: "Because there was no CP [corrosion protection] for the steel siphon line during the period before upgrading on February 13, 2013, the Respondents could not have tested the line for CP during the period alleged in the Complaint." Respondents' Prehearing Brief (Rs' Br.") at 8. This statement implies that Respondents knew the steel siphon line lacked corrosion protection. Nevertheless, a conductivity test, while purportedly difficult to administer because of Respondent's pressurized lines, Tr. 43-44, could have resolved the issue of whether the siphon line was cathodically protected. Another option available to Respondents was to excavate the line, which is the step Respondents eventually took seven years later on February 13, 2013.

[16] I note that the letter contains an obvious typographical error in which the date of the inspection is referenced as September 13, 2007, rather than September 13, 2006. *See* CX-15 at 1; *see also* Tr. 79-80.

also indicated that EPA personnel had found piping at the Facility that appeared to be made of galvanized steel, but that EPA required further information to confirm the piping material. CX-19 at 2, CX-20 at 1. The letter dated May 27, 2008, in particular, described the attempts of EPA to obtain from BIA "any information about whether original documentation exists from the installation of the UST systems in March 1990 to indicate the material of the product piping," and noted that a formal request for this information, along with ownership and leasing information, had been made by letter dated May 23, 2008, and sent to the BIA Northwest Regional Director. CX-20 at 1-2.

On June 12, 2008, Boulind-Yeung called Respondent Mr. Washines to discuss the current status of the USTs and the outstanding violations. CX-21, Tr. 42-43. She explained to him that she was working with BIA to obtain information related to the piping in order to avoid any need for a contractor to test or excavate the piping.[17] CX-21. According to Boulind-Yeung, Respondent Mr. Washines indicated that he was not going to pay for further examination of the piping and that he had already spent enough money addressing outstanding issues left by the previous operator. CX-21 at 2, Tr. 44.

In 2009, another inspection of the Facility was conducted by another team member, inspector Todd Bender ("Bender"), because Boulind-Yeung was involved with other duties at that time. Tr. 46-47. According to Bender's report of the inspection, his visual inspection of the piping revealed galvanized steel piping "out of turbine sumps." CX-4 at 1. His notes elaborated as follows:

> CP – 1 inch steel siphon line between tanks 1 + 2 (manifolded UST) needs corrosion protection + 3 yr tests
> – unknown length of steel pipe from STP sumps (from threaded steel penetration to ground until point (?) where fiberglass secondary begins (need pics or dig to document) requires both CP + 3 yr tests.

CX-4 at 5.

Boulind-Yeung became involved with the Facility again when she was assigned to perform an inspection in 2012. Tr. 44-45. Before beginning her inspection, Boulind-Yeung first consulted with Elizabeth Sanchey, the environmental program manager for the Yakama Nation, and then sent an intent-to-inspect letter to Respondents on April 13, 2012, that proposed a date for the inspection. Tr. 45, 47. Ms. Sanchey proceeded to serve as a liaison between Respondents and Boulind-Yeung in scheduling the inspection for June 14, 2012, and she was also present for the inspection. Tr. 45-46, 53.

On June 14, 2012, Boulind-Yeung conducted the inspection as scheduled, during which she completed a report that documented her findings and extensive notes of the inspection. Tr. 52, CX-5. In her report, she identified three USTs that contained gasoline. CX-5 at 1. She also

[17] In the context of her discussion with Respondent Mr. Washines, Boulind-Yeung described at the hearing three methods of determining piping material: (1) locating documentation that identifies the piping material; (2) hiring a contractor to perform a conductivity test, the success of which is uncertain, particularly with pressurized systems; and (3) hiring a contractor to excavate the piping in order to observe it in the soil. Tr. 43-44.

recorded that the piping material for all three tanks "appear[ed] to be steel" and that the piping was pressurized. *Id.*

Boulind-Yeung explained at the hearing that in order to determine the material of underground piping, inspectors may (1) conduct a visual inspection that involves an examination of "both ends," i.e., the product piping "coming into the pump dispensers" and "the turbine sump end at the other end of the pipe," Tr. 61; (2) obtain documentation related to the installation of the UST system, such as paid invoices and warranty paperwork, Tr. 62; or (3) obtain "a testing report from a corrosion protection tester, like a conductivity test," Tr. 62-63. With regard to her belief that piping material at the Facility was made of steel, Boulind-Yeung relied upon her visual observations, noting in her report that "[o]nly steel with a rubber gasket [was] observed in the turbine sumps." CX-5 at 5; *see also* Tr. 59-61, CX-6 at 10. She further noted in her report that because of rust present in Tank 1's sump, she was able to observe "that the steel line had some threading just before it disappeared into the gasket." CX-5 at 5. She also recorded her observations of "steel flexes" in the "dispenser . . . on each of the three lines." CX-5 at 5. She explained at the hearing that she could not see what the "metal flex connector was screwed into, so what it was transitioning to, whether it was transitioning to fiberglass or steel." Tr. 61, CX-5 at 5. However, she confirmed that of "all the product piping that [she] could see, there was none of it that was made of a noncorrodible material, so [she] had every indication in believing that it was galvanized steel." Tr. 88.

Boulind-Yeung further explained at the hearing that two of the pressurized USTs at the Facility were connected by a siphon line and "manifolded together," such that the tanks contained the same product and the fuel was dispensed at the same rate. Tr. 53-54. She explained that with pressurized systems involving "manifolded tanks with a siphon line," the siphon line "will contain product all the time as long as the system is pressurized and there's fuel in the system." Tr. 54-55. She then confirmed that siphon lines associated with fully-buried USTs are also underground and, thus, in contact with the ground. Tr. 55. Finally, she testified that if a siphon line corrodes to the point where it is compromised, a fuel leak could occur at any time fuel is in the system, regardless of whether fuel is being dispensed. Tr. 55-56.

At the conclusion of her inspection in 2012, Boulind-Yeung identified several outstanding issues, including the suspicion of underground steel piping at the Facility and the need for cathodic protection of the piping. Tr. 64. She explained to Respondent Mr. Washines that "EPA would need either assurances signed off by a CP [corrosion protection] expert that the entire product piping . . . was protected or isolated from the soil or that a CP system had been added with passing test results." CX-5 at 5. She explained further that, having discussed the matter with one such expert, she understood there to be a number of options available to Respondents, like "digging one hole right next to the sump to see what's there & then proceed or to install a dielectric union at both ends to isolate the piping from the electrical system & installing galvanic anodes." *Id.* Boulind-Yeung suggested to Respondent Mr. Washines that he obtain bids from at least one contractor for the necessary work and discuss their knowledge concerning installations. *Id.*, Tr. 64. Boulind-Yeung characterized their discussion as "a cordial exchange as far as next steps, getting documentation to us, and contacting contractors to investigate the cathodic protection issue," and she noted Respondent Mr. Washines' assurances that he would try to remedy the issue. Tr. 91.

On February 5, 2013, Respondents hired Pacific Environmental Services Company to investigate the piping at the Facility, among other tasks. Tr. 65, 196-200. As part of the investigation, a cathodic protection test was performed on the siphon line. JX-1 ¶ (I)(25). The investigation revealed that while the other piping at the Facility consisted of fiberglass, the siphon line connecting the manifolded USTs was indeed made of steel and in direct contact with the ground and that it lacked cathodic protection. JX-1 ¶ (I)(25), Tr. 65-66. Soon after, on February 13, 2013, Respondents remedied the lack of cathodic protection on the steel siphon line by having a sacrificial anode installed on the siphon line to provide the required cathodic protection.[18] JX-1 ¶ (I)(27), Tr. 66, 196-201, CX-11, CX-13.

PRINCIPLES OF LAW APPLICABLE TO LIABILITY

A. Burden of Presentation and Persuasion

The Rules of Practice provide:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a). Further, each matter of controversy shall be decided upon a preponderance of the evidence. 40 C.F.R. § 22.24(b).

B. Liability

Codified at 42 U.S.C. §§ 6991 through 6991m, Sections 9001 through 9014 of RCRA describe the regulation of underground storage tanks. Specifically, Section 9003(a) of RCRA directs the Agency to promulgate release detection, prevention, and correction regulations applicable to all owners and operators of USTs, as may be necessary to protect human health and the environment. 42 U.S.C. § 6991b(a). At a minimum, such regulations were required to include the following requirements applicable to all USTs:

> (1) 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; (2) requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing or comparable system;

[18] At the hearing, Respondent Mr. Washines was asked why he waited until February 2013 to have this work performed. Tr. 200-01. He responded that "the biggest issue was being able to pay for the work to be done. We just didn't have the money at the time. . . .[T]he way we got it, got the financing to pay for this was we had to mortgage her [his wife's] home." Tr. 201. Despite this comment and others implying a possible lack of finances, *see, e.g.*, Tr. 184, Respondents did not assert a claim of an inability to pay the proposed penalty.

> (3) requirements for reporting of releases and corrective action taken in response to a release from an underground storage tank; (4) requirements for taking corrective action in response to a release from an underground storage tank; (5) requirements for the closure of tanks to prevent future releases of regulated substances into the environment; and (6) requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank.

42 U.S.C. § 6991b(c). Section 9003(a) of RCRA also directs the Agency to promulgate performance standards for new underground storage tanks pertaining, at a minimum, to the design, construction, installation, release detection, and compatibility of such tanks. 42 U.S.C. § 6991b(e).

Pursuant to this authority, the Agency promulgated regulations at 40 C.F.R. Parts 280-282. Among other requirements, these regulations impose duties related to the design, construction, installation, and notification for UST systems, as found in 40 C.F.R. Part 280, Subpart B. The regulations also distinguish between the technical requirements pertaining to "new UST systems," as found in 40 C.F.R § 280.20, and the technical requirements pertaining to "existing UST systems," as found in 40 C.F.R. § 280.21.

As to the design, construction, and installation of new UST systems, the regulations specify that "[i]n order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements." 40 C.F.R. § 280.20. Distinct requirements apply to tanks, *see* 40 C.F.R. § 280.20(a), and to piping, *see* 40 C.F.R. § 280.20(b). In general, "piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory." 40 C.F.R. § 280.20(b). These regulations then specify that, as opposed to fiberglass-reinforced plastic piping, steel piping must be protected from corrosion, or cathodically protected, in the following manner:

> (i) The piping is coated with a suitable dielectric material; (ii) Field-installed cathodic protection systems are designed by a corrosion expert; (iii) Impressed current systems are designed to allow determination of current operating status as required in § 280.31(c); and (iv) Cathodic protection systems are operated and maintained in accordance with § 280.31 or guidelines established by the implementing agency.

40 C.F.R. § 280.20(b)(2).

The regulations governing the operation and maintenance of corrosion protection for USTs, found in 40 C.F.R. Part 280, Subpart C, General Operating Requirements, provide that "[a]ll owners and operators of steel UST systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented for as long as the

UST system is used to store regulated substances." 40 C.F.R. § 280.31. The regulations further provide:

> (a) All corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.
>
> (b) All UST systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:
>
> > (1) *Frequency.* All cathodic protection systems must be tested within 6 months of installation and at least every 3 years thereafter or according to another reasonable time frame established by the implementing agency; and
> >
> > (2) *Inspection criteria.* The criteria that are used to determine that cathodic protection is adequate as required by this section must be in accordance with a code of practice developed by a nationally recognized association.
> >
> > * * *
>
> (c) UST systems with impressed current cathodic protection systems must also be inspected every 60 days to ensure the equipment is running properly.
>
> (d) For UST systems using cathodic protection, records of the operation of the cathodic protection must be maintained (in accordance with § 280.34) to demonstrate compliance with the performance standards in this section. These records must provide the following:
>
> > (1) The results of the last three inspections required in paragraph (c) of this section; and
> >
> > (2) The results of testing from the last two inspections required in paragraph (b) of this section.

40 C.F.R. § 280.31.

C. Definitions

Certain terms are defined by RCRA and/or the implementing regulations, in pertinent part, as set forth below.

The statutory provisions of RCRA governing USTs provide that the term *person* has the same meaning as provided in 42 U.S.C. § 6903(15), except that such term includes a consortium, a joint venture, and a commercial entity, and the United States Government. 42 U.S.C. §

6991(5). In turn, the term *person* is defined at 42 U.S.C. § 6903(15) as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. § 6903(15). Similarly, the regulations promulgated by the Agency define the term *person* as "an individual, trust, firm, joint stock company, federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. 'Person' also includes a consortium, a joint venture, a commercial entity, and the United States Government." 40 C.F.R. § 280.12.

Operator means any person in control of, or having responsibility for, the daily operation of the UST at issue. 42 U.S.C. § 6991(3); 40 C.F.R. § 280.12.

In the case of USTs in use on November 8, 1984, or brought into use after that date, *owner* means any person who owns an UST used for the storage, use, or dispensing of regulated substances. 42 U.S.C. § 6991(4)(A); 40 C.F.R. § 280.12.

Underground storage tank means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. 42 U.S.C. § 6991(10); 40 C.F.R. § 280.12.

The term *regulated substance* includes "petroleum," which is defined to include crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure." 42 U.S.C. § 6991(6), (7)(B); 40 C.F.R. § 280.12. The term *regulated substance* "includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons . . . , such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils." 40 C.F.R. § 280.12.

Release means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an UST into ground water, surface water, or subsurface soils. 42 U.S.C. § 6991(8); 40 C.F.R. § 280.12.

UST system, or *tank system*, means "an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any." 40 C.F.R. § 280.12.

New tank system means "a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988." 40 C.F.R. § 280.12. Conversely, an *existing tank system* means "a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988." *Id.*

Connected piping means "all underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow." 40 C.F.R. § 280.12.

Cathodic protection is "a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current." 40 C.F.R. § 280.12.

Operational life refers to "the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under Subpart G." 40 C.F.R. § 280.12.

ANALYSIS AND CONCLUSIONS OF LAW AS TO LIABILITY

As previously addressed in this decision, Respondents have conceded liability as to Violation 1, Counts 1 through 4, and Violation 3, Counts 7 through 9, as alleged in the Amended Complaint. *See generally* JX-1. Consequently, the following discussion focuses only on that which remains in dispute, namely alleged Violation 2, Counts 5 and 6.

A. Count 5 – Failure to Equip Siphon Line with Cathodic Protection

Count 5 of the Amended Complaint charges Respondents with a violation of 40 C.F.R. § 280.20 from at least May 1, 2009, through February 13, 2013, based upon Respondents' alleged failure to properly equip the steel siphon line at the Facility with cathodic protection. As previously noted, the regulations at 40 C.F.R. § 280.20 establish Performance Standards for New UST Systems, and subsection (b)(2) specifically imposes a duty to protect from corrosion "piping that routinely contains regulated substances and is in contact with the ground" and provides a specific manner in which piping that is constructed from steel must be cathodically protected. This duty, as well as others contained within 40 C.F.R. § 280.20, are required of "all owners and operators of new UST systems." 40 C.F.R. § 280.20. While the facts underlying the violation alleged in Count 5 do not appear to be in dispute, Respondents oppose liability based upon a legal question, namely the applicability of 40 C.F.R. § 280.20 to them. In particular, Respondents dispute whether they, as successive owners and/or operators of the UST systems at the Facility, were under an obligation to adhere to the Performance Standards for New UST Systems as set forth in 40 C.F.R. § 280.20(b)(2).

Arguments of the Parties

Complainant argues that it has met its burdens of production and persuasion in demonstrating that Respondents are liable for failing to protect from corrosion piping that routinely contains regulated substances and is in contact with the ground, as required by 40 C.F.R. § 280.20(b). Compl. Post-Hrg Br. at 7, 14-15. With respect to the applicability of that regulatory provision only to "new tank systems," Complainant argues that Respondents have admitted and stipulated to each component of the regulatory definition of that phrase – namely, that Respondents are the owners and/or operators of three "tank systems" that are "used to contain an accumulation of regulated substances" and that the tank systems were installed in 1990, after the regulatory benchmark of December 22, 1988. *Id.* at 8 (citing various paragraphs of the Amended Answer and Joint Stipulations). Thus, Complainant maintains, Respondents'

UST systems are "new tank systems" within the meaning of that term as defined by 40 C.F.R. § 280.12. Compl. Post-Hrg Br. at 8.

Complainant contends that its position that Respondents are subject to the performance standards for new UST systems found at 40 C.F.R. § 280.20 is supported by a plain reading of the introductory language of that section, which states as follows: "In order to prevent releases due to structural failure, corrosion, or spills and overfills *for as long as* the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements." Compl. Post-Hrg Br. at 8 (quoting 40 C.F.R. § 280.20 (emphasis added by Complainant)). Based upon that language, Complainant contends, the performance standards for new UST systems are designed to prevent structural failure and corrosion throughout the "operational life" of the new UST system, as that term is defined by the regulations, and that the performance standards apply to all owners and operators of the new UST systems. Compl. Post-Hrg Br. at 8-9. Noting that Respondents have admitted to being owners and/or operators of the UST systems at the Facility and to the UST systems having been operational since at least May 1, 2009, Complainant argues that Respondents never properly closed the UST systems pursuant to 40 C.F.R. Part 280, Subpart G, and that they thus "remain in their operational life" and subject to the performance standards at 40 C.F.R. § 280.20. *Id.* at 9 (citing the Joint Stipulations).

Respondents oppose this position,[19] arguing that the UST systems at the Facility are not "new tank systems" covered by the performance standards of 40 C.F.R. § 280.20. Respondents' Prehearing Brief ("Resp. Pre-Hrg Br.") at 2-7. To advance this argument, Respondents point to the regulatory definition of the phrase "new tank system," which states as follows: "New tank system means a tank system that *will be used* to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988." *Id.* at 3 (quoting 40 C.F.R. § 280.12 (emphasis added by Respondents)). By using the future tense, Respondents argue, the definition covers only tanks that are in the process of initial installation by owners or operators and that have not yet been used to contain regulated substances. Resp. Pre-Hrg Br. at 3. Respondents contend that this "plain meaning" is bolstered by the use of the term "new tank system" only in Subpart B of the regulations, which governs the design, construction, and installation of USTs, as a means of distinguishing the future installation of UST systems after December 22, 1988, from those that were installed prior to that date for which upgrades are required for compliance. *Id.* According to Respondents, because the term is not used in Subpart C, which establishes general operating requirements, "new tank systems" are only regulated as such during the system's initial installation under Subpart B. *Id.* at 3-4. Respondents also point to other sources—such as the decisions of the Environmental Appeals Board ("Board" or "EAB") in *Euclid of Virginia, Inc.*, 13 E.A.D. 616 (EAB 2008), and *Norman C. Mayes*, 12 E.A.D. 54, 57 (EAB 2005), the "Musts for USTs" document, and other sections of 40 C.F.R. Part 280—for support that the initial installation of an UST system is the critical point of compliance with respect to the performance standards at 40 C.F.R. § 280.20. Resp. Pre-Hrg Br. at 3-6.

Based upon their interpretation of the definition of "new tank systems," Respondents argue that "the only logical construction of the term 'all owners and operators' in 40 C.F.R. §

[19] As previously noted, Respondents did not file a post-hearing brief in this matter. However, the arguments that they advanced pre-hearing and at hearing have been considered in rendering this decision.

280.20 is all owners and operators *who install tank systems*." Resp. Pre-Hrg Br. at 4 (emphasis added by Respondents). Noting the absence of any express requirement in the regulations that a successive owner or operator retrofit an UST system in order to comply with a performance standard set forth at 40 C.F.R. § 280.12 if a previous owner or operator failed to do so at the time of installation, Respondents argue that only the owners and operators who install "the entire tank systems are responsible for complying with the regulations for meeting performance standards in that particular section." *Id.* at 4-5, 7. Thus, Respondents contend, the previous lessee of the Facility who installed the USTs in 1990 is solely responsible for complying with the requirements of 40 C.F.R. § 280.20, and Respondents cannot be found to be "owners or operators of new tank systems." *Id.* at 7.

Complainant counters these arguments by contending that they lack support and are inconsistent with the plain language of 40 C.F.R. § 280.20, the context of the performance standards within 40 C.F.R. Part 280, and the EAB's decision in *Carroll Oil Company*, 10 EAD 635 (EAB 2002). Compl. Post-Hrg Br. at 9-13. In particular, Complainant points to the language of 40 C.F.R. § 280.20 specifying that "all owners and operators of new UST systems" are required to comply with the requirements contained therein to refute the argument that Respondents are absolved from that duty simply because they were not the owners or operators to design, construct, or install the UST systems at the Facility. *Id.* at 9. Complainant argues, "in order to effectuate the plain meaning of 40 C.F.R. § 280.20, both original owners and all subsequent owners of USTs must be bound by the performance standards. To hold otherwise would not only vitiate the purpose of the entire section, but ignore the key phrase: 'all owners and operators.'" *Id.* at 11-12. Complainant further contends that the distinction drawn by the regulations between "new tank systems" and "existing tank systems" is "relevant only for determining to which set of performance standards the owners and operators must adhere, not whether owners and operators of UST systems are subject to regulation at all." *Id.* at 12 (citing 40 C.F.R. §§ 280.20, 280.21). Additionally, Complainant argues that "Respondents' interpretation ignores the operational requirements within 40 C.F.R. § 280.20, which can only be satisfied *after* the new tank system has been placed into service"[20] and reinforce that "the performance standards in 40 C.F.R. § 280.20 remain in effect during the operational life of the UST system." *Id.* at 10-11.

As further support for its position, Complainant looks to *Carroll Oil Company*, 10 EAD 635 (EAB 2002), in which the EAB explained:

> [T]he UST regulations require that owners and operators of USTs installed after December 22, 1988, ("new UST systems") adhere to certain "performance standards." For "existing UST systems" (those whose installation began before the above date), the regulations require that owners and operators either meet the performance standards for new USTs or upgrade their USTs not later than December 22, 1998. Upgrading can be accomplished by adding to USTs certain protective features, such as linings for tanks and pipes, corrosion protection, and equipment to prevent overspilling and overfilling.

Id. at 639 (internal citations omitted). According to Complainant, "the EAB's reading of 40 C.F.R. § 280.20 makes clear that owners and operators of new UST systems are bound to

[20] As examples, Complainant cites 40 C.F.R. §§ 280.20(c)(2)(ii), 280.31(d), and 280.71(c).

observance of the performance standards for new UST systems, not merely that a new UST system must meet the performance standards upon installation." Compl. Post-Hrg Br. at 12-13.

Discussion of Liability as to Count 5

As previously discussed, the regulations at 40 C.F.R. § 280.20(b)(2) impose a duty to protect from corrosion "piping that routinely contains regulated substances and is in contact with the ground" and provides a specific manner in which piping that is constructed of steel must be cathodically protected. This duty, as well as others contained within 40 C.F.R. § 280.20, is required of "all owners and operators of new UST systems." 40 C.F.R. § 280.20. Thus, in order to establish Respondents' liability for a violation of 40 C.F.R. § 280.20 with respect to the siphon line as charged in Count 5, Complainant is required to demonstrate that during the alleged period of violation (1) Respondents were "owners" or "operators" of the UST systems at the Facility; (2) the UST systems were "new tank systems"; (3) the associated siphon line routinely contained regulated substances and was in contact with the ground; (4) it was constructed of steel; and (5) it lacked adequate cathodic protection.

The parties have stipulated to the following elements that support the charged violation: that during the relevant time period, Respondents were owners and/or operators of the USTs at the Facility, JX-1 ¶¶ (I)(2) and (3); that each of the three USTs at the Facility—including the connected UST piping consisting of the siphon line and pressurized lines, each of which is in contact with the ground—routinely contained gasoline, a type of petroleum and a regulated substance, JX-1 ¶¶ (I)(7), (8), (17), and (18); that the siphon line was constructed of bare steel, JX-1 ¶ (I)(20); and that until February 13, 2013, this steel siphon line lacked cathodic protection, JX-1 ¶ (I)(26). In dispute, however, is whether the UST systems at the Facility were "new tank systems" during that period, thus subjecting Respondents to the performance standards for new UST systems as set forth in 40 C.F.R. § 280.20.

In order for the requirements of 40 C.F.R. § 280.20 to apply to Respondents, the UST systems at the Facility must satisfy the regulatory definition of "new tank systems." First, a "UST" means any one or combination of tanks, including connected underground piping, that is used to contain an accumulation of regulated substances. 42 U.S.C. § 6991(10); 40 C.F.R. § 280.12. The term "new tank system" is then defined as "a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988." 40 C.F.R. § 280.12. Respondents dispute that the UST systems at the Facility fall within this definition. In summary, Respondents contend that the regulatory phrase "will be used" is controlling and refers to a system that "has not yet been used to contain regulated substances." Resp. Pre-Hrg. Br. at 3. They argue that "[a] natural reading of this definition is that it refers to tanks that are in the process of initial installation by owners or operators" and that "this plain meaning is bolstered by the regulation's overall context," among other considerations. *Id.*

When interpreting a regulation, this Tribunal is guided by the approach articulated by the Board in *Howmet Corp.*, 13 E.A.D. 272 (EAB 2007), as follows:

> As we have explained in previous cases, "[w]hen construing an administrative regulation, the normal tenets of statutory construction are generally applied." *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (citing *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993)). "The plain meaning of words is ordinarily the guide to the definition of a regulatory term." *Id.* (citing *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993)). "Additionally, the regulation must, of course, be 'interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" *Id.* (quoting *Sec. of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990)). Moreover, in interpreting a regulation, we examine not just the provision at issue, but the entire regulation. *In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant*, 11 E.A.D. 126, 141 (EAB 2003) ("The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.") (quoting *Food & Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). *See generally In re Harpoon P'ship*, 12 E.A.D. 182, 195-96 (EAB 2005), *appeal dismissed*, *Harpoon P'ship v. EPA*, No. 05-2806 (7th Cir., Aug. 24, 2005). *Cf. United States Nat'l Bank of Or. V. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law . . . .") (citations omitted). Moreover, just as legislative history can be helpful in interpreting a statute, regulatory history, such as preamble statements, assists us in interpreting regulations. *See In re Morton L. Friedman & Schmitt Const. Co.*, 11 E.A.D. 302, 328 (EAB 2004), *aff'd*, *Friedman v. United States Environmental Protection Agency*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb 25, 2005). Last, we give greater deference to a position when it is supported by Agency rulings, statements, and opinions that have been consistent over time. *See In re Lazarus, Inc.*, 7 E.A.D. 318, 352-53 (EAB 1997).

Howmet, 13 E.A.D. at 282.

Applying these rules of construction here, I first look to the plain language of the regulatory definition of "new tank system." This exercise reveals no ambiguity. As Respondents have urged, it is necessary to examine language in context, meaning here to examine the definition of the term "new tank system" in the context of the entire sentence that defines the term, rather than simply a phrase, such as "will be used," in isolation from the rest of the definition.

Based on my reading of the definition of "new tank system," I note two grammatical clauses that are contained within the sentence. The first clause provides as part of the definition "a tank system that will be used to contain an accumulation of regulated substances." The second clause then provides "and for which installation has commenced after December 22, 1988. (See also 'Existing Tank System.')." The phrase "that will be used" describes the purpose for which a tank system is to be used, namely to contain an accumulation of regulated substances. The second clause, by inclusion of the words "and for which," refers back to the subject of "a tank system" and then interjects a temporal element, namely "after December 22, 1988," that clearly serves as the date by which to distinguish between a "new tank system" and an "existing tank system" for regulatory purposes. The reference in the definition to "See also

'Existing Tank System'" reinforces this distinction. In contrast to a "new tank system," an "existing tank system" is defined as "a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988." 40 C.F.R. § 280.12. These definitions reflect that if a tank system is installed and used to contain an accumulation of regulated substances *after* December 22, 1988, it is regulated as a "new tank system" and subject to the performance standards for new UST systems at 40 C.F.R. § 280.20. Conversely, if a tank system is used to contain an accumulation of regulated substances or installation of the tank system is begun *on or before* December 22, 1988, it is regulated as an "existing tank system" and subject to 40 C.F.R. § 280.21, which requires existing UST systems either to comply with the performance standards for new UST systems, to be upgraded in accordance with the standards set forth therein, or to be permanently closed, no later than December 22, 1998. 40 C.F.R. § 280.21(a).

While I find the plain language of the regulatory definitions to be clear and unambiguous, the regulatory history of the Agency's final rule that led to the codification of those definitions, titled "Underground Storage Tanks; Technical Requirements" and published on September 23, 1988,[21] lends further support. The preamble to this final rule ("Preamble") articulates the intent and purpose of 40 C.F.R. Part 280 generally, and the definitions of "new tank system" and "existing tank system" specifically. In this regard, the Preamble states, in relevant part, that "[t]he following sections contain the revised definitions, the rationale for the changes, and the Agency's interpretation of these terms." 53 Fed. Reg. 37,082, 37,113-14 (Sept. 23, 1988).[22] As to the definition of "new tank system," the Preamble provides the following:

> (16) New Tank System. "New tank system" means a tank system that will be used to contain an accumulation of regulated substance and for which installation has commenced after the effective date of this regulation.
>
> Existing tanks that are converted after the effective date of this regulation from tanks storing non-regulated substances to tanks storing regulated substances are considered new UST systems and are required to meet new tank standards.

Preamble at 78. Use of the future tense within the phrase "will be used" in the context of the publication date of the final rule—September 23, 1988—and the effective date of the final rule months later—December 22, 1988—was appropriate at the time of publication and a clear reference to actions taken after the final rule became effective—namely, the installation and use of the subject tank to contain an accumulation of regulated substances—which would distinguish that tank system as "new" and subject it to the performance standards at 40 C.F.R. § 280.20. Meanwhile, a tank system that on or before the effective date of the final rule was already used to store an accumulation of regulated substances, or the installation of which had been started and it was intended to be used for that purpose, would be treated as "existing" and subject to the requirements of 40 C.F.R. § 280.21.

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[21] *See* 53 Fed. Reg. 37,082 (Sept. 23, 1988) (codified at 40 C.F.R. Part 280). As noted above, the regulations were revised in other respects on July 15, 2015. *See* 80 Fed.Reg. 41,566 (July 15, 2015).

[22] For ease of reference, subsequent citations to the Preamble will refer to the paginated version that is publically available on the Internet at https://www.epa.gov/sites/production/files/2014-09/documents/40cfr280preamble.pdf.

As explained in the Preamble, the distinction between "new tank systems" and "existing tank systems" is most significant with respect to the time by which owners and operators of UST systems are required to comply with corrosion protection requirements. *See, e.g.*, Preamble at 24 ("Although all federal requirements are in effect immediately for new tanks, owners and operators will have additional time to upgrade existing tanks systems to the corrosion protection standard for new UST systems . . . ."); Preamble at 75 ("[T]he definition of 'existing tank system' is only relevant to the determination of *when* certain requirements must be met, *not which* requirements apply.") (emphasis added).

Consistent with the Agency's intent and interpretation as set out in the Preamble, the "Musts for USTs" compliance assistance document, written in plain language and accompanying Respondents' Business Lease, states: "If you install an UST after December 22, 1988, it must meet the **requirements for new USTs** concerning correct installation, leak detection, and spill, overfill, and corrosion protection." CX-35 at 4 (emphasis in original).

In defending themselves against liability for Count 5, Respondents do not dispute that an UST system is considered a "new tank system" for regulatory purposes if installation of the system commences after December 22, 1988. They focus, however, on the "will be used" segment of the regulatory definition of "new tank system" and maintain that a UST system is regulated as a "new tank system" only for so long as installation is ongoing and the system has yet to be used to contain an accumulation of regulated substances. Thus, in the context of the violation charged in Count 5, Respondents argue, in essence, that the duty to equip piping with corrosion protection is a discrete obligation that occurs, or fails to occur, by the time installation of the UST system is complete and it first contains an accumulation of regulated substances. At that point, Respondents appear to argue, the UST system ceases to be a "new tank system" and only the owner or operator who installed the system may be held liable for the failure to equip the associated piping with corrosion protection. As explained below, this position is unavailing.

First, to argue that a "new tank system" ceases to be regulated as such once installation is complete and it is used to contain an accumulation of regulated substances ignores the regulations that apply to "new UST systems" *after* the new tank system has been placed into service. For example, the performance standards set forth at 40 C.F.R. § 280.20(c) require owners and operators of new UST systems to "use the . . . spill and overfill prevention equipment" described therein, subject to certain exceptions, such as if "[t]he UST system is filled by transfers of no more than 25 gallons at one time." 40 C.F.R. § 280.20(c)(1), (2)(ii). As argued persuasively by Complainant:

> This makes it clear that 40 C.F.R. § 280.20(c)(2)(ii) can regulate the activity of owners and operators of new UST systems during the operational life of the new UST system, and demonstrates that 40 C.F.R. § 280.20 can continue to have regulatory effect on owners and operators well after the design, construction, and installation of a new UST system is complete.

Compl. Post-Hrg. Br. at 10.

The position advanced by Respondents, if adopted, would also frustrate the objective of the statute and regulations. The Agency discussed in the Preamble the special challenges in developing effective regulation of USTs:

> First, the regulated universe is immense, including over 2 million UST systems estimated to be located at over 700,000 facilities nationwide. Second, 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. Third, most of the facilities to be regulated are owned by very small businesses, essentially "Mom and Pop" enterprises not accustomed to dealing with complex regulatory requirements. Fourth, numerous technological innovations and changes are now underway in various sectors of the UST system service community.

Preamble at 8. Also considered in development of the final rule was an EPA-sponsored study, "Causes of Release from UST System," that was made available for public comment in December 1987. *Id.* at 14. This study revealed that "piping releases occur twice as often as tank releases"; that "[c]orrosion, poor installation techniques and workmanship, accidents, and natural events . . . are the four major causes of failure for piping"; and that "[w]hen piping fails, pressurized systems pose a significant added threat of sudden, large releases." *Id.*

The Preamble notes that pressurized piping systems, like the systems at the Facility, are "used in high-volume applications where many dispensers are fed from one tank" and "reportedly are used at about 95 percent of new retail motor fuel system installations." Preamble at 15-16. Because of their design, releases from pressurized piping systems have the potential to be "catastrophic." *Id.* at 16. "If a delivery line is breached, free product is released until the pressure in the pipe equals the pressure outside the pipe," which can result in releases of large amounts of product quickly into the environment. *Id.* at 16. Further noted was that "pressurized piping [is] often damaged by external corrosion" and that "[c]athodic protection of steel piping would significantly reduce corrosion failures." *Id.* at 16.

The final rule thus established "comprehensive requirements for the management of a wide range of UST systems" that were "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." Preamble at 24. Given the "large number of tank owners and tank systems," the Agency recognized the need for a "phase-in approach" with respect to existing tank systems to afford owners and operators of such systems additional time to upgrade the existing tank systems to the standards applicable to new UST systems. *Id.* In doing so, the Agency rejected the alternative approach of not requiring existing tank systems to be upgraded or replaced as "simply unacceptable because the Agency has concluded that UST owners probably would not upgrade if it is not required." *Id.* at 37. The Agency further stated:

> In order to ensure human health and the environment are protected, the Agency has established a clear national goal of upgrading all substandard UST systems within 10 years that rejects a purely voluntary approach as inadequate. This goal is

> intended to prompt all UST owners and operators to plan for and undertake the upgrading steps that are needed to protect human health and the environment.

Id. at 37. The foregoing language clearly reflects the Agency's objective to minimize the number of substandard UST systems operating in this country. Further, as has been argued persuasively by Complainant, the Agency's conclusion is supported by the introductory language of 40 C.F.R. § 280.20, which states that "all owners and operators of new UST systems must meet the following requirements." The Agency's objective would be thwarted by Respondents' interpretation of the regulations, which would, in essence, discourage any successive owners and operators of UST systems from adding corrosion protection to any portion of their systems found to be lacking in that regard by rendering the performance standards requiring the installation of corrosion protection unenforceable against them.

Furthermore, contrary to Respondents' assertions, the application of "all owners and operators" is not qualified or limited to a subset of only those owners and operators who installed the tank systems. Rather, the regulatory language broadly imposes the requirements upon "*all* owners and operators of new UST systems." 40 C.F.R. § 280.20 (emphasis added). To construe the regulation as urged by Respondents would result in the creation of an entire class of owners and operators, who solely by virtue of successive ownership or operation, would be exempt from regulatory compliance. Not only is such a position at odds with the Agency's authorization under RCRA to promulgate regulations concerning release detection, prevention, and correction that are applicable to all owners and operators of USTs as necessary to protect human health and the environment, but it also defies the regulatory purpose of 40 C.F.R. § 280.20 "to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances . . . ." 40 C.F.R. § 280.20. As Complainant has argued, the plain meaning of 40 C.F.R. § 280.20 clearly applies to both original owners and operators and all subsequent owners and operators of new tank systems, all of whom are bound by those performance standards. "To hold otherwise would not only vitiate the purpose of the entire section, but ignore the key phrase: 'all owners and operators.'" Compl. Post-Hrg. Br. at 11-12. Accordingly, I am not persuaded by Respondents' contention that the term "all owners and operators" in 40 C.F.R. § 280.20 is meant to be construed as "all owners and operators who install tank systems," thereby making the regulatory provision inapplicable to them as successive owners and operators.

I also am not swayed by Respondents' reliance upon the Board's decisions in *Euclid* and *Mayes* to support their arguments. As Respondents correctly observe, the Board has distinguished between UST systems treated as "new" and those treated as "existing" in the following manner:

> "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 release of regulated substances, or, if not upgraded, permanently closed.

Euclid, 13 E.A.D. at 624; *see also Mayes*, 12 E.A.D. at 57. Respondents point to the Board's statement concerning "new" UST systems as indicative that the critical point of compliance with the performance standards is the initial installation of the tank system. Resp. Pre-Hrg Br. at 4. While I agree that the Board is clear as to the obligation of owners and operators to incorporate protective technologies at the time of installation, I find that their statement hardly suggests that the failure to comply at the time of installation simply absolves successive owners and operators from the responsibility to do so after installation is complete. The Board's discussion of "continuing obligations" in *Mayes* lends support to this conclusion.

As part of that decision, the Board considered whether the charges against the respondent for failure to notify authorities of the existence of USTs on his property and perform release detection on the USTs in accordance with the regulations were brought more than five years after the violations had occurred and were thus barred by the general federal statute of limitations. *Mayes*, 12 E.A.D. at 62-73. In the context of that determination, the Board found the UST notification and release detection requirements to be "continuing obligations" that operated until those obligations had been satisfied. *Id.* at 69-73. To evaluate the nature of the notification and release detection requirements, the Board engaged in an analysis of the statutory language serving as a basis for the violations at issue, the applicable regulations, and the legislative and regulatory histories as a means of "discerning the intent and purpose of the particular legal requirements in question." *Id.* at 65-66. The Board advised that, in the course of that analysis, "[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature." *Id.* (quoting *Lazarus, Inc.*, 7 E.A.D. 318, 366-67 (EAB 1997)). In determining that the notification and release detection requirements were continuing in nature, the Board focused in particular on "the clear evidence of a congressional ban on further unregulated uses of UST systems in this country." *Id.* at 67. Notably, with respect to the release detection requirements, the Board held:

> These provisions [imposing the release detection requirements] 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 . . . is plainly a condition on the use of USTs, as the UST must be closed if release detection is not present.

Id. at 73 (internal citations omitted).

In the present proceeding, Respondents have failed to advance any argument suggesting a distinction between the performance standards set forth at 40 C.F.R. § 280.20 and the requirements at issue in *Mayes*. As already discussed, the policy objectives of the applicable statutory and regulatory provisions weigh in favor of subjecting Respondents to the requirement to equip the piping at the Facility with corrosion protection. Further, the introductory language of 40 C.F.R. § 280.20 reflects the intent of the performance standards to protect a UST system from corrosion "for as long as the UST system is used to store regulated substances." By

referring to the operational lifetime of the system, the language connotes continuity and suggests the continuing nature of those standards. Accordingly, I find Respondents' reliance upon *Mayes* to support their position to be misplaced.

Based on the foregoing discussion, I conclude that an UST system installed after December 22, 1988, is regulated as a "new tank system" during the entire course of its operations, with the associated regulations applying to all owners and operators of the given system. Thus, Respondents are subject to the regulations at 40 C.F.R. § 280.20. As owners and operators of a new UST system — that is, a tank system that was installed after December 22, 1988 — Respondents were under a duty to protect steel piping from corrosion. Despite notice of this obligation through published regulations, the Must for USTs compliance assistance document, and multiple site visits and inspections by EPA in 2006, 2009, and 2012, Respondents did not comply with the requirement to cathodically protect the steel piping of the siphon line until February 5, 2013.

In a further attempt to avoid liability, Respondents point to the actions of the previous operator who installed the tanks, as well as those of the Agency during the period leading up to the instant proceeding, as resulting in "substantial uncertainty about the siphon line's material construction" for which Respondents should not be held legally responsible. Resp. Pre-Hrg Br. at 9-12. Any such is argument is unpersuasive. A past owner or operator's lack of compliance with the UST regulatory requirements does not absolve Respondents, as current owners or operators of the USTs at the Facility, from their obligations under the law or from their duty to exercise due diligence with regulatory compliance of the existing UST systems. As to the actions taken by the Agency, I agree with Complainant's argument that "EPA's knowledge of Respondents' UST systems . . . is not a prerequisite to the applicability of RCRA or its implementing regulations." Compl. Post-Hrg. Br. at 16. The responsibility to comply with the regulations pertaining to the UST systems rests entirely with Respondents as the owners or operators of such systems, regardless of the Agency's efforts toward compliance assistance.

While Respondents' responsibility to comply with the law may not be divested to the Agency, the facts of this case reveal repeated efforts by the Agency, spanning several years, to facilitate Respondents' compliance with UST regulatory requirements prior to bringing this enforcement action.[23] Respondents were continually warned of the Agency's belief that the siphon line was galvanized steel and therefore required corrosion protection. In spite of such compliance assistance, Respondents failed to heed the warnings and concerns expressed by Agency personnel until 2013 when they achieved compliance by having a sacrifical anode installed on the steel siphon line on February 5, 2013. Accordingly, I conclude that the provisions of 40 C.F.R. § 280.20 are applicable to Respondents and that the preponderance of the evidence presented establishes that Respondents failed to equip the steel siphon line with cathodic protection, in violation of 40 C.F.R. § 280.20(b)(2), from at least May 1, 2009, through February 13, 2013.

B. Count 6 – Failure to Maintain and Operate Corrosion Protection System

[23] *See* CX-3 through CX-5, CX-18, CX-19, CX-21, CX-23, and CX-24.

Count 6 of the Amended Complaint charges Respondents with a violation of 40 C.F.R. § 280.31 from at least May 1, 2009, through February 13, 2013, based upon Respondents' alleged failure to properly maintain corrosion protection at the Facility with respect to the steel siphon line. As noted above, the regulations at 40 C.F.R. § 280.31 govern the operation and maintenance of corrosion protection for USTs and impose certain requirements on all owners and operators of steel UST systems with corrosion protection to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances. 40 C.F.R. § 280.31. One such requirement is set forth in subsection (a), which provides that "[a]ll corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground." 40 C.F.R. § 280.31(a). While the facts underlying the violation alleged in Count 6 do not appear to be in dispute, Respondents oppose liability for Count 6 based upon a legal question, namely the applicability of 40 C.F.R. § 280.31 to them. Specifically, Respondents dispute whether they were obligated to comply with 40 C.F.R. § 280.31 with respect to the siphon line until a "corrosion protection system" for the siphon line had been installed.

Arguments of the Parties

Relying upon the testimony of Boulind-Yeung for explanation of the term "corrosion protection system" as it is used in 40 C.F.R. § 280.31(a), Complainant argues that "the sole corrosion protection system on Respondents' steel UST systems was comprised of the three components of sti-P3® tanks: (1) dielectric coating on the tanks, (2) anodes on the tanks, and (3) isolation bushings to prevent electrical interference from the turbine." Compl. Post-Hrg. Br. at 18 (citing Tr. 37-38, CX-12, CX-13, and JX-1 ¶¶ (I)(14), (15)). Because the corrosion protection system failed to protect the steel siphon line from corrosion, Complainant argues, it "was not sufficient to continuously prevent corrosion of the metal components that routinely contain gasoline and were in contact with the ground." *Id.* (citing Tr. 38, 54-55, 176, 178). Complainant maintains that Respondents did not come into compliance until February 13, 2013, "when Respondents retrofitted the corrosion protection system for their steel UST systems by installing a sacrifical anode to provide corrosion protection for the siphon line." *Id.* (citing Tr. 138-39, 163, CX-13, JX-1 ¶ (I)(27), and Amended Answer at ¶ 1.13.) Thus, Complainant contends, Respondents are liable for violating 40 C.F.R. § 280.31 from at least May 1, 2009, through February 13, 2013. *Id.* at 19.

Respondents argue that they are not liable for the claimed violation of 40 C.F.R. § 280.31 "because the regulation did not apply to [them] or the USTs until a corrosion protection system was actually retrofitted for the steel siphon line piping," that is, until February 13, 2013. Resp. Pre-Hrg Br. at 7-8. According to Respondents, the term "all corrosion protection systems" as used in 40 C.F.R. § 280.31(a) refers only to "*existing* CP [corrosion protection] systems already installed on the USTs," which they did not have for the steel siphon line because this line was "outside the pre-engineered CP for those sti-P3® tanks." *Id.* at 8-9 (emphasis in original). Further, "[s]uch systems can only be operated and maintained for steel piping on a tank system if such a system has already been 'installed' pursuant to 40 C.F.R. § 280.20(b)." *Id.* Respondents argue, "Because there was no CP for the steel siphon line during the period before upgrading on

February 13, 2013, the Respondents could not have tested the line for CP during the period alleged in the [Amended] Complaint," and liability for failing to do so cannot attach. *Id.*

Discussion of Liability as to Count 6

As previously discussed, the regulations at 40 C.F.R. § 280.31 provide that "[a]ll owners and operators of steel UST systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances." 40 C.F.R. § 280.31. One such requirement is that "[a]ll corrosion protection systems . . . be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground." 40 C.F.R. § 280.31(a). Thus, in order to establish Respondents' liability for a violation of 40 C.F.R. § 280.31 with respect to the siphon line as charged in Count 6, Complainant is required to demonstrate that during the alleged period of violation (1) Respondents were "owners" or "operators" of the UST systems at the Facility; (2) the UST systems were steel and equipped with corrosion protection; (3) the associated siphon line routinely contained regulated substances and was in contact with the ground; (4) the siphon line was constructed of steel; and (5) the corrosion protection system was not operated and maintained to continuously provide corrosion protection to the siphon line.

The parties have stipulated to the following elements that support the charged violation: that during the relevant time period, Respondents were owners and/or operators of the USTs at the Facility, JX-1 ¶¶ (I)(2) and (3); that each of the three USTs at the Facility have a single wall, steel sti-P3® tank equipped with corrosion protection in the form of sacrifical anodes, JX-1 ¶¶ (I)(4), (14), and (15); that each of the three USTs at the Facility—including the connected UST piping consisting of the siphon line and pressurized lines, each of which is in contact with the ground—routinely contained gasoline, a type of petroleum and a regulated substance, JX-1 ¶¶ (I)(7), (8), (17), and (18); that the siphon line was constructed of bare steel, JX-1 ¶ (I)(20); and that until February 13, 2013, this steel siphon line lacked cathodic protection, JX-1 ¶ (I)(26). Further, the parties agree that all cathodic protection systems must be tested within six months of installation and at least every three years thereafter pursuant to 40 C.F.R. § 280.31(b)(1). JX-1 ¶ (I)(21). Notwithstanding these stipulations, Respondents contend that the requirements of 40 C.F.R. § 280.31(a)—namely, to operate and maintain a corrosion protection system—did not apply to them with respect to the siphon line for the period of the alleged violation because no corrosion protection system existed to maintain and operate until the steel siphon line was retrofitted with corrosion protection in the form of a sacrificial anode on February 13, 2013.

In weighing the arguments of the parties as to liability for Count 6, I first note that the term "corrosion protection system" is not defined by the regulations. At the hearing, however, testimony was elicited from Complainant's witnesses that, based upon their experience in the industry, they understand the term to refer to a system that is installed with USTs to prevent corrosion of each steel component of the UST system, including the tanks and piping. Tr. 103-04, 175-78. While this understanding of the meaning of "corrosion protection system" was not directly challenged at the hearing or otherwise during the course of this proceeding, Respondents advanced the argument in their prehearing brief that they were not under a duty to maintain a corrosion protection system with regard to the steel siphon line until a sacrificial anode had been

installed for it. Such an argument appears to presume that there are separate and distinct corrosion protections systems for tanks and for piping. I find no legal support for this position.

On the contrary, the regulations reflect that underground tanks and connected underground piping collectively comprise an "UST system" or "Tank system," as defined, and each component of the system requires cathodic protection if made of steel or metal. *See* 40 C.F.R. §§ 280.12, 280.20(a) and (b), 280.31(a). Because an "UST system" is defined to consist of an assemblage of multiple components, including both the tanks and piping, it stands to reason that a "corrosion protection system" was intended to be similarly construed as an assemblage of the cathodic protection required for each metal component of the UST system, including both the tanks and the piping. Thus, if one piece of the corrosion protection system is absent—such as here, where the USTs themselves were cathodically protected, but the steel siphon line was not—the system as a whole would be considered substandard. This interpretation is consistent with the intent and purpose of RCRA and, by extension, the applicable regulations, to "ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances." 40 C.F.R. § 280.31. The Preamble, which emphasizes the importance of corrosion protection of tanks and piping, also states that:

> [C]orrosion was found to be one of the common causes of release in existing underground tank and piping systems that are unprotected from corrosion. The consensus of experts in the field contacted by EPA indicates that the installation and proper operation and maintenance of corrosion protection systems can significantly reduce the incidence or volume of release due to corrosion.

Preamble at 101. If adopted, Respondents' position would, instead, permit circumvention of the regulatory requirements to install and then operate and maintain a corrosion protection system by simply delaying, perhaps indefinitely, implementation of such a system. In accordance with the foregoing discussion, I find Respondents' arguments to be unconvincing.

Having rejected Respondents' position, I find that, contrary to Respondents' claims that they had no corrosion protection system to maintain, the undisputed facts of this case reveal that Respondents did have a corrosion protection system in place through the installation of sti-P3® tanks, which, by design, provided corrosion protection to those tanks. *See* Tr. 37-38, CX-35 at 19, and JX-1 ¶¶ (I)(14) and (15). This corrosion protection, however, did not extend to the metal piping, namely the steel siphon line. *See* Tr. 37-38, 55, JX-1 ¶¶ (I)(23)(25), and (26). The regulations at 40 C.F.R. § 280.31 require that all corrosion protection systems continuously provide corrosion protection to the metal components of a steel UST system, including the piping, provided that the piping routinely contains regulated substances and is in contact with the ground. Here, Respondents failed to comply with this requirement when they failed to operate and maintain their existing corrosion protection system, which protected the tanks, to ensure that all of the metal components of the overall UST system, including the steel siphon line of the piping, also received proper corrosion protection. Thus, I conclude that Respondents violated 40 C.F.R. § 280.31 by failing to operate and maintain their corrosion protection system to include the steel siphon line of the UST system piping from May 1, 2009 to February 13, 2013.

PRINCIPLES OF LAW AND AGENCY GUIDANCE AS TO PENALTY

The Rules of Practice provide that upon determining that a violation occurred, "the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and "shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

Section 9006(d)(2) of RCRA states that any owner or operator of an UST who fails to comply with any requirement or standard promulgated under Section 9003 of RCRA "shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." 42 U.S.C. § 6991e(d)(2). In order to reflect inflation, the maximum allowable penalty has since been increased pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-358 to 1321-380 (codified at 31 U.S.C. § 3701 note). *See* Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340-46 (Dec. 11, 2008) (adjusting maximum penalties for inflation). Accordingly, for violations occurring after January 12, 2009, through December 6, 2013,[30] the Administrator may assess a civil penalty of up to $16,000 per tank per day of violation. *Id.* at 75,346.

In determining the appropriate civil penalty to assess for a violation of RCRA's UST provisions, Section 9006(c) of RCRA directs the Administrator to "assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6991e(c). The Administrator may also take into account "[t]he compliance history of an owner or operator" and "[a]ny other factor the Administrator considers appropriate."[31] 42 U.S.C. § 6991e(e).

In November of 1990, EPA issued OSWER Directive Number 9610.12, entitled "U.S. EPA Penalty Guidance for Violations of UST Regulations" ("Penalty Policy" at CX-36), in an effort to guide the calculation of civil penalties assessed under Section 9006 of RCRA. By Memorandum dated April 6, 2010, and entitled "Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009" ("Revised Matrices" at CX-37), the Agency adjusted the matrices contained in the Penalty Policy to implement changes effectuated by the 2008 Civil Monetary Penalty Inflation Adjustment Rule. While the Penalty Policy is not binding on a Presiding Officer, the Board has instructed that it must be considered and "should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *Carroll Oil*, 10 E.A.D. at 655-56 (quoting *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002)).

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[30] Notably, the Agency issued a subsequent Civil Monetary Penalty Inflation Adjustment Rule on November 6, 2013, that further adjusted certain civil monetary penalties for inflation. *See* Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643, 66,643–44 (Nov. 6, 2013). Such adjustments, however, are applied only to violations that have occurred after the effective date of the Final Rule, that is, after December 6, 2013. *Id.* at 66,645.

[31] RCRA places the burden on a respondent to allege and prove inability to pay as an affirmative defense should the respondent wish to have its financial condition considered as a mitigating penalty factor. *See Carroll Oil*, 10 E.A.D. at 662–63 (EAB 2002). Respondents did not raise the issue of inability to pay the proposed penalty in their Amended Answer or produce any evidence that would support such a claim.

Penalties assessed under the framework of the Penalty Policy are intended to achieve three goals: (1) to encourage timely resolution of environmental problems; (2) to support fair and equitable treatment of the regulated community; and (3) to deter potential violators from future violations. CX-36 at 10. The goal of deterrence is achieved by assessing a penalty at a level that removes any significant economic benefit that the violator may have gained from noncompliance, also called the "economic benefit component" of the penalty, and that charges an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law, also called the "gravity-based component" of the penalty. *Id.* To support the goal of fair and equitable treatment of the regulated community, the gravity-based component incorporates additional criteria to account for legitimate differences between similar cases, such as the violator's background and actions and the environmental threat posed by the situation. *Id.* Together the economic benefit component and the gravity-based component comprise the "initial penalty target figure." *Id.* at 12.

As further explained by the Penalty Policy, the economic benefit component is intended to "remove[] any significant profit from noncompliance" and "represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance." CX-36 at 14. Economic benefit is calculated based on two sources, avoided costs and delayed costs, that are then added together to determine the total economic benefit. *Id.* Avoided costs are the "periodic, operation and maintenance expenditures that should have been incurred, but were not." *Id.* Delayed costs are the "expenditures that have been deferred by the violation, but will be incurred to achieve compliance." *Id.* An example of a delayed cost is the "failure to install required equipment, such as cathodic protection," which is considered to be delayed, and not avoided altogether, because the violator will eventually be required to incur the associated costs to come into compliance. *Id.* at 20. "The benefit from delayed costs is generally expressed as only the return on investment that could have been earned on the money not spent." *Id.* The Penalty Policy identifies two methods for calculating the economic benefit component: (1) the "rule-of-thumb" approach, and (2) the computer software program called BEN, referred to as the "BEN model." *Id.* at 14, 17. Under the Penalty Policy, the "rule-of-thumb" approach "should be used for making an initial estimate of the economic benefit of noncompliance. If the initial estimate is less than $10,000, the rule-of-thumb calculation may be used as a basis for the economic benefit assessed in the penalty." *Id.* at 17. If the initial estimate exceeds $10,000, then the BEN model should be used. *Id.*

The "rule-of-thumb" approach utilizes mathematical equations to calculate avoided and delayed costs. CX-36 at 17- . Specifically, avoided costs are calculated as follows:

DETERMINING AVOIDED COSTS

$$\text{AVOIDED COSTS} = \left[\text{Avoided Expenditures} + \frac{\text{Avoided Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}}\right] \times (1 - \text{Weighted Tax Rate})$$

Avoided Expenditures are estimated using local, comparable costs.

Interest is the equity discount rate provided in the BEN model (currently 18.1 percent).
Number of Days is from the date of noncompliance to the date of compliance.
365 Days is the number of days in a year.
Marginal Tax Rate is based on corporate tax rates or financial responsibility compliance class.

Id. at 15, 51.[33] In turn, delayed costs are calculated by utilizing the following equation:

DETERMINING DELAYED COSTS

$$\text{Delayed Costs} = \frac{\text{Delayed Expenditures} \times \text{Interest} \times \text{Number of Days}}{\text{365 Days}}$$

Delayed Expenditures are estimated using local, comparable costs.
Interest is the equity discount rate provided in the BEN model (currently 18.1 percent).
Number of Days is from the date of noncompliance to the date of compliance.
365 Days is the number of days in a year.

Id. at 20.

Turning to the gravity-based component, the Penalty Policy explains that it consists of four elements—the matrix value, the violator-specific adjustments to the matrix value, the environmental sensitivity multiplier ("ESM"), and the days of noncompliance multiplier ("DNM")—which are reduced to the following equation:

DETERMINING THE GRAVITY-BASED COMPONENT

$$\text{Gravity-Based Component} = \text{Matrix Value} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}$$

Matrix Value is based on potential for harm and deviation from the requirement.
Violator-Specific Adjustments to the matrix value are based on violator's cooperation, willfulness, history of noncompliance, and other factors.
Environmental Sensitivity Multiplier (ESM) is a value based on the environmental sensitivity associated with the location of the facility.
Days of Noncompliance Multiplier (DNM) is a value based on the number of days of noncompliance.

CX-36 at 22.

[33] The formula for calculating avoided costs using the rule-of-thumb approach appears in two locations in the Penalty Policy, and the two versions vary, with one version containing brackets around one part of the equation and the other lacking brackets, such that the order in which the calculation is performed differs and the two versions of the formula yield different results. *See* CX-36 at 17, 51. Notably, however, a "correctional insert" dated August 11, 1993, was added to the Penalty Policy to clarify which of the two versions found in the Penalty Policy is to be used when calculating avoided costs.. *See* CX-36 at 15-16.

To calculate the gravity-based component, the first step is to determine the initial matrix value based upon two criteria. CX-36 at 22. The first criterion is the extent of deviation, which requires "[a]n assessment of the extent to which the violation deviates from the UST statutory or regulatory requirements." *Id.* The second criterion is the actual or potential harm, which requires "[a]n assessment of "the likelihood that the violation could (or did) result in harm to human health or the environment and/or has (or had) an adverse effect on the regulatory program." *Id.* at 23. These criteria are reflected on a matrix, with each criterion forming an axis on the matrix. *Id.* Three levels of gravity—namely, major, moderate, and minor—apply to each criterion and form the grid of the matrix.[34] *Id.* The matrix value is then reached by selecting a gravity level for each criterion and identifying the point of intersection on the matrix. *Id.*

Following a determination of the matrix value, adjustments to this value may be made, referred to as violator-specific adjustments, to account for the violator's degree of cooperation or lack thereof (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made), the degree of willfulness or negligence (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made), a history of noncompliance (adjustments up to a 50 percent increase may be made), and other unique factors (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made). *Id.* at 27-29. Additionally, a further adjustment may be made "based on potential site-specific impacts that could be caused by the violation," referred to as the ESM. *Id.* at 30. This factor is intended to "take[] into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release." *Id.* Levels of the ESM are characterized as low, moderate, or high. *Id.* Finally, an adjustment may be made to "take[] into account the number of days of noncompliance," referred to as DNM. *Id.* at 31.

ANALYSIS AND ASSESSMENT OF PENALTY

As previously addressed in this decision, Respondents conceded the amount of the penalty proposed by Complainant as to Violation 1, Counts 1 through 4, and Violation 3, Counts 7 through 9, as described in the Amended Complaint and in Complainant's detailed narrative explanation of the calculation of the proposed penalty. *See* JX-1, CX-38, and CX-44. Consequently, the below discussion focuses only on that which remains in dispute, namely the amount of penalty to be assessed for Violation 2, Counts 5 and 6.

As the Administrative Law Judge designated to preside over this matter, I am tasked with determining the amount of the penalty based on the evidence before me and the penalty factors set out in RCRA and in consideration of the penalty guidance of the Agency. *See* 40 C.F.R. §

[34] For the extent-of-deviation criterion, the deviation is considered "major" where there was substantial noncompliance; "moderate" where there was significant deviation from the requirements, but to some extent, the requirement was implemented as intended; and "minor" where there was only a slight deviation from the requirements. CX-36 at 23. For the potential-for-harm criterion, it is considered "major" where "[t]he violation causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program." *Id.* at 27. It is considered "moderate" where "[t]he violation causes or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program." *Id.* Finally, it is considered "minor" where "[t]he violation causes or may cause a situation resulting in a relatively low risk to human health and the environment and/or may have a minor adverse effect on the regulatory program." *Id.*

22.27(b). During the course of the hearing, Respondents were prepared to concede the penalty proposed by Complainant for Violation 2, Counts 5 and 6, because their challenges to those counts focused on defending against liability rather than the calculation of the proposed penalty. Tr. 113-114. However, following a brief colloquy with the court, Respondents elected to retain the opportunity to hear and challenge Complainant's presentation of evidence as to the penalty calculation for Violation 2. Tr. 113-117. Nevertheless, direct challenges to Complainant's calculation of the penalty were not advanced, and consistent with earlier representations, the crux of Respondents' challenges to Violation 2 rested on the determination of liability for Counts 5 and 6. Tr. 168-79, 210-12.

The evidentiary record reflects that in calculating the proposed penalty in this proceeding, Complainant considered the statutory penalty factors and the Penalty Policy developed by the Agency to guide the calculation of civil penalties assessed under RCRA. Tr. 132-33, CX-44. My review of the penalty calculation and my assessment follows.

A. Gravity-Based Component

In determining the matrix value, comprised of the extent of deviation and the actual or potential harm posed by a violation, for Count 5, the Penalty Policy classifies the failure to provide cathodic protection to metal piping in accordance with 40 C.F.R. § 280.20(b)(2) as a "major" deviation from the requirement and "moderate" potential for harm. CX-36 at 38, Tr. 145-47. With regard to those classifications, Katherine Griffith ("Griffith"), a project officer and case developer for Region 10 who was responsible for calculating the proposed penalty in this case, testified at the hearing that because Respondents had provided no corrosion protection to the steel siphon line, they "deviated completely" from the requirement. Tr. 118-19, 132, 147. She also described the potential for harm caused by Respondents' failure to provide corrosion protection for the siphon line, testifying that it creates a risk of corrosion and a release of gasoline into the environment, "especially [with the siphon line] being underground in the soil with groundwater and [with] product being under pressure going through that siphon line." Tr. 147. Consistent with the record before me, Complainant argues in favor of a "major" level for extent of deviation and a "moderate" level for potential for a harm. Compl. Post-Hrg Br. at 23-24 (citing CX-44 at 4, Tr. 146-147). Given these respective classifications of "major" and "moderate," for a violation occurring after January 12, 2009, the Penalty Policy assigns a matrix value of $1,060 for Count 5. Tr. 149, CX-36 at 26, CX-37 at 29.

With regard to Count 6, the Penalty Policy classifies the failure to operate and maintain corrosion protection systems to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground in accordance with 40 C.F.R. § 280.31 as a "major" deviation from the requirement and "major" potential for harm. CX-36 at 41, Tr. 147-48. At the hearing, Griffith explained that Respondents wholly deviated from the requirements imposed by 40 C.F.R. § 280.31 by failing to "operate or maintain corrosion protection for the siphon line in question." Tr. 148. She further explained that the operation and maintenance of corrosion protection systems "includes testing to ensure that whatever is protecting that bare steel is still in place," and the failure to perform such testing creates a risk of undetected corrosion and releases into the environment. *Id.* Consistent with the record before me, Complainant argues in favor of

a "major" level for extent of deviation and "major" level for potential for harm. Compl. Post-Hrg Br. at 24 (citing CX-44 at 4, Tr. 148). Given these classifications of "major," for a violation occurring after January 12, 2009, the Penalty Policy assigns a matrix value of $2,130. Tr. 150, CX-36 at 26, CX-37 at 29.

As described above, following the determination of the matrix value, it is appropriate to consider the applicability of any violator-specific adjustments that could, in turn, increase or decrease the matrix value. Such factors include the degree of cooperation or noncooperation, the degree of willfulness or negligence, any history of noncompliance, and any other unique factors. CX-36 at 27-29, Tr. 150-54. In this matter, Complainant urges an upward adjustment of ten percent for Respondents' history of noncompliance and an upward adjustment of ten percent for Respondents' degree of negligence. Compl. Post-Hrg Br. at 24 (citing CX-36 at 4 of 6, Tr. 155-56). In support of the proposed upward adjustment due to Respondents' purported history of noncompliance, Complainant cites in its post-hearing brief to the multiple violations of UST regulations observed by Greeves during his September 13, 2006 inspection of the Facility, the Expedited Enforcement Compliance Order and Settlement Agreement subsequently issued to Respondents on September 21, 2006, for three violations at the Facility, and Respondents' failure to avail themselves of the numerous opportunities to come into compliance in lieu of a formal enforcement action that were thereafter afforded to them. Compl. Post-Hrg. Br. at 26-27 (citing CX-3, CX-7, CX-15, CX-16, Tr. 156). Griffith testified at the hearing that she also considered Bender's inspection of the Facility in 2009, which revealed more violations. Tr. 157-58 (referring to CX-4).[24] According to the Penalty Policy, such actions constitute "prior violations" warranting an upward adjustment. CX-36 at 29 ("For purposes of this document, a 'prior violation' includes any act or omission for which an accountable enforcement action has occurred (e.g., an inspection that found a violation, a notice of violation, an administrative or judicial complaint, or a consent order)."). Thus, ample evidence in the record supports the upward adjustment of ten percent proposed by Complainant.

Turning to the degree of willfulness or negligence shown by a violator, the Penalty Policy advises that this adjustment factor relates to the amount of control a violator had over the events giving rise to the violation; the foreseeability of those events; whether the violator took reasonable precautions against the events or made good faith efforts to comply; whether the violator knew or should have known of the hazards associated with its conduct; and whether the violator knew of the legal requirement that was violated. CX-36 at 28. With regard to Respondents' purported degree of negligence here, Complainant points to evidence in the record reflecting the Agency's efforts to put Respondents on notice to investigate the material of the siphon line and protect it from corrosion if it was, as suspected, made of steel, as well as Respondents' rebuffs of those attempts by the Agency. Compl. Post-Hrg Br. at 25 (citing Tr. 42, 159-60, CX-21, CX-23 through CX-33). Complainant also notes that Respondents maintained exclusive control over the maintenance of the USTs at the Facility and that "[d]espite this knowledge and control, Respondents postponed coming compliance for several years." Compl. Post-Hrg Br. at 25 (citing CX-11, Tr. 137-38, 162-63).

[24] Griffith also cited to the June 2012 inspection performed by Boulind-Yeung; however, as it appears that this inspection gave rise to the instant enforcement action, I did not consider it as an example of a "history" of noncompliance or "previous violation." *See* Tr. 158-59 (referring to CX-5), CX-36 at 29.

Complainant's arguments are well-supported. As discussed above, regardless of the fact that Respondents did not initially install the USTs, they operated and maintained control of the USTs during the lengthy course of events that led to the charged violations. Agency personnel brought to Respondents' attention as early as 2006 its suspicions regarding the material comprising the siphon line and the need to protect it from corrosion if further investigation revealed that it consisted of steel, and it continually raised the issue in the ensuing years. Agency personnel also provided Respondents with a copy of the compliance assistance document, "Musts for USTs," that explained the regulatory requirements in plain English terms. Thus, Respondents knew or should have known of the regulatory requirements to which they were bound. Yet, it was not until many years later, in 2013, that Respondents came into compliance by testing and cathodically protecting the siphon line that was indeed steel. Based upon these considerations, and in the absence of any arguments to the contrary, the evidentiary record supports an upward adjustment of ten percent. Consequently, as urged by Complainant, I find that a total upward adjustment of twenty percent (ten percent for Respondents' history of noncompliance and ten percent for Respondents' degree of negligence), reflected as a multiplier of 1.20, is warranted. CX-44 at 4.

The next element to be considered is the environmental sensitivity multiplier, or ESM, which takes into account the potential site-specific impacts that could be caused by the violation. CX-36 at 30. Factors to be considered in assessing the sensitivity level, which can range from low to moderate to high, include geological features of the area; toxicity of the petroleum; human or environmental receptors such as the number of drinking water wells potentially affected and proximity to sensitive populations; and potential hazards of a release. CX-36 at 30. At the hearing, Griffith testified that she ranked the environmental sensitivity as low, or a multiplier of 1.0, for "regional consistency," despite finding that "directly on site is a public drinking water well." Tr. 164-65. On balance, I do not find this position to beinconsistent with the record.

The final element for consideration in the gravity-based component is the days of noncompliance multiplier, or DNM. As reflected by its name, this factor takes into account the number of days of a violator's noncompliance. CX-36 at 31. According to Complainant, "EPA determines the number of days of non-compliance by calculating the number of days in which Respondents were out of compliance with the regulations, limited by the general five-year federal statute of limitations." Compl. Post-Hrg Br. at 22 (citing 18 U.S.C. § 3282). Thus, Complainant calculated the number of days of noncompliance here to be 1,385 days, based on a period of violation from May 1, 2009, which was approximately five years prior to the date on which the Complaint was filed, through February 13, 2013.[25] *See* CX-44 at 4, JX-1 ¶ I (26) and (27), Tr. 141, 166. Pursuant to the Penalty Policy, 1,385 days of noncompliance translates into a multiplier of 5.5. *See* CX-36 at 31 (271-365 days of noncompliance equates to a multiplier of 2.5, and for each additional 6 months or fraction thereof, an additional 0.5 multiplier is added), CX-44 at 4, Tr. 166. My review reveals that this figure is consistent with the record.

[25] While Respondents came into compliance when Pacific Environmental Services Company installed a sacrifical anode on the steel siphon line at some point on February 13, 2013, they stipulated that "prior to and into February 13, 2013," the steel siphon line lacked cathodic protection. *See* JX-1 ¶ I (26) and (27).

Thus, the record is consistent with the calculation of the gravity-based component of the penalty for Violation 2 as follows: Count 5 is $1,060 x 1.2 x 1.0 x 5.5 = $6,996; Count 6 is $2,130 x 1.2 x 1.0 x 5.5 = $14,058. *See* CX-44 at 4.

B. Economic Benefit Component

The second component to be considered, if applicable, in the assessment of a penalty is the economic benefit component, which is based on the economic benefit of noncompliance resulting from avoided costs and delayed costs. CX-36 at 14. Complainant urges that Respondents derived an economic benefit by delaying the costs required to test and equip their steel siphon line with corrosion protection. *See* Compl. Post-Hrg Br. at 22, Tr. 134-38, CX-44 at 4. In order to calculate delayed costs using the rule-of-thumb approach, the Penalty Policy sets forth a formula comprised of three components: delayed expenditures, an interest rate, and the number of days of noncompliance. *See* CX-36 at 20. The record reveals that Respondents delayed compliance until February 13, 2013, at which time they hired Pacific Environmental Services Company to install a sacrificial anode on the steel siphon line, costing Respondents $15,939. JX-1 ¶¶ I (25-27), CX-11. Complainant used this amount as the delayed expenditure component in the delayed costs equation. *See* Compl. Post-Hrg Br. at 22, CX-44 at 4, Tr. 138-39. Griffith testified that she determined the interest rate component of the delayed costs equation, in consultation with a financial analyst at Region 10, to be 6.5 percent. Tr. 137, 140; *see also* CX-44 at 4. The number of days of noncompliance remained at 1,385. *See* Compl. Post-Hrg Br. at 22, Tr. 140-41, CX-44 at 4. The delayed cost was then calculated to be $3,931 ($15,939 (delayed expenditures) x 6.5% (interest) x 1,385 (number of days) /365 days = $3,931 (delayed costs)). CX-36 at 20, CX-44 at 4, Tr. 141. I have found this calculation of economic benefit to be consistent with the record.

C. Total Civil Penalty

Having determined each component of the penalty assessment, I find the proposed penalty for Violation 2, Counts 5 and 6, of $24,985 ($6,996 + $14,058 + $3,931 = $24,985) to be appropriate and consistent with the record of evidence in this matter. After full consideration of the evidentiary record in this matter and the arguments raised by the parties, I assess a total civil penalty of $66,176 for Violation 1 (Counts 1 through 4), Violation 2 (Counts 5 and 6), and Violation 3 (Counts 7 through 9) against Respondents.

COMPLIANCE ORDER

Section 9006(a) of RCRA provides that "whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subtitle . . . the Administrator may issue an order requiring compliance within a reasonable specified time period . . . ." 42 U.S.C. § 6991e(a)(1). Here, Complainant included a Compliance Order in the Complaint and Amended Complaint to compel Respondents to complete the following "Compliance Tasks," in summary:

1) Respondents shall conduct one set of ALLD tests and LTTs in July or August 2014, and a second set of ALLD tests and LTTs in July or August 2015. Respondents shall submit copies of the test reports to EPA within 30 calendar days of completion of each test.

2) Respondents shall submit copies of financial assurance used to satisfy 40 C.F.R. Part 280, Subpart H, within 30 days of the renewable period beginning in May 2014 and within 30 days of the renewable period beginning in May 2015.

3) The foregoing test reports and documentation of financial assurance shall be submitted to Griffith at the mailing address provided in the compliance order.

4) Informational copies of the documents submitted to Griffith shall also be provided to the Yakama Nation Environmental Management Program at the mailing address provided in the compliance order.

5) Upon request by either EPA or the Yakama Nation, Respondents shall provide the requesting entity access to all records and documentation related to the conditions of the Facility and to all results and data pertaining to the UST systems at the Facility.

Amended Complaint ¶ 4.1.

Presumably in recognition of the fact that the time frames set forth in the Compliance Order have elapsed, Complainant requests in its Post-Hearing Brief as follows:

> Complainant respectfully requests a Compliance Order requiring Respondents to submit copies of the next two sets of annual LTTs and ALLD tests to EPA, each within 30 calendar days of completion of each test. Complainant also requests a Compliance Order requiring Respondents to submit copies of the current financial assurance used to satisfy 40 C.F.R. part 280, subpart H, for each tank at the Facility within 30 days of the issuance of the order, and copies of the next method of financial assurance used to satisfy 40 C.F.R. part 280, subpart H at the Facility within 30 days of the expiration of the current method of financial assurance.

Compl. Post-Hrg Br. at 28-29. In support of its request, Complainant notes that Respondents failed to comply with both the regulations requiring them to conduct release detection for underground piping at the Facility that regularly conveys regulated substances under pressure and the regulations requiring them to demonstrate financial responsibility for the USTs at the Facility, and that those violations continued even after the Complaint had been filed. *Id.* at 29. As observed by Complainant, Respondents also "do not dispute imposition of the Compliance Tasks by EPA in the Compliance Order." *Id.* (citing Amended Answer ¶ 2.1). Accordingly, Complainant argues, "a Compliance Order is warranted and appropriate under the facts and circumstances of this case." Compl. Post-Hrg Br. at 29.

I agree with Complainant. As set forth below, Respondents are directed to submit copies of the next two sets of annual LTTs and ALLD tests to EPA, each within 30 calendar days of completion of each test. Respondents are also directed to submit copies of the current financial

assurance used to satisfy 40 C.F.R. Part 280, Subpart H, for each tank at the Facility within 30 days of the issuance of this Compliance Order, and copies of the next method of financial assurance used to satisfy 40 C.F.R. Part 280, Subpart H, at the Facility within 30 days of the expiration of the current method of financial assurance. Respondents shall otherwise satisfy the terms of the Compliance Order as set forth in the Amended Complaint.

DECISION AND ORDER

1. Respondents Edward and Theresa Washines and Da Stor At Lillie's Corner are liable for a total civil monetary penalty in the amount of $66,176 and are ordered to pay that amount in the manner directed below.

2. Payment of the full amount of this civil penalty shall be made within 30 days of the date on which this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as follows:

> Payment shall be made by submitting a certified or cashier's check(s)[26] in the requisite amount, payable to "Treasurer, United States of America," and mailed to:
>
> U.S. Environmental Protection Agency
> Fines and Penalties
> Cincinnati Finance Center
> P.O. Box 979077
> St. Louis, MO 63197-9000
>
> A transmittal letter identifying the subject case and EPA docket number (RCRA-10-2014-0100), as well as Respondents' names and addresses, must accompany the check.
>
> If Respondents fail to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

3. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within 20 days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within 30 days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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

COMPLIANCE ORDER

[26] Or by one of the electronic methods described at the following Agency website: https://www.epa.gov/financial/additional-instructions-making-payments-epa.

5. Based upon the foregoing findings, Respondents are hereby ordered to take the following actions:

6. Respondents shall submit copies of the next two sets of annual LTTs and ALLD tests to EPA, each within 30 calendar days of completion of each test.

7. Respondents shall submit copies of the current financial assurance used to satisfy 40 C.F.R. Part 280, Subpart H, for each tank at the Facility within 30 days of the issuance of this Compliance Order, and copies of the next method of financial assurance used to satisfy 40 C.F.R. Part 280, Subpart H, at the Facility within 30 days of the expiration of the current method of financial assurance.

8. Annual ALLD/LTT test reports and documentation of financial assurance required under this Order shall be submitted to Katherine Griffith, EPA Compliance Officer, at the following addresses:

Katherine Griffith, Compliance Officer
U.S. Environmental Protection Agency
Region 10, MS OCE-082
1200 Sixth Avenue, Suite 900
Seattle, WA 98101
Tel: 206-553-2901
Email: griffith.katherine@epa.gov

9. Informational copies of documents submitted to EPA under paragraph 8 shall be provided to:

Yakama Nation Environmental Management Program
P.O. Box 151
Toppenish, WA 98948

10. Upon request by either EPA or the Yakama Nation, Respondents shall provide the requestor access to all records and documentation related to the conditions at the Facility and to all results and data pertaining to the UST systems under this Order.

SO ORDERED.

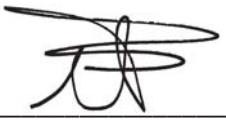
Christine Donelian Coughlin
Administrative Law Judge
U.S. Environmental Protection Agency

Dated: July 15, 2016
Washington, DC

In the Matter of *Edward and Theresa Washines, Da Stor at Lillie's Corner,* Respondent.
Docket No. RCRA-10-2014-0100

CERTIFICATE OF SERVICE

I hereby certify that true copies of this Initial Decision and Order, dated July 15, 2016, issued by Administrative Law Judge Christine Donelian Coughlin, were sent to the following parties on this 15th day of July 2015, in the manner indicated.



Danielle Pope
Paralegal

Original and One Copy by Hand Delivery to:

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Dated: July 15, 2016
Washington, DC