

11:58:27 AM
BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 7

ENVIRONMENTAL PROTECTION
AGENCY REGION 7
ADMINISTRATIVE CLERK

In the matter of:

B & A Petroleum Corporation
d/b/a Infinite Oil
1349 Park Avenue
Omaha, Nebraska 68105

Respondent

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U.S. EPA Docket No.:
RCRA-07-2010-0019

**MEMORANDUM IN SUPPORT OF MOTION FOR
DEFAULT ORDER AS TO LIABILITY AND PENALTY**

Complainant, the United States Environmental Protection Agency, Region 7 (EPA Region 7), submits this Memorandum in Support of its Motion for Default Liability and Penalty for the reasons set forth below.

B & A Petroleum Corporation, d/b/a Infinite Oil (Respondent) has failed to submit an Answer and Request for a Hearing in response to the Administrative Complaint ("Complaint") filed by the Director of the Air and Waste Management Division of U.S. EPA Region 7 (Complainant) on April 2, 2010. The Complaint was issued under Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively "Subtitle I of RCRA"), 42 U.S.C. § 6991e, and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules of Practice").

Due to Respondent's failure to submit an Answer pursuant to 40 C.F.R. § 22.17, Complainant files this motion requesting the issuance of a Default Order against Respondent. In addition to seeking a judgment of liability for violations of Subtitle I of RCRA, Complainant is seeking civil monetary penalties in the amount of \$118,365.45 for these violations. Previous EPA administrative tribunals support waiving a respondent's rights and assessing the proposed penalty amount in situations where a respondent does not file an answer and presents no evidence to contradict the alleged violations. *In re Gaskey Construction Corp*, CWA Appeal No. 06-07 (EAB unpublished opinion, December 14, 2006); *In re Pyramid Chemical Company*, 11 E.A.D. 657 (September 16, 2004); *In the Matter of James Bond, Owner, Bond's Body Shop*, Docket Nos. CWA-08-2004-0047 and RCRA-08-2004-0004 (January 11, 2005. Chief ALJ Susan L. Biro).

In support of this motion, Complainant states and argues as follows:

I. PROCEDURAL BACKGROUND

1. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules of Practice").
2. In accordance with 40 C.F.R. §§ 22.5(a) and 22.14, on April 2, 2010, the original Complaint and one copy was filed with the Regional Hearing Clerk, EPA Region 7.
3. In accordance with 40 C.F.R. § 22.5(b)(1), on April 21, 2010, Complainant delivered a copy of the Complaint, via UPS, with proof of service requested, to Respondent's registered agent and president, Mohammed Ali.
4. Mohammed Ali, registered agent and president of Respondent, and a person who is authorized to receive a copy of a complaint under 40 C.F.R. § 22.5(b)(1)(ii)(a), received a copy of the original complaint on April 21, 2010 and, as proof of his receipt signed the UPS receipt form. Said form is attached hereto and marked "Exhibit 1."
5. As per 40 C.F.R. § 22.15, Respondent must file an answer to the complaint with the Regional Hearing Clerk, EPA Region 7, within thirty (30) days after service of the complaint. As of December 1, 2010, Respondent had not filed an answer, nor requested an extension of time within which to file an answer, with the Regional Hearing Clerk, EPA Region 7.
6. The Regional Judicial Officer of EPA Region 7 presently has jurisdiction over this matter as the Presiding Officer pursuant to 40 C.F.R. § 22.4(b) and Regional Delegation R7-1-038, in that Respondent has not yet filed an Answer in this case as required under the Consolidated Rules of Practice.
7. Complainant has notified Respondent of Complainant's intention to request a default judgment in this matter by way of correspondence sent to Mohammed Ali, registered agent and president of Respondent. A copy of this correspondence is attached hereto and marked "Exhibit 2." This correspondence was received on September 18, 2010, and as proof of his receipt signed the UPS receipt form. Said form is attached hereto and marked "Exhibit 3."
8. Complainant respectfully requests the Presiding Officer admit "Exhibit 1", "Exhibit 2" and "Exhibit 3" into evidence to demonstrate proof of service of the complaint upon Respondent and that Complainant has given Respondent notice of its intention to file this Motion.

II. RESPONDENT'S LIABILITY

9. Section 9006 of RCRA, 42 U.S.C. § 6991e, authorizes EPA to assess a civil penalty

against any owner or operator of a Underground Storage Tank system who fails to comply with any requirement or standard promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991b (40 C.F.R. Part 280) or any requirement or standard of a state UST program that has been approved by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c.

10. Effective September 18, 2002, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the state of Nebraska was granted final authorization to administer a state UST management program in lieu of the federal UST management program. The provisions of the Nebraska UST management program, through this final authorization, have become requirements of Subtitle I of RCRA and are, accordingly, enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. Nebraska's authorized UST program is implemented jointly and regulations are set forth in the Nebraska Revised Statute Section 81-1575-77, 118, which designates the Nebraska State Fire Marshal as the agency responsible for conducting preventative activities and these regulations can be found at Title 159 of Nebraska's State Fire Marshal's Rules and Regulations (hereinafter "159 Neb. Admin. Code," followed by the applicable section of the regulations).
11. As per 40 C.F.R. § 22.15(d), failure of the Respondent to admit, deny or explain any material factual allegation contained in the Complaint constitutes an admission of each factual allegation. As per 40 C.F.R. § 22.17(a), a party may be found in default after failure to file a timely answer to a complaint; and default by the Respondent constitutes, for purposes of the pending proceedings, an admission of all facts in the complaint and a waiver of Respondent's right to contest such factual allegations. Respondent's failure to admit, deny or explain any of the material factual allegations contained in the Complaint, constitutes Respondent's admission of the factual allegations in the Complaint.
12. According to the factual allegations set forth in the Complaint filed herein, the Respondent has violated Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), which provides that any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by EPA under Section 9003 of RCRA, 42 U.S.C. § 6991c, or that is part of an authorized state underground storage tank program shall be liable for a civil penalty not to exceed \$10,000 for each tank for each day of violation. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, violations of RCRA Section 9006(d)(2), 42 U.S.C. § 6991e(d)(2) which occur subsequent to January 30, 1997 are subject to a new statutory maximum civil penalty of \$11,000 for each day of violation, and those violations occurring after January 12, 2009 are subject to a statutory maximum civil penalty of \$16,000 for each day of violation.

For the above and foregoing reasons, and in accordance with the regulations set forth in 40 C.F.R. § 22.1, et seq., based upon the aforementioned law and facts, Complainant requests the Presiding Officer issue a Default Order against Respondent, finding said Respondent liable for violations of Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), as set forth in the complaint filed in the matter herein.

III. CIVIL PENALTY ASSESSMENT

13. In addition to liability, Complainant is seeking the assessment of a civil penalty against Respondent in the amount of \$118,365.45 for the violations set forth in the complaint filed in the matter herein. This represents a reduction of the civil penalty to \$118,365.45 from \$125, 216, which Complainant originally sought in the complaint.
14. The legal authority for assessing a penalty for alleged violations of RCRA Subtitle I, and the regulations promulgated thereunder, is set forth at RCRA § 9006(d)(2), 40 U.S.C. § 6991e(d)(2), and the “Adjustment of Civil Monetary Penalties for Inflation” section found at 40 C.F.R. § 19.4. RCRA § 9006(d)(2) , 40 U.S.C. § 6991e(d)(2), and 40 C.F.R. § 19.4 authorize the assessment of a civil administrative penalty not to exceed \$16,000 per day for non-compliance with any requirement or standard promulgated by the Administrator under RCRA § 9003, 42 U.S.C. §6991b that occurred after January 12, 2009. All violations set forth in the complaint, filed herein, are alleged to have occurred after January 12, 2009.
15. Section 9006(e) of RCRA, 42 U.S.C. § 6991e(e), sets forth the applicable statutory penalty factors to consider in assessing a penalty, including the compliance history of the facility operator and any other factor the Administrator considers appropriate. EPA uses the U.S. EPA Penalty Guidance for Violations of UST Regulations" (Penalty Policy) to apply the statutory penalty factors in a fair and consistent manner.
16. Attached to this motion, and marked “Exhibit 4”, is the “Declaration of Wilfredo Rosado-Chaparro”, a compliance officer for the Storage Tank and Oil Pollution Branch of the U.S. EPA Region 7. This declaration outlines in detail how the Respondent calculated the civil penalty in this matter. This affidavit explains why the penalty in this matter should be \$118,365.45 rather than the \$125, 216, which was originally requested in the in the complaint filed in the matter herein. Complainant requests the Presiding Officer to admit “Exhibit 4”, as evidence in support of Complainant’s request for the penalty assessment set forth in the complaint and this motion.

For the above and for reasons, and in accordance with the regulations set forth in 40 C.F.R. § 22.1, et seq., Complainant requests that, based upon the aforementioned law and facts, the Presiding Officer issue a Default Order against Respondent, finding said Respondent liable for violations of Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), and ordering said Respondent to pay the proposed penalty of \$118,365.45 as set forth in the complaint filed in the matter herein.

Date

May 27, 2011

Respectfully submitted,


Raymond C. Bosch
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101
Bosch.Raymond@epa.gov
(913) 551-7501 Voice
(913) 551-7925 FAX

CERTIFICATE OF SERVICE

I hereby certify that the original and one true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT AS TO LIABILITY AND PENALTY were hand delivered to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 901 North Fifth Street, Kansas City, Kansas 66101; and a true and correct copy were sent by certified mail, return receipt requested, to Mohammed Ali, Registered Agent, B & K Corporation, on this 27th day of May, 2011.


Raymond C. Bosch
Assistant Regional Counsel



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Important Delivery Information

Signature Required

Scheduled Delivery: 21-April-2010

Shipment Detail

Ship To:

Mohammed Ali
B&K, B& A, M&A Petroleum Corp.
215 N. Prospect Ave
STREAMWOOD
IL
601074103
US

Number of Packages 1

UPS Service: NEXT DAY AIR SAVER

Weight: 4.0 LBS

Tracking Number: 1Z6952072996726916

Click here to track if UPS has received your shipment or visit http://www.ups.com/WebTracking/track?loc=en_US on the Internet.



Proof of Delivery

[Close Window](#)

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number: 1Z6952072996726916

Service: NDA SAVER DEL CONF

Special Instructions: Signature Required

Delivered On: 04/21/2010 11:47 A.M.

Delivered To: STREAMWOOD, IL, US

Signed By: ALI

Left At: Residential

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 05/26/2011 1:24 P.M. ET

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

VIA U.P.S. Overnight Mail

September 17, 2010

Mohammed Ali
215 North Prospect Ave.
Streamwood, ILL 60107

RE: Complaint, Compliance Order and Notice of Opportunity for Hearing
B & A Petroleum; B & K Petroleum and M & A Petroleum
Docket No. RCRA-07-2010-0019; Docket No. RCRA-07-2010-0020;
Docket No. RCRA-07-2010-0021

Dear Mr. Ali:

As you are aware, on April 2, 2010, the United States Environmental Protection Agency Region 7 (EPA) filed complaints against your above companies. To date, you have not filed an answer, as required by 40 CFR §22.15. If you do not contact me at the address or telephone number below by Monday, September 27, 2010, EPA will begin proceedings to seek the entry of default judgments in these cases. The address and telephone number for contacting me is as follows:

Raymond C. Bosch
Attorney Advisor
U.S. Environmental Protection Agency, Region VII
901 North Fifth Street
Kansas City, Kansas 66101
(913) 551-7501 Voice
(913) 551-7925 FAX

Thank you for your attention to this matter.

Sincerely,

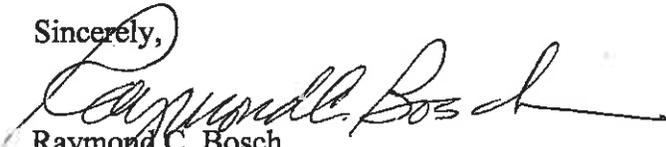

Raymond C. Bosch
Assistant Regional Counsel

Exhibit 3

----- Forwarded by Raymond Bosch/R7/USEPA/US on 09/18/2010 01:37 PM -----

From: "UPS Quantum View" <auto-notify@ups.com>
To: bosch.raymond@epa.gov
Date: 09/18/2010 10:54 AM
Subject: UPS Delivery Notification, Tracking Number 1ZW0R3775891748532

***Do not reply to this e-mail. UPS and ENVIRONMENTAL PROTECTION will not receive your reply.

At the request of ENVIRONMENTAL PROTECTION, this notice is to confirm that the following shipment has been delivered.

Important Delivery Information

Tracking Number: 1ZW0R3775891748532
Delivery Date / Time: 18-September-2010 / 10:23 AM

Delivery Location: RESIDENTIAL
Signed by: FATAMA

Shipment Detail Ship To:

Mohammed Ali
215 N PROSPECT AVE
STREAMWOOD
IL
60107
US

Number of Packages 1
UPS Service: NEXT DAY AIR
Shipment Type: Letter

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Proof of Delivery

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Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number: 1ZW0R3775891748532

Service: NDA DEL CONF SAT

Special Instructions: Signature Required

Delivered On: 09/18/2010 10:23 A.M.

Delivered To: STREAMWOOD, IL, US

Signed By: FATAMA

Left At: Residential

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 05/26/2011 1:34 P.M. ET

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Declaration of Wilfredo Rosado-Chaparro

Wilfredo Rosado-Chaparro, U.S. Environmental Protection Agency (EPA) Region 7, Storage Tank and Oil Pollution Branch (STOP), hereby submits the following declaration with regard to the penalty calculated in this matter.

I, Wilfredo Rosado-Chaparro, declare as follows:

1. I am employed as a compliance officer within the EPA Region 7 STOP Branch, and in the course of my employment, I am responsible for the enforcement of regulations regarding the EPA Region 7 Underground Storage Tank Program (UST Program). My responsibilities as a compliance officer include calculating penalties for administrative complaints brought by EPA Region 7 for UST violations.

2. As the EPA representative responsible for calculating the proposed penalty in this matter, I have personal knowledge of the matters set forth in this Declaration.

3. EPA filed a Complaint and Notice of Opportunity for Hearing (Complaint) in this matter on April 2, 2010, citing alleged violations of the Resource Conservation and Recovery Act (RCRA) Subtitle I, 42 U.S.C. § 6991, *et seq.*, and the UST regulations set forth at 40 C.F.R. Part 280. The violations were identified during an UST inspection conducted by EPA on November 5, 2009, at the facilities located at:

- a. 1349 Park Avenue in Omaha, Nebraska, and
- b. 2302 South 13th Street in Omaha, Nebraska

4. The Complaint proposes a penalty of \$125,216 based on the Respondent's alleged violations listed at follows:

- a. 1349 Park Avenue in Omaha, Nebraska:

- (a) 159 Neb. Admin. Code 6-002.04 and §40 CFR 280.31(d) - Failure to maintain records of corrosion protection (CP) inspections for tank #1.
- (b) 159 Neb. Admin. Code 6-002.01 and §40 CFR 280.31(a) - Failure to operate and maintain corrosion protection (CP) system. EPA inspector performed test on the system and it did not meet the negative potential of at least 850 mV, therefore the CP system was not operational and was not providing corrosion protection to tank #1 system.
- (c) 159 Neb. Admin. Code 7-005.01 and §40 CFR 280.44(a) - Failure to provide adequate testing for piping system. The required annual function test (FT) has not been performed in the past year.
- (d) 159 Neb. Admin. Code 7-002.02A and §40 CFR 280.41(b)(1)(ii) - Failure to perform monitoring of pressurized piping. The required annual line tightness test (LTT) has not been performed in the past year.
- (e) 159 Neb. Admin Code 7-002.01 and §40 CFR 280.41(a) - Failure to monitor tanks at least every 30 days. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43.
- (f) 159 Neb. Admin Code 7-006 and §40 CFR 280.45 - Failure to maintain records of release detection monitoring. UST system owners and operators must maintain records in accordance with 7-006 and § 280.34 demonstrating compliance with all applicable requirements of this subpart.
- (g) 159 Neb. Admin. Code 6-002.02 and §40 CFR 280.31(b) - Failure to ensure proper operation of CP system. Pursuant to Nebraska regulations the

annual (every three years under §40 CFR 280.31(b)) CP test has not been performed on tank #1.

(h) 159 Neb. Admin. Code 6-002.03 and §40 CFR 280.31(c) - Failure to inspect impressed current system every 60 days on tank #1.

b. 2302 South 13th Street in Omaha, Nebraska:

(a) 159 Neb. Admin Code 7-006 and §40 CFR 280.45 - Failure to maintain records of release detection monitoring. UST system owners and operators must maintain records in accordance with § 280.34 demonstrating compliance with all applicable requirements of this subpart.

(b) 159 Neb. Admin. Code 5-003 and §40 CFR 280.21(c) – Failure to install any cathodic protection for metal piping upgrade requirement. EPA inspector observed that there was no corrosion protection installed on the pipe's flex connectors.

(c) 159 Neb. Admin. Code 7-005.01 and §40 CFR 280.44(a) - Failure to provide adequate testing for piping system. The required annual function test (FT) has not been performed in the past year.

(d) 159 Neb. Admin. Code 7-002.02A and §40 CFR 280.41(b)(1)(ii) - Failure to perform monitoring of pressurized piping. The required annual line tightness test (LTT) has not been performed in the past year.

5. The UST inspections were performed by EPA lead inspector Bjorn Brinkman, who was accompanied by EPA inspector Wayne Bartel, Omaha Fire Prevention Bureau Chief, Chuck Circo and the Nebraska State Fire Marshall Deputy, Kirk Negus.

6. On October 29, 2009, Mr. Brinkman sent correspondence to Respondent's president informing him that UST compliance inspections on these two facilities would be taking place between November 2, 2009, through November 27, 2010, and instructing him to have available at the time of inspection a list of documents including, but not limited to, the last 12-months of leak detection records. The actual inspections were performed on November 4 and 5, 2009.

7. At the time of the inspection at 1349 Park Avenue in Omaha, Nebraska, the inspectors observed that:

- a. The cathodic protection (CP) system on tank #1 was not operating properly and that no test and inspection records were available.
- b. The annual function test on the mechanical line leak detectors (MLLD) on all three of the facility's USTs had not been performed.
- c. The required annual line tightness test (LTT) on the pressurized product lines for the three USTs had not been performed.
- d. The automatic tank gauging (ATG) used as the release detection method for this facility appeared not to be functioning properly. The inspectors were unable to obtaining any monitoring information from the ATG. Additionally, the required 12 months of passing ATG (release detection) results were not available.

8. At the time of the inspection at the 2302 South 13th Street in Omaha, Nebraska, the inspectors observed that:

- a. The annual function test on the mechanical line leak detectors (MLLD) of the two facility's USTs had not been performed.
- b. The required annual line tightness test (LTT) on the pressurized product lines for the two USTs had not been performed.

c. The flex connectors on the pressurized product lines were not cathodically protected against corrosion.

d. ATG records for the last 12 months of release detection were not available for inspection.

9. Based on the inspection at the 1349 Park Avenue, EPA determined that the

Respondent had failed to:

a. Perform monthly monitoring or have an annual LTT on the pressurized piping for the three tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 7-002.02A, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (b)(1)(ii), for the period of March 17, 2009, through April 1, 2010.

b. Perform annual function test on the MLLD for the three tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 7-005.01, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.44 (a) for the period of March 17, 2009, through April 1, 2010.

c. Properly operate and maintain the corrosion protection system for tank #1 since November 5, 2009, a violation of 159 Neb. Admin. Code 6-002.01, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i, and 40 C.F.R. § 280.31 (a), for the period of November 5, 2009, through April 1, 2010.

d. To ensure proper operation of CP system for tank #1 since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 6-002.02, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.31(b) for the period of March 17, 2009, through April 1, 2010.

e. To inspect impressed current system every 60 days on tank #1 since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 6-002.03, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.31(c) for the period of March 17, 2009, through April 1, 2010.

f. To maintain records of corrosion protection (CP) inspections for tank #1 since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 6-002.04, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 CFR § 280.31(d) for the period of March 17, 2009, through April 1, 2010.

g. To monitor tanks for release detection at least every 30 days on the three USTs at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-002.01, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (a), for the period of March 17, 2009, through April 1,2010.

h. To maintain records of release detection monitoring for at least the last 12 months for all tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-006, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.45, for the period of March 17, 2009, through April 1,2010.

10. Based on the inspection at the 2302 South 13th Street facility, EPA determined that the Respondent had failed to:

a. To maintain records of release detection monitoring for at least the last 12 months for all tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-006, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.45, for the period of March 17, 2009, through April 1,2010

- b. Perform monthly monitoring or have an annual LTT on the pressurized piping for the three tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 7-002.02A, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (b)(1)(ii), for the period of March 17, 2009, through April 1, 2010.
- c. Perform annual function test on the MLLD for the three tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 7-005.01, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.44 (a) for the period of March 17, 2009, through April 1, 2010.
- d. To install any cathodic protection for metal piping upgrade requirement on the facility's pressurized line flex connectors since November 5, 2009, a violation of 159 Neb. Admin. Code 5-003, Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i, and 40 C.F.R. § 280.21 (c), for the period of November 5, 2009, through April 1, 2010.

Calculation of Penalties

11. Based on the inflationary adjustment rule in effect at the time of filing the Complaint, RCRA § 9006(d)(2), 42 U.S.C. § 6991e(d)(2), authorizes the assessment of a civil penalty of up to \$16,000 for each UST for each day of violation for non-compliance with any requirement or standard promulgated by the Administrator under RCRA § 9003, 42 U.S.C. § 6991 b.

12. RCRA § 9006(c), 42 U.S.C. § 6991e(c), provides that any penalty assessed shall take into account the seriousness of the violations and any good faith efforts to comply with the applicable requirements. II. RCRA § 9006(e), 42 U.S.C. § 6991e(e), sets forth the following additional factors that may be taken into account in determining the terms of a civil penalty

under subsection (d): compliance history of a facility owner or operator, and any other factor the Administrator considers appropriate.

13. To rationally and consistently apply the statutory factors set forth at RCRA §§ 9006(c) and (e), 42 U.S.C. §§ 6991e(c) and (e), to the facts and circumstances of each case, EPA adopted the *U.S. EPA Penalty Guidance for Violations of UST Regulations* (Penalty Policy) in November 1990. The Penalty Policy was delivered to Respondent with the Complaint and can be on at the EPA website at <http://www.epa.gov/oust/directiv/od961012.htm>.

14. The Penalty Policy includes both a “Gravity” component and an “Economic Benefit” component. These components are added together to determine an appropriate penalty amount.

15. I personally calculated the proposed penalty in this matter consistent with the RCRA § 9006 statutory factors described above and the Penalty Policy.

Gravity Component

16. The “Gravity” component is a monetary value that reflects the seriousness of the violations and the population at risk. The Gravity component is determined by 1) taking an initial Matrix Value; 2) adding in any Violator Specific Adjustments (degree of cooperation, degree of willingness or negligence, history of prior violations, or other unique factors); 3) then adding in any Environmental Sensitivity Multiplier, and finally; 4) enhancing this total by a multiplier which is based upon the number of Days of Noncompliance.

17. The initial “Matrix Value” is determined by the position on a chart in which a violation falls. The chart (see “Exhibit 4” of the Penalty Policy) contains two axes, one being “Extent of Deviation from Requirement” and the other “Potential for Harm”. Where a violation falls on this matrix is determined by the seriousness of the violation, which is defined in terms of one of three terms: “Major”, “Moderate” or “Minor”. Whether a violation is “Major”,

“Moderate” or “Minor” is solely determined by the regulation that is violated. “Appendix A” of the Penalty Policy lists various violations of the UST regulations found within 40 C.F.R. § 280, and the whether they are “Major”, “Moderate” or “Minor”.

18. A common “Violator Specific Adjustment” is an assessment for a history of non-compliance. According to Section 3.2.3 of the Penalty Policy of the Penalty Policy, entitled *History of Non-Compliance*, “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). A prior violation of the same or a related requirement would constitute a similar violation.”

19. The “Environmental Sensitivity Multiplier” is discussed in Section 3.3 of the Penalty Policy. In that section, it states, “The environmental sensitivity multiplier takes into account the adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release.” There were no Environmental Sensitivity Multipliers assessed in this particular action.

20. The “Days of Noncompliance” portion of the Gravity component is multiplier which is based upon the number of days in which the violation is known to have occurred. The chart describing the multiplier to be used is found in the Penalty Policy at Section 3.4.

Economic Benefit Component

21. Under the Penalty Policy, the “Economic Benefit” component of a penalty calculation “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. The total economic benefit component is based on the benefit from two sources: (1) avoided costs; and (2) delayed costs. All penalties assessed must include the full economic

benefit unless the benefit is determined to be "incidental" (*i.e.*, less than \$100)." See Penalty Policy, Chapter 2, Section 2.1 *Definition of Economic Benefit*.

The 1349 Park Avenue Facility

22. For the 1349 Park Avenue facility the Penalty Policy's initial gravity component for noncompliance with:

- a. 159 Neb. Admin. Code 7-002.02A [40 C.F.R. § 280.41 (b)(1)(ii)], 159 Neb. Admin. Code 7-005.01 [40 C.F.R. § 280.44 (a)], 159 Neb. Admin. Code 6-002.01 [40 C.F.R. § 280.31 (a)], 159 Neb. Admin Code 7-002.01 [40 C.F.R. § 280.41 (a)], 159 Neb. Admin Code 7-006 [40 C.F.R. § 280.45] and 159 Neb. Admin. Code 6-002.03 [40 C.F.R. § 280.31(c)] classifies the Potential for Harm and Extent of Deviation as "Major".
- b. 159 Neb. Admin. Code 6-002.02 [40 C.F.R. § 280.31(b)], and 159 Neb. Admin. Code 6-002.04 [40 C.F.R. § 280.31(d)] classifies the Potential for Harm and Extent of Deviation as "Moderate".

23. As stated above, EPA typically increases the initial Matrix Value of the Gravity component in accordance with the Penalty Policy by adding in any "Violator Specific Adjustments", such as history of prior violations. In this particular matter, I deemed that the Respondent's receipt of an Enforcement Compliance Order from the City of Omaha Fire Department UST inspector, for the very same violation in March 17, 2009, warranted an increase of 5% under history of noncompliance consistent with the Penalty Policy, except for the 159 Neb. Admin. Code 6-002.01 [§40 CFR 280.31(a)] violation, which had not been identified before EPA's November 5, 2009, inspection.

24. As also stated above, EPA typically increases the Matrix Value by any Environmental Sensitivity. There was no increased penalty assessed for Environmental Sensitivity at this Facility.

25. I determined that all but one of the violations for this facility lasted 380 days and, thus, increased the Days of Noncompliance Multiplier of 3.0 in accordance with Section 3.4 of the Penalty Policy, starting at 2.5 for one year and adding 0.5 for each additional 6 months of noncompliance. The violation cited for 159 Neb. Admin. Code 6-002.01 [40 C.F.R. § 280.31 (a)] was determined to last only 147 days, so it received a Days of Noncompliance multiplier of 1.5 in accordance with Section 3.4 of the Penalty Policy.

26. Based on careful consideration of all of the factors set forth in the gravity component of the Penalty Policy, I calculated the initial gravity component of the penalty for each violation at:

- a. 159 Neb. Admin. Code 7-002.02A [40 C.F.R. § 280.41 (b)(1)(ii)] - \$20,076.05
- b. 159 Neb. Admin. Code 7-005.01 [40 C.F.R. § 280.44 (a)] - \$20,076.05
- c. 159 Neb. Admin. Code 6-002.01 [40 C.F.R. § 280.31 (a)] - \$3,186.68
- d. 159 Neb. Admin Code 7-002.01 [40 C.F.R. § 280.41 (a)] - \$20,076.05
- e. 159 Neb. Admin Code 7-006 [40 C.F.R. § 280.45] - \$6,692.02
- f. 159 Neb. Admin. Code 6-002.03 [40 C.F.R. § 280.31(c)] - \$3,346.01
- g. 159 Neb. Admin. Code 6-002.04 [40 C.F.R. § 280.31(d)] - \$446.13
- h. 159 Neb. Admin. Code 6-002.02 [40 C.F.R. § 280.31(b)] - \$3,346.01

These add to a total initial gravity component of the penalties for the 1349 Park Avenue facility of \$77,245.00.

27. In addition, I calculated an economic benefit component which consists of the operation and maintenance costs the Respondent would have incurred had it performed the requirements for the cited violations. The penalty calculated for the economic benefit component will eliminate any savings enjoyed by the Respondent for not complying with the regulations.

The initial economic benefit component of the penalty for each violation:

- a. 159 Neb. Admin. Code 7-002.02A [40 C.F.R. § 280.41 (b)(1)(ii)] - \$146.00
- b. 159 Neb. Admin. Code 7-005.01 [40 C.F.R. § 280.44 (a)] - \$130.00
- c. 159 Neb. Admin. Code 6-002.01 [40 C.F.R. § 280.31 (a)] - \$141.00
- d. 159 Neb. Admin Code 7-002.01 [40 C.F.R. § 280.41 (a)] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible.
- e. 159 Neb. Admin Code 7-006 [40 C.F.R. § 280.45] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible
- f. 159 Neb. Admin. Code 6-002.03 [40 C.F.R. § 280.31(c)] - \$511.00
- g. 159 Neb. Admin. Code 6-002.04 [40 C.F.R. § 280.31(d)] - \$255.00
- h. 159 Neb. Admin. Code 6-002.02 [40 C.F.R. § 280.31(b)] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible

The total Economic Benefit component of the penalties for the 1349 Park Avenue facility amount to \$1,182.00.

28. The gravity and economic benefit components calculated in accordance with the Penalty Policy for the 1349 Park Avenue facility totaled \$78,428.00.

The 2302 South 13th Street Facility

29. For the 2302 South 13th Street facility the Penalty Policy's initial gravity component for noncompliance with 159 Neb. Admin. Code 7-002.02A [40 C.F.R. § 280.41 (b)(1)(ii)], 159 Neb. Admin. Code 7-005.01 [40 C.F.R. § 280.44 (a)], 159 Neb. Admin Code 7-006 [40 C.F.R. § 280.45] and 159 Neb. Admin. Code 5-003 [40 C.F.R. § 280.21(c)] classifies the Potential for Harm and Extent of Deviation as "Major".

30. As stated above, EPA typically increases the initial Matrix Value of the Gravity component in accordance with the Penalty Policy by adding in any "Violator Specific Adjustments", such as history of prior violations. In this particular matter, I deemed that the Respondent's receipt of an Enforcement Compliance Order from the City of Omaha Fire Department UST inspector, for the very same violation in March 17, 2009, warranted an increase of 5% under history of noncompliance consistent with the Penalty Policy, except for the 159 Neb. Admin. Code 5-003 [40 C.F.R. § 280.21(c)] violation, which had not been identified before EPA's November 5, 2009, inspection.

31. As also stated above, EPA typically increases the Matrix Value by any Environmental Sensitivity. There was no increased penalty assessed for Environmental Sensitivity at this Facility.

32. I determined that all but one of the violations for this facility lasted 380 days and, thus, increased the Days of Noncompliance Multiplier of 3.0 in accordance with Section 3.4 of the Penalty Policy, starting at 2.5 for one year and adding 0.5 for each additional 6 months of noncompliance. The violation cited for 159 Neb. Admin. Code 5-003 [40 C.F.R. § 280.21 (c)]

was determined to last only 147 days, so it received a Days of Noncompliance multiplier of 1.5 in accordance with Section 3.4 of the Penalty Policy.

33. Based on careful consideration of all of the factors set forth in the gravity component of the Penalty Policy, I calculated the initial gravity component of the penalty for each violation at:

- a. 159 Neb. Admin. Code 7-002.02A [40 C.F.R. § 280.41 (b)(1)(ii)] - \$13,384.04
- b. 159 Neb. Admin. Code 7-005.01 [40 C.F.R. § 280.44 (a)] - \$13,384.04
- c. 159 Neb. Admin Code 7-006 [40 C.F.R. § 280.45] - \$6,692.02
- d. 159 Neb. Admin. Code 5-003 [40 C.F.R. § 280.21(c)] - \$6,373.35

These add to a total initial gravity component of the penalties for the 2302 South 13th Street facility of \$39,833.45.

34. In addition, I calculated an economic benefit component which consists of the operation and maintenance costs the Respondent would have incurred had it performed the requirements for the cited violations. The penalty calculated for the economic benefit component will eliminate any savings enjoyed by the Respondent for not complying with the regulations. The initial economic benefit component of the penalty for each violation:

- a. 159 Neb. Admin. Code 7-002.02A [40 C.F.R. § 280.41 (b)(1)(ii)] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible.
- b. 159 Neb. Admin. Code 7-005.01 [40 C.F.R. § 280.44 (a)] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible

c. 159 Neb. Admin Code 7-006 [40 C.F.R. § 280.45] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible

d. 159 Neb. Admin. Code 5-003 [40 C.F.R. § 280.21(c)] - \$104.00

The total Economic Benefit component of the penalties for the 2302 South 13th Street facility amount to \$104.00.

35. The gravity and economic benefit components calculated in accordance with the Penalty Policy for the 2302 South 13th Street facility totaled \$39,937.44.

Total Penalty

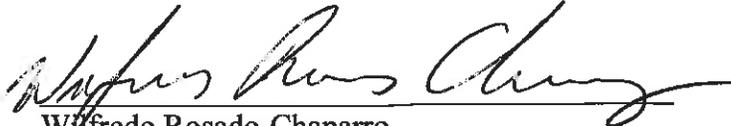
36. The proposed penalty for both the 1349 Park Avenue and 2302 South 13th Street facilities totaled \$118,365.45.

37. There was no reduction to the proposed penalty amount based on ability to pay absent notice or information from the Respondent indicating that it was otherwise unable to pay the proposed penalty amount.

38. The penalty calculation worksheet for the alleged violations in this matter prepared by myself, with oversight from UST Program manager Margaret Stockdale, was delivered to the Respondent with the Complaint and is attached hereto.

I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

5/27/2011
Date



Wilfredo Rosado-Chaparro
Storage Tank and Oil Pollution Branch
U.S. Environmental Protection Agency, Region 7