

BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION III

In the Matter of:	:	Administrative Complaint,
	:	Compliance Order and Notice of
	:	Right to Request a Hearing
L.C.W. Inc., d/b/a KWIK LUBE	:	
	:	U.S. EPA Docket No.
	:	RCRA-03-2010-0043
Respondent,	:	
	:	
	:	Proceeding under Section 9006
	:	of the Resource Conservation and
1522 Third Avenue	:	Recovery Act, as amended,
Huntington, WV 25701	:	42 U.S.C. § 6991e
	:	
Facility.	:	

**I. INTRODUCTION**

This Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or the "Agency") by Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively "RCRA"), 42 U.S.C. § 6991e, 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"), a copy of which is enclosed with this Complaint (Enclosure "A").

The Director of the Land and Chemicals Division of EPA Region III ("Complainant"), hereby notifies L.C.W., Inc. ("Respondent") that EPA has reason to believe that Respondent has violated Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i, and the State of West Virginia's federally authorized underground storage tank program with respect to the underground storage tanks at Respondent's facility located at 1522 Third Avenue, Huntington, West Virginia (the "Facility"). Section 9006 of RCRA, 42 U.S.C. § 6991e, authorizes EPA to take enforcement action, including issuing a compliance order or assessing a civil penalty, whenever it is determined that a person is in violation of any requirement of RCRA Subtitle I, EPA's regulations thereunder, or any regulation of a state underground storage tank program which has been authorized by EPA.

On April 10, 1996, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the State of West Virginia was granted final authorization to administer a state underground storage tank management program *in lieu* of the Federal underground storage tank management program established under Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991i. The authorization of West Virginia's underground storage tank program became effective on July 1, 1996. The provisions of West Virginia's authorized underground storage tank program regulations, set forth in WVUSTR, which incorporate by reference the federal underground storage tank program regulations set forth at 40 C.F.R. Part 280 (1995 ed.), 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. A copy of the authorized WVUSTR, Parts 33-30-1 through 33-30-4.6, is enclosed with this Complaint (Enclosure "B"). The authorized West Virginia underground storage tank regulations are cited as the legal basis for EPA's Complaint along with the incorporated provisions of the federal regulations.

Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d), authorizes EPA to assess a civil penalty against any owner or operator of an underground storage tank who fails to comply with, *inter alia*, 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 underground storage tank program that has been approved by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c.

EPA has given the State of West Virginia notice of the issuance of this Complaint in accordance with Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991e(a)(2).

In support of this Complaint, the Complainant makes the following allegations, findings of fact and conclusions of law:

## **II. COMPLAINT**

### **Findings of Facts and Conclusions of Law**

1. The United States Environmental Protection Agency - Region III ("EPA" or the "Region") and EPA's Office of Administrative Law Judges have jurisdiction over this matter pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e, 40 C.F.R. § 280, 40 C.F.R. §§ 22.1(a) (4), and 22.1(a) (4) (c).
2. At all times relevant to this Complaint, L.C.W., Inc. has been a West Virginia corporation doing business as Kwik Lube in the State of West Virginia.
3. Respondent is a "person" as defined in Section 9001(5) of RCRA, 42 U.S.C. § 6991(5), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12.
4. At all times relevant to this Complaint, Respondent has been the "owner" and "operator," as those terms are defined in Section 9001(3) and (4) of RCRA, 42 U.S.C. § 6991(3) and

(4), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12, of the "underground storage tanks" ("USTs") and "UST systems" as those terms are defined in Section 9001(10) of RCRA, 42 U.S.C. § 6991(10), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12, located at 1522 Third Avenue, Huntington, West Virginia, 25701(the "Facility").

5. On November 7, 2007, an EPA representative conducted a Compliance Evaluation Inspection ("CEI") of the Facility pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d.
6. At the time of the November 7, 2007 CEI, and at all times relevant to the applicable violations alleged herein, three (3) USTs, as described in the following subparagraphs, were located at the Facility:
  - A. A two thousand (2,000) gallon steel tank that was installed on or about May 1, 1987 and that, at all times relevant hereto, routinely contained used oil, a "regulated substance" as that term is defined in Section 9001(7) of RCRA, 42 U.S.C. § 6991(7), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12 (hereinafter "UST No. 1"), and
  - B. A two thousand (2,000) gallon steel tank that was installed on or about May 1, 1987 and that, at all times relevant hereto, routinely contained oil, a "regulated substance" as that term is defined in Section 9001(7) of RCRA, 42 U.S.C. § 6991(7), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12 (hereinafter "UST No. 2").
  - C. A two thousand gallon steel tank that was installed on or about May 1, 1987, and that all times relevant hereto, routinely contained water. This tank had previously been used to store "regulated substance" as that term is defined in Section 9001(7) of RCRA, 42 U.S.C. § 6991(7), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12 (hereinafter "UST No. 3").
7. At all times relevant to the applicable violations alleged herein, UST No. 1 and UST No. 2 have been "petroleum UST systems" and "existing UST systems" as these terms are defined in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12.
8. USTs Nos. 1 and 2 are and were, at all times relevant to applicable violations alleged in this Complaint, used to store "regulated substance(s)" at Respondent's Facility, as defined in Section 9001(7) of RCRA, 42 U.S.C. § 6991(7), and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.12, and have not been "empty" as that

term is defined at WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.70(a).

9. Pursuant to RCRA Section 9005, 42 U.S.C. § 6991d, on January 2, 2008 and May 9, 2008, EPA issued Information Requests to Respondent concerning its petroleum UST systems at the Facility.

**COUNT I**

(Failure to perform release detection on USTs Nos. 1 and 2)

10. The allegations of Paragraphs 1 through 9 of the Complaint are incorporated herein by reference.
11. Pursuant to WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c), owners and operators of existing UST systems must provide a method or combination of methods of release detection monitoring that meets the requirements described therein.
12. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a) provides, in pertinent part, that USTs shall be monitored at least every 30 days for releases using one of the methods listed in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d) through (h), except that:
  - (1) UST systems that meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 (Performance Standards for New UST Systems) or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Upgrading of Existing UST Systems), and the monthly inventory control requirements in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(a) or (b) (Inventory Control or Manual Tank Gauging), may use tank tightness testing, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(c) (Tank Tightness Test), at least every 5 years until December 22, 1998, or until 10 years after the UST is installed or upgraded under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21(b) (Tank Upgrading Requirements); and
  - (2) UST systems that do not meet the performance standards in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.20 (Performance Standards for New UST Systems) or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Upgrading of Existing UST Systems), may use monthly inventory controls, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by

reference 40 C.F.R. § 280.43(a) or (b) (Inventory Control or Manual Tank Gauging) and annual tank tightness testing, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(c) (Tank Tightness Test) until December 22, 1998, when the tank must be upgraded under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.21 (Tank Upgrading Requirements) or permanently closed under WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71; and

- (3) Tanks with a capacity of 550 gallons or less may use weekly tank gauging, conducted in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(b).

13. From September 12, 2006 to November 7, 2007, no method of release detection was used by Respondent for USTs Nos. 1 and 2.
14. From September 12, 2006 to November 7, 2007, Respondent's USTs Nos. 1 and 2 at the Facility were not monitored in compliance with any of the methods set forth in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a)(1)-(3) and/or WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.43(d)-(h).
15. Respondent's acts and/or omissions as alleged in Paragraphs 13 and 14, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c) and WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.41(a).

## COUNT II

(Failure to test cathodic protection system on USTs Nos. 1, 2 and 3)

16. Paragraphs 1 through 15 of this Complaint are incorporated by reference as if fully set forth herein.
17. WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1), provides that all UST systems equipped with cathodic protection system must be tested for proper operation within 6 months of installation and at least 3 years thereafter by a qualified cathodic protection tester.
18. USTs Nos. 1 through 3 are and were, at the time of the violations alleged herein, "steel UST systems with corrosion protection" and, Tanks 1 and 2, were used to store regulated substances within the meaning of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31.

19. A test of the cathodic protection system for USTs Nos. 1 through 3 was conducted on July 10, 2004. From at least July 11, 2007 until June 27, 2008, Respondent failed to conduct a test of the cathodic protection system as required by WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1), for the USTs Nos. 1, 2 and 3 at the Facility.
20. Respondent's act and/or omission as alleged in Paragraph 19, above, constitute violations by Respondent of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1).

**COUNT III**

(Failure to Provide Financial Assurance)

21. The allegations in Paragraphs 1 through 20, above, are incorporated herein by reference as though fully set forth at length herein.
22. WVUSTR Section 33-30-2.2.1, which incorporates by reference 40 C.F.R. §§ 280.90 through 280.112, provides, in pertinent part, that owners and operators of petroleum UST systems are required, with exceptions not relevant hereto, to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs. Subject to the limitations set forth in 40 C.F.R. § 280.94, incorporated by reference into WVUSTR Section 33-30-2.2.1, an owner or operator may demonstrate financial responsibility using any of the mechanisms set forth in 40 C.F.R. §§ 280.95 through 280.103.
23. At the time of the CEI on November 7, 2007, Respondent did not have financial responsibility for USTs Nos. 1 through 3 by any of the methods set forth in 40 C.F.R. §§ 280.95 through 280.103, which are incorporated by reference into WVUSTR Section 33-30-2.2.1.
24. Respondent's act and/or omission as alleged in Paragraph 23, above, constitutes a violation by Respondent of WVUSTR Section 33-30-2.2.1, which incorporates by reference 40 C.F.R. §§ 280.95 through 280.103.

**COUNT IV**

(Failure to Respond to an Information Request Letter)

25. The allegations in Paragraphs 1 through 24, above, are incorporated by reference as though fully set forth at length herein.

26. Section 9005 of RCRA, 42 U.S.C. § 6991d, provides that for the purposes of, *inter alia*, enforcing the provisions of RCRA Subtitle I, 42 U.S.C. §§ 6991 *et seq.*, any owner or operator of an UST shall furnish information regarding such UST to a duly designated officer, employee or representative of the EPA, or a duly designated officer, employee or representative of a State acting pursuant to Section 9003(h)(7) of RCRA, 42 U.S.C. § 6991b (h)(7), upon request of such officer, employee or representative.
27. WVUSTR Section 33-30-2.2.1, which incorporates by reference 40 C.F.R. § 280.34, requires, in pertinent part, owners and operators to cooperate fully with requests for document submission, testing and monitoring by the owner and operator pursuant to Section 9005 of Subtitle I of RCRA.
28. EPA issued an information request letter (“IRL”) to Respondent pursuant to Section 9005 of Subtitle I of RCRA on January 2, 2008 (“January 2, 2008 IRL”).
29. The January 2, 2008 IRL requested Respondent to submit the following information to EPA: 1) the name and address of the owner for the UST systems at the Facility; 2) the name and address of the owner of the Facility property; 3) the name and address of each operator of the UST systems at the Facility; and 4) documentation, as specified in the January 2, 2008 IRL, demonstrating the Facility’s compliance with the UST regulations.
30. The January 2, 2008 IRL specifically required that any submissions be certified by Respondent as true, accurate and complete.
31. In response to EPA’s January 2, 2008 IRL, Respondent submitted an undated and uncertified letter to EPA consisting of a statement that Respondent had purchased the Facility on December 8, 2004 and enclosed an UST certificate issued by the State of West Virginia and a December 2, 2005 inspection report from the State of West Virginia RCRA Subtitle C hazardous waste inspection of the Facility.
32. EPA issued an IRL to Respondent pursuant to Section 9005 of Subtitle I of RCRA on May 9, 2008 (“May 9, 2008 IRL”).
33. The May 9, 2008 IRL requested Respondent to submit information to EPA for, among other things, 1) the name and address of the owner for the UST systems at the Facility; 2) the name and address of the owner of the Facility property; 3) the name and address of each operator of the UST systems at the Facility; and 4) documentation, as specified in the May 9, 2008 IRL, demonstrating the Facility’s compliance with the UST regulations.
34. The May 9, 2008 IRL specifically required that any submissions be certified by Respondent as true, accurate and complete.

35. In response to EPA's May 9, 2008 IRL, Respondent submitted an undated and uncertified handwritten note to EPA dated June 3, 2008 stating "I contacted Corrosion Technical Services in West Chester, OH to get the tanks tested."
36. As of the date of this Complaint, Respondent has not furnished information in response to the January 8, 2008 and May 9, 2008 IRLs, to EPA, specifically: 1) the name and address of the owner for the UST systems at the Facility; 2) the name and address of each operator of the UST systems at the Facility; and documentation, as specified in the January 8, 2008 IRL and May 9, 2008 IRL, demonstrating the Facility's compliance with the UST regulations.
37. Respondent's act and/or omission as alleged in Paragraph 36, above, constitutes a violation by Respondent of Section 9005 of RCRA, 42 U.S.C. § 6991d and WVUSTR Section 33-30-2.2.1, which incorporates by reference 40 C.F.R. § 280.34.

### **III. COMPLIANCE ORDER**

Pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e, Respondent is hereby ordered to:

38. Within thirty (30) days of the effective date of this Compliance Order, comply with the release detection requirements of WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.40(a) and (c), for all UST systems located at the Facility subject to this Complaint or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
39. Within thirty (30) days of the effective date of this Compliance Order, complete measures to ensure that the corrosion protection systems for USTs Nos. 1, 2 and 3 at the Facility are tested for proper operation by a qualified cathodic protection tester in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.31(b)(1) or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
40. Within thirty (30) days of the effective date of this Compliance Order, demonstrate compliance with the financial responsibility requirements for all UST systems located at the Facility in accordance with WVUSTR Section 33-30-2.2.1, which incorporates by reference 40 C.F.R. §§ 280.90 through 280.112 or close such UST systems in accordance with WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. § 280.71.
41. If Respondent elects to close any or all of the USTs subject to this Compliance Order, it



must submit to EPA, within fifteen (15) calendar days after the effective date of this Compliance Order, a notice of intent to permanently close, identifying which UST(s) it intends to close. Such notice shall be sent to Mr. Clark Conover at the address set forth below. A copy of such notice shall also be sent to WVDEQ at the address set forth below.

- 42. Within seventy-five (75) days of the effective date of this Compliance Order, submit to EPA a report which documents and certifies Respondent's compliance with the terms of this Compliance Order.
- 43. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Compliance Order shall be certified by a responsible corporate officer of Respondent.

The certification required above shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is true, accurate, and complete. As to [the/those] identified portions of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

- 1. All documents and reports to be submitted pursuant to this Compliance Order shall be sent to the following persons and shall be sent certified mail, return receipt requested to the attention of:

Mr. Clark Conover  
 Environmental Scientist  
 USEPA Region III  
 1060 Chapline Street-Suite 303

Wheeling, WV 26003

and

Joyce A. Howell  
Sr. Assistant Regional Counsel (3RC30)  
U.S. Environmental Protection Agency - Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

2. One copy of all documents submitted to EPA shall also be sent by regular mail to the attention of:

Tom Fisher  
Hazardous Waste and UST Program Manager  
Division of Water & Waste Management  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street, SE  
Charleston, WV 25304-2345

44. If activities undertaken by the Respondent in connection with this Compliance Order or otherwise indicate that a release of a regulated substance from any UST at the Facility may have occurred, Respondent may be required to undertake corrective action pursuant to applicable regulations in WVUSTR Section 33-30-2.2.1 which incorporates by reference 40 C.F.R. Part 280, Subpart F.
45. Respondent is hereby notified that failure to comply with any of the terms of this Compliance Order may subject it to imposition of a civil penalty of up to \$37,500 for each day of continued noncompliance, pursuant to Section 9006(a)(3) of RCRA, 42 U.S.C. § 6991e(a)(3), the Debt Collection Improvement Act of 1996 ("DCIA"), and the subsequent Civil Monetary Penalty Inflation Adjustment Rules, 61 *Fed. Reg.* 69,360 (December 31, 1996), 69 *Fed. Reg.* 7121, 7126 (February 13, 2004), and 73 *Fed. Reg.* 75,340 (December 11, 2008) codified at 40 C.F.R. Part 19 (Enclosure "D" "E" and "F").
46. The term "days" as used herein shall mean calendar days unless specified otherwise.

#### **IV. PROPOSED CIVIL PENALTY**

Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), provides, in relevant part, that any owner or operator of an underground storage tank who fails to comply with any requirement or standard 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. In accordance with the Adjustment of Civil Monetary Penalties for Inflation, promulgated pursuant to the Debt Collection Improvement Act of 1996 and codified at 40 C.F.R. Part 19, all violations of RCRA Section 9006(d)(2), 42 U.S.C. § 6991e(d)(2), occurring on or before March 15, 2004 are subject to a 10% increase for inflation, and violations occurring after March 15, 2004 and before January 12, 2009 are subject to a 17.23% increase for inflation, not to exceed \$11,000 per violation per day, and all violations occurring after January 12, 2009 are subject to an additional increase for inflation, not to exceed \$16,000 per day. (Enclosure "F"). For purposes of determining the amount of any penalty to be assessed, Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), requires EPA to take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific penalty at this time, but will do so at a later date after an exchange of information has occurred. *See* 40 C.F.R. § 22.19(a)(4).

To develop a proposed penalty for the violations alleged in this Complaint, EPA will take into account the particular facts and circumstances of this case with specific reference to EPA's November 1990 U.S. EPA Penalty Guidance for Violations of UST Regulations ("UST Penalty Guidance") (Enclosure "C"), the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Part 19 (Enclosure "D"), and Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004) (September 21, 2004) (Enclosure "E"). These policies provide a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to particular cases. As a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will also consider, among other factors, Respondent's ability to pay a civil penalty. The burden of raising and demonstrating an inability to pay rests with the Respondent. In addition, to the extent that facts and circumstances unknown to Complainant at the time of issuance of this Complaint become known after the Complaint is issued; such facts and circumstances may also be considered as a basis for adjusting a civil penalty.

This Complaint does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), an explanation of the number and severity of the violations alleged in this Complaint is set forth below.

#### Penalty Explanation

##### **Count I -Failure to provide release detection for USTs.**

The "potential for harm" for this violation is "major." Given that USTs are, by definition, underground, it is critically important that facility owners and operators utilize effective methods of detecting releases from such tanks. The prevention and detection of leaks are the cornerstones

of the UST regulatory program. Respondent's failure to use an acceptable method of release detection created the possibility of a leak going undetected and harming human health or the environment.

The "extent of deviation" for this violation is "major." Failure to monitor an UST for releases at least every 30 days using an allowable method of release detection typically constitutes a "major" deviation from the requirements of the RCRA regulatory program. In this case, Respondent did not monitor at all for a period of years.

**Count II -Failure to test cathodic protection system.**

The "potential for harm" for this violation is "minor" since the USTs at Respondent's Facility contained a limited amount of regulated substances. The purpose of cathodic protection testing is to ensure that releases due to corrosion are prevented for as long as the steel UST system is used to store regulated substances. Respondent was eleven months late in performing the triennial test.

The "extent of deviation" for this violation is "moderate" since a test was performed, however the test was overdue by eleven months.

**Count III -Failure to comply with financial responsibility requirements.**

The "potential for harm" for this violation is "moderate." Financial assurances are a key element of the UST regulatory system, ensuring that there are adequate resources available to properly address any releases which have occurred or will occur in the future that may cause significant adverse effects to the environment and the regulatory program.

The "extent of deviation" for this violation is "major." Under the UST Penalty Policy, the failure to provide financial assurances is a substantial deviation from the regulatory program.

**Count IV -Failure to Respond to an Information Request Letter**

EPA does not propose a penalty for this violation.

**V. NOTICE OF RIGHT TO REQUEST A HEARING**

Respondent may request a hearing before an EPA Administrative Law Judge and at such hearing may contest any material fact upon which the Complaint is based, contest the appropriateness of any compliance order or proposed penalty, and/or assert that Respondent is entitled to judgment as a matter of law. To request a hearing, Respondent must file a written answer ("Answer") within thirty (30) days after service of this Complaint. The Answer should clearly and directly admit, deny or explain each of the factual allegations contained in this

Complaint of which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation and so states, such a statement is deemed to be a denial of the allegation. The Answer should contain: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) a statement of whether a hearing is requested. All material facts not denied in the Answer will be considered to be admitted.

Failure of the Respondent to admit, deny or explain any material allegation in the Complaint shall constitute an admission by Respondent of such allegation. Failure to Answer may result in the filing of a Motion for Default Order and the possible issuance of a Default Order imposing the penalties proposed herein without further proceedings.

Any hearing requested and granted will be conducted in accordance with the Consolidated Rules, a copy of which has been enclosed with this Complaint (Enclosure "A"). Respondent must send any Answer and request for a hearing to the attention of:

Regional Hearing Clerk (3RC00)  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029.

In addition, please send a copy of any Answer and/or request for a hearing to the attention of:

Joyce A. Howell  
Sr. Assistant Regional Counsel  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029.

#### **VI. SETTLEMENT CONFERENCE**

Complainant encourages settlement of this proceeding at any time after issuance of the Complaint if such settlement is consistent with the provisions and objectives of RCRA. Whether or not a hearing is requested, Respondent may request a settlement conference with the Complainant to discuss the allegations of the Complaint, and the amount of the proposed civil penalty.

**A REQUEST FOR A SETTLEMENT CONFERENCE DOES NOT RELIEVE THE RESPONDENT OF ITS RESPONSIBILITY TO FILE A TIMELY ANSWER.**

In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order

signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of Respondent's right to contest the allegations of the Complaint and its right to appeal the proposed Final Order accompanying the Consent Agreement.

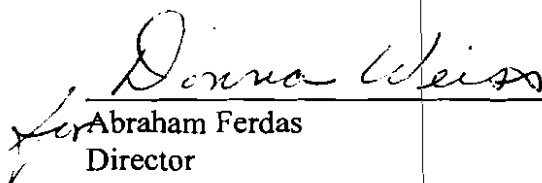
If you wish to arrange a settlement conference, please contact Joyce Howell, Senior Assistant Regional Counsel, at (215) 814-2644 prior to the expiration of the thirty (30) day period following service of this Complaint. Once again, however, such a request for a settlement conference does not relieve Respondent of its responsibility to file an Answer within thirty (30) days following service of this Complaint.

Please note that the Quick Resolution settlement procedures set forth in 40 C.F.R. § 22.18 do not apply to this proceeding because the Complaint seeks a compliance order. See 40 C.F.R. § 22.18(a)(1).

#### **VII. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS**

The following Agency officers, and the staffs thereof, are designated as the trial staff to represent the Agency as the party in this case: the Region III Office of Regional Counsel, the Region III Land and Chemicals Division, and the Office of the EPA Assistant Administrator for Enforcement and Compliance Assurance. Commencing from the date of issuance of this Complaint until issuance of a final agency decision in this case, neither the Administrator, members of the Environmental Appeals Board, Presiding Officer, Regional Administrator, nor Regional Judicial Officer, may have an *ex parte* communication with the trial staff or the merits of any issue involved in this proceeding. Please be advised that the Consolidated Rules prohibit any *ex parte* discussion of the merits of a case with, among others, the Administrator, members of the Environmental Appeals Board, the Presiding Officer, the Regional Administrator, and the Regional Judicial Officer.

Dated: 12/29/09

  
\_\_\_\_\_  
Abraham Ferdas  
Director  
Land and Chemicals Division  
U.S. EPA Region III

- Enclosures:
- A. Consolidated Rules of Practice, 40 C.F.R. Part 22
  - B. WVUSTR, Parts 33-30-1 through 33-30-4.6
  - C. UST Penalty Guidance
  - D. Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19
  - E. Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004
  - F. Civil Monetary Penalty Inflation Adjustment Rule, 73 *Federal Register* 75340 (December 11, 2008, *effective* January 12, 2009.)

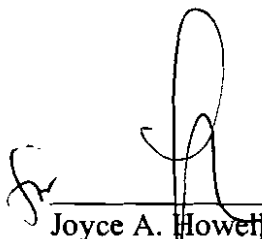
**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on December , 2009, the original and one true and correct copy of the foregoing Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing was hand-delivered to and filed with the Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, Philadelphia, Pennsylvania, and that a true and correct copies of the Administrative Complaint and its enclosures were sent via Federal Express, signature confirmation requested upon the following:

L.C.W., Inc., d/b/a KWIK LUBE  
1522 Third Avenue  
Huntington, WV 25701

**29 DEC 2009**

\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Joyce A. Howell  
Sr. Assistant Regional Counsel  
U.S. EPA - Region III  
Counsel for Complainant