



MAY 19 2009

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2009 MAY 20 PM 3:13
REGIONAL HEARING
CLERK

CERTIFIED MAIL— RETURN RECEIPT REQUESTED
Article Number: 7005 3110 0000 5929 6844

Charles Hayward, Administrator
Wesley Health Care Center, Inc.
131 Lawrence Street
Saratoga Springs, New York 12866

Re: **In the Matter of Wesley Health Care Center, Inc., Respondent**
Docket No. RCRA-02-2009-7504

Dear Mr. Hayward:

Enclosed is the Complaint, Compliance Order and Opportunity for Hearing in the above-referenced proceeding. The Complaint alleges violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint. If you wish to contest the allegations and/or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint with the Regional Hearing Clerk of the Environmental Protection Agency (“EPA”), Region 2, at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer of Region 2, a default order may be entered against you and the entire proposed penalty may be assessed.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.) For your general information and use, I also enclosed both an "Information Sheet for U.S. EPA Small Business Resources" and a "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" which may apply to you depending on the size of the proposed penalty and nature of your company.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

If you have any questions or wish to schedule an informal conference, please contact the attorney whose name is listed in the Complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Dore LaPosta". The signature is written in a cursive, slightly stylized font.

Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (without enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II
2009 MAY 20 PM 3:13
REGIONAL HEARING
CLERK

In the Matter of

Wesley Health Care Center, Inc.
Saratoga Springs, New York

Respondent.

Proceeding Under Section 9006
of the Solid Waste Disposal Act,
as amended

COMPLAINT, COMPLIANCE ORDER
AND NOTICE OF OPPORTUNITY
FOR HEARING

Docket No. RCRA-02-2009-7504

COMPLAINT

This is a civil administrative proceeding instituted pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901 et seq. (the "Act").

Complainant in this proceeding, Dore LaPosta, Director, Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("EPA"), has been duly delegated the authority to institute this action.

GENERAL ALLEGATIONS

1. Respondent is Wesley Health Care Center, Inc. ("Respondent" or "Wesley").
2. Respondent is a not-for-profit corporation organized pursuant to the laws of the State of New York.
3. Respondent is a "person" within the meaning of Section 9001(6) of the Act, 42 U.S.C. § 6991(6), and 40 C.F.R. § 280.12.
4. Respondent was and continues to be an "owner" and an "operator" of a 1,000-gallon steel "underground storage tank" ("UST"), as that term is defined in Section 9001 of the Act, 42 U.S.C. §6991, and 40 C.F.R. § 280.12. The UST is located at Wesley Health Care Center, 131 Lawrence Street, Saratoga Springs, New York ("Wesley Facility").

5. Pursuant to Sections 2002, 9002, and 9003 of the Act, 42 U.S.C. §§ 6912, 6991a, and 6991b, EPA promulgated rules setting forth requirements applicable to owners and operators of UST systems, set forth at 40 C.F.R. Part 280.
6. Pursuant to 40 C.F.R. § 280.12, EPA is the “implementing agency” responsible for enforcing the requirements of the Act and the regulations promulgated pursuant thereto which are the subject of this Complaint.
7. 40 C.F.R. § 280.12 defines an underground storage tank or UST as 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 underground pipes connected thereto) is 10 percent or more beneath the surface of the ground.
8. 40 C.F.R. § 280.12 defines an existing tank system as a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988.
9. Pursuant to 40 C.F.R. § 280.40, owners and operators of UST systems must provide a method, or combination of methods, of release detection that meet the requirements of 40 C.F.R. Part 280, Subpart D, in accordance with the Schedule for Phase-in of Release Detection at Subsection 280.40(c).
10. Pursuant to 40 C.F.R. § 280.21, no later than December 22, 1998, all existing UST systems had to comply with the upgrade requirements in paragraphs (b) through (d) of that section, the new performance standard requirements set forth at 40 C.F.R. § 280.20, or the closure requirements set forth at 40 C.F.R. §§ 280.70 - 280.74.
11. On or about October 7, 2008, authorized staff from the New York State Department of Environmental Conservation (“NYSDEC”) inspected the Wesley Facility in order to determine compliance with the NYSDEC regulations and the regulations at 40 C.F.R. Part 280. To document the inspection, NYSDEC staff prepared a Petroleum Bulk Storage (“PBS”) Regulations Inspection Report.
12. Following the inspection of the Wesley Facility, NYSDEC sent a referral to EPA, including a Notice of Violation issued by NYSDEC, dated October 17, 2008, and the PBS Inspection Report (collectively the “Referral”). The Referral stated the existing “gasoline/ethanol tank” at the Wesley Facility was not upgraded with operational overfill and spill prevention devices, and the corrosion protection system was not tested.
13. The Referral also stated that release detection was not being performed for the UST system located at the Wesley Facility.
14. Pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, on or about November 5, 2008, EPA sent an Information Request Letter (“IRL”) to Respondent to determine the status of its compliance with the Act and 40 C.F.R. Part 280.

15. Respondent replied to EPA's IRL on November 20, 2008 (the "November 2008 Response"). In the November 2008 Response, Respondent admitted that it is the owner of one 1,000-gallon steel tank that was installed at the Wesley Facility on or about November 1, 1985.
16. In the November 2008 Response, Respondent admitted that the UST system at the Wesley Facility was used for storage of "regular gas (10% ethanol)."
17. In the November 2008 Response, Respondent admitted that the UST system at the Wesley Facility was not equipped with overfill and spill prevention devices.
18. At the time of NYSDEC's inspection, the UST system at the Wesley Facility was in use. It did not meet all the performance standards set forth at 40 C.F.R. § 280.21.

Count 1 – Failure to Upgrade Existing UST System with Spill and Overfill Prevention Devices, as Required by 40 C.F.R. § 280.21(d).

19. Complainant realleges each allegation contained in Paragraphs "1" through "18" with the same force and effect as if fully set forth herein.
20. Pursuant to 40 C.F.R. § 280.21, not later than December 22, 1998, all existing UST systems had to comply with the upgrade requirements in paragraphs (b) through (d) of that section, the new performance standard requirements set forth at 40 C.F.R. § 280.20, or the closure requirements set forth at 40 C.F.R. §§ 280.70 - 280.74.
21. Pursuant to 40 C.F.R. § 280.21(d), all existing UST systems had to be upgraded with spill and overfill prevention equipment.
22. At the time of NYSDEC's inspection of the Wesley Facility, the UST system did not have spill or overfill prevention equipment.
23. Respondent did not have spill or overfill prevention equipment from at least May 15, 2004 to December 16, 2008.
24. Respondent's failure to upgrade its existing UST system with spill and overfill protection equipment is a violation of 40 C.F.R. § 280.21(d).

Count 2 – Failure to Ensure Proper Cathodic Protection and Reporting, as Required by 40 C.F.R. § 280.31(b) and § 280.34.

25. Complainant realleges each allegation contained in Paragraphs "1" through "24" with the same force and effect as if fully set forth herein.
26. Pursuant to 40 C.F.R. § 280.21, not later than December 22, 1998, all existing UST systems had to comply with the upgrade requirements in paragraphs (b) through (d) of

that section, or with the new performance standard requirements set forth at 40 C.F.R. § 280.20, or the closure requirements set forth at 40 C.F.R. §§ 280.70 - 280.74.

27. Pursuant to 40 C.F.R. § 280.31(b), all owners and operators of steel UST systems with corrosion protection must comply with inspection requirements specified in 40 C.F.R. § 280.31(b).
28. At the time of NYSDEC's inspection of the UST system at the Wesley Facility, the inspector requested records of any upgrades made to the system. Respondent did not produce any records showing proper operation of the UST's cathodic protection system.
29. At the time of NYSDEC's inspection of the UST system at the Wesley Facility, the required testing and inspection of the cathodic protection system has not been conducted.
30. In the November 2008 Response, Respondent stated that the UST system at the Wesley Facility was equipped with a sacrificial anode.
31. In the November 2008 Response, Respondent admitted that there were no corrosion surveys performed for the UST.
32. Respondent failed to operate and maintain corrosion protection for the UST system in accordance with the requirements at 40 C.F.R. § 280.31(b) from at least December 16, 2005 to December 16, 2008.
33. Respondent failed to maintain records related to corrosion protection for the UST system as required by 40 C.F.R. § 280.34(b)(2).
34. Respondent's failure to upgrade and comply with the operation requirements for corrosion protection for the UST system from at least December 16, 2005 to December 16, 2008 and to comply with the recordkeeping requirements related to corrosion protection for the UST system constitutes a violation of 40 C.F.R. § 280.31(b) and § 280.34.

Count 3 – Failure to Provide a Method of Release Detection that Can Detect a Release from any Portion of the Petroleum UST System, as Required by 40 C.F.R. Part 280 Subpart D.

35. Complainant realleges each allegation contained in Paragraphs “1” through “34” with the same force and effect as if fully set forth herein.
36. Pursuant to 40 C.F.R. § 280.41, owners and operators of petroleum UST systems must provide a method of release detection that meets the requirements of 40 C.F.R. Part 280, Subpart D.
37. Pursuant to 40 C.F.R. § 280.45, owners and operators of UST systems must maintain records in accordance with 40 C.F.R. § 280.34 demonstrating compliance with all applicable requirements of 40 C.F.R. Part 280 Subpart D.

38. In EPA's IRL, Respondent was asked to provide information about upgrades to or replacement of the UST system at the Wesley Facility. The November 2008 Response stated only that the 1,000-gallon tank dated from November 1, 1985.
39. The UST system at the Wesley Facility did not comply with the spill and overflow requirements at 40 C.F.R. § 280.21, not later than December 22, 1998, or the upgrade requirements in paragraphs (b) through (d) of that section, or the new performance standard requirements at 40 C.F.R. § 280.20, or the closure requirements at 40 C.F.R. §§ 280.70 - 280.74.
40. Respondent stated in the November 2008 Response that it currently completed daily inventory monitoring. Respondent provided three months of inventory monitoring records.
41. Since the UST system at the Wesley Facility did not meet the performance standards at 40 C.F.R. § 280.21 from at least April 1, 2004 to December 31, 2008, Respondent was, pursuant to 40 C.F.R. § 280.41(a)(2), not eligible to utilize the monthly Inventory Control method set forth at 40 C.F.R. § 280.43.
42. Respondent was not providing a method of release detection for the UST system at the Wesley Facility from at least May 15, 2004 to December 16, 2008.
43. Respondent also failed to maintain and provide records demonstrating compliance with release detection requirements, as required by 40 C.F.R. §§ 280.34 and 280.45.
44. Respondent's failure to implement a required method of release detection that can detect a release from any portion of the petroleum UST at the Wesley Facility, and to maintain records for at least one year demonstrating compliance with the release detection requirement constitutes a violation of 40 C.F.R. Part 280, Subpart D.

PROPOSED CIVIL PENALTY

Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e (d)(2)(A), authorizes the assessment of a civil penalty of up to \$10,000 for each tank for each day of violation of any requirement or standard promulgated by the Administrator. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996), EPA is required to adjust its penalties for inflation on a periodic basis. EPA issued a Civil Monetary Penalty Inflation Adjustment Rule on December 31, 1996, as amended; *see* 61 Fed. Reg. 69360 (1996), codified at 40 C.F.R. Part 19.

Under Table I of the Civil Monetary Penalty Inflation Adjustment Rule, the maximum civil penalty under 42 U.S.C. Section 6991e(d)(2) for each tank for each day of violation occurring after March 15, 2004 is \$11,000.

The penalties are proposed pursuant to the “U.S. EPA Penalty Guidance for Violations of UST Requirements,” dated November 1990 (“UST guidance”). The penalty amounts in this UST guidance were amended by a September 21, 2004 document entitled, “Modifications to EPA Penalty Policies to implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004).” (These documents are available upon request.) This UST guidance provides a rational, consistent, and equitable calculation methodology for applying the statutory penalty factors to particular cases.

Based upon the facts alleged in this Complaint and taking into account factors such as the seriousness of the violations and any good faith efforts by the Respondent to comply with the applicable requirements, Complainant proposes, subject to receipt and evaluation of further relevant information, to assess the following civil penalties:

Count 1: a civil penalty of **\$21,324.94** was calculated for Respondent’s failure to provide spill and overfill prevention devices by the due date, as required by 40 C.F.R. § 280.21(d).

Count 2: a civil penalty of **\$7,461.44** was calculated for Respondent’s failure to ensure the proper operation of cathodic protection system and to maintain records, as required by 40 C.F.R. § 280.31(b) and § 280.34.

Count 3: a civil penalty of **\$20,335.94** was calculated for Respondent’s failure to provide a method of release detection and to maintain records demonstrating compliance, as required by 40 C.F.R. Part 280 Subpart D

The Total Proposed Penalty Amount for these violations is: \$49,122.32

Penalty Computation Worksheets explaining the rationale for the proposed civil penalties in this specific case are attached to this Complaint.

COMPLIANCE ORDER

Based on the foregoing, and pursuant to the authority of Section 9006 of the Act, 42 U.S.C. § 6991e, Complainant issues the following Compliance Order against Respondent, which shall take effect thirty (30) days after service of this Order (*i.e.*, the effective date), unless by that date, the Respondent has requested a hearing pursuant to 40 C.F.R. § 22.15. See 42 U.S.C. § 6991(e)(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c):

1. Respondent shall, to the extent Respondent has not done so, within thirty (30) days after the effective date of this Order, comply with all applicable upgrade requirements of 40 C.F.R. § 280.21 for the UST system at the Respondent’s Wesley Facility, or meet new UST system performance standards at 40 C.F.R. § 280.20. If the UST can not meet all the upgrade requirements of 40 C.F.R. § 280.21 then in the alternative, cease operation and permanently close the UST system at the Wesley Facility in accordance with the requirements specified under 40 C.F.R. §§ 280.70 – 280.74.

2. Respondent shall, to the extent Respondent has not done so, within thirty (30) days after the effective date of this Order, comply with all applicable requirements of 40 C.F.R. § 280.31 for

corrosion protection and 40 C.F.R. Part 280 Subpart D for release detection for the UST system at the Respondent's Wesley Facility.

3. Respondent shall, within forty-five (45) calendar days after the effective date of this Order, submit to EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein. If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement. Such written notice shall contain the following certification:

I certify that the information contained in this written notice and the accompanying documents is true, accurate and complete. As to the accuracy of the identified portions of this response, which I cannot personally verify, I certify under penalty of law that this response and all attachments were prepared in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the UST system, and/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: _____

Respondent shall submit the notice required to be submitted pursuant to this paragraph to:

**Dr. Dennis J. McChesney, Team Leader, UST Team
RCRA Compliance Branch
Division of Enforcement and Compliance Assistance
290 Broadway, 20th Floor
New York, NY 10007-1866**

NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to Section 9006(a)(3) of the Act, 42 U.S.C. §6991e(a)(3), and in accordance with the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996) and the regulations promulgated thereunder (see the Civil Monetary Inflation Rule, 73 Fed. Reg. 75340 (December 11, 2008) to be codified at 40 C.F.R. Part 19), a violator failing to comply with a Compliance Order within the time specified in the Order is liable for a civil penalty up to \$37,500 for each day of continued noncompliance.

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 40 C.F.R. Part 22, entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS" ("Consolidated Rules"). A copy of these rules accompanies this "Complaint, Compliance Order, and Notice of Opportunity for Hearing" (hereinafter the "Complaint").

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the compliance order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts that Respondent disputes (and thus intends to place at issue in the proceeding); and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure to affirmatively raise in the Answer facts that constitute or that might constitute the grounds of its defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity to Request a Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order

in the Complaint, unless Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within 30 days after such Order is served, such Order shall automatically become final. 40 C.F.R. § 22.37.

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [*i.e.* in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued thereto shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by the defaulting Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against any defaulting Respondent, and to collect the assessed penalty amount in federal court. Any default order requiring compliance action shall be effective and enforceable against any defaulting Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; *see* 40 C.F.R. § 1.25(e)], Respondent must do so "within thirty (30) days after the initial decision is served upon the parties". 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.07(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document". Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged; (2) any information relevant to Complainant's calculation of the proposed penalty; (3) the effect the proposed penalty would have on Respondent's ability to continue in business; and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Beverly Kolenberg
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th floor
New York, New York 10007-1866
(212) 637-3167 (phone)
(212) 637-3104 (fax)

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waives its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. §

22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

If, instead of filing an Answer, Respondent wishes not to contest the Compliance Order in the Complaint and wants to pay the total amount of the proposed penalty within thirty (30) days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified above.

Dated: May 19, 2009



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency -Region 2
290 Broadway
New York, NY 10007-1866

To: Charles Hayward, Administrator
Wesley Health Care Center
131 Lawrence Street
Saratoga Springs, New York 12866

cc: Russ Brauksieck, Chief
Spill Prevention and Bulk Storage Section
NYSDEC
625 Broadway, 11th Floor
Albany, N.Y. 12233

Elizabeth M. Lowe, Regional Director
NYSDEC, Region 5
P.O. Box 296
1115 State Route 86
Ray Brook, NY 12977-0296

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, Compliance Order, and Notice of Opportunity for Hearing, bearing docket number RCRA-02-2009-7504, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to Charles Hayward, Administrator, Wesley Health Care Center, 131 Lawrence Street, Saratoga Springs, New York 12866. I hand-carried the original and a copy of the Complaint to the Office of Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: MAY 20 2009
New York, New York

Mildred N. Bay

Penalty Calculation Worksheet

Respondent: Wesley Health Care Center.

Count 1 – Failure to Upgrade Existing UST System with Spill and Overfill prevention Devices as Required by 40 C.F.R. § 280.21(d).

- 1. Days of noncompliance: 15-May-04 16-Dec-08
- 2. Number of tanks: 1
- 3. Total number of days: 1,676

Part 2 - Economic Benefit Component:

- 4. One Time Capital & Time Costs: See BEN computer model v. 4.3 \$1,762.00
- 5. Delay Capital & Avoided Costs: See BEN computer model v. 4.3 \$770.00
- 6. Avoided Annually Recurring Costs: See BEN computer model v. 4.3
- 7. Initial Economic Benefit (4-5+6): See BEN computer model v. 4.3 \$992.00
- 8. Final Economic Benefit at Penalty Payment Date: See BEN computer model v. 4.3 \$2,466.00

Part 3 - Matrix Value For The Gravity-Based Component:

- 9. Matrix Value (MV): 1,500
- 10. Per-tank MV (line 2 times line 9): 1,500

Inflation Adjustment Rule:

- 10a. $1,500 \times 1.2895$ (infl. adj. for post 3/15/04 (1.10×1.1723)) = \$1,934.25

Potential for Harm: Major

Extent of Deviation: Major

Justification for Potential for Harm: The Potential for Harm for this violation was determined to be Major because the owners did not employ spill and overfill prevention devices which are necessary to prevent product from getting into the environment.

Justification for Extent of Deviation: The Extent of Deviation for this violation was determined to be Major. Respondent has been in substantial noncompliance with the regulatory requirements since 1998 because no upgrade on the UST system had been performed.

Part 4 - Violator-Specific Adjustments To Matrix Value

Note: Lines 11, 12, 13, and 14, below, have the Matrix Value of \$1,934.25 which reflects an inflation adjustment increase of 17.23% for post-March 15, 2004 violations. See Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule (Pursuant to Debt Collection Improvement Act of 1996, Effective October 1, 2004).

	% Change (+/-)	MV	Total Dollar Adjustment
11. Degree of cooperation or non-cooperation:		\$1,934.25	-
12. Degree of willfulness or negligence.		\$1,934.25	-
13. History of noncompliance:		\$1,934.25	-
14. Unique factors:		\$1,934.25	-
15. Post-March 15, 2004 Adjusted Matrix Value (line 10 + Dollar Adjustments in lines 11 to 14) =		\$1,934.25	

Justification for Degree of Cooperation/ non-cooperation: no adjustment made.
 Justification for Degree of Willfulness or Negligence: no adjustment was made.
 Justification for History of Noncompliance: no adjustment was made.
 Justification for Unique Factors: no adjustment was made.

Calculations for Gravity Based Components (GBC) with Inflation Adjustments:

16. Environmental Sensitivity:	moderate
17. Environmental Sensitivity Multiplier (ESM):	1.5
18. Days of Noncompliance Multiplier (DNM):	6.5

Calculations for Gravity Based Components:

19. Total Gravity-Based Component =	(AMV)	(ESM)	(DNM)
	= \$1,934.25	1.5	6.5
	= \$18,854.94		

20. Economic Benefit Component (from line 8):	\$2,466.00
21. Gravity-Based Component (from line 19):	\$18,854.94
22. Initial Penalty Target Figure: (line 20 plus line 21):	\$21,324.94

Count 2 – Failure to Ensure that Cathodic Protection System is tested every three years as required by 40 C.F.R. § 280.31(b).

- | | | |
|---------------------------|-----------|-----------|
| 1. Days of noncompliance: | 16-Dec-05 | 16-Dec-08 |
| 2. Number of tanks: | 1 | |
| 3. Total number of days: | 1,096 | |

Part 2 - Economic Benefit Component:

- | | | |
|---|-------------------------------|----------|
| 4. One Time Capital & Time Costs: | See BEN computer model v. 4.3 | 0 |
| 5. Delay Capital & Avoided Costs: | See BEN computer model v. 4.3 | 0 |
| 6. Avoided Annually Recurring Costs: | See BEN computer model v. 4.3 | \$124.00 |
| 7. Initial Economic Benefit (4-5+6): | See BEN computer model v. 4.3 | \$124.00 |
| 8. Final Economic Benefit at Penalty
Payment Date: | See BEN computer model v. 4.3 | \$208.00 |

Part 3 - Matrix Value For The Gravity-Based Component

- | | |
|---------------------------------------|-----|
| 9. Matrix Value (MV): | 750 |
| 10. Per-tank MV (line 2 times line 9) | 750 |

Inflation Adjustment Rule:

- 10a. 750 x 1.2895 (infl. adj. for post 3/15/04 (1.10 x 1.1723)) = \$967.13

Potential for Harm: Moderate Extent of Deviation: Major

Justification for Potential for Harm: The Potential for Harm for this violation was determined to be Moderate. The sacrificial anode may have been providing sufficient corrosion protection to the UST system, even though the owners did not provide the required three year tests or document its proper operation.

Justification for Extent of Deviation: The Extent of Deviation for this violation was determined to be Major. Respondent has been in substantial noncompliance with the regulatory requirements because the required corrosion surveys were not performed.

Part 4 - Violator-Specific Adjustments To Matrix Value

Note: Lines 11, 12, 13, and 14, below, have the Matrix Value of \$967.13 which reflects an inflation adjustment increase of 17.23% for post-March 15, 2004 violations. See Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule (Pursuant to Debt Collection Improvement Act of 1996, Effective October 1, 2004).

	% Change (+/-)	MV	Total Dollar Adjustment
11. Degree of cooperation or non-cooperation:		\$967.13	-
12. Degree of willfulness or negligence.		\$967.13	-
13. History of noncompliance:		\$967.13	-
14. Unique factors:		\$967.13	-
15. Post-March 15, 2004 Adjusted Matrix Value (line 10 + Dollar Adjustments in lines 11 to 14) =		\$967.13	

Justification for Degree of Cooperation/ non-cooperation: no adjustment made.
 Justification for Degree of Willfulness or Negligence: no adjustment was made.
 Justification for History of Noncompliance: no adjustment was made.
 Justification for Unique Factors: no adjustment was made.

Calculations for Gravity Based Components (GBC) with Inflation Adjustments:

16. Environmental Sensitivity:	moderate
17. Environmental Sensitivity Multiplier (ESM):	1.5
18. Days of Noncompliance Multiplier (DNM):	5

Calculations for Gravity Based Components:

19. Total Gravity-Based Component =	(AMV)	(ESM)	(DNM)
	= \$967.13	1.5	5
	= \$7,253.44		

20. Economic Benefit Component (from line 8):	\$208.00
21. Gravity-Based Component (from line 19):	\$7,253.44
22. Initial Penalty Target Figure: (line 20 plus line 21):	\$7,461.44

Count 3 – Failure to provide Release Detection to UST as required by 40 C.F.R. § 280.41

- 1. Days of noncompliance: 15-May-04 16-Dec-08
- 2. Number of tanks: 1
- 3. Total number of days: 1,676

Part 2 - Economic Benefit Component

- 4. One Time Capital & Time Costs: See BEN computer model v. 4.3 0
- 5. Delay Capital & Avoided Costs: See BEN computer model v. 4.3 0
- 6. Avoided Annually Recurring Costs: See BEN computer model v. 4.3 \$1,145.00
- 7. Initial Economic Benefit (4-5+6): See BEN computer model v. 4.3 \$1,145.00
- 8. Final Economic Benefit at Penalty
Payment Date: See BEN computer model v. 4.3 \$1,477.00

Part 3 - Matrix Value For The Gravity-Based Component

- 9. Matrix Value (MV): 1,500
- 10. Per-tank MV (line 2 times line 9) 1,500

Inflation Adjustment Rule:

- 10a. $1,500 \times 1.2895$ (infl. adj. for post 3/15/04 (1.10×1.1723)) = \$1,934.25

Potential for Harm: Major

Extent of Deviation: Major

Justification for Potential for Harm: The Potential for Harm for this violation was determined to be Major because the owners of the petroleum tank did not employ a release detection method that could detect a release from any portion of the UST system. Respondent was improperly utilizing Inventory Control as the sole method for release detection to prevent product from getting into the environment.

Justification for Extent of Deviation: The Extent of Deviation for this violation was determined to be Major. Respondent has been in substantial and ongoing noncompliance with the regulatory requirement to perform release detection.

Part 4 - Violator-Specific Adjustments To Matrix Value

Note: Lines 11, 12, 13, and 14, below, have the Matrix Value of \$1,934.25 which reflects an inflation adjustment increase of 17.23% for post-March 15, 2004 violations. See Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule (Pursuant to Debt Collection Improvement Act of 1996, Effective October 1, 2004).

	% Change (+/-)	MV	Total Dollar Adjustment
11. Degree of cooperation or non-cooperation:		\$1,934.25	-
12. Degree of willfulness or negligence.		\$1,934.25	-
13. History of noncompliance:		\$1,934.25	-
14. Unique factors:		\$1,934.25	-
15. Post-March 15, 2004 Adjusted Matrix Value (line 10 + Dollar Adjustments in lines 11 to 14) =		\$1,934.25	

Justification for Degree of Cooperation/ non-cooperation: no adjustment made.
 Justification for Degree of Willfulness or Negligence: no adjustment was made.
 Justification for History of Noncompliance: no adjustment was made.
 Justification for Unique Factors: no adjustment was made.

Calculations for Gravity Based Components (GBC) with Inflation Adjustments:

16. Environmental Sensitivity:	moderate
17. Environmental Sensitivity Multiplier (ESM):	1.5
18. Days of Noncompliance Multiplier (DNM):	6.5

Calculations for Gravity Based Components:

19. Total Gravity-Based Component =	(AMV)	(ESM)	(DNM)
=	\$ 1,934.25	1.5	6.5
=	\$18,858.94		

20. Economic Benefit Component (from line 8):	\$ 1,477.00
21. Gravity-Based Component (from line 19):	\$18,858.94
22. Initial Penalty Target Figure: (line 20 plus line 21):	\$20,335.94

TOTAL PENALTY AMOUNT: \$49,122.32