

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.II

2012 MAR 16 P 3:51

REGIONAL HEARING
CLERK

Hon. M. Lisa Buschmann, Presiding Officer

In the Matter of: Andrew B. Chase, a/k/a
Andy Chase, Chase Services, Inc., Chase
Convenience Stores, Inc., and Chase
Commercial Land Development, Inc.,

Respondents.

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

Docket No. RCRA-02-2011-7503

STATUS REPORT//REQUEST FOR TIME TO FILE NON-DISPOSITIVE MOTIONS

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA or Agency), through her attorney, herewith provides the following status report to inform this Court of recent developments and, further, to move for a short (10 day) extension of time for the right to file non-dispositive motions.

I. Background

The history underlying this administrative proceeding has been detailed to this Court on a number of occasions, most recently in the two status reports (February 14th and March 1st). Earlier last month, Complainant moved for accelerated decision on liability (February 10th motion), and the papers accompanying said motion provided in ample detail the facts and circumstances of this matter. That motion seeks a judgment on liability for 20 of the 21 counts of the complaint (all counts except count 20). Notwithstanding these various recitations, for the convenience of this Court, a brief review of such facts and circumstances will be repeated below,

and the Court is respectfully referred to the partial accelerated decision motion paper, *i.e.* the declaration of Lee A. Spielmann (including the exhibits attached thereto), executed February 3, 2012, the declaration of Jeffrey K. Blair (including the exhibits attached thereto), executed on January 25, 2012 and the declaration of Paul Sacker (including the exhibits attached thereto), executed on February 10, 2012 for a full history and attendant chronology pertinent to this litigation.

This administrative proceeding was commenced under authority of Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6991e, and EPA seeks a civil penalty of approximately \$233,000 against various respondents for violations of a number of requirements of the 40 C.F.R. Part 280 underground storage tank regulations alleged to have occurred in the course of Respondents' ownership and/or operation of underground storage tanks located at six retail gasoline stations in New York State. The complaint alleges Respondent Andrew B. Chase (an individual) is liable for each of the 21 counts, either singly or in tandem with one of three named corporate respondents; the corporate respondents are not alleged to be liable for all violations. The complaint alleges that Mr. Chase at present is the owner and operator of the underground storage tank (sometimes referred to below as "UST" or "USTs") systems at two of the six gasoline stations, the other four stations having been sold in July 2009. Various requirements for the operation, maintenance and closure of the underground storage tanks are alleged in the complaint to have been violated. More specifically, the complaint alleges violations regarding 19 underground storage tanks (these include violations pertaining to the piping connected to a number of the tanks) at the six service stations, as follows: three USTs at

the service station identified as “Service Station I,”¹ three USTs at Service Station II, two USTs at Service Station III, three USTs at Service Station IV, three USTs at Service Station V and five USTs at Service Station VI.

The complaint was based, in part, upon information EPA collected through information request letters (IRLs) that were sent by EPA under authority of Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, to Respondent Andrew B. Chase. The first such IRL was sent from EPA to Mr. Chase in April 2009, and Mr. Chase provided a response to this IRL in June 2009.²

The December 22, 2011 order of this Court, denominated “NOTICE OF HEARING AND SCHEDULING ORDER AND ORDER ON MOTION TO EXTEND FILING DEADLINE FOR DISPOSITIVE MOTIONS,” requires, *inter alia*, that the parties file a joint set of stipulated facts, exhibits and testimony on or before March 23, 2012. It further requires that “[a]ll non-dispositive motions...must be filed on or before” March 16, 2012.

The January 5, 2012 order of this Court, “ORDER RESCHEDULING HEARING,” directs that a hearing in the matter commence on June 12, 2012.

On February 22, 2012, Complainant moved to supplement her prehearing exchange to add six additional documents, known as “PBS applications.”

¹ Paragraph 7 of the Sacker declaration, pages 5 and 6, identify the location of each of the six service stations.

² There were several follow-up IRLs: in October 2009; in January 2010; and in November 2010. Mr. Chase provided a response to EPA’s IRLs (in addition to the June 2009 response) in December 2009; January 2010; and in October 2010 (received by EPA in November 2010). EPA inspector Paul Sacker sent e-mails to Mr. Chase on at least three occasions (on January 7, 2010, and twice on January 27, 2010), seeking additional information and/or clarification of information previously provided in an IRL response. Mr. Chase also communicated with Mr. Sacker by fax, one transmitted February 4, 2010, another on December 15, 2010. Paragraphs 12 through 17 of the Sacker declaration.

II. Status Report

The undersigned has today submitted (sent via e-mail) to Respondents' counsel a proposed set of joint stipulations of fact, exhibits and testimony, and has requested that counsel respond by next Tuesday, March 20th.

Complainant is considering requesting this Court to move back the hearing date. To that end, the undersigned has sent a number of e-mails to Respondents' counsel, notifying him that such a motion may be shortly forthcoming and requesting that he inform the Agency whether he would object to such an extension and/or whether he would be available to participate in a hearing during the dates for the contemplated extension (e-mails from the undersigned on March 16th, at 12:59 PM;³ March 7th, at 12:28 PM; February 28th, at 4:26 PM; and February 16th, at 3:54 PM). EPA awaits a response as to counsel's availability for a hearing for any such extension in the date of the hearing. Any such motion likely will be made in the next week or so.

In addition, EPA has inquired as to the possibility of the parties re-visiting settlement discussions (e-mails of March 7th, at 12:28 PM; February 28th, at 4:26 PM; February 23rd, at 6:27 PM; January 13th, at 6:42 PM, December 23, 2011, at 3:24 PM; and December 15, 2011, at 9:37 PM). EPA awaits a response on this matter.

III. Motion to extend time to file non-dispositive motions

As noted above, the December 22nd order gave the parties until March 16, 2012 to file non-dispositive motions. Respondents' answer indicated, as an affirmative defense, that "Respondents also dispute the amount of the proposed penalty." Respondents' prehearing

³ The proposed stipulations were attached to and transmitted through *this e-mail*.

exchange has further elaborated on the question of the amount of proposed penalty. There Respondents have stated (December 2, 2011 submission, pages 3 and 4, "PRELIMINARY STATEMENT"):

By the time the EPA actually filed this Complaint, [Respondent] Andrew Chase, and the various companies owning and operating the stations at issue, has run into financial hardship. Each of the stations, but for Dannemora, has been sold, and Mr. Chase no longer has any interest in those stations. Due to the financial conditions of the stations, any net proceeds received from the sale were relatively minimal, and none of the corporations, but for Belmont, currently have any assets. None of the Respondent corporations have any financial ability to pay any amount of fine. Andrew Chase, as an alleged operator, and as an individual[,] does not have the capacity to pay the fines.

*** To impose the fines requested years after the fact and years after many of the stations have been sold, in fact, poses incredible financial hardship upon Andrew Chase, individually.

Despite these assertions of an inability to pay and of an "incredible financial hardship," Respondents have not provided documentation to support or confirm such claims. No such documentation accompanied Respondents' December 2011 prehearing exchange, and no such documentation has otherwise been provided to EPA. A number of e-mails from the undersigned has specifically requested that Respondents provide documentation to demonstrate this alleged financial hardship. These e-mails were sent to Respondents' counsel as follows: March 7th, at 12:28 PM; February 28th, at 4:26 PM; February 23rd, at 6:27 PM; January 13th, at 6:42 PM; December 23rd (2011), at 3:24 PM; and December 15th (2011), at 9:37 PM. To date no financial documentation has been submitted to EPA.

Given Respondents' claim of financial hardship but the failure to provide any documentation to substantiate such claim, EPA has been considering moving to request this Court to require Respondents to provide such documentation and, if they fail to do so, then to

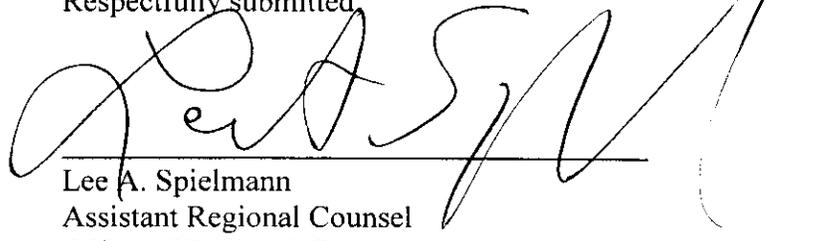
preclude Respondents from introducing such evidence at the hearing. Such a production and preclusion motion would be made under authority of, *inter alia*, 40 C.F.R. §§ 22.19 and 22.22. In light of the recent litigation events (specifically, the need for the parties to submit joint stipulations, which necessarily will entail their being in direct communication), EPA was hoping that there might be at least one more opportunity for the parties to engage in meaningful discussion as to Respondents producing documents to support their (alleged) claim of financial hardship and also to discuss possible dates for a re-scheduled hearing. EPA has also been considering requesting that this Court schedule a settlement conference, with the participation of the Court, so that many of these issues may be addressed on the record and (perhaps) the number of issues in contention could be reduced. Accordingly, Complainant respectfully requests this Court to extend the deadline for the filing of non-dispositive motions for 10 days, to March 26, 2012, a time shortly after the joint stipulations must be submitted to the Court. Complainant submits that good cause exists for the granting of an extension of slightly more than one week.

IV. Relief sought

Therefore, Complainant respectfully moves this Court, pursuant to 40 C.F.R. §§ 22.1(c), 22.4(c) and 22.20(a), for an order: **a)** vacating so much of the December 22, 2011 order requiring that all non-dispositive motions be served on or before March 16, 2012; **b)** extending the time for the submission of non-dispositive motions for ten days, through March 26, 2012; and **d)** granting Complainant such other and further discretionary relief as this Court deems just and proper.

Dated: March 16, 2012
New York, New York

Respectfully submitted,



Lee A. Spielmann
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3222
FAX: 212-637-3199

TO: Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, DC 20460

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

Thomas W. Plimpton, Esq.
Stafford, Piller *et al.* (Counsel for Respondents)
One Cumberland Avenue
P.O. Box 2947
Plattsburgh, New York 12901

In re Andrew B. Chase et al.
Docket No. RCRA-02-2011-7503

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "STATUS REPORT// REQUEST FOR TIME TO FILE NON-DISPOSITIVE MOTIONS," dated March 16, 2012, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and One Copy
By Inter-Office Mail:

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

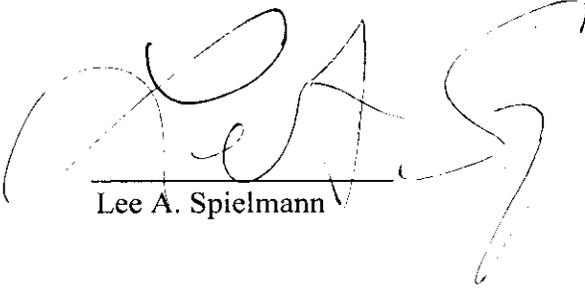
Copy by Fax Transmission,
202-565-0044, and Pouch Mail:

Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900 L
Washington, DC 20460

Copy by Fax Transmission,
518-561-4848, and First Class Mail:

Thomas W. Plimpton, Esq.
Stafford Piller et al.
One Cumberland Avenue
P.O. Box 2947
Plattsburgh, New York 12901

Dated: March 16, 2012
New York, New York



Lee A. Spielmann