UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

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.	**Hon. M. Lisa Buschmann, Presiding Officer** Docket No. RCRA-02-2011-7503

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
2012 SEP 24 P 2: 47
REGIONAL HEARING CLERK

COMPLAINANT'S MEMORANDUM IN REPLY TO RESPONDENTS' "RESPONSE BRIEF OF RESPONDENTS," DATED AUGUST 29, 2012

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA or Agency), through her attorney, herewith submits, pursuant to this Court's "ORDER GRANTING JOINT MOTION TO CANCEL HEARING AND FOR THE COURT TO ISSUE AN INITIAL DECISION BASED ON THE WRITTEN RECORD," dated July 13, 2012, as amended by the September 5, 2012, "ORDER ON MOTION TO REVISE DATE FOR EPA'S REPLY BRIEF,"[1] this memorandum in reply to the "RESPONSE BRIEF OF RESPONDENTS," dated August 29, 2012 (the "Response Brief"). For the reasons more fully detailed below and in the accompanying declaration of Gail Coad, executed on September 21, 2012 (the "Coad declaration"), Respondents have failed to demonstrate that they (either Mr. Chase individually or Mr. Chase together with the corporate

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[1] The September 5th order states that "Complainant shall file and serve its Reply Brief, and any accompanying affidavits, declarations, documents and memoranda, on or before September 24, 2012" (emphasis deleted).

respondents) have an inability to pay or would otherwise suffer financial hardship if this Court were to assess against them the $263,052.63 penalty amount[2] EPA is seeking as a consequence of Respondents having violated those provisions of 40 C.F.R. Part 280 that this Court has previously found.[3] Accordingly, EPA submits that it is entitled to a judgment assessing the penalty against Respondents that the Agency is seeking, and thus EPA respectfully requests that this Court issue an order directing Respondents to make payment of the $263,052.63 amount to the United States.

This memorandum, together with the Coad declaration, constitutes Complainant's Reply Brief for purposes of the July 13th and September 5th orders, and for purposes of this Court adjudicating and deciding the appropriate relief to be assessed and ordered against Respondents for those violations this Court found in its June 21st order.

I. RESPONDENTS HAVE FAILED TO MEET THEIR BURDEN TO DEMONSTRATE THEIR CLAIM OF AN INABILITY TO PAY THE PENALTY SOUGHT BY EPA OR THAT MAKING SUCH PAYMENT WOULD CAUSE THEM FINANCIAL HARDSHIP

As indicated above, EPA is seeking to have this Court assess a penalty of approximately $263,000. As also has been previously noted, Respondents bear the burden of proof on their claim that they are unable to pay this penalty/they would suffer financial hardship were they

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[2] Paragraph 204 of the August 9, 2012 declaration of Paul Sacker. Pages 4 and 5 of EPA's August 9, 2012 Memorandum of Law (submitted as part of EPA's Initial Brief) lists, for each of the 19 counts, both the amount of penalty EPA is seeking and against whom (*i.e.* whether against Respondent Andrew B. Chase individually, or jointly and severally against Mr. Chase and one of the corporate respondents).

[3] In its June 21, 2012 ruling, "Order On Complainant's Motion For Partial Accelerated Decision," this Court found Respondents liable to the United States, and thus subject to a civil penalty, pursuant to Section 9006(d) of the Solid Waste Disposal Act, as amended, 42 U.S.C. §6991e(d), for each of the following 19 counts of the complaint: 1 through 16, 18, 19 and 21.

required to pay this penalty.[4] Despite ample opportunity and time to provide documentation to EPA to support their inability to pay/financial hardship claim, Respondents have failed to provide such documentation, either in the context of this litigation or for settlement purposes. Nor is there anything substantive in the Response Brief that demonstrates or supports such claim. Respondents have failed to meet their burden: they have not demonstrated with the requisite factual specificity and particularity that they are unable to pay the penalty EPA is seeking or that being ordered by this Court to pay the penalty EPA seeks would cause them financial hardship.

a. Respondents' Response Brief Provides No Factual Evidentiary Support For Their Claim Of An Inability To Pay/They Would Suffer Financial Hardship If Required To Pay The Penalty EPA Is Seeking

While the Response Brief asserts that Respondents are unable to pay the penalty EPA is

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[4] As was noted in EPA's March 25, 2012 motion (pages 9-10), the leading case on the burden of proof issue in this type of proceeding (a Subtitle I underground storage tank case) is the Environmental Appeals Board's (EAB) decision in *In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, 10 E.A.D. 635 (2002). Identifying one issue as "whether and how Carroll Oil's affirmative defense of inability to pay should be considered in the context of a penalty assessment," the EAB stated the governing principle (at 662-63):

> [I]t is important to first recognize that the statutory penalty factors are restricted to 'seriousness of the violation' and 'good faith efforts to comply.' Thus, considering 'ability to pay' is not part of the Agency's prima facie burden in determining a penalty amount. *** [B]ecause it is not part of the Agency's proof, 'ability to pay,' in order to be considered, must be raised to and proven as an affirmative defense by the respondent. The rules governing this proceeding provide that 'the respondent has the burdens of presentation and persuasion for any affirmative defenses.' 40 C.F.R. § 22.24. Consistent with the foregoing, in previous RCRA cases, recognizing that statutory penalty factors do not include 'ability to pay,' the Board and its predecessors have treated 'ability to pay' as a defense that must be raised and substantiated by respondents [footnotes omitted; citations omitted].

The March 22, 2012 order of this Court gave express notice that Respondents carried the burden of proof on any inability to pay/financial hardship claim (page 3: "Both parties are reminded that if Respondents seek to mitigate any imposed penalty based on their alleged inability to pay, they are alone charged with substantiating that defense, as they bear the burden of proof on it[,]" citing *Carroll Oil*.

seeking for Respondents' 40 C.F.R. Part 280 violations, they provide no factual evidentiary support for their argument. Instead, the Response Brief merely repeats conclusory assertions previously made in this litigation without any back-up support or proof. The litany of these unsupported and unsubstantiated assertions include the following:

> Page 1 of the Response Brief: "Due to the financial conditions of the stations at the time of the sale, any net proceeds received from the sale were relatively minimal...."
>
> Pages 1 and 2 of the Response Brief: "[N]one of the named corporations are in operation. 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."
>
> Page 2 of the Response Brief: "To impose the fines requested years after the fact and after many of the stations have been sold, in fact, poses incredible financial hardship upon Andrew Chase, individually...."
>
> Page 2 of the Response Brief: "A penalty that is so large that it is beyond the financial means of the Respondents to pay[] will only force the Respondents into bankruptcy...."
>
> Page 3 of the Response Brief: "Any assessment of a requested penalty in this case will devastate Andy Chase and force him into bankruptcy."

Not only are these assertions not corroborated by supporting facts, they additionally raise questions for which the Response Brief does not provide answers. For example, the statement on page 1 of the Response Brief that "any net proceeds received from the sale [of the gas stations] were relatively minimal" provides neither a specific amount nor the context of what is meant by "minimal." Although raising the issue of the selling of the gasoline stations Respondents fail to state the amount they received for those sales.[5] Other questions are left unanswered by the use of

[5] Page 1 of the Response Brief, after observing that, "[o]f the six Service Stations at issue, five were sold prior to service of the Complaint[,]" notes that "Each of the stations, but for Lyon Mountain, has been sold...."

"minimal." This term's usage might mean, in the context of the amount derived from the sale of the stations, tens of thousands of dollars, or hundreds of thousands of dollars, or millions of dollars. The Response Brief just does not say, nor does it give any other indication as to what is meant by "minimal." The Response Brief also fails to discuss what became of that money: was it used to make payments for prior obligations or to pay for pre-existing debts? For example, was that money used to pay unpaid taxes, liens, overdue mortgage accounts or some other pre-existing obligation, or was that money perhaps invested, either in stocks, bonds or other financial instruments? There is no information in the Response Brief that informs as to what became of the money received from the sale of the service stations.

These statements are merely conclusions for which there is no factual support or corroboration in the Response Brief. The response papers provided by Respondents fail to provide any yardstick or objective standard against which to measure or analyze the truthfulness, completeness or correctness of their claim of inability to pay/financial hardship; the assertions set forth in the Response Brief cannot be verified without supporting data or some factually specific objective parameters. This holds true of the assertions made throughout the Response Brief, including that "Andrew Chase, as an alleged operator, and as an individual, does not have the capacity to pay the fines" or that compelling payment would "devastate Andy Chase and force him into bankruptcy."

Without a verifiable basis for this Court to confirm if Respondents' claim has merit, there is no way to determine whether an actual inability to pay exists or whether financial hardship would result if Respondents were ordered to pay the penalty. Respondents thus have failed to meet the burden of proof they carry on this issue, and this Court should accordingly disregard

those assertions of inability to pay/financial hardship made in the Response Brief.

Other aspects of the Response Brief call into question the reliability of the assertions made in it. Respondents have provided no affidavit or declaration from the person with the most intimate and extensive knowledge of their financial condition, Andrew Chase himself. Nor has a declaration or affidavit been provided by an accountant, financial advisor or someone else who might have managerial or other responsibility for Mr. Chase's financial affairs. Rather, all that has been provided is an unsworn statement of counsel, a statement that does not assert that counsel has any specific obligations or responsibilities in handling and managing the financial accounts of Mr. Chase. This situation reinforces the unreliability of the Response Brief on the question of establishing Respondents' putative claim of inability to pay/financial hardship, and it further attests that Respondents have failed to carry their burden of proof on this claim.[6]

b. Respondents Have Failed To Provide Sufficient And Adequate Information To Support Their Inability To Pay/Financial Hardship Claim

In the Response Brief, Respondents note that they have provided to EPA various pieces of financial information. Page 2 states the following:

> On or about March 26, 2012, the EPA was forwarded copies of the 2008 and 2009 tax returns for Chase Commercial Properties, the 2008 and 2009 tax

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[6] *Compare Sterling Financial Services Co., Inc. v. Franklin*, 2008 WL 60291 (2nd Cir. 2008) (unpublished opinion), where, in an action by plaintiff Sterling alleging defendant Franklin's breach of an agreement to guarantee certain loans plaintiff made to a third-party, the court refused to credit weight to one of defendant's declarations because it "was conclusory with no original documentary corroboration," and the court did not rely upon the assertions in another declaration because it "did not indicate that it was based on personal knowledge or that [the declarant] was competent to testify about" its purported subject matter (at ** 2). The Second Circuit has long held that "a hearsay affidavit is not a substitute for the personal knowledge of a party." *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (1988). *See also* pages 12 through 14, and the case law cited therein, of Complainant's April 5, 2012 "MEMORANDUM IN REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION."

returns for Chase Convenience Stores, the 2008 and 2009 tax returns for Chase Services, the 2008 tax return for Belmont, Inc., the IRS payment notice for Andrew Chase, individually, for the 2009 tax year, and the New York State Department of Taxation Notice of Adjustment for Andrew Chase, individually. On June 14, 2012, a copy of the Individual Ability to Pay Claim (Financial Data Request Form) was forwarded to the EPA.[7]

Notwithstanding the paragraph quoted above, the Response Brief does not tell the entire story; Respondents have omitted to state what they have failed to provide EPA despite EPA's requests.

On July 9th, at 10:34 PM, the following request for documentation was made by the undersigned to Respondents' counsel after the latter had provided some information to EPA:

1) Six to 12 months of complete credit card statements

2) Six to 12 months of complete statements for Mr. Chase's two Wells Fargo accounts (Wells Fargo 1637 and Wells Fargo 7991)

3) Six to 12 months of complete statements for any other investment accounts Mr. Chase is currently maintaining

4) Six to 12 months of checking account statements for Mr. Chase's business and personal accounts.

Please speak to Mr. Chase and forward these to me as soon as possible so that we can expedite the financial review.

On August 24th, the undersigned sent, at 2:36 PM, another e-mail to Respondents' counsel, Thomas Plimpton. This e-mail stated, in part:

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[7] These documents were never submitted within the context of the litigation, either in Respondents' prehearing exchange, in a motion to supplement Respondents' prehearing exchange, to the Region 2 Regional Hearing Clerk, or to the Court. Accordingly, EPA has deemed that such documents were submitted for settlement purposes only and has throughout this litigation treated them as such.

> Given what has been submitted to EPA to date, I have been told by the financial analyst that she is unable to determine whether a financial inability to pay exists. Accordingly, at this point, I am able to tender $XXX as a settlement amount, which represents approximately a XX% reduction in what EPA is seeking. For the Agency to consider settling for a lower amount, it would need additional documentation to verify Mr. Chase's claims of financial hardship.
>
> As for the documentation we are seeking, I refer you to my July 9th e-mail (at 10:34 PM), in which I requested various statements, including six to 12 months for Mr. Chase's Wells Fargo accounts and other investment accounts.
>
> EPA is open to considering and discussing settlement, but for any significant reduction, the Agency must obtain documents that are necessary for a proper evaluation of Mr. Chase's overall financial situation. And we believe the documents requested in my July 9th e-mail are indeed needed for such an evaluation.[[8]]

Four days later, on August 28, 2012, at 3:19 PM, the undersigned sent another e-mail to Mr. Plimpton reiterating EPA's need to receive additional financial information in order to properly analyze Respondents' claim of an inability to pay/financial hardship. That e-mail reads, in part, as follows:

> EPA is at present unable to agree to a $XXX settlement. In extensive discussions with our financial analyst, she has explained that, based upon the documentation Mr. Chase has to date submitted, she is unable to conclude whether an inability to pay exists. Specifically, the documentation received to date indicates Mr. Chase made a substantial amount of money from the sale of five of the gas stations, and she needs to know what became of that money in order to provide a definitive conclusion on whether an inability to pay in fact exists. Until EPA receives documentation concerning the money made from the sale of the gas stations, in keeping with Agency protocol we are constrained as to the extent of the flexibility we might exercise regarding possible settlement amounts. For the Agency to accept your offer of a settlement for $XXX, we need documentation in support thereof, and to date we have not received such information.

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[8] Specific figures regarding settlement offers have been redacted to maintain the confidentiality of settlement negotiations between the parties.

As I recently did, I refer you to my July 9th e-mail, the relevant portion of which I am attaching below and italicizing. EPA needs this documentation in order to consider Mr. Chase's inability to pay claim and to reach a decision as to how much of a penalty reduction is warranted for settlement purposes. We still need the information I requested on July 9th:

1) Six to 12 months of complete credit card statements

2) Six to 12 months of complete statements for Mr. Chase's two Wells Fargo accounts (Wells Fargo 1637 and Wells Fargo 7991)

3) Six to 12 months of complete statements for any other investment accounts Mr. Chase is currently maintaining

4) Six to 12 months of checking account statements for Mr. Chase's business and personal accounts.

In your August 2nd e-mail to me (5:38 PM), there is no mention of investment accounts, nor does it provide any of the other documentation requested in the July 9th e-mail. Until we receive the information sought, EPA is unable to accept your offer of settlement for $XXX or some such offer. While the Agency is still interested in negotiating a settlement in this matter, to do so entails our receiving documentation necessary for our financial analyst to draw a comprehensive picture of Mr. Chase's financial situation, and to date we have not received that information. If, as Mr. Chase claims, he finds himself in a precarious financial situation, the Agency is willing to accommodate itself to those circumstances and consider an offer Mr. Chase might accept, but it first needs to receive documentation and records that in fact reveal an actual inability to pay exists; EPA is, however, unable to tender such an offer based on what it has up to now received from Mr. Chase.

Please let me know if the information requested above (and in early July) will be forthcoming [emphases in original][[9]].

Thus, EPA has made a number of requests for specified financial information, and

[9] As with the prior quotation from e-mail correspondence, specific dollar amounts discussed as part of settlement have been omitted. If the Court so requests, paper copies of the quoted e-mails will be provided to it, with redactions made regarding settlement amounts or percentages discussed.

Respondents have not provided the documentation sought. As noted in the Coad declaration (discussed further below), what Respondents have to date submitted to EPA is far from complete and does not provide sufficient information to support a conclusion that Respondents would be unable to pay the $263,000 penalty or that an order requiring them to pay such penalty would result in their suffering financial hardship.

Ms. Coad, a principal in the Cambridge, Massachusetts, firm of Industrial Economics, Inc., a management and economic consulting firm, has conducted a financial evaluation of Respondents. She has served as a financial consultant for nearly 25 years, and her resume was included with EPA's initial prehearing exchange. Paragraphs 1 through 3 of the Coad declaration.

Ms. Coad, the holder of an MBA from Stanford University, has reviewed the documents Respondents submitted to EPA[10] and publicly available documentation in order to attempt to evaluate Respondents' inability to pay/financial hardship claim.[11] From such documentation, she learned that Respondents' sale of four gas stations was consummated for over $5.1 million. In paragraph 11 of her declaration, she has stated:

> I determined the date and sales price for the four gas station properties previously owned by the corporate Respondents. On July 24, 2009, three of the properties were sold to R.L. Vallee Inc. for more than $4.7 million. The fourth property was sold to Mountain Mart 109 LLC for $1.05 million on November 10, 2011. Gross sales proceeds from the four properties totaled over $5.1 million. While the properties may have had outstanding mortgages or other obligations, that information is not publicly available, and was not provided in the pre-hearing exchange or in Respondents' Response dated August 29, 2012.

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[10] Documents Respondents provided to EPA (the undersigned) in support of their inability to pay/financial hardship claim were in turn forwarded to Industrial Economics (IE); the undersigned personally was involved in their electronic transmission to IE.

[11] The Court is respectfully referred to the Coad declaration in its entirety.

Further, from other publicly available information, Ms. Coad learned that Mr. Chase has been offering his home for sale and is seeking nearly two million dollars,[12] the gasoline service station in Lyon Mountain, New York, has a market value of $165,000,[13] and that in March 2011 Mr. Chase incorporated a business through which he installs and maintains automatic teller machines (ATMs).[14] Based upon the totality of the publicly available information (such as tax records and other information available on or through the Internet), Ms. Coad has concluded that Mr. Chase does appear to be able to pay the $263,000 penalty EPA is seeking in this proceeding. In paragraph 15 of her declaration, she has stated (emphasis added):

> Based on publicly available information, *Mr. Chase appears to be able to pay the proposed penalty of about $263,000.* As described above, Mr. Chase appears to have reaped substantial gains from the sales of his four gas stations, could reap substantial gains from the sale of his house and he has started a new business. While it is certainly possible that Mr. Chase is financially stressed, I do not have the public documentation that supports that conclusion.

Ms. Coad then notes her conclusion that Respondents have not provided any documentation for her to reach a different conclusion: "Further, in the context of this administrative case, Respondents have not provided any documentary basis in the pre-trial exchange or briefing process for me to conclude otherwise." Paragraph 16 of the Coad declaration.

Also in paragraph 16, she states that the Response Brief is inadequate to evaluate Respondents' claim: "The Respondents' Response Brief makes assertions about the severe

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[12] Paragraph 12 of the Coad declaration.

[13] Paragraph 13 of the Coad declaration.

[14] Paragraph 14 of the Coad declaration.

hardship that the proposed penalty payment would impose on Mr. Chase without any factual or evidentiary back-up." She then references the documents Respondents submitted to EPA for settlement purposes and summarizes the various defects and deficiencies in these documents (*id.*):

> The Response Brief refers to documents Respondents provided in the context of settlement, including tax returns and other financial data. *I found that these documents were incomplete*. For example, the tax returns for the company Respondents did not include all supporting schedules which are necessary for me to understand the data. *The documentation was also internally inconsistent and inconsistent with public documents*. For example, Mr. Chase's estimate of the value of his home at 14 Klein Strasse on his Financial Data Request Form was much lower than the $1.99 million asking price for the property and also less than the County's assessed market value of $755,400. *Finally, the documents did not describe Respondents current situation*. For example, I was not able to trace the disposition of the substantial proceeds from the sale of the four gas stations [emphases added].

Paragraph 16 then discusses some of the additional documentation still not provided:

> At my request, EPA has made follow-up requests for additional information necessary to better understand Respondents' financial situation, including settlement statements for the sold gas stations, recent credit card statements, and complete tax returns including all supplemental schedules. However, I have not yet seen documents fully responsive to these requests [[15]].

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[15] These requests were the EPA e-mails quoted above, pages 7 through 10, and in at least one additional e-mail. The e-mail of June 18, 2012, at 6:13 PM, from the undersigned to Respondents' counsel requested the information referred to in this paragraph. That e-mail stated:

> Thank you for sending the recent financial disclosure form. Our financial analyst has informed me that she needs much more information to draw any definite picture of Mr. Chase's financial situation. To do so, she needs the following items/information, which I ask that you have Mr. Chase provide as soon as possible:
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> 1) The last three years of his personal income tax returns, complete with all schedules
>
> 2) Settlement sheets for the sale of the five gasoline stations sold in 2009 and 2011
>
> 3) Appraisals of the 14 Klein Strasse property, with an explanation for the basis of the $1.9 million asking price

Ms. Coad's conclusion, based in part on her extensive experience in the financial evaluation field, is unequivocal: Respondents have not demonstrated they are unable to pay the penalty EPA seeks or that an order requiring such payment would cause them financial hardship (paragraph 17 of the Coad declaration):

> Based on my many years of experience in performing evaluations of companies and individuals' financial situations in the context of an environmental enforcement action, at this time *I do not have a sufficient basis to conclude EPA's proposed penalty of about $263,000 should be reduced for ability to pay concerns* [emphasis added].

Under similar circumstances, where respondents have failed to provide sufficient information for a financial analyst to conclude that an inability to pay exists, the Environmental Appeals Board has upheld the assessment of a significant penalty in the face of an inability to pay argument. In an default action against appellants Willie P. Burrell and The Willie P. Burrell Trust (the latter referred to as the "WB Trust"), the EAB affirmed a Regional Judicial Officer's

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4) Verification that Mr. Chase paid the IRS the nearly $220K amount due on taxes

5) Marketing materials regarding the sale of the 3851 Route 374 Lyon Mountain gas station

6) Copy of the 2011 federal income tax return fro Adirondack ATM Services, Inc.

7) The loan/mortgage documentation related to Mr. Chase's home, including the mortgage, and a copy of the most recent statement

8) Copy of the last thee months of the Citibank credit card statement

9) Provide the following re the financial data request form: page 4 (this was missing from the version you sent); clarify the estimate of the Cadillac (perhaps a zero was missing from the figure provided); whether Mr. Chase or a company owns the Infiniti.

The sooner EPA receives this, the more quickly we will be able to discuss settlement in concrete terms. Given that the hearing begins in about four weeks, I again ask that you kindly expedite sending EPA these materials.

assessment of a penalty of nearly $90,000, and in doing so explained its rationale:

> Appellants did not provide the Region with any information regarding the WB Trust's inability to pay. The Region did not receive tax returns or other information on the assets and makeup of that trust. [D]ue to the lack of information, the Region's analyst could not make an accurate determination of the Trust's ability to pay.
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> Willie Burrell and the WB Trust's claims that they lack an ability to pay are unsupported by specific evidence. Appellants were given the opportunity to provide such evidence but did not do so. They do not demonstrate that either entity has an inability to pay, and thus, such claims fall short.

In re Willie P. Burrell & The Willie P. Burrell Trust, TSCA Appeal 11-05, 15 E.A.D. __ (EAB 2012) (slip opinion at 25-26).[16]

This holding in the *Burrell* ruling and its underlying rationale should provide the operative governing principle: the Chase Respondents had ample opportunity to provide specific factual evidence to support their inability to pay/financial hardship argument, but they never did so, and thus Respondents failed to demonstrate that they had an inability to pay. Accordingly, for the same reasons as in the *Burrell* proceeding, Respondents's financial claim falls short, and this Court should, without regard to such claim, determine an appropriate penalty amount for the 19 counts of the complaint for which Respondents were found liable. Because Respondents have failed to meet their burden to substantiate and to prove their inability to pay/financial hardship claim — in their Response Brief and otherwise — this Court should disregard such claim and deny it any weight.

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16 Available at www.epa.gov/eab.

II. RESPONDENTS OTHER ARGUMENTS LACK MERIT OR ARE OTHERWISE IRRELEVANT TO THIS COURT'S CONSIDERATION OF THE PENALTY ISSUE

Respondents raise or suggest a number of other arguments, each of which lacks merit and/or is otherwise irrelevant to this Court's consideration of the issue at bar — the appropriate penalty amount for the 19 counts of the complaint for which liability has been established. These other arguments will be addressed in the same order as they were raised in the Response Brief.

a. The Chronology Underlying This Litigation Is Irrelevant And Is Of No Consequence For The Court's Consideration Of The Penalty Issue

After noting that five of the six service stations at which the violations occurred had been sold prior to the commencement of this proceeding, Respondents assert, "Many of the alleged violations referred to in the Complaint concern issues that occurr[ed] as early as 2006 and ending in 2009." Page 1 of the Response Brief. This line of argument then continues (page 1):

> Despite their investigation, the EPA chose not to file this action until April 2011. By the time the EPA actually filed this Complaint, the various companies owning and operating the stations at issue[] had run into financial hardship. Each of the stations, but for Lyon Mountain, has been sold, and Mr. Chase and the companies no longer have any interest in those stations.

Respondents are implicitly raising a laches defense: the Court's penalty determination should take into account EPA's alleged "delay" in commencing this proceeding.[17] Respondents have failed to provide any factual support for such an argument: nothing in their Response Brief demonstrates they suffered any actual prejudice. Respondents have not shown there is substantive merit to this argument.

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[17] There is no argument that the applicable statute of limitations had run prior to the commencement of the proceeding for any of the violations found. *See generally 3M (Minnesota Mining and Manufacturing) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

Moreover, even if assuming *arguendo* that the facts in question give rise to a potential laches defense, the question of laches would still be irrelevant to this Court's penalty determination. This principle has long been established. "It is well settled that the United States is not...subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940). As Justice Cardozo noted for the Court in *United States v. Mack*, "Laches within the term of the statute of limitations is not defense at law. Least of all is it a defense to an action by the sovereign." 295 U.S. 480, 489 (1935). This principle is uniformly recognized within the circuits and retains its vitality in modern jurisprudence.[18]

This Court should disregard Respondents' effort to inferentially raise a laches argument. Not only have no facts been tendered to support its substance, but, as a matter of law, this argument lacks merit.

b. <u>The Absence Of Evidence Of Actual Harm Is Not Relevant To The Penalty Issue</u>

Respondents additionally raise the argument that the record is devoid of any evidence that actual harm resulted from Respondents' violations of the 40 C.F.R. Part 280 underground storage tank (UST) regulations. On page 2 of the Response Brief, they assert: "[T]he amount of the fines do not appear to be in any way related to any actual harm due to any leak or contamination. It is undisputed that no such leak or contamination has occurred as a result of the violations."

This argument should not be used as a basis or rationale to reduce the penalty sought for Respondents' UST violations. EPA need not prove that actual harm resulted from a respondent's

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[18] *See, e.g.*, *Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) ("It is well established that the Government generally is exempt from the consequences of its laches"); *United States v. Angell*, 292 F.3d 333, 338 (2nd Cir. 2002) ("[L]aches is not available against the federal government when it undertakes to enforce a public right or protect the public interest"); and *United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991) ("The government is not subject to the defense of laches when enforcing its rights").

violation(s). The Environmental Appeals Board has so ruled in prior cases. For example, in *In re V-1 Oil Company*, RCRA (9006) Appeal No. 99-1, 8 E.A.D. 729, 755 (EAB 2000), the EAB was ruling upon the issue whether a $25,000 penalty in an UST case involving a failure to comply with the requirement for the permanent closure of a tank. In affirming the assessment of such a penalty even in the absence of evidence of any actual harm having occurred, the EAB explained:

> First, we agree with the Presiding Officer that the violation is serious. V-1 does not challenge the Presiding Officer's conclusion that the violation was 'serious' in its Appeal Brief. However, it asserts in its Proposed Alternative Findings of Fact that there is no evidence in the record indicating that its USTs caused environmental harm. This violation is serious because of its potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty [emphasis added, citations omitted][[19]].

This principle is firmly anchored in EAB jurisprudence. *See, e.g., In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, 14 E.A.D.__, 2009 WL 2050079 (EAB 2009), where the EAB, in rejecting respondent's (Ram's) defense that EPA had failed to demonstrate actual harm, observed that (at *14), when determining the amount of penalty, "'it is the *potential* in each situation that is important, not solely whether the harm has actually occurred[,]'" quoting the penalty policy for underground storage tanks, § 3.1.2 (emphasis in original); *In re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, 10 EAD 385, 401 (EAB 2002), "Thus we find no error in the Presiding Officer's holding on this point, as it is consistent with our prior decisions in which we affirmed penalty assessments based on their 'potential for harm, regardless fo whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a

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[19] This case was also discussed in EPA's August 9, 2012 memorandum of law (pages 42-43), part of Complainant's Initial Brief submission.

substantial penalty'" (citations omitted); *In re Everwood Treatment Company, Inc. and Cary W. Thigpen*, RCRA (3008) Appeal No. 95-1, 6 E.A.D. 589, 603 (EAB 1996), *aff'd sub. nom, Everwood Treatment Co. v. EPA*, 1998 WL 1674543 (S.D. Ala. 1998), where the Board cited with approval the applicable penalty policy in support of the principle that a significant penalty may be warranted even in the absence of proof of actual environmental harm: "The policy applicable to this case, the 1990 Penalty Policy, also supports the conclusion that certain violations may have 'serious implications' for the RCRA program and can have a 'major' potential for harm regardless of their actual impact on humans and the environment" (citation omitted).[20] The federal courts recognize the validity of this salient principle. *See, e.g.*, *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff'd in part, rev'd on other grounds*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000), "The court may justifiably impose a significant penalty if it finds there is a risk or potential risk of environmental harm, even absent proof of actual deleterious effect."[21]

Under governing EAB principles, no weight should be attached to Respondents' argument that there should be a penalty reduction because of the absence of evidence of actual harm to the environment resulting from Respondents' violations. This argument is untenable as

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[20] Indeed, as the EAB has noted, failure to comply with underground storage tank regulations, as this Court found occurred for 19 separate counts, "unquestionably threatens the UST regulatory scheme and program." *Ram*, 2009 WL 2050079, at *15.

[21] In other contexts, federal courts have stated that penalties need not be *per se* reduced in circumstances where evidence of actual harm is lacking. *See, e.g..*, *Capitol-Records, Inc. v. Thomas-Rasset*, __F.3d__, 2012 WL 3930988 (8th Cir. 2012), where the Court of Appeals noted (at * 7), "It makes no sense to consider the disparity between 'actual harm' and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate. There is no question that each of the penalties sought in this proceeding falls within the authorized statutory amount.

a matter of Part 22 EPA case law and federal case law, and this Court should accordingly disregard it.

c. It Would Be Inappropriate For This Court To Reconsider Its Preclusion Order In The Context Of The Penalty Briefing

On page 2 of the Response Brief, Respondents request reconsideration of this Court's earlier (June 28, 2012) "Order On Complainant's Motion To Preclude Documentation And Draw Adverse Inference": "Respondents respectfully request that this Court reconsider its decision to restrict the introduction of financial hardship information and allow such evidence to be submitted." EPA submits it would be inappropriate on several grounds for this Court to presently — in the context of the penalty briefing — reconsider its June 28th preclusion ruling.

1. Contrary to the July 13, 2012 Order

It would be inappropriate for this Court at this junction to reconsider its June 28th preclusion order in light of the Court's order of July 13, 2012, "Order Granting Joint Motion To Cancel Hearing And For The Court To Issue An Initial Decision Based On The Written Record." The July 13th order stated: "Each of the parties' seven requests, stipulations, and conditions listed in the Joint Motion appear reasonable and are accepted." One of the conditions to which the parties stipulated in their joint motion was that the Court's June 28th preclusion order "shall remain fully operative" and shall continue to apply to the parties' submissions regarding the penalty issue. More specifically, condition number 6 stated, in its entirety:

> Notwithstanding any provision set forth in each of the previously five numbered paragraphs, provisions of the order of this Court, denominated 'ORDER ON COMPLAINANT'S MOTION TO PRECLUDE DOCUMENTATION AND DRAW ADVERSE INFERENCE,' dated June 28, 2012, whereby 'all financial information and evidence that may be presented in support of any claim [by Respondents] of financial hardship or inability to pay' have been precluded from the hearing, shall remain fully operative and shall apply

with full force and effect to all submissions Respondents shall make pursuant hereto [brackets in original].

This factor alone should result in denial of Respondents' request for reconsideration of the June 28th preclusion order, as reconsideration would contravene an express condition to which the parties agreed in seeking this Court's authorization for the penalty issue to be determined based upon the written record. Further, additional reasons exists for this Court to deny Respondents' last minute request that this Court — while considering the penalty issue — reconsider its preclusion order.

2. Interlocutory Appeal Never Sought

Respondents could have sought review of the preclusion order prior to their submittal of the Response Brief. At any time subsequent to the issuance of the Court's ruling, Respondents could have sought interlocutory review of such order pursuant to the prescribed procedures of 40 C.F.R. Part 22. The extent to which interlocutory appeal is available is governed by 40 C.F.R. § 22.29, and under that provision, the threshold requirement for obtaining such review is that the party seeking it must file a motion with the Presiding Officer.[22]

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[22] Whether interlocutory review of an order or ruling of the Presiding Officer occurs is a matter within "the discretion of the Environmental Appeals Board." 40 C.F.R. § 22.29(a). Obtaining such review is a two-step process. A party must first move for the Presiding Officer to recommend such review. Forty C.F.R. § 22.29(a) states, in relevant part, "A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review...." The Presiding Officer is authorized to recommend such review pursuant to 40 C.F.R. § 22.29(b). Where the Presiding Officer does recommend interlocutory review by the Board, the EAB may still deny such review, either affirmatively or by inaction. 40 C.F.R. § 22.29(c). Where the Presiding Officer does not recommend such review, the order or ruling "may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest." 40 C.F.R. § 22.29(c).

Respondents never sought to utilize the mechanism provided for in 40 C.F.R. § 22.29 to obtain interlocutory review of the preclusion order. During the two month period from the time the order was issued through the filing of their Response Brief, Respondents never moved for an interlocutory appeal of the June 28th order.

3. Respondents never moved for reconsideration

Similarly, during this two-month interval, Respondents could have filed a motion for reconsideration, but they never moved for this Court to reconsider its June 28th preclusion order. While the Part 22 rules expressly authorize motions for reconsideration of final orders, 40 C.F.R. § 22.32, these rules vest in the Presiding Officer an ample residuum of authority under which this Court could have heard a motion for reconsideration. *See*, *e.g.*, 40 C.F.R. § 22.4(c)(10), authorizing a Presiding Officer to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22]"; 40 C.F.R. 22.1(c), "Questions arising at any stage of the proceeding which are not addressed in [40 C.F.R. Part 22] shall be resolved at the discretion of the...Presiding Officer...." These rules vest in the Presiding Officer additional authority that indubitably would support a party's attempt to move to reconsider an order other an a final order.[23]

4. Respondents' rights are preserved

Further, Respondents's rights are nonetheless preserved, and thus they would not be prejudiced, by this Court refusing now — in the context of the penalty issue briefing — to

[23] It should be noted that there is no express bar in Part 22 to a party filing a motion for reconsideration of other types of orders or rulings.

reconsider its June 28th preclusion order. Under Part 22 procedures, Respondents' rights are fully protected: by operation of law Respondents' right to have the EAB review the preclusion order is preserved. Pursuant to 40 C.F.R. § 22.30(c), in any appeal (or cross-appeal) from an eventual initial decision the EAB is authorized to review *any* issue Respondents have raised in the proceeding: "The parties' rights of appeal shall be limited to *those issues raised during the course of the proceeding* and by the initial decision...." (emphasis added).

During appellate review the Board is thus unquestionably authorized to review the June 28th preclusion ruling.[24] Thus no need exists now for this Court, while determining the penalty issue, to reconsider its June 28th ruling.

5. <u>Respondents' failure to heed the preclusion notice</u>

Moreover, Respondents could have avoided issuance of the preclusion order altogether. This order was issued only because Respondents refused to comply with a pre-trial order for which they had ample notice. Twice this Court advised Respondents that, if they intend to claim inability to pay/financial hardship, the burden of proof rested on them. Page 3 of the July 12, 2011, order of this Court, included the provision that, "if Respondent[s] intend to take the position that they are unable to pay the proposed penalty or that payment will have an adverse effect on their ability to continue to do business, [Respondents must submit in their pre-hearing exchange] a copy of any and all documents they intend to rely upon in support of such position." This notice was re-confirmed in this Court's March 22, 2012, order, which stated, in part, that "if Respondents seek to mitigate any imposed penalty based on their alleged inability to pay, they

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[24] Respondents having raised the issue of the preclusion order in their Response Brief presumptively constitutes an "issue[] raised during the course of the proceeding...."

are alone charged with substantiating that defense, as they bear the burden of proof on it[,]" citing to the *Carroll Oil* EAB decision.[25]

Respondents admit in their Response Brief that they provided some financial documentation to EPA on March 26, 2012, prior to the Court having issued any preclusion order. Yet, although these documents had been submitted to EPA, Respondents never listed them in their pre-hearing exchange, never moved this Court to supplement their pre-hearing exchange with such documentation,[26] never filed such documents with the Regional Hearing Clerk of Region 2 of the EPA and never provided such documents to the Court.

In its May 11, 2012 ruling, the Court issued a conditional order of preclusion, stating that "[i]f Respondents fail to timely submit to Complainant all of the [financial] information listed above...they may be precluded from introducing any documentation or information relevant to such claim into the record in this proceeding...." Page 8 of the May 11th ruling. In issuing "an appropriate conditional statement of sanction" (pages 7-8), the Court explained its rationale (page 7 of the May 11th ruling):

> The next question is whether to grant Complainant's request for an order precluding Respondents, if they fail to comply, from introducing into the record documentation that may be relevant to inability to pay, and inferring that such documentation would be adverse to them. A sanction cannot be definitively imposed at this point in the proceeding as the condition therefor, the failure to provide financial documents, has not yet taken place and may not occur. An automatic sanction set forth in advance is also not appropriate. In the event that Respondents timely submit some financial documents and Complainant finds that they are insufficient, a determination must be made as to whether the submittal is sufficient or whether it constitutes a failure under 40 C.F.R. § 22.19(g) to 'provide

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25 These advisements to Respondents were set forth in EPA's March 25th motion that sought, *inter alia*, an order of preclusion.

26 The provision governing the requirement to supplement a prehearing exchange is set forth at 40 C.F.R. § 22.19(f).

> information within its control as required,' before a sanction may be imposed. Furthermore, there may be a question of appropriateness of imposing a sanction if there is a question of timeliness, such as documents being received after the deadline but purportedly submitted in advance thereof.

Nearly seven weeks passed until the Court issued its June 28, 2012 preclusion ruling. During this period, Respondents did not attempt to introduce any financial information into the litigation. In the June 28th ruling, the Court granted EPA's motion "with respect to precluding evidence as to inability to pay or financial hardship that may be presented by Respondents" (page 5 of the June 28th ruling). After noting that the documents Respondents had previously supplied to EPA "do not meet the requirements of the May 11 Order" (page 3 of the June 28th ruling), that Respondents' certification that certain documents do not exist was untimely, and that Respondents failed to provide an explanation for their failure to timely submit such certification prior to the May 30th due date set by the May 11th ruling, the Court stated (page 4):

> Respondents failed to respond to the May 11th Order, despite the clear warning therein that if they fail to timely submit all of the information listed in the Order they may be sanctioned. In addition, they failed to explain their lack of response to the May 11 Order. The Opposition conveys [Respondents'] position that they have already demonstrated their financial condition and need not submit additional documentation despite being ordered to do so. Respondents therefore demonstrate a disregard for orders issued in this proceeding. In these circumstances, a sanction is clearly warranted.

Beyond any doubt, Respondents had ample notice and more than sufficient opportunity to comply with the Court's order to provide financial documentation and to introduce financail documentation into this litigation, but they simply failed to avail themselves of any such opportunity. Given the totality of these circumstances — Respondents having disregarded express notice that they were required to formally provide financial documentation if they asserted an inability to pay/financial hardship claim or they would face preclusion, having never

moved to supplement their prehearing exchange, having forfeited ample opportunity to move to vacate the preclusion order or seek interlocutory review once it had been issued — it would be singularly inappropriate under these circumstances for this Court to exercise its discretionary authority to grant Respondents relief from an order for the issuance of which Respondents essentially bear sole and exclusive responsibility.

III. CONCLUSION

For all the reasons set forth in this memorandum and the Coad declaration (as well as for for the reasons set forth in Complainant's August 9, 2012 Initial Brief), Complainant respectfully requests that this Court, in deciding upon an appropriate penalty amount for the 19 counts at issue, dismiss the arguments Respondents have made in their Response Brief regarding their alleged but unsupported claim of inability to pay/financial hardship, and further that this Court: **1)** issue a judgment assessing Respondent Andrew B. Chase a penalty of $18,864 for count 1, $25,546 for count 2, $4,116 for count 3, $5,024 for count 4, $2,537 for count 5, $3,054 for count 6, $4,296 for count 7, $7,560 for count 9, $23,764 for count 10, $340.13 for count 11, $22,191 for count 18, $19,095 for count 19 and $2,120 for count 21; **2)** issue a judgment jointly and severally assessing Respondents Andrew B. Chase and Chase Convenience Stores, Inc., $40,480 for count 8; **3)** issue a judgment jointly and severally assessing Respondents Andrew B. Chase and Chase Services, Inc., $5,144 for count 12, $55,316 for count 13 and $462 for count 14; **4)** issue a judgment jointly and severally assessing Respondents Andrew B. Chase and Chase Commercial Land Development, Inc., $24,066 for count 15 and $247.50 for count 16; **5)** issue an order directing Respondents to pay in accordance with the above; **6)** issue an order directing Respondent Andrew B. Chase to comply and/or to maintain compliance with all applicable

regulatory provisions regarding his ownership and operation of UST systems at the service station in Lyon Mountain, New York; and **7)** grant Complainant such other and further relief as this Court deems just, lawful and proper.

Dated: September 24, 2012
New York, New York

Yours, etc.

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Administrative Law Judge
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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.	Docket No. RCRA-02-2011-7503

DECLARATION OF GAIL B. COAD

I, Gail B. Coad, pursuant to 28 U.S.C. § 1746 hereby swear under penalty of perjury, that the following is true and correct:

1. My name is Gail B. Coad. I make this declaration based on my personal knowledge and expertise, as more fully set forth below.

2. I am a Principal of Industrial Economics, Incorporated, a management and economic consulting firm located at 2067 Massachusetts Avenue, Cambridge, Massachusetts 02140. I have a Master's Degree in Business Administration (1974) from Stanford University's Graduate School of Business in Palo Alto, California. I also have a B.A. Degree in Economics (1972) from Connecticut College in New London, Connecticut.

3. I have served as a consultant since 1988, focusing on providing business and financial analysis services primarily to government clients. I have testified in Federal and State court, as well as in administrative hearings, on financial and inability to pay issues relating to companies and individuals. My qualifications are more fully outlined in my resume included in EPA's initial prehearing exchange.

4. One of the core areas of my practice is to conduct financial evaluations of entities involved in environmental enforcement actions. I have conducted hundreds of financial analyses in this context, often involving individuals and small closely held companies. In addition, I have evaluated over one hundred individuals and companies involved in the retail gasoline business. I conduct these analyses with the support of Industrial Economics' staff under my direction.

5. Part of my analysis typically involves research of publicly available information and records. This information allows me to develop an independent judgment about the parties, and to verify the representations and documentation that the parties may produce. We will normally conduct a search on the internet for the parties, pull property records and information from the local county assessor's office, and obtain an investigative report that compiles information for an individual, including addresses, phone numbers, property holdings, liens, licenses, and automobile registrations. Depending on the findings, we may follow up various leads and information with further research.

6. When a Respondent provides EPA with tax return or other financial information, I also conduct a financial analysis to determine the Respondent's financial capability. First, I evaluate the entity's annual net "cash flow" based on available information. In the case of individuals, a Respondent will provide some of these data on EPA's financial data request form. I also assess the entity's assets and liabilities to determine whether assets are available that could generate cash for penalty payment, or that could provide a basis for financing penalty payment with debt. Where multiple related entities are involved, I examine the related party transactions and determine whether the payments or transactions with related parties are appropriate and reasonable. I may then adjust the estimated cash flow based on my assessment.

7. The U.S. Environmental Protection Agency (EPA) initially retained me on or about June 22, 2010 to assess the financial capability of identified parties based on publicly available information. The identified parties included Mr. Andrew Chase and four companies: Chase Properties Inc., Chase Convenience Stores, Inc., Chase Commercial Land Development, Inc., and Bellmont LM Inc. I, with the assistance of staff, conducted an investigation. I concluded that the parties potentially had the capability to pay a substantial penalty. At that time Mr. Chase and his companies were identified to be potentially involved with six (6) gas station/convenience store/restaurant complexes in the vicinity of Plattsburgh, New York.

8. EPA subsequently initiated an official enforcement action. On March 28, 2012, EPA asked me to evaluate Respondents' financial capability and "inability to pay" a proposed penalty of about $263,000, based on additional documentation Respondents produced

for settlement purposes. I also updated our research of publicly available documents. In conducting our updated analysis, we determined that Mr. Chase had sold four of the five gas station properties that he had owned. In addition, he had ceased operating the sixth gas station property. To the best of my knowledge, Mr. Chase's company Bellmont LM continues to operate a station and store in Lyon Mountain NY.

9. The purpose of an "inability to pay" analysis is to identify what, if any, potential sources of funds can be applied to either a penalty payment or necessary remediation/injunctive relief, along with the implications to a Respondent's future financial stability. The issue is ability to pay, not willingness to pay. The purpose of the analysis is to inform the court's ultimate decision regarding penalty. In order to perform a useful and accurate analysis, I need up-to-date and complete information on a Respondent's assets, liabilities, income and expenses. I also need to understand any uncertainties that might affect a Respondent's future financial status.

10. Andrew B. Chase is about 48 years old. His primary address is 14 Klein Strasse, Ellenburg Depot, New York, 12935.[1] He lives there with his wife, Patricia Chase. We did not find evidence of other dependents in public documents.

11. From available public documentation, I determined the date and sales price for the four gas station properties previously owned by the corporate Respondents. On July 24, 2009, three of the properties were sold to R.L. Vallee Inc. for more than $4.7 million.[2] The fourth property was sold to Mountain Mart 109 LLC for $1.05 million on November 10, 2011.[3] Gross sales proceeds from the four properties totaled over $5.1 million. While the properties may have had outstanding mortgages or other obligations, that information is not publicly available, and was not provided in the pre-hearing exchange or in Respondents' Response dated August 29, 2012.

12. Through my research on the internet in 2012, I became aware that on June 1, 2012 the Respondent Andrew Chase offered his home located at 14 Klein Strasse for sale with an asking price of $1.99 million. The property is being sold on a turnkey basis including furniture, appliances, boats, jet skis, and snowmobiles.[4] As of the date of this

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[1] LexisNexis Risk Investigations National Comprehensive Report (NCR): "Andrew B. Chase" Generated: 06/12/2012

[2] Clinton County Assessor Records, Tax ID: 280.-1-33.4 with associated SWIS ID: 094000, Tax ID: 251.3-2-18.2 with associated SWIS ID: 094489, and Tax ID: 188.-1-1.4 with associated SWIS ID: 093489, New York Property Records accessed on 09/07/2012

[3] Clinton County Assessor Records, Tax ID: 194.-121.2 with associated SWIS ID: 094200, New York Property Records accessed on 09/07/2012

[4] Summary description of the offering follows: "Adirondack Contemporary: A wide expanse of lake provides stunning open water views, and incredible recreational opportunities. This Adirondack contemporary home has an impressive style that is best suited for a family that enjoys year round activities. Over 7500 square feet of living that includes 3-bedrooms, plus a master suite with its own sitting area, fireplace, huge walk in closet, and over-sized master bath. The open floor plan of the main floor blends a large living room, dining area, family area with fireplace, a cooks dream kitchen, a large office with coffered ceiling, and a stunning view of the water. The lower walk out level includes a large bar with its own walk-in cooler, a sauna, pool table, and a family area with fireplace. The attention to detail is obvious from the time you walk in. Everything included in the sale – all appliances, furniture, Bennington pontoon boat, Four Winns open bow boat, Jet Ski, 3 new snowmobiles, and much more. $1,990,000.00 (143065)" Accessed on June 27, 2012 at: http://www.lavalleyrealestate.com/adirondack-property .

declaration, the house continues to be listed for sale at the same price.[5]

13. At this time, Respondent Bellmont LM owns one gas station located in the village of Lyon Mountain, NY. The county assessor has a market value of $165,000 for this property.[6] The station has two pumps on an island and appears to have a convenience store.[7]

14. On or about March 21, 2011, Mr. Chase incorporated a new business, Adirondack ATM Services, LLC.[8] ATM servicing companies place ATM's in various locations (say convenience stores or other busy locations where customers may need cash), and then ensure that the ATM has adequate cash to supply to customers and remains in good working order. The owner makes a small percentage on the cash paid out from the machine.

15. Based on publicly available information, Mr. Chase appears to be able to pay the proposed penalty of about $263,000. As described above, Mr. Chase appears to have reaped substantial gains from the sales of his four gas stations, could reap substantial gains from the sale of his house and he has started a new business. While it is certainly possible that Mr. Chase is financially stressed, I do not have the public documentation that supports that conclusion.

16. Further, in the context of this administrative case, Respondents have not provided any documentary basis in the pre-trial exchange or briefing process for me to conclude otherwise. The Respondents' Response Brief makes assertions about the severe hardship that the proposed penalty payment would impose on Mr. Chase without any factual or evidentiary back-up. The Response Brief refers to documents Respondents provided in the context of settlement, including tax returns and other financial data. I found that these documents were incomplete. For example, the tax returns for the company Respondents did not include all supporting schedules which are necessary for me to understand the data. The documentation was also internally inconsistent and inconsistent with public documents. For example, Mr. Chase's estimate of the value of his home at 14 Klein Strasse on his Financial Data Request Form was much lower than the $1.99 million asking price for the property and also less than the County's assessed market value of $755,400.[9] Finally, the documents did not describe Respondents current situation. For example, I was not able to trace the disposition of the substantial proceeds from the sale of the four gas stations. At my request, EPA has made follow-up requests for additional information necessary to better understand Respondents'

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[5] Original Navica MLS listing for MLS# R143065A, accessed on 09/07/2012

[6] Clinton County Assessor Records, Tax ID: 183.2-2-22 and SWIS ID: 093489, New York Property Records accessed on 09/07/2012.

[7] Based on Google Maps street view of the property, 9/7/2012.

[8] Notice in North Country BizConnect, company address at PO Box 315, Lyon Mountain NY. This is the same address Mr. Chase uses for his business activities.

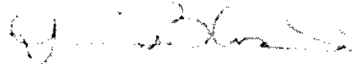
[9] Clinton County Assessor Records, Tax ID: 185.2-2-1 and SWIS ID: 093489, New York Property Records accessed on 09/21/12.

financial situation, including settlement statements for the sold gas stations, recent credit card statements, and complete tax returns including all supplemental schedules. However, I have not yet seen documents fully responsive to these requests.

17. Based on my many years of experience in performing evaluations of companies and individuals' financial situations in the context of an environmental enforcement action, at this time I do not have a sufficient basis to conclude that EPA's proposed penalty of about $263,000 should be reduced for ability to pay concerns.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on September 21, 2012



Gail B. Coad
Principal
Industrial Economics, Incorporated

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 "COMPLAINANT'S MEMORANDUM IN REPLY TO RESPONDENTS' 'RESPONSE BRIEF OF RESPONDENTS,' DATED AUGUST 29, 2012," dated September 24, 2012, together with the "Declaration of Gail B. Coad," executed on September 21, 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 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 Certified Mail,
Return Receipt Requested:

Thomas W. Plimpton, Esq.
Stafford Piller et al.
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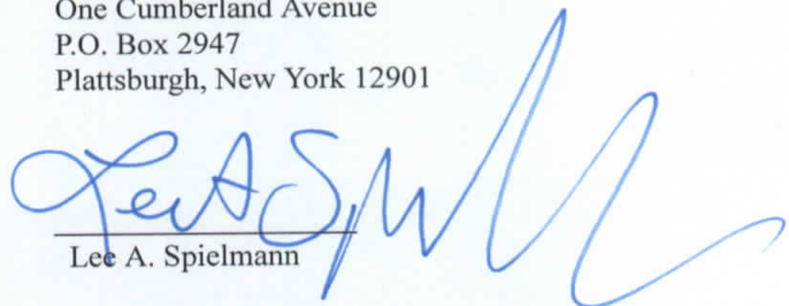

Dated: September 24, 2012
New York, New York

Lee A. Spielmann