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

COMPLAINANT'S MEMORANDUM IN REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

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 40 C.F.R. § 22.16(b),[1] this memorandum in reply to Respondents' "DECLARATION OF THOMAS W. PLIMPTON IN OPPOSITION TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION," dated and served March 29, 2012 (the "Plimpton declaration"). For the reasons more fully detailed below, the Plimpton declaration fails to raise a genuine issue of material fact for any of the 20 counts of the complaint for which Complainant (henceforth also referred to as "EPA") has sought accelerated decision as to

[1] In pertinent part, 40 C.F.R. § 22.16(b) states, "The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response."

liability.[2] Accordingly, EPA submits it is entitled to a judgment granting it the partial accelerated decision sought in the motion of February 10, 2012.

I. As Respondents Concede Counts 3 Through 17, And Count 21, EPA Is Entitled To A Judgment Of Liability For These Counts As A Matter Of Law Under 40 C.F.R. Part 22

The Plimpton declaration does not attempt to refute and/or otherwise does not challenge counts 3 through 17 and count 21 of the complaint, the counts for which EPA's has moved for a partial accelerated decision on liability; the only counts addressed in the Plimpton declaration are counts 1 and 2 (paragraphs 5 through 7 of the declaration), and counts 18 and 19 (paragraphs 9 through 11 of the declaration).[3] The Plimpton declaration does not dispute or contest EPA's attempt to secure an accelerated decision with regard to any of the other 16 counts of the complaint. As a consequence, Respondents have, by operation of law, waived any objection to this Court granting EPA the judgment it seeks for each of these 16 counts.

In 40 C.F.R. § 22.16(b), the rule provides, in pertinent part, "Any party who fails to respond within the designated period waives any objection to the granting of the motion." Therefore, with Respondents having "fail[ed] to respond within the designated period," they have "waived any objection to the granting of [EPA's February 10th partial accelerated] motion" with regard to each of counts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 21 of the complaint. The consequence of such failure timely to provide any response to these counts is that

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[2] There were 21 counts in the complaint. As noted in the EPA's motion for partial accelerated decision, EPA is not seeking a judgment on liability for count 20 of the complaint.

[3] *See, e.g.*, paragraph 7 of the Plimpton declaration: "EPA's Motion for a Partial Accelerated Decision for Counts 1 and 2 should be denied"; paragraph 11 of said declaration: "EPA's Motion for a Partial Accelerated Decision for Counts 18 and 19 should be denied."

Respondents have conceded the accuracy of these counts and EPA's concomitant entitlement to judgment on each of said 16 counts as sought in the February 10th motion. The regulatory provision codified at 40 C.F.R. § 22.16(b) is self-enforcing, and the operation of this provision is not contingent upon the exercise of the discretion or upon a decision of an adjudicating tribunal. The Environmental Appeals Board (EAB or Board) has acknowledged the functioning of this regulatory provision and has confirmed the automatic operation of its waiver provision. These principles were given EAB imprimatur in the case of *In re Pyramid Chemical Company*, RCRA (3008) Appeal No. 03-03, "Default Order and Final Decision," 11 EAD 657, 668 (EAB 2004):

> As for the procedural posture in this case, Respondent waived its objections to the Motion for Default when it failed to timely file a response to the motion. 40 C.F.R. § 22.16(b) (waiver of objections to motions when no timely response is filed).[4]

Earlier EAB case law has similarly affirmed the applicability of this principle. *See, e.g., In re House Analysis & Associates & Fred Powell*, CAA Appeal No. 93-1, "Final Decision," 4 EAD 501, 506 n.19 (EAB 1993):

> [W]e believe any objection respondent may have had in this respect has been waived. [W]e conclude that respondent received Complainant's Motion for Accelerated Decision or Motion for Default. According to 40 C.F.R. § 22.16(b), if no response is filed to a motion within the designated period, 'the parties may be deemed to have waived any objection to the granting of the motion.' No response was filed. If respondent had an objection to the issuance of a default order based on the failure to receive proper service of the Order on Prehearing Exchange, it was incumbent upon him to raise it at that time. Having failed to do so, any objection on this basis is deemed waived.[5]

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[4] *See also id.* at 663: "The Consolidated Rules provide that a party who fails to timely respond to a motion waives its objections. *Id.* § 22.16(b)."

[5] *Accord*, e.g., *George v. Hilaire Farm Nursing Home*, 622 F. Supp. 1349, 1353 (S.D.N.Y. 1985) (local rule requires, where a party moves for summary judgment, it include a short and concise

Respondents having waived any objection to EPA obtaining an accelerated decision on liability for any (and all) of these 16 counts of the complaint, they have thus failed to raise any genuine issue of material fact with regard to them. EPA, having amply supported its motion for partial accelerated decision, is accordingly entitled to a judgment as a matter of law for all of these counts as set forth in the February 10th motion.

II. The Exhibit A Documentation Attached To The Plimpton Declaration Is Facially Irrelevant And Unconnected To The Allegations Made In Count 1 Of The Complaint

The Plimpton declaration argues that "[a]s a result of the evidence attached hereto as Exhibit A, the EPA's Motion for a Partial Accelerated Decision for Counts 1 and 2 should be denied." Paragraph 7 of the Plimpton declaration. As will be demonstrated below, this argument is patently erroneous and devoid of any legal merit.

Paragraph 5 of the Plimpton declaration states the following:

> Counts 1 and 2 of the Complaint, which relate to the Lyon Mountain facility, concern allegations that (1) there was a failure to provide annual tightness tests/monthly monitoring, and (2) annual test of the line leak detector.[6]

More specifically, count 1 alleges Respondents' failure to have an annual line tightness test or to have monthly monitoring conducted for the period between April 24, 2008 and December 15, 2010, and count 2 alleges Respondents' failure to have conducted annual testing of

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statement of material facts as to which it asserts no genuine issue of material fact exists; the Court notes, "The material facts set forth in the 3(g) statement of the moving party will be deemed to be admitted unless controverted by the opposing party" and rules that "all the material facts set out in 3(g) statements, not being controverted, are admitted...").

[6] The facility identified as the "Lyon Mountain facility" in the Plimpton declaration has been identified and referred to throughout this litigation, including in EPA's partial accelerated motion, as "Service Station I." Counts 1 and 2 (as well as counts 3 through 7) pertain to Service Station I. Declaration of Lee A. Spielmann, executed on February 3, 2012, and Exhibit A attached thereto (a copy of the complaint commencing this proceeding).

the automatic line leak detector.[7] Count 1 does not allege Respondents' failure to have annual testing of the automatic line leak detector conducted, and count 2 does not allege Respondents' failure to have an annual line tightness test or monthly monitoring of the pressurized lines (piping) conducted.[8]

The three documents annexed as Exhibit A to the Plimpton declaration **only concern**, however, testing of the automatic line leak detector; they do not demonstrate that annual line tightness test or monthly monitoring occurred, nor do they otherwise refer or pertain to annual

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[7] The Plimpton declaration omits any reference to the respective time periods of violation alleged in each count. Count 1 alleges the violations occurred between April 24, 2008 and December 15, 2010, while count 2 alleges the violations occurred over two time periods: between May 1, 2006 and April 22, 2009, and between April 22, 2010 and September 7, 2010. Both counts pertain to the underground piping attached to those underground storage tanks at Service Station I identified as tank # 006A and tank # 006B. Paragraphs 71-79 of the complaint (count 1) and ; paragraphs 80 -86 of the complaint (count 2), respectively (Exhibit A to the Spielmann declaration).

[8] The annual line tightness test/monthly monitoring (such monitoring also referred to as interstitial monitoring) represent testing procedures separate and different from the annual automatic line leak detector testing requirement. Separate regulatory provisions pertain to these tests. *Compare* paragraph 73 of the complaint, which states, "Pursuant to 40 C.F.R. § 280.41(b)(1)(ii), underground piping that routinely contains and conveys regulated substances under pressure must, *inter alia*, have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or have monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c)" with paragraph 82 of the complaint, which states that 40 C.F.R. § 280.44(a) provides, in part, that an "'annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.'" These tests serve different purposes. *Compare* paragraph 55 of the Paul Sacker declaration, executed on February 10, 2012, where he states, "Under the UST [underground storage tank] regulations, such pressurized piping [*i.e.* pressurized piping used to convey a substance such as gasoline] must be monitored monthly for release detection or a line tightness test must be conducted once per year to demonstrate that the lines (pipes) are intact," with paragraph 59 of his declaration:

> An automatic line leak detector [ALLD] is at the interface of a tank and its piping and is intended to shut off the pump associated with an UST as soon as a release is detected in a pipe through a pressure drop. An ALLD does not monitor releases from the tank itself. For USTs such as tanks 006A and 006B, the regulations require (and did at the time of each inspection) that the automatic line leak detectors be tested at least once per year to ensure they are working properly.

line tightness testing or monthly monitoring. The Plimpton declaration openly admits as much in paragraph 6:

> However, Adirondack Energy and Paragon Environmental Construction, Inc. performed *leak detector* testing at the Lyon Mountain facility in 2009, 2010 and 2011 and found those tanks tested to have passed. Copies of those *leak detector* testing forms have been previously provided and are attached as Exhibit A [emphases added].[9]

Thus none of the three documents constituting Exhibit A purport to concern or reflect annual line tightness testing or monthly monitoring of the pressurized lines. On the face of these documents, and as the Plimpton declaration observes, these documents concern only automatic line leak detector testing.[10] Therefore, these documents are irrelevant and immaterial to the allegations set forth in count 1 of the complaint, and, consequently none of them raises a genuine issue of material fact with regard to the failure to conduct annual line tightness/monthly monitoring allegations of count 1 of the complaint. These documents lack merit and are insufficient as a matter of law to preclude issuance of a judgment of partial accelerated decision concerning count 1 of the complaint.

III. The Dates Of The Tests Indicated in Exhibit A Of The Plimpton Declaration Render Such Documents Irrelevant To The Allegations Set Forth In Count 2 Of The Complaint

The dates of the three documents that constitute Exhibit A of the Plimpton declaration are: **a)** April 22, 2009 (for the document denominated "Leak Detector/FTA EVALUATION

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[9] The three documents that constitute Exhibit A of the Plimpton declaration were previously submitted as part of Respondents' Pre-Hearing Exchange, dated December 2, 2011.

[10] For purposes of addressing count 1 of the complaint, EPA assumes that these documents are what they purport to be, but such assumption for purposes of this motion is not intended or to be construed as EPA accepting the validity of any information or results purportedly set forth on such documents.

CHART"; hereinafter the "FTA document"), **b)** September 7, 2010 (for the [first] document denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING"; hereinafter the "Estabrook 1 document") and **c)** August 23, 2011 (for the [second] document denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING"; hereinafter the "Estabrook 2 document"). Count 2 of the complaint alleges Respondent Andrew B. Chase's failure to conduct, or to have a third-party conduct on his behalf, "an annual test of the operation of the automatic line leak detector for the following periods of time: a) from at least May 1, 2006 until April 22, 2009, and b) from April 22, 2010 until September 7, 2010." Paragraph 85 of the complaint, attached to the Spielmann declaration as Exhibit A.

None of these documents refutes the allegations of count 2 of the complaint.[11] Rather, the FTA document and the Estabrook 1 document demonstrate the accuracy of the allegations made in that count, specifically paragraph 85 of the complaint. The complaint alleges no annual automatic line leak detector (hereinafter, "ALLD") tests were conducted from May 1, 2006 up until April 22, 2009, and the FTA document, indicating a test on April 22, 2009, supports the veracity of this allegation: for that period of almost three years, **up until** April 22, 2009, for the piping associated with tanks 006A and 006B at Service Station I (the Lyon Mountain station), no such ALLD tests had been conducted. Further, the complaint alleges that no such ALLD tests for the piping associated with these tanks had been conducted between April 22, 2010 (one year following the April 22, 2009 date) through, and up until, September 7, 2010, and the Estabrook 1 document (which is dated September 7, 2010) similarly supports EPA's allegation that no such

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[11] Each of the three documents of Exhibit A to the Plimpton declaration concerns Service Station I, the Lyon Mountain facility.

ALLD tests had been conducted for the period starting one year after the April 22, 2009 test and running **up until** September 7, 2010. These documents do not refute or negate the allegations of the complaint, nor do they defeat EPA's efforts to obtain an accelerated decision on liability for count 2 of the complaint. Because the dates of the FTA document and the Estabrook 1 document coincide with the dates the complaint lists as the end of each of the respective violations, these two documents buttress EPA's contention that no annual ALLD tests occurred up through and until those dates as alleged in the complaint (April 22, 2009 and September 7, 2010).

As for the Estabrook 2 document, this document is irrelevant and immaterial to any question of liability, and such irrelevancy is self-evident from the face of the document. It is dated August 23, 2011. There is no allegation in count 2 of the complaint that there had been a failure to conduct an annual ALLD test between September 7, 2010 and the year subsequent thereto; the period of the violation alleged in count 2 ended on September 7, 2010. Simply put, the date of the test indicated on the Estabrook 2 document is beyond the time period of any violation alleged in count 2 of the complaint.

None of the documents of Exhibit A of the Plimpton declaration raises a genuine issue of material fact concerning the allegations of count 2 of the complaint. As is the case with count 1 of the complaint, albeit on different grounds, these documents lack legal or factual merit for purposes of precluding the entry of an accelerated decision as EPA seeks for these counts; these documents are insufficient as a matter of law to deny this Court issuing a judgment of partial accelerated decision in EPA's favor concerning count 2 of the complaint.[12]

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[12] EPA accepts that these documents are what they purport to be for purposes of litigating this motion, but nothing in this reply is intended or is to be construed as EPA accepting or conceding, for purposes of any eventual hearing, that these documents assert what they purport to assert. EPA reserves

IV. The Document Submitted As Exhibit B To The Plimpton Declaration Contains Data Beyond The Time Relevant To The Allegations Set Forth In Count 18 Of The Complaint

Paragraph 11 of the Plimpton declaration states that "[a]s a result of the evidence attached hereto as Exhibit B, the EPA's Motion for a Partial Accelerated Decision for Counts 18 and 19 should be denied." For the reasons detailed below, this argument too is clearly erroneous and lacks any legal merit.

The Plimpton declaration is correct insofar as it asserts that "Count 18...relate[s] to Service Station VI, and allege[s] there was a...failure to annually test the automatic line leak detector...." Paragraph 9 of the Plimpton declaration. The declaration omits any mention of an essential and dispositive fact, *i.e.* the time period during which the complaint alleges the violation alleged in count 18 occurred. Paragraph 260 of the complaint alleges as follows:

> Respondent Andrew B. Chase failed, for the piping for each of tank number 1, tank number 3A and tank number 3B at Service Station VI, to conduct (or to have a third-party on his behalf conduct) an annual test of the operation of the automatic line leak detector from *December 31, 2008 through September 7, 2010* [emphasis added].

Exhibit A to the Spielmann declaration.

Exhibit B of the Plimpton declaration consists of one document, denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING," and it is dated August 23, 2011; this document pertains to Service Station VI (as admitted in paragraphs 9 and 10 of the Plimpton declaration).[13] Nothing in the complaint alleges ALLD violations at Service Station VI occurred up until, or ran through to, August 23, 2011: the operative period for the violations

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its right to object to such documents, *inter alia*, on such grounds at any eventual hearing.

[13] The document that constitutes Exhibit B to the Plimpton declaration was previously submitted as part of Respondents' Pre-Hearing Exchange, dated December 2, 2011.

alleged count 18 of the complaint runs until, and terminates on, September 7, 2010. This September 2010 date is approximately 11 months **prior to** the date of the ALLD test reported in the document identified as Exhibit B to the Plimpton declaration.

Exhibit B does not negate, refute or call into question the correctness or validity of the allegations of count 18 of the complaint. The date this document asserts an ALLD test occurred is considerably beyond (almost one year) the relevant time frame for the violations set forth in count 18 of the complaint; the information this document purports to provide is not germane to the violations alleged in this count. Under any logical reading or interpretation of Exhibit B, nothing in this document gainsays the accuracy or veracity of the allegations made in count 18 of the complaint. This annexed document to the Plimpton declaration is thus neither relevant nor material to the allegations of count 18 of the complaint.

Exhibit B fails to raise a genuine issue of material fact with regard to count 18 of the complaint, and, as such, it is to be disregarded by this Court in determining whether to grant EPA the accelerated decision on liability for this count that Complainant seeks through the February 10th motion.

V. The Document Submitted As Exhibit B To The Plimpton Declaration Contains Information Factually Irrelevant And Unconnected To Count 19 Of The Complaint

The Plimpton declaration asserts that count 19 "alleges that there was a...failure to... provide adequate monthly monitoring for lines." Paragraph 9 of the Plimpton declaration. Further, paragraph 10 thereof states that Paragon Environmental Construction, Inc. "performed leak detector testing at Service Station VI," and thus, as a result of the testing recorded in Exhibit B, "EPA's Motion for a Partial Accelerated Decision for Count[]...19 should be denied." Paragraph 11 of the Plimpton declaration.

Exhibit B is irrelevant and immaterial to count 19 on two separate grounds. While that document purports to be a record of leak detector testing for the piping, count 19 alleges a different violation: the failure of Respondent Andrew B. Chase to properly conduct interstitial monthly monitoring of the piping or to conduct an annual line tightness test.[14] What count 19 does not allege is a failure to conduct the annual ALLD testing.[15] Nothing in Exhibit B to the Plimpton declaration speaks to the allegations made in this count; Exhibit B is simply not relevant to the violations alleged in this count of the complaint.

The second ground why Exhibit B is not relevant to count 19 is a matter of chronology. As can be seen from paragraphs 273, 274 and 275 of the complaint, the operative period during which the complaint alleges the violations occurred runs from August 24, 2009 through to December 15, 2010 (Exhibit A to the Spielmann declaration). Exhibit B to the Plimpton declaration, denominated "ESTABROOK'S EZY CHECK LEAK DETECTOR TESTING," is dated August 23, 2011, more than eight months after the period of the alleged violations has terminated, so whatever testing information Exhibit B might record is outside the period for which this count alleges violations.

Accordingly, Exhibit B to the Plimpton declaration is of no consequence to EPA's motion

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[14] While this count of the complaint alleges Respondent Andrew B. Chase relied on interstitial monthly monitoring for the piping associated with those underground storage tanks identified as tank # 1, tank # 3A and tank # 3B, such monitoring had not been properly conducted, and Respondent has never demonstrated another method of monthly monitoring had taken place; similarly Respondent never demonstrated that an annual line tightness test had been conducted (had an annual line tightness test been conducted, that would have made moot the issue whether the interstitial monthly monitoring had been properly conducted).

[15] As previously noted, the annual line tightness test/monthly interstitial monitoring requirements are separate and different from the requirement for annual testing of the operation of an automatic line leak detector. *See* note 8, above.

for a judgment of liability for count 19 of the complaint. It does not address the violations, and it certainly does not refute or deny any portion of the evidence supporting EPA's motion for a partial accelerated decision for count 19 of the complaint. Exhibit B does not raise a genuine issue of material fact, and this Court should consequently disregard Exhibit B to the Plimpton declaration in deciding this count of EPA's February 10th motion. Complainant submits EPA is entitled to a judgment of accelerated decision regarding liability for count 19.

VI. This Court Should Disregard The Factual Assertions In The Plimpton Declaration

Separate from the factual recitation and arguments presented in Sections II through V, above, this Court should disregard the Plimpton declaration. Nowhere does it state that it is made upon the declarant's (Thomas Plimpton) personal knowledge. Rather, all it asserts in this regard is that Mr. Plimpton is the attorney for Respondents. Based on what has been stated therein, the document constitutes a hearsay document, and it is well established that an attorney's hearsay affidavit (or declaration) is insufficient to defeat an otherwise properly made motion for summary judgment.[16] This principle represents well-established case law. *See, e.g.*,

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[16] The Plimpton declaration makes statements about station ownership to which EPA wishes to respond briefly.

Paragraph 4 of the declaration states, "The Complaint incorrectly alleges that Service Station I in Lyon Mountain, New York is owned by Andrew Chase individually. That Service Station is actually owned by Belmont, Inc. a New York State corporation." Paragraph 8 states, in part, "Service Station VI...was previously owned by Respondent, Chase Services, Inc. The Station was sold prior to service of the Complaint, Compliance Order, and Notice of Opportunity for Hearing."

In addition to the fact that the Plimpton declaration fails to provide or make reference to any documentation to support its claim of present or past ownership, a more fundamental reason exists for this Court to dismiss these assertions as irrelevant to the disposition of EPA's motion. While the statements in the Plimpton declaration speak of ownership of the *service stations*, both the underlying statute and the 40 C.F.R. Part 280 regulations make clear that responsibility, and ultimately liability, for violations is placed upon the owners (as well as operators) of the *underground storage tanks*. *See, e.g.*, 42 U.S.C. § 6991b(a), wherein it states that "[t]he Administrator [of EPA]...shall promulgate release

Barcamerica Intern. USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 594 n.4 (9th Cir. 2002) ("[T]the arguments and statements of counsel are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment") (internal citations, quotations omitted); *Randell v. United States*, 64 F.3d 101, 109 (2nd Cir. 1995) ("These statements, made by [plaintiff's] attorney did not purport to be made on personal knowledge as required under .R.Civ.P.56(e). As unsupported assertions they were inadequate to defeat a motion for summary judgment"); and *United States v. Potamkin Cadillac Corporation*, 689 F.2d 379, 381 (2nd Cir. 1982) (defendant's evidence that a report had been filed was an affidavit filed by its attorney, who admitted he lacked personal knowledge; the court rules, "On the government's motion for summary judgment, Judge Duffy properly ruled that [defendant's] unsupported assertion that it had filed the report did not create a genuine issue of material fact which might preclude summary judgment.").[17]

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detection, prevention, and correction regulations applicable to all *owners* and operators of *underground storage tanks*" (emphasis added). *See also* 40 C.F.R. § 280.10(a), where it states in relevant part that "[t]he requirements of this part apply to all owners and operators of an UST system as defined in [40 C.F.R.] § 280.12, and the latter provision defines an "UST system" as "an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any."

The following paragraphs of the complaint allege Respondents' (Respondent Andrew B. Chase and/or in tandem with the named corporate respondents) ownership and/or operation of the underground storage tank systems for which the complaint alleges violations: 36, 40, 43, 47, 51 and 54. *See* Exhibit A to the Spielmann declaration. In the declaration of Paul Sacker, submitted as part of EPA's February 10th motion, he discussed Respondent Andrew B. Chase's ownership and/or operation of the underground storage tank systems at issue in this proceeding. *See* paragraphs 18 through 44 of the Sacker declaration, executed on February 10, 2012.

[17] This lack of requisite personal knowledge can also be fatal to an attempt to obtain summary judgment. *See, e.g., Beyah v. Coughlin*, 789 F.2d 986, 989-90 (2nd Cir. 1986) (Court of Appeals vacates trial court grant of summary judgment, explaining:

> The first flaw in the granting of summary judgment to defendants in the present case was the court's reliance on the materials submitted by defendants has having established the contents of the soaps provided to plaintiffs. The only affidavit submitted was that of

VII. Conclusion

Respondents' opposition papers — the Plimpton declaration and the documents attached thereto —do not address (let alone dispute or contest) 16 of the 20 counts of the complaint for which EPA has sought an accelerated decision on liability, and thus Respondents have waived any objections to the granting of the motion for those counts. As for the four counts (counts 1, 2, 18 and 19 of the complaint) that are addressed in the Plimpton declaration, nothing stated therein (nor anything in the documents attached to the declaration) creates a genuine issue of material fact or otherwise has merit for purposes of this Court adjudicating EPA's February 10th motion for partial accelerated decision. Therefore, for these reasons and for the reasons set forth in EPA's February 10, 2012 motion (including the three declarations submitted in support thereof, together with the attachments in each such declaration), Complainant respectfully requests this Court to deny in all respects the relief Respondents seek in the Plimpton declaration[18] and further requests that this Court: **1)** render a judgment that Respondents (Andrew B. Chase individually or in tandem with named corporate respondents): **a)** failed to comply with the applicable requirements of 40 C.F.R. Part 280 as set out in each of counts 1 through 19 and count 21 of the complaint, **b)** that each such failure constitutes, within the meaning of Section 9006(d)(2)(A) of the Solid Waste Disposal Act, as amended (hereinafter "the Act"), 42 U.S.C. § 6991e(d)(2)(A), a

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> Cream, defendants' attorney. Cream, however, did not suggest that he had personal knowledge of any of the facts he asserted. *** In short, insofar as the contents of the soaps were concerned, defendants proferred no statements sworn to by anyone who had knowledge of the facts asserted. Their factual presentation thus did not carry their burden under Rule 56(e) of establishing that there was no genuine issue as to the contents of the soaps provided to plaintiffs.

[18] The Plimpton declaration seeks denial of partial accelerated decision for counts 1 and 2 of the complaint (paragraph 7 of the declaration) and denial of partial accelerated decision for counts 18 and 19 of the complaint (paragraph 11 of the declaration).

failure "to comply with[] any requirement or standard promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the Act]," and **c)** that for each such failure Respondents (as set forth in the complaint) "shall be subject to a civil penalty...for each tank for each day of violation"; **2)** issue an order granting Complainant an accelerated decision establishing and declaring Respondents liable to the United States for each of said 20 counts with regard to such violations of the 40 C.F.R. Part 280 requirements;[19] and **3)** grant Complainant such other and further relief as this Court deems lawful and proper.

Dated: April 5, 2012
New York, New York

Respectfully submitted,

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[19] If this Court were to rule that Respondents have raised a genuine issue of material facts with regard to any of counts 1, 2, 18 and/or 19, then Complainant requests that this Court grant EPA an accelerated decision on liability for the remaining counts of the complaint for which EPA has moved for such judgment.

TO: Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
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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' OPPOSITION TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION," dated April 5, 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
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New York, New York 10007-1866

Copy by Pouch Mail:

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Copy by UPS Overnight:

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Dated: April 6, 2012
New York, New York

Lee A. Spielmann