

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2012 JUL 19 P 3:03
REGIONAL HEARING
CLERK

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In the Matter of :
Valvo's Convenience & Gas, Inc. :
And Stephen Valvo, Individually :
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: :
Proceeding under Section 9006 the :
Solid Waste Disposal Act, as amended :
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ADDENDUM TO THE
MOTION TO FILE SECOND
AMENDED COMPLAINT

Docket No. RCRA-02-2011-7507

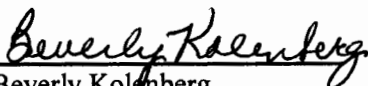
Pursuant to 40 C.F.R. §§ 22.14(c), 22.16, and 22.4(c), Complainant moved on July 11, 2012 for an Order to file a Second Amended Complaint in this case. This Addendum to the Motion has as attachments a copy of the Proposed Draft Second Amended Complaint and a blacklined copy comparing the Proposed Draft Second Amended Complaint to the prior Amended Complaint. The proposed penalty sought by Complainant in this case was not changed in the Proposed Draft Second Amended Complaint. The penalty summary sheets served and filed with the Amended Complaint are unchanged, and Complainant is not attaching a duplicate set in this Addendum.

In the Proposed Draft Second Amended Complaint, Complainant has (1) included the specific dates that certain violations were corrected, (2) updated the time periods of the continuing violations and (3) added a new Count 8 alleging that during 2011 and 2012, Respondents failed to perform any release detection and maintain adequate records for the diesel underground storage tank at the former Hanover Convenience facility and to cooperate fully during an inspection. Despite the addition of this Count, Complainant has used its discretion and has not increased the amount of the proposed penalty in this case.

In sum, the attachments to this Addendum provide the Court and Respondents with an understanding of the substance of the Proposed Second Amended Complaint and the changes from Amended Complaint

Dated: July 18, 2012
New York, New York

Respectfully submitted,


Beverly Kolonberg
Assistant Regional Counsel
Counsel for Complainant
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007-1866

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

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

Mr. Stephen Valvo and
Valvo's Convenience & Gas, Inc.
1271 Routes 5 and 20
Silver Creek, New York 14136

Paul A. Chiaravalloti, Esq., for the Respondents
1967 Wehrle Drive
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Williamsville, New York 14221

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed copies of the foregoing Addendum to the Motion to File Second Amended Complaint, bearing the Docket Number RCRA-02-2011-7507 by pouch mail to Honorable M. Lisa Buschmann, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Mail Code 1900L, Washington, D.C. 20460-2001, by regular mail to Mr. Stephen Valvo and to Valvo's Convenience & Gas, Inc., 1271 Routes 5 and 20, Silver Creek, N.Y. 14136, and to Paul A. Chiaravalloti, Esq., counsel for the Respondents, 1967 Wehrle Drive, Suite 1, Williamsville, N.Y. 14221.

I hand-carried the original and a copy of the foregoing Complaint to the Office of Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: July 18, 2012
New York, New York

Beverly Kalenberg

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

Valvo's Convenience & Gas, Inc. and
Stephen M. Valvo, individually.

Respondents

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

PROPOSED DRAFT

SECOND AMENDED COMPLAINT,
COMPLIANCE ORDER
AND
NOTICE OF OPPORTUNITY FOR HEARING

DOCKET NO. RCRA-02-2011-7507

SECOND AMENDED COMPLAINT

Background

1. This is a civil administrative proceeding instituted pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901 et seq. (the "Act").
2. Complainant in this proceeding, Dore LaPosta, Director, Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("EPA"), has been duly delegated the authority to institute this action.
3. One Respondent in this action is Valvo's Convenience & Gas, Inc. ("Valvo's C&G"). Valvo's C&G is the owner of real property at 1267 Routes 5 and 20 and at 351 Central Avenue in Silver Creek, New York at which there are five and three underground storage tanks ("USTs"), respectively, at issue in this case.
4. The other Respondent in this action is Stephen M. Valvo ("Respondent Valvo") who was and continues to be the "operator" of USTs located at the Valvo Transport, Inc. facility and an "owner" of the USTs at the former Hanover Convenience Facility.
5. On July 30, 2009, Respondent Valvo's C&G filed a Chapter 11 petition for bankruptcy in the Bankruptcy Court in the Western District of New York. In its First Amended Disclosure Statement, dated August 11, 2010, Valvo's C&G stated it owned the properties

at which the Valvo's C&G, Valvo Transport and the former Hanover Convenience Facilities were located.

6. A 10,000-gallon and a 12,000-gallon UST for gasoline storage, and a 2,000-gallon UST for diesel fuel storage (all installed in March 1997), located on a part of the property at 1267 Routes 5 and 20 in Silver Creek, New York (the "Valvo's C&G Facility"), are registered with the New York State Department of Conservation ("NYSDEC") with the following Petroleum Bulk Storage ("PBS") report number: PBS# 9-600317 and are listed as owned by Valvo's C&G and operated by Respondent Valvo.
7. A 10,000-gallon UST for diesel fuel storage (installed in May 1993) and a 2,000-gallon UST for waste oil storage (installed in November 1997), also located on a part of the property at 1267 Routes 5 and 20 in Silver Creek, New York (the "Valvo Transport Facility"), are registered with NYSDEC with the following number: PBS # 9-600126 and are listed as owned by Valvo Transport, Inc. and operated by Respondent Valvo. Valvo's C&G's First Amended Disclosure Statement, dated August 11, 2010, filed in its bankruptcy petition, indicated that it owned these USTs.
8. An 8,000-gallon and a 12,000-gallon UST for gasoline storage, and a 1,000-gallon UST for diesel fuel storage (all installed on June 1, 1991), located at 351 Central Avenue, Silver Creek, New York (the former "Hanover Convenience Facility"), are registered with NYSDEC with the following number: PBS # 9-425508 and since 2004 are listed on the PBS forms as owned by Respondent Valvo.
9. PBS Applications were filed for three USTs at 351 Central Avenue on March 8, 2002, May 23, 2004 and August 15, 2006. The PBS applications listed Respondent Valvo as the owner of the USTs and Melissa Elwell as the operator of the USTs in the 2004 and 2006 applications. On January 5, 2011, Respondent Valvo filed a PBS Application for 351 Central Avenue and identified himself as the owner of the USTs. The 2011 application listed the name of the facility as Valvo Convenience & Gas, Inc. (For purposes of this case, and to avoid confusion, the facility at 351 Central Avenue will be referred to herein as the former Hanover Convenience Facility.)
10. Pursuant to Section 9005(a) of the Act, 42 U.S.C. §6991d(a), and 40 C.F.R. § 280.34, on or about December 21, 2007, EPA sent an Information Request Letter ("IRL") to Respondent Valvo to determine the status and compliance with the Act and 40 C.F.R. Part 280 of the UST systems at all the Facilities cited above. EPA received a partial response from Respondent Valvo on May 28, 2008.
11. EPA sent the second IRL requesting information regarding the UST systems at the Valvo's C&G, Valvo Transport, and former Hanover Convenience Facilities on or about May 10, 2010. EPA received an incomplete response on January 13, 2011 that stated that Valvo's C&G had legal ownership of these properties; Respondent Valvo was the sole corporate officer, and Valvo's C&G owned the USTs at the former Hanover Convenience Facility.

Regulatory Background

12. Respondent Valvo's C&G, Respondent Valvo and Valvo Convenience & Gas, Inc. are each considered a "person" within the meaning of Section 9001(6) of the Act, 42 U.S.C. § 6991(6), and 40 C.F.R. § 280.12.
13. The USTs and connected underground piping at each Facility identified in paragraphs 6, 7 and 8, above, are "underground storage tanks," as defined in Section 9001 of the Act, 42 U.S.C. § 6991, and are "UST systems," as defined in 40 C.F.R. § 280.12. Installation of all these tank systems commenced after December 22, 1988, and they are all "new tank systems," as defined in 40 C.F.R. § 280.12.
14. Pursuant to Section 9003 of the Act, 42 U.S.C. § 6991b, EPA promulgated rules setting forth requirements for owners and operators of UST systems which are codified at 40 C.F.R. Part 280.
15. 40 C.F.R. § 280.12 defines an underground storage tank or UST as any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent (10%) or more beneath the surface of the ground.
16. Pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, owners and operators of USTs must supply upon request, or otherwise make available to EPA, information regarding their USTs.
17. Pursuant to 40 C.F.R. § 280.20(c)(1)(ii), owners and operators of new UST systems must install on each UST system an adequate overfill prevention device that meets the requirements of 40 C.F.R. Part 280, Subpart B.
18. Pursuant to 40 C.F.R. § 280.31(b), owners and operators of new and existing UST systems must ensure that the cathodic protection system on USTs with metallic components is tested within six months of installation and every three years thereafter in accordance with the requirements of 40 C.F.R. Part 280, Subpart C.
19. Pursuant to 40 C.F.R. § 280.41(a), owners and operators of new and existing UST systems must ensure that they monitor tanks for releases every thirty (30) days in accordance with the requirements of 40 C.F.R. Part 280, Subpart D.
20. Pursuant to 40 C.F.R. § 280.41(b), owners and operators of new and existing UST systems with pressurized piping must conduct either annual line tightness tests or monthly release detection monitoring of each pressurized piping system.
21. Pursuant to 40 C.F.R. § 280.70(a), owners and operators of new and existing UST systems must maintain release detection in accordance with 40 C.F.R. § 280.40 for

- temporarily closed USTs that contain one inch or more of residue.
22. Pursuant to 40 C.F.R. § 280.70(a), owners and operators of new and existing UST systems must maintain corrosion protection and testing in accordance with 40 C.F.R. § 280.31 for temporarily closed USTs that contain metallic components.
 23. Pursuant to 40 C.F.R. § 280.70(c), owners and operators are required to permanently close or upgrade any UST system that has been temporarily closed for more than twelve (12) months and which does not meet either the performance standards in § 280.20 for new UST systems or the upgrade requirements in § 280.21, except that the spill and overfill equipment requirements do not have to be met.

Valvo's C&G Facility

24. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on February 26, 2007, an authorized representative of EPA ("Inspector") inspected the UST system located at the Valvo's C&G Facility to determine its compliance with the Act and 40 C.F.R. Part 280.
25. At the time of EPA's inspection, the three UST systems at the Valvo's C&G Facility were not in use, and reportedly had not been in use since 2000. The USTs contained petroleum residue. The USTs did not meet the requirements applicable to temporarily closed tanks set forth in § 280.70(a) (release detection), 40 C.F.R § 280.70(a) (corrosion protection), and 40 C.F.R § 280.70(c) (permanent closure).
26. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on October 22, 2008, an Inspector re-inspected the UST systems located at the Valvo's C&G Facility to determine their compliance with the Act and 40 C.F.R. Part 280.

Valvo Transport Facility

27. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on February 26, 2007, an Inspector inspected the UST systems located at the Valvo Transport Facility to determine their compliance with the Act and 40 C.F.R. Part 280.
28. At the time of EPA's inspection, the 10,000-gallon diesel fuel UST at the Valvo Transport Facility was not in use. The system did not meet the requirements applicable to temporarily closed tanks set forth in 40 C.F.R § 280.70(a) (release detection), 40 C.F.R § 280.70(a) (corrosion protection), and 40 C.F.R § 280.70(c) (permanent closure). The 2,000 waste oil UST was still in use. It did not meet the performance standards set forth at 40 C.F.R. § 280.31(b) or 40 C.F.R § 280.41(a).
29. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on March 15, 2010, an Inspector re-inspected the USTs at the Valvo Transport Facility to determine their compliance with the Act and 40 C.F.R. Part 280.
30. At the time of EPA's re-inspection, the 10,000-gallon diesel fuel UST system at the Valvo Transport Facility was not in use and contained greater than one-inch of petroleum

residue. It did not meet the permanent closure standards set forth at 40 C.F.R § 280.70(c).

31. The 2,000-gallon waste oil UST at the Valvo Transport Facility was reportedly placed into temporary closure between March 15, 2009 and September 15, 2009, but still contained greater than one inch of petroleum residue. The system did not meet the performance standards for temporarily closed tanks set forth in § 280.70(a) (release detection), 40 C.F.R § 280.70(a) (corrosion protection) and 40 C.F.R § 280.70(c) (permanent closure).

Former Hanover Convenience Facility

32. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on August 10, 2007, an Inspector inspected the UST systems located at the former Hanover Convenience Facility to determine their compliance with the Act and 40 C.F.R. Part 280.
33. At the time of EPA's inspection, the UST systems at the former Hanover Convenience Facility were in use and did not meet the performance standards set forth at 40 C.F.R. § 280.41(a) and 40 C.F.R. § 280.41(b).
34. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on March 15, 2010, an Inspector re-inspected the UST systems located at the former Hanover Convenience Facility to determine their compliance with the Act and 40 C.F.R. Part 280.
35. At the time of EPA's re-inspection, the UST systems at the former Hanover Convenience Facility were in use and did not meet the performance standards set forth at 40 C.F.R. § 280.31(b), 40 C.F.R. § 280.41(a) and 40 C.F.R. § 280.41(b).

July 21, 2011 Inspection by EPA Inspector

36. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on July 21, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo's C&G Facility at Routes 5 & 20 to determine their compliance with the Act and 40 C.F.R. Part 280.
37. Respondent Valvo informed the EPA Inspector that the tanks were not in use and were not empty. Release detection was not being performed on any of the three tanks.
38. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on July 21, 2011, an EPA Inspector re-inspected the UST systems located at Valvo Transport at Routes 5 & 20 to determine their compliance with the Act and 40 C.F.R. Part 280.
39. Respondent Valvo informed the EPA Inspector that the two tanks were not in use and the diesel tank was not empty. The waste oil tank had been emptied on July 5, 2011 to no more than one inch of residue. Release detection was not being performed for the diesel tank.

40. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on July 21, 2011, an EPA Inspector re-inspected the UST systems located at the former Hanover Convenience Facility to determine their compliance with the Act and 40 C.F.R. Part 280.
41. Respondent Valvo told the EPA Inspector that he performed the interstitial monitoring of the diesel UST at the former Hanover Convenience Facility by checking the port of the UST. When asked by the EPA Inspector to see the location of the port, Respondent Valvo said that he could not recall where it was located. Respondent Valvo admitted that he could not locate the monitoring port for the diesel UST.
42. At the July 21, 2011 Re-Inspection of the diesel UST at the former Hanover Convenience Facility, Respondent Valvo gave the EPA Inspector written monthly records from January 2011 through July 2011 recording that Tank 3, the diesel UST, had a score of zero showing no product was found during the interstitial monitoring each month.

October 20, 2011 Re-Inspection by EPA Inspector

43. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on October 20, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo's C&G Facility at Routes 5 & 20 to determine their compliance with the Act and 40 C.F.R. Part 280.
44. Respondent Valvo informed the EPA Inspector that the tanks at the Valvo's C&G Facility were not in use, and the Inspector determined that the tanks had been emptied to no more than one inch of residue.
45. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on October 20, 2011, an EPA Inspector re-inspected the UST systems located at Valvo Transport to determine their compliance with the Act and 40 C.F.R. Part 280.
46. Respondent Valvo informed the EPA Inspector, at the October 20, 2011 Inspection, that the tanks at Valvo Transport were not in use, and the Inspector confirmed that the tanks were emptied to no more than one inch of residue.

Actions in 2012

47. On February 29, 2012, Empire Geo Services, Inc. provided an environmental report for the February 21, 2012 removal of the waste oil UST at Valvo Transport stating that an Empire Environmental Geologist had visited the removal site to observe the excavation site and collect verification soil samples. The soil samples were analyzed for volatile organic compounds ("VOCs") and semi-volatile compounds ("SVOCs") and no VOCs or SVOCs were detected.
48. On or about March 21, 2012, an Inspector from NYSDEC inspected the former Hanover Convenience Facility and verified that the diesel tank did not have an accessible interstitial monitoring port; thus, proper release detection could not be performed. The Inspector also learned that Tank 1, a gasoline tank, and Tank 3, the diesel tank, had failed

their most recent corrosion tests.

49. On or about April 23, 2012, Respondent Valvo sent an Inspector for NYSDEC photographs and paperwork for work performed by Jemko Petroleum Equipment, Inc, 4895 East Lake Road, Erie, PA 16511-1477 at 351 Central Avenue. The April 20, 2012 Invoice for the former Hanover Convenience Facility at 351 Central Avenue stated "Diesel is down, Remove from manhole/island to find interstitial and make accessible for monthly inspections."
50. On or about May 23, 2012, Respondents removed the two gasoline tanks at the Valvo's C& G Facility.
51. On or about May 23, 2012, Respondents removed the diesel tank at Valvo Transport.

Count 1 - Failure to permanently close temporarily closed USTs at the Valvo's C&G Facility

52. Complainant re-alleges each allegation contained in Paragraphs "1" through "51" with the same force and effect as if fully set forth herein.
53. Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain release detection for any temporarily closed UST that contains more than one inch of petroleum residue.
54. Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain cathodic corrosion protection in accordance with 40 C.F.R. § 280.31 for any temporarily closed UST that contains metallic components.
55. Pursuant to 40 C.F.R. § 280.70(c), when an UST system is temporarily closed for more than twelve (12) months, owners and operators must permanently close the UST system if it does not meet either the performance standards in § 280.20 for new UST systems or the upgrade requirements in § 280.21, except that the spill and overfill equipment requirements do not have to be met.
56. As of the April 6, 2006 and the July 16, 2012 Petroleum Bulk Storage registrations for the USTs at the Valvo's C&G Facility at 1267 Routes 5 and 20, all the UST systems were in temporary closure.
57. At the February 26, 2007 inspection of the Valvo's C&G Facility, the Inspector could not find evidence of the location of the diesel fuel UST. Respondent Valvo told the Inspector that the two gasoline USTs had been closed since at least 2000.
58. At the February 26, 2007 inspection, there was no evidence that release detection was being performed for the two gasoline USTs.
59. At the October 22, 2008 inspection, the gasoline USTs had been temporarily closed. Respondent Valvo told the Inspector that the diesel fuel UST had been removed in 2000.

At the October 22, 2008 inspection, there was no evidence of release detection for the gasoline USTs. There were 3.25 inches of petroleum product and 2.50 inches of water in the 10,000-gallon UST and 2.25 inches of petroleum product and 3.50 inches of water in the 12,000-gallon UST.

60. At the February 26, 2007 and the October 22, 2008 inspections, the Inspector confirmed that the two gasoline USTs were of a sti-P3 variety that required cathodic corrosion protection testing every three years. No cathodic corrosion protection test results were provided.
61. In a February 17, 2010 letter to EPA, counsel for Respondent Valvo's C&G stated the diesel UST at the Valvo's C&G Facility had not been removed and would remain in the ground. The diesel UST was not monitored for release detection, as required by 40 C.F.R. § 280.41. The diesel UST should have been permanently closed no later than one year after it was put into temporary closure.
62. On June 29, 2011, Respondents' contractor conducted corrosion tests on the three tanks at the Valvo's C & G facility. The diesel UST failed the corrosion test.
63. On July 21, 2011, an EPA inspector verified the location of the diesel UST at the Valvo's C & G facility.
64. On August 12, 2011, Respondent Valvo informed EPA that NOCO Oil had emptied each of the three tanks to a level of no more than one inch of residue on August 11, 2011.
65. On October 20, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo's C&G Facility at Routes 5 & 20 and confirmed via measuring stick that all three tanks had been emptied to no more than one inch of residue.
66. On April 11, 2012, Respondent Valvo's C&G and Respondent Valvo retested the corrosion protection on the diesel UST at the Valvo's C & G facility. The diesel UST again failed.
67. On or about May 23, 2012, Respondent Valvo's C&G and Respondent Valvo removed the two gasoline tanks at the Valvo's C & G Facility. The diesel UST remained in place.
68. Respondent Valvo's C&G and Respondent Valvo failed to perform release detection monitoring for the two gasoline USTs, as required by 40 C.F.R. § 280.41 and § 280 71(a) until at least August 11, 2011 (when the tanks were reportedly emptied, ending the need to conduct release detection).
69. Respondent Valvo's C&G and Respondent Valvo failed to permanently close the two gasoline USTs from at least August 1, 2009 until at least August 11, 2011.
70. Respondent Valvo's C&G and Respondent Valvo have failed, and continue to fail, to maintain corrosion protection for the diesel UST, as required by 40 C.F.R. § 280.31 and §

280.71(a).

71. Respondent Valvo's C&G and Respondent Valvo failed to permanently close the diesel UST from at least August 1, 2009 until the present.
72. Respondent Valvo's C&G and Respondent Valvo's failure to comply with the permanent closure requirements specified in 40 C.F.R. § 280.70(c) for the three USTs at the Valvo's C&G Facility constitutes a violation of 40 C.F.R. Part 280.

Count 2 - Failure to permanently close temporarily closed USTs at Valvo Transport Facility

73. Complainant re-alleges each allegation contained in Paragraphs "1" through "72" with the same force and effect as if fully set forth herein.
74. Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain release detection for any temporarily closed UST that contains more than one inch of petroleum residue.
75. Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain cathodic corrosion protection in accordance with 40 C.F.R. § 280.31 for any temporarily closed UST that contains metallic components.
76. Pursuant to 40 C.F.R. § 280.70(c), when an UST system is temporarily closed for more than twelve (12) months, owners and operators must permanently close the UST system if it does not meet either performance standards in 40 C.F.R. § 280.20 for new UST systems or the upgrade requirements in 40 C.F.R. § 280.21, except that the spill and overfill equipment requirements do not have to be met.
77. At the February 26, 2007 inspection, the diesel fuel UST had been in temporary closure since 2000, and the waste oil UST was still in use.
78. At the March 15, 2010 inspection, the diesel fuel UST was in temporary closure since at least 2000 and contained 16.50 inches of petroleum product. The waste oil UST was in temporary closure since at least some time between March 15, 2009 and September 15, 2009 and contained 20.50 inches of petroleum residue.
79. During the February 26, 2007 and March 15, 2010 inspections, no evidence of release detection for the USTs was provided to the Inspector.
80. At the February 26, 2007 and March 15, 2010 inspections, the tanks were of a sti-P3 variety and were equipped with cathodic corrosion protection provided via sacrificial anodes.
81. 40 C.F.R. § 280.31 requires that the first test of the corrosion protection systems for the tanks was due within six months of installation, or November 1, 1993, for the diesel fuel UST, and May 1, 1998, for the waste oil UST, and every three years thereafter. The two tests prior to the 2007 and 2010 inspections should have been conducted for the diesel

fuel UST by November 1, 2005, and November 1, 2008, and for the waste oil UST by May 1, 2007, and May 1, 2010, respectively.

82. At the inspections, there was no evidence of any cathodic corrosion protection testing.
83. On June 29, 2011, Respondent Valvo's C & G and Respondent Valvo's contractor conducted a corrosion test on the diesel tank only. It passed.
84. On or about July 5, 2011 Respondent Valvo's C & G and Respondent Valvo had the waste oil tank emptied to no more than one inch of residue.
85. On or about July 28, 2011, Respondent Valvo's C & G and Respondent Valvo arranged to empty the diesel tank to no more than one inch of residue. This was observed by an inspector from NYSDEC, who had to leave the Facility before the emptying of the diesel tank was completed.
86. On October 20, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo Transport and confirmed via measuring stick that both tanks were emptied to no more than one inch of product.
87. On or about February 21, 2012, Respondent Valvo's C & G and Respondent Valvo removed the waste oil tank.
88. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed to maintain release detection until about July 2011 for the diesel UST and for the waste oil UST at the Valvo Transport Facility although they still contained product. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an operator, had not maintained any cathodic corrosion protection testing for the waste oil UST at the Valvo Transport Facility until the UST's closure on February 21, 2012.
89. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed, from at least August 1, 2009 through at least July 28, 2011 for the diesel fuel UST, and starting from some date between March 15, 2010 and September 15, 2010 to at least February 21, 2012 for the waste oil UST, to comply with the permanent closure requirements specified in 40 C.F.R. § 280.70(c) for the two USTs at the Valvo Transport Facility in violation of the applicable standards at 40 C.F.R. Part 280.

Count 3 – Failure to test the cathodic protection system for the waste oil UST every three years at the Valvo Transport Facility

90. Complainant re-alleges each allegation contained in Paragraphs "1" through "89" with the same force and effect as if fully set forth herein.
91. 40 C.F.R. § 280.31 requires that owners and operators of new and existing UST systems must ensure that the cathodic protection system on USTs with metallic components are tested within six months of installation and every three years thereafter in accordance

with the requirements of 40 C.F.R. 280, Subpart C.

92. At the February 26, 2007 inspection and the March 15, 2010 re-inspection, there was no evidence of cathodic protection testing for the waste oil UST.
93. During the March 15, 2010 re-inspection, the waste oil UST had been temporarily closed for a period of six months to one year, or from sometime between March 15, 2009 and September 15, 2009.
94. Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed, from at least August 1, 2009 through at least March 15, 2010 (*i.e.*, one year from the earliest date of temporary closure, and the earliest date when permanent closure had to occur for the waste oil UST), to comply with the cathodic protection testing requirements specified in 40 C.F.R. § 280.31(b) for the waste oil UST at the Valvo Transport Facility in violation of the applicable standards at 40 C.F.R. Part 280.

Count 4 - Failure to monitor the waste oil UST at the Valvo Transport Facility for releases every 30 days

95. Complainant re-alleges each allegation contained in Paragraphs "1" through "94" with the same force and effect as if fully set forth herein.
96. Pursuant to 40 C.F.R. § 280.41(a), owners and operators of a UST system must monitor the tank for releases every thirty (30) days.
97. According to the PBS application submitted by Respondent Valvo in his May 15, 2008 response to EPA's Information Request Letter, the waste oil UST at the Valvo Transport Facility had no registered method of release detection.
98. At the February 26, 2007 inspection, there was evidence that the waste oil UST was in use. During that inspection, Respondent Valvo provided no evidence of release detection monitoring for the waste oil UST.
99. During the March 15, 2010 re-inspection, Respondent Valvo stated that the waste oil UST was placed into temporary closure within the "last six months to a year." The waste oil UST still had 20.50 inches of petroleum residue. As a result, monthly release detection monitoring was required. No evidence of release detection monitoring was provided to the Inspector for this UST.
100. Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed, from at least August 1, 2009 through at least March 15, 2010 (*i.e.*, one year from the earliest date of temporary closure, and the earliest date when permanent closure had to occur for the waste oil UST), to comply with release detection requirements specified in 40 C.F.R. § 280.41(a) for the waste oil UST at the Valvo Transport Facility in violation of the applicable standards at 40 C.F.R. Part 280.

Count 5. - Failure to test the cathodic protection system every three years at the former Hanover Convenience Facility

101. Complainant re-alleges each allegation contained in Paragraphs "1" through "100" with the same force and effect as if fully set forth herein.
102. Pursuant to 40 C.F.R. § 280.31(b), owners and operators of new and existing UST systems must ensure that cathodic protection systems on USTs with metallic components are tested every three years in accordance with the requirements of 40 C.F.R. 280, Subpart C.
103. As of September 23, 2010, the PBS database indicated that the Hanover Convenience Facility had three federally regulated USTs, all installed in June 1991, which were double-walled steel and equipped with sacrificial anodes for cathodic corrosion protection.
104. 40 CFR § 280.31 requires the cathodic protection system to be tested within six months of installation, or December 1, 1991, and every three years thereafter. The last two tests should have been conducted by December 1, 2006 and December 1, 2009, respectively.
105. During the August 10, 2007 inspection, one cathodic corrosion test result for the three tanks from March 8, 2007 was available. No evidence of cathodic protection testing in the three years prior to March 8, 2007 was provided to the Inspector.
106. During the March 15, 2010 re-inspection, no cathodic protection test results were provided.
107. On April 11, 2010, Respondent Valvo sent EPA information that cathodic protection tests were conducted on March 8, 2007 and March 30, 2010 for the three USTs. The 12,000-gallon and 8,000-gallon USTs failed the tests. The operator stated that the failing tanks were emptied and placed into temporary closure.
108. The corrosion test, which should have been performed by March 8, 2010, was conducted twenty-two days late for the three USTs.
109. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an owner, failed, from March 8, 2010 through March 30, 2010, to comply with the cathodic protection testing requirements specified at 40 C.F.R. § 280.31(b) for the three USTs at the Hanover Convenience Facility in violation of 40 C.F.R. Part 280.

Count 6 - Failure to perform release detection every 30 days for a UST at the former Hanover Convenience Facility from on or about August 1, 2009 through April 11, 2010

110. Complainant re-alleges each allegation contained in Paragraphs "1" through "109" with the same force and effect as if fully set forth herein.
111. Pursuant to 40 C.F.R. § 280.41(a), owners and operators must monitor a tank for releases every thirty (30) days.
112. At the March 15, 2010 re-inspection, the two gasoline USTs were monitored via manual interstitial monitoring, and twelve months of passing records were available at the Facility. No evidence that the diesel UST was monitored was provided to the Inspector or in response to EPA's IRLs.
113. In a letter, dated April 11, 2010, from Melissa Elwell, the operator of the former Hanover Convenience Facility, to the EPA Inspector, she reported that the diesel UST had been emptied of product and was in temporary closure.
114. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an owner, failed from on or about August 1, 2009 through April 11, 2010 to comply with release detection requirements for the diesel tank, as required by 40 C.F.R. § 280.41(a) and in violation of 40 C.F.R. Part 280.

Count 7 - Failure to perform annual line tightness tests or monthly monitoring of the pressurized piping system at the former Hanover Convenience Facility

115. Complainant re-alleges each allegation contained in Paragraphs "1" through "114" with the same force and effect as if fully set forth herein.
116. Pursuant to 40 C.F.R. § 280.41(b), owners and operators of new and existing UST systems with pressurized piping must conduct either annual line tightness tests or monthly release detection monitoring of each pressurized piping system in accordance with the specified methods.
117. During the March 15, 2010 inspection, the two gasoline USTs were observed using pressurized piping, but no evidence of release detection monitoring or annual line tightness tests for the pressurized lines was provided to the Inspector or in response to EPA's May 2010 IRL.
118. On April 11, 2010, Respondent Valvo sent EPA evidence of a passing annual line tightness test, dated March 30, 2010.
119. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an owner, failed, from at least August 1, 2009 through at least March 30, 2010, to perform monthly release detection monitoring or to provide an annual line tightness tests for the two pressurized gasoline piping systems at the Hanover Convenience Facility in violation of the

requirements at 40 C.F.R. § 280.41(b) and 40 C.F.R. Part 280.

Count 8 - Failure during 2011 and 2012 to perform any release detection and maintain adequate records for the diesel UST at the former Hanover Convenience Facility and to cooperate fully during an inspection

120. Complainant re-alleges each allegation contained in Paragraphs "1" through "119" with the same force and effect as if fully set forth herein.
121. Pursuant to 40 C.F.R. § 280.41(a), owners and operators must monitor a tank for releases every thirty (30) days.
122. Pursuant to 40 C.F.R. § 280.45, all UST owners and operators must maintain records in accordance with 40 C.F.R. § 280.34 demonstrating compliance with all applicable requirements of this subpart.
123. Pursuant to 40 C.F.R. § 280.34, owners and operators of UST systems must cooperate fully with inspections, monitoring and testing conducted by the implementing agency, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended.
124. Pursuant to 40 C.F.R. § 280.31(a), all corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.
125. On March 22, 2011, Respondent Valvo sent EPA handwritten release detection records for the diesel UST at the former Hanover Convenience Facility showing that manual interstitial monitoring was being conducted for the months of January through March 2011.
126. During the July 21, 2011 EPA re-inspection of the diesel UST at the former Hanover Convenience Facility, Respondent Valvo gave the EPA Inspector additional written monthly records from January 2011 through July 2011 recording that Tank 3, the diesel tank, had a score of zero showing no product was found during the interstitial monitoring each month.
127. Respondent Valvo told the EPA Inspector that he performed the interstitial monitoring of the diesel UST by checking the port of the UST. When asked by the EPA Inspector for the location of the port, Respondent Valvo said that he could not recall where it was located. Respondent Valvo admitted that he could not locate the monitoring port for the diesel UST.
128. On or about March 21, 2012, an inspector for the NYSDEC visited the former Hanover Convenience facility and confirmed that an interstitial monitoring port for Tank 3, the

diesel tank, could not be located by Respondent Valvo.

129. On or about March 21, 2012, an inspector for the NYSDEC visited the former Hanover Convenience facility and verified that no release detection was being performed for Tank 3, the diesel tank.
130. On or about March 21, 2012, an inspector for the NYSDEC visited the former Hanover Convenience facility and verified that the results of the most recent cathodic protection testing of Tank 3, the diesel tank, demonstrated it was not functioning adequately to protect the tank from corrosion.
131. On or about April 23, 2012, Respondent Valvo sent the Inspector for NYSDEC, photographs and paperwork for work performed by Jemko Petroleum Equipment, Inc, 4895 East Lake Road, Erie, PA 16511-1477 at 351 Central Avenue related to the NYSDEC's Inspection. The April 20, 2012 Invoice to Valvo Convenience & Gas, Inc. for former Hanover Convenience Facility at 351 Central Avenue stated "Diesel is down, Remove from manhole/island to find interstitial and make accessible for monthly inspections."
132. From at least January 1, 2011 through at least April 20, 2012, Respondent Valvo failed to conduct adequate release detection in accordance with 40 C.F.R. § 280.41(a), failed to maintain proper records of release detection for the diesel UST and failed to cooperate fully during an inspection, in violation of the requirements at 40 C.F.R. § 280.34 and § 280.45.

PROPOSED CIVIL PENALTY

Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e (d)(2)(A), authorizes the assessment of a civil penalty of up to \$10,000 for each tank for each day of violation of any requirement or standard promulgated by the Administrator. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996), required EPA to adjust its penalties for inflation on a periodic basis. EPA issued a Civil Monetary Penalty Inflation Adjustment Rule on December 31, 1996, see 61 Fed. Reg. 69360 (1996); on February 13, 2004, see 69 Fed. Reg. 7121 (2004); and on December 11, 2008, see 73 Fed. Reg. 239 (2008), codified at 40 C.F.R. Part 19.

Under Table I of the Civil Monetary Penalty Inflation Adjustment Rule, the maximum civil penalty under 42 U.S.C. Section 6991e(d)(2) for each tank for each day of violation occurring between January 30, 1997 and January 12, 2009, is \$11,000. The maximum civil penalty for violations occurring after January 12, 2009 was increased to \$16,000.

The penalties are proposed pursuant to the "U.S. EPA Penalty Guidance for Violations of UST Requirements," dated November 1990 ("UST guidance"). The penalty amounts in this UST guidance were amended by a September 21, 2004 document entitled, "Modifications to EPA Penalty Policies to implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)," and a December 29, 2008

document entitled, "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)." A guidance entitled "Revision to Adjusted Penalty Policy Matrices Issued on November 16, 2009" was issued on April 6, 2010. (These documents are available upon request.) This UST guidance provides a rational, consistent, and equitable calculation methodology for applying the statutory penalty factors to particular cases.

Based upon the facts alleged in this Second Amended Complaint and taking into account factors such as the seriousness of the violations and any good faith efforts by the Respondents to comply with the applicable requirements, Complainant proposes, subject to receipt and evaluation of further relevant information, to assess the following civil penalties for post bankruptcy petition violations from August 1, 2009:

<u>Count 1</u> : Failure to permanently close 3 USTs at Valvo's C&G	\$22,812
<u>Count 2</u> : Failure to permanently close 2 USTs at Valvo Transport	\$14,058
<u>Count 3</u> : Failure to test cathodic protection at Valvo Transport.....	\$2,167
<u>Count 4</u> : Failure to monitor waste oil UST at Valvo Transport	\$4,280
<u>Count 5</u> : Failure to test cathodic protection at former Hanover Convenience.....	\$3,192
<u>Count 6</u> : Failure to perform release detection at former Hanover Convenience from about August 1, 2009 through about April 11, 2010	\$4,293
<u>Count 7</u> : Failure to perform annual line tightness tests or monthly monitoring for pressurized piping at former Hanover Convenience	\$8,564
<u>Count 8</u> : Failure during 2011 and 2012 to conduct release detection and maintain proper records for the diesel UST at former Hanover Convenience and to cooperate fully during an inspection.....	NO ADDITIONAL PENALTY ADDED
<u>Total Proposed Penalty Amount for Counts 1-8 (unchanged).....</u>	<u>\$59,366.00</u>

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

COMPLIANCE ORDER

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

1. Respondents shall, starting no later than thirty (30) days of the effective date of this Order, comply with all applicable UST system standards in 40 C.F.R. Part 280 for all the UST systems at the Facilities cited in this Order, including but not limited to corrosion protection, release detection monitoring, recordkeeping, and closure requirements.
2. Within thirty (30) days of the effective date of this Order, Respondents shall permanently close the diesel UST system at the Valvo's C & G Facility cited in this Order that has been temporarily closed for longer than the twelve-month temporary closure period or Respondents shall bring the UST system into compliance with all the temporary closure requirements at 40 C.F.R. § 280.70.
3. Respondents shall submit, within ten (10) days of the effective date of this Order, evidence of adequate release detection, corrosion protection and record keeping for the diesel UST at the former Hanover Convenience Facility at 351 Central Avenue, Silver Creek, New York.

Respondents shall, within sixty (60) calendar days after the effective date of this Order, submit to EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein. If the Respondents are in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement. Furthermore, in all documents or reports submitted to EPA pursuant to this Compliance Order, the Respondents' written notice shall contain the following certification:

We/I certify that the information contained in this written notice and the accompanying documents is true, accurate and complete. As to the identified portions of this response for which I cannot personally verify their accuracy, I certify under penalty of law that this response and all attachments were prepared so as to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: _____
Name: _____
Title: _____

Respondents shall submit the documents specified above to:

Dennis J. McChesney Ph.D., MBA, Team Leader
UST Program
U.S. EPA Region 2
290 Broadway, 20th Floor
New York, New York 10007-1866

NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to Sections 9006(a)(3) of the Act, 42 U.S.C. §6991e(a)(3), and in accordance with the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996) and the regulations promulgated thereunder (see the Civil Monetary Inflation Rule, 61 Fed. Reg. 69630 (December 31, 1996), 69 Fed. Reg. 7121 (February 13, 2004) and 73 Fed. Reg. 75340-46 (December 11, 2008), codified at 40 C.F.R. Part 19), a violator failing to comply with a Compliance Order that has taken effect within the time specified in the Order is liable for a civil penalty up to \$37,500 for each day of continued noncompliance.

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS" (hereinafter "Consolidated Rules"), and which were codified at 40 C.F.R. Part 22. A copy of these rules accompanies this "Second Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing" (hereinafter the "Second Amended Complaint").

A. Answering the Second Amended Complaint

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

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

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

Respondents' Answer(s) to the Second Amended Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Second Amended Complaint and with regard to which Respondents have any knowledge. 40 C.F.R. § 22.15(b). Where Respondents lack knowledge of a particular factual allegation and so state in their

Answer(s), the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer(s) shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts that Respondents dispute (and thus intend to place at issue in the proceeding); and (3) whether Respondents request a hearing. 40 C.F.R. § 22.15(b).

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

B. Opportunity to Request a Hearing

If requested by Respondents in their Answer(s), a hearing upon the issues raised by the Second Amended Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondents do not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if their Answer(s) raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Second Amended Complaint, such Order shall automatically become final unless Respondents request a hearing pursuant to 40 C.F.R. § 22.15 within 30 days after such Order is served. 40 C.F.R. § 22.37.

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

C. Failure to Answer

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

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

D. Exhaustion of Administrative Remedies

Where Respondents fail to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondents waive their right to judicial review. 40 C.F.R. § 22.17(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. § 1.25(e)], Respondents must do so "Within thirty (30) days after the initial decision is served" upon the parties. 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "...5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document". Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

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

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

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

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

The parties may engage in settlement discussions irrespective of whether Respondents have requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondents' requesting a formal hearing does not

prevent them from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Second Amended Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

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

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondents waive their right to contest the allegations in the Second Amended Complaint and waive their right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

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

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

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

Dated: _____

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

To:

Mr. Stephen Valvo, Individually, and
Valvo's Convenience & Gas, Inc.
1271 Routes 5 and 20
Silver Creek, N.Y. 14136

cc:

Paul A. Chiaravalloti, Esq., for the Respondents
1967 Wehrle Drive
Suite 1
Williamsville, N.Y. 14221

Hon. M. Lisa Buschmann
Administrative Law Judge
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed copies of the foregoing Second Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing, bearing the Docket Number RCRA-02-2011- 7507 and copies of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to: Mr. Stephen Valvo, Individually, and to Valvo's Convenience & Gas, Inc., 1271 Routes 5 and 20, Silver Creek, N.Y. 14136, to Paul A. Chiaravalloti, Esq., counsel for the Respondents, 1967 Wehrle Drive, Suite 1, Williamsville, N.Y. 14221, and to Hon. M. Lisa Buschmann, Administrative Law Judge, EPA Office of Administrative Law Judges, 1200 Penn. Ave., N.W., Mail Code 1900L, Washington, D.C. 20460.

I hand-carried the original and a copy of the foregoing Second Amended Complaint to the Office of Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: July 18, 2012
New York, New York

Beverly Kolentz

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

Valvo's Convenience & Gas, Inc. and
Stephen M. Valvo, individually.

Respondents

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

PROPOSED DRAFT

SECOND AMENDED COMPLAINT,
COMPLIANCE ORDER
AND
NOTICE OF OPPORTUNITY FOR HEARING

DOCKET NO. RCRA-02-2011-7507

SECOND AMENDED COMPLAINT

Background

1. This is a civil administrative proceeding instituted pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901 et seq. (the "Act").
2. Complainant in this proceeding, Dore LaPosta, Director, Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 ("EPA"), has been duly delegated the authority to institute this action.
3. One Respondent in this action is Valvo's Convenience & Gas, Inc. ("Valvo's C&G"). Valvo's C&G is the owner of real property at 1267 Routes 5 and 20 and at 351 Central Avenue in Silver Creek, New York at which there are five and three underground storage tanks ("USTs"), respectively, at issue in this case.
4. The other Respondent in this action is Stephen M. Valvo ("Respondent Valvo") who was and continues to be the "operator" of USTs located at the Valvo Transport, Inc. facility and an "owner" of the USTs at the former Hanover Convenience Facility.
5. On July 30, 2009, Respondent Valvo's C&G filed a Chapter 11 petition for bankruptcy in the Bankruptcy Court in the Western District of New York. In its First Amended

Disclosure Statement, dated August 11, 2010, Valvo's C&G stated it owned the properties at which the Valvo's C&G, Valvo Transport and the former Hanover Convenience Facilities were located.

6. A 10,000-gallon and a 12,000-gallon UST for gasoline storage, and a 2,000-gallon UST for diesel fuel storage (all installed in March 1997~~are~~), located on a part of the property at 1267 Routes 5 and 20 in Silver Creek, New York (the "Valvo's C&G Facility"). ~~The USTs~~), are registered with the New York State Department of Conservation ("NYSDEC") with the following Petroleum Bulk Storage ("PBS") report number: PBS# 9-600317 and are listed as owned by Valvo's C&G and operated by Respondent Valvo.
7. A 10,000-gallon UST for diesel fuel storage (installed in May 1993) and a 2,000-gallon UST for waste oil storage (installed in November 1997~~are~~), also located on a part of the property at 1267 Routes 5 and 20 in Silver Creek, New York (the "Valvo Transport Facility"). ~~The USTs~~), are registered with NYSDEC with the following number: PBS # 9-600126 and are listed as owned by Valvo Transport, Inc. and operated by Respondent Valvo. Valvo's C&G's First Amended Disclosure Statement, dated August 11, 2010, filed in its bankruptcy petition, indicated that it owned these USTs.
8. An 8,000-gallon and a 12,000-gallon UST for gasoline storage, and a 1,000-gallon UST for diesel fuel storage (all installed on June 1, 1991~~are~~), located at 351 Central Avenue, Silver Creek, New York (the former "Hanover Convenience Facility"). ~~They~~), are registered with NYSDEC with the following number: PBS # 9-425508 and since 2004 are listed on the PBS ~~form forms~~ as owned by Respondent Valvo.
9. Respondent Valvo's C&G and Respondent Valvo PBS Applications were filed for three USTs at 351 Central Avenue on March 8, 2002, May 23, 2004 and August 15, 2006. The PBS applications listed Respondent Valvo as the owner of the USTs and Melissa Elwell as the operator of the USTs in the 2004 and 2006 applications. On January 5, 2011, Respondent Valvo filed a PBS Application for 351 Central Avenue and identified himself as the owner of the USTs. The 2011 application listed the name of the facility as Valvo Convenience & Gas, Inc. (For purposes of this case, and to avoid confusion, the facility at 351 Central Avenue will be referred to herein as the former Hanover Convenience Facility.)
10. Pursuant to Section 9005(a) of the Act, 42 U.S.C. §6991d(a), and 40 C.F.R. § 280.34, on or about December 21, 2007, EPA sent an Information Request Letter ("IRL") to Respondent Valvo to determine the status and compliance with the Act and 40 C.F.R. Part 280 of the UST systems at all the Facilities cited above. EPA received a partial response from Respondent Valvo on May 28, 2008.
11. EPA sent the second IRL requesting information regarding the UST systems at the Valvo's C&G, Valvo Transport, and former Hanover Convenience Facilities on or about May 10, 2010. EPA received an incomplete response on January 13, 2011 that stated that Valvo's C&G had legal ownership of these properties; Respondent Valvo was the sole corporate officer, and Valvo's C&G owned the USTs at the former Hanover Convenience

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Facility.

Regulatory Background

- 9-12. Respondent Valvo's C&G, Respondent Valvo and Valvo Convenience & Gas, Inc. are each considered a "person" within the meaning of Section 9001(6) of the Act, 42 U.S.C. § 6991(6), and 40 C.F.R. § 280.12.
- 10-13. The USTs and connected underground piping at each Facility identified in paragraphs 6, 7 and 8, above, are "underground storage tanks," as defined in Section 9001 of the Act, 42 U.S.C. § 6991, and are "UST systems," as defined in 40 C.F.R. § 280.12. Installation of all these tank systems commenced after December 22, 1988, and they are all "new tank systems," as defined in 40 C.F.R. § 280.12.
- 11-14. Pursuant to Section 9003 of the Act, 42 U.S.C. § 6991b, EPA promulgated rules setting forth requirements for owners and operators of UST systems which are codified at 40 C.F.R. Part 280.
- 12-15. 40 C.F.R. § 280.12 defines an underground storage tank or UST as any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent (10%) or more beneath the surface of the ground.
- 13-16. Pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, owners and operators of USTs must supply upon request, or otherwise make available to EPA, information regarding their USTs.
- 14-17. Pursuant to 40 C.F.R. § 280.20(c)(1)(ii), owners and operators of new UST systems must install on each UST system an adequate overfill prevention device that meets the requirements of 40 C.F.R. Part 280, Subpart B.
- 15-18. Pursuant to 40 C.F.R. § 280.31(b), owners and operators of new and existing UST systems must ensure that the cathodic protection system on USTs with metallic components is tested within six months of installation and every three years thereafter in accordance with the requirements of 40 C.F.R. Part 280, Subpart C.
- 16-19. Pursuant to 40 C.F.R. § 280.41(a), owners and operators of new and existing UST systems must ensure that they monitor tanks for releases every thirty (30) days in accordance with the requirements of 40 C.F.R. Part 280, Subpart D.
- 17-20. Pursuant to 40 C.F.R. § 280.41(b), owners and operators of new and existing UST systems with pressurized piping must conduct either annual line tightness tests or

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monthly release detection monitoring of each pressurized piping system.

- ~~18.21.~~ Pursuant to 40 C.F.R. § 280.70(a), owners and operators of new and existing UST systems must maintain release detection in accordance with 40 C.F.R. § 280.40 for temporarily closed USTs that contain one inch or more of residue.
- ~~19.22.~~ Pursuant to 40 C.F.R. § 280.70(a), owners and operators of new and existing UST systems must maintain corrosion protection and testing in accordance with 40 C.F.R. § 280.31 for temporarily closed USTs that contain metallic components.
- ~~20.~~ Pursuant to 40 C.F.R. § 280.70(b), owners and operators of new and existing UST systems must leave vent lines open and functioning and cap and secure all other lines, pumps, manways and ancillary equipment when a UST system is temporarily closed for three months or longer.
- ~~21.23.~~ Pursuant to 40 C.F.R. § 280.70(c), owners and operators are required to permanently close or upgrade any UST system that has been temporarily closed for more than twelve (12) months and which does not meet either the performance standards in § 280.20 for new UST systems or the upgrade requirements in § 280.21, except that the spill and overfill equipment requirements do not have to be met.

Valvo's C&G Facility

- ~~22.24.~~ Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on February 26, 2007, an authorized representative of EPA ("Inspector") inspected the UST system located at the Valvo's C&G Facility to determine its compliance with the Act and 40 C.F.R. Part 280.
- ~~23.25.~~ At the time of EPA's inspection, the three UST systems at the Valvo's C&G Facility were not in use, and reportedly had not been in use since 2000. The USTs contained petroleum residue. The USTs did not meet the requirements applicable to temporarily closed tanks set forth in § 280.70(a) (release detection), 40 C.F.R § 280.70(a) (corrosion protection), and 40 C.F.R § 280.70(c) (permanent closure).
- ~~24.26.~~ Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on October 22, 2008, an Inspector re-inspected the UST systems located at the Valvo's C&G Facility to determine their compliance with the Act and 40 C.F.R. Part 280.

Valvo Transport Facility

- ~~25.27.~~ Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on February 26, 2007, an Inspector inspected the UST systems located at the Valvo Transport Facility to determine their compliance with the Act and 40 C.F.R. Part 280.
- ~~26.28.~~ At the time of EPA's inspection, the 10,000-gallon diesel fuel UST at the Valvo Transport Facility was not in use. The system did not meet the requirements applicable to temporarily closed tanks set forth in 40 C.F.R § 280.70(a) (release detection), 40 C.F.R §

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280.70(a) (corrosion protection), and 40 C.F.R § 280.70(c) (permanent closure). The 2,000 waste oil UST was still in use. It did not meet the performance standards set forth at 40 C.F.R. § 280.31(b) or 40 C.F.R § 280.41(a).

~~27-29.~~ Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on March 15, 2010, an Inspector re-inspected the USTs at the Valvo Transport Facility to determine their compliance with the Act and 40 C.F.R. Part 280.

~~28-30.~~ At the time of EPA's re-inspection, the 10,000-gallon diesel fuel UST system at the Valvo Transport Facility was not in use and contained greater than one-inch of petroleum residue. It did not meet the permanent closure standards set forth at 40 C.F.R § 280.70(c).

~~29-31.~~ The 2,000-gallon waste oil UST at the Valvo Transport Facility was reportedly placed into temporary closure between March 15, 2009 and September 15, 2009, but still contained greater than one inch of petroleum residue. The system did not meet the performance standards for temporarily closed tanks set forth in § 280.70(a) (release detection), 40 C.F.R § 280.70(a) (corrosion protection) and 40 C.F.R § 280.70(c) (permanent closure).

Former Hanover Convenience Facility

~~30-32.~~ Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on August 10, 2007, an Inspector inspected the UST systems located at the former Hanover Convenience Facility to determine their compliance with the Act and 40 C.F.R. Part 280.

~~31-33.~~ At the time of EPA's inspection, the UST systems at the former Hanover Convenience Facility were in use and did not meet the performance standards set forth at 40 C.F.R. § 280.41(a) and 40 C.F.R. § 280.41(b).

~~32-34.~~ Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on March 15, 2010, an Inspector re-inspected the UST systems located at the former Hanover Convenience Facility to determine their compliance with the Act and 40 C.F.R. Part 280.

~~33-35.~~ At the time of EPA's re-inspection, the UST systems at the former Hanover Convenience Facility were in use and did not meet the performance standards set forth at 40 C.F.R. § 280.31(b), 40 C.F.R. § 280.41(a) and 40 C.F.R. § 280.41(b).

July 21, 2011 Inspection by EPA Inspector

~~36.~~ Pursuant to Section 9005(a) of the Act, 42 U.S.C. § 6991d(a), and 40 C.F.R. § 280.34, on ~~or about December~~ July 21, 2008, 2011, an EPA sent an Information Request Letter ("IRL") to Respondent Valvo. Inspector re-inspected the UST systems located at the Valvo's C&G Facility at Routes 5 & 20 to determine the status and their compliance with the Act and 40 C.F.R. Part 280 of the UST systems at all.

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34. ~~Respondent Valvo informed the Facilities cited above. EPA received a partial response from Respondent Valvo on May 28, 2008.~~

37. EPA sent the second IRL requesting information regarding Inspector that the tanks were not in use and were not empty. Release detection was not being performed on any of the three tanks.

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38. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on July 21, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo's C&G, Valvo Transport, at Routes 5 & 20 to determine their compliance with the Act and 40 C.F.R. Part 280.

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39. Respondent Valvo informed the EPA Inspector that the two tanks were not in use and the diesel tank was not empty. The waste oil tank had been emptied on July 5, 2011 to no more than one inch of residue. Release detection was not being performed for the diesel tank.

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40. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on July 21, 2011, an EPA Inspector re-inspected the UST systems located at the former Hanover Convenience Facilities on or about May 10, 2010. EPA received an incomplete response on January 13, 2011 that stated that Valvo's C&G had legal ownership of these properties; Facility to determine their compliance with the Act and 40 C.F.R. Part 280.

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41. Respondent Valvo was told the sole corporate officer, and Valvo's C&G owned EPA Inspector that he performed the UST interstitial monitoring of the diesel UST at the former Hanover Convenience facility Facility by checking the port of the UST. When asked by the EPA Inspector to see the location of the port, Respondent Valvo said that he could not recall where it was located. Respondent Valvo admitted that he could not locate the monitoring port for the diesel UST.

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42. At the July 21, 2011 Re-Inspection of the diesel UST at the former Hanover Convenience Facility, Respondent Valvo gave the EPA Inspector written monthly records from January 2011 through July 2011 recording that Tank 3, the diesel UST, had a score of zero showing no product was found during the interstitial monitoring each month.

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October 20, 2011 Re-Inspection by EPA Inspector

43. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on October 20, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo's C&G Facility at Routes 5 & 20 to determine their compliance with the Act and 40 C.F.R. Part 280.

44. Respondent Valvo informed the EPA Inspector that the tanks at the Valvo's C&G Facility were not in use, and the Inspector determined that the tanks had been emptied to no more than one inch of residue.

45. Pursuant to Section 9005 of the Act, 42 U.S.C. § 6991d, on October 20, 2011, an EPA Inspector re-inspected the UST systems located at Valvo Transport to determine their

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compliance with the Act and 40 C.F.R. Part 280.

46. Respondent Valvo informed the EPA Inspector, at the October 20, 2011 Inspection, that the tanks at Valvo Transport were not in use, and the Inspector confirmed that the tanks were emptied to no more than one inch of residue.

Actions in 2012

47. On February 29, 2012, Empire Geo Services, Inc. provided an environmental report for the February 21, 2012 removal of the waste oil UST at Valvo Transport stating that an Empire Environmental Geologist had visited the removal site to observe the excavation site and collect verification soil samples. The soil samples were analyzed for volatile organic compounds ("VOCs") and semi-volatile compounds ("SVOCs") and no VOCs or SVOCs were detected.

48. On or about March 21, 2012, an Inspector from NYSDEC inspected the former Hanover Convenience Facility and verified that the diesel tank did not have an accessible interstitial monitoring port; thus, proper release detection could not be performed. The Inspector also learned that Tank 1, a gasoline tank, and Tank 3, the diesel tank, had failed their most recent corrosion tests.

49. On or about April 23, 2012, Respondent Valvo sent an Inspector for NYSDEC photographs and paperwork for work performed by Jemko Petroleum Equipment, Inc., 4895 East Lake Road, Erie, PA 16511-1477 at 351 Central Avenue. The April 20, 2012 Invoice for the former Hanover Convenience Facility at 351 Central Avenue stated "Diesel is down, Remove from manhole/island to find interstitial and make accessible for monthly inspections."

50. On or about May 23, 2012, Respondents removed the two gasoline tanks at the Valvo's C & G Facility.

35-51. On or about May 23, 2012, Respondents removed the diesel tank at Valvo Transport.

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Count 1 - Failure to permanently close temporarily closed USTs at the Valvo's C&G Facility

36-52. Complainant re-alleges each allegation contained in Paragraphs "1" through "3551" with the same force and effect as if fully set forth herein.

37-53. Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain release detection for any temporarily closed UST that contains more than one inch of petroleum residue.

38-54. Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain cathodic corrosion protection in accordance with 40 C.F.R. § 280.31 for any temporarily closed UST that contains metallic components.

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39-55. Pursuant to 40 C.F.R. § 280.70(c), when an UST system is temporarily closed for more than twelve (12) months, owners and operators must permanently close the UST system if it does not meet either the performance standards in § 280.20 for new UST systems or the upgrade requirements in § 280.21, except that the spill and overfill equipment requirements do not have to be met.

40-56. ~~The current~~As of the April 6, 2006 and the July 16, 2012 Petroleum Bulk Storage registrations for the USTs at the Valvo's C&G Facility at 1267 Routes 5 and 20 ~~indicate that~~, all the UST systems ~~are currently~~were in temporary closure.

41-57. At the February 26, 2007 inspection of the Valvo's C&G Facility, the Inspector could not find evidence of the location of the diesel fuel UST. Respondent Valvo ~~said~~told the Inspector that the two gasoline USTs had been closed since at least 2000.

42-58. At the February 26, 2007 inspection, there was no evidence that release detection was being performed for the two gasoline USTs.

43. At the October 22, 2008 inspection, the gasoline USTs had been temporarily closed. Respondent Valvo told the Inspector that the diesel fuel UST had been removed in 2000.

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44-59. At the October 22, 2008 inspection, there was no evidence of release detection for the gasoline USTs. There were 3.25 inches of petroleum product and 2.50 inches of water in the 10,000-gallon UST and 2.25 inches of petroleum product and 3.50 inches of water in the 12,000-gallon UST.-

45-60. At the February 26, 2007 and the October 22, 2008 inspections, the Inspector confirmed that the two gasoline USTs were of a sti-P3 variety that required cathodic corrosion protection testing every three years. No cathodic corrosion protection test results were provided.

46-61. In a February 17, 2010 letter to EPA, counsel for Respondent Valvo's C&G stated the diesel fuel-UST at the Valvo's C&G Facility had not been removed and would remain in the ground. The diesel fuel-UST was not monitored for release detection, as required by 40 C.F.R. § 280.41. The diesel fuel UST should have been permanently closed no later than one year after it was put into temporary closure.

62. Respondent Valvo's C&G On June 29, 2011, Respondents' contractor conducted corrosion tests on the three tanks at the Valvo's C & G facility. The diesel UST failed the corrosion test.

63. On July 21, 2011, an EPA inspector verified the location of the diesel UST at the Valvo's C & G facility.

64. On August 12, 2011, Respondent Valvo informed EPA that NOCO Oil had emptied each of the three tanks to a level of no more than one inch of residue on August 11, 2011.

65. On October 20, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo's C&G Facility at Routes 5 & 20 and confirmed via measuring stick that all three tanks had been emptied to no more than one inch of residue.

66. On April 11, 2012, Respondent Valvo's C&G and Respondent Valvo retested the corrosion protection on the diesel UST at the Valvo's C & G facility. The diesel UST again failed.

67. On or about May 23, 2012, Respondent Valvo's C&G and Respondent Valvo removed the two gasoline tanks at the Valvo's C & G Facility. The diesel UST remained in place.

47-68. Respondent Valvo's C&G and Respondent Valvo failed to perform release detection monitoring for the two gasoline USTs, as required by 40 C.F.R. § 280.41. ~~The USTs should have been permanently closed by no later than 2001, one year after they were reportedly placed into temporary closure, and § 280 71(a) until at least August 11, 2011 (when the tanks were reportedly emptied, ending the need to conduct release detection).~~

Respondent Valvo's C&G's

69. Respondent Valvo's C&G and Respondent Valvo failed to permanently close the two gasoline USTs from at least August 1, 2009 until at least August 11, 2011.

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70. Respondent Valvo's C&G and Respondent Valvo have failed, and continue to fail, to maintain corrosion protection for the diesel UST, as required by 40 C.F.R. § 280.31 and § 280.71(a).

71. Respondent Valvo's C&G and Respondent Valvo failed to permanently close the diesel UST from at least August 1, 2009 until the present.

~~48-72.~~ Respondent Valvo's C&G and Respondent Valvo's failure to comply with the permanent closure requirements specified in 40 C.F.R. § 280.70(c) for the three USTs at the Valvo's C&G Facility constitutes a violation of 40 C.F.R. Part 280.

Count 2 - Failure to permanently close temporarily closed USTs at Valvo Transport Facility

~~49-73.~~ Complainant re-alleges each allegation contained in Paragraphs "1" through "~~4872~~" with the same force and effect as if fully set forth herein.

~~50-74.~~ Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain release detection for any temporarily closed UST that contains more than one inch of petroleum residue.

~~51-75.~~ Pursuant to 40 C.F.R. § 280.70(a), owners and operators must maintain cathodic corrosion protection in accordance with 40 C.F.R. § 280.31 for any temporarily closed UST that contains metallic components.

~~52-76.~~ Pursuant to 40 C.F.R. § 280.70(c), when an UST system is temporarily closed for more than twelve (12) months, owners and operators must permanently close the UST system if it does not meet either performance standards in 40 C.F.R. § 280.20 for new UST systems or the upgrade requirements in 40 C.F.R. § 280.21, except that the spill and overfill equipment requirements do not have to be met.

~~53-77.~~ At the February 26, 2007 inspection, the diesel fuel UST had been in temporary closure since 2000, and the waste oil UST was still in use.

~~54-78.~~ At the March 15, 2010 inspection, the diesel fuel UST was in temporary closure since at least 2000 and contained 16.50 inches of petroleum product. The waste oil UST was in temporary closure since at least some time between March 15, 2009 and September 15, 2009 and contained 20.50 inches of petroleum residue.

~~55-79.~~ During the February 26, 2007 and March 15, 2010 inspections, no evidence of release detection for the USTs was provided to the Inspector.

~~56-80.~~ At the February 26, 2007 and March 15, 2010 inspections, the tanks were of a sti-P3 variety and were equipped with cathodic corrosion protection provided via sacrificial anodes.

~~57-81.~~ 40 C.F.R. § 280.31 requires that the first test of the corrosion protection systems for the

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tanks was due within six months of installation, or November 1, 1993, for the diesel fuel UST, and May 1, 1998, for the waste oil UST, and every three years thereafter. The two tests prior to the 2007 and 2010 inspections should have been conducted for the diesel fuel UST by November 1, 2005, and November 1, 2008, and for the waste oil UST by May 1, 2007, and May 1, 2010, respectively.

~~58.~~82. At the inspections, there was no evidence of any cathodic corrosion protection testing.

83. On June 29, 2011, Respondent Valvo's C & G and Respondent Valvo's contractor conducted a corrosion test on the diesel tank only. It passed.

84. On or about July 5, 2011 Respondent Valvo's C & G and Respondent Valvo had the waste oil tank emptied to no more than one inch of residue.

85. On or about July 28, 2011, Respondent Valvo's C & G and Respondent Valvo arranged to empty the diesel tank to no more than one inch of residue. This was observed by an inspector from NYSDEC, who had to leave the Facility before the emptying of the diesel tank was completed.

86. On October 20, 2011, an EPA Inspector re-inspected the UST systems located at the Valvo Transport and confirmed via measuring stick that both tanks were emptied to no more than one inch of product.

87. On or about February 21, 2012, Respondent Valvo's C & G and Respondent Valvo removed the waste oil tank.

~~59.~~88. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed to maintain release detection until about July 2011 for the diesel fuel UST and for the waste oil USTs UST at the Valvo Transport Facility although they still contained product. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an operator, have had not maintained any cathodic corrosion protection testing for the USTs waste oil UST at the Valvo Transport Facility until the UST's closure on February 21, 2012.

~~60.~~89. Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed, from at least August 1, 2009 through at least ~~June~~ July 28, 2011 for the diesel fuel UST, and starting from some date between March 15, 2010 and September 15, 2010 to at least February 21, 2012 for the waste oil UST, to comply with the permanent closure requirements specified in 40 C.F.R. § 280.70(c) for the two USTs at the Valvo Transport Facility in violation of the applicable standards at 40 C.F.R. Part 280.

Count 3 – Failure to test the cathodic protection system for the waste oil UST every three years at the Valvo Transport Facility

~~61.~~90. Complainant re-alleges each allegation contained in Paragraphs "1" through "~~60~~89" with the same force and effect as if fully set forth herein.

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~~62-91.~~ 40 C.F.R. § 280.31 requires that owners and operators of new and existing UST systems must ensure that the cathodic protection system on USTs with metallic components are tested within six months of installation and every three years thereafter in accordance with the requirements of 40 C.F.R. 280, Subpart C.

~~63-92.~~ At the February 26, 2007 inspection and the March 15, 2010 re-inspection, there was no evidence of cathodic protection testing for the waste oil UST.

~~64-93.~~ During the March 15, 2010 re-inspection, the waste oil UST had been temporarily closed for a period of six months to one year, or from sometime between March 15, 2009 and September 15, 2009.

~~65-94.~~ Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed, from at least August 1, 2009 through at least March 15, 2010 (*i.e.*, one year from the earliest date of temporary closure, and the earliest date when permanent closure had to occur for the waste oil UST), to comply with the cathodic protection testing requirements specified in 40 C.F.R. § 280.31(b) for the waste oil UST at the Valvo Transport Facility in violation of the applicable standards at 40 C.F.R. Part 280.

Count 4 - Failure to monitor the waste oil UST at the Valvo Transport Facility for releases every 30 days

~~66-95.~~ Complainant re-alleges each allegation contained in Paragraphs "1" through "~~6594~~" with the same force and effect as if fully set forth herein.

~~67-96.~~ Pursuant to 40 C.F.R. § 280.41(a), owners and operators of a UST system must monitor the tank for releases every thirty (30) days.

~~68-97.~~ According to the PBS application submitted by Respondent Valvo in his May 15, 2008 response to EPA's Information Request Letter, the waste oil UST at the Valvo Transport Facility had no registered method of release detection.

~~69-98.~~ At the February 26, 2007 inspection, there was evidence that the waste oil UST was in use. During that inspection, Respondent Valvo provided no evidence of release detection monitoring for the waste oil UST.

~~70-99.~~ During the March 15, 2010 re-inspection, Respondent Valvo stated that the waste oil UST was placed into temporary closure within the "last six months to a year." The waste oil UST still had 20.50 inches of petroleum residue. As a result, monthly release detection monitoring was required. No evidence of release detection monitoring was provided to the Inspector for this UST.

~~71-100.~~ Valvo's C&G, as an owner, and Respondent Valvo, as an operator, failed, from at least August 1, 2009 through at least March 15, 2010 (*i.e.*, one year from the earliest date of temporary closure, and the earliest date when permanent closure had to occur for the waste oil UST), to comply with release detection requirements specified in 40 C.F.R. §

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280.41(a) for the waste oil UST at the Valvo Transport Facility in violation of the applicable standards at 40 C.F.R. Part 280.

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Count 5. - Failure to test the cathodic protection system every three years at the former Hanover Convenience Facility

~~72.101.~~ Complainant re-alleges each allegation contained in Paragraphs "1" through "~~74~~100" with the same force and effect as if fully set forth herein.

~~73.102.~~ Pursuant to 40 C.F.R. § 280.31(b), owners and operators of new and existing UST systems must ensure that cathodic protection systems on USTs with metallic components are tested every three years in accordance with the requirements of 40 C.F.R. 280, Subpart C.

~~74.103.~~ As of September 23, 2010, the PBS database indicated that the Hanover Convenience Facility had three federally regulated USTs, all installed in June 1991, which were double-walled steel and equipped with sacrificial anodes for cathodic corrosion protection.

~~75.104.~~ 40 CFR § 280.31 requires the cathodic protection system to be tested within six months of installation, or December 1, 1991, and every three years thereafter. The last two tests should have been conducted by December 1, 2006 and December 1, 2009, respectively.

~~76.105.~~ During the August 10, 2007 inspection, one cathodic corrosion test result for the three tanks from March 8, 2007 was available. No evidence of cathodic protection testing in the three years prior to March 8, 2007 was provided to the Inspector.

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~~77.106.~~ During the March 15, 2010 re-inspection, no cathodic protection test results were provided.

~~78.107.~~ On April 11, 2010, Respondent Valvo sent EPA information that cathodic protection tests were conducted on March 8, 2007 and March 30, 2010 for the three USTs. The 12,000-gallon and 8,000-gallon USTs failed the tests. The operator stated that the failing tanks were emptied and placed into temporary closure.

~~79.108.~~ The corrosion test, which should have been performed by March 8, 2010, was conducted twenty-two days late for the three USTs.

~~80.109.~~ Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an owner, failed, from March 8, 2010 through March 30, 2010, to comply with the cathodic protection testing requirements specified at 40 C.F.R. § 280.31(b) for the three USTs at the Hanover Convenience Facility in violation of 40 C.F.R. Part 280.

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Count 6 - Failure to perform release detection every 30 days for a UST at the former Hanover Convenience Facility from on or about August 1, 2009 through April 11, 2010

~~81.110.~~ Complainant re-alleges each allegation contained in Paragraphs "1" through "~~80109~~" with the same force and effect as if fully set forth herein.

~~82.111.~~ Pursuant to 40 C.F.R. § 280.41(a), owners and operators must monitor a tank for releases every thirty (30) days.

~~83.~~ At the August 10, 2007 inspection, the three USTs were only monitored for releases via "manual tank gauging." Release detection records were not maintained. Pursuant to 40 C.F.R. § 280.43(b)(5) and 40 C.F.R. § 280.41(a), "manual tank gauging" was not allowed under the regulations to be employed as a method of release detection for the USTs. No monthly records of an alternative release detection monitoring method or results were available.

~~84.112.~~ At the March 15, 2010 re-inspection, the two gasoline USTs were monitored via manual interstitial monitoring, and twelve months of passing records were available at the Facility. No evidence that the diesel fuel-UST was monitored was provided to the Inspector or in response to EPA's IRLs.

~~113.~~ In a letter, dated April 11, 2010, from Melissa Elwell, the operator of the former Hanover Convenience Facility, to the EPA Inspector, she reported that the diesel UST had been emptied of product and was in temporary closure.

~~85.114.~~ Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an owner, failed from on or about August 1, 2009 through April 11, 2010, and, upon information and belief, from on or about January 1, 2011 to the present to comply with release detection requirements specified in for the diesel tank, as required by 40 C.F.R. § 280.41(a) for the diesel fuel UST at Hanover Convenience and in violation of 40 C.F.R. Part 280.

Count 7 - Failure to perform annual line tightness tests or monthly monitoring of the pressurized piping system at the former Hanover Convenience Facility

~~86.115.~~ Complainant re-alleges each allegation contained in Paragraphs "1" through "~~85114~~" with the same force and effect as if fully set forth herein.

~~87.116.~~ Pursuant to 40 C.F.R. § 280.41(b), owners and operators of new and existing UST systems with pressurized piping must conduct either annual line tightness tests or monthly release detection monitoring of each pressurized piping system in accordance with the specified methods.

~~88.~~ During the August 10, 2007, March 15, 2010 inspection, the two gasoline USTs were

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observed using pressurized piping. ~~No evidence of release detection monitoring or annual line tightness tests were provided to the Inspector, and no evidence was provided subsequently in response to EPA's December 2008 IRL.~~

~~89.117.~~ During the March 15, 2010 inspection, but no evidence of release detection monitoring or annual line tightness tests for the pressurized lines was provided to the Inspector or in response to EPA's May 2010 IRL.

~~90.118.~~ On April 11, 2010, Respondent Valvo sent EPA evidence of a passing annual line tightness test, dated March 30, 2010.

~~91.119.~~ Respondent Valvo's C&G, as an owner, and Respondent Valvo, as an owner, failed, from at least August 1, 2009 through at least March 30, 2010, to perform monthly release detection monitoring or to provide an annual line tightness tests for the two pressurized gasoline piping systems at the Hanover Convenience Facility in violation of the requirements at 40 C.F.R. § 280.41(b) and 40 C.F.R. Part 280.

Count 8 - Failure during 2011 and 2012 to perform any release detection and maintain adequate records for the diesel UST at the former Hanover Convenience Facility and to cooperate fully during an inspection

120. Complainant re-alleges each allegation contained in Paragraphs "1" through "119" with the same force and effect as if fully set forth herein.

121. Pursuant to 40 C.F.R. § 280.41(a), owners and operators must monitor a tank for releases every thirty (30) days.

122. Pursuant to 40 C.F.R. § 280.45, all UST owners and operators must maintain records in accordance with 40 C.F.R. § 280.34 demonstrating compliance with all applicable requirements of this subpart.

123. Pursuant to 40 C.F.R. § 280.34, owners and operators of UST systems must cooperate fully with inspections, monitoring and testing conducted by the implementing agency, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended.

124. Pursuant to 40 C.F.R. § 280.31(a), all corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.

125. On March 22, 2011, Respondent Valvo sent EPA handwritten release detection records for the diesel UST at the former Hanover Convenience Facility showing that manual

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interstitial monitoring was being conducted for the months of January through March 2011.

126. During the July 21, 2011 EPA re-inspection of the diesel UST at the former Hanover Convenience Facility, Respondent Valvo gave the EPA Inspector additional written monthly records from January 2011 through July 2011 recording that Tank 3, the diesel tank, had a score of zero showing no product was found during the interstitial monitoring each month.
127. Respondent Valvo told the EPA Inspector that he performed the interstitial monitoring of the diesel UST by checking the port of the UST. When asked by the EPA Inspector for the location of the port, Respondent Valvo said that he could not recall where it was located. Respondent Valvo admitted that he could not locate the monitoring port for the diesel UST.
128. On or about March 21, 2012, an inspector for the NYSDEC visited the former Hanover Convenience facility and confirmed that an interstitial monitoring port for Tank 3, the diesel tank, could not be located by Respondent Valvo.
129. On or about March 21, 2012, an inspector for the NYSDEC visited the former Hanover Convenience facility and verified that no release detection was being performed for Tank 3, the diesel tank.
130. On or about March 21, 2012, an inspector for the NYSDEC visited the former Hanover Convenience facility and verified that the results of the most recent cathodic protection testing of Tank 3, the diesel tank, demonstrated it was not functioning adequately to protect the tank from corrosion.
131. On or about April 23, 2012, Respondent Valvo sent the Inspector for NYSDEC, photographs and paperwork for work performed by Jemko Petroleum Equipment, Inc, 4895 East Lake Road, Erie, PA 16511-1477 at 351 Central Avenue related to the NYSDEC's Inspection. The April 20, 2012 Invoice to Valvo Convenience & Gas, Inc. for former Hanover Convenience Facility at 351 Central Avenue stated "Diesel is down. Remove from manhole/island to find interstitial and make accessible for monthly inspections."
132. From at least January 1, 2011 through at least April 20, 2012, Respondent Valvo failed to conduct adequate release detection in accordance with 40 C.F.R. § 280.41(a), failed to maintain proper records of release detection for the diesel UST and failed to cooperate fully during an inspection, in violation of the requirements at 40 C.F.R. § 280.34 and § 280.45.

PROPOSED CIVIL PENALTY

Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e (d)(2)(A), authorizes the assessment of a civil penalty of up to \$10,000 for each tank for each day of violation of any requirement or

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standard promulgated by the Administrator. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-34; 110 Stat. 1321 (1996), required EPA to adjust its penalties for inflation on a periodic basis. EPA issued a Civil Monetary Penalty Inflation Adjustment Rule on December 31, 1996, see 61 Fed. Reg. 69360 (1996); on February 13, 2004, see 69 Fed. Reg. 7121 (2004); and on December 11, 2008, see 73 Fed. Reg. 239 (2008), codified at 40 C.F.R. Part 19.

Under Table I of the Civil Monetary Penalty Inflation Adjustment Rule, the maximum civil penalty under 42 U.S.C. Section 6991e(d)(2) for each tank for each day of violation occurring between January 30, 1997 and January 12, 2009, is \$11,000. The maximum civil penalty for violations occurring after January 12, 2009 was increased to \$16,000.

The penalties are proposed pursuant to the "U.S. EPA Penalty Guidance for Violations of UST Requirements," dated November 1990 ("UST guidance"). The penalty amounts in this UST guidance were amended by a September 21, 2004 document entitled, "Modifications to EPA Penalty Policies to implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)," and a December 29, 2008 document entitled, "Amendments to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)." A guidance entitled "Revision to Adjusted Penalty Policy Matrices Issued on November 16, 2009" was issued on April 6, 2010. (These documents are available upon request.) This UST guidance provides a rational, consistent, and equitable calculation methodology for applying the statutory penalty factors to particular cases.

Based upon the facts alleged in this Second Amended Complaint and taking into account factors such as the seriousness of the violations and any good faith efforts by the Respondents to comply with the applicable requirements, Complainant proposes, subject to receipt and evaluation of further relevant information, to assess the following civil penalties for post bankruptcy petition violations from August 1, 2009:

Count 1: Failure to permanently close 3 USTs at Valvo's C&G \$.....\$22,812

Count 2: Failure to permanently close 2 USTs at Valvo Transport..... \$14,058

Count 3: Failure to test cathodic protection at Valvo Transport.....
\$.....\$2,167

Count 4: Failure to monitor waste oil UST at Valvo Transport.....\$
.....\$4,280

Count 5: Failure to test cathodic protection at former Hanover Convenience.....\$.....\$3,192

Count 6: Failure to perform release detection at former Hanover Convenience...\$ from about
August 1, 2009 through about April 11, 2010 \$4,293

Count 7: Failure to perform annual line tightness tests or monthly monitoring for

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pressurized piping at former Hanover Convenience
\$.....\$8,564

Count 8: Failure during 2011 and 2012 to conduct release detection and maintain proper records for the diesel UST at former Hanover Convenience and to cooperate fully during an inspection.....NO ADDITIONAL PENALTY ADDED

Total Proposed Penalty Amount for Counts 1-7.....\$8
(unchanged)..... \$59,366.00

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

COMPLIANCE ORDER

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

1. Respondents shall, starting no later than thirty (30) days of the effective date of this Order, comply with all applicable UST system standards in 40 C.F.R. Part 280 for all the UST systems at the Facilities cited in this Order, including but not limited to corrosion protection, release detection monitoring, recordkeeping, and closure requirements.
2. ~~In accordance with 40 C.F.R. §§ 280.41(a) and 280.70, Respondents shall submit, within ten (10) days of the effective date of this Order, evidence (a) that all the UST systems at the Facilities cited in this Order have been emptied of residue or are currently undergoing adequate release detection, and (b) of any required cathodic protection testing for any temporarily closed UST systems.~~
3. ~~2.~~ Within ~~sixty (60)~~ thirty (30) days of the effective date of this Order, Respondents shall permanently close ~~all the diesel UST systems~~ system at the ~~Facilities~~ Valvo's C & G Facility cited in this Order that ~~have~~ has been temporarily closed for longer than the twelve-month temporary closure period or Respondents shall bring the UST ~~systems~~ system into compliance with all the temporary closure requirements at 40 C.F.R. § 280.70.
3. Respondents shall submit, within ten (10) days of the effective date of this Order, evidence of adequate release detection, corrosion protection and record keeping for the diesel UST at the former Hanover Convenience Facility at 351 Central Avenue, Silver Creek, New York.

Respondents shall, within sixty (60) calendar days after the effective date of this Order, submit to

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EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein. If the Respondents are in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement. Furthermore, in all documents or reports submitted to EPA pursuant to this Compliance Order, the Respondents' written notice shall contain the following certification:

We/I certify that the information contained in this written notice and the accompanying documents is true, accurate and complete. As to the identified portions of this response for which I cannot personally verify their accuracy, I certify under penalty of law that this response and all attachments were prepared so as to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: _____
Name: _____
Title: _____

Respondents shall submit the documents specified above to:

Dennis J. McChesney Ph.D., MBA, Team Leader
UST Program
U.S. EPA Region 2
290 Broadway, 20th Floor
New York, New York 10007-1866

NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES

Pursuant to Sections 9006(a)(3) of the Act, 42 U.S.C. §6991e(a)(3), and in accordance with the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-34, 110 Stat. 1321 (1996) and the regulations promulgated thereunder (see the Civil Monetary Inflation Rule, 61 Fed. Reg. 69630 (December 31, 1996), 69 Fed. Reg. 7121 (February 13, 2004) and 73 Fed. Reg. 75340-46 (December 11, 2008), codified at 40 C.F.R. Part 19), a violator failing to comply with a Compliance Order that has taken effect within the time specified in the Order is liable for a civil penalty up to \$37,500 for each day of continued noncompliance.

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation have been set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS" (hereinafter "Consolidated

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Rules”), and which were codified at 40 C.F.R. Part 22. A copy of these rules accompanies this “Second Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing” (hereinafter the “Second Amended Complaint”).

A. Answering the Second Amended Complaint

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

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

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

Respondents’ Answer(s) to the Second Amended Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Second Amended Complaint and with regard to which Respondents have any knowledge. 40 C.F.R. § 22.15(b). Where Respondents lack knowledge of a particular factual allegation and so state in their Answer(s), the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer(s) shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense; (2) the facts that Respondents dispute (and thus intend to place at issue in the proceeding); and (3) whether Respondents request a hearing. 40 C.F.R. § 22.15(b).

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

B. Opportunity to Request a Hearing

If requested by Respondents in their Answer(s), a hearing upon the issues raised by the Second Amended Complaint and Answer may be held. 40 C.F.R. § 22.15(c). If, however, Respondents do not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if their Answer(s) raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Second Amended Complaint, such Order shall automatically become final unless Respondents request a hearing pursuant to 40 C.F.R. § 22.15

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within 30 days after such Order is served. 40 C.F.R. § 22.37.

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

C. Failure to Answer

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

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

D. Exhaustion of Administrative Remedies

Where Respondents fail to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondents waive their right to judicial review. 40 C.F.R. § 22.17(d).

In order to appeal an initial decision to the Agency's Environmental Appeals Board [EAB; see 40 C.F.R. § 1.25(e)], Respondents must do so "Within thirty (30) days after the initial decision is served" upon the parties. 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "...5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document". Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

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

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

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

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

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

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

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondents waive their right to contest the allegations in the Second Amended Complaint and waive their right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). In order to conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

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

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RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

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

Dated: _____

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

To:

Mr. Stephen Valvo, Individually, and
Valvo's Convenience & Gas, Inc.
1271 Routes 5 and 20
Silver Creek, N.Y. 14136

cc:

Russ Brauksieck, Chief
Facility Compliance Section
NYSDEC
625 Broadway, 11th Floor
Albany, N.Y. 12233-7250

Paul A. Chiaravalloti, Esq., for the Respondents
1967 Wehrle Drive
Suite 1
Williamsville, N.Y. 14221

Hon. M. Lisa Buschmann
Administrative Law Judge
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed copies of the foregoing Second Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing, bearing the Docket Number RCRA-02-2011- 7507 and copies of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to: Mr. Stephen Valvo, Individually, and to Valvo's Convenience & Gas, Inc., 1271 Routes 5 and 20, Silver Creek, N.Y. 14136 and, to Paul A. Chiaravalloti, Esq., counsel for the Respondents, 1967 Wehrle Drive, Suite 1, Williamsville, N.Y. 14221, and to Hon. M. Lisa Buschmann, Administrative Law Judge, EPA Office of Administrative Law Judges, 1200 Penn. Ave., N.W., Mail Code 1900L, Washington, D.C. 20460.

I hand-carried the original and a copy of the foregoing Second Amended Complaint to the Office of Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: July 18, 2012
New York, New York

Beverly Kalenberg

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