



August 25, 2011

A. Solomon Menter
1910-1978

- Peter L. Hubbard
- J. Scott Finlay
- Antonio E. Caruso
- Jeffrey A. Dove
- F. Paul Vellano, Jr.
- Mitchell J. Katz
- Kevin M. Newman
- Addison F. Vars III
- Marcy Robinson Dembs*
- James H. McGowan
- Thomas J. Fucillo
- Vic J. Kopnitsky, Jr.
- Joseph W. Russell
- Julian B. Modesti
- Robert G. Bennett
- Josephine Yang-Patyi
- John P. Sidd
- Jennifer K. Frank
- Teresa M. Bennett
- Douglas P. Needham
- Michael J. Balestra
- Adam F. Kinney
- Anthony A. Marrone II

*also admitted
in Florida

**Ms. Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region II
290 Broadway, 16th Floor
New York, New York 10007-1866**

**Re: In the Matter of Schmitt Sales, Inc.
Docket No. RCRA-02-2011-7508**

Dear Ms. Maples:

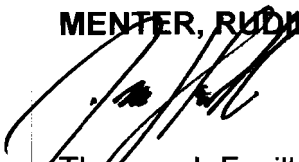
This firm represents Schmitt Sales, Inc. ("Schmitt"), Respondent in the referenced proceeding.

In accordance with 22 C.F.R. §22.15, and the August 3, 2011 Order Granting An Extension Of Time To File An Answer To The Complaint, please find the original and one copy of Schmitt's Answer And Request For Hearing ("Answer").

This Answer has also been served upon Ms. LaPosta and Mr. Keith. Enclosed is a Certificate of Service by First Class Mail. By copy of this letter to Mr. Keith, this is to request an informal settlement conference.

Sincerely,

MENTER, RUDIN & TRIVELPIECE, P.C.


**Thomas J. Fucillo
tfucillo@menterlaw.com**

cc (with attachment):

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

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U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION II
2011 AUG 31 P 2:46
REGIONAL HEARING
CLERK



Stuart Keith, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

Terry Mahon

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY
2011 AUG 31 P 2:46
HEARING ROOM

IN THE MATTER OF:

Schmitt Sales, Inc.,

d.b.a Brooks Super Duper;
Dutch Hollow Market;
Echoes on the Lake;
Parkview Market;
Pine Valley Busy Mart;
Tubby's Corner Quick Stop;
T-Burg Foodline, Inc.;
Cassadaga Supermarket;
Schmitt's Robo Mart;
Ducky's,

Respondent.

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

ANSWER
And REQUEST FOR HEARING
DOCKET NO. RCRA-02-2011-7508

Respondent Schmitt Sales, Inc. (hereinafter, the "Schmitt"), by its attorneys, Menter, Rudin & Trivelpiece, P.C., as and for its Answer to the United States Environmental Protections Agency's ("EPA's") Complaint, Compliance Order and Notice of Opportunity For Hearing (the "Complaint"), alleges as follows:

1. Paragraph "1" of the Complaint contains a jurisdictional statement as to which no response is required.
2. Schmitt **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph "2" of the Complaint.
3. Schmitt **ADMITS** the allegation stated in paragraphs "3" and "4" of the Complaint.

4. With respect to the allegations in paragraph "5" of the Complaint, Schmitt **ADMITS** that definitions of the terms "underground storage tank" and "UST" are contained within the cited regulations, avers that such regulations speak for themselves and **DENIES** any characterization of such definitions which conflicts with the actual verbiage in the cited regulations.

5. Schmitt **ADMITS** the allegation stated in paragraph "6" of the Complaint.

6. Schmitt **ADMITS** the allegations stated in paragraphs "7" and "8" of the Complaint, except for the allegation in paragraph "8" that the 8,000 gallon UST system number 2 stores diesel fuel. Instead, UST system number 2 stores unleaded gasoline.

7. Schmitt **ADMITS** the allegations stated in paragraph "9" of the Complaint, insofar as they apply to the period prior to December 15, 2010, and **DENIES** that it "continues" to be the owner and operator of the facility, as it sold the facility during or about December 15, 2010.

8. Schmitt **ADMITS** the allegations stated in paragraph "10" of the Complaint, insofar as they apply to the period prior to December 15, 2010, but **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of such allegations as they apply to the period after December 15, 2010.

9. Schmitt **ADMITS** the allegations stated in paragraphs "11" and "12" of the Complaint.

10. Schmitt **ADMITS** the allegations stated in paragraphs "13" and "14" of the Complaint, insofar as they apply to the period prior to June 15, 2011, but **DENIES** the allegations as they apply to the period after June 15, 2011 as all tanks and product lines were removed on that date.

11. Schmitt **ADMITS** the allegations stated in paragraph “15” of the Complaint, insofar as they apply to the period prior to April 1, 2010, and **DENIES** that it “continues” to be the owner and operator of the facility, as it sold the facility during or about April 15, 2011.

12. Schmitt **ADMITS** the allegations stated in paragraph “16” of the Complaint, insofar as they apply to the period prior to April 1, 2010, but **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of such allegations as they apply to the period after April 1, 2010.

13. Schmitt **ADMITS** the allegations stated in paragraphs “17”, “18”, “19” and “20” of the Complaint.

14. Schmitt **ADMITS** the allegations stated in paragraphs “21” and “22” of the Complaint, except that the facility’s name is the Cassadaga Shur Fine and its New York Petroleum Bulk Storage registration number is 9-466158.

15. Schmitt **ADMITS** the allegations stated in paragraphs “23”, “24”, “25”, “26” and “27” of the Complaint.

16. With respect to the allegations set forth at paragraph “28” of the Complaint, Schmitt **ADMITS** that inspections were held at or about the times stated in the Complaint at the stated facilities, but **DENIES SUFFICIENT KNOWLEDGE OR INFORMATION** to form a belief as to whether the private party that conducted the inspections was an authorized representative of EPA.

17. With respect to the allegations set forth at paragraph “29” of the Complaint, Schmitt **ADMITS** that EPA sent Notice of Violations to Schmitt, and **DENIES**

SUFFICIENT KNOWLEDGE OR INFORMATION to form a belief as to the remaining allegations in paragraph "29" of the Complaint.

18. With respect to the allegations stated in paragraph "30" of the Complaint, Schmitt **ADMITS** that the NOV cited alleged UST violations that were identified by the inspector.

19. With respect to the allegations set forth at paragraph "31" of the Complaint, Schmitt **ADMITS** that it responded to the information requested by EPA.

20. Schmitt **ADMITS** the allegations stated in paragraph "32" of the Complaint.

ANSWER TO COUNT 1

21. Schmitt incorporates each response to the allegations set forth in paragraphs "1" through "32" of the Complaint as if fully set forth herein.

22. The provisions of the Code of Federal Regulations cited in paragraphs "34", "35", and "36" constitute writings which speak for themselves and require no response, and Schmitt **DENIES** any characterization of same which conflicts with the actual wording in the cited regulations.

Brooks Super Duper

23. Schmitt **ADMITS** the allegations stated in paragraph "37" of the Complaint.

24. Schmitt **DENIES** the allegations stated in paragraphs "38", "39", "40", "41" and "42" of the Complaint. By way of an Affirmative Defense, Schmitt alleges that such testing was properly performed for that location by Leak Detection Services ("LDS"), on October 23, 2008, and the results of the cathodic testing for the piping of UST Systems 1, 2 and 3 was contained on the records provided to EPA by Schmitt. The actual test

results are appended at Exhibit A, and the results for the piping are referred to in

Dutch Hollow Market

25. Schmitt **ADMITS** the allegations stated in paragraphs “43” and “44” of the Complaint.

26. With respect to paragraph “45” of the Complaint, Schmitt **ADMITS** that its testing company did not utilize the specified “off/100 millivolt polarization decay measurements” for tanks and piping, and by way of an Affirmative Defense, **DENIES** that such testing is mandatory, and **DENIES** that the test methodology utilized by its testing contractor failed to comply with 40 C.F.R. §280.31(a) and (b). Schmitt did not subsequently provide alternative test results to EPA because it sold the facility during or about December 15, 2010.

27. Schmitt **DENIES** the allegations stated in paragraph “46” of the Complaint. See explanation at paragraph “27” above.

Echoes on the Lake

28. Schmitt **ADMITS** the allegations stated in paragraphs “47”, “48”, “49” and “50” of the Complaint.

29. Schmitt **DENIES** the allegations stated in paragraphs “51” and “52” of the Complaint. By way of an Affirmative Defense, Schmitt alleges that such testing was properly performed and the results of such testing maintained. The actual cathodic

protection test results for UST Systems 001 and 002 conducted on May 12, 2007 and August 12, 2008 are appended at Exhibit B.

30. With respect to paragraph "53" of the Complaint, Schmitt **ADMITS** that its testing company did not utilize the specified "off/100 millivolt polarization decay measurements" for tanks and piping, and by way of an Affirmative Defense, Schmitt **DENIES** that such testing is mandatory, and **DENIES** that the test methodology utilized by its testing contractor failed to comply with 40 C.F.R. §280.31(a) and (b).

31. With respect to paragraph "54" of the Complaint, Schmitt **DENIES** that it failed to triennially test the cathodic protection systems at the Echoes on the Lake facility, and **DENIES** that it failed to utilize a proper test method for the testing it performed. By way of an Affirmative Defense, Schmitt alleges that such testing was properly performed and the actual cathodic protection testing results for UST Systems 001 and 002 conducted on May 12, 2007 and August 12, 2008 are appended at Exhibit B.

32. By way of further defense with respect to paragraph "54" of the Complaint, in the event that EPA finds that Schmitt did not utilize a proper test method, which Schmitt denies, it is improperly duplicative, multiplicitous and inequitable to penalize Schmitt for both a failure to conduct proper testing and a failure to maintain records of the testing it is cited for not properly performing, because the record-keeping violation necessarily arose from the same factual occurrence as the failure to undertake the proper testing.

Parkview Market

33. Schmitt **ADMITS** the allegations stated in paragraph "55" of the Complaint.

34. With respect to paragraph "56" of the Complaint, Schmitt **ADMITS** that it was unable to locate records at the time of the inspection indicating that cathodic protection testing had previously been performed, but **DENIES** that such testing had not been properly performed.

35. With respect to paragraph "57" of the Complaint, Schmitt **ADMITS** that it was unable to locate records in response to the information requests indicating that cathodic protection testing had been performed prior to the February 2009 inspection, but **DENIES** that such testing had not been performed. By way of an Affirmative Defense, Schmitt alleges that such testing was properly performed and the records maintained, and that the cathodic protection testing results for UST Systems 1, 2 and 3, conducted on March 3, 2006 are appended at Exhibit C.

36. Schmitt **DENIES** the allegations stated in paragraphs "58" and "59" of the Complaint. The records containing the cathodic protection testing results for UST Systems 1, 2 and 3, conducted on March 3, 2006 are appended at Exhibit C.

37. Schmitt **DENIES** the allegations stated in paragraph "60" of the Complaint.

Pine Valley Busy Mart

38. Schmitt **ADMITS** the allegations stated in paragraphs "61", "62" and "63" of the Complaint.

39. With respect to paragraph "64" of the Complaint, Schmitt **ADMITS** that its failure to test triennially the cathodic protection systems for the piping for UST System

004 constitutes a violation of 40 CFR §280.31(b), but by way of an Affirmative defense, Schmitt **DENIES** that those circumstances also constitute a violation of 40 CFR §280.31(a) because the systems were properly operated and maintained to continuously provide cathodic protection.

ANSWER TO COUNT 2

40. Schmitt incorporates each response to the allegations set forth in paragraphs "1" through "64" of the Complaint as if fully set forth herein.

41. The provisions of the Code of Federal Regulations cited in paragraphs "66", "67", and "68" constitute writings which speak for themselves and require no response, and Schmitt **DENIES** any characterization of same which conflicts with the actual wording in the cited regulations.

Brooks Super Duper

42. Schmitt **ADMITS** the allegations stated in paragraphs "69", "70" and "71" of the Complaint.

43. With respect to paragraph "72", Schmitt states that such release detection monitoring was properly performed during the months in question, but **ADMITS** that records memorializing such monitoring were inadvertently lost for February, March and April 2010, which constitutes an unintentional violation of 40 CFR §280.45(b) for those specific months, and, by way of an Affirmative Defense, Schmitt **DENIES** that it failed to cooperate with USEPA during its inspection or in response to its requests for records, and therefore, **DENIES** that such actions constitute a violation of 40 CFR §280.34.

Dutch Hollow Market

44. Schmitt **ADMITS** the allegations stated in paragraphs "73" and "74" of the Complaint.

45. With respect to paragraph "75", Schmitt **ADMITS** that it inadvertently lost such records and therefore was unable to provide them to EPA, but by way of an Affirmative Defense, Schmitt **DENIES** that it failed to maintain such records in the first instance.

46. With respect to paragraph "76", Schmitt states that release detection monitoring was properly performed during the months in question, but **ADMITS** that records of such release detection monitoring were inadvertently lost for the months October, November and December 2009 and May 2010, which constitutes an unintentional violation of 40 CFR §280.45(b), and, by way of an Affirmative Defense, Schmitt **DENIES** that it failed to cooperate with USEPA during its inspection or in response to its requests for records, and therefore, **DENIES** that such actions constitute a violation of 40 CFR §280.34.

Tubby's Corner Quick Stop

47. Schmitt **ADMITS** the allegations stated in paragraphs "77" and "78" of the Complaint.

48. With respect to paragraph "79", Schmitt **ADMITS** that it inadvertently lost the requested records and therefore was unable to provide them to EPA, but by way of

an Affirmative Defense, Schmitt **DENIES** that it failed to maintain such records in the first instance.

49. With respect to paragraph "80", Schmitt states that release detection monitoring was properly performed during the months in question, but **ADMITS** that records of such release detection monitoring were inadvertently lost for the month of December 2009, which constitutes an unintentional violation of 40 CFR §280.45(b), and by way of an Affirmative Defense, **DENIES** that it failed to cooperate with USEPA during its inspection or in response to its requests for records, and therefore, **DENIES** that such actions constitute a violation of 40 CFR §280.34.

ANSWER TO COUNT 3

50. Schmitt incorporates each response to the allegations set forth in paragraphs "1" through "80" of the Complaint as if fully set forth herein.

51. The provisions of the Code of Federal Regulations cited in paragraphs "82", and "83" constitute writings which speak for themselves and require no response, and Schmitt **DENIES** any characterization of same which conflicts with the actual wording in the cited regulations.

52. With respect to the allegations stated in paragraph "84" of the Complaint, Schmitt **ADMITS** that all of the UST Systems at the cited locations were either new or existing tank systems, and states that 40 C.F.R. §280.21(d) and 40 C.F.R. §280.20(c) constitute writings which speak for themselves and require no response, and Schmitt **DENIES** any characterization of same which conflicts with the actual wording in the cited regulations.

Cassadaga Super Market

53. Schmitt **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “85” of the Complaint.

54. Schmitt **ADMITS** the allegations stated in paragraphs “86”, “87” and “88” of the Complaint.

Pine Valley Busy Mart

55. Schmitt **ADMITS** the allegations stated in paragraphs “89”, “90”, “91” and “92” of the Complaint.

Schmitt's Robo Mart

56. Schmitt **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “93” of the Complaint and alleges that by way of an Affirmative Defense that the fill port had been covered with pavement and Schmitt was unable to confirm its belief that a ball float device was actually present within UST System number 4.

57. Schmitt **ADMITS** the allegations stated in paragraphs “94”, “95” and “96” of the Complaint. Schmitt installed the drop tube even though it believed that there was a compliant ball float device, because it could not confirm the existence of the ball float device and desired to cooperate with EPA.

58. Schmitt **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “97” of the

Complaint because it was unable to determine whether or not there was a compliant ball float device in UST System number 4.

T-Burg Foodline, Inc.

59. Schmitt **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “98” of the Complaint and alleges by way of an Affirmative Defense that the fill port was paved over and Schmitt was unable to confirm its belief that a ball float device was present within UST System 003.

60. Schmitt **ADMITS** the allegations stated in paragraphs “99” and “100” of the Complaint. Schmitt installed the overfill prevention device on UST System 003 even though it believed that there was a compliant ball float device on that system, because it could not confirm the existence of the ball float device and desired to cooperate with EPA.

61. Schmitt **DENIES KNOWLEDGE OR INFORMATION** sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph “101” of the Complaint because it was unable to determine whether or not there was a compliant ball float device in UST System number 4.

ANSWER TO COUNT 4

62. Schmitt incorporates each response to the allegations set forth in paragraphs “1” through “101” of the Complaint as if fully set forth herein.

63. The provisions of the Code of Federal Regulations cited in paragraph “103” constitutes a writing which speaks for itself and requires no response, and Schmitt **DENIES** any characterization of same which conflicts with the actual wording in the cited regulation.

64. Schmitt **ADMITS** the allegations stated in paragraphs “104”, and “105” of the Complaint.

65. Schmitt **DENIES** the allegations stated in paragraph “106” of the Complaint. By way of an Affirmative Defense, Schmitt alleges that the prior tenant had recently vacated the premises and that Schmitt was actively seeking a new tenant to continue to use the facilities. Schmitt alleges that all petroleum had been removed from all tanks at the facility and all tanks and piping had been properly tested. Additionally, Schmitt alleges that the cited regulation does not require that fill caps be “locked”; instead, it requires that fill lines and pumps be “cap[ped]” and secure[d]”. The system at Ducky’s was properly capped, and therefore, it was protected in compliance with the cited regulation.

RESPONSE TO PROPOSED CIVIL PENALTY

66. With respect to each Count alleged in the Complaint, in addition to the specific responses below, a downward adjustment to the proposed penalty is warranted because:

a. Schmitt made a good faith effort to comply with each of the cited regulations.

b. Several of the violations alleged were for discrete portions of multi-part regulations, or involved missing time periods for records which were otherwise generally maintained. In response, EPA's proposed penalty differs little from a penalty which would be applied had Schmitt violated all provisions of the same multi-part regulation or failed to maintain all of the applicable records during the period in question. Schmitt alleges that slavish or mechanical use of EPA's penalty guidance matrices is inequitable, arbitrary and capricious under such circumstances.

c. Schmitt fully cooperated with EPA, both during the inspection and in response to EPA's requests for information.

d. Schmitt has no history of noncompliance with EPA.

Specific Response to Civil Penalty for Count 1

67. EPA seeks a total proposed penalty of \$56,194.00 for the violations alleged in Count 1 of the Complaint. Schmitt seeks a substantial reduction to that proposed penalty which is fully in accordance with EPA's "Penalty Guidance for UST Violations", based upon the following facts:

a. Brooks Super Duper (\$12,642.00 penalty proposed by EPA for the Brooks facility on Count 1).

Schmitt alleges that no penalty is warranted with respect to the Brooks Market because Schmitt properly monitored the corrosion protection on the piping at the Brooks Market, and maintained proper records reflecting that monitoring. Exhibit "A" reflects

the triennial monitoring that was actually performed. Therefore, the total penalty sought by EPA for Count 1 should be reduced by the entire \$12,642.00 that is sought.

Even if EPA does not accept the test results for the triennial testing at the Brooks Super Duper, which Schmitt will contest, the gravity component of EPA's proposed penalty should be reduced because both the "potential for harm" and "extent of deviation" should be designated as "minor". The piping was properly installed and designed with cathodic protection, testing was actually performed and the system was actually working as designed.

b. Dutch Hollow Market (\$4,851.00 penalty proposed by EPA for the Dutch Hollow facility with respect to Count 1).

Schmitt alleges that its testing contractor tested the cathodic protection systems, using a compliant testing protocol that has been accepted in the past by NYSDEC. Therefore, no violation exists and no penalty is warranted.

In the event that EPA's contention that the testing contractor did not use a compliant test methodology is upheld, Schmitt alleges that a substantial downward adjustment to the proposed penalty is still warranted because:

1) Schmitt paid a reputable and qualified contractor to perform testing of the cathodic protection systems at the Dutch Hollow facility, and therefore received no economic benefit as a result of the alleged violation.

2) The penalty matrix values selected by EPA for "potential for harm" and "extent of deviation" should be adjusted downward because the tanks were properly

cathodically protected, and testing was performed, even though the testing contractor used a testing practice which EPA will not accept, although NYSDEC does accept.

3) Test results which conformed to EPA's desired methodology were not subsequently provided because the facility was sold by Schmitt shortly after EPA's inspection. Therefore, Schmitt's failure to undertake the requested testing subsequently is not based upon a failure to cooperate and it does not constitute a further or continuing violation.

c. Echoes on the Lake (\$12,186.00 penalty proposed by EPA for the Echoes on the Lake Facility with respect to Count 1).

Schmitt alleges that the penalty sought by EPA for this facility in Count 1 should be completely withdrawn as Schmitt properly tested the corrosion protection system for the tanks and piping at this facility, as reflected in Exhibit "B".

Even if EPA does not accept the test results for the triennial testing at the Brooks Super Duper, which Schmitt will contest, Schmitt alleges that a downward adjustment in the proposed penalty is still warranted because:

1) Schmitt disputes EPA's characterization of the environmental sensitivity component of its penalty calculation as "high", and that an Environmental Sensitivity Multiplier of 2 is warranted for the alleged violations. The cathodic protection component of the tank systems at Echoes on the Lake was properly designed and installed and the tank systems were therefore properly protected. Under such circumstances, EPA's blanket use of these characterizations in its penalty matrix

regardless of the factual circumstances relating to an alleged violation is inequitable, arbitrary and capricious.

2) Schmitt alleges that it is logically inconsistent, inequitable, duplicative, multiplicitous and therefore, legally improper, to penalize Schmitt both for its failure to undertake a specific test and for a failure to maintain records relating to the test that it did not conduct as both alleged violations arise from identical facts. Under such circumstances, EPA's proposed penalty is arbitrary and capricious and should be adjusted downward to reflect penalization for either one or the other, but not both alleged violations.

d. Parkview Market (\$18, 243.00 penalty proposed by EPA for the Parkview Market Facility with respect to Count 1).

Schmitt alleges that EPA's proposed penalty should be completely withdrawn, as Schmitt properly performed triennial testing on the cathodic protection system at Parkview Market on March 3, 2006, as reflected at Exhibit "C".

e. Pine Valley Busy Mart (\$8, 272.00 penalty proposed by EPA for the Pine Valley Busy Mart Facility with respect to Count 1).

Schmitt alleges that its contractor did not perform cathodic protection testing with respect to the piping for UST system number 004 because Schmitt erroneously believed that the piping was made of double-walled Fiberglas, as was all of the other lines at that facility, which does not require cathodic protection. Schmitt's omission constitutes a unique circumstance warranting a downward adjustment in the proposed penalty.

Response to Civil Penalty for Count 2

68. EPA seeks a total proposed penalty of \$637.00 for the violations alleged in Count 2 of the Complaint. Schmitt seeks a downward adjustment to that proposed penalty which is fully in accordance with EPA's "Penalty Guidance for UST Violations" because:

a. Schmitt alleges that it actually performed the necessary monitoring which the missing records related. However, Schmitt was unable to retrieve all records relating to such monitoring. Therefore, Schmitt avoided no recurring costs and enjoyed no economic benefit with respect to the alleged violation. The majority of the records relating to such monitoring were provided to EPA.

b. The missing records represented a small percentage of the records compiled by Schmitt during the applicable timeframe. Therefore, EPA's designation of the "extent of deviation" as "moderate" is inaccurate, inequitable, and arbitrary and capricious. The extent of deviation should be designated as "minor".

Response to Civil Penalty for Count 3

69. EPA seeks a total proposed penalty of \$7,420.00 for the violations alleged in Count 3 of the Complaint. Schmitt seeks a reduction in that proposed penalty which is fully in accordance with EPA's "Penalty Guidance for UST Violations" based upon the following facts:

a. Cassadaga Super Market (\$1,060.00 penalty proposed by EPA for this facility with respect to Count 3).

Schmitt alleges that it believes that UST system number 1 did have a compliant ball float valve, and therefore, that there was no violation of the cited regulation. Schmitt was unable to confirm compliance, however, because it was covered with concrete which prevented access to that equipment. Schmitt immediately installed a compliant drop tube with shutoff in an effort to cooperate with EPA. That constitutes a unique circumstance warranting a downward adjustment in the proposed penalty. In addition, because of those unique circumstances, the “potential for harm” should be designated as “minor”, as should the “extent of deviation”.

b. Pine Valley Busymart (\$4,240.00 penalty proposed by EPA for this facility with respect to Count 3).

Schmitt alleges that it believes that UST systems number 7 and 8 each had a compliant ball float valve, and therefore, that there was no violation of the cited regulation. Schmitt was unable to confirm compliance, however, because it was covered by concrete which prevented access to that equipment. Schmitt immediately installed compliant drop tubes with shutoff in an effort to cooperate with EPA. That constitutes a unique circumstance warranting a downward adjustment in the proposed penalty. In addition, because of those unique circumstances, the “potential for harm” should be designated as “minor”, as should the “extent of deviation”.

c. Schmitt’s Robo Mart (\$1,060.00 penalty proposed by EPA for this facility with respect to Count 3).

Schmitt alleges that it believes that UST system number 4 had a compliant ball float valve, and therefore, that there was no violation of the cited regulation. Schmitt was unable to confirm compliance, however, because it was covered by concrete which prevented access to that equipment. Schmitt immediately installed a compliant drop tube with shutoff in an effort to cooperate with EPA. That constitutes a unique circumstance warranting a downward adjustment in the proposed penalty. In addition, because of those unique circumstances, the “potential for harm” should be designated as “minor”, as should the “extent of deviation”.

d. T-Burg Foodline, Inc. (\$1,060.00 penalty proposed by EPA for this facility with respect to Count 3).

Schmitt alleges that it believes that UST system number 003 had a compliant ball float valve, and therefore, that there was no violation of the cited regulation. Schmitt was unable to confirm compliance, however, because of concrete which prevented access to that equipment. Schmitt immediately installed a compliant drop tube with shutoff in an effort to cooperate with EPA. That constitutes a unique circumstance warranting a downward adjustment in the proposed penalty. In addition, because of those unique circumstances, the “potential for harm” should be designated as “minor”, as should the “extent of deviation”.

Response to Civil Penalty for Count 4

70. EPA seeks a total proposed penalty of \$12,008.00 for the violations alleged in Count 4 of the Complaint. Schmitt seeks a substantial reduction in that

proposed penalty which is fully in accordance with EPA's "Penalty Guidance for UST Violations", because:

a. Schmitt alleges that the prior tenant had vacated the site and Schmitt was actively marketing the facility for and anticipated its continued use. Schmitt alleges that all petroleum had been removed from all tanks at the facility and all tanks and piping had been properly tested.

b. The cited regulation does not require that fill caps be "locked"; instead, it requires that fill lines and pumps be "cap[ped]" and secure[d]". The system at Ducky's was properly capped, and therefore, it was protected in compliance with the cited regulation.

c. Even if it is determined that the absence of locking fill caps was a violation, the "potential for harm" was "minor" because there was no product in the tanks. Similarly, the extent of deviation should be designated as "minor" rather than "major" because Schmitt had otherwise complied with all other temporarily closure requirements. Under such circumstances, EPA's characterization of the "potential for harm" as "moderate" and the "extent of deviation" as "major" is inaccurate, inequitable, and arbitrary and capricious.

REQUEST FOR HEARING

71. Pursuant to 40 C.F.R. Part 22, Respondent hereby requests a hearing on this matter.

DATED: August 25, 2011

MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Respondent, Schmitt Sales, Inc.

By: 

Thomas J. Fucillo, Esq. of Counsel
Office and Post Office Address
308 Maltbie Street, Suite 200
Syracuse, New York 13204
Telephone: (315) 474-7541

To: Regional Hearing Clerk (original and one copy)
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

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

Exhibit A

A

Leak Detection Systems, Inc.

105 Pamela Drive, Warren, PA 16365 | 814.866.5759 | leakdetectionsystemsinc.com

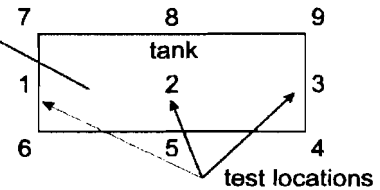
CORROSION PROTECTION TESTING FORM UNDERGROUND STORAGE TANK (UST)

UST Facility I.D. # 0- 9-382841
Test Date: 10/23/08

Facility Name Brooks Market
Address 1 Third St.
Cattaraugus, NY 14719

Equipment used to test sti-PP4

10 pipe line



PLAN
N.T.S

Note: minimum test locations (1,2,3)

Sacrificial or Impressed System (circle one)

RESULTS	PASS		SYSTEM No. 1		PRODUCT Super Unleaded		SIZE 6,000			
Test Locations	1	2	3	4	5	6	7	8	9	10
Reading _-Volt)	883	897	886							880
Native Voltage										
Instant Off										
Polarization (Mv)										

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

RESULTS	PASS		SYSTEM No. 2		PRODUCT Regular Unleaded		SIZE 8,000			
Test Locations	1	2	3	4	5	6	7	8	9	10
Reading _-Volt)	899	910	913							887
Native Voltage										
Instant Off										
Polarization (Mv)										

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

COMMENTS / RECOMMENDATIONS: _____

I hereby certify that I have an understanding of the principles and measurements of all common types of techniques used to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell as applied to buried piping and tank systems.

Name of tester (Print) Aaron Michel

NACE Certification #: _____

Signature: _____

Date: 10/23/08

Leak Detection Systems, Inc.

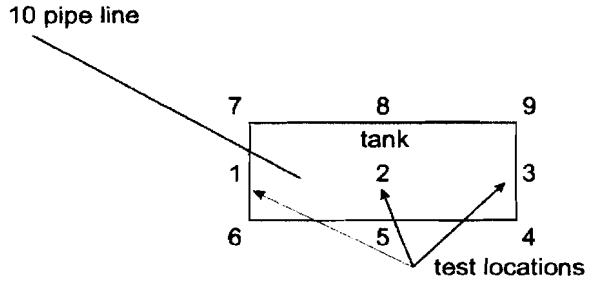
105 Pamela Drive, Warren, PA 16365 | 814.866.5759 | leakdetectionsystemsinc.com

CORROSION PROTECTION TESTING FORM UNDERGROUND STORAGE TANK (UST)

UST Facility I.D. # 0- 9-382841
Test Date: 10/23/08

Facility Name Brooks Market
Address 1 Third St.
Cattaraugus, NY 14719

Equipment used to test sti-PP4



PLAN
N.T.S

Note: minimum test locations (1,2,3)

Sacrificial or Impressed System (circle one)

RESULTS	PASS		SYSTEM No.			3		PRODUCT		Kerosene		SIZE		1,000	
Test Locations	1	2	3	4	5	6	7	8	9	10					
Reading _-Volt)	895	905	926												898
Native Voltage															
Instant Off															
Polarization (Mv)															

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

COMMENTS / RECOMMENDATIONS: _____

I hereby certify that I have an understanding of the principles and measurements of all common types of techniques used to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell as applied to buried piping and tank systems.

Name of tester (Print) Aaron Michel NACE Certification #: _____
Signature: _____ Date: 10/23/08

Exhibit B

B

Leak Detection Systems, Inc.

105 Pamela Drive, Warren, PA 16365 | 814.866.5759 | leakdetectionsystemsinc.com

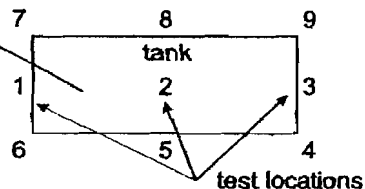
CORROSION PROTECTION TESTING FORM UNDERGROUND STORAGE TANK (UST)

UST Facility I.D. # 0- 6-495107

Test Date: 5/12/07

Facility Name Breeze Inn
Address Black Lake Road
Edwardsville, NY 13646

10 pipe line



PLAN
N.T.S

Note: minimum test locations (1,2,3)

Sacrificial or Impressed System (circle one)

RESULTS	PASS		SYSTEM No. 1		PRODUCT Regular		SIZE 8,000				
Test Locations	1	2	3	4	5	6	7	8	9	10	
Reading _-Volt)	926	930	934							912	
Native Voltage											
Instant Off											
Polarization (Mv)											

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

RESULTS	PASS		SYSTEM No. 2		PRODUCT Super		SIZE 8,000				
Test Locations	1	2	3	4	5	6	7	8	9	10	
Reading _-Volt)	977	980	989							941	
Native Voltage											
Instant Off											
Polarization (Mv)											

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

COMMENTS / RECOMMENDATIONS: _____

I hereby certify that I have an understanding of the principles and measurements of all common types of techniques used to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell as applied to buried piping and tank systems.

Name of tester (Print) Tom Michel

NACE Certification #: _____

Signature: _____

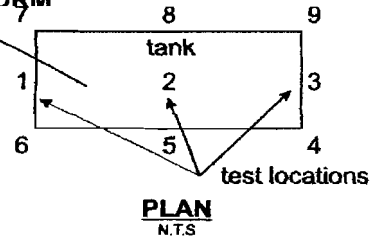
Date: 5/12/07

Leak Detection Systems, Inc.

105 Pamela Drive, Warren, PA 16365 | 814.866.5759 | leakdetectionsystemsinc.com

CORROSION PROTECTION TESTING FORM

Equipment used to test Sti-PP4



Note: minimum test locations (1,2,3)

Sacrificial or Impressed System (circle one)

RESULTS	PASS		SYSTEM No. 1		PRODUCT Regular		SIZE 8,000					
Test Locations	1	2	3	4	5	6	7	8	9	10		
Reading _-Volt)	914	921	933							912		
Native Voltage												
Instant Off												
Polarization (Mv)												
Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle												

RESULTS	PASS		SYSTEM No. 2		PRODUCT Super		SIZE 8,000					
Test Locations	1	2	3	4	5	6	7	8	9	10		
Reading _-Volt)	976	968	986							941		
Native Voltage												
Instant Off												
Polarization (Mv)												
Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle												

COMMENTS / RECOMMENDATIONS: _____

I hereby certify that I have an understanding of the principles and measurements of all common types of techniques used to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell as applied to buried piping and tank systems.

Name of tester (Print) Tom Michel NACE Certification #: _____

Signature: _____ Date: 8/12/08

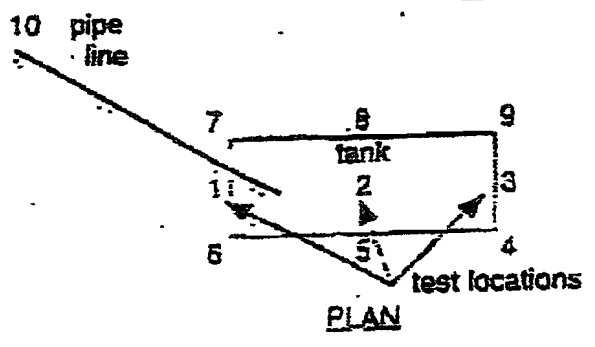
Exhibit C

(C)

**CORROSION PROTECTION TESTING FORM
UNDERGROUND STORAGE TANK (UST)**

(UST) Facility I.D. # 0- 9-382833
Test Date: 3-3-06

Facility Name Parkview Market
Address RTG. 394
W. LAKE RD
MAYVILLE, NY
Testing Company Name LEAK DETECTION
SYSTEMS INC
Telephone No. 814-866-5759
Equipment used to test STEEL TANK INST. DATA STP3



Sacrificial or Impressed System (circle one)
N/A = not applicable

Note: minimum test locations (1,2,3)

RESULTS	SYSTEM No. <u>03</u>						PRODUCT <u>SUPGR UNLD</u>				SIZE <u>4000</u>
Test Locations	1	2	3	4	5	6	7	8	9	10	
Reading (-Volt)	<u>1016</u>	<u>997</u>	<u>1007</u>							<u>981</u>	
Native Voltage											
Instant Off											
Polarization (mV)											

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

RESULTS	SYSTEM No.						PRODUCT				SIZE
Test Locations	1	2	3	4	5	6	7	8	9	10	
Reading (-Volt)											
Native Voltage											
Instant Off											
Polarization (mV)											

Corrosion Protection: TANK (PASS or FAIL or N/A) circle - PIPING (PASS or FAIL or N/A) circle

COMMENTS/RECOMMENDATIONS:

I hereby certify that I have an understanding of the principles and measurements of all common types of techniques used to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell as applied to buried piping and tank systems.
Name of Tester (Print): Tom Michal NACE Certification Number: _____
Signature: [Signature] Date: 3-3-06