UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

January 5, 2012

Mr. Stephen Valvo
1271 Routes 5 and 20
Silver Creek, N.Y. 14136

Valvo Convenience & Gas, Inc.
1271 Routes 5 and 20
Silver Creek, N.Y. 14136

Paul A. Chiaravalotti, Esq.
Attorney for Respondents
1967 Wehrle Drive, Suite 1
Williamsville, New York 14221

Re: Complainant's Rebuttal Prehearing Exchange, Docket No. RCRA-02-2011-7507

Dear Mr. Valvo and Mr. Chiaravalotti:

Enclosed, pursuant to the Prehearing Order issued on October 19, 2011 by the Hon. Barbara A. Gunning, are copies of the Complainant's Rebuttal Prehearing Exchange. If you have any questions, I may be reached at (212) 637-3167 or by email at kolenberg.beverly@epa.gov .

Sincerely,

Beverly Kolenberg

Beverly Kolenberg
Assistant Regional Counsel
Office of Regional Counsel

Enclosure

cc: Hon. Barbara A. Gunning
Karen Maples, Regional Hearing Clerk

UNITED STATES ENVIRON Original N AGENCY
F

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.	**Honorable Barbara A. Gunning,** Administrative Law Judge **Docket No. RCRA-02-2011-7507**

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

Complainant, the Director of the Division of Enforcement and Compliance Assistance for the United States Environmental Protection Agency ("EPA"), Region 2, submits this rebuttal prehearing exchange pursuant to the "Prehearing Order," dated October 19, 2011, and pursuant to 40 C.F.R. § 22.19(a).

PRELIMINARY STATEMENT

Complainant commenced this administrative action pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6991e (referred to collectively as the "Act"). The Complaint, Compliance Order and Notice of Opportunity for Hearing, issued on June 3, 2011, alleged that Respondents Valvo Convenience and Gas, Inc. and Stephen M. Valvo, individually, violated the underground storage tank regulations at three facilities in Silver Creek, New York. Respondents filed a joint Answer on July 12, 2011. Complainant subsequently submitted a Motion for Change in Name of Corporate Respondent, dated December 8, 2011, along with stipulations of the parties. By Order, dated December 21, 2011, Complainant's Motion was granted. Pursuant to the Order, Complainant will file an Amended Complaint shortly.

COMPLAINANT'S REBUTTAL ARGUMENT

Respondents' Prehearing Exchange raises two arguments. The first alleges an inability to pay a penalty because Valvo's Convenience & Gas, Inc. is seeking to pay $750,000 to its Creditors, not including EPA, through a plan of reorganization in the bankruptcy court. EPA objected to Respondents' plan because it did not address compliance with environmental law. To date, the key environmental compliance obligations sought from Respondents in this case have not been implemented, nor has Complainant been provided with a date certain for compliance. However, the facts related to Respondents' state of compliance with the underground storage tank regulations will be addressed in the hearing of this case, not in this rebuttal. To the extent appropriate, their ability to pay can also be addressed in the hearing.

The second argument is a legal one that asserts Complainant failed to comply with the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501 *et seq.*, and is thereby barred from seeking a penalty in this case. In support of the argument, Respondents state that "Complainant's Exhibits 17 through 23 show that these are Requests for Information," and they fail to "display a valid Office of Management and Budget ("OMB") control number." The argument is flawed and should be rejected.

Pursuant to Section 9005 of the Act, 42 U.S.C. §§ 6991d, for the purposes of "enforcing the provisions of this subchapter, any owner or operator of an underground storage tank shall, upon request of any officer, employee or representative of the Environmental Protection Agency . . . furnish information relating to such tanks, their associated equipment, [and] their contents" . . . . Similarly, 40 C.F.R. §280.34 imposes reporting requirements on owners or operators of underground storage tanks. The information sought in the Information Request Letters ("IRLs") cited by Respondents was part of EPA's ongoing investigation of possible noncompliance by Respondents with the underground storage tank regulations. The IRLs are exempt from OMB review pursuant to Section 3518 of the PRA, 44 U.S.C. § 3518, and the regulations implementing the statute at 5 C.F.R. § 1320.4(a)(2).

Subsection 3518(c)(2)(B)(ii) of the PRA, 44 U.S.C. § 3518(c)(2)(B)(ii), states that "this chapter shall not apply to the collection of information . . . during the conduct of . . . an administrative action or investigation involving an agency against specific individuals or entities."

In further support of the statutory provision, 5 C.F.R. § 1320.4(a) states that "this section shall not apply to collections of information: . . . (2) during the conduct of a civil action to which the United States or any official or agency thereof is a party, or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities." As a result, EPA Region 2 stated in its initial Information Request Letter to Respondents (Complainant's Exhibit 17) EPA's inquiries are not subject to the PRA.

CONCLUSION

For the foregoing reasons, the PRA does not represent a viable defense for Respondents and is not a bar to EPA's seeking a penalty and compliance order in this action.

Dated: January 5, 2012
New York, New York

Respectfully submitted,

Beverly Kolenberg

Beverly Kolenberg
Assistant Regional Counsel
Waste and Toxic Substances Branch
U.S. Environmental Protection Agency
290 Broadway, 17th floor
New York, New York 10007-1866
Kolenberg.beverly@epa.gov
212-637-3167
Fax: 212-637-3104

Re: In the Matter of Valvo's Convenience & Gas, Inc. and Stephen M. Valvo, individually
Docket Number RCRA-02-2011-7507

CERTIFICATE OF SERVICE

This is to certify that I have this day caused (or am causing) to be sent Complainant's Rebuttal Prehearing Exchange bearing Docket Number RCRA-02-2011-7507 in the following manner to the respective addressees below:

Original and One Copy
By Hand:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, New York 10007

Copies by Certified Mail,
Return Receipt Requested:

Valvo Convenience and Gas, Inc.
Stephen M. Valvo, individually
1271 Routes 5 and 20
Silver Creek, New York 14136

Copy by Regular Mail:

Paul A. Chiaravalotti, Esq.
Attorney for Respondents
1967 Wehrle Drive, Suite 1
Williamsville, New York 14221

Copy by Pouch Mail:

Hon. Barbara A. Gunning
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, D.C. 20160-2001

Dated: New York, New York

January 5, 2012

Beverly Kolenberg