UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG.II
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REGIONAL HEARING CLERK

In the Matter of: Andrew B. Chase, a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc., Respondents. Proceeding Under Section 9006 of the Solid Waste Disposal Act, as amended.	Honorable M. Lisa Buschmann, Presiding Officer Docket No. RCRA-02-2011-7503

MEMORANDUM OF LAW IN SUPPORT OF ORDERING INJUNCTIVE RELIEF AND ASSESSING THE PENALTIES THE COMPLAINT SEEKS AGAINST RESPONDENTS FOR THE VIOLATIONS THIS COURT FOUND IN ITS JUNE 2012 RULING ON COMPLAINANT'S PARTIAL ACCELERATED DECISION MOTION

PRELIMINARY STATEMENT

On behalf of Complainant, the Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency (EPA or Agency), Region 2, this memorandum of law is submitted in support of this Court issuing a judgment assessing the penalties the complaint seeks against Respondents (as more specifically detailed in the next section) for those violations this Court found in its June 21, 2012 ruling on Complainant's February 2012 motion for accelerated decision on liability and an order directing that payment of such penalties be made to the United States. The June 21, 2012 ruling, "Order On Complainant's Motion For Partial Accelerated Decision" (hereinafter "June 2012 order") found Respondents liable to the United States, and thus subject to a civil penalty, pursuant to Section 9006(d) of the

Solid Waste Disposal Act, as amended, 42 U.S.C. §6991e(d), for the following counts of the complaint: 1 through 16, 18, 19 and 21.

This memorandum of law is also submitted on behalf of Complainant in support of an order from this Court directing and enjoining Respondent Andrew B. Chase, to the extent he continues to own and operate underground storage tanks at the station identified as Station I, to comply with all applicable requirements set forth in 40 C.F.R. Part 280, the regulations that govern the operation, maintenance and closure of underground storage tanks (hereinafter also referred to as "USTs") and their connected piping (hereinafter the term "UST system" will be used to indicate an underground storage tank with its associated equipment, including its connected piping). Section 9006(a), 42 U.S.C. § 6991e(a), authorizes such an order directing compliance.

This memorandum and the declaration of Paul M. Sacker (and the exhibits attached thereto), executed on August 9, 2012 (hereinafter referred to as the "Sacker declaration"), are submitted pursuant to the July 13, 2012 order of this Court, as amended by this Court's subsequent July 25, 2012 Order. The July 13th order, "Order Granting Joint Motion To Cancel Hearing And For The Court To Issue An Initial Decision Based On The Written Record," stated that "Complainant shall file and serve its Initial Brief (and any accompanying affidavits, declarations, documents and memoranda) on or before August 6, 2012" (emphasis omitted),[1] and

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[1] The parties' joint motion that requested cancellation of the hearing originally scheduled to begin July 17, 2012 stated that the motion was "made upon the parties' agreement and acceptance of [seven express] conditions," and the Court's July 13th order noted that "[e]ach of the parties' seven requests, stipulations, and conditions listed in the Joint Motion appear reasonable and are accepted."

this deadline was extended by the July 25th Order to August 9, 2012.[2]

This memorandum, together with the Sacker declaration (and any exhibits attached thereto), constitutes Complainant's (also subsequently referred to as "EPA") Initial Brief for purposes of July 13th order and the July 25th order, and for purposes of this Court adjudicating and deciding the appropriate relief to be assessed and ordered against Respondents for those violations this Court found and declared in its June 21st order.

Complainant submits that, as will be demonstrated below and by the Sacker declaration, EPA is entitled to a judgment directing that Respondents (as specified in the section below) be assessed the civil penalties set forth in the complaint (*i.e.* that this Court order Respondents to pay such civil penalties to the United States) for the violations set forth in counts 1 through 16, 18, 19 and 21 of the complaint, as this Court found and declared in its June 21st order.[3] Each of these penalty amounts is reasonable in light of the seriousness of the respective violations and in consideration of Respondents' good faith efforts (or lack thereof) to comply with the applicable regulatory requirements. Further, each of these penalties is amply warranted and fully justified in light of the circumstances involving and surrounding the respective violations, and, accordingly, Complainant seeks for this Court to assess such penalties against Respondents for their previously established violations of the 40 C.F.R. Part 280 requirements and to order appropriate

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[2] The July 25th order, "Order On Motion For Additional Time To File Initial Brief," stated that "Complainant shall file and serve its Initial Brief (and any accompanying affidavits, declarations, documents and memoranda) on or before August 9, 2012" (emphasis omitted).

[3] As have been previously noted, the complaint contains 21 counts. EPA did not seek a judgment of liability for count 20 in its motion for partial accelerated decision, and it will not be seeking a ruling on either liability or penalty for this count. The Court's June 21st order denied accelerated decision on liability for count 17, holding "Complainant has not established the absence of genuine issues of material fact with respect to" that count. EPA will also not be seeking a ruling on either liability or penalty for count 17.

injunctive relief against Mr. Chase.

RELIEF SOUGHT BY COMPLAINANT

Complainant seeks a judgment and order directing Respondents (as particularly specified below in each number sub-paragraph) to pay a civil penalty to the United States for the 40 C.F.R. Part 280 violations listed in each of the following counts, as found and declared by this Court in the June 21st order), in the amounts specified below:

1) For **count 1** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$18,694**;

2) For **count 2** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$24,546**;

3) For **count 3** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$4,116**;

4) For **count 4** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$5,024**;

5) For **count 5** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$2,537**;

6) For **count 6** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$3,054**;

7) For **count 7** (involving Station I), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$4,296**;

8) For **count 8** (involving Station II), Respondents Chase Convenience Stores, Inc., and Andrew B. Chase be assessed, jointly and severally, and required to pay a civil penalty in the amount of **$40,480**;

9) For **count 9** (involving Station III), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$7,560**;

10) For **count 10** (involving Station III), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$23,764**;

11) For **count 11** (involving Station III), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$340.13**;

12) For **count 12** (involving Station IV), Respondents Chase Services, Inc., and Andrew B. Chase be assessed, jointly and severally, and required to pay a civil penalty in the amount of **$5,144**;

13) For **count 13** (involving Station IV), Respondents Chase Services, Inc., and Andrew B. Chase be assessed, jointly and severally, and required to pay a civil penalty in the amount of **$55,316**;

14) For **count 14** (involving Station IV), Respondents Chase Services, Inc., and Andrew B. Chase be assessed, jointly and severally, and required to pay a civil penalty in the amount of **$462**;

15) For **count 15** (involving Station V), Respondents Chase Commercial Land Development, Inc., and Andrew B. Chase be assessed, jointly and severally, and required to pay a civil penalty in the amount of **$24,066**;

16) For **count 16** (involving Station V), Respondents Chase Commercial Land Development, Inc., and Andrew B. Chase be assessed, jointly and severally, and required to pay a civil penalty in the amount of **$247.50**;

17) For **count 18** (involving Station VI), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$22,191**;

18) For **count 19** (involving Station VI), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **$19,095**; and

19) For **count 21** (involving Station VI), Respondent Andrew B. Chase be assessed and required to pay a civil penalty in the amount of **2,120**.

Complainant also seeks a judgment and order directing that Respondent Andrew B. Chase, to the extent he still owns and/or operates the underground storage tank systems at Station I, comply with all 40 C.F.R. Part 280 requirements applicable to such ownership and/or operation of said UST systems, including compliance with the following provisions that this Court found in the June 21st order Mr. Chase had violated:

1) 40 C.F.R. § 280.41(b)(1)(ii);

2) 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i); and

3) 40 C.F.R. § 280.20(c)(1)(ii), as incorporated into 40 C.F.R. § 280.21.

BACKGROUND: VIOLATIONS FOUND BY THIS COURT IN ITS JUNE 21ST ORDER

The facts underlying this proceeding, including both predicate background facts and the circumstances surrounding the 19 violations at issue, will not be repeated, as they have been discussed at length, most recently in the June 21st order.[4] Essential to a ruling on this motion, the violations this Court found and declared in its June 21st order will be summarized below:

For **Station I**, Respondent Andrew B. Chase violated these requirements of 40 C.F.R. Part 280 for the time periods listed for each count, and was found liable therefor, as follows:

a) **Count 1**, for pressurized piping connected to each of tanks 006A and 006B (two pipes total; the tanks contained gasoline), Mr. Chase failed to conduct release detection (either annual line tightness testing or monthly monitoring), a violation of 40 C.F.R. § 280.41(b)(1)(ii), for the period from April 24, 2008 to December 15, 2010 (pages 22, 24 of the June 21st order);

b) **Count 2**, for tanks 006A and 006B (which contained gasoline), Mr. Chase failed to conduct the required annual testing of the operation of the automatic line leak detector for two pressurized pipes, a violation of each of 40 C.F.R. § 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i), and such violations occurring over two separate time intervals — from at least May 1, 2006 until April 22, 2009, and from April 22, 2010 until September 7, 2010 (pages 22, 24-25 of the June 21st

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[4] These facts and circumstances have also been set forth at length in the papers Complainant submitted in support of her February 2012 motion for accelerated decision on liability, including in the joint stipulations agreed to by the parties, the February 2012 declaration of Paul Sacker and the January 2012 declaration of Jeffrey Blair.

order);[5]

c) **Count 3**, for tank 008 (a tank that had contained kerosene), Mr. Chase failed to provide overfill prevention equipment that met the mandated criteria for such equipment set forth in 40 C.F.R. § 280.20(c)(1)(ii), a violation of said provision as incorporated into 40 C.F.R. § 280.21, for the two years prior to and through April 30, 2008 (pages 8 - 9 of the June 21st order);[6]

d) **Count 4**, for tank 008 (as noted above, it had contained kerosene, and which tank was temporarily out of service after April 2008 and was removed from service in November 2009; page 4 of the June 21st order), Mr. Chase failed to provide release detection as required by 40 C.F.R. § 280.70(a), from April 2008 to November 30, 2009 (pages 9-10 of the June 21st order);[7]

e) **Count 5**, for tank 008 (same tank as involved in count 4), Mr. Chase failed to maintain corrosion protection as required by 40 C.F.R. § 280.70(a), from April 2008 to November 2009 (pages 9, 10-11 of the June 21st order);[8]

f) **Count 6**, for tank 008 (same as involved in counts 4 and 5), Mr. Chase failed timely to cap and secure this tank as required by 40 C.F.R. § 280.70(b), from July 30, 2009 to November 30, 2009 (pages 9, 11 of the June 21st order); and

g) **Count 7**, for tank 008 (same as involved in counts 4, 5 and 6), Mr. Chase failed either to permanently close this tank or have it inspected for proper operation by a qualified cathodic protection tester as required by 40 C.F.R. § 280.70(c), from April 30, 2009 to November 30, 2009 (pages 9, 11 of the June 21st order).

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[5] The June 21st order indicates the start of the first time interval as May 6, 2006. Pages 22, 25 of said order. The complaint (paragraph 85) and the Sacker declaration (paragraphs 54 and 55 indicate the violation commenced, for purposes of determining its extent in order to derive a penalty therefor, was May 1, 2006.

[6] Paragraph 149 of the Sacker declaration indicates a start date of April 1, 2006, but, as he stated therein, under either start date the penalty amount for this count would be the same.

[7] Paragraph 118 of the Sacker declaration indicates a more appropriate end date would be April 29, 2009 and not November 30, 2009. The penalty EPA seeks for this count ($5,024; paragraph 121 of the Sacker declaration) is less than the penalty listed in the complaint for this count.

[8] See paragraph 122 of the Sacker declaration for slight changes in the start and end dates for the violation in count 5.

For **Station II**, with regard to **count 8**, Respondent Chase Convenience Stores, Inc., and Respondent Andrew B. Chase violated, and were liable for such violations of, the requirement of 40 C.F.R. §280.44(a) as incorporated into 40 C.F.R. § 280.41(b)(1)(i) regarding tanks 001A, 001B (which contained gasoline) and 002 (which contained diesel fuel) in that these respondents failed to conduct the required annual testing of the operation of the automatic line leak detector for three pressurized pipes, with such violations having occurred from September 1, 2006 to April 6, 2009 (Pages 12-13 of the June 21st order).[9]

For **Station III**, Respondent Andrew B. Chase violated these requirements of 40 C.F.R. Part 280 for the time periods listed for each count, and was found liable therefor, as follows:

a) **Count 9**, for tanks 001 and 002 (containing gasoline), Mr. Chase failed to conduct triennial testing of the cathodic protection system of said tanks, a violation of 40 C.F.R. § 280.31(b), for the period of May 1, 2008 to April 6, 2009 (pages 14-15 of the June 21st order);

b) **Count 10**, for tanks 001 and 002 (the tanks at issue in count 9), Mr. Chase failed to conduct the required annual testing of the operation of the automatic line leak detector for two pressurized pipes, a violation of 40 C.F.R. §280.44(a) as incorporated into 40 C.F.R. § 280.41(b)(1)(i), for the period of November 1, 2006 to April 6, 2009 (page 13 of the June 21st order); and

c) **Count 11**, for tanks 001 and 002 (the tanks at issue in counts 9 and 10), Mr. Chase failed to maintain release detection records for the underground piping of these tanks, a violation of 40 C.F.R. § 280.45, for the period from August 26, 2007 to December 31, 2007 (pages 15-16 of the June 21st order).

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[9] Paragraph 141 of the complaint indicates each of tank 001A, 001B and 002 at Station II contained gasoline; this is somewhat erroneous. While tanks 001A and 001B contained gasoline, tank 002 contained diesel fuel. This was noted in EPA's memorandum of law supported in support of the motion for accelerated decision on liability, and further in paragraph 40 of the Blair January 2012 declaration and paragraphs 38 and 39 of the parties' joint stipulations, both of which were submitted in support of EPA's February 2012 motion for accelerated decision on liability.

For **Station IV**, Respondent Chase Services, Inc. (CSI), and Respondent Andrew B. Chase violated these requirements of 40 C.F.R. Part 280 for the time periods listed for each count, and were found liable therefor, as follows:

a) **Count 12**, for tank 001A (which contained diesel fuel), Respondents CSI and Mr. Chase failed to provide overfill prevention equipment that met the mandated criteria for such equipment set forth in 40 C.F.R. § 280.20(c)(1)(ii), a violation of said provision, for the period from August 26, 2008 to July 24, 2009 (pages 17-18 of the June 21st order);

b) **Count 13**, for tank 001A (which contained diesel fuel), Respondents CSI and Mr. Chase failed to conduct an annual test of the automatic line leak detector for the pressurized line connected to this tank, this violation having occurred from April 1, 2006 to April 6, 2009, and for tanks 003A and 003B (which contained gasoline), Respondents CSI and Mr. Chase failed to conduct an annual test of the automatic line leak detector for the pressurized line connected to each of these tanks, and these violations occurred from June 1, 2006 to April 6, 2009; and each of these three violations constituted a violation of 40 C.F.R. §280.44(a) as incorporated into 40 C.F.R. § 280.41(b)(1)(i) (pages 13-14 of the June 21st order); and

c) **Count 14**, for tanks 001A, 003A and 003B (the tanks at issue in count 13), Respondents CSI and Mr. Chase failed to maintain release detection records for the underground piping of these tanks, a violation of 40 C.F.R. § 280.45, for the period from August 26, 2007 to December 31, 2007 (pages 16-17 of the June 21st order).

For **Station V**, Respondent Chase Commercial Land Development, Inc. (CCLD), and Respondent Andrew B. Chase violated these requirements of 40 C.F.R. Part 280 for the time periods listed for each count, and were found liable therefor, as follows:

a) **Count 15**, for tanks 001A and 001B (which contained gasoline) and tank 002A (which contained diesel fuel), Respondents CCLD and Mr. Chase failed to conduct an annual test of the automatic line leak detector for the pressurized line connected to each of these tanks, each of these three violations constituting a violation of 40 C.F.R. §280.44(a) as incorporated into 40 C.F.R. § 280.41(b)(1)(i), which violations occurred from November 1, 2006 to April 6, 2009 (page 14 of the June 21st order); and

b) **Count 16**, for tanks 001A, 001B and 002A (the same tanks as in count 15), Respondents CCLD and Mr. Chase failed to maintain release detection records for the underground piping of these tanks, a violation of 40 C.F.R. § 280.45, for the period from August 26, 2007 to December 31, 2007 (page 17 of the June 21st order).

For **Station VI**, Respondent Andrew B. Chase violated these requirements of 40 C.F.R. Part 280 for the time periods listed for each count, and were found liable therefor, as follows:

a) **Count 18**, for tank 1 (which contained diesel fuel) and tanks 3A and 3B (which contained gasoline), Mr. Chase failed to conduct an annual test of the automatic line leak detector for the pressurized piping connected to each of these tanks, each of these three violations constituting a violation of 40 C.F.R. §280.44(a) as incorporated into 40 C.F.R. § 280.41(b)(1)(i), which violations occurred from December 31, 2008 to September 7, 2010 (pages 22, 25 of the June 21st order);

b) **Count 19**, for tanks 1, 3A and 3B (the tanks at issue in count 18), for pressurized piping connected to each of these tanks (three pipes total), Mr. Chase failed to properly and adequately conduct release detection (monthly monitoring; no evidence of any annual line tightness test), a violation of 40 C.F.R. § 280.41(b)(1)(ii), for the period from April 24, 2009 to December 15, 2010 (pages 23, 26 of the June 21st order); and

c) **Count 21**, for tank 2A (which contained "off-road" diesel fuel) and tank 2B (which contained kerosene), Mr. Chase failed to report within 24 hours from August 24, 2010 to the New York State Department of Environmental Conservation (NYSDEC) that the sensors on the tank 2A/2B system were in alarm, and he also failed immediately to investigate whether the alarm involved a release of regulated substances from these tanks, a violation of 40 C.F.R. § 280.50, which incorporates 40 C.F.R. § 280.52 (pages 19-21 of the June 21st order).

ARGUMENT

POINT I

EACH OF THE PENALTIES SOUGHT WAS DEVELOPED USING THE GUIDANCE OF THE UST PENALTY Guidance AND EACH IS REASONABLE UNDER UST STATUTORY CRITERIA, AND THIS COURT SHOULD ASSESS THE PENALTIES EPA SEEKS

The penalties EPA is seeking for this Court to assess — for those violations of the 40 C.F.R. Part 280 requirements this Court found against Respondents (either Mr. Chase individually or Mr. Chase and one of the corporate respondents), as set forth in the June 21st order — were developed in accordance with the guidance of the UST penalty guidance, and each of these penalties satisfies the criteria set forth in the applicable statutory provision — each penalty must be reasonable in light of the seriousness of the underlying violation and any good faith efforts to comply by the violator(s). As detailed in the accompanying Sacker declaration, each of the penalties for the 19 counts, developed using the guidance provided by the "U.S. EPA Penalty Guidance For Violations of UST REGULATIONS OSWER Directive 9610.12 November 14, 1990" (subsequently referred to as the "UST penalty guidance"), meets the statutory criterion that such penalties be reasonable. Further, as documented in the Sacker declaration, for each of the 19 separate penalties EPA is seeking (for those counts of the complaint for which this Court awarded EPA an accelerated decision on liability, *i.e.* counts 1 through 16, 18, 19 and 21), EPA gave considerations to those factors the UST statute mandates be considered in assessing a penalty. Case law that has developed under the governing rules of procedure, 40 C.F.R. Part 22, has upheld and affirmed that penalties for such or similar

violations. Accordingly, EPA seeks a judgment from this Court assessing the penalties as sought in the complaint (unless otherwise modified herein)[10] against Respondents, and a concomitant order directing payment to the United States be made in accordance with such judgment, as follows:

> a) Against Mr. Chase individually for **counts 1 through 7** (Station I violations), **counts 9 through 11** (Station III violations) and **counts 18, 19 and 21** (Station VI violations);
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> b) Jointly and severally against Mr. Chase and Respondent Chase Convenience Stores, Inc., for **count 8** (Station II violations);
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> c) Jointly and severally against Mr. Chase and Chase Services, Inc., for **counts 12 through 14** (Station IV violations); and
>
> d) Jointly and severally against Mr. Chase and Chase Commercial Land Development, Inc., for **counts 15 and 16** (Station V violations).

Further, in conjunction with a judgment assessing a penalty against Respondents as noted herein, EPA further seeks an order from this Court directing such Respondents to pay civil penalties to the United States.

EPA submits it has met its burden and is entitled as a matter of law for this Court to assess the civil penalties as sought herein and to order payment that payment thereof be made.[11]

I. The Statutory Authority and The Penalty Factors

Section 9006(d)(2)(A) of the Solid Waste Disposal Act, as amended (the Solid Waste Disposal Act, as amended, henceforth referred to as the "Act"), 42 U.S.C. § 6991e(d)(2)(A),

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[10] EPA is seeking a slightly reduced penalty, relative to the complaint, for counts 4 and 5.

[11] Pursuant to 40 C.F.R. § 22.24(b), "[e]ach matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence."

provides that "[a]ny owner or operator of an underground storage tank who fails to comply with[] any requirement or standard promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the Act]...shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation." Thus, a violator is subject to a penalty not just for each tank it owns or operates, but also for each day on which the violation occurred. The maximum amount of penalty per tank and per violation listed in the statute has been subsequently increased to account for inflation.[12] Under Section 9006(c) of the Act, 42 U.S.C. § 6991e(c), EPA may assess a civil penalty for an UST violation that EPA "determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."[13]

The Environmental Appeals Board (hereinafter also referred to as the "EAB"), in *In re Euclid of Virginia, Inc.*, RCRA (9006) Appeal 06-05 & 06-06, 13 E.A.D. 616, 623-24 (EAD 2008), addressed the purposes underlying Congressional enactment of the UST statute and the

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[12] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations that are now codified at 40 C.F.R. Part 19, which, *inter alia*, increase the maximum penalty EPA might obtain pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), to $11,000 for any violation occurring between January 30, 1997 and January 12, 2009, and to $16,000 for any violation occurring after January 12, 2009. *See, e.g., In re Norman C. Mayes*, RCRA (9006) Appeal No. 04-01, 10 E.A.D. 54, 57 n.2 (EAB 2005), "[T]wo penalty-related congressional acts direct EPA (and other federal agencies) to adjust maximum civil penalties on a periodic basis to reflect inflation."

[13] Besides the mandatory factors of seriousness of violation and good faith efforts to comply, EPA may consider, in determining an appropriate penalty for an UST violation, "[t]he compliance history of an owner or operator in accordance with this subchapter [Subchapter IX, 42 U.S.C. §§ 6991 - 6991i]" and "[a]ny other factors the Administrator [of EPA] considers appropriate."

broad scope of the objectives it seeks to attain:

> In 1976, Congress enacted RCRA [the Resource Conservation and Recovery Act, 'RCRA'] to better regulate the large and ever-increasing volume of solid and hazardous waste generated by individuals, municipalities, and businesses in the United States. RCRA restructured an existing statute, the Solid Waste Disposal Act of 1965, as amended in 1970, to eliminate the purported 'last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes.' In 1984, Congress amended RCRA to close loopholes it had identified, in that instance to address, among other things, accidental releases from USTs containing petroleum or other regulated substances. As so amended, RCRA directed the EPA to promulgate release detection, prevention, and correction regulations for USTs, with the goal of protecting human health and the environment.
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> Under the UST program created by Congress and implemented by EPA, owners of UST systems must, among other things: (1) implement spill and overfill control procedures; (2) provide for corrosion protection; (3) monitor tanks and underground piping for releases; (4) maintain records of release detection systems; (5) report accidental releases; (6) take corrective action in response to any such releases; (7) comply with requirements for appropriate temporary and permanent closure of USTs to prevent future releases; and (8) maintain evidence of financial responsibility for taking corrective action and compensating third parties in the event of accidental releases from USTs. 'New' UST systems, whose installation commenced or will commence after December 22, 1988, must incorporate protective technologies at the time of installation, while 'existing' UST systems, whose installation commenced on or before December 22, 1988, were required to have been upgraded by December 22, 1998, to incorporate all technological precautions needed to prevent, detect, and correct accidental releases of regulated substances, or, if not upgraded, permanently closed.

II. The UST Implementing Regulations

Section 9003(a) of the Act, 42 U.S.C. § 6991b(a) directs EPA to "promulgate release detection, prevention, and corrective regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment." The regulations EPA has developed governing the installation, operation, maintenance and closure of underground storage tanks, codified at 40 C.F.R. Part 280, have been promulgated

under that authority, and these regulations constitute the "requirement[s] or standard[s] promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the Act]." The EAB has noted the following on the intent behind the UST regulatory scheme:

> The UST regulations are part of a comprehensive regulatory program for USTs implementing Subtitle I of the Resource Conservation and Recovery Act ('RCRA'). The UST regulations, authorized by RCRA and promulgated in 1988, are designed to prevent, detect, and clean up releases from USTs containing petroleum and other regulated substances. ***
>
> One of the most important features of the UST regulations is the requirement for UST owners and operators to phase in modern design, construction, and installation standards for the purpose of preventing releases of regulated substances from USTs due to corrosion, overspilling, and overfilling. To this end, the UST regulations require that owners and operators of USTs installed after December 22, 1988, ('new UST systems') adhere to certain 'performance standards.' For 'existing UST systems' (those whose installation began before the above date), the regulations require that owners and operators either meet the performance standards for new USTs or upgrade their USTs not later than December 22, 1998. Upgrading can be accomplished by adding to USTs certain protective features, such as linings for tanks and pipes, corrosion protection, and equipment to prevent overspilling and overfilling [citations omitted].

In re Carroll Oil Company, RCRA (9006) Appeal No. 01-02, 10 EAD 635, 638-39 (EAB 2002).

A person's failure to comply with a regulatory requirement codified in 40 C.F.R. Part 280 constitutes a failure to comply with "any requirement or standard promulgated by the Administrator [of EPA] under section 6991b of this title [Section 9003 of the Act]" for purposes of Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A), and thus constitutes a "violation of any requirement of this subchapter [Subchapter IX, 42 U.S.C. §§ 6991 - 6991i]" for purposes of Section 9006 of the Act, 42 U.S.C. § 6991e. Accordingly, for any violation of a regulation set forth at 40 C.F.R. Part 280 (as this Court found occurred for 19 counts of the complaint, involving six service stations) the violator(s) of such provision is, *inter alia*, subject

to a civil penalty pursuant to Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A), as amended. Further, whenever there is an ongoing violation of a 40 C.F.R. Part 280 regulatory requirement regarding underground storage tank systems, Section 9006(a)(1) of the Act, 42 U.S.C. § 6991e(a)(1) provides, in part that EPA "may issue an order requiring compliance within a reasonable specified time period...."

The EAB recognized that, in light of the importance of its enactment of the UST provisions, Congress intended that there be strict adherence to and compliance with the UST regulatory scheme for the operation of underground storage tanks:

> Congress enacted the UST provisions of RCRA to address the long-unacknowledged problem of UST systems leaking gasoline and other contaminants into the environment. *** Congress therefore directed EPA to promulgate release detection, prevention, and correction regulations applicable to all owners and operators of new and existing USTs, as necessary to protect human health and the environment. *In doing so, Congress expressed its determination that USTs may no longer be used in the United States except in accordance with the comprehensive [UST] regulatory program* [emphasis added].

In re Norman C. Mayes, RCRA (9006) Appeal No. 04-01, 12 E.A.D. 54, 67-68 (EAB 2005).

In promulgating the Part 280 regulatory requirements, EPA acknowledged some of the difficulties it faced, including that "the regulatory universe is immense, including over 2 million UST systems estimated to be located at over 700,000 facilities nationwide." 53 *Fed. Reg.* 37082, 37083 (September 23, 1988). The purposes underlying EPA's promulgation of the UST regulatory standards underscore the need for effective enforcement of such rules (*id.* at 37096):

> [T]oday's final rule establishes comprehensive requirements for the management of a wide range of UST systems. These final standards for UST systems are designed to reduce the number of releases of petroleum and hazardous substances, increase the ability to quickly detect and minimize the contamination of soil and ground water by such releases, and ensure adequate cleanup of contamination. To

> do this, the standards in some way must affect every phase of the life cycle of a storage tank system: Selection of the tank system; installation, operation and maintenance; closure and disposal; and cleanup of the site in cases of product release.

It is against this statutory and regulatory backdrop that the appropriateness and importance of assessing the penalties against Respondents as EPA seeks must be considered, and it is also within this context that the necessity for doing so must be evaluated.

III. The UST Penalty Guidance

EPA has developed a policy document to be used as guidance in the development of penalties for UST violations. As discussed in paragraph 8 of the Sacker declaration, this document, entitled, "U.S. EPA Penalty Guidance For Violations of UST Regulations OSWER Directive 9610.12 [dated] November 14, 1990" (subsequently referred to as the "UST penalty guidance" or as the "UST penalty guidance") states on page 2 the purposes for which it is to be used:

> This document provides guidance to [EPA]...Regional Offices on calculating civil penalties against owner/operators of underground storage tanks (USTs) who are in violation of the UST technical standards and financial responsibility regulations. The methodology described in this guidance seeks to ensure that UST civil penalties, which can be as high as $10,000 [this amount has been increased since 1990] for each tank for each day of violation, are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance.

The UST penalty guidance further observes that it "presents guidance for determining the appropriate civil penalty amount for an administrative complaint and order...." *Id. See generally* Exhibit A to the Sacker declaration, a copy of the UST penalty guidance.

Part 22 tribunals recognize the role and importance of the UST penalty guidance. It serves "as [the] starting point for implementing the statutory penalty factors." *Carroll Oil*, 10

E.A.D. at 669. The EAB has observed it is more than simply the starting point; penalty policies represents a means "to implement the statutory directive[s]" in determining an appropriate administrative penalty. *In re B&R Oil Company*, RCRA (3008) Appeal No. 97-3, 8 E.A.B 39, 54 (EAB 1998). More specifically, the EAB has written in *In re William E. Comley, Inc. & Bleach Tek, Inc.*, FIFRA Appeal No. 03-01, 11 E.A.D. 247, 262 (EAB 2004), "[W]e have noted on numerous occasions that penalty policies serve to facilitate application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments." In the *Euclid* case, the EAB summarized the overall utility of guidance provided by the UST penalty guidance:

> The EPA has developed guidelines for the implementation of these statutory factors. The *U.S. EPA Penalty Guidance for Violations of UST Regulations* has been developed for the calculation of civil penalties against owners/operators of USTs who...are in violation of the UST technical standards and financial responsibility regulations. The UST Penalty Policy seeks to ensure that UST civil penalties are assessed in a fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance. To deter the violator from repeating the violation, and to deter other potential violators from failing to comply, the penalty policy seeks to place the violator in a worse position economically than if the violator had complied on time. The policy document achieves deterrence by removing any significant economic benefit that the violator may have gained from non-compliance (referred to as the economic benefit component of the penalty) and by assessing an additional amount, based on the specific violation and circumstances of the case, to penalize the violator for not obeying the law (referred to as the gravity-based component) [citation omitted].[14]

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[14] Despite the utility of the UST penalty guidance, it does not represent the ultimate benchmark for the legal validity of an UST penalty. *See, e.g., In re Morgan Properties, Inc.*, RCRA-UST-94-002, "Order on Motion for Accelerated Decision," (Judge Pearlstein, July 28, 1997), "The fact that the Region followed the [UST Penalty Guidance] is not alone probative on the issue of what penalty should ultimately be assessed" (at 18) (available at www.epa.gov/oalj). As the EAB noted in *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal 95-6, 6 E.A.B. 735, 759 (EAB 1997), because a penalty policy "has never been subjected to the rule making procedures of the Administrative Procedure Act, [it] thus does not carry the force of law."

In his declaration accompanying this memorandum, Mr. Sacker discusses how EPA, Region 2 uses the UST penalty guidance to develop a penalty for an UST violation. He discussed the initial steps in calculating an UST penalty (paragraphs 15 through 20 of the Sacker declaration), and then the steps taken to develop the gravity-based component (paragraphs 21 through 26), including the initial matrix value and the three classifications (major, moderate and minor) assigned to determine an extent of deviation from the regulatory requirements and the potential for harm (paragraphs 22 through 24), whether a violation should be assessed on a per-tank or per-facility basis (paragraphs 25 and 26), violator-specific adjustments (paragraphs 27 through 29), the environmental sensitivity multiplier (paragraphs 30 through 34), the days of non-compliance multiplier (paragraphs 35 through 37), and how these various factors are combined (paragraph 38). The Court is respectfully referred to the Sacker declaration for his more detailed explanations.

IV. Authority of This Tribunal to Impose Penalties

Pursuant to 40 C.F.R. § 22.27(b), this Court has the authority to impose the penalties EPA seeks to have assessed against Respondents. That provision provides, in relevant part:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific

reasons for the increase or decrease [15].

The Presiding Officer is vested with ample discretion in assessing penalty amounts, and he/she has much latitude in this area. While the Presiding Officer is obligated to give *bona fide* consideration to any applicable penalty policy ("shall consider any civil penalty guidelines issued" pursuant to the underlying statutory provision), they are not bound *per se* to adhere to and follow such guidelines. *See, e.g., Comley*, 11 E.A.D. at 262, while Presiding Officers "are required to consider any penalty policies issued under" the statute authorizing the proceeding, they "are not required to apply such penalty policies in calculating penalties." They are free to disregard such policies. *See, e.g., In re Chem Lab Products, Inc.*, FIFRA Appeal 02-01, 10 E.A.D. 711, 725 (EAD 2002). Vesting a Presiding Officer with discretion to disregard a penalty policy serves a salient function: "This freedom to depart from the framework of a *Penalty Policy* preserves an ALJ's discretion to handle individual cases fairly where circumstances indicate that the penalty suggested by the *Penalty Policy* is not appropriate." *In re FRM Chem, Inc., a/k/a Industrial Specialties*, FIFRA Appeal No. 05-01, 12 E.A.D. 739, 753 (EAB 2006). Where a penalty assessed by a Presiding Officer is within the range of penalties provided for by an applicable penalty policy, on appeal the Environmental Appeals Board will not substitute its judgment for that of the Presiding Officer absent a showing of clear error or that the Presiding Officer abused her discretion. *See, e.g., John A. Capozzi d/b/a Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, 11 E.A.D. 10, 32 (EAB 2003). Indeed, without a showing of abuse of discretion or clear error, the EAB will defer to a Presiding Officer's penalty determination "if it

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[15] The term "Act" is defined in 40 C.F.R. § 22.3(a) to "mean[] the particular statute authorizing the proceeding at issue."

falls within the range of the applicable" penalty guidance policy. *FRM Chem*, 12 E.A.D. at 753.

The discretion vested in Part 22 trial tribunals to determine appropriate penalties mirrors the standards in the Article III federal courts. In the federal trial courts, the assessment of a civil penalty is committed to the informed discretion of the trial court judge. *See, e.g., U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 230 n.6 (1975); *U.S. v. Ekco Housewares, Inc.*, 62 F.3d 806, 814 (6th Cir. 1995); *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1121 n.8 (2d Cir. 1975); *U.S. v. Phelps Dodge Industries, Inc.*, 589 F. Supp. 1340, 1362 (S.D.N.Y. 1984).[16]

V. The Penalties EPA Seeks Were Developed in Accordance with the UST Penalty Guidance

While the Presiding Officer must consider an applicable penalty policy, she need not follow it, and she has wide latitude in refusing to do so. Nonetheless, the provision that a Presiding Officer "consider" an applicable penalty policy is not precatory. As the EAB stated in *Chem Lab Products*, 10 E.A.D. at 725:

> The regulatory requirement that an ALJ 'consider' a penalty policy is not perfunctory. By requiring that such policies be considered, and further requiring an ALJ to explain his or her reasons for imposing a penalty different than the one proposed by complainant (which would typically be based on a penalty policy),

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[16] The EAB has frequently directed that EPA administrative tribunals look to the decisions of the federal courts construing and applying the comparable or analogous provisions of the Federal Rules of Civil Procedure in adjudicating questions arising under Part 22. *See, e.g., In re Pyramid Chemical Company*, RCRA (3008) Appeal No. 03-03, 11 E.A.D. 657, 683 n.34, 2004 WL 14481 (2004) ("Although the Board is not bound by the Federal Rules of Civil Procedure, the Board may, in its discretion, refer to the Federal Rules of Civil Procedure for guidance when interpreting EPA's procedural rules"); *In re Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004) ("As we have said in previous decisions, although the Federal Rules of Civil Procedure do apply to the proceedings before us, we look to the Federal Rules, including the summary judgment standard in Rule 56, for guidance"); In *re Chempace Corporation*, FIFRA Appeals Nos. 99-2 and 99-3, 9 E.A.D. 119, 135 n.22 (2000)("The Board is not bound by the Federal Rules of Civil Procedure and related practice; however, those rules and related practice can nonetheless by used to inform our analysis of relevant issues").

the regulations clearly intend a serious consideration of any applicable penalty policy.

As made abundantly clear in the Sacker declaration, EPA, Region 2, used the UST penalty guidance in determining the amount of each of the 19 violations that remain in contention.[17]

The violations at issue can be divided overall into six types:

a) the failure to conduct the required annual testing of the operation of the automatic line leak detector for pressurized pipes (counts 2 [Station I], 8 [Station II], 10 [Station III], 13 [Station IV], 15 [Station V] and 18 [Station VI]);

b) the failure to conduct (or properly conduct) release detection for pressurized piping, either the annual line tightness testing or monthly monitoring (counts 1 [Station I] and 19 [Station VI]);

c) the failure to comply with applicable requirements pertaining to a tank that had been temporarily taken out of service (counts 4, 5, 6 and 7, all at Station I);

d) the failure to provide overfill prevention equipment that met the mandated criteria for such equipment (count 3 [Station I] and count 12 [Station IV]);

e) the failure to conduct triennial testing of two USTs' cathodic protection system (count 9, at Station III);

f) the failure to report within 24 hours and to investigate immediately the possible release of regulated substances from underground storage tanks (count 21, at Station VI); and

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[17] So as not to be unduly repetitious or make this memorandum unnecessarily longer than it need be (especially in light of the 90-page length of Mr. Sacker's declaration), the undersigned will generally not repeat the statements made in the Sacker declaration but will simply refer this Court to the paragraphs therein in which the relevant assertions can be found. This Court is respectfully referred to Mr. Sacker's declaration.

g) the failure to maintain release detection records for underground piping (count 11 [Station III], count 14 [Station IV] and count 16 [Station V]).

Mr. Sacker abundantly documents that the penalty for each of the six automatic line leak detector violations was developed in accord with the guidance of the UST penalty guidance; these can be found in paragraphs 45 through 73. After this discussion he describes the use of the UST penalty guidance and the determination of the penalties for each of the counts at issue:

In paragraph 46 he discusses determining the matrix value for automatic line leak detectors violations (failure to conduct annual test of their operation), and in paragraphs 47 through 50 he provides an overview of how he determined the start and end dates of such violations. Paragraph 51 discusses generally the economic benefit component for the six automatic line leak detector violations. He then proceeds to detail the particulars of each of the six counts and how the determinations were made using the guidance of the UST penalty guidance, as follows:

For **count 2**: Mr. Sacker discusses starting and end dates[18] in paragraph 54; he discusses the economic benefit component, the days of non-compliance multiplier, the environmental sensitivity multiplier and other possible adjustment factors in paragraphs 55 and 56, and he provides a total dollar amount for this count in paragraph 57;

For **count 8**: Mr. Sacker discusses starting and end dates in paragraph 58; he discusses the economic benefit component, the days of non-compliance multiplier, the environmental sensitivity multiplier and other possible adjustment factors in paragraph 59, and he provides a total dollar amount for this count in paragraph 60;

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[18] Starting and end dates are important to know to determine the duration of a violation, which directly impacts the extent of the DNM (days of non-compliance multiplier).

For **count 10**: Mr. Sacker discusses starting and end dates in paragraph 61; he discusses the economic benefit component, the days of non-compliance multiplier, the environmental sensitivity multiplier and other possible adjustment factors in paragraph 62, and he provides a total dollar amount for this count in paragraph 63;

For **count 13**: Mr. Sacker discusses starting and end dates in paragraph 64; he discusses the economic benefit component, the days of non-compliance multiplier, the environmental sensitivity multiplier and other possible adjustment factors in paragraphs 65 and 66, and he provides a dollar amount for this count in paragraph 67;

For **count 15**: Mr. Sacker discusses starting and end dates in paragraph 68; he discusses the economic benefit component, the days of non-compliance multiplier, the environmental sensitivity multiplier and other possible adjustment factors in paragraph 69, and he provides a total dollar amount for this count in paragraph 70; and

For **count 18**: Mr. Sacker discusses starting and end dates in paragraph 71; he discusses the economic benefit component, the days of non-compliance multiplier, the environmental sensitivity multiplier and other possible adjustment factors in paragraph 72, and he provides a total dollar amount for this count in paragraph 73.

Turning to the counts involving release detection requirements for piping (failing to conduct or properly conduct monthly monitoring or annual line tightness test) and the determination of the respective penalty amount for each count under the UST penalty guidance, Mr. Sacker in paragraph 94 of his declaration elaborates on the matrix value for each count. Mr. Sacker then proceeds to describe the following matters regarding counts 1 and 19:

For **count 1**: Mr. Sacker discusses starting and end dates in paragraph 95; the economic benefit component in paragraph 96; the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible adjustment factors in paragraph 97, and he provides a total dollar amount for this count in paragraph 98; and

> For **count 19**: Mr. Sacker discusses starting and end dates in paragraph 99; the economic benefit component in paragraph 100, the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other adjustment factors in paragraph 101; and he provides a total dollar amount for this count in paragraph 102.

As for the four counts involving violations of the temporary closure provisions (failing to provide release detection; failing to provide corrosion protection; failing to cap and secure a temporarily closed tank; and failing to permanently remove from service a temporarily closed tank), Mr. Sacker describes determining the appropriate UST penalty guidance matrix value in paragraph 117, and he then continues to discuss the other UST penalty guidance factors for each of these four counts, as follows:

> For **count 4**: Mr. Sacker discusses starting and end dates in paragraph 118, the economic benefit component in paragraph 119, the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible adjustment factors in paragraph 120; and he provides a total dollar amount for this count in paragraph 121;
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> For **count 5**: Mr. Sacker discusses starting and end dates in paragraph 122; the economic benefit component in paragraph 123, and the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible adjustment factors in paragraph 124; and he provides a total dollar amount for this count in paragraph 125;
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> For **count 6**: Mr. Sacker discusses starting and end dates in paragraph 126; the economic benefit component in paragraph 127, the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible adjustment factors in paragraph 128; and he provides a total dollar amount for this count in paragraph 129; and
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> For **count 7**: Mr. Sacker discusses starting and end dates in paragraph 130; the economic benefit component in paragraph 131, and the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible

adjustment factors in paragraph 132, and he provides a total dollar amount for this count in paragraph 133.

Turning to the two counts involving violations of the overfill prevention requirements, Mr. Sacker discusses determining the appropriate UST penalty guidance matrix value for these violations in paragraph 148, and he then continues to discuss the other UST penalty guidance factors for each of these two counts, as follows:

For **count 3**: Mr. Sacker discusses starting and end dates in paragraph 149, the economic benefit component in paragraph 150, the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible adjustment factors in paragraph 151; and he provides a total dollar amount for this count in paragraph 152;

For **count 12**: Mr. Sacker discusses starting and end dates in paragraph 153; the economic benefit component in paragraph 154, and the days of non-compliance multiplier, the environmental sensitivity multiplier and possible other possible adjustment factors in paragraph 155; and he provides a total dollar amount for this count in paragraph 156.

Mr. Sacker's declaration then discusses count 9, the count involving a failure to comply with the corrosion protection testing requirement. He describes the various UST penalty guidance factors used to determine the amount of penalty for this count: determining the matrix value (paragraph 167), determining the start and end dates of the violation (paragraph 168), determining the economic benefit component (paragraph 169), determining the days of non-compliance multiplier, the environmental sensitivity multiplier and any violator-specific adjustments (paragraph 170) and the total dollar amount for this count (paragraph 171).

Mr. Sacker's next focus is on the failure to report within 24 hours and to investigate immediately the possible release of regulated substances from underground storage tanks. He

next discusses the various UST penalty guidance factors used to determine the amount of penalty for this count: determining the matrix value (paragraph 180), determining the start and end times for the violation (paragraph 181), determining the economic benefit component (paragraph 182), determining the days of non-compliance multiplier, the environmental sensitivity multiplier and any violator-specific adjustments (paragraph 183) and the total dollar amount for this count (paragraph 184).

The last set of violations for which Mr. Sacker discusses the use of the UST penalty guidance to determine a penalty amount involve counts 11, 14 and 16, the failures to maintain records of release detection monitoring for pressurized piping. He describes seriatim: determining the appropriate matrix value for each of these three violations (paragraph 193), determining the economic benefit and "unique" factors (paragraph 194), the start and the end dates of these violations (paragraph 195), the economic benefit component and the days of non-compliance multiplier (paragraph 196), violator specific adjustments (paragraph 197), the environmental sensitivity multiplier (paragraph 198) and integrating all these disparate factors to derive a total penalty for each of these record-keeping violations (paragraph 199).

As the above should make clear, each of the 19 penalties for the violations in this proceeding was determined by Mr. Sacker using the guidance set forth in the UST penalty guidance. In deriving the penalty amounts, he did not act arbitrarily. He calculated a reasonable penalty, giving due consideration to the 1990 UST penalty guidance. The Court is respectfully referred to the respective paragraphs referenced in the above discussion in this section.

VI. Each of the Penalties EPA Seeks Satisfies the Statutory Criteria

As noted above, the UST statute states that, in assessing a penalty(ies) for an UST violation(s), EPA must determine that such penalty is "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." Section 9006(c) of the Act, 42 U.S.C. § 6991e(c). The legal validity of a penalty is thus dependent upon whether it meets these criteria — the penalty must be reasonable in the context of the serious nature of the violation for which the penalty is being sought and in the context of any good faith efforts by the violator to comply with the applicable requirements, which, in this proceeding, are the 40 C.F.R. Part 280 regulations. These are the only two express mandatory statutory conditions for evaluating the legal validity of an UST penalty.[19] In 2005, a provision was added to the UST statute listing additional conditions for consideration in assessing a civil penalty: an owner/operator's compliance history and "[a]ny other factor the Administrator considers appropriate." EPA, however, is not required to consider these factors, as the prefatory language is conditional: "Both of the following *may be* taken into account in determining the terms of a civil penalty" for an UST violation. Section 9006(e) of the Act, 42 U.S.C. § 6991e(e). A plain reading of this provision suggests consideration of these other factors is discretionary. Some courts have, nonetheless, given an expansive reading to language akin to that found in Section 9006(c) of the Act, 42 U.S.C. § 6991e(c), the provision setting forth the

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[19] *Compare, e.g.*, Section 16(a)(2)(B) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2)(B), where the statute provides a number of factors EPA must consider in assessing a penalty thereunder:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

"seriousness of the violation" and "good faith efforts to comply" language.

In Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3), that part of the Act concerned with solid and hazardous waste and not underground storage tanks, the statute provides that, "In assessing such a penalty [thereunder], the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." In *U.S. v. Ekco Housewares, Inc.*, 853 F. Supp. 975, 989 (N.D. Oh. 1994), *aff'd in part, rev'd in part*, 62 F.3d 806 (6th Cir. 1995), the district court stated that, in applying the Section 3008(a)(3) language, courts should consider a whole range of other factors, to wit: "the nature, circumstances, extent and gravity of the violations...the violator's ability to pay, prior history of such violations, and the degree of culpability...economic benefit or savings (if any) resulting from the violation...[and] such other matters as justice may require."

Whether one adopts the more narrow (and literal interpretation) of the UST enforcement penalty language or the more expansive and liberal reading of that provision, each of the penalties sought for the counts in question in this proceeding satisfies the statutory criteria that they be reasonable, given all the attendant and surrounding circumstances of the violations. Indeed, "[t]he reasonableness of a penalty, however, is a fact-driven question, one that turns on the circumstances and events peculiar to the case at hand." *United States v. Ekco Housewares, Inc.*, 62 F.3d 806, 816 (6th Cir. 1995). Mr. Sacker has documented in his declaration the many facts that cogently demonstrate the reasonableness of these penalties; his recitation of the relevant and operative facts in the declaration establishes irrefragably the reasonableness of the penalty assessments EPA is seeking.

The violations will be discussed below in the same order as they were presented in the

prior section.

A. The Automatic Line Leak Detector Violations

As this Court found, at each of the six service stations, Respondents (Mr. Chase for Stations I, III and VI; Mr. Chase and Chase Convenience Stores, Inc., for Station II; Mr. Chase and Chase Services, Inc., for Station IV; and Mr. Chase and Chase Commercial Land Development, Inc., at Station V), failed to conduct the annual test for the operation of the automatic line leak detectors (subsequently also referred to as ALLDs). The importance of a properly functioning ALLD, which can only be ensured through regular testing, was set forth in paragraph 76 of the Sacker declaration, where he states:

> A properly functioning automatic line leak detector is a key aspect to ensuring that underground storage tanks holding substances such as gasoline or diesel fuel are operated in an environmentally safe and responsible manner and that leaks from pipes connected to such tanks are detected and immediately responded to. An ALLD in proper working condition is a critical component to ensuring that UST systems are operated and maintained in compliance with the requirements set forth in 40 C.F.R. Part 280. An ALLD constitutes the first line of defense in preventing a release of the contents of an UST system that uses pressurized piping to deliver product to customers. Piping is an important source of releases that occur from UST systems, and an automatic line leak detector serves as a primary defense against leaking pipes and helps prevent releases from an underground storage tank's pressurized piping from getting into the environment.

Because it is so important to the responsible and environmentally safe management of an UST that an ALLD be kept in proper working order, it is important that it be tested regularly and periodically (paragraph 78 of the Sacker declaration), as the Part 280 regulations require, in order to maintain the ALLD in proper working condition. Mr. Sacker has elaborated on this in paragraph 77 of his declaration:

> As I have previously stated, in my February 10, 2012 declaration (paragraph 59), '[a]n automatic line leak detector is at the interface of a tank and its piping and is intended to shut off the pump associated with an UST as soon as a release is detected in a pipe through a pressure drop.' An ALLD must be designed to alert an operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm and must detect leaks of three gallons per hour at 10 pounds per square inch line pressure within one hour. The annual test of the operation of the leak detector required by 40 C.F.R. § 280.44(a) is necessary to ensure that the ALLD is indeed capable of detecting such a release. An ALLD that is not functioning properly, or fails to detect a drop in pressure while an UST is being used to pump product, such as gasoline or diesel fuel, to a customer, creates a significant risk that a leak will not be prevented. The risk of a release to the environment is greatest during the active use of the pressurized pump of an underground storage tank to deliver product to a customer, as the product is under pressure and is being forced through the system. A leak in the piping could potentially propel this product at high pressure into the environment, and this could occur repeatedly over the course of a day as the UST is accessed. An automatic line leak detector is essential to the responsible and environmentally safe operation of underground storage tank systems in which gasoline, diesel fuel, kerosene or the like is contained [brackets in original].

A failure to test regularly elevates the risk that an ALLD will not function as intended, which in turn elevates the risk that a leak in a pipe, which is conveying a regulated substance under pressure, would enter the environment. Paragraph 78 of the Sacker declaration. In fact, the tanks involved in the six separate ALLD violations contained either gasoline or diesel fuel, the dangers of which, when leaking from piping, are quite obvious and well-known. *See* paragraphs 80 and 81 of the Sacker declaration in which he gives an overview of the some of these dangers, including to the communities (generally) in which the stations were located. This concern is compounded because of the size of the tanks involved in the ALLD violations: all told, they held nearly 120,000 gallons, the equivalent of nearly one-half million quarts. Paragraph 78 of the Sacker declaration.

Given these factors, Mr. Sacker has concluded that each of the penalties sought for the

ALLD violations is reasonable. Paragraphs 78 through 80 demonstrate the seriousness of these violations and the risks that result from failing to properly test the operation of an ALLD. The protracted periods of time over which these violations occurred (paragraph 83 of the Sacker declaration) magnify the seriousness of the ALLD violations.[20] These violations went uncorrected for extended periods of time, multiplying the risks involved. Further, three of the service stations were located in environmentally sensitive areas (paragraphs 85 and 86 of the Sacker declaration). All of these factors unquestionably reveal the seriousness of the ALLD violations.

In addition, the prolonged periods of non-compliance, and the repeated instances thereof, attest to Respondents' lack of good faith efforts to comply with the ALLD testing requirements. Paragraph 87 of the Sacker declaration. This non-compliance continued even after Mr. Chase was put on notice about the need for ALLD performance tests. The facts depict owners and operators as virtually blind to the requirement for annual ALLD performance tests; certainly Respondents did not attach a high priority to complying with the regulatory requirement for such annual testing. As Mr. Sacker notes in paragraphs 89 and 90 of his declaration:

> Even after Mr. Chase had express notice of the ALLD test requirements, he still failed to conduct such tests at Stations I and VI. The second violation at Station I (count 2), running for the period April 22, 2010 through September 7, 2010, occurred even though an ALLD test had been performed for the piping on that same tank system in April 2009.

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[20] If the statutory maximum of $10,000 (disregarding any subsequent inflation adjustments) were applied on a per-day basis, as the statute allows [42 U.S.C. § 6991e(d)(2)], and if all the days of non-compliance were tabulated (paragraphs 55, 56, 59, 62, 65, 66, 69 and 72), the penalty EPA could seek just for the six separate ALLD violations would exceed $67 million. This figure does not include any of the other violations.

> All these facts attest that Respondents did not attach a high priority to timely complying with the ALLD annual testing requirements, and that lack of priority and concern demonstrates that Respondents' good faith efforts to comply were minimal, at best.

Such facts led Mr. Sacker, based on his years as a Region 2 employee working in UST matters, to conclude that each of the penalties sought for the ALLD violations is reasonable and appropriate, and that such penalties satisfy the statutory standards for the valid assessment of UST penalties. Paragraph 91 of the Sacker declaration.

Mr. Sacker's concerns about the dangers inherent in Respondents' failures to perform the annual ALLD performance tests dovetail with what EPA itself has found regard underground storage tank systems. For example, "Most releases do not come from the tank portion of UST systems, because piping releases occur twice as often as tank releases." 53 *Fed. Reg.* 37082 at 37088 (September 23, 1988). *See also* 53 *Fed. Reg.* at 37142: "Release detection is an essential backup measure to prevention, particularly for...pressurized piping because they are more prone to releases." *Id.* at 37,146: "EPA's information on the causes of release clearly indicates that pressurized piping represents a major source of uncontrolled releases."

Part 22 tribunals, both trial and appellate, have recognized the importance of the ALLDs to the UST scheme and their role in the responsible management of UST systems. *See*, *e.g.*, *Euclid*, where the EAB, in upholding a Presiding Officer's finding of a failure to conduct ALLD testing and the penalty therefor, observed that "Line release detection is also a critical element of the UST regulations" 13 E.A.D. at 695 (the EAB assessed a total penalty of over $3.1 million for a number of UST violations).

This Court should assess in full the penalties the complaint seeks for the six separate

ALLD violations.

B. Release Detection for Pressurized Piping Violations

This Court has found that Respondent Andrew B. Chase failed to conduct release detection on pressurized piping (either the annual line tightness test or monthly monitoring, count 1 at Station I) and failed properly to conduct monthly monitoring (count 19, at Station VI). The importance of these requirements, which Mr. Sacker termed "a vital linchpin to the overall Part 280 regulatory scheme" (paragraph 106), was summarized in paragraph 105 of the Sacker declaration:

> Release detection requirements, including testing to ensure that equipment designed to prevent releases and/or alert the owner/operator to a release(s), constitute the very heart of the Part 280 regulations: these requirements represent core requirements, a vital component in the regulatory scheme to prevent, or at least minimize, releases of regulated substances such as gasoline or diesel fuel to the environment. Release detection is a key preventive measure to achieve the goal underlying the Part 280 regulations: to ensure the safe and environmentally responsible maintenance and operation of underground storage tanks, a really salient concern given their overall ubiquity throughout the United States.[21]

The serious nature of these violations was compounded by the extraordinary lengths of time these violations continued: nearly 1,000 days for the violation in count 1, and some 16 months for the violation in count 19 (paragraph 108 of the Sacker declaration). These violations involved multiple pressurized lines, and the tanks contained gasoline or diesel fuel, each associated with a host of dangers. Paragraphs 109 and 110. Similarly, these long periods of non-compliance demonstrated a lack of good faith, indeed a lack of concern, as "much of [the] failure

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21 "The most significant problem is the sheer size of the regulated community. Nationally, over 700,000 UST facilities account for about 2 million UST systems, an average per state of about 14,000 UST facilities and 40,000 UST systems." 53 *Fed. Reg.*37,082, 37,095 (September 23, 1988).

consisted of his simply not doing anything." Paragraph 111 of the Sacker declaration. The importance of the need to assess the penalties sought is underscored because Mr. Chase had ample notice on a number of occasions of the need to conduct one of these two procedures but never demonstrated to EPA that he had complied: "on at least six occasions Mr. Chase was advised of the need to conduct one of these procedures, but he never produced evidence of his complying with the applicable regulation up through his December 15, 2010 information request letter response." Paragraph 112 of the Sacker declaration. Mr. Chase's actions betray the low priority he attached to compliance at these two stations with these release detection violations. Paragraph 113 of the Sacker declaration.

All of these circumstances were crucial in Mr. Sacker's conclusion and steadfast belief that each of these two penalties is reasonable in light of all operative circumstances. His conclusion that these are valid and justifiable penalty assessments is strongly supported by the attendant facts, and this Court should assess each of these penalties in full. *See* paragraph 114 of the Sacker declaration.

EPA tribunals recognize the importance of ensuring proper release detection. *Compare*, *e.g.*, I*n re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, ___E.A.D.___ (EAB 2009), slip opinion at 22-25 (in holding that the proper potential for harm classification for lack of release detection is major, the EAB observed):

> Failure to regularly ensure that release detection equipment functions properly unquestionably threatens the UST regulatory scheme and program. Indeed, Congress mandated release detection for tanks when it enacted the UST program. and EPA emphasized...how important release detection is to preventing environmental harm.*** Moreover, EPA observed that release detection can minimize releases should an UST owner or operator fall short of meeting other UST program requirements, such as corrosion standards [citations omitted].

C. The Temporary Closure Violations

At Station I, Mr. Chase had temporarily taken one tank out of service, and he then failed to comply with a number requirement regarding the handling and permanent closing of such a tank. The four violations were the failure to maintain release detection, the failure to maintain cathodic protection, the failure to cap and secure the temporarily closed tank and the failure timely to close on a permanent basis this tank. Each of these measures is necessary. For example, release detection is needed to ensure a tank, still containing a regulated substance (the tank in question had 31.5 inches of residue of kerosene; paragraph 135 of the Sacker declaration), does not leak, especially since it is likely not being monitored and observed with the same degree of regularity and frequency as an operating tank. Paragraph 136 of the Sacker declaration. Such a tank is also vulnerable to corrosion or otherwise having its structural integrity compromised. If such a tank were put back in service, a leak might well result. Paragraph 137 of the Sacker declaration. The cap and secure requirement is designed to prevent the use of such a tank, with its greater risk of a release. The closure requirement is intended to ensure that tanks that may have corroded are permanently taken out of service. Paragraphs 138 and 139 of the Sacker declaration. Each of these provisions plays an important role in the responsible management of UST systems. As Mr. Sacker explains in paragraph 140:

> The temporary closure requirements are thus important provisions for the environmentally safe and responsible management of underground storage tank systems. These regulations serve to ensure that the termination of service of USTs takes place in a manner that minimizes the risks associated with owners or operators taking them out of service, and these regulations are an important part of the overall 40 C.F.R. Part 280 objective of protecting human health and the environment from the dangers inherent in the use of underground storage tanks that contain petroleum-based substances as kerosene.

Based upon these facts, the penalties EPA seeks for these four counts are reasonable, especially given the extended periods of time the various regulations went unheeded by Mr. Chase, from about seven months to over 16 months. As with his overall operation of the USTs at the service stations, this neglect demonstrated his inattentiveness to regulatory requirements, *i.e.* his lack of good faith efforts to comply with what the regulations prescribe. What underscores this lack of good faith is that Mr. Chase indeed had been given express notice of the regulatory requirements, and, with the release detection requirements, the situation was only rectified when the tank was taken out of service seven months later (and not through any affirmative effort on Mr. Chase's part to comply with the substantive requirements). As Mr. Sacker observed (paragraph 144), "Mr. Chase did not give the attention to the regulatory requirements that are triggered when an underground storage tank is temporarily taken out of service."

Based on his knowledge of the circumstances relevant to the temporary closure violations, Mr. Sacker deems that each of the four penalties EPA seeks for counts 4 through 7 is reasonable and appropriate.

This Court should assess the penalties EPA seeks against Mr. Chase for each of these temporary closure violations.

D. Overfill Prevention Violations.

This Court found two overfill prevention violations: for count 3 at Station I and for count 12 at Station IV. Overfill prevention equipment serves important roles, which Mr. Sacker discussed in paragraph 158 of his declaration:

> The importance of the requirement for functional overfill prevention equipment should be self-evident: to prevent overfilling and thus spillage to the surrounding environment of the petroleum-based products during the process of filling an UST system. Such equipment is intended to prevent harm to the people working with underground storage tanks, be they those working at retail gasoline stations, those who deliver substances to such stations, and retail customers purchasing motor fuel. These requirements are also intended to prevent spills that would allow gasoline and other products to enter the environment, perhaps then contaminating drinking water supplies, natural water bodies, agricultural areas, or residences. The danger of faulty or non-functioning overfill prevention equipment also includes the danger of an explosion or a fire, especially when the overfilled product is something as inflammable as gasoline or kerosene.

These requirements implicate basic safety concerns, including those pertaining to the dangers of fire and explosion. Paragraph 159 of the Sacker declaration.

Based on such circumstances, he deems the penalties sought as reasonable. He notes several specific concerns: the violation at Station IV came to an end (for purposes of this proceeding) not because Respondents affirmatively undertook compliance but because the station was sold in July 2009; Station IV overlies an area with bodies of water used as a source for drinking water; and the long periods of disregard of the regulatory requirements by Mr. Chase and Chase Services, Inc. (the latter for Station IV), a disregard that oppugns the existence of good faith efforts to comply. Paragraph 162 of the Sacker declaration. In light of these considerations, Mr. Sacker affirms his belief in the reasonableness of the penalty EPA seeks for these two violations. Paragraph 164 of the Sacker declaration.

In light of the facts noted above and the reasonableness of the penalty computation, this Court should assess the penalty for each of counts 3 and 12 in the amount EPA is seeking.

E. Corrosion Protection Testing Violation

This violation concerns only count 9 at Station III. Mr. Sacker has detailed the

importance of this requirement in paragraph 172 of his declaration:

> The requirement for regular testing of those underground storage tanks equipped with cathodic protection function is important to ensure the structural integrity of underground storage tanks. Such integrity is a primary safeguard against leaks from a tank containing petroleum products into the environment, leaks that might contaminate drinking water supplies, natural water bodies, agricultural areas, or residences. Maintaining such integrity accordingly plays an important role in effecting the safe and environmentally responsible operation and maintenance of underground storage tanks that 40 C.F.R. Part 280 seeks.

Further, regular corrosion protection testing "keeps a vigilant eye on the integrity of the tank system." Not performing such testing might have compromised the safety of these tanks, an especially pressing concern because these tanks contained gasoline. Paragraph 173 of the Sacker declaration.

These facts lead Mr. Sacker to conclude that the penalty EPA is seeking for count 9 is reasonable. The serious concerns about a tank for which the required cathodic protection is not being performed are magnified because of Mr. Chase's disregard (or neglect) of the regulatory requirement that lasted through the time the station was sold; he "never provided any evidence of a test conducted prior to July 2009," a fact that lends credence to the view that Mr. Chase "may never have addressed this requirement." Paragraph 176 of his declaration.

Mr. Sacker fully supports that the penalty EPA is seeking for this count is warranted under the standards of the UST statutory penalty provision.

This Court should assess against Mr. Chase the penalty EPA seeks to obtain for count 9.

F. Reporting/Immediate Investigation of Suspected Release Violation

This violation, occurred at Station VI and involved a compartmentalized underground storage tank consisting of two compartments, one that contained "off-road" diesel fuel, the other

contained kerosene. The significance of this violation implicates the joint federal-state involvement in the regulation of underground storage tanks. As Mr. Sacker explained in paragraph 185 of his declaration:

> The significance of the requirement that an owner or operator immediately report a suspected release to the New York State Department of Environmental Conservation (NYSDEC) is to ensure that the State is kept fully informed in a prompt manner of all suspected releases of petroleum-based substances from underground storage tanks. The underground storage tank law is part of overall law on solid and hazardous waste (formally called the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k), and Congress instructed EPA to partner with the states in implementing the law on solid and hazardous waste. As part of the states' participation in this overall scheme to govern the generation, management, handling and disposal of solid waste (including the management of tanks), it is important that states be given prompt notice of suspected releases from underground storage tanks.

This violation also implicated a direct safety concern: an owner or operator must immediately investigate a suspected release from an underground storage tank "so that corrective measures be taken, as well that preventative measures be taken to ensure no repetition or recurrence." The more promptly a possible suspected leak is investigated, the more quickly it will be uncovered and rectified. Paragraph 186 of the Sacker declaration.

Mr. Sacker deems this violation "sufficiently serious" for this Court to assess the penalty sought. While the overall time period of non-compliance in this situation is gauged in hours, Mr. Chase's not complying with the regulatory mandate "should be evaluated in light of his longstanding ownership and operation of underground storage tanks." Paragraph 187 of the Sacker declaration.

Based upon his evaluation of the circumstances, Mr. Sacker concludes that the penalty EPA is seeking for this one violation is reasonable and is justified under the UST statutory

penalty standards.

This Court should assess the penalty EPA seeks for the count 21 violation against Mr. Chase.

G. Failure to Maintain Records of Release Detection Monitoring Violations

There were three such violations, one occurring at Station III, one at Station IV and one at Station V. Mr. Sacker's declaration records why he deems these violations, for which in the aggregate a penalty of approximately $1,050 is being sought, significant (paragraph 200 of his declaration):

> The significance of these record-keeping violations arises from the reasons that records are to be maintained: the records afford the regulated party the means to check whether its piping is experiencing releases (small or large). In addition, the records provide a method by which EPA can readily confirm with a high degree of certainty whether an owner or operator of USTs is complying with specified release detection monitoring requirements. Without such records being developed and kept, EPA would be unable readily to ascertain whether an owner/operator complies with such requirements or violates them, and would then have to base its conclusion from presumption, inference and the entirety of the circumstances. The record-keeping requirements represent the mechanism, the means, for the EPA efficiently and effectively to keep abreast of the extent and rates of compliance, and a failure to comply with these record-keeping requirements might indicate (as in the present case) non-compliance. Thus insisting on the records being kept may help deter releases and is one concrete way EPA can insist and then confirm that owners/operators are complying with the underlying regulatory requirements.

Despite the relatively low level of penalty being sought for these violations, that reason does not militate for taking these violations "lightly" or for "dismiss[ing]" them. Paragraph 201 of the Sacker declaration. These violations evince a pattern seen with other violations: for over four months Respondents did not comply with the recordkeeping requirements, even after EPA inquired and requested records on the release detection being conducted on the piping. In

keeping with his actions involving other violations, Mr. Chase "consistently ignored [EPA's request for information on the piping] and focused on providing records that only pertained to tanks." Paragraph 202 of the Sacker declaration.

Against this background, Mr. Sacker concludes that the penalties sought for each of these counts is reasonable and appropriate.

This Court too should deem these violations to be reasonable and appropriate, and it should assess the penalties against Respondents as EPA is seeking.

POINT II

THE TOTALITY OF THE CIRCUMSTANCES — RESPONDENTS HAVING OWNED AND OPERATED 19 UNDERGROUND STORAGE TANKS AT SIX SERVICE STATIONS FOR A NUMBER OF YEARS, THE LONG PERIODS OF NON-COMPLIANCE WITH MANY REGULATORY REQUIREMENTS, INCLUDING SUBSEQUENT TO EPA HAVING GIVEN EXPRESS NOTICE OF REGULATORY NON-COMPLIANCE — UNDERSCORES THE NEED AND IMPORTANCE FOR THIS COURT TO ASSESS THE PENALTIES EPA SEEKS

Independent of the considerations discussed above, a number of factors in the aggregate militate for this Court to assess the penalties EPA is seeking. These factors touch upon the very purposes underlying civil penalties and the objectives to be achieved by their enforcement.

As Mr. Sacker concluded regarding the violations at issue, and as Complainant submits this Court should also conclude, the violations found by this Court in its June 21st ruling on EPA's motion for accelerated decision on liability are serious violations. That the record is devoid of evidence that actual harm resulted from any of violations found by this Court is not relevant to this analysis. In an UST case turning on the question whether non-compliance with the requirement for permanent closure of a tank merited a $25,000 penalty, the Environmental

Appeals Board held, "This violation is serious because of its potential for harm, regardless of whether actual harm occurred. Proof of actual harm to the environment need not be proven to assess a substantial penalty" (judgment of Presiding Officer awarding $25,000 penalty affirmed). *In re V-1 Oil Company*, RCRA (9006) Appeal No. 99-1, 8 E.A.D. 729, 755 (EAB 2000). The EAB in *Carroll Oil Company* noted its "previous decisions...holding that 'seriousness of a violation' is or can be based on *potential* rather than actual harm." 10 E.A.D. at 657. It defies logic to argue that in a case involving 19 violations at six service stations involving nearly 20 underground storage tanks and their associated piping, with some violations lasting in the years, the violations were not serious, especially since they involved some of the most fundamental requirements of the 40 C.F.R. Part 280 regulations, including annual testing of the operation of ALLDs, procedures to ensure the integrity of both tanks and their piping and other provisions intended to protect people and the environment from the hazards of petroleum-based motor fuels.

Violations of the UST rules such as those for which this Court has found liability, with a significant potential for harm and with many having a fairly lengthy duration, call for penalties with "teeth," penalties that "sting." These violations and the concomitant need to enforce against the violators, go to the very reasons for the existence of civil penalties. As the *Ekco Housewares* trial court noted, when a trial judge exercises her discretion in assessing a civil penalty (853 F. Supp. at 989): "[T]he Court should give effect to a major purpose of a civil penalty: deterrence. *** Even if a defendant is unlikely to repeat its violation, a substantial penalty is warranted to deter others." On appeal before the Sixth Circuit, one issue was defendant's "conten[tion] [that] the amount of the penalty imposed exceeds the amount necessary to deter it from future violations." Rejecting this argument, the court of appeals held: "The district court properly

considered the deterrence effect not just on [defendant], but on the regulated community as a whole." 62 F.3d at 816. The principle that a penalty assessed should deter violations not just by the defendant against whom the assessment will be made but against others who might commit similar violations is firmly established in federal jurisprudence; nor is it of recent vintage. *See, e.g., United States v. T & S Brass and Bronze Works, Inc.*, 681 F. Supp. 314, 322 (D.S.C. 1988), *aff'd in part, vacated in part*, 865 F.2d 1261 (4th Cir. 1988); Phelps Dodge, 589 F. Supp. 1340, 1358 (S.D. N.Y. 1984); *United States v. Swingline, Inc.*, 371 F. Supp. 37, 47 (E.D.N.Y. 1974).

That the deterrence effect of a civil penalty is intended to resonate with others in the regulated community is of particular importance in the UST universe, "given the[] overall ubiquity [of underground storage tanks] throughout the United States." In fact, data published in 1988 indicated the presence then of over 700,000 UST facilities throughout the United States that account for approximately two million UST systems, which works out to an average of 14,000 UST facilities and 40,000 UST systems in each state. 53 *Fed. Reg.* at 37,095 (September 3, 1988).

The above discussion in this section involves general principles applicable to the instant proceeding. There are, however, specific circumstances relevant only to this proceeding that call further support the imposition upon Respondents of the penalties EPA seeks.

Respondent Andrew B. Chase has been involved in the UST business for a good number of years.[22] As discussed throughout Mr. Sacker's declaration accompanying this memorandum, many, if not most, of the violations found by this Court were of long duration. *See, e.g.,*

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[22] The February 2012 Sacker declaration, submitted in support of EPA's motion for partial accelerated decision, notes installations of UST at Station I in 1988 and 1989, and Mr. Chase is/was the owner and operator of such tanks. Paragraphs 26 through 28 of Mr. Sacker's February 2012 declaration.

paragraphs 55, 58, 62, 65, 68, 97, 101 108 and 115 (all of which have been previously discussed) in this memorandum. The circumstances surrounding Respondents' disregard of or inattention to the regulatory requirements led Mr. Sacker to conclude that good faith efforts to comply were absent, or, at most, minimal. *See, e.g.*, paragraphs 87, 111, 143, 162 and 176 of the Sacker declaration, and this consideration is magnified where Respondents failed to produce evidence of efforts to attain compliance even after EPA had alerted Respondents about the Agency's concern about non-compliance issues at stations. *See, e.g.*, paragraphs 88 and 112. Because EPA had no evidence that would have warranted violator-specific adjustments to the penalty, no such adjustments were made for the substantive violations. *See, e.g.*, paragraphs 55, 59, 62, 65, 69, 72, 97 and 101.

Complainant submits that all these consideration further support this Court assessing the penalty amounts EPA is seeking.

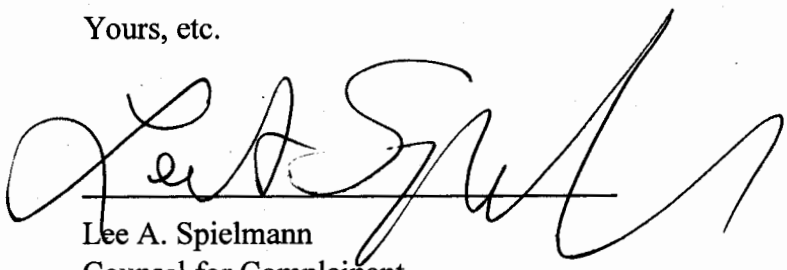
CONCLUSION

Complainant submits she has for each of the 19 counts at issue satisfied the elements necessary to support a judgment granting EPA the relief it seeks — a judgment ordering, as necessary, injunctive relief at Station I and assessing a penalty for each of the violations of counts 1 through 16, 18, 19 and 21 against Respondents. For the all the reasons set forth above, Complainant respectfully requests this Court: **1)** issue a judgment assessing Respondent Andrew B. Chase a penalty of $18,864 for count 1, $25,546 for count 2, $4,116 for count 3, $5,024 for count 4, $2,537 for count 5, $3,054 for count 6, $4,296 for count 7, $7,560 for count 9, $23,764 for count 10, $340.13 for count 11, $22,191 for count 18, $19,095 for count 19 and $2,120 for

count 21; **2)** issue a judgment jointly and severally assessing Respondents Andrew B. Chase and Chase Convenience Stores, Inc., $40,480 for count 8; **3)** issue a judgment jointly and severally assessing Respondents Andrew B. Chase and Chase Services, Inc., $5,144 for count 12, $55,316 for count 13 and $462 for count 14; **4)** issue a judgment jointly and severally assessing Respondents Andrew B. Chase and Chase Commercial Land Development, Inc., $24,066 for count 15 and $247.50 for count 16; **5)** issue an order directing Respondents to pay in accordance with the above; **6)** issue an order directing Respondent Andrew B. Chase to comply and/or to maintain compliance with all applicable regulatory provisions regarding his ownership and operation of UST systems at Station I; and **7)** grant Complainant such other and further relief as this Court deems just, lawful and proper.

Dated: August 9, 2012
New York, New York

Yours, etc.



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In re Andrew B. Chase et al.
Docket No. RCRA-02-2011-7503

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "MEMORANDUM OF LAW IN SUPPORT OF ORDERING INJUNCTIVE RELIEF AND ASSESSING THE PENALTIES THE COMPLAINT SEEKS AGAINST RESPONDENTS FOR THE VIOLATIONS THIS COURT FOUND IN ITS JUNE 2012 RULING ON COMPLAINANT'S PARTIAL ACCELERATED DECISION MOTION," dated August 9, 2012, together with "DECLARATION OF PAUL M. SACKER IN SUPPORT OF ASSESSING THE PENALTY SOUGHT AGAINST RESPONDENTS IN EACH OF COUNTS 1 THROUGH 16, 18, 19 AND 21 OF THE COMPLAINT," executed on August 9, 2012, together with the exhibit annexed thereto, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and One Copy
By Inter-Office Mail:[1]

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

Copy by Pouch Mail:

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

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[1] With prior permission of the Regional Hearing Clerk, and in an effort to save on paper, only one copy of the exhibits will be filed with the office of the Regional Hearing Clerk.

Copy by Certified Mail,
Return Receipt Requested:

Thomas W. Plimpton, Esq.
Stafford Piller et al.
One Cumberland Avenue
P.O. Box 2947
Plattsburgh, New York 12901

Dated: August 9, 2012
New York, New York

Lee A. Spielmann