



In support of this motion, Complainant states and argues as follows:

### **I. PROCEDURAL BACKGROUND**

1. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Consolidated Rules of Practice”).
2. In accordance with 40 C.F.R. §§ 22.5(a) and 22.14, on April 2, 2010, the original Complaint and one copy was filed with the Regional Hearing Clerk, EPA Region 7.
3. In accordance with 40 C.F.R. § 22.5(b)(1), on April 21, 2010, Complainant delivered a copy of the Complaint, via UPS, with proof of service requested, to Respondent’s registered agent and president, Mohammed Ali.
4. Mohammed Ali, registered agent and president of Respondent, and a person who is authorized to receive a copy of a complaint under 40 C.F.R. § 22.5(b)(1)(ii)(a), received a copy of the original complaint on April 21, 2010 and, as proof of his receipt signed the UPS receipt form. Said form is attached hereto and marked “Exhibit 1.”
5. As per 40 C.F.R. § 22.15, Respondent must file an answer to the complaint with the Regional Hearing Clerk, EPA Region 7, within thirty (30) days after service of the complaint. As of December 1, 2010, Respondent had not filed an answer, nor requested an extension of time within which to file an answer, with the Regional Hearing Clerk, EPA Region 7.
6. The Regional Judicial Officer of EPA Region 7 presently has jurisdiction over this matter as the Presiding Officer pursuant to 40 C.F.R. § 22.4(b) and Regional Delegation R7-1-038, in that Respondent has not yet filed an Answer in this case as required under the Consolidated Rules of Practice.
7. Complainant has notified Respondent of Complainant’s intention to request a default judgment in this matter by way of correspondence sent to Mohammed Ali, registered agent and president of Respondent. A copy of this correspondence is attached hereto and marked “Exhibit 2.” This correspondence was received on September 18, 2010, and as proof of his receipt signed the UPS receipt form. Said form is attached hereto and marked “Exhibit 3.”
8. Complainant respectfully requests the Presiding Officer admit “Exhibit 1”, “Exhibit 2” and “Exhibit 3” into evidence to demonstrate proof of service of the complaint upon Respondent and that Complainant has given Respondent notice of its intention to file this Motion.

### **II. RESPONDENT’S LIABILITY**

9. Section 9006 of RCRA, 42 U.S.C. § 6991e, authorizes EPA to assess a civil penalty

against any owner or operator of a Underground Storage Tank system who fails to comply with any requirement or standard promulgated under Section 9003 of RCRA, 42 U.S.C. § 6991b (40 C.F.R. Part 280) or any requirement or standard of a state UST program that has been approved by EPA pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c.

10. Effective September 18, 2002, pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, Subpart A, the state of Nebraska was granted final authorization to administer a state UST management program in lieu of the federal UST management program. The provisions of the Nebraska UST management program, through this final authorization, have become requirements of Subtitle I of RCRA and are, accordingly, enforceable by EPA pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. Nebraska's authorized UST program is implemented jointly and regulations are set forth in the Nebraska Revised Statute Section 81-1575-77, 118, which designates the Nebraska State Fire Marshal as the agency responsible for conducting preventative activities and these regulations can be found at Title 159 of Nebraska's State Fire Marshal's Rules and Regulations (hereinafter "159 Neb. Admin. Code," followed by the applicable section of the regulations).
11. As per 40 C.F.R. § 22.15(d), failure of the Respondent to admit, deny or explain any material factual allegation contained in the Complaint constitutes an admission of each factual allegation. As per 40 C.F.R. § 22.17(a), a party may be found in default after failure to file a timely answer to a complaint; and default by the Respondent constitutes, for purposes of the pending proceedings, an admission of all facts in the complaint and a waiver of Respondent's right to contest such factual allegations. Respondent's failure to admit, deny or explain any of the material factual allegations contained in the Complaint, constitutes Respondent's admission of the factual allegations in the Complaint.
12. According to the factual allegations set forth in the Complaint filed herein, the Respondent has violated Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), which provides that any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by EPA under Section 9003 of RCRA, 42 U.S.C. § 6991c, or that is part of an authorized state underground storage tank program shall be liable for a civil penalty not to exceed \$10,000 for each tank for each day of violation. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, violations of RCRA Section 9006(d)(2), 42 U.S.C. § 6991e(d)(2) which occur subsequent to January 30, 1997 are subject to a new statutory maximum civil penalty of \$11,000 for each day of violation, and those violations occurring after January 12, 2009 are subject to a statutory maximum civil penalty of \$16,000 for each day of violation.

For the above and foregoing reasons, and in accordance with the regulations set forth in 40 C.F.R. § 22.1, et seq., based upon the aforementioned law and facts, Complainant requests the Presiding Officer issue a Default Order against Respondent, finding said Respondent liable for violations of Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), as set forth in the complaint filed in the matter herein.

### III. CIVIL PENALTY ASSESSMENT

13. In addition to liability, Complainant is seeking the assessment of a civil penalty against Respondent in the amount of \$141,360 for the violations set forth in the complaint filed in the matter herein.
14. The legal authority for assessing a penalty for alleged violations of RCRA Subtitle I, and the regulations promulgated thereunder, is set forth at RCRA § 9006(d)(2), 40 U.S.C. § 6991e(d)(2), and the “Adjustment of Civil Monetary Penalties for Inflation” section found at 40 C.F.R. § 19.4. RCRA § 9006(d)(2) , 40 U.S.C. § 6991e(d)(2), and 40 C.F.R. § 19.4 authorize the assessment of a civil administrative penalty not to exceed \$16,000 per day for non-compliance with any requirement or standard promulgated by the Administrator under RCRA § 9003, 42 U.S.C. §6991b that occurred after January 12, 2009. All violations set forth in the complaint, filed herein, are alleged to have occurred after January 12, 2009.
15. Section 9006(e) of RCRA, 42 U.S.C. § 6991e(e), sets forth the applicable statutory penalty factors to consider in assessing a penalty, including the compliance history of the facility operator and any other factor the Administrator considers appropriate. EPA uses the “U.S. EPA Penalty Guidance for Violations of UST Regulations, OSWER Directive 9610.12 November 14, 1990” (Penalty Policy) to apply the statutory penalty factors in a fair and consistent manner.
16. Attached to this motion, and marked “Exhibit 4”, is the “Declaration of Wilfredo Rosado-Chaparro”, a compliance officer for the Storage Tank and Oil Pollution Branch of the U.S. EPA Region 7. This declaration outlines in detail how the Respondent calculated the civil penalty set forth in the Complaint filed in the matter herein and requested in this motion. Complainant requests the Presiding Officer to admit “Exhibit 4”, as evidence in support of Complainant’s request for the penalty assessment set forth in the complaint and this motion.

For the above and for reasons, and in accordance with the regulations set forth in 40 C.F.R. § 22.1, et seq., Complainant requests that, based upon the aforementioned law and facts, the Presiding Officer issue a Default Order against Respondent, finding said Respondent liable for violations of Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), and ordering said Respondent to pay the proposed penalty of \$141,360, as set forth in the complaint filed in the matter herein.

Date

May 27<sup>th</sup>, 2011

Respectfully submitted,

Raymond C. Bosch

Raymond C. Bosch  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
901 North Fifth Street  
Kansas City, Kansas 66101  
[Bosch.Raymond@epa.gov](mailto:Bosch.Raymond@epa.gov)  
(913) 551-7501 Voice  
(913) 551-7925 FAX

CERTIFICATE OF SERVICE

I hereby certify that the original and one true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT AS TO LIABILITY AND PENALTY were hand delivered to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 901 North Fifth Street, Kansas City, Kansas 66101; and a true and correct copy were sent by certified mail, return receipt requested, to Mohammed Ali, Registered Agent, B & K Corporation, on this 27<sup>th</sup> day of May, 2011.

Raymond C. Bosch

Raymond C. Bosch  
Assistant Regional Counsel



This message was sent to you at the request of ENVIRONMENTAL PROTECTION to notify you that the electronic shipment information below has been transmitted to UPS. The physical package(s) may or may not have actually been tendered to UPS for shipment. To verify the actual transit status of your shipment, click on the tracking link below or contact ENVIRONMENTAL PROTECTION directly.

### **Important Delivery Information**

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#### **Signature Required**

**Scheduled Delivery:** 21-April-2010

#### **Shipment Detail**

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##### **Ship To:**

Mohammed Ali  
B&K, B& A, M&A Petroleum Corp.  
215 N. Prospect Ave  
STREAMWOOD  
IL  
601074103  
US

**Number of Packages** 1

**UPS Service:** NEXT DAY AIR SAVER

**Weight:** 4.0 LBS

**Tracking Number:** 1Z6952072996726916

[Click here to track](http://www.ups.com/WebTracking/track?loc=en_US) if UPS has received your shipment or visit [http://www.ups.com/WebTracking/track?loc=en\\_US](http://www.ups.com/WebTracking/track?loc=en_US) on the Internet.

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## Proof of Delivery

[Close Window](#)

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number: 1Z6952072996726916

Service: NDA SAVER DEL CONF

Special Instructions: Signature Required

Delivered On: 04/21/2010 11:47 A.M.

Delivered To: STREAMWOOD, IL, US

Signed By: ALI

Left At: Residential

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 05/26/2011 1:24 P.M. ET

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7  
901 NORTH 5TH STREET  
KANSAS CITY, KANSAS 66101

**VIA U.P.S. Overnight Mail**

September 17, 2010

Mohammed Ali  
215 North Prospect Ave.  
Streamwood, ILL 60107

RE: Complaint, Compliance Order and Notice of Opportunity for Hearing  
B & A Petroleum; B & K Petroleum and M & A Petroleum  
Docket No. RCRA-07-2010-0019; Docket No. RCRA-07-2010-0020;  
Docket No. RCRA-07-2010-0021

Dear Mr. Ali:

As you are aware, on April 2, 2010, the United States Environmental Protection Agency Region 7 (EPA) filed complaints against your above companies. To date, you have not filed an answer, as required by 40 CFR §22.15. If you do not contact me at the address or telephone number below by Monday, September 27, 2010, EPA will begin proceedings to seek the entry of default judgments in these cases. The address and telephone number for contacting me is as follows:

Raymond C. Bosch  
Attorney Advisor  
U.S. Environmental Protection Agency, Region VII  
901 North Fifth Street  
Kansas City, Kansas 66101  
(913) 551-7501 Voice  
(913) 551-7925 FAX

Thank you for your attention to this matter.

Sincerely,

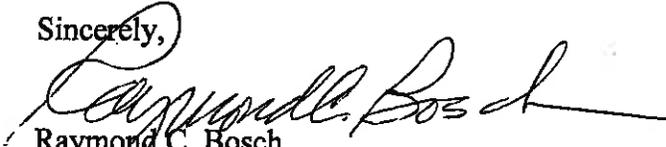
  
Raymond C. Bosch  
Assistant Regional Counsel

Exhibit 3

----- Forwarded by Raymond Bosch/R7/USEPA/US on 09/18/2010 01:37 PM -----

From: "UPS Quantum View" <auto-notify@ups.com>  
To: bosch.raymond@epa.gov  
Date: 09/18/2010 10:54 AM  
Subject: UPS Delivery Notification, Tracking Number 1ZW0R3775891748532

\*\*\*Do not reply to this e-mail. UPS and ENVIRONMENTAL PROTECTION will not receive your reply.

At the request of ENVIRONMENTAL PROTECTION, this notice is to confirm that the following shipment has been delivered.

**Important Delivery Information**

**Tracking Number:** 1ZW0R3775891748532  
**Delivery Date / Time:** 18-September-2010 / 10:23 AM

**Delivery Location:** RESIDENTIAL  
**Signed by:** FATAMA

**Shipment Detail Ship To:**

Mohammed Ali  
215 N PROSPECT AVE  
STREAMWOOD  
IL  
60107  
US

**Number of Packages** 1  
**UPS Service:** NEXT DAY AIR  
**Shipment Type:** Letter

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## Proof of Delivery

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Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number: 1ZW0R3775891748532

Service: NDA DEL CONF SAT

Special Instructions: Signature Required

Delivered On: 09/18/2010 10:23 A.M.

Delivered To: STREAMWOOD, IL, US

Signed By: FATAMA

Left At: Residential

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 05/26/2011 1:34 P.M. ET

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**Declaration of Wilfredo Rosado-Chaparro**

Wilfredo Rosado-Chaparro, U.S. Environmental Protection Agency (EPA) Region 7, Storage Tank and Oil Pollution Branch (STOP), hereby submits the following declaration with regard to the penalty calculated in this matter.

I, Wilfredo Rosado-Chaparro, declare as follows:

1. I am employed as a compliance officer within the EPA Region 7 STOP Branch, and in the course of my employment, I am responsible for the enforcement of regulations regarding the EPA Region 7 Underground Storage Tank Program (UST Program). My responsibilities as a compliance officer include calculating penalties for administrative complaints brought by EPA Region 7 for UST violations.

2. As the EPA representative responsible for calculating the proposed penalty in this matter, I have personal knowledge of the matters set forth in this Declaration.

3. EPA filed a Complaint and Notice of Opportunity for Hearing (Complaint) in this matter on April 2, 2010, citing alleged violations of the Resource Conservation and Recovery Act (RCRA) Subtitle I, 42 U.S.C. § 6991, *et seq.*, and the UST regulations set forth at 40 C.F.R. Part 280. The violations were identified during an UST inspection conducted by EPA between November 4 and 5, 2009, at the facilities located at:

- a. 2411 North 30th Street in Omaha, Nebraska
- b. 3874 Hamilton Street in Omaha, Nebraska
- c. 5188 Leavenworth Street in Omaha, Nebraska

4. The Complaint proposes a penalty of \$141,360 based on the Respondent's alleged violations listed at follows:

- a. 2411 North 30th Street in Omaha, Nebraska:
- (a) 159 Neb. Admin. Code 6-002.04 and §40 CFR 280.31(d) - Failure to maintain records of corrosion protection (CP) inspections for tank #1 and #2.
  - (b) 159 Neb. Admin. Code 6-002.02 and §40 CFR 280.31(b) - Failure to ensure proper operation of CP system. Pursuant to Nebraska regulations the annual (every three years under §40 CFR 280.31(b)) CP test has not been performed on tank #1 and #2.
  - (c) 159 Neb. Admin. Code 7-005.01 and §40 CFR 280.44(a) - Failure to provide adequate testing for piping system. The required annual function test (FT) has not been performed in the past year.
  - (d) 159 Neb. Admin. Code 7-002.02A and §40 CFR 280.41(b)(1)(ii) - Failure to perform monitoring of pressurized piping. The required annual line tightness test (LTT) has not been performed in the past year.
  - (e) 159 Neb. Admin Code 7-006 and §40 CFR 280.45 - Failure to maintain records of release detection monitoring. UST system owners and operators must maintain records in accordance with 7-006 and § 280.34 demonstrating compliance with all applicable requirements of this subpart.
  - (f) 159 Neb. Admin. Code 6-002.03 and §40 CFR 280.31(c) - Failure to inspect impressed current system every 60 days.
  - (g) 159 Neb. Admin. Code 6-002.01 and §40 CFR 280.31(a) - Failure to operate and maintain corrosion protection (CP) system. EPA inspector performed test on the system and it did not meet the negative potential of at least 850 mV,

therefore the CP system was not operational and was not providing corrosion protection to tank #1 and #2 systems.

b. 3874 Hamilton Street in Omaha, Nebraska:

(a) 159 Neb. Admin Code 10-001.01 and §40 CFR 280.70(a) - Failure to continue operation maintenance of release detection in a temporarily closed tank system. When an UST system is temporarily closed, owners and operators must continue operation and maintenance of any release detection in accordance with subpart D.

(b) 159 Neb. Admin Code 7-006 and §40 CFR 280.45 - Failure to maintain records of release detection monitoring. UST system owners and operators must maintain records in accordance with 7-006 and § 280.34 demonstrating compliance with all applicable requirements of this subpart.

(c) 159 Neb. Admin Code 10-001.02 and §40 CFR 280.70(b)(2) – Failure to comply with temporary closure requirements for tank systems. The dispensers and fill pipes at the facility were not secure.

(d) 159 Neb. Admin Code 7-002.01 and §40 CFR 280.41(a) - Failure to monitor tanks at least every 30 days. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43. The inspector was unable to access ATG and very operational status.

c. 5188 Leavenworth Street in Omaha, Nebraska.

(a) 159 Neb. Admin Code 10-001.01 and §40 CFR 280.70(a) - Failure to continue operation maintenance of release detection in a temporarily closed tank system. When an UST system is temporarily closed, owners and operators must

continue operation and maintenance of any release detection in accordance with subpart D. EPA inspector observed that the facility's ATG was not operational.

(b) 159 Neb. Admin Code 7-006 and §40 CFR 280.45 - Failure to maintain records of release detection monitoring. UST system owners and operators must maintain records in accordance with 7-006 and § 280.34 demonstrating compliance with all applicable requirements of this subpart. ATG was not operational.

(c) 159 Neb. Admin Code 10-001.02 and §40 CFR 280.70(b)(2) – Failure to comply with temporary closure requirements for tank systems. The dispensers at the facility were not secure.

(d) 159 Neb. Admin Code 7-002.01 and §40 CFR 280.41(a) - Failure to monitor tanks at least every 30 days. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43. EPA inspector observed that the facility's ATG was not operational.

(e) 159 Neb. Admin. Code 7-005.01 and §40 CFR 280.44(a) - Failure to provide adequate testing for piping system. The required annual function test (FT) has not been performed in the past year.

(f) 159 Neb. Admin. Code 7-002.02A and §40 CFR 280.41(b)(1)(ii) - Failure to perform monitoring of pressurized piping. The required annual line tightness test (LTT) has not been performed in the past year.

5. The UST inspections were performed by EPA lead inspector Bjorn Brinkman, who was accompanied by EPA inspector Wayne Bartel, Omaha Fire Prevention Bureau Chief, Chuck Circo and the Nebraska State Fire Marshall Deputy, Kirk Negus.

6. On October 29, 2009, Mr. Brinkman sent correspondence to the Respondent's president informing him that UST compliance inspections on these three facilities will be taking place between November 2, 2009, through November 27, 2009, and instructing him to have available at the time of inspection a list of documents including, but not limited to, the last 12-months of leak detection records. The actual inspections were performed on November 4 and 5, 2009.

7. At the time of the inspection at 2411 North 30th Street in Omaha, Nebraska, the inspectors observed that:

- a. The cathodic protection (CP) system on tank #1 and #2 was not operating properly and that no test and inspection records were available.
- b. The annual function test on the mechanical line leak detectors (MLLD) on all the facility's USTs had not been performed.
- c. The required annual line tightness test (LTT) on the pressurized product lines for all of the facility's USTs had not been performed.
- d. The automatic tank gauging (ATG) used as the release detection method for this facility appeared to be functioning properly. However, the facility did not have available at the time of the inspection the required 12 months of passing ATG (release detection) results for all the tanks.

8. At the time of the inspection at the 3874 Hamilton Street in Omaha, Nebraska, the inspectors observed that:

- a. The facility was temporarily closed.

b. The automatic tank gauging (ATG) used as the release detection method for this facility appeared not to be operating. Furthermore, the inspectors were unable to obtain the required 12 months of passing ATG (release detection) results for all the tanks

c. The dispensers and fill pipes at the facility were not secure.

9. At the time of the inspection at the 5188 Leavenworth Street in Omaha, Nebraska, the inspectors observed that:

a. The facility was temporarily closed.

b. The automatic tank gauging (ATG) used as the release detection method for this facility was not operating and the required 12 months of passing ATG (release detection) results for all the tanks were not available.

c. The dispensers and fill pipes at the facility were not secure.

d. The annual function test on the mechanical line leak detectors (MLLD) on all of the facility's USTs had not been performed.

e. The required annual line tightness test (LTT) on the pressurized product lines for all of the facility's USTs had not been performed.

10. Based on the inspection at the 2411 North 30th, EPA determined that the Respondent had failed to:

a. Perform monthly monitoring or have an annual LTT on the pressurized piping for all the tanks at the facility since December 22, 2008, constituting a violation of 159 Neb. Admin. Code 7-002.02A; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (b)(1)(ii), for the period of December 22, 2008, through April 1, 2010.

b. Perform the annual function test on the MLLD for all the tanks at the facility since December 22, 2008, constituting a violation of 159 Neb. Admin. Code 7-005.01;

Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.44 (a), for the period of December 22, 2008, through April 1, 2010.

c. Properly operate and maintain the corrosion protection system for tank #1 and #2 since November 5, 2009, a violation of 159 Neb. Admin. Code 6-002.01; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i, and 40 C.F.R. § 280.31 (a), for the period of November 5, 2009, through April 1, 2010.

d. Properly test, inspect and maintain the test and inspection records for the corrosion protection system for tanks #1 and #2 since December 22, 2008, constituting a violation of 159 Neb. Admin. Code 6-002.02; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.31(b), for the period of December 22, 2008, through April 1, 2010.

e. Properly test, inspect and maintain the test and inspection records for the corrosion protection system for tanks #1 and #2 since December 22, 2008, constituting a violation of 159 Neb. Admin. Code 6-002.03; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.31(c) for the period of December 22, 2008, through April 1, 2010.

f. Properly test, inspect and maintain the test and inspection records for the corrosion protection system for tanks #1 and #2 since December 22, 2008, constituting a violation of 159 Neb. Admin. Code 6-002.04; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 CFR § 280.31(d), for the period of December 22, 2008, through April 1, 2010.

g. To maintain records of release detection monitoring for at least the last 12 months for all tanks at the facility since December 22, 2008, constituting a violation of 159 Neb.

Admin Code 7-006; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.45, for the period of December 22, 2008, through April 1,2010.

11. Based on the inspection at the 3874 Hamilton Street facility, EPA determined that the Respondent had failed to:

a. Maintain records of release detection monitoring for at least the last 12 months for all tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-006; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.45, for the period of March 17, 2009, through April 1,2010

b. To continue operation maintenance of release detection on all of the facility's temporarily closed tank system since March 17, 2009, constituting a violation of 159 Neb. Admin Code 10-001.01; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.70 (a), for the period of March 17, 2009, through April 1,2010.

c. Comply with temporary closure requirements for tank systems. The dispensers and fill pipes at the facility were not secure November 4, 2009, a violation of 159 Neb. Admin Code 10-001.02; Section 9003(c) of RCRA; 42 U.S.C. §§ 6991-6991i; and §40 CFR 280.70(b)(2), for the period of November 4, 2009, through April 1, 2010.

d. To monitor tanks for release detection at least every 30 days on all the USTs at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-002.01; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (a), for the period of March 17, 2009, through April 1,2010.

12. Based on the inspection at the 5188 Leavenworth Street facility, EPA determined that the Respondent had failed to:

- a. Maintain records of release detection monitoring for at least the last 12 months for all tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-006; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.45, for the period of March 17, 2009, through April 1, 2010
- b. To continue operation maintenance of release detection on all of the facility's temporarily closed tank system since March 17, 2009, constituting a violation of 159 Neb. Admin Code 10-001.01; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.70 (a), for the period of March 17, 2009, through April 1, 2010.
- c. Comply with temporary closure requirements for tank systems. The dispensers and fill pipes at the facility were not secure November 4, 2009, a violation of 159 Neb. Admin Code 10-001.02; Section 9003(c) of RCRA; 42 U.S.C. §§ 6991-6991i; and §40 CFR 280.70(b)(2), for the period of November 4, 2009, through April 1, 2010.
- d. To monitor tanks for release detection at least every 30 days on all the USTs at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin Code 7-002.01; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (a), for the period of March 17, 2009, through April 1, 2010.
- e. Perform monthly monitoring or have an annual LTT on the pressurized piping for all the tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 7-002.02A; Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.41 (b)(1)(ii), for the period of March 17, 2009, through April 1, 2010.
- f. Perform the annual function test on the MLLD for all the tanks at the facility since March 17, 2009, constituting a violation of 159 Neb. Admin. Code 7-005.01;

Section 9003(c) of RCRA, 42 U.S.C. §§ 6991-6991i; and 40 C.F.R. § 280.44 (a), for the period of March 17, 2009, through April 1, 2010.

### **Calculation of Penalties**

13. Based on the inflationary adjustment rule in effect at the time of filing the Complaint, RCRA § 9006(d)(2), 42 U.S.C. § 6991e(d)(2), authorizes the assessment of a civil penalty of up to \$16,000 for each UST for each day of violation for non-compliance with any requirement or standard promulgated by the Administrator under RCRA § 9003, 42 U.S.C. §6991b.

14. RCRA § 9006(c), 42 U.S.C. § 6991e(c), provides that any penalty assessed shall take into account the seriousness of the violations and any good faith efforts to comply with the applicable requirements.

15. RCRA § 9006(e), 42 U.S.C. § 6991e(e), sets forth the following additional factors that may be taken into account in determining the terms of a civil penalty under subsection (d): compliance history of a facility owner or operator, and any other factor the Administrator considers appropriate.

16. To rationally and consistently apply the statutory factors set forth at RCRA §§ 9006(c) and (e), 42 U.S.C. §§ 6991e(c) and (e), to the facts and circumstances of each case, EPA adopted the *U.S. EPA Penalty Guidance for Violations of UST Regulations* (Penalty Policy) in November 1990. The Penalty Policy was delivered to Respondent with the Complaint and which may be found on the EPA website at <http://www.epa.gov/oust/directiv/od961012.htm>.

17. The Penalty Policy includes both a “Gravity” component and an “Economic Benefit” component. These components are added together to determine an appropriate penalty amount.

18. I personally calculated the proposed penalty in this matter consistent with the RCRA § 9006 statutory factors described above and the Penalty Policy.

### **Gravity Component**

19. The “Gravity” component is a monetary value that reflects the seriousness of the violations and the population at risk. The Gravity component is determined by 1) taking an initial Matrix Value; 2) adding in any Violator Specific Adjustments (degree of cooperation, degree of willingness or negligence, history of prior violations, or other unique factors); 3) then adding in any Environmental Sensitivity Multiplier, and finally; 4) enhancing this total by a multiplier which is based upon the number of Days of Noncompliance.

20. The initial “Matrix Value” is determined by the position on a chart in which a violation falls. The chart (see “Exhibit 4” of the Penalty Policy) contains two axes, one being “Extent of Deviation from Requirement” and the other “Potential for Harm”. Where a violation falls on this matrix is determined by the seriousness of the violation, which is defined in terms of one of three terms: “Major”, “Moderate” or “Minor”. Whether a violation is “Major”, “Moderate” or “Minor” is solely determined by the regulation that is violated. “Appendix A” of the Penalty Policy lists various violations of the UST regulations found within 40 C.F.R. § 280, and the whether they are “Major”, “Moderate” or “Minor”.

21. A common “Violator Specific Adjustment” is an assessment for a history of non-compliance. According to Section 3.2.3 of the Penalty Policy of the Penalty Policy, entitled *History of Non-Compliance*, “a ‘prior violation’ includes any act or omission for which an accountable enforcement action has occurred (e.g., an inspection that found a violation, a notice of violation, an administrative or judicial complaint, or a consent order). A prior violation of the same or a related requirement would constitute a similar violation.”

22. The “Environmental Sensitivity Multiplier” is discussed in Section 3.3 of the Penalty Policy. In that section, it states, “The environmental sensitivity multiplier takes into account the

adverse environmental effects that the violation may have had, given the sensitivity of the local area to damage posed by a potential or actual release.” There were no Environmental Sensitivity Multipliers assessed in this particular action.

23. The “Days of Noncompliance” portion of the Gravity component is multiplier which is based upon the number of days in which the violation is known to have occurred. The chart describing the multiplier to be used is found in the Penalty Policy at Section 3.4.

### **Economic Benefit Component**

24. Under the Penalty Policy, the “Economic Benefit” component of a penalty calculation “represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance. The total economic benefit component is based on the benefit from two sources: (1) avoided costs; and (2) delayed costs. All penalties assessed must include the full economic benefit unless the benefit is determined to be "incidental" (*i.e.*, less than \$100).” See Penalty Policy, Chapter 2, Section 2.1 *Definition of Economic Benefit*.

### **The 2411 North 30th Facility**

25. For the 2411 North 30th facility the Penalty Policy's initial Matrix Value for the Gravity component for noncompliance with the following violations are set forth below:

- a. 159 Neb. Admin. Code 7-005.01 [§40 CFR 280.44(a)], 159 Neb. Admin. Code 7-002.02A [§40 CFR 280.41(b)(1)(ii)], 159 Neb. Admin Code 7-006 [§40 CFR 280.45], 159 Neb. Admin. Code 6-002.03 [§40 CFR 280.31(c)], and 159 Neb. Admin. Code 6-002.01 [§40 CFR 280.31(a)] classifies the Potential for Harm and Extent of Deviation as "Major".

b. 159 Neb. Admin. Code 6-002.04 [§40 CFR 280.31(d)] and 159 Neb. Admin. Code 6-002.02 [§40 CFR 280.31(b)] classifies the Potential for Harm and Extent of Deviation as "Moderate".

26. As stated above, EPA typically increases the initial Matrix Value of the Gravity component in accordance with the Penalty Policy by adding in any "Violator Specific Adjustments", such as history of prior violations. In this particular matter, I deemed that the Respondent's receipt of an Enforcement Compliance Order from the City of Omaha Fire Department UST inspector, for the very same violation in December 22, 2008, warranted an increase of 5% under history of noncompliance consistent with the Penalty Policy, except for the 159 Neb. Admin. Code 6-002.01 [§40 CFR 280.31(a)] violation, which had not been identified before EPA's November 5, 2009, inspection.

27. As also stated above, EPA typically increases the Matrix Value by any Environmental Sensitivity. There was no increased penalty assessed for Environmental Sensitivity at this Facility.

28. I determined that all but one of the violations for this facility lasted 465 days and, thus, increased the penalty with a Days of Noncompliance Multiplier of 3.0 in accordance with Section 3.4 of the Penalty Policy, starting at 2.5 for one year and adding 0.5 for each additional 6 months of noncompliance. The violation cited for 159 Neb. Admin. Code 6-002.01 [§40 CFR 280.31(a)], was determined to last only 147 days, so it received an increase of Days of Noncompliance multiplier of 1.5 in accordance with Section 3.4 of the Penalty Policy.

29. Based on careful consideration of all of the factors set forth in the gravity component of the Penalty Policy, I calculated the initial gravity component of the penalty for each violation at:

- a. 159 Neb. Admin. Code 7-005.01 [§40 CFR 280.44(a)]- \$13,384.04
- b. 159 Neb. Admin. Code 7-002.02A [§40 CFR 280.41(b)(1)(ii)] - \$13,384.04
- c. 159 Neb. Admin Code 7-006 [§40 CFR 280.45] - \$6,692.02
- d. 159 Neb. Admin. Code 6-002.03 [§40 CFR 280.31(c)] - \$3,346.01
- e. 159 Neb. Admin. Code 6-002.01 [§40 CFR 280.31(a)] - \$9,560.03
- f. 159 Neb. Admin. Code 6-002.04 [§40 CFR 280.31(d)] - \$446.13
- g. 159 Neb. Admin. Code 6-002.02 [§40 CFR 280.31(b)] - \$3,346.01

These add to a total initial gravity component of the penalties for the 2411 North 30th Facility of \$50,158.28.

30. In addition, I calculated an Economic Benefit component which consists of the operation and maintenance costs the Respondent would have incurred had it performed the requirements for the cited violations. The penalty calculated for the economic benefit component will eliminate any savings enjoyed by the Respondent for not complying with the regulations.

The initial economic benefit component of the penalty for each violation:

- a. 159 Neb. Admin. Code 7-005.01 [§40 CFR 280.44(a)]- \$107.00
- b. 159 Neb. Admin. Code 7-002.02A [§40 CFR 280.41(b)(1)(ii)] - \$121.00
- c. 159 Neb. Admin Code 7-006 [§40 CFR 280.45] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible
- d. 159 Neb. Admin. Code 6-002.03 [§40 CFR 280.31(c)] - \$650.00
- e. 159 Neb. Admin. Code 6-002.01 [§40 CFR 280.31(a)] - \$141.00

f. 159 Neb. Admin. Code 6-002.04 [§40 CFR 280.31(d)] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible.

g. 159 Neb. Admin. Code 6-002.02 [§40 CFR 280.31(b)] - \$0.00, In accordance with the Penalty Policy, economic benefit components of less than \$100.00 are considered negligible.

These add to a total initial Economic Benefit component of the penalties for the 2411 North 30th facility of \$1,019.00.

31. The Gravity and Economic Benefit components calculated in accordance with the Penalty Policy for the 2411 North 30th Facility totaled \$51,177.26.

#### **3874 Hamilton Street Facility**

32. For the 3874 Hamilton Street Facility the Penalty Policy's initial Matrix Value for the Gravity component for noncompliance with the following violations are set forth below:

a. 159 Neb. Admin Code 10-001.01 [§40 CFR 280.70(a)], 159 Neb. Admin Code 7-002.01 [§40 CFR 280.41(a)], 159 Neb. Admin Code 7-006 [§40 CFR 280.45] classifies the Potential for Harm and Extent of Deviation as "Major".

b. 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)] classifies the Potential for Harm and Extent of Deviation as "Moderate".

33. As stated above, EPA typically increases the initial Matrix Value of the Gravity component in accordance with the Penalty Policy by adding in any "Violator Specific Adjustments", such as history of prior violations. In this particular matter, I deemed that the Respondent's receipt of an Enforcement Compliance Order from the City of Omaha Fire Department UST inspector, for the very same violations in March 17, 2009, warranted an

increase of 5% under history of noncompliance consistent with the Penalty Policy, except for the 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)] violation, which had not been identified before EPA's November 4, 2009 inspection.

34. As also stated above, EPA typically increases the Matrix Value by any Environmental Sensitivity. There was no increased penalty assessed for Environmental Sensitivity at this Facility.

35. I determined that all but one of the violations for this facility lasted 380 days and, thus, increased the penalty with a Days of Noncompliance Multiplier of 3.0 in accordance with Section 3.4 of the Penalty Policy, starting at 2.5 for one year and adding 0.5 for each additional 6 months of noncompliance. The violation cited for 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)], lasted 148 days and received a Days of Noncompliance Multiplier of 1.5 in accordance with Section 3.4 of the Penalty Policy.

36. Based on careful consideration of all of the factors set forth in the gravity component of the Penalty Policy, I calculated the initial gravity component of the penalty for each violation at:

- a. 159 Neb. Admin Code 10-001.01 [§40 CFR 280.70(a)] - \$6,692.02
- b. 159 Neb. Admin Code 7-006 [§40 CFR 280.45] - \$6,692.02
- c. 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)] - \$1,593.34
- d. 159 Neb. Admin Code 7-002.01 [§40 CFR 280.41(a)] - \$20,076.05

These add to a total initial gravity component of the penalties for the 3874 Hamilton Street facility of \$35,053.43.

37. In addition, I calculated an economic benefit component which consists of the operation and maintenance costs the Respondent would have incurred had it performed the

requirements for the cited violations. The penalty calculated for the economic benefit component will eliminate any savings enjoyed by the Respondent for not complying with the regulations. The total initial economic benefit component of the penalties for the 3874 Hamilton Street facility adds to \$0.00.

38. The gravity and economic benefit components calculated in accordance with the Penalty Policy for the 3874 Hamilton Street facility totaled \$35,053.43.

### **5188 Leavenworth Street Facility**

39. For the 5188 Leavenworth Street Facility, the Penalty Policy's initial Matrix Value for the Gravity component for noncompliance with the following violations are set forth below:

- a. 159 Neb. Admin Code 10-001.01 [§40 CFR 280.70(a)], 159 Neb. Admin Code 7-002.01 [§40 CFR 280.41(a)], 159 Neb. Admin Code 7-006 [§40 CFR 280.45], 159 Neb. Admin. Code 7-002.02A [§40 CFR 280.41(b)(1)(ii)], and 159 Neb. Admin. Code 7-005.01 [§40 CFR 280.44(a)] classifies the Potential for Harm and Extent of Deviation as "Major".
- b. 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)] classifies the Potential for Harm and Extent of Deviation as "Moderate".

40. As stated above, EPA typically increases the initial Matrix Value of the Gravity component in accordance with the Penalty Policy by adding in any "Violator Specific Adjustments", such as history of prior violations. In this particular matter, I deemed that the Respondent's receipt of an Enforcement Compliance Order from the City of Omaha Fire Department UST inspector, for the very same violations in March 17, 2009, warranted an increase of 5% under history of noncompliance consistent with the Penalty Policy, except for the

159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)] violation, which had not been identified before EPA's November 4, 2009 inspection.

41. As also stated above, EPA typically increases the Matrix Value by any Environmental Sensitivity. There was no increased penalty assessed for Environmental Sensitivity at this Facility.

42. I determined that all but one of the violations for this facility lasted 380 days and, thus, increased the penalty with a Days of Noncompliance Multiplier of 3.0 in accordance with Section 3.4 of the Penalty Policy, starting at 2.5 for one year and adding 0.5 for each additional 6 months of noncompliance. The violation cited for 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)], lasted 148 days and received a Days of Noncompliance Multiplier of 1.5 in accordance with Section 3.4 of the Penalty Policy.

43. Based on careful consideration of all of the factors set forth in the gravity component of the Penalty Policy, I calculated the initial gravity component of the penalty for each violation at:

- a. 159 Neb. Admin Code 10-001.01 [§40 CFR 280.70(a)] - \$6,692.02
- b. 159 Neb. Admin Code 7-006 [§40 CFR 280.45] - \$6,692.02
- c. 159 Neb. Admin Code 10-001.02 [§40 CFR 280.70(b)(2)] - \$1,593.34
- d. 159 Neb. Admin Code 7-002.01 [§40 CFR 280.41(a)] - \$13,384.04
- e. 159 Neb. Admin. Code 7-002.02A [§40 CFR 280.41(b)(1)(ii)] - \$13,384.04
- f. 159 Neb. Admin. Code 7-005.01 [§40 CFR 280.44(a)] - \$13,384.04

These add to a total initial gravity component of the penalties for the 5188 Leavenworth Street facility of \$55,129.48.

44. In addition, I calculated an economic benefit component which consists of the operation and maintenance costs the Respondent would have incurred had it performed the requirements for the cited violations. The penalty calculated for the economic benefit component will eliminate any savings enjoyed by the Respondent for not complying with the regulations. The total initial economic benefit component of the penalties for the 5188 Leavenworth Street Facility adds to \$0.00.

45. The gravity and economic benefit components calculated in accordance with the Penalty Policy for the 5188 Leavenworth Street Facility totaled \$55,129.48.

**Total Penalty**

46. The proposed total penalty for the 2411 North 30th Street, the 3874 Hamilton Street and the 5188 Leavenworth Street facilities totaled \$141,360.00.

47. There was no reduction to the proposed penalty amount based on ability to pay absent notice or information from the Respondent indicating that it was otherwise unable to pay the proposed penalty amount.

48. The penalty calculation worksheet for the alleged violations in this matter prepared by myself, with oversight from UST Program manager Margaret Stockdale, was delivered to the Respondent with the Complaint and is attached hereto.

I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

5/27/2011  
Date

  
\_\_\_\_\_  
Wilfredo Rosado-Chaparro  
Storage Tank and Oil Pollution Branch  
U.S. Environmental Protection Agency, Region 7