



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

November 23, 2011

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

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

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

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.II  
2011 NOV 23 P 1:34  
REGIONAL HEARING  
CLERK

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

Dear Mr. Valvo and Mr. Chiaravalotti:

Enclosed, pursuant to the Prehearing Order issued on October 19, 2011 by the Hon. Barbara A. Gunning, are copies of the Complainant's Initial Prehearing Exchange and Complainant's Exhibits for your review and response. Under the Order, Respondents' Prehearing Exchange and/or rebuttal evidence is due on December 23, 2011.

Kindly note that Order also states that the parties are encouraged to engage in settlement discussions during and after preparation of the prehearing exchanges.

If you have any questions, I may be reached at (212) 637-3167 or by email at [kolenberg.beverly@epa.gov](mailto:kolenberg.beverly@epa.gov).

Sincerely,

Beverly Kolenberg  
Assistant Regional Counsel  
Office of Regional Counsel

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

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 2**

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In the Matter of :  
Valvo Convenience and Gas, Inc., :  
And Stephen Valvo, Individually :  
Respondents :  
Proceeding Under Section 9006 of the :  
Solid Waste Disposal Act, as amended. :  
-----X

**Honorable Barbara A. Gunning,**  
Administrative Law Judge

**Docket No. RCRA-02-2011-7507**

**U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2011 NOV 23 P 1:35  
REGIONAL HEARING  
CLERK**

**COMPLAINANT'S PREHEARING EXCHANGE**

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

**PRELIMINARY STATEMENT**

Complainant commenced this administrative action pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6991e (referred to collectively as the "Act"). The Complaint, Compliance Order and Notice of Opportunity for Hearing (the "Complaint"), issued on June 3, 2011, alleged that Respondents Valvo Convenience and Gas, Inc.<sup>1</sup> ("Valvo C&G") and Stephen M. Valvo, individually, violated the underground storage tank ("UST") regulations at three facilities ("Facilities") in Silver Creek, New York. The Complaint alleged that Respondents failed to maintain release detection for temporarily closed USTs that contained more than one inch of

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<sup>1</sup> EPA will file a motion to amend slightly the name of this Respondent that appears in the Complaint and this Prehearing Exchange.

petroleum residue, failed to comply with permanent closure requirements for temporarily closed USTs, failed to test cathodic corrosion protection systems every three years, failed to monitor for releases at least every 30 days, and failed to perform annual line tightness tests or monthly monitoring for pressurized piping in violation of the UST regulations at 40 C.F.R. Part 280.

The Complaint proposed penalties for violations that continued at the Facilities after July 30, 2009, the date that Valvo C&G filed a petition for relief under Chapter 11 of the Bankruptcy Code. Although Section 362 of the Bankruptcy Code prohibits the filing of certain claims against a debtor, which is referred to as the "automatic stay," the Complaint is exempted from the automatic stay by Section 362(b)(4) of the Bankruptcy Code, which exempts "an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police or regulatory power, including the enforcement of a judgment other than a money judgment." 11 U.S.C. § 362(b)(4).<sup>2</sup>

EPA's enforcement of the UST regulations enacted to protect public health and safety is a classic exercise of police and regulatory authority. The injunctive relief sought to compel regulatory compliance clearly falls within that authority. *See Penn Terra Ltd. v. Dept. of Env't'l Resources*, 733 F.2d 267 (3d Cir. 1984). Further, this action seeking civil penalties for violations of environmental law qualifies under the police or regulatory exception to the automatic stay. *See In re Commerce Oil Co.*, 847 F.2d 291, 295-95 (6th Cir. 1988); *United States v. LTV Steel Co., Inc.*, 269 B.R. 576, 582 (W.D. Pa. 2001) ("Section 362(b)(4) only limits the government's police regulatory power to *enforce* a money judgment outside of the bankruptcy. The government's power to seek *entry* of a civil penalty judgment for violations of the environmental laws is not precluded."). In this case, EPA seeks to establish liability and the amount of the civil penalty against Valvo C&G and Mr.

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<sup>2</sup> Since Stephen M. Valvo did not file for bankruptcy, the automatic stay would not apply to him, individually.

Valvo. EPA will seek to collect the penalty against Valvo C&G in the bankruptcy proceeding using the appropriate means. (“Civil penalties for post-petition violations would also be entitled to be treated as administrative expenses.” *In re Chateaugay Corp.(LTV)*, 944 F.2d 997 (2dCir. 1991)). In the event Mr. Valvo does not pay his assessed penalty after a decision in this case, EPA will file a civil collection action.

In accordance with the Court’s Prehearing Order, Complainant submits the following:

**1(a) COMPLAINANT'S WITNESSES**

EPA may call the following witnesses:

1. Jeffrey K. Blair of Polu Kai Services, LLC, headquartered in Falls Church, Virginia, with a field office in Smethport, Pennsylvania, is an EPA, Region 2, UST Environmental Field Inspector. He is a geologist/production engineer by training. Mr. Blair received a Bachelor of Science degree from the University of Pittsburgh and completed UIC Inspector and UST training in 1989 and 2007, respectively. Mr. Blair conducted inspections of the Facilities in 2007, 2008, 2010 and 2011. His testimony is expected to cover his involvement in the development of this case, including the following: a) what he observed and otherwise learned during his various inspections of the Facilities; b) his preparation for those inspections; c) the inspection reports that he wrote, including his findings and conclusions; d) his overall recommendations regarding the Facilities; and e) his knowledge of the scope and magnitude of the violations he observed, as well as the basis for his evaluations and conclusions regarding such violations. His testimony may also include background information, including his knowledge and familiarity with UST regulations and the UST program in Region 2.

2. Paul Sacker is an environmental engineer with EPA, Region 2 in its New York City Office, and he is assigned to the Division of Enforcement and Compliance Assistance.<sup>3</sup> Mr. Sacker received a bachelor's degree in Chemical Engineering from the City College of New York. He has been employed by EPA for over twenty-three years and has been involved with the UST program for over fourteen years. Mr. Sacker's testimony will cover various aspects of his participation in the development of this case to date. He will testify that EPA inspected the Facilities in Silver Creek, New York on February 26, 2007, August 10, 2007 and October 22, 2008, before the Chapter 11 bankruptcy petition was filed, and on March 15, 2010, July 21, 2011 and October 20, 2011 after the petition was filed. The inspections revealed continuing violations of the UST regulations at 40 C.F.R. Part 280. Mr. Sacker will explain how he tried without success to get Stephen Valvo, the owner and principal officer of Valvo C&G, to implement steps to bring the USTs at the Facilities into compliance with the law.

Mr. Sacker will testify about EPA's Notice of Violation letters. Mr. Sacker will testify about his inspection on July 21, 2011, after the Complaint was filed, including what he observed and otherwise learned about the Facilities; b) his preparation for the inspection; c) his involvement in the review and analysis of the inspection reports by Mr. Blair; d) his preparation of the information request letters ("IRLs") EPA sent to Respondents; e) his review, analysis and evaluation of the various responses submitted to the IRLs; f) his determinations and conclusions about the violations that existed or may have existed at each Facility; g) his knowledge, as well as his analysis and conclusions, about the seriousness of the alleged violations and any good faith efforts by

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<sup>3</sup> In accordance with Rule 615 of the Federal Rules of Evidence, EPA expects to designate Mr. Sacker as a representative of the Agency whose presence is essential to this case. While the Federal Rules of Evidence do not govern this Part 22 proceeding, case law recognizes that it provides guidance in areas for which no express provision of Part 22 exists.

Respondents to comply with the applicable Part 280 requirements and prohibitions; h) his involvement in the drafting and development of the Complaint (including compliance order provisions, and the necessity for them); i) his involvement, role and responsibility in the development and finalization of the proposed penalty for each count and how each comports with the statutory requirements and EPA guidelines for their development; j) his discussion of adjustment factors to the proposed penalty; k) his evaluation, analysis and conclusions as to the appropriateness of the penalty sought in this case; and l) his view of the overall significance of the violations alleged in this proceeding.

In addition, Mr. Sacker is expected to provide background information about, among other things, his knowledge of the UST regulations, the UST program and how it is enforced in Region 2, his knowledge of the applicable penalty policy and how the penalty was developed in this case. Mr. Sacker is also expected to provide background and explanatory information on the documents EPA will seek to introduce into evidence at the hearing.

3. Dennis McChesney, Ph.D. UST Team Leader, Region 2's Division of Enforcement and Compliance Assistance, at EPA's New York City Office. Dr. McChesney received a Bachelor of Science in biology from the University of San Francisco, a Master of Science in Environmental Sciences from Rutgers University, a Masters in Business Administration from Fairleigh Dickinson University and a Doctor of Philosophy in Environmental Sciences from Rutgers University. Dr. McChesney is expected to testify about his supervisory role and oversight in the development and review of the proposed penalty, the penalty factors under the statute and the applicable Agency UST penalty guidelines. Dr. McChesney's testimony will explain the bases under EPA guidance for the development of penalties for UST violations, the operation of EPA's computer program for calculating the penalties, including, but not limited to the matrix values, inflation factors and

applicable adjustments, as well as the economic benefit component of the penalty and the BEN model calculations. As needed, Dr. McChesney will provide an overview of Region 2's UST enforcement program.

Complainant respectfully reserves the right to call or decline to call any of the witnesses identified above, and to expand or otherwise modify the scope, extent, or areas of testimony of any of the witnesses cited, where appropriate. In addition, Complainant respectfully reserves the right to call additional witnesses to address issues or materials which may be placed in issue by Respondents in their prehearing exchange. The listing of the expected scope of the testimony of each witness is not intended to limit EPA's right to modify or otherwise expand upon the scope and extent of the testimony of each witness, where appropriate, including in response to matters set forth in Respondents' prehearing exchange. In addition, as this litigation proceeds, if EPA deems it necessary, it may move to list additional witnesses. If the Agency needs to supplement its witness list, it will provide the requisite notice to this tribunal and Respondents.

#### **1(b) COMPLAINANT'S EXHIBITS**

EPA anticipates offering into evidence the following documents and records, copies of which are annexed hereto and will be identified as "Complainant's Exhibit," with each exhibit numbered with the following Arabic numerals:

1. "U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990," available at <http://www.epa.gov/oust/directiv/od961012.htm>.
2. September 21, 2004 memorandum, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)" from Thomas V. Skinners, Acting [EPA] Assistant Administrator, to Regional Administrators.

3. December 29, 2008, "Amendment to EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)," from Grant Y. Nakayama, Assistant Administrator, to Regional Administrators.
4. April 6, 2010, "Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009," from Rosemarie A. Kelley, Director of the Waste and Chemical Enforcement Division of EPA's Office of Civil Enforcement, to Regional Counsels, Regional Division Directors and Regional Enforcement Directors.
5. Inspection Report, dated February 26, 2007, for Valvo C&G.
6. Inspection Report, dated October 26, 2007 for Valvo Transport.
7. Inspection Report and photographs, dated October 22, 2008, for Valvo C&G.
8. Inspection Report and photographs, dated March 15, 2010, for Hanover Convenience.
9. Bulk Storage Database Search Details for Hanover Convenience.
10. Inspection Report and photographs, dated March 15, 2010, for Valvo Transport.
11. Bulk Storage Database Storage Search Results for Valvo Transport.
12. Inspection Report and photographs, dated July 21, 2011, for Valvo C&G.
13. Inspection Report and photographs, dated July 21, 2011, for Precision Transport, a/k/a Valvo Transport.
14. Inspection Report, dated October 20, 2011, for Valvo C&G.
15. Note to File from Paul Sacker to Precision Tran@ roadrunner.com, dated June 4, 2008.
16. Note to File from Paul Sacker re conversation with Stephen Valvo, dated June 4, 2008.
17. Request for Information to Stephen Valvo and Valvo C&G, dated December 21, 2007.
18. 2<sup>nd</sup> Notice – Response Overdue re Field Citation Number: II-UST-FC-497EC, dated January 8, 2010, for Valvo C&G.



19. Request for Information, dated May 10, 2010, for Valvo Transport, Hanover Convenience and Valvo C&G.
20. Request for Extension to Respond to Information Pursuant to Section 9005 of Solid Waste Disposal Act, as amended, dated June 7, 2010.
21. 2<sup>nd</sup> Notice Response Overdue, Non-Response to Request for Information, dated August 10, 2010.
22. Notice of Violation, Overdue Request for Information, dated September 23, 2010, for Valvo Transport, Hanover Convenience, and Valvo C&G.
23. Notice of Violation for Underground Storage Tank Systems, dated December 16, 2010, for Valvo Transport, Hanover Convenience and Valvo C&G.
24. Petroleum Bulk Storage Report Forms faxed to Paul Chiaravalloti, dated December 23, 2010.
25. Letter to Paul Chiaravalloti, dated January 3, 2011, from Beverly Kolenberg, re Notices of Violation for Valvo's Underground Storage Tank Systems.
26. Letter from Paul Chiaravalloti, dated January 13, 2011, to Paul Sacker re Request for Information: RCRA-UST-IR-10-024.
27. Faxed response from Paul Chiaravalloti, dated January 13, 201, re Request for Information: RCRA-UST-IR-10-024.
28. Note to File re Stephen Valvo Facilities, dated January 14, 2011, by Paul Sacker.
29. Faxed copy of PBS Certificate for Valvo C&G from from Paul Chiaravalloti, dated January 21, 2011.
30. Fax from Paul Sacker to Paul Chiaravalloti, dated February 10, 2011, Compliance Steps for Valvo Matter.
31. Letter to Paul Chiaravalloti, dated February 11, 2011, from Beverly Kolenberg to follow-up

- on Notices of Violation for Underground Tank Systems, dated December 16, 2010.
32. Faxed response from Paul Chiaravalloti, dated March 22, 2011, to Paul Sacker, 4 pages with cover sheet of interstitial testing results.
  33. Letter to Paul Chiaravalloti, dated June 7, 2011, with EPA's legal position on effect of bankruptcy petition on this administrative action.
  34. Fax from Paul Chiaravalloti, dated July 1, 2011, noting failed test results, 3 pages, including cover sheet.
  35. Fax from Maria Szarpa, dated July 8, 2011, with test results from JEMKO and NOCO, 5 pages.
  36. Fax from JEMKO, dated July 8, 2011, stating that the cathodic readings for tank four were failing.
  37. Original Inspection Report for Valvo C&G and Precision Transport faxed by Paul Sacker to Paul Chiaravalloti, dated July 25, 2011.
  38. Fax from Paul Chiaravalloti, dated August 12, 2011, to Paul Sacker with NOCO Invoice.
  39. Fax from Paul Chiaravalloti, dated August 25, 2011, to Beverly Kolenberg, re Valvo case.
  40. Request for Additional Information, dated August 31, 2011, to Stephen Valvo related to Valvo Transport, Hanover Convenience and Valvo C&G.
  41. Fax from Paul Chiaravalloti, dated September 23, 2011, to Beverly Kolenberg regarding response to information RCRA-UST-IR-2010-24.
  42. New York State Department of Environmental Conservation Petroleum Bulk Storage Program Facility Information Report, 5 pages.
  43. Resume and Credential Letters for Jeffrey K. Blair, Environmental Field Inspector.
  44. Penalty Calculation Manual Excerpt, 10 pages.

45. Valvo C&G Penalty Chart titled “Summary of Violations Cited, as of June 2, 2011.”
46. Penalty Sheet for Valvo Convenience & Gas, Count 1- Violation of §280.70(c).
47. Penalty Sheet for Valvo Transport, Count 2a diesel tank – Violation of §280.70(c).
48. Penalty Sheet for Valvo Transport, Count 2b waste oil tank – Violation of §280.70(c).
49. Penalty Sheet for Valvo Transport, Count 3- Violation of §280.70(a).
50. Penalty Sheet for Valvo Transport, Count 4 – Violation of §280.70(a).
51. Penalty Sheet for Hanover Convenience, Count 5 – Violation of §280.31(b)(1).
52. Penalty Sheet for Hanover Convenience, Count 6 – Violation of §280.41(a).
53. Penalty Sheet for Hanover Convenience, Count 7 – Violation of §280.41(b)(1)(ii).
54. BEN, economic benefit run – Count 1.
55. BEN, economic benefit run – Count 2a.
56. BEN, economic benefit run – Count 2b.
57. BEN, economic benefit run – Count 3.
58. BEN, economic benefit run – Count 4.
59. BEN, economic benefit run – Count 5.
60. BEN, economic benefit run – Count 6.
61. BEN, economic benefit run – Count 7.
62. Environmental Sensitivity Map for “Valvo Facilities and Hanover Convenience.”

**1(c) PLACE AND TIME FOR HEARING**

Pursuant to paragraph 1(c) of the October 19, 2011 Prehearing Order and 40 C.F.R. §§ 22.19(d) and 22.21(d), Complainant respectfully requests that the hearing be held in New York City (New York County), the location of the offices of EPA, Region 2. Complainant’s witnesses and documents are all located here, and there are rooms available for the hearing nearby.

Complainant estimates that approximately two days will be needed to present its direct case.

## **2. BASIS FOR DETERMINATION OF PROPOSED PENALTY**

The Complaint seeks a civil penalty of \$59,366. Complainant's Exhibits 46 – 62 document the factors utilized in calculating the proposed penalty, as well as the basis for the economic benefit component of each count in the Complaint. At hearing, EPA will provide testimony on how the penalty for each count was derived, *e.g.*, the basis for each determination, the factual underpinning for each penalty sought, the justification for each penalty in light of mandatory statutory factors and applicable EPA guidance. The following discussion is intended to provide an overview.

Section 9006(d)(2)(A) of the Act, 42 U.S.C. § 6991e(d)(2)(A), provides that “any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by the [EPA] Administrator 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.” This dollar amount has been modified by subsequent penalty adjustment provisions promulgated pursuant to law passed by Congress that increased the maximum amount of the penalties. EPA is authorized to obtain, pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d), up to \$11,000 for any violation occurring between January 30, 1997 and January 12, 2009, and up to \$16,000 for any violation occurring after January 12, 2009.<sup>4</sup> Section 9006(c) of the Act, 42 U.S.C. § 6991e(c), authorizes the assessment of a penalty “which the Administrator determines is reasonable taking into

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<sup>4</sup> The Federal Civil Penalties Inflation Adjustment Act of 1990, codified at 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, codified at 31 U.S.C. § 3701, has authorized EPA to promulgate regulations that, *inter alia*, would increase the maximum penalty EPA might obtain pursuant to Section 9006(d) of the Act, 42 U.S.C. § 6991e(d). EPA issued regulations, codified at 40 C.F.R. Part 19, raising the maximum penalties that can be sought 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. The violations alleged in the Complaint for which penalties are being sought occurred after January 12, 2009.

account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.” Section 9006(e) of the Act, 42 U.S.C. § 6991e (Incentive for performance) lists two factors that “may be taken into account in determining the terms of a civil penalty (1) [t]he compliance history of an owner or operator in accordance with this subchapter [and] (2) [a]ny other factors the Administrator [of EPA] considers appropriate.” EPA has developed penalty guidelines that are entitled “U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12 November 14, 1990” (“Penalty Policy”), that are available at <http://www.epa.gov/oust/directiv/od961012.htm>. Consistent with the adjustment of the statutory maximum to account for inflation, the penalty amounts used in the Penalty Policy were subsequently adjusted for inflation. See Complainant’s Exhibits 2 – 4.

The goals behind the policy are three-fold: to encourage the timely and prompt resolution of environmental problems, to support fair and equitable treatment of a person subject to UST regulation and to deter potential violators from future non-compliance. (Section 1.3 UST Penalty Assessment Framework) EPA seeks to implement the goals of the Penalty Policy by removing any significant economic benefit a violator may gain from non-compliance (referred to as the “economic benefit component”) and increasing the penalty amount based on the nature and circumstances surrounding the specific violation in order to penalize a violator for failure to comply with an applicable UST requirement or prohibition.<sup>5</sup> In addition, the Penalty Policy provides for adjustments “to take into account legitimate differences between similar cases.” “Under this methodology, the gravity-based component incorporates adjustments that reflect the specific circumstances of the violation, the violator’s background and actions, and the environmental threat

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<sup>5</sup> The amount of any given penalty for a specific violation is subject to, and cannot exceed, the maximum amount permitted by statute.

posed by the situation.” *Id.* The sum of the economic benefit component and the gravity-based component yields the initial penalty amount listed in an administrative complaint to which the adjustment factors are applied.

The economic benefit component (one of the fundamental components of the Penalty Policy) consists of avoided costs and delayed costs. It “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 former consists of the periodic operation and maintenance expenditures that should have been incurred, but were not as a result of the non-compliance. The latter consists of expenditures deferred that must be incurred to attain compliance. One of the methods to determine the economic benefit component (which was utilized in this proceeding) is software known as BEN. The BEN system “uses a financial analysis technique known as ‘discounting’ to determine the net present value of economic gains from noncompliance.” (Section 2.1 Definition of Economic Benefit) This system provides an evaluation based upon twelve specific factors or inputs, including, *inter alia*, a violator’s initial capital investment, non-depreciable expenditures and operation/maintenance costs.

Under the Penalty Policy guidelines, avoided costs represent avoided expenditures added to the interest the money potentially earned because it had not been spent. The Penalty Policy calculates avoided costs by considering avoided expenditures, estimated based on comparable costs, interest (defined as the equity discount), number of days in which non-compliance has occurred and the marginal tax rate, which varies depending on the size of the business. Delayed costs involve the delayed expenditures multiplied by the appropriate interest rate multiplied by the number of days of noncompliance, a number then divided by 365 (for the number of days in a year; this denominator is also utilized in the avoided cost calculation).

The BEN sheets in Complainant's Exhibits 54 -61 and the testimony of EPA's witnesses, will provide information about how these guidelines were applied the counts in the Complaint.

The gravity-based component (the other fundamental component of the Penalty Policy) is intended to deter future violations. It is comprised of four elements: the matrix value, the violator-specific adjustments to the matrix, the environmental sensitivity multiplier (ESM) and the days of noncompliance multiplier (DSM). The matrix value is based on the potential for harm, and the violator's deviation from the applicable regulatory requirement. The former involves a determination of the extent to which the applicable requirement was not followed. The latter assesses the likelihood that a violation may have or did result in harm to human health and the environment and/or has had a negative impact on EPA's regulatory program. EPA uses a matrix to determine the appropriate level for each factor, with classifications of major, moderate and minor (for both extent of deviation and actual/potential harm). Under this graduated scale, the most serious violations (from either the extent of deviation or the actual/potential for harm) are ranked as major. For example, substantial noncompliance is classified as a major extent of deviation (with significant deviation). If the violator has to a limited extent complied, the violation is classified as moderate. A minor deviation involves a slight level of noncompliance, where most of the requirement has been met. A major potential for harm involves a substantial or continuing risk to human health or the environment or a substantial impact on the functioning of EPA's regulatory program. Moderate potential for harm involves a lesser degree of risk, significant, but less than substantial, and minor potential involves a relatively low risk of harm to human health or the environment, or to EPA's regulatory program. EPA's witness, Paul Sacker, will explain the gravity-based determinations for each of the counts, and what factors were considered and how each was weighed.

After the matrix value has been determined, the guidelines indicate that violator-specific

adjustments be made. These include the violator's degree of cooperation or non-cooperation (allowing for between a 50% increase and a 25% decrease), a violator's degree of willfulness or negligence (also allowing for between a 50% increase and a 25% decrease), the violator's history of noncompliance (allowing for up to a 50% increase) and other unique factors (allowing for between a 50% increase and a 25% decrease). Each of these factors is fact and circumstance specific. No downward adjustment would be given if the good faith efforts to comply with a requirement primarily consist of coming into compliance. As for willfulness/negligence, among the circumstances to be considered are the extent to which the violator had control over the events constituting the violation, the foreseeability of events constituting the violation, whether the violator knew or should have known of the hazards associated with its violative conduct and whether the violator knew of the legal requirement that was violated. The history of noncompliance involves an amalgam of considerations: the number of previous violations, the seriousness of the prior violations, the duration of prior violations; the similarity of present violations to prior ones and the violator's response to the previous violations. The "other unique factors" provision enables EPA to consider factors that do not fall into specifically delineated categories.

Another possible adjustment to the matrix value based on the potential of a site-specific impact is the environmental sensitivity multiplier or ESM. The ESM "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." (Section 3.3 of the Penalty Policy) It differs from the potential for harm consideration because that consideration weighs the probability that a release or other harmful event would occur because of the violation whereas the ESM looks to the actual or potential impact of such a release once it did in fact occur. It is a relative measure of the sensitivity of the environment in which a UST tank is located, and such sensitivity is evaluated as low, moderate



or high. For a low ESM, the number 1 is assigned; for a high ESM, 2 is the multiplier.

The days of noncompliance multiplier adjusts the matrix value to take account of the time duration of the noncompliance. Up to 90 days, the DNM value is one; between 91 and 180 days it is 1.5; from 181 days to 270 days, it is 2.0, and for 271 days to one year, the number is 2.5. For each additional six months, 0.5 is added.

In summary, the gravity-based component is determined by the matrix value multiplied by the violation specific adjustments, further multiplied by the ESM, and then multiplied by the days of noncompliance multiplier. EPA's witness will testify about the application of the penalty guidelines to each of the counts, and about the exhibits revealing how such guidelines were used to develop each penalty count. EPA's witness will also explain the manner in which the penalty was calculated in consideration of the Chapter 11 bankruptcy proceeding of Respondent Valvo C&G.

#### **4. PAPERWORK REDUCTION ACT**

The Paperwork Reduction Act ("PRA") presents no legal impediment to EPA seeking or obtaining penalties or injunctive relief for any of the counts in this case, as explained below. Under the PRA, if the collection of information (as defined in 44 U.S.C. § 3502) is not in compliance with specified requirements, "no person shall be subject to any penalty for failing to comply with a collection of information." 44 U.S.C. § 3512. Section 3512 of the PRA would only apply to violations that involve recordkeeping requirements.

Where a regulation requires the collection of information from private parties, the PRA mandates that EPA and other federal agencies, *inter alia*, obtain Office of Management and Budget ("OMB") approval in advance for that collection. *See* 44 U.S.C. § 3501 *et seq.* OMB assigns a control number to the information request embodied in the regulation. The "collection of information" is defined in the PRA to include "obtaining . . . , soliciting, or requiring the disclosure

. . . or opinions regardless . . . of form or format, calling for . . . answers to identical questions posed . . . to ten or more persons.” This definition embraces a regulation that requires that a person submit or maintain information. The PRA bars EPA from collecting any penalties or obtaining injunctive relief for failure to comply with an information collection requirement if the Agency has not *obtained* OMB approval of that Information Collection Request and has not properly *displayed* an OMB control number for that collection of information. *See e.g., In Re Billy Yee*, 10 EAD 1 (EAB 2001). *See generally* the discussion on the PRA in *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990). As the Court noted, “the public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act.” 494 U.S. at 40. Although Congress amended the PRA subsequent to the *Dole* decision, the amendments did not change this focus. *See also In re SCA Chemical Services Inc.*, 1994 TSCA LEXIS 79 (Judge Lotis), *In Re: TRW, Inc.*, 1995 TSCA LEXIS 8 (Judge Head).

In this proceeding, there are no counts that involve recordkeeping requirements. The following counts allege violations of UST requirements that do not implicate the concerns or trigger the protections of the PRA insofar as these allege violations of substantive provisions: (1) count 1 and 2: failure to comply with permanent closure requirements for temporarily closed USTs, including failure to perform release detection and corrosion testing, 40 C.F.R. § 280.70(c); (2) counts 3 and 5: failure to conduct testing of the cathodic protection system every three years, 40 C.F.R. § 280.70.(a) and 40 C.F.R. § 280.31(b)(1); (3) counts 4 and 6: failure to perform release detection for tanks, 40 C.F.R. § 280.41(a); (4) count 7: failure to conduct either an annual line tightness test or monthly monitoring, 40 C.F.R. § 280.41(b)(1)(ii). For these seven counts, the PRA defense is not available to Respondents, as the provisions these counts allege were violated constitute substantive requirements that do not implicate the concerns of Section 3512, and for these counts, Respondents are not being

charged with a paperwork violation.

Accordingly, the PRA does not represent a viable defense for Respondents and is not a bar to EPA's seeking a penalty in this action. In addition, there is no bar to the injunctive relief being sought in this case.

Dated: November 23, 2011  
New York, New York

Respectfully submitted,



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

**CERTIFICATE OF SERVICE**

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

Original and One Copy

By Hand:

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

Copies by Certified Mail,  
Return Receipt Requested:

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

Copy by Regular Mail:

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

Dated: New York, New York

11/23/2011

Mary C. Coyne