

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2**

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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.
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**Honorable Susan L. Biro,
Presiding Officer**

**Docket Number:
RCRA-02-2011-7503**

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 DEC 15 P 2:55
REGIONAL HEARING
CLERK

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

Complainant, the Director of the Division of Enforcement and Compliance Assistance (“DECA”) of the United States Environmental Protection Agency (“EPA” or “Agency”), Region 2, herewith submits the following rebuttal prehearing exchange pursuant to paragraph 4 of the “Prehearing Order,” dated July 12, 2011, as subsequently amended, and pursuant to 40 C.F.R. § 22.19(a).

Response to paragraph 3(A)

Respondents have provided four separate documents as attachments.

First attachment

The first document attached to Respondent’s Initial Prehearing Exchange (IPHE) is entitled “ESTABROOK’S EZY CHECK LEAK DETECTOR TESTING” (hereinafter “Attachment 1”); it concerns the station located at 7155 Route 9 in Plattsburgh, New York (Service Station VI, paragraph 52 of the Complaint).¹

¹ For purposes of this rebuttal PHE, EPA will presume this document (as well as the three other documents Respondents have submitted in their IPHE) is what it purports to be. Nothing herein, however, is intended or is to be construed as EPA accepting the truthfulness or accuracy of any such document, nor is anything herein intended or to be construed as waiving any objections to the admissibility pursuant to 40 C.F.R. § 22.22(a) of any such document if this matter were to proceed to hearing.

Count 18 of the Complaint, paragraphs 250-62, alleges Respondent Andrew B. Chase (Chase) failed, for each of three identified underground storage tanks (“USTs”) at Service Station VI, to conduct (or have a third-party on his behalf conduct) an annual test of the automatic line leak detector for two periods of time: “from December 31, 2008 through September 7, 2010.” Paragraph 260.

Attachment 1 indicates the date of the purported tests was August 23, 2011, a time beyond the operative period for which the Complaint alleges this violation occurred at Service Station VI. This document is thus not relevant to the issue of Respondent’s failure to have conducted the prescribed test for the period identified in the Complaint, nor is it relevant to an evaluation as to the appropriateness of the penalty sought for this violation.

Second attachment

The second document attached to the IPHE is entitled, “ESTABROOK’S EZY CHECK LEAK DETECTOR TESTING” (hereinafter “Attachment 2”), and it pertains to the service station located at 3851 Route 374 in Lyon Mountain, New York (identified in the Complaint as Service Station I; paragraph 34).

Count 2 of the Complaint, paragraphs 80 through 87, alleges Chase failed, for each of two identified USTs at Service Station I, to conduct (or have a third-party on his behalf conduct) an annual test of the automatic line leak detector for two periods of time: “from at least May 1, 2006 until April 22, 2009” and “from April 22, 2010 until September 7, 2010.” Paragraph 85.

Attachment 1 indicates the date of the purported tests was August 23, 2011, a time beyond the operative period for which the Complaint alleges this violation occurred at Service Station I. This document is thus not relevant to the issue of Respondent’s failure to have conducted the prescribed test for the period identified in the Complaint, nor is it relevant to an evaluation as to the appropriateness of the penalty sought for this violation.

Third and fourth attachments

The third and fourth documents attached to the IPHE are entitled, respectively, “ESTABROOK’S EZY CHECK LEAK DETECTOR TESTING” (hereinafter “Attachment 3”), and Leak Detector[/]FTA EVALUATION CHART” (hereinafter “Attachment 4”). Both pertain to the Lyon Mountain service station (identified in the Complaint as Service Station I; paragraph 34).

As noted above, the second count of the Complaint, set forth in paragraphs 80 through 87, alleges the failure of Chase, for each of two identified USTs at that station, to have conducted t (or have a third-party conduct on his behalf) an annual test of the automatic line leak detector for two periods of time: “from at least May 1, 2006 until April 22, 2009” and “from April 22, 2010 until September 7, 2010.” Paragraph 85. Attachment 3 purports to show each of two “pumps” passing, with the tests conducted on September 7, 2010, and Attachment 4 purports to show to test, each one noted with a passing indication, with the tests conducted on April 22, 2009. Given the time frames identified in paragraph 85 of the Complaint, each document appears to address EPA’s allegations regarding the failure to conduct the required annual test of the automatic line leak detector.²

Respondents’ affirmative defenses

Respondents have provided no documentation in their IPHE in support of their affirmative defenses.

² That Respondents have attached such documents, and that these purport to address the liability issue, does not mean that these documents resolve the liability issue. EPA has, at this point, no way of knowing whether these documents are truthful, accurate or otherwise credible. At the very least, EPA would seek to cross-examine the person attempting to establish a foundation for the admissibility of the document in an effort to ascertain the truthfulness and reliability of the information listed on the documents. Further, the allegations in count 2 cover a period of several years (part of calendar year 2006, calendar years 2007 and 2008, part of calendar year 2009 and part of calendar year 2010). Attachment 3 involves one set of purported tests on one day in calendar year 2010, and Attachment 4 involves one set of purported tests on one day in calendar year 2009. Nothing in these documents addresses the other years the Complaint alleges a failure to perform the required testing in this count.

The first affirmative defense asserts Mr. Chase “was never the owner and/or operator of service stations I, II, III, IV, V and VI” (paragraph 124 of the Answer). The documents Respondents have submitted as part of their IPHE appear to refute this: each of Attachments 1, 2 and 3 lists, as the owner, Andrew Chase. Further, in their list of witnesses, Respondents assert that Mr. Chase was not the owner of either Service Station I or VI, and the IPHE observes that this is “reflected in the public records available in the Clinton County Clerk’s Office.” The IPHE does not include a copy of any such public records, nor does it provide a URL link to a website that would connect to this office. Further, Respondents do not address that documents included in EPA’s initial PHE (Exhibit 22), the New York State Department of Environmental Conservation “Petroleum Bulk Storage” certificates, for each of the service stations (dated October 3, 2008 for Service Station I; dated August 18, 2008 for Service Station II; dated November 29, 2005 for Service Station III; dated February 1, 2007 for Service Station IV; dated September 29, 2006 for Service Station V; and dated February 22, 2008 for Service Station VI), list that Mr. Chase as the owner and/or operator of each of the six service stations.

Respondents’ second affirmative defense, set forth in paragraphs 125 through 130, consist of conclusory denials of the corresponding allegations made in the Complaint. *See, e.g.*, paragraph 125:

Respondents dispute that at service station I there was a failure to conduct annual tightness tests/provide monthly monitoring; that they failed to test operation of automatic line leak detector; that they failed to provide overfill protection for the existing tank system; that they failed to maintain release detection, failed to maintain cathodic protection, failed to cap and secure, temporarily, closed UST; and that they failed to permanently close UST.

No documentation has been attached to the IPHE in support of these defenses (other than the four discussed above).

The third affirmative defense states that “Respondents also dispute the amount of the proposed penalty.” The grounds for such dispute are not mentioned. In the IPHE, the

“Preliminary Statement” section amplifies upon this assertion, including that Mr. Chase and the associated companies “had run into financial hardship.” Further (pages 3-4):

Due to the financial conditions of the stations, any net proceeds received from the sale [Respondents claim five of the six stations have to date been sold; see also paragraphs 37, 41, 44 and 48 of the Complaint] were relatively minimal, and none of the corporations, but for Belmont, currently have any assets. None of the Respondent corporations have any financial ability to pay any amount of fine. Andrew Chase, as the alleged operator, and as an individual does not have the capacity to pay the fines.

The IPHE further asserts that the fines appear to be disproportional to the impact of the violations, that Mr. Chase cooperated in EPA’s investigation, the stations attempted to comply with issues raised during that investigation, and it concludes: “To impose the fines requested years after the fact and years after many of the stations have been sold, in fact, poses incredible financial hardship upon Andrew Chase, individually.” Page 4 of the IPHE.

Despite these assertions, Respondents do not attach any documentation that might corroborate or support the financial hardship claim, documents such as copies of Mr. Chase’s most recent federal income tax returns or a copy of a certified financial statement as to his financial condition. Similarly, Respondents provide no documentation that would support their argument for the a reduction (or elimination) of the penalty on any other grounds, such as the argument that “the amount of the fines do [sic] not appear to be in any way related to any actual harm due to any leak or contamination.” Page 4 of the IPHE.

Further, in their IPHE, Respondents state they “intend[] to rely upon any documentation submitted by Complainant.” Respondents have, however, failed to identify with any specificity the particular documents within EPA’s PHE upon which they intend to rely or which might support the arguments presented in their Answer and in the IPHE. EPA, as is this Court, thus left to speculate upon which documents Respondents will rely in support of their denials of EPA’s allegations.

Financial considerations

These have been addressed above, as Respondents raised them in their affirmative defenses.

Other challenges to the proposed penalty

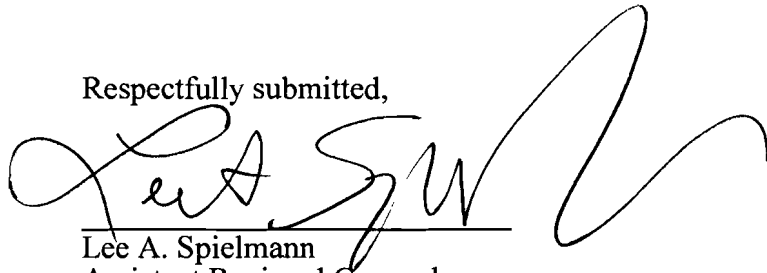
These matters have too been addressed in EPA's discussion of Respondents' affirmative defenses.

Proposed location for hearing

Respondents propose the hearing be held in Plattsburgh, New York, and they oppose EPA's suggested location in New York City. EPA accordingly counter proposes, as an alternative to its proposal that a hearing in the matter be held in New York City, that a hearing be held in Albany, New York.

Dated: December 15, 2011
New York, New York

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing "COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE," dated December 15, 2011, in the above-referenced proceeding in the following manner to the respective addressees listed below:

Original and One Copy
By Inter-Office Mail:

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

Copy by Fax Transmission,
202-565-0044, and Pouch Mail:

Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900 L
Washington, DC 20460

Copy by Fax Transmission,
518-561-4848 and Certified Mail,
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