UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Jerry C. Carter, Inc.,	)	**Docket No. RCRA-UST-99-004**
and	)	
Michael K. Joseph	)	
	)	
	)	
Respondents	)	

ORDER ON MOTIONS FOR ACCELERATED DECISION

Introduction.

Complainant, United States Environmental Protection Agency ("Complainant" or "EPA"), pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a), filed on November 19, 1999, a Motion for Accelerated Decision on liability in the above-captioned matter, arguing that there exists no genuine issue of material fact on the issue of liability, and that it is entitled to judgment as a matter of law. Respondent, Michael K. Joseph, on December 8, 1999, filed a Counter Motion for Accelerated Decision along with a Response to EPA's Motion for Accelerated Decision. In the Motion Respondent Joseph asserts that he is not an "operator" of the six underground storage tank systems ("USTs") in question and that therefore, he is entitled to accelerated decision as to liability.

Background.

The Complaint, as amended on September 3, 1999, alleges violations of Section 9003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991b, and the regulations promulgated thereunder at 40 C.F.R. Part 280. In the Complaint, EPA states that Respondents are the

"owner" & "operator"[1] of six "USTs" located at their Braselton, Georgia, facility ("facility"), which contain either gasoline, diesel fuel, or kerosene, each of which is a "regulated substance" as that term is defined in Section 9001(2) of RCRA, 42 U.S.C. § 6991(2) and 40 C.F.R. § 280.12. As such, EPA concludes that Respondents' six UST systems are subject to the requirements of Section 9001 of RCRA. The essence of the violation is Respondents' alleged failure to monitor for releases one of the six UST systems at the facility, Tank #6, and its associated piping. The absence of a release detection method violates 40 C.F.R. §§280.41(a) and 280.41(b).

On July 27, 1998 EPA conducted an UST compliance inspection of Respondents' Braselton, Georgia facility to determine Respondents' compliance with the Technical Standards and Corrective Action Requirements for Owners and Operators of USTs, found in 40 C.F.R. Part 280. Upon inspecting the facility, the inspector, Mr. John Gopaul, was unable to locate leak detection monitoring and testing records for the six USTs. Accordingly, Mr. Gopaul requested that Respondents supply EPA with leak detection records within two business days from the date of inspection. On August 24, 1998, having not yet received the requested materials, Mr. Gopaul contacted Respondent Carter, and the following day, EPA received the requested information. The materials included State of Georgia notification data dated March 30, 1998, and Statistical Inventory Reconciliation Records ("SIRs") for the period of July 1997 to July 1998. These records showed that Tank #6, one of the six tanks at Respondents' facility, a 1,000 gallon kerosene UST, was not monitored for a release using the required

[1]Section 9001(3) of RCRA, 42 U.S.C. § 6991(3) and 40 C.F.R. § 280.12 define "owner" as "any person who owns an UST system used for storage, use or dispensing of regulated substances..." for an UST system "in use on November 8, 1984, or brought into use after that date." Section 9001(4) of RCRA, 42 U.S.C. § 6991(4) and 40 C.F.R. § 280.12 define "operator" as "any person in control of, or having responsibility for, the daily operation of the UST system."

release detection method until May 1998, despite the fact that Respondents were required to begin release detection on December 22, 1990.[2]

After reviewing this data, EPA, on January 8, 1999, sent an Information Request to Respondents to determine whether Respondents had the release detection monitoring on Tank #6 prior to May 1998. In its response of January 29, 1999, Respondent Carter did not indicate that such monitoring had been utilized and in a telephone call on February 9, 1999, Respondent Carter confirmed to EPA that it had not included Tank #6 in the SIR until May 1998. This indicated to EPA that there was no release detection monitoring for Tank #6 from December 1990 to May 1998.

Based on the results of the inspection and the information it received from Respondent Carter, EPA concluded that Respondents had violated the release detection monitoring requirements found in 40 C.F.R. §§ 280.41(a) and 280.45 by failing to conduct release detection monitoring for Tank #6 for that period of time. EPA proposed a civil penalty in the amount of $33,375.00 for these alleged violations.

I. STANDARD FOR ACCELERATED DECISION

A motion for accelerated decision under section 22.20 of the Rules of Practice is analogous to a motion for summary judgment under FRCP 56. The Rules of Practice provide, in pertinent part, that "the Presiding Officer upon any motion of a party or sua sponte,...render an accelerated decision...if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or

[2]There exists a discrepancy as to the date Tank #6 was installed at the facility. In the Complaint, EPA states that Tank #6 system was installed in May 1965, and the release detection was required for that tank on December 22, 1990. However, in its Motion for Accelerated Decision, EPA states that Tank # 6, including its piping, was installed on May 8, 1985, and pursuant to 40 C.F.R. Part 280, Tank #6 was required to have leak detection for its piping by December 22, 1990, and for the tank itself, by December 22, 1993.

any part of the proceeding." Granting accelerated decision is appropriate only when the moving party demonstrates that there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, 477 U.S. 242, 250-51 (1986). In deciding such motions, the Court views the evidence in the light most favorable to the non-moving party . See Adickes v. Kress, 398 U.S. 144, 158-59 (1970).

II. EPA's MOTION FOR ACCELERATED DECISION

According to EPA, Respondents Carter and Joseph, as the "owner" and "operator" of the facility respectively, were required to comply with the release detection requirements of 40 C.F.R. Part 280, but failed to do so. EPA argues that there exists no dispute of material fact as to Respondents' liability for the alleged violations, given that Respondents have not provided any evidence demonstrating that they did in fact comply with the requirements by conducting release detection on the Tank #6 UST system prior to May 1998 and that the results of the inspection and the materials presented by Respondents, show that Respondents failed to comply with the requirements.

EPA, on the other hand, disagrees with Respondent Joseph's interpretation of the Lease Agreement as it relates to his alleged status as an "operator" of the USTs and asserts that the duties outlined in the Lease mirror the type of control required by 40 C.F.R. § 280.12 for operator status. Contrary to Respondent Joseph's arguments, EPA maintains that Paragraph 5(I) of the Lease clearly illustrates that his responsibilities confer to him operator status. According to EPA, the performance of the inventory control requirements in Section 5(c) and 5(I) of the Lease constitute a release detection method for USTs as set forth in 40 C.F.R. § 280.43.[3] Additionally, EPA purports that this inventory control

[3]40 C.F.R. § 280.43 sets forth the various methods of release detection for USTs. Product inventory control is one such method.

method along with an annual tightness test satisfy the release detection requirements for owners and operators of USTs found in 40 C.F.R. § 280.41(a).[4] As such, EPA concludes that the performance of such duties accords Respondent Joseph with operator status as he has control of, and responsibility for, the daily operation of the USTs.

III. RESPONDENT JOSEPH'S MOTION FOR ACCELERATED DECISION

Respondent Joseph maintains he is not an "operator"as that term is defined in 40 C.F.R. § 280.12 and therefore is not liable for the alleged violations. Noting that the section defines the term as "any person in control of, or having responsibility for, the daily operation of the UST system," Joseph asserts that as he has neither control nor responsibility over the USTs, liability cannot attach.

Joseph asserts that EPA's claim that he is an operator rests on two grounds: Joseph's admission in its original answer that he is an operator; and Respondent Carter's echoing of EPA's claim. Joseph easily refutes these grounds, noting that he has amended the answer and that Carter's agreement with EPA on the issue is no more than a claim by an interested party. In contrast, Joseph maintains that resolution of the issue is properly determined by comparing the definition set forth in Section 280.12 with the terms of the lease agreement between Joseph and Respondent Carter. The terms of that lease, Joseph argues, dictate his responsibilities at the facility and such terms do not confer to him control or responsibility over the USTs at the facility. Essentially, according to Joseph, his responsibility was limited to "simply manning the station on behalf of Carter" and therefore, effectively, he was merely Carter's cashier at the facility. Joseph Memorandum to Motion at 2, 3. The terms of

[4]40 C.F.R. § 280.41(a) states that owners and operators much provide release detection for USTs and piping and that tanks must be monitored every 30 days for releases except in some limited circumstances.

the lease instruct only that he act as a cashier for the sale of gasoline and products sold at the convenience store located at the facility, that he take inventory of the tanks, and that he keep the premises clean. Joseph argues that these types of duties are "non-operational" and that he "was simply manning the station." Thus, according to Joseph, the duties set forth in the lease do not accord him with operator status as defined in 40 C.F.R. 280.12. Furthermore, Joseph contends that Respondent Carter was the operator of the tanks.

In making this argument, Respondent Joseph points to certain provisions of the Lease that delineate his duties as the lessee of the facility. For example, Clause A states that he must "keep the station open for business eighteen (18) hours each day," Clause B requires that he "[a]ccount for product volumes delivered to the station at prices established by Lessor," and Clause (D) directs him to "[c]hange and post prices for gasoline station products immediately upon notification by Lessor...." According to the Lease, Joseph notes, Respondent Carter was responsible, pursuant to Section 16, for significant repairs to the station, including the USTs and "all equipment under the ground," and pursuant to Paragraph 25(3) of the lease, for "maintenance of kerosine [sic] and fuel equipment," while his duties were limited to making minor repairs.

Respondent Joseph also asserts that Paragraph 5(I) of the Lease Agreement supports his contention that he was not an "operator" because while that Paragraph instructed him to "[m]aintain an inventory control system" for the petroleum products at the facility,[5] the lease does not specify that he

[5]Paragraph 5(I) of the Lease directs Respondent Joseph to perform the following to maintain an inventory control system:

> (1) Make and record an accurate physical measurement of the level of product and water in each tank each day and make and record corresponding pump meter readings;
> (2) Make daily computation of gain or loss for each separate

had any responsibility for release detection or for compliance with any other regulatory requirements for USTs.

IV. THE PARTIES RESPONSES TO THE MOTIONS FOR ACCELERATED DECISION [6]

A. EPA's Response

Like Joseph, EPA looks to the lease agreement to support its claim that Joseph is an operator. In particular, Complainant points to Sections 5 (c) and 5 (I) of the lease. EPA argues those provisions require Joseph to perform inventory control, by accounting for product volumes delivered to the station, recording product measurement daily and reconciling the amounts with deliveries and sales, actions which EPA claims constitute a method of release detection under 40 C.F.R. 280.43. These duties under the lease are consistent with the definition of an "operator," as set forth at 42 U.S.C. § 6991(4) and 40 C.F.R. § 280.12, as "any person in control of, or having responsibility for, the daily operation of the UST system." EPA discounts the assertion in Joseph's affidavit that he has no responsibilities

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> tank system based on the tank and pump readings and delivery records;
> (3) Immediately notify Lessor upon discovery of any product loss or gain which cannot be explained by spillage, temperature variation or other cause not related to equipment management maintenance or upon discovery of a water level of one inch or more;
> (4) Maintain all inventory control records as long as necessary or may be required by applicable law;
> (5) Comply with all laws or regulations covering petroleum product inventory control; and
> (6) Follow such other reasonable procedures as may be specified from time to time.

[6]This section only discusses new matters raised by the parties in their responses.

regarding EPA regulations as plainly contrary to the terms of the lease provisions at sections 5 (c) and 5(I)(1)-(6), and it flatly denies the statement in Joseph's affidavit that he is prohibited under the lease from performing tank testing or leak detection on the USTs, arguing that the lease contains no such prohibition.[7]

B. Joseph's Response

Conceding that his duties included measuring petroleum levels in the USTs, recording pump meter readings and keeping records of product inventory, Joseph asserts that such activities do not equate with having control or responsibility over the tanks. Joseph also disputes EPA's assertion that responsibility for one element of the release detection requirements of 40 C.F.R. § 280.43(a) makes him an operator.

Joseph also notes that Carter, an owner of several service stations, had entered into a consent agreement with EPA concerning these tanks in 1991, yet Carter did not inform him of the consent agreement nor did Carter reference the regulations for performing release detections in the lease. Last, Joseph denies that he had responsibility to perform the annual tightness test under the lease and states that there is no basis for EPA to imply that he had that responsibility.

C. Carter's Response

[7]EPA also argues that Joseph's original admission that he is an operator should be considered. That argument is rejected. To do otherwise would amount, effectively, to denying Joseph's Amended Answer after the Court had granted the motion to amend it.

Respondent Carter, in response to EPA's Motion[8], argues that he was not the operator and that he did not have complete control over the USTs because he had leased the facility to Respondent Joseph. Submitting "records to the EPA and its pressure tests on the subject UST... does not establish that Jerry C. Carter had *full control* over the subject UST and thus, there exists an issue of material fact as to the individual who is potentially liable and thus the responsible party." Response at 3, (emphasis added). Carter asserts that EPA "blindly relies upon the allegation that Jerry C. Carter is the owner of the USTs and therefore is the responsible party." *Id.* Carter argues that, in determining his liability, EPA's reliance on the fact that Carter is the owner of the USTs is misplaced, as it is the "operator [who] is responsible for compliance with those regulations to which the USTs are subject." *Id*. at 4. Thus Carter asserts that EPA should only look to Joseph in this matter.

Carter also asserts that EPA failed to comply with "applicable procedures in this matter" by not providing an "Initial Response Warning" or a "Notice of Violation and also failed to hold a "Negotiation Show Cause Meeting" or any "facts that a threat to human health or the environment has occurred." *Id*. at 4-5. Last, Carter asserts that denying a hearing would deprive him of the opportunity to show "the facts as they are and not as the EPA simply alleges without substantial proof ... [and that] EPA has not shown the seriousness of the alleged violation [denying Carter the opportunity present] proof of its

[8]EPA filed a subsequent motion, arguing that, under 40 C.F.R. § 22.16(b), Carter's failure to file a response to its Motion for Accelerated Decision should operate as a waiver as to any objection by Carter to its granting. Joseph too filed a motion to strike Carter's untimely responses to Joseph's replies. While the Court did not receive Carter's responses until January 18, 2000, Carter indicated that he did indeed file his Response on January 9, 2000, but that apparently, EPA never received it. There has been some uncertainty about the timing and circumstances of Carter's responses but the Court, consistent with 40 C.F.R. § 22.4(c)(10), has decided to resolve these issues in Carter's favor and accept his responses. *However, all parties are put on notice that future deadlines are to be met.*

good faith and reasonable efforts to comply with the applicable requirements. " *Id*. at 5.

V. THE COURT'S DETERMINATION[9]

The determination of whether Respondent Joseph was an "operator" and Respondent Carter was an "operator" of the UST rests initially on factual resolutions, which then must be measured against the statutory and regulatory definitions of those terms. Respondent Joseph has denied that he was an "operator" of the USTs at the facility, and argues in his Response to EPA's Motion that the lease agreement between him, the lessee, and Respondent Carter, the lessor, reveals that he did not have control over or responsibility for the daily operations of the USTs.

Despite the flurry of motions, responses and replies over these issues, the determination of Carter and Joseph's liability is not difficult to resolve. The starting point for such resolution is the definition for the terms "owner and "operator." 42 USC § 6991 and 40 C.F.R. § 280.12 share the same definition for these terms and provide:

> *Operator* means any person in control of, or having responsibility for, the daily operation of the UST system.
>
> *Owner* means: (a) In the case of an UST in use on November 8, 1984 or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances...

The parties agree that the determination of Carter and Joseph's status is a legal determination and

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[9]On December 5, 2000, EPA filed a motion for leave to supplement its motion for accelerated decision on liability. This motion, prompted by the Court's November 29, 2000 Order granting Joseph's motion to amend his answer, seeks to "add facts to support [EPA's] position that Respondent Joseph is an operator of the UST system..." Though the motion has not been granted, EPA submitted its supplement along with the motion. The supplement is chiefly a reiteration of earlier arguments. Upon consideration, the motion to supplement is DENIED.

that construction of the lease agreement is important to this issue. Under the lease agreement dated September 15, 1994, Jerry C. Carter is the lessor and Michael K. Joseph is the leasee of a service station and convenience store located in Braselton, Georgia.

Regarding the issue whether Carter is the owner of the USTs, the lease describes him as the lessor of the property in issue. The property includes the buildings and the improvements. Several provisions of the lease lead to the conclusion that Carter's ownership includes the USTs. Under the lease, it is Carter who is to be immediately notified of any tank product gain or loss and he is entitled to daily fuel volume reports form Joseph. Carter is also to be informed promptly by Joseph of any equipment malfunctions. Evidence of a leak in an UST would certainly constitute a malfunction. Maintenance is to be performed by Carter's repair contractors. Of note, while Carter retains title to all fuels, kerosene sales are deemed as made by the lessor directly to the customer, with all proceeds from such sales belonging to Carter.

The lease terms underscore that while Joseph runs the cash register, the *ownership* and *title* to the gasoline station proceeds remain with Carter. Further, it is Carter who dictates the unleaded gasoline handling procedures and had the right to inspect to ensure Joseph's compliance with the contract. Indicative of his plenary authority as owner, Carter also can dictate the books and magazines sold at the station, as well as approve vending machines, signs, and advertising devices.

It is Carter who pays the real estate taxes and the ad valorem taxes on the inventories. Further, it is Carter, not Joseph, who must secure all licenses to operate the gas station.[10] While the lease provides

[10]The fact that the lease contains a provision (Section 11, Indemnity) declaring that the lessee indemnifies lessor from all liabilities, suits, etc., is not relevant to the RCRA UST action. Its relevance may only play a role, subsequent to the penalty imposed, in an action for indemnification or contribution. The Court expressly declines any construction as to the effect of such provisions.

that the lessor shall not be responsible for maintenance on underground tanks, but is responsible for maintenance on kerosene fuel equipment, neither of these provisions are inconsistent with ownership. Last, under the lease, it is Carter who is to keep the gasoline storage tanks and all equipment under the ground in good repair.

Each of these provisions are consistent with the conclusion that Carter is the owner of the UST systems at the station. Indeed there is no evidence in the record that anyone other than Carter is the owner of the property at the station, property which necessarily includes the USTs that are the subject of this litigation. By leasing the facility to Respondent Joseph, Carter did not give up his ownership of the USTs. Accordingly, the Court concludes that there is no issue of material fact concerning the ownership of the USTs and that Carter is the owner of them.

Regarding the issue whether Joseph is the operator of the USTs, the lease provides that Joseph has the obligation to keep the station open for business eighteen hours each day, that he is described as the lessor's dealer, and that he is the collector of the proceeds, adjusting the gasoline prices per the direction of Carter. In addition, there is no specific exclusion of the USTs from Joseph's operator duties. There are, however, several references in the lease that infer Joseph is the operator of the USTs. For example, Joseph is required to account to Carter for the gasoline product volumes delivered and to take all steps if fuel or oil spills create environmental hazards, including notification to regulatory agencies. Joseph also is required to notify Carter of any leaks of hazardous materials.[11]

Also telling is Joseph's obligation to maintain an inventory control system for the petroleum products, a responsibility that includes a daily physical measurement, along with computation of any

[11]Provisions of the lease, such as this, have a dual import, simultaneously demonstrating that Carter is the owner and that Joseph is the operator.

gain or loss, of the product in each tank. Joseph also has the duty to comply with "all laws and regulations covering petroleum product inventory control," a responsibility that underscores that he is the operator of the USTs in issue but, as noted before, does nothing to dispel that Carter is the owner of the USTs. Thus, on several bases, there can be no doubt that under the terms of the lease Joseph is the operator of the property as well as the operator of the USTs in issue and that on this record there is no issue of material of fact on that point.

Resolution of the shared liability for the alleged UST violations does not end the matter. It still must be determined whether there are any issues of material fact as to the alleged violations. The first violation asserts that the Respondents failed to comply with the tank release detection requirements of 40 C.F.R. § 280.41 for UST Number 6. Under that regulation the requirement for leak detection began, as applicable here, December 22, 1993. The second violation asserts a related similar failure: noncompliance with the line leak detection requirements for the pressurized piping associated with UST Number 6, in violation of 40 C.F.R. 280.41(b)(1). The requirement for leak detection for pressurized piping began, as applicable here, December 22, 1990.

It is undisputed that Respondents have failed to provide any information to show that tank release detection was conducted on the UST Number 6 system prior to May 1998. No such documentation was provided at the time of the inspection. Further, in Respondent Carter's response to EPA's request for information no records of leak detection for the UST Number 6 system were provided for any time prior to May 1998. In addition, the affidavit of Sebastian Thaliath, an affidavit submitted by Carter, Mr. Thaliath concedes there was no release detection performed prior to May 1998. Respondent Joseph's Answer only declares an absence of knowledge as to the Complaint's allegations regarding these violations while Respondent Carter denies that the allegations apply to him.

Both Respondents concede that the UST Number 6 is in fact an UST and that the tank and systems involved are subject to regulation under RCRA Section 9001 and the associated regulations under 40 C.F.R. Part 280. The Respondents also admit that kerosene is a regulated substance and that it was present in UST Number 6. There is also no dispute that UST Number 6 and its associated piping was installed on May 8, 1985 and that, under the cited regulations, such pressurized piping was required to have release detection by December 22, 1990 and that the USTs were required to have release detection by December 22, 1993. As mentioned, the Respondents have not shown any evidence to show compliance with the release detection requirements of the cited regulations prior to May 1998.

Respondents have raised several affirmative defenses. The Court agrees that the following defenses[12] do not present a genuine issue of material fact, are irrelevant, or raise issues that are completely unsupported:

-Carter's objection to the omission of an Initial Response Warning, Notice of Violation, and Negotiation Show Cause meeting is not relevant to the issue of liability.

-Carter's objection that the Compliance Order is not fair and equitable treatment of the regulated community and represents selective enforcement.

-Carter's assertion that the Compliance Order will not deter potential violators.

- Carter's assertion that the time period for compliance is unreasonable, barred by the doctrines of waiver and laches, that the Compliance Order is too severe, that compliance with the Order would cause him to violate the terms of the lease.

- Carter's various claims: that he is not the current operator of the USTs; that only

[12]Several of Carter's defenses relate to penalty issues. These include his assertion that he acted in good faith, that any violations were beyond his control and that any penalty should therefore be nominal. This Order does not address the penalty. The determination of an appropriate penalty will be made after a hearing on that issue.

Respondent Joseph may be looked to for liability; that the lease put these responsibilities upon Joseph; and that enforcement against Carter violates his rights under the Fifth Amendment and the Contract Clause of the United States Constitution.

- Carter's claims that the Complaint fails to state a claim of violation; that RCRA and the regulations promulgated thereunder are vague and do not provide notice of the conduct prohibited.

- Joseph's similar claim that the Complaint fails to state a claim.

- Joseph's claim that he was not a party to an earlier Consent Order against Carter and that he was not a party to an earlier action in 1991; and that Carter failed to disclose the earlier Consent Order.

Given that there does not exist a genuine issue of material fact with respect to liability, EPA is entitled to judgment as a matter of law. Accordingly, EPA's Motion for Accelerated Decision is **GRANTED**, Respondent Joseph's Motion for Accelerated Decision is **DENIED**.

No further Motions will be entertained. The case now will be set for a hearing on the issue of an appropriate penalty, with the date and location for the hearing to be established in a conference call which will be scheduled shortly.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: January 8, 2001

In the Matter of Jerry C. Carter,Inc. & Michael K. Joseph, Respondents
Docket No. RCRA-UST-99-004

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Motions For Accelerated Decision**, dated January 8, 2001, was sent this day in the following manner to the addressees listed below:

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Dated: January 8, 2001