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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
FRANK MUSTAFA,	)	Docket No. II RCRA-UST-91-0402
	)	
Respondent	)	

ACCELERATED DECISION AND ORDER

Pursuant to Section 22.20(a)[1] of the Consolidated Rules of Practice, 40 C.F.R. Part 22, I hereby render, without a hearing, an accelerated decision in favor of the U.S. Environmental Protection Agency (EPA or Complainant) with regard to the liability of the Respondent herein. I hereby assess a civil penalty in this matter, and I further order Respondent to comply immediately with the requirements of 42 U.S.C. § 6991a(a) and 40 C.F.R. § 280.41.

I. The Complaint

This civil administrative proceeding for the assessment of a civil penalty was initiated by the issuance of a complaint by the EPA pursuant to Section 9006 of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA), the Hazardous and Solid Waste Amendments of 1984 (HSWA) and

[1]Section 22.20(a) of the Consolidated Rules of Practice (CROP) provides, in pertinent part, that the "Presiding Officer, upon motion of a party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding."

the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9001 et seq. (hereinafter collectively referred to as the Act or RCRA).

The complaint charges, in the first of two counts, that Respondent, Frank Mustafa (Respondent or Mr. Mustafa) as an owner of six (6) underground storage tank systems (UST systems or UST's) at three separate service stations located in the U.S. Virgin Islands, failed to notify the Virgin Islands Department of Planning and Natural Resources (DPNR) of the existence of these UST systems as required by Section 9002(a) of the Act, 42 U.S.C. § 6991a(a), and by 40 C.F.R. § 280.3. The second count charges that Respondent failed to meet the release or leak detection requirements for each UST system, as required by 40 C.F.R. §§ 280.40(a) and 280.41(b)(1). The total civil penalties sought by EPA in this matter are as follows:

Count I	$ 60,000.00
Count II	56,105.00
Total Proposed Penalty	$116,105.00

II. The Answer

On October 18, 1991, counsel for Respondent filed an answer to the complaint and request for formal hearing (answer). In its answer, Respondent admits to owning and operating UST systems at the Golden Cow Service Station located at Estate Friedensthal, Christiansted, St. Croix, U.S. Virgin Islands (hereinafter Golden Cow). In addition, Respondent admits to owning and operating the UST systems at Frankie's Service Station located at 25 Estate Two

Williams, Frederiksted, St. Croix, U.S. Virgin Islands (hereinafter Two Williams).

Respondent denies the allegations of the complaint that it is the owner and operator of two or more UST systems at Frankie's Service Station, 3A La Grande Princess, Christiansted, U.S. Virgin Islands (hereinafter La Grande Princess). However, in the Statement of Facts included in the answer, Respondent states: "Respondent's lease for the station located at 3A La Grande Princess, Christiansted, St. Croix, U.S. Virgin Islands expired in about June of 1990. Respondent has since divested himself of that station."

The answer denies the alleged violations and explains Respondent's failure to submit the required notification forms. Respondent states that he has made several attempts to obtain the requested information with regard to the UST's from the previous owners of the service stations but that his efforts have been unsuccessful.

III. Findings and Conclusions as to Liability

An accelerated decision as to the liability of a respondent in a given case is appropriate where there exist no genuine issues of material fact and complainant therein is entitled to judgment as a matter of law. In this case, the parties have filed stipulations which generally concede the liability of Respondent. Based upon those stipulations and Respondent's answer, the following findings of fact and/or conclusions of law are hereby made.

1. Respondent in this matter is Frank Mustafa. (Stipulation (Stip.) ¶ 1.)

2. Respondent is a person as defined by Section 9001(6) of the Act, 42 U.S.C. § 6991(6), and 40 C.F.R. § 280.12. (Complaint (Comp.) p. 1; Answer (Ans.) p. 1.)

3. Respondent is the owner and operator of two or more UST systems, as those terms are defined in Section 9001 of the Act and in 40 C.F.R. § 280.12, located at the Golden Cow Service Station, Estate Friedensthal, Christiansted, St. Croix, U.S. Virgin Islands. (Comp. p. 1; Ans. p. 1; Stip. ¶ 2.)

4. Respondent is the owner and operator of two or more UST systems located at Frankie's Service Station, 25 Estate Two Williams, Frederiksted, St. Croix, U.S. Virgin Islands. (Comp. p. 2; Ans. p. 1; Stip. ¶ 3.)

5. Respondent was the owner and operator of two or more UST systems located at 3A La Grande Princess, Christiansted, St. Croix, U.S. Virgin Islands, during the time period of May 8, 1986, through May of 1990. (Stip. ¶ 4.)

6. Respondent failed to submit notification forms pursuant to Section 9002(a) of the Act, 42 U.S.C. § 6991(a), and 40 C.F.R. § 280.3 (1985), to the EPA or to the DPNR by May 8, 1986, for any of the UST systems owned by Respondent. (Stip. ¶ 5.)

7. Respondent submitted the notification forms described in paragraph 6 above for three (3) UST systems owned by him and located at Golden Cow, and for three UST systems owned by him and

located at Two Williams, on or about November 26, 1991. (Stip. ¶ 6.)

8. Respondent's failure to submit notification forms by May 8, 1986, as to all of the UST systems owned and/or operated by him at that time, located at Golden Cow, Two Williams and La Grande Princess, constitutes violations of Section 9002(a) of the Act, 42 U.S.C. § 6991a(a), and of 40 C.F.R. § 280.3 (1985). (Stip. ¶ 7.)

9. The UST systems owned or previously owned by Respondent located at Golden Cow, Two Williams and La Grande Princess are of unknown age. (Stip. ¶ 8.)

10. As of June 4, 1991, Respondent had failed to meet tank release detection requirements set forth in 40 C.F.R. § 280.40(a) and piping release detection requirements set forth in 40 C.F.R. § 280.41(b)(2), for any of the UST systems located at Golden Cow, Two Williams or, as of May 30, 1990, for any of the UST systems located at La Grande Princess. (Stip. ¶ 9.)

11. Respondent was required, pursuant to 40 C.F.R. § 280.40(c) to comply with release detection requirements by December 22, 1989, for UST systems owned by him. (Stip. ¶ 10.)

12. Respondent's failure to meet the above-described release detection requirements constitutes a violation of 40 C.F.R. § 280.40. (Stip. ¶ 11.)

13. The citation to 40 C.F.R. § 280.41(b)(1) in paragraphs 29 and 31 of the complaint, are corrected to read "40 C.F.R. § 280.41(b)(2)" due to the fact that piping at the UST systems

referred to in findings of fact 3, 4 and 5 above are suction piping and not pressurized piping. (Stip. ¶ 13.)

14. The parties to this proceeding have stipulated, and I so find, that no genuine issue of material fact exists as to the question of liability and Complainant is entitled to judgment as a matter of law as to Counts 1 and 2 of the complaint issued in the above-captioned matter. (Stip. ¶ 12.)

IV. Findings and Conclusions as to the Penalty

The parties have stipulated as to Respondent's liability for the failure to submit required notification forms and the failure to meet release detection requirements. It remains to be determined as to what civil penalty, if any, should be assessed against Respondent. "Respondent has already stipulated to liability and has agreed to waive a hearing on the issue of damages, in an effort to save time and reduce expenses to both parties . . . ."[2] Thus, "the parties agreed that if settlement could not be reached, the question of the amount of penalty to be assessed would be addressed by the Court on brief, rather than at a formal hearing."[3]

I find that although Respondent requested a formal hearing in this matter when he filed an answer to the complaint, Respondent subsequently has elected to waive his right to a hearing.

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[2]Respondent's Motion for Enlargement of Time at 1 (March 2, 1993).

[3]Complainant's Brief in Support of Motion for Accelerated Decision and for a Compliance Order, at 4 (February 12, 1993).

Respondent now seeks an accelerated decision as to all issues in this matter including, most specifically, as to the question of the amount of the penalty, if any, which should be imposed for the violations found.

In other words, the parties jointly seek a decision as to the penalty question even though genuine issues of material fact may exist. Moreover, the parties seek a resolution of any such issues of material fact and of penalty question on the basis of their respective submissions regardless of the inherent adequacy or inadequacy of those submissions. Although I am less than sanguine about the result of my deliberations in these circumstances, preferring, as I do, a formal hearing in which witnesses can be examined and cross-examined and the material issues of fact thoroughly aired, I will attempt to honor the parties' joint request.

A. Complainant's Contentions as to the Penalty: Complainant maintains that it has correctly applied the EPA penalty guidance in calculating the proposed penalty and pursuant to such guidance, has proposed a fair and appropriate penalty in light of the statutory purposes to be served under the provisions of the Act governing the regulation of UST's.

EPA explains the calculation of the penalty as follows:

> The penalty assessed was calculated in accordance with the provisions of the 'U.S. EPA Penalty Guidance for Violations of UST Regulations,' dated November 1990 (the 'Penalty Guidance'). The factors considered in determining the penalty (for each count) were the days of noncompliance, the number of UST systems for which there was noncompliance,

the potential for harm, the extent of the deviation from statutory or regulatory requirements, the degree of noncooperation, the degree of willfulness or negligence, and the level of environmental sensitivity at the location of the UST systems. In addition, with reference to Count 2 (failure to provide a method of release detection) an additional factor was considered -- the economic benefit of noncompliance.

The Penalty Guidance sets forth a 'Matrix Value' Table, which sets forth nine different Matrix Values determined by the potential for harm and by the extent of deviation from the regulatory requirements associated with the particular violation. This Matrix Value is then multiplied by the number of UST systems for which the violation has been documented, and further adjusted on the basis of the violator's cooperation, willfulness or negligence, history of noncompliance, and other unique factors, if any. These computations yield an 'Adjusted Matrix Value.'

The Penalty Guidance requires that the Adjusted Matrix Value be multiplied by two factors: (1) an Environmental Sensitivity Multiplier, determined on the basis of local environmental conditions; and (2) a Days of Noncompliance Multiplier, based on the period of time for which noncompliance has been documented, to yield a Gravity-Based Component for the proposed penalty.

In the instant case, for violation of the notification requirement of § 9002 of RCRA and 40 C.F.R. § 280.3 (1985), the 'Potential for Harm' was determined to be major. Failure of an UST owner or operator to comply with the notification requirement denies the regulatory agency any knowledge of the number, ages, and technical specifications of the UST systems such as is necessary to protect human health and the environment, and results in a substantial adverse effect on the regulatory program. The 'Extent of Deviation' was determined to be major, because there was total noncompliance with this specific regulatory requirement.

The Matrix Value indicated on the table, $1,500, was then multiplied by the number of tanks involved (six) to yield $9,000, and then increased by 100% -- 50% for noncooperation and 50% for willfulness -- to yield an

Adjusted Matrix Value of $18,000. This figure was multiplied by an Environmental Sensitivity Multiplier of 1.5, representing a 'moderate' environmental sensitivity since the UST systems are located in commercial/residential areas, and by a Days of Noncompliance Multiplier of 6.5, representing noncompliance for a period of _five [sic] years. (The days of noncompliance were calculated as of June 4, 1991, the date the penalty computation was completed, just prior to the issuance of the complaint.)

These computations resulted in an initial penalty target figure of $175,574 for Count 1. This amount was, however, reduced to $60,000, the statutory maximum of $10,000 per tank for non-notification specified in § 9006(d) of RCRA, 42 U.S.C. § 6991e(d).

For violation of the release detection requirement of 40 C.F.R. § 280.40(c), the 'Potential for Harm' was determined to be major since failure to use any method to detect releases from the UST system can result in a release of product into surrounding soils and groundwater going unnoticed for a lengthy period of time. The 'Extent of Deviation' was determined to be major inasmuch as Respondent failed altogether to comply with this requirement.

The Matrix Value indicated on the table, $1,500, was then multiplied by the number of tanks involved (six) to yield $9,000, and then increased by 20% -- 10% for noncooperation and 10% for willfulness -- to yield an Adjusted Matrix Value of $11,250. This figure was multiplied by an Environmental Sensitivity Multiplier of 1.5, representing a 'moderate' environmental sensitivity since the UST systems are located in commercial/residential areas, and by a Days of Noncompliance Multiplier of 3.0, representing noncompliance for a period of 1.5 years. (As for Count 1, the days of noncompliance were calculated as of June 4, 1991, the date the penalty computation was completed.)

These computations resulted in a Gravity-Based Component of $50,625 for Count 2. For Count 2, an Economic Benefit Component was calculated to determine avoided and delayed costs associated with noncompliance with release detection requirements. This figure, $5,480, was added to the Gravity-Based

Component to yield an initial penalty target figure of $56,105 for Count 2.

The total proposed penalty is therefore $116,105.[4]

B. Respondent's Contentions as to the Penalty: In his prehearing exchange Respondent contends that if he is forced to pay the proposed penalty, he will not be able to continue in business. He contends that the general economic picture in the Virgin Islands, and particularly on St. Croix, has been very bleak and that this situation was exacerbated by the severe destruction resulting from Hurricane Hugo in September 1989. More specifically, Respondent contends that he was not adequately compensated for his losses due to the collapse of the insurance industry in the Virgin Islands.

In his brief in opposition to Complainant's motion, the Respondent sets forth his arguments as to why EPA's proposed penalty is arbitrary, capricious and otherwise contrary to law.

First, Respondent maintains that in calculating the proposed penalty, EPA failed to consider certain fundamental circumstances unique to the Virgin Islands, which are essential to the sound reasoned evaluation of two key elements of the penalty calculus: (1) the egregiousness of Respondent's noncompliance; and (2) the potential harm represented by the violations charged. Respondent avers that a penalty calculation made solely with reference to circumstances commonly existing on the U.S. mainland is patently arbitrary, because general assumptions that may apply for the

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[4]Complainant's Prehearing Exchange, at 10-13 (January 23, 1992).

mainland are not always valid in the Virgin Islands. Respondent submits that among the circumstances which should be considered are the devastation of Hurricane Hugo on September 17 and 18 of 1989, Respondent's post-hurricane compliance efforts, and the sources of the water supply in the Virgin Islands.

Respondent argues that this case involved technical violations of notification requirements and leak detection device standards and not the disposal of hazardous waste or the contamination of the groundwater supply through leaking UST systems. Respondent argues that in "assessing the potential harm in this case, the EPA failed to take into account the minor importance of ground water in the Virgin Islands, where wells are uncommon and cistern collection of rainwater and desalination of sea water are the norm."

Respondent alleges that the penalty proposed clearly is not fair and equitable when compared with the treatment of others in the regulated community and that RCRA case law is replete with examples of far lower fines for far more egregious and dangerous violations.

As for the circumstances resulting from Hurricane Hugo, Respondent claims that Mr. Mustafa's home and businesses were severely damaged in the hurricane. To make matters worse, Mr. Mustafa was among the many insured by one of several local companies that failed to make good on their policies and that he was never fully compensated for his losses. This failure eroded any profits and contributed to the shaky financial condition of his stations. Respondent asserts that a penalty of $116,105.00 would

be catastrophic because Respondent's two service stations simply do not have the profit potential ever to recover from such a large expense. Respondent also states that he has no history of prior offenses.

As for the application of the factors in the penalty policy, Respondent insists that: (1) under the circumstances the extent of the deviation was minor, rather than major; (2) the potential for harm was minor; (3) the "violator specific" adjustments were arbitrarily applied; (4) EPA failed to consider "other unique factors" which are clearly present in this case; (5) the application of the "Environment Sensitivity Multiplier Index" was patently arbitrary; and (6) the calculation of the "Days of Noncompliance Multiplier" is arbitrarily high.

V. The Penalty

Section 22.27(b) of the CROP (40 C.F.R. § 22.27(b)) states, in pertinent part:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the Complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Act requires that any penalty which may be assessed must be "reasonable taking into account the seriousness of the violation

and any good faith efforts to comply with applicable requirements."[5]

The "U.S. EPA Penalty Guidance for Violations of UST Regulations" of November 1990 (Penalty Policy) describes the several steps in the computation of the penalty amount. They include the determination of the economic benefit of noncompliance and the determination of a gravity-based component which result in an initial penalty target figure but which thereafter may be adjusted based on four violator-specific adjustment figures (which are also to be considered in determining the gravity-based component). Consideration will be given to these steps in calculating the penalty in this case.

A. Economic Benefit of Noncompliance: The economic-benefit component represents the economic advantage that Respondent may have gained by delaying capital and/or nondepreciable costs and by avoiding operational and maintenance costs associated with compliance. The total economic-benefit component is based on the benefit from both avoided costs and delayed costs.

For Count I Complainant has determined that there was no economic benefit to Respondent in terms of avoided costs or delayed costs for noncompliance. As one might expect, Respondent concurs with this assessment. I therefore find that there was no economic benefit afforded to Respondent due to his noncompliance with the provisions for notification to the EPA or the DPNR of the UST

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[5]Section 9006(c) of SWDA, 42 U.S.C. § 6991e(c).

systems owned and/or operated by him. The proper dollar amount for this factor for Count I of the complaint is $0.

For Count II, the Complainant has calculated the economic-benefit component to be $5,480.00. Respondent has offered no evidence to show that the economic benefit that he gained from noncompliance was of a lesser amount nor has Respondent advanced any meaningful arguments that this amount was calculated improperly or incorrectly. Therefore, I have no basis upon which to reduce this figure of $5,480.00.

B. Gravity-Based Component: This component consists first of a matrix value which is based upon the extent to which the violation deviates from statutory or regulatory requirements and upon the actual or potential harm resulting from the violation. This matrix value is then adjusted to take into account the Respondent's degree of cooperation or noncooperation; the degree of willfulness or negligence associated with the violation; Respondent's history of noncompliance and other unique factors associated with the case. Following the adjustments to the matrix value, it is multiplied by an environmental sensitivity multiplier (ESM) which is supposed to reflect the potential or actual environmental impact at the site and by a days of noncompliance multiplier (DNM) which takes into account the number of days of noncompliance. The result is the gravity-based component.

For Count I EPA determined that both the potential for harm and the extent of deviation were major, resulting in a matrix value of $1,500.00. According to "Appendix A: 'Matrix Values for

Selected Violations of Federal Underground Storage Tank Regulations'" the appropriate matrix value for a failure to notify the designated state or local agency of an existing tank is "Major Major $1500."[6]

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[6]The appendix describes this violation with a regulatory citation to § 280.22(a). The violation alleged in Count I of the complaint and so stipulated herein cited § 280.3 (1985). Section 280.3 provided, in pertinent part:

> §280.3 Notification requirements.
>
> (a) On or before May 8, 1986, each owner of an underground storage tank currently in use must submit, in the form prescribed in Appendix I of this section, a notice of the existence of such tank to the State or local agency or department designated in Appendix II of this section to receive such notice.
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> (b) On or before May 8, 1986, each owner of an underground storage tank taken out of operation after January 1, 1974 (unless the owner knows that such tank has been removed from the ground) must submit, in the form prescribed in Appendix I of this section, a notice of the existence of such tank to the State or local agency or department designated in Appendix II of this section to receive such notice.

The notification requirements section of Part 280 subsequently was revised and has been republished as Section 280.22 which provides, in pertinent part, as follows:

> § 280.22 Notification requirements.
>
> (a) Any owner who brings an underground storage tank system into use after May 8, 1986, must within 30 days of bringing such tank into use, submit, in the form prescribed in appendix I of this part, a notice of existence of such tank system to the state or local agency or department designated in appendix II of this part to receive such notice.

Respondent disagrees, contending that based upon the time when Mr. Mustafa was first notified of the violations, the catastrophic devastation, disorder and disruption which resulted from Hurricane Hugo about six (6) weeks after Mr. Mustafa first learned of the notification requirements from DPNR, and his efforts to achieve compliance under arduous circumstances, the designation of "major" for extent of deviation is arbitrary and capricious. Based upon the totality of the circumstances, Respondent asserts that the appropriate designation is "minor."

Respondent's contentions as to the extent of deviation must be rejected. Clearly Respondent was guilty of substantial noncompliance in his failure to notify the proper parties of the existence of the UST systems.

The notification requirements were first published in the Federal Register on November 8, 1985 and the Respondent, like everyone else, is charged with knowledge of the United States Code

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(Footnote 6 continued)

> NOTE: Owners and operators of UST systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the designated state or local agency in accordance with the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, on a form published by EPA on November 8, 1985 (50 FR 46602) unless notice was given pursuant to section 103(c) of CERCLA. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form contained in appendix I of this part.

Hence, the nature of the violation here is essentially identical to a violation of 40 C.F.R. § 280.22(a).

and rules and regulations duly promulgated thereunder.[7] The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."[8] Moreover, on May 6, 1986, both the Virgin Island Daily News and the St. Croix Avis carried articles announcing the notification requirements and on July 21, 1986 the Government of the Virgin Islands issued a Press Release concerning the requirement.

Respondent maintains that "at the end of July of 1989 . . . DPNR itself was still trying to comprehend the new law." Complainant points out that DPNR, through a letter dated July 25, 1989, informed Respondent of the notification requirements for owners of UST systems and provided him with a brochure describing these requirements and a copy of the notification form.[9] Thus, there is no question but that Respondent received actual notice of this requirement in late July of 1989. On August 30, 1989, DPNR sent Mr. Mustafa a notice-of-violation (NOV) letter for his failure to comply with the notification requirements.[10] On September 8, 1989, a representative of DPNR telephoned Mr. Mustafa concerning his continued failure to file the notification forms and was

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[7]44 U.S.C. § 1507.

[8]Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

[9]Complainant's Motion for Accelerated Decision (Motion) (February 12, 1993) Exhibit (Exh.) 6.

[10]Motion, Exh. 7.

informed by Mr. Mustafa that his forms would be forthcoming shortly.[11] Respondent argues that he could not file the required notification forms because he did not have all of the information requested, that he sought that information from the previous owners but without success. However, as Complainant points out, the notification forms themselves allow UST owners to indicate "unknown" or to provide estimates as to the information requested.

On September 17 and 18 of 1989, Hurricane Hugo struck the island of St. Croix. Mr. Mustafa clearly had ample opportunity between July 25, 1989, and the arrival of Hurricane Hugo to complete and file the required forms but he failed to do so.

Respondent asserts that in evaluating the circumstances of the case, the disorder and disruption bordering on total chaos, following the advent of Hurricane Hugo must be taken into consideration. According to Respondent, Mr. Mustafa's home and businesses were severely damaged in the storm and the Golden Cow was still missing its roof as of April 1993. In describing the months following the hurricane, Respondent states that the National Guard was called in to maintain order; that emergency food and water had to be air lifted to the island; that it was months before telephone, power and other basic services were restored; and that during that period, finding food and shelter was the only priority. I agree with Respondent that consideration must be given to these circumstances and to Mr. Mustafa's "efforts to rebuild his home, his businesses, and his life" under such arduous conditions when

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[11]Complainant's Prehearing Exchange (January 23, 1992) Exh. 7.

evaluating his failure to comply with the UST requirements during the period following Hurricane Hugo. I believe these circumstances should be considered in connection with the "other unique factors associated with the case" which will be considered in adjusting the matrix value and in connection with the DNM.

Therefore, the extent of deviation for Count I should be classified as major.

Respondent also insists that EPA classification of the potential for harm as major is erroneous and urges that this factor be classified as minor. Respondent cites the fact that St. Croix relies only to a minimal extent on drinking water from groundwater sources as compared with the U.S. mainland. In this regard Respondent states that:

> The majority of Virgin Islanders depend on desalination and rainwater catchment for water. Moreover, both of Mr. Mustafa's gas stations are located in areas far removed from the few wells that do exist on St. Croix . . . . And unlike the mainland, St. Croix has no lakes, rivers or streams that could be contaminated by a possible UST leak. Therefore, Mr. Mustafa's particular UST's do not pose any risk to human health or the environment. Based on the relevant circumstances surrounding Mr. Mustafa's technical violation, the risk to human health and the environment [by] his failure to notify DPNR of his UST systems is unquestionably minor.

EPA has evaluated the potential for harm for Count I as major on the basis of the Penalty Policy statement that "failure to submit tank notification data may be considered to have <u>significant</u> potential for harm because the Agency has few other sources of

information on the location of USTs."[12] In describing the difference between a major potential for harm and a moderate potential for harm, EPA uses the word "significant" in connection with a moderate potential for harm. A moderate potential for harm is described as a violation which "may have a significant adverse effect on the regulatory program" while a major potential for harm is described as a violation which "may have a substantial adverse effect on the regulatory program."[13] The difference between significant and substantial is not crystal clear.[14] However, EPA's use of the word "significant" in the Penalty Policy both in describing the violation alleged in Count I and in describing a moderate potential for harm in connection with the adverse effect on the regulatory program resulting from such a violation is considered "significant." The failure to submit the required notification forms is considered to have "significant potential for harm"; a violation which "may have a significant adverse effect on the regulatory program" possesses a moderate potential for harm. I conclude that this warrants the classification of the potential

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[12]Penalty Policy at 15 (emphasis added).

[13]Id. at 17 (emphasis added).

[14]Significant is defined as momentous or important while substantial is defined as being of considerable importance. Webster's II New Riverside University Dictionary (1984). In an earlier dictionary significant is defined as important or of consequence while substantial is defined as essential, material or important. The Random House Dictionary of the English Language (1969). Turning to Roget's International Thesaurus (Third Ed. 1962) one finds that important is equated to substantial (670.16) and to significant (670.19) and both terms are equated with meaningful (543.10).

for harm as moderate. A moderate classification is considered reasonable taking into account the seriousness of the violation. The major/moderate classification for Count I results in a matrix value of $1,000.00.

Given the type of violation the penalty for Count I is assessed on a per-tank basis since the specific notification requirement is clearly associated with each tank at a facility. Hence, the initial matrix value of $1,000.00 will be multiplied by six (6) which is the number of UST systems for which Respondent failed to submit a notification,[15] producing $6,000.00.

For Count II EPA determined that the failure to provide a method of release detection was a major deviation from the regulatory requirement and presented a major potential for harm. This resulted in an initial matrix value of $1,500.00. Respondent, on the other hand, contends that the relevant circumstances are the same for both counts and, consequently, the deviation from the regulatory requirement and the potential for harm should both be ranked as minor.

I must reject Respondent's arguments concerning the deviation from the regulatory requirement factor for Count II for the same reasons that I rejected the same arguments with respect to Count I.

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[15]Subsequent to issuance of the complaint in this matter, Complainant learned, on the basis of notification forms filed for each of the three gas stations, that there are three, not two, UST systems at Golden Cow and at Two Williams. This new information could have justified the imposition of a higher penalty than that sought in the complaint. Complainant, however, in the exercise of enforcement discretion, decided not to seek imposition of the higher penalty.

The failure to provide any detection method whatsoever - even the most rudimentary method - is clearly a total and complete deviation from the regulatory requirement and must be classified as major.

Complainant has classified the potential for harm resulting from the failure to meet the release detection requirements as major while Respondent insists that they be classified as minor. This issue must be resolved primarily on the basis of the potential threat to the groundwater on St. Croix presented by the violation.

The urban areas of the Virgin Islands rely primarily on desalinated seawater while rural areas depend mainly on rainwater collected from rooftop rainfall catchments and ground water.[16] "Ground water sources supply 18 percent of the total water used in the U.S. Virgin Islands."[17] The public water supply system in St. Croix consists of separate potable water- and seawater-distribution systems. The potable water-distribution system uses desalinated water from the Virgin Islands Water and Power Authority (VIWAPA) which is supplemented by ground water withdrawn from the Virgin Islands Department of Public Works (VIDPW) well fields on St. Croix.[18] "In St. Croix, the . . . VIDPW uses ground water to

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[16]Heriberto Torres-Sierra and Teresita Rodriguez-Alonso, U.S. Virgin Islands Water Supply and Use: U.S. Geological Survey Water-Supply Paper 2350 (1987) at 485.

[17]Joseph W. Troester, U.S. Geological Survey Ground-Water Studies in the U.S. Virgin Islands, Water Fact Sheet, U.S. Geological Survey, Department of the Interior, Open-File Report 88-163 (1988).

[18]H. Torres-Sierra and T. Rodriguez-Alonso, at 488.

supplement the desalinated water in the public-supply system."[19] About 94 percent of the water in the public water supply systems throughout the Virgin Islands is produced by the desalination plants while the remaining six (6) percent comes from the VIDPW well fields on St. Croix and St. John.[20]

Just over half the population of the Virgin Islands is not served by public-supply water systems. These people are classified as domestic self-supplied users and about 38 percent of their water is supplied by private wells.[21] Commercial self-supplied users, including hotels, condominiums, airports, laundries, rum distilleries and gasoline stations also rely, to some extent, upon the use of ground water.[22] Complainant points out that St. Croix, where Respondent's facilities are located, has the largest and best developed groundwater resources in the Virgin Islands. The Kingshill Aquifer underlies 25 square miles of the island and accounts for 67 percent of the total groundwater withdrawal in the Virgin Islands.[23] There are an estimated 500 to 600 wells located on St. Croix, both public and private, capable of pumping 1.5 to

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[19] Id. at 486.

[20] Id. at 488.

[21] Id. at 488-489.

[22] Id. at 489.

[23] A. Zack, T. Rodriguez-Alonzo, & A. Roman-Mas, U.S. Virgin Islands Ground-Water Quality: U.S. Geological Survey Open-File Report 87-0756 (1987).

2.0 million gallons per day.[24] In 1987 about 960,000 gallons of water were withdrawn each day from the Kingshill Aquifer on St. Croix.[25] Respondent's facilities, where the UST's are located, are situated over the Kingshill Aquifer.

Based upon these facts, Complainant would have me conclude that the potential for harm to the ground water in the Kingshill Aquifer resulting from an undetected leak from one or more of Respondent's UST's is major. However, Complainant's own penalty computation memorandum belies this contention where it states "that the potential environmental impact at the site would be moderate, should petroleum be released at Respondent's facilities. Respondent's UST facilities are located in commercial/residential areas but do not threaten local water supplies." Moreover, the Penalty Policy, in distinguishing the potential for harm factor from the ESM, emphasizes that the potential for harm factor measures the probability that a release or other harmful action would occur because of the violation. I cannot conclude that there is a major probability that a release would occur because of the failure to provide a method of release detection. Therefore, I conclude that the potential for harm should be classified as moderate. With a major/moderate matrix, the value for Count II is $1,000.00.

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[24]Treadway, "Seeking Scarce Water," The Daily News, Oct. 28, 1991, at 15.

[25]H. Torres-Sierra and T. Rodriguez-Alonso, Fig. 3 at 487.

Given the type of violation, the penalty for Count II is assessed on a per-tank basis since the tank release detection requirements and the piping release detection requirements are associated with more than one tank. Hence, the initial matrix value of $1,000.00 will be multiplied by six (6) which is the number of UST systems for which Respondent failed to submit a notification,[26] producing a result of $6,000.00.

In summary, the matrix values for the gravity-based component for each violation is:

Count I:	$6,000.00
Count II:	$6,000.00

C. Violator-Specific Adjustments: These adjustments may be made based upon the violator's: (1) degree of cooperation or noncooperation; (2) degree of willfulness or negligence; (3) history of noncompliance; and (4) other unique factors.

In assessing the violator's degree of cooperation or noncooperation and in assessing the violator's degree of willfulness or negligence, the Penalty Policy authorizes upward adjustments by as much as 50 percent. EPA proposes the maximum upward adjustment of 50 percent for both elements in calculating the penalty for Count I. I agree that an upward adjustment for both elements is appropriate but I do not believe that the maximum of 50 percent is appropriate for Count I.

Mr. Mustafa was sent the forms and brochure by DPNR in late July of 1989. One month later on August 30, he received a final

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[26]See FN 15, supra at 21.

notice from DPNR. In a telephone conversation with Ms. B. Yvette Canegata of DPNR a few days thereafter (September 8) Mr. Mustafa stated that his notification forms would be forthcoming shortly. Thereafter, an "Act of God" in the form of Hurricane Hugo intervened. His failure to give the UST notification requirements the highest priority in the aftermath of the storm is understandable, except perhaps by the most rigid of law enforcement zealots.

EPA conducted its inspection in this matter on September 13, 1990. At that time the EPA inspector explained the notification requirement to Mr. Mustafa and once again provided him copies of the notification forms; the inspector also discussed the release detection requirements and compliance deadlines. Mr. Mustafa indicated that he would submit the UST notification forms by September 21, 1990.[27] He failed to do so and did not file the required forms for Golden Cow and Two Williams until November 26, 1991, some five months after the complaint in this matter was filed. Had Respondent failed altogether to file the notification forms after receipt of the complaint, I would agree that a 50 percent upward adjustment would be appropriate. In the circumstances here, I conclude that an upward adjustment of 20 percent is appropriate for Respondent's degree of noncooperation

[27]Affidavit of Ms. B. Yvette Canegata (May 20, 1992) (Canegata Aff.).

and his degree of negligence and willfulness[28] in filing the late notification forms.

As for Count II, I also agree that an upward adjustment is appropriate. Following the issuance of the complaint in June of 1991, a representative of EPA inspected Two Williams and Golden Cow on January 27, 1992, and January 31, 1992, respectively. Respondent had failed to implement any acceptable method of release detection at either location.[29] Respondent has not offered any evidence of compliance with the release detection requirements to date. He asserts that prior to receiving the complaint he could not find anyone on the island capable of undertaking the project of installing leak detection devices at a reasonable or even an affordable cost because of the small size of the community and because of a severe shortage of skilled labor caused by hurricane rebuilding efforts. EPA asserts that "[i]nventory control requires the use of a 'dip stick' to measure the level of product in the tank, and a pen and paper to record the measurements. Annual tank tightness testing requires certain specialized equipment and procedures. Contractors able to perform such tests have been available on St. Croix at all relevant times."

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[28]While Respondent's failure to file the forms may have resulted in part from inadvertence and inattention, it also was willful in the sense that it was knowing and voluntary, particularly after September 13, 1990. However, there is no basis to conclude that it was willful in the sense of being evil or malicious.

[29]Affidavit of Dr. Billy Faggart (April ?, 1993).

On balance, and giving Respondent the benefit of the doubt as to the availability of qualified personnel to perform annual tank tightness testing in the period following Hurricane Hugo, I conclude that Complainant's proposed upward adjustment of ten (10) percent is appropriate for the Count II violation.

In reaching the conclusions concerning the upward adjustments for Respondent's degree of noncooperation and degree of willfulness or negligence for Counts I and II, full consideration has been given to Respondent's spirit of cooperation in stipulating as to liability and in waiving a hearing as to the appropriate penalty, thereby greatly streamlining the processing of the case and as a consequence producing a savings in EPA resources.

I decline to make an upward adjustment for previous violations since the notice of violation issued by DPNR was but a step in the continuum culminating in the issuance of the complaint in this matter.

I agree with Respondent that a downward adjustment is appropriate for the chaotic physical, social and economic conditions of the island immediately following Hurricane Hugo. This "Act of God" certainly made compliance with UST requirements of secondary importance while residents, including Mr. Mustafa, were faced with great difficulties in meeting the basic needs of life and in restoring the operations of businesses, such as Two Williams and Golden Cow, to something approximating pre-Hugo circumstances. Certainly, Respondent should not be held to the same high standard of compliance with the UST requirements for the

period immediately following Hurricane Hugo as he should for times when conditions more closely approximate those which would be described as normal. Giving full consideration to these unique factors and without discounting the opportunities Mr. Mustafa had to comply both before Hurricane Hugo and again, in recent months after Hurricane Hugo, I conclude that a 15 percent downward adjustment is appropriate for both Counts.

Cumulatively, these adjustments for each Count may be summarized as follows:

	Count I	Count II
Degree of Cooperation/Noncooperation	+20%	+10%
Degree of Willfulness or Negligence	+20%	+10%
History of Noncompliance	-	-
Other Unique Factors	-15%	-15%
Net Upward Adjustment	+25%	+ 5%

D. Environmental Sensitivity Multiplier (ESM): The next step described in the Penalty Policy is the determination of the ESM. As noted previously, EPA has concluded "that the potential environmental impact at the site would be moderate, should petroleum be released at Respondent's facilities. Respondent's UST facilities are located in commercial/residential areas but do not threaten local water supplies."

Respondent asserts that the "EPA's selection of an ESM of 1.5 is patently arbitrary in light of its own admission that Mr. Mustafa's UST systems do not threaten the local water supply.

Based on the EPA's own evaluation, an ESM of 1.0, and not 1.5, is appropriate here."

Given the number of UST's involved, the fact that the UST's are located over the Kingshill Aquifer, that 67 percent of the total groundwater withdrawal in the Virgin Islands is from the Kingshill Aquifer and that several hundred wells are located on St. Croix, I conclude that a release, if one did occur, would have a moderate impact on the local environment and public health. Therefore, an ESM of 1.5 is appropriate for each violation.

E. Days of noncompliance multiplier (DNM): Finally, the DNM must be determined based upon the duration of each violation. For Count I EPA selected a DNM of 6.5 based upon a period of noncompliance running from May 1986 when notification was first required to June 1991 when the complaint was issued.

Respondent contends that 6.5 is arbitrarily high because it fails to take into consideration the length of time DPNR took to master the new regulatory requirements and inform Mr. Mustafa, and other members of the Virgin Islands public, of the changes in the law. Respondent points out that Mr. Mustafa is not a sophisticated corporate mogul, but rather is a simple gas station operator on a small and isolated Caribbean island who is simply not equipped to monitor all the technical changes in the law. Respondent also contends that EPA should have considered, in calculating a fair and equitable DNM, the turbulent and disordered period following the destruction of Hurricane Hugo, which greatly hampered the

accomplishment of even the most minor administrative tasks. Respondent concludes that the DNM should be closer to 2.0.

Giving full consideration to the matters that Respondent raises, I conclude that some interval of time during the five (5) year period between May 1986 and June 1991 should be discounted. I believe that a DNM of 4.0 for Count I is appropriate.

For Count II Complainant selected a DNM of 3.0 based upon a period of noncompliance running from December 1989 when release detection was first required to June 1991 when the complaint was first issued. In calculating the DNM some allowance should be made in consideration of the difficulties facing the inhabitants of St. Croix in late 1989 and early 1990. Therefore, I select 2.5 as an appropriate DNM for Count II.

F. Ability to pay: Respondent asserts that a penalty of the amount proposed by EPA - "$116,105 would be catastrophic, because these two small stations simply do not have the profit potential to ever recover from such a large payout." However, Respondent has offered no evidence to support an inability to pay a penalty in this matter. No affidavits, no audited financial statements, no tax returns were submitted. Therefore I have no basis upon which to make a conclusive finding as to Respondent's ability or inability to pay the penalty imposed herein.

Respondent does argue that the penalty proposed by EPA is not fair and equitable when compared with others in the regulated community where far lower penalties were imposed by far more egregious and dangerous violations. This argument is unpersuasive.

Even if the agency had assessed a lower penalty in another similar case, such assessment would not be controlling here. As noted by the Supreme Count, "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."[30]

G. Final penalty calculation:

Count I:	
Matrix Value	$ 6,000.00
Net Violator Specific Upward Adjustment	x .25
	$ 1,500.00
	+$ 6,000.00
	$ 7,500.00
ESM	x 1.5
	$11,250.00
DNM	x 4
Gravity Based Component	$45,000.00
Economic Benefit Component	- 0 -
Subtotal	$45,000.00
Count II:	
Matrix Value	$ 6,000.00
Net Violator Specific Upward Adjustment	x .05
	$ 300.00
	+$ 6,000.00
	$ 6,300.00
ESM	x 1.5
	$ 9,450.00
DNM	x 2.5
Gravity Based Component	$23,625.00
Economic Benefit Component	$ 5,480.00
Subtotal	$29,105.00
	$45,000.00
	29,105.00
Total Penalty	$74,105.00

[30]Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973).

ORDER[31]

Pursuant to Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6991e, the following Order is entered against Respondent, Frank Mustafa.

I. A. A civil penalty in the amount of $74,105.00 is assessed against Respondent for the violations of the Solid Waste Disposal Act found herein.

B. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding a cashier's check or certified check payable to "Treasurer of the United States of America" to:

EPA - Region 2
(Regional Hearing Clerk)
P.O. Box 360188M
Pittsburgh, PA 15251

II. The following Compliance Order is also entered against Respondent, Frank Mustafa.

A. Respondent shall submit to DPNR all required notifications pursuant to Section 9002(a) of the Act, 42 U.S.C. § 6991a(a), and 40 C.F.R. § 280.3 (1985) and 40 C.F.R. § 280.22, NOTE, for those UST systems for which such notifications may not yet have been submitted.

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[31]Pursuant to 40 C.F.R. § 22.20(b) this accelerated decision constitutes an initial decision. Therefore, in accordance with 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. The procedures for appeal from this initial decision are set forth in 40 C.F.R. § 22.30.

B. Respondent shall comply with 40 C.F.R. § 280.40 by providing a method of release detection for each UST system owned or operated by Respondent. Release detection must meet the specifications listed in 40 C.F.R. § 280.40(1) - § 280.40(3).

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: September 1, 1993
Washington, DC