UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
NORMAN C. MAYES,	)	**Docket No. RCRA-UST-04-2002-0001**
RESPONDENT	)	

INITIAL DECISION

Pursuant to Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6991e, Norman C. Mayes is assessed a civil penalty of $66,301 for violations of RCRA and its implementing regulations for underground storage tanks found in the Tennessee Hazardous Waste Management Regulations Act, Chapter 1200-1-15.01, *et. seq.* (40 C.F.R. Part 280).

Issued: February 27, 2004

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Debra S. Benjamin, Esquire
Matthew Hicks, Esquire
U.S. EPA, Region IV
61 Forsyth Street S.W.
Atlanta, GA 30303-8960

For Respondent: Rebecca A. Bell, Esquire
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I. Procedural History

This civil administrative penalty proceeding arises under the authority of Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6991e. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 25, 2002, the United States Environmental Protection Agency, Region IV ("Complainant" or the "EPA") filed a Complaint against Norman C. Mayes ("Respondent"), alleging violations of Sections 9002 and 9003 of RCRA, 42 U.S.C. §§ 6991a and 6991b, and the implementing regulations for the standards and requirements for underground storage tanks ("USTs") found in 40 C.F.R. Parts 280 and 281.[1]

Specifically, Count I[2] in the Complaint alleges that Respondent failed to notify or submit a notice to either the Tennessee Department of Environmental Conservation ("TDEC") UST Division or EPA within thirty days of bringing into use UST systems identified as Tanks #1 and #2[3] in violation of Section

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[1] Pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, the Administrator of the U.S. Environmental Protection Agency granted the State of Tennessee authorization to administer certain portions of RCRA in lieu of the federal program. The State of Tennessee's rules for the regulation of underground storage tanks storing petroleum are set forth at the Tennessee Hazardous Waste Management Regulations Act, Chapter 1200-1-15.01. Although the state regulations are not cited by Complainant, they are virtually identical pertaining to the provisions relevant to this case. Respondent has not identified any discrepancy between the two regulations.

[2] The Complaint did not enumerate by count numbers the alleged violations charged against Respondent, but Complainant's proposed penalty specified five separate counts. I have assigned count numbers to the alleged violations for identification purposes.

[3] Tanks #1 and #2 are the 1,000 gallon tanks, also referred to in the pleadings as AV #1 and AV #2. Tank #3 is the 3,000

9002 of RCRA and 40 C.F.R. § 280.22. Count II alleges that Respondent failed to comply with the UST system release detection requirements for UST systems identified as Tanks #1 and #2 in violation of Section 9003 of RCRA and 40 C.F.R. § 280.40. Count III alleges that Respondent failed to comply with the UST system release detection requirements for Tank #3 in violation of Section 9003 of RCRA and 40 C.F.R. § 280.40. Count IV alleges that Respondent failed to upgrade or permanently close UST systems identified as Tanks #1 and #2 prior to the December 22, 1998 deadline in violation of Section 9003 of RCRA and 40 C.F.R. § 280.70(c). Count V alleges that Respondent failed to permanently close and assess the site for releases after 12 months of temporary closure for Tank #3 in violation of Section 9003 of RCRA and 40 C.F.R. § 280.70(c).

For these alleged violations, Complainant initially sought a compliance order and a civil administrative penalty in the amount of $72,670 against Respondent. Complainant considered the statutory penalty factors in Section 9006(c) of RCRA and calculated the proposed penalty by applying the methodology of the RCRA Civil Penalty Guidance for Violations of UST Regulations dated November 1990.

Respondent filed an Answer on April 23, 2002, contesting the EPA's jurisdiction and denying or claiming to have no knowledge of the allegations made by Complainant. Respondent argued that Tanks #1 and #2 are not USTs as defined under 40 C.F.R. Part 280 because they fall under the farm tank exemption and, thus, they are exempt from the registration and notification requirements. Respondent denied that release detection is required for Tank #3 because the tank has been "empty" since 1997 pursuant to the language of 20 C.F.R. § 280.70. Moreover, Respondent argued that Tank #3 was "never temporarily closed, but was rather in a change-of-service capacity." Answer, at 3, ¶ 32. Respondent asserted that a change of use permit was applied for and granted by the state agency of TDEC, so the twelve month period for completing permanent closure after temporary closure as well as the closure requirements of Subpart G never applied. *Id*.

On April 7, 2003, Complainant filed a Motion for Accelerated Decision on Liability and Penalty Amount with Reference to Tank #3 ("Motion"). In its Motion, Complainant argued that there exist no genuine issues of material fact with respect to Respondent's liability for its acts or omissions with reference to the UST identified in the Complaint as Tank #3. Complainant

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gallon tank also referred to in the pleadings as AV #3.

asserted that it has proposed a reasonable and appropriate penalty pursuant to the statutory factors and the applicable penalty policy.

Respondent filed its Response to Complainant's Motion for Accelerated Decision on Liability and Penalty Amount with Reference to Tank #3 ("Response") on April 16, 2003. Respondent contended that the Motion should be denied because there are genuine issues of material fact regarding Tank #3 and the proposed penalty is not reasonable or appropriate. The Motion was denied on June 3, 2003.

On May 8, 2003, Respondent submitted a Motion in Limine to Suppress Certain Evidence Obtained by an Unlawful Search and Seizure ("Motion in Limine").[4] Respondent sought to exclude all evidence and information obtained during a site investigation relating to the presence and operation of USTs conducted by governmental agency representatives on November 28, 2000. Motion at 1-2. Specifically, Respondent claimed that the search of Respondent's barn, two airplane hangars, shed, tractors, and farm equipment, and the seizure of fuel from the tanks of Respondent's farm equipment by representatives of the EPA were violations of the Fourth Amendment of the United States Constitution ("the Constitution") and federal law prohibiting unreasonable searches and seizures because they were conducted without a search warrant and without the voluntary consent of Respondent. *See id.* In response, Complainant asserted that it had prior voluntary consent[5] for all aspects of the investigation. *See* Complainant's Response to Respondent's Motion in Limine to Suppress Certain Evidence, at 2. Finding that EPA's site investigation of Respondent's property on November 28, 2000 was consensual, the Motion in Limine was denied in an Order on June 3, 2003.

Respondent filed a second Motion on May 23, 2003, regarding suppressing Complainant's evidence and requesting that it be able to provide additional facts in support of its previous Motion in Limine. Respondent made a third motion regarding the alleged illegal search and seizure issue, asking the court to reconsider its Order denying Respondent's Motion in Limine, or

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[4] The certificate of service for the Motion in Limine refers to another document.

[5] Complainant supported this assertion with affidavits of four individuals participating in the site investigation on November 28, 2000: Mr. Jim Miller, Mr. Steven Burton, Ms. Jane Roach, and Mr. Steven Wilson.

alternatively, for interlocutory appeal on the issue. In a prehearing telephone conference with both parties, I denied Respondent's motion, but stated that evidence could be proffered at the hearing relevant to the issue of illegal search and seizure.

On May 28, 2003, Respondent filed a Motion Requesting the Issuance of Subpoenas ("Motion for Subpoenas"),requesting that subpoenas be issued to ten of its witnesses to compel their attendance at the hearing. In this Motion, Respondent outlined in detail the expected testimony of the named individuals, making apparent that such testimony bears a direct relation to Respondent's assertions in this matter. Motion for Subpoenas at 1-4. However, Respondent made no showing of the grounds and necessity for the requested subpoenas. 40 C.F.R. § 22.21(b). Accordingly, Respondent's Request for the Issuance of Administrative Subpoenas was denied.

On June 3, 2003, Complainant filed a Motion to Supplement Prehearing Exchange and Motion for Leave to Amend Complaint ("Motion to Supplement and Amend"). Complainant noticed that the penalty calculations that were used to develop the total penalty amount alleged in the Complaint were incorrect and that the total penalty amount needed to be revised. Complainant sought to lower the total penalty amount from $72,670 to $66,666.[6] Complainant's unopposed Motion to Supplement and Amend was orally granted at hearing.

An evidentiary hearing was held on June 9 through 13, 2003 in Knoxville, Tennessee. Both parties have since filed post-hearing briefs and post-hearing reply briefs. For the reasons discussed below, having fully considered the record in the case, the arguments of counsel, and being fully advised, I find Respondent to be in violation of RCRA as alleged in Counts I-V of the Complaint. For these violations, Respondent is liable for a civil administrative penalty in the amount of $66,301.

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[6] Complainant explained that "[i]n preparing for the hearing on this matter, Complainant noticed that the penalty calculations that were used to develop the total penalty amount alleged in the Complaint were incorrect and that the total penalty amount needed to be revised." Complainant's Motion to Supplement Prehearing Exchange and Motion For Leave to Amend Complaint.

II. Findings of Fact

1. Respondent Norman C. Mayes owns and operates Powell Airport, a corporation incorporated under Tennessee law, which is located on East Emory Road at I-75 in Powell, Tennessee (the "facility"). Stipulation, ¶¶ 1, 2.

2. Respondent has owned and operated Powell Airport since 1966.[7] Stipulation, ¶ 3; Tr. at 831-2.

3. Prior to 2003, there were two hangars[8], a small office building, a shed, a silo, and a barn at the facility. Tr. at 77, 894; C's Exs. 6, 15, 26; R's Exs. 3, 5, 9. There is one 2,600 foot paved runway in the middle of the property. Tr. at 834; R's Exs. 3, 4, 9. Adjoining the runway is a paved tarmac where there are two gasoline dispensers and three fill ports for three tanks. Tr. at 76, 215, 243; C's Exs. 4, 6, 15, 26; R's Ex. 4.

4. Powell Airport is privately owned but is open to the public. Stipulation, ¶ 12. The facility does not have a fence or gate. Tr. at 71-2, 240. There was no legible sign near the office prohibiting the public from entering the tarmac area. Tr. at 157, 333; C's Ex. 4, photograph 1. A large sign on a silo at the facility facing the interstate advertises air charter flights and airplane rides. Tr. at 72, 240; R's Exs. 3, 4, 5, 7, 8, 9. Respondent's stationary reflects that Powell Airport's services include aircraft charters and aerial advertising and photography. Tr. at 82; C's Exs. 5, 8, 11, 15, 26.

5. There are three steel underground storage tanks at the facility that store aviation grade gasoline. Tanks #1 and #2 are 1,000 gallon tanks and Tank #3 is a 3,000 gallon tank. Stipulation, ¶¶ 4, 6, 7, and 8. The fill ports for Tanks #1 and #2 are labeled for aviation gas and a tag on one of the gasoline dispensers states that it contains aviation gasoline. Tr. at 118, 253, 277; C's Exs. 5, 26.

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[7] Respondent also states in his testimony that he acquired the property where the airport is located in 1977 from his father, who acquired it in 1949. Tr. at 829.

[8] The south hangar is across from the runway and is approximately 1800 feet from the office structure. Tr. at 895. The other hangar is approximately 40 feet from the office structure. Respondent's residential home is also located on the property and is approximately 2000 feet from the office structure. Tr. at 896.

6. Tanks #1, #2, and #3 were existing, in the ground, and under Respondent's ownership and operation on or after May 8, 1986. Tanks #1 and #2 were in installed in the middle to late 1950's. Tr. at 831. Tank #3 was installed no later than 1982. C's Exs. 1, 2.

7. The facility is located across the street from commercial properties which include a former gasoline station.[9] R's Ex. 9. Two gas stations are on property adjacent to the facility. R's Ex. 5. There is one active drinking water well that is located 2,450 feet (O.46 miles) southwest of the site that serves one residence. C's Exs. 20, 26.

8. Respondent currently owns four airplanes which are housed at Powell Airport. Tr. at 785. At one time, Respondent owned 10 to 12 airplanes which were kept at the facility. Tr. at 830. Powell Airport had a flight training center with eight full-time flight instructors and was in the business of chartered planes and rentals. Tr. at 830-834. Powell Airport has an aviation designation number of 9-A-2 which is indicated on the airport's Tennessee aviation license. Tr. at 828. Powell Airport had an air taxi certificate that allowed its airplanes to fly anywhere in the continental United States. Tr. at 836. Additionally, private airplanes lease space at the facility. Tr. at 997, 1002.

9. Respondent received about $1,100 during 2001 for selling hay from the facility. Tr. at 850; C's Ex. 32. For several years prior to 2001, Respondent sold hay from the facility. Tr. at 989-91; C's Ex. 32.

10. Respondent registered Tank #3 as an UST with TDEC beginning in April 1986. C's Ex. 1. Respondent never notified or submitted a notice of existence of Tanks #1 and #2 to TDEC or the EPA.

11. Respondent has a tobacco allotment for his farm that he sells to another farm where the tobacco is grown. C's Ex. 32. The facility is deemed a farm by the Farm Services Agency. Tr. at 1030-4; C's Ex. 32.

12. On August 27, 1997, TDEC telephoned Respondent who reported that Tank #3 was temporarily out-of-service and emptied in approximately April 1997. Tr. at 15; C's Ex. 3.

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[9] Most of the facility property is zoned agricultural with a small section zoned commercial/agricultural. Tr. at 339, 898; R's Ex. 6.

13. On March 17, 2000, TDEC performed a routine site visit of the Powell Airport to check the status of Tank #3. C's Ex. 4. The site visit revealed the presence of Tanks #1 and #2. *Id*. Product level measurement of Tank #1 indicated that it contained 35 inches of product and zero inches of water. *Id*. Product level measurement of Tank #2 indicated that it contained 22 inches of product and 5 inches of water. *Id.* Product level measurement of Tank #3 indicated that it contained 2 inches of product and 6 inches of water. *Id.,* Tr. at 55. Photographs of the facility were taken. *Id*. No contact was made with Respondent during the visit. Tr. at 379.

14. On March 17, 2000, following the site visit on the same day, TDEC telephonically contacted Respondent. C's Ex. 5. Respondent reported that Tanks #1 and #2 were not registered because they are farm tanks exempt from regulation. *Id*. Respondent reported that Tanks #1 and #2 are used to fuel his tractors for farm use. *Id*.

15. On March 21, 2000, TDEC conducted a follow-up visit where additional photographs of the site were taken. C's Ex. 6. The inspectors found at least two tractors on the premises. *Id*. The two inspectors found no evidence of frequent use for agricultural purposes. *Id*. No contact was made with Respondent during the visit. Tr. at 71, 379.

16. In a letter on Mayes Aviation, Powell Airport stationary dated August 1, 2000 and received by TDEC on August 21, 2000, Respondent stated that "[t]he tank in question [Tank #3] has not had any product in it for two (2) years or longer. C's Ex. 8. It is filled with water at this time." *Id*.

17. On September 18, 2000, Respondent contacted TDEC telephonically and advised TDEC that the substance in Tank #3 was not regulated because he had converted the tank to storing herbicide spray for use on his farm. C's Ex. 13.

18. In a letter to TDEC dated September 25, 2000, Respondent stated that Tank #3 had not had fuel in it since 1997. C's Ex. 11. Respondent enclosed a Notification for Underground Storage Tanks form amending the tank status for Tank #3. *Id*. The form dated September 25, 2000 reflects that Tank #3 was last used on or about June 15, 1997 and that there was a change-in-service to agricultural use. *Id.* Respondent reported "Change In Substance" to Round-up®, an agricultural herbicide spray. *Id.* at 4.

19. On October 23, 2000, Respondent contacted TDEC telephonically and reported that Tank #3 was currently being used to store the

non-regulated herbicide Roundup® and that the tank had been used as such since 1997. C's Ex. 18.

20. On November 2, 2000, the EPA sent to Respondent a Request for Information pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d. C's Ex. 22. The EPA sought specific information concerning the USTs at Respondent's facility. *Id*. Respondent filed a response to the Information Request on November 21, 2002, stating that Tank #3 was temporarily closed, that Tank #2 was used for agricultural purposes, and that Tank #1 was out of use. C's Ex. 23. Respondent reported that the "date of ownership" for all three tanks was 1987. *Id*. As part of Respondent's response, he submitted an affidavit stating that he had never stored any herbicides and/or any other chemicals in Tanks #1, #2, or #3. C's Exs. 14, 23.

21. On November 28, 2000, representatives from the EPA and TDEC conducted an investigation to determine the contents of Tank #3 and the status of Tanks #1 and #2 ("November 2000 inspection"). C's Exs. 15, 16, 26. The inspectors found that no release detection records were being kept for any of the tanks. *Id*.

22. Respondent was informed of the November 28, 2000 inspection by two certified letters dated November 6, 2000 and November 20, 2000, a telephone call, and facsimile. C's Exs. 24, 25, 26. About twelve inspectors met with Respondent, Respondent's wife, and Mr. Jim Miller, a contractor employed by Respondent. C's Exs. 15, 16, 26. While Respondent spoke with certain inspectors in the office about compliance documentation, Mr. Miller took other inspectors to visit other parts of the facility and to take samples. Tr. at 188; C's Exs. 15, 16, 26. Respondent accompanied the inspectors to the hangar to point out the container of Roundup®. Tr. at 494, 535-6, 975-6. Respondent raised no objection to the inspection or sampling. Tr. at 103, 112, 261, 268-70, 470-3.

23. During the November 2000 investigation, the three USTs were manually gauged. C's Exs. 15, 26. Tank #1 contained 1 3/4 inch product and 25 1/4 inches water, Tank #2 contained 31 5/8 inches product and 2 3/8 inches water, and Tank #3 contained 5/8 inch product, and 7 3/8 inches water. *Id*. Laboratory analyses and fuel characterization of a sample from Tank #2 by the Tennessee Department of Agriculture ("TDA") disclosed that the fuel was an acceptable and viable aviation fuel. Tr. at 390-409; C's Ex. 26, Appendix C. No pesticides were detected in Tank #3. *Id*.

24. During the November 2000 inspection, inspectors also observed the contents of the fuel in two tractors at the south hangar.

C's Exs. 15, 26. The first tractor contained red-dyed diesel fuel and the second tractor contained a clear fuel that appeared to be gasoline. *Id*. A third tractor in the north hangar contained red-dyed diesel fuel as observed through a disposable bailer. *Id*. No aviation fuel was observed to be present in any farming equipment. *Id*.

25. Handwritten inventory records produced by Respondent during the investigation in November 2000 and again in May and August 2002 disclose that 1,000 gallons of aviation fuel were delivered to Tank #3 on September 4, 1997. C's Exs. 16, 33, 34. During the period from 1997 through 1999, Respondent and/or his customers pumped hundreds of gallons from Tank #3 for airplane maintenance and/or flying. C's Exs. 33, 34. In March 2000 the remaining aviation gas in Tank #3 was pumped to Tank #2, but Respondent testified that he used gas from Tank #3 to fly his airplane in July 2001. C's Exs. 33, 34; Tr. at 817, 871-875.

26. Tank #3 was not empty or temporarily closed prior to its removal from the ground. Respondent never placed Roundup® in Tank #3. Tr. at 409-10; C's Ex. 26.

27. On July 9, 2001, all three underground storage tanks were excavated and removed from the ground. C's Exs. 17, 18, 19, 27. The inspectors observed small holes on the bottom of Tanks #2[10] and #3[11]. C's Exs. 17, 27. The observed fluids in the bottom of the excavation pit of Tank #3 exhibited a sheen color on the surface, and fuel and/or gasoline vapors were detected in the excavation area. *Id*. Water samples were taken from the two excavation pits and soil samples were taken from the excavation pits and dispenser island. *Id*. Petroleum staining and odor were apparent in the soil samples collected. *Id*.

28. The analytical results from the soil samples collected from the excavation pits at the July 2001 UST closure showed that concentrations of Total Petroleum Hydrocarbons-Gasoline Range Organics ("TPH-GRO") exceeded the closure assessment guideline cleanup level for soil of 100 parts per million ("ppm"). C's Exs. 19, 20, 27. Benzene concentrations were below the soil benzene cleanup level of 25 ppm. *Id*.

29. Laboratory analytical data from un-recharged groundwater samples from the excavation pits showed that the benzene and TPH-

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[10] Tank #2 had approximately 5 holes on the bottom.

[11] Tank #3 had approximately 2 holes on the bottom.

GRO concentrations exceeded the drinking water supply cleanup levels. C's Exs. 19, 20, 27.

30. As a result of the discovery of soil and groundwater contamination from the release of aviation gas during the closure of the UST system in July 2001, Respondent retained Remedial Solutions, Inc. to serve as corrective action contractor for the facility. C's Ex. 20. In November 2002, Remedial Solutions reported that the "drinking water supply" cleanup levels for soil and groundwater are applicable for the facility based on the presence of one active private drinking water well located 2,450 feet southwest of the site. *Id*. Remedial Solution's groundwater samples exhibited benzene and TPH concentrations that exceeded drinking water supply cleanup levels. *Id*. Soil samples exhibited benzene and TPH-GRO concentrations below the cleanup levels. *Id*.

31. The existing Tanks #1, #2, and #3 were not equipped with the release detection mechanisms as of December 22, 1993.

32. Respondent's property was not devoted to the production of crops or raising animals, and is primarily an airport.

33. Tanks #1 and #2 are not farm tanks or residential tanks used for storing aviation fuel for noncommerical purposes.

34. As of December 22, 1998, Tanks #1, #2, or #3 were not upgraded or closed.

35. Respondent is an incredible witness.

36. The EPA considered the statutory factors in Section 9006(c) of RCRA in determining the amount of the proposed penalty for Respondent's violations of the UST regulations. The proposed penalty for each alleged violation was calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Requirements dated November 14, 1990, and the EPA sought a total penalty of $66,666.

37. The amount of the penalty for Count V (failure to close Tank #3) is reduced $365 to reflect the period of noncompliance from December 23, 1998 through July 9, 2001.

38. The total penalty amount of $66,301 consists of $5,781 for the economic benefit component and $60,520 for the gravity-based component. C's Exs. 30, 31.

39. The penalty of $5,781 for the economic benefit component encompasses estimated avoided costs and delayed expenditures, and

is indexed for the financial responsibility class of 4, the weighted tax rate of 15%, and the interest rate of 0.101% per the regional economist. C's Exs. 30, 31. Such method and the resulting penalty reasonably and appropriately represent the economic advantage that Respondent gained by not complying with the UST standards.

40. The penalty of $60,520 for the gravity-based component encompasses the matrix value of the major potential for harm to human health and the environment resulting from Respondent's violations and the major extent of deviation from the UST requirements and contemplates deterrence to potential violators. C's Exs. 30, 31. The matrix value is adjusted for the number of days of noncompliance and the low environmental sensitivity multiplier of 1.0 based on the absence of sensitive areas near the facility. *Id*. Downward adjustments to the matrix value for the degree of cooperation, willfulness or negligence, or other unique factors are not warranted. The method for calculating the gravity-based component and the resulting penalty are both reasonable and appropriate.

III. Discussion

As a preliminary matter, I address three issues: (1) the statute of limitations applicable to the violations; (2) the claim of the unlawful search and seizure of Respondent's facility; and (3) the burden of proof for Respondent's defenses.

Statute of Limitations

At the outset of the hearing, Respondent made a Motion to Dismiss the violations alleged in Paragraphs 40 and 41 of the Complaint (Counts I, II, and III) on the grounds that they were not within the statute of limitations and that because this was a jurisdictional element, it could be raised at any time. Tr. at 14. Complainant opposed this motion arguing not only that this was the first time they had heard of this issue, but also that this was a case of a "continuing violation." Tr. at 10-15. The parties were directed to address this issue in the post-hearing briefs. Although this issue should have been raised in the Answer, the Complainant has been put on notice and both parties have had the opportunity to brief this issue. 40 C.F.R. § 22.15(b).

Respondent argues that the alleged violations are time barred by the statute of limitations. Respondent asserts that

case law clearly provides that the running of the statute of limitations begins on the date the alleged violator committed the violations which give rise to the penalties, rather than the date the EPA could have reasonably expected to have detected such violations. *See 3M Company v. Browner*, 17 F.3d 2453 (D.C. Cir. 1994). Moreover, Respondent argues that the EAB has made it clear in *In re Lazarus, Inc.*, TSCA Appeal No. 95-2, 5 E.A.D. 318 (EAB, Sept. 30, 1997) that the "continuing violations" exception to the standard five-year statute of limitations applies only to the failure to comply with authorization requirements. In contrast, the failure to comply with regulatory requirements is not covered under the exception. *See id.* at 377-380. Respondent argues that Complainant's allegations including the failure to register, failure to have release detection mechanisms, and failure to comply with temporary or permanent closure requirements are violations of authorization requirements and should not be exempt under the "continuous violations" doctrine. *See* Reply Brief of Respondent, p. 3.

More specifically, Respondent argues that because the underground storage tank registration requirement is regulatory in nature, the statute of limitations for Count I begins to run from the date of the initial violation in 1987, when the Complainant states these tanks came into use. Reply Brief of Respondent, p. 3. Applying the five-year standard, Respondent claims that Count I should have been brought no later than 1993. *See id.* Likewise, Respondent also argues that the installation of release detection devices on the underground storage tanks is regulatory in nature and, thus, the violation should have accrued on December 22, 1993. Thus, Counts II and III should have been brought no later than December 22, 1998. *See id.*

In response, Complainant argues that the violations are continuing in nature and that the violations are exempt from the application of the five-year statute of limitations. The EPA reads the *Lazarus* case as standing for the principle that the doctrine of continuing violations provides a special accrual rule whereby the limitations period for continuing violations only begins to run when the course of the behavior in violation is finished. *See Lazarus*, at 321-323. Complainant asserts that the violations in this case are similar to the violations in *Lazarus* for the failure to register PCB transformers and the failure to mark a PCB transformer with a prescribed warning. *See* Complainant's Posthearing Brief, at 13. According to the EPA, the one recordkeeping requirement in *Lazarus* that was found not to be part of the continuing violation is different from the instant violations because it was not a condition on the use of PCBs. *See Lazarus*, at 326-8.

Generally, for civil penalty cases brought before federal agencies, the applicable federal statute, 28 U.S.C. § 2462, states that "a claim shall not be entertained unless commenced within five years from the date when the claim first accrued." This statute of limitations applies because one is not specified in this federal environmental statute. Creating an exception to this rule, the EAB in *Lazarus* established that under the "continuing violation" exemption, "the limitations period for continuing violations does not begin to run until an illegal course of conduct is complete." *Lazarus*, at 364. Respondent's reliance on *3M Co.* is misplaced because it fails to consider the exception carved out by the EAB's holding in *Lazarus* for continuing environmental violations.

I find that the violations alleged by Complainant against Respondent are regulatory and continuing in nature. The failure to submit a "notice of existence" for Tanks #1 and #2 did not give TDEC the ability to track the UST system and to ensure that the standards for USTs were met. The registration also serves as a notice for inspection and provides the monetary pool for an adequate fund in case of leaking and other issues. This violation is readily distinguishable from the *Lazarus* authorization requirement in that the UST is consistently under the TDEC's on-going jurisdiction. The PCB recordkeeping requirement under EPCRA found only in *Lazarus* establishes jurisdiction during each annual filing.

The requirement to have release detection mechanisms, described in Counts II and III, obviously allow for the owner/operator of the UST and the applicable regulatory agency to ensure that the tank is not releasing regulated substances. The course of conduct for these violations is not complete until the proper release detection has been installed or other action has been taken with the tank that would no longer require the release detection. Like the *Lazarus* registration requirements, the release detection mechanisms are a condition on the use of USTs and are devised to ensure safety and that UST requirements are met.

For the foregoing reasons, I find that the alleged violations set forth in Counts I, II, and III are continuing in nature, and that action therefor is not barred by the five-year statute of limitations. Although the question of whether Counts IV and V are barred by the statute of limitations does not arise because the Complaint was filed less than five years after the alleged violations, I point out that the requirement to upgrade or close the tanks, Counts IV and V, is clearly a regulatory requirement that is not met until the actual act has taken place.

Illegal Search and Seizure

Respondent argues that TDEC, TDA, and EPA did not have permission to enter and search the facility. Specifically, Respondent claims that the search of Respondent's barn, two airplane hangars, shed, tractors, and farm equipment, the gauging of the underground tanks, and the seizure of fuel from the tanks of Respondent's three tractors by representatives of the EPA and TDA were violations of the Fourth Amendment of the United States Constitution and federal law prohibiting unreasonable searches and seizures because they were conducted without a search warrant and without the voluntary consent of Respondent. *See* Motion in Limine to Suppress Certain Evidence Obtained by an Unlawful Search and Seizure, at 1-2 ("Motion in Limine")(May 8, 2003). Further, Respondent argues that Complainant did not have statutory authority to inspect Tanks #1 and #2 because they were not "underground storage tanks" pursuant to 40 C.F.R. § 280.12.

The EPA argues that it had prior voluntary consent for all aspects of its investigation including all the searches performed during the inspection and the seizures of fuel for testing. *See* Complainant's Response to Respondent's Motion in Limine to Suppress Certain Evidence, at 2. Complainant explains that it is given "broad inspection, monitoring and testing authority" under Section 9005(a) of RCRA, 42 U.S.C. § 6991d(a), and that an owner of USTs is statutorily required to "furnish information relating to such tanks", and to allow agents of the EPA to "conduct testing" and have "access [to] all relevant records" relating to such tanks. *See* Order on Respondent's Motion in Limine to Suppress Complainant's Evidence Obtained by an Unlawful Search and Seizure at 2 ("Order on Unlawful Search and Seizure"). Moreover, Complainant argues that the consent to the investigation provided consent to collection for sampling, and that any possessory interest in the fuel required to be extracted for the testing procedures was therefore abrogated. *See* Order on Unlawful Search and Seizure, at 2.

The Fourth Amendment generally applies to criminal matters and is only used in civil matters where the deterrent effect of suppressing unlawfully obtained evidence exceeds the social cost of depriving the Government of the use of the evidence. *See United States v. Leon*, 468 U.S. 897 (1984); *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 729 (9th Cir. 1989). The EPA's Chief Judicial Officer ("CJO") has found that "[t]he exclusionary rule was initially created by the federal courts to deter Fourth Amendment violations in criminal cases and

has not necessarily been extended to all administrative proceedings." *In the Matter of* Boliden-Metech*, Inc.*, TSCA Appeal No. 89-3, 3 E.A.D. 439, 444 n. 5 (CJO, Nov. 21, 1990)(citing *U.S. v. Leon*, 468 U.S. 433 (1976)). I maintain my view as explained in the Order on Unlawful Search and Seizure that the unacceptably high social cost of depriving the Government of the use of the evidence obtained from the site inspection at Respondent's property would outweigh any deterrent effect on future site inspections performed by representatives of the EPA. *See* Order on Unlawful Search and Seizure.

A warrant may not be constitutionally required when Congress has determined that warrantless searches are necessary to further a regulatory scheme, and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. *Donovan, Secretary of Labor v. Dewey, et. al.*, 452 U.S. 594, 598-602 (1981). Here, in view of the substantial federal interest in ensuring the public's health and safety with the proper maintenance and regulation of underground storage tanks, Congress has made specific provisions in RCRA reasonably determining that a system of warrantless inspections is necessary if the law is to be properly enforced and inspection made effective. RCRA authorizes the EPA and state representatives to enter any establishment where USTs are located, to inspect and sample tanks, and to test and monitor surrounding soils, surface water, air and ground water. *See* 42 U.S.C. § 6991d(1)(2)(3). According to the explicit language of the statute, TDEC and EPA had the authority to investigate Respondent's underground storage tanks. Moreover, as explained below, Respondent's two smaller tanks are considered "underground storage tanks" pursuant to the regulatory definition and are subject to EPA jurisdiction.

Assuming *arguendo* that the Fourth Amendment unlawful search and seizure principles do apply to this specific instance, I further find that there was voluntary consent by the Respondent with respect to the November 2000 inspection and that the facility was open to the public. Respondent has testified that he was scared during the November 2000 inspection and that there was an element of coercion when about thirteen inspectors arrived. Although the number of inspectors may have been somewhat intimidating, inspectors from three government agencies appeared because of conflicting information provided by Respondent concerning the contents of the USTs at the facility.

Although Respondent claims the property where the tanks are

located is closed to the public,[12] there was no credible evidence to support this position. EPA witnesses testified that Respondent's sign that allegedly stated the property was private was washed out and unreadable, and consisted of a small sign on a stick in a bucket. Photographic evidence produced at the hearing confirms this testimony. Additionally, Respondent has a large billboard on his silo that advertises the property as a business where the public can come for airplane rides and other aviation needs. Respondent also admitted that there is no fence or gates around the open property which would put someone on notice that the area is not public.

During the November 2000 inspection, Respondent's contractor, Jim Miller, accompanied some of the investigators. Not only did Respondent have advance notice of the inspection, but Respondent was present on the site during the inspection. In fact, Respondent also accompanied inspectors to a shed to discuss the contents of a plastic container. The EPA asked and received permission from Mr. Mayes to obtain photographs of the facility. C's Ex. 26, p. 3. Mr. Mayes introduced his contractor, Jim Miller, as his representative to TDEC and EPA personnel at the outset of the November 2000 inspection. Tr. at 103, 188, 261, 377. C's Ex. 15, 26. Mr. Mayes was advised that samples would be taken from the contents of the USTs. C's Ex. 15, 26. Mr. Miller accompanied some of the inspectors in an examination of buildings and the general vicinity around the facility for evidence of agricultural activities.

Inasmuch as Respondent had claimed Tanks #1 and #2 to be exempt from UST regulation as farm tanks, the inspectors were fully justified in examining the facility to determine whether this claimed exception was appropriate and met the regulatory requirements for such an exemption. Accordingly, I find that the EPA has shown that the November 2000 inspection was consensual. Additionally, Respondent has not demonstrated that the earlier site visits by TDEC were unlawful. Complainant lawfully conducted its inspections of the premises and there is no relevant question of an illegal search and seizure here.

Burden of Proof

The Rules of Practice governing this proceeding with respect to the burden of proof provide that:

> The complainant has the burdens of presentation and

[12] *See* Tr. at 952.

> persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a). The EPA must prove its prima facie case by proving each jurisdictional element and the factual allegations supporting the violations charged. Upon the prima facie showing, the burden of production and persuasion shifts to respondent to establish by a preponderance of the evidence the applicability of any affirmative defenses he wishes to raise.

Respondent argues that Complainant "erroneously states that the EPA does not have to prove the Respondent's defenses are flawed to win this judgment." Reply Brief of Respondent, p. 7; Complainant's Post Trial Brief, p. 19. Respondent explains that at trial, Respondent presented its defenses including affirmative defenses in response to Complainant's prima facie case, at which time the burden shifted to Complainant to refute these defenses. Reply Brief of Respondent, p. 7. Specifically, Respondent contends that the burden of proving that the tank was "empty" pursuant to 40 C.F.R. § 280.40 falls to Complainant. Respondent asserts that Complainant fails to do so at the hearing, and, therefore, the exemption to the release detection requirement applies and Respondent is not in violation of this regulation. *See id.* Similarly, during the hearing, Respondent contends that the EPA has the burden of proving that Tanks #1 and #2 are not exempt farm tanks and that Tank #3 was not exempt from release detection requirements. Tr. at 29-31, 298, 973, and 986.

The EPA counters that Respondent has the burden of proving the claimed exemptions for having farm tanks and an empty tank.

By seeking to invoke exemptions to the regulations, Respondent is raising affirmative defenses and bears the initial burden of production and the ultimate burden of persuasion for each affirmative defense. *See In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 540 n. 20 (EAB, Oct. 20, 1994); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 n.9 (EAB, Aug. 2, 1990); *In re Globe Aero Ltd., Inc.*, 27 Envtl. L. Rep. 47157, 47161 (CJO 1996); *U.S. v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967)(the party that claims the benefits of an exception to the prohibition of a statute carries the burden of

proving that it falls within the exception.) Accordingly, in every instance of where Respondent seeks the protection of a regulatory exemption, he must prove by a preponderance of the evidence each raised defense.[13]

Respondent's Credibility

In August 1997, Respondent advised TDEC that Tank #3 was emptied in approximately April 1997 and was temporarily out of service ("TOS"). C's Ex. 3. TDEC conducted two site visits at Respondent's facility in March 2000, disclosing the existence of three underground tanks, two fill ports tagged for aviation gas, and two gasoline dispensers. The tanks were "stuck,"[14] disclosing that Tank #1 had 35 inches of product, that Tank #2 had 22 inches of product and 5 inches of water, and that Tank #3 had 2 inches of product and 6 inches of water. C's Exs. 4, 6. Tr. at 145-6. In March 2000, TDEC advised Respondent that the TOS Tank #3 needed to be emptied to less than one inch and closed. C's Ex. 5. At that time, Respondent advised TDEC that Tanks #1 and #2 were not registered because the tanks are farm tanks exempt from regulation. C' Ex. 5; Tr. at 182.

In August 2000, Respondent reported to TDEC that Tank #3 had not had any product in it for two years or longer and that it was then filled with water. C's Ex. 8. Then in September 2000, Respondent reported to TDEC that there had been no fuel in Tank #3 since about June 1997 and that Tank #3 had been converted to storing the herbicide Roundup®, which was not a regulated substance. C's Exs. 11, 13.

In October 2000, TDEC notified Respondent that he was in violation of Tennessee Rule 1200-1-15-.07(1)(c) for his failure to permanently close Tank #3 as prescribed. C's Ex. 12. Responding to TDEC's notice of violation in October 2000, Respondent reported that Tank #3 had been storing the non-regulated herbicide Roundup® since 1997. C's Ex. 18.

As a result of Respondent's inconsistent reporting

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[13] The statute of limitations and illegal search and seizure defenses are also affirmative defenses for which respondent bears the burden of proof. *See In re* J.V. Peters and Co., RCRA (3008) Appeal No. 95-2, 7 E.A.D. 77, 85 (EAB, Apr. 14, 1997).

[14] The term "stuck" or "sticking" refers to the practice of inserting a stick or measuring device into a tank to measure or gauge the level of the tank's contents.

concerning the contents and use of the tanks at the facility, TDEC sought the assistance of the EPA to determine compliance with the UST regulations. The EPA then launched an investigation, beginning with a Request for Information being sent to Respondent in early November 2000 and culminating in a site inspection in late November 2000.

Respondent's response to the Request for Information was received by the EPA in November 2000. C's Ex. 23. This response included a single typewritten page, a photocopy of the information requests, an Application for Permanent Closure of Underground Storage Tank (UST) systems, a photocopy of Respondent's Amended Notification for Underground Storage Tanks dated September 25, 2000, an affidavit from Respondent, and a photocopy of an envelope indicating that Respondent had sent forms to TDEC for a change of use for his fuel tank in September 2000. *Id.* The response to the Request for Information stated that Tank #3 was temporarily closed, that Tank #2 was in agricultural use, and that Tank #1 was out of use. The date of ownership for all three tanks was listed as 1987. Respondent, in his affidavit dated November 17, 2000, stated that he had never stored any herbicides and/or any other chemicals in his three tanks at the facility. *Id.*

The EPA conducted a compliance inspection of Respondent's underground storage tank facility on November 28, 2000. Personnel from the TDA, as well as the TDEC UST Division, were included in the inspection because Respondent had reported storing Roundup® in one of his tanks and the EPA needed assistance in evaluating compliance with pesticide regulations and to provide fuel characterization support. C's Ex. 26.

At the November 2000 inspection, Respondent again disavowed his earlier claim of storing Roundup® in Tank #3, but steadfastly claimed that Tank #3 was "empty" and had not been used to store aviation gas since 1997. Respondent continued to allege that Tank #3 was empty upon filing his Answer and response to the EPA's Motion for Accelerated Decision.

The record before me establishes that many of Respondent's assertions concerning the dates of ownership, contents, and use of the three underground storage tanks at the facility to TDEC in 1997, in the amended Notification for USTs dated September 25, 2000, in his various reports to TDEC and the EPA during 2000, and in his testimony at hearing, summarized above, were misstatements of fact. Although Respondent claimed that Tank #3 was empty and had not been used to store aviation gas since about June 1997, documentary evidence, consisting of Respondent's handwritten

inventory log and a bill of lading, was produced at hearing by the EPA showing that 1,000 gallons of aviation gas were delivered to Tank #3 on September 4, 1997, and that from the date of this delivery through 1999 Respondent and/or his customers pumped hundreds of gallons from Tank #3 for airplane maintenance and/or flying. C's Exs. 33, 34. In March 2000, the remaining aviation gas in Tank #3 was pumped to Tank #2. C's Exs. 33, 34; Tr. at 871-875. At the hearing, Respondent admitted the September 4, 1997 delivery of aviation fuel to Tank #3 and that Tank #3 continued to have aviation fuel at an amount exceeding one inch until early 2000. Respondent also acknowledged that aviation gas could not be delivered to Tanks #1 or #2 because neither tank was registered with TDEC. Tr. at 855.

The fact that much of the aviation gas pumped from Tank #3 until at least late 1999 was used for airplane maintenance purposes rather than flying does not negate the fact that Respondent falsely stated that Tank #3 was empty after 1997. Likewise, Respondent's assertions that Tanks #1 and #2 were not used "commercially" after about 1985 and that his airport business declined significantly after 1997 do not negate the fact that Respondent used aviation gasoline from Tank #2[15] for use in his airplanes and that such contradicted his claims that the tanks were "agricultural." During late 1999 and until about March 2000, Respondent pumped most of the remaining aviation fuel from Tank #3 into Tank #2, with water being transferred to Tank #1. C's Ex. 16. At the November 2000 inspection, Respondent acknowledged that he used gas from Tank #2 to move his aircraft around on the airstrip. C's Exs. 15, 16. Samples of the contents of Tank #2 during the November 2000 inspection revealed that the gas qualified to be sold as aviation fuel. C's Ex. 26. Interestingly, Respondent testified that he used aviation gas from Tank #3 to fly one of his airplane as late as 2001. C's Ex. 33, R's Ex. 3.; Tr. at 817.

Likewise, Respondent's representations that Tank #3 was used to store the non-regulated herbicide Roundup® were misstatements of fact. Respondent's attempt to explain the discrepancies concerning the storage of Roundup® in Tank #3 by claiming that he only intended to use Tank #3 to store Roundup® is incredible. Clearly, in September 2000 when Respondent filed the amended Notification for Underground Storage Tanks, certifying under

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[15] The record reflects that Respondent pumped water into Tank #3 so as to remove as much gas as possible from Tank #3, thereby resulting in Tank #1 being used as a "slop" tank to receive the water from Tank #3. C's Ex. 16.

penalty of law that the information provided by him was true, accurate, and complete, Respondent knew that he had never stored Roundup® in Tank #3 and that Tank #3 was not last used in 1997.

Moreover, counsel's assertions in Respondent's Answer and response to the EPA's Motion for Accelerated Decision and at hearing that Tank #3 was empty after 1997, that Respondent never represented that he used Tank #3 to store herbicide, and that Respondent had applied for and was granted a change-in-service permit were disingenuous.

Respondent also provided false and misleading information concerning the dates of ownership of the tanks. Respondent's testimony and stipulations reflect that Tanks #1 and #2 were installed in the 1950's, that he has owned and operated Powell Airport since 1966, and that he acquired the property where the airport is located from his father in 1977. Stipulation, ¶ 3; Tr. at 829-831. However, Respondent had claimed that the "date of ownership" for all three tanks was 1987 in his response to the EPA Information Request. C's Ex. 23.

Respondent's various misstatements and testimony concerning the dates of ownership, contents, and use of the three underground storage tanks at the facility are considered to have been willful misrepresentations made in an attempt to avoid UST jurisdiction and to obfuscate his noncompliance with the UST requirements. Respondent has repeatedly told untruths and deliberately provided misleading accounts of what actually transpired at the facility. As a result, he has entangled himself in a web of incredibility. Accordingly, little probative weight, if any, is accorded Respondent's testimony and filings.[16]

Finally, I note that at the hearing Respondent denied that the single typewritten page dated November 14, 2000, responding to the EPA's Information Request which was included in Complainant's Exhibit 23 was prepared or submitted to the EPA by him or on his behalf. Respondent's denial and attendant insinuation of serious misconduct on the part of the EPA is incredible. First, I observe that the document in question is directly responsive to the Information Request sent to Respondent by the EPA two weeks earlier and states that it is in response to the Information Request. Moreover, Respondent has not proffered any other document showing that he submitted a response to the EPA's Information Request. I point out that the Information

[16] Respondent's testimony, however, that he did not sell tainted fuel for flying is credible.

Request states that compliance with the Information Request is mandatory and failure to respond fully and truthfully to each and every question or information request within fifteen days could result in an enforcement action pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e, including the imposition of penalties up to $25,000 for each day of non-compliance. Although the page in question is not signed by Respondent, the page is imprinted with the identical date stamp included on the remainder of the submission acknowledged to have been submitted by Respondent. The preparer of the document stated that there were enclosures and the enclosures included in the exhibit match those identified by the preparer on the typewritten page. Finally, there was testimony by EPA witness Steve Burton that the typewritten page was received with the rest of the documents identified as Complainant's Exhibit 23. Tr. at 526-28.

A. Liability

1. Count I

Count I of the Complaint alleges that Respondent failed to submit a notice within thirty (30) days of bringing Tanks #1 and #2 into use in violation of Section 9003 of RCRA and 40 C.F.R. §280.22.

Section 280.22(a) provides that:

> [a]ny owner who brings an underground storage tank 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 such tank system to the state or local agency or department designated in appendix II of this part to receive such notice.
> 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.

40 C.F.R. §280.22; 53 Fed. Reg. 37082, 37208.

In demonstrating Respondent's liability, Complainant must

initially establish a number of prima facie elements: (1) Respondent was the "owner" and/or "operator" of Tanks #1 and #2; (2) Tanks #1 and #2 contained "regulated substances"; and (3) Tanks #1 and #2 are "underground storage tank systems." Pursuant to the regulations, the term "owner" means, in the case of a UST system, any person who owns a UST system utilized for storage, use, or dispensing of regulated substances. 40 C.F.R. § 280.12. Respondent has stipulated that he was the owner and operator of Tanks #1 and #2 which are steel tanks located underground on his property. Stipulation, ¶¶ 2, 4. Tanks #1 and #2 were owned and operated by Respondent and were in the ground on or after May 8, 1986. Tr. at 831.

Pursuant to 40 C.F.R. § 280.12, a "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils. Again, Respondent has stipulated that all three tanks "were all used by Respondent at some time to store aviation grade gasoline which is a motor fuel." Stipulation, ¶ 6. As outlined above, motor fuel is enumerated as a "regulated substance."

And thirdly, an "underground storage tank" means any one or combination of tanks that is used to contain an accumulation of regulated substances, and the volume of which is 10 percent or more beneath the surface of the ground. 40 C.F.R. § 280.12. The regulatory definition goes on to explain that "[t]his term does not include any: (a) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes..." *Id.* The term "noncommercial purposes" with respect to motor fuel means not for resale. *Id.* A "farm tank" is defined as a "tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. 'Farm' includes fish hatcheries, rangeland and nurseries with growing operations." *Id.*

Tanks #1 and #2 are of a capacity less than 1,100 and used for storing motor fuel. *See* Stipulation, ¶¶ 6,8. Both tanks were also used to contain "regulated substances" and were 10 percent or more beneath the surface of the ground. The remaining issue is whether Tanks #1 and #2 are "farm tanks", thus placing them outside of the "underground storage tank" definition.

Turning initially to the "farm tank" issue, Respondent argues that Respondent's property is a tract of land devoted to the production of crops. Respondent maintains that his property

is considered to be a farm[17] by the United States Department of Agriculture and points out that Respondent would not otherwise have a tobacco allotment granted to the tract of land. Respondent asserts that federal agencies should not have varied definitions that may confuse the public. Tr. at 1032-34; Post-Trial Brief of Respondent. Respondent also points to the testimony of John Austin who testified that he has seen the activities of bailing, raking and mowing hay on the land. Tr. at 1031, 12-22; P. 1032, 10-14. Further, Respondent argues that Complainant's witnesses agree that hay is a crop and that Respondent's property was zoned agricultural, with the small section with the office building considered commercial/agricultural. Tr. at 211, 339.

Complainant argues that Respondent's property is clearly not "devoted to farming" as required by the UST regulations. Complainant asserts that the 87 acre parcel of property was developed into an airport more than fifty years ago and has been used as an airport ever since. Tr. at 829, 1013. Complainant maintains that Respondent earned money operating Powell Airport by charging other aircraft for landing, aviation fuel purchases, rental of hangar space, and by offering services like flight training, charter flights, and plane rentals. Tr. at 829-30.

Among other things, Complainant also highlights the fact that Respondent's yearly average symbolic income of $1,000 from the sale of his hay crop is too minimal to consider it as anything but a side business. Tr. at 850. Complainant points out that Respondent's property is not dedicated primarily to farming and, in fact, the mowing of the hay is simply cosmetic in nature to keep the airport looking tidy. Tr. at 844, 848. Finally, Complainant asserts that aviation fuel was not found in the tanks of the farm equipment although Respondent claimed he used the aviation gas for his farm equipment.

When assessing the meaning of a "devotion" to the production of crops or the raising of animals, I must look to the plain conventional meaning of the word because the regulations do not provide any further guidance. The *American Heritage Dictionary*

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[17] A farm as defined by the United States Department of Agriculture in the Farm Service Agency Handbook is as follows: "[a] farm is made up of tracts that have the same owner and operator. A tract is a unit of contiguous land that is both the following: under 1 ownership and operated as a farm or *part of a farm*." (Emphasis added.) Farm Service Agency Handbook, Farm, Tract, and Crop Data, 3-CM (Revision 3).

of the English Language, Fourth Edition defines "devoted" as: "to give or apply (one's time, attention, or self) entirely to a particular activity, pursuit, cause, or person." *American Heritage Dictionary of the English Language*, Fourth Edition, 2000.

Respondent's property is a small commercial airport with his residence and some farming activities. However, the farming activities taking place on the property housing the two tanks in question was minimal and clearly was subservient to the airport activities. Certainly the property was not "devoted" to farming activities. Respondent's testimony reflects that although the airport business and activities had significantly decreased during the time in question, particularly after 1997, airport activity earlier dominated the use of the property. Tr. at 830-33, 835-36.

In direct contrast to Respondent's assertions that the two tanks were used to fuel the farm equipment, the fuel found during the November 2000 inspection in the tractors was not aviation fuel. Tr. at 106, 114, 264-265, 274, 492-93, 509. Two of the tractors contained diesel fuel and the third tractor had regular gasoline. Respondent claims that his son had unknowingly filled one of the tractors with regular gasoline. Although there may have been an incidental use of aviation fuel in his tractors, such certainly does not render the property as being devoted to the production of crops.

Mayes Aviation doing business at Powell Airport has been an active and successful airport since 1951.[18] Respondent has obviously made his living[19] from his airport business. Tr. at 829-833. Respondent's only farm crop, hay, brought in a minimal amount of money for 2000 and 2001.[20] C's Ex. 32. Additionally, Respondent received a small monetary sum for his tobacco allotment which he sold,[21] but only received this allotment

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[18] The bottom of Respondent's airport stationary reads "[s]erving Knoxville since 1951, Aircraft Charter, Aerial Advertising, Aerial Photography." C's Ex. 8.

[19] Respondent is a pilot by vocation. Tr. at 816.

[20] Respondent earned only an average of $1,000 per year from sales of hay in any given year that he sold hay. Tr. at 850-51.

[21] Respondent testified that he has sold his tobacco allotment each year to "a farm that doesn't have an airport on

because he had a "farm" capable of growing tobacco.[22] However, such income only produced less than a few hundred dollars in annual income in 2000-2001. *Id.* Although the Farm Services Agency deems the property to be a farm that is "farmed" by Respondent because it has a tobacco allotment, this legal fiction cannot be used to qualify Respondent's property as being "devoted to the production of crops" for UST regulation purposes. Regardless, such an item would not tip the scales in favor of Respondent's assertion that his property was "devoted" to farming activities.

The number of airplanes present at the airport, either owned by him or planes owned by others, speaks to the fact that the primary purpose of Respondent's land was an airport. Mr. Mayes testified that he had seven to eight aircraft at Powell Airport at one time. Tr. at 995. Respondent's witness, Douglas L. Davis, testified that he paid Respondent $50 per month to park his plane at the airport. Tr. at 1007. Respondent testified that he flew numerous charters, did aerial photography, and had up to eight flight instructors working for him at one time. *See* Tr. at 834; C's Ex. 8, 11. In addition, Respondent admits that his primary purpose for cutting the hay was to keep the airport looking clean and neat. Tr. at 849. He stated "you would want to live in an environment that looked halfway decent. And this has been my concern ever since we have had the airport." *Id.* Although it is difficult to pinpoint the exact amount of activity attributable to the airport activities compared to the farming activity during the pertinent period, it is unequivocally clear that the property in question was not devoted to farming activity.

Additionally, the location of the tanks in question makes them very convenient for airport use. Tanks #1 and #2 were located beneath the paved tarmac at Powell Airport where the aviation fuel dispensers were located. Tr. at 62, 68, 110-11, 215. Finally, I note that Respondent's testimony reflects that he used aviation gasoline from Tank #2 for use in the airplanes at the airport. C's Exs. 15, 16. Such use belies his claim that the tanks were "agricultural." C's Exs. 15, 16. Samples of the contents of Tank #2 during the November 2000 inspection revealed that the gas qualified to be sold as aviation fuel. C's Ex. 26.

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it." Tr. at 851, 853-854.

[22] The Department of Agriculture's definition of a "farm" is very broad and is quite different from that directed by the UST regulations.

Based on the foregoing, I find that the two tanks in question are not "farm tanks" pursuant to 40 C.F.R. 280.12 and fit squarely within the definition of "underground storage tanks."[23]

Inasmuch as I have determined that Tanks #1 and #2 are not farm tanks within the meaning of 40 C.F.R. § 280.12, I need not reach the question of whether these tanks stored motor fuel for noncommercial purposes.[24] Nonetheless, I note Respondent's argument that the fuel contained in the two tanks was used for noncommercial purposes. *See* Post-Trial Brief of Respondent. Respondent asserts that the testimony of a pilot stating that he would not use old aviation fuel shows that the fuel could not have been used for commercial purposes. *See id.*; see also Tr. at 1001, Testimony of Douglas Davis. Respondent admits using some of the fuel to taxi his airplanes in order to keep the cylinders and the engine from "sticking." *See* Post-Trial Brief of Respondent; Tr. at 108, 266, 495. Tanks #1 and #2 were used in conjunction with Tank #3 to facilitate Respondent's airport, proper care of his planes, and the sale of fuel. As such, Tanks #1 and #2 are deemed to have stored motor fuel for noncommercial purposes.

Lastly, Complainant must show that Respondent did not notify TDEC or the EPA that Tanks #1 and #2 existed. Respondent does not dispute that he did not provide notification, as his argument is that he had no reason to make the notification because the two tanks were exempt as farm tanks. *See* Post-Trial Brief of Respondent; Respondent's Answer, ¶ 19. The tanks were removed from the ground on July 9, 2001. Respondent was, thus, out of compliance with the registration requirement for both tanks from 1986[25] until 2001. Accordingly, I find Respondent liable for the

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[23] Moreover, the farm exemption claimed by Respondent is an affirmative defense for which he as respondent bears the burden of proof.

[24] There is no dispute that none of the tanks in question is a residential tank. 40 C.F.R. § 280.12.

[25] The EPA penalty calculations were based on the information that Respondent's ownership of the facility commenced in 1987. C's Ex. 30. At the hearing and in the Stipulations, Respondent admitted that the two smaller tanks were installed in the 1950's, that he has owned and operated Powell Airport since 1966, and that he acquired the property where the airport is

failure to register Tanks #1 and #2 pursuant to 40 C.F.R. § 280.22.

2. Count II

In Count II of the Complaint, the EPA alleges that Respondent failed to comply with the UST system release detection requirements for Tanks #1 and #2 in violation of 40 C.F.R. § 280.40. Section 280.40 outlines the general release detection requirements for all UST systems and requires that:

> (a) Owners and operators of new and existing UST systems must provide a method, or combination of methods, of release detection that:
> (1) Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;
> (2) Is installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition; and
> (3) Meets the performance requirements in § 280.43 or 280.44, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer... .
> (c) Owners and operators of all UST systems must comply with the release detection requirements of this subpart by December 22 of the year listed in the following table: ...

40 C.F.R. § 280.40(a),(c). The table of the schedule for the phase-in of release detection in 40 C.F.R. § 280.40(c) reflects that for tanks installed between 1980 and 1988 release detection was required by December 22, 1993.[26] Here, Respondent reported that his ownership of Tanks #1 and #2 commenced in 1987 and based

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located from his father in 1977. Stipulation, ¶ 3; Tr. at 829-831.

[26] Compliance with the release detection requirements of 40 C.F.R. Part 280, Subpart D, was phased in over a ten-year period. Recognizing the magnitude of installing release detection mechanisms, the EPA implemented regulations providing the regulated community an extended period of time in which to install release detection or close down the tanks.

on this information Respondent has been charged with failure to have leak detection since December 22, 1993.[27]

Respondent argues that Tanks #1 and #2 do not fall under the definition of "underground storage tanks" as they fit the "farm tank" exemption and, thus, Respondent was not required to perform any release detection on these tanks.

In order to show Respondent's liability for Count II, Complainant must initially show that: (1) Respondent is the owner/operator of Tanks #1 and #2; (2) Tanks #1 and #2 are "underground storage tanks"; (3) Tanks #1 and #2 are "existing tanks"; and (4) Tanks #1 and #2 did not have the method or combination of methods in place to perform the required release detection pursuant to § 280.40.

As discussed above with regard to Count I, I find that Respondent is the owner and operator of the two tanks, that the two tanks are underground storage tanks, and that the two tanks in question are not "farm tanks" pursuant to 40 C.F.R. § 280.12 and fit squarely within the definition of "underground storage tanks".

Complainant must also show that Tanks #1 and #2 are part of an "existing tank system". Pursuant to 40 C.F.R. § 280.l2, an "existing tank system" means a tank system used to contain an accumulation of regulated substances or for which installation has commenced on the site or installation of the tank system. Moreover, a "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils. 40 C.F.R. § 280.12. Again, Respondent has stipulated that all three tanks "were all used by Respondent at some time to store aviation grade gasoline which is a motor fuel." Stipulation, ¶ 6. As outlined above, motor fuel is enumerated as a "regulated substance." Because Tanks #1 and #2 are part of a tank system used to contain aviation fuel which is a "regulated substance," the two tanks are found to be part of an existing UST system.

Lastly, Complainant must show that Tanks #1 and #2 did not

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[27] At the hearing, Respondent testified that Tanks #1 and #2 were installed in the middle to late 1950's. Tr. at 831. Tanks installed before 1965 are required to have release detection by December 22, 1989. 40 C.F.R. § 280.40(c).

have the method or combination of methods in place to perform the required release detection pursuant to § 280.40. Respondent admits that he did not perform release detection on Tanks #1 and #2. *See* Answer to Administrative Complaint and Request for Hearing and Settlement Conference ("Respondent's Answer"), ¶ 26. Respondent has suggested that his recordkeeping for the fuel levels constitutes a form of release detection. Such suggestion is rejected. First, recordkeeping alone is not sufficient to meet the regulatory requirements for release detection in 40 C.F.R. § 280.40(a). Moreover, Respondent's inventory control log was an imprecise measurement of the tanks' contents and wholly inadequate as a form of release detection.

Accordingly, I find that Respondent failed to conduct release detection requirements for Tanks #1 and #2 in violation of 40 C.F.R. § 280.40 and that he is liable for such violations as charged since at least December 1993.

3. Count III

In Count III of the Complaint, the EPA alleges that Respondent failed to comply with the UST system release detection requirements for Tank #3 in violation of 40 C.F.R. § 280.40. The EPA charges that Respondent was required to provide a method of release detection for Tank #3 no later than December 22, 1993, under the phase-in schedule under 40 C.F.R. § 280.40(c). Based on Respondent's reporting that Tank #3 was installed in the early 1980's, Respondent is charged with violating 40 C.F.R. § 280.40(c) for failing to have release detection for Tank #3 since December 22, 1993.

Respondent argues that release detection is never required as long as the UST is empty according to 40 C.F.R. § 280.70(a), and that, in fact, Tank #3 was empty during the penalty period of March 25, 1997 through its excavation and removal. *See* Post-Trial Brief of Respondent. Respondent asserts that the UST system need not be in temporary closure for the "empty" exemption to apply. *See id.* Respondent goes on to argue that in September of 2000, Respondent sought a change-in-service for Tank #3, had contacted TDEC pursuant to 40 C.F.R. § 280.71, and had filed a change in use form (within ten months of the removal of the tanks from the ground). *See id.*

In order to show Respondent's liability, Complainant must initially show that: (1) Respondent is the owner or operator of Tank #3; (2) Tanks #3 is an "underground storage tank"; (3) Tank #3 is an "existing tank"; and (4) Tank #3 did not have the method or combination of methods in place to perform the required

release detection as required by 40 C.F.R. § 280.40.

Respondent has stipulated that he was the owner and operator of Tank #3 and that Tank #3 was an UST within the meaning of 40 C.F.R. § 280.12. Stipulation, ¶¶ 2, 4. Additionally, there is no dispute that Tank #3 is part of an existing UST system.

Finally, Complainant must also show that Tank #3 did not have the method or combination of methods in place by December 22, 1993,[28] to perform the required release detection pursuant to § 280.40. Respondent does not dispute that he did not have any release detection in place for Tank #3 prior to its removal from the ground. Respondent's Answer, ¶ 26. Respondent testified that one of the reasons that he kept an inventory control log of who he sold aviation fuel to was so that he could account for how many gallons he had in his tank. Tr. at 902. He stated that "[t]his could tell us whether we were leaking any fuel or not". *Id.* As previously discussed, this is not an acceptable release detection method and it does not meet the regulatory standards for leak detection.

Respondent's defense that Tank #3 was exempt from the release detection requirements because it was empty is rejected. His interpretation of the regulations is misplaced. In defense of this Count, Respondent points to 40 C.F.R. § 280.70(a), which states:

> When an UST system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with § 280.31, and any release detection in accordance with subpart D. ... *However, release detection is not required as long as the UST system is empty.* The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (*one inch*) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the

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[28] As previously described, the schedule for phase-in of release detection is laid out in 40 C.F.R. § 280.40(c), which specifies that owners and operators of all UST systems must comply with the release detection requirements by December 22 of the year listed in the table contained in the regulatory section. That table specifies that for UST systems installed between 1980 and 1988, release detection is required by December 22, 1993. 40 C.F.R. § 280.40(c).

system. [Emphasis added].

40 C.F.R. § 280.70(a). First, it is interesting to note that Respondent vehemently argues that Tank #3 was not temporarily closed, yet attempts to use the "Temporary closure" section of the regulations to stage its defense.[29] Section 280.70 outlines what needs to happen to a tank which is in temporary closure mode. Single sentences contained within the regulation section cannot be read in a vacuum. This section must be read as a whole and the provisions for an empty tank are contextual to temporary closures.

Regardless, Tank #3 was not "empty" as defined by section 280.70(a). There must be no more than 2.5 centimeters, or one inch, of residue remaining for the tank to be deemed "empty." Respondent claims that Tank #3 has been empty since 1997 but Respondent's testimony and his inventory records disclose that 1,000 gallons of aviation gas were delivered to Tank #3 on September 4, 1997 and that the tank was used to pump gas for airplanes until at least March 2000. On March 17, 2000, TDEC performed a site inspection of the Powell Airport to check the status of Tank #3. Product level measurement of Tank #3 indicated that it contained 2 inches of product and 6 inches of water. *Id.,* Tr. at 55. Again during the November 2000 inspection, Tank #3 was not "empty". The inspectors stuck Tank #3 and found that it contained 5/8 inch product, and 7 3/8 inches water.

Further, the EPA has specifically rejected the use of this exemption for intermittent emptiness of an underground storage tank. The Proposed Rule to the UST regulations notes that "any underground storage tank that contains regulated substances for any period of time, *even small amounts*, is within the jurisdiction." (Emphasis added.) 52 Fed. Reg. 12662-01, 12690 (Apr. 17, 1987). Additionally, I observe that the "empty" provision of the temporary closure section was not provided to act as an exemption three years after the leak detection method was required to have been installed. In this regard, I note that the Tennessee rules specifically provide that the temporary closure period, including any extensions that may be granted by the Division, shall not extend beyond December 22, 1999, for any UST system that does not meet the upgrade requirements. Tennessee UST Rule 1200-15-02(1) or 1200-1-15-02(2); *see also* C's Ex. 12 (Notice of Violation).

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[29] Section 280.70 is found in Subpart G, entitled "Out-of-Service UST Systems and Closure." 40 C.F.R. § 280.70.

Although Respondent points out that "none of EPA's witnesses and experts could dispute that Tank #3 was empty according to the definition of empty that 0.3 percent by weight of total capacity of the UST system remain in the system," the EPA persuasively argues that the 2.5 centimeter/one inch standard is the one that should be used unless there are physical obstacles. Pursuant to the Federal Register's "Amendment and Clarification of the One-inch Rule", the EPA added the 0.3 percent by weight portion of the "one inch rule" to accommodate large tank-like containers, such as cargo tanks, that are routinely transported and weighed. *See* 47 Fed. Reg. 36092, 36093 (Aug. 18, 1982). The EPA agrees that the standard of "0.3 percent by weight" could be used as an alternative to the one-inch rule in the case of large portable cargo tanks because weighing those tanks was already routine practice. *Id.* In the instant case, however, weighing Tank #3 would be virtually impossible because the tank was buried below ground. The EPA employed the correct standard of one-inch of residue to determine whether Respondent's tank was empty within the meaning of 40 C.F.R. § 280.70(a).

In his earlier pleadings, Respondent also claimed that there was a change-in-service for Tank #3 as he had been storing the herbicide Roundup® in Tank #3 since 1997. However, Respondent later recanted this claim and now denies that Roundup® was ever stored in Tank #3. There is no evidence whatsoever that Respondent complied with the requirements for a change-in-service. 40 C.F.R. § 280.71(a),(c). (See Count V for a more detailed discussion of the change-in-service issue).

In conclusion, I find that the "empty" exemption from the release detection requirements set forth in 40 C.F.R. § 280.70(a) is not available to Respondent in 1997 when he was required to provide release detection in 1993. Further, Complainant has shown that Tank #3 was not "empty" within the meaning of 40 C.F.R. § 280.70(a)[30] and that there was no change-in-service within the meaning of 40 C.F.R. § 280.71(a),(c). Complainant has demonstrated that Respondent failed to have release detection for Tank #3 by December 22, 1993 as required by 40 C.F.R. § 280.40.

4. Count IV

Count IV of the Complaint alleges that Respondent failed to

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[30] The record also reflects that 1,197 gallons of aviation fuel were delivered to Mayes Airport on October 19, 1994. C's Exs. 33, 34.

upgrade or permanently close Tanks #1 and #2 prior to the December 22, 1998 deadline pursuant to 40 C.F.R. § 280.21. Section 280.21(a), in pertinent part, requires that:

> Not later than December 22, 1998, all existing UST systems must comply with one of the following requirements:
>
> (1) New UST system performance standards under § 280.20;
> (2) The upgrading requirements in paragraphs (b) through (d) of this section; or
> (3) Closure requirements under subpart G of this part, including applicable requirements for corrective action under subpart F.

40 C.F.R. § 280.21(a). The regulation further provides that steel tanks must be upgraded to meet one of the enumerated requirements, which include interior lining, cathodic protection, and internal lining combined with cathodic protection. 40 C.F.R. § 280.21(b).

Respondent argues that Tanks #1 and #2 are not "underground storage tanks" pursuant to 40 C.F.R. § 280.12 and, thus, are exempt from the requirement for upgrading or permanent closure prior to December 22, 1998. Specifically, Respondent argues that Tanks #1 and #2 are farm tanks.

In demonstrating Respondent's liability, Complainant must initially establish a number of prima facie elements: (1) Respondent was the "owner" and/or "operator" of Tanks #1 and #2; (2) Tanks #1 and #2 contained "regulated substances"; and (3) Tanks #1 and #2 are "existing UST systems." Again, Respondent has stipulated that he was the owner and operator of Tanks #1 and #2, and there is no dispute that the tanks stored a regulated substance. Stipulation, ¶¶ 2, 4. Further, Respondent stipulates that all three tanks were made of steel. Stipulation, ¶ 5. As outlined above under Counts I and II, Tanks #1 and #2 are "existing UST systems" as defined in 40 C.F.R. § 280.12, and Respondent's argument that Tanks #1 and #2 are exempt from regulation as farm tanks is rejected. (See discussion under Count I).

And finally, Complainant must show that Respondent did not, in fact, upgrade or permanently close these tanks prior to December 22, 1998. Respondent does not dispute that Tanks #1 and #2 were not upgraded prior to the regulatory deadline of December 22, 1998. *See* Post-Trial Brief of Respondent; Respondent's

Answer, ¶ 28.[31] Accordingly, I find that Complainant is liable for the failure to upgrade Tanks #1 and #2 pursuant to 40 C.F.R. § 280.21 for the period of December 23, 1998 through July 9, 2001 when the tanks were removed from the ground.

5. Count V

In Count V, Complainant alleges that Respondent failed to permanently close and assess the site for releases after 12 months of temporary closure for Tank #3 as directed by 40 C.F.R. § 280.70(c). Section 280.70(c) states that:

> When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in § 280.21, *except that* the spill and overfill equipment requirements do not have to be met. Owners and operators must permanently close the substandard UST systems at the end of this 12-month period in accordance with §§ 280.71-280.74, *unless* the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with § 280.72 before such an extension can be applied for.

40 C.F.R. § 280.70(c).

Complainant argues that Respondent, until he filed his Answer, had consistently represented to TDEC and EPA that Tank #3 was "temporarily out of service" as of April 1997. Tr. at 46-51; C's Ex. 3. Additionally, Respondent wrote letters in August and September of 2000 to TDEC representing that Tank #3 had not had fuel in it since 1997. C's Exs. 8 and 11. In November of 2000, on his Response to EPA's Information Request, Respondent again informed Complainant that the tank was temporarily closed. C's Ex. 23. Ms. Jane Roach testified that during a telephone conversation in March of 2000, Respondent acknowledged that the tank was "temporarily out of service" and did not attempt to change his characterization of the tank. Tr. at 68-69, C's Ex. 5.

Complainant alleges that Respondent believed that he could

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[31] The tanks were excavated and removed from the ground on July 9, 2001.

avoid certain registration requirements by claiming that Tank #3 was temporarily closed. For instance, Respondent refused to pay his tank registration fees for the year 2000-2001 claiming that he had not used Tank #3 since 1997. Tr. at 82-83, 90; C's Exs. 7, 8, 9, 10, 11, and 12. Complainant further argues that Respondent's statements that he had not used Tank #3 since 1997 were false. When Respondent was asked to explain an invoice for the purchase of aviation fuel, he testified that in September 1997 1,000 gallons of aviation fuel were delivered to Tank #3 and that he proceeded to use product from this tank until the end of 1999 or early 2000. Tr. at 778-779, 971-973. He further testified that on July 14, 2001, he flew an airplane that had been fueled from Tank #3. Tr. at 815-817; C's Ex. 32.[32] He even sought reimbursement from TDEC in September 2000 for past tank registration payments on the basis of his representation that Tank #3 had not been used since 1997. Tr. at 90; C's Ex. 11.

Respondent argues that Tank #3 was never temporarily closed, but instead in September 2000 he sought a change-in-service for the tank and contacted TDEC pursuant to 40 C.F.R. § 280.70. Moreover, Respondent asserts that he filed a change-in-service form with TDEC in September of 2000 for Tank #3 which was within ten months of all of the tanks being removed from the ground.

Section 280.71, entitled Permanent closure and changes-in-service, requires that:

> (a) At least 30 days before beginning either permanent closure or a change-in-service under paragraphs (b) and (c) of this section, or within another reasonable time period determined by the implementing agency, owners and operators must notify the implementing agency of their intent to permanently close or make the change-in-service, *unless* such action is in

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[32] Complainant's Exhibits 32 and 33 indicate that the inventory records were submitted to the EPA at a settlement conference or during settlement proceedings. Neither party has objected to these documents being received and entered into evidence as exhibits. *See* 40 C.F.R. § 22.22(a)(referencing Rule 408 of the Federal Rules of Evidence (28 U.S.C.). Moreover, these handwritten inventory records were produced by Respondent to inspectors at the November 28, 2000 inspection and the inventory records were proffered as part of Respondent's prehearing exchange. Respondent's proposed Exhibit 32; C's Ex. 16. Respondent would be found liable on all counts even if these documents had not been part of the evidentiary record.

> response to corrective action....
> (c) Continued use of an UST system to store a non-regulated substance is considered a change-in-service. Before a change-in-service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with § 280.72.

40 C.F.R. § 280.71(a),(c).

As noted above, Respondent bears the initial burden of production and the ultimate burden of persuasion for each defense or exception to the regulation he raises. Although Respondent claimed in his Answer that there was a "change-of-service" capacity for Tank #3 (Answer ¶ 32), he produced no evidence that he had adhered to the change-in-service requirements of §§ 280.71 and 280.72. Not only did Respondent neglect to "empty and clean the tank by removing all liquid and accumulated sludge," he also did not conduct a site assessment or measure to determine the presence of a release and other requirements as required by the UST regulations. 40 C.F.R. §§ 280.71, 280.72. Respondent simply made misleading statements on his amended Notification for Underground Storage Tanks Form dated September 25, 2000, and attempted to use the change-in-service provisions to avoid the regulatory requirements to upgrade or permanently close the tank. Respondent's argument that in September 2000 he was merely stating his intent to make a change-in-service by storing Roundup® in 1997 is not credible as he cannot retroactively express his intention to perform an act three years after the purported act. I find that Tank #3 did not have a change-in-service prior to removal from the ground.

In order to show Respondent's liability as charged, Complainant must initially show that: (1) Respondent is the owner/operator of Tank #3; (2) Tanks #3 is an "underground storage tank"; (3) Tank #3 was temporarily closed for more than 12 months; (4) Tank #3 did not meet either performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21; and (5) Respondent did not permanently close Tank #3 at the end of this 12-month period of temporary closure in accordance with §§ 280.71-280.74.

Pursuant to the regulations, the term "owner" means, in the case of a UST, any person who owns a UST system utilized for storage, use, or dispensing of regulated substances. 40 C.F.R. § 280.12. The term "operator" refers to any person in control of, or having responsibility for, the daily operation of the UST. 40 C.F.R. § 280.12. Respondent has stipulated that he was the owner

and operator of Tank #3, and there is no dispute that the tanks stored a regulated substance. Stipulation, ¶¶ 2, 4. Further, Respondent stipulates that all three tanks were made of steel. Stipulation, ¶ 5. As outlined above, Tank #3 is an "underground storage tank" as defined in 40 C.F.R. § 280.12.

The record before me is unclear as to whether Tank #3 was ever not in use for any extended period of time or was temporarily closed. Not only has Respondent continuously argued that the tank was never temporarily closed,[33] Respondent's inventory records show that aviation fuel from the tank was used to fuel airplanes at the site through 1999. C's Ex. 31, 32, 33. The misleading information in Respondent's Answer and the convoluted arguments presented in subsequent pleadings and at hearing have created a conundrum. Complainant has built its case for Count V on Respondent's untruthful statements and misrepresentations of fact. The record before me does not adequately establish that Tank #3 was temporarily closed in April 1997 as charged and remained temporarily closed for 12 months. Respondent admits that Tank #3 was not permanently closed until it was excavated and removed on July 9, 2001. *See* Respondent's Answer, ¶ 32.

Independent of the temporary closure and change-in-service issues, Respondent was required to permanently close Tank #3 by December 22, 1998 pursuant to 40 C.F.R. § 280.21. Respondent does not dispute that Tank #3 was not upgraded in accordance with 40 C.F.R. § 280.21(a). Again, Respondent admits that Tank #3 was not permanently closed until it was removed from the ground on July 9, 2001. Accordingly, I find that Respondent failed to permanently close Tank #3 by the December 22, 1998 deadline as required by 40 C.F.R. § 280.21. As such, Respondent failed to comply with the closure or upgrade requirements from December 23, 1998 through July 9, 2001.[34]

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[33] Temporary closure does not require the tank to be empty. 40 C.F.R. § 280.70(a).

[34] Respondent is not prejudiced by this finding. Clearly, Respondent is aware of the regulatory requirements for the upgrading or closure of UST systems under 40 C.F.R. § 280.21 (Count IV). Secondly, the misstated charge in Count V directly resulted from Respondent's intentional misstatements of fact. Finally, leave to amend the pleadings is freely given when justice so requires. *See* Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 181-2 (1962).

B. Penalty

According to the penalty provision in Section 9006(d) of RCRA:

> (1) Any owner who knowingly fails to notify or submits false information pursuant to section 6991a(a) of this title shall be subject to a civil penalty not to exceed $10,000 for each tank for which notification is not given or false information is submitted.
> (2) Any owner or operator of an underground storage tank who fails to comply with -
> (A) any requirement or standard promulgated by the Administrator under section 6991b of this title;
> (B) any requirement or standard of a State program approved pursuant to section 6991c of this title; or
> (C) the provisions of section 6991b(g) of this title (entitled "Interim Prohibition") shall be subject to a civil penalty not to exceed $10,000 for each tank for each day of violation.

42 U.S.C. § 6991e(d). Pursuant to the Debt Collection and Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996), and the regulations promulgated thereunder,[35] for violations occurring on and after January 31, 1997, the statutory maximum penalty for each tank for each day of violation shall be $11,000. Pursuant to the Rules of Practice, the EPA bears the burden of proof to show that any penalty sought is appropriate.[36] *See In re John A. Capozzi*, RCRA (3008) Appeal No. 02-01, slip op. at 28, 11 E.A.D. __ (EAB, Mar. 25, 2003).

As to the amount of the penalty for an UST violation, Section 9006(c) of RCRA sets forth two factors that the EPA and Administrative Law Judge ("ALJ") must consider in determining the appropriate amount of the civil administrative penalty; the seriousness of the violation and any good faith efforts to comply

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[35] *See* Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69360 (December 31, 1996), codified at 40 C.F.R. Part 19.

[36] "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a).

with the applicable requirements. In addition to consideration of these two statutory penalty criteria, the ALJ must also consider any applicable EPA penalty policy. 40 C.F.R. § 22.27(b).

In proposing a penalty of $66,666, the EPA employed the U.S. EPA Penalty Guidance for Violations of UST Requirements dated November 14, 1990 which was designed by the Agency to guide its calculation of civil penalties against owner/operators of underground storage tanks who are in violation of the UST technical standards and financial responsibility regulations. *See U.S. EPA Penalty Guidance for Violations of UST Requirements,* November 14, 1990 ("UST Penalty Policy"). C's Ex. 29. The two statutory penalty criteria set forth in Section 9006(c) of RCRA are incorporated in the UST Penalty Policy. Additionally, the EPA considered the two penalty factors in calculating the proposed penalty. C's Ex. 30. The methodology described in this guidance document seeks to ensure that UST civil penalties are assessed in a "fair and consistent manner, and that such penalties serve to deter potential violators and assist in achieving compliance." *Id.* at 1.

While the policy is not binding on ALJs, the EAB has emphasized that the Agency's penalty policies should be applied whenever possible because such policies "assume that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In re M.A. Bruder & Sons*, RCRA (3008) Appeal No. 01-04, slip op. at 21, 10 E.A.D. __ (EAB, July 10, 2002); *In re Carroll Oil Co.*, 2002 WL 1773052 EPA, July 31, 2002.

1. UST Civil Penalty Policy Methodology

In accordance with the penalty policy methodology, the EPA calculated: (1) the "economic benefit" component that removes any significant economic benefit that the violator may have gained from noncompliance; and (2) a gravity-based component to measure the seriousness of the violations. The EPA adjusts the penalty for adjustments to take into account differences between similar cases.[37] C's Ex. 30, 31. The sum of the economic benefit and the gravity-based components yields the initial penalty figure,

[37] The gravity-based component incorporates adjustments that reflect the specific circumstances of the violation, the violator's background and actions, and the environmental threat posed by the situation. *See* C's Ex. 30, at 4.

which can be adjusted during settlement negotiations.[38] *See* UST Penalty Policy, at 6. The outcome of such negotiations is the final penalty. *See id.*

To determine the economic benefit figure, the EPA added the avoided costs and the delayed costs to estimate the amount of profit from Respondent's noncompliance. *See* C's Ex. 30, 31; Penalty Policy, at 8. The avoided costs[39] are the periodic, operation and maintenance expenditures that should have been incurred, but were not. *See id.* The delayed costs[40] are those expenditures that have been deferred by the violation, but will be incurred to achieve compliance. *See id.*

For the gravity-based component, the EPA determined a base "matrix value" for each violation, and then multiplied this by the violator-specific adjustments, the environmental sensitivity multiplier and the days of noncompliance multiplier. C's Ex. 30, 31. First, the EPA selected a base matrix value by ranking two violation criteria - the "potential for harm" and "extent of deviation from requirement" - among the categories of "major," "moderate," and "minor," and then locating the cell on the grid where those rankings intersected. Tr. at 639-41, 652-56, 659-61, 671-74; UST Penalty Policy at 12-19. Additionally, the EPA considered four adjustment factor criteria (degree of cooperation/noncooperation; degree of willfulness or negligence; history of noncompliance; and other unique factors) to adapt the penalty amount to the gravity of the violation and the surrounding circumstances. Tr. at 640, 644-48, 656-59; UST Civil Penalty Policy at 17.

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[38] Once a complaint is issued, the EPA may enter into settlement negotiations with the owner/operator to encourage timely resolution of the violation. *See Penalty Policy*, at 6. Such negotiations provide the owner/operator with the opportunity to present evidence to support downward adjustments in the penalty. *See id.*

[39] Avoided costs are calculated by multiplying the avoided expenditures by the interest and the number of days, dividing this sum by 365 days, multiplying this by the marginal tax rate, and adding this sum to the avoided expenditures. *See* UST Penalty Policy, at 9.

[40] Delayed costs are calculated by multiplying the delayed expenditures by the interest and the number of days, and dividing that sum by 365 days. *See* UST Penalty Policy, at 12.

2. Penalty Calculation for Counts I-V

On Count I for failing to register Tanks #1 and #2, the EPA found the avoided expenditures to be zero, as there is de minimus time and expense involved in filing a form. C's Ex. 30. The delayed expenditures were also considered zero, as no recurrent filings are required. *See id.* Thus, the economic benefit component was found to be zero. The EPA considered both potential for harm and the extent of deviation to be major, which placed the violation in the highest cell of the gravity-based matrix ($1,500). Tr. at 644, 656; C's Ex. 30. Because Count 1 is for both Tanks #1 and #2, the penalty matrix value sum is $3,000. I note that Complainant's witness, Michael Hollinger, testified that "failure to register is a very fundamental problem in that if the state or EPA... are not familiar with or don't know about a tank, don't know of its existence, then further regulation of that tank is impossible, and without regulation of underground storage tanks, releases can occur." Tr. at 644.

A low level of environmental sensitivity, 1.0, was assigned since no sensitive areas near the site of the violations were reported in the inspection report. C's Ex. 30. The days of noncompliance multiplier for Count I was 6.0, or $18,000, as the violation was found to be for 1,567 days.[41] As a result for Count I, the sum of the economic benefit component ($0) and the gravity-based component ($18,000) is $18,000.[42]

On Count II for failure to perform release detection on Tanks #1 and #2, the EPA found the avoided expenditures to be an estimated $600, as there is a tank tightness test each tank would have been required to undergo each year.[43] C's Ex. 30. The

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[41] Respondent's period of noncompliance under Count I is approximately 15 years. The EPA generously applied the five-year statute of limitations to the penalty calculation. C's Ex. 30. I will, in light of due process concerns, not enlarge the penalty amount to include the additional years of Respondent's noncompliance.

[42] The EPA noted that it made no violator specific adjustments to the penalty because the penalty policy factors took into account the seriousness of the violation and the facts did not indicate Respondent made a good faith effort to comply with the regulation. C's Ex. 30, at Statutory Factors.

[43] Upon questioning, Mr. Hollinger testified that the cost assigned for the tank tightness test was based on regional

delayed expenditures were also considered zero. *See id.* The EPA placed Respondent in the financial responsibility class 4 with a weighted tax rate of 0.15 percent. *See id.* The interest rate is 0.101 percent as determined by the regional economist. *See id.* Thus, the economic benefit component was found to be $731, as the calculated avoided cost is $731 and the calculated delayed cost is $0. *See id.*

The EPA determined the potential for harm to be major and the extent of deviation to be major, which is a penalty matrix value of $1,500 per tank. Tr. at 644, 656; C's Ex. 30. Because Count II is for both Tanks #1 and #2, the penalty matrix value sum is $3,000. As with Count I, a low level of environmental sensitivity, 1.0, was assigned since no sensitive areas near the site of the violations were reported in the inspection report. C's Ex. 30. The days of noncompliance multiplier for Count II was 6.0, or $18,000, as the violation was found to be for 1,567 days.[44] As such, for Count II, the sum of the economic benefit component ($731) and the gravity-based component ($18,000) is $18,731.

On Count III for failure to perform leak detection on Tank #3, the EPA found the avoided expenditures to be an estimated $300, as there is a tank tightness test that the tank would have been required to undergo each year. *See id.* The delayed expenditures were considered zero. *See id.* The EPA placed Respondent in the financial responsibility class 4 with a weighted tax rate of 0.15 percent. *See id.* The interest rate is 0.101 percent as determined by the regional economist. *See id.* Thus, the economic benefit component was found to be $366, as the calculated avoided cost is $366 and the calculated delayed cost is $0. *See id.*

The EPA determined the potential for harm to be major and the extent of deviation to be major, which is a penalty matrix value of $1,500. Tr. at 644, 656; C's Ex. 30. As with the counts above, a low level of environmental sensitivity, 1.0, was assigned since no sensitive areas near the site of the violations were reported in the inspection report. C's Ex. 30. The days of

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factors. Tr. at 672.

[44] Respondent's period of noncompliance is 7 ½ years because Respondent was required to begin performing release detection by December 22, 1993. Again, the EPA liberally applied the five-year statute of limitations to the penalty calculation. C's Ex. 30.

noncompliance multiplier for Count III was 6.0, or $9,000, as the violation is for 1,567 days.[45] As such, for Count III the sum of the economic benefit component ($366) and the gravity-based component ($9,000) is $9,366, but was adjusted to $4,792 to reflect the initially proposed penalty amount.[46]

On Count IV for failure to meet the upgrade or closure requirements for Tanks #1 and #2, the EPA found the delayed expenditures to be an estimated $300 per tank for the tank tightness test that each tank would have been required to undergo each year, $5,000 for retrofit of an impressed current corrosion protection system on each tank and piping, and $1,000 for each tank for spill and overfill equipment costs. C's Ex. 30. The avoided expenditures were considered zero. *See id.* The EPA placed Respondent in the financial responsibility class 4 with a weighted tax rate of 0.15 percent. *See id.* The interest rate is 0.101 percent according to the regional economist. *See id.* Thus, the economic benefit component was found to be $3,243, as the calculated delayed cost is $3,243 and the calculated avoided cost is $0. *See id.*

The EPA determined the potential for harm to be major and the extent of deviation to be major, which is a penalty matrix value of $1,500 for each tank. Tr. at 644, 656; C's Ex. 30. As with the counts above, a low level of environmental sensitivity, 1.0, was assigned since no sensitive areas near the site of the violations were reported in the inspection report. C's Ex. 30. The days of noncompliance multiplier for Count IV was 4.5, as the violation was found to be for 930 days.[47] As such, for Count IV

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[45] Again, I note that the EPA generously applied the five-year statute of limitations to calculating the penalty amount. C's Ex. 30. The EPA could have extended the days of noncompliance to December 23, 1993.

[46] In connection with the Motion for Accelerated Decision, the EPA calculated the penalty to be $4,792 based on a noncompliance period from November 28, 1995 to April 30, 1997, the date represented to be the date of temporary closure by Respondent. C's Ex. 31. The EPA decided not to increase the penalty for this violation. Additionally, the EPA construed the days of noncompliance liberally by applying the five-year statute of limitations to the initial penalty calculation. *See id.*

[47] Tanks #1 and #2 were existing systems that were required to be upgraded or closed by December 22, 1998. The tank systems were removed from the ground on July 9, 2001.

the sum of the economic benefit component ($3,243) and the gravity-based component ($13,500) is $16,743.[48]

On Count V for failure to permanently close Tank #3 by April 30, 1998, the EPA found the delayed expenditure to be $5,000 for the estimated cost to remove the tank and to conduct a site assessment as required by the UST regulations at the time of closure. C's Ex. 30. The EPA placed Respondent in the financial responsibility class 4 with a weighted tax rate of 0.15 percent. *Id*. The interest rate is 0.101 percent per the regional economist. *See id.* The calculated delayed cost is $1,613. *See id.* Thus, the economic benefit component was found to be $1,613, as the calculated avoided expenditure is $0 and the calculated delayed cost is $1,613. *See id.*

The EPA determined the potential for harm to be major and the extent of deviation to be major, which is a penalty matrix value of $1,500 for each tank. Tr. at 644, 656; C's Ex. 30. As with the counts above, a low level of environmental sensitivity, 1.0, was assigned since no sensitive areas near the site of the violations were reported in the inspection report. C's Ex. 30. The days of noncompliance multiplier for Count V was 5.0, as the violation is for 1,166 days.[49] As such, for Count V, the sum of the economic benefit component ($1,613) and the gravity-based component ($7,500) is $9,113, but was adjusted to $8,400.[50]

The EPA's proposed penalty of $8,400 is for the period from April 30, 1998 to April 30, 2001 even though the EPA later determined that the period of noncompliance extended to July 9, 2001. C's Exs. 30, 31. The EPA's charge under Count V is that Respondent failed to permanently close Tank #3 twelve months after it was temporarily closed in April 1997. However, as

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[48] The initially proposed penalty amount was incorrectly calculated as $16,711. C's Ex. 31.

[49] The EPA determined that Tank #3 was required to be upgraded or permanently closed by April 30, 1998 because it was temporarily closed in April 1997. C's Ex. 30. The tank system was removed from the ground on July 9, 2001.

[50] The initially proposed penalty was $8,400. C's Ex. 31. In connection with the Motion for Accelerated Decision, the EPA calculated the penalty based on a noncompliance period from April 30, 1998 to April 30, 2001, the estimated date of compliance. *See id.* The EPA has decided not to increase the penalty for this violation.

discussed above, I do not find that Tank #3 was temporarily closed in April 1997. Rather, I have determined that Tank #3 was in noncompliance status for lack of upgrading or permanent closure from December 23, 1998 to July 9, 2001. As such, the amount of the penalty for Count V has been reduced $365 to reflect the reduced period of noncompliance, resulting in a total penalty of $8,035 for Count V.

3. Respondent's Challenge to the Penalty Calculation

At the hearing, Respondent challenged the EPA's application of the UST Civil Penalty Policy. However, the EPA has fairly and consistently followed the policy in calculating the gravity-based component and the economic benefit component in this proceeding and I find no reason to alter the total penalty on that basis. As discussed above, the EPA has established by a preponderance of the evidence that Tanks #1 and #2 were not registered, did not have proper release detection, and were not upgraded or closed as required, and that Tank #3 did not have proper release detection and was not closed as required. In particular, I note that the gravity-based component of the penalties was premised on the assessments of the potential for harm and extent of deviation as being major in nature. Such assessments are fully warranted as Respondent deviated from the regulatory requirements to such an extent that there was no compliance and Respondent's actions resulted in, or were likely to result in, a situation that could cause harm to human health or the environment.

Additionally, the EPA has demonstrated that when the three tanks in question were removed from the ground on July 9, 2001, two of the tanks were observed to have corrosion holes. Lead, benzene, and petroleum hydrocarbon contamination associated with aviation fuel was found in soil and groundwater samples taken during the excavation. C's Ex. 20, 23.

Although Respondent correctly points out that the sampled groundwater was not recharged water, later sampling by Respondent's contractor, Mr. Mark Miller of Remedial Solutions, disclosed that groundwater samples collected from its groundwater monitoring wells exceeded the cleanup levels for Benzene and total petroleum hydrocarbons when applying the "drinking water supply" standard. C's Ex. 20. The "drinking water supply" cleanup levels for soil and groundwater are applicable based on the presence of one active private drinking water well located 2,450 feet southwest of the site. Id. Further, Mr. Jim Miller's Permanent Closure Report also reflects that based on visual inspection, the contamination above minimum cleanup levels was caused by corrosion of the tanks and/or pipe and joint failure.

C's Ex. 19.

Ted W. Simon, PhD, a toxicologist with EPA's Waste Management Division, testified at the hearing that exposure to elevated levels of benzene, TPH, and lead can be deleterious to human health, particularly young children. Tr. at 580-86; C's Ex. 28. For example, Dr. Simon testified that the lead level "is so far above our protected estimate, that this would almost certainly lead to adverse effects in someone consuming this water." Tr. at 589. Additionally, Dr. Simon reported that some of the chemicals contained in the USTs at the facility were found in the water and soil samples taken at the time of the excavation of the tanks and later by Mr. Mark Miller of Remedial Solutions. Tr. at 586-600.

Thus, the record strongly indicates that a release or releases from the UST systems in question occurred at the facility. Respondent's assertion that the contamination discovered at the site could have originated at an abandoned gasoline station across the street from the facility or at two gasoline stations adjacent to the facility is plausible. However, more than likely, the releases came from one or more of the UST systems at the facility. In this regard, I note that there were holes in two of Respondent's tanks when the tanks were excavated. C's Exs. 17, 27. Mr. Burton from the EPA detected odors of gasoline vapors in the excavation area and observed a sheen on the surface of the water in the excavation pits. C's Ex. 27. Petroleum staining was observed in the soil samples collected in the excavation pits. *Id*. Finally, I observe that the removed USTs at the facility were closest to the sampled areas of contamination, and there was no evidence of leaking tanks on the other sites.

Respondent argues that the penalty calculation is highly subjective and that Respondent should have been given a downward adjustment in the penalty calculation for his cooperation and good faith effort to comply. *See* Reply Brief of Respondent, at 10. Respondent asserts that one of the adjustment factors was for cooperation which could have been adjusted plus or minus 25%, yet was not adjusted for Respondent's cooperation. Respondent points to the testimony of Mr. Ryan Hyers, who agreed that Respondent was cooperative in complying with the clean-up directives. Tr. at 262, 264. Respondent also argues that his cooperative behavior, such as hiring contractors to remove the tanks from his property, submitting removal and abatement reports, and installing monitoring wells, should be reflected in a downward adjustment to the matrix value. *See* Tr. at 708-9. Moreover, Respondent contends that he supplied a number of

documents to the EPA in an effort to explain his situation of his own free will and volition. Tr. at 888-889.

Complainant's witness, Mr. Hyers, testified that Respondent's "cooperativeness" was the minimum requirement imposed on all tank owners rather than actions worthy of a matrix value reduction. *See* Tr. at 709.

I find that Complainant appropriately did not adjust downward the matrix value to reflect Respondent's actions and conduct. The UST Penalty Policy explains that:

> In order to have the matrix value reduced, the owner/operator must demonstrate cooperative behavior by going beyond what is minimally required to comply with requirements that are closely related to the initial harm addressed. For example, an owner/operator may indicate a willingness to establish an environmental auditing program to check compliance at other UST facilities, if appropriate, or may demonstrate efforts to accelerate compliance with other UST regulations for which the phase-in deadline has not yet passed. Because compliance with the regulation is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no 'reward' for doing now what should have been done in the first place. On the other hand, lack of cooperation with enforcement officials can result in an increase of up to 50 percent of the matrix value.

UST Penalty Policy, at 18.

Respondent's activities were only the minimal requirements necessary to finally come into compliance with the UST regulations. Respondent's acts of sending in explanatory materials to the EPA were not above and beyond what was necessary to state his case. Furthermore, Respondent's adherence to clean-up directives clearly does not constitute cooperative behavior to merit a reduction and would be, in fact, a reward for doing now what should have been done by him.

Finally, I note that no adjustment to the penalty was made for the factor of ability to pay. Respondent submitted no information to the EPA to support a claim of inability to pay when such was solicited. At the hearing, Respondent stated that ability to pay was not at issue.

4. Appropriate Civil Penalty Amount

In analyzing the EPA's determination of an appropriate penalty, I note that the rules governing this proceeding require ALJs to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act," and also to "consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). As discussed above, the EPA's penalty calculation has involved a fair and reasonable application of the UST Penalty Policy methodology.

Accordingly, Respondent is hereby assessed a civil penalty of $66,301. This amount is reasonable for the gravity of the violations committed and the nature of Respondent's operations. The amount of the penalty is appropriate and takes into account the seriousness of the violations and any good faith efforts to comply with the UST requirements. 42 U.S.C. § 6991e(c). Furthermore, this amount is sufficient to serve as a deterrent.

C. Attorney's Fees

In view of the foregoing determination, Respondent is not eligible for or entitled to attorney's fees. *See* Equal Access to Justice Act, 5 U.S.C. § 504; 40 C.F.R. Part 17; L&C Services, Inc. EAJA Appeal No. 98-1, 8 E.A.D. 110 (EAB, Jan. 1999). Accordingly, Respondent's Motion for Attorney's fees is denied.

IV. Conclusions of Law

1. Respondent is a "person" as defined by 40 C.F.R. § 280.12.

2. Respondent is an "owner" and "operator" of three "Underground Storage Tanks" as those terms are defined by 40 C.F.R. § 280.12.

3. Respondent failed to prove that Tanks #1 and #2 were "farm tanks" as that term is defined in 40 C.F.R. § 280.12.

4. The Underground Storage Tanks are an "existing tank system" as that term is defined by 40 C.F.R. § 280.12.

5. Respondent's three USTs contained aviation grade petroleum which is a "regulated substance" pursuant to 40 C.F.R. § 280.12.

6. Complainant's allegations against Respondent constitute "continuing violations" and are not barred by the otherwise applicable five-year statute of limitations period. 28 U.S.C. §

2462.

7. Respondent has not demonstrated that the inspections conducted by Complainant were unlawful searches and seizures. Complainant has established that the November 28, 2000 inspection was consensual.

8. Complainant has the burdens of presentation and persuasion to establish the prima facie case against Respondent. Respondent has the burdens of presentation and persuasion for any affirmative defenses and exemptions stated in the regulations.

9. Respondent failed to prove that Tanks #1, #2, or #3 were "empty" as defined in 40 C.F.R. § 280.70(a).

10. Respondent failed to prove that Tank #3 had a "change-in-service" as that term is used in 40 C.F.R. § 280.71.

11. Tank #3 was never "temporarily closed" as that term is used in 40 C.F.R. § 280.70.

12. Tanks #1, #2, and #3 are subject to EPA jurisdiction as regulated USTs.

13. Respondent failed to submit the appropriate "notice" form for Tanks #1 and #2 within 30 days of bringing the tanks into use as required by 40 C.F.R. § 280.22.

14. Respondent failed to provide a method of release detection for Tanks #1, #2, and #3 by at least December 22, 1993 as required by 40 C.F.R. § 280.40.

15. Respondent failed to upgrade or, alternatively, close Tanks #1 and #2 by December 22, 1998 as required by 40 C.F.R. §§ 280.21 and 280.70.

16. Respondent failed to upgrade, or alternatively, close Tank #3 by December 22, 1998 as required by 40 C.F.R. §§ 280.21 and 280.70.

17. The total civil penalty of $66,301 for Respondent's violations is authorized and in accordance with statutory penalty criteria in Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), and the applicable penalty policy issued under RCRA. *See* U.S. EPA Penalty Guidance for Violations of UST Requirements; 40 C.F.R. § 22.27(b)

18. The total civil penalty of $66,301 is appropriate and

reasonable for Respondent's violations of the underground storage tank regulations in 40 C.F.R. §§ 280.12-280.72.

19. Respondent is not eligible for or entitled to attorney's fees. 5 U.S.C. § 504; 40 C.F.R. Part 17.

ORDER

1. Respondent Norman C. Mayes is assessed a civil administrative penalty in the amount of $66,301.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the Final Order by submitting a cashier's check or certified check in the amount of $66,301, payable to the "Treasurer, United States of America," and mailed to:

EPA Region 4
Regional Hearing Clerk
P.O. Box 100142
Atlanta, Georgia 3084

3. A transmittal letter identifying the subject case title and EPA docket number (RCRA-04-2002-0001), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

_____
Barbara A. Gunning
Administrative Law Judge

Dated: February 27, 2004
Washington, DC

In the Matter of Norman C. Mayes, Respondent
Docket No. RCRA-04-2002-0001

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision, dated February 27, 2004, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: March 1, 2004

Original and One Copy By Pouch Mail to:

Patricia Bullock
Regional Hearing Clerk
U.S. EPA, Region IV
Sam Nunn Federal Center
Atlanta, Georgia 30303-8909

Copy by Pouch Mail to:

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