UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
UNITED STATES DEPARTMENT	**)**	
OF THE NAVY,	**)**	**Docket No. RCRA-III-9006-062**
Naval Air Station Oceana,	**)**	
	)	
Respondent	**)**	

ORDER ON CROSS MOTIONS FOR ACCELERATED DECISION

I. Procedural Background

This proceeding was initiated by a Complaint filed on September 30, 1998 by the United States Environmental Protection Agency, Region III (Complainant), against the United States Department of the Navy, Naval Air Station Oceana (Respondent). The Complaint was brought under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (RCRA). The Complaint charges Respondent in two counts with violations of Subchapter IX of RCRA, 42 U.S.C. § 6991-6991i, which concerns underground storage tanks and other equipment that store regulated substances (UST systems), and the regulations promulgated thereunder at 40 C.F.R. part 280. Count I has been withdrawn. Count II, which remains, charges Respondent with failure to use spill prevention equipment on one of two fill pipes of a UST owned and operated by Respondent, in violation of 40 C.F.R. § 280.20(c) (9 Virginia Administrative Code 25-580-50C). For this violation, Complainant proposes a penalty of $1,577.

Respondent answered the Complaint on November 2, 1998, denying the violations alleged and setting forth several affirmative defenses. On January 12, 1999, Respondent submitted a Motion for Partial Accelerated Decision on Count II ("Motion"), requesting that the Complaint be dismissed with prejudice on grounds that Complainant cannot meet its burden of going forward with regard to an essential element of Count II. On January 27, 1999, Complainant filed a Cross Motion for Accelerated Decision on Liability and Memorandum in Reply to Respondent's Motion for Accelerated Decision ("Cross Motion"). Respondent submitted a Reply to Complainant's Cross Motion on February 12, 1999, and Complainant filed a Sur-Reply on February 26, 1999. Respondent submitted a Response to Complainant's Sur-Reply on March 29, 1999. On April 13, 1999, oral argument was held on the motions. On April 20, 1999, Respondent submitted certain additional documents in response to the Presiding Judge's request for supplemental material, to which Complainant responded on May 12, 1999. A Reply

to Complainant's response was filed by Respondent on May 26, 1999.

On April 16, 1999, the General Counsel of the Department of Defense submitted by letter to the Department of Justice, Office of Legal Counsel (OLC), a request for an opinion on the authority of EPA to assess administrative penalties against Federal facilities for violations of RCRA's UST provisions. Pursuant thereto, a motion to stay this proceeding was granted pending the issuance of the OLC's opinion. After the OLC rendered its opinion on June 14, 2000 in favor of EPA, the stay was lifted and the parties were invited to provide any updated information relevant to the pending cross motions for accelerated decision. The Respondent and Complainant submitted supplemental memoranda on June 29 and June 30, 2000, respectively.

II. Undisputed Facts

Respondent owns and operates "UST 830C," a 10,000 gallon, double-walled, fiberglass reinforced, plastic, underground storage tank, installed at Naval Air Station Oceana (NAS Oceana) in 1994. UST 830C contains either number two low sulfur fuel oil, or diesel fuel, required for certain vehicles at the Naval Air Station. UST 830C has a fill pipe which is configured with the required spill prevention equipment ("first pipe") and a second pipe which does not have the requisite spill prevention equipment ("second pipe"). The Complaint alleges that Respondent violated 40 C.F.R. § 280.20(c) by not installing spill prevention equipment on the second pipe.

The first pipe and the second pipe are of equal dimension, four inches in diameter, positioned side by side, one foot apart, and within a manway on UST 830C. The pipes rise to the surface of a tank pad, and have similar manhole covers over them. Both pipes have a rounded flange, which is a coupling that allows connection to a hose for the transfer of product into the tank. There is no direct evidence that the second pipe has been used for filling the tank.

There are other tank openings on UST 830C. The tank has automatic tank gauging and has automatic line leak detection. Transcript of Oral Argument ("Tr.") at 15; Affidavit of Kevin R. Cloe, attached to Respondent's Response to Request for Supplemental Matter, dated April 20, 1999. The tank is filled with more than 25 gallons of product at a time. Tr. 30.

EPA conducted an inspection of Respondent's facility on July 31, 1997. On that date there were no labels or markings on or around the tank or pipes to distinguish one pipe from the other. However, the manhole cover over the first pipe was painted. The inspector concluded that both pipes were "fill pipes." The inspector noted that there were "[n]o indications of any spillage" around the second pipe. Cross Motion, Exhibit 7 n. 2. When the inspector pointed out the lack of spill prevention equipment on the second pipe, Respondent padlocked the second pipe, and shortly thereafter stenciled "DO NOT FILL" on the concrete adjacent to the second pipe, and stenciled "FILLPORT" on the concrete adjacent to the first pipe.

III. Applicable Statutory and Regulatory Provisions

The regulations at 40 C.F.R. § 280.20 provide, in pertinent part, as follows:

> In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements:
>
> * * * *
>
> (c) *Spill and overfill prevention equipment*. (1) Except as provided in paragraph (c)(2) of this section, to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:
>
> (i) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example a catchment basin); and
>
> (ii) Overfill prevention equipment . . .
>
> * * * *
>
> (2) Owners and operators are not required to use the spill and overfill prevention equipment specified in paragraph (c)(1) of this section if:
>
> (i) Alternative equipment is used that is determined by the implementing agency to be no less protective of human health and the environment than the equipment specified in paragraph (c)(1) (i) or (ii) of this section; or
>
> (ii) The UST system is filled by transfers of no more than 25 gallons at one time.

IV. Arguments of the Parties

In its Motion, Respondent requests accelerated decision on the following grounds: (1) that the second pipe is not a "fill pipe" but is a "sounding port," that allows manual gauging of UST 830C, and spill prevention equipment is not required on a sounding port; and (2) that no product has ever been introduced into the second pipe, so the 25 gallon *de minimis non curat lex* exception at 40 C.F.R. § 280.20(c)(2)(ii) applies.

Respondent argues that a "fill pipe" can only be the UST opening that is actually used for product transfer, according to the plain language of the regulations. The second pipe on UST 830C is used by the fuel delivery contractor to check the fuel level in the tank as the tank is being filled, and the first pipe is used as the fill pipe, Respondent asserts. In support, Respondent presents the Statement of Edward Brecht, Motor Vehicle Operator Supervisor at Public Works Center Transportation Department at NAS Oceana, who states that he authorizes fuel deliveries to UST 830C, that fuel deliveries occur approximately one to two times per month, that the

offloading of fuel is not documented, that he is not present for all fuel deliveries, but that "on numerous occasions" he has observed such deliveries, and that according to his observations, "the fuel delivery contractors have always used the fill port equipped with spill prevention containment . . . when offloading fuel" and he has "never observed a fuel delivery contractor load fuel into the sounding port." Motion, Exhibit 5.[1] He states that "[t]he sounding port is not used to fill the tank but rather to allow the fuel delivery contractor to check the fuel level in the tank as the tank is being filled through the fill port." *Id.* However, he also states, "it is not possible to document specific instances in which the sounding port may have been used to fill UST 830C." *Id.*

Respondent submits that, as a general rule, UST regulatory requirements govern all UST piping that routinely contains regulated substances, citing to 40 C.F.R. §§ 280.41(b) and 280.44. Sounding ports are free of UST regulatory requirements because such piping does not routinely contain regulated substances. Fill pipes, which do not routinely contain regulated substances, are nevertheless subject to the 40 C.F.R. § 280.20(c) requirements because of the risk of harm resulting from product transfer. Because the regulation of fill pipes is an exception to the general rule, EPA must strictly confine the exception to pipes that are the pathway for product transfer into the UST. Section 280.20(c) links the terms "fill pipe" and "product transfer." The regulations do not provide fair notice of an interpretation allowing EPA to regulate pipes that do not routinely contain product without regard to whether they are used for product transfer. There is no evidence that the second pipe was used for product transfer.

In addition, Respondent asserts that a presumption of regularity, that "things are rightly done, unless the circumstances of the case overturn this presumption," should apply, citing *Pasadena Research Laboratory v. United States*, 169 F.2d 375 (9th Cir. 1948), *cert. denied,* 335 U.S. 853 (quoting *U.S. Bank v. Dandridge*, 25 U.S. 64, 69 (1827); *Petrelle v. Weirton Steel*, 953 F.2d 152-3 (4th Cir. 1991); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 771-772 (10th Cir. 1999). Supporting such presumption, Respondent asserts, is the fact that the first pipe cover is marked with a green color symbol appropriate to fill pipes used for low-sulfur No. 2 fuel oil, pursuant to American Petroleum Institute Practice 1637. Motion, Exhibits 3, 4. Further supporting such presumption, Respondent asserts, is the well established business practice throughout the industry, and Navy policy at NAS Oceana, of restricting product transfer operations to the fill pipe on a tank.

In its Cross Motion, Complainant requests accelerated decision on the issue of liability on the basis that there is no genuine issue of material fact as to the condition of UST 830C at the

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[1] Attached to the Motion is a construction drawing of UST 830C, which was enclosed with Respondent's notification form submitted to the Commonwealth of Virginia in 1994. Motion, Exhibit 1, p. 8; Cross Motion Exhibit 2; Tr. 19, 25. The drawing shows two pipes, one of which is labeled "4" tank sounding line." Motion, Exhibit 1, p. 8. However, according to an Affidavit of Kevin R. Cloe, a Navy Professional Engineer, some structures represented in the drawing vary from the structures on UST 830C as installed. Respondent's Response to Request for Supplemental Matter, dated April 20, 1999, attachment.

time of the inspection, and that Complainant is entitled to judgment as a matter of law that the second pipe is a "fill pipe" on which Respondent failed to use spill prevention equipment. Complainant's argument is based on the capability of the second pipe to function as a fill pipe. Complainant presents an affidavit of the inspector, James Bailey, stating that he observed that the first and second pipe "were approximately four inches in diameter, both protruded from the hull of the tank system, both were fitted with a rounded flange at their tips to allow product transfers from a filling hose, and both had twin latches closing over this assembly." Cross Motion, Exhibit 4, Affidavit of Jim Bailey ¶ 5. Complainant also presents the affidavit of David Wiley, an environmental engineer in EPA's Office of Underground Storage Tanks, concluding from documents and photographs regarding the second pipe, and discussions with Mr. Bailey, that the second pipe is "capable of allowing a product transfer from a delivery hose"and is a "fill pipe" as that term is used in 40 C.F.R. § 280.20(c). Exhibit 5, Affidavit of David Wiley ¶¶ 5, 6, 7, 8.

Acknowledging that the regulations do not define "fill pipe," Complainant emphasizes the preventative nature of the spill prevention regulations, and asserts that the regulatory intent is that the term "must include pipes that may serve as fill pipes, pipes that look like and are equipped as fill pipes, otherwise Part 280 is being interpreted in a manner inconsistent with its purpose." Cross Motion at 10-11. Complainant asserts that such interpretation is "the most reasonable one Part 280 will bear." *Id.* at 11. Complainant argues that the regulatory scheme does not rely on regularity of operators, but requires tanks to be outfitted defensively, to address the risks of release associated with product transfer. It is reasonably foreseeable that the second pipe could be used as a fill pipe, Complainant urges. Thus, the term "fill pipe" must include "all pipes that are designed and appear to the product deliverer to be capable of allowing a filling operation." Motion at 12. Respondent's assertion that no product has been transferred to UST 830C through the second pipe is irrelevant given the risks associated with a deliverer using that pipe to transfer product, Complainant maintains. As the Agency which wrote the regulations, Complainant argues, its interpretation should be given great deference.

Complainant considers the API color coding directives to be merely installation practices, protecting against inadvertent mixing of product, and thus irrelevant to spill and overfill prevention. Complainant points out API Recommended Practice 1637, recommending pipes be differentiated by stencils to avoid confusion, and API Recommended Practice 1615 (¶11.2.4 (5th ed. 1996) recommending reinforcing plates be installed under gauge and fill openings, and that"[f]ill pipes may be located at any opening on the tank." Motion Exhibits 2, 3. Furthermore, Complainant argues that UST 830C is mis-marked and may cause confusion, because the cover on the first pipe is painted blue (the code for middle grade leaded gasoline) rather than green. Motion Exhibit 4. Complainant asserts that Respondent has reported inconsistently that UST 830C contains diesel fuel (Cross Motion Exhibit 9) and that it contains Number 2 fuel oil (Motion at 1-2).

In response to Respondent's claim that the 25 gallon exemption of 40 C.F.R. § 280.20(c)(2)(ii) applies, Complainant argues that under Respondent's interpretation, a fill port on a newly installed tank would not be required to have spill prevention equipment.

In reply, Respondent argues that in the text of the regulations, there is no "reasonably foreseeable" test as to using the wrong pipe for product transfer. Such test should not be implied in the regulatory language, where EPA specifically provided in the regulations for protection of ground-water monitoring wells, by requiring them to be marked and secured (40 C.F.R.§ 280.43(f)(8), but did not provide any such protection for sounding ports, as no such control was deemed necessary. Respondent asserts that it is appropriate to equip a tank with both a fill pipe and sounding port, and in support, presents an EPA publication, "Detecting Leaks: Successful Methods Step-by-Step," dated November 1989, which refers to a "gauge hole," separate from a fill pipe, to gauge the volume of product in the tank. *See,* Respondent's Response to Complainant's Sur-Reply, Exhibit 7; *see also,* Petroleum Equipment Institute Publication RP100-90, attached to Respondent's Reply Memorandum, dated May 19, 1999. In light thereof, Respondent urges that EPA has the burden to clearly define a "fill pipe." Complainant's regulatory interpretation, adopted in this litigation, is not owed deference, and should be viewed skeptically, as it is imprecise and at odds with the regulatory language. Mr. Wiley's legal conclusions in his affidavit similarly should be given little or no weight. In response to Complainant's arguments about the color coded pipe cover, Respondent presents another color photograph of the manhole cover where it appears green, indicating number 2 low sulfur fuel oil, which is a petroleum product that is virtually identical to diesel fuel. Motion, Exhibit 4a; *see,* Order on Motions, dated March 23, 1999. Respondent urges that any environmental risks, or any "reasonably foreseeable" standard, should have been addressed in the rulemaking proceeding, not *post hoc* in this enforcement proceeding.

Further, in its Reply, Respondent requests dismissal of the Complaint unless Complainant can demonstrate that it enforces the regulations in regard to sounding ports against others in the regulated community in the same manner and to the same extent as sought against Respondent, suggesting that it has been singled out for discriminatory enforcement. Respondent cites to 42 U.S.C. § 6991f(a), which provides that Federal facilities are subject to UST requirements "in the same manner, and to the same extent, as any other person subject to such requirements." Respondent sent a letter to Complainant on February 3, 1999, requesting information relevant to its argument. In response, by letter from Complainant's counsel dated April 7, 1999, Complainant reported tentatively, based on information from three EPA Regions, that no UST actions involving fill pipes have been initiated. Attachment to Respondent's Response to Request for Supplemental Matter, dated April 20, 1999. EPA had sent Respondent a Request for Information, dated September 4, 1998, seeking extensive information, and "volumes of documentary evidence" were furnished by Respondent in response. Motion n. 9, Exhibit 7. While Respondent was preparing the response, and before the due date for the response, as extended by certain EPA personnel to November 2, 1998, EPA filed the Complaint, on October 5, 1998. Motion, Exhibits Affidavits of Susan S. Hulbert and R. Timothy Ziemer, attached to Respondent's Response to Request for Supplemental Matter, dated April 20, 1999.

In response to Respondent's defensive assertions, Complainant effectively quotes Walter Reuther in support of its argument that the second pipe looks like a fill pipe and is equipped like a fill pipe, and therefore, is a fill pipe: "If it looks like a duck, walks like a duck and quacks like a

duck, then it just may be a duck." Complainant's Supplemental Submittal, dated June 30, 2000. Complainant refers to a "tradition" of looking to the broad remedial purpose of an environmental provision when defining terms used therein, and asserts that a finding that the second pipe is a fill pipe would serve the broad remedial purpose of preventing spills.

At the oral argument in this proceeding, held on April 13, 1999, Respondent argued that the regulation at 40 C.F.R. Part 280 "only requires spill prevention equipment on fill pipes and creates an exception where the fill pipe is not actually used for fuel transfer operations." Tr. 3. Respondent argued further that the 25 gallon exemption for fill pipes applies to a sounding port. Tr. 30. Respondent asserted that the fuel delivery operator "knows [that] under API 1637 he has an affirmative duty to put the diesel in the right diesel fuel pipe, the cover is color-coded, that's the guarantee." Tr. 32.

Complainant questioned at the oral argument the purpose of a sounding port when UST 830C has an automatic tank gauge and where, as Respondent asserts, leak detection is conducted through interstitial monitoring. Tr. 79. Complainant asserted that the industry standard for gauging is a two-inch, rather than a four-inch, pipe, on the basis of discussions with Mr. Bailey and Mr. Wiley. *Id.* Complainant also asserted on the basis of these discussions that a truck driver would "take both manhole covers off which is routine and look at one pipe or the other to decide which was the fill pipe." Tr. 82. Complainant suggested the possibility that the driver may inadvertently switch the covers. Tr. 99. The definition of "fill pipe" comes from "the industry," from the features of a pipe, Complainant contended. Tr. 84. Standard 10,000 gallon USTs are outfitted with six openings, which can be engineered by the facility to house different pipes and vents, Complainant asserted. Tr. 91-92. A lock on the second pipe would render it beyond the definition of a "fill pipe," Complainant conceded, but not the mere labeling of the second pipe, with phrases such as "Do not fill." Tr. 96-97.

V. Discussion

The issues presented by the cross motions and responses thereto are: (1) whether the second pipe is a "fill pipe" within the meaning of 40 C.F.R. § 280.20(c); (2) whether the second pipe meets the 25 gallon exemption thereunder; (3) whether the regulations provide fair notice of the conduct Complainant seeks to enforce in this proceeding; and (4) whether Respondent was singled out for selective enforcement on the part of Complainant.

A. Standards for Accelerated Decision

With respect to accelerated decisions and dismissals, the Consolidated Rules of Practice provide, in pertinent part, as follows:

The Presiding Officer may at any time render an accelerated decision in favor of a

> party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgement as a matter of law. The Presiding Officer . . . may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a). Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12, TSCA Appeal No. 93-1 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, 1993 EPA App. LEXIS 32 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148.

Under FRCP 56(c), the movant has the initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)).

After the initial burden of the movant is met, it is the obligation of the party responding to a motion for summary judgment to designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Id.* at 324. The motion for summary judgment places the nonmovant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the nonmovant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 n. 23, 1997 EPA App. LEXIS 4 (EAB 1997). If, however, the nonmovant states reasons that he cannot present by affidavit facts essential to justify his opposition, summary judgment may be denied or continued pending discovery, under FRCP 56(f). *Celotex*, 477 U.S. at 326.

Although credibility determinations, weighing of evidence and drawing legitimate inferences from the facts are functions for trial, the judge in determining whether summary judgment is warranted "must view the evidence presented through the prism of the substantive evidentiary burden," and must believe the evidence of the nonmovant, and draw all justifiable inferences in its favor. *Liberty Lobby*, 477 U.S. at 254-255. Where the defendant moves for

summary judgment, the motion is granted where the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex*, 477 U.S. at 322. Thus, the judge's inquiry is "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict;" the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Under the Consolidated Rules of Practice, Complainant "has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint" and "[e]ach matter of controversy shall be decided . . . upon a preponderance of the evidence." 40 C.F.R. § 22.24.

On cross motions for summary judgment, "[t]he fact that both sides have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other . . . the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 247-248 (6th Cir. 1991); *Schwabenbauer v. Board of Education of City of Olean*, 667 F.2d 305, 314 (2d Cir. 1981).

B. Whether genuine issues of material fact exist as to the second pipe being a "fill pipe"

Each party has met its initial burden for its respective motion to identify documents in the case file which establish the absence of genuine issues of material fact in regard to each party's respective motion. With the numerous documents filed in this proceeding, the oral argument held in this matter, and the passage of two years since the Complaint was filed, the parties have had ample opportunity to present any genuine issues of material fact in opposition to the opposing party's motion for accelerated decision. Neither party has asserted the existence of any such issues.

The parties, however, dispute the color of the painted manhole cover over the first pipe. Motion, Exhibits 4, 4a; Respondent's Reply dated February 12, 1999, Exhibit 1. An inference drawn in favor of Complainant, opposing Respondent's Motion, that the manhole cover is blue, or an inference drawn in favor of Respondent, opposing Complainant's Cross Motion, that the manhole cover is green, does not change the outcome of the decision on the cross motions for accelerated decision, as discussed *infra.* The color of the manhole cover is not material to the issue of whether the second pipe is a "fill pipe" or to any other issue as to Respondent's liability.

Respondent expressly concedes that there are no genuine issues of material fact concerning the physical characteristics of the second pipe. Respondent's Reply Memorandum, dated May 19, 1999. Complainant concedes that it "has no reason to doubt" that product transfers never have occurred through the second pipe. Cross Motion at 14. There are no genuine issues of material fact as to the question of whether the second pipe is a "fill pipe" within the meaning of 40 C.F.R. § 280.20(c).

C. Whether Complainant established prima facie that the second pipe is a "fill pipe"

Respondent's position is that Complainant has failed to establish an essential element of its case, by failing to present evidence that the second pipe has actually been *used as* a fill pipe. The relevant element of Complainant's case is that the second pipe is a "fill pipe" within the meaning of 40 C.F.R. § 280.20(c). As discussed below, there is no basis upon which to conclude that Complainant must present direct evidence establishing that the second pipe has, in fact, previously been used to fill the tank, as an element of its case.

The UST regulations define the word "pipe" in 40 C.F.R. § 280.12 as "a hollow cylinder or tubular conduit that is constructed of non-earthen materials," but do not define the term "fill pipe." Therefore, Complainant must show that the second pipe is a "fill pipe" under the common meaning of that term, in the context of the language of Section 280.20(c), which requires installation of "spill prevention equipment that will prevent release of the product to the environment when the transfer hose is detached from the fill pipe." From the word "fill" preceding "pipe," it clearly follows that the meaning of "fill pipe" is a pipe with a function of filling the tank.

Indeed, the parties agree that the determination as to whether the second pipe constitutes a "fill pipe" involves the function of the pipe, but disagree as to the method for determining the function. Stated simply, Complainant relies on the physical appearance and capability of the pipe,[2] and Respondent relies on an unsworn statement that it was used as a sounding port and the lack of evidence that it actually was used to fill the tank. In addition, the parties disagree as to exclusivity of function. Respondent asserts that the second pipe only has one function, and Complainant suggests that the second pipe may have more than one function. Respondent does not claim that a pipe on a UST cannot be used for more than one function, and concedes that the rounded flange renders the second pipe capable of being used to fill the tank. There is no basis to conclude from the documents presented in this proceeding that fill pipes or sounding ports on USTs only can be used for one function. Therefore, for purposes of ruling on Respondent's Motion, an inference is drawn that it is possible for a pipe on a UST to be used, intended or

[2] The issue of deference to a Federal agency's interpretation of its regulations is not pertinent to this proceeding. First, the language of a regulation must be ambiguous for a court to defer to an agency's interpretation. *Christenson v. Harris County*, 529 U.S. 576, 632 (2000). As discussed below, no ambiguity as to 40 C.F.R. § 280.20(c) has been shown. Second, deference is not owed to an interpretation which is presented for the first time in litigation of an enforcement action. Third, EPA administrative tribunals, as decision makers of the EPA, do not ordinarily defer to interpretations of any individual component of EPA. *See, Lazarus Inc.*, 1997 EPA App. LEXIS 27, TSCA App. No. 95-2, n. 55 (EAB Sept. 30, 1997); *Mobil Oil Corp.*, 5 E.A.D. 490, EPCRA App. 94-2, slip op. at 23 n. 30 (EAB 1994); *NE Hub Partners, LP*, 1998 EPA App. LEXIS 83, UIC App. Nos. 97-3, 97-4, slip op. at 10 n. 6 (EAB, May 1, 1998); *Phibro Energy USA*, 1997 EPA ALJ LEXIS 183, EPA Docket No. CAA-R6-P-9-LA 92002 (ALJ, Order Upon Reconsideration, July 31, 1997).

designed for more than one function.

The function of an object may be determined either on the basis of direct evidence when the object is in use, or on the basis of circumstantial evidence, inferred, for example, from the common function of objects with the same physical characteristics. Indeed, it is observed that circumstantial evidence of function is embodied in many regulatory and statutory definitions of objects, which describe the physical characteristics and/or design. *E.g.*, 40 C.F.R. § 280.12 ("pipe" or "piping" defined as "a hollow cylinder or tubular conduit that is constructed of non-earthen materials;" "tank" defined as a "stationary device designed to contain an accumulation of regulated substances . . . ; "wastewater treatment tank" means "a tank that is designed to receive and treat an influent wastewater . . ."); 40 C.F.R. § 273.6 ("battery means a device consisting of one or more electrically connected electrochemical cells and which is designed to receive, store, and deliver electric energy"); Section 2(h) of the Federal Insecticide, Fungicide and Rodenticide Act and 40 C.F.R. § 152.500(a)("device" means "any instrument or contrivance . . . which is intended for trapping, destroying . . . or mitigating any pest . . .").

Due to the fact that fill pipes are in use only intermittently for brief periods of time, evidence as to whether a particular pipe is used for filling the tank may be limited to circumstantial evidence, such as its physical characteristics or design. An issue arises, as in this case, when the circumstantial evidence of the pipe's function differs from the actual function claimed by the owner or operator of the UST.

Complainant presents circumstantial evidence that the second pipe functions as a fill pipe, including the dimensions, location, and rounded flange (coupling) which allows the pipe to be connected to a filling hose. Respondent concedes that the coupling on the second pipe "permits connection to a filling hose." Respondent's Reply Memorandum, dated May 19, 1999, ¶ 3.a(1). Respondent does not furnish any other explanation of the purpose for the coupling or the circumstances surrounding its installation and continued existence on the pipe. Therefore, Complainant's assertion that the rounded flange is designed for connecting a transfer hose to fill the tank is uncontroverted. Although the first pipe on UST 830C is used for filling the tank, it is undisputed that USTs may have more than one fill pipe (see, Respondent's Reply Memorandum, dated May 19, 1999, ¶ 3.a(3)). From Complainant's evidence, a reasonable inference can be drawn that the second pipe was used or intended for use as an alternative fill pipe. Moreover, the characteristics of the second pipe are consistent with the regulatory text: if a "transfer hose is detached from the [second] fill pipe," a "release of product into the environment" could result. 40 C.F.R. § 280.20(c).

Respondent believes that this evidence is insufficient and that Complainant instead must present evidence that the second pipe was actually used at some point to fill the tank. Respondent is mistaken. The text of 40 C.F.R. Part 280 does not express or suggest that a pipe must have been actually used for filling the tank in order to trigger the requirement to install spill prevention equipment. The text of Section 280.20(c) refers to preventing a release before it happens: "spill prevention equipment that *will prevent* release of product . . . *when* the transfer hose is detached

from the fill pipe." Due to the possibility of a release the first time a fill pipe is used, it follows that Section 280.20(c) requires spill prevention equipment to be installed before the pipe actually is used to fill the tank.

It is concluded that Complainant has established *prima facie* that the second pipe is a "fill pipe" within the meaning of 40 C.F.R. § 280.20(c).

D. Whether Respondent has shown that the second pipe is not a "fill pipe"

Upon this showing, the burden shifts to Respondent to show that the second pipe does not function as a fill pipe. Respondent relies on the unsworn Statement of Mr. Brecht that on the occasions when he has observed fuel deliveries into UST 830C, it was not filled through the second pipe, and that the second pipe was used as a sounding port. Motion, Exhibit 5. Mr. Brecht's statements are taken as true for purposes of ruling on the Cross Motion. However, Respondent's evidence does not include information as to whether the second pipe was used for product transfer on those occasions when Mr. Brecht was not observing the fuel delivery, or information as to whether Mr. Brecht has authorized and/or observed fuel deliveries into UST 830C since it was installed in 1994. Respondent has not pointed to any characteristic of the second pipe which renders it uniquely a sounding port, or even typical of a sounding port. Respondent has not presented any evidence which establishes that the second pipe was used exclusively as a sounding port, or that it never has been used to fill the tank, since its installation.

The fact that there is no direct evidence that the second pipe has been used to fill the tank does not establish that it never has been used for that purpose. If there was some showing that the use of a pipe for product transfer necessarily leaves behind a visible indication of spillage or other tangible indication of use, then the lack of such evidence of usage might be meaningful. Respondent has not made any such showing, asserting merely that such tangible signs "often accompany the improper introduction of product into a UST"(emphasis added), and referring to the preamble to EPA's final UST rule. Motion at 4; 53 Fed. Reg. 37082 (September 23, 1988)("Experienced installation contractors reported that they repeatedly and frequently observe various indicators of spill and overfill problems, such as discolored soil above and around the tank . . . .").

Instead, Respondent urges the application of a presumption of regularity to the facts of this case, that is, a presumption that the contract fuel delivery personnel transfer the product only through the first pipe, on the basis that the manhole cover is green, signaling the product transfer point for diesel fuel. *See,* Motion, Exhibit 3 p. iii ("[a]n effective equipment marking system for product identification can help to promote safe and efficient manufacturing, distribution and marketing operations in the petroleum industry") and ¶ 1.1.3 ("[t]he principal purpose of a marking system is to identify product transfer points . . . or to prevent errors in product handling"). For purposes of ruling on Complainant's Cross Motion, the Respondent's assertion, supported by the photograph marked as Exhibit 4a to the Motion, that the manhole cover over the

first pipe is green, is taken as true.

The case law cited by Respondent does not support such an application of a presumption of regularity to the facts of the present proceeding. In *Bank of United States v. Dandridge*, the Supreme Court stated in pertinent part, as follows,:

> By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved; will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium.*

25 U.S. 64, 69-70 (1827)(emphasis added). The Court cited examples of a presumption that a man in public office has been rightly appointed, that entries in public books have been made by the proper officer, and that "acts done by the corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." *Id.* at 70.

Neither the Supreme Court's reasoning in *Dandridge* nor that of other courts in the cases cited by Respondent supports the presumption that Respondent requests in this proceeding. It may be reasonable to presume that fuel delivery personnel perform their duty in filling UST 830C with fuel, or that they have received some instruction or training in fuel delivery procedures, which may be the "natural result or necessary accompaniment" of contract employment with the U.S. Navy for delivering fuel. Respondent, however, requests a presumption that, in the approximately six years of operating of UST 830C, with approximately one to two fuel deliveries per month, by an unknown number of unnamed contract delivery personnel, with an unknown amount of training or communication with NAS Navy Oceana personnel, in every single instance, the fuel was delivered through the same one of two adjacent pipes, both of which are equipped for filling the tank, merely on the basis of the painted manhole cover. *Compare, Pasadena Research Laboratory v. United States*, 169 F.2d 375 (9th Cir. 1948)(samples taken by government inspector, sealed in vials, transported and analyzed were presumed not tampered with, on presumption that doctors, nurses and postal employees "do their duty and exercise due care"); *Petrelle v. Weirton Steel*, 953 F.2d 152-3 (4th Cir. 1991) (public officials are accredited with a presumption of regularity); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 771-772 (10th Cir. 1999)(jury instruction permitting the jury to make certain reasonable inferences about the regularity of business practices burdens the plaintiff with providing "affirmative disproof" to overcome the initial inference, and at worst is an "example of over-instructing a jury," but not prejudicial error, in retaliatory discharge employment case).

This is simply too much to presume. Respondent has not established a firm nexus between the painted manhole cover and the first pipe, such that choosing the first pipe over the second pipe for filling the tank is the "natural result or necessary accompaniment" of a green painted manhole cover. First, the pages of the American Petroleum Institute Recommended Practice 1637 ("API 1637"), a "Color-Symbol System to Mark Equipment and Vehicles for Product Identification" presented by Respondent do not refer to the particular "equipment" to be marked or to manhole covers. Motion, Exhibit 3. Second, the API 1637 marking system consists of symbols as well as colors: "[t]he equipment marking color symbol system described in the recommended practice facilitates easy identification of products by means of colors and symbols." *Id.* ¶ 1.2.1(emphasis added). Figure 1 of API 1637 shows a green hexagon as the symbol for Number 2 fuel oil, but the manhole cover on UST 830C is painted as a green circle rather than a green hexagon. *Id.*, Figure1; Motion Exhibit 4a. Third, even assuming that the green color alone identifies the product transfer point for Number 2 fuel oil, the close proximity and similarity of the two pipes on the tank and the interchangeability of the manhole covers leaves a significant possibility that either or both of the two pipes would be perceived as the product transfer point.[3] Fourth, one can easily imagine that events such as weather, snow covered ground for instance, could easily cloak the thoughtful choice between the two pipes which has to be made by the delivery person. Consequently, no presumption of regularity, of contract personnel always filling UST 830C through the first pipe, is warranted.

There is no other basis for drawing any inference that the second pipe is exclusively a sounding port, and never has functioned as a fill pipe. Notably, Respondent failed to explain the fact that the second pipe was equipped with the coupling for product transfer. Respondent also did not explain the purpose of a sounding port on a tank which is equipped with an automatic tank gauge, as is UST 830C. Any intent on the part of Respondent to use the second pipe exclusively as a sounding port was not manifested until after the inspection, whereupon Respondent locked the second pipe and marked it with a stencil, "Do not fill." Respondent has not provided any evidence that pipes with the physical characteristics of the second pipe are used exclusively as sounding ports on other USTs. Absent any such explanation, manifestation, or evidence, no justifiable inference can be drawn that the second pipe never has functioned as a fill pipe. Such an inference cannot rest merely on Respondent's bald statement that the second pipe functions as a sounding port.

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[3] There are documented cases of tanks being filled through the wrong pipe, with catastrophic results. *See, e.g., Hawkins v. Scituate Oil Co., Inc.,* 723 A.2d 771 (R.I 1999)(tort case, home heating oil delivered into the wrong pipe); *Edwards v. Post Transportation Co.,* 279 Cal Reptr. 231 (Cal. App. 1991)(transporter was directed to pump sulfuric acid into the wrong pipe, into sodium bisulfite tank, where tanks were labeled inadequately and pipes were switched). Instances of delivering fuel into monitoring well pipes led EPA to require monitoring wells to be marked as such. 52 Fed. Reg. 12662-01, 12732 (April 17, 1987)(" EPA has been informed by . . . officials about incidents where, for example, product deliveries were introduced into monitoring wells"; marking of monitoring wells therefore should make them distinct in appearance from fill pipes, or they should be locked).

To illustrate this point, one can readily see that it is not appropriate, particularly where protection of the environment or public health and safety are concerned, to define an object by its owner's mere statement that it has only a benign function, where its physical characteristics indicate otherwise. Were objects so defined, many violations of law would be rendered unenforceable, such as a defendant claiming that he used a handgun as a paperweight (Tr. 100), or a defendant claiming that he grew marijuana plants merely as decorative houseplants. *See, People v. Glaser,* 238 Cal. App. 2d 819 (Ca. App. 1965), *cert. denied,* 385 U.S. 880 (1966) (defendant argued unsuccessfully that marijuana plants may be grown as a medicine or ornamental bush). On the other hand, an owner who, prior to being charged with a violation, clearly *manifests* his intent to use the object only for a benign function would have a stronger argument. For instance, had Respondent taken appropriate measures to ensure that fuel delivery personnel do not use the second pipe as a fill port, by labeling it appropriately and/or locking the pipe cap, Respondent's argument that the second pipe does not function as a fill pipe would be more persuasive. The color of the manhole cover on the first pipe does not clearly manifest an intent that the second pipe is not to be used as a fill port.

It is concluded that Complainant has presented in this proceeding sufficient evidence to support a reasonable finding, by a preponderance of the evidence, that the second pipe is a "fill pipe" within the meaning of Section 280.20(c). Therefore, an accelerated decision dismissing this proceeding on grounds that Complainant has not established an element of its case is not warranted. It is further concluded, on the uncontroverted facts, that as a matter of law the second pipe is a "fill pipe" under 40 C.F.R. § 280.20(c).

E. Whether Respondent had fair notice that 40 C.F.R. § 280.20(c) applies to the second pipe

Respondent challenges the application of the spill prevention requirement to the second pipe on UST 830C on the principles of due process addressed by the Environmental Appeals Board in *CWM Chemical Services, Inc., supra* (PCB disposal regulation, silent as to whether PCB concentrations should be measured on a wet weight or dry weight basis, does not give fair warning that dry weight concentrations are required)(citing, *Diamond Roofing Co., Inc., v. OSHA Rev. Comm'n,* 528 F.2d 645, 649 (5th Cir. 1976)("[i]f the violation of a regulation subjects private parties to . . . civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express"); *Bethlehem Steel Corp. v. OSHA Rev. Comm'n,* 573 F.2d 157, 161 (3rd Cir. 1978)("[i]f the language [of the regulation] is faulty, the [agency] has the means and the obligation to amend"); *Phelps Dodge Corp. v. Fed. Mine Safety and Health Review Comm'n,* 681 F.2d 1189, 1192 (9th Cir. 1982)("application of a regulation in a particular situation may be challenged on the ground it does not give fair warning that the allegedly violative conduct was prohibited"); *Gates v. Fox Co., Inc., v. OSHA Review Comm'n,* 790 F.2d 154, 156 (D.C. Cir. 1986)("where the imposition of penal sanctions is at issue . . . the due process clause prevents [deference to agency interpretation of its regulations] from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires")). "To satisfy due

process, the notice of the required conduct must come from the language of the regulation itself." *CWM,* 6 E.A.D. at 18.

There are no genuine issues of material fact with respect to Respondent's due process challenge. Issues as to the interpretation of regulations and of whether the regulations provide notice of the required conduct are questions of law appropriate for accelerated decision. *Id.* at 12.

As stated above, the term "pipe" is defined in 40 C.F.R. § 280.12, and from the preceding word "fill," it clearly follows that the meaning of "fill pipe" is a pipe with a function of filling the tank. USTs by definition (40 C.F.R. § 280.12) are filled only with regulated substances. Statutory and regulatory definitions of objects, as noted above, frequently embody circumstantial evidence of function, such as physical characteristics and design, particularly where they commonly have only one function. On the other hand, definitions of objects that commonly have different functions, one of which is regulated and the other of which is not, may be more reflective of direct evidence of actual use. *See, e.g.*, Section 9001(1) of RCRA and 40 C.F.R. § 280.12 ("UST means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances . . ."; "gathering lines" defined as "any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations"; "connected piping" defined as "all underground piping including valves, elbows, joints, flanges . . . attached to a tank system through which regulated substances flow"; "ancillary equipment" defined as "any devices including . . . piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from an UST"); 40 C.F.R. § 279.1 ("aboveground tank" defined as "a tank used to store or process used oil . . .").

As to uncommon situations, regulatory terms cannot be so precise that they always distinguish every situation to which the term applies from those to which it does not apply. *See, Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)(". . . most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions [and] [c]onsequently, no more than a reasonable degree of certainty can be demanded"); *Housworth v. Glisson*, 485 F. Supp. 29, 38 (N.D. Ga. 1978)("[a] certain amount of vagueness must be tolerated in lawmaking because of the limitations of language and the infinite variety of human conduct"); *Rose v. Locke*, 423 U.S. 48, 49-50 (1975); *Robinson v. United States*, 324 U.S. 282, 286 (1945)("[i]n most English words and phrases there lurk uncertainties"). There is no assertion or evidence in this proceeding that a given pipe on a UST commonly has different functions, or that sounding ports have been confused with fill pipes in instances other than the one at hand. Thus, Respondent has not established the necessity of a distinction in the regulations of a "fill pipe" and a sounding port.

The term "fill pipe" and the regulatory text of Section 280.20(c) are sufficiently clear to provide fair notice that EPA intended to require spill prevention equipment to be installed on

pipes with a function -- not necessarily an exclusive function -- of filling the tank. As discussed above, undisputed evidence shows that the second pipe on UST 830C has that function.

Respondent's argument, that the regulatory text did not provide fair notice that the second pipe is a "fill pipe" requiring spill prevention equipment, presumes that the second pipe is established to be a sounding port *exclusively*. As discussed above, this was not established, although Respondent had ample opportunities to do so. For example, Respondent could have presented evidence that affirmative measures were taken so that the second pipe could not be used as a fill pipe. Respondent's failure to establish that the second pipe was used as a sounding port exclusively -- and never used to fill the tank -- is fatal to its fair notice argument.

Therefore, it is concluded as a matter of law that the text of 40 C.F.R. § 280.20(c) provides fair notice that the second pipe is a "fill pipe" and as such is required to be equipped with spill prevention equipment.

F. Whether the 25 gallon exemption applies

The 25 gallon exemption provides as follows:

> Owners and operators are not required to use the spill and overfill prevention equipment specified in paragraph (c)(1) of this section if:
>
> * * *
>
> (ii) The UST system is filled by transfers of no more than 25 gallons at one time.

40 C.F.R. § 280.20(c)(2)(ii).

It is undisputed that UST 830C, with a capacity of 10,000 gallons, is filled through the first pipe with more than 25 gallons of product during a fuel delivery. Tr. 30. There are no disputed facts material to the issue of whether the 25 gallon exemption applies.

Respondent interprets the exemption as applying solely to an *individual pipe* on a UST, such that any pipe which is not used to fill the tank with more than 25 gallons at one time is exempt from the requirement to install spill prevention equipment on the pipe. Respondent provides no support for such an interpretation.

The regulatory text is not consistent with Respondent's interpretation. Section 280.20(c)(2)(ii) provides an exemption for a *UST system* – not a pipe -- which is filled with 25 gallons or less at a time. The preamble to the final UST rule clarifies that the exemption applies to USTs receiving only small quantities of product, stating, "an exemption from equipment requirements is provided for UST systems filled with small volume delivery of no more than 25 gallons . . ." 53 Fed. Reg. 37082 (September 23, 1988).

Moreover, as concluded above, Respondent has not established that the second pipe never was used to deliver product into the tank. If fuel delivery personnel used the second pipe to fill the tank, then it is reasonable to infer that a quantity exceeding 25 gallons was delivered through the second pipe. It is concluded as a matter of law that the 25 gallon exemption at 40 C.F.R. § 280.20(c)(2)(ii) does not relieve Respondent of the requirement to install spill prevention equipment on the second pipe on UST 830C.

G. Selective Enforcement

The Federal government has "wide discretion" in exercising its prosecution powers. *United States v. Smithfield Foods, Inc.*, 969 F.Supp. 975, 985 (E.D. Va. 1997). A challenge to the government's decision to prosecute is a "demanding" burden, and the courts presume that prosecuting officials have properly discharged their duties. *United States v. Armstrong*, 517 U.S. 456, 463-464 (1996). To establish a claim of selective enforcement, the respondent must show: (1) that respondent "has been singled out while other similarly situated violators were left untouched," and (2) that the EPA selected respondent "for prosecution 'invidiously or in bad faith, i.e., based upon such considerations as race, religion, or the desire to prevent the exercise of Constitutional rights.'" *Newell Recycling Company, Inc.*, 1999 EPA App. LEXIS 28, TSCA App. No. 97-7 (EAB, Sept. 13, 1999), *aff'd*, --- F.3d --- (5th Cir., Nov. 8, 2000)(quoting, *Smithfield Foods*, 969 F.Supp. at 985)(quoting *United States v. Production Plated Plastics, Inc.*, 942 F. Supp. 956, 962 (W.D. Mich. 1990)).

Respondent has not presented any evidence of any other government owner or private owner of USTs with pipes without the requisite spill prevention equipment similar to those on UST 830C whose violations went "untouched." Nor has Respondent proffered a bad faith explanation for EPA's enforcement action against it. Therefore, Respondent has not made any showing as to similarly situated violators, and has not raised any genuine issue of material fact with respect to the selective enforcement to defeat Complainant's Cross Motion. *Smithfield, supra* (defendants did not raise genuine issue of material fact with regard to any defense of selective enforcement because there was no evidence suggesting that EPA failed to pursue actions against similarly situated violators); *Armstrong, supra* (defendants failed to make a credible showing of different treatment of similarly situated persons, i.e., that the government declined to prosecute similarly situated suspects of other races); *United States v. Moon*, 718 F.2d 1210, 1229 (2nd Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)(no evidentiary hearing is mandated unless the court finds that both prongs of the selective prosecution test have been met). Therefore, Respondent's claim of selective enforcement is not supported and is of no avail.

VI. Conclusions

There are no genuine issues of material fact, and Complainant is entitled to judgment as a matter of law, as to the issue of whether the second pipe is a "fill pipe" under 40 C.F.R. §

280.20(c). The text of that provision provides fair notice that the second pipe was required to be equipped with spill prevention equipment. Respondent did not establish that the 25 gallon exemption of 40 C.F.R. § 280.20(c)(2)(ii) relieves Respondent of the requirement to install spill prevention equipment on the second pipe. Respondent's claim of selective enforcement does not raise any genuine issues of material fact as to Respondent's liability for the violation alleged in Count II of the Complaint, and was not properly supported. There are no genuine issues of material fact, and Complainant is entitled to judgment as a matter of law, that Respondent failed to use spill prevention equipment on both fill pipes of UST 830C, in violation of 40 C.F.R. § 280.20(c) (9 VAC 25-580-50C.2). Issues as to any penalty to assess for this violation are reserved for further proceedings.

ORDER

1. Respondent's Motion for Partial Accelerated Decision on Count II is **DENIED.**

2. Complainant's Cross Motion for Accelerated Decision on Liability is **GRANTED.**

3. The parties shall in good faith attempt to reach a settlement of this proceeding. Complainant shall report on the status of settlement **thirty (30) days from the date of this Order.**

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: November 15, 2000
Washington, D.C.