UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Aylin, Inc., Rt. 58 Food Mart, Inc.,	)	**Docket No. RCRA-03-2013-0039**
Franklin Eagle Mart Corp.,	)	
Adnan Kiriscioglu d/b/a New Jersey Petroleum	)	
Organization a/k/a NJPO,	)	
5703 Holland Road Realty Corp.,	)	
8917 South Quay Road Realty Corp., and	)	
1397 Carrsville Highway Realty Corp.	)	
	)	
Respondents.	)	

ORDER ON THE PARTIES' MOTIONS RELATING TO ADDITIONAL DISCOVERY AND TO SUPPLEMENT THEIR PREHEARING EXCHANGES

On March 27, 2013, the United States Environmental Protection Agency ("EPA"), Director of the Land and Chemicals Division of Region 3 ("Complainant"), filed an Administrative Complaint, Compliance Order and Notice of Right to Request Hearing against Aylin, Inc. ("Aylin"), Rt. 58 Food Mart, Inc. ("Rt. 58"), Franklin Eagle Mart Corp. ("Franklin Eagle"), and Adnan Kiriscioglu d/b/a New Jersey Petroleum Organization a/k/a NJPO ("Kiriscioglu") (collectively, "Original Respondents") for alleged violations of Section 9005(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991d(a), and certain provisions of the Virginia Administrative Code ("VAC"), arising from their ownership and/or operation of the underground storage tanks ("USTs")[1] located at three gas stations in the Commonwealth of Virginia. The Original Respondents filed a joint Answer to Administrative Complaint, Compliance Order and Notice of Right to Request a Hearing ("Joint Answer") on April 29, 2013.

On November 5, 2013, I issued a Prehearing Order and Order on Motion to Stay Proceedings ("Prehearing Order"), which set deadlines for the parties' prehearing exchange process and for the filing of dispositive motions regarding liability. The parties subsequently filed their prehearing exchanges and engaged in extensive motions practice. By Order dated

[1] For purposes of this Order, any reference to the term "UST" is meant to encompass the "UST system."

August 10, 2015, I ruled on several pending motions and established deadlines for a number of procedures.

By leave of this Tribunal, Complainant filed a First Amended Administrative Complaint, Compliance Order and Notice of Right to Request Hearing ("Amended Complaint") against Aylin, Rt. 58, Franklin Eagle, Kirisciogluu, 5703 Holland Road Realty Corp. ("Holland Road Realty"), 8917 South Quay Road Realty Corp. ("Quay Road Realty"), and 1397 Carrsville Highway Realty Corp. ("Carrsville Highway Realty") (collectively, "Respondents") on August 12, 2015. The Amended Complaint contains a Compliance Order and seeks a civil penalty for the following 17 counts of alleged violations:

Count 1: failure of Respondents Aylin, Rt. 58, Franklin Eagle, and Kirisciogluu to furnish information, in violation of 42 U.S.C. § 6991d(a);

Count 2: failure of Respondents Aylin, Holland Road Realty, and Kirisciogluu to adequately monitor USTs for releases at the Pure Gas Station in Suffolk, Virginia ("Pure Facility"), in violation of 9 VAC § 25-580-140.1.

Count 3: failure of Respondents Aylin, Holland Road Realty, and Kirisciogluu to adequately inspect the impressed current cathodic protection system for the USTs at the Pure Facility, in violation of 9 VAC § 25-580-90;

Count 4: failure of Respondents Aylin, Holland Road Realty, and Kirisciogluu to provide cathodic protection for UST piping at the Pure Facility, in violation of 9 VAC § 25-580-60.

Count 5: failure of Respondents Aylin, Holland Road Realty, and Kirisciogluu to conduct annual line tightness testing or monthly monitoring of the underground piping connected to USTs at the Pure Facility, in violation of 9 VAC § 25-580-140.2.

Count 6: failure of Respondents Aylin, Holland Road Realty, and Kirisciogluu to conduct annual testing of automatic line leak detectors for the piping connected to USTs at the Pure Facility, in violation of 9 VAC § 25-580-140.2.

Count 7: failure of Respondents Aylin, Holland Road Realty, and Kirisciogluu to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the USTs at the Pure Facility, in violation of 9 VAC § 25-590-40.

Count 8: failure of Respondents Rt. 58, Quay Road Realty, and Kirisciogluu to adequately monitor USTs for releases at the Rt. 58 Food Mart in Suffolk, Virginia ("Rt. 58 Facility"), in violation of 9 VAC § 25-580-140.1;

Count 9: failure of Respondents Rt. 58, Quay Road Realty, and Kirisciogluu to provide

cathodic protection for UST piping at the Rt. 58 Facility, in violation of 9 VAC § 25-580-60;

Count 10: failure of Respondents Rt. 58, Quay Road Realty, and Kiriscioglu to conduct annual line tightness testing or monthly monitoring of the underground piping connected to USTs at the Rt. 58 Facility, in violation of 9 VAC § 25-580-140.2;

Count 11: failure of Respondents Rt. 58, Quay Road Realty, and Kiriscioglu to conduct annual testing of automatic line leak detectors for the piping connected to USTs at the Rt. 58 Facility, in violation of 9 VAC § 25-580-140.2;

Count 12: failure of Respondents Rt. 58, Quay Road Realty, and Kiriscioglu to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the USTs at the Rt. 58 Facility, in violation of 9 VAC § 25-590-40;

Count 13: failure of Respondents Franklin Eagle, Carrsville Highway Realty, and Kiriscioglu to adequately monitor USTs for releases at the Franklin Eagle Mart in Franklin, Virginia ("Franklin Facility"), in violation of 9 VAC § 25-580-140.1.

Count 14: failure of Respondents Franklin Eagle, Carrsville Highway Realty, and Kiriscioglu to provide cathodic protection for UST piping at the Franklin Facility, in violation of 9 VAC § 25-580-60.

Count 15: failure of Respondents Franklin Eagle, Carrsville Highway Realty, and Kiriscioglu to conduct annual line tightness testing or monthly monitoring of the underground piping connected to USTs at the Franklin Facility, in violation of 9 VAC § 25-580-140.2;

Count 16: failure of Respondents Franklin Eagle, Carrsville Highway Realty, and Kiriscioglu to conduct annual testing of automatic line leak detectors for the piping connected to USTs at the Franklin Facility, in violation of 9 VAC § 25-580-140.2; and

Count 17: failure of Respondents Franklin Eagle, Carrsville Highway Realty, and Kiriscioglu to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the USTs at the Franklin Facility, in violation of the 9 VAC § 25-590-40.

Respondents filed a joint Answer to First Amended Complaint, Administrative Complaint, Compliane [sic] Order and Notice of Right to Request a Hearing ("Amended Joint Answer") on August 31, 2015. The Amended Joint Answer denies the charges against Respondents and raises a number of affirmative defenses, including that Respondents lack the ability to pay the proposed penalty.

The parties also supplemented their prehearing exchanges by leave of this Tribunal.

Thereafter, the parties again engaged in extensive motions practice. This Order disposes of the following motions currently pending before this Tribunal[2]:

I. Respondents' Motion for Leave to Conduct Additional Discovery[3] and to Supplement their Prehearing Exchanges to Add a Witness, filed on November 4, 2015, and in connection thereto, Complainant's Motion for Leave to File Complainant's Sur-Reply to Respondents' Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery, filed on December 14, 2015.

II. Complainant's Second Motion to Compel Discovery and Impose Sanctions, filed on December 4, 2015.

III. Complainant's Motion for Leave to File Supplemental Prehearing Exchange, filed on December 10, 2015.[4]

I will rule on each of these motions in turn.

I. RESPONDENTS' MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY AND TO SUPPLEMENT THEIR PREHEARING EXCHANGES TO ADD A WITNESS, AND COMPLAINANT'S MOTION FOR LEAVE TO FILE COMPLAINANT'S SUR-REPLY TO RESPONDENTS' REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY

As previously noted, on November 4, 2015, Respondents filed a Motion for Leave to Conduct Additional Discovery and to Supplement their Prehearing Exchanges to Add a Witness ("Respondents' Motion" or "Rs' Mot."). Therein, Respondents move to add Ezgi Kiriscioglu as a proposed fact witness for Respondents. Rs' Mot. at 11-13. Respondents also move to depose one of Complainant's proposed witnesses, Leslie Beckwith, and to compel Complainant to answer written interrogatories. Rs' Mot. at 5-11. Respondents attached to their Motion their

[2] Also pending before this Tribunal is Complainant's Motion for Partial Accelerated Decision on Liability ("AD Motion") and Memorandum of Law in Support of its Motion for Accelerated Decision on Liability ("AD Memo"), filed on November 20, 2015.

[3] Respondents, albeit unnecessarily, renewed this motion by filing dated February 26, 2016 since the Presiding Officer had not yet issued her ruling on the motion.

[4] On November 21, 2015, Complainant filed a cover letter that refers to its "Motion Leave [sic] to File Supplemental Prehearing Exchange" and copies of a number of unidentified documents. No motion was enclosed, however. On December 10, 2015, Complainant filed a cover letter acknowledging this omission, its Motion for Leave to File Supplemental Prehearing Exchange, and copies of the same documents it had previously filed on November 21.

proposed interrogatories and two notices of deposition, one for Ms. Beckwith and one for Andrew Ma, another proposed witness of Complainant who, according to Respondents, was voluntarily being made available for deposition by Complainant. Rs' Mot. at 4 n.2. Complainant filed its Response to Respondents' Motion for Leave to Conduct Additional Discovey [sic] and to Supplement their Prehearing Exchanges to Add Witness ("Complainant's Response" or "C's Resp.") on November 19, 2015.[5] In its Response, Complainant objects to the discovery sought by Respondents, including the deposition of Mr. Ma. On December 2, 2015, Respondents filed their Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement their Prehearing Exchanges to Add a Witness ("Respondents' Reply" or "Rs' Reply"), which counters Complainant's objections to their request for discovery.

Thereafter, on December 14, 2015, Complainant filed a Motion for Leave to File Complainant's Sur-Reply to Respondents' Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery ("Complainant's Sur-Reply Motion" or "C's Sur-Reply Mot."), along with a copy of its proposed Sur-Reply ("C's Sur-Reply"). On December 18, 2015, Respondents filed an Opposition to Complainant's Motion for Leave to File Sur-Reply ("Respondents' Opposition" or "Rs' Opp.").

A. Respondents' Request to Supplement their Prehearing Exchanges to Add a Witness

In their Motion, Respondents seek to add Ezgi Kiriscioglu as a proposed fact witness to their prehearing exchanges. Explaining the substance of Ms. Kiriscioglu's expected testimony, Respondents assert that while they did not initially identify Ms. Kiriscioglu as a witness, they determined the importance of her testimony after Complainant's submission of its prehearing exchanges because "she is the one individual . . . with actual knowledge of the majority of the documents [included in Complainant's prehearing exchanges] and the context in which the documents were prepared and maintained." Rs' Mot. at 11-13. Respondents also assert that Complainant does not object to their request. Rs' Mot. at 1-2, 5, 11. Complainant confirmed this representation in its Response. C's Resp. at 8.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. The Rules of Practice establish the requirement that parties file prehearing exchanges of information in accordance with an order issued by the Presiding Officer. 40 C.F.R. § 22.19(a)(1). With respect to the contents of a

[5] The cover letter to this filing erroneously identifies the filing as Complainant's AD Motion. Complainant subsequently filed its Response with a cover letter identifying it as such on November 23, 2015. Complainant erroneously attached to this filing a number of documents related to its AD Motion.

party's prehearing exchange, the Rules of Practice provide, in pertinent part:

> Each party's prehearing information exchange shall contain: (i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . .; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

40 C.F.R. § 22.19(a)(2). The Rules of Practice also describe the circumstances under which a party is required to supplement its prehearing exchange, as follows:

> A party who has made an information exchange under paragraph (a) of this section . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

40 C.F.R. § 22.19(f).

If a party fails to provide information within its control as required in its prehearing exchange or in a supplement to its prehearing exchange promptly upon learning that the contents of the prehearing exchange are incomplete, outdated, or inaccurate, the Rules of Practice authorize the Presiding Officer, in her discretion, to infer that the information would be adverse to the party failing to provide it, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g). Thus, a motion for leave to supplement a party's prehearing exchange may be denied where the motion is not prompt or where the existing prehearing exchange is not incomplete, inaccurate, or outdated. Evidence of bad faith, delay tactics, or undue prejudice may also warrant the denial of a supplement to a prehearing exchange. As reasoned persuasively by my esteemed colleague Chief Administrative Law Judge Susan L. Biro, parties may otherwise "attempt to unfairly disadvantage their opponent by holding back significant information until a couple weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits." *99 Cents Only Stores*, 2009 EPA ALJ LEXIS 9, at *10-11 n.2.

In the present proceeding, Respondents' request to add Ms. Kiriscioglu as a proposed witness to their prehearing exchange appears to satisfy the requirements of 40 C.F.R. § 22.19(f), and because it was submitted before this matter had even been scheduled for hearing,[6] Complainant has not been denied a meaningful opportunity to prepare cross examination and any evidence to rebut Ms. Kiriscioglu's expected testimony. Indeed, Complainant does not oppose Respondents' request. Accordingly, Respondents' request to add Ms. Kiriscioglu as a proposed witness in this proceeding is granted.

[6] This matter was scheduled for hearing pursuant to the Notice of Hearing Order issued on December 10, 2015.

B. Complainant's Motion for Leave to File Complainant's Sur-Reply to Respondents' Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery

Before ruling on Respondents' request for additional discovery, I will first consider Complainant's Sur-Reply Motion. The Rules of Practice set limits on motion practice by providing for the filing of a response and a reply to a motion and then authorizing the filing of any additional responsive documents only by order of the Presiding Officer, as appropriate. 40 C.F.R. § 22.16(a). The preamble to the proposed amendments to 40 C.F.R. Section 22.16(a), which were adopted in full in 1999, explains the purpose of this practice:

> EPA believes that a motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer. The proposed rule specifically provides the movant an opportunity for a reply because responses to motions often raise issues not addressed in the motion itself. The proposed rule then limits the scope of the reply to those issues raised in the response, in order to avoid giving an unfair advantage to the movant. For those instances where this motion-response-reply format may not be appropriate, the Presiding Officer may order an alternative approach.

63 Fed. Reg. 9,464, 9,470 (Feb. 25, 1998). As observed by Chief Administrative Law Judge Susan L. Biro:

> The motion-response-reply structure is not a requirement that a reply be filed or that a sur-reply is always unnecessary. If an issue is fully briefed in a motion and a response, then no reply is necessary; if an issue is not fully briefed in a motion, response, and reply, then a sur-reply may be necessary. There are several instances in which a sur-reply may be necessary and appropriate. For example . . . where a reply raises issues beyond those raised in the response, and the opposing party elects not to move to strike those issues as violating the requirement of Section 22.16(b) that the reply "shall be limited to issues raised in the response," the opposing party may instead elect to file a sur-reply.

Strong Steel Products, LLC, 2004 EPA ALJ LEXIS 144, at *13.

Here, Complainant contends that its Sur-Reply is necessary "to better inform" this Tribunal. C's Sur-Reply Mot. at 1. Specifically, Complainant asserts that much of the information sought by Respondents was provided in Complainant's AD Motion, AD Memo, and the accompanying affidavits of Andrew Ma and Leslie Beckwith, and that because its Response was filed the day before it filed the AD Motion, "such Response was necessarily not as comprehensive as possible regarding the information requested and only addressed generally the information Respondents sought from Andrew Ma." *Id.* Respondents counter that "Complainant

should not be permitted to prolong these proceedings and burden the Tribunal and the Respondents by being granted yet another opportunity to advance arguments that previously have been submitted and are before the Presiding Officer." Rs' Opp. at 3. Among other criticisms, Respondents denounce Complainant's attempt to "plead ignorance" as to the contents of Mr. Ma and Ms. Beckwith's affidavits, even though Complainant filed those documents as part of its AD Motion just one day after it filed its Response to Respondents' request for additional discovery, in order to justify its proposed Sur-Reply and "obtain another 'bite of the apple.'" *Id.* at 3-4.

As observed by Respondents in their Opposition, Complainant's Sur-Reply Motion does not seek leave to file a sur-reply on account of Respondents raising issues in their Reply beyond those raised in Complainant's Response, which could warrant the filing of a sur-reply in order for the given issues to be completely briefed. The need for a sur-reply is not limited to those circumstances alone, however. In this instance, Complainant argues that a sur-reply is necessary because it was constrained by the record at the time it filed its Response as a result of not yet having filed certain documents that, according to Complainant, render Respondents' request for additional discovery unnecessary. Thus, Complainant contends, in essence, that it was precluded from fully briefing the issues. A party's own delay in filing a document upon which the party intends to rely to brief an issue would not ordinarily merit granting the party an opportunity to file a sur-reply. Here, however, Complainant's proposed Sur-Reply does add context and clarity to the arguments it raised in its Response now that the documents referenced by the Response have been filed, which is more of an aid than a burden for this Tribunal's consideration of Respondents' request for additional discovery. Accordingly, given the particular circumstances of this case and in the interest of completeness and clarity, Complainant's Sur-Reply Motion is granted.

C. Respondents' Request to Conduct Additional Discovery

As discussed above, Respondents seek to compel Complainant to answer the 11 proposed written interrogatories ("Interrogatories 1-11") attached to their Motion. Respondents also seek to depose two of Complainant's proposed witnesses, Leslie Beckwith and Andrew Ma. Complainant listed Ms. Beckwith as a proposed witness in its Second Supplemental Prehearing Exchange ("SSPE"), filed on October 23, 2015. Therein, Complainant explains that Ms. Beckwith is the Director of the Office of Financial Responsibility and Data Management in the Commonwealth of Virginia's Department of Environmental Quality ("VADEQ") and that she "may be called to testify to VADEQ's financial responsibility requirements for USTs and Respondents' compliance with same." SSPE at 2. First identifying Mr. Ma as a proposed witness in its Initial Prehearing Exchange ("IPE"), filed on March 14, 2014, Complainant explains that Mr. Ma is an Environmental Scientist in the Office of Land Enforcement, Land and Chemicals Division, Environmental Science Center, EPA, Region 3, and that he is expected to testify as to his inspections of the three Facilities during March of 2010, his interactions with Respondents or their representatives, and the calculation of the proposed penalty, among other matters. IPE at 2-3.

1. Standard for Adjudicating a Motion for Additional Discovery

The Rules of Practice at 40 C.F.R. § 22.19(e) set forth the procedure for a party to move for additional discovery following a prehearing exchange, as well as the conditions necessary for a Presiding Officer to grant such a motion. Specifically, a motion for additional discovery must "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought." 40 C.F.R. § 22.19(e)(1). In turn, the Presiding Officer may order additional discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
>
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
>
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1).

The Rules of Practice are more restrictive with regard to depositions than other forms of additional discovery, authorizing the Presiding Officer to order depositions only upon an additional finding that:

> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
>
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

2. Arguments of the Parties

a. <u>Respondents' Motion</u>

In support of their request to depose Ms. Beckwith, Respondents contend that Complainant's summary of her expected testimony is insufficiently detailed. Rs' Mot. at 5 (citing *Alan Richey, Inc.*, 2005 EPA ALJ LEXIS 46, at *11-12). Specifically, Respondents contend that the summary informs them "merely of the *general nature* of her testimony," rather than "details regarding the *substance* of her testimony, including her personal observations of the

Respondents' compliance with VADEQ's UST financial responsibility requirements." Rs' Mot. at 6 (emphasis in original). Respondents also decry the purported absence in Complainant's prehearing exchanges of any documents containing Ms. Beckwith's personal observations of Respondents' compliance with VADEQ's UST financial responsibility requirements. Rs' Mot. at 6. As a result, Respondents argue, they need "direct access to information regarding her expected testimony . . . to have a meaningful opportunity to prepare for the hearing." *Id.* Respondents then proceed to argue that their request for satisfies each of the applicable requirements for additional discovery set forth in the Rules of Practice. Rs' Mot. at 6-8.

With respect to their request to compel Complainant to answer the 11 proposed written interrogatories attached to their Motion, Respondents argue that the purpose of the limited interrogatories is "to prevent surprises to the parties and the resulting inefficiencies at the hearing, and to permit adequate preparation for hearing." R's Mot. at 9 (quoting *Richey*, at *11-12). Specifically, Respondents contend that Interrogatories 3-9 are aimed to narrow certain contested issues and that Interrogatories 1, 2, 10, and 11 seek evidence pertaining to the penalty proposed in the Amended Complaint. Rs' Mot. at 9-10. Respondents then argue that this request also satisfies each of the applicable requirements for additional discovery set forth in the Rules of Practice. Rs' Mot. at 10-11.

b. Complainant's Response

In its Response, Complainant urges this Tribunal to deny Respondents' requests for discovery on the grounds that they unreasonably burden Complainant, seek information that Complainant voluntarily provided to Respondents, and fail to present any reason to support the belief that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing, in contravention of the Rules of Practice. C's Resp. at 5.

With respect to its contention that Respondents' requests for discovery are unreasonably burdensome and seek information already provided voluntarily to Respondents, Complainant maintains that the discovery "would serve no other purpose than to frustrate Complainant and its two witnesses as they prepare for hearing" because Complainant already supplied Respondents with a "considerable amount [of] evidentiary information," including the information and testimony they are seeking, by way of its prehearing exchange and the affidavits of Ms. Beckwith and Mr. Ma accompanying its AD Motion. C's Resp. at 5-6. To the extent that Respondents found Complainant's narrative summary of Ms. Beckwith's expected testimony to be insufficient, Complainant argues that "the detailed information proffered by Ms. Beckwith's affidavit provides Respondents ample information as to her testimony at trial." C's Resp. at 6. Complainant further argues that the proposed deposition of Ms. Beckwith would burden her, the Commonwealth of Virginia, and Complainant in that it would require the expenditure of time and resources to prepare for and travel to the deposition. *Id.* As for Respondents' wish to depose Mr. Ma, Complainant contends that it "voluntarily offered Respondents the opportunity to depose Andrew Ma since December 2015 during the same time Respondent Adnan

Kiriscioglu was deposed by Complainant as agreed by the parties mutually."[7] *Id.* Complainant argues that a deposition of Mr. Ma is no longer warranted, however, because Complainant has already provided Respondents with the information they are seeking, including a detailed affidavit of Mr. Ma, "from which Respondents can put on a vigorous defense of his anticipated testimony." C's Resp. at 6-7. Thus, Complainant argues, "at this point in time his deposition serves no purpose other than to frustrate and burden Complainant on the eve of trial." *Id.* at 7.

Finally, Complainant observes that Respondents do not state in their Motion any reason to believe that the information sought from Ms. Beckwith and Mr. Ma may not, in the absence of their depositions, otherwise be preserved for presentation by these witnesses at hearing. C's Resp. at 8. Complainant argues, in essence, that such an assertion would be disingenuous given its assurances that it intends to call both Ms. Beckwith and Mr. Ma to testify at the hearing, and that Respondents will thus have an opportunity to question them at that time. *Id.*

c. Respondents' Reply

As a preliminary matter, Respondents note that they had requested in their Motion that this Tribunal order the deposition of only Ms. Beckwith "based on the understanding that Complainant had agreed to make [Mr. Ma] available for deposition on a voluntary basis on December 9, 2015." Rs' Reply at 2 n.1. Asserting that "Complainant apparently changed its mind with respect to Mr. Ma without any notice to Respondents other than Complainant's Response," Respondents request that this Tribunal also order the deposition of Mr. Ma. *Id.*

Turning to their arguments in support of their requests for discovery, Respondents challenge Complainant's contention that their requests are unreasonably burdensome, arguing first that they "are entitled to have a meaningful opportunity to prepare for the hearing, including obtaining information from the Complainant's fact witnesses," and that "it stretches the imagination for the Complainant to assert that it is the party being frustrated by Respondents' relatively narrow discovery request in a complex case." Rs' Reply at 3. Respondents further argue against the notion that the deposition of Ms. Beckwith would be burdensome to her or the Commonwealth of Virginia by noting that Respondents propose to conduct the deposition at the offices of VADEQ, as reflected in the notice of deposition attached to their Motion, or that it would be burdensome to Complainant by noting that that the Commonwealth of Virginia falls within Complainant's region of EPA. *Id.* at 4. Finally, Respondents dispute that the requested discovery would "frustrate" Complainant given that "Complainant already has taken a significant amount of time to prepare the sworn statements of Ms. Beckwith and Mr. Ma," which will "likely narrow[] the scope of Respondents' requested oral examinations," and that "Complainant is defending, not taking, the two requested depositions." *Id.*

[7] Respondent Kiriscioglu was deposed by Complainant in December of 2014. Thus, I may reasonably presume that Complainant meant that it had voluntarily offered Respondents the opportunity to depose Mr. Ma since December of *2014*, not December of *2015*.

Respondents next challenge Complainant's contention that the information contained in its prehearing exchanges and the affidavits of Ms. Beckwith and Mr. Ma attached to its AD Motion obviate Respondents' need for additional discovery. Rs' Reply at 5-6. In particular, Respondents argue that the affidavits do not afford Respondents the opportunity to ask "responsive follow-up questions" of Ms. Beckwith and Mr. Ma and that they "should not have to wait until the hearing" to ask such questions because they "go directly to the issue of liability and provide . . . a meaningful opportunity to prepare for the hearing." *Id.* at 6.

Finally, Respondents contend that they do, in fact, seek significant, probative evidence that may not otherwise be preserved for hearing, contrary to Complainant's position. Rs' Reply at 7. In particular, Respondents argue that Complainant's AD Motion and the accompanying affidavit of Mr. Ma do not address all of the issues in dispute, such as the allegation that Respondent Kiriscioglu is an "operator" pursuant to the applicable regulations and the affirmative defense of selective enforcement purportedly raised by Respondents in their Amended Joint Answer. *Id.* Respondents further argue that the proposed documentary evidence supplied by Complainant "is not an adequate substitute for direct information from Mr. Ma required for the Respondents to have a meaningful opportunity to prepare for a hearing." *Id.* As for Ms. Beckwith, Respondents argue that her affidavit "does not include her actual observations" and thus "does not provide direct information required for the Respondents to have a meaningful opportunity to prepare for hearing." *Id.* at 8.

d. Complainant's Sur-Reply

In its Sur-Reply, Complainant first objects to Respondents' proposed interrogatories, arguing that it has voluntarily provided the information sought by Respondents in Interrogatory 1-9 and 11. C's Sur-Reply at 2. With respect to Interrogatory 10, Complainant objects specifically to the part inquiring about civil penalties assessed in other enforcement cases and settlements as irrelevant and lacking in probative value. *Id.* at 2-3.

As for the depositions sought by Respondents, Complainant first objects on various grounds to specific lines of questioning that Respondents seek to pursue with Mr. Ma, as indicated in Respondents' Reply. C's Sur-Reply at 4-7. Aside from those lines of questioning, however, Complainant argues that Respondents have failed to "describe in detail the nature of the information sought" from Mr. Ma as required by 40 C.F.R. § 22.19(e)(1). *Id.* at 6 n.3. As part of this argument, Complainant notes the claim of Respondents in their Reply that the affidavits of Mr. Ma and Ms. Beckwith will likely narrow the scope of each of their proposed depositions without offering any further explanation as to how they would be narrowed. *Id.* As for the proposed deposition of Ms. Beckwith, Complainant objects to Respondents questioning Ms. Beckwith as to "whether any omission by the Respondents is considered a recordkeeping violation by VADEQ," on account of it lacking significant probative value on a disputed issue of material fact. *Id.* at 7. Finally, Complainant argues that the requested depositions fail to satisfy either of the additional criteria for this form of additional discovery set forth at 40 C.F.R. § 22.19(e)(3). *Id.* at 8-9.

3. Analysis

a. Respondents' Request for Depositions

Upon consideration, I find Complainant's arguments against Respondents' request to depose Ms. Beckwith and Mr. Ma to be persuasive.

With respect to the proposed deposition of Ms. Beckwith, Respondents first argue in favor of this additional discovery on the grounds that Complainant's summary of her expected testimony was insufficiently detailed and that Complainant's prehearing exchanges lacked any documents containing her personal observations of Respondents' compliance with VADEQ's UST financial responsibility requirements. The Rules of Practice do not set a standard for the degree of specificity required for a summary of expected testimony but rather direct parties merely to provide as part of their prehearing exchanges "a brief narrative summary" of the expected testimony of each proposed witness. 40 C.P.R. § 22.19(a)(2)(i). As observed by the Environmental Appeals Board ("EAB"), however, the purpose of the prehearing exchange is to afford the parties a meaningful opportunity to prepare for hearing, *JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005), and such purpose can be achieved only if the prehearing exchange imparts sufficient information concerning, among other things, the testimony of each proposed witness. I agree with Respondents that the narrative summary provided by Complainant informs Respondents only of the general nature of Ms. Beckwith's expected testimony but lacks any details regarding the substance of that testimony, which is necessary for Respondents to have a meaningful opportunity to prepare for hearing. This argument was rendered moot, however, by the Declaration of Leslie Beckwith in Support of Complainant's Motion for Partial Accelerated Decision ("Beckwith Declaration"), which describes in greater detail the substance of her expected testimony.

Respondents nevertheless maintain that a deposition of Ms. Beckwith is necessary for them to have a meaningful opportunity to prepare for hearing, citing a number of subjects that Complainant's prehearing exchange and the Beckwith Declaration still fail to cover, such as whether Ms. Beckwith is the custodian of VADEQ's documents, including email communications between Respondents and Josiah Q. Bennett of VADEQ that Complainant included in its prehearing exchange, Rs' Mot. at 6; any documents that Ms. Beckwith reviewed, Rs' Reply at 6; and any interactions that she may have had with Respondents, Rs' Reply at 6. Respondents contend that "[t]he information Respondents seek to elicit from Ms. Beckwith go [sic] to whether any omission by the Respondents is considered a recordkeeping violation by VADEQ, rather than an absence of financial responsibility based on VADEQ's enforcement procedures and precedents." Rs' Reply at 8.

The probative value of information relating to the manner in which VADEQ would apply its regulations is negligible in this proceeding. "The phrase 'probative value' denotes the

tendency of a piece of information to prove *a fact* that is of consequence in the case." *Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991). As observed by Complainant in its Sur-Reply, the EAB has held that where EPA authorizes a state to administer its own RCRA regulations in lieu of the federal RCRA program, the state's interpretations or applications of its regulations do not necessarily bar EPA from enforcing a contrary understanding within that state. *Gen. Motors Auto. – N. Am.*, 14 E.A.D. 1, 87-91 (EAB 2008). Thus, the information that Respondents wish to elicit from Ms. Beckwith – namely, how the Commonwealth of Virginia would apply its regulations to Respondents' conduct – does not have a tendency to prove a fact bearing on Respondents' liability or the appropriateness of the proposed penalty in a case brought by a regional office of EPA. Moreover, I am unpersuaded that the information sought by Respondents cannot reasonably be obtained by alternative methods of discovery. Written interrogatories certainly appear to be an adequate means of eliciting from Ms. Beckwith such information as the identity of any documents she reviewed, a description of any interactions she had with Respondents, and any other considerations that led her to conclude that Respondents had failed to comply with the applicable financial responsibility requirements. The need for follow-up questions is not evident given the lack of complexity of Ms. Beckwith's expected testimony and the information sought from her. In addition, Respondents fail to persuade that relevant and probative evidence may otherwise not be preserved for presentation by Ms. Beckwith at the hearing absent the proposed deposition. For the foregoing reasons, I conclude that Respondents' request to depose Ms. Beckwith fails to satisfy the standards for additional discovery established by the Rules of Practice. Accordingly, this request is denied.

Turning to the proposed deposition of Mr. Ma, Respondents contend that his affidavit does not obviate their need for additional discovery, and that the information sought may not be reasonably obtained by any means of discovery other than the proposed deposition, because "[h]is affidavit does not allow for responsive follow-up questions necessary to elicit detailed information regarding his observations [during his inspections of the Facilities]." Rs' Reply at 5-6. Among other topics that purportedly are not addressed by Mr. Ma's affidavit but about which Respondents wish to question him are "where VADEQ determines an underground storage tank system to end by regulatory definition and practice," Rs' Reply at 6; "his observations of Mr. Kiriscioglu," Rs' Reply at 7; and the affirmative defense purportedly raised in their Joint Amended Answer that "Complainant has treated [Respondents] in a manner different than other similarly-situated parties in Region III (*i.e.*, Selective Enforcement Doctrine)," Rs' Reply at 7. Respondents conclude, "[W]hile the prehearing exchanges and Mr. Ma's affidavit reveal that Complainant provided inspection reports that reflect Mr. Ma's observations of the three retail gasoline stations by way of written summaries, photographs and notes, this information is not an adequate substitute for direct information from Mr. Ma required for the Respondents to have a meaningful opportunity to prepare for a hearing." Rs' Reply at 7.

Each line of questioning that Respondents wish to pursue with Mr. Ma in their proposed deposition fails to satisfy the standard for additional discovery set forth at 40 C.F.R. § 22.19(e)(1). First, as argued by Complainant, "where VADEQ determines an underground storage tank system to end by regulatory definition and practice" is not information that has

significant probative value bearing on a disputed issue of material fact relevant to the liability and relief that Complainant seeks to impose in view of the EAB's holding in *General Motors Automotive* discussed above. Even if this information did have a tendency to prove a fact relevant to Respondents' liability or the appropriateness of the proposed penalty, it would most reasonably be obtained from VADEQ, rather than Complainant. Second, I am unpersuaded that Respondents cannot reasonably obtain information pertaining to "[Mr. Ma's] observations of Mr. Kiriscioglu" by methods of discovery other than the proposed deposition given that the number of interactions between Mr. Ma and Respondent Kiriscioglu appears to be very limited based upon the assertions of Mr. Ma in the Declaration of Andrew Ma in Support of Complainant's Motion for Partial Accelerated Decision ("Ma Declaration"), which notes that Respondent Kiriscioglu did not attend the inspections of the Facilities that Mr. Ma performed. Finally, with respect to the information that Respondents seek to elicit from Mr. Ma regarding the affirmative defense purportedly raised in their Joint Amended Answer that "Complainant has treated [Respondents] in a manner different than other similarly-situated parties in Region III (*i.e.*, Selective Enforcement Doctrine)," as observed by Complainant, Respondents do not explicitly cite a defense of "selective enforcement" in their Joint Amended Answer. The only defense in their Joint Amended Answer that could be construed as a defense of selective enforcement states: "The proposed penalty is not consistent with precedent established by past penalty assessments for UST violations in EPA Region III." However, information relating to such a defense lacks probative value bearing on a disputed issue of material fact relevant to the relief that Complainant seeks to impose as the EAB has "consistently held, in a number of statutory contexts, that 'penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another." *Chem Lab Prods., Inc.*, 10 E.A.D. 711, 728 (EAB 2002) (quoting *Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999)). Accordingly, the information that Respondents seek to elicit from Mr. Ma on their purported selective enforcement defense does not have a tendency to prove a fact bearing on the appropriateness of the proposed penalty in this proceeding.

Inasmuch as Respondents specified only the foregoing issues as those falling within the scope of their proposed deposition of Mr. Ma, I am unable to discern whether Respondents seek any additional information from Mr. Ma that is discoverable under 40 C.F.R. § 22.19(e)(1). While Respondents argue generally in favor of the proposed deposition on the basis that Mr. Ma's inspection reports are not "an adequate substitute for direct information from Mr. Ma required for the Respondents to have a meaningful opportunity to prepare for a hearing," the Ma Declaration provides Respondents with a detailed view of the documentary and testimonial evidence that he is expected to proffer at the hearing, and thus, the need for follow-up questions is not evident. For the foregoing reasons, I conclude that Respondents' request to depose Mr. Ma fails to satisfy the standard for additional discovery established by 40 C.F.R. § 22.19(e)(1). Accordingly, this request is denied.

b. Respondents' Request for Written Interrogatories

With the exception of one portion of Interrogatory 10, Respondents' request to compel

Complainant to answer their proposed interrogatories also fails to satisfy the standard established by 40 C.F.R. § 22.19(e)(1) for additional discovery.

Interrogatory 1 asks for the identity of all persons who are purported to have personal knowledge of the facts forming the basis for each count in the Amended Complaint and a description of the nature of their knowledge. Similarly, Interrogatory 11 asks for the identity of each source, including each person at VADEQ and each VADEQ document, relied upon by Complainant for the allegations set forth in Counts 2 through 17 of the Amended Complaint. Respondents argue that these proposed interrogatories "seek relevant evidence the Respondents need to prepare adequately for the hearing." Rs' Mot. at 10. Complainant objects on the basis that it "has voluntarily provided the information sought in Respondents' first and eleventh proposed interrogatories and identified all persons, including [VADEQ] employees, who have personal knowledge of the facts and the nature of such knowledge in its prehearing exchange submittals." C's Sur-Reply at 2. I agree that Complainant's prehearing exchange and Accelerated Decision Memo appear to respond sufficiently to Interrogatories 1 and 11 and that Complainant has therefore already provided the information sought voluntarily. Accordingly, Interrogatories 1 and 11 do not satisfy the standard for additional discovery set forth at 40 C.F.R. § 22.19(e)(1) and the request for these interrogatories is denied.

Interrogatory 2 asks for a copy of the notice of the issuance of the Amended Complaint provided by EPA to the VADEQ, as alleged in Paragraph 2 of the Amended Complaint; the date on which this notice was provided; and the name of the individual at the VADEQ to whom the notice was sent. Complainant contends that it already voluntarily provided this notice to Respondents and, as support, points to a document denoted as CX 152 that, pursuant to this Tribunal's ruling set forth below, is now part of Complainant's prehearing exchange. C's Sur-Reply at 2. Indeed, this document appears to satisfy Respondents' request. Accordingly, Interrogatory 2 does not satisfy the standard for additional discovery set forth at 40 C.F.R. § 22.19(e)(1) and the request for this interrogatory is denied.

Interrogatory 3 first notes that Paragraph 10 of the Amended Complaint alleges that, at all times relevant to the Amended Complaint, Respondent Kiriscioglu was an "operator," as that term is defined by Section 9001(3) of RCRA, 42 U.S.C. § 6991(3), and 9 VAC § 25-580-10, of the USTs located at the Facilities. Interrogatory 3 then asks for a description of each fact on which this allegation is based, including each act or failure to act, on the part of Respondent Kiriscioglu, and the identity of each source relied upon in preparing such descriptions. Similarly, Interrogatory 4 asks whether the allegation that Respondent Kiriscioglu was an "operator" of the USTs at all relevant times is based on piercing the corporate veil of Respondents Aylin, Rt. 58, and Franklin Eagle. If so, Interrogatory 4 then asks for a description of each fact demonstrating how Respondent Kiriscioglu is derivatively and personally liable for the alleged violations, and the identity of each source relied upon in preparing such descriptions. Finally, Interrogatory 5 asks for the identity of each enforcement action and/or case brought by Complainant since January 1, 2003, in which a shareholder of a corporate entity who owns or operates an UST was named as a respondent.

In support, Respondents argue that Interrogatories 3 through 5 are compelled by the absence of factual allegations in the Amended Complaint or proposed evidence in Complainant's prehearing exchanges on the subject of Respondent Kiriscioglu's individual liability for the alleged violations as an "operator." Rs' Mot. at 9. According to Respondents, Interrogatories 3 through 5 "are intended to narrow this issue in a cost-effective manner and to enable the Respondents to prepare adequately for hearing." *Id.* Complainant counters in its Sur-Reply that it voluntarily provided the information sought by Respondents in its Accelerated Decision Memo. C's Sur-Reply at 2 (citing Accelerated Decision Memo at 22-27).

I am inclined to agree with Complainant. In the section of its Accelerated Decision Memo entitled "Respondent Operators of the UST and UST Systems at the Facilities," Complainant identifies a holding by the Environmental Appeals Board in *Southern Timber Products, Inc.*, 3 E.A.D. 880 (EAB 1992), rather than the act of piercing the corporate veil, as the basis for its position that Respondent Kiriscioglu is liable for the alleged violations as an "operator." Accelerated Decision Memo at 19-23. Complainant then proceeds to cite specific sources, such as the transcript of the deposition of Respondent Kiriscioglu taken by Complainant in December of 2014 and a May 5, 2014 response to Complainant's Motion for Discovery filed on February 24, 2014,[8] for facts supporting its position. Accelerated Decision Memo at 23-27. Interrogatories 3 and 4 thus appear to seek information that Complainant has now provided. Accordingly, they do not satisfy the standard for additional discovery set forth at 40 C.F.R. § 22.19(e)(1). Interrogatory 5 also fails to satisfy the standard for additional discovery in that it seeks information about unrelated matters that lack significant probative value on a disputed issue of material fact relevant to liability or the proposed penalty in this proceeding. *See Microban Prods. Co.*, 1998 EPA ALJ LEXIS 135, at *5 ("[The respondent's] second aspect of discovery . . . fails the 'significant probative value' requirement as it seeks information about unrelated matters: the inquiry into EPA's treatment of independent pesticide applications of *similar* pesticides *other* manufacturers. This would amount to launching a fleet of fishing expeditions, serving no purpose beyond distraction from the issue to be decided."). For the foregoing reasons, the request for Interrogatories 3 through 5 is denied.

Interrogatory 6 asks whether Paragraphs 55, 104, and 136 of the Amended Complaint – which allege that the method of release detection selected for the USTs at each of the Facilities was automatic tank gauging pursuant to 9 VAC § 25-580-160(4) – are premised on the notion that Respondents were required to select one method of release detection and were then bound

[8] As observed in the Order on Motions issued by this Tribunal on August 10, 2015, the Headquarters Hearing Clerk was copied on a letter addressed to counsel for Complainant and dated May 6, 2014, to which Respondents Aylin, Rt. 58, Franklin Eagle, and Kiriscioglu purportedly attached a partial response to Complainant's requests for discovery, but the partial response itself was not filed. Order on Motions at 21 n.13. To date, neither Complainant nor Respondents appear to have filed the partial response, and it thus is not a part of the record of this proceeding.

by that selection for any period of time beyond a discrete 30-day monitoring period in order to comply with 9 VAC § 25-580-140.1. Interrogatory 6 then asks three questions related to the "statistical inventory reconciliation" methods purportedly used at the Facilities for purposes of release detection. In turn, Interrogatory 7 asks a series of questions related to Paragraphs 100, 132, and 162 of the Amended Complaint – which charge Respondents with failing to demonstrate financial responsibility at the Facilities as required by 9 VAC § 25-590-40 – and whether those allegations take into account the argument that regulated USTs in the Commonwealth of Virginia satisfy the regulation at issue by way of the Virginia Petroleum Storage Tank Fund.

In support of Interrogatories 6 and 7, Respondents advance the argument that the applicable regulations set forth in the Virginia Administrative Code "prescribe one or a combination of compliance methods [with respect to release detection and financial responsibility requirements] and that they have presented evidence . . . to demonstrate such compliance." Rs' Mot. at 9-10. The intention behind Interrogatories 6 and 7, Respondents contend, is to narrow these issues and facilitate their preparation for hearing. *Id.* at 10. Complainant counters in its Sur-Reply that it voluntarily provided the information sought by Respondents in its Accelerated Decision Memo. C's Sur-Reply at 2-3 (citing Accelerated Decision Memo at 27-39, 52-56). Again, I am inclined to agree with Complainant. The portions of the Accelerated Decision Memo cited by Complainant do indeed appear to address the questions raised by Interrogatories 6 and 7. Thus, they do not satisfy the standard for additional discovery set forth at 40 C.F.R. § 22.19(e)(1) and the request for these interrogatories is denied.

First noting the allegations of failure to provide cathodic protection for piping at the Rt. 58 and Franklin Facilities set forth at Paragraphs 113 and 146 of the Amended Complaint, respectively, Interrogatories 8 and 9 ask for a description of each fact on which those allegations are based and the identity of each source relied upon in preparing those descriptions. In support, Respondents argue that "third-party cathodic protection evaluations and tests performed at Respondents' request" and provided by Complainant as part of its SSPE suggest that the subject piping was protected as required by the applicable regulations and that the intention of Interrogatories 8 and 9 is to narrow this issue in a cost-effective manner. Rs' Mot. at 10. Complainant counters in its Sur-Reply that it voluntarily provided the information sought by Respondents in its Accelerated Decision Memo. C's Sur-Reply at 2-3 (citing Accelerated Decision Memo at 50-52). Once again, I am inclined to agree with Complainant. The portion of the Accelerated Decision Memo cited by Complainant sets forth facts in support of the allegations at issue and their sources, and thus appears to provide the information sought by Interrogatories 8 and 9. Accordingly, they do not satisfy the standard for additional discovery set forth at 40 C.F.R. § 22.19(e)(1) and the request for these interrogatories is denied.

Finally, Interrogatory 10 asks for three sets of information. Interrogatory 10(b) asks for an explanation of how the proposed penalty is consistent and equitable with civil penalties imposed in other cases for violations similar to those alleged in the Amended Complaint. As discussed above, the resolution of other cases lacks probative value bearing on a disputed issue

of material fact in this proceeding, and thus, the information that Respondents seek to elicit through this question does not satisfy the standard for additional discovery set forth in the Rules of Practice. Accordingly, the request for Interrogatory 10(b) is denied.

Interrogatory 10(a) asks for an account of each act or omission on the part of Respondents that "constitutes good-faith grounds not to apply downward violator-specific adjustments" to the proposed penalty, including an inability to pay,[9] and Interrogatory 10(c) then asks for the identity of each source relied upon to answer 10(a). In support, Respondents argue that this question "seek[s] relevant evidence the Respondents need to prepare adequately for the hearing and any settlement discussions before the hearing." Rs' Mot. at 10. Complainant counters only that Respondents have failed to provide all of the financial documentation necessary for Complainant to analyze their ability to pay the proposed penalty. C's Sur-Reply at 3. Upon consideration, I find that the information that Respondents seek to elicit through Interrogatory 10(a) and (c) satisfy the requirements governing additional discovery under the Rules of Practice. First, the information has significant probative value on disputed issues of material fact relevant to the amount of the proposed penalty, which Respondents contest in their Amended Joint Answer as "excessive, unreasonable, and otherwise not in accordance with the EPA Penalty Policy, including adjustment factors." Amended Joint Answer at 13. Further, the

[9] In November of 1990, EPA issued the U.S. EPA Penalty Guidance for Violations of UST Regulations ("Penalty Policy") in an effort to guide the calculation of civil penalties assessed under Section 9006 of RCRA. U.S. EPA Office of Underground Storage Tanks, OSWER Directive 9610.12, U.S. EPA Penalty Guidance for Violations of UST Regulations (Nov. 1990), at ch. 1, http://www.epa.gov/oust/directiv/od961012.htm. While the Penalty Policy is not binding on a Presiding Officer, the EAB has instructed that it must be considered and "should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'" *Carroll Oil*, 10 E.A.D. at 655-56 (quoting *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002)).

With respect to the calculation of a penalty, the Penalty Policy provides that the "Initial Penalty Target Figure" is comprised of two components: the Gravity-Based Component and the Economic Benefit Component. Penalty Policy at 5. The Gravity-Based Component consists of four elements, including the Matrix Value and the Violator-Specific Adjustments to the Matrix Value. Penalty Policy at 14. To calculate the Gravity-Based Component, the first step is to determine the Matrix Value, which is a value based on two criteria. *Id.* Following a determination of the Matrix Value, adjustments to this value may be made, referred to as Violator-Specific Adjustments, to account for the violator's degree of cooperation or lack thereof (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made), the degree of willfulness or negligence (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made), a history of noncompliance (adjustments up to a 50 percent increase may be made), and other unique factors (adjustments ranging from a 50 percent increase to a 25 percent decrease may be made). *Id.* at 17.

information sought by Respondents is most reasonably obtained from Complainant as Complainant is the party who calculated the proposed penalty, and Complainant does not appear to have already provided the information voluntarily. *See* Complainant's Rebuttal Prehearing Exchange at 3 (stating that Complainant did not apply any violator specific adjustments, without further explanation). Finally, nothing in the record suggests that this relatively limited discovery would unreasonably delay this proceeding or unreasonably burden Complainant. Accordingly, I find that Respondents' request to compel Complainant to respond to Interrogatory 10(a) and (c) is warranted under the Rules of Practice, and is granted.

4. Conclusion

Respondents' request for additional discovery is granted with respect to its request for an order compelling Complainant to respond to Interrogatory 10(a) and (c). Otherwise, Respondents' request is denied.

II. COMPLAINANT'S SECOND MOTION TO COMPEL DISCOVERY AND IMPOSE SANCTIONS

As previously noted, the parties engaged in extensive motions practice following the issuance of the Prehearing Order. Of particular relevance, Complainant filed an unopposed Motion for Discovery on February 24, 2014, wherein Complainant sought to compel the Original Respondents to answer interrogatories and produce documents related to 1) the business, financial, and operational relationships between the Original Respondents and other entities; and 2) the Original Respondents' claim in their Joint Answer of an inability to pay the proposed penalty. On March 12, 2014, I issued an Order on Complainant's Motion for Discovery ("Discovery Order") directing the Original Respondents to respond to Complainant's requests for discovery by April 4, 2014. That deadline was later extended to May 5, 2014.

As noted above, the Original Respondents appear to have provided Complainant with a partial response to Complainant's requests for discovery – without ever filing that document with the Headquarters Hearing Clerk – on May 6, 2014. On May 7, 2014, however, Respondent Kiriscioglu filed a Motion to Defer Discovery Response ("Motion to Defer") seeking to delay his obligation to submit his personal financial information in response to Complainant's Motion for Discovery until after a ruling had been issued on another pending motion. Complainant subsequently filed a Motion to Compel Discovery and Impose Sanctions ("First Motion to Compel") seeking an order compelling the Original Respondents to comply with the March 12, 2014 Discovery Order and with the November 5, 2013 Prehearing Order and, if the Original Respondents failed to do so, an order imposing sanctions pursuant to 40 C.F.R. § 22.19(g). On September 11, 2014, the Original Respondents filed an opposition to the First Motion to Compel. However, on September 23, 2014, the Original Respondents filed a Supplemental Discovery Exchange and Exhibit Volume II, which purportedly was responsive, in part, to Complainant's requests for discovery.

By Order dated August 10, 2015, I denied Respondent Kiriscioglu's Motion to Defer and directed the Original Respondents to respond to Complainant's requests for discovery by September 11, 2015, in accordance with the March 12, 2014 Discovery Order, to the extent that they had not already done so. That deadline was later extended to October 1, 2015.

On December 4, 2015, Complainant filed a Second Motion to Compel Discovery and Impose Sanctions ("Second Motion to Compel"). Respondents filed a Response to Complainant's Second Motion to Compel Discovery and Impose Sanctions ("Rs' Resp.") on December 21, 2015. Complainant did not reply.

A. Complainant's Second Motion to Compel

In its Second Motion to Compel, Complainant notes that it had requested as Item 92 in its Motion for Discovery that Respondent Kiriscioglu complete and submit the personal financial information statement attached to the Motion for Discovery as Attachment B, but that Respondent Kiriscioglu has yet to do so, in contravention of the March 12, 2014 Discovery Order and the August 10, 2015 Order on Motions. Second Motion to Compel at 6-7, 9. Complainant contends that the given document "seeks to analyze the validity of Respondents [sic] claim of inability to pay the proposed civil penalty in this case[,] such as the assets and debts of Respondent Kiriscioglu[,] including such assets or debts as they relate to his relationship with the corporate Respondents that he owns and controls."[10] *Id.* at 9 (citing Attachment B, Declaration of Gail B. Coad). Citing the Rules of Practice and its jurisprudence for support, Complainant requests that I order Respondent Kiriscioglu to provide the document and, if he again fails to do so, to impose the sanctions authorized by the Rules of Practice as a consequence for his failure to respond. *Id.* at 7-10.

B. Respondents' Response

Respondents object to the relief sought in the Second Motion to Compel on the basis that Respondents, rather than Complainant, bear the burdens of presentation and persuasion on ability-to-pay claims. Rs' Resp. at 1, 4. According to Respondents, Complainant has already been informed that Respondent Kiriscioglu has yet to decide whether he will pursue such a claim. *Id.* at 6. Respondents then assert:

> Respondent Kiriscioglu and his attorney read [Complainant's request] as conditional – that is, if Mr. Kiriscioglu intends to assert Ability-to-Pay as an affirmative defense for himself, then he must submit the Individual Inability to Pay Claim form attached to the Motion; and, if he does not intend to assert this affirmative defense at the hearing for himself, then he need not complete and submit

[10] The Original Respondents claimed in their Joint Answer that they lacked an ability to pay the proposed penalty, and Respondents reiterated this claim in their Amended Joint Answer.

the form.

Id. at 6-7. Noting that Complainant has not set forth any bases for its request other than for purposes of assessing Respondent Kiriscioglu's ability to pay the proposed penalty, *id.* at 7 n.3, Respondents argue that Respondent Kiriscioglu should not be compelled to provide the information sought at this point in the proceeding, and that the imposition of sanctions is premature given Respondent Kiriscgiolu's "good-faith belief that he needed to respond to [Item 92] only if he was asserting the Ability-to-Pay affirmative defense as to himself," *id.* at 7-9. Respondents then assert that they will provide the information if Respondent Kiriscioglu decides to pursue an ability-to-pay claim, no later than 30 days before the scheduled hearing. *Id.* at 8.

C. Analysis

Where a party in a proceeding governed by the Rules of Practice fails to provide information as required by an order compelling additional discovery, the Presiding Officer is authorized, in her discretion, to infer that the information would be adverse to the party failing to provide it, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g). In the present proceeding, Respondent Kiriscioglu does not dispute that he has yet to respond to Item 92 in Complainant's Motion for Discovery, notwithstanding this Tribunal's Discovery Order and Order on Motions. While I would ordinarily consider such a failure to be a defiance of those orders, Respondents' explanation for this particular omission is compelling.

Specifically, as observed by Respondents, their ability to pay the proposed penalty is not part of Complainant's prima facie case. In order to determine the appropriate civil penalty to assess for a violation of RCRA's UST provisions, Section 9006(c) of RCRA directs the Administrator to "assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6991e(c). The Administrator may also take into account "[t]he compliance history of an owner or operator" and "[a]ny other factor the Administrator considers appropriate." 42 U.S.C. § 6991e(e). Notably absent from this enumeration of penalty factors is a respondent's ability to pay. RCRA thus places the burden on a respondent to allege and prove inability to pay as an affirmative defense should the respondent wish to have its financial condition considered as a mitigating penalty factor. *See, e.g.*, *Carroll Oil Co.*, 10 E.A.D. 635, 662–63 (EAB 2002). Given that the burden of demonstrating Respondent Kiriscioglu's inability to pay falls squarely on Respondent Kiriscioglu, and that Complainant has not clearly cited any bases for its request that this Tribunal require him to respond to Item 92 other than to assess his ability to pay the proposed penalty,[11] I find that an order compelling his

[11] In its February 24, 2014 Motion for Discovery, Complainant explained that it sought information from the Original Respondents not only for purposes of assessing their ability to pay the proposed penalty but also to determine the business, financial, and operational relationships between the Original Respondents and other entities. Here, it is not clear that Complainant seeks a response to Item 92 for any reason other than to assess Respondent Kiriscioglu's ability to pay

response is not warranted. The decision to pursue a claim of inability to pay, and the manner of supporting such a claim, is Respondent Kiriscioglu's prerogative alone.

However, if Respondent Kiriscioglu opts to pursue a claim of inability to pay the proposed penalty and deems his response to Item 92 necessary for purposes of satisfying his burden on this issue, I hereby advise that a failure to file the response as a supplement to Respondents' prehearing exchange at least 30 days prior to the start of the hearing may result in this Tribunal excluding the response from evidence.[12] As argued persuasively by Respondents, the filing of the response at least 30 days prior to the start of the hearing would provide Complainant ample opportunity to review, analyze, and prepare any rebuttal to Respondent Kiriscioglu's submission, especially given that the financial consultant retained by Complainant has already performed an analysis of his financial condition based upon publicly available data and the documents that he has provided. *See* Second Motion to Compel, Attachment B (Declaration of Gail B. Coad) at ¶¶ 7-9. Complainant also appears to find a 30-day period to be reasonable given the absence of any reply from Complainant on this or any other issue raised by Respondents in their Response.

For the reasons set forth above, Complainant's Second Motion to Compel is denied.

III. COMPLAINANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL PREHEARING EXCHANGE

On December 10, 2015, Complainant filed a Motion for Leave to File Supplemental Prehearing Exchange ("Complainant's PHE Motion" or C's PHE Mot."), to which Complainant

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the proposed penalty.

[12] I am mindful that the Rules of Practice provide, as follows:

> If . . . a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties *at least 15 days before the hearing date*, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control for the information, or had good cause for not doing so.

40 C.F.R. § 22.22(a) (emphasis added). Notwithstanding this provision, I exercise my discretion to modify the deadline by which Respondent Kiriscioglu may file his response to Item 92 based upon my authority to "take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [the Rules of Practice]." 40 C.F.R. § 22.4(10).

attached six proposed exhibits denoted as CX 149-154 that it seeks to add to its prehearing exchange. Respondents subsequently filed a Partial Opposition to Complainant's Motion for Leave to File Supplemental Prehearing Exchange ("Respondents' Opposition" or "Rs' Opp.") on December 11, 2015. Therein, Respondents seek the exclusion of two of the proposed exhibits, CX 149 and 150, on the basis that they are clearly inadmissible. On December 21, 2015, Complainant filed its Reply to Respondents' Partial Opposition to Complainant's Motion for Leave to File Supplemental Prehearing Exchange ("Complainant's Reply" or "C's Reply"), in which Complainant treats Respondents' Opposition as a motion in limine and argues against Respondents' request to exclude CX 149 and 150 from Complainant's prehearing exchange.

As explained above, a motion for leave to supplement a party's prehearing exchange may be denied where the motion is not prompt, where the existing prehearing exchange is not incomplete, inaccurate, or outdated, where the record reflects evidence of bad faith or delay tactics on behalf of the filing party, or where the non-filing party would experience undue prejudice if the supplement was accepted. *See* 40 C.F.R. § 22.19(f), (g). Respondents do not object to Complainant's PHE Motion on any those grounds, and I find that they do not warrant denial of the Motion. Respondents do object to CX 149 and 150, however, on the basis that those proposed exhibits are irrelevant, immaterial, and of no probative value, such that they are clearly inadmissible under the Rules of Practice. As observed by Complainant, such an objection may be construed as a motion in limine[13].

Motions in limine are not referenced by the Rules of Practice. With respect to the admission of evidence, the Rules of Practice provide simply that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). However, a motion in limine is the appropriate means of seeking exclusion of proposed testimony and exhibits on the basis that the proposed evidence does not satisfy the foregoing standard. In the absence of administrative rules on the subject, the Federal Rules of Civil Procedure, Federal Rules of Evidence, and related case law may be consulted for guidance. *See, e.g., Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 560 n.65 (EAB 2008) (citing *J. Phillip Adams*, 13 E.A.D. 310, 330 n.22 (EAB 2007); *Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997)); *Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n.20 (EAB 1993). For example, Chief Administrative Law Judge Susan L. Biro observed:

> In Federal court practice, a motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose. Motions in limine are generally disfavored. If evidence is not clearly inadmissible, evidentiary rulings may be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. Thus, denial of a motion in limine does not mean that all

[13] It should be noted that Respondents have since filed a Motion in Limine, seeking the exclusion of CX 149 and 150, as well as other proposed evidence. An order ruling on the outstanding issues raised in that motion will be forthcoming.

> evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that without the context of the trial the court is unable to determine whether the evidence in question should be excluded.

Zaclon, Inc., 2006 EPA ALJ LEXIS 21, at *11 (internal citations and quotation marks omitted).

In support of their opposition to CX 149 – which is purported to be the results of an online search conducted on November 18, 2015, of public records for bankruptcies, judgments, and liens and showing a civil judgment filed by Crossroads Fuel Service, Inc., of $18,525 against Respondent Kiriscioglu on August 26, 2013 – Respondents argue that it is an "attempt by the Complainant to attack Mr. Kiriscioglu's character, when his character is not an issue in this proceeding," and that Complainant's PHE Motion fails to identify who conducted the search or authenticated the document, or even aver that the document was obtained by Complainant in the course of preparing its AD Motion. Rs' Opp. at 4. Accordingly, Respondents contend, CX 149 is clearly inadmissible for any purpose and should be excluded. *Id.* at 6. Turning to CX 150 – which is purported to be a copy of a final rulemaking published in the Federal Register that establishes an exemption from Federal UST regulations for those persons who provide secured financing to UST owners – Respondents argue that the rulemaking in question does not apply to this proceeding and that the proposed exhibit thus lacks relevancy, materiality, and probative value and should be excluded as clearly inadmissible for any purpose. *Id.*

In its Reply, Complainant counters that CX 149 and 150 are each cited in the section of its Accelerated Decision Memo seeking to demonstrate the absence of any genuine issue of material fact regarding the role of Respondent Kiriscioglu as an operator of the USTs at issue. C's Reply at 2-3. According to Complainant, CX 149 "is one piece of evidence that supports Complainant's contention that Respondent Kiriscioglu controlled the day-to-day operations of the USTs at the facilities, including payment to fuel suppliers, such as Crossroads Fuel." C's Reply at 3 (citing Accelerated Decision Memo at 27). As for CX 150, Complainant cites the statement in the rulemaking that a tank may have more than one operator at a given time, C's Reply at 3-4 (citing 60 Fed. Reg. 46,692, 46,693 (Sept. 7, 1995)), and argues that "[t]his supports Complainant's contention that Respondent Kiriscioglu was, at the time of the alleged violations, an 'operator' of the tanks at the facilities," C's Reply at 4 (citing Accelerated Decision Memo at 20 n.8). Complainant further contends that judicial notice of CX 150 is appropriate, even if Complainant had not exchanged it prior to hearing. C's Reply at 4.

Upon consideration, I find that Complainant has persuasively argued against the exclusion of CX 149 and 150 on account of those proposed exhibits conceivably containing information that is relevant, material, and of probative value to the determination of Respondent Kiriscioglu's role as an "operator" of the USTs in question. As for Respondents' arguments regarding the authentication of CX 149, Respondents are correct that this Tribunal may not admit a proffered exhibit into evidence absent authentication of the exhibit. Authentication is the act of proving that a proposed exhibit is true and genuine in order for it to be admitted into evidence in a contested proceeding. *Minnesota Metal Finishing, Inc.*, 2007 EPA ALJ LEXIS 14, at *14

(citing Black's Law Dictionary, 127 (7th Ed. 1999) and *United States v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997)). Federal Rule of Evidence 901 requires the authentication of exhibits prior to their admission into evidence in federal courts. While the Federal Rules of Evidence do not govern this proceeding, that fact "does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be, and absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding." *Minnesota Metal Finishing*, 2007 EPA ALJ LEXIS 14, at *15 (quoting *Woolsey v. NTSB*, 993 F.2d 516 (5th Cir. 1993) (internal quotation marks omitted)). Here, while Complainant does not identify in its PHE Motion a proposed witness capable of authenticating CX 149, I am not necessarily persuaded that none of the witnesses proposed in Complainant's prehearing exchange possess the ability to do so or that Complainant lacks the means to supplement its prehearing exchange to propose such a witness as necessary. Accordingly, I cannot discern at this time that CX 149 and 150 are clearly inadmissible for any purpose. Thus, Respondents' request that these documents be excluded is denied, and Complainant's PHE Motion is granted.

IV. ORDER

1. Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement their Prehearing Exchanges to Add a Witness is hereby **GRANTED IN PART**, and **DENIED IN PART**, as set forth above. Complainant shall furnish the information as to which Respondents' Motion has been granted within 30 days of the date of this Order.

2. Complainant's Motion for Leave to File Complainant's Sur-Reply to Respondents' Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery is hereby **GRANTED**.

3. Complainant's Second Motion to Compel Discovery and Impose Sanctions is hereby **DENIED**.

4. Complainant's Motion for Leave to File Supplemental Prehearing Exchange is hereby **GRANTED**.

Christine Donelian Coughlin
Administrative Law Judge

Dated: March 2, 2016
Washington, D.C.

In the Matter of *Aylin, Inc., RT. 58 Food Mart, Inc., Franklin Eagle Mart Corp., Adnan Kirisciogłu d/b/a New Jersey Petroleum Organization a/k/a NJPO, 5703 Holland Road Realty Corp., 8917 South Quay Road Realty Corp., and 1397 Carrsville Highway Realty Corp.*, Respondents.
Docket No. RCRA-03-2013-0039

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order on the Parties' Motions Relating to Additional Discovery and to Supplement their Prehearing Exchanges, dated March 2, 2016, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Paralegal

Original and One Copy by Hand Delivery to:

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Dated: March 2, 2016
Washington, D.C.