BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: EDWARD AND THERESA WASHINES, DA STOR AT LILLIE'S CORNER Wapato, Washington Respondents.	**DOCKET NO. RCRA-10-2014-0100** **RESPONDENTS' PREHEARING BRIEF**

I. INTRODUCTION

Pursuant to the Administrative Law Judge's Scheduling Order dated January 8, 2015, Respondents E. Arlen Washines and Da Stor at Lillie's Corner ("Respondents")[1] hereby submit the following Prehearing Brief.

II. VIOLATIONS AND PENALTIES NOT IN DISPUTE

A. Violation 1: Failure to Conduct Release Detection for Piping

Counts 1-2:

At the hearing the Respondents will not dispute their liability for Counts 1-2, nor will they challenge the amount of penalties being imposed by the Environmental Protection Agency ("EPA"), Region 10 ("the Region") for Counts 1-2.

[1] Respondent Theresa Washines died on July 8, 2014.

Counts 3-4:

At the hearing Respondents will not dispute their liability for Counts 3-4, nor will they challenge the amount of penalties being imposed by the Region for Counts 3-4.

B. Violation 3: Failure to Maintain Financial Responsibility

Counts 7-9:

At the hearing Respondents will not dispute their liability for Counts 7-9, nor will they challenge the amount of penalties being imposed by the Region for Counts 7-9.

III. DEFENSES FOR DISPUTED VIOLATIONS AND PENALTIES

A. Violation 2: Failure to Properly Install and Maintain Corrosion Protection for Steel Piping

Counts 5-6:

1. **The Respondents are not liable or subject to penalties in Count 5 under 40 CFR § 280.20 for failing to install corrosion protection systems on the steel siphon piping because their underground storage tanks are not "new tank systems" under 40 CFR Subpart B.**

The Region alleges that the underground storage tanks ("USTs") operated by the Respondents are "new tank systems" that subject them to 40 CFR § 280(b)(2), which requires installation of corrosion protection systems for all piping. Amended Complaint, ¶ 3.6. The Region argues that "Respondents' tanks satisfy each element of the definition of "new tank system," and that the Respondents "are within the group of 'all owners and operators of new UST systems.'" Complainant's Prehearing Exchange at 7-9. However, a plain reading of the UST regulations and their context show that the Region's interpretation as applied to the facts of this matter is not correct. Even if the regulations are found to be ambiguous, the Region's

interpretation defies logic and is therefore not reasonable, and should be rejected by the Presiding Officer.

Any analysis of this issue begins with the plain language of the regulation. *In re John P. Vidiksis,* 14 E.A.D. 333, 338 (EAB 2009). The definition of "new tank system" reads as follows: "New tank system means a tank system that *will be used* to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988." 40 CFR § 280.12 (italics added for emphasis). Note that instead of including or adding the words "is used" or "was used," the definition only employs a future tense, meaning that a "new tank system" is one that has not yet been used to contain regulated substances. A natural reading of this definition is that it refers to tanks that are in the process of initial installation by owners or operators.

This plain meaning is bolstered by the regulation's overall context. Regulations must be read as a whole, and "single components may not be plucked out and applied wherever convenient." *In re Norman C. Mayes,* 12 E.A.D. 54, 91 (EAB 2005); see also *In re Brown Wood Preserving Co.,* 2 E.A.D. 783, 791 (CJO 1989) (holding that RCRA regulations cannot be interpreted in isolation). In the UST regulations, the term "new tank system" is only present in Subpart B of the rules, which govern design, construction, and installation of USTs; it is used to distinguish future installation of tank systems after December 22, 1988, from those that were already installed prior to that date (and for which "upgrades" are necessary for compliance). In the "General Operating Requirements" of Subpart C, this distinction disappears because there is a logical assumption that "all UST systems" means those that were already installed or upgraded under Subpart B. *See, e.g.,* 40 CFR § 280.31. In other words, it is not necessary to include the words "new" or "existing" when referring to tank systems in Subpart C because those qualifiers only refer to the requirements for the systems' *initial*

installation or upgrade under Subpart B. Performance standards are then assumed to be in place for all systems unless the owners or operators failed to comply with the requirements when they originally installed or upgraded them.

The Environmental Appeals Board agrees with this interpretation, and has explained the difference between initial installations and upgrades:

> "New" UST systems, whose installation commenced or will commence after December 22, 1988, must incorporate protective technologies *at the time of installation*, while "existing" UST systems, whose installation commenced on or before December 22, 1988, were required to be upgraded by December 22, 1988, to incorporate all technological precautions needed to prevent, detect, and correct accidental releases of regulated substances, or, if not upgraded, permanently closed.

In re Euclid of Virginia, Inc., 13 E.A.D. 616, 624 (EAB 2008) (italics added for emphasis); see also *Mayes,* 12 E.A.D. at 57. The language that Congress enacted regarding UST performance standards in RCRA also confirms this intent: "The Administrator shall....issue performance standards for underground storage tanks *brought into use* on or after the effective date of such standards." 42 U.S.C. § 6991b(e).

The EPA guidance document that the Region has included in its list of exhibits also bears out the temporal element of the definition. Clearly directed towards the owners of USTs, the document (entitled "Musts for USTs") repeatedly emphasizes that initial installation is the critical compliance point. *See, e.g.,* Exhibit CX-35 at 4 (time when owner of new system must "act" is "at installation"); Exhibit CX-35 at 6 ("You must meet four requirements when you install a new UST system"). Note that the installation requirement includes corrosion protection ("CP").

Based on this interpretation of "new tank systems," the only logical construction of the term "all owners and operators" in 40 CFR § 280.20 is "all owners and operators *who install tank systems*." There is no requirement anywhere that owners or operators must retrofit the

tank systems with the required performance standards if a previous owner or operator failed to install them in the first place. Although the term "upgrade" is defined as including "addition or retrofit," the only owners or operators required to upgrade their systems are those owning tanks installed before December 22, 1988 (and they must do so by December 22, 1998).

Although the Region argues that 40 CFR § 280.20 "repeatedly" references the entire lifetime of the tank systems as being the point of compliance for UST performance standards, the language cited by the Region does not support this contention. The CP operation and maintenance ("O & M") requirements of 40 CFR § 280.31 are provided as the sole means of ensuring that the performance standards installed under 40 CFR § 280.20 are still effective – there is no requirement that owners or operators take any other action to make sure the systems are in compliance. Language in § 280.20 stating that the performance standards are required in order to prevent releases "as long as the UST system is used" simply means that the EPA has determined that those standards are the only ones that will achieve that objective. Despite what the Region argues, this does not mean that all owners and operators must somehow go beyond the precise operation, testing, inspection, repair, and recordkeeping requirements of Subparts C and D in order to be in compliance with the standards of Subpart B.[2] The first sentence of 40 CFR § 280.31 makes this point clear: "All owners and operators of steel UST systems with corrosion protection must comply with *the following requirements* to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances." 40 CFR § 280.31 (italics added for emphasis). This list of requirements is exclusive and does not appear to leave open the possibility that there might be other mandatory actions that EPA

[2] "Repair" is defined as "to restore a tank or UST system component that has caused a release of product from the UST system." 40 CFR § 280.12; see also 40 CFR § 280.33 (requirements for repairs). The Region has not alleged that Respondents failed to repair their UST system.

could enforce against UST operators.

The Region also cites the closure requirements of Subpart G (specifically 40 CFR § 280.70(c) to illustrate its position that all owners and operators have to somehow make sure that performance standards are still in place aside from the O & M provisions. However, the Region fails to note that the same section requires UST owners to continue O & M for corrosion protection while the system is temporarily closed, which is of course how substandard CP systems would be discovered for purposes of any required permanent closure. 40 CFR § 280.70(a). There are no other requirements other than those listed in subsection (a).

Even if the Region in reply argues that the definition of "new tank system" is somehow ambiguous and should be construed liberally in its favor, the interpretation the Region offers is not reasonable, for three reasons. First, both the O & M provisions for corrosion protection in 40 CFR § 280.31 and the release detection requirements in Subpart D appear to be the exclusive methods that owners and operators are required to employ to prevent releases from tanks. Any claim that UST operators should "read between the lines" in 40 CFR § 280.20, or that EPA can enforce other phantom requirements beyond those enumerated in the regulations is simply not credible. Second, as a practical matter, to avoid the possibility of future penalties under that section, all successive owners and operators of tank systems would need to immediately excavate their newly acquired USTs in order to make sure the performance standards were installed correctly. This could not possibly have been the intent of EPA when the regulations were promulgated. Finally, at facilities where the original owner had a history of numerous EPA inspections and non-compliance, it is not reasonable to assess penalties against a successive operator for substandard UST installations that should have been disclosed by the previous operator or discovered by the Region through routine inquiries by EPA inspectors.

Turning to the facts to be proven at the hearing, the Respondents' tank system was originally installed in 1990 by a previous lessee of the facility named Robert E. "Red" Ramsey. Exhibit CX-8. As such, Mr. Ramsey was an "operator of a new tank system." The Respondents did not acquire control of, or begin operating the USTs until after 2005.[3] Exhibit CX-9. Therefore, because the Respondents did not actually install the tanks, they are not "owners or operators of a new tank system." As a result, any facts that the Region brings forward at the hearing to prove that the Respondents failed to "install" a corrosion protection system on the steel siphon line from at least May 1, 2009, through February 13, 2013, are not relevant to any violation of 40 CFR § 280.20(b)(2). Quite simply, the owners or operators who install the entire tank systems are responsible for complying with the regulations for meeting performance standards in that particular section, and any further requirements to excavate USTs in order to retrofit CP systems on USTs after initial installation do not exist anywhere in the regulations.

As a result, the Presiding Officer should find as a mixed issue of fact and law that Respondents are not "owners or operators of new tank systems," and conclude thereby that the Respondents have not violated 40 CFR § 280.20(b)(2) as alleged in the Amended Complaint. Count 5 of the Amended Complaint should therefore be dismissed by the Presiding Officer.

2. Respondents are not liable or subject to penalties in Count 6 under 40 CFR § 280.31 because the regulation did not apply to the Respondents or the USTs until a corrosion protection system was actually retrofitted for the steel siphon line piping.

[3] At the hearing the Respondents will show that the facility is located on Indian land owned in trust by the United States. The U.S. is therefore an "owner" subject to the UST regulations. Respondent Theresa Washines was an owner of a beneficiary interest in the facility under regulations administered by the U.S. Department of the Interior. Upon her death the heirs of her estate acquired this interest, to be determined in probate proceedings.

The Region alleges that the Respondents violated the O & M requirements for CP throughout a period of time when they had not conducted any testing for CP on the steel siphon line piping ("siphon line") connecting Tank #1 and Tank #2. Amended Complaint, ¶¶ 3.19-3.22; ¶ 3.24. Respondents have admitted that the siphon line is bare steel. Answer, ¶ 1.3. However, Respondents are maintaining as an affirmative defense that the requirements of 40 CFR § 280.31(a) did not apply to the Respondents or the USTs until February 13, 2013, when the Respondents retrofitted a corrosion protection system for the steel siphon line.

Under the plain language of the regulation, O & M requirements are only applicable to "all corrosion protection systems." 40 CFR § 280.31(a). Logically, this would mean the *existing* CP systems already installed on the USTs. Such systems can only be operated and maintained for steel piping on a tank system if such a system has been already been "installed" pursuant to 40 CFR § 280.20(b). The Region has alleged and admitted that the Respondents in 2006 did actually test the CP systems that were in place on the USTs, but failed to test the siphon line, for which there was no such system in place (as it was later confirmed by the Region). Because there was no CP for the steel siphon line during the period before upgrading on February 13, 2013, the Respondents could not have tested the line for CP during the period alleged in the Complaint.

Nevertheless, the Region argues that the Respondents violated the O & M requirements, asserting only that they are included as "all owners and operators of steel UST systems with corrosion protection." Complainant's Prehearing Exchange at 10. However, the Region's sole reliance on the fact that the USTs are STiP3 tanks with a pre-engineered CP system does not help the Region's case. If a tank has a built-in system for corrosion protection, there should be a presumption that testing that system automatically meets the requirements of the regulation. The Region has admitted that the Respondents in fact did this, but are also

arguing that the siphon line should also have been tested despite the fact that it is outside the pre-engineered CP for those STiP3 tanks. Like the alleged violations of performance standards in Count 5, the Region's position forces owners and operators to "read between the lines" and go beyond what is specifically required in the regulations.

As a result, the Presiding officer should find as a mixed issue of law and fact that the Respondents did not violate the requirements of 40 CFR § 280.31(a) because they did maintain the corrosion protection system that had been originally installed, and dismiss Count 6 of the Amended Complaint.

3. During the period in which the Region alleges the Respondents violated UST regulations, there was no information on record from the previous operator or previous EPA inspections that the siphon was bare steel, and the Region could not ascertain whether a new CP system was necessary.

At the hearing, the Region will put into evidence its inspection reports and correspondence with the Respondents showing that a Septeber 2006 inspection of the facility raised suspicions that the siphon line was made of bare steel. *See, e.g.,* Exhibits CX-3; CX-4; CX-5; CX-6; CX-7. In this regard the Region will undoubtedly take the position that the Respondents were on notice as of the date of that inspection that the siphon line required a CP system, and that the Respondents failed to excavate the UTSs and install the anode as soon as the inspection report was completed. Exhibit CX-3 at 4. However, at the hearing the Respondents will show that the history of enforcement actions taken against the previous operator never revealed any suspicions that an unprotected steel line ever existed on these USTs.

The Respondents' exhibits will show that the facility had been inspected at least three times when Mr. Ramsey was the operator during the 1990s, but none of the Region's

inspectors caught the fact that the siphon line was bare steel.[4] *See* Exhibits RX-3; RX-4; RX-5; RX-6; RX-7; RX-8. One inspection report from 1995 included photos of the tanks, and none of the notes on the photos indicates any concern with a bare steel siphon line. Exhibit RX-4. In its correspondence the Region showed no concern to Mr. Ramsey about any unprotected piping. Exhibit RX-5. Both the UST notification and inspection reports indicate only that the piping is "doubled walled." Exhibits CX-8 at 3; RX-4 at 1. Note that on one of the inspections reports, question marks were scribbled next to the piping information, which may indicate that the information could not be confirmed or was questionable. Exhibit RX-4. On some of the reports the initial "P" is used to describe the piping material, which may stand for either "plastic" or "pressurized" (as opposed to "S" for steel). *See, e.g.,* Exhibit RX-6. One can only conclude from these reports that neither Mr. Ramsey nor the Region ever checked the original UST installation information from 1990 to make sure the siphon was not required to have a CP system. Although it is possible that Mr. Ramsey simply forgot that the line was bare steel, it is also possible that he tried to conceal this fact once he learned that he would have to excavate the USTs to install an anode. In any case there is no record that the issue was ever addressed by the inspectors.

As the Region will show at the hearing, the September 2006 inspection finally began to raise some suspicion that the siphon line piping was not as Ramsey or prior inspections had reported. This was almost sixteen years after the USTs were installed. By then the tanks were in the hands of the Respondents, who were also not aware that the siphon was bare steel. Correspondence with the Bureau of Indian Affairs (BIA) indicates quite clearly that the Region

[4] Complainant plans to object under F.R.E. 403 to the admission of Respondents' exhibits involving the Region's inspection of the USTs in the period before the Respondents acquired operational control of the facility. However, this evidence is relevant to prove that neither the Region nor the Respondents knew that the siphon line was bare steel and/or lacked corrosion protection.

had no conclusive information regarding the piping material, and was requesting relevant information to make a final regulatory determination on CP requirements. Exhibits CX-19; CX-20. Also significant is the fact that the Region, although it notified the Respondents that there was a potential problem with the siphon, never took any action during this period to enforce the regulation that it is now attempting to enforce in this proceeding. After another inspection in June 2012, the Region finally began to conclude that the line was indeed made of steel and was not protected; the inspectors took photos of the USTs similar to those made in 1995 (but with obviously different analytical results). BIA could find nothing regarding the USTs in its records and communicated that both to the Respondents (in May 2010), and to the Region (in December 2012). Exhibits RX-9; RX-10. However, the true nature of the piping material and lack of CP was only finally revealed when the Respondents excavated the USTs and retrofitted the line with a CP anode in February 2013.

Given these facts, the Region will likely argue at the hearing that the Respondents somehow had a duty to 1) investigate whether there were sufficient corrosion protection systems for the siphon line and 2) upgrade the USTs to provide CP for that piping. However, as the Respondents have indicated *supra,* this position should be rejected by the Presiding Officer. The provisions of 40 CFR § 280.31(b) are the exclusive requirements for operation and maintenance of USTs by owners or operators, and the Region cannot add any more without promulgating additional rules. Also as indicated *supra,* these USTs are not subject to any more requirements under Subpart B of the regulations. Although the Respondents understand the risk to the environment that can be caused by a lack of cathodic protection, and ultimately did take action to correct it, the issue here is whether they should be held liable and penalized for the period of time when there was substantial uncertainty about the siphon line's material construction. Considering the failure of the previous operator in initially disclosing this critical

fact, and the subsequent failure of the Region's inspectors in discovering the problem for almost two decades, the answer should be "No."

IV. DISPUTED PENALTY CALCULATIONS

A. Violation 2, Count 5

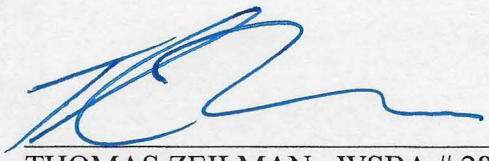
Respondents deny, contest and dispute the entire amount of the penalty calculated by the Region in Count 5 for allegations of "failure to equip corrosion protection for steel piping that routinely contains regulated substances and is in contact with the ground from at least May 1, 2009 through February 13, 2103 as required by 40 CFR § 280.20." Respondents will prove at the hearing, based on the Respondents' affirmative defense in Section III.A.1 (*supra*), that there should be no penalty imposed for Count 5.

B. Violation 2, Count 6

Respondents deny, contest and dispute the entire amount of the penalty calculated by the Region for alleged violations in Count 6 for allegations of "failure to properly maintain corrosion protection for steel piping that routinely contain regulated substances and is in contact with the ground from at least May 1, 2009 through February 13, 2103 as required by 40 CFR § 280.31(a)." Respondents will prove at the hearing, based on Respondents' affirmative defense in Section III.A.2 (*supra*), that there should be no penalty imposed for Count 6.

Respondents' counsel may be contacted by phone at (509) 575-1500, by cell phone at (509) 949-7942, by fax at (509) 575-1227, by email at tzeilman@qwestoffice.net, or by mail at 402 E. Yakima Avenue, Suite 710, P.O. Box 34, Yakima, WA 98907.

RESPECTFULLY SUBMITTED this 13th day of March, 2015.



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