UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
VIRGIN PETROLEUM - PRINCESS, INC., *ET AL.*,	)	**Docket No. RCRA-02-2002-7501**
	)	
Respondents.	)	

ORDER ON CROSS MOTIONS FOR ACCELERATED DECISION

I. Background

This proceeding was initiated on September 27, 2002, by a Complaint issued by Region 2 of the U.S. Environmental Protection Agency (EPA) under Section 9006 of the Solid Waste Disposal Act, as amended by, *inter alia,* the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*., (RCRA or the Act). The Complaint alleges ten counts of violation of the Act and the regulations promulgated thereunder governing Underground Storage Tank (UST) systems.

Respondents, Virgin Petroleum - Princess, Inc., Virgin Petroleum - Diamond, Inc., Virgin Petroleum - Two Brothers, Inc., Virgin Petroleum - Peter's Rest, Inc., Virgin Petroleum - Boetzberg, Inc., and Virgin Petroleum - Glynn, Inc., are the owners and/or operators of UST systems containing gasoline at service stations located on the island of St. Croix, in the United States Virgin Islands. Yusef ("Joe") Jaber, a Virgin Island real estate broker, is the
President of each corporate Respondent.

Pursuant to Sections 2002, 9002 and 9003 of the Act, EPA promulgated federal regulations governing UST systems, codified at 40 C.F.R. Part 280, setting forth requirements for owners and operators of UST systems. One such requirements is that owners and operators of UST systems are required to provide a method, or combination of methods, to detect releases from the UST systems. 40 C.F.R. § 280.40.

In 2000 and 2002, EPA conducted inspections of several of Respondents' facilities to determine compliance with the Act and 40 C.F.R. Part 280. In 2000 and 2001, EPA issued four information request letters to the Virgin Petroleum Service Stations, to the attention of Mr. Joe Jaber, requesting information on UST systems owned and/or operated by Virgin Petroleum, Inc., to determine compliance with the Act and 40 C.F.R. Part 280. EPA did not receive a response to the first three information request letters. On March 21, 2002, Mr. Jaber submitted a response to the Fourth Information Request.

Based on the inspections and the responses to the Information Request letter, the Complaint charged Respondents in Count 1 with failure to comply with information submission requirements, in Counts 6 and 8 with improper temporary closure of UST systems at two facilities, in Counts 2, 3, 4, 5, 7 and 9 with failure to provide release detection for UST systems and failure to maintain records demonstrating compliance at six facilities, and in Count 10 with failure to provide financial assurance required for UST systems under 40 C.F.R. § 280.93 at six facilities. Complainant proposed a total penalty of $82,087 to be assessed against Respondents for the alleged violations.

Respondents filed an Answer, denying liability for the alleged violations, setting forth affirmative defenses, and requesting a hearing. In a "First Stipulation," dated February 27, 2003, Respondents admitted that they did not perform release detection or maintain release detection records as specified in the regulations during the time periods relevant to the allegation in Counts 2 through 9 of the Complaint. In the Answer, the Respondents admitted that, in their response dated March 21, 2002, to EPA's information request, they indicated that they did not have financial assurance for the USTs in question. However, Respondents asserted that such insurance was not available in the Virgin Islands and that no other service stations on the Islands have coverage. Answer ¶ 142.

Prehearing exchanges were filed, and this matter was set for hearing to commence on September 29, 2003.

On April 17, 2003, Complainant filed a Motion for Partial Accelerated Decision as to Liability and Brief in Support (Motion), requesting an accelerated decision on Respondent's liability for violations described in counts 2 through 10 of the Complaint. Respondents submitted a Response to Motion for Accelerated Decision as to Liability and Cross-Motion for Full Accelerated Decision (Response, or Cross Motion) on May 16, 2003. Complainant's Reply to Respondents' Response to Motion for Partial Accelerated Decision with respect to Liability and Complainant's Response to Cross Motion for Full Accelerated Decision (Complainant's Reply) was submitted on May 22, 2003. Respondents submitted a "Reply Re Cross-Motion for Full Accelerated Decision" on June 2, 2003 (Respondent's Reply).

On June 11, 2003, Complainant filed a Motion to Amend Complaint, which was granted, removing Respondent Virgin Petroleum - Glynn Inc. from Count 1, and adding allegations that the Fourth Information Request letter was sent to additional addresses. Respondents were provided 20 days from the date of service of the Amended Complaint to file an Answer to the Amended Complaint or merely an Answer to the additional allegations. Respondents did not respond within that time period, but on August 28, 2003, filed a Motion for Leave to file an amended Answer out of time, along with an Answer to the additional allegations. The Motion for Leave states that the Answer to the Amended Complaint was untimely due to administrative oversight, and that the new allegations of the Amended Complaint should not be deemed admitted because they are not substantively different from any prior allegations or defenses, and the delay should not cause EPA any undue prejudice. The Answer to the Amended Complaint neither admits nor denies the new allegations.

To date, Complainant has not filed an opposition to the Motion for Leave. Whether the new allegations are admitted or denied does not impact the outcome of the decision herein on the cross motions for accelerated decision, and the ruling on the Motion for Leave is therefore reserved for further proceedings.

II. Standards for Accelerated Decision

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

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgement as a matter of law.

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

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

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

III. Count 1 and the Paperwork Reduction Act

A. Arguments of the Parties

Count 1 alleges that Respondents Princess, Diamond, Two Brothers, Peter's Rest, Boetzberg, and Virgin Petroleum failed to respond to First, Second and Third Information Request letters issued by EPA on or about June 13, 2000, August 10, 2000, and October 18, 2000, respectively, and failed to respond to EPA's Fourth Information Request letter, which required a response by February 23, 2002, until March 21, 2002.

Complainant does not request accelerated decision as to Count 1, but Respondents request a "full accelerated decision" in their favor, on the basis that the Paperwork Reduction Act is a complete defense to this proceeding. Specifically, Respondents assert that Section 9005 of the Act, the statutory authority for EPA's issuance of Requests for Information, "is circumscribed by the Paperwork Reduction Act" (PRA), 44 U.S.C. § 3501 *et seq*. The PRA requires authorization by the Office of Management and Budget (OMB) of any "collection of information" by a federal agency, and upon such approval, the collection of information is assigned a control number. If a collection of information does not include a control number, or a statement that no response is required unless a valid control number is displayed, then no penalty can be imposed for failure to comply with a collection of information. 44 U.S.C. §§ 3507, 3512. Respondents argue that the Requests for Information at issue are a "collection of information" that is covered by 40 C.F.R. Part 280, and that Part 280 was approved and given an OMB control number 2050-0068. Response at 3, 4. Because the Requests for Information did not contain that control number, or advise Mr. Jaber that he was not required to respond unless they displayed a valid control number, they are "fatally defective." Response at 5. Specifically, the Requests for Information are a duplicative requests for data required under 40 C.F.R. § 280.34, Respondents assert. Response at 6.

In addition, Respondents state that the fact that they responded to a Request for Information does not indicate that they have waived the PRA defense, and that the PRA defense may be raised at any time during a proceeding, citing *Center for Auto Safety v. National Highway Traffic Safety Administration,* 244 F. 3d 144, 150 (D.C. Cir. 2001).

Recognizing that there is an exception to the PRA requirements for agency investigations, under 44 U.S.C. § 3518(c)(1), Respondents assert that Request for Information letters cover information within the scope of EPA regulations and that the control number for the regulation, 2050-0068, was required to be displayed on the letters. Without doing so, Respondents argue, EPA cannot bootstrap such letters as being in compliance with the PRA. Response page 6. Respondents assert that the Requests for Information, "Enclosure II," is a "very standard questionnaire that has been utilized to pose identical questions to ten or more persons," presumably sent to hundreds of thousands of respondents nationally, and that a response thereto imposes an enormous burden on Respondents to gather up and produce the documents requested. Reply at 3-4. Further, Respondents note that the letters do not state that an official investigation of Respondents' facilities had

commenced. Reply at 5. Respondents assert that EPA had a duty under the PRA to inform Mr. Jaber that the type of information requested was approved by OMB and to include the control number 2050-0068, or to inform him that EPA had no right to demand the information. EPA failed to do so, and the statement in the letters that "This information request is not subject to the requirement of the Paperwork Reduction Act . . . " or any conclusory self-serving statement that the agency is conducting an investigation is not sufficient to meet the administrative investigation exemption.

Complainant asserts that the Response is in essence a motion to dismiss, which is untimely as it was filed after the deadline for dispositive motions of April 18, 2003, set by an Order dated March 27, 2003. As to the merits of the Cross Motion, Complainant points out that the PRA plainly states that it does not apply to an investigation of specific individuals or entities. Complainant's Reply at 7. Complainant cites to legislative history of the PRA, which clarifies that the exemption covers all law enforcement investigations, and to OMB's regulations implementing the PRA, which state that the exemption applies after a case file is opened as to a particular party. Complainant's Reply at 7, *citing* S. Rep. No. 96-930, at 42 (1980); 5 C.F.R. § 1320.4; 60 Fed. Reg. 30438, 30439 (June 8, 1995). Because EPA had inspected Respondents' facilities to determine compliance with UST requirements and subsequently sent the information request, Complainant asserts that an investigation had commenced. Complainant's Reply at 8-9.

B. Discussion

As to Complainant's argument that Respondents' Cross Motion for Accelerated Decision was untimely, the failure to meet the deadline set by an Order does not preclude the issuance of an accelerated decision in their favor. An accelerated decision may be issued *sua sponte*. 40 C.F.R. § 22.20(a); s*ee, Caravan Refrigerated Cargo, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989)(where party argued that the cross motion for summary judgment should have been denied as untimely, filed 14 days after the deadline set for such motions, the court upheld summary judgment applying the reasoning that a court may issue summary judgment orders *sua sponte*).

The PRA provides, at 44 U.S.C. § 3512, as follows:

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if–
>
> (1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or
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> (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.
>
> (b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

The exemption at issue is set forth in Section 3518(c)(1)(B) of the PRA, which provides, in pertinent part:

> (c)(1) Except as provided in paragraph (2), this subchapter shall not apply to the collection of information--
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> * * *
>
> (B) during the conduct of--
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> * * *
>
> (ii) an administrative action or investigation involving an agency against specific individuals or entities;
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> * * *
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> (c)(2) This subchapter applies to the collection of information during the conduct of general investigations . . . undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

Pursuant to the latter section of the PRA, the regulations promulgated by OMB provide, at 5 C.F.R. § 1320.4:

> (b) The requirements of this Part apply to the collection of information during the conduct of general investigations or audits (other than information collected in an antitrust investigation to the extent provided in paragraph (a)(3) of this section) undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.
>
> (c) The exception in paragraph (a)(2) of this section applies during the entire course of the investigation, audit, or action, whether before or after formal charges or complaints are filed or formal administrative action is initiated, but only after a case file or equivalent is opened with respect to a particular party. In accordance with paragraph (b) of this section, collections of information prepared or undertaken with reference to a category of individuals or entities, such as a class of licensees or an industry, do not fall within this exception.

The multiple Request for Information letters sent by the EPA did not display a valid OMB control number and did not inform Mr. Jaber that a response was not necessary unless the letters displayed a valid control number. Rather, the letters stated: "This information request is not subject to the requirements of the Paperwork Reduction Act . . ." Motion, Exhibit 4 p. 2.

The question is whether the Request for Information letters at issue fit within the PRA exemption for "an administrative action or investigation involving an agency against specific individuals or entities." 44 U.S.C. § 3518(c)(1)(B)(ii).

Legislative history of the PRA explains the exemption for administrative action or investigation as "intended to preserve a well-settled exception for subpoenas and similar forms of compulsory process used for the collection of evidence or other information in an adjudication or

investigation for law enforcement purposes." S. Rep. No. 96-930, at 55-56 (1980). The Environmental Appeals Board (EAB) has observed, "In practice, the administrative enforcement exemption to the PRA has been applied to ICRs [information collection requests or collections of information] that are compulsory in nature and a standard part of an agency's investigatory program." *Zaclon, Inc.,* 7 E.A.D. 482, 493 (EAB 1998)(citing *United States v. Saunders*, 951 F.2d 1065, 1067 (9th Cir. 1991)(summonses issued by the IRS in conjunction with tax investigations are within the PRA's administrative enforcement exemption); *United States v. Particle Data, Inc.*, 634 F. Supp. 272, 275 (N.D. Ill. 1986)(document requests for audit purposes are within the exemption); *Phillips Petroleum Co. v. Lujan*, 963 F.2d 1380, 1387 (10th Cir. 1992); *Shell Oil Co. v. Babbitt*, 945 F. Supp. 792, 807 (D. Del. 1996), *aff'd*, 125 F.3d 172, 177 (3d Cir. 1997)). The EAB stated that the summonses and audits in these cases "were for the specific purpose of determining the recipients' compliance with certain legal obligations," and were thus distinct from the RCRA permit application call-in letter at issue in *Zaclon, Inc.*, 7 E.A.D. at 494. The call-in letter requested submission of a part B post-closure permit application for a closed waste pile. The EAB held that the letter was not subject to the exemption for administrative enforcement actions and investigations, because the letter did not suggest that company's compliance was under investigation, but rather was the first step in the RCRA permitting process, and there was no indication of an adversarial relationship between Zaclon and EPA. 7 E.A.D. 494. EPA had no reason to believe that the company would not comply with the information request; compliance only became an issue after it failed to respond to the letter within the required time period. *Id.*

In the case at hand, during inspections of Respondents' facilities in May and September 2000, EPA inspectors were unable to obtain or view the required documentation, records or information related to the facility's management of petroleum products in USTs in specific Release Detection Records. The May 2000 Inspection Report states that there was no documentation at the facility to show release detection record keeping at the Princess, Sunny Isle and Tide Village facilities. Complainant's Prehearing Exchange Exhibit 7. The September 2000 Inspection Report states that there was no documentation at the facility to show release detection record keeping at the Hannah's Rest, Peter's Rest and Glynn facilities. Complainant's Prehearing Exchange Exhibit 8.

The Request for Information letters sent by EPA were for the specific purpose of determining the Respondents' compliance with the release detection and other UST requirements, as evidenced by the statement in each letter that "This information is necessary to determine whether your UST systems are in compliance with Subtitle I of RCRA . . . and the regulations promulgated pursuant thereto. . ." Motion, Exhibit 4 p. 1; Complainant's Prehearing Exchange Exhibit 1 p. 1. Enclosure II to the Information Request letter requested information specific to Respondents, and was not a standard questionnaire seeking general information from any UST owner, as evidenced by the reference to Mr. Joe Jaber in the text. Motion Exhibit 4 p. 5, ¶ 1 Therefore, the Requests for Information were for investigatory purposes and were within the administrative investigation exemption of the PRA, 44 U.S.C. § 3518(c)(1)(B)(ii).

Accordingly, Respondents' cross motion for accelerated decision with respect to Count 1 is denied.

IV. Counts 2 through 9

A. Background

Pursuant to 40 C.F.R. § 22.20(a), Complainant requests an order granting accelerated decision as to Respondents' liability on Counts 2 through 10 of the Complaint, on the basis that, as to these violations, no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law. Count 2 through 9 are addressed first.

Section 9003 of RCRA authorizes EPA to promulgate regulations for UST release detection, prevention and correction. The statute provides at Section 9003(c) that the regulations must include, *inter alia*, "requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment" and "requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing or comparable system." 42 U.S.C. § 6991b(c)(1) and (2).

Accordingly, EPA promulgated implementing regulations which require owners and operators of UST systems to ensure that their USTs are not leaking, including 40 C.F.R. § 280.41 which provides, in pertinent part:

> (a) *Tanks*. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43(d) through (h) except that:
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> (1) UST systems that meet the performance standards in § 280.20 or §280.21, and the monthly inventory control requirements in § 280.43(a) or (b), may use tank tightness testing . . . at least every 5 years until December 22, 1998, or until 10 years after the tank is installed or upgraded under § 280.21(b), whichever is later;
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> (2) UST systems that do not meet the performance standards in § 280.20 or § 280.21 may use monthly inventory controls (conducted in accordance with §280.43(a) or (b)) and annual tank tightness testing . . . until December 22, 1998 when the tank must be upgraded under § 280.21 or permanently closed under §280.71 . . . .

In turn, Section 280.43(a) provides as follows:

> Each method of release detection for tanks used to meet the requirements of §280.41 must be conducted in accordance with the following:
> (a) *Inventory control*. Product inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0 percent

of flow-through plus 130 gallons on a monthly basis in the following manner:

(1) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;

(2) The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch;

(3) The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory before and after delivery;

(4) Deliveries are made through a drop tube that extends to within one foot of the tank bottom;

(5) Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of 6 cubic inches for every 5 gallons of product withdrawn; and

(6) The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch at least once a month.

Inventory volume measurements for "regulated substance inputs" are the gallons of fuel delivered, and "withdrawals" are the gallons of fuel pumped out of the tank. Inventory volume measurements for the amount still remaining in the tank are made by dipping a measuring stick into the tank and noting the level of liquid in the tank to the nearest one-eighth of an inch. The amount of fuel in the tank in inches is then converted to gallons by using a conversion chart. The resulting number of gallons is the "stick inventory." Inventory control, also known as inventory reconciliation, must be performed on a monthly basis, by calculating the "book inventory," *viz.,* the beginning inventory plus gallons delivered, minus gallons pumped, and then comparing the difference between the "book inventory" and the "stick inventory" with the regulatory standard of one percent of flow-through (total gallons pumped from the tank) plus 130 gallons. If that difference exceeds the regulatory standard for two consecutive months, then the owner or operator is required to report a suspected release to EPA or authorized state agency, and to investigate and confirm suspected releases. 40 C.F.R. §§ 280.40(b), 280.50(c)(2), 280.52.

Records of release detection are required to be kept under 40 C.F.R. §§ 280.34(b)(4) and 280.45. Section 280.34(b)(4) states that "Owners and operators must maintain the following information . . . Recent compliance with release detection requirements," and Section 280.45 states that "All UST system owners and operators must maintain records in accordance with § 280.34" and "the results of any sampling, testing, or monitoring must be maintained for at least 1 year."

The regulations provide further that "When a UST system is temporarily closed, owners and operators must continue . . . any release detection in accordance with subpart D," unless the UST is empty. 40 C.F.R. § 280.70(a)

Respondents are charged in Counts 2, 3, 4, 5, 7 and 9 of the Complaint with failure to provide release detection, and to maintain records demonstrating compliance with release detection

requirements, for the UST systems at various facilities owned by Respondents. Specifically, Count 2 alleges the failure of Virgin Petroleum - Princess, Inc. to provide release detection and records showing compliance for USTs at the Princess Service Station; Count 3 alleges the failure of Virgin Petroleum - Diamond, Inc. to provide release detection and records showing compliance for USTs at the Sunny Isle Service Station; Count 4 alleges the failure of Virgin Petroleum - Two Brothers, Inc. to provide release detection and records showing compliance for USTs at the Hanna's Rest Service Station; Count 5 alleges the failure of Virgin Petroleum - Peter's Rest, Inc. to provide release detection and records showing compliance for USTs at the Peter's Rest Service Station; Count 7 alleges the failure of Virgin Petroleum - Boetzberg, Inc. to provide release detection and records showing compliance for USTs at the Tide Village Service Station; and Count 9 alleges the failure of Virgin Petroleum - Glynn, Inc. to provide release detection and records showing compliance for USTs at the Glynn Service Station.[1]

Count 6 alleges that the UST systems at the Tide Village facility, owned by Virgin Petroleum - Boetzberg, Inc. had not been in service since December 1, 1999 and that each tank contained approximately 1000 gallons of gasoline, but that on or about July 25, 2000, the Tide Village facility opened and began selling gasoline. Amended Complaint ¶¶ 109, 112. Count 6 alleges further that at the time of the May 23, 2000 inspection, there were no records demonstrating compliance with release detection requirements at that facility, and that Mr. Jaber indicated that release detection was not being performed on the USTs at that facility. Amended Complaint ¶ 110, 111. Therefore, the Amended Complaint alleges that Respondent Boetzberg failed to provide release detection for UST systems that were temporarily closed between December 1, 1999 and May 23, 2000, in violation of 40 C.F.R. § 280.70(a).[2]

Count 8 alleges that the UST systems at the Glynn facility, owned by Virgin Petroleum - Glynn, Inc. had not been in service since December 1, 1999, according to Mr. Jaber, and that each tank contained approximately 1000 gallons of gasoline, but that on or about July 25, 2000, the Glynn facility opened and began selling gasoline. Amended Complaint ¶ 129. Count 8 alleges further that at the time of the September 25, 2000 inspection, there were no records demonstrating compliance

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[1] The Complainant also alleges that Virgin Petroleum, Inc., is liable for Counts 2 through 9, but does not request in its Motion a finding of liability against Virgin Petroleum, Inc. because Respondents did not admit in their Answer that Virgin Petroleum, Inc. is an owner or operator of the UST systems at these service stations. *See,* Complaint and Answer ¶ 15; Motion n. 2.

[2] The Amended Complaint also alleges that at the time of the May 23, 2000 inspection, the fill ports were open in the UST systems, and that Respondent Boetzberg failed to cap and secure the fill ports for UST systems that were temporarily closed at the Tide Village facility. Amended Complaint ¶¶ 113, 116. Respondents deny these allegations in the Answer and Prehearing Exchange statement, but do not pursue them in their accelerated decision pleadings. It is not necessary to address these allegations on the Motion and Cross Motion for accelerated decision, as they have no effect on the rulings on the Motions.

with release detection requirements at that facility, and that Mr. Jaber indicated that release detection was not being performed on the USTs at that facility. Amended Complaint ¶ 130, 131. Therefore, the Amended Complaint alleges that Respondent Glynn, Inc. failed to provide release detection for UST systems that were temporarily closed between December 1, 1999 and July 25, 2000, in violation of 40 C.F.R. § 280.70(a).

B. Discussion

Complainant points out that Respondents admit in their Answer (at ¶ 20) that the UST systems are subject to release detection requirements, and that they admit in the First Stipulation, dated February 27, 2003 (Motion, Exhibit 5) that they did not perform release detection as specified in the regulations and that they did not compile and record information relating to release detection as required under the regulations. Complainant's position is that by these admissions, Respondents have left no facts in contention as to liability for Counts 2 through 9.

Respondents admit in their Response to the Motion that they "'dropped the ball' in their recordkeeping duties, in that they did not keep daily and monthly inventory data in the 'form and format" required by applicable EPA regulations." Response at 2. The First Stipulation states as follows:

> Respondents did not do release detection as specified in the regulations . . . during the time periods relevant to the allegations in Counts 2 through 9 of EPA's Complaint, but did have an informal release detection method. Respondents did not during these relevant time periods compile and record information relating to release detection in the form and format required under the regulations.

Motion, Exhibit 5. However, Respondents assert that there was no evidence of any fuel leak, that all tanks and lines passed the tank integrity testing on June 16, 2001, and that they

> will demonstrate at the hearing herein . . . that they *substantially complied* with the release detection/recordkeeping methods of 40 C.F.R. Part 280 Subpart D. The proof at the hearing will show that Respondents' fuel inventory and sales record systems, unsophisticated though they might have been in this early stage of ownership and operation, would nevertheless have demonstrated discrepancies in fuel inventory, i.e., loses of fuel due to theft or leakage. Tank volumes were measured daily, to within a quarter inch, and in the same way as required by EPA regulations, for example. Tank inventory data was periodically compared with purchase and sales data, in the same manner, and seemingly to the same level of precision, as the formal EPA methodology.

Response at 2. Respondents acknowledge that "evidence of Respondents' informal recordkeeping and repeat integrity testing bears primarily upon the penalty issue." Response at 3.

Respondents are correct that the degree to which they complied with the regulations is an

issue pertinent to the penalty assessment. "Substantial compliance" is not a defense to liability. *See, Smith v. Coldwell Banker Real Estate Services,* 122 F. Supp. 2d 267, 272-273 (D. Conn. 2000)(court is "unwilling to recognize [a defense of substantial compliance] absent any language in the statute or its regulations supporting a defense of 'substantial compliance' with the purpose of the statute."). There is no dispute that Respondents did not comply with the substantive requirements of Section 280.43(a), *e.g.,* they did not show that they conducted inventory control to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis," did not show that "Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day" and that "The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch." 40 C.F.R. § 280.43(a) (emphasis added). Whether or not a UST system was pressure tested, or whether it actually leaked or not, are not relevant to the issue of liability.

Complainant has met its initial burden of showing that there exists no genuine issue of material fact as to Respondents' liability for Counts 2 through 9, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, . . . show[ing] that there is no genuine issue as to any material fact and that [Complainant] is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)). Respondents have not raised any genuine issues of fact material to liability for Counts 2 through 9, and have not shown any entitlement to judgment as a matter of law. Therefore, Complainant's Motion for Accelerated Decision will be granted as to Counts 2 through 9.

V. Count 10

A. Background and Parties' Arguments

Count 10 of the Amended Complaint alleges that Mr. Jaber in the March 21, 2002 response to the Fourth Information Request Letter noted that Respondents did not have financial assurance for the six facilities at issue (Princess, Sunny Isle, Hanna's Rest, Peter's Rest, Tide Village, and Glynn facilities), and the that failure to provide financial assurance for those facilities constitutes a violation of 40 C.F.R. § 280.93.

Financial responsibility is governed by 40 C.F.R. § 280.93(a) and (b), which provides, "Owners and operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks . . . ." Section 280.94(a)(1) provides that "An owner or operator . . . may use any one or a combination of the mechanisms listed in §§ 280.95 through 280.103 to demonstrate financial responsibility under this subpart for one or more underground storage tanks . . . ." These mechanisms include, *inter alia,* a financial test of self-insurance (§ 280.95), a guarantee (§ 280.96),

insurance and risk retention group coverage (§ 280.97), a surety bond (§ 280.98), letter of credit (§ 280.99), and a trust fund (§ 280.102).

Complainant requests accelerated decision as to Respondents' liability for Count 10, on the basis that in their March 21, 2002 response to the Fourth Request for Information letter, Respondents noted that they did not have financial assurance for the UST systems at issue, and that in their Answer, Respondents admitted to not having financial assurance. Motion at 15-16 and Exhibit 4. Noting Respondents' assertion in the Answer that such insurance is not available in the U.S. Virgin Islands (Answer § 142), Complainant cites to cases holding that impossibility of obtaining insurance is irrelevant to the issue of liability for failure to comply with financial assurance requirements. Motion at 21-22.

In their Response (at 7), Respondents claim that there is not a single liability insurance carrier authorized to write insurance in the Virgin Islands that offers the insurance coverage required by 40 C.F.R. part 280. Respondents assert that the line of authority relied upon by Complainant for the proposition that the defense of impossibility does not apply to violations of environmental regulations does not apply here because such cases have never included those of true, objective impossibility, but rather, address technological or financial unfeasibility. Response at 7. Respondents argue further that it is fundamentally unfair, irrational, arbitrary, and a violation of Constitutional due process, to punish a person for failure to act where it is impossible to act. Respondent suggests that EPA's motives in singling out Respondents was selective enforcement. Response at 7-8. Respondents assert that if they were charged with civil contempt for failure to obtain insurance, the lack of insurance for sale would constitute a complete defense, citing, *inter alia, Natural Resources Defense Council v. Train,* 510 F.2d 692, 714 (D.C. Cir. 1974).

Even assuming *arguendo* that it is impossible to obtain the insurance, Complainant argues in reply, Respondents have made no showing as to the impossibility of complying by other available methods of providing financial assurance under the regulations. Complainant's Reply at 10. In a footnote, Complainant argues that even if impossibility could be a defense to liability, Respondents would still have to establish that it was indeed impossible to obtain insurance as an affirmative defense, and that EPA's research revealed that UST insurance is available in the Virgin Islands. Complainants' Reply n. 6. In support, Complainant presents an Affidavit (dated May 22, 2003) of Madho Ramnarine Singh, UST State Program Coordinator for the United States Virgin Islands UST program, in which Mr. Singh identified three insurance companies that claim to provide insurance for UST owners and operators in the Virgin Islands. Complainant's Reply, Exhibit 1.

Respondents assert that information from two reputable, competent insurance agencies conflicts with Mr. Singh's findings, that Respondents will "further pursue the matter," that these are fact issues that can be resolved at hearing, and that the "present state of the record does not permit summary administrative adjudication based upon uncontroverted evidence. Respondents acknowledge that there are alternative means to satisfy the financial responsibility requirements, but

the net worth and related requirements "are wholly unrealistic for all but the very wealthiest

independent service station operators." Respondents' Reply at 6. Singling out the other independent service station operators who cannot realistically comply is unfair, arbitrary discriminatory action and selective enforcement by EPA, Respondents assert. *Id* at 7.

B. Discussion

Respondents' Answer admitted only that in the March 21, 2002 response to the Request for Information, Mr. Jaber noted that Respondents did not have financial assurance for the facilities at issue. Complaint and Answer ¶ 142. Respondents denied the allegation that "Respondents failed to provide financial assurance for UST systems" at those facilities. Complaint and Answer ¶ 143. Respondents do not explain the reason for such denial, except to assert that the violation should be legally excused if performance is an impossibility. Respondent's Prehearing Exchange at 3. Nevertheless, Respondents in their Response and Reply have not denied that they failed to provide financial assurance. Thus, the question presented is whether Respondents have demonstrated that impossibility of complying with financial assurance requirements is a defense to liability for Count 10.

Respondents admit that "EPA is correct . . . that there are alternative means of satisfying financial responsibility requirements relating to UST tanks." Respondents' Reply at 6. The regulations list several alternatives to insurance as means of obtaining financial responsibility. 40 C.F.R. § 280.95-280.103. For purposes of establishing financial responsibility, compliance can be achieved by use of any one, or a combination, of the mechanisms listed. 40 C.F.R. § 280.94(a) (1). Indeed, "In promulgating the regulation, the Agency allowed UST owners and operators to choose among these various mechanisms (or combination of mechanisms) in order to address the difficulty many were encountering in obtaining traditional pollution liability insurance." *B&R Oil Co., Inc.*, 8 E.A.D. 39 (EAB 1998) *citing* Financial Responsibility Requirements for Petroleum Underground Storage Tanks, 53 Fed. Reg. 43,322, 43,324-5 (Oct. 26, 1988).

The fact that compliance with any alternative may be financially unfeasible for many UST owners and operators does not render the alternatives impossible; "[b]y definition, where there is a possible alternative, there is no impossibility." *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 866 (7th Cir. 1994)(an alternative existed where Bethlehem could have complained earlier about the restrictive time schedule and worked with EPA to modify the time schedule to assure compliance)(*citing United States v. T & S Brass & Bronze Works, Inc*., 681 F. Supp. 314, 321 (D.S.C.,1988) (because an operator could always stop operating a surface impoundment or else cease its business, it was not impossible to comply with a RCRA deadline)); *B&R Oil Co., Inc*., 8 E.A.D. 39, 58 (EAB 1998) (the ability of competitors to obtain insurance, and the failure of respondent to obtain partial coverage or explore combining two forms of financial assurance, undermined the claim that obtaining insurance was impossible).

Moreover, Respondents did not point to any evidence in support of their argument that they were unable to utilize any of the acceptable alternatives to insurance to satisfy their financial

responsibility requirements. Respondents' mere assertions, without presentation of any evidence or affidavit in support, that it has "information . . . from two reputable, competent insurance agencies"conflicting with Mr. Singh's findings, that there are factual issues that can be resolved at hearing, and that the "present state of the record does not permit summary administrative adjudication based upon uncontroverted evidence," together with Respondents' mere promise that they will "further pursue the matter," do not meet the standards for opposing accelerated decision or summary judgment. Respondents have only alleged that a factual dispute may exist, or that future proceedings may turn something up, which is insufficient to defeat Complainant's motion for accelerated decision. *Green Thumb Nursery, Inc.,* 6 E.A.D. 782 n. 23 (EAB 1997). Respondents have not provided "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Respondents also have not stated reasons that they cannot present by affidavit facts essential to justify their position that accelerated decision in favor of EPA should be denied or continued pending discovery. *See,* Federal Rule of Civil Procedure 56(f); *Celotex*, 477 U.S. at 326.

Respondents have utterly failed to support their assertions that EPA singled out the service station operators who cannot realistically comply and that it constitutes unfair, arbitrary discriminatory action or selective enforcement. These assertions, without any factual or evidentiary support, do not meet the standards for opposing a motion for accelerated decision, and do not even mention the standards for establishing that EPA engaged in selective enforcement. *See, B & R Oil*, 8 E.A.D. at 51 ("Respondent faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement. . . . an affirmative defense of selective enforcement . . requires proof that (1) the government 'singled out' a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.").

Even if it was impossible to obtain financial assurances in the Virgin Islands, it is well established in the courts that impossibility is not a defense to liability under RCRA, although it is pertinent to the appropriate remedies or imposition of sanctions. *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990), *aff'd without opinion*, 955 F.2d 45 (6th Cir. 1992), *cert. denied*, 506 U.S. 820 (1992)(*citing United States v. Clow Water System, A Division of McWane, Inc.*, 701 F. Supp. 1345, 1348 (S.D. Ohio 1988)); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 285 (W.D. Mich. 1988), *appeal dismissed*, 867 F.2d 611 (6th Cir. 1989); *T & S Brass*, 681 F. Supp. at 321.

Therefore, Respondents' defense that it is impossible to secure financial assurances under RCRA does not preclude a finding of liability for Count 10. Complainants have sustained their burden on the Motion to show that no genuine issue of material fact exists as to Respondents' liability for Count 10, and that Complainant is entitled to judgment as a matter of law.

VI. Conclusions

There are no genuine issues of material fact as to liability for Counts 2 through 10 of the Amended Complaint. Complainant is entitled to judgment as a matter of law on those Counts. Specifically, Respondent Virgin Petroleum - Princess, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D for the UST systems at the Princess facility between April 1, 2000 and August 20, 2002, and to maintain records demonstrating compliance, as alleged in Count 2 of the Amended Complaint. Respondent Virgin Petroleum - Diamond, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D for the UST systems, and to maintain records demonstrating compliance, at the Sunny Isle facility between March 31, 2000 and August 20, 2002, as alleged in Count 3 of the Amended Complaint. Respondent Virgin Petroleum - Two Brothers, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D for the UST systems at the Hanna's Rest facility between July 25, 2000 and August 20, 2002, and to maintain records demonstrating compliance, as alleged in Count 4 of the Amended Complaint. Respondent Virgin Petroleum - Peter's Rest, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D for the UST systems at the Peter's Rest facility between July 25, 2000 and August 20, 2002, and to maintain records demonstrating compliance, as alleged in Count 5 of the Amended Complaint. Respondent Virgin Petroleum - Boetzberg, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D and Section 280.70(a) for the UST systems that were temporarily closed at the Tide Village facility between December 1, 1999 and July 25, 2000, as alleged in Count 6 of the Amended Complaint. Respondent Virgin Petroleum - Boetzberg, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D for the UST systems at the Tide Village facility between July 25, 2000 April 1, 2000 and August 20, 2002, and to maintain records demonstrating compliance, as alleged in Count 7 of the Amended Complaint. Respondent Virgin Petroleum - Glynn, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D and Section 280.70(a) for the UST systems that were temporarily closed at the Glynn facility between December 1, 1999 and July 25, 2000, as alleged in Count 8 of the Amended Complaint. Respondent Virgin Petroleum - Glynn, Inc. is liable for failure to provide release detection as required by 40 C.F.R. Part 280 Subpart D for the UST systems at the Glynn facility between July 25, 2000 and August 20, 2002, and to maintain records demonstrating compliance, as alleged in Count 9 of the Amended Complaint.

Respondents Virgin Petroleum - Princess, Inc., Virgin Petroleum - Diamond, Inc., Virgin Petroleum - Two Brothers, Inc., Virgin Petroleum - Peter's Rest, Inc., Virgin Petroleum - Boetzberg, Inc., and Virgin Petroleum - Glynn, Inc., are liable for failure to provide financial assurance for UST systems at the Princess, Sunny Isle, Hanna's Rest, Peter's Rest, Tide Village and Glynn facilities, in violation of 40 C.F.R. § 280.93.

The issues as to the penalty assessment, remain in dispute and are reserved for further proceedings.

ORDER

2. Complainant's Motion for Partial Accelerated Decision is **GRANTED** as to liability for Counts 2 through 10 of the Amended Complaint.

3. Respondents' Cross Motion for Accelerated Decision is **DENIED.**

4. The hearing as previously scheduled shall be held on the issues of liability for Count 1, and on the penalty for the violations alleged in Counts 1 through 10 of the Amended Complaint.

5. The parties shall continue to negotiate a settlement of this matter in good faith, being mindful that a Consent Agreement and Final Order must be fully executed and filed with the Regional Hearing Clerk by September 26, 2003 in order for the hearing, scheduled to commence on September 29, 2003, to be cancelled.

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Susan L. Biro
Chief Administrative Law Judge

Date: September 10, 2003
Washington, D.C.