UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
GOODMAN OIL COMPANY,	**)**	**Docket No. RCRA -10-2000-0113**
and	**)**	
GOODMAN OIL COMPANY OF	**)**	
LEWISTON,	**)**	
	)	
Respondents	**)**	

ORDER ON RESPONDENTS' MOTIONS
FOR RECONSIDERATION
AND TO SUPPLEMENT PRE-HEARING EXCHANGE

An Order was issued in this matter on August 22, 2001, granting Complainant's Motion for Accelerated Decision on Liability on Counts 1 through 6, 15 through 22, and 27 of the Amended Complaint, and denying Complainant's Motion for Accelerated Decision on Respondents' Affirmative Defenses. On August 31, 2001, Respondents submitted a Motion to Supplement Pre-Hearing Exchange, along with six exhibits. On September 4, 2000, Respondents submitted a Motion for Reconsideration of the Order, asserting that the accelerated decision as to Count 1 was in error and that newly discovered evidence, including some of the six exhibits, supports Respondents' selective enforcement defense and therefore that the defense should be reinstated as to Counts 1 through 6, 15 through 22 and 27.

I. Motion to Supplement Pre-Hearing Exchange

Respondents move to supplement their prehearing exchange with the following six exhibits: FOIA response letters from Region 10 acknowledging receipt of Freedom of Information Act (FOIA) requests on August 6, 2001 (Respondents' Prehearing Exhibits ("RX") 84, 85), Respondents' letter dated August 8, 2001 to EPA Region 10 FOIA officer (RX 86), EPA Region 8 FOIA response letter dated August 28, 2001 (RX 87), and Region 10 FOIA response letters dated August 29, 2001, with enclosures (RX 88, 89).

Respondents assert that they have good cause for Respondents' failure to exchange the

information earlier and that they have provided the information to all other parties as soon as Respondents had control of the information, in accordance with 40 C.F.R. § 22.22(a)(1). Grounds stated are that Respondents requested the information on July 25, 2001, that they requested expedited FOIA responses, and that they only recently received the information from EPA through FOIA, as indicated by the dates of the FOIA response letters.

On that basis, Respondents have shown good cause under 40 C.F.R. § 22.22(a)(1). Accordingly, the Respondents Motion to Supplement Pre-Hearing Exchange is hereby **GRANTED.**

II. Motion for Reconsideration

Specifically, as to Count 1, Respondents point out an error in the quotation of 40 C.F.R. § 280.70(c) on page 4 of the Order.[1] The second sentence of that paragraph should read, "Owners and operators must permanently close the substandard UST systems *at* the end of this 12-month period . . . ." (Italics added). The word "*by*" was mistakenly substituted for the word "*at*" in the quotation of that provision. Respondents argue that this error is significant, and indicates an interpretation of the provision contrary to EPA's intent as stated in the Preamble to the final regulation, and merits a denial of an accelerated decision as to Count 1. Respondents also assert that the Court erroneously relied upon the Environmental Appeals Board (EAB) decision in *V-1 Oil Company*, RCRA (9006) Appeal No. 99-1 (EAB February 25, 2000) to support an interpretation of Section 280.70(c) as requiring permanent closure of underground storage tanks (USTs) *within* 12 months of temporary closure. Respondents assert that the provision should be interpreted to allow a reasonable time *after* the 12 month temporary closure period to complete permanent closure.

The Court appreciates the Respondents having pointed out this scrivener's error in the quotation of Section 280.70(c). An Erratum is being issued today to correct the error. However, the error does not affect the ruling in the Order on Count 1. The Order did not reach the issue of whether Section 280.70(c) allows a reasonable time *after* the 12-month period to permanently close USTs, because Respondents neither alleged nor proffered any evidence which showed that permanent closure was, in fact, completed within some "reasonable time" after the 12 months expired in February 1999, or that it has ever been completed. Order p. 6. Nor did Respondents' allege that non-completion of permanent closure at this juncture in time, some 2 ½ years after the 12 month period is reasonably justified. Thus, even assuming that Respondents' interpretation

[1] The quotation was unfortunately taken from Complainant's erroneous quotation of Section 280.70(c) on page 12 of its Memorandum in Support of Motion for Partial Accelerated Decision on Liability.

of Section 280.70(c) is correct,[2] there was no factual basis for finding the delay in closure after the twelve months was lawful. In the Motion for Reconsideration, Respondents have not proffered any newly discovered evidence, or stated any specific facts, as to permanent closure of the USTs at issue in Count 1. There are no facts upon which a reasonable trier of fact could find in favor of Respondents as to Count 1. Therefore, Respondents have not raised any genuine issue of material fact as to liability for Count 1.

As to the selective enforcement defense, Respondents assert that they have newly discovered evidence which was only received recently from EPA pursuant to Respondents requests to EPA under the Freedom of Information Act (FOIA). Respondents have supplemented their prehearing exchange since issuance of the Order dated August 22, 2001. Respondents' Third and Fourth Supplement to Pre-Hearing Exchange, dated August 23 and 27, 2001 (RX 74B - 74M; 77-83); Motion to Supplement Pre-Hearing Exchange, dated August 31, 2001 (RX 84-89). Respondents state that the evidence therein shows that Goodman has been singled out for enforcement because it does business with Indians, and has then been targeted for excessive penalties widely divergent from other, similarly situated entities. The evidence includes six complaints issued by Region 10 against other entities, four of which were against owners and operators of USTs on federal Indian reservations, as part of EPA's formal strategy to conduct inspections and pursue alleged violations on Indian reservations. Respondents' Prehearing Exhibits ("RX") 74H-74M, 82. Respondents claim that EPA is pursuing the present matter because Respondents do business with Indians, under its enforcement strategy, and that EPA therefore has a stake in the exercise of Respondents' right to sell fuel to Indians. Citing to the evidence recently received from EPA through FOIA, Respondents also argue that the assessment of penalties against Goodman is excessive and unreasonable in light of EPA's responses to other UST owners and operators, both on and off Indian reservations, for more egregious violations, such as granting an extension for UST upgrade compliance, issuing field citations, and assessing nominal penalties. RX 88, 89. This evidence, according to Respondents, supports an inference that Respondents were singled out for enforcement because they do business with Indians, and suggests that EPA's issuance of the Complaint in this matter was motivated by the desire to punish Respondents for exercising their constitutional right to do business with Indian tribes. Respondents conclude that there is no prejudice to EPA because

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[2] The Order noted the EAB's reference in *V-1 Oil* to Section 280.70(c) as requiring the respondent to "implement permanent closure of the tanks *by* the end of the 12-month temporary closure period" and "to implement permanent closure *within* 12 months." *V-1 Oil*, slip. op. at 22, 25 (emphasis added). However, the EAB also referred therein to the regulations which "generally require the permanent closure of USTs that have been temporarily closed for *more than* a year." *Id.* at 2 (emphasis added). As pointed out by Respondents, the preamble to the final rule for 40 CFR Part 280 includes in its discussion of Section 280.70(c) the following: ". . . the tank will be considered temporarily closed and, *after* 12 months is up, subject to permanent closure requirements in accordance with § 280.70(c) of the final rule," and "[a]ny temporarily closed UST systems . . . must permanently close *after* the 12 month temporary closure period ends." 53 Fed. Reg. 37082, 37182-83 (Sept. 23, 1988)(emphasis added).

they are entitled to pursue the

selective enforcement defense at the hearing regarding Counts 7-14 and 23 through 26, and as to penalty issues.

First, as to the latter assertion, a clarification is appropriate. The Order of August 22, 2001 states on page 11 that "Respondents have not raised any genuine issue of material fact that is material to Respondents' liability on the basis of selective enforcement." However, the Order generally concludes on page 15 that, "[t]o the extent that these Affirmative Defenses may be relevant to mitigation of a penalty, and/or to liability for the counts upon which accelerated decision has not been requested, the Third, Fourth, Sixth and Twelfth Affirmative Defenses will not be dismissed on Complainant's Motion for Accelerated Decision." Perhaps Respondents rely on that conclusion in asserting that they are entitled to pursue selective enforcement as to liability on Counts 7-14 and 23 through 26. The Third Affirmative Defense, upon which Respondents based their selective enforcement arguments, asserts that "EPA's Amended Complaint is the result of bias and prejudice against Respondents on the part of EPA and EPA officials." The fact that the Third Affirmative Defense and the selective enforcement arguments address the Amended Complaint in general rather than any particular count or allegation of violation, and the conclusion in the Order that Respondents have not, in arguments as to selective enforcement, raised any genuine issue of material fact as to liability, means that Respondents have failed to support these arguments *as to liability in general.* Therefore Respondents are not entitled to pursue the selective enforcement defense at the hearing regarding liability on any count in the Amended Complaint.

Respondents are, however, entitled to pursue the selective enforcement argument at the hearing as it relates to the penalty assessment, based upon either the Third Affirmative Defense, to the extent it relates to the penalty proposed in the Amended Complaint, or the Tenth Affirmative Defense, which specifically relates to the penalty.

As to whether to reconsider the ruling that Respondents failed to raise a genuine issue of material fact, on the basis of newly discovered evidence of selective enforcement, a review of relevant law and precedent is an appropriate backdrop. The Consolidated Rules of Practice do not provide for reconsideration of an Administrative Law Judge's ruling. The Federal Rules of Civil Procedure, which do not apply to, but may provide guidance on, EPA administrative enforcement proceedings, provide at Rule 60(b) for relief from a ruling based upon "newly discovered evidence which by due diligence could not have been discovered in time" to move for a new trial. The EAB, agreeing with an Administrative Law Judge's refusal to consider at the penalty hearing evidence proffered in order to revisit an accelerated decision on liability, has reiterated the doctrine of law of the case, which "prevents relitigation of settled rulings." *Rogers Corp.*, TSCA Appeal No. 98-1, slip op. at 29 (EAB, November 28, 2000)(citations omitted). The EAB added that the "law of the case does not limit a court's power to revisit an issue it previously decided," and cites a Supreme Court's opinion stating that the court "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating*

Corp., 486 U.S. 800, 817 (1988)(quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)). The EAB cited to two other extraordinary circumstances: where "the evidence on a subsequent trial was substantially different" and where "controlling authority has since made a contrary decision of the law applicable to such issues." *Rogers Corp.*, slip op. at 30 (citations omitted).

With this backdrop, Respondents' additional evidence is considered. Respondents assert that the additional evidence shows a large proportion of enforcement actions taken by EPA against owners and operators of USTs on Indian reservations, which is part of EPA's enforcement strategy. Respondents assert further that the additional evidence shows large penalties assessed against Respondents compared to less severe action taken with respect to other UST owners and operators with more egregious violations. Viewing the evidence in light most favorable to Respondents, it does not support at least the second of the two prongs of a selective enforcement defense: (1) that EPA singled out Respondents while other similarly situated violators were left untouched, and that EPA's selection of Respondents was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. That is, while the evidence may indicate that EPA singled out Respondent among other UST owners and operators, there is no evidence presented by Respondents showing or suggesting that the Complainant was motivated by a desire to prevent Respondents from doing business with Indian tribes. While EPA may have an interest in preventing and enforcing UST violations on Indian reservations -- which does not indicate an impermissible motive toward Respondents – Respondents have not shown any "stake" of EPA in preventing the sales of fuel to Indian tribes. *See, B & R Oil Company, Inc.*, RCRA (3008) Appeal No. 97-3, 1998 EPA App. LEXIS 106 * 30 (EAB, November 18, 1988)(the fact that the Region followed an orderly, rational process to arrive at a target group for investigation, and then focused its efforts on one company, "hardly indicates illegal discrimination"); *citing, Falls v. Town of Dyer*, 875 F.2d 146, 148 (7th Cir. 1989)("A government legitimately could enforce its law against a few persons, even just one, to establish a precedent, ultimately leading to widespread compliance") and *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir. 1996)("Legislators often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law.")

It is concluded that Respondents have not, on the basis of their selective enforcement arguments, Prehearing Exchange, and supplements thereto, raised any genuine issue of material fact as to liability for the violations alleged in the Amended Complaint. Respondents have not demonstrated any clear error in the August 22, 2001 ruling as to selective enforcement, or a manifest injustice to Respondents.

Accordingly, Respondents Motion to Reconsider is **DENIED.** Respondents may, however, present arguments and evidence as to selective enforcement in the context of the penalty assessment. *See, Britton Construction Co.*, CWA App. No. 97-5, 97-8, 1999 EPA App. LEXIS 9 * 53 (EAB, March 30, 1999)(circumstances of EPA's enforcement effort were

appropriate to consider in reducing the penalty; "the [EAB] and many courts have specifically found that in assessing penalties, consideration of governmental action is entirely appropriate").

Susan L. Biro
Chief Administrative Law Judge

Dated: September 6, 2001
Washington, D.C.