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BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

HEARINGS CLERK  
EPA -- REGION 10

In the Matter of:

EDWARD AND THERESA WASHINES,  
DA STOR AT LILLIE'S CORNER

Wapato, Washington

Respondents.

**DOCKET NO. RCRA-10-2014-0100**

**ANSWER AND REQUEST FOR  
HEARING**

Edward Arlen Washines, Theresa Washines and Da Stor at Lillie's Corner ("Respondents") hereby answer and respond to the Complaint, Compliance Order, and Request for Hearing as follows:

**I. RESPONSES TO FACTUAL ALLEGATIONS**

**General Allegations**

1.1 Respondents admit all of the allegations contained in paragraphs 3.1, 3.2, 3.3, 3.4, and 3.5 of the Complaint, including all subparagraphs.

1.2 In paragraph 3.6 of the complaint, Respondents admit that the three underground storage tanks ("USTs") were installed in 1990 and they are used to contain petroleum. Respondents deny the allegation in paragraph 3.6 that the three USTs are a "new tank system" for purposes of enforcing the UST regulations against the Respondents.

Respondents assert and argue in response that 40 CFR § 280.20 does not apply to these USTs

because the Respondents did not design, construct, or install them, and were not required to notify EPA of their existence when they acquired ownership of such USTs.

1.3 Respondents admit all of the allegations in paragraphs 3.7 and 3.8 of the Complaint, including all subparagraphs.

1.4 Respondents deny all of the allegations in subparagraph 3.9.1., and assert and argue in response that the requirements of 40 CFR § 280.20 do not apply to the three USTs because they do not constitute a "new tank system" for purposes of enforcing regulations regarding design, construction, installation and notification of USTs under 40 CFR Part 280, Subpart B.

1.5 Respondents deny all of the allegations in subparagraph 3.9.2 to the extent the EPA is attempting to enforce the operation and maintenance requirements of 40 CFR § 280.31(a) against the Respondents for the galvanized metal siphon line before February 13, 2013. Respondents assert in response that such requirements were not applicable to the Respondents or the USTs before said date.

1.6 Respondents admit all of the allegations in subparagraphs 3.9.3, and 3.9.4.

1.7 Respondents admit all of the allegations in paragraphs 3.10, 3.11, and 3.12.

**Violation 1: Failure to Conduct Release Detection for Piping**

1.8 Respondents admit all of the allegations contained in Paragraphs 3.13 to 3.18 of the Complaint, including all subparagraphs.

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

1.9 Respondents admit all of the allegations in paragraph 3.19, but also assert in response that the previous owner and operator reported to EPA that the piping was fiberglass or flexible plastic, and EPA inspections of the USTs over several years after 1994 produced no

evidence that the siphon line was galvanized steel. Respondents also assert in response that EPA did not have any conclusive evidence that the siphon line was galvanized steel until February 2013, and has admitted as such in the record.

1.10 Respondents admit all of the allegations in paragraph 3.20, but also assert in response that they did not conduct the test on the siphon line because EPA never made a conclusive determination that the siphon line piping was galvanized steel requiring cathodic protection, and has admitted as such in the record.

1.11 Respondents admit the allegation in paragraph 3.21 that in 2013 they conducted a cathodic protection test of the siphon line and determined that the steel pipe lacked adequate cathodic protection, but assert in response that the true date of the test was not January 30 but instead February 5, 2013.

1.12 Respondents admit that on February 13, 2013, they installed a sacrificial anode to provide cathodic protection for the siphon line.

**Violation 2, Count 5:**

1.13 Respondents deny that their acts or omissions, as alleged in paragraphs 3.19 and 3.22 for the steel siphon line, constitute a violation of 40 CFR § 280.20 from at least May 1, 2009 through February 13, 2013.

**Violation 2, Count 6:**

1.14 Respondents deny that their acts or omissions, as alleged in paragraphs 3.20 through 3.22 for the steel siphon line, constitute a violation by Respondents of 40 CFR § 280.31 from at least May 1, 2009 through February 13, 2013.

**Violation 3: Failure to Maintain Financial Responsibility**

1.15 Respondents admit each all the allegations contained in Paragraphs 3.25 to 3.28

of the Complaint.

## **II. RESPONSES TO COMPLIANCE ORDER AND PENALTIES**

### **Compliance Tasks**

2.1 Respondents do not dispute imposition of the Compliance Tasks by EPA in the Compliance Order.

### **Penalties**

2.2 **Violation 2, Count 5:** Respondents deny, contest and dispute the penalty imposed by EPA of \$8,302.00 for alleged violations 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 deny that any violation of such regulation occurred and assert in response that there should be no penalty imposed.

2.3 **Violation 2, Count 6:** Respondents deny, contest and dispute the penalty imposed by EPA of \$16,683.00 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 deny that any violation of such regulation occurred and assert in response that there should be no penalty imposed.

## **III. AFFIRMATIVE DEFENSES**

### **Violation 2, Count 5:**

3.1 Respondents argue as an affirmative defense that any protective technologies such as corrosion protection must be incorporated "at the time of installation" of any USTs that

are "new tank systems." *Norman C. Mayes*, 12 E.A.D. 54, 57 (2005). Because the record shows that Respondents did not install the USTs as a "new tank system" in 1990, any requirement by EPA that Respondents must somehow upgrade or retrofit the tanks is not authorized by the UST regulations and is therefore invalid. In this case the record will show that the previous owner and operator who installed the USTs failed to notify EPA that the siphon line was galvanized steel, and there was no final factual determination that such piping was unprotected steel until February 2013. The record will also show that although EPA performed numerous inspections of the USTs under the previous owner, EPA failed to detect the steel siphon line. There is no requirement or affirmative duty in 40 CFR § 280.20 that successive owners or operators of USTs must investigate whether the information in UST notifications is correct, nor are they required to upgrade or retrofit the tank systems with such protection unless the tanks were installed before December 1988. Although EPA may argue that such requirements may be "read into" the Subpart B regulations, the Environmental Appeals Board's interpretation – that corrosion protection is required *at the time of installation of the USTs* – must control this case. EPA's interpretation of 40 CFR § 280.20 and its application of such regulation to the Respondents and the facts of this case is therefore not reasonable, and thus no deference is required under the standard in *Chevron v. NRDC*, 467 U.S. 837 (1984).

**Violation 2, Count 6:**

3.2 Respondents argue 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 installed a corrosion protection system for the steel siphon line. Under the plain language of the regulation, operation and maintenance requirements are only applicable to "all corrosion protection systems." Because there was no such system in place for the steel siphon

line during the period before upgrading on February 13, 2013, the Respondents never violated the regulation during the period alleged in the Complaint and Compliance Order. Although EPA may argue that Respondents somehow had a duty to 1) investigate whether there were sufficient corrosion protection systems for the piping or 2) upgrade the USTs, this is belied by the testing regulations of 40 CFR § 280.31(b), which are the exclusive requirements for inspection of USTs by owners or operators. As such EPA's interpretation of 40 CFR § 280.31 and its application of such regulation to the Respondents and the facts of this case is not reasonable, and no deference is warranted under the standard in *Chevron v. NRDC*, 467 U.S. 837 (1984).

#### IV. REQUEST FOR HEARING

4.1 Respondents request a hearing on the issues raised by EPA in its Complaint, Compliance Order, and Notice of Opportunity for Hearing pursuant to 42 U.S.C. § 6991e(b) and 40 CFR § 22.15(c). Respondents request such hearing for the purpose of proving the facts asserted and alleged in paragraphs 1.9, 1.10, 1.11, 3.1, and 3.2 of this Answer, which explain, and are relevant and material to the allegations made in the Complaint.

RESPECTFULLY SUBMITTED, this 27<sup>th</sup> day of May, 2014.



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