UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER DENYING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

I. RELEVANT PROCEDURAL HISTORY

On March 27, 2013, the United States Environmental Protection Agency ("EPA"), Director of the Land and Chemicals Division of Region 3 ("Complainant"), initiated this proceeding by filing an Administrative Complaint, Compliance Order and Notice of Right to Request Hearing against Aylin, Inc. ("Aylin"), Rt. 58 Food Mart, Inc. ("Rt. 58"), Franklin Eagle Mart Corp. ("Franklin Eagle"), and Adnan Kiriscioglu d/b/a New Jersey Petroleum Organization a/k/a NJPO ("Kiriscioglu") (collectively, "Original Respondents") for alleged violations of Section 9005(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991d(a), and certain provisions of the Commonwealth of Virginia's federally-authorized underground storage tank ("UST") regulations ("VA UST Rules").[1] The alleged violations arose from the Original Respondents' purported ownership and/or operation of the USTs located at

[1] Pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, EPA granted final authorization to the Commonwealth of Virginia effective on October 28, 1998, to administer and enforce its own UST management program in lieu of the federal UST management program established under Subtitle I of RCRA, 42 U.S.C. §§ 6991 *et seq.* 40 C.F.R. § 282.96. Set forth at 9 VAC §§ 25-580-10 *et seq.*, and 9 VAC §§ 25-590-10 *et seq.*, the provisions of the program became requirements of Subtitle I of RCRA upon final authorization by EPA, and EPA retains the authority to enforce the program and issue a compliance order and/or assess a civil penalty pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. *Id.*

three gas stations in the Commonwealth of Virginia: the Pure Gas Station in Suffolk, Virginia ("Pure Facility"), the Rt. 58 Food Mart in Suffolk, Virginia ("Rt. 58 Facility"), and the Franklin Eagle Mart in Franklin, Virginia ("Franklin Facility"). The Original Respondents filed a joint Answer to Administrative Complaint, Compliance Order and Notice of Right to Request a Hearing on April 29, 2013.

On November 5, 2013, I issued a Prehearing Order and Order on Motion to Stay Proceedings ("Prehearing Order"), which set deadlines for the parties' prehearing exchange process and for the filing of dispositive motions regarding liability. The parties subsequently filed their prehearing exchanges and engaged in extensive motions practice. By Order dated August 10, 2015, I ruled on several pending motions and established deadlines for a number of procedures.

By leave of this Tribunal, Complainant filed a First Amended Administrative Complaint, Compliance Order and Notice of Right to Request Hearing ("Amended Complaint") on August 12, 2015, alleging 17 counts of violation against Aylin, Rt. 58, Franklin Eagle, Kiriscioglu, 5703 Holland Road Realty Corp. ("Holland Road Realty"), 8917 South Quay Road Realty Corp. ("Quay Road Realty"), and 1397 Carrsville Highway Realty Corp. ("Carrsville Highway Realty") (collectively, "Respondents"). The Amended Complaint charges Respondents Holland Road Realty, Quay Road Realty, and Carrsville Highway Realty ("Respondent Realty Corporations") in their capacities as the owners of the subject USTs, and charges the remaining Respondents in their capacities as the operators of the subject USTs. Respondents filed a joint Answer to First Amended Complaint, Administrative Complaint, Compliane [sic] Order and Notice of Right to Request a Hearing ("Amended Answer") on August 31, 2015. The parties also supplemented their prehearing exchanges by leave of this Tribunal.

Thereafter, the parties again engaged in extensive motions practice. Of particular relevance to this Order, Complainant filed a Motion for Partial Accelerated Decision on Liability ("AD Motion") on November 20, 2015, wherein Complainant seeks the issuance of an order finding Respondents liable for the violations alleged in Counts 2 through 17 of the Amended Complaint. Complainant concurrently filed a Memorandum of Law in Support of its Motion for Accelerated Decision on Liability ("AD Memo") and the declarations of Andrew Ma,[2] John V. Cignatta, and Leslie Beckwith. Thereafter, Respondents filed their Response to Complainant's Motion for Partial Accelerated Decision on Liability and Memorandum of Law ("Respondents' Response" or "Rs' Resp."), and Complainant filed its Reply to Respondents' Response to Complainant's Motion for Partial Accelerated Decision on Liability ("Complainant's Reply" or "C's Reply").

[2] On November 23, 2015, Complainant filed a separate list and compilation of the exhibits referenced by the declaration of Andrew Ma as attachments to its response to an unrelated motion filed by Respondents. The following day, Complainant filed another list of those exhibits.

A. Parties' Unopposed Motions for Leave to File Out of Time

By Order dated December 10, 2015, I granted leave to Respondents to file their response to the AD Motion no later than January 15, 2016. On January 19, 2016, Respondents filed an Unopposed Motion for Leave to File Response One Business Day out of Time ("Respondents' Out of Time Motion" or "Rs' Out of Time Mot."), along with their Response. Similarly, on January 29, 2016, Complainant filed an Unopposed Motion for One Business Day Extension of Time to File its Reply to Respondents' Response to Complainant's Motion for Partial Accelerated Decision ("Complainant's Extension Motion" or "C's Ext. Mot."). Complainant then filed its Reply the following business day on February 1, 2016.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Section 22.7(b) of the Rules of Practice authorizes this Tribunal to grant extensions of time for filing any document "upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties." 40 C.F.R. § 22.7(b). With respect to the timeliness of a motion for an extension of time, the Rules of Practice direct that it "shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer . . . reasonable opportunity to issue an order." *Id.* Filed on the date on which Complainant's reply was due, the Extension Motion requests that the filing deadline for Complainant's reply be extended by one business day on account of "unforeseen circumstances, including the historic snowstorm that occurred January 22-23, 2016, that affected the mid-Atlantic states, including the Philadelphia area (and closing the federal government in Washington, D.C., for at least two days)." Noting that Respondents do not object to this request, Complainant argues that good cause has been shown for the extension sought and that Respondents will not be prejudiced by it. I agree, and while the Extension Motion was filed only shortly before the expiration of the filing deadline for Complainant's reply, it was not opposed by Respondents. Accordingly, Complainant's Extension Motion is hereby **GRANTED**.

Turning to Respondents' Out of Time Motion, the Rules of Practice do not contemplate a motion for leave to file a document after the filing deadline has passed (i.e., "out of time"). Under such circumstances, I may consult the Federal Rules of Civil Procedure for guidance. See, e.g., Envtl. Prot. Servs., Inc., 13 E.A.D. 506, 560 n.65 (EAB 2008) (citing J. Phillip Adams, 13 E.A.D. 310, 330 n.22 (EAB 2007); Lazarus, Inc., 7 E.A.D. 318, 330 n.25 (EAB 1997)); Carroll Oil Co., 10 E.A.D. 635, 649 (EAB 2002); Asbestos Specialists, Inc., 4 E.A.D. 819, 827 n.20 (EAB 1993). The Federal Rules of Civil Procedure ("FRCP") appear to impose a heavier burden on a party moving to file a document after the filing deadline has passed than on a party moving for an extension of the filing deadline in advance of its expiration. Specifically, FRCP 6(b)(1) states:

When an act may or must be done within a specified time, the court may, for good cause shown, extend the time: (A) with or without motion or notice if the court acts, or if a request is

made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect. Fed. R. Civ. Pro. 6(b)(1). Thus, for purposes of ruling on a motion for leave to file a response after the expiration of the response period, FRCP 6(b)(1) would have this Tribunal consider not only whether the moving party has shown good cause for the delay in filing its response and whether any prejudice would result, but also whether the moving party has shown that its neglect is "excusable." I am also mindful, however, that the Rules of Practice require that I "assure that the facts are fully elicited, adjudicate all issues, and avoid delay," and that I "take all measures necessary for the . . . efficient, fair and impartial adjudication of issues." 40 C.F.R. §§ 22.4(c) and (c)(10).

In the present proceeding, Respondents first note the hip replacement surgery that their counsel underwent on December 15, 2015, and then assert that the complexity of the issues presented by the AD Motion and the considerable size of the record of this proceeding precluded them from completing their Response by the extended deadline, despite "work[ing] diligently" during the extended response period. Respondents argue that their Out of Time Motion "is filed, not for delay, but in the interests of justice so that the Tribunal may have all arguments of counsel" and that "[n]o prejudice will occur" as a result of granting it. Finally, Respondents represent that Complainant does not oppose their request. Given that Respondents appear to have acted in good faith and without any intent to delay this proceeding, I find that good cause exists for the very brief extension sought. I further find that Complainant will not be unduly prejudiced by it. While Respondents do not advance a reason for their failure to make a timely motion for a one-day extension of the filing deadline, let alone circumstances amounting to excusable neglect, I find that the interests of fully eliciting the facts and adjudicating the issues are best served in this case by accepting Respondents' Response beyond the filing deadline because Respondents seek to respond to a dispositive motion. Accordingly, Respondents' Out of Time Motion is hereby **GRANTED**.

II. STANDARD FOR ADJUDICATING A MOTION FOR ACCELERATED DECISION

Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to:

> 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 judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the FRCP, and while the FRCP do not apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under Section 22.20(a) of the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-

02 (EAB 1999). Federal courts have endorsed this approach. For example, the U.S. Court of Appeals for the First Circuit described Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Rule 56, it directs a federal court to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the United States Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To discharge its initial burden of production, the moving party is required to support its assertion that a material fact is not genuinely disputed either by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then

required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion permit denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Rules of Practice, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. As prescribed by Section 22.24(b) of the Rules of Practice, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

III. RELEVANT LEGAL BACKGROUND

A. Subtitle I of RCRA and its Implementing Regulations

Codified at 42 U.S.C. §§ 6991 through 6991m, Subtitle I of RCRA establishes a federal program for the regulation of USTs. As observed by Complainant in its AD Memo, AD Memo at 8, the EAB comprehensively described this program in *Euclid of Virginia, Inc.*, 13 E.A.D. 616 (EAB 2008), as follows:

> In 1976, Congress enacted RCRA to better regulate the large and ever-increasing volume of solid and hazardous waste generated by individuals, municipalities, and businesses in the United States. RCRA restructured an existing statute, the Solid Waste Disposal Act of 1965, as amended in 1970, to eliminate the purported "last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. Rep. No. 94-1491, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239. In 1984, Congress amended RCRA to close loopholes it had identified, in that instance to address, among other things, accidental releases from USTs containing petroleum or other regulated substances. *See* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, tit. VI, § 601(a), 98 Stat. 3221, 3277-87 (1984) (codified as amended at RCRA §§ 9001-9010, 42 U.S.C. §§ 6991-6991i). As so amended, RCRA directed the EPA to promulgate release detection, prevention, and correction regulations for USTs, with the goal of protecting human health and the environment. RCRA § 9003, 42 U.S.C. § 6991b. EPA promulgated regulations on November 8, 1985, and September 23, 1988, which, as amended, are in effect today. *See* Notification Requirements for Owners of Underground Storage Tanks, 50 Fed. Reg. 46,602 (Nov. 8, 1985); Underground Storage Tanks – Technical Requirements, 53 Fed. Reg. 37,082 (Sept. 23, 1988) (codified as amended at 40 C.F.R. pt. 280).
>
> Under the UST program created by Congress and implemented by EPA, owners [and operators] of UST systems must, among other things: (1) implement spill and overfill control procedures; (2) provide for corrosion protection; (3) monitor tanks and underground piping for releases; (4) maintain records of release detection systems; (5) report accidental releases; (6) take corrective action in response to any such releases; (7) comply with requirements for appropriate temporary and permanent closure of USTs to prevent future releases; and (8) maintain evidence of financial responsibility for taking corrective action and compensating third parties in the event of accidental releases from USTs. RCRA §§ 9003(c)-(d), 42 U.S.C. §§ 6991b(c)-(d); 40 C.F.R. §§ 280.30-.230. "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 have been upgraded by December 22, 1998, to incorporate all technological precautions needed to prevent, detect, and correct accidental releases of regulated substances, or, if not upgraded, permanently closed. RCRA §§ 9003(e)-(h), 42 U.S.C. §§ 6991b(e)-(h); 40 C.F.R. §§ 280.12, .20-.21.

Id. at 623-24.

EPA amended the regulations set forth at 40 C.F.R. Parts 280 and 281 by final rulemaking published on July 15, 2015. Revising Underground Storage Tank Regulations, 80 Fed. Reg. 41,566 (July 15, 2015). The purpose of the amendments was to strengthen the regulation of USTs by emphasizing the proper operation and maintenance of UST systems by their owners and operators, incorporating requirements similar to certain provisions of the Energy Policy Act of 2005, and updating requirements in order to reflect improvements in technology and codes of practice, among other measures. *Id.* at 41,567.

B. VA UST Rules

As authorized by EPA, the Commonwealth of Virginia implements its own UST management program in lieu of the federal program, with technical standards and corrective action requirements for USTs appearing at 9 VAC §§ 25-580-10 *et seq.*, and financial responsibility requirements for USTs appearing at 9 VAC §§ 25-590-10 *et seq.* Both sets of requirements are at issue in this proceeding, as described below.

1. Counts 2, 8, and 13: Alleged Failure to Adequately Monitor USTs for Releases at each Facility, in Violation of 9 VAC § 25-580-140.1.

Contained in Part IV of the technical standards and corrective action requirements ("Release Detection"), the regulations at 9 VAC § 25-580-140 provide, in pertinent part:[3]

> C. Owners and operators of petroleum UST systems not required to have secondary containment under subdivision 7 of 9 VAC 25-580-50 must provide release detection for tanks and piping as follows:
>
> 1. Tanks. Tanks must be monitored at least every 30 days for releases using one of the methods listed in subdivisions 4 through 8 of 9 VAC 25-580-160 . . . .

In turn, the regulations at 9 VAC § 25-580-160(4)-(8) identify the following methods of release detection: (4) "automatic tank gauging," (5) "vapor monitoring," (6) "ground water monitoring," (7) "interstitial monitoring," and (8) "other methods," as long as such other methods "can detect 0.2 gallon per hour leak rate or a release of 150 gallons within a month with a probability of detection of 0.95 and a probability of false alarm of 0.05" or "can detect a release as effectively as any of the other methods allowed in subsections 3 through 8 of this section," as demonstrated by the owner or operator.

[3] The regulations were amended effective on September 15, 2010, and appear in this Order as amended.

The VA UST Rules define the following relevant terms at 9 VAC § 25-580-10:

"Owner" means in the case of any UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances . . . .

"Operator" means any person in control of, or having responsibility for, the daily operation of the UST system.

"Person" means an individual, trust, firm, joint stock company, corporation . . . .

"Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of nonearthen materials (e.g., concrete, steel, plastic) that provide structural support.

"Underground storage tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 or more beneath the surface of the ground.

"UST system" or "tank system" means any underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

"Petroleum UST system" means any underground storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other regulated substances. Such systems include those containing motor fuels . . . .

"Regulated substance" means an element, compound, mixture, solution, or substance that, when released into the environment, may present substantial danger to the public health or welfare, or the environment. . . .The term "regulated substance" includes but is not limited to petroleum and petroleum-based substances . . . such as motor fuels.

"Motor fuel" means petroleum or a petroleum-based substance that is motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any grade of gasohol, and is typically used in the operation of a motor engine. This definition applies to blended petroleum motor fuels such as biodiesel and ethanol blends that contain more than a de minimis amount of petroleum or petroleum-based substance.

"Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an UST into ground water, surface water or subsurface soils.

"Release detection" means determining whether a release of a regulated substance has occurred from the UST system into the environment or into the interstitial space between the UST system and its secondary barrier or secondary containment around it.

2. Count 3: Alleged Failure to Adequately Inspect the Impressed Current Cathodic Protection System for the USTs at the Pure Facility, in Violation of 9 VAC § 25-580-90.

Contained in Part III of the technical standards and corrective action requirements ("General Operating Requirements"), the regulations at 9 VAC § 25-580-90 provide, in pertinent part:

> 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:
>
> * * *
>
> 3. UST systems with impressed current cathodic protection systems must also be inspected every 60 days to ensure the equipment is running properly.

The term "cathodic protection" is defined by 9 VAC § 25-580-10 as a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current.

3. Counts 4, 9, and 14: Alleged Failure to Provide Cathodic Protection for UST Piping at each Facility, in Violation of 9 VAC § 25-580-60.

Contained in Part II of the technical standards and corrective action requirements ("UST Systems: Design, Construction, Installation, and Notification"), the regulations at 9 VAC § 25-580-60 provide, in pertinent part:

> 3. Piping upgrading requirements. Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and must meet the requirements of subdivisions 2 b (2), (3) and (4) of 9 VAC 25-580-50.
>
> NOTE: The codes and standards listed in the note following subdivision 2 b of 9 VAC 25-580-50 may be used to comply with this requirement.

In turn, the regulations at 9 VAC § 25-580-50 provide, in pertinent part:

In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements:

* * *

2. Piping. The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

* * *

b. The piping is constructed of steel and cathodically protected in the following manner:

* * *

(2) Field-installed cathodic protection systems are designed by a corrosion expert;

(3) Impressed current systems are designed to allow determination of current operating status as required in subdivision 3 of 9 VAC 25-580-90; and

(4) Cathodic protection systems are operated and maintained in accordance with 9 VAC 25-580-90; or

NOTE: The following codes and standards may be used to comply with subdivision 2 b of this section:

(a) National Fire Protection Association Standard 30, “Flammable and Combustible Liquids Code”;

(b) American Petroleum Institute Publication 1615, “Installation of Underground Petroleum Storage Systems”;

(c) American Petroleum Institute Publication 1632, “Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems”; and

(d) National Association of Corrosion Engineers Standard RP-01-69, “Control of External Corrosion on Submerged Metallic Piping Systems.”

The term “pipe” or “piping” is defined by 9 VAC § 25-580-10 as a hollow cylinder or the tubular conduit that is constructed of nonearthen materials that routinely contains and conveys regulated substances from the underground tank(s) to the dispenser(s) or other end-use equipment. Such piping includes any elbows, couplings, unions, valves, or other in-line fixtures that contain and convey regulated substances from the underground tank(s) to the dispenser(s). Pipe or piping does not include vent, vapor recovery, or fill lines.

4. Counts 5, 10, and 15: Alleged Failure to Conduct Annual Line Tightness Testing or Monthly Monitoring of the Underground Piping Connected to the USTs at each Facility, in Violation of 9 VAC § 25-580-140.2.

The regulations at 9 VAC § 25-580-140 provide, in pertinent part:

> C. Owners and operators of petroleum UST systems not required to have secondary containment under subdivision 7 of 9 VAC 25-580-50 must provide release detection for tanks and piping as follows:
>
> * * *
>
> 2. Piping. Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:
>
> > a. Pressurized piping. Underground piping that conveys regulated substances under pressure must:
> >
> > * * *
> >
> > (2) Have an annual line tightness test conducted in accordance with subdivision 2 of 9 VAC 25-580-170 or have monthly monitoring conducted in accordance with subdivision 3 of 9 VAC 25-580-170.

In turn, the regulations at 9 VAC § 25-580-170 provide, in pertinent part:

> Each method of release detection for piping used to meet the requirements of 9 VAC 25-580-140 must be conducted in accordance with the following:
>
> * * *
>
> 2. Line tightness testing. A periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure.

3. Applicable tank methods. Any of the methods in subsections 5 through 8 of 9 VAC 25-580-160 may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

5. Counts 6, 11, and 16: Alleged Failure to Conduct Annual Testing of Automatic Line Leak Detectors for the Piping Connected to the USTs at each Facility, in Violation of 9 VAC § 25-580-140.2.

The regulations at 9 VAC § 25-580-140 provide, in pertinent part:

C. Owners and operators of petroleum UST systems not required to have secondary containment under subdivision 7 of 9 VAC 25-580-50 must provide release detection for tanks and piping as follows:

* * *

2. Piping. Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:

a. Pressurized piping. Underground piping that conveys regulated substances under pressure must:

(1) Be equipped with an automatic line leak detector conducted in accordance with subdivision 1 of 9 VAC 25-580-170 . . . .

In turn, the regulations at 9 VAC § 25-580-170 provide, in pertinent part:

Each method of release detection for piping used to meet the requirements of 9 VAC 25-580-140 must be conducted in accordance with the following:

1. Automatic Line Leak Detectors. Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of three gallons per hour at 10 pounds per square inch line pressure within one hour. An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.

6. Counts 7, 12, and 17: Alleged Failure to Demonstrate Financial Responsibility for Taking Corrective Action and for Compensating Third Parties for Bodily Injury and Property Damage Caused by Accidental Releases from the USTs at each Facility, in Violation of 9 VAC § 25-590-40.

The regulations at 9 VAC § 25-590-40 require owners or operators of petroleum underground storage tanks to 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 in certain per-occurrence and annual aggregate amounts enumerated therein. Notably, the regulations also provide:

> Owners and operators of petroleum underground storage tanks may use the Virginia Petroleum Storage Tank Fund in combination with one or more of the mechanisms specified in 9 VAC 25-590-60 through 9 VAC 25-590-110 and 9 VAC 25-590-250 to satisfy the financial responsibility as required by this section. The fund may be used to demonstrate financial responsibility for the owner or operator in excess of the amounts specified in 9 VAC 25-590-210 C 1 up to the per occurrence and annual aggregate requirements specified in this section for both taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases from petroleum underground storage tanks.

9 VAC § 25-590-40(C).

IV. COMPLAINANT'S *PRIMA FACIE* CASE

As noted above, Complainant seeks the issuance of an order finding Respondents liable for the violations alleged in Counts 2 through 17 of the Amended Complaint. Each of these alleged violations can be divided into two critical elements of liability.

First, the technical standards and corrective action requirements of the VA UST Rules apply to "all owners and operators of an UST system," subject to certain exceptions. 9 VAC § 25-580-20. Likewise, the financial responsibility requirements of the VA UST Rules apply to "owners and operators of all petroleum UST systems regulated under 9 VAC 25-580," subject to certain exceptions. 9 VAC § 25-590-20. In addition, Section 9006(d) of RCRA authorizes EPA to assess a civil penalty against "[a]ny owner or operator of an underground storage tank who fails to comply with . . . any requirement or standard of a State program approved pursuant to section 9004." 42 U.S.C. § 6991e(d). Accordingly, Complainant is required to demonstrate as part of its *prima facie* case for each count of violation that each Respondent named in that count was an "owner" and/or "operator" of the USTs at the given Facility during the relevant period. Second, Complainant is required to demonstrate as part of its *prima facie* case for each count of violation that a failure to comply with the given provision of the VA UST Rules occurred during the relevant period.

To prevail on its AD Motion, then, Complainant is required to demonstrate that no genuine issue of material fact exists relating to Respondents' ownership and/or operation of the USTs and their failure to comply with the given provisions of the VA UST Rules, and that the

facts demonstrate those two critical elements of liability by a preponderance of the evidence, such that Respondents' liability for Counts 2 through 17 has been established as a matter of law.

A. Arguments of the Parties

1. Complainant's AD Motion

In its AD Memo, Complainant first identifies the named Respondents and asserts that Respondent Kiriscioglu organized each of the six corporate Respondents in the Commonwealth of Virginia; that he owns and operates each corporate Respondent from an office located in North Bergen, New Jersey; and that he is the President, Secretary, Treasurer, and sole shareholder of each corporate Respondent. AD Memo at 9-12 (citing the Affidavit of Adnan Kiriscioglu (May 5, 2014) ("Kiriscioglu Affidavit")[4]; several of Complainant's proposed exhibits ("CX"), including the December 18, 2014 deposition of Respondent Kiriscioglu ("Kiriscioglu Deposition"); and a purported May 5, 2014 response from Respondents to the Motion for Discovery filed by Complainant on February 24, 2014 ("May 2014 Discovery Response")). Noting Respondent Kiriscioglu's admission during his deposition that registration forms submitted to the Virginia Department of Environmental Quality ("VADEQ") erroneously identified the owners of the USTs as Respondents Aylin, Rt. 58, and Franklin Eagle, rather than the Respondent Realty Corporations, Complainant argues that, as the following terms are defined by the governing law, Respondent Holland Road Realty was a "person" and the "owner" of the "USTs" and "UST systems" located at the Pure Facility, Respondent Quay Road Realty was a "person" and the "owner" of the "USTs" and "UST systems" located at the Rt. 58 Facility, and Respondent Carrsville Highway Realty was a "person" and the "owner" of the "USTs" and "USTs systems" at the Franklin Facility, at all times relevant to the alleged periods of violation. AD Memo at 16-19 (citing several of Complainant's proposed exhibits).

With respect to the "operator" of each Facility, Complainant advances a handful of arguments related to the appropriate interpretation of that term but focuses on the standard articulated in *Southern Timber Products, Inc.*, 3 E.A.D. 880 (JO 1992) ("*Southern Timber II*"), which identified a multitude of factors as being relevant to the determination of whether an officer of a corporate operator of a facility exercised "active and pervasive control over the overall operation of the facility," such that the officer may be considered a "co-operator" of the facility for purposes of liability under RCRA. AD Memo at 20 (citing *Southern Timber II*, 3 E.A.D. at 894-96). Applying this standard to Respondent Kiriscioglu, Complainant argues that he exerted active and pervasive control over the overall operation of the Facilities, and retained the ultimate authority over the USTs, through such conduct as delegating responsibility to, training, and managing personnel at the Facilities; maintaining the authority to hire and fire managers; controlling and managing the financial resources of the Facilities; personally certifying to VADEQ the annual gallonage throughput of the USTs; and retaining contractors to

[4] This document was attached to Respondent Kiriscioglu's Motion for Partial Accelerated Decision filed on May 7, 2014.

perform work on the USTs and UST systems. AD Memo at 23-27 (citing Kiriscioglu Affidavit; May 2014 Discovery Response; and several of Complainant's proposed exhibits). Complainant concludes that "[t]he evidentiary record in this case is overwhelmingly clear" as to the degree of control and authority exercised by Respondent Kiriscioglu and that he thus was a "person" and "operator" of the "USTs" and "UST systems" at the Facilities during the periods of alleged violation, as those terms are defined by the governing law. AD Memo at 27. Based on admissions of Respondents, Complainant argues that Respondents Aylin, Rt. 58, and Franklin Eagle were also "operators" of the USTs and UST systems at the Facilities. AD Memo at 22-23 (citing CX 92 and Kiriscioglu Affidavit).

Turning to the second critical element of liability, Complainant proceeds to argue that no genuine disputes of material fact exist as to Respondents' failure to comply with the VA UST Rules, as charged in the Amended Complaint. AD Memo at 27-56. Specifically, with respect to Counts 2, 8, and 13, Complainant first contends that Respondents were required to provide release detection for the USTs at each Facility during the relevant periods on account of each UST containing a sufficient quantity of petroleum or a mixture of petroleum such that each UST constituted a "petroleum UST system" that was not "empty," within the meaning of the applicable regulations. AD Memo at 29-31 (citing Ma Affidavit and CX 68, 85-87). Noting that Respondents admitted in their Amended Answer to electing automatic tank gauging ("ATG") as a method of release detection for the USTs but then argued that Complainant failed to consider the statistical inventory reconciliation ("SIR") also performed by Respondents during the relevant periods, Complainant contends that, despite a number of requests by EPA for documentation of any release detection performed for the USTs, Respondents failed to produce records for certain periods specified by Complainant. AD Memo at 31-35 (citing Amended Answer; Ma Affidavit; and CX 22). Thus, Complainant argues, no genuine issue of material fact exists that release detection was required but not performed during those periods. AD Memo at 34-35. As for the remaining months of alleged violation for which records have been produced, Complainant contends that the records fail to satisfy the standard for release detection set forth at 9 VAC § 25-580-160.8(a). AD Memo at 37-38 (citing Ma Affidavit and Cignatta Affidavit). Accordingly, Complainant maintains, no genuine issue of material fact exists with respect to Respondents' failure to monitor the USTs at each Facility for releases as required during the periods of alleged violation. AD Memo at 38-39.

As for Respondents' failure to monitor the underground piping at each Facility for releases by an annual line tightness test or monthly monitoring, as charged in Counts 5, 10, and 15 of the Amended Complaint, Complainant first argues that Respondents were required to perform release detection for the piping during the relevant periods because USTs, by definition, include any underground piping connected to them and, as already demonstrated, the USTs were subject to the release detection requirements on account of not being "empty" within the meaning of the applicable regulations. AD Memo at 40. Noting Respondents' admission in their Amended Answer that the piping at issue operated under pressure, Complainant then contends that the record contains only limited documentation of release detection for the piping at each Facility and that no genuine issue of material fact exists that Respondents failed to monitor the

piping at each Facility for releases as required during the relevant periods. AD Memo at 39-42 (citing Amended Answer and Ma Affidavit).

Complainant next turns to Respondents' failure to perform annual tests of the functionality of the automatic line leak detectors at each Facility, as charged in Counts 6, 11, and 16. AD Memo at 43-46. Noting that Respondents do not dispute that the pressurized underground piping at each Facility was equipped with automatic line leak detectors, Complainant argues that the record contains only limited documentation of passing tests for that equipment and that no genuine issue of material fact exists that Respondents failed to perform the required tests during the relevant periods. *Id.* (citing Amended Answer and Ma Affidavit).

Complainant next addresses the allegation in Count 3 of the Amended Complaint that Respondents failed to adequately inspect the impressed current cathodic protection system with which each steel tank at the Pure Facility was equipped to ensure that the equipment was operating properly. AD Memo at 46-47. According to Complainant, the record establishes that each tank present at the Pure Facility is comprised of steel and equipped with an impressed current cathodic protection system. *Id.* at 47 (citing Ma Affidavit). Complainant argues, however, that the record contains only limited documentation of inspections of this equipment and that no genuine issue of material fact exists that Respondents failed to perform inspections as required during the relevant periods. *Id.* at 47 (citing Ma Affidavit).

Turning to Respondents' failure to equip certain metal components of the underground piping at each Facility with cathodic protection, as charged in Counts 4, 9, and 14 of the Amended Complaint, Complainant first contends that owners and operators are required to continue operation and maintenance of corrosion protection even if USTs are temporarily closed within the meaning of the applicable regulations. AD Memo at 47-48. Complainant then argues that, as demonstrated by documentation in the record, no genuine issue of material fact exists that the metal piping components beneath each of the two dispensers at the Pure Facility lacked adequate cathodic protection during the relevant period. AD Memo at 48-49 (citing Ma Affidavit and Amended Answer). With respect to the Rt. 58 Facility, Complainant argues that each of the three USTs are comprised of steel and required to be equipped with cathodic protection. AD Memo at 50 (citing Ma Affidavit). Complainant then contends that, as demonstrated by documentation in the record, no genuine issue of material fact exists as to the lack of adequate cathodic protection for the metal piping components under the dispensers and in the sumps containing the submersible turbine pump associated with each UST at the Rt. 58 Facility during the relevant period. AD Memo at 50-52 (citing Ma Affidavit). As for the Franklin Facility, Complainant likewise argues that each of the two USTs are comprised of steel and required to be equipped with cathodic protection, and that documentation in the record shows that no genuine issue of material fact exists with regard to the metal piping components under the dispensers and in the sumps containing the submersible turbine pump associated with each UST lacking adequate cathodic protection during the relevant period. AD Memo at 51-52 (citing Ma Affidavit).

Finally, with respect to Respondents' failure to demonstrate financial responsibility for the USTs at each Facility, as charged in Counts 7, 12, and 17 of the Amended Complaint, Complainant notes that Respondents appear to argue in their Amended Answer that they satisfied the entirety of their financial responsibility obligations under the applicable regulations by way of the Virginia Petroleum Storage Tank Fund ("Fund") during the relevant periods. AD Memo at 52-53 (citing Amended Answer). In response to such an argument, Complainant contends that owners and operators of USTs may avail themselves of the Fund to satisfy a portion, but not all, of their financial responsibility obligations. AD Memo at 53-54 (citing Beckwith Affidavit and 9 VAC §§ 25-590-50, 25-590-210.A, 25-590-210.B). Complainant urges that I rule as much as a matter of law. AD Memo at 56. Complainant further argues that Respondents knew or should have known of their obligation to demonstrate financial responsibility and to maintain evidence of their compliance at each Facility given the inspections of the Facilities performed by VADEQ in 2003 and 2005, but that Respondents nevertheless failed to do so. AD Memo at 54 (citing a number of Complainant's proposed exhibits and Ma Affidavit). Complainant concludes that no genuine issue of material fact exists that, while Respondents produced documentation of financial responsibility for certain limited periods, they failed to demonstrate financial responsibility for the USTs at each Facility for the periods alleged in Amended Complaint. AD Memo at 55-56 (citing a number of Complainant's proposed exhibits and Ma Affidavit).

2. Respondents' Response

In their Response, Respondents counter that genuine disputes of material facts exist, claiming to cite evidence in their Response "that places the Complainant's evidence in question and raises a question of fact for the hearing." Rs' Resp. 16-17. With respect to Complainant's *prima facie* case, Respondents identify six general areas of purported disagreement among the parties:

1. Noting that this Tribunal already ruled in the Order on Motions dated August 10, 2015, that genuine issues of material fact exist as to Respondent Kiriscioglu's status as an "operator" of the USTs at the Facilities, Respondents argue that genuine issues of material fact remain on this issue and that further development of those issues at hearing is necessary.[5] *Id.* at 17-18, 20-28. In support of this position, Respondents first argue against the legal theory of holding Respondent Kiriscioglu liable, claiming that officers are expected to use appropriate care and diligence when acting on behalf of their corporations and that the "business judgment rule" shields a corporate officer from liability for business decisions made in good faith and with

[5] Respondents also renew the argument advanced as part of Respondent Kiriscioglu's Motion for Partial Accelerated Decision, filed on May 7, 2014, that Complainant failed to plead the elements necessary to establish Respondent Kiriscioglu's individual liability for the alleged violations, this time in the context of the Amended Complaint (whereas Respondent Kiriscioglu's Motion for Partial Accelerated Decision raised the argument in the context of the Complaint). *Id.* at 18-20. For the same reasons that argument was rejected in this Tribunal's Order of August 10, 2015, it is rejected here.

reasonable care even if the decisions ultimately harm the corporation's interests. Rs' Resp. at 20-21. Respondents maintain that "real peril, not to mention a lack of inherent stability and predictability," will result from Complainant's urging this Tribunal "to impose strict liability on Mr. Kiriscioglu as a corporate officer based on essentially ad hoc judicial assessments of how blameworthy he should be for having been neglectful in allowing the alleged violations, if proven, to occur." *Id.* at 21.

Respondents next challenge Complainant's application of the holding in *Southern Timber II*. *Id.* at 22. Specifically, Respondents argue that Complainant is required to establish that Respondent Kiriscioglu is an operator of the USTs, rather than an operator of the Facilities, before individual liability for the alleged violations can attach to him, and that Complainant fails to limit itself in its AD Motion to activities related to the USTs specifically as opposed to the Facilities generally. *Id.* Looking to a ruling rendered in another administrative proceeding by my esteemed colleague, Chief Administrative Law Judge Susan Biro, Respondents further argue that Complainant fails in its AD Motion "to establish the entire universe of 'operational' duties and activities associated with the USTs under the VADEQ UST regulations in order to know whether the fraction attributed to Mr. Kiriscioglu as a corporate officer is large enough to be considered 'active and pervasive control over the overall operation' of the USTs at the Facilities." *Id.* (citing *Carbon Injection Systems LLC*, 2012 EPA ALJ LEXIS 26, at *69).

Respondents next urge this Tribunal to construe the term "operator" as defined by the applicable provisions of the VA UST Rules as requiring "at least some continuous level of activity" with respect to the USTs at the Facilities, and to reject Complainant's reference to *Shell Oil Co. v. Meyer*, 705 N.E.2d 962 (Ind. 1998), for the proposition that both a person "controlling" the day-to-day activities associated with a UST and the person "responsible" for those activities can be considered "operators." *Id.* at 22-23. Respondents then posit:

> Ultimately, the question before the Tribunal as to whether Mr. Kiriscioglu is liable individually as an "operator" turns on (1) what constituted the daily operation of the USTs at the Facilities, (2) who did these things, (3) in what capacity was that person acting, and (4) who is responsible for that person's actions in that capacity.

Id. at 23. Arguing that Complainant's AD Motion fails to satisfy its burden on this issue, "particularly when viewed in the context of the presiding officer's determination in *Carbon Injection*," Respondents proceed to identify five purported genuine issues of material fact as to the level of control exercised by Respondent Kiriscioglu – such as whether he personally trained employees and managers at the Facilities - and cite the testimony of Respondent Kiriscioglu in his deposition for support. *Id.* at 24-28 (citing CX 93, 148).

2. Respondents contest that the Respondent Realty Corporations qualify as "owners" of the USTs for purposes of compliance with the VA UST Rules. Rs' Resp. at 28-29. Noting that Complainant relies upon testimony from Respondent Kiriscioglu in his deposition to support its position on this issue, Respondents maintain that, notwithstanding that testimony, Respondents

Aylin, Rt. 58 and Franklin Eagle are considered the "owners" of the USTs pursuant to guidance from VADEQ because the USTs have continuously been registered with VADEQ in their names. *Id.* at 28-29 (citing CX 96, 10, 20, 28). Thus, while Respondents concede that the Respondent Realty Corporations own the real estate at their respective Facilities, Respondents argue, in essence, that the registration of the USTs is dispositive of their ownership for purposes of this proceeding. *Id.* at 13-14. Based on this dispute, Respondents urge that the issue be developed further at hearing. *Id.* at 29.

3. Respondents contend that genuine issues of material fact exist with respect to their purported failure to provide release detection for the USTs at each Facility, as alleged in Counts 2, 8, and 13 of the Amended Complaint. Rs' Resp. at 29-32. Citing the requirement established by 9 VAC § 25-580-140 that tanks be monitored at least every 30 days for releases using one of the methods set forth in 9 VAC § 25-580-160, including ATG and "other methods," Respondents challenge the notion that Respondents selected ATG as the sole method of release detection for the USTs and that the SIR also performed by Respondents did not satisfy the standards for it to constitute a lawful method of release detection under 9 VAC § 25.580-160.8. *Id.* at 30-31. Respondents note that Complainant derives support for its position regarding the sufficiency of the SIR performed by Respondents from "a handful of paragraphs" in the Ma Affidavit and Cignatta Affidavit, and they urge that these assertions be subject to cross-examination, "at a minimum." *Id.* at 31-32. Additionally, Respondents argue that "there is a genuine dispute that arises out of VADEQ's Petroleum Storage Tank Compliance Manual," which sets forth "how a state inspector determines whether SIR has been performed during a 'formal' compliance inspection." *Id.* at 31 (citing RX 10).

4. Noting the evidence in the record that the Facilities were closed and not selling motor fuels at various times since 2008, Rs' Resp. at 32 (citing CX 148, EPA 1608-09, and Ma Declaration ¶¶ 24, 34, 45), Respondents argue that genuine disputes of material fact exist as to whether Respondents were required to monitor the underground piping for releases or conduct annual tests of the automatic line leak detectors during those periods, *id.* at 32-33. As support, Respondents first refer to 9 VAC § 25-580-140(C)(2) as requiring release detection for piping only when it "routinely contains regulated substances." *Id.* Respondents then claim that "[c]odes of practice require that UST piping runs be sloped so that any product in the piping travels back to the tank when active pumping is not occurring," such that the piping at issue did not contain any product that could be released into the environment during the times that the Facilities were not selling motor fuels. *Id.* at 33. Accordingly, Respondents argue, "no line tightness tests or monthly monitoring was required." *Id.*

5. Respondents argue that genuine issues of material fact exist as to whether the requirement set forth at 9 VAC § 25-580-90 – that corrosion protection systems "continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground" – applies to certain equipment at the Facilities. Rs' Resp. at 33-35. While Respondents acknowledge the photographs of the Pure Facility attached to Mr. Ma's inspection report that purport to show

certain metal components in contact with the ground, Respondents argue that these *above-ground* components do not satisfy the regulatory definition for an *underground* storage tank system. *Id.* at 33-34 (citing CX 12, EPA 100). In this regard, Respondents contend that "[t]he question becomes where does the UST system stop," such that the requirement at issue does not apply. *Id.* at 33. With respect to the Rt. 58 and Franklin Facilities, Respondents similarly argue that while "the testers' reports cited by the Complainant indicate the lack of cathodic protection at the dispensers and pumps," photographs taken during the inspections show that the metal components of this equipment are not "in contact with the ground" and thus do not require cathodic protection. *Id.* at 34 (citing CX 21, EPA 271-72; CX 29, EPA 513). Additionally, Respondents argue that "the issue of corrosion protection for the swing joints or metal components in the sumps was never raised by . . . VADEQ inspectors as a problem." *Id.* at 35 (citing CX 11, 15, 24, 31).

6. Respondents contend that a genuine dispute of material fact exists with respect to their alleged violation of the applicable financial responsibility requirements. *Id.* at 35-36. Among other arguments, Respondents challenge the allegation they failed to provide financial assurance based upon their reading of the regulations, as follows:

> VADEQ does not require UST owners or operators to submit current evidence of UST financial responsibility to VADEQ until "within 30 days after the owner or operator identifies or confirms a release from an underground storage tank required to be reported under 9 VAC 25-580-220 or 9 VAC 25-580-240." 9 VAC § 25-590-150A. Unless VADEQ requires an UST owner or operator to submit evidence of financial assurance under 9 VAC § 25-590-150E, the obligation involves recordkeeping under 9 VAC § 25-590-160.

Id. at 36. Thus, Respondents concede only that they may have committed a recordkeeping violation. *Id.*

3. Complainant's Reply

In reply, Complainant argues in favor of accelerated decision as appropriate and in the best interests of judicial economy and conservation of the parties' resources. C's Reply at 5; *see also* C's Reply at 27 ("To completely deny the motion and hold a six-day hearing on the record before the Court would do a disservice to judicial economy, unnecessarily expend the resources of the Parties and the Tribunal, and result in no additional elicitation of material facts."). Citing the section of the Rules of Practice governing accelerated decision, which directs the Presiding Officer to determine the material facts that exist without substantial controversy and the material facts that remain controverted "[i]f an accelerated decision . . . is rendered on less than all issues or claims in the proceeding," Complainant contends that "there exist no material facts with *substantial* controversy." *Id.* (citing 40 C.F.R. § 22.20(b)(2)).

Complainant then turns to the specific arguments raised by Respondents, as follows:

1. Complainant maintains that no genuine issues of material fact exist to preclude finding that Respondent Kiriscioglu was an "operator" of the USTs at the Facilities. C's Reply at 6-12. Accusing Respondents of being "merely argumentative" in their Response, Complainant contends that Respondents fail to offer "*any significant probative evidence* in rebuttal to the overwhelming factual evidence that Respondent Kiriscioglu is an operator of the Facilities, including the UST systems at the Facilities." *Id.* at 6-7 (emphasis in original). Instead, Complainant argues, "Respondents merely refer to a half a dozen of Respondent Kiriscioglu's self-serving responses to well selected set-up questions posed by Complainant's counsel during Respondent Kiriscioglu's deposition." *Id.* at 7. Characterizing these excerpts as "insufficient" for purposes of demonstrating the existence of a genuine issue of material fact, Complainant maintains that Respondents "completely ignore the overwhelming body of evidence in the record" that supports the pertinent facts. *Id.* at 9-10. Complainant then proceeds to identify examples of such evidence. *Id.* at 10-12 (citing several of Complainant's proposed exhibits).

Complainant next argues that Respondents misread the governing law as to a corporate officer's liability as an "operator." *Id.* at 6-8. For example, Complainant contends that Respondents misconstrue the standard established by *Southern Timber II*, which is:

> whether Respondent Kiriscioglu, as the officer of a corporate operator, exercised active and pervasive control over the overall daily operation of the UST systems at the Facilities in question in light of the factors set forth in *Southern Timber II*, and *not* whether Respondent Kiriscioglu operated the underground storage tanks on a daily basis by physically pumping fuel to customers, taking fuel deliveries at the facilities, maintaining daily fuel inventory or other similar activities.

Id. at 8-9. Stressing the applicability of the foregoing standard, Complainant argues against Respondents' reading of *Carbon Injection Systems* as requiring Complainant to "satisfy a 'condition precedent' (by identifying the entire universe of 'operational' duties associated with the USTs) before the *Southern Timber II* factors can be applied to the corporate officer, Respondent Kiriscioglu, to determine his status as an 'operator.'" *Id.* at 8.

2. Complainant maintains that no genuine issues of material fact exist to preclude finding that the Respondent Realty Corporations were owners of the USTs at the Facilities. C's Reply at 13-14. In support, Complainant argues that Respondents have failed to point to any evidence to contradict Respondent Kiriscioglu's admissions during his deposition that the Respondent Realty Corporations owned the USTs at the Facilities and that the registration forms submitted to VADEQ erroneously identified Respondents Aylin, Rt. 58, and Franklin Eagle as the owners. *Id.* at 13-14 (citing AD Memo at 14-19). Rather, Complainant argues, Respondents "[a]t most . . . pose a legal issue citing nonbinding VADEQ guidance intended for use by VADEQ enforcement staff," which "has no force of law," and "cannot rewrite" the governing law on this issue. *Id.* at 13.

3. Complainant argues that no genuine issues of material fact exist to preclude finding that Respondents failed to perform release detection for the USTs, as alleged in Counts 2, 8, and 13. C's Reply at 14-16. Complainant first contends that no genuine issue of material fact exists as to whether release detection was performed for those periods lacking any related records. *Id.* at 14-15. Complainant then argues that "[a]s to the periods for which there are 'records,' Respondents point to no significant probative evidence that such records demonstrate SIR or any other valid method of release detection for that matter," in rebuttal to the evidence identified by Complainant that "the so-called SIR records on their face depict inventory control (*e.g.*, Cignatta Affidavit, Exhibit 2 (CX 145, EPA 2379)) and not SIR (*e.g.*, Cignatta Affidavit, Exhibit 1 (CX 72, EPA 1282))." *Id.* at 15. In response to Respondents' contention that a genuine dispute arises from the VADEQ's Petroleum Storage Tank Compliance Manual, Complainant maintains that it is not binding on EPA and that Respondents' claim to have provided the data required by that document fails to demonstrate compliance with the applicable regulations. *Id.* at 15.

4. Complainant maintains that no genuine issues of material fact exist to preclude finding that Respondents failed to conduct release detection for the underground piping at each Facility, as alleged in Counts 5, 10, and 15. C's Reply at 16-17. Noting Respondents' contention that codes of practice require pipes to be sloped, such that any product is returned to the tank in the absence of active pumping and the piping does not routinely contain regulated substances, Complainant argues that Respondents fail to identify this code of practice by name, specify that the pipes at issue were so designed and installed, or offer any evidence in support. *Id.* at 16. According to Complainant, insofar as "Respondents present a legal – not a factual – issue of whether release detection is required when pressurized piping [is] connected to an UST that is not 'empty' but is not 'operating,'" no genuine issue of material fact exists. *Id.* at 17. Similarly, Complainant contends that no genuine issue of material fact exists to preclude finding that Respondents failed to conduct annual tests of automatic line leak detectors for the piping at each Facility, as alleged in Counts 6, 11, and 16. *Id.* at 18.

5. Noting that Respondents do not address in their Response the violation alleged in Count 3 of the Amended Complaint, Complainant maintains that no genuine issues of material fact exist to preclude finding that Respondents failed to inspect the impressed current cathodic protection system for the USTs at the Pure Facility every 60 days as required by 9 VAC § 25-580-90.3, as alleged in Count 3. C's Reply at 18.

6. Complainant argues that no genuine issues of material fact exist to preclude finding that Respondents failed to equip the piping at each Facility with cathodic protection, as alleged in Counts 4, 9, and 14 of the Amended Complaint. C's Reply at 18-23. Complainant argues that Respondents do not raise any questions of fact on this subject but, rather, "pose a legal question as to whether [the metal piping components under the dispensers] are part of an UST system as defined by 9 VAC § 25-580-10." *Id.* at 18. Complainant then proceeds to challenge Respondents' interpretation, maintaining that it is inconsistent with the applicable regulations. *Id.* at 19. Complainant also challenges Respondents' contention that the metal piping components in the submersible turbine pumps at the Rt. 58 and Franklin Facilities were not

subject to the cathodic protection requirement because they were not designed to be in contact with the ground, arguing that the design is irrelevant to the factual question of whether this component is, in fact, in contact with the ground. *Id.* at 20. Complainant then urges this Tribunal to infer from evidence in the record "that Respondents were required, but failed, to have cathodic protection at Rt. 58 Food Mart and Franklin Eagle Mart as alleged in Counts IX and XIV." *Id.* at 21-23.

7. Complainant contends that no genuine issues of material fact exist to preclude finding that Respondents failed to demonstrate financial assurance, as alleged in Counts 7, 12, and 17 of the Amended Complaint. C's Reply at 24-25. Complainant challenges Respondents' purported efforts to "downplay the importance of this requirement" and "assert baldly that their responsibility is at the minimum level," when the records submitted by Respondents indicate otherwise. *Id.* at 24. Complainant maintains that "[t]he record is devoid of any evidence" to support the notion that a genuine issue of material fact exists as to liability and that "whether VADEQ considers this a record-keeping violation is irrelevant to the determination of liability." *Id.* Because "only a question of law [remains] to be decided by this Tribunal," Complainant urges that "there is no reason to further develop this issue at hearing." *Id.* at 24-25.

B. Discussion

As a preliminary matter, I commend Complainant for the efforts that it clearly undertook to narrow the scope of this proceeding by way of its AD Motion and to support its request for relief with extensive references to affidavits, proposed documentary evidence in the record, and the purported May 5, 2014 response from Respondents to Complainant's request for discovery. Conversely, as Complainant observes in its Reply, Respondents' reliance upon evidentiary material in the record to support their objections to accelerated decision is relatively minimal. Nevertheless, in accordance with the standard of adjudication described above, I must view the evidentiary material and all reasonable inferences drawn therefrom in the light most favorable to Respondents, and at this juncture, a number of considerations weigh against a finding that no genuine issues of material fact exist and that Respondents are liable for the violations alleged in Counts 2 through 17 as a matter of law.

First, with respect to Respondent Kiriscioglu's alleged role as an "operator" of the USTs, the parties appear to disagree in their briefings on the appropriate interpretation of that term for purposes of this proceeding. Complainant emphasizes that an "operator" exercises overall authority over the operation of the USTs, as opposed to an employee or manager who is employed by the "owner" or "operator" and performs the day-to-day operations on behalf of the "owner" or "operator." Complainant then looks to the factors set forth in *Southern Timber II* as the framework for determining whether Respondent Kiriscioglu exerted such authority here. Respondents, on the other hand, urge this Tribunal to construe the term as requiring "at least some continuous level" of involvement with the USTs, "as opposed to irregular or infrequent action," before liability as an "operator" can attach. This approach appears to focus less on the overall control of or responsibility for operations – which, Respondents argue in essence, is

intrinsic of any corporate officer and should not necessarily compel a finding of liability – and more on the degree to which the corporate officer was personally involved in the operational duties and activities, hence Respondents' emphasis on the observation of Chief Judge Biro in *Carbon Injection Systems*. Significantly, both the level of authority wielded by a corporate officer and the level of involvement of the corporate officer in the activity at issue were factors identified in *Southern Timber II* as appropriate to consider in determining whether a corporate officer acted as an "operator" for regulatory purposes, and I find that case and the full range of factors described therein to be instructive here.

Turning to the evidence put forth by the parties on this issue, I first note that Complainant looks to the purported May 5, 2014 response from Respondents to Complainant's request for discovery to support its position on a number of material facts relating to this issue. Yet, as this Tribunal has advised the parties on at least two occasions, *see* Order on Motions (Aug. 10, 2015) at 21 n. 13, Order on the Parties' Motions Relating to Additional Discovery and to Supplement their Prehearing Exchanges (Mar. 2, 2016) at 17 n.8, this response was not filed with the Headquarters Hearing Clerk, and thus, it is not a part of the record of this proceeding. Accordingly, Complainant's reliance on it for purposes of its AD Motion is problematic. While Complainant undoubtedly cites to ample other evidentiary material to advance its argument that Respondent Kiriscioglu was an "operator" of the USTs, Respondents point to contradictory evidence – such as Respondent Kiriscioglu's testimony during his deposition that he did not train the managers of the Facilities with respect to the operation of the USTs and that he performed little oversight of their activities – that, when viewed in the light most favorable to Respondents, suggests that genuine issues of material fact exist as to whether Respondent Kiriscioglu exercised sufficient control over the operation of the USTs to render him an "operator" for regulatory purposes under *Southern Timber II*. Aside from the evidence identified by Respondents in their Response, the record contains additional material that I cited in denying accelerated decision on this issue in the August 10, 2015 Order on Motions – such as Respondent Kiriscioglu's representation in his Affidavit that he was physically present at the Facilities only sporadically because his personal and business addresses are hundreds of miles from the Facilities – that continues to support Respondents' position and render accelerated decision inappropriate. Accordingly, I find that genuine issues of material fact exist as to the status of Respondent Kiriscioglu as an "operator" of the USTs and that resolution of these factual questions at hearing is necessary.

With respect to the alleged ownership of the USTs, the record appears to contain inconsistencies that also warrant further development at hearing. In particular, proposed documentary evidence in the record undoubtedly identifies Respondents Aylin, Rt. 58, and Franklin Eagle as the owners of the USTs, the most recent being a Supplemental Information Submission signed and dated by Respondent Kiriscioglu on April 29, 2013. As observed by Complainant, Respondent Kiriscioglu later contradicted those assertions during the course of his deposition and instead named the Respondent Realty Corporations as the owners of the USTs, which comports with other proposed documentary evidence in the record. Respondents nevertheless continue to argue in their Response that the registration forms identifying

Respondents Aylin, Rt. 58, and Franklin Eagle as the owners of the USTs to VADEQ effectively control for enforcement purposes pursuant to guidance from VADEQ in the record, which acknowledged that the registration form was once considered a reflection of the parties' intent to separate a UST from the land, such that it became the personal property of the entity registering it. While Respondents' reliance upon guidance from VADEQ – with respect to this issue and others – is questionable in terms of absolving Respondents of liability in this proceeding, I find that, in general, an evidentiary hearing is the most appropriate environment within which to address inconsistencies in the record, and more specifically with regard to inconsistencies regarding the issue of ownership.

As for Respondents' alleged failure to comply with the given provisions of the VA UST Rules as charged in Counts 2 through 17 of the Amended Complaint, I agree with Complainant that Respondents raise a number of legal issues in opposition to Complainant's request for accelerated decision and fail to support some of their contentions with citations to evidentiary material in the record. Nevertheless, I find that Respondents have contested some of the material facts in this proceeding to an extent that a ruling on liability as a matter of law is inappropriate. For instance, as described above, Respondents challenge Complainant's position on the sufficiency of the records produced by Respondents to demonstrate release detection for the USTs at each Facility, and while they do not necessarily cite to evidentiary material that calls Complainant's stance into question, they urge that they be afforded the opportunity to cross-examine Mr. Ma and Mr. Cignatta, whose affidavits Complainant cited in support of its position, on this subject at hearing. Respondents also dispute that certain equipment at the Facilities was subject to the requirement that corrosion protection systems "be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground" and, in support, point to photographs taken during EPA's inspections of the Facilities that arguably show that the subject equipment was not, in fact, in contact with the ground. Under the standard of adjudication for a motion for accelerated decision, Respondents thus appear to have minimally shown the existence of some genuine issues of material fact regarding their alleged failure to comply with the given provisions of the VA UST Rules, and I find that allowing further development of these issues in the context of an evidentiary hearing is more appropriate than deciding them now as a matter of law in the course of an accelerated decision.[6]

In conclusion, I am compelled to find that genuine issues of material fact exist in this

[6] As previously noted, even if accelerated decision appears to be technically proper upon review of the evidentiary material in the record of a proceeding, sound judicial policy and the exercise of judicial discretion support this Tribunal's denial of accelerated decision in order for the case to be developed more fully at hearing. *See Roberts v. Browning*, 610 F.2d at 536; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255 ("[T]he trial court may . . . deny summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial.").

proceeding with respect to the critical elements of Complainant's *prima facie* case for the violations charged in Counts 2 through 17 of the Amended Complaint and that an evidentiary hearing is warranted.[7] For these reasons, Complainant's AD Motion is hereby **DENIED**.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: March 24, 2016
Washington, D.C.

[7] Having concluded that genuine issues of material fact exist with respect to Complainant's *prima facie* case, I have not reached the issue of any affirmative defenses raised by Respondents in their Amended Answer.

Docket No. RCRA-03-2013-0039

In the Matter of *Aylin, Inc., RT. 58 Food Mart, Inc., Franklin Eagle Mart Corp., Adnan Kirisciogl u d/b/a New Jersey Petroleum Organization a/k/a NJPO, 5703 Holland Road Realty Corp., 8917 South Quay Road Realty Corp., and 1397 Carrsville Highway Realty Corp.*, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order on Complainant's Motion for Partial Accelerated Decision, dated March 24, 2016, was sent this day in the following manner to the addresses listed below.

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Paralegal

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