

of General Counsel. Ashby Dyke, Esquire, and Major Robert Cottel, Esquire, appeared on behalf of Respondent.

Counsel for both parties requested a conference off the record with the undersigned Presiding Judge prior to commencement of any oral argument. The request was granted. During the conference, counsel for Respondent orally requested a stay of the proceedings as to the penalty issues, pending an opinion by the Department of Justice's Office of Legal Counsel ("OLC") as to EPA's authority to impose fines against Federal facilities for violations of UST requirements. On or about April 18, 1999, the Department of Defense had submitted a request to OLC to render such an opinion. Respondent's counsel stated that such an opinion was expected to be issued in July 1999. Counsel for Complainant concurred in the Respondent's motion for a stay of proceedings pertaining to the penalty. The parties agreed that the OLC's opinion would be binding on the parties as to the penalty issues in this proceeding. The parties agreed that there are no genuine issues of material fact as to liability, except as to allegations in Count I with respect to Tank Number 6. Respondent's counsel asserted that Respondent had complied with the Compliance Order set forth in the Amended Complaint. Complainant's counsel indicated that it had not yet verified such compliance.

The request for stay was granted during the conference, ⁽²⁾ and therefore the oral argument, which would pertain only to penalty issues, was canceled.

Due to the stay of proceedings on the penalty issue, the only parts of this proceeding which may be addressed at this time are the question of Respondent's liability for the alleged violations, and the Compliance Order set forth in the Amended Complaint.

II. Complainant's Motion for Accelerated Decision

The Amended Complaint alleges two counts of violation of the Federal UST regulations at 40 C.F.R. Part 280. ⁽³⁾ Count I alleges that USTs at Respondent's facility, designated as Tank Numbers 5, 6, 7, 8 and 10, did not meet the performance standards of 40 C.F.R. § 280.20 for new UST systems or the upgrading requirements of 40 C.F.R. § 280.21 for existing UST systems, and were each closed and removed from the ground more than 12 months after their respective dates of last use, in violation of 40 C.F.R. § 280.70(c). ⁽⁴⁾ Count II alleges that Respondent reported to the District of Columbia Department of Consumer and Regulatory Affairs that Respondent's USTs designated Tank Numbers 4, 5, 6, 8, and 10 failed tank tightness testing, indicating that a release may have occurred, but that Respondent did not report within 24 hours after the date of the latest failed test, as required by 40 C.F.R. § 280.50. ⁽⁵⁾

In its Answer to the Amended Complaint, Respondent admits all allegations of fact in Count II, and admits the allegations of fact in Count I, except that Respondent denies that Tank Number 6 was removed more than 12 months after its last use. In its Prehearing Exchange Statement, dated January 22, 1999, Respondent asserts that Tank Number 6 was in use on a continuous basis to fuel a back up generator, except for brief periods of repair, until weeks before its removal. Respondent's Prehearing Exchange Exhibits 5 and 6, which are respectively 1995 and 1996 District of Columbia Department of Consumer and Regulatory Affairs registration certificates for Respondent's USTs, indicate that Tank Number 6 was storing diesel fuel but that Tanks Number 5, 7, 8 and 10 were temporarily out of service.

In its Response to Complainant's Motion for Accelerated Decision, Respondent

asserts as follows with regard to the issue of liability:

As it is Respondent's position that this enforcement action should be dismissed for lack of jurisdiction to decide the legal issues presented, and because EPA has no authority to impose fines against other federal agencies, Respondent's Motion to Dismiss the First Amended Complaint is incorporated herein by reference as its response to the liability issue of Complainant's Motion for Accelerated Decision.

While Respondent asserts a lack of jurisdiction with regard to the legal issues as to the penalty, Respondent acknowledges jurisdiction with regard to compliance orders. In its Motion to Dismiss, Respondent distinguishes EPA's authority to enforce from its authority to assess fines, asserting that in regard to UST requirements, Section 6001(b) of RCRA authorizes the former but not the latter. Section 6001(b) provides, in pertinent part, "The Administrator may commence an administrative enforcement action against any department . . . of the Federal Government pursuant to the enforcement authorities contained in this chapter." Respondent states on Page 9 of its Motion to Dismiss that it "concedes that EPA may initiate actions to require federal agencies to comply with UST regulations." Respondent's Answer to the Amended Complaint states that Respondent has no objection to the Complainant's Compliance Order.

A compliance order in regard to USTs is authorized only when EPA determines that "any person is in violation of any requirement of this subchapter [IX of RCRA]." RCRA Section 9006(a). A determination of violation is linked to a compliance order, generally requiring the person to come into compliance with the requirements it allegedly violated. Therefore, a determination as to liability for the alleged violations, and a determination as to whether Respondent has fully complied with the Compliance Order, should be made in order to determine whether it is appropriate to impose the proposed Compliance Order.

As to whether Respondent has fully complied with the terms of the Compliance Order, the statements of counsel at the prehearing conference and a review of the case file in this proceeding do not establish that Respondent has fully complied.

As to the issue of liability for the alleged violations, Complainant may be entitled to an accelerated decision in its favor only if no genuine issues of material fact exist as to liability and it is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). Respondent has raised a material issue of fact with respect to the allegations in Count I as to Tank Number 6, but has not raised any genuine issue of material fact with regard to the remaining issues of liability alleged in the Amended Complaint.

It is noted that Complainant's proposed penalty calculation for Count I appears to encompass multiple penalties, one for each tank. See, Amended Complaint pp. 9-10. This appears to be consistent with following guidance on page 15 of the U.S. EPA Penalty Guidance for Violations of UST Regulations, dated November 14, 1990: "[b]ased on the type of violation . . . , penalties will be assessed on a per-tank basis if the specific requirement or violation is clearly associated with one tank." The Amended Complaint refers to a singular "violation" in Count I. While there are multiple penalties proposed for Count I, only one violation is alleged in Count I. Therefore, the issue of whether Respondent permanently closed Tank Number 6 within 12 months of its last use is relevant only to the amount of penalty and the Compliance Order, and not to the issue of liability. Tank Number 6 was removed, so there is no question that Respondent is subject to the Compliance Order's requirement to comply with the applicable regulations for permanent closure as to Tank Number 6 as well as to Tank Numbers 4, 5, 7, 8, and 10.

Accordingly, Complainant is entitled to judgment as a matter of law that Respondent is liable for a violation of 40 C.F.R. § 280.70(c) and a violation of 40 C.F.R. § 280.50 as alleged in the Amended Complaint. Complainant's Motion for Accelerated Decision will be granted in part, as to liability, and stayed in part, as to penalty issues. The Compliance Order proposed in the Complaint will be incorporated herein.

ORDER

1. Respondent's request for a stay as to penalty issues in this proceeding is **GRANTED**. This proceeding is stayed with respect to all penalty issues, including those raised in Complainant's Motion for Accelerated Decision on the penalty and in Respondent's Motion to Dismiss, until the date that the Department of Justice Office of Legal Counsel issues its opinion as to EPA's authority to assess penalties against Federal facilities for alleged violations of UST requirements.

2. Complainant's Motion for Accelerated Decision is **GRANTED, in part, as to the issues of Respondent's liability for both Counts I and II alleged in the Amended Complaint.**

3. Any party's objection to any portion of the summary of the prehearing conference herein shall be filed within ten days of the date of service of this Order. The portion of this Order summarizing the prehearing conference shall be presumed agreeable to both parties fifteen days after the date of service shown below if no such objection is received.

4. *To the extent Respondent has not already satisfied the requirements of the following Compliance Order*, Respondent shall, pursuant to the authority of Section 9006 of RCRA, 42 U.S.C. § 6991e:

A. Within thirty (30) calendar days of the effective date of this Order:

1. Commence, and thereafter complete, the closure procedures for Tank Nos. 4, 5, 6, 7, 8, and 10 at the Facility in accordance with 20 District of Columbia Municipal Regulations Chapter 61;
2. Submit to the District of Columbia's Environmental Health Administration ("DCEHA") and EPA for review and comment a Standard Operating procedure for UST Management ("UST Manual") at the Facility to ensure compliance by Respondent with the District of Columbia's UST regulations. The UST Manual shall include, at a minimum, procedures for complying with release detection, closure, record keeping and notification requirements for all USTs at the Facility, as well as procedures for the designation and training of personnel at the Facility responsible for compliance with UST requirements. Within ten (10) days of the Respondent's receipt of DCEHA's and EPA's comments on the UST Manual, Respondent shall revise the UST Manual in accordance with DCEHA's and EPA's comments and provide a copy of the revised UST Manual to DCEHA and EPA. Respondent shall thereafter implement the provisions of the UST manual at the Facility. Nothing in this Paragraph 2 shall in any way be construed to limit Respondent's obligations to otherwise comply with the District of Columbia's EPA-authorized UST regulations and other applicable law;

B. Within forty-five (45) calendar days of the effective date of this Compliance Order, submit a report to EPA which demonstrates and certifies whether or not Respondent is in compliance with the terms of this Compliance Order;

C. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any findings or makes any representations concerning Respondent's compliance or noncompliance with this Compliance Order shall be certified by the commanding officer of the Facility;

D. The certification of the commanding officer of the Facility required above shall be in the following form:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete, I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____

Name: _____

Title: _____

E. All documents and reports to be submitted pursuant to this Compliance Order shall be sent to the following persons:

1. Documents to be submitted to EPA shall be sent certified mail, return receipt requested to:

Mr. Michael P. Cramer (3WC31)
United States Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103

and

Ms. Bernadette M. Rappold (3RC30)
United States Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103

2. One copy of all documents submitted to EPA shall be sent by regular mail to:

Mr. V. Sreenivas, Ph.D.
Chief of the UST Branch
Environmental Health Administration
Department of Health, Suite 203
2100 Martin Luther King, Jr. Avenue S.E.
Washington, D.C. 20020-5732

F. Respondent is hereby notified that failure to comply with any of the terms of this Compliance Order may subject it to imposition of a civil penalty up to \$27,500 for each day of continued noncompliance, pursuant to Section 9006(a) (3) of RCRA, 42 U.S.C. § 6991(a)(3).

Susan L. Biro
Chief Administrative Law Judge

Dated: May 25, 1999
Washington, D.C.

1. Complainant subsequently requested that the oral argument in this case be consolidated with the oral argument scheduled for the same date in another proceeding against the same Respondent, U.S. Department of the Army, Walter Reed Medical Center in regard to its facility located at the Forest Glen Annex in Silver Spring, Maryland, Docket number RCRA-9009-054. The request was granted.
2. A stay of proceedings is a matter of discretion for the presiding judge. *See, Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Unitex Chemical Corp.*, EPA Docket No. TSCA-92-H-08, 1993 EPA ALJ LEXIS 146 (ALJ, Order Staying Proceedings, March 18, 1993)(granting a stay of one year or until decision by D.C. Circuit, whichever occurs first, where D.C. Circuit had already scheduled briefs and oral argument, and decision would affect most or all claims in the administrative proceeding); *citing, General Motors Corp.*, EPA Docket No. II-TSCA-PCB-91-0245 (ALJ, Order Staying Proceedings, February 5, 1993).
3. The District of Columbia's UST program, set forth in the District of Columbia Municipal Regulations, was not finally authorized by EPA until May 4, 1998, after the violations alleged in the Amended Complaint occurred.
4. Section 280.70(c) provides that a UST temporarily closed more than 12 months must be permanently closed, pursuant to requirements set forth in Sections 280.71 through 280.74, if it does not meet the standards of Section 280.20 or 280.21.
5. Section 280.50 requires UST owners and operators to report to the implementing agency within 24 hours in the event that monitoring results from a release detection method indicate that a release may have occurred, unless the monitoring device is found defective, and additional monitoring does not confirm the initial result.

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