UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

I. Procedural History

A Complaint initiating this proceeding was filed on June 19, 2000, alleging that Goodman Oil Company violated Section 9003 of the Resource Conservation and Recovery Act, (RCRA), and regulations promulgated thereunder concerning underground storage tanks (USTs). Complainant, Unit Manager of the Groundwater Protection Unit, Region 10 of the United States Environmental Protection Agency, alleged in the Complaint 35 counts of UST violations. Goodman Oil Company (Goodman) answered the Complaint, prehearing exchanges were filed, and this matter was set for hearing.

On March 2, 2001, Complainant submitted a Motion to Amend Complaint And Compliance Order To Add Respondent And To Withdraw Certain Claims. The Motion was granted, adding Goodman Oil Company of Lewiston (Goodman Lewiston) as a Respondent in this matter. The Amended Administrative Complaint and Compliance Order (Amended Complaint), filed on April 4, 2001, alleged 23 counts of violation and proposed a penalty of $545,194 against Goodman, and alleged four counts of violation and proposed a penalty of $88,276 against Goodman Lewiston. The Respondents submitted an Answer to the Amended Complaint on May 4, 2001, denying the violations, asserting several defenses and requesting a hearing. Prehearing exchange information was supplemented by the parties. The hearing schedule was revised and the hearing was rescheduled to commence on September 11, 2001.

On July 6, 2001, Complainant filed a Motion For Partial Accelerated Decision on Liability and Defenses and Memorandum in Support (Motion), requesting an accelerated decision on Respondents' liability for Counts 1 through 6, 15 through 22, and 27, and on Respondents' Affirmative Defenses. Pursuant to an extension of time, Respondents submitted a Memorandum in Opposition on July 31, 2001 (Opposition). Complainant filed a Reply to the Opposition on August 17, 2001.

II. Factual Background

Respondents own and/or operate USTs and UST systems which contained petroleum and which are located at several facilities in the State of Idaho. Goodman Lewiston is a wholly owned subsidiary of Goodman, with the same officers and registered agents. In 1991, 1992, 1993, and 1998, EPA conducted inspections of several of Respondents' facilities and issued Respondents field citations for UST violations, including release detection violations, for which Respondents paid penalties to EPA. Goodman's secretary-treasurer issued a statement, dated July 28, 1998, claiming that it met the financial test for self insurance to meet the requirements for financial responsibility, set forth in 40 C.F.R. § 280.95. On or about June 10, 1999, EPA conducted an inspection of Goodman's headquarters in Boise, Idaho, and examined records of its facilities. On July 9, 1999, EPA requested further information from Goodman, concerning its USTs in Idaho. By letter dated July 30, 1999, Goodman provided additional information to EPA. EPA issued a request for information under Section 9005 of RCRA to Goodman on November 3, 1999. Goodman responded to the request on December 21, 1999. On October 2, 2000, EPA sent Goodman Lewiston a request for information under Section 9005 of RCRA. By letter dated October 18, 2000, former counsel for Respondents responded to the request by indicating that it would not provide the information requested under the circumstances.

The Amended Complaint alleges in Count 1 that Goodman failed to permanently close a UST system at its Capitol Exxon facility within the 12-month temporary closure period. Counts 2 through 6 allege that Goodman failed to demonstrate that it met financial responsibility requirements for USTs at five of its facilities. The Amended Complaint alleges in Counts 7 though 14 that Goodman and Goodman Lewiston failed to properly conduct inventory control for several months at certain facilities. Counts 15 through 17 allege that Respondent[1] failed to upgrade piping which routinely held petroleum but which had not been cathodically protected at facilities owned by Goodman. The Amended Complaint alleges in Counts 18 through 22 that Goodman continued to use steel tanks that had not been upgraded at five of its facilities. In Counts 23 and 24 Goodman is alleged to have failed to notify EPA of the Idaho State Division of Environmental Quality when inventory control records for several months showed that two tanks had a suspected release, and in Counts 25 and 26 Goodman is alleged to have failed to investigate a suspected release from those tanks. Count 27 alleges that Goodman Lewiston failed to provide complete and accurate responses to the October 2, 2000 Information Request.

III. Discussion

[1] The Amended Complaint refers in Counts 15 through 17 to "Respondent" without specifying either Goodman or Goodman Lewiston. However, because the Amended Complaint refers in those Counts to the particular facilities by name, and alleges in Paragraph 2 that they are owned by Goodman, there is no ambiguity.

Complainant asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law as to Respondents' liability for Counts 1 through 6, 15 through 22, and 27 of the Amended Complaint. Complainant also seeks a dismissal of Respondents' Affirmative Defenses. Respondents argue that factual disputes exist which preclude accelerated decision as to liability, withdraw a few of the Affirmative Defenses, and oppose dismissal of other Affirmative Defenses.

A. Standards for Accelerated Decision

The Consolidated Rules of Practice provide, at 40 C.F.R. § 22.20(a), in pertinent part, as follows:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of a 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.

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decision under the Consolidated Rules of Practice. *Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995); *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 1995 TSCA LEXIS 10 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact, "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting Fed. R. Civ. Proc. 56(c) . Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Clarksburg Casket Company,* EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); *Green Thumb Nursery,* 6 E.A.D. 782, 793 (EAB 1997). A factual issue is "*material* where, under the governing law, it might affect the outcome of the proceeding," and is "*genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." *Clarksburg Casket,* slip op. at 9. The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990).

B. Count 1

Count 1 alleges that Goodman failed to permanently close the USTs at its Capitol Exxon facility within 12 months of temporary closure, in violation of 40 C.F.R. § 280.70(c), which provides in pertinent part:

> When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21 . . . Owners and operators must permanently close the substandard UST systems by the end of this 12-month period in accordance with §§ 280.71-280.74, *unless* the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with § 280.72 before such an extension can be applied for.

Complainant presents evidence that the USTs at the Capitol Exxon were not in operation and were not upgraded at the time of the EPA inspection on May 18, 1998, and that Goodman's records show that the USTs were closed in February 1998. Complainant's Prehearing Exchange Exhibits ("CX") 44, 45. Goodman stipulates that it ceased using the USTs at the Capitol Exxon in February 1998. Stipulations, dated February 14, 2001 ("Stip.") ¶ 23; Respondents' Prehearing Exchange statement at p. 5, ¶ 4.6. Complainant points out that Goodman admits that the tanks were not emptied until November 1999. Respondents' Prehearing Exchange statement at p. 5, ¶ 4.6. Therefore, Complainant asserts, the USTs at the Capitol Exxon were temporarily closed in February 1998 and were not permanently closed within 12 months. Complainant asserts that Goodman never applied for or received an extension of time to permanently close the tanks. Complainant points out that Goodman has presented no evidence that the USTs at the Capitol Exxon were *ever* permanently closed. Complainant therefore asserts that no genuine issues of material fact exist as to Goodman's liability for Count 1.

In its Opposition, Goodman asserts that genuine issues of material fact exist as to whether EPA "tacitly" granted Goodman an extension of the 12-month temporary closure period. Opposition at 4. Goodman presents an Affidavit of Charles D. Conley, president of Goodman, in which Mr. Conley states that on May 19, 1998, he signed an Expedited Compliance Order and Settlement Agreement regarding the Capitol Exxon facility. Conley Affidavit ¶ 6, attached to Opposition. The Compliance Order required Goodman to either conduct inventory control by sticking the tanks, or to drain the tanks, but did not require Goodman to permanently close the tanks within any specific time frame, although EPA knew that the USTs were out of service. CX 47. Respondents point out that EPA inspected other Goodman facilities, Nampa and Americana, at which EPA knew the USTs were out of service for almost a year, and that no violations were noted at one, and at the other, Goodman was merely ordered to maintain inventory control or drain the tanks.[2] CX 49, 60. In a letter dated September 4, 1998, stating that Goodman's

[2] It is noted, however, that the Inspection Report for the Americana facility states that "Tanks should be out by 7/1/98," which is twelve months after the USTs were taken out of

documentation shows correction of violations at the Capitol facility, EPA did not instruct Goodman to permanently close those USTs pursuant to any time frame. CX 69. Mr. Conley asserts that at no time did any EPA inspector provide a deadline for removal of the tanks at the Capitol Exxon facility. Conley Affidavit ¶ 8. Goodman asserts that it expressly relied upon EPA's verbal instructions for temporarily closed facilities and the Compliance Order, and diligently maintained inventory control of the Capitol Exxon UST system. Conley Affidavit ¶ 4; Affidavit of Kent Lamberson, attached to Opposition, ¶ 4. Respondent asserts that the USTs were drained in October 1999 and are currently empty. Lamberson Affidavit ¶¶ 7, 8. Goodman emphasizes that tank tightness tests were performed, and the tanks were found to be tight. CX 46, 134.

In addition, Goodman argues that 40 C.F.R. § 280.70(c) does not require permanent closure of the tank prior to the end of the 12 month period of temporary closure, but argues instead that that regulation allows a reasonable period of time *after* the 12 month period to accomplish permanent closure. Goodman bases this interpretation on the language of Section 280.70(c), "temporarily closed for more than 12 months" and "must permanently close . . . at the end of this 12-month period," on the provision allowing an extension of time, and on the fact that closure cannot occur instantaneously. Goodman argues further that the regulation does not require a written application for an extension of time. Goodman presents evidence that, as to the requirement for completion of a site assessment, it completed a site assessment at the Capitol Exxon in 1994, and submitted the results to the Idaho Department of Environmental Quality (IDEQ). Respondents' Prehearing Exchange Exhibit ("RX") 56.

Goodman argues in support of its Twelfth Affirmative Defense[3] that genuine issues of material fact exist as to whether EPA should be estopped from seeking a penalty for Count 1. Goodman recognizes that a party asserting estoppel against the Government must prove that the Government engaged in "affirmative misconduct" in addition to the traditional elements of estoppel. Goodman claims that EPA, through its written and oral instructions to Goodman to maintain inventory control for temporarily closed USTs, "led Goodman to believe that it would be allowed a reasonable period of time to close the UST system . . . provided Goodman maintained strict control over the inventory and drained the tanks within a reasonable time." Opposition at 17. Goodman points out that, "[w]hen necessary, EPA has not hesitated to instruct Goodman in writing to close a UST system." *Id.* RX 55 (EPA letter to Goodman, dated June 23, 1995, requesting Goodman to close USTs which contain petroleum substance, posing a current threat to human health and the environment).

Finally, in the alternative, Goodman argues that, in the event it is found that an extension of time was not granted, genuine issues of material fact exist regarding the extent of liability, as

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service. CX 49.

[3] Respondents' Twelfth Affirmative Defense states, "EPA's enforcement action is barred by the equitable doctrines of estoppel, laches and unclean hands."

to when Goodman was required to remove the USTs, and as to a UST that was taken out of service prior to 1988.

It is undisputed that Goodman temporarily closed the USTs at the Capitol Exxon facility in February 1998, that the tanks were not upgraded, and that the tanks were not drained until October or November 1999, at least eight months after the 12 month period. However, merely draining the tanks does not constitute permanent closure. Section 280.70(c) requires permanent closure "in accordance with §§ 280.71-280.74." Those provisions require not merely draining the tanks, but also submitting notification of permanent closure, subsequent assessment of the excavation zone pursuant to § 280.72, removing the tanks from the ground or filling them with inert solid material, and maintaining records that are capable of demonstrating compliance with closure requirements. 40 C.F.R. §§ 280.71, 280.72, 280.74. Viewing the record in light most favorable to Respondents, Goodman has not shown that the Capitol Exxon UST system met those requirements for permanent closure. Thus, Goodman has not set forth a factual basis for examining an argument that Section 280.70(c) allows a reasonable time after the 12 month period to complete closure since Goodman has not shown that it permanently closed the USTs at the Capitol Exxon facility within any time period.[4]

Furthermore, Goodman has not provided specific facts showing that there is a genuine issue for trial as to an extension being granted. Goodman has not identified any period of extension that was granted, nor has it shown that it completed permanent closure in compliance with any such extension. An extension of time is not material to the issue of Goodman's liability if it did not comply with any such extension of time. No inference can be drawn that EPA granted an indefinite extension of time, as an indefinite extension would amount essentially to a waiver of the regulatory requirement, which is not authorized by the regulations or suggested by EPA's Enforcement Strategy documents. *See*, RX 62 ("we are not extending the deadline . . ."). Therefore, Goodman has not raised any genuine issue of material fact as to an extension being granted.

As to the estoppel argument, courts have routinely held that "mere negligence, delay, inaction, or failure to follow Agency guidelines" do not constitute affirmative misconduct sufficient to estop the Government. *BWX Technologies, Inc.*, RCRA (3008) App. No. 97-5, 2000 EPA App. LEXIS 9 * 50 (EAB, April 5, 2000)(quoting *Board of County Commissioners of County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985)(neither carelessness nor reluctance to be of assistance are tantamount to affirmative misconduct); *Landfill, Inc.*, 3 E.A.D. 461, 468 (CJO, November 30, 1990)(EPA is not estopped from taking enforcement actions against individuals who rely on administrative advice); *United States v. Bloom*, 112 F.3d 200 (5th Cir. 1997)(assertions of

[4] The Environmental Appeals Board (EAB) has held that Section 280.70(c) requires UST owners and operators to "implement permanent closure of the tanks within 12 months of their temporary closure." *V-1 Oil Company*, RCRA (9006) Appeal No. 99-1 (EAB, Feb. 25, 2000), slip op. at 25.

inaction do not qualify as affirmative misconduct); *United States v. Lacks Industries*, 29 E.R.C. 2035 (W.D. Mich. 1989)(state's acquiescence does not excuse violation of RCRA). Affirmative misconduct means an affirmative act of misrepresentation, or concealment of a material fact. *United States v. Ruby Co.*, 588 F.2d 697, 703-704 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). Reliance on a government employee's misrepresentation is not reasonable if the requirements of the statute or regulation are clear. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996). The requirements of 40 C.F.R. § 280.70(c) are "clear and unambiguous." *V-1 Oil Company*, slip op. at 32.

Considering such case law, Respondents have not asserted facts constituting affirmative misconduct upon which a claim of estoppel against the Government successfully can be based. Goodman states that during the inspection on May 18, 1998, it informed the EPA inspectors that its intention at the time was to upgrade the facility. Opposition at 4. On that information, EPA could have reasonably expected that Goodman would reactivate, rather than close, the tanks. The Compliance Order (directing Goodman to maintain inventory control or drain the tanks) and the September 4th letter (evidencing Goodman's corrections of violations) were issued before the 12 month period for permanently closing the tanks had elapsed. Neither rise to the level of an affirmative act of misrepresentation or concealment of a material fact. CX 47, 69. Goodman therefore has not raised any genuine issue of material fact as to Count 1 on its estoppel argument.

Moreover, Goodman states that it is "not requesting that EPA be estopped from enforcing the permanent closure standards," but is "requesting that EPA be estopped from assessing a civil penalty against Goodman" for Count 1. Opposition at 17-18. Thus, Goodman appears to concede that the estoppel argument should be considered on the issue of the penalty rather than as a defense to liability. As to the arguments as to the *extent* of Goodman's liability, they too are relevant to the amount of penalty rather than to the issue of whether Goodman is liable for violating 40 C.F.R. § 280.70(c).

C. Counts 2 through 6

Counts 2 through 6 allege that from April 26, 1991 to the present, Goodman failed to demonstrate that it met the financial responsibility requirements of 40 C.F.R. § 280.93(a) for USTs at five facilities: at the Capitol Exxon facility (Count 2), the Collister Exxon (Count 3), the Homedale Tiger Mart Exxon (Count 4), the Nampa Exxon (Count 5), and the Weiser Exxon (Count 6). Section 280.93(a) provides as follows:

> Owners and operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following per-occurrence amounts * * * *

Petroleum marketing firms which own 13-99 USTs at more than one facility are required to

comply with the financial responsibility requirements by April 26, 1991, under 40 C.F.R. § 280.91(c). One of the mechanisms for compliance is to pass a financial test of self-insurance. 40 C.F.R. § 280.95. To demonstrate that the financial test is met, the regulations require, *inter alia*, that "the chief financial officer of the owner or operator, or guarantor, must sign, within 120 days of the close of *each financial reporting year*" a letter worded exactly as set forth in the regulations. 40 C.F.R. § 280.95(d)(emphasis added). One of the requirements of the financial test of self-insurance is for the owner, operator, or guarantor to have $10 million in tangible assets. 40 C.F.R. §§ 280.95(b)(2), 280.95(c)(1)(requiring financial test of 40 C.F.R. § 264.147(f)(1) be met), 264.147(f)(1)(B).

The parties agree that Goodman owns between 13 and 99 USTs at more than one facility. Stip. ¶ 1. The parties also agree that in a notice dated July 28, 1998, Goodman's secretary-treasurer indicated that Goodman and its subsidiaries held fee simple assets worth greater than $5 million, and that it therefore claimed that it met the financial test set forth in § 280.95 to use self-insurance as its financial responsibility mechanism. Stip. ¶ 9; CX 66.

Complainant asserts that the letter does not meet the regulatory requirements. Specifically, it does not show that Goodman had $10 million in tangible net worth, as required by § 280.95(b)(2), and does not include the certification language required by § 280.95(d). Goodman's subsequent responses to EPA's notice that the letter was inadequate also failed to meet the regulatory requirements. CX 73, 88. Complainant asserts that Goodman has presented no evidence that it has met those requirements at any time over the past five years that the USTs at the five facilities were in operation. Complainant explains that financial responsibility requirements applied not only during the time the USTs stored fuel, but also until the time that the USTs are properly closed.

Goodman expressly concedes that it did not meet the "technical" requirements for financial responsibility. Opposition at 9. Nevertheless, it asserts that summary judgment on these counts should not be granted because there are genuine issues of material fact existing in regard to its affirmative defenses of arbitrary and capricious government action (Fourth Affirmative Defense) and selective enforcement (Third Affirmative Defense).

D. Arbitrary and Capricious Government Action

Respondents' Fourth Affirmative Defense states that "EPA's actions are arbitrary, capricious, an abuse of discretion and unconstitutional." Respondents assert that genuine issues of material fact exist as to whether EPA is enforcing the UST regulations consistently and predictably in this case. Respondents argue that when EPA does not act in a consistent and predictable manner, it risks having its action invalidated under Section 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), citing *United States v. One 1985 Mercedes*, 917 F.2d 415, 421-422 (9th Cir. 1990). Section 706(2) of the APA provides, in pertinent part: "To the extent necessary to decision and when presented, the reviewing court . . . shall – . . . hold unlawful and set aside agency action, findings and conclusions found to be – (A)

arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law . . . ."

In support, Respondents present four arguments: (1) that EPA gave inconsistent verbal and written instructions for UST closure; (2) that EPA did not physically inspect or request records from the Goodman Lewiston facilities prior to issuing the Complaint; (3) that between 1988 and 2000, EPA Region 10 collected merely $133,652 in UST penalties yet seeks $633,479 from Respondents; and (4) that EPA's enforcement policy regarding UST upgrades created confusion in the regulated community regarding whether extensions of time were granted, yet EPA seeks penalties of $106,920 from Goodman because it missed the upgrade requirement for five of its facilities by merely a few weeks. Opposition at 20.

The APA provision cited by Respondents governs the scope of judicial review, and pertains only to a *reviewing court*, not to an Administrative Law Judge. Sections 554 through 558 of the APA are the provisions which are applicable to this proceeding. Therefore, to the extent that Respondents rely on Section 706 of the APA, their argument as to arbitrary and capricious action on the part of EPA is rejected. However, on the basis that an Administrative Law Judge may make findings and conclusions "on all the material issues of fact, law or discretion presented in the record" under Section 557(c) of the APA, Respondents' four arguments are addressed as follows.

Goodman's first argument as to inconsistent instructions for UST closure was discussed above as to Count 1, and found not to raise any dispute of material fact as to liability. The second argument concerns Goodman Lewiston and, as discussed below as to Count 27, does not establish any improper conduct on the part of EPA, and is thus not material to Respondents' liability. The third and fourth argument are relevant only to the amount of penalty and, as to the fourth argument specifically, it is discussed in detail below with respect to Counts 15 through 22.

E. Selective Enforcement

Respondents' Third Affirmative Defense states that "EPA's Amended Complaint is the result of bias and prejudice against Respondents on the part of EPA and EPA officials." Respondents assert that they have presented evidence on both elements of a selective enforcement defense: that EPA singled out Respondents while other similarly situated violators were left untouched, and that EPA's selection of Respondents was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.

Respondents again argue that EPA seeks penalties greatly in excess of the total penalties that EPA Region 10 has collected over the past twelve years of the UST program. In addition, Respondents assert that they were singled out for enforcement of the tank upgrading requirements, because EPA allowed flexibility for certain owners and operators regarding the tank upgrading deadline after announcing that no extensions of deadlines would be granted, and because states have formally granted extensions. RX 62, 63, 64. Respondents request additional

time to complete and develop facts as to being singled out for enforcement, as present counsel entered this case late in the proceeding.

Respondents assert that the evidence raises a genuine dispute as to "whether EPA selected Respondents for prosecution as part of an effort to prevent Goodman from exercising its constitutional right to judicial redress." Mr. Conley states in his Affidavit that he "believe[s] that EPA's current enforcement action is in retaliation for Goodman's consistent support of the constitutional rights of Indians." Conley Affidavit ¶ 14. Goodman for several years has supplied fuel to Indian tribes, and Idaho courts recently have ruled in Goodman's favor where Idaho attempted to levy fuel tax against Goodman for sales to the Coeur D'Alene Tribe. Conley Affidavit ¶¶ 14-16; RX 35. A Nevada district court judge held unlawful Nevada's attempt to tax Goodman's sale of fuel to a tribe. RX 52. Respondent points out another company which successfully challenged in the Idaho courts a transfer fee, under Idaho law, as an unlawful gasoline tax, and which company was also the subject of an EPA administrative complaint for UST violations. Goodman presents an Associated Press article published in the *Idaho Statesman*, reporting not only on the present EPA action but also on Goodman's legal battles in favor of the Coeur D'Alene Tribe. RX 54. Mr. Conley states that Goodman has been the target of state tax auditors investigating Goodman's sales of fuel to Indians. Conley Affidavit ¶ 17.

Respondents acknowledge that the standards for selective enforcement are "rigorous." Opposition at 21; *see, B & R Oil Co.*, RCRA (3008) App. No. 97-3, 1998 EPA App. LEXIS 106 (EAB, Nov. 18, 1998); *United States v. Production Plated Plastics*, 742 F.Supp. 956, 962 (W.D. Mich. 1990), *opinion adopted by* 955 F.2d 45 (6th Cir. 1992), *cert. denied*, 506 U.S. 820 (1992). The Supreme Court has stated, "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Indeed, "Agency officials have broad discretion in deciding against whom to institute disciplinary proceedings." *Allred's Produce v. Dep't of Agriculture*, 178 F.3d 743, 747 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999)(there is no authority for the proposition that "an otherwise culpable violator is shielded from the consequences of this actions simply because [the law] is applied unevenly . . ."); *see also, Production Plated Plastics*, 742 F.Supp. at 962. To make a claim that enforcement action was in bad faith based on a desire to prevent the exercise of a constitutionally protected right, a defendant has been required to show: "(1) the exercise of a protected right; (2) the prosecutor's 'stake' in the exercise of that right; (3) the unreasonableness of the prosecutor's conduct; and, presumably, (4) that the prosecution was initiated with the intent to punish the [defendant] for exercise of the protected right." *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996).

The question of whether Goodman has shown that it was singled out for enforcement which other similarly situated UST owners or operators were left untouched need not be reached, as Goodman clearly does not meet the second element of a selective enforcement defense. Goodman does not explain how the present enforcement action is related to prevention of its right to judicial redress, and does not assert or show any "stake" of EPA Region 10 in the exercise of that right. Goodman does not provide any explanation, nor can any be inferred, as to how the actions of states in levying taxes on fuel bears any connection to the action of the EPA

in enforcing Federal UST regulations. The *Idaho Statesman* article draws no connection between the state tax cases and the EPA action. RX 54. Mr. Conley's belief that EPA acted in retaliation does not indicate any personal knowledge, but is merely conjecture and surmise, which is not sufficient to defeat a motion for accelerated decision. *Kulak v. City of New York*, 85 F.3d 63, 71 (2nd Cir. 1996)("conclusory statements, conjecture or speculation by the party resisting the motion will not defeat summary judgment"); *D'Amico v. City of New York*, 132 F.3d 145, 149 (2nd Cir.), *cert. denied*, 524 U.S. 911 (1998)(the non-moving party may not rely upon mere conclusory allegations or speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful"). Viewing the evidence in light most favorable to Respondents, no reasonable inference can be drawn that EPA's selection of Respondents was in bad faith based on the desire to prevent the exercise of a constitutional right. No reasonable finder of fact could conclude, based on the evidence presented by Respondents, that retaliation or other improper motive actually motivated EPA's decision to file the Complaint in this matter.

As to Respondents' request to be given time to fully develop the record in support of its selective enforcement defense, the discovery phase of this litigation, in which present counsel for Respondents participated, is closed. Respondents' prehearing exchanges were due on June 8, 2001, and all pretrial motions were due on July 20, 2001. Respondents, having engaged their present counsel in this matter four months ago, did not move for discovery by July 20, 2001. Moreover, the "mere allegation of selective prosecution does not require discovery or an evidentiary hearing . . . [t]he defendant must first make a preliminary or threshold showing of the essential elements of the selective prosecution defense." *United States v. Jacob*, 781 F.2d 643, 646 (8th Cir. 1986). Respondents have not made any such preliminary showing.

In sum, Respondents have not raised any genuine issue that is material to Respondents' liability on the basis of selective enforcement.

F. Counts 15 through 22

Counts 15 through 17 allege that from December 22,1998 through January 17, 1999, "Respondent," presumably Goodman, continued to use metal piping which routinely held petroleum but which had not been cathodically protected, at three facilities: Homedale Tiger mart (Count 15), Nampa Exxon (Count 16), and Weiser Exxon (Count 17). Complainant asserts that these acts constitute violations of 40 C.F.R. § 280.21(c).

Counts 18 through 22 allege that from December 22, 1998 through January 26, 1999, Goodman continued to use steel tanks that had not been upgraded at five facilities: 16th & State Exxon (Count 18), Collister Exxon (Count 19), Homedale Tiger Mart (Count 20), Nampa Exxon (Count 21) and Weiser Exxon (Count 22). In addition, Counts 18 and 19 allege that from December 22, 1998 through February 5, 1999, Goodman continued to use a steel 10,000 gallon tank that had not been upgraded at the respective facilities. Complainant asserts that these acts constitute violations of 40 C.F.R. § 280.21(b).

The regulations provide in Section 280.21, in pertinent part, as follows:

> (a) *Alternatives allowed.* Not later than December 22, 1998, all existing UST systems must comply with one of the following requirements:
> (1) New UST system performance standards under § 280.20;
> (2) The upgrading requirements in paragraphs (b) and (d) of this section; or
> (3) Closure requirements under subpart G of this part . . . .
> (b) *Tank upgrading requirements.* Steel tanks must be upgraded to meet one of the following requirements . . . :
> (2) *Cathodic protection.* A tank may be upgraded by cathodic protection . . . .
> (c) *Piping upgrading requirements.* Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected . . . .

Complainant asserts that since the piping and tanks referenced in Counts 15 through 22 did not meet the new tank performance standards of § 280.20, they were required to be upgraded in accordance with § 280.21. Complainant presents evidence that the piping was galvanized steel and that cathodic protection was not installed until January 17, 1999. CX 11, 12, 13, 14, 24, 25, 28, 29, 126. Complainant also presents evidence that the tanks were asphalt coated or bare steel and were not cathodically protected until at least January 26, 1999. CX 4, 5, 7, 8, 13, 14, 24, 25, 28, 29, 126.

Goodman stipulates that at the respective facilities, it continued to use the piping which was not cathodically protected, and continued to use the tanks which were not upgraded, until sometime in January 1999. Stip. ¶¶ 38-45; Opposition at 10. Goodman asserts that its contractor completed most of the work to upgrade the UST systems before the December 22, 1998 deadline, but that the evidence is disputed as to exactly when the upgrades were completed. A letter from the contractor dated February 25, 2000, indicates that cathodic protection was installed and tested the week of January 17, 1999, but a letter dated January 26, 1999 did not provide such dates. CX 126, 160.

This argument is relevant to the *extent* of Goodman's liability, which is material to the amount of penalty rather than to the issue of whether Goodman is liable for the alleged violations.

Goodman claims that it has presented evidence that EPA was arbitrary and capricious in seeking penalties of $106,920 from Goodman for missing the upgrade requirement for five of its facilities by merely a few weeks. Opposition at 20. In support of the argument, Goodman presents EPA's enforcement strategy documents indicating that EPA would not extend the December 22, 1998 upgrade requirement and would have zero tolerance for violations, and EPA documents dated two weeks prior to the deadline announcing that EPA would not focus inspection resources on certain UST facilities during the first six months after the deadline. RX 61, 62. Goodman's attorney states in an affidavit that Richard Jarvis, the UST program coordinator for IDEQ, "indicated that there was confusion in the regulated community regarding whether any extensions of time had been granted." Affidavit of John McCreedy, dated July 31,

2001, attached to Opposition, ¶ 6.

Goodman has not raised a dispute of material fact by its argument that EPA's decision to enforce the upgrading deadline against it was arbitrary or capricious. EPA's concerns about "unduly impacting small businesses and local governments" merely prompted it to state in a guidance memorandum from EPA's Office of Enforcement and Compliance Assurance to EPA Regional Offices that it would focus its resources over the first six months on "compliance assistance activities, especially for small businesses and local governments, and high priority inspections . . . " RX 62. An attachment to the memorandum specified that during the first six months after the deadline, EPA will not focus its Federal inspection resources on small UST facilities (owned and operated by a person not owning other UST facilities), and USTs owned or operated by local and state governments, but will focus on, *inter alia*, owners and operators of multiple UST facilities, and of facilities that are endangering sensitive ecosystems or sources of drinking water by failing to upgrade, replace or close USTs. *Id.* EPA expressly stated in the memorandum that it is "not extending the deadline" and stated in the attachment that it "does not establish or modify any regulatory requirements" and "cannot be relied upon, to create any right . . . enforceable by any party in litigation with the United States." *Id.* To the extent that Goodman questions the amount of penalty proposed where the deadline was missed by only a few weeks, that question may be relevant to the issue of the penalty, but not to the issue of liability.

Goodman also asserts that genuine issues of material fact exist as to Counts 15 through 22 on the basis of its defense of selective enforcement. As concluded above, Goodman has not raised any genuine issue that is material to liability, on the basis of selective enforcement.

G. Count 27

The Amended Complaint alleges in Count 27 that Goodman Lewiston failed to provide complete and accurate responses to the Section 9005 Information Request dated October 2, 2000. The Information Request stated, "[w]hile EPA has previously received some information which may be responsive to this request from your other company, Goodman Oil Company, EPA has reason to believe that Goodman Oil Company of Lewiston has additional information responsive to this request." CX 185. The Request warned that "[f]ailure to provide complete and truthful responses to this Information Request within ten (10) days of your receipt of this Information Request, or to adequately justify such failure to respond, may subject you to administrative or judicial enforcement action pursuant to Section 9006 of the Act . . . ." *Id.*

Section 9005(a) of RCRA provides, in pertinent part:

> For the purposes of . . . enforcing the provisions of this subchapter, any owner or operator of an underground storage tank . . . shall, upon request of any officer, employee or representative of the Environmental Protection Agency . . . furnish information relating to such tanks . . ."

The regulations provide, at 40 C.F.R. § 280.34, in pertinent part: the "[o]wners and operators of UST systems must cooperate fully with inspections, . . . as well as requests for document submission . . . pursuant to Section 9005 . . . ."

In a letter dated October 18, 2000, Respondents' counsel stated, "[d]ue to ongoing litigation with EPA, Goodman Oil Company of Lewiston is not in a position to respond to the information request for the following reasons." CX 186. Reasons stated are that much of the information is or should be in EPA's possession, that EPA's actions in performing a records inspection after the Complaint was filed are "irregular" and required to be done prior to filing the Complaint, that the Complaint includes allegations of ongoing violations, that Goodman's request for EPA to withdraw its Complaint should be resolved prior to a response, and that Goodman has reason to believe that the inspector is biased against Respondents.

Complainant asserts that Goodman provided some of the information requested in its Prehearing Exchange filed on December 23, 2000, but that Goodman Lewiston has "never" provided the remaining information requested. Motion at 23. Complainant provides a copy of the Information Request and response, points out information that Goodman provided, and identifies information which was not provided by Respondents. CX 185, 186; Motion at 22-23; Reply at 9-10. Complainant states that it submitted its Information Request to Goodman Lewiston only after being informed in Goodman's Answer to the Complaint that certain USTs referenced in the Complaint against Goodman were neither owned nor operated by Goodman. Reply at 8. Complainant asserts that in previous correspondence with EPA, Goodman had not indicated that the USTs at the Lewiston facilities were not owned or operated by Goodman. Reply at 9; CX 133, 143.

Respondents assert that "the record raises a strong inference that Goodman and Goodman Lewiston have already supplied EPA with most of the information requested in the October 2, 2000 Information Request." Opposition at 14. Respondents assert further that EPA should be required to "itemize in detail all information previously supplied regarding the Goodman-Lewiston facilities." *Id.* Respondents maintain their entitlement to a hearing "to determine whether, and to what extent, the information requested was already in EPA's possession." *Id.*

Furthermore, Respondents assert that EPA acted arbitrarily and capriciously in that EPA did not physically inspect or request records from the Goodman Lewiston facilities prior to issuing the Complaint. Respondents' Sixth Affirmative Defense asserts that "EPA failed to conduct inspections, review records, properly interpret records, and comply with all laws, regulations and policies governing EPA's use of its inspection and enforcement authority." The parties stipulated that EPA did not physically inspect or request records from the Tiger Mart # 5, Goodman Oil Bulk Plant and Mountain Mart #2 facilities in Lewiston, Idaho prior to June 19, 2000. Stip.¶¶ 20, 21.

It has been held that "[t]he mere pendency of a related civil action does not automatically preclude EPA's use of other authorized law enforcement techniques," and that use of such techniques does not indicate bad faith. *National-Standard Co. v. Adamkus,* 881 F.2d 352, 363

(7th Cir. 1989)(EPA's inspection of facility under Section 3007(a) of RCRA during the pendency of a related civil action was properly authorized and did not evidence bad faith). The Consolidated Rules of Practice provide at 40 C.F.R. § 22.19(e)(5) that "[n]othing in [the discovery provisions of the Consolidated Rules of Practice] shall limit . . . EPA's authority under any applicable law to conduct inspections, issue information request letters . . . or otherwise obtain information." *See,* 64 Fed. Reg. 40138, 40161 (July 23, 1999)("FOIA requests, inspections, [and] statutorily provided information collection requests . . . issued by an authorized Agency official . . . do not constitute discovery and are not restricted by the [Consolidated Rules of Practice]"). Respondents cite to no authority which requires EPA to complete inspections and information requests of a *subsidiary* of a company, prior to filing a complaint against the *company.*

Complainant has properly supported its request for accelerated decision on Count 27, and listed information which was requested in the Information Request and which Respondents have not provided. Respondents do not set forth specific facts showing that there is a genuine issue for trial, by referencing probative evidence in the record, or by producing such evidence, as to its compliance with the Information Request. As to the argument that Respondents provided "most" of the information requested, this argument relates to the *extent* of Goodman's liability and as such is relevant to the amount of penalty rather than to the issue of liability.

H. Affirmative Defenses

As concluded above, Respondents have not raised any genuine issues of material fact as to liability on its Affirmative Defenses of estoppel, arbitrary and capricious action, selective enforcement, or failure to comply with all laws, regulations and policies governing EPA's use of its inspection and enforcement authority. However, Complainant does not request accelerated decision as to liability for Counts 7 through 14 or Counts 23 through 26, or as to the penalty assessment, and these issues are therefore still in dispute. To the extent that these Affirmative Defenses may be relevant to mitigation of a penalty, and/or to liability for the counts upon which accelerated decision has not been requested, the Third, Fourth, Sixth and Twelfth Affirmative Defenses will not be dismissed on Complainant's Motion for Accelerated Decision.

Respondents expressly withdraw the Second and Ninth Affirmative Defenses, and therefore dismissal of those Defenses is moot. Opposition at 15. Respondents withdraw the Seventh Defense, as to statute of limitations, conditioned on EPA's stipulation not to calculate penalties for Counts 2 through 6 for actions prior to the five year statute of limitations period of 28 U.S.C. § 2462. *Id.* Respondents assert that EPA's delay in enforcing financial responsibility requirement, and the penalty issues, must be determined at the evidentiary hearing. Inasmuch as the Seventh Affirmative Defense may be relevant to the penalty issues, it will not be dismissed on Complainant's Motion for Accelerated Decision.

Similarly, the remaining Affirmative Defenses may be relevant to Respondents' liability for the remaining counts upon which Complainant has not requested accelerated decision, and/or

relevant to the penalty assessment, and therefore will not be dismissed on Complainant's Motion for Accelerated Decision.

IV. Conclusions

Accordingly, it is concluded that there are no genuine issues of material fact as to Goodman's liability for Count 1, and Complainant is entitled to judgment as a matter of law that Goodman failed to permanently close the UST system at the Capitol Exxon facility as required by 40 C.F.R. § 280.70(c), and therefore that Goodman violated 40 C.F.R. § 280.70(c) and Section 9003 of RCRA.

There are no genuine issues of material fact as to Counts 2 through 6. Complainant is entitled to judgment as a matter of law on those Counts alleging that from April 26, 1991 to the date of the Amended Complaint, Goodman failed to demonstrate that it met the financial responsibility requirements of 40 C.F.R. Part 280 Subpart H for USTs at the Capitol Exxon facility, the Collister Exxon, the Homedale Tiger Mart Exxon, the Nampa Exxon, and the Weiser Exxon, in violation of Section 280.93(a) and of Section 9003 of RCRA.

There are no genuine issues of material fact as to Goodman's liability for Counts 15 through 22. Complainant is entitled to judgment as a matter of law on those Counts alleging that after December 22, 1998, Goodman continued to use metal piping which was not cathodically protected at the Homedale Tiger Mart Exxon, Nampa Exxon, and Weiser Exxon, and continued to use steel USTs which had not been upgraded at the 16th and State Exxon, Collister Exxon, Homedale Tiger Mart Exxon, Nampa Exxon, and Weiser Exxon, in violation of 40 C.F.R. §§ 280.21(b) and (c) and of Section 9003 of RCRA.

Respondents have not raised any genuine issues of material fact as to Goodman Lewiston's liability for Count 27. Complainant is entitled to judgment as a matter of law that Goodman Lewiston is liable for violating 40 C.F.R. § 280.34, by failing to provide complete and accurate responses to the Information Request dated October 2, 2000, as alleged in Count 27 of the Amended Complaint.

In consideration of the possibility that Respondents may offer evidence in support of the Affirmative Defenses on issues of liability for the counts upon which accelerated decision has not been requested, or on penalty issues, an accelerated decision dismissing Respondents' Affirmative Defenses is denied.

The issues of liability for Counts 7 through 14 and Counts 23 through 26, and issues as to the penalty assessment, remain in dispute and are reserved for further proceedings.

ORDER

1. Complainant's Motion for Partial Accelerated Decision is **GRANTED in part**, as to liability for Counts 1 through 6, 15 through 22, and 27. Respondent Goodman Oil Company is liable for violating 40 C.F.R. §§ 280.70(c), 280.93(a), 280.21(b), 280.21(c), and 280.34, as alleged in Counts 1 through 6, and Counts 15 through 22 of the Amended Complaint. Respondent Goodman Oil Company of Lewiston is liable for violating 40 C.F.R. § 280.34, by failing to provide complete and accurate responses to the Information Request dated October 2, 2000, as alleged in Count 27 of the Amended Complaint.

2. Complainant's Motion for Partial Accelerated Decision is **DENIED in part,** as to Respondents' Affirmative Defenses.

3. Respondents' request to be given time to fully develop the record in support of its selective enforcement defense is **DENIED.**

4. The hearing as previously scheduled shall be held on the issues of liability for Counts 7 through 14 and Counts 23 through 26, and on the penalty issues.

_____

Susan L. Biro
Chief Administrative Law Judge

Date: August 22, 2001
Washington, D.C.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ERRATUM

An error was made in the quotation of 40 C.F.R. § 280.70(c) on Page 4 of the Order on Complainant's Motion for Partial Accelerated Decision. The quotation should read as follows:

> When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21 . . . Owners and operators must permanently close the substandard UST systems at the end of this 12-month period in accordance with §§ 280.71-280-74, *unless* the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with § 280.72 before such an extension can be applied for.

The quotation of Section 280.70(c) on Page 4 of the Order on Complainant's Motion for Partial Accelerated Decision is hereby corrected to read as shown above.

_____
Susan L. Biro
Chief Administrative Law Judge

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