UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Morgan Properties, Inc.	)	**RCRA-UST-94-002**
	)	
Respondent	)	

ORDER ON MOTION FOR ACCELERATED DECISION

Proceedings

On February 18, 1994, the Region 4 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed an Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing (the "Complaint") against Morgan Properties, Inc., of Cullman, Alabama (the "Respondent" or "Morgan"). The Complaint charges Respondent with a series of violations of the regulations promulgated under the Resource Conservation and Recovery Act ("RCRA") §9003, 42 U.S.C. §6991b, governing release detection and correction standards for underground storage tank systems ("USTs"), 40 CFR Part 280. The Respondent filed its Answer and request for a hearing on March 25, 1994.

The Complaint charges Respondent with 51 violations at some 16 automobile service stations or other facilities in the Cullman, Alabama, area, where Respondent owns or operates USTs. The Complaint is based on a series of inspections the Region conducted at Respondent's facilities from August 31 to September 2, 1993. Pursuant to RCRA §9006(d)(2), 42 U.S.C. §6991e(d)(2), the Complaint originally sought assessment of a total civil penalty of $652,772 against Respondent. After the exchange of documentation between the parties, the Region withdrew seven of the charges, resulting in a reduced proposed penalty of $620,880 for 44 remaining violations.[(1)]

The Complaint charges Respondent with the following specific violations, listed by most applicable regulation:

- 40 CFR §280.41(b)(1)(ii), (fourteen violations). Failure to conduct annual line tightness tests on pressurized piping in accord with 40 CFR §244(b), or conduct monthly monitoring in accord with 40 CFR §280.44(c);

- 40 CFR §280.41(a), (eight violations). Failure to conduct release detection for tanks, using one of the methods listed in §280.43(d-h);

- 40 CFR §280.31(c),(six violations). Failure to inspect UST systems with impressed cathodic protection systems every sixty days;

- 40 CFR §280.31(b), (two violations). Failure to test cathodic protection systems within six months of installation and every three years thereafter;

- 40 CFR §280.41(b)(1)(i), (three violations). Failure to equip USTs that have pressurized piping with automatic line leak detectors in accordance with §280.44(a);

- 40 CFR §280.41(b)(2), (two violations). Failure to conduct line tightness tests every three years, or to conduct monthly monitoring for USTs with suction piping;

- 40 CFR §280.31(a), (two violations). Failure to operate and maintain corrosion protection systems to continuously provide corrosion protection to the tank and piping components of the systems;

- 40 CFR §280.30(a), (two violations). Failure to ensure that releases due to spilling or overfilling do not occur;

- 40 CFR §280.53(b), (two violations). Failure to immediately clean up and contain a spill of petroleum product, and to notify the implementing agency, the Alabama Department of Environmental Management;

- 40 CFR §280.50(b), (one violation). Failure to report an unusual operating condition, water in an unused kerosene UST system, to the implementing agency within 24 hours,;

- 40 CFR §280.22(a), (one violation). Failure to notify the state or local agency of the existence of UST systems; and,

- 40 CFR §280.50(c), (one violation). Failure to report monitoring results indicating that a release may have occurred, to the implementing agency within 24 hours.

In its Answer, Respondent denied most of the material allegations of the Complaint. The specific responses varied, however, with respect to some of the 51 alleged violations. The facts relating to each of the specific violations will be discussed below in these rulings.

The parties have filed prehearing exchanges of proposed witnesses and exhibits, pursuant to the EPA Rules of Practice, and the order of the former presiding Administrative Law Judge ("ALJ") in this proceeding. This proceeding was redesignated to the undersigned ALJ on February 13, 1997.

The Region filed a Motion for Accelerated Decision on September 5, 1996. The motion seeks a decision finding Respondent liable for the alleged violations, as well as a determination that the proposed penalty is appropriate. Respondent filed its Response in Opposition on October 4, 1996. Complainant filed a Reply on October 23, 1996.

Discussion

The EPA Rules of Practice, at 40 CFR §22.20(a), empower the Administrative Law Judge to render an accelerated decision on all or part of the issues in a proceeding, "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." The motion for accelerated decision is essentially equivalent to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The Complaint in this case stems from a series of inspections conducted by the Region on some sixteen facilities with UST systems owned by Morgan in the Cullman, Alabama, area, in late August and early September, 1993. In addition to alleging or disputing facts in defense of some of the allegations, Morgan also raised several more generic defenses in its Answer and Response in Opposition to the Motion for Accelerated Decision. The Respondent also contends that accelerated decision on the amount of the civil penalty is not appropriate.

Before addressing the specific facts in relation to each violation, the issues raised by the generic defenses or arguments, which will apply to many of the charges, are discussed first. The motion with respect to liability is

discussed first, followed by discussion of the appropriate amount of any civil penalty. These rulings grant partial accelerated decision on liability, with respect to most of the charges that remain in dispute. These rulings deny accelerated decision on liability with respect to other alleged violations. Accelerated decision is denied with respect to the amounts of the penalties for all violations.

- Name of Respondent

Respondent claims that the correct entity that should be named in the Complaint is Morgan Oil Company, rather than Morgan Properties, Inc. Respondent states that Morgan Oil Company was formerly an independent operating division of Morgan Properties, Inc., and is now a separate corporation.

The Region has not moved to amend the Complaint to change the name of the Respondent. To the contrary, the Region reasserts its belief that Morgan Properties, Inc., continues to control the assets of Morgan Oil, while acknowledging a corporate reorganization took place in December 1994, after the Complaint was filed. In its Answer, Respondent Morgan Properties, Inc., admitted that it was an Alabama corporation that did business as Morgan Oil Company.

In the absence of a motion to amend the Complaint, or any substantive evidence that the name of Respondent should be changed, there is no basis upon which to rule on this issue. Therefore, unless and until any such motion is granted, the name of Respondent will remain Morgan Properties, Inc. ("Morgan").

- Morgan's Ownership and Operation of the UST Systems

Morgan contends it is at least partially shielded from liability for any violations at its UST systems, since it is "an independent oil jobber which supplies petroleum to independent, dealer-operated retail outlets."[(2)] Respondent contends that "it is ultimately the dealers' responsibility" to comply with the UST regulations.[(3)]

However, in its Answer, Morgan admitted it "is an owner and/or operator of Underground Storage tanks (USTs or UST systems), as those terms are defined in Section 9001 of RCRA, 42 U.S.C. §6991 and 40 CFR §280.12."[(4)] Respondent also admitted that it owns the UST systems at each subject facility, while stating that the "facility is operated by an independent dealer."[(5)] It also

admitted ownership and/or operation of the Morgan Oil Company Bulk Plant.[(6)]

The evidentiary materials indicate that Respondent was not only the owner, but also the operator with effective control over the subject UST systems. Respondent provided all available records of inspections and maintenance of these UST systems to the Region. These records uniformly indicate that Respondent was the owner and the party for whom the tests were conducted.[(7)] Respondent has not raised any facts indicating it did not have full access to these records and complete control over the UST systems. This proceeding is thus distinguished from *In re 1833 Nostrand Avenue Corporation*, [UST] II-RCRA 93-0205 (Order Denying Partial Accelerated Decision, August 10, 1995). In that case, the Respondent presented sufficient facts to raise an issue concerning its access to the USTs and records allegedly controlled by the lessees of its service stations.

Here, Respondent only stated, with no evidentiary support, that it is "ultimately" the dealers' responsibility to comply with the UST regulations. Such a statement, with no substantive offer of proof, does not raise a genuine issue of material fact. In order to prevail against a properly supported motion for summary judgment, a party may not rest on mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In this case, Respondent is the admitted owner of the USTs and the evidence shows it also operates and controls them. Therefore, Respondent cannot defeat Complainant's motion for accelerated decision on this basis.

Alleged Failure to Document Inspections

In response to some of the allegations of the Complaint, Respondent has asserted that it conducted the required inspections of the USTs, but did not document them, and therefore had no records of those inspections to provide to the Region.[(8)] In its opposition to the motion for accelerated decision, and in the Morgan Affidavit, Respondent characterizes many of its lapses as failure to document tests, rather than failure to perform them.

In the affidavit, Donald Morgan states that it provided all documentation of tests and inspections in its possession to the Region. Mr. Morgan then "concedes" that, while the tests may not have been properly documented, Morgan "believes" that the required tests were performed.[(9)] This assertion is insufficient

to raise a genuine issue of material fact for adjudication. The mere belief that a test was conducted cannot substitute for a proffer of substantive evidence to that effect.

The failure to produce records of required tests of UST systems' components is *prima facie* evidence that the tests were not performed. UST system owners and operators are required to maintain records of release detection tests and monitoring, pursuant to several sections of the regulations: 40 CFR §§280.45, 280.34, and 280.31(d). The Complainant produced the affidavit and reports of its inspectors, as well as Respondent's own records of those tests that were conducted on its UST systems. If in fact the additional tests that were due were conducted, it was incumbent on Respondent, in responding to the motion, to provide an affidavit or some offer of proof to support those facts. If the tests were conducted but not documented, Respondent would have had to proffer witnesses who could testify to those facts. Where Respondent has not done so, for required tests where the records were required to be maintained at the times of the inspections, it has not raised issues of fact for hearing.

However, under 40 CFR §280.45(b), the results of most release detection monitoring and testing must be maintained for only one year. The results of tank tightness testing must be retained until the next test is conducted. Therefore, for line tightness tests that were to have been done over a year before the inspection, the lack of documentation of such tests is not alone sufficient to show that the test was not conducted. There are different record keeping requirements for inspections of cathodic protection systems. 40 CFR §280.31(d). In general, the Respondent's failure to produce documentation of an required monitoring, inspections, or release detection tests, where the records were required to be maintained at the time of the inspection, means the test was not conducted. The particulars of the various alleged violations are discussed below in these rulings.

Rulings on Respondent's Liability

These rulings will not necessarily address the details of each of the pending 44 counts individually. Liability for the several categories of violations will be discussed below in light of the general principles outlined above.

- Release Detection for Pressurized Piping - §280.41(b)(1)(ii)

The Complaint includes 14 counts alleging that Morgan failed to conduct annual line tightness tests on pressurized piping, as required by 40 CFR §280.41(b)(1)(ii).[10] Under that regulation, the owner or operator may alternatively conduct monthly monitoring of its UST systems. Respondent has not claimed it conducted monthly monitoring. Hence the annual line tightness tests are required.

In response to these counts, Respondent has admitted that these facilities use pressurized piping, and has given the dates it claims that line tightness tests were conducted.[11] In most cases, the last test was conducted in 1991 or 1992, over one year before the 1993 date of the Region's inspection. Respondent submitted all available documentation of that tests.[12] Complainant does not address in its brief the meaning of the "annual" line tightness requirement. However, it can be inferred by reference to the Complainant's penalty calculations that the Region considers Respondent to be in noncompliance beginning 365 days after the date of the last documented test.[13] Respondent, in its prehearing exchange states that it understood this regulation as requiring an inspection every calendar year.[14] The term "annual" is not defined in the regulations.

"Annual" means "recurring, done, or performed every year."[15] The first meaning of "year" given in one dictionary is based on the calendar year, beginning January 1 and ending December 31. The fifth definition is "a period equal to the calendar year but beginning on a different date."[16] In the context of the UST regulations, the annual requirement could also be read to require that the tests be done by December 22 of each succeeding calendar year after the phase-in beginning on that date in 1990, as provided in 40 CFR §280.40(c). In these circumstances, Complainant has not presented sufficient authority to support its interpretation of the annual testing requirement.

Another factor that may be relevant to the decisions on these allegations is the record keeping requirement for line tightness tests. Such records must be maintained for at least one year, unless a longer period is required by the implementing agency, pursuant to 40 CFR §280.45(b). In the absence of any indication to the contrary on this record, it is presumed that the records need only be maintained for one year, or 365 days from the date of the test. This interpretation would be consistent with the Region's interpretation of the annual testing requirement -- that the next test be conducted within 365 days of the prior test. In the absence of any substantive evidentiary material or offer of proof by the Respondent, it is nevertheless presumed on

this motion, as discussed above, that the date of the latest line tightness test conducted at each facility is established by the date of the latest documented test.

The facts concerning the last documented pressurized piping release detection tests are established by the evidentiary materials -- the actual line tightness test reports submitted with Complainant's motion.[(17)] The following list gives the number of each violation, the name of the facility, and the date of the last documented line tightness test for pressurized piping at that facility. The Region inspected these facilities from August 31 to September 2, 1993.

#1 - H&W Shell #1 - July 30, 1992.

#5 - H&W Shell #2 - November 5, 1991.

#9 - H&W Shell #3 - October 25, 1991.

#12 - Jack's Truck Stop - April 17, 1992.

#15 - V&W Food Mart - October 11, 1991.

#17 - Take Two 7-11 - April 2, 1992.

#24 - Maddox Shell - August 2, 1992.

#29 - C&M Food Mart - October 26, 1991.

#31 - Morgan Oil Bulk Plant - none.

#35 - Robertson Shell - none.

#38 - Parker's 292 Truck Stop - October 24, 1991.

#45 - Smith Lake Trade Center - April 3, 1992.

#47 - Campbell Shell - October 10, 1991.

#48 - Morris Grocery - August 6, 1991.

Accelerated decision is granted to the extent of finding the above facts establishing the dates of the latest line tightness tests at each facility. For those tests in which the latest test was conducted in calendar year 1991 or earlier, accelerated decision on liability is granted. Even under Respondent's understanding that the test was required each calendar year,

those facilities are in violation for not having conducted a line tightness test in 1992. Accelerated decision on liability is thus granted for violations ##5, 9, 15, 29, 31, 35, 38, 47, and 48. For the five facilities in which line tightness tests were conducted in 1992, the decision on liability is denied pending clarification of the "annual" testing requirement. This applies to violations ##1, 12, 17, 24, and 45.

- Release Detection for Suction Piping - §280.41(b)(2)

The Complaint alleges two violations of the release detection requirements for suction piping, set forth in 40 CFR §280.41(b)(2). Suction piping is required to be tested for release detection every three years, or the tanks must be monitored monthly. Respondent admitted one of these allegations, with respect to the facility at Valley Grove Grocery, violation #42.[(18)] Hence, accelerated decision is granted with respect to liability for that count.

With respect to other count alleging this violation (#36), at the Robertson Shell facility, Respondent admitted the facility used 3 UST systems with suction piping, but denied the allegation.[(19)] Morgan did not however produce any records of line tightness tests or monthly monitoring, or any offer of proof that the tests were conducted. It can be inferred from the penalty calculation for this violation that the Region takes the position the test was due December 22, 1992, three years after the initial phase-in date for this requirement under 40 CFR §280.41(c).[(20)] Although the records of such tests are only required to be kept for one year, Respondent has not presented any evidence or offer to prove that the test was conducted as required. Therefore, accelerated decision on liability is granted with respect to violation #36 as well.

- Release Detection for Tanks - §280.41(a)

The Complaint alleges 8 violations of the release detection requirements for tanks, set forth in 40 CFR §280.41(a).[(21)] These requirements vary depending on the age of the tanks and whether the tanks meet performance standards set forth in §§280.20 and 280.21. In general, monthly inventory monitoring using the methods in §280.43(a) or (b) is required regardless of the status of the tanks. Tanks that meet the performance standards (essentially internal lining and/or cathodic protection) need only be tested for tightness every five years, under §280.41(a)(1), while those that do not meet the standards must be tested annually under §280.41(a)(2).

The Region does not specify in either its Complaint or motion for accelerated decision which subsection of the tank testing requirements are applicable to Respondent's USTs at these facilities. The Complaint in each instance merely cites §280.40(a), and alleges that the Respondent's facility "uses UST systems which are due for tank release detection," that "was not performed as required."[(22)] With two exceptions, Respondent denied these allegations, while alleging that its tanks were "upgraded."[(23)] In response to most of the charges, Morgan also gave dates that it asserts it conducted release detection tests. Respondent did admit to this violation with respect to the tanks at its Valley Grove Grocery facility, and with respect to one of the two UST systems at Maddox Shell.[(24)]

The Respondent has not, however, submitted any substantive evidence or offer of proof that it conducted monthly inventory control on the tanks at any of these facilities. Even if the tanks were upgraded to meet the performance standards in §§280.20 and 280.21, inventory control is required in conjunction with tank tightness testing. The Region's inspection report and checklist documents the lack of inventory control at these facilities, as well as the lack of documentation of tank tightness testing.[(25)]

If the facilities were upgraded in 1991 to meet the performance standards, tank tightness testing would not be required until 1996.[(26)] Otherwise, the tanks must be tested annually. None of the tank tightness tests documented by Respondent were conducted within one year before the inspections, although several were done in 1992, the preceding calendar year.[(27)] However, since Respondent did not conduct monthly inventory control to detect releases from its tanks at any of these facilities, the issue concerning the meaning of the "annual" testing requirement is irrelevant.

Accelerated decision is therefore granted establishing Respondent's liability for violating 40 CFR §280.41(a), with respect to violations ##2, 6, 18, 25, 32, 37, 43, and 49. It remains to be determined whether the violations included failure to conduct required tank tightness tests as well.

- Cathodic Protection System Inspections - §280.31(c)

The Complaint includes six counts alleging that Respondent failed to conduct inspections of USTs with impressed cathodic protection systems, as required by 40 CFR §280.31(c).[(28)] That

subsection requires such systems to be "inspected every 60 days to ensure the equipment is running properly."

For each of these facilities, Complainant has submitted Post Installation Reports indicating an initial inspection of the cathodic protection systems.[(29)] These inspections were conducted between June 1992 and January 1993 at the six subject facilities. There are no records of any subsequent inspections on the logs included in the reports. In its Answer, Respondent stated, in response to each of these alleged violations, that the inspections were performed but not documented.[(30)] However, Morgan provides no evidence or offer of proof to substantiate those claims. The exhibits referenced above establish the last date that inspections of the cathodic protection systems were conducted at each facility.

The regulations require the owner or operator to maintain records of the last three inspections of cathodic protection systems. 40 CFR §280.31(d)(1). The Region's inspections of Respondent's facilities took place in late August and early September 1993. The latest inspections of Respondent's cathodic protection systems were in 1992 and, in one case, January 1993. All of the latest inspections took place more than 60 days before the dates of the Region's inspections. Hence, there is no genuine issue of material fact concerning these allegations, and accelerated decision can be granted with respect to all these violations (##4, 8, 21, 28, 41, and 51).

- Cathodic Protection Systems - §280.31(b)

The Complaint also alleges two counts of violations of 40 CFR §280.31(b).[(31)] This regulation requires cathodic inspection systems to be tested for proper operation within 6 months of installation and at least every 3 years thereafter.

With respect to the alleged violation at the Morgan Oil Company Bulk Plant (violation #34), the Respondent denied in its Answer (¶88) that it had a newly installed system subject to this requirement. The Region's own inspection report states that the date of installation of the tanks is uncertain, and that the presence of cathodic protection systems could not be confirmed.[(32)] Therefore, accelerated decision cannot be granted due to the existence of a genuine issue of material fact whether §280.31(b) applies to this facility.

In response to the alleged violation at the Smith Lake Trade Center (violation #46), Morgan responded that it tested the

cathodic protection system in January 1990 and September 1993.[33] Morgan provided documentation of the January 1990 test only.[34] Since this facility was inspected on September 1, 1993, and the inspector did not note any testing of the cathodic protection system, it can be assumed that any such testing took place later in the month. The Region gives the date of noncompliance as beginning on January 1, 1991.[35] However, §280.31(b) requires such inspections every three years, not annually.

Accelerated decision cannot be granted on this violation due to the uncertainty of the meaning of the frequency requirement for the testing of cathodic protection systems. The issue is similar to that concerning the meaning of the "annual" testing requirement for pressurizing piping discussed above. The regulation, 40 CFR §280.31(b)(1), requires testing "within 6 months of installation and at least every 3 years thereafter . . ." If the term "years" means calendar years, a test any time during 1993 would satisfy the requirement. If "years" means 365-day periods from the date of the last test, the test would have been due on January 4, 1993, and Respondent would be in violation. Accelerated decision is therefore denied on this count, pending resolution of this question.

- Automatic Line Leak Detectors - §280.41(b)(1)(i)

The Complaint alleges three counts of violations of 40 CFR §280.41(b)(1)(i), which requires pressurized piping to be equipped with an automatic line leak detector that meets the standard set forth in §280.44(a).[36] Respondent admitted one of these violations (#30, at the Morgan Oil Bulk Plant), partially admitted the charges at another facility (#23, at Maddox Shell), and denied the charges at the third facility (#16, at Take Two 7-11).[37]

Respondent set forth sufficient facts in its Answer, supported by the Morgan affidavit, to create genuine issues of material fact concerning liability for these violations at Take Two 7-11, and for two of the three tanks at Maddox Shell.[38] Morgan asserts that float type line leak detectors were present and operational, and connected to the dual wall piping at these facilities. This contradicts the Region's inspection report which indicates no such line leak detectors were present.[39] Donald Morgan is listed as a witness in Respondent's prehearing exchange. Drawing reasonable inferences in favor of Respondent, a factual issue for the hearing remains as to whether the float type devices described by Mr. Morgan were operational and satisfied the regulatory requirements of §§280.41(a)(1)(i) and

280.44(a). Hence, accelerated decision is denied with respect to these alleged violations at Maddox Shell and Take Two 7-11 (violations ##16 and 23).

Morgan admits in its Answer that one of the line leak detectors for the three UST systems at Maddox Shell was missing at the time of the inspection.(40) However, as discussed above, a factual issue remains as to liability for this violation at the other two UST systems at this facility. With respect to the bulk plant, the Respondent admitted this violation.(41) Accelerated decision on liability can therefore be granted with respect to that violation (#30), and partially, for one of the tanks at Maddox Shell (#23).

- Corrosion Protection Systems - §280.31(a)

The Complaint charges Respondent with two counts of failing to continuously operate the corrosion protection systems at two facilities.(42) The Region's inspection reports establish that the cathodic protection systems at these two facilities were turned off at the time of the inspection.(43) In its Answer, Respondent denied knowledge of these violations. Respondent further stated that the dealers had been instructed to keep the systems turned on, and that a lock had been placed on the breakers.(44)

As the owner of these UST systems, Respondent must be held liable for these violations. Respondent has not raised any facts that could contradict the inspection reports indicating that the cathodic protection systems were turned off, and therefore not continuously operating as required by §280.31(a). The facts concerning the degree of Morgan's control over these systems at these facilities could be relevant to the amount of the civil penalty. However, accelerated decision is granted with respect to Respondent's liability for these violations (##19 and 39).

- Spill and Overfill Control - §280.30(a)

The Complaint charges Morgan with two violations of 40 CFR §280.30(a).(45) That regulation requires owners and operators of USTs to ensure that releases due to spilling and overfilling do not occur, and to monitor transfers and tank volumes constantly to prevent overfilling and spilling. The Region's inspection report states that free petroleum product was found in monitoring wells at two of Respondent's facilities.(46)

Accelerated decision is granted on Respondent's liability for these two violations. Respondent does not raise any facts

disputing that free product was found as stated in the inspection report. Respondent does state, in its Answer and the Morgan affidavit, that the quantities of free product were small, that Respondent was previously unaware of the problems, and that they were immediately cleaned up.[(47)] These facts may be relevant in determining the appropriate amount of the civil penalty to assess, but they do not affect Respondent's liability. Therefore, accelerated decision on liability is granted with respect to violations ##10 and 13.

- Reporting and Cleanup of Spills - §280.53(b)

The Complaint charges Morgan with two violations of 40 CFR §280.53.[(48)] Although not specified in the Complaint, the applicable subsection is §280.53(b), for spills or overfills of less than 25 gallons of petroleum. That regulation requires that spills of less than 25 gallons be cleaned up "immediately." If cleanup cannot be accomplished within 24 hours, the owner or operator must notify the State agency.

These two alleged violations relate to the free product found in the monitoring wells at two facilities, discussed in the immediately preceding section of these rulings. Respondent alleges in the Morgan affidavit that the free product was cleaned up within 24 hours of its discovery, in compliance with the regulations, and that the implementing agency, the Alabama Department of Environmental Management ("ADEM"), was duly notified.[(49)] Complainant asserts that the existence of the free product in the monitoring wells indicates it was not cleaned up immediately.

An issue of fact is raised by these submissions with regard to whether Respondent cleaned up the spilled petroleum "immediately" within the meaning of §280.53(b). The record does not establish when the spilling or overfilling actually occurred. There may also be a dispute over when Respondent "discovered" the spill or overfill, and whether the time of discovery is the operative time for determining the immediateness of the cleanup response. In this regard, there is also a dispute over what Donald Morgan told the Region's inspector, Franklin Baker.[(50)] These existence of these factual issues requires denial of accelerated decision on Respondent's liability for these two counts (violations ##11 and 14).

- Notification Requirements - §280.22

The Complaint charges Morgan with one violation of 40 CFR §280.22(a), which requires owners of new UST systems to submit a form notifying the state or local agency of the new UST's existence.(51) This charge relates to a waste oil tank and a kerosene tank at the Maddox Shell facility. In its Answer (¶61), Respondent admitted this violation, stating it believed these tanks were exempt from the notification requirement. Due to its admission, accelerated decision on Respondent's liability is granted with respect to this violation (#22).

- Reporting of Suspected Releases - §280.50(c)

The Complaint charges Respondent with one violation of 40 CFR §280.50.(52) Subsection (c) of this regulation requires the owner or operator of a UST to report a monitoring result that shows a release may have occurred, to the implementing agency within 24 hours. However, under subdivision (1), if the monitoring device is found to be defective, and is "immediately" repaired and retested, such reporting is not required.

In its Answer (¶70), Respondent admitted this allegation, but explained that a loose nylon bushing was found and repaired. The tank then was retested and passed. The Region's inspection report confirms this sequence of events.(53) The report states that one of the tanks at the Maddox Shell facility failed a precision tank tightness test on August 29, 1992, and no documentation of reporting a suspected release to ADEM was provided. The report then confirms that the tank was tested again and passed on September 9, 1992.

Respondent's admission and the sequence of events cited in the inspection reports indicate that the Respondent violated §280.50(c) by not notifying ADEM of the suspected release within 24 hours. The confirmation of a successful repair of the tank system did not occur until eleven days after the monitoring result showing a possible release. Respondent thus was not exempt from the reporting requirement, which requires that such repair and retesting be done "immediately." In the context of this regulation, that means within 24 hours. Accelerated decision on Respondent's liability is therefore granted with respect to this violation (#26).

- Reporting of Unusual Operating Conditions - §280.50(b)

The Complaint charges Respondent with one violation of 40 CFR §280.50(b), which requires the owner or operator of a UST to notify the implementing agency within 24 hours of any "unusual

operating condition (such as the . . . unexplained presence of water in the tank)."[54] The inspection report states that one UST at the Valley Grove Grocery had been out of use since 1992, and now contained 18 inches of water with petroleum emulsion.[55] Respondent's Answer (¶111) admits these facts and states that ADEM approved the tank's closure in April, 1994. That date, is, of course, some eight months after the Region's 1993 inspection.

Respondent provided no explanation for the presence of water in the tank. It is not disputed that this condition was not reported to the ADEM until after the inspection. Accelerated decision will therefore be granted on Respondent's liability for this violation (#44).

Amounts of Civil Penalties

Federal enforcement of the UST regulations is governed by RCRA §9006, 42 U.S.C. §6991e. The Administrator may issue compliance orders to persons determined to be in violation of any requirement of the UST statute or regulations, that offer the respondent an opportunity for a hearing. Such orders may assess a penalty "which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." RCRA §9006(c). Any owner or operator of a UST who fails to comply with any requirement or standard promulgated under the statute is subject to a civil penalty "not to exceed $10,000 for each tank for each day of violation." RCRA §9006(d)(2).

The Region calculated its proposed civil penalty in this proceeding by following the U.S. EPA Penalty Guidance for Violations of UST Regulations, dated November 1990, by the EPA's Office of Underground Storage Tanks (the "Penalty Guidance," Ex. 19). Complainant submitted its penalty computation worksheets, under the Penalty Guidance, for each of the 44 alleged violations, as an exhibit in support of its motion for accelerated decision (Ex. 20). The Region seeks accelerated decision "with regard to the appropriateness of the penalty for the violations alleged in the Complaint." (Complainant's Motion for Accelerated Decision).

Respondent argues that accelerated decision is not appropriate with respect to the amounts of civil penalties. Morgan contends that the Region did not properly consider several components of the proposed penalties, such as the economic benefit from noncompliance, its good faith efforts to comply, and its ability to pay a penalty. Respondent also contends that the Region

incorrectly assessed separate penalties for violations at different facilities. The Respondent further asserts that the gravity of many of the violations exaggerated was by characterizing them as failure to conduct tests, rather than failure to document them. These latter two contentions will be dealt with first.

- Number of Separate Violations

In relation to the amount of the proposed civil penalty in this proceeding, Respondent argues that each violation of a distinct section of the regulations should be considered only a single violation, although it may have occurred at a number of different tanks or facilities with USTs. This position is directly contrary to the language of the statute.

The applicable enforcement provision of the statute, RCRA §9006(d)(2), provides that owners or operators of USTs who violate any of the promulgated requirements "shall be subject to a civil penalty not to exceed $10,000 *for each tank* for each day of violation." (emphasis added). The Region here has calculated its proposed penalties by following the UST Penalty Guidance. That method is consistent with the statute in providing for the assessment of penalties per tank, where the violations can be clearly associated with single tanks. (Ex. 19, p. 15). Where the subject of the violation cannot be clearly associated with a single tank, a single penalty is assessed for the entire facility. While the term "facility" is not defined in the regulations, resort to a dictionary is not necessary to reject Morgan's assertion that the Respondent itself should be considered a single facility. The subjects of this proceeding are the 16 facilities owned by Respondent in the Cullman area, each of which has one or more USTs. Therefore Respondent's contention does not raise any issue for hearing with respect to the number of violations and the Region's calculation of penalties on a per tank or per facility basis.

- Failure to Document Tests or Inspections

This contention was discussed above in relation to Respondent's liability. Respondent claims that some of the allegedly missing release detection tests were done, but not documented, and that should reduce the gravity of the violation and the amount of the appropriate civil penalty. Actually, if that could be established, Respondent would have committed a different violation -- failure to maintain records -- that was not charged in this proceeding. That is why the discussion of this

contention is properly considered with respect to Respondent's liability on this motion for accelerated decision.

Nevertheless, the same conclusion would apply here in the interest of closure. Respondent has presented no evidence or offer of proof that has raised an issue of fact for hearing with regard to the supposedly undocumented tests. Complainant submitted its own inspection reports and the affidavit of the inspector who conducted the inspections, supplemented by the actual test reports that were made available by Respondent. Morgan made no substantive offer to prove that documentation was incomplete, or that it could show that other tests were performed. These rulings find therefore that Respondent has not done those required tests or inspections for which no documentation has been submitted, where the records were required to be maintained at the time of the Region's inspection.

- Penalty Calculations

Accelerated decision will nevertheless not be granted with respect to the amount of the civil penalty for any of the violations for which Respondent has been found liable in these rulings. The penalty computations (Ex. 20) each consist of a series of assumptions and judgments based on the Penalty Guidance. The fact that the Region followed the Guidance is not alone probative on the issue of what penalty should ultimately be assessed. On a motion for accelerated decision, that is the only meaningful decision that can be made with respect to civil penalties. A decision simply finding that the amount of the penalty is appropriate, considering the factors established in the Penalty Guidance," as requested by the Region,[(56)] would have no decisional significance. Construing Respondent's submissions broadly and drawing reasonable inferences in Respondent's favor, several issues of fact are raised with respect to the penalty calculations, and the appropriate amount of the civil penalties that should be assessed for these violations.

The Respondent, in its Answer, prehearing exchange, and the affidavit of Donald Morgan, has raised facts that are relevant to the statutory penalty factors -- the seriousness of the violations and Respondent's good faith efforts to come into compliance. Respondent has proffered the testimony of Donald and Bert Morgan with respect to Morgan's cooperation with the Region, its efforts to come into compliance, and the lack of environmental harm from the violations.

Some additional unresolved issues relevant to the civil penalty factors include the following. The number of days Respondent was in violation is not at all clear with respect to many of the charges of not conducting release detection tests. This is relevant to the seriousness of the violations. It is also not clear whether the failure to conduct tank release detection includes the failure to conduct tank tightness tests, in addition to failure to conduct monthly inventory control. For several of the violations, Morgan's relationship with the dealers may be a mitigating factor that could be relevant to Respondent's good faith efforts to comply. In terms of the Penalty Guidance, these factual issues are also relevant to "settlement adjustment factors" concerning the gravity of the violation, such as degree of cooperation, degree of wilfulness or negligence, and history of noncompliance.[(57)] Respondent has provided enough specific facts to raise genuine issues that could affect the amount of the civil penalties that should ultimately be assessed for each violation.

Respondent has also challenged the Region's calculation of economic benefit as a result of the violations, and has claimed it does not have the ability to pay a civil penalty of the magnitude proposed. These are factors that are not mentioned in the statute, but are considered under the Penalty Guidance. The Complainant has placed them at issue by considering them in its penalty calculations. Respondent has set forth specific facts contradicting the figures used in the Region's calculation of the economic benefit components of the proposed penalties.[(58)]

Morgan has also proffered the testimony of an expert witness on the company's financial position and ability to pay the penalty.[(59)] Complainant asserts that it is not proper for the judge to consider a respondent's ability to pay on a motion for accelerated decision, citing the Penalty Guidance. The Penalty Guidance characterizes ability to pay as a "settlement adjustment."[(60)] However, the Guidance is not binding on the ALJ. As indicated above, it would be a meaningless exercise to find that the Region calculated the penalty correctly under the Penalty Guidance, since that does not, in a contested case, conclude the issue of the amount of the penalty that should be assessed. Any issue that could be considered by the judge in an administrative enforcement hearing can be considered in the context of a motion for accelerated decision. Indeed, the Region also responded substantively on this issue by asserting that it does believe Morgan has the ability to pay. The Region cites facts concerning Morgan's notes receivable from shareholders.[(61)] Respondent contests those facts and has offered an expert

witness on this issue. Therefore, an issue of fact is drawn with respect to Respondent's ability to pay a penalty of the magnitude proposed.

For these reasons, accelerated decision will not be granted with respect to the amounts of civil penalties to be assessed for any of the violations alleged in the Complaint.

Summary of Rulings

1. Accelerated decision on Respondent's liability is granted with respect to the following 33 (plus one partial) violations alleged in the Complaint:

- nine violations of 40 CFR §280.41(b)(1)(ii), failure to conduct release detection for pressurized piping (violations ##5, 9, 15, 29, 31, 35, 38, 47, and 48);

- two violations of 40 CFR §280.41(b)(2), failure to conduct release detection on suction piping (violations ##36 and 42);

- eight violations of 40 CFR §280.41(a), failure to conduct release detection for tanks (violations ##2, 6, 18, 25, 32, 37, 43, and 49);

- six violations of 40 CFR §280.31(c), failure to inspect cathodic protection systems (violations ##4, 8, 21, 28, 41, and 51);

- one violation, plus a partial violation, of 40 CFR §280.41(b)(1)(i), failure to equip pressurized piping with an automatic line leak detector (violation #30, and for one of the three tanks involved in violation #23);

- two violations of 40 CFR §280.41(b)(1)(i), failure to continuously operate corrosion protection systems (violations ##19 and 39);

- two violations of 40 CFR §280.30(a), failure to ensure that releases due to spilling and overfilling do not occur (violations ##10 and 13);

- one violation of 40 CFR §280.22(a), failure to notify the state agency of an new UST (violation #22);

- one violation of 40 CFR §280.50(c), failure to report a monitoring result that shows a release may have occurred to the implementing agency within 24 hours (violation #26);

- and one violation of 40 CFR §280.50(b), failure to notify the implementing agency within 24 hours of an unusual operating condition (violation #44).

2. Accelerated decision on Respondent's liability is denied with respect to the following 11 (including one partial) violations alleged in the Complaint:

- five violations of 40 CFR §280.41(b)(1)(ii), failure to conduct release detection for pressurized piping (violations ##1, 12, 17, 24, and 45);

- two violations of 40 CFR §280.31(b), failure to test operation of cathodic protection systems (violations ##34 and 46);

- two violations (including one partial) of 40 CFR §280.41(b)(1)(i), failure to equip pressurized piping with automatic line leak detectors (violation #16, and concerning two of the three tanks involved in violation #23);

- and two violations of 40 CFR §280.53(b), failure to immediately clean up and report spills of petroleum (violations ##11 and 14).

3. Accelerated decision is denied with respect to the amounts of civil penalties to be assessed for those violations for which Respondent has been found liable.

Further Proceedings

Under separate cover, an order will be issued shortly scheduling this matter for a hearing on the remaining issues concerning Respondent's liability and the amount of civil penalties to be assessed.

Andrew S. Pearlstein

Administrative Law Judge

Dated: Washington, D.C.

July 28, 1997

1. The withdrawn violations, as numbered in the Complaint, are ##3, 7, 20, 27, 33, 40, and 50.

2. Affidavit of Donald Morgan, October 11, 1995, submitted with Respondent's brief in opposition to the motion (the "Morgan affidavit"), ¶2.

3. Morgan affidavit, ¶2.

4. Complaint, ¶3; Answer, ¶3.

5. Answer, ¶¶7, 16, 25, 33, 41, 44, 59, 75, 89, 96, 105, 112, 117, and 120.

6. Answer, ¶78.

7. Exhibits ##3-16, attached to Complainant's motion.

8. Answer, ¶¶15, 24, 58, 74, 104, and 128.

9. Morgan Affidavit, ¶6.

10. The Complaint's numbered violations alleging this violation are ##1, 5, 9, 12, 15, 17, 24, 29, 31, 35, 38, 45, 47, and 48.

11. Answer ¶¶9, 18, 27, 35, 43, 48, 65, 77, 82, 91, 98, 114, 119, and 122. Respondent's Answer tracks the paragraph numbers of the Complaint. The Complaint, however, lists the violations separately from the factual paragraph allegations, as listed in the preceding note.

12. Exhibit 3 to Complainant's motion.

13. Exhibit 20 to Complainant's motion consists of the penalty calculations for all violations, in bulk. Each penalty calculation worksheet includes a listing for the date of the requirement and the number of days of noncompliance.

14. Morgan's Reply to EPA Prehearing Statement, November 15, 1995, p. 4.

15. Webster's New Riverside University Dictionary, 1988, p. 110.

16. Id., p. 1334.

17. Exhibit 3.

18. Complaint and Answer, ¶107.

19. See violation #36; Complaint and Answer, ¶93.

20. Exhibit 20.

21. As numbered in the Complaint, these violations are ##2, 6, 18, 25, 32, 37, 43, and 49.

22. Complaint, ¶¶10-11, 19-20, 51-52, 67-68, 83-84, 94-95, 108-109, and 123-124.

23. Answer, ¶¶11, 20, 52, 68, 84, 95, 109, and 124.

24. Answer, ¶¶68 and 109.

25. Exhibits 1 and 4.

26. Respondent alleged the tanks were "upgraded" at H&W Shell #1 (Answer, ¶11); H&W Shell #2 (¶20); Take Two 7-11 (¶52); and Morris Grocery (¶124).

27. Respondent did submit documentation of tank tightness tests conducted at three facilities: H&W Shell #1 (violation #2), August 3, 1992 (Exhibit 5); Maddox Shell (violation #25), August 3 and 29, 1992 (Exhibits 9 and 10); and Morris Grocery (violation #49), August 6, 1991 (Exhibit 15).

28. The numbers of these violations in the Complaint are ##4, 8, 21, 28, 41, and 51.

29. Exhibits 6, 7, 8, 11, 13, and 16.

30. Answer, ¶¶15, 24, 58, 74, 104, and 128.

31. The numbers of these violations in the Complaint are ##34 and 46.

32. Exhibit 1, p. 11.

33. Answer, ¶116.

34. Exhibit 14.

35. Exhibit 20, penalty calculation for violation #46.

36. These violations, as numbered in the Complaint, are ##16, 23, and 30.

37. See Answer, respectively, ¶¶80, 63, and 46.

38. Answer, ¶46; Morgan affidavit, ¶7.

39. Exhibit 1, pp. 8,9.

40. Answer, ¶63.

41. Answer, ¶80.

42. These two violations are ##19 and 39 in the Complaint.

43. Exhibit 1, pp. 7-8, 13.

44. Answer, ¶¶54 and 100.

45. These violations in the Complaint are ##10 and 13.

46. Exhibit 1, pp. 5-6.

47. Answer ¶¶29-30, 37-38; Morgan Affidavit, ¶4.

48. These violations in the Complaint are ##11 and 14.

49. Morgan Affidavit, ¶4.

50. See Exhibit 1, pp. 5 and 6; Answer ¶¶30 and 38; Morgan Affidavit, ¶4.

51. This is violation #22 in the Complaint.

52. This violation is #26 in the Complaint.

53. Exhibit 1, p. 9.

54. This is violation #44 in the Complaint.

55. Exhibit 1, p. 14.

56. Complainant's Reply, p. 7.

57. Exhibit 19, p. 23.

58. Respondent's Response in Opposition, pp. 5-6.

59. Respondent's prehearing exchange, p. 2.

60. Exhibit 19, p. 23.

61. See Complainant's Reply, p. 6.