UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
V-1 Oil Company,	)	Docket No. 10-94-0251-RCRA
	)	
Respondent	)	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: January 29, 1999
Washington, D.C.

Appearances

For Complainant:

Mark A. Ryan. Esq. Deborah Hilsman, Esq. Region 10 U.S. Environmental Protection Agency Boise, Idaho

For Respondent:

Kent W. Gauchay, Esq. Simpson, Gauchay & Gardner Idaho Falls, Idaho

I. Introduction

This case arises under Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e. The U.S. Environmental Protection Agency ("EPA") alleges that V-1 Oil Company ("V-1") violated 40 CFR 280.70(c) by failing to permanently close two underground storage tanks ("USTs"). This regulation essentially requires the permanent closure of USTs which have been temporarily closed for more than 12 months. EPA seeks a civil penalty of $36,674 for the

alleged Section 280.70(c) violation, as well as the issuance of a Compliance Order.

V-1 disputes EPA's version of the facts. It argues that the USTs in this case had not been temporarily closed for more than 12 months as EPA asserts and, therefore, did not trigger the permanent closure provisions of Section 280.70(c). Respondent submits that, instead, the two underground storage tanks had undergone a "change-in-service," within the meaning of 40 CFR 280.71(c), and thus were not required to be permanently closed.

A hearing was held in this matter on October 15 and 16, 1997, in Idaho Falls, Idaho. For the reasons that follow, V-1 is held to have violated Section 280.70(c) as alleged by EPA, and a civil penalty of $25,000 is assessed for this violation. In addition, respondent is directed to satisfy the terms of the Compliance Order that are set forth in EPA's amended complaint.

II. Facts

V-1 is a privately owned oil company with approximately 250 employees. It conducts business in eight western mountain states, with physical operations in six of those states. While V-1's primary business involves the sale of propane, it also sells gasoline at several locations. *Tr. 241.* It is the company's gasoline sales operation which is the subject of the present enforcement action.

The Twin Falls Facility

The events of this case took place at V-1's facility in Twin Falls, Idaho. The Twin Falls facility is a propane retail outlet, located in a largely residential area. V-1 began selling gasoline at this location in 1978, and it continued to do so until approximately June of 1991. *Tr. 56, 241-42, 286*.

V-1 offered several reasons for its decision to discontinue the sale of gasoline at Twin Falls. The major reason was a monetary one. V-1's president, Gary Huskinson, testified, "it seems like there was a continual price war and there just wasn't any profit in the gasoline business at that time." *Tr. 243; Compl. Ex. 9 at 2.* Still, respondent's decision to close down its gasoline pumps was not, at least in June of 1991, a permanent one. Huskinson's testimony indicates that V-1 would have reentered the retail gasoline business in Twin Falls had market conditions improved. *Tr. 243-44*; *see Tr. 323.*[(1)] V-1, however, never did resume gasoline sales at the Twin Falls facility.

Closing The Underground Storage Tanks

The gasoline at V-1's Twin Falls facility was stored in two underground storage tanks. One tank held 12,000 gallons, and the other tank held approximately 6,000 gallons. *Compl. Ex. 3*; *Tr. 242*. The tanks, as well as the related piping material, were asphalt coated or constructed of bare steel, and were neither lined, double-walled, nor cathodically protected.
Compl. Ex. 3.

V-1 began closing the USTs by selling off as much of the gasoline product as it could pump from the tanks. A hand pump was then used to extract the remaining gasoline from the tanks. Company president Huskinson explained, "we put a pipe down to the bottom of the tank and cut off at an angle and pumped down to about a quarter of an inch of the product out of the tank, then we filled them with a hose with city water and there was a little sludge on the top and we pumped that off." *Tr. 247.*

Thereafter, on July 12, 1991, V-1 filed a Notification for Underground Storage Tanks (EPA form 7530-1) with the Idaho Department of Environmental Quality ("IDEQ") informing the State agency that the two USTs at its Twin Falls facility were no longer used to store gasoline. *Resp. Ex. 5.* On this document, respondent checked boxes indicating that the tanks were "Temporarily Out of Use." Respondent, however, also checked boxes indicating that the tanks had instead undergone a "Change in service." In addition, V-1 informed the IDEQ that no "site assessment" had been

performed.[(2)]

EPA Takes Enforcement Action

It appears that nothing of consequence occurred in this case from the time that V-1 filed its UST notification form with the IDEQ on July 12, 1991, until November 29, 1993, when the IDEQ advised respondent that there was a problem. Specifically, in a letter dated November 29, 1993, the IDEQ informed V-1 regarding the Federal underground storage tank permanent closure and site assessment requirements. The IDEQ letter in part read:

> Upon reviewing our inventory records, we find that your two underground gasoline tanks at 435 North Washington, Twin Falls, have remained temporarily out of use since July 1991.
>
> Please be advised that Section 280.70(c) of the federal EPA Underground Storage Tank Regulations (40 CFR) states: "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 for new UST systems or the upgrading requirements, except that spill and overfill equipment requirements do not have to be met. Owners and operators must permanently close the substandard UST systems at the end of this 12-month period 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 Section 280.72 before such an extension can be applied for."

Compl. Ex. 4.

V-1 responded to IDEQ's correspondence of November 29, in a letter dated December 2, 1993. There, respondent in part stated, "[a]t the time that these tanks were placed out of use, they were filled with water and your office notified." In addition, citing adverse weather conditions, and the expense associated with excavating the USTs, V-1 essentially requested more time from the IDEQ for removing its tanks. *Compl. Ex. 6.*

Thereafter, on February 2, 1994, EPA inspected the two USTs at V-1's Twin Falls facility. This inspection was conducted by Ellen Van Duzee, the EPA underground storage tank coordinator for the State of Idaho. *Tr. 35, 37*.

On her February 2 inspection, Van Duzee observed that the USTs were not in use. *Tr. 56*. Having been informed by V-1 that the tanks were filled with water, Van Duzee used water finding paste and a gauge stick to determine their contents. *Tr. 57.* She calculated that each tank held approximately 11-1/2 feet of water. She further calculated that one tank contained approximately two inches of petroleum, and the other tank a little more than one inch petroleum. It appears, however, that the petroleum measured by Van Duzee was in the tanks' fill tubes (*i.e.,* the small pipe that extends from the UST), and not in the tanks themselves. *Tr. 59-60; Resp. Ex. 1.*[(3)]

Van Duzee met with Huskinson, V-1's president, on February 4, 1994, to discuss the underground storage tank situation. At this meeting, Van Duzee issued to V-1 an "Expedited Enforcement Compliance Order and Settlement Agreement," otherwise known as a "field citation."[(4)] In the field citation, EPA alleged that V-1 violated Section 280.70(c) by failing to close the Twin Falls USTs within 12 months of their being temporarily taken out of service. EPA sought permanent closure of the underground storage tanks, as well as a $300 penalty. *Tr. 61; Compl. Ex. 7.*

Following Van Duzee's discussions with V-1, EPA's Region 10 UST coordinator, Todd Bender, became involved. Bender discussed this matter with Huskinson in July of 1994. Bender testified that the two talked about a site assessment, permanent closure of the underground storage tanks, and EPA's publication "Musts for USTs." Also, Bender informed Huskinson that a site assessment had to be performed at the Twin Falls facility regardless of whether the tanks were permanently closed or

whether a change-in-service occurred. *Tr. 138-39.*

Bender followed-up this discussion with Huskinson with a "last chance" letter to V-1. In this letter, Bender again set forth EPA's position and informed the company that this was the last chance to resolve the dispute by the informal field citation route. *Tr. 139, 142; Compl. Ex. 8.* Huskinson, however, refused to accept delivery of this letter. *Tr. 140.*[(5)]

In a letter dated July 21, 1994, counsel for V-1 responded to the EPA "last chance" letter. While V-1's counsel disputed any notion that the company had violated the UST regulations, or that it was in any way responsible for ground contamination in the Twin Falls area, respondent asked EPA for a one-month extension of time "to make a final decision on what to do." *Compl. Ex. 9.*

In June, 1995, after an unsuccessful attempt to resolve this mater informally, EPA withdrew the field citation. *Compl. Ex. 11.* In its place, EPA brought the present enforcement action.

On October 1, 1997, shortly before the hearing in this case, V-1 excavated the two underground storage tanks at the Twin Falls facility. *Jt. Ex. 1.*[(6)]

III. Discussion

A. Liability

The issue is whether V-1 violated 40 CFR 280.70(c). Section 280.70(c) in part provides: "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."

There is no dispute here that the two Twin Falls underground storage tanks were not used to store gasoline for more than 12 months. There also is no dispute that the underground storage tanks did not meet the Section 280.20 performance standards for new UST systems or the Section 280.21 upgrading requirements for existing UST systems. Rather, the dispute centers on whether this greater than 12-month period that the tanks were not used to store gasoline constituted a "temporary closure," as EPA contends, or a "change-in-service," as V-1 contends.

If EPA is correct and the USTs were temporarily closed for more than 12 months, then pursuant to the unambiguous language of Section 280.70(c), V-1 was required to have permanently closed the tanks. The record is clear that respondent did not do so. Accordingly, a violation of Section 280.70(c) would be established. If, however, V-1 is correct and the tanks had undergone a change-in-service because they contained water, and not gasoline, then respondent could well be in compliance with the change-in-service provisions of Section 280.71(c) and thus not liable for any Section 280.70(c) violation.[(7)]

Upon analysis of this issue, it is held that V-1 maintained the Twin Falls USTs in a temporary closure status for more than 12 months. Accordingly, respondent committed a violation of Section 280.70(c) when, after this 12-month period, it failed to close the tanks permanently. The evidence supporting this holding is discussed below.

First, the testimony of V-1's president, Gary Huskinson, and vice-president, Robert Clayton, establishes that when the company stopped selling gasoline in Twin Falls in either May or June of 1991, it did so only temporarily. Respondent still held out hope that it could reenter the retail gasoline market. If market prices rebounded, and if the city's widening of the adjacent public street allowed proper access to the gas pumps, V-1 was prepared to go back into the gasoline business. *Tr. 243-44, 323.*[(8)] The testimony of these V-1 officials shows that respondent intended the UST closure to be temporary only. Their testimony is in direct conflict with the notion that the company sought to engage in a change-in-service

by removing the gasoline from the USTs and replacing it with water.

Second, in response to the IDEQ's and the EPA's initial enforcement efforts regarding the USTs, neither Huskinson nor Clayton offered the explanation that the tanks had undergone a change-in-service. For example, in responding to a letter from the IDEQ *(Compl. Ex. 4)* in which V-1, in effect, was advised that it was not in compliance with Section 280.70(c), Clayton made no mention of a change-in-service. Instead, Clayton asked the State environmental agency for more time to excavate the tanks. *Compl. Ex. 6.*

Likewise, when Huskinson talked with EPA representative Van Duzee on February 4, 1994, about the Twin Falls USTs (a conversation which V-1 tape recorded), Huskinson made no mention of a change-in-service occurring. *Tr. 64, 126; Resp. Ex. 1.* Huskinson's silence on this matter is compelling, for one would expect that if a change-in-service had actually occurred, it would have been raised by V-1 to persuade EPA not to issue a field citation. The fact that this defense was not raised on February 4 is telling.

Third, respondent's argument that it replaced the gasoline in the underground storage tanks with water in order to effect a change-in-service begs the question -- *i.e.,* a change-in-service to what? V-1's witnesses offered no explanation as to the water in the USTs being used for any purpose whatsoever. In fact, they testified that because the water mixed with residue petroleum that had been left in the tanks, it created a considerable problem of how to dispose of the now contaminated substance. *Tr. 281.*[(9)] Whether the tanks were filled with water for safety reasons, as respondent maintains (*Tr. 286),* or whether they were filled with water as a result of respondent's good faith interpretation of an EPA publication (a point discussed below), the fact remains that the water that was put into the USTs did not effect a change-in-service.[(10)]

Finally, the fact that V-1 did not conduct a site assessment after removing the gasoline from the tanks, and before filling them with water, is further evidence that the USTs did not undergo a change-in-service. In that regard, Section 280.71(a), titled "Permanent closure and changes-in-service," states that "[t]he required assessment of the excavation zone under § 280.72 ["Assessing the site at closure or change-in-service"] must be performed after notifying the implementing agency but before the completion of the ... change-in-service." V-1 did not do this. Accordingly, respondent cannot now argue that its USTs had undergone a change-in-service when it failed to follow the clearly prescribed regulatory steps for effecting such a change. *See Compl. Ex. 8* (EPA letter of July 12, 1994, informing V-1 that "[e]ven an official 'change-in-service' from storage of a regulated substance (like gasoline) to an unregulated substance (like *pure* water) requires active measurement for 'the presence of a release where contamination is most likely to be present at the UST site.'" *(EPA's emphasis).*

V-1 attempts to evade compliance with this site assessment requirement by arguing that following this regulatory methodology would only have served to make matters worse. It asserts that site assessment soil borings could have acted as conduits spreading the known ground contamination to other areas. Accordingly, V-1 submits that by not complying with the letter of the law (*i.e.,* Section 280.70(c)), it "acted in the best interest of the environment." *Resp. Br. at 9.*

Respondent's site assessment argument has no merit. Its unsupported assertions are defeated by the testimony of EPA witness Van Duzee. She testified that she had never seen a site assessment cause additional environmental harm. Van Duzee also testified that the collecting of soil samples after the USTs have been excavated does not result in environmental harm. Furthermore, she added that the applicable UST regulations do not require that either borings or monitoring wells be drilled. *Tr. 347-49.*

In sum, EPA has established that the Twin Falls USTs were temporarily closed for more than 12 months in violation of Section 280.70(c). Despite this finding, V-1 raises several affirmative defenses that still must be addressed.

B. V-1's Affirmative Defenses

All of V-1's affirmative defenses rest in some way upon an EPA publication titled, "Musts for USTs." Court Ex. 2.[(11)] Page 23 of the Musts for USTs sets forth three exceptions to the permanent underground storage tank closure requirements of Section 280.70(c). One of these exceptions, the one relied upon by V-1, involves a change-in-service. It states, in part, "[y]ou can change the contents of your UST to an unregulated substance, such as water." In other words, an owner or operator of an underground storage tank can relieve itself of the obligation to comply with the permanent closure provisions of Section 280.70(c) by replacing the regulated substance with water.

As its first affirmative defense, V-1 submits that it has complied with the plain wording of this EPA publication. Respondent argues that as directed by the Musts for USTs, it removed the gasoline from the Twin Falls tanks and filled them with water. Indeed, both the company's president and vice-president testified that they relied upon the Musts for USTs in deciding upon this course of action. *Tr. 250, 281, 323.*

As its second affirmative defense, V-1 submits that the doctrine of equitable estoppel prohibits EPA from prosecuting it for relying in good faith upon the agency's Musts for USTs publication. In that regard, respondent states: "[EPA was] aware that their *Musts for USTs* publication advised UST owners that they could effect a change-in-service by filling a UST with an unregulated substance, and specifically indicated that it could be water. In addition, they were aware that their publication did not specifically state that a formal site assessment was required. Furthermore, they were aware that the publication set no standards for emptying and cleaning USTs." *Resp. Br. at 11*. Accordingly, V-1 argues that it cannot now be penalized by EPA for following the government's own publication.

Finally, as a third affirmative defense, respondent asserts that the Fair Notice Doctrine bars EPA's prosecution of this case. V-1 explains, "[t]he Fair Notice Doctrine, based in the principals of the due process clause of the United States Constitution, prevents application of a regulation if that regulation fails to give the regulated party fair notice, or warning, of the conduct that the regulation proposes to require or prohibit." *Resp. Br. at 12.* Here, V-1 submits that it "was given no agency interpretation at all, prior to the enforcement procedure by the EPA, other than what was found in the *Musts for USTs* publication." *Resp. Br. at 13.*

V-1's reliance upon these three affirmative defenses is misplaced. A fatal flaw common to all three defenses is that respondent equates compliance with the Musts for USTs, a general guidance document, as compliance with Section 280.70(c), a promulgated regulation. This is not so.

The regulation that V-1 is alleged to have violated is contained in 40 CFR Part 280, Subpart G. Part 280 is titled, "Technical Standards And Corrective Action Requirements For Owners And Operators Of Underground Storage Tanks (UST)." Subpart G is titled, "Out-of-Service UST Systems and Closure." These headings clearly inform the regulated community, and this includes V-1, that they contain standards affecting the operation and closure of underground storage tanks. Moreover, insofar as this enforcement action is concerned, Section 280.70(c) clearly states that USTs which are temporarily closed for more than 12 months must be closed permanently. There is no ambiguity in this regulation; nor does V-1 assert that to be the case. Accordingly, V-1 cannot now argue that it did not receive "fair notice" as to the conduct required by Section 280.70(c). *See Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947)("[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.")

In addition, V-1 is not a particularly small company. As noted, it has approximately 250 employees with operations in eight states. It owns and operates USTs in the furtherance of its retail gasoline (and propane) business. Therefore, it should come as no surprise to V-1 (or to anyone in this type of business, no matter its size) that owners and operators of underground storage tanks are subject

to numerous EPA regulations. V-1's dealings with the IDEQ support this conclusion. (Indeed, even V-1 admits that it is "highly regulated." *Resp. R.Br. at 6.*) Accordingly, respondent is charged with the knowledge of the UST provisions contained in 40 CFR Part 280, particularly the plainly worded closure provisions of Section 280.70(c). V-1 has offered no adequate explanation as to why this should not be the case.

Moreover, the very document that V-1 so heavily relies upon, the Musts for USTs publication, contains information damaging to respondent's case. The opening paragraph of the Musts for USTs informs the reader that it is a summary of the regulations only. Page one, paragraph one, of this publication reads:

WHAT ARE THESE REGULATIONS ABOUT?

> The U.S. Environmental Protection Agency (EPA) has written regulations for many of the nation's underground storage tank systems. This booklet briefly describes the new technical requirements for these systems, which include tanks and piping. *You can find the complete regulations in the Federal Register.* Properly managed, underground storage tank systems -- often called USTs -- will not threaten our health or our environment.

Court Ex. 2 at 1 (emphasis added).

Thus, not only was V-1, as an owner and operator of underground storage tanks, responsible for knowing and complying with the applicable Code of Federal Regulations, it also was directed to those regulations by the EPA general guidance document that it relied upon.

In addition, even if V-1 had properly relied upon the Musts for USTs when it filled the Twin Falls tanks with water in June of 1991, it was subsequently informed by the IDEQ that this action did not constitute a change-in-service of the tanks. The IDEQ did this by letter dated November 29, 1993, in which it substantially quoted the UST closure provisions of Section 280.70(c). Despite this notification, V-1 did not remove the tanks permanently until October 13, 1997. *See Compl. Ex. 4.*

For these reasons, V-1's affirmative defenses are rejected.

C. Civil Penalty

Section 9006(d) of RCRA provides the statutory authority for the assessment of a civil penalty in this case. 42 U.S.C. § 6991e(d). Pursuant to Section 9006(d)(2)(A), a maximum daily penalty of $10,000 may be assessed, per tank, for a violation of any standard promulgated under Section 9003 of RCRA. 42 U.S.C. §§ 6991e(d)(2)(A) & 6991b. Section 9006(c) sets forth the criteria for determining an appropriate civil penalty. It provides:

> Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, 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.*

42 U.S.C. § 6991e(c)*(emphasis added).*

EPA seeks a civil penalty of $36,674 against V-1.[(12)] As was the case with the issue of liability, EPA bears the burden of proof on the penalty issue.

EPA arrived at this penalty figure by applying the formula contained in "U.S. EPA Penalty Guidance for Violations of UST Regulations" (the "Penalty Policy"). *Court Ex. 1*. While the use of this Penalty Policy may provide for a more consistent

national penalty approach by EPA, and in some cases may even be helpful to the judge in determining the appropriate penalty to be assessed (*see* 40 CFR 22.27(b)), the Environmental Appeals Board is correct in stating that ultimately it is the statutory penalty criteria against which the judge is to measure the facts adduced at hearing and assess a civil penalty. *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997).

Accordingly, upon consideration of the facts established at the hearing, together with the RCRA penalty criteria of Section 9006(c), a civil penalty of $25,000 is assessed against V-1 for violating 40 CFR 280.70(c). A substantial penalty is warranted here because of the serious nature of the violation and V-1's lack of good faith, as evidenced by its failure to promptly close the tanks after being informed by the IDEQ, on November 29, 1993, that the provisions of Section 280.70(c) applied to its operation. V-1, however, did not permanently close the tanks until October of 1997.

There is no doubt that this is a serious violation. In promulgating 40 CFR Part 280, EPA identified the important role of the UST system closure provisions in preventing contaminating releases. It stated:

> [T]he principal objective of the UST system closure requirements is to identify and contain existing contamination and to prevent future releases from UST systems no longer in service (52 FR 12757). Available information suggested that UST systems improperly closed in the past have had undetected releases that later required corrective action.... Because a large number of existing UST systems are expected to close in the next 5 to 10 years, EPA believes that it is particularly important to require proper management procedures for out-of-service UST systems so that contamination due to improperly closed UST systems can be prevented from posing a threat of additional releases in the future and needed corrective action can be identified and taken.

53 *Fed. Reg.* 37181 (September 23, 1988).

Thus, failure to comply with the closure provisions of Section 280.70(c) poses significant health and environmental risks. These risks are well-illustrated in this case by the fact that the two tanks at V-1's Twin Falls facility were more than 20 years old. The tanks were asphalt coated or constructed of bare steel, and were not lined, double-walled, or cathodically protected. *Resp. Ex. 5.* The condition of these aging tanks, therefore, increased the likelihood that corrosion would cause the gasoline-contaminated water to be released into the environment. *See* 53 *Fed. Reg.* 37082, 37088. Indeed, even V-1 management acknowledged that the tanks could not meet the December 22, 1998, deadline for upgrading existing USTs. 40 CFR 280.21.[(13)]

In addition, the Twin Falls USTs were located in a residential area. There are residences immediately behind the V-1 facility, as well as across the street. *Tr. 56, 183.* Also, there are wells close by. *Tr. 118.* These areas could sustain significant environmental harm in the event of a UST release.

Along this line, Todd Bender, EPA's Region 10 underground storage tank program enforcement coordinator, testified that the gasoline-contaminated water contained in V-1's USTs posed a threat to the environment. (V-1's vice-president conceded that there was a brown particulate floating in the tank water, and also that the water had a slight odor to it. *Tr. 336.* Also, the company president stated that the tank water had "a little crust or something ... in the top." *Tr. 254.*) According to Bender, as little as one quart of gasoline in a 12,000 gallon tank has the potential to do environmental harm. *Tr. 198-99, 211.* In fact, respondent acknowledged that it had great difficulty in getting rid of this contaminated water. *Tr. 281.*

Aside from the seriousness of the violation, the record shows that V-1 did not act in good faith once notified by the IDEQ and EPA that it was in violation of Section 280.70(c). When V-1 temporarily closed the tanks in June of 1991, it relied upon EPA's Musts for USTs in erroneously believing that it had performed a change-in-service. Even though V-1 was wrong on this point, and in violation of the applicable UST regulation, for penalty assessment purposes its reliance upon this EPA document cannot be said to be that unreasonable. This is a factor that cuts in V-1's favor in assessing its good faith efforts to comply with Section 280.70(c). As far as this good faith is concerned, however, things took a distinct turn for the worse on November 29, 1993.

It was in a letter dated November 29, 1993, that the IDEQ specifically informed V-1 of Section 280.70(c)'s requirement that USTs temporarily out-of-service for more than 12 months must be permanently closed. Therefore, as of this notification, V-1 was specifically made aware of the applicable UST closure provisions and that the IDEQ believed that it was in violation of Section 280.70(c). *Compl. Ex. 4.* Despite this 1993 notification, and despite subsequent contacts in 1994, from EPA's Ellen Van Duzee *(Tr. 61-66)* and Todd Bender *(Tr. 138-39)*, it wasn't until October of 1997, that V-1 permanently closed the tanks. V-1 has not offered a sufficient explanation as to why it took so long to comply with the UST regulation. In sum, this evidences a lack of good faith on the part of respondent.[(14)]

Also, as for the period of time between the temporary closing of the tanks and their being excavated, the efforts by V-1 to monitor the tanks for leaks is not a basis for reducing the penalty in this case. For example, tightness tests on the tanks were not performed since approximately 1989. *Tr. 306-07; see Resp. Ex. 4.* In 1991, respondent had ceased conducting inventory control measurements on the contents of the tanks. *Tr. 321.*[(15)] All that the company did after the tanks were filled with water was to check the water level in the tanks on a quarterly basis.

While EPA witness Bender conceded that properly performed inventory control and tank tightness tests are good indicators as to whether the tank is leaking *(Tr. 188-89)*, the applicable UST regulation nonetheless specifically requires an external monitoring method, not an internal one. Moreover, these alternative monitoring methods were not even employed by V-1 from June, 1991, to October, 1997.

In sum, based upon the penalty criteria of RCRA Section 9006(c), it is held that a civil penalty of $25,000 is the appropriate assessment for the Section 280.70(c) violation committed by V-1.[(16)]

D. Compliance Order

Pursuant to RCRA Section 9006(a), 42 U.S.C. § 6991e, EPA requests the issuance of a Compliance Order as set forth in its amended complaint. EPA's request is granted and, to the extent that it has not already done so, V-1 is ordered to do the following:

a. Within thirty (30) days of receipt of this Order, respondent must submit IDEQ's 30-Day Notice of Closure Form to EPA with a copy to IDEQ clearly indicating the date these tank systems will be permanently closed.
b. Within thirty (30) days of receipt of this Order, respondent must submit to EPA a site assessment plan documenting proposed sample locations, types of samples to be collected, analytical methods which will be used, contractors (if any) to be utilized, and proposed disposal location/method for removed UST materials.
c. Within sixty (60) days of receipt of this Order, respondent must complete permanent tank closure. Permanent tank closure shall entail removal of all water, petroleum, and sludge remaining in each tank, disposal of this material in an environmentally sound manner, removal or in-place closure of the tanks and piping as described in 40 CFR 280.71(b), and completion of a site assessment which measures for the presence of a release where contamination is most likely to be present.
d. Within ninety (90) days of receipt of this Order, respondent must provide a detailed site assessment report to EPA and IDEQ. In addition, a completed Idaho UST Site Closure Evaluation Form, and an updated Notification for Underground Storage Tanks form (EPA form 7530-1) indicating permanent closure on page one shall be submitted with the site assessment report.
e. If the site assessment reveals that a release has occurred and test results indicate that applicable water quality criteria (as specified in Idaho State regulations IDAPA 16.01.02.852,06) or that applicable soil cleanup levels (as specified in Idaho UST Information Series #1: Idaho Cleanup Requirements for Petroleum Contaminated Soil (Attachment 1)) have been exceeded,

respondent shall:

1. Notify the EPA and IDEQ within 24 hours of release confirmation in accordance with 40 CFR 280.61(a).

2. Work cooperatively with IDEQ to fully assess the extent of contamination and provide for remediation of all identified contamination in accordance with IDAPA regulations 16.01.02.851, and 852.

ORDER

It is held that V-1 Oil Company violated the Resource Conservation and Recovery Act, 42 U.S.C. § 6991e, by failing to comply with 40 CFR 280.70(c). For this violation, the respondent is assessed a civil penalty of $25,000. It is also directed to satisfy the terms of the Compliance Order as set forth above. *Id.* Respondent shall pay the civil penalty within 60 days from the date of this order.[(17)] Unless this case is appealed to the Environmental Appeals Board in accordance with 40 CFR 22.30, or unless it is directed for review *sua sponte*, it will become a final order of the Board.

Carl C. Charneski
Administrative Law Judge

1. V-1 also was concerned with the possibility that the public street fronting its facility would be widened, thus making it more difficult for its customers to access the gas pumps.

Tr. 244-45.

2. "Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site ...." 40 CFR 280.72(a).

3. Van Duzee's misunderstanding as to the contents of the tanks does not affect the holding in this case. What is important is the fact that this water had mixed with petroleum and was not "pure." *Tr. 122, 142.*

4. The field citation is an informal on-site method for resolving enforcement disputes, and attaining prompt regulatory compliance. *Tr. 92, 152.* Part I of the citation is titled "Compliance Order;" Part II is titled "Settlement Agreement." The field citation process, if accepted by respondent, takes the place of an adversarial hearing.

5. EPA also sent this "last chance" letter to V-1's vice-president, as well as to the company's legal counsel. V-1 eventually received this letter. *Tr. 148; Compl. Ex. 9.*

6. Aside from the fact that the tanks were excavated on October 1, 1997, it was determined that the circumstances surrounding the excavation were not relevant to this proceeding. This determination was made in the interest of fairness, as respondent could not be expected to defend against any new allegations made by EPA on the eve of trial, and EPA had no interest in postponing the hearing. *Tr. 11-14.*

7. 40 CFR 280.71(c) in part states: "Continued use of an UST system to store a non-regulated substance is considered a change-in-service." Nonetheless, as discussed *infra*, there is serious dispute here as to whether V-1 even properly performed a change-in-service. This dispute also centers on its failure to conduct a site assessment.

8. Company president Huskinson stated that at one point respondent was leaning toward pulling the tanks because of the impending 1998 deadline for the upgrading of existing UST systems. *Tr. 296; see* 40 CFR 280.21. The fact that V-1 may have considered pulling the tanks, however, in no way alters the established fact that for the time periods involved in this case the Twin Falls USTs were temporarily closed. Indeed, Huskinson conceded that had the retail gasoline business picked up, the tanks could well have been put back into service.

Tr. 292; Resp. Ex. 1.

9. As for the company's efforts to dispose of this water, V-1 president Huskinson explained:

> We contacted many -- several contractors to see what the best way was to get it out, asked DEQ if it could be pumped out and put on roadbeds where they're doing asphalting because I didn't think that that would be contaminating anything and *no one wanted to touch it.*

Tr. 281 (emphasis added).

10. V-1 management stated that it filled the tanks with water on the advice of an unnamed contractor. *Tr. 286.* While V-1 believes that this made the tanks safer *(T.258)*, an EPA witness experienced in the area of underground storage tanks disagreed. *Tr. 201.* This is an issue that need not be resolved in this case.

11. Court Exhibit 2 is a 1988 edition of this publication, while Court Exhibit 3 is a 1990 edition of the same publication. The relevant portions of these two exhibits are identical.

12. EPA proposed this penalty on a per facility basis, as opposed to the statutorily allowed per tank basis.

13. The fact that underground storage tanks can, and do, leak is further illustrated by this case. In that regard, V-1's president testified that the company's Twin Falls facility was "probably" contaminated by a "huge release" that had occurred at a station across the street. *Tr. 118, 268; Compl. Ex. 9 at 1.* Indeed, EPA witness Van Duzee testified that the IDEQ had filed suit against the tank owners across the street from V-1's facility. *Tr. 87.*

14. Additional evidence of V-1's lack of good faith is the fact that the company president refused to accept a letter from Bender dated July 12, 1994. *Tr. 140; Compl. Ex. 8.*

15. *See Compl. Ex. 8*, EPA letter informing V-1 that even inventory control documents are a "wholly insufficient" substitute for a site assessment. *See, also, Tr. 79* (inventory control does not satisfy EPA's leak detection requirements).

16. This penalty consideration also took into account EPA's financial analysis regarding the economic benefit derived by V-1 as a result of its noncompliance. This analysis is contained in Complainant's Exhibit 19. Also considered was the testimony of EPA witness, Charlotte Resseguie, an economic benefit expert. *See Tr. 225-235.* However, this penalty consideration did not take into account EPA's assertions that V-1 had committed another UST violation in the past. *See Compl. Br. at 21-23.* In that regard, EPA has not provided any documentary proof to support its position. Also, the testimony upon which complainant relies is unclear and too sketchy either to prove this point, or to provide the court with sufficient information so as to properly take such a fact into account.

17. Payment of the civil penalty may be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, addressed to Mellon Bank, EPA Region 10 (Regional Hearing Clerk), P.O. Box 360903M, Pittsburgh, PA. 15251.

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