



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
Andrew B. Chase, a/k/a Andy Chase,)
Chase Services, Inc., Chase Convenience) **Docket No. RCRA-02-2011-7503**
Stores, Inc., and Chase Commercial)
Land Development, Inc.,)
)
Respondents.)

**ORDER ON COMPLAINANT’S MOTION
FOR PARTIAL ACCELERATED DECISION**

I. Procedural Background

This proceeding was initiated on April 7, 2011 by the Director of the Division of Enforcement and Compliance Assistance of the United States Environmental Protection Agency, Region 2 (“Complainant” or “EPA”) filing a Complaint, Compliance Order and Notice of Opportunity for Hearing against the Respondents. The Complaint was filed pursuant to Section 9006 of the Solid Waste Disposal Act, as amended (the “Act” or “SWDA”), 42 U.S.C. § 6991. The Complaint charges Respondents, as owners and/or operators of underground storage tanks (“USTs”) at six retail gasoline stations, with 21 counts of violating regulatory requirements for UST release detection, prevention and correction. These regulatory requirements, codified at 40 C.F.R. Part 280, were promulgated by the Environmental Protection Agency pursuant to Section 9003(a) of the Act. Complainant proposed a total penalty of \$232,838.63 for the alleged violations. Respondents submitted an Answer to the Complaint on June 6, 2011, denying the alleged violations. Thereafter, the parties filed prehearing exchanges.

On February 10, 2012, Complainant filed a Notice of Motion and Memorandum of Law in Support of Complainant’s Motion for Accelerated Decision on Liability (“Motion” or “Mot.”), and Declarations of Lee A. Spielmann, Paul M. Sacker, and Jeffrey K. Blair in support. By its Motion, Complainant seeks an order establishing Respondents’ liability for Counts 1 through 19 and 21 of the Complaint.

The parties submitted Joint Stipulations on March 22, 2012 (“Stips”). Respondents filed a Declaration of Thomas W. Plimpton in Opposition to Complainants Motion for Partial

Accelerated Decision (“Opposition” or “Opp.”) dated March 29, 2012, requesting that the Motion be denied with respect to Counts 1, 2, 18 and 19 of the Complaint. Complainant filed a Memorandum in Reply to Respondents’ Opposition to Complainant’s Motion for Partial Accelerated Decision (“Reply”), dated April 5, 2012.

II. Governing Law

Section 9003 of the Act, 42 U.S.C. § 6991b, authorizes the Environmental Protection Agency to promulgate release detection, prevention, and correction regulations applicable to all owners and operators of USTs as necessary to protect human health and the environment. A UST is defined in Section 9001 of the Act as “any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances,” that is, petroleum or hazardous substances defined in 42 U.S.C. § 9601(14). 42 U.S.C. §§ 6991(7), (14). If the EPA determines that any person is in violation of any requirement of the Act, it may issue a compliance order, and any owner or operator of a UST who fails to comply with any requirement or standard promulgated under Section 9003 of the Act “shall be subject to a civil penalty not to exceed \$10,000 for each tank for each day of violation.” 42 U.S.C. §§ 6991e(a) and 6991e(d)(2).

III. Standards for Accelerated Decision

The Motion is governed by Section 22.20(a) of the Rules of Practice, which provide that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). If accelerated decision is rendered on less than all the issues in the proceeding, the decision “shall specify the facts which appear substantially controverted, and the issues and claims upon which the hearing shall proceed.” 40 C.F.R. § 22.20(b)(2).

The standard for accelerated decision under 40 C.F.R. § 22.20 is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”). *Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995)(“Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is therefore, the most fertile source of information about administrative summary judgment.”). The moving party bears the initial burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The movant must show that a material fact cannot be genuinely disputed by “citing to particular parts of materials in the record” or “showing

that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” FRCP 56(c)(1).

Once that burden is met, to defeat summary judgment, the nonmoving party must show that a material fact is genuinely disputed by “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence . . . of a genuine dispute.” FRCP 56(c)(1). “In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party’s favor.” *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)(“The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor”).

Rule 56 of the FRCP provides that “If a party . . . fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly . . . address the fact; (2) consider the fact undisputed for purposes of the motion; [or] (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it.” FRCP 56(e)(3).

IV. Stipulated Facts

The following facts are stipulated by the parties and/or admitted by the Respondents in their Answer¹:

1. Respondents Chase Services, Inc. (“CSI”), Chase Convenience Stores, Inc. (“CCS”), and Chase Commercial Land Development, Inc. (“CCLD”) (collectively, “corporate Respondents”), are for-profit corporations organized under the laws of the State of New York. Andrew B. Chase (“Mr. Chase”) is the chairman or chief executive officer of each of the corporate Respondents. Stips ¶¶ 3-6.

Station I:

2. A retail gasoline and convenience store business known as Chase’s Mobil at 3851 Route 374, Lyon Mountain, New York (“Station I”) has had four USTs known as:

- (a) Tank # 001, with a capacity of 3,000 gallons, which constituted a “new tank system” under 40 C.F.R. § 280.12;
- (b) Tank # 006A, with a capacity of 11,000 gallons;
- (c) Tank # 006B, with a capacity of 4,000 gallons, which along with Tank #006A constituted a “new tank system” under 40 C.F.R. § 280.12 and a petroleum UST system for purposes of 40 C.F.R. § 280.41; and

¹ These numbered Stipulated Facts are referenced in discussions below as “Facts” with the designated paragraph number.

(d) Tank # 008, with a capacity of 550 gallons. Stips ¶¶ 7, 8, 29, 32, 68.

3. Station I has had Tank nos. 001, 006A and 006B from 1998 until at least March 22, 2012. Stips ¶ 8.

4. Station I had Tank # 008 since it was installed on or about October 1, 1988, but it was temporarily out of service after April 2008 and was removed from service in November 2009. Stips ¶ 8, 68.

5. For at least two years prior to and through on or about April 30, 2008, Tank # 008 at Station I was being used to store kerosene. The tank was constructed of steel/carbon steel/iron. Stips ¶¶ 34, 37.

6. Between April 24, 2008 and December 10, 2010, underground piping for each of Tank nos. 006A and 006B at Station I routinely contained and was used to convey gasoline under pressure and as of April 24, 2009 and August 24, 2010 was equipped with an automatic line leak detector. Stips ¶ 30, 33.

Station II:

7. A retail gasoline and convenience store business at 654 Bear Swamp Road, Peru, New York (“Station II”) was owned along with the three USTs referenced below by CCS from at least 1998 through July 24, 2009. The three USTs are known as:

- (a) Tank # 001A, with a capacity of 11,000 gallons;
- (b) Tank # 001B, with a capacity of 4,000 gallons; which along with Tank #001A constituted a “new tank system” under 40 C.F.R. § 280.12 ;
- (c) Tank # 002, with a capacity of 12,000 gallons, which constituted a “new tank system” under 40 C.F.R. § 280.12. Stips ¶¶ 7, 9, 10, 11, 29.

8. As of at least August 26, 2008, for each of Tank nos. 001A and 001B at Station II had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 38.

9. As of at least August 26, 2008, Tank # 002 at Station II had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 39.

10. As of at least September 1, 2006, underground piping for each of Tank nos. 001A, 001B and 002 at Station II was equipped with an automatic line leak detector. Stips ¶ 40.

11. The tanks were installed on or about September 1, 1998. Stips ¶ 28. CCS was required to conduct annual tests for the underground piping for each of Tank nos. 001A, 001B and 002 at Station II. Stips ¶ 41.

Station III:

12. A retail gasoline and convenience store business at 1785 Military Turnpike Road, Unit 10, Plattsburgh, New York (“Station III”) had two USTs, from at least 1995 through July 24, 2009, that were installed on or about November 1, 1995, known as:

- (a) Tank # 001, with a capacity of 11,000 gallons; and
- (b) Tank # 002, with a capacity of 4,000 gallons. Stips ¶¶ 7, 12, 28, 29, 46.

13. Tank nos. 001 and 002 were constructed of steel/carbon steel/iron, were used to store gasoline, and were a “steel UST system[] with corrosion protection . . . used to store [a] regulated substance[]” within the meaning of 40 C.F.R. § 280.31. Stips ¶¶ 42, 43.

14. The tanks were equipped with a cathodic protection system since at least May 1, 2008 until at least April 6, 2009. Stips ¶ 44.

15. Since at least November 1, 2006 until at least April 6, 2009, each of the tanks had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 45.

16. Each of the tanks constituted a “new tank system” under 40 C.F.R. § 280.12, and, with their underground piping constituted a petroleum UST system for purposes of 40 C.F.R. § 280.41. Stips ¶ 46.

17. As of at least August 26, 2008, underground piping for each of the tanks was equipped with an automatic line leak detector. Stips ¶ 47.

Station IV:

18. A retail gasoline and convenience store business at 4340 Route 3, P.O. Box 975, Redford, New York (“Station IV”) was owned by CSI from 1995 through July 24, 2009. CSI also owned the four USTs at Station IV known as:

- (a) Tank # 001A, with a capacity of 9,000 gallons;
- (b) Tank # 001B, with a capacity of 3,000 gallons, which along with Tank #001A constituted a “new tank system” under 40 C.F.R. § 280.12;
- (c) Tank # 003A, with a capacity of 10,000 gallons; and
- (d) Tank # 003B, with a capacity of 5,000 gallons, which along with Tank #003A constituted a “new tank system” under 40 C.F.R. § 280.12. Stips ¶¶ 7, 13, 14, 15, 29.

19. Tank nos. 001A and 001B were installed on or about June April 1, 1992. Stips ¶ 28. As of at least August 26, 2008, Tank # 001A contained and was being used to store diesel fuel. Stips ¶ 48.

20. Since at least April 1, 2006, Tank # 001A had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 49.

21. Tank nos. 003A and 003B were installed on or about June 3, 2003. Stips ¶ 28. Since at least June 1, 2006, Tank nos. 003A and 003B had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 50.

22. As of at least August 26, 2008, underground piping for each of Tank nos. 001A, 003A and 003B was equipped with an automatic line leak detector. Stips ¶ 51.

23. CSI was required to, and did, conduct annual tests for the operation of the automatic line leak detector for the underground piping for each of Tank nos. 001A, 003A and 003B. Stips ¶¶ 52, 53.

Station V:

24. A retail gasoline and convenience store business at 936 Route 374, Dannemora, New York (“Station V”) was owned along with the four USTs referenced below by CCLD from at least 2001 through July 24, 2009. The four USTs, installed on or about November 1, 2001, are known as:

- (a) Tank # 001A, with a capacity of 10,000 gallons;
- (b) Tank # 001B, with a capacity of 5,000 gallons, which along with Tank #001A constituted a “new tank system” under 40 C.F.R. § 280.12;
- (c) Tank # 002A, with a capacity of 6,000 gallons; and
- (d) Tank # 002B, with a capacity of 2,000 gallons, which along with Tank #002A constituted a “new tank system” under 40 C.F.R. § 280.12. Stips ¶¶ 7, 16, 17, 18, 28, 29.

25. Since at least November 1, 2006, Tank nos. 001A and 001B had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 54.

26. Since at least November 1, 2006 Tank no. 002A had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 55.

27. As of at least August 26, 2008, underground piping for each of Tank Nos. 001A, 001B and 002A was equipped with an automatic line leak detector. Stips ¶ 56. CCLD conducted release detection monitoring for the underground piping of these tanks. Stips ¶ 57.

Station VI:

28. A retail gasoline and convenience store business at 7155 Route 9, Plattsburgh, New York (“Station VI”) had five USTs from at least 2007 through March 22, 2012, installed on or about December 31, 2007, known as:

- (a) Tank # 1, with a capacity of 10,000 gallons, which constituted a “new tank system” under 40 C.F.R. § 280.12;
- (b) Tank # 2A, with a capacity of 5,000 gallons;
- (c) Tank # 2B, with a capacity of 6,000 gallons, which along with Tank #2A constituted a “new tank system” under 40 C.F.R. § 280.12;
- (d) Tank # 3A, with a capacity of 2,000 gallons; and.
- (e) Tank # 3B, with a capacity of 2,000 gallons, which along with Tank #3A constituted a “new tank system” under 40 C.F.R. § 280.12. Stips ¶¶ 7, 19, 28, 29.

29. As of at least August 26, 2008, Tank # 2A contained and was being used to store biodiesel fuel. Stips ¶ 58.

30. As of at least August 26, 2008, the shut-off valve intended for overfill protection that was attached to Tank # 2A was damaged and non-functional. Stips ¶ 59.

31. As of August 26, 2008 and August 24, 2010, Tank #1 had underground piping that routinely contained and that was used to convey diesel fuel under pressure. Stips ¶ 60.

32. As of August 26, 2008 and August 24, 2010, each of Tank nos. 3A and 3B had underground piping that routinely contained and that was used to convey gasoline under pressure. Stips ¶ 61.

33. As of August 26, 2008 and August 24, 2010, underground piping for each of Tank nos. 1, 3A and 3B was equipped with an automatic line leak detector. Stips ¶ 62.

34. As of August 24, 2010, Tank # 2A contained “off-road” diesel fuel, and Tank # 2B contained kerosene. Stips ¶¶ 65, 66.

Inspections and Follow-up:

35. Duly designated representatives of EPA conducted an inspection of Stations II, III, IV, V and VI on August 26, 2008, an inspection of Station VI again on August 24, 2010, and inspections of Station I on April 24, 2009 and August 24, 2010. Stips ¶¶ 20-22.

36. All of the tanks referenced above were in use at the time of each of the inspections of the respective Stations, with the exception of Tank # 008 at Station I. Stips ¶¶ 20-22, 24-27.

37. EPA issued information request letters to Mr. Chase on or about April 1, 2009, October 5, 2009, September 7, 2010 and November 29, 2010 seeking information on all UST facilities owned or operated by him, and/or CSI and any affiliated entities. Stips ¶ 23.

V. Counts 3 through 17 and 21

The first determination to be made is whether Complainant has carried its burden to show

that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law as to Counts 3 through 17 and 21.

A. Complainant's claim as to Count 3

Count 3 of the Complaint alleges that for at least two years prior to and through April 30, 2008, Mr. Chase provided on Tank # 008 at Station I only a whistler valve as overfill protection equipment, which does not meet the requirements of 40 C.F.R. § 280.20(c)(1)(ii). Complaint ¶¶ 93, 94. That provision states as follows:

[T]o prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:

- (i) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fillpipe (for example a spill catchment basin); and
- (ii) Overfill prevention equipment that will:
 - (A) Automatically shut off flow into the tank when the tank is no more than 95 percent full; or
 - (B) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high level alarm; or
 - (C) Restrict flow 30 minutes prior to overfilling, alert the operator with a high level alarm one minute before overfilling, or automatically shut off flow into the tank so that none of the fittings located on top of the tank are exposed to product due to overfilling.

40 C.F.R. § 280.20(c)(1)(ii). This provision is incorporated into 40 C.F.R. § 280.21(a), which requires that all existing UST systems comply not later than December 22, 1998 with one of the following: (1) new UST performance standards set forth in 40 C.F.R. § 280.20; (2) upgrading requirements in 40 C.F.R. § 280.21(b) through (d); or (3) tank closure requirements of 40 C.F.R. Part 280 subpart G. Section 280.21(d) provides that all existing UST systems be upgraded to comply with spill and overfill protection requirements in Section 280.20(c). Therefore, unless a tank has been properly closed, it must comply with the spill and overfull protection requirements.

Tank # 008 was in use and was not closed two years prior to and through April 30, 2008. Facts 4, 5. To make a prima facie showing of a violation of Section 280.20(c)(1)(ii) as incorporated into Section 280.21(a), EPA must show that (1) Mr. Chase is an owner or operator, (2) of an existing UST system, (3) that is not closed in accordance with Part 280 Subpart G, and (4) which does not have overfill protection equipment that meets the criteria of 280.20(c)(1)(ii)(A), (B) or (C).

Complainant has provided documentation showing that Mr. Chase is the owner and operator of USTs, including Tank # 008, at Station I, including a Petroleum Bulk Storage

(“PBS”) application dated January 2010 and certificate dated October 3, 2008. Declaration of Paul M. Sacker (“Sacker Decl”) p. 7, and attached Exhibits 1, 2, 14 p. 1.

The terms “tank system” and “existing tank system” are defined in 40 C.F.R. § 280.12 as a UST and “connected underground piping, underground ancillary equipment, and containment system, if any” which is “used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988.” Tank #008 contained kerosene and was installed around October 1988. Facts 4, 5. Complainant has presented documentation showing that Tank #008 had piping which relied on suction to convey the product. Declaration of Jeffrey K. Blair (“Blair Decl”) at 9 and attached Exhibit 1. Therefore, Tank # 008 constituted an “existing tank system.”

As to whether the tank met the criteria of 280.20(c)(1)(ii)(A), (B) or (C), Complainant presented a UST Inspection Form, April 24, 2009, for Station I stating “No verification of overfill protection on Tank 008 (listed as whistler valve),” and presented a Declaration of the inspector, Jeffrey Blair, stating that during the April 24, 2009 inspection, he requested from Mr. Chase’s representative, Carol Blaine, documentation on overfill protection on tank # 008 and Respondents did not provide such documentation. Blair Decl at 14 and attached Exhibit 1 p. 2; Sacker Decl at 33. Complainant also showed that it inquired in an October 2009 Information Request as to the overfill protection on Tank # 008, and Respondents did not respond except for indicating the presence of a whistler valve. Sacker Decl at 33, attached Exhibits 15, 16. Mr. Sacker, an Environmental Engineer at EPA, explained in his Declaration that a whistler valve does not meet the criteria of 40 C.F.R. § 280.20(c)(1)(ii) because it merely creates a sound which stops when the overfill is reached. Sacker Decl at 34.

Therefore, Complainant has shown with respect to Count 3 that Mr. Chase was required to, but failed, to have overfill protection equipment on Tank # 008 at Station I that met the criteria of 40 C.F.R. § 280.20(c)(1)(ii)(A), (B) or (C), for two years prior to and through April 30, 2008.

B. Complainant’s claims as to Counts 4, 5, 6 and 7

Counts 4, 5, 6 and 7 of the Complaint also concern Tank # 008 at Station I. The Complaint alleges in Count 4 that Mr. Chase failed to continue release detection after Tank # 008 was temporarily closed in April 2008 until it was emptied and permanently closed on or about November 30, 2009, in violation of 40 C.F.R. § 280.70(a). Count 5 alleges that Mr. Chase failed to conduct triennial testing of the cathodic protection system of Tank # 008 during the same time period, in violation of 40 C.F.R. § 280.70(a). Count 6 alleges that Mr. Chase failed to cap and secure Tank # 008 from July 30, 2008 through on or about November 30, 2009, in violation of 40 C.F.R. § 280.70(b). Count 7 alleges that from on or about April 30, 2009 through on or about November 30, 2009, Mr. Chase failed to either permanently close Tank # 008 or have it inspected for proper operation by a qualified cathodic protection tester, in violation of 40 C.F.R. § 280.70(c).

The regulations pertinent to Counts 4 through 7 provide as follows, in pertinent part:

(a) When an UST system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with § 280.31, and any release detection in accordance with subpart D [unless the system is empty, so that no more than 2.5 centimeters (one inch) of residue or 0.3 percent by weight of the total capacity of the UST system remain in the system].

(b) When an UST system is temporarily closed for 3 months or more, owners and operators must also comply with the following requirements:

- (1) Leave vent lines open and functioning; and
- (2) Cap and secure all other lines, pumps, manways, and ancillary equipment.

(c) 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 * *

40 C.F.R. § 280.70. In turn, 40 C.F.R. § 280.31 requires steel UST systems with corrosion protection to, *inter alia*, “be inspected for proper operation by a qualified cathodic protection tester . . . within 6 months of installation and at least every 3 years thereafter” 40 C.F.R. § 280.31(b)(1). C.F.R. § 280.21(b)(2) allows tanks to be upgraded by cathodic protection if they meet the requirements of 40 C.F.R. § 280.20(a)(2)(iv), which requires tanks to have cathodic protection systems operated and maintained in accordance with Section 280.31.

As discussed above, Complainant has shown that Mr. Chase is the owner and operator of Tank # 008 and that it is a UST system. Tank # 008 was temporarily closed on or about April 30, 2008 and was removed from service in November 2009. Fact 4.

Complainant has presented documentation showing that Tank # 008 was not empty between April 30, 2008 and November 2009. Specifically, Mr. Blair in his Declaration stated that during the April 24, 2009 inspection, he measured the amount of product in Tank #008 and found it contained 31.5 inches of kerosene residue. Blair Decl at 14 and attached Exhibit 1; see also, Sacker Decl at 35. Mr. Blair also stated that he requested records of release detection for Tank # 008 but Ms. Blaine was unable to produce any, and he did not receive any after the inspection upon his request that she send him any that she found later. *Id.* p. 15 and attached Exhibit 1 p. 3. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information request letters and an email to Mr. Chase requesting evidence of release detection monitoring, Mr. Chase did not submit such evidence. Sacker Decl at 35. Therefore, in support of Count 4, Complainant has shown that Mr. Chase was required to, but failed, to continue release detection on Tank # 008 while it was temporarily closed, in violation of 40 C.F.R. § 280.70(a).

As relevant to Count 5, Tank # 008 was constructed of steel, as well as carbon steel and iron. Fact 5. As noted, Complainant has shown that Tank # 008 was not empty. Complainant has presented documentation showing that the tank was equipped with cathodic protection, namely Br. Blair’s report of the April 2009 inspection, and the PBS application dated January

2010, as explained by Mr. Sacker. Sacker Decl at 36-37, and attached Exhibit 1 p. 2. Mr. Blair stated in his Declaration that during the April 2009 inspection he requested test results as to proper operation of cathodic protection for Tank # 008, that Ms. Blaine was unable to produce any, and that he did not receive any after the inspection upon his request that she send him any that were found later. Blair Decl at 15-16 and attached Exhibit 1 p. 2. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information request letters and an email to Mr. Chase requesting evidence of cathodic protection test results, no such evidence was received. Sacker Decl at 37. Therefore, in support of Count 5, Complainant has shown that Mr. Chase failed to operate and maintain Tank #008 in accordance with corrosion protection requirements of 40 C.F.R. § 280.31 by failing to conduct triennial testing of the cathodic protection system of Tank # 008 during the period from April 2008 to November 2009, in violation of 40 C.F.R. § 280.70(a).

With regard to Count 6, on the UST Inspection Form dated April 24, 2009, under the heading “Temporary Closure,” the box marked “N,” indicating “no,” is checked for the inspection item “Cap and secure all lines, pumps, manways.” Blair Decl Exhibit 1 p. 4. Tank #008 was the only tank at Station I in temporary closure at the time of the inspection, and it had been temporarily closed 3 months or more on July 30, 2008. Facts 4, 36. Mr. Sacker in his Declaration stated that Mr. Chase never provided any evidence that Tank #008 had been properly capped and secured, in response to the October 2009 Information Request Letter and an email dated January 7, 2010. Sacker Decl at 38. In support of Count 6, Complainant has shown that in violation of 40 C.F.R. § 280.70(b), Mr. Chase failed to cap and secure lines, pumps, manways, and ancillary equipment of Tank # 008, during the time in which it was temporarily closed for 3 months or more, from July 30, 2008 to November 2009.

As noted above, Tank # 008 was equipped with cathodic protection. It was temporarily closed for 12 months as of April 30, 2009, and was permanently closed in November 2009. Therefore, according to 40 C.F.R. § 280.70(c), as of April 30, 2009, Mr. Chase was required to close Tank # 008 if it did not meet performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21, including the requirement for tanks to have cathodic protection systems operated and maintained in accordance with Section 280.31. 40 C.F.R. § 280.20(a)(2)(iv). As noted above, Complainant has shown that Mr. Chase did not operate and maintain Tank # 008 in accordance with the requirement of Section 280.31 that the cathodic protection system be tested triennially during the time it was temporarily closed. Mr. Chase did not close the tank from the time 12 months after it was in temporary closure, that is, April 30 2009, until November 2009. Fact 4. Therefore, in support of Count 7, Complainant has shown that from on or about April 30, 2009 through November 2009, Mr. Chase failed to meet the requirement to either permanently close Tank # 008 or have it inspected for proper operation by a qualified cathodic protection tester, in violation of 40 C.F.R. § 280.70(c).

C. Complainant’s claims as to Counts 8, 10, 13, and 15

Counts 8, 10, 13 and 15 of the Complaint allege failure to conduct an annual test of the operation of the automatic line leak detector on USTs at Stations II, III, IV, and V respectively, in

violation of 40 C.F.R. § 280.44(a) as incorporated into 40 C.F.R. § 280.41(b)(1)(i). The latter provision states as follows:

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:

* * *

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

(1) *Pressurized piping*. Underground piping that conveys regulated substances under pressure must:

(i) Be equipped with an automatic line leak detector conducted in accordance with § 280.44(a).

40 C.F.R. § 280.41(b)(1)(i). In turn, 40 C.F.R. § 280.44(a) provides that “An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer’s requirements.”

To establish a violation of these provisions, Complainant must show that the alleged Respondents were: (1) owners or operators (2) of petroleum UST systems, (3) which had underground piping which routinely conveyed regulated substances under pressure, (4) the piping was equipped with an automatic line leak detector, and (5) they failed to conduct an annual test of the operation of the line leak detector in accordance with the manufacturer’s requirements.

Complainant presented PBS applications and certificates showing that Mr. Chase was the operator of the USTs at Stations II, III, IV and V. Sacker Decl at 16-23, and attached Exhibits 3-10.

Count 8 alleges that Mr. Chase and CCS failed to comply with these provisions regarding the three tanks, # 001A, #001B and #002 at Station II from at least September 1, 2006 until April 6, 2009. The parties stipulated that CCS was an owner of these tanks during that time and that as of at least August 26, 2008, the three tanks had underground piping that routinely contained and that was used to convey regulated substances under pressure, namely gasoline or diesel fuel, and that as of at least September 1, 2006, the piping was equipped with automatic line leak detectors. Facts 7-11. The tanks were in use on August 26, 2008. Facts 35, 36. The term “petroleum UST system” means a UST system that contains petroleum, including those containing motor fuels. 40 C.F.R. § 280.12. The three tanks are USTs with connected underground piping and contained gasoline and diesel fuel, and therefore they are “petroleum UST systems.”

Mr. Blair stated in his Declaration that during the August 26, 2008 inspection of Station II, the store manager Ms. Thompson accompanied him, and he asked her for documentation of annual tests of operation of the automatic line leak detectors for the three USTs, but she was unable to produce any, and he did not receive any after the inspection upon his request that she send him any that she found later. Blair Decl at 16-17 and attached Exhibit 3. Mr. Sacker stated

in his Declaration that in response to the April and October 2009 information request letters and an email to Mr. Chase requesting evidence of line leak detector tests for the USTs, Mr. Chase only submitted evidence of passing line leak detector tests for the tanks on April 6, 2009, but no evidence of the tests being conducted prior to that time. Sacker Decl at 40-41. Complainant has shown in support of Count 8 that Mr. Chase and CCS failed to conduct the required annual line leak detector tests for the underground piping for each of Tank nos. 001A, 001B and 002 at Station II from September 1, 2006 to April 6, 2009.

Count 10 alleges that Mr. Chase failed to comply with 40 C.F.R. § 280.41(b)(1)(i) and § 280.44(a) regarding the two USTs at Station III from at least November 1, 2006 until April 6, 2009. The parties stipulated that since at least November 1, 2006 until at least April 6, 2009, each of the tanks had underground piping that routinely contained and that was used to convey gasoline under pressure, that each of the tanks constituted a “new tank system” under 40 C.F.R. § 280.12, and, with their underground piping constituted a petroleum UST system for purposes of 40 C.F.R. § 280.41, and that as of at least August 26, 2008, underground piping for each of the tanks was equipped with an automatic line leak detector. Facts 13-19. The tanks were in use on August 26, 2008. Facts 35, 36.

Mr. Blair stated in his Declaration that during the August 26, 2008 inspection of Station III, the store manager Jodie Clark accompanied him, and he asked her for documentation of annual tests of operation of the automatic line leak detector, but she was unable to produce any, and he did not receive any after the inspection upon his request that she send him any that she found later. Blair Decl at 17, 19 and attached Exhibit 4 p. 3. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information request letters and an email to Mr. Chase requesting evidence of line leak detector tests, Mr. Chase only submitted evidence of passing line leak detector tests for the tanks on April 6, 2009, but no evidence of the tests being conducted prior to that time. Sacker Decl at 44-45. Complainant has shown in support of Count 10 that Mr. Chase failed to conduct the required annual line leak detector tests for the underground piping for each of the two USTs at Station III from November 1, 2006 to April 6, 2009.

Count 13 alleges that Mr. Chase and CSI failed to comply with 40 C.F.R. § 280.41(b)(1)(i) and § 280.44(a) regarding certain USTs at Station IV, namely Tank # 001A from at least April 1, 2006 until April 6, 2009, and regarding UST nos. 003A and 003B from at least June 1, 2006 until April 6, 2009. The parties stipulated that Tank # 001A was installed on or about June April 1, 1992, and since at least April 1, 2006, had underground piping that routinely contained and that was used to convey diesel fuel under pressure, and as of at least August 26, 2008, contained and was being used to store diesel fuel. Facts 19, 20. Tank nos. 003A and 003B were installed on or about June 3, 2003, and since at least June 1, 2006, had underground piping that routinely contained and that was used to convey gasoline under pressure. Facts 20, 21. As of at least August 26, 2008, underground piping for each of Tank nos. 001A, 003A and 003B was equipped with an automatic line leak detector. Fact 22. CSI was required to, and did, conduct annual tests for the operation of the automatic line leak detector for the underground piping for each of Tank nos. 001A, 003A and 003B. Fact 23. As noted above, the term “petroleum UST system” means a UST system that contains petroleum, including those

containing motor fuels. 40 C.F.R. § 280.12. The three tanks are USTs with connected underground piping and contained gasoline and diesel fuel, and therefore they are “petroleum UST systems.”

Mr. Blair stated in his Declaration that during the August 26, 2008 inspection of Station IV, the store manager Lisa Smith accompanied him, and he asked her for documentation of annual tests of operation of the automatic line leak detector, but she was unable to produce any, and he did not receive any after the inspection upon his request that she send him any that she found later. Blair Decl at 20, 22 and attached Exhibit 5 p. 3. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information request letters and an email to Mr. Chase requesting evidence of line leak detector tests, Mr. Chase only submitted evidence of passing line leak detector tests for the tanks on April 6, 2009, but no evidence of the tests being conducted prior to that time. Sacker Decl at 50. Complainant has shown in support of Count 13 that Mr. Chase and CSI failed to conduct the required annual line leak detector tests for the underground piping for Tank # 001A from at least April 1, 2006 until April 6, 2009, and regarding UST nos. 003A and 003B from at least June 1, 2006 until April 6, 2009.

Count 15 alleges that Mr. Chase and CCLD failed to comply with 40 C.F.R. § 280.41(b)(1)(i) and § 280.44(a) regarding certain USTs at Station V, namely Tank nos. 001A, 001B and 002A from at least November 1, 2006 until April 6, 2009. The parties stipulated that CCLD was the owner of the USTs at Station V; since at least November 1, 2006, Tank nos. 001A and 001B had underground piping that routinely contained and that was used to convey gasoline under pressure; since at least November 1, 2006, Tank no. 002A had underground piping that routinely contained and that was used to convey diesel fuel under pressure; as of at least August 26, 2008, underground piping for each of Tank Nos. 001A, 001B and 002A was equipped with an automatic line leak detector; and CCLD conducted release detection monitoring for the underground piping of these tanks. Facts 25-27.

Mr. Blair stated in his Declaration that during the August 26, 2008 inspection of Station V, Mr. Chase accompanied him, and Mr. Blair asked Mr. Chase for documentation of annual tests of operation of the automatic line leak detector, but he did not produce any, and Mr. Blair did not receive any after the inspection upon his request that Mr. Chase send him any that he found later. Blair Decl at 24-25 and attached Exhibit 6 p. 3. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information request letters and an email to Mr. Chase requesting evidence of line leak detector tests, Mr. Chase only submitted evidence of passing line leak detector tests for the tanks on April 6, 2009, but no evidence of the tests being conducted prior to that time. Sacker Decl at 54. Complainant has shown in support of Count 15 that Mr. Chase and CCLD failed to conduct the required annual line leak detector tests for the underground piping for Tank nos. 001A, 001B and 002A from at least November 1, 2006 until April 6, 2009.

D. Complainant’s claim as to Count 9

Count 9 alleges that from at least May 1, 2008 until April 6, 2009, Mr. Chase failed to

conduct triennial testing of the cathodic protection system of Tank nos. 001 and 002 at Station III in violation of 40 C.F.R. § 280.31, which requires “owners and operators of steel UST systems with corrosion protection to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances,” including, *inter alia*, inspection “for proper operation by a qualified cathodic protection tester . . . within 6 months of installation and at least every 3 years thereafter” 40 C.F.R. § 280.31(b)(1).

Complainant presented PBS applications and certificates showing that Mr. Chase was the owner and operator of the USTs at Station III. Sacker Decl at 16-23, and attached Exhibits 5, 6. The parties stipulated that Tank nos. 001 and 002 were used to store gasoline, were a “steel UST system[] with corrosion protection . . . used to store [a] regulated substance[]” within the meaning of 40 C.F.R. § 280.31, and were equipped with a cathodic protection system since at least May 1, 2008 until at least April 6, 2009. Facts 13, 14. Mr. Blair stated in his Declaration that during the August 26, 2008 inspection he observed that Tank nos. 001 and 002 were “active and contained gasoline.” Blair Decl at 18. He stated further that during the inspection he requested test results as to proper operation of cathodic protection for Tank nos. 001 and 002, that store manager Jodie Clark was unable to produce any, and that he did not receive any after the inspection upon his request that she send him any that were found later. Blair Decl at 18 and attached Exhibit 4 p. 2. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information request letters and an email and phone call to Mr. Chase requesting evidence of cathodic protection test results, no such evidence was received, but finally Mr. Chase provided passing cathodic protection results of testing the tanks at Station III on April 6, 2009. Sacker Decl at 43-44 and attached Exhibit 30. Therefore, in support of Count 9, Complainant has shown that Mr. Chase was required to, but failed, to conduct triennial testing of the cathodic protection system of Tank nos. 001 and 002 at Station III during the period from May 1, 2008 to April 6, 2009, in violation of 40 C.F.R. § 280.31(b).

E. Complainant’s claims as to Counts 11, 14 and 16

Counts 11, 14 and 16 of the Complaint allege that, for a period including August 26, 2007 and the end of December 2007, Mr. Chase (and in addition Respondent CSI for Count 14, and Respondent CCLD for Count 16) failed to maintain release detection records for the underground piping of Tank nos. 001 and 002 at Station III; Tank nos. 001A, 001B, 003A, and 003B at Station IV; and Tank nos. 001A, 001B and 002A at Station V, respectively, in violation of 40 C.F.R. § 280.45. The applicable regulations provide as follows:

§ 280.41 * * *

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:

* * * *

(b) Piping. * * *

(1) *Pressurized piping.* Underground piping that conveys regulated substances under pressure must:

(i) Be equipped with an automatic leak line detector . . . and

(ii) Have an annual line tightness test . . . or monthly monitoring conducted * * * * .

§ 280.45 Release detection recordkeeping.

All UST system owners and operators must maintain records in accordance with § 280.34 * * * * .

(b) The results of any sampling, testing, or monitoring must be maintained for at least 1 year * * * * .

To establish a violations alleged in Counts 11, 14 and 16, Complainant must show that the alleged Respondents were: (1) owners or operators (2) of petroleum UST systems, (3) which had underground piping which routinely conveyed regulated substances under pressure, (4) the piping was equipped with an automatic line leak detector, and (5) they failed to maintain records of release detection for such underground piping for at least one year.

Complainant presented PBS applications and certificates showing that Mr. Chase was the owner and operator of the USTs at Stations III, and the operator of the USTs at Stations IV and V. Sacker Decl at 16-23, and attached Exhibits 5-10. Mr. Sacker explained in his Declaration that the method of release detection used at Stations III, IV and V was interstitial monitoring. Sacker Decl at 46, 51, 55.

With respect to Count 11, as noted above, the parties stipulated that since at least November 1, 2006 until at least April 6, 2009, each of the tanks had underground piping that routinely contained and that was used to convey gasoline under pressure, and that each of the tanks with their underground piping constituted a petroleum UST system for purposes of 40 C.F.R. § 280.41. Facts 13-19. Mr. Blair in his Declaration stated that during his August 2008 inspection of Station III, he requested records of release detection for the USTs, but Ms. Clark only produced manual interstitial monitoring records between January 2008 and the time of the inspection. Blair Decl at 19-20 and attached Exhibit 4 p. 3. He requested Ms. Clark to send him any documentation found later, but he never received any. Decl at 20. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information response letters and email requesting information on piping, Mr. Chase provided an interstitial monitoring log for tanks only, for the period from August 2007 to August 2008, but did not provide information or records as to piping for the period August 2007 through December 2007. Sacker Decl at 46. Complainant has shown that for a period including August 26, 2007 and the end of December 2007, Mr. Chase failed to meet his obligation to maintain release detection records for the underground piping of Tank nos. 001 and 002 at Station III, in violation of 40 C.F.R. § 280.45.

With respect to Count 14, as noted above, the parties stipulated that CSI owned Tank nos. 001A, 001B, 003A and 003B at Station IV. Fact 18. The parties also stipulated that since at least April 1, 2006, Tank # 001A had underground piping that routinely contained and that was used to convey diesel fuel under pressure, and since at least June 1, 2006, Tank nos. 003A and 003B had underground piping that routinely contained and that was used to convey gasoline under pressure. Facts 20-22. As concluded above, Tank nos. 001A, 003A and 003B at Station IV are “petroleum UST systems.”

Mr. Blair in his Declaration stated that during his August 2008 inspection of Station IV, he requested records of release detection for the USTs, but Ms. Smith only produced records of manual interstitial monitoring results between January 2008 and the time of the inspection. Blair Decl at 23 and attached Exhibit 5 p. 3. He requested Ms. Smith to send him any documentation found later, but he never received any. Decl at 23. Mr. Sacker stated further that in response to the April and October 2009 information response letters and email requesting information on piping, Mr. Chase provided an interstitial monitoring log for tanks only, for the period from August 2007 to August 2008, but did not provide information or records as to piping for the period August 2007 through December 2007. Sacker Decl at 52. Mr. Sacker also explained that Tank # 001B did not have pressurized piping and therefore interstitial monitoring was not required on the piping of that tank. *Id.* at 51. Therefore, Complainant has not established a violation of 40 C.F.R. § 280.45 with respect to that UST. Complainant has, however, shown that for a period including August 26, 2007 and the end of December 2007, Mr. Chase and CSI failed to meet the requirement to maintain release detection records for the underground piping of Tank nos. 001A, 003A, and 003B at Station IV, in violation of 40 C.F.R. § 280.45.

Regarding Count 16, as noted above, the parties stipulated that CCLD owned the USTs at Station V. Fact 24. The parties also stipulated that since at least November 1, 2006, Tank nos. 001A and 001B had underground piping that routinely contained and that was used to convey gasoline under pressure, since at least November 1, 2006 Tank no. 002A had underground piping that routinely contained and that was used to convey diesel fuel under pressure, and CCLD conducted release detection monitoring for the underground piping of these tanks. Facts 25-27.

Mr. Blair in his Declaration stated that during his August 2008 inspection of Station V, he requested records of release detection for the USTs, but Mr. Chase only produced manual interstitial monitoring records between January 2008 and the time of the inspection. Blair Decl at 25 and attached Exhibit 6 p. 3. He requested Mr. Chase to send him any documentation found later, but Mr. Blair never received any. Decl at 20. Mr. Sacker stated in his Declaration that in response to the April and October 2009 information response letters and email requesting information on piping, Mr. Chase provided an interstitial monitoring log for tanks only, for the period from August 2007 to August 2008, but did not provide information or records as to piping for the period August 2007 through December 2007. Sacker Decl at 55-56. In support of Count 16, Complainant has shown that for a period including August 26, 2007 and the end of December 2007, Mr. Chase and CCLD failed to meet the requirement to maintain release detection records for the underground piping of Tank nos. 001A, 001B and 002A at Station V, in violation of 40 C.F.R. § 280.45.

F. Complainant's claims as to Counts 12 and 17

Counts 12 and 17 of the Complaint allege that as of August 26, 2008, Mr. Chase (and CSI with respect to Count 12. and CCLD with respect to Count 17) failed to provide the overfill prevention equipment for Tank # 001A at Station IV and Tank # 2A at Station VI, respectively, as required by 40 C.F.R. § 280.20(c)(1)(ii). The latter provision states as follows:

In order to prevent releases due to structural failure, corrosion, or spills and overfills for

as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements:

* * * *

(c) *Spill and overflow prevention equipment.* (1) Except as provided in paragraph (c)(2) of this section [proper alternative equipment as determined by the agency, or UST systems filled by transfers of no more than 25 gallons at one time], to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overflow prevention equipment:

(i) * * *

(ii) Overflow prevention equipment that will:

(A) Automatically shut off flow into the tank . . .

(B) Alert the transfer operator when the tank is no more than 90 percent full . . . ;

or

(C) Restrict flow 30 minutes prior to overfilling, alert the operator . . . one minute before overfilling, or automatically shut off flow

Thus, to establish violations of 40 C.F.R. § 280.20(c)(1)(ii), Complainant must show that the alleged Respondents were (1) owners or operators (2) of a “new UST system”, (3) that was in use storing regulated substances, and (4) did not have overflow prevention equipment meeting the requirements of Section 280.20(c)(1)(ii).

Complainant presented PBS applications and certificates showing that Mr. Chase was the operator of USTs at Station IV and was the owner and operator of the USTs at Station VI. Sacker Decl at 19-20, 24-25, and attached Exhibits 7, 8, 11, 12. The term “new tank system” is defined in 40 C.F.R. § 280.12 as “a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988.” The parties stipulated that Tank # 001A at Station IV was installed on or about June April 1, 1992, and Tank #2A at Station VI was installed on or about December 31, 2007. Facts 19, 28.

With regard to Count 12, the parties stipulated that CSI was the owner of Station IV, and that as of at least August 26, 2008, Tank # 001A contained and was being used to store diesel fuel. Facts 18, 19. Therefore it was in use storing a regulated substance. Mr. Blair in his Declaration stated that during his August 2008 inspection, he observed the shut-off valve attached to Tank # 001A, that it was intended and designed to provide overflow protection, and that it was “damaged and non-functional,” in that the flapper component (valve) was missing and it was readily apparent to him that it “would be unable to prevent the tank from being overfilled.” Blair Decl at 21 and attached Exhibit 5 p. 2. Mr. Sacker stated in his Declaration that in response to the April 2009, August 2009, January 2010 and September 2010 information request letters, Mr. Chase did not provide evidence of repairs to the overflow prevention device in response to the inquiries as to steps taken to repair the overflow devices on Tank # 001A at Station IV. Sacker Decl at 48-49.

Complainant has shown in support of Count 12 that as of at least August 26, 2008, CSI and Mr. Chase were required to, but failed, to provide overflow prevention equipment for Tank # 001A at Station IV that meets the requirements of 40 C.F.R. § 280.20(c)(1)(ii).

As to Count 17, the parties stipulated that as of at least August 26, 2008, Tank # 2A contained and was being used to store biodiesel fuel and the shut-off valve intended for overflow protection that was attached to that tank was damaged and non-functional. Facts 29, 30; see also, Blair Decl at 27-28 and attached Exhibit 7. Mr. Blair explained that biodiesel fuel is a type of off-road diesel fuel. Blair Decl at 27.

The question arises, whether biodiesel fuel is a “regulated substance” within the meaning of the applicable regulations. The term “regulated substance” is defined in 40 C.F.R. § 280.12 as

(a) Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste . . .)² and

(b) Petroleum. . . .

The term “regulated substance” includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil . . . such as motor fuels

In turn, “motor fuel” is defined as “petroleum or a petroleum-based substance” 40 C.F.R. § 280.12. Biodiesel is by definition not petroleum or petroleum based. EPA has stated in a recent “Notice of Final Guidance” that “[t]anks storing gasoline or diesel mixed with ethanol or biodiesel are regulated, although pure ethanol and pure biodiesel are not regulated substances under subtitle I of SWDA.” Compatibility of Underground Storage Tank Systems with Biofuel Blends, 76 Fed. Reg. 39095, 39096 (July 5, 2011). The parties do not make any assertions or point to any evidence as to whether the bio-fuel in Tank # 2A was blended with petroleum-based substances. See, Sacker Decl at 57-58, Blair Decl at 25-27. Therefore, Complainant has not shown that Tank #2A at Station VI was storing a regulated substance at the time of the alleged violation, and therefore Complainant has not established the absence of genuine issues of material fact with respect to Count 17.

G. Complainant’s claim as to Count 21

Count 21 of the Complaint alleges that for a period of time around August 24, 2010, various sensors connected to or associated with Tanks 2A and 2B at Station VI were in alarm, and Mr. Chase failed to report within 24 hours from August 24, 2010 to the New York State Department of Environmental Conservation (NYSDEC) that the sensors were in alarm and to immediately investigate whether the alarm involved a release of regulated substances from Tanks 2A and 2B, in violation of 40 C.F.R. § 280.50, which incorporates § 280.52. The latter

² Section 101(14) of CERCLA, 42 U.S.C. § 9601, is a definition of “hazardous substance” which includes substances defined or designated by EPA under provisions of other environmental statutes, but does not specifically list bio-diesel fuel.

provisions state as follows:

§ 280.50 Reporting of suspected releases

Owners and operators of UST systems must report to the implementing agency within 24 hours . . . and follow the procedures in § 280.52 for any of the following conditions:

* * * *

(c) Monitoring results from a release detection method required under § 280.41 or § 280.42 that indicate a release may have occurred unless: * * * the monitoring device is found to be defective, and is immediately repaired * * * *.

* * * *

§ 280.52 Reporting of spills and overfills

(a) Owners and operators of UST systems must contain and immediately clean up a spill or overfill and report to the implementing agency within 24 hours . . . and begin corrective action in accordance with Subpart F * * * *.

Complainant presented PBS applications and certificates showing that Mr. Chase was the owner and operator of the USTs at Station VI. Sacker Decl at 24-25, and attached Exhibits 11, 12. The parties stipulated that as of August 24, 2010, Tank # 2A contained “off-road” diesel fuel, and Tank # 2B contained kerosene. Fact 34. Therefore, they were “UST systems” as defined in 40 C.F.R. § 280.12.

Mr. Blair stated in his Declaration that at the time of the August 2010 inspection of Station VI, he observed that a tank monitor was present on Tank nos. 2A and 2B, indicating that interstitial monitoring was being conducted for the Tank 2A/Tank 2B system, and that “various sensors connected to the 2A/2B UST system were in alarm; something had triggered operation of the alarms.” Blair Decl p. 31 and attached Exhibit 8 p. 5. Mr. Sacker in his Declaration stated that the NYSDEC is the “implementing agency” for receiving reports under 40 C.F.R. § 280.50. Sacker Decl at 66-67. He also stated that he accompanied Mr. Blair on this inspection, and that a printout of monitoring data that he generated that day from the tank monitor indicated that the sensors for all the sumps were registering “Fuel Alarm.” Sacker Decl at 62, 67. He stated that he observed liquid, apparently water with growth on the surface, indicating water had been in the sumps for some time, and that the water in the sumps may result in the sensors malfunctioning, going into alarm mode or masking actual leaks in the piping. *Id.* at 63, 68. He stated that the alarms indicated a possible release from the piping of each tank. *Id.* at 67. The September 2010 information request letter requested Mr. Chase to submit evidence that he investigated the alarm within 24 hours and either reported a release to the NYSDEC or corrected equipment error and printed out sensor output, and if a release was confirmed provide the steps taken to address it. *Id.* at 68. In response, Mr. Chase provided a receipt dated August 26, 2010 indicating the alarms were checked, sumps were cleaned out, and that pump sensors were reacting to water in the sump pits. *Id.* Mr. Sacker explained that this indicated that more than 24 hours had passed after the inspection before an investigation was conducted. *Id.* at 69. Mr. Sacker stated that he checked NYSDEC’s online Spill Report database several times since the inspection, but it does not have a report of suspected release for the Tank 2A/Tank 2B UST system at Station VI for the month of August 2010. *Id.* at 69 and attached Exhibit 31. He asserted that the alarms for the tanks are “unusual operating conditions” within the meaning of 40 C.F.R. § 280.50, and should have been

investigated. *Id.* at 69-70.

Complainant has shown that sensors connected to or associated with Tanks 2A and 2B at Station VI were in alarm, and that Mr. Chase was required to, but failed, to report within 24 hours from August 24, 2010 to the implementing agency that the sensors on UST systems were in alarm and to immediately investigate whether the alarm involved a release of regulated substances from Tank nos. 2A and 2B, in violation of 40 C.F.R. § 280.50.

H. Whether the parties have met their burdens on motion for accelerated decision

Complainant has carried its initial burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law, “citing to particular parts of materials in the record,” with respect to Counts 3 through 16 and 21 of the Complaint. FRCP 56.

Although in their Answer Respondents denied the alleged violations, they only requested that the Motion be dismissed as to Counts 1, 2, 18 and 19. It appears that they do not contest the Motion with respect to Counts 3 through 17 and 21.

Complainant argues that such failure to respond to the latter counts constitutes not only a waiver of an objection to the Motion under 40 C.F.R. § 22.16(b), but also that the latter provision “is self-enforcing, and the operation of this provision is not contingent upon the exercise of the discretion or upon a decision of an adjudicating tribunal.” Reply at 3. In support, Complainant cites to decisions of the Environmental Appeals Board confirming that failure to respond to a motion is a waiver of an objection to the granting of the motion. Indeed, the plain language of the regulation indicates that the waiver operates without discretion on the part of the judge: “Any party who fails to respond . . . waives any objection to the granting of the motion.” 40 C.F.R. § 22.16(b). However, the judge must make a decision as to whether the motion has merit, and whether it meets procedural requirements. A motion, albeit unopposed, which has no merit under applicable law, or which does not meet procedural requirements such as timeliness, may be denied.

Turning to the next step in determining whether to grant the Motion with respect to Counts 1 through 16 and 21, Respondents state in their Opposition that Stations II, III, IV, V and VI were sold prior to service of the Complaint, and that “[t]he Complaint incorrectly alleges that Station I . . . is owned by Andrew Chase individually,” but “is actually owned by Belmont, Inc.” These assertions raise a question as to whether Respondents have genuinely disputed a material fact as to ownership of the service stations. The fact that the stations were sold prior to service of the Complaint is not material to Respondents’ liability for the alleged violations. Instead, the facts that are material with respect to ownership are the owner or operator of the USTs at the time of the alleged violations. As discussed above, the parties have stipulated facts as to ownership of some stations and their USTs, and Complainant has presented evidence as to the owner and operator of the USTs at other stations. Respondents have not presented any evidence in rebuttal.

As to the asserted ownership of Belmont, Inc., upon review of Respondents' supporting documents, it is observed that Pages 2 and 3 of Exhibit A to the Opposition and pages 2 and 3 of Respondents' unnumbered Prehearing Exchange Exhibits are leak detector testing forms, dated September 7, 2010 and August 23, 2011, with the site address of "3851 Rt. 374, Lyon's Mountain, NY" and the "Owner's Name" of "Andy Chase" or "Andrew Chase" written on the forms. Respondents conceded that Mr. Chase is also known as Andy Chase. Complaint and Answer ¶ 27. Therefore, Respondents' own exhibits indicate that at least the USTs at Station I are owned by Mr. Chase, and Respondents are silent as to the operator of the USTs at Station I. They do not indicate any time period in which Belmont, Inc. owned Station I, and have not provided any documentation showing such ownership, but have merely stated in the Prehearing Exchange that "Mr. Chase is expected to testify that he was not the owner of Station # 1, as reflected by public records available in the Clinton County Clerk's Office" and that "Station #1 is owned by Belmont, Inc."

The facts asserted by Respondents as to ownership are insufficient to raise a genuine issue of material fact. Furthermore, in opposing a motion for summary judgment, the party "may not raise an issue of fact by merely referring to the proposed testimony of possible witnesses. . . . An affidavit stating what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under [FRCP] 56." *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1995). Therefore, Respondents have "fail[ed] to properly support an assertion of fact or fail[ed] to properly address another party's assertion of fact," and therefore have not demonstrated a genuine issue of material fact. FRCP] 56(e).

Accordingly, Complainant has shown that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law as to Counts 3 through 16 and 21 of the Complaint.

VI. Counts 1, 2, 18 and 19

The Complaint alleges in Count 1 that Mr. Chase failed to either have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 006A and 006B at Station I between April 24, 2008 and December 15, 2010, which constitutes a violation of 40 C.F.R. § 280.41(b)(1)(ii).

Count 2 of the Complaint alleges that with respect to the same tanks, Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector from at least May 6, 2006 until April 22, 2009 and from April 22, 2010 to September 7, 2010, in violation of 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i).

Count 18 alleges that for the piping of Tank nos. 1, 3A and 3B at Station VI, Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector from December 31, 2008 through September 7, 2010, in violation of 40 C.F.R. § 280.44(a) and 40

C.F.R. § 280.41(b)(1)(i).

Count 19 alleges that as of August 24, 2009 to at least December 15, 2010, Mr. Chase failed to either have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 1, 3A and 3B at Station VI, in violation of 40 C.F.R. § 280.41(b)(1)(ii).

The regulatory provisions relevant to Counts 1, 2, 18 and 19 state as follows, in pertinent part:

§ 280.41 * * *

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:

* * *

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

(1) *Pressurized piping*. Underground piping that conveys regulated substances under pressure must:

(i) Be equipped with an automatic line leak detector conducted in accordance with § 280.44(a); and

(ii) Have an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c).

* * * *

§ 280.44 * * *

Each method of release detection for piping used to meet the requirements of § 280.41 must be conducted in accordance with the following:

(a) * * * * An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.

(b) *Line tightness testing*. A periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure.

(c) *Applicable tank methods*. Any of the methods in § 280.43(e) through (h) may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.

40 C.F.R. §§ 280.41(b)(1), 280.44.

As noted above, Complainant has presented evidence that Mr. Chase was the owner or operator of the USTs at Stations I and VI. Sacker Decl at 7, 24 and 25, and attached Exhibits 1, 2, 11, 12, 14 p. 1.

With respect to Station I, the parties stipulated that Tank nos.006A and 006B constituted a petroleum UST system for purposes of 40 C.F.R. § 280.41, that between April 24, 2008 and December 10, 2010, underground piping for each of Tank nos. 006A and 006B routinely contained and was used to convey gasoline under pressure, and that as of April 24, 2009 and

August 24, 2010 the piping was equipped with an automatic line leak detector. Facts 2, 6.

The parties stipulated that the USTs at Station VI were installed on or about December 31, 2007, that as of August 26, 2008 and August 24, 2010, each of Tank nos. 1, 3A and 3B were “new tank systems” which had underground piping which routinely contained and was used to convey petroleum products under pressure, and that the piping was equipped with an automatic line leak detector. Facts 28, 31, 32, 33. Mr. Blair’s Declaration and inspection reports show that during the inspections, each of the tanks was in use, and that Tank #1 contained diesel fuel and Tank nos. 3A and 3B contained gasoline. Blair Decl at 26-27 and attached Exhibits 9, 12. Therefore Complainant has shown that they were petroleum UST systems as defined in the regulations.

A. Discussion and Conclusions as to Count 1

Mr. Blair stated in his Declaration that during his inspections of Station I in April 2009 and August 2010, he requested from Ms. Blaine documentation of test results for the underground piping for Tank nos. 006A and 006B, and that she was unable to produce any except for an interstitial monitoring test result for the month of April 2009. Blair Decl at 11-12 and attached Exhibits 1 and 2. He stated further that he did not receive any in response to his request that she send him any such test results found later. *Id.* Mr. Sacker stated in his Declaration that Mr. Chase sent him results of a line tightness test for the pressurized piping conducted on December 20, 2010. However, Mr. Sacker stated that in response to the April 2009, October 2009 and September 2010 information request letters and emails requesting monthly monitoring records or evidence of line tightness testing in the past 12 months, no prior test results were ever provided. Sacker Decl at 30.

In the Opposition, Respondents request that the Motion be denied as to Counts 1 and 2 on the basis that it presented evidence of leak detector testing on forms presented as Exhibit A, which consists of three forms, dated April 22, 2009, September 7, 2010 and August 23, 2011.

These forms show passing tests for leak *detectors*, and do not show any annual line tightness testing or monthly monitoring for underground piping. Testing of the leak detectors does not exempt owners and operators from the requirements to conduct annual line tightness testing or monthly monitoring, as Section 280.44(b)(1) requires piping to “(i) [b]e equipped with an automatic line leak detector conducted in accordance with § 280.44(a) [which requires annual leak detector tests]; and (ii) [h]ave an annual line tightness test . . . or have monthly monitoring . . .” 40 C.F.R. § 280.44(b)(1) (emphasis added). Therefore, Respondents have not raised any genuine issue of material fact as to Count 1, and Complainant is entitled to judgement as matter of law that Mr. Chase violated 40 C.F.R. § 280.41(b)(1)(ii) as alleged in Count 1.

B. Discussion and Conclusions as to Count 2

Mr. Blair stated in his Declaration that during his inspections of Station I in April 2009

and August 2010, he requested from Ms. Blaine documentation of annual tests of the automatic line leak detector for Tank nos. 006A and 006B, and that she was unable to produce any except for one dated April 22, 2009. Blair Decl at 13 and attached Exhibits 1 and 2. He stated further that he did not receive any in response to his request that she send him any such test results found later. *Id.* Mr. Sacker asserted in his Declaration that he received no other results of automatic line leak detector tests other than the one dated April 22, 2009 and one dated September 7, 2010, in response to the April 2009 and September 2010 information request letters and emails requesting evidence of leak detector testing. Sacker Decl at 31-32. Mr. Sacker explained that Tank nos. 6A and 6B, having been installed in May 1998, were required to have automatic line leak detector tests conducted by May 1999. *Id.* He pointed out that another line leak detector test was required one year after the April 2009 test, but the testing did not occur until almost 5 months later, in September 2010. *Id.*

Respondents also refer to Exhibit A in response to Count 2, that is, the three forms referenced above dated April 22, 2009, September 7, 2010 and August 23, 2011. These forms do not refute the allegations and evidence presented by Complainant as to Count 1, that is, that Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector from at least May 6, 2006 until April 22, 2009 and from April 22, 2010 to September 7, 2010. Accordingly, Complainant has shown that is entitled to judgement as matter of law that Mr. Chase violated 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i) as alleged in Count 2.

C. Discussion and Conclusions as to Count 18

Regarding Count 18, Mr. Blair stated in his Declaration that during his inspections of Station VI in August 2008 and August 2010, he requested from Ms. Martineau, the store manager, documentation of annual tests of the automatic line leak detector for Tank nos. 1, 3A and 3B, and that she did not provide any. Blair Decl at 28-29 and attached Exhibits 7 and 8. He stated further that he did not receive any in response to his request that she send him any such test results found later. *Id.* Mr. Sacker acknowledged in his Declaration that he received from Mr. Chase the results of automatic line leak detector testing on September 7, 2010. However, Mr. Sacker asserted that he received no other results of automatic line leak detector tests in response to the April 2009 and September 2010 information request letters and emails requesting evidence of leak detector testing from 2007 (when they were installed) to the present. Sacker Decl at 59-60.

Respondents point to Exhibit B to their Opposition, which is a form showing passing results for leak detector testing on August 23, 2011. This form does not raise any genuine issue of material fact as to the allegations and evidence presented by Complainant as to Count 18, that is, that Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector from December 31, 2008 through September 7, 2010. Accordingly, Complainant has shown that is entitled to judgement as matter of law that Mr. Chase failed to conduct an annual test of the operation of the automatic line leak detector, in violation of 40 C.F.R. § 280.44(a) and 40 C.F.R. § 280.41(b)(1)(i), as alleged in Count 18.

D. Discussion and Conclusions as to Count 19

Mr. Blair stated in his Declaration that during his inspection of Station VI in August 2010, he requested from Ms. Martineau, the store manager, documentation of test results, either line tightness test or monthly monitoring, for the underground piping for Tank nos. 006A and 006B, and that she was unable to produce any. Blair Decl at 29-30 and attached Exhibit 8 p. 3. He stated further that he did not receive any in response to his request that she send him any such test results found later. *Id.* Mr. Sacker stated in his Declaration that during the inspection he asked Ms. Martineau for copies of the monthly release detection monitoring records for the piping for those tanks, or a line tightness test, and she responded that she had taken the monthly monitoring records home and would provide them as soon as possible. Sacker Decl at 62-63. Mr. Sacker stated further that these records were never provided to EPA nor was evidence of a line tightness test ever provided. *Id.* at 63. Mr. Sacker also stated that in response to the September 2010 and November 2010 information request letters and email requesting release detection or line tightness tests for piping on the tanks at Station VI, Mr. Chase did not provide any records from electronic interstitial monitoring. *Id.* at 65-66. However, Mr. Sacker asserts, he did provide handwritten observation logs for the submersible pumps, suggesting that the facility used interstitial monitoring, but they indicated “dry” on dates when the sumps were full of liquid as observed by Mr. Sacker and as indicated by the receipt for subsequent repair work on the sumps. Sacker Decl at 64. Mr. Sacker concluded that the facility could not have used manual or electronic interstitial monitoring for release detection of the piping of Tanks 1, 3a and 3B when the equipment was not maintained properly during relevant times. *Id.* at 64-65, 66. Complainant has shown that as of August 24, 2009 to at least December 15, 2010, Mr. Chase failed to either have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b) or monthly monitoring conducted in accordance with 40 C.F.R. § 280.44(c) for underground piping of Tank nos. 1, 3A and 3B at Station VI.

In the Opposition, Respondents request that the Motion be denied as to Count 19 on the basis that it presented evidence of leak detector testing on a forms presented as Exhibit B, dated August 23, 2011. This form shows passing tests for leak *detectors*, and do not show any annual line tightness testing or monthly monitoring for underground piping. As noted above in the discussion of Count 1, testing of the leak detectors does not exempt owners and operators from the requirements to conduct annual line tightness testing or monthly monitoring. It is concluded that there are no genuine issues of material fact as to Count 19, and Complainant is entitled to judgement as matter of law that Mr. Chase violated 40 C.F.R. § 280.41(b)(1)(ii) as alleged in Count 19.

ORDER

1. Complainant's Motion for Accelerated Decision on Liability is **GRANTED** with respect to Counts 1 through 16, 18, 19 and 21.
2. Complainant's Motion for Accelerated Decision on Liability is **DENIED** with respect to Count 17.
3. The issues as to Respondents' liability for Counts 17 and 20 of the Complaint, issues as to penalties to assess for violations found, and issues as to the Compliance Order, remain controverted. Unless the parties achieve a settlement and file a Consent Agreement and Consent Agreement resolving this matter beforehand, the hearing in this matter will proceed on these controverted issues.
4. The parties shall continue in good faith to settle this matter. Complainant shall file a Status Report as to the status of any settlement efforts **on or before July 3, 2012.**

M. Lisa Buschmann
Administrative Law Judge

Date: June 21, 2012
Washington, D.C.