

on behalf of Respondent.

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

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

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

II. Complainant's Motion for Accelerated Decision

The Amended Complaint alleges six counts of violation of UST regulations of the State of Maryland's UST management program, authorized by EPA to be administered by the State of Maryland in lieu of the Federal UST management program under Subtitle I of RCRA. The alleged violations involve USTs at Respondent's facility at the Forest Glen Annex, Stephen Sitter Avenue, Silver Spring, Maryland. Count I of the Amended Complaint alleges that piping material of a UST designated Tank Number 12 was constructed of bare steel and was not cathodically protected, in violation of Code of Maryland Regulations ("COMAR") § 26.10.03.01.C(2). Count II alleges that Respondent failed to comply with release detection requirements for Tanks 22 and 23 once they were installed as required by COMAR § 26.10.05.01.C. Count III alleges that Tank 20 did not meet applicable performance standards for new UST systems or applicable upgrading requirements, and that it was closed more than six months after it was last used, in violation of COMAR § 26.10.10.01. In Count IV, Respondent is charged with failure to notify the Maryland Department of the Environment ("MDE") within two hours of failed tank tightness tests for Tanks 510, 511, 15A, 15B, and 19, in violation of COMAR § 26.10.08.01.A. Count V charges Respondent with violating COMAR § 26.10.03.01.E(1) by improper installation of piping on two USTs located at or near Building 605 at Respondent's Forest Glen facility. Count VI alleges that flex connectors, integral parts of piping associated with the latter two USTs, were improperly coated and improperly protected against corrosion, in violation of COMAR § 26.10.03.01.C.

In its Answer to the Amended Complaint, Respondent admits all allegations of fact in Counts I through IV, and denies allegations in Paragraphs 46 and 50 of the Amended Complaint, which concern Counts V and VI. However, in its Prehearing Exchange Statement, dated January 22, 1999, Respondent states that it no longer denies the allegations in Paragraphs 46 and 50.

In its Response to Complainant's Motion for Accelerated Decision, Respondent asserts as follows with regard to the issue of liability:

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

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

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

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

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

Accordingly, Complainant is entitled to judgment as a matter of law as to Respondent's liability for the violations alleged in the Amended Complaint. Complainant's Motion for Accelerated Decision will be granted in part, as to liability, and stayed in part, as to penalty issues. The Compliance Order proposed in the Complaint will be incorporated herein.

ORDER

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

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

3. Any party's objection to any portion of the summary of the prehearing conference herein shall be filed within ten (10) days of the date of service of this Order. The portion of this Order summarizing the prehearing conference shall be presumed agreeable to both parties fifteen (15) days after the date of service shown below if no such objection is received.

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

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

1. Submit to MDE and EPA a written report documenting Respondent's compliance with COMAR § 26.10.10.03 (40 C.F.R. § 280.72) for Tank Number 12, including, but not limited to, a description of any corrective actions taken in accordance with COMAR Part 26.10.09 (40 C.F.R. Part 280, Subparts E and F). Commence and thereafter implement and complete closure of Tank Number 12 in accordance with the requirements of COMAR §§ 26.10.10.02-26.10.10.05 (40 C.F.R. §§ 280.71 to 280.74);
2. Comply with the release detection requirements of COMAR § 26.10.05.01 (40 C.F.R. § 280.40) with respect to Tanks 22 and 23;
3. Comply with the record keeping requirements of COMAR §§ 26.10.04.05 and 26.10.05.06 (40 C.F.R. § 280.34 and 280.45) with respect to Tanks 22 and 23;
4. Submit to MDE and EPA for review and comment and Standard Operating Procedure Manual for UST Management ("UST Manual") at the Facility to ensure compliance by Respondent with the State of Maryland's authorized UST regulations. The UST Manual shall include, at a minimum, procedures for complying with release detection, closure and notification requirements for all USTs at the Facility, as well as a requirement for training of Respondent's personnel at the Facility responsible for compliance with UST requirements. Within ten (10) days of the Respondent's receipt of MDE's and EPA's comments on the UST Manual, Respondent shall revise the UST Manual in accordance with MDE's and EPA's comments and provide a copy of the revised UST Manual to MDE and EPA. Respondent shall thereafter implement the provisions of the UST Manual at the Facility. Nothing in this Paragraph nor in the UST Manual shall in any way be construed to limit Respondent's obligations to otherwise comply with the State of Maryland's EPA-authorized UST regulations and other applicable law; and
5. Commence and thereafter implement and complete closure of Tank Number 20 in accordance with the requirements of COMAR §§ 26.10.10.02 through 26.10.10.05 (40 C.F.R. 2§ 280-71 through 280.74).

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

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

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

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

and imprisonment for knowing violations.

Signature: _____

Name: _____

Title: _____

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

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

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

and

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

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

Mr. Horacio Tablada.
Chief of UST Program
Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224

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

Susan L. Biro
Chief Administrative Law Judge

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

1. Complainant subsequently requested that the oral argument in this case be consolidated with the oral argument scheduled for the same date in another proceeding against the same Respondent, U.S. Department of the Army, Walter Reed Medical Center in regard to its facility located at 6800 Georgia Avenue, N.W. Washington D.C., Docket number RCRA-9009-052. The request was granted.
2. A stay of proceedings is a matter of discretion for the presiding judge. *See, Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Unitex Chemical Corp.*, EPA Docket No. TSCA-92-H-08, 1993 EPA ALJ LEXIS 146 (ALJ, Order Staying Proceedings, March 18, 1993)(granting a stay of one year or until decision by D.C. Circuit, whichever occurs first, where D.C. Circuit had already scheduled briefs and oral argument, and decision would affect most or all claims in the administrative proceeding); *citing, General Motors Corp.*, EPA Docket No. II-TSCA-PCB-91-0245 (ALJ, Order Staying Proceedings, February 5, 1993).

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