

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103**

In the Matter of:	)	
	)	
	)	U.S. EPA Docket Number
930 Port Street, Inc.	)	RCRA-03-2021-0090
28102 Baileys Neck Road	)	
Easton, MD 21601	)	Proceeding Under Section 9006 of the
	)	Resource Conservation and Recovery
RESPONDENT,	)	Act, as amended, 42 U.S.C. Section
	)	6991e
	)	
Easton Point	)	
930 Port Street	)	
Easton, MD 21601	)	
	)	
FACILITY.	)	
	)	
	)	

**COMPLAINANT’S INITIAL PREHEARING EXCHANGE**

Pursuant to Rule § 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules of Practice”), 40 C.F.R. § 22.19(a), and the Presiding Officer’s Prehearing Order of June 24, 2021, Complainant hereby submits this Initial Prehearing Exchange in the above-captioned matter. Complainant respectfully reserves its right to supplement this Initial Prehearing Exchange in accordance 40 C.F.R. § 22.19(f).

Section 1 of the Presiding Officer’s Prehearing Order of June 24, 2021, provides that all parties are to submit (A) a list of all expert and other witnesses, a brief summary of the expected testimony, as well as (B) copies of all documents and a list of exhibits intended to be introduced into evidence, and (C) a statement specifying the amount of time needed to present its direct case.

**A. WITNESSES**

Complainant expects to call some or all of the following witnesses to testify on behalf of Complainant in the hearing in this matter. Complainant respectfully reserves the right to supplement the list of fact or expert witnesses in Complainant’s Rebuttal Prehearing Exchange and to seek leave of the Court to present in written or affidavit form, all or part of the testimony of some of the witnesses. In addition, Complainant anticipates that the parties will be able to

stipulate that the exhibits are what they purport to be. In the event that the parties are unable to so stipulate, Complainant reserves the right to present the testimony of the appropriate records custodians or other witnesses, live or in written affidavit form, for the sole purpose of establishing that certain documents are what they purport to be.

In addition, should Respondent's initial or supplemental prehearing exchanges, or other investigation and discovery, reveal the need for further witnesses, Complainant respectfully reserves the right to supplement the list of witnesses upon adequate notice to this tribunal and Respondent and to call such witnesses at the hearing of this matter. Specifically, Complainant reserves the right to call an expert witness to testify about Respondent's ability to pay the penalty to be proposed based on analysis of the documents and other information Respondent is to submit with their initial prehearing exchange.

Complainant reserves the right to supplement the summaries of various witnesses' testimony to add additional evidence. To the extent that the parties can agree on stipulations and narrow the issues, or the issues are narrowed by accelerated decision, the number of witnesses, and/or length of their testimony, may be reduced.

Melissa Toffel, EPA, Region III

Mrs. Toffel is a RCRA I Environmental Compliance Officer in the Office of Enforcement and Compliance Assurance Division, RCRA Section, EPA, Region III. Mrs. Toffel has been employed by EPA in this and other positions since 2000. From January 2007, Mrs. Toffel has served as an underground storage tank ("UST") enforcement inspector in the RCRA Section.

Mrs. Toffel is expected to testify concerning her training and experience as an EPA inspector and in conducting UST inspections, her inspection of the Facility on June 13, 2018, and her relevant observations and findings during, after, and as a result of the inspection of the Facility, and the factual basis for Complainant's allegations that Respondent violated RCRA Subtitle I. Mrs. Toffel will also testify as to the contents of the inspection report for the inspection noted above, including relevant attachments thereto, inspection procedures, relevant regulatory requirements, her contacts with Respondent or its representative, and such other matters within her knowledge as arise during the course of the hearing. Mrs. Toffel may also testify as a potential rebuttal witness as to the relevance and credibility of the testimony presented by Respondent's witnesses and/or as to Respondent's exhibits.

Mrs. Toffel will also testify to explain the calculation of the civil penalty to be sought by Complainant. Mrs. Toffel will testify that she prepared a summary of the violations alleged in the Complaint and calculated the penalty proposed by Complainant in accordance with the November 1990 U.S. EPA Penalty Guidance for Violations of UST Requirements ("UST Penalty Guidance") and the Interim Consolidated Enforcement Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA, which reflect the statutory

penalty criteria and factors set forth Section 9006(c) of RCRA. She will also testify that the UST systems at the Facility currently remain out of compliance<sup>1</sup> and she will describe the actions necessary to achieve compliance at the hearing if such USTs at the Facility are still noncompliant at such time. Mrs. Toffel's resume is attached and marked as Exhibit CX 47.

Michael Jester, Maryland Department of the Environment

Mr. Jester is a Supervisor with the Maryland Department of the Environment ("MDE") since 2014. Mr. Jester oversees, manages, and directs technical field personnel in the investigation of UST systems and environmental cleanup efforts.

Mr. Jester is expected to testify concerning his training and experience as a MDE inspector and as a supervisor of UST facilities in the State of Maryland. In addition, Mr. Jester is expected to testify concerning MDE's inspections of the Facility on May 1, 2015, June 26, 2015, October 15, 2015, February 12, 2016, March 16, 2016, and May 4, 2018 and his relevant observations and findings during, after, and as a result of these inspections of the Facility and ensuing investigations. Mr. Jester will testify also as to the contents of the inspection reports for the MDE inspections noted above, including relevant attachments thereto, if any, MDE's inspection procedures, relevant regulatory requirements, his contacts with Respondent or its representative, and such other matters within his knowledge as arise during the course of the hearing. Mr. Jester will testify also concerning the alleged violations in the Complaint, Complainant's inspection report, and Respondent's release detection records for the UST systems at the Facility. Mr. Jester may also testify as a potential rebuttal witness as to the relevance and credibility of the testimony presented by Respondent's witnesses and as to Respondent's exhibits. Mr. Jester's resume is attached and marked as Exhibit CX 50.

Joel Hennessy, EPA, Region III

Mr. Hennessy is a geologist in the Office of Enforcement and Compliance Assurance Division, RCRA Corrective Action Branch, EPA, Region III. Mr. Hennessy has been employed by EPA since 1988. Mr. Hennessy is expected to testify as an expert witness with regard to the relative sensitivity of the environment receptors surrounding the Facility and their vulnerability to any potential release from the USTs at the Facility. Mr. Hennessy will testify concerning his expert report dated April 5, 2021 as to his opinion concerning the impact of a potential release of petroleum products from the Facility to groundwater use and other environmental receptors surrounding the Facility. Mr. Hennessy's report is attached and marked as CX 45 and his resume is attached and marked as CX 48.

Kristen Keteles, Ph.D., EPA, NEIC

Ms. Keteles is a toxicologist in the Office of Enforcement and Compliance Assistance, National Enforcement Investigations Center (NEIC), EPA. Ms. Keteles has been employed by

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<sup>1</sup> Complainant recently discovered that Respondent has additional periods of noncompliance for some of the alleged violations in the Complaint, which started after the Complaint was filed, including an additional potential violation not alleged in the Complaint. Complainant may file a motion to amend the Complaint to include these additional periods and additional violation, with the objective of resolving all of the violations in a single action.

NEIC, EPA as a Senior Toxicologist since 2016. Ms. Keteles is expected to testify as an expert witness to the toxicity of petroleum products and its constituents, and the harm a potential release of petroleum products at the Facility could pose to human health and/or the environment given the various environmental pathways through which a potential petroleum release from the USTs at the Facility could impact the environment and human exposure. Ms. Keteles' report is attached and marked as CX-46 and her resume is attached and marked as CX 49.

**B. DOCUMENTS AND EXHIBITS**

<b>CX 1</b>	Delegations Manual: 8-24. Inspections and Information Gathering (Subtitle I) (1200 TN 350 8-24) (April 15, 2019)	
<b>CX 2</b>	Delegation Manual: 8-25. Administrative Enforcement Subtitle I (1200 TN 350 8-25) (April 15, 2019)	
<b>CX 3</b>	Delegation Manual: 8-26. Administrative Enforcement: Agency Representation in Hearings and Signing of Consent Agreements Subtitle I (1200 TN 350 8-26) (April 15, 2019)	
<b>CX 4</b>	Notice Letter dated September 20, 2018 from Carol Amend, Associate Director, Land and Chemicals Division, Office of RCRA Programs, U.S. EPA Region 3, to Tom Walter, Program Manager, Maryland Department of the Environment, Re: RCRA Proposed Compliant, Compliance Order and Notice of Opportunity for Hearing	
<b>CX 5</b>	Notice Letter dated May 5, 2021 from Karen Melvin, Director, Enforcement and Compliance Assurance Division, U.S. EPA Region 3, to Tim Miller, 930 Port Street, Inc., Re: Administrative Compliant, Compliance Order and Notice of Opportunity for Hearing, EPA Docket No. RCRA-03-2021-0090	
<b>CX 6</b>	Administrative Compliant, Compliance Order and Notice of Opportunity for Hearing, EPA Docket No. RCRA-03-2019-0090, filed May 6, 2021.	
<b>CX 7</b>	Code of Maryland Regulations, COMAR § 26.10. <i>et. seq.</i>	
<b>CX 8</b>	Regional Judicial Officer's Standing Orders, dated May 7, 2020 and May 22, 2020	
<b>CX 9</b>	Complainant's Consent to Electronic Service, EPA Docket No. RCRA-03-2019-0090, filed May 6, 2021.	
<b>CX 10</b>	Certificate and Proof of Service of Administrative Compliant, and Notice of Opportunity for Hearing, EPA Docket No. RCRA-03-2021-0090 filed on June 8, 2021	
<b>CX 11</b>	<i>Consolidated Rules of Practice</i> , 40 C.F.R. Part 22	
<b>CX 12</b>	<i>Civil Monetary Penalty Inflation Adjustment</i> , Vol. 85 <i>Fed. Reg.</i> No. 247, Pages 83818-21 (December 23, 2020)	
<b>CX 13</b>	<i>U.S. EPA Penalty Guidance for Violations of UST Regulations</i> , Directive Number: 9610.12, (November 14, 1990)	

<b>CX 14</b>	<i>Interim Consolidated Penalty Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA Pilot, October 5, 2018</i>	
<b>CX 15</b>	Respondent's Answer to the Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing, EPA Docket No. RCRA-03-2021-0090	
<b>CX 16</b>	State of Maryland Business Entity Filing: 930 Port Street, Inc.	
<b>CX 17</b>	RCRA Subtitle I Inspection Report: 930 Port Street, Inc. (06/21/18)	
<b>CX 18</b>	Inspection report dated May 5, 2015 by Outten Petroleum, Inc. of 930 Port Street, Easton, MD	
<b>CX 19</b>	Maryland Department of the Environment Report of Observations re: 930 Port Street, Easton, MD dated June 26, 2015	
<b>CX 20</b>	Maryland Department of the Environment Report of Observations re: 930 Port Street, Easton, MD dated October 15, 2015	
<b>CX 21</b>	Maryland Department of the Environment Report of Observations re: 930 Port Street, Easton, MD dated February 12, 2016	
<b>CX 22</b>	Maryland Department of the Environment Report of Observations re: 930 Port Street, Easton, MD dated March 16, 2016	
<b>CX 23</b>	Notice of Non-Compliance NNC-OCP-2017-002 dated July 5, 2016 from Maryland Department of the Environment to Tim Miller, 930 Port Street, Inc.	
<b>CX 24</b>	Maryland Department of the Environment Report of Observations re: 930 Port Street, Easton, MD dated May 4, 2018	
<b>CX 25</b>	Email dated July 12, 2018 (2:46 PM Eastern Time) from Melissa Toffel, U.S. EPA, to Tim Miller, 930 Port Street, Inc., requesting follow-up information to the inspection concerning the USTs at the Easton Point Facility.	
<b>CX 26</b>	Email dated July 24, 2018 (9:47 AM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, responding to the e-mail request for follow-up information dated July 12, 2018 concerning the USTs at the Easton Point Facility.	
<b>CX 27</b>	Email dated July 24, 2018 (2:52 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, responding to the e-mail request for follow-up information dated July 12, 2018: release detection records (inventory control of the USTs at the Easton Point Facility).	
<b>CX 28</b>	Email dated July 24, 2018 (3:27 PM Eastern Time) from Melissa Toffel, U.S. EPA, to Tim Miller, 930 Port Street, Inc., requesting additional release detection records for the USTs	

	located at the Easton Point Facility, and email reply dated July 24, 2018 (3:33 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, responding to the July 24, 2018 (3:27 PM Eastern Time) e-mail request for additional release detection records for the USTs at the Easton Point Facility.	
<b>CX 29</b>	Email dated August 8, 2018 (5:12 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, responding to the July 24, 2018 (3:33 PM Eastern Time) e-mail request for additional release detection records (automatic tank gauging reports of the USTs located at the Easton Point Facility).	
<b>CX 30</b>	Email dated August 21, 2018 (9:23 AM Eastern Time) from Melissa Toffel, U.S. EPA, to Tim Miller, 930 Port Street, Inc., requesting follow-up information concerning the release detection records (automatic tank gauging “Fail” results) of the UST #3 located at the Easton Point Facility and email reply dated August 21, 2018 (9:24 AM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, responding to the August 21, 2018 (9:23 AM Eastern Time) e-mail request for additional information for UST #3 at the Easton Point Facility.	
<b>CX 31</b>	Email dated August 23, 2018 (1:09 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, with additional release detection records (automatic tank gauging) of the USTs located at the Easton Point Facility.	
<b>CX 32</b>	Email dated May 22, 2019 (3:17 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, with additional release detection records (automatic tank gauging) of the USTs located at the Easton Point Facility.	
<b>CX 33</b>	Email dated May 22, 2019 (3:18 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, with additional release detection records (automatic tank gauging) of the USTs located at the Easton Point Facility.	
<b>CX 34</b>	Compilation of Veeder-Root Printouts	
<b>CX 35</b>	Tank Release Detection Records Chart	
<b>CX 36</b>	Email dated May 22, 2019 (3:51 PM Eastern Time) from Tim Miller, 930 Port Street, Inc., to Melissa Toffel, U.S. EPA, with additional line leak detector and line tightness testing records of the USTs located at the Easton Point Facility.	
<b>CX 37</b>	Estabrook’s Ezy Chek Leak Detector Results dated June 27, 2016 (USTs #2, 4, and 5)	
<b>CX 38</b>	Estabrook’s Ezy Chek Leak Detector Results dated July 26, 2016 (USTs #2, 4, and 5)	
<b>CX 39</b>	Estabrook’s Ezy Chek Leak Detector Results dated September 1, 2016 (USTs #1 and 3)	

<b>CX 40</b>	Estabrook's Ezy Chek Leak Detector Results dated March 23, 2018 (USTs #1, 2 3, 4 and 5)	
<b>CX 41</b>	Estabrook's Ezy Chek Product Line Tester dated June 27, 2016 (USTs #2, 4 and 5)	
<b>CX 42</b>	Estabrook's Ezy Chek Product Line Tester dated September 1, 2016 (USTs #1, and 3)	
<b>CX 43</b>	Estabrook's Ezy Chek Product Line Tester dated March 24, 2018 (USTs #1, 2, 3, 4, and 5)	
<b>CX 44</b>	Melissa Toffel's Inspector Field Notes	
<b>CX 45</b>	Report of Joel Hennessy	
<b>CX 46</b>	Toxicology Report: Easton Point Fuel Station	
<b>CX 47</b>	Curriculum Vitae – Melissa Toffel	
<b>CX 48</b>	Curriculum Vitae - Joel Hennessy	
<b>CX 49</b>	Curriculum Vitae – Kristen Keteles	
<b>CX 50</b>	Curriculum Vitae –Michael Jester	

Complainant estimates that 2-3 days are necessary to present its direct case. Complainant does not foresee the need of an interpreter for any of its witnesses.

Section 2 of the Presiding Officer's Prehearing Order provides that Complainant shall submit (A) documentation showing service of the Complaint, (B) a brief narrative, and a copy of any documentation in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer, (C) all factual information and supporting documentation relevant to the assessment of a penalty, and (D) a copy, or a statement of the internet address (URL), or any EPA guidance documents and/or policies that Complainant has relied upon to the allegations set forth in the Complaint.

#### A. DOCUMENTATION OF SERVICE OF THE COMPLAINT

Complainant served the Complaint by commercial delivery UPS service at Respondent's principal place of business located at 930 Port Street, Easton, Maryland on May 7, 2021 at 10:01am Eastern time. CX 10 and CX 16. In addition, the Complainant served the Complaint by commercial delivery UPS service to Respondent's registered agent, Timothy Miller, at his residence located at 28102 Baileys Neck Road, Easton, Maryland<sup>2</sup> on May 7, 2021 at 10:40 am Eastern time. CX 10. Furthermore, a copy of the Complaint was served on Respondent's counsel, Charles R. Schaller, Esq. at the offices of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC located at 100 Light Street, 19<sup>th</sup> Fl., Baltimore, Maryland.<sup>3</sup> CX 10. On June 7, 2021, attorney Ashley P. Cullinan, Esq. of the offices of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC filed an Answer to the Complaint on behalf of Respondent. CX 15.

<sup>2</sup> Respondent also uses 28102 Baileys Neck Road, Easton, Maryland as a mailing address. CX 17, Attachments 2 and 6.

<sup>3</sup> Due to Covid-19 restrictions and safety precautions issued by the Centers of Disease Control and Prevention, UPS representatives did not obtain a signature from the addressees at the time of delivery.

B. FACTUAL/LEGAL BASES FOR COMPLAINANT'S ALLEGATIONS DENIED OR OTHERWISE NOT ADMITTED BY RESPONDENTS

Pursuant to the Prehearing Order, Complainant is required to submit “a brief narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted by Respondent in its Answer.”

Jurisdiction is vested in EPA’s Office of Administrative Law Judges pursuant to Section 9006 of RCRA, 42 U.S.C. 6991e, 40 C.F.R. Part 280 and 40 C.F.R. § 22.1(a)(4) and .4(c).

EPA has given the State of Maryland Department of the Environment notice of the issuance of this Complaint in accordance with Section 9006(a)(2) of RCRA, 42 U.S.C. § 6991e(a)(2). CX 4.

Respondent admits to being the “owner” and/or “operator” of the 5 USTs and UST systems at the Facility. Answer ¶ 1, ¶ 3. However, the Respondent denied the composition of the 5 USTs, the date of the installment of such USTs, and that such USTs contained and were used to contain regulated substances. Answer ¶ 3. Respondent’s USTs Nos. 1 through 4 were installed in 1994 and UST No. 5 was installed in 1995; all of which are cathodically protected steel USTs used to contain a regulated substance as indicated in the registration of such USTs by Respondent and memorialized in the inspection reports by MDE and EPA. CX 17-24. Respondent’s USTs Nos. 1 through 5 are petroleum tank systems that were installed after December 22, 1988, and are therefore “new tank systems” as defined in COMAR § 26.10.02.04B(31) subject to the performance standards for new UST systems set forth in COMAR § 26.10.03.01. CX 17 -24.

Count I -Failure to perform release detection in accordance with COMAR § 26.10.05.04E.

Respondent denied using automatic tank gauging as its method of release detection during the time of the alleged violations (Answer ¶ 9) notwithstanding the volume of automatic tank gauging test report strips provided by Respondent to Complainant during the inspection and subsequent investigation that covered the period of noncompliance as alleged in the Complaint.<sup>4</sup> CX 17, 34, and 35. Respondent further denied that it did not use another acceptable form of release detection of its USTs during the periods of noncompliance alleged in the Complaint but proffered no alternative acceptable method of release detection in its Answer or during the course of Complainant’s investigation.

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<sup>4</sup> Respondent provided Complainant with Veeder Root (automatic tank gauging) printout test strips for an approximate 5 year period for its UST systems at the Facility. Complainant’s CX 35 is a summary table of all the Veeder Root test strip summaries and periods of noncompliance for which no test results were provided by Respondent to Complainant during the course of the inspection and follow-up investigation.



Count II- Failure to perform automatic line leak detector testing annually on USTs in accordance with COMAR § 26.10.05.02C(2) and COMAR § 26.10.05.05B.

Respondent admitted to performing the annual automatic line leak detector tests on its UST systems during the dates alleged by Complainant in its Complaint. Answer ¶ 20-22. However, Respondent denied the failure to perform the tests during the alleged periods of noncompliance but proffered no additional test dates for such period of noncompliance in its Answer. During the course of Complainant's investigation, Respondent's representative stated that he did not believe Respondent had any additional tests for the alleged period of noncompliance. CX 25, Question 2; CX 26 Reply 2. To date, no test documentation has been provided by Respondent for the alleged periods of noncompliance in the Complaint.

Count III - Failure to perform line tightness testing or monthly monitoring on piping for USTs in accordance with COMAR § 26.10.05.02C(2)(b)

Respondent admitted to performing the line tightness tests on its UST systems during the dates alleged by Complainant in its Complaint. Answer ¶ 31-33. However, Respondent denied the failure to perform the tests during the alleged periods of noncompliance but proffered no additional test dates for such period of noncompliance in its Answer. During the course of Complainant's investigation, Respondent's representative stated that he did not believe Respondent had any additional tests for the alleged period of noncompliance. CX 25, Question 3; CX 26 Reply 3. To date, no test documentation has been provided by Respondent for the alleged periods of noncompliance in the Complaint.

Count IV - Failure to report a suspected release from UST No. 3 in accordance with COMAR § 26.10.08.01A.

Respondent denied that on February 20, 2017 and on February 27, 2020 the automatic tank gauging system provided a fail test result for UST No. 3 at the Facility. Answer ¶ 42-43. However, the record shows that a fail test result for UST No. 3 occurred at the Facility on such dates as alleged in the Complaint indicating that a release may have occurred from UST No. 3. CX 30. Respondent denied the allegation that it did not notify MDE of the suspect release. Answer ¶ 44-45. During the course of Complainant's investigation, Respondent's representative stated that Respondent did not report the suspect release to MDE. CX 30.

Count V - Failure to investigate a suspected release from UST No.3 in accordance with COMAR § 26.10.08.03.

Respondent denied that on February 20, 2017 and on February 27, 2020 the automatic tank gauging system provided a fail test result for UST No. 3 at the Facility. Answer ¶ 50-51. However, the record shows that a fail test result for UST No. 3 occurred at the Facility on such dates as alleged in the Complaint indicating that a release may have occurred from UST No. 3. CX 30. Respondent denied the allegation that it did not conduct an immediate investigation and

confirm the suspected release of regulated substance. Answer ¶ 52-53. During the course of Complainant's investigation, Respondent's representative stated that Respondent did not conduct an immediate investigation and confirm the suspected release of regulated substance from UST No. 3 at the Facility. CX 30.

Count VI - Failure to test cathodic protection system on USTs in accordance with COMAR § 26.10.04.02D(1).

Respondent admitted to testing the cathodic protection system on its steel USTs at the Facility on June 17, 2016 and February 1, 2018 for USTs Nos. 1 through 5 as alleged in the Complaint. Answer ¶ 58-59. However, Respondent denied that it failed to test the cathodic protection system annually as required by law from but proffered no additional test dates in its Answer for the period between June 17, 2016 and February 1, 2018 for USTs Nos. 1 through 5 as alleged in the Complaint. Answer ¶ 60. During the course of Complainant's investigation, Respondent's representative stated that he did not believe Respondent had any additional tests for the alleged period of noncompliance. CX 25, Question 5; CX 26 Reply 5. To date, no test documentation has been provided by Respondent for the alleged periods of noncompliance in the Complaint.

C. FACTUAL INFORMATION AND SUPPORTING DOCUMENTS RELEVANT TO THE ASSESSMENT OF A PENALTY

Complainant will utilize the following relevant information to calculate a penalty in this case, reserving its right to submit such additional documentation in its Rebuttal Prehearing Exchange when Complainant shall present the penalty amount sought in this case including a detailed narrative explanation of the factors considered and methodology utilized in the calculation of the amount of the proposed penalty as required under Section 4 of the Prehearing Order.

To develop a proposed penalty for the violations alleged in this Complaint, Complainant will take into account the particular facts and circumstances of this case with specific reference to the methodology set forth in the UST Penalty Policy, found at <https://www.epa.gov/sites/production/files/2014-02/documents/d9610.12.pdf> and the Interim Consolidated Enforcement Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA Policy found at <https://www.epa.gov/sites/production/files/2019-12/documents/final-interim-consolidated-ust-penalty-policy-v3.pdf>, which reflects the statutory penalty criteria and factors set forth Section 9006(c) of RCRA.

In addition, in accordance with the Adjustment of Civil Monetary Penalties for Inflation, promulgated pursuant to the Debt Collection Improvement Act of 1996 and codified at 40 C.F.R. Part 19, Complainant will apply an adjustment to the penalty for inflation. All violations of RCRA Section 9006(d)(2), 42 U.S.C. § 6991e(d)(2), occurring after November 2, 2015 where penalties are assessed on or after January 15, 2018 shall be liable for a civil penalty not to exceed \$23,426 for each tank for each day of violation. The most recent adjustment of civil monetary

penalties for inflation are published in the Vol. 85 *Fed. Reg.* No. 247, Pages 83818-83821 (December 23, 2020) and can be found at <https://www.govinfo.gov/app/details/FR-2020-12-23>.

### *Economic Benefit*

To ensure that the penalty deters potential violators, the UST Penalty Guidance requires EPA to recapture any economic benefit the noncompliance provided to the violator, in order to remove any significant profit from noncompliance, unless the economic benefit is less than \$100. CX 13, at Chapter 2.

### *Gravity-Based Component*

Under the UST Penalty Guidance, a gravity-based penalty component is determined through consideration of two factors: the potential for harm and the extent of deviation from a statutory or regulatory requirement. CX 13, at Chapter 3. The actual or potential harm from the violation is characterized as major, moderate, or minor, and the extent of deviation from the requirement is characterized as major, moderate, or minor, in accordance with appendix A of the UST Penalty Guidance, which sets forth penalty recommendations for specific violations of the UST regulations. *Id.*, at § 3.1 and appendix A. Appendix A of the UST Penalty Guidance also displays whether the penalty associated with a specific type of violation should be assessed on a per tank basis or facility-wide basis. *Id.* These values are then applied to the “Matrix Values for Determining the Gravity-Based Component of a Penalty” chart, as revised by the *Interim Consolidated Penalty Policy for Underground Storage Tank (UST) Regulations and Revised Field Citation Program and ESA Pilot*, October 5, 2018, to determine the initial gravity-based component. *Id.*, at § 3.1 and CX-14.

The UST Penalty Guidance provides for adjustments to be made to the gravity-based component to account for: (1) violator-specific adjustments, (2) an environmental sensitivity multiplier, and (3) the duration of the violation. CX-13, at §§ 3.2 through 3.4.

The violator-specific adjustments may adjust the inflation adjusted matrix value upward by as much as 50% or downward to reflect the particular circumstances surrounding the violation, such as the degree of cooperation or non-cooperation by Respondents in response to the inspection and enforcement action, the degree of willfulness or negligence on the part of the owner/operator with respect to the violations, the owner/operator's history of noncompliance, and other unique factors. *Id.*, at § 3.2.

The environmental sensitivity multiplier may adjust the inflation adjusted matrix value upward by 50% if the area where the violations occurred is moderately environmentally sensitive or upward by 100% if the area is highly environmentally sensitive. *Id.*, at § 3.3.

The UST Penalty Guidance uses a range of multipliers based on the duration of the violation. For violations that continued for more than 90 days, but no more than 180 days, the multiplier is 1.5. For violations that continued for more than 180 days, but no more than 270 days, the multiplier is 2. For violations that continued for more than 270 days but no more than

365, the multiplier is 2.5. For each additional six months or fraction thereof, the multiplier increases by an additional 0.5. *Id.*, at § 3.4.

D. OTHER EPA GUIDANCES AND/OR POLICIES, AND PREAMBLES TO REGULATIONS.

In addition to the documents and exhibits included within Complainant's Initial Prehearing Exchange as described above, Complainant may reference the preamble to "Underground Storage Tanks; Technical Requirements and State Program Approval; Final Rules." 53 Fed. Reg. 37194-212, which is available on the EPA website, at: <https://www.epa.gov/ust/1988-underground-storage-tanks-technical-requirements-final-rule-and-underground-storage-tanks>, and EPA policies found at: [www.epa.gov/oust/fedlaws/sept2388.htm](http://www.epa.gov/oust/fedlaws/sept2388.htm).

Complainant may also refer at the hearing to MDE's underground storage tank regulatory compliance policies and guidances found at: <https://mde.maryland.gov/programs/LAND/OilControl/Documents/Fact%20Sheet%20UST%20System%20Release%20Detection%201.14.16%203%20pgs.pdf> and [https://mde.state.md.us/programs/ResearchCenter/FactSheets/Documents/www.mde.state.md.us/assets/document/factsheets/UST\\_release\\_detection.pdf](https://mde.state.md.us/programs/ResearchCenter/FactSheets/Documents/www.mde.state.md.us/assets/document/factsheets/UST_release_detection.pdf).

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Respectfully submitted,

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