

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

EDWARD AND THERESA WASHINES,  
DA STOR AT LILLIE'S CORNER

Wapato, Washington

Respondents.

DOCKET NO. RCRA-10-2014-0100

**COMPLAINANT'S INITIAL  
PREHEARING EXCHANGE**

**INTRODUCTION**

Pursuant to the Administrative Law Judge's Order of September 9, 2014 and Section 22.19(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10, ("Complainant") hereby submits the following Initial Prehearing Exchange.

For purposes of this Prehearing Exchange, "Facility" refers to the property located at 50 West Wapato Road in Wapato, Washington, within the external boundary of the Yakama Indian Reservation, on which Respondents operated a gasoline service station.

**1.A. WITNESSES**

Complainant respectfully submits the following list of witnesses that Complainant intends to call at hearing, with a brief narrative summary of their expected testimony:

**i. Charlotte Boulind-Yeung** (fact witness): Charlotte Boulind-Yeung is an inspector for the Ground Water Unit in the Office of Compliance and Enforcement at Region 10 of the United States Environmental Protection Agency (“EPA”). Her office is located in Seattle, Washington. Ms. Boulind-Yeung’s duties include inspecting facilities subject to regulation under Subtitle I of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6991-6991m, providing compliance assistance to underground storage tank (UST) owners and operators, and collecting and reviewing evidence regarding alleged violations of RCRA Subtitle I. As part of her duties at EPA, Ms. Boulind-Yeung issues Expedited Enforcement Compliance Order and Settlement Agreements (also known as "field citations"), and issues UST Field Notices of Non-Compliance. Ms. Boulind-Yeung will testify that she inspected the UST systems at the Da Stor at Lillie’s Corner facility (the “Facility”) in June 2012. Ms. Boulind-Yeung’s inspection report is attached at CX-5. Ms. Boulind-Yeung will testify to the observations she made during her last inspection of the Facility on June 14, 2012, including the presence of metal components that regularly contained gasoline, which were in contact with the ground, within the turbine sump. She will testify that the cathodic protection records available at the Facility indicate that the siphon line was not tested. Ms. Boulind-Yeung will also testify as to her communications with Respondents, from June 2008 to the present. A record of the first communication between Ms. Boulind-Yeung and Respondents is attached at CX-21. Ms. Boulind-Yeung will also testify as to her communications with Respondents’ contractors in regards to the Facility. Written communications between Ms. Boulind-Yeung and Respondents’ contractors are attached at CX-10 and CX-12. Ms. Boulind-Yeung's résumé is attached as CX-1. Ms. Boulind-Yeung is expected to testify to her observations during her inspections of the Facility, her review of the evidence in this matter, and the factual basis for Complainant’s allegations that Respondents have violated RCRA Subtitle I, 42 U.S.C. §§ 6991-6991m.

**ii. Katherine Griffith** (fact witness): Katherine Griffith is the case developer in the Ground Water Unit in the Office of Compliance and Enforcement at EPA Region 10 assigned to this case. Her office is located in Seattle, Washington. Ms. Griffith's duties include collecting and reviewing evidence regarding alleged violations of RCRA Subtitle I, 42 U.S.C. §§ 6991-6991m, and making determinations of compliance with those requirements. Ms. Griffith will testify that she reviewed the information collected by Complainant related to Respondents' USTs at the Facility, including the 2006, 2009, and 2012 inspection reports and Complainant's correspondence with Respondents. She will testify that she discussed the alleged violations with Mr. Washines and Respondents' contractors and informed Respondents in writing about the violations observed at the Facility. She will also testify that she communicated with contractors who had conducted work on the USTs or had inspected the USTs at the Facility. CX-14. Ms. Griffith will testify that she prepared a summary of the violations alleged and calculated the penalty proposed by Complainant. CX-38. She will testify that she calculated the proposed penalty in accordance with the November 1990 U.S. EPA Penalty Guidance for Violations of UST Requirements ("UST Penalty Guidance") and will explain the factors considered in calculating the proposed penalty amount. CX-36. Ms. Griffith will testify as to her communications with Respondents' contractors in regards to the Facility. She will also testify that the UST systems at the Facility currently remain out of compliance<sup>1</sup> and will describe the actions necessary to achieve compliance. Katherine Griffith's résumé is attached as CX-2.

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<sup>1</sup> Complainant recently discovered that Respondents have additional periods of noncompliance, which started after the Complaint was filed. Complainant intends to file a motion to amend the Complaint to include these additional periods, with the objective of resolving all of the violations in a single action.

## **1.B. DOCUMENTS AND EXHIBITS**

Copies of the following documents and exhibits Complainant intends to introduce into evidence are numbered and attached hereto as follows:

- CX - 1** Résumé of Charlotte Boulind-Yeung
- CX - 2** Résumé of Katherine Griffith
- CX - 3** EPA UST Inspection Report, September 13 and 21, 2006 (Jim Greaves, Lead Inspector)
- CX - 4** EPA UST Inspection Report, September 21, 2009 (Todd Bender, Lead Inspector)
- CX - 5** EPA UST Inspection Report, June 14, 2012 (Charlotte Boulind-Yeung, Lead Inspector)
- CX - 6** EPA UST Inspection Photolog, June 14, 2012
- CX - 7** Expedited Enforcement Compliance Order and Settlement Agreement Number 5122 dated September 21, 2006
- CX - 8** Notification for Underground Storage Tanks, EPA Form 7530-1, dated February 17, 1994
- CX - 9** Notification for Underground Storage Tanks, EPA Form 7530-1, dated October 28, 2005
- CX - 10** Mascott Equipment Company Service Order Number 160444, Cathodic Protection Test Report, dated October 16, 2009
- CX - 11** Retrofit Report, Pacific Environmental Services Company, Cathodic Protection Testing at Da Stor 50 Wapato Road W., Wapato, WA, dated February 15, 2013
- CX - 12** Cathodic Protection (CP) Compliance Test Results, “sti-p3 Tank Monitoring Test Results,” dated November 17, 1994
- CX - 13** Invoice, Pacific Environmental Services Company, Cathodic Protection Testing at Da Stor 50 Wapato Road W., Wapato, WA, dated February 15, 2013
- CX - 14** Cathodic Protection (CP) Compliance Test Report Information dated July 22, 2013, with email between EPA and Mascott Equipment Co.

- CX - 15** Certified Letter from Jim Greaves (EPA) to E. Arlen Washines, re Expedited Enforcement Compliance Order and Settlement Agreement No.5122, dated May 8, 2007
- CX - 16** Certified Letter from Jim Greaves (EPA) to E. Arlen Washines, re Expedited Enforcement Compliance Order and Settlement Agreement No.5122, dated August 13, 2007
- CX - 17** Memo to File from Jim Greaves, re “File pass off for follow-up, Da Stor at Lillie's Corner,” dated September 24, 2007
- CX - 18** Letter from Jim Greaves (EPA) to Teresa Washines, re Lillis Corner (EPA Facility ID No. 4260115), located at 50 W. Wapato Road in Wapato, Washington -Yakama Indian Reservation, dated October 5, 2005
- CX - 19** Letter from Charlotte Boulind-Yeung (EPA) to Mr. Robbins (BIA), re outstanding UST violations at the Da Stor Facility and cathodic protection concerns for piping, dated December 27, 2007
- CX - 20** Letter from Charlotte Boulind-Yeung (EPA) to Mr. Robbins (BIA), re compliance requirements for the USTs at the Da Stor Facility and cathodic protection concerns for piping, dated May 27, 2008
- CX - 21** Telephone Log of conversation between Charlotte Boulind-Yeung and E. Arlen Washines, dated June 12, 2008
- CX - 22** Telephone Notes of Katherine Griffith, dated January 27, 2013 and March 5, 2013.
- CX - 23** Telephone Record regarding Da Stor at Lillie’s Corner between Todd Bender and E. Arlen Washines, dated August 14, 2009
- CX - 24** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Important logistics and environmental compliance results information for you to digest in advance of our inspection,” dated August 14, 2009
- CX - 25** Email from Todd Bender (EPA) to Pablo Ramirez (Farmers Insurance) regarding “Lastly, the self certification of compliance, which, if you wish, you may help the Washines with” dated October 14, 2009
- CX - 26** Email from Todd Bender, Environmental Protection Agency, to E. Arlen Washines regarding “Da Stor in Wapato (Lillies Corner),” dated October 14, 2009
- CX - 27** Email conversation between Todd Bender (EPA), E. Arlen Washines, and Pablo Ramirez (Farmers Insurance), regarding “Insurance documents needed for Da Stor compliance – some regulatory feedback,” dated April 19, 2010 and October 14, 2009

- CX - 28** Email conversation between Todd Bender (EPA) and Mr. Washines regarding “Please send an update on Da Stor compliance status,” dated October 20, 2009
- CX - 29** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Da Stor Update,” dated January 4, 2010
- CX - 30** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Lacking a compliance update for Da Stor,” dated April 9, 2010
- CX - 31** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Da Stor compliance needs include (right now),” dated April 12, 2010
- CX - 32** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Have you booked day/time for pipe trenchwork investigation yet? If so, when?,” dated April 26, 2010 through May 5, 2010
- CX - 33** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Please provide me with a full compliance update,” dated May 18, 2010 through August 6, 2010
- CX - 34** Business Lease for Da Stor, between BIA, Teresa Washines, and E. Arlen Washines, dated October 14, 2004
- CX - 35** EPA Publication, “Musts for USTs, a Summary of Federal Regulations for Underground Storage Tank Systems,” published July 1995
- CX - 36** U.S. EPA Penalty Guidance for Violations of UST Regulations OSWER Directive 9610.12, November 14, 1990
- CX - 37** Memorandum from Rosemarie A Kelley, Director Waste and Chemical Enforcement Division, “Revision to Adjusted Attachment C: Clarification to OSWER Directive 9610.12. Use in place of Exhibit 4,” dated April 6, 2010
- CX - 38** Memorandum for Record from Katherine Griffith, Case Developer, UST Program “Underground Storage Tanks (UST) Enforcement Case – Da Stor at Lillie’s Corner – Penalty Justification,” dated April 15, 2014
- CX - 39** Email from Todd Bender (EPA) to E. Arlen Washines regarding “Documentation of previous Financial Responsibility (insurance) for Da Stor,” dated October 20, 2009
- CX - 40** Financial Responsibility, Zurich American Insurance Company, Insurance Policy for Da Stor, dated April 23, 2010
- CX - 41** Financial Responsibility, Zurich American Insurance Company, Insurance Policy for Da Stor, dated August 23, 2012
- CX - 42** Financial Responsibility, ACE American Insurance Company Policy, Insurance Policy for Da Stor, dated May 2, 2013

**1.C. LOCATION OF HEARING AND ESTIMATED DURATION OF PRESENTATION OF COMPLAINANT’S DIRECT CASE**

Complainant proposes Yakima, Washington, as the location for the hearing.

Respondents and Respondents’ counsel are located in Yakima County, Washington, which is approximately 2.5 hours east-southeast of the Seattle-Tacoma International Airport. All of Complainant’s proposed witnesses live and work in or near Seattle, Washington. Suitable court rooms are available in both Seattle and Yakima.

In the event that the hearing is scheduled during the winter months, Complainant proposes Seattle, Washington, as the location for the hearing, as the mountain passes between Seattle and Yakima close during heavy snowfall. One party or the other will need to cross the Cascade Mountains if the hearing is held during the winter, but holding a winter hearing in Seattle would help avoid unnecessary impacts to other cases in the presiding officer’s schedule.

Subject to the length of cross-examination of witnesses, Complainant estimates that it will require approximately one day to present its direct case. Translation services are not necessary for the testimony of Complainant’s witnesses.

**2.A. FACTUAL AND LEGAL BASES FOR ALLEGATIONS DENIED IN RESPONDENTS’ ANSWER**

In accordance with the Presiding Officer’s instructions and 40 C.F.R. § 22.19, Complainant sets forth in this section a brief narrative statement of the factual and legal bases for the allegations that Respondents denied or otherwise did not admit in their Answer.

A. Violation 2, Count 5: 40 C.F.R. § 280.20(b)(2)

Complainant alleges that Respondents violated 40 C.F.R. § 280.20(b)(2) during the period from at least May 1, 2009, through February 13, 2013, when Respondents failed to install

cathodic protection for the steel siphon line which connects Tank #1 and Tank #2. Complaint, ¶¶ 3.6, 3.9, 3.19 – 3.23. Respondents deny these allegations. Answer, ¶¶ 1.2, 1.4, 1.13 – 1.14, 3.1. Respondents assert that their USTs do not constitute a “new tank system” and are not subject to the design, construction, installation and notification requirements for such USTs under 40 C.F.R. part 280, subpart B. Answer, ¶¶ 1.4, 3.1.

*Respondents’ Tanks are “New Tank Systems”*

The date the regulations came into effect, December 22, 1988,<sup>2</sup> is used to distinguish between “existing tank systems” and “new tank systems.” 53 Fed. Reg. 37194. “New tank system means a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988.” 40 C.F.R. § 280.12. Respondents’ tank systems are used to contain a regulated substance and were installed in 1990. Answer, ¶ 1.1, ¶ 1.2 and CX-8. Respondents’ tank systems satisfy each element of the definition, and are new tank systems for purposes of 40 C.F.R. part 280.

*Performance Standards under 40 C.F.R. § 280.20*

As owners or operators of a new tank system, Respondents must meet the performance standards in 40 C.F.R. § 280.20. Respondents deny this, and instead assert that the requirements of 40 C.F.R. § 280.20 are only enforceable against the owners and operators who installed the UST system, and do not apply to any future or current owners or operators. Answer, ¶ 3.1.

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. 40 C.F.R. § 280 (emphasis added).

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<sup>2</sup> Note: There is one exception, which is not relevant to this case. The UST regulations promulgated in 53 Fed. Reg. 37194 had an effective date of December 22, 1988 except for 40 C.F.R. § 280.22(g), which went into effect on October 24, 1988. Section 280.22(g) contained notification requirements for people selling USTs after October 24, 1988.



Respondents are within the group of “all owners and operators of new UST systems” and therefore must meet the requirements of 40 C.F.R. § 280.20. The Part 280 regulations repeatedly reference 40 C.F.R. § 280.20 in contexts that demonstrate the performance standards in 40 C.F.R. § 280.20 apply throughout the operational life of a UST system installed after December 22, 1988. For example, the “operation and maintenance of corrosion protection” regulations in 40 C.F.R. § 280.31(d) reference the cathodic protection standards in 40 C.F.R. §§ 280.20(a)-(b). Similarly, 40 C.F.R. § 280.70 requires owners or operators of any new UST system in temporary closure for more than 12 months to permanently close that UST system if it no longer meets the performance standards in 40 C.F.R. § 280.20. The performance standards in 40 C.F.R. § 280.20 remain in effect after installation of a new UST system. For UST systems installed after December 22, 1988, 40 C.F.R. 280.20 clearly states the intended period of time in which the performance standards are to apply:

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. 40 C.F.R. § 280 (emphasis added).

Respondents are owners and/or operators of the three underground storage tanks at the Facility. Answer, ¶¶ 1.1, 1.3. An underground storage tank system includes the underground storage tank and the “connected piping.” 40 C.F.R. § 280.12. Respondents’ tank systems were installed after December 22, 1988, and are therefore new tank systems for purposes of 40 C.F.R. § 280.20. Respondents are within the group of “all owners and operators of new UST systems” that must meet the requirements of 40 C.F.R. § 280.20.

B. Violation 2, Count 6: 40 C.F.R. § 280.31(a)

40 C.F.R. § 280.31(a) requires that “All corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.” Complainant alleges that Respondents violated 40 C.F.R. § 280.20(b)(2) during the period from at least May 1, 2009, through February 13, 2013, when Respondents failed to install cathodic protection for the steel siphon line which connects Tank #1 and Tank #2. Complaint, ¶¶ 3.19 – 3.22. Respondents deny these allegations. Answer, ¶ 1.14.

Respondents’ siphon line is a manifold that connects Tank #1 and Tank #2, and has done so since at least May 1, 2009. Answer, ¶¶ 1.1, 1.3. Respondents’ siphon line (a) is constructed of steel piping, (b) was in contact with the ground, (c) routinely contained regulated substances, and (e) lacked cathodic protection during the period from at least May 1, 2009, through February 13, 2013. Answer, ¶¶ 1.1 – 1.4, 1.11 – 1.12. Respondents allege they had no obligation to maintain a corrosion protection system on the bare steel siphon line until one existed, and they had no obligation to install corrosion protection on the siphon line when they became owners.

Section 280.31 applies to “[a]ll owners and operators of steel UST systems with corrosion protection.” Respondents are owners and/or operators of steel UST systems. Answer ¶ 1.1. Respondents have corrosion protection systems on their UST systems, as their USTs are STiP3 tanks. CX-11. STiP3 tanks have a pre-engineered corrosion protection system that is integrated into the tank. CX-12. Respondents are owners and/or operators of steel UST systems with corrosion protection, and must comply with 40 C.F.R. § 280.31. Respondents’ siphon line is (a) constructed of steel piping, (b) part of Respondents’ new UST systems, (c) in contact with

the ground, (d) routinely contained regulated substances, and (e) lacked cathodic protection during the period from at least May 1, 2009, through February 13, 2013.

**2.B. FACTUAL INFORMATION AND SUPPORTING DOCUMENTS RELEVANT TO COMPLAINANT'S PROPOSED PENALTY**

and

**2.C. DETAILED EXPLANATION OF THE FACTORS CONSIDERED AND METHODOLOGY USED TO CALCULATE THE PROPOSED PENALTY**

i. EPA Penalty Guidance relied upon for Complainant's Penalty Calculations

The UST Penalty Guidance used to calculate the proposed penalty may be found in the Office of Solid Waste and Emergency Response (OSWER) Directive 9610.12, which is attached as Exhibit CX-36, and is also available on the EPA website, at:

<http://www.epa.gov/oust/directiv/od961012.htm>.

On April 6, 2010, a memorandum from the Director of EPA's Waste and Chemical Enforcement Division, titled "Revision to Adjusted Attachment C: Clarification to OSWER Directive 9610.12. Use in place of Exhibit 4," updated the penalty matrices in the UST Penalty Guidance to account for inflation. This "Revised Matrix Memo" is attached as Exhibit CX-37, and is also available on the EPA website, at:

[www2.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf](http://www2.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf).

ii. Complainant's Penalty Calculation

The penalty calculations established in the UST Penalty Guidance are based upon Section 9006 of RCRA, 42 U.S.C. § 6991e. Under Section 9006(d) of RCRA, 42 U.S.C. § 6991e(d), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$16,000 for each tank for each day of violation, issue an order requiring compliance, or both, for any violation of Subtitle I of RCRA, 42 U.S.C. §§ 6991-6991m, or the implementing regulations promulgated in 40 C.F.R.

part 280. In assessing a penalty, EPA may consider the compliance history of the owner or operator and any other factor the Administrator considers appropriate. RCRA Section 9006(e), 42 U.S.C. § 6991e(e).

*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-36, 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. *Id.*, 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 in the Revised Matrix Memo, to determine the initial gravity-based component. *Id.*, at § 3.1 and CX-37, at attachment C.

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-36, 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.

### iii. Complainant's Penalty Calculation

The following test explains the factors considered and methodology utilized in calculating the penalty proposed in the Complaint.

### *Violation Adjustments*

Two of the violation adjustments are applicable to all counts, and will be discussed prior to the counts of violation, to avoid reiterating the same details in each count. The Violator Specific Adjustment was adjusted upward by 20% (to 1.20) to reflect a history of noncompliance (10%) and lack of cooperation of the owner/operator (10%).

UST Penalty Guidance, CX-36, states that “enforcement personnel have the option of adjusting the matrix value based on any information known about the violator’s: (1) degree of cooperation or noncooperation; (2) degree of willfulness or negligence; (3) history of noncompliance; and (4) other unique factors. The UST Penalty Guidance permits an upward adjustment of 50% of the gravity based penalty for noncooperation and an additional upward adjustment of 50% for history of noncompliance. In contrast, “because compliance with the regulation is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no ‘reward’ for doing now what should have been done in the first place.” *Id.*, at § 3.2.1.

The Violator Specific Adjustment of 1.20 used by Complainant is based upon evidence documenting Respondents’ failure to cooperate with compliance assistance and Respondents’ continued noncompliance. For example, Complainant inspected Respondents’ facility on September 13, 2006. CX-3. During the inspection, Complainant noted several violations of the UST regulations. The violations included failure to maintain financial assurance, 40 C.F.R. § 280.93, failure to monitor tanks for releases every 30 days, 40 C.F.R. § 280.41(a), failure to perform a line tightness test, 40 C.F.R. § 280.41(b)(1)(ii), and failure to test the automatic line leak detectors, 40 C.F.R. § 280.44(a). The Respondents’ lease required that the Respondents

“comply with all applicable regulations contained in 40 CFR Parts 280 (attached) and as explained in EPA/530/UST-88/008 Musts for UST's (also attached).” CX-34, CX-35. Despite this, the inspector noted that Respondents were unaware of the requirements of the UST regulations and proceeded to inform Respondents of the regulatory requirements.

The inspector also observed that underground piping entering the turbine sump was steel. CX-3, CX-19. The inspector returned to complete the inspection on September 21, 2006. Complainant issued an Expedited Enforcement Compliance Order and Settlement Agreement on September 21, 2006, for the violations observed on September 13, 2006. CX-7. The Expedited Enforcement Compliance Order and Settlement Agreement required Respondents to pay a monetary penalty and prove compliance within 30 days.

Respondents failed to demonstrate compliance with all the violations noted on the Expedited Enforcement Compliance Order and Settlement Agreement within 30 days of signing. In lieu of initiating a formal enforcement action against Respondents, on May 8, 2007, Complainant mailed a letter to Respondents reminding Respondents of the obligation to correct the violations. CX-15. The May 8, 2007, letter allowed Respondents until July 31, 2007, to correct the continuing violations. Despite the extension of time to come into compliance, Respondents again failed to demonstrate compliance by July 31, 2007. Complainant subsequently mailed Respondents another letter on August 13, 2007, reiterating the need to come into compliance immediately. CX-16. Respondents failed to respond to the August 13, 2007, letter, as well. Therefore, Respondents' reaction to the September 21, 2006, Expedited Enforcement Compliance Order and Settlement Agreement demonstrates both a habitual lack of cooperation—even when met with continued leniency—and a history of violations in relation to Counts 1 through 4.

In addition to Respondents' lack of cooperation with regards to the Expedited Enforcement Compliance Order and Settlement Agreement, from 2009 to 2011, Respondents rebuffed Complainant's steadfast attempts to assist Respondents in complying with the cathodic protection and financial assurance requirements (Counts 5 through 9). In particular, on June 12, 2008, Charlotte Boulind-Yeung, inspector for Complainant, contacted Respondents to remind Respondents of the need to obtain financial assurance and to inspect the siphon line between Tank #1 and Tank #2 for adequate cathodic protection. CX-21. Ms. Boulind-Yeung offered compliance assistance to Respondents, which was not accepted. Complainant again contacted Respondents on August 14, 2009, October 14, and October 20, 2009, both via telephone and email. CX-23 – CX-26, and CX-28. On August 14, 2009, and October 20, 2009, Complainant again informed Respondents of the need to obtain financial assurance and to assess the cathodic protection for steel piping manifolding Tank #1 and Tank #2. *Id.* Todd Bender, inspector for Complainant, ultimately contacted Respondents' insurance company directly to ascertain whether Respondents had adequate financial assurance. CX-27. These incidents support Complainant's use of a 1.20 Violator Specific Adjustment factor to the gravity penalty to account for Respondents' noncooperation.

Respondents' pattern of noncooperation and violations continued through calendar year 2010. On January 4, 2010, Complaint reminded Respondents of the need to assess cathodic protection for the steel piping manifolding Tank #1 and Tank #2. CX-27. Despite the efforts of Complaint to assist Respondents to come into compliance since 2006, Complainant again, on April 9, 2010, was forced to remind Respondents of continuing violations for failure to cathodically protect steel piping and maintain financial assurance. CX-30. Complainant repeated the requirements to Respondents on April 12, April 26, and May 18, 2010. CX-31 –



CX-33. Complainant's repeated admonishments notwithstanding, Respondents did not assess the steel siphon line until January 30, 2013, and did not cathodically protect the siphon line until February 13, 2013. Therefore, Complainant will present evidence at the hearing to demonstrate Respondents' prior history of violations of the cathodic protection and financial assurance requirements as well as Respondents' lack cooperation with Complainant's compliance assistance to support the 20% increase in the gravity-based penalty for each violation.

The Environmental Sensitivity Multiplier may be used to further adjust the Matrix Value to take into account the sensitivity of the local area to damage posed by a potential or actual release. Complainant has not made any adjustment for the sensitivity of the local area, so Complainant used an Environmental Sensitivity Multiplier of 1.0, for Low Environmental Sensitivity, for each violation.

*Violation 1: Failure to Conduct Release Detection for Piping*  
*Counts 1-2: Failure to Conduct an Annual Test of Operation of each ALLD*  
*Counts 3-4: Failure to Monitor each Pressurized Line (LTT)*

40 C.F.R. § 280.44(a) requires, among other things, that each method of release detection for piping used to meet the requirements of 40 C.F.R. § 280.41 be conducted so that an annual test of the operation of the leak detector is performed in accordance with the manufacturer's requirements. EPA has not established any alternative time frame for testing cathodic protection systems.

*Counts 1-2:* Respondents admit to failing to conduct an annual test of the operation of each ALLD, as alleged in Paragraphs 3.14 through 3.16 of the Complaint, in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a) from at least May 1, 2009, through October 15, 2009; October 16, 2010, through August 1, 2012; and August 2, 2013, through August 26, 2013.

Answer, ¶ 1.8.

This violation presents a major potential for harm to the environment and the regulatory program and is a major deviation from the regulatory requirement. The UST Penalty Guidance states that failure to provide adequate line leak detector system for underground piping, in violation of 40 C.F.R. § 280.44(a), is assessed as a violation posing a “major” potential for harm and a “major” deviation from the regulatory requirement. CX-36, at appendix A, subpart D.

*Counts 3-4:* Where the piping conveys regulated substances under pressure, the regulation requires, among other things, the piping have an annual line tightness test conducted in accordance with 40 C.F.R. § 280.44(b). EPA has not established any alternative time frame for testing cathodic protection systems. Respondents admit to failing to conduct an annual line tightness test as alleged in Paragraphs 3.14 through 3.16 of the Complaint, in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(b) from at least May 1, 2009 through October 15, 2009; October 16, 2010, through August 1, 2012; and August 2, 2013, through August 26, 2013.

Answer, ¶ 1.8.

The UST Penalty Guidance states that failure to provide any underground piping monitoring method, in violation of 40 C.F.R. § 280.41(b), is assessed as a violation posing a “major” potential for harm and a “major” deviation from the regulatory requirement. CX-36, at appendix A, subpart D.

*Counts 1-2 and 3-4:* A major potential for harm to the environment and the regulatory program means the violation causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program. In this case, on an annual basis, Respondents did not test the operation of the release detection for the piping at the Facility in accordance with the manufacturer's requirements. The failure to undertake an annual test of the operation of the

release detection for the piping at the Facility could result in substantial risks to human health and the environment where an undetected leak in the piping occurs. An undiscovered release of product from the piping or piping connections could easily remain unaddressed for a significant time. The longer a release is unaddressed, for example, because piping release detection was not properly operating, the greater the risk to human health and the environment.

*Counts 1-2 and 3-4:* A major deviation from the regulatory requirement means that the violator deviated from the requirements of the regulation or statute to such an extent that there is substantial noncompliance. In this case, Respondents did not test the operation of the release detection for the piping at the Facility in accordance with the manufacturer's requirements, on an annual basis. Exhibit 4 of the UST Penalty Guidance, as amended by the Revised Matrix Memo, shows that a “major” potential for harm to the environment and the regulatory program and a “major” deviation from the regulatory requirement has a matrix value of \$2,130.

Respondents failed to conduct an annual test of the operation of each ALLD from at least May 1, 2009 through October 15, 2009; October 16, 2010, through August 1, 2012; and August 2, 2013, through August 26, 2013. Answer, ¶ 1.8. As Respondents were in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a) for a period of 848 days, the “days of noncompliance multiplier” is 4. As mentioned above, the Matrix Value is modified by an environmental sensitivity multiplier of 1 and a Violator Specific Adjustment of 1.2.

$$\$2,130 \times 4 \times 1 \times 1.2 = \$10,224$$

The UST Penalty Guidance states that failure to provide adequate line leak detector system for underground piping, in violation of 40 C.F.R. § 280.44(a), be assessed on a “per tank” basis. CX-36 at appendix A, subpart D. Respondents’ facility however only has two ALLDs for three tanks, because the steel siphon line that connects Tank #1 and Tank #2 allows those USTs

to operate on a single ALLD. As Respondents only needed to test two ALLDs, Complainant calculated this penalty as two counts (one per ALLD) instead of three counts (one per tank). Where Respondents fail to conduct annual ALLD testing and annual LTT, Complainant typically assesses the gravity component of the penalty once, rather than twice. As a result, the Adjusted Gravity for all four counts was calculated at \$20,448 instead of \$40,896.

The Economic Benefit was calculated for the avoided costs of two annual line tightness tests and annual line leak detector tests. On March 5, 2013, Mascott informed EPA the annual line tightness tests and annual line leak detector tests would cost \$175 per test per line. CX-22. The interest rate (6.5%), the number of days of noncompliance (848), and the marginal tax rate (15%) were applied into the equation for avoided costs and the total avoided cost was calculated to be \$685, as per the example in the UST Penalty Guidance, Appendix C, Page C-8.

$$\text{Avoided Costs} = \left( \$700 + \left( \$700 \times 0.065 \times \frac{848}{365} \right) \right) \times (1 - 0.15) = \$685$$

Thus, the appropriate total penalty to be assessed is:

$$\text{Counts 1 - 4 } \$20,448 + \$685 = \$21,133$$

In turn, that was divided by 4 to get \$5,284 per count for Counts 1-4.

*Violation 2, Count 5: Failure to Install Cathodic Protection for Metal Piping*  
*Violation 2, Count 6: Failure to Maintain Cathodic Protection for Metal Piping*

During the June 21, 2009, inspection, the inspectors informed Respondents that the piping for the siphon line appeared to be galvanized steel and lacked cathodic protection. CX-4, CX-24, CX-26 and CX-27. No action on the owner's part was conducted and it was identified as a continued violation during the June 14, 2012, inspection. CX-5 – CX-7. Respondents did not conduct a cathodic protection test on the siphon line until January 30 or February 5, 2013, at which point Respondents determined that the siphon line lacked adequate cathodic protection.

Answer, ¶ 1.11. Respondents installed a sacrificial anode to provide cathodic protection for the siphon line on February 13, 2013. Answer, ¶ 1.12.

*Count 5:* 40 C.F.R. § 280.20(b)(2) requires the piping for new tank systems that routinely contains regulated substances and is in contact with the ground be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory. Respondents' tank system lacked adequate cathodic protection until the sacrificial anode was installed on February 13, 2013. Answer, ¶ 1.11. The UST Penalty Guidance states failure to provide any cathodic protection for metal piping, in violation of 40 C.F.R. § 280.20(b)(2), be assessed as a violation posing a "moderate" potential for harm and a "major" deviation from the regulatory requirement. CX-36, at appendix A, subpart B.

*Count 5:* A moderate potential for harm to the environment and the regulatory program means that the violation causes or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program. In this case, failing to provide cathodic protection to the underground piping which regularly carried regulated substances left that piping vulnerable to corrosion; corrosion of the metal piping could have led to a release and thus could result in a significant risk to human health and the environment.

*Count 6:* 40 C.F.R. § 280.31(a) requires that "all corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground." As previously established, Respondents have a corrosion protection system on their USTs, but Respondents were not operating or maintaining corrosion protection

systems to continuously provide corrosion protection for that piping prior to February 13, 2013.

Answer, ¶ 1.11. The explicit purpose of 40 C.F.R. § 280 is “to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances.”

Correspondingly, the UST Penalty Guidance states failure to operate and maintain cathodic protection for metal piping, that a violation of 40 C.F.R. § 280.31(a), be assessed as a violation posing a “major” potential for harm and a “major” deviation from the regulatory requirement.

CX-36, at §§ 3.1.1, 3.1.2, and appendix A, subpart B.

*Count 6:* A major potential for harm to the environment and the regulatory program means the violation causes or may cause a situation resulting in a substantial or continuing risk to human health and the environment and/or may have a substantial adverse effect on the regulatory program. In this case, failing to operate and/or maintain cathodic protection to the underground piping which regularly carried regulated substances left that piping vulnerable to corrosion; corrosion of the metal piping could have led to a release and thus could result in a significant risk to human health and the environment. The UST penalty guidance assesses failures in operation and maintenance of a cathodic protection system to have a higher potential for harm to the environment and the regulatory program than failing to install a system, because it is the pattern of regular testing and upkeep that can determine the potential for corrosion before the equipment is compromised. CX-36, at appendix A, subpart C. For example, cathodic testing can determine whether additional maintenance is required, or whether the situation has changed such that upgrades to the cathodic protection system are necessary to meet the performance standards in 40 C.F.R. § 280.20.

Counts 5 and 6: A major deviation from the regulatory requirement means the violator deviated from the requirements of the regulation or statute to such an extent that there is

substantial noncompliance. In this case, failing to install, operate, and maintain cathodic protection to the underground piping which regularly carried regulated substances left that piping vulnerable to corrosion, and indicates substantial noncompliance with the regulations.

Exhibit 4 of the UST Penalty Guidance, as amended by the Revised Matrix Memo, shows that a “moderate” potential for harm to the environment and the regulatory program and a “major” deviation from the regulatory requirement has a matrix value of \$750, which as a result of the Inflation Rule, is adjusted to \$1,060. As previously stated, a “major” potential for harm to the environment and the regulatory program and a “major” deviation from the regulatory requirement has a matrix value of \$2,130.

Respondents failed to install, operate, or maintain corrosion protection on the siphon line from at least May 1, 2009, until Respondents installed a sacrificial anode for the siphon line on February 13, 2013. Answer, ¶ 1.12. As Respondents were in violation of 40 C.F.R. §§ 280.20 and 280.31 for at least 1,365 days, the “days of noncompliance multiplier” is 5.5. As mentioned above, the Matrix Value is modified by an environmental sensitivity multiplier of 1 and a Violator Specific Adjustment of 1.2.

$$40 \text{ CFR } \S 280.20: \quad \$1,060 \times 5.5 \times 1 \times 1.2 = \$ 6,996$$

$$40 \text{ CFR } \S 280.31: \quad \$2,130 \times 5.5 \times 1 \times 1.2 = \$14,058$$

The UST Penalty Guidance states that violations of 40 C.F.R. § 280.20(b) should be assessed on a “per piping” basis while violations of 40 C.F.R. § 280.31, should be assessed either on a “per tank” or “per facility” basis. CX-36, at appendix A, subpart D. In this case, the violation is limited to the siphon piping, so the penalty was assessed so that each violation only has one count.

The Economic Benefit was calculated for the delayed cost of installing an anode for the siphon line. Pacific Environmental Services installed a sacrificial anode on the line and conducted a CP test in the amount of \$15,939. CX-12. The invoice for this service was provided to EPA with the test result. The interest rate (6.5%) and the number of days of noncompliance (1,385) were plugged into the equation for delayed costs and the total delayed cost was calculated to be \$3,931.

$$\text{Delayed Costs} = \left( \$15,939 \times 0.065 \times \frac{1385}{365} \right) \times (1 - 0.15) = \$3,931$$

As the economic benefit was relevant to Count 5 and Count 6, it was divided equally between the two. Thus, the penalty recommended in the Complaint is:<sup>3</sup>

$$\text{Count 5: } \$ 6,996 + \frac{\$3,931}{2} = \$ 8,302$$

$$\text{Count 6: } \$14,058 + \frac{\$3,931}{2} = \$16,683$$

*Violation 3, Counts 7-9: Failure to Maintain Financial Responsibility*

40 C.F.R. § 280.93 requires, among other things, that owners or operators of petroleum underground storage tanks must demonstrate adequate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks.

*Counts 7-9:* Respondents failed to maintain adequate financial responsibility on any of the three UST systems, in violation of 40 C.F.R. § 280.93, from at least May 1, 2009, through

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<sup>3</sup> Instead of divided evenly between Counts 5 & 6, the economic benefit could have been assigned entirely to Count 5. That would have no change on the overall penalty, but would change the recommended penalty for Count 5 to \$10,927 and Count 6 to \$14,058.



April 22, 2010; April 24, 2011, through April 22, 2012; and April 24, 2013, through May 1, 2013; by any of the methods set forth in 40 C.F.R. §§ 280.95 through 280.103. Answer ¶ 1.15.

Failure to maintain adequate financial responsibility presents a moderate potential for harm to the environment and the regulatory program and is a major deviation from the regulatory requirement. The UST Penalty Guidance states that failure to comply with financial responsibility requirements, in violation of 40 C.F.R. § 280.93, is assessed as a violation posing a “major” potential for harm and a “major” deviation from the regulatory requirement. CX-36, at appendix A, subpart H.

A moderate potential for harm to the environment and the regulatory program means that the violation causes or may cause a situation resulting in a significant risk to human health and the environment and/or may have a significant adverse effect on the regulatory program. The failure to maintain adequate financial responsibility means that there is no assurance that Respondents are capable of timely completion of corrective action and third-party compensation if there was an accidental release from one or more UST systems. As a result, failure to maintain adequate financial responsibility increases the risk posed by those UST systems to human health and the environment.

A major deviation from the regulatory requirement means the violator deviated from the requirements of the regulation or statute to such an extent that there is substantial noncompliance. In this case, periods of time in which Respondents did not have any of the forms of financial responsibility set forth in 40 C.F.R. §§ 280.95 through 280.103 in place to address an accidental release from Respondents’ UST systems indicates substantial noncompliance. Exhibit 4 of the UST Penalty Guidance, as amended by the Revised Matrix

Memo, shows that a “moderate” potential for harm to the environment and the regulatory program and a “major” deviation from the regulatory requirement has a matrix value of \$1,060.

Respondents failed to maintain adequate financial responsibility on any of the three UST systems, in violation of 40 C.F.R. § 280.93, from at least May 1, 2009, through April 22, 2010; April 24, 2011, through April 22, 2012; and April 24, 2013, through May 1, 2013; by any of the methods set forth in 40 C.F.R. §§ 280.95 through 280.103. Answer ¶ 1.15. As Respondents were in violation of 40 C.F.R. § 280.93 for a period of 730 days, the “days of noncompliance multiplier” is 3.5. As mentioned above, the Matrix Value is modified by an environmental sensitivity multiplier of 1 and a Violator Specific Adjustment of 1.2.

$$\$1,060 \times 3.5 \times 1 \times 1.2 = \$4,452$$

The UST Penalty Guidance states that failure to provide adequate financial responsibility is evaluated on a per facility basis, and assessed in terms of whether the facility failed to meet the requirement for per-occurrence coverage of insurance, in violation of 40 C.F.R. § 280.93(a) and failure to meet the requirement for annual aggregate coverage of insurance, in violation of 40 C.F.R. § 280.93(b). Respondents’ failure to demonstrate financial responsibility for their per-occurrence coverage and their aggregate coverage occurred when Respondents allowed their insurance policies to lapse. CX-3, CX-4, CX-15 and CX-39 – CX-42. As a result, both 40 C.F.R. § 280.93(a) and (b) were violated, and the penalty is applied for each.

$$\$4,452 + \$4,452 = \$8,904$$

The Economic Benefit was calculated for the avoided costs of two years in which financial responsibility was not in place for the UST systems. The avoided cost was the premium paid in 2010 of \$4,306 for each year, so \$8,612 of premiums. CX-40. Following the same method as was used in Violation 1, the interest rate (6.5%), the number of days of

noncompliance (730), and the marginal tax rate (15%) were plugged into the equation for avoided costs and the total avoided cost was calculated to be \$8,272,<sup>4</sup> after following the prescribed calculation method below:

$$\text{Avoided Costs} = \left( \$8,612 + \left( \$8,612 \times 0.065 \times \frac{730}{365} \right) \right) \times (1 - 0.15) = \$8,272$$

Thus, the appropriate total penalty to be assessed is:

$$\text{Counts 7 - 9 } \$8,904 + \$8,272 = \$17,176$$

In turn, that was divided by 3 to get \$3,657 per tank systems for Counts 7-9.

iv. Complainant's Proposed Penalty

After considering the record and the UST Penalty Guidance, Complainant calculated a penalty in the amount of \$63,294.<sup>5</sup>

**2.D. EPA GUIDANCE DOCUMENTS, POLICIES, AND PREAMBLES  
COMPLAINANT HAS RELIED UPON IN THE COMPLAINT**

In addition to documents included within Complainant's Initial Prehearing Exchange, Complainant referenced 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: [www.epa.gov/oust/fedlaws/sept2388.htm](http://www.epa.gov/oust/fedlaws/sept2388.htm).

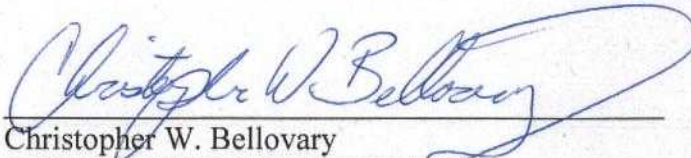
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<sup>4</sup> The penalty memo originally drafted for the Complaint contained an error, as it erroneously used the \$1,076 down-payment of instead of the \$4,306 annual cost. As a result, the Violation 3 penalty in the Complaint is \$6,205 lower than the correct value, shown here.

<sup>5</sup> The error described in Footnote 4 equally affected the total recommended penalty within the Complaint, which is \$6,205 lower than the correct value, shown here. Complainant intends to file a motion to amend the penalty recommendations within the Complaint to conform to EPA's UST Penalty Guidance.

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Respectfully submitted this 23<sup>rd</sup> day of October, 2014.



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