UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)	
	)	
Euclid of Virginia, Inc.	)	
4225 Connecticut Ave. NW	)	**RCRA (3008) Appeal No. 06-05**
Washington, DC 20008	)	
	)	
Docket No. RCRA-3-2002-0303	)	

BRIEF FOR RESPONDENT BEFORE THE ENVIORNMENTAL APPEALS BOARD

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Complainant was required to notify the relevant jurisdictions, the District of Columbia, Maryland and Virginia, prior to commencing the enforcement action in the instant case, pursuant to 42 USC §6991e(a)(2), and, if so, whether Complainant proved that it gave the required notice.

2. Whether Respondent may be charged with noncompliance for periods for which it did not retain records, beyond the period when record retention was required by the regulations.

3. Whether, for reasons stated in Respondent's Brief. Euclid violated the relevant tank release detection regulations.

4. Whether, for reasons stated in Respondent's Brief, Euclid violated the relevant line release detection regulations

5. Whether, for reasons stated in Respondent's Brief, Euclid violated the relevant corrosion protection regulations.

6. Whether, for reasons stated in Respondent's Brief, Euclid violated the relevant spill prevention regulations

7. Whether it is appropriate to penalize Euclid on the basis that it did not conform to the EPA's policies or internal interpretation of the regulatory scheme, where Euclid demonstrated compliance with the plain wording of the regulations.

8. To the extent that respondent may not have conformed exactly to the District of Columbia, Maryland, Virginia and federal tank and line release detection, corrosion protection or spill prevention methodology, or the exact wording of the financial responsibility regulations, is imposition of a high level of penalty appropriate under the circumstances where Euclid did substantially comply

9. Whether for reasons discussed in the Respondent's Brief, imposition of penalties at the level at which they were imposed is proper

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a civil penalty proceeding brought under §3008(a) of the Solid Waste Disposal Act (herein RCRA). The Respondent, Euclid of Virginia, Inc. ("Euclid"), operates 23 retail gasoline service stations located in three jurisdictions, the District of Columbia, Maryland and Virginia. In the First Amended Complaint, Euclid is charged with violating various provisions of 42 USC §6991 through 6991i of the federal underground storage tank regulations, as well as the related statutes and regulations promulgated by the District of Columbia, Maryland and Virginia.

In this action, Euclid was charged with violation of the following provisions: (1) tank release detection, (2) line release detection, (3) corrosion protection, (4) overfill protection, (5) spill protection and (6) financial responsibility. All of the three jurisdictions have approved state programs, which have been authorized pursuant to §9004 of RCRA, and all three jurisdictions regulate each of the six categories of violations that are alleged.

After a trial on the merits, the Administrative Law Judge sustained the Complainant (herein the "EPA") on 69 of the 70 counts which were addressed at the hearing. Of the 74 Counts in the Amended Complaint, four Counts, Counts 19, 64, 65 and 72 were withdrawn by the EPA. The ALJ held that, with respect to Count 47 the EPA did not present sufficient evidence. Of the $3,362,149 in penalties requested by the EPA, the ALJ awarded $3,085,293 in fines.

Euclid appeals the decision of the ALJ in imposing this penalty for the reasons set forth herein.

The ALJ also entered a Compliance Order. Euclid has been under continuous examination by the EPA and believes that it has already satisfied the Compliance Order. The Compliance Order reads that Euclid shall comply, "to the extent [Euclid] has not already done so." Initial Decision at 116. Euclid does, however, contest the Compliance Order to the extent that it is interpreted as requiring Euclid to comply with standards which are more stringent than set forth in the applicable regulations. An example is Count 18, where the ALJ imposes a standard which clearly exceeds the Maryland requirements for corrosion protection. If the Order has not been satisfied in connection with the information provided to the EPA after the hearing, Euclid has no objection to satisfying the requirements of the Compliance Order to the extent of the applicable regulations. For that reason, the portion of the Initial Decision consisting of the Compliance Order is not a subject of this Appeal, provided, however, that the EPA provide a statement of any aspects of the Order which have not been satisfied to-date and give Euclid an opportunity to object to the EPA's requirements. Euclid's acquiescence to the Compliance Order should not be deemed an admission against its interest for any purpose.

ARGUMENT INCLUDING RELEVANT FACTS

1. Whether Complainant was required to notify the relevant jurisdictions, the District of Columbia, Maryland and Virginia, prior to commencing the enforcement action in the instant case, pursuant to 42 USC §6991e(a)(2) and, if so, whether Complainant offered the required proof that that it gave the required notice.

The applicable law requires the EPA to notify the state officials prior to commencement of an enforcement action such as the instant case. 42 USC §6991e(a)(2) states:

> (2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State with a program approved under section 6991c of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

The Initial Decision at page 3, observes that the majority of the Counts in the Amended Complaint involve State, as opposed to Federal, regulations. The regulatory schemes for D.C. and Virginia were approved by the EPA before and during the period covered by the alleged violations, and so there is some overlap between the federal and the state regulatory scheme with respect to these two jurisdictions. The Initial Decision cites to the relevant provisions of the federal and state statutes and regulation on these points at page 3.

As noted in the Initial Decision at page 7, the EPA concedes that there was no formal, written notification to any of the three state jurisdictions preceding the commencement of this action. The EPA invited the Tribunal to consider the fact that there had been involvement of the state environmental personnel in the investigation of Euclid as satisfying the notice requirements. Under this rationale, the Initial Decision rejects Euclid's contention that the notification requirements of 42 USC §6991e(a)(2) were not met.

The difficulty with this position is that, in the instant record, there is absolutely no evidence that any form of notice, oral, written or otherwise, was ever given to any of the 3 states involved, even though all of the states have an environmental compliance program which was approved prior to the filing of the Complaint. Rather, despite a statement on the record by Euclid's legal counsel at the close of Complainant's case that Euclid would seek verification that the appropriate notice had been given, and Complainant's representations on the record that the notice would be provided, the Complainant never did introduce any evidence that it gave notice. Regarding the required notifications of the State, Complainant's counsel stated on the record that:

. . . . I believe that, that the notifications were verbal and we will put on – one of our witnesses will, will be testifying. Anyway, she will testify that she provided this notification to the state. Tr-1 at 43.

No witnesses were called and no evidence of notice was produced. The EPA relies solely on inferences to meet the notice requirement. These inferences, Complainant argues, may be drawn from the representations that the Complainant and some personnel from the environmental departments of the three jurisdictions were jointly engaged in an investigation of Euclid. The record is devoid of any indication that any particular notice was given, the content of the alleged notice, whether the alleged notice was oral or written, the date of the alleged notice, or anything else pertaining to the alleged notice.

Inferential notice is insufficient under the statute. In order to properly bring this action, the EPA must affirmatively and explicitly notify the states some time prior to the filing of the Complaint. In the trial of the action, the EPA must plead and prove that it provided the notice.

In *Harmon Industries v. Browner*, 191 F3d 894 (1999), the court addressed the specific requirement of prior notice. The court held that the notice provisions of the statute were to be interpreted under the plain meaning standard. Under this standard, giving notice means providing notification to the states. The court stated:

> Rather than serving as an affirmative grant of federal enforcement power as the EPA suggests, we conclude that the notice requirement . . . reinforces the primacy of a state's enforcement rights under RCRA. Taken in the context of the statute as a whole, the notice requirement operates as a means to allow a state the first chance opportunity [sic] to initiate the statutorily permitted enforcement action. If the state fails to initiate any action, then the EPA may institute its own action. Thus the notice requirement is an indication of the fact that Congress intended to give states, that are authorized to act, the lead role in enforcing the RCRA.
>
> 191 F.3d at 899.

Earlier in the opinion, the Court noted:

> The plain language of section 6928 allows the federal agency to initiate an enforcement action against an environmental violator even in states that have received authorization . . . . The only requirement, according to the EPA, is that the EPA notify the state in writing if it intends to initiate an enforcement action against an alleged violator.
>
> 191 F3d at 898-899 (Emphasis added).

The policy reasons behind this express statutory notification requirement are obvious. Not only does the notification requirement allow the states with approved programs to take whatever actions they may deem appropriate, but it also protects the entity, such as Euclid, which is the subject of the investigation. This prevents the entity that is the subject of the investigation from being forced to report to two different, and potentially conflicting, regulatory bodies. The states have roving inspectors who regularly visit UST sites to monitor compliance. The Respondent is under continuous regulatory supervision of the states. The states are constantly monitoring Respondent's compliance with the regulatory requirements and Respondent is constantly interfacing with state inspectors and regulators. In addition, the approved state-specific compliance regulations deviate from the regulations promulgated by the EPA. This deviation is a result of perceptions by the states that unique characteristics of state law, business practices, and the state's ecology are appropriate reasons for state-specific regulations.

It is therefore critical that the states be given notice that the EPA intends to bring an enforcement action, particularly of the magnitude of this enforcement action. The notice requirement is minimally burdensome on the EPA. All that is required is that some notice be given prior to commencement of the case, and that the notice inform the state that of the name of the intended respondent and a brief indication of the nature of the alleged violation.

In its post-hearing brief, Euclid cited *Brenntag Great Lakes LLC* RCRA-05-2002-0001, reported at 2002 WL 31926407. In *Brenntag*, there was proof that the State of Minnesota had requested the EPA to enforce the environmental laws:

> In the case at bar, the EPA is not attempting to contradict the actions of the state. Instead, it is undisputed that the state asked the Federal government to enforce this case and gave them the materials to prosecute the case. Affidavit of Kim S. Kuck.
>
> *Brenntag,* Opinion Denying the Cross-Motions for Accelerated Decision

The Initial Decision in *Brenntag* also quotes from the applicable RCRA notice requirements and holds that the notice requirement was met because the affidavit states that it had been the state which requested the EPA to commence the enforcement case.

In the instant case, the EPA did not demonstrate that any of the three jurisdictions had requested it to commence the instant case, or that the EPA notified any of the jurisdictions that the investigation would lead to the commencement of the instant case. As pointed out in the Initial Decision, at page 4, the EPA conducted a broad investigation of Euclid's operations in 2001, about a year before filing the instant case. These investigations could have had a number of outcomes distinct from filing the instant case. Even to the extent that the state personnel were aware of these investigations, and may have assisted the EPA, there is no indication that any of the states received any prior

notice, much less a prior written notice as required by *Harmon Industries* , or even any notice-in-fact.

Commenting in the *Brenntag* case on the language of the statute, this court observed:

> The provisions of section 3008 are quite clear. They provide that when a State, like Minnesota, enacts its own hazardous waste program which is approved by the EPA, the Federal government must give the State notice before taking enforcement action. A fair reading of these statutory provisions is that such Federal enforcement action is based upon a particular state's hazardous waste regulations, which, by law, take the place of the Federal hazardous waste regulations.

In the context of citizen enforcement of RCRA, the U.S. Supreme Court has held that prior notification is a jurisdictional prerequisite. *Hallstrom v. Tillamook County*, 493 US 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1990)(citizen's suit required to be dismissed for lack of jurisdiction where notice not given to the EPA because the "plain language" of the statute required prior notice); *U.S. v. Power Engineering Co.*, 125 F.Supp 2d 1050 (D. CO, 2000)(Declining to follow *Harmon*, *supra* as to "overfiling" in a state but sustaining its holding as to requiring notice by EPA to state prior to filing).

It is not sufficient from an evidentiary standpoint that the ALJ infer from what he believes to be the conduct of the investigation by the EPA that the states "must have known" that the EPA intended to file the instant case. The EPA had ample opportunity, at trial and in the post-trial process, to demonstrate that it complied with the clear notice mandate of §6991e(a)(2). If the EPA had evidence of compliance with the notice requirement, it would have been a simple matter to bring this evidence before the tribunal. The fact that the EPA chose not to do so can only be interpreted against the EPA, which has the burden of proof on this point. Accordingly, it has not been shown that the EPA complied with the clearly articulated statutory notice requirements and so the case should be dismissed. EPA must affirmatively prove by sufficient evidence that it notified the states. *Hazardous Waste Treatment Council v. U.S. E.P.A*, 886 F.2d 355 (DC Cir. 1989) interpreting 5 USC §556(d).

The remaining discussion in this brief is offered without prejudice to the Respondent's contention that the Tribunal below is without jurisdiction due to the failure of notice.

2. Whether the penalties imposed are excessive.

In the instant case, the EPA has attempted to inflate the failure to follow its guidance into reasons for enhanced penalties. Euclid does not contend that it complied in all instances with all of the regulations. However, Euclid's operations over an extensive period of time show no environmental degradation. There were no leaks, no spills, nothing of the kind. Many of the alleged violations were caused not by Euclid but rather by certified tank installers and other state-certified outside contractors. All of the personnel who installed and maintained Euclid's UST systems were licensed by the respective states. The penalties were excessive particularly counts related to line release detection, corrosion protection, overfill prevention and spill prevention, where the contractors had the direct responsibility for installation and maintenance. The alleged violations are summarized at page 6 of the Initial Decision.

The tank release detection counts involve a disagreement between Euclid and the EPA regarding the proper method of inventory reconciliation. Euclid performed inventory reconciliation by taking an inventory sheet with delivery and ending inventory recorded for all locations on a daily basis. This sheet was reviewed daily by a manager and then entered into a spreadsheet by Euclid's president and reviewed more frequently than monthly. The EPA guidance suggests that the tank release detection be performed on a tank-by-tank basis, but none of the applicable regulations make this explicit.

Even assuming that Euclid did not fully comply with the tank release detection standards, the penalty levels were set at a level far in excess of what even the alleged violations would have warranted.

With respect to line release detection, Complainant introduced evidence of water intrusion into the sumps which are used as a containment vessel in the event of a line leak. Complainant also complains of tight "boots." Respondent had the sumps installed and maintained by state certified personnel. Respondent also contracted with a state certified remediation company to remediate sump problems.

With respect to corrosion protection, Complainant introduced evidence that testing was not performed properly, but Euclid used only certified testers. There were complaints about the installation and maintenance of the systems, but again, the systems were installed and maintained by certified contractors. Most agregiously, Complainant argues that the wrapping of the small metal fittings which are a component of a fiberglass system does not qualify as meeting the corrosion protection requirements where, as recently as late 2006, the Maryland Department of the Environment recommended this method.

The overfill drop tubes were observed by Complainant to be improperly installed, so that they did not penetrate deeply enough into the tanks, and in one instance that a tube was upside down. Obviously these tubes were installed by the contractor who installed the tank or by a maintenance contractor. All contractors involved with UST's in all 3

jurisdictions must be certified.

The spill containment facility was also maintained by a certified contractor.

In all of these instances, the ALJ upheld the EPA's assignment of major or moderate/major levels of environmental impact, resulting in most instances in the highest matrix values in the regulations. The ALJ, also without any direct evidence to sustain these findings, held that Euclid was, for the most part, highly uncooperative, highly negligent, that the violations were willful, and that Euclid had a high level of noncompliance.

With respect to the allegations related to tank release detection, the matrix values asserted by the EPA and accepted by the ALJ were all Major or Moderate/Major. The evidence at the trial, discussed at length below, showed, at worst, that Euclid maintained a tank leak detection system at all facilities at all times. At best, the evidence shows that Euclid was slow to upgrade some of the systems. On the basis of that evidence, the ALJ sustained

This characterization of the penalties had the following effect. It charged that Euclid was directly at fault and involved in the alleged violations, and then this method increased the penalty charged by to an average of 147% of the Major or Moderate/Major levels identified in the case. The direct effect of this excessive characterization was to charge Euclid in the aggregate more than $1,230,000 in penalties under the Counts involving tank release detection.

For the line release detection counts, the same penalty categories were utilized. Evidence supporting noncompliance with line release detection standards consisted entirely of inferences drawn from missing line release detection records. Without exception, those test records which were available indicated that the sites passed the line leak tests. Joint Stipulation 7 reads, "Respondent has never used its own employees to perform line leak detector tests and line tightness tests on any UST which it has owned and/or operated, but it has always used paid contractors to perform such testing."

As with the tank release detection counts, the direct effect of the excessive characterization of the line release detection counts resulted in a computed penalty again in excess of $1,280,000 in the aggregate. Since a line which is leaking on day one will not spontaneously stop leaking on day two, a passing line leak test on day two is also proof that the line was not leaking on day one. Euclid did not maintain records of all of the tests performed if there were passing line leak tests. The penalty imposed here is clearly excessive.

With respect to corrosion protection, even though the corrosion protection was performed by state-certified independent contractors, the ALJ sustained the Complainant's characterization of the alleged violations as Major/Major or Moderate/Major. The ALJ also sustained factors ranging up to 65% for noncooperation,

negligence, willfulness and history of noncompliance. As a result, the penalty charged is clearly excessive. The penalty imposed for tank cathodic protection is in excess of $300,000 in the aggregate.

Counts involving overfill drop tubes penalize Euclid for the failure to install the drop tubes according to the specifications of the EPA's expert. The evidence at trial clearly indicates that these drop tubes were installed according to the manufacturer's specifications. In any event, the drop tubes were all installed by independent third-party state-certified contractors. For the overfill counts, based on absolutely no evidence of Euclid's involvement in the installation of these facilities, the ALJ imposed a penalty in excess of $129,000.

Attached hereto as Exhibit A is a spreadsheet which reproduces the penalty calculation from the Complaint as sustained by the ALJ. It is Euclid's position that, in the event that penalties should be imposed, they are calculated improperly given the facts proven by the EPA at the trial. As can be seen from an analysis of this Exhibit, in order to sustain penalties at this level, the ALJ utilized the highest penalty levels in the regulations.

Of particular concern to Euclid is the fact that in many instances, the ALJ imposed a penalty which is higher that the penalty requested by the EPA. There is no evidence in the record, or discussion in the Initial Opinion, which would justify the imposition of higher penalties. As is evident from reviewing Exhibit A, where a negative number in parentheses indicates a higher penalty than the penalty requested in the Complaint, for many of the Counts, increases ranging from a few hundred to almost ten thousand dollars per Count were imposed. A total of $155,326 in penalties was asserted in excess of the penalties requested in the Complaint, as detailed on Exhibit A.

In *U.S. v. DiPaolo*, ___ F.Supp.2d ___, 2006 WL 3780411 (S.D. NY 12/15/06), the court discussed the appropriateness of *de minimus* penalties. *De minimus* penalties are not inappropriate where the penalty is fair to the respondent while satisfying the articulated purposes of RCRA. In *DiPaolo*, the respondent had a default order entered against it at the administrative level. The EPA sued to reduce the administrative default to judgment, and also to assess an additional $42MM in additional fines occasioned by the respondent's repeated disregard for deadlines imposed at the administrative level as well as the respondent's ignoring information requests, failing to comply with the ALJ's compliance order and other improper conduct.

The court in *DiPaolo* held that under the circumstances a *de minimus* penalty of just over $9,000 was warranted instead of the forty-two million dollar penalty which would have been assessed under the EPA's regulatory penalty guidelines. The court noted that draconian penalties are never appropriate. Furthermore, a penalty should be gauged to encourage compliance and any penalty assessed must be measured under this standard.

Finally, the *DiPaolo* court noted that the absence of a release of gasoline into the environment indicated that a penalty on the higher end of the penalty scale was not appropriate. The tanks in the *DiPaolo* case were not cathodically protected, they lacked release detection and in many other ways were seriously out of compliance.

In the instant case, there was no release of gasoline or other controlled substance into the environment. Euclid did not fail to install automatic tank gauging equipment. In some instances, the equipment was installed after the applicable deadlines but during the entire period Euclid was monitoring the tanks and lines for releases.

Regarding line release detection, corrosion protection, overfill prevention and spill prevention, Euclid relied on state certified contractors to install and maintain this equipment.

Under the circumstances, imposing a fine of such a magnitude as was imposed by the ALJ in this instance is not warranted. Likewise, it is not appropriate to accept the EPA penalty guidelines for imposition of a penalty without a review of the actual conduct of the Respondent. Euclid never released anything into the environment. Judging Euclid liable under the levels of environmental impact, as was done in computing the penalty in the Initial Decision by the Tribunal in the instant case, is not warranted. If these levels of penalty are appropriate for a respondent who has only technical violations, what levels would be left to penalize an entity which actually harmed the environment?

The EPA did not prove that Euclid failed to conform its conduct to the environmental regulations. At best, for the most part, the EPA proved that Euclid did not comply up to the highest standards set forth in the EPA's guidance.

In general, the factors to be considered when imposing a penalty as specified in 42 USC §6928(a)(3) are:

(1) the application of the twin statutory penalty factors of "seriousness of violation" and "good faith efforts to comply;"

(2) the economic benefit of noncompliance

If a respondent demonstrates good faith efforts to comply with the regulations, this factor should be considered in the penalty computation. It is Euclid's position that the Tribunal totally discounted its clear evidence of actual and good-faith compliance and imposed a penalty based on a standard derived from the EPA's "wish list" compliance practices.

Moreover, in the instant case, the economic benefit, as found by the Tribunal, is minimal for all violations. A table of economic benefit is shown below:

Count/Initial Decision Page	Alleged Violation	Avoided Cost Per I.Dec.	Penalty
1/p. 23	Tank release detection	$ 1,275	$ 180,100
2/p. 50	Line release detection	$ 907	$ 85,304
3/p. 115	Financial Responsibility	None	$ 22,866
4/p. 52	Line release detection	$ 907	$ 35,977
5/p. 115	Financial Responsibility	None	$ 17,998
6/p. 25	Tank release detection	$ 6,141	$ 89,878
7/p. 54	Line release detection	$ 605	$ 50,499
8/p. 78	Corrosion Protection	$ 484	$ 21,934
9/p. 27-28	Tank release detection	$ 1,876	$ 21,016
10/p. 29	Tank release detection	$ 978	$ 13,683
11/p. 54	Line release detection	$ 907	$ 15,262
12/p. 55	Line release detection	None	$ 11,495
13/p. 79	Corrosion Protection	None	$ 3,000
14/p. 80	Corrosion Protection	None	$ 2,500
15/p. 31	Tank release detection	$ 3,652	$ 56,288
16/p. 56	Line release detection	$ 605	$ 73,604
17/p. 82	Corrosion Protection	$ 968	$ 47,962
18/p. 84	Corrosion Protection	None	$ 7,177
19	N/A	N/A	N/A
20/p. 57	Line release detection	$ 1,210	$ 34,075
21/p. 96	Overfill Prevention	None	$ 15,000
22/p. 32	Tank release detection	$ 2,489	$ 26,414
23/p. 58	Line release detection	$ 302	$ 15,152
24/p. 59	Line release detection	$ 1,210	$ 27,527
25/p. 61	Line release detection	$ 1,210	$ 42,680
26/p. 97	Overfill Prevention	$ 528	$ 6,930
27/p. 62	Line release detection	$ 1,512	$ 47,371
28/p. 63	Line release detection	$ 1,210	$ 45,540
29/p. 98	Overfill Prevention	$ 528	$ 15,000
30/p. 33	Tank release detection	$ 4,818	$ 126,038
31/p. 64	Line release detection	$ 1,210	$ 129,910
32/p. 88	Corrosion Protection	$ 528	$ 101,689
33/p. 99	Overfill Prevention	None	$ 4,455
34/p. 106	Spill Prevention	None	$ 4,840
35/p. 35	Tank release detection	$ 7,285	$ 168,985
36/p. 65	Line release detection	$ 1,512	$ 162,387
37/p. 93	Corrosion Protection	None	$ 859
38/p. 116	Financial Responsibility	None	$ 23,622
39/p. 37	Tank release detection	$ 4,452	$ 85,964
40/p. 66	Line release detection	$ 1,210	$ 68,035
41/p. 89	Corrosion Protection	None	$ 3,000

42/p. 100	Overfill Prevention	None	$ 7,276
43/p. 39	Tank release detection	$ 2,489	$ 88,619
44/p. 67	Line release detection	$ 907	$ 32,807
45/p. 91	Corrosion Protection	$ 968	$ 8,744
46/p. 101	Overfill Prevention	$ 502	$ 19,500
47/p. 39-40	Tank release detection	-0-	-0-
48/p. 68	Line release detection	$ 1,210	$ 42,680
49/p. 102	Overfill Prevention	None	$ 12,870
50/p. 41-42	Tank release detection	$ 3,654	$ 116,899
51/p. 69	Line release detection	$ 1,512	$ 73,287
52/p. 92	Corrosion Protection	$ 4,177	$ 20,264
53/p. 103	Overfill Prevention	None	$ 28,387
54/p. 53	Tank release detection	$ 3,654	$ 100,000
55/p. 70	Line release detection	$ 1,512	$ 73,287
56/p. 116	Financial Responsibility	None	$ 22,110
57/p. 44	Tank release detection	$ 3,654	$ 65,000
58/p. 71	Line release detection	$ 1,210	$ 68,200
59/p. 95	Corrosion Protection	$ 484	$ 86,973
60/p. 104	Overfill Prevention	None	$ 18,089
61/p. 116	Financial Responsibility	None	$ 22,110
62/p. 46	Tank release detection	$ 4,587	$ 66,392
63/p. 72	Line release detection	$ 1,512	$ 71,121
64	N/A	N/A	N/A
65	N/A	N/A	N/A
66/p. 73	Line release detection	$ 302	$ 19,422
67/p. 116	Financial Responsibility	None	$ 11,289
68/p. 74	Line release detection	None	$ 12,760
69/p. 116	Financial Responsibility	None	$ 4,881
70/p. 47	Tank release detection	None	$ 30,000
71/p. 75	Line release detection	$ 7,210	$ 45,760
72	N/A	N/A	N/A
73/p. 92	Corrosion protection	None	$ 3,000
74/p. 105	Overfill Prevention	None	1,930
	Totals:	$ 84,989	$ 3,084,573

Note: The Initial Decision at page 3 totals the penalty at $3,085,293. The $720 discrepancy cannot be located by Respondent.

A penalty of the magnitude or the penalty asserted in the instant case is not going to act as a deterrent to Euclid or any other entity which is making a good faith effort at compliance. The penalty should be reduced substantially, to meet the goals of fostering compliance and rationally administering the environmental laws. If penalties like the one imposed in this case are the norm, then the service station business will be transformed into an enforcement lottery, with those selected for enforcement being driven out of business. A penalty of the magnitude imposed in this case requires a showing of extreme

fault. In the instant case, all that was demonstrated was that Euclid did not technically comply with certain aspects of the regulations, and that Euclid did not conform its compliance to extra-regulatory interpretations promulgated by the EPA.

This observation is not merely speculative. In *The Washington Post* for February 13, 2007, on page D-1, there is an article entitled "Inspectors with LUST in Their Hearts" by Cindy Skrzycki. That article quotes the EPA as follows: "About 62% of the 640,000 remaining underground tanks are in compliance with federal release-prevention and detection rules, the EPA said. The tanks can hold up to 12,000 gallons of fuel . . . ." If the statistics in this article are accurate, there are 243,200 tanks out there, as of 2007, which do not even have the same level of compliance as Euclid's tanks had when the EPA investigation started in the instant case. Selective enforcement against Euclid with the level of penalties imposed is not appropriate, fair or in accordance with the law and precedent regarding imposition of penalties.

The EPA may argue that the penalties are set at the level at which the Tribunal imposed them because the violations have a serious negative impact on the implementation of the environmental protection scheme set forth in the RCRA. However, in this case, Euclid did not deliberately violate any of the statutes or regulations. Although Euclid's compliance is not perfect, it certainly made a good-faith attempt to comply. Euclid had release detection and other controls in place at all relevant times. The violations with the highest penalties, tank release detection and line release detection, are overstated even under the RCRA enforcement impact standard. In both instances, Euclid had a policy of monitoring for leaks which it followed which worked. The implementation of the ATG system for tank monitoring was problematic, until the ATG equipment was upgraded by the various manufacturers after the period at issue in this case. During the periods at issue, there were repeated false positive readings for leaks. With respect to the line leak detection, Euclid's lines and sumps were installed by a certified contractor and Euclid had a contractor on-call to respond to alarms.

This is not a case of a respondent who deliberately violated RCRA or was so grossly negligent that its sole negligence created a risk of substantial harm. Under the circumstances, the penalties imposed are grossly excessive.

The Environmental Appeals Board has the authority to reduce the penalty imposed in this case pursuant to 40 CFR §22.31(a). In the case of *In Re Rybond, Inc.*, 6 E.A.D. 614 (1996), the Board reduced a penalty imposed on an entity which was leasing a site to a tenant which operated an unlicensed hazardous waste dump. In *Rybond*, the penalty was reduced from $178,986 to $25,000 on a showing that the respondent was apparently not aware that one of its tenants was storing hazardous waste in two tanks on the premises in connection with the operation of a machine shop. This case is directly analogous in many respects to the instant case, because Euclid, relying on qualified contractors, was not aware of the problems with its impressed current system, drop tube installation and other similar defects in its environmental control mechanisms.

The Board in *Rybond* also noted that the requirements of RCRA were appropriately met by a reduced penalty, finding that:

> . . . "a primary purpose of civil penalties is deterrence." In re Sav-Mart, Inc., 5 E.A.D. 732, 738 (1995). Rybond asserts that upon learning of the "alleged violations," it "worked cooperatively with EPA" to dispose of the hazardous wastes. Although any good faith efforts to comply after a violation has been discovered typically do not constitute a basis for reducing a penalty amount under the RCRA Penalty Policy, Rybond's efforts provide some evidence that under the circumstances of this case a substantially reduced penalty amount is appropriate and will be sufficient to deter Rybond from future violations.

As noted in the Joint Stipulations, the locations supplied with petroleum by Euclid were operated under contract with the on-site operator. J. Stip. # 19, 60, 72, 82, 109, 121, 129, 135, 149, and 152, as well as testimony elicited at the hearing, makes it clear that each of the 23 locations was operated by Euclid's lessee. As such, the holding in *Rybond* is directly on point.

During and after the EPA investigation, Respondent engaged in a complete upgrade of its tank and line release detection systems and methodology. This upgrade was done not only to facilitate compliance with the regulatory requirements, but it was also facilitated by the substantial improvement in the available technology. Technology available in 1995 (when the District of Columbia required automatic gauging) and 1998 (when Virginia and Maryland followed suit) was unreliable. Euclid also upgraded its other practices so as to exceed the RCRA requirements. Euclid's practices currently exceed the standards which the EPA has argued apply to the instant case.

It is submitted that a more appropriate penalty would be an across-the-board $10,000 per site penalty, yielding a total of $230,000, plus the avoided cost totaling $84,989, for a total of $314,989. Such a penalty is substantial but it is not unfair and it meets the competing goals involved in environmental enforcement.

2. Whether Respondent properly conducted tank release detection, and whether Complainant presented adequate competent evidence sufficient to sustain the penalties. The following counts relate to the allegations in the Complaint that Respondent failed to properly conduct tank release detection:

No.	Facility	Count	Jurisdiction
1.	420 Rhode Island	1	DC
2.	42832 Mosby Hwy	6	VA
3a.	13793 Spottswood Trail	9 post-closing	VA
3b.	13793 Spottswood Trail	10 pre-closing	VA
4.	4123 Ocean Gate (Trappe)	15	MD
5.	3507 Enterprise	22	MD
6.	3900 Frederick	30	MD
7.	4225 Connecticut	35	DC
8.	6181 Annapolis	39	MD
9.	6038 Baltimore Ave	43	MD
10.	7887 Barlow Rd	47	MD
11.	3800 Rhode Island	50	MD
12.	1576 Wisconsin	54	DC
13.	22 Florida Ave	57	DC
14.	15501 New Hampshire	62	MD
15.	5608 Buckeystown	70	MD

3A. Record Retention and Conforming Method of Inventory Reconciliation. At trial, Respondent produced its records of tank release detection, i.e. compliance with the tank tightness release control regulations utilizing the inventory control method, Respondent's Exhibit X-5. This reconciliation shows results of inventory reconciliation on a facility-wide basis for all facilities, commencing on January 1, 1999. Leon Buckner, Euclid's general manager, testified regarding the procedures utilized for tank leak detection, Tr-10 at 137-142 and again at 152-158. Mr. Buckner testified that, since prior to September, 1997, he receives daily inventory sheets from the various facilities, which he reviews for loss of inventory on a daily basis. Mr. Buckner then forwards to Mr. Yuen periodically. Mr. Yuen compiles the daily inventory sheets and examines them for variances more frequently than monthly. Tr-10 at 158-159. Any end of month discrepancies in inventory are investigated by Euclid personnel or, if necessary, by sending an outside maintenance and repair company to the site. Tr-10 at 159-164. The computer printout of these monthly inventory summaries is Respondent's X-5.

The evidence presented and unrebutted shows that the inventory control sheets were compiled and reviewed daily by Mr. Buckner, in full compliance with 40 CFR §280.43(a)(1).

The regulations, 40 CFR §280.43, requires that the inventory control records be reconciled at least monthly in order to determine if the inventory shortage indicates a

leak. The inventory control consists of reconciling the beginning inventory with purchases and sales. This figure should correspond with the ending inventory as measured in the tanks. The reconciliation process results in sheets which contain the reconciliation figures.

In connection with the release detection requirements, the Court rejected Euclid's argument that its failure to produce tank tightness records for the entire length of time from the commencement of the assertion of penalty, September, 1998, until the commencement of the Euclid investigation in June of 2001, was, standing alone without any other evidence, insufficient to establish that Euclid did not properly utilize the inventory control method of tank leak detection verification. Initial Decision at 14.

The evidence offered by the EPA on this point consisted, in its entirety, that Euclid did not have sufficient records to show to its investigators to verify that Euclid had conducted uninterrupted tank leak detection for the entire period. The EPA was not able to point to a leak or other maintenance problem, or to a release of controlled substance (i.e. gasoline or oil) into the environment to prove that Euclid was not conducting tank tightness testing.

Euclid's position is that it was conducting tank leak detection testing using inventory reconciliation. This method was proper for the Euclid facilities in Maryland and Virginia. In these states, the inventory reconciliation method may be used to test tank tightness either prior to December 22, 1998 or for tanks less than 10 years old. The tanks at issue in Maryland and Virginia qualify for this method. The tanks in the District of Columbia do not. The District of Columbia mandated that other methods be used after 1995. The discussion below relates to the Counts involving UST's located at Maryland and Virginia stations.

The Court opined that Euclid did not demonstrate that it met the tank leak detection requirements because it did not have records demonstrating that it had met the requirements. However, Euclid is not required anywhere in the regulations to retain tank test records for an extended period of time. Moreover, fact that Euclid's records are incomplete is not, without more, sufficient to establish that Euclid did not satisfy the tank leak detection requirements.

40 CFR §280.45(b) imposes a one-year, or other reasonable time period, as a record retention period for results of sampling, testing and monitoring for release detection. That section imposes a one-year minimum record retention requirement, but does not specify a maximum period, other than that the records be retained for a "reasonable" period of time. Prior to the instant case, Euclid had never been the subject of an environmental investigation which would have required it to produce records even as old as one year.

In the cases of *Baltimore Gas & Electric Co.* 76 Md. PSC 181 (1985), *C&P Telephone Co. v. Comptroller*, a decision of the Maryland Tax Court, *Comptroller v.*

DIGI-Data Corp., 317 MD 212, 562 A.2d 1259 (1989) and *Bly v. Tri-Continental Industries, et al.*, 663 A.2d 1232 at 1236 (D.C. App. 1995), establish the proposition that an entity cannot be held liable for an alleged violation if a defense of that violation would require the entity to produce records which the entity is not required to retain. In this case, the records of inventory control provided by the Respondent extend well prior to June of 2001, the anniversary date of the investigation which resulted in the filing of this case by the Complainant. There is no legal basis for holding Respondent liable for failure to perform tank leak detection for any prior periods, in the absence of evidence that a longer retention period is objectively "reasonable." There is no such evidence in the record.

The Court rejected the argument that Euclid cannot be held liable for the alleged violation of tank leak detection regulations solely on the evidence of a lack of records, without discussing or distinguishing the precedent cited by Euclid. The Court's position was that Euclid was not entitled to rely on any record retention standards to rebut the contention that it was not satisfying the tank tightness test requirements. It is respectfully submitted that Euclid is entitled to a presumption that it performed the tank tightness testing and the EPA, with few exceptions related to specific instances, did nothing to rebut this presumption. The testimony of Euclid personnel and Euclid's exhibits are the only proof in the record regarding the actual performance of tank leak detection tests. The only rebuttal to this is such inference as may be drawn from the incomplete state of Euclid's records at the time of the EPA investigation.

In the following cases cited to the Tribunal, the courts held that a lack of records was not sufficient evidence to hold a recordkeeping party liable for matters for which the records would have exonerated the party. In Euclid's case, it presented uncontradicted testimony and other evidence that the unavailability of the records for the instant case was due to extrinsic factors.

In the case of *Murphy v. McGraw Hill Cos.*, 2003 WL 21788979 (WestLaw)(S.D. Ohio, 2003), the court considered whether the inadvertent destruction of certain records supported an inference that the records contained information which would support the other party's case. In *Murphy*, the plaintiff brought a discrimination claim. The federal statute required record retention for a one year period. The state statute required record retention until the complaint or investigation of discrimination is finally adjudicated. The defendant in *Murphy* either misplaced or discarded certain records related to the complaint prior to the expiration of the statutory record retention period. There was no fault demonstrated by the *Murphy* plaintiff related to the loss of the relevant documents. The court in *Murphy* held that the mere absence of documents would not give rise to an inference that the documents would have supported the plaintiff's position, unless the plaintiff could demonstrate that the documents were deliberately lost or destroyed. In *Wolfe, Infant, by Ronda L. Wolfe, Mother and Next Friend, v. Virginia Birth-related Neurological Injury Compensation Program*, Record No. 2489-02-3, May 20, 2003, (included in Resp. Post-Hearing Brief) Court of Appeals of Virginia, the court also held that an innocent loss or destruction of the records by a physician related to a delivery of a

baby would not support an inference that the physician was negligent, without more.

Neither the EPA nor the Tribunal cites any precedent contrary to these cases. The Tribunal's rebuttal is simply that Euclid should have retained the records. It is respectfully submitted that this rationale is *post hoc* reasoning; it attempts to impose a requirement on Euclid years after the records were discarded.

In the absence of other evidence, the absence of records on the record of this case does not establish liability for failure to maintain tank leak detection. There was no other evidence to show that Respondent was not performing the appropriate testing.

At the hearing, there was considerable testimony and evidence regarding record retention requirements as well as the actual record retention practices of Euclid. It is respectfully represented that the trial established that Euclid's record retention was reasonable, and therefore it is not adequate for the EPA to attempt to establish violations of the tank tightness test requirements in the absence of evidence that the tanks were not tight. The EPA conducted an extensive investigation in this case, interviewing a number of Euclid employees and affiliates. None of the investigation established by extrinsic evidence that Euclid was not performing tank leak detection tests. The only evidence produced by the EPA for the majority of the tank leak detection allegations was that Euclid could not demonstrate that it had performed the tests years ago because of a lack of records.

There was some conflicting testimony regarding the record retention requirements applicable to Respondent. However, none of the testimony elicited by the EPA demonstrated that Euclid's record retention was not reasonable. Joan Meyers, a consultant who had assisted in the drafting of the EPA regulations related to financial responsibility, and who qualified as an expert in finance, testified that the Internal Revenue Service, Small Business Administration and other bodies recommend various record retention periods in excess of one year. Tr-6 at 90 and following. However, she was unable to point out any EPA regulations which require release detection-related records to be retained in excess of one year. Dr. Meyers testified that the conclusion of an Internal Revenue Service tax audit of Euclid would have no effect on the record retention requirements. Tr-6 at 98 and following. Euclid's expert, Edward Davis (discussed below) rebutted this testimony. Dr. Myers had no experience with record retention by small businesses after the conclusion of a tax audit.

Mr. Koo Yuen, Euclid's president, testified that Respondent had been audited by the IRS in 2001 and that the audit was successfully concluded. He also testified, Tr-13 at 59 - 61 that after the IRS audit, Euclid discarded certain records and changed its informal record retention policies to retain fewer records. Due to a dispute with Mobil Oil, Euclid had filed bankruptcy in the mid-1990's. This bankruptcy resulted in Mobil Oil canceling its unfavorable oil supply contract. Euclid dismissed the bankruptcy petition thereafter. In connection with the Euclid bankruptcy, the United States Trustee's office requested a significant amount of documentation. At the conclusion of the Euclid

bankruptcy, Mr. Yuen did not ensure that all of the documentation provided to the US Trustee's office was returned to Euclid. Tr-13 at 57-61.

Edward Davis, CPA, duly qualified in the case as an expert in accounting, testified for the Respondent. Mr. Davis testified that if a business such as Respondent were audited by the Internal Revenue Service, there would be little reason to retain records after the audit, and that Respondent would be justified in discarding records after the audit. Tr-10 at 55 and following.

Mr. Yuen explained that the EPA investigators were not interested in tank reconciliation records unless these records could provide individual tank data, and so the spreadsheet was not produced until pretrial in this case. Tr-13 at 86 - 89.

Mr. Yuen also testified that he had provided "line detector test, tank tests, as well as line leak detector tests" to his insurance company annually as a precondition of renewal of the insurance policy. Tr-13 at 105-106.

Complainant produced no evidence to contradict this testimony, or any evidence other than the missing records tending to show that the reconciliations were not performed. Accordingly, Complainant has not established that Respondent is liable for the penalties assessed for the Counts of the Complaint referenced above. The evidence in the record consisting of the testimony of Mr. Yuen and Mr. Buckner shows, without contradiction, that the inventory control tank leak detection test methodology was performed continuously for the entire period at issue.

3B. Euclid's Inventory Control Method, at Variance with the EPA Non-Regulatory Guidance, Complied with the Regulations. Complainant's attempt to introduce other evidence of improper methodology in conduct of the tank release detection failed. Marie Owens, an EPA investigator, testified, TR-5 at 36 and following, that Euclid's daily inventory control sheets did not have sufficient detail to permit inventory control testing. However, when it was pointed out that a figure on the sheet was gallons and not dollars, she testified that the data on the daily sheet, in conjunction with the cumulative data from the history of inventory, deliveries and sales, would allow computation of the data needed for tank release detection using the inventory control method. Tr-5 at 72-80. The testimony of Mr. Yuen and Mr. Buckner supplied the missing information.

3C. Improper Penalty based on "Policy". One of the difficulties in this case is the insistence by the EPA on a particular methodology. The EPA has published brochures and other guidance to assist the public to monitor UST's. This published guidance, however, imposes requirements which go beyond or is different from the provisions of the law and regulations. One such difference is the requirement that tank leak detection testing be conducted on a tank-by-tank basis, as opposed to monitoring the inventory of a combination of tanks. There are other instances where the EPA asserted its own interpretation or methodology as being a requirement, where actually the statutes

and regulations either do not specify a requirement or have a less stringent requirement.

The EPA is not entitled to rely on policy statements in enforcing the environmental laws unless there is some evidence justifying the guidance statement language in the particular case. In *In re Ash Grove Cement Co*, 7 EAD 387, 1997 WL 732000, the court stated, "When relying on policy or guidance documents, the Region must justify application of a particular policy or guidance on a case-by-case basis and must be prepared to address counterarguments raised by others." In this case, the EPA did not conclusively demonstrate that the variations from its guidance documents had any measurable impact on the ability of the multi-tank inventory control results to make leak detection less likely.

In *In the Matter of Bradley Petroleum, Inc.*, RCRA (9006)-VIII-94-08, 1998 WL 289275, the court stated that it was not appropriate to penalize the respondent based on the EPA's extension of the applicable regulatory language to cover a situation where the "spirit" of the regulations may have been violated. In that case, as in the instant case, the EPA argued that the respondent was required to monitor tank inventory on a daily basis. The court in *Bradley Petroleum* observed that the regulations require only monthly monitoring. Even though it might be better for the environment, and more in the spirit of the regulatory scheme, for more frequent monitoring, if the respondent can demonstrate that it is inspecting the monitoring results on a monthly basis, this is adequate and no penalty will be imposed.

Bradley Petroleum also held that, where the respondent deviated from the tank testing guidance published by the EPA, it was Complainant's burden to establish that the tank leak detection testing methodology is not in compliance with the regulations. The guidance was not relevant in an enforcement proceeding except to the extent that it conformed to the actual language of the regulations.

Even though there was an actual leaking tank involved in the *Bradley Petroleum* case, where the gasoline seeped into an adjacent basement, Bradley Petroleum was not fined because the EPA did not demonstrate that its tank leak detection testing method failed to meet the applicable requirements, according to the written terms of the regulation. That is, the inventory control method used by Bradley Petroleum would have been sufficient to detect a leak within the regulatory parameters. Since it could not be demonstrated that the respondent's methodology failed to meet the regulatory requirements, as written, no fined was imposed. No fine was imposed on a showing that Bradley Petroleum complied with the literal terms of the regulations even though there was evidence in *Bradley Petroleum* that the daily records related to the tank leak detection had been altered by the respondent. Even this evidence did not overcome the fact that the method used by Bradley Petroleum met the regulatory requirements.

The case of *Bradley Petroleum* stands for the proposition that if Euclid complies with the regulatory scheme, there is no basis for imposing any penalty even though the EPA or its consultants believe that a better result would be achieved if Euclid had done

things differently. This doctrine applies not only to the Tribunal's decision to fine Euclid under the tank leak detection testing counts, but also to other counts as identified herein.

The Initial Decision at page 18 quotes the regulations regarding inventory control. The Initial Decision comes to the conclusion that the use of the singular word "tank" in the regulations means that it is impermissible to conduct an inventory reconciliation on a facility-wide basis. However nothing in the regulations specifically prohibits this, and there is no showing that conducting an inventory reconciliation on a facility wide basis is less likely to detect a leak than conducting the tests tank by tank. The EPA guidance pamphlet, cited in footnote 23 on page 19, does allow combining multiple figures if tanks are manifolded together. There is no showing that any other form of multiple tank reconciliation, even on non-manifolded tanks, provides a less reliable reading, or is contrary to any express statement in any statute or regulation.

The regulations, federal and state, only require that the inventory control method utilized by the Respondent be sufficient to detect a specified amount of lost inventory over a monthly period. They do not require that the Respondent perform this method on a tank-by-tank basis or that the Respondent perform the method on only a single grade of petroleum product. Respondent complied with the literal requirements of the regulations and cannot be fined or penalized for variances from the EPA guidance. There was no evidence at the hearing that the method utilized by Euclid would not have detected the specified loss of inventory, or that, even on a multi-tank, multi-product basis, Euclid ever had a monthly inventory loss which was more than the allowable inventory loss, encompassing all tanks and all grades at each location.

The Initial Decision at page 19 attempts to impose a daily reconciliation requirement on Euclid. As noted in *Bradley Petroleum*, the requirement is that the inventory figures be reviewed on a monthly and not a daily basis. Euclid testified that the figures are reviewed more frequently than monthly. There is no justification for any fine or penalty to be imposed on Euclid to the extent that the failure to perform a daily analysis not required by the regulations, in the absence of evidence that Euclid failed to comply with the wording of the regulations themselves.

Euclid utilized forms provided by a consulting company, USTMAN, for 9 of the 15 facilities involved. The reports show that Euclid was maintaining inventory control for these facilities using the USTMAN forms. The fact that USTMAN did not produce a report is irrelevant because the import of the introduction of the forms is to demonstrate that Euclid was performing inventory reconciliation in conformity with the regulations.

The USTMAN sheets were prepared beginning August 1998 for 9 of the 15 sites for which the tank release detection is an issue. The exceptions, for which USTMAN

data sheets were not prepared and maintained are:

Facility with no USTMAN Sheets	Count
3507 Enterprise	22
3900 Frederick	30
4225 Connecticut	35
1576 Wisconsin	54
15501 New Hampshire	62
5608 Buckeystown	70

The USTMAN sheets in their entirety for 9 stations, for 12 months, for 4 years, 432 documents, were not introduced at trial, but a summary showing which facilities were monitored by this method was introduced as Respondent's Exhibit X-2.

On the record at the hearing, there is no evidence presented from which any inferences can be drawn from the failure of Respondent to produce records beyond the one-year retention period. No inferences can be drawn from any failure of Respondent to produce payment records for outside contractor tests of tanks, lines and the like prior to 2001, as this is the year the audit commenced. Complainant did not demonstrate that any particular period longer than one year would be "reasonable." The testimony of Joan Myers did not touch on factors which would make a record retention policy a reasonable one. Euclid's evidence, which is uncontradicted, establishes that its record retention policy was reasonable and in conformity with the applicable regulations.

3D. Whether the Initial Opinion Properly Penalizes an Out-of Service Tank (Count 10, Initial Order page 28). Particularly with respect to 13793 Spottswood Trail, Count 10, release detection record retention would be not required in any event. The tanks at issue in Count 10 were pumped out in 1997 and removed and properly disposed of in early April of 1999. Respondent's Exhibit C-8. That Exhibit also indicates that the related tests show no contamination of the site when tested upon removal of the tanks. There is nothing in the regulations which would require retention of tank testing records for an extended period of time under the circumstances.

Moreover, these tanks were emptied prior to the date which is five years prior to the filing of this Complaint. It is uncontradicted that the tanks remained out of service until they were removed in April, 1999. Under the circumstances, these tanks were not subject to the monitoring requirements. Testimony indicates that the tanks, when removed, had liquid in them consisting of a mixture of fuel and water of 96 and 370, respectively, gallons of "sludge." Tr-1 at 194 and following. There is no testimony to show that the tanks had any appreciable amount of regulated substance in them from the time they were emptied until they were salvaged.

The tank referenced in Count 10 was long gone by the time the Complaint was filed, and any records associated with this tank need not have been retained even under the longest possible record retention argument.

3E. Whether the Initial Opinion Utilizes the Proper Evidentiary Standard. In the event that it may be determined that Respondent is responsible to retain records for an extended period of time, the failure of Respondent to produce these records does not mean that Respondent was not conducting the required tests. Mr. Yuen and other Euclid personnel testified that there was a policy of maintaining inventory reconciliations at all times, not only to determine possible leaks but also as a method of theft prevention, for purposes of accounting for the inventory itself and to reconcile with fuel delivery invoices. Mr. Yuen testified that Respondent began to monitor the integrity of its UST's "From day one. Ever since I have been in this business." Tr-13 at 71. The purpose of this monitoring is to follow product loss, monitor delivery and to ensure that there are no leaks in the tanks or lines. Tr-13 at 72. Mr. Yuen testified specifically that the tanks and lines were monitored continuously since September, 1977. Tr-13 at 74 - 75. The methodology utilized by Euclid takes the presence of water into consideration. Tr-13 at 75. Mr. Yuen prepared an inventory reconciliation on a spreadsheet on a monthly basis. Tr-13 at 86 - 87. Not all of these records were retained by Euclid.

Under the circumstances, the inference to be drawn from the absence of records is not sufficient to establish that Euclid did not comply with the regulations in the absence of extrinsic evidence, such as a tank leak.

The evidentiary weight given to inferences from stipulated facts is excessive. As discussed above, under 5 USC §556(d) and the *Hazardous Waste Treatment Council* case, the Complainant must produce sufficient, probative, competent evidence of the violation in order to sustain the penalty. The ALJ, in determining that Euclid violated the applicable regulations, relied heavily and some times exclusively on the Joint Stipulations. With the exception of the stipulations to the effect that Euclid did not provide the notices required for financial assurances, and that it did not upgrade certain tank leak detection to an automatic system on the dates required, there are no stipulations which establish any elements of Euclid's liability. The remaining Joint Stipulations are limited to the record retention practices of Euclid.

The Joint Stipulations are appropriate to the extent that they avoid requiring the EPA to prove that Euclid did not have certain records. Euclid admits not having the records in discovery. As discussed extensively in this Brief, the lack of records has never been equated to sufficient evidence to sustain liability. Nor is it sufficient if inferences can be drawn from a lack of records under the circumstances.

3F. Euclid's Tank Test Methodology Conforms to the Maryland and Virginia Regulations. The penalty imposed by the ALJ on the Maryland and Virginia stations, on the basis that they did not conduct tank tightness tests based using inventory reconciliation, cannot be sustained on this record. Even if it is determined that Euclid departed in some respects from the best practices related to use of this method to comply with the regulations, the magnitude of the penalty is grossly excessive. The penalty imposed is equivalent to the penalty which would have been imposed had Euclid not

done any tank leak detection testing and where there was evidence of an actual leak or spill with environmental impact. The record is clear that Euclid did what it believed complied with the regulations, and that what Euclid did is a reasonable interpretation of the regulatory requirements.

3G. To the Extent that Respondent may not have Conformed Exactly to the District of Columbia Tank Testing Methodology, Euclid did Perform Tank Tests which Substantially Complied and which had been Accepted by D.C. Environmental Inspectors. For many of the District of Columbia stations, Euclid relied on automatic tank gauging (ATG) methods.

With respect to Counts 1, 35, 54 and 57, the Counts involving DC UST's, for the period up to May 4, 1998, Euclid could rely on inventory reconciliation because the federal law permitted such reliance. May 4, 1998 is the effective date for the approval of the DC environmental regulatory scheme by the EPA, and on and after that date, the DC regulations apply.

The ALJ asserts, as justification for imposing substantial penalties related to the conduct of tank release detection in DC, that Respondent may not use inventory control for tank release detection in a number of instances.

Mr. J. Kofi Berko, Jr., the supervisory inspector for DC UST's testified that DC had inspected Euclid facilities prior to the filing of the instant Complaint. Tr-2 at 214 and following. Although there was apparently no ATG present at the 420 Rhode Island facility during inspections in 2001, the District of Columbia never cited this facility (or any other DC facility) for using inventory control for tank leak detection instead of using an ATG prior to the involvement of the EPA.

In fact, Mr. Berko testified, Tr-2 at 221, that, " . . . based on <u>our</u> [i.e. District of Columbia] regulations, you couldn't use – – the tanks were over 10 years old, so you couldn't use tank gauging system as a leak detection system . . . ."

There is testimony to the same effect on Tr-2 at 222:

> Q Would any of these tanks have qualified for manual tank gauging as a method of leak detection for tanks?
>
> A No.
>
> Q Why not?
>
> A Because the tanks were more than 10 years old at that time, and according to the regulations you couldn't, you cannot use manual tank gauging as a leak detection system for tanks that old.

Complainant characterizes the District of Columbia regulations to require use of an ATG instead of inventory control after the specified date in 1995, however the testimony and other evidence in the case indicates that it is the practice of the District of Columbia to permit or at least tolerate inventory control to be used for tanks which are less than 10 years old.

Respondent is entitled to rely on the interpretation and practice of the District of Columbia in this regard and not to be penalized when the EPA comes in at a much later date and attempts to enforce a different standard. Avoiding such conflicting enforcement standards is exactly what the RCRA statutory scheme, where states with approved environmental programs take the lead in enforcement action, is designed to protect against.

The Initial Decision at page 22 rejected Euclid's arguments that it was properly using ATG equipment because there is no documentation that the ATG system was programmed to perform "automatic" ATG tests. Euclid demonstrated that it had an ATG system in place at various times after December of 1998. Prior to the dates of installation of ATG's, Euclid continued to use inventory reconciliation. This practice was endorsed by the DCDOH in inspection reports after the date on which ATG's became mandatory.

Even from the dates on which ATG's were installed in the DC stations onward, the EPA did not demonstrate that Euclid had violated the DC tank gauging regulations. Complainant's witnesses and exhibits indicated that the Respondent had months during which it did not obtain a passing result from its automatic tank gauging ("ATG") system. An automatic tank gauging system is a device which measures the volume in a tank over a period of time (several hours) to determine whether changes in the tank volume may indicate that the tank is leaking. The reasons for the lack of passing results varied, from delivery of fuel or pumping of fuel during the conduct of the test, to other reasons. None of these reasons associated with a lack of passing results was due to a leak in the tank. The reasons for failing the test were all established by Euclid in connection with performance of the tests, and verified to result from reasons other than leaking. As a backstop, Euclid's inventory control system verified that there was no gasoline lost out of these tanks even though the ATG did not produce a passing result.

The regulations regarding tank leak detection, as written, literally do not require that any of the leak detection tests indicate a passing result. *See* 40 CFR §280.43; 20 DCMR §6000 - 6012.4; COMAR 26.10.05 and following; 9 VAC 25-580-130 and following. If the ATG or inventory control test is conducted and the reason for failure is ascertained, then the requirements are met. If it is determined that the test failed due to a leak, then the appropriate measures must be undertaken. There is no evidence that Respondent ever generated any failing test results as a result of a leak; in fact, Complainant's and Respondent's witnesses all unanimously testified that there were no leaks in the tanks or lines during the relevant period. Likewise for inconclusive readings. Under the regulations, what is required is that if a failing result or an inconclusive result is obtained from an ATG test, the reason for the result is investigated and resolved.

In Euclid's case, none of the failing or inconclusive results were traceable to leaks in the tank systems. With respect to use of the ATG for tank leak detection, the presence of invalid or failing test results does not per se cause Respondent to fail to meet the requirements so long as the ATG tests were conducted and the reason for failure or invalidity was timely investigated. Respondent provided testimony on the record that such results always were, and said testimony was not contradicted. *See, e.g.*, Tr-10 at 150 and following (Testimony of Mr. Buckner).

It is also clear that Respondent uses ATG as a method of catastrophic leak detection. In addition, Respondent conducted tank tests using the ATG systems, as specified in the exhibits and testimony, but Respondent was not satisfied with the ATG results because many of the results were inconclusive. The reason for this is because the ATG equipment and methodology had not evolved to the point where it was consistently providing reliable test results.

Respondent had established an inventory control system and used this system for many years with success. Respondent saw no reason to abandon this system in "blind" reliance on ATG's, where the reliability of ATGs for monthly monitoring had proven to be so problematic. Tr-11 at 170 and following (testimony of Andre Miller). Just because Respondent continued to utilize an inventory control method for leak detection does not mean that they did not use the ATG systems also. Mr. Miller testified that the ATG's routinely generated false alarms, especially in the beginning when ATG technology was evolving.

In addition, Marie Owens testified for the Complainant, Tr-5 at 66, that her investigation disclosed that Leon Buckner received copies of ATG printouts periodically for use in the leak detection methodology employed by Respondent.

If a facility obtains a failing or inconclusive ATG test, the facility is required to determine the reason for the failure or inconclusive test. Nothing else is required under the regulations. Respondent maintained three basic methods of leak detection: catastrophic leak detection using interstitial sensors, inventory control and ATG methods. (Interstitial sensors are sensors positioned between the walls of a double-walled UST which detect liquid intrusion into the interstitial space). The inconclusive or failing results of an ATG test can be properly checked against inventory control to determine the cause of the failing or inconclusive result. It is clear from the testimony that Respondent closely monitored the status of the tanks for a number of reasons including to ensure that the tanks did not leak. Significantly, there never was a release from a tank or line during Respondent's operating history. The only release was due to a broken check valve at a gas pump, where a customer spilled about 1 gallon of gasoline when filling the auto tank. This spill was immediately cleared in compliance with all applicable regulations.

Complainant points out that even after Respondent established enhanced procedures to ensure the integrity of its ATG testing, Respondent still obtained false failing results and invalid results on a regular basis. Complainant's Post-Hearing Brief at 44-45.

Respondent's systems were all installed and maintained by state-certified firms. Complainant attempts to develop a theory of noncompliance out of various observations, some of which were based on interviews with lower-level cashiers at the facilities, and on speculation about the effects of Respondent's systems. Respondent, on the other hand, demonstrated that it has a reliable system which has been in-place and properly functioning since the inception of operations. The evidence is uncontradicted that Respondent's equipment does not leak and has never leaked, and Respondent is aware, at a minimum on a monthly basis, of the status of each of its tank systems.

With respect to the waste oil tank on the premises, as discussed above, the mere absence of records of test results does not establish that the required testing was not being performed. This tank is used to store used oil from oil changes. The oil is periodically pumped out by a jobber who recycles it. Once Euclid determines that the tank is not leaking, there is no reason for Euclid to maintain records of the tests for more than one year.

3H. THE DC SITES

Count One (Initial Order P. 21). With respect to Count One, the EPA demonstrated at best (1) that Euclid did not convert from inventory reconciliation to ATG until January, 2002 (although there is no evidence that Euclid did not perform inventory reconciliation as a method of leak detection for the period May, 1998 through December, 2001); (2) that Euclid had failed or inconclusive readings from use of the ATG (although there is no evidence that Euclid failed to investigate these failed or inconclusive readings, or that such readings resulted from a leaking tank); (3) that Euclid was not able to produce records of tests on its waste oil tank; and (4) Euclid performed inventory reconciliation on a facility-wide basis rather than on a single tank basis.

The penalty imposed for Count One, $180,100, is grossly excessive for several reasons. First, Euclid's demonstration that it was conducting tank leak detection testing for the site in conformity with the inventory control regulations is not rebutted by any evidence presented by Complainant. Euclid's methodology may have been different than the EPA's preferred methodology, but there is no conclusive showing that Euclid violated the letter of the regulations.

Second, although Euclid did not install an ATG until January 2002, there is no evidence that Euclid did not continue to use the tried and true inventory reconciliation method in the interim, with the acquiescence of the DCDOH. While this method may no longer have been permissible, using an outmoded method for tank leak detection testing,

the only violation proven by the EPA on this record, does not sustain a penalty of this magnitude.

Third, although there were no demonstrated passing or conclusive test results from the ATG for a period of time, there is no proof that Euclid did not investigate the reasons for the failing results. The record indicates that the technology for performing ATG evolved, and the equipment became more reliable as time went on. Also, operators became more familiar with equipment operations as time went on. The regulations require only testing and follow up on failing or inconclusive results. There is no evidence that Euclid violated the regulations in this regard. The Tribunal is not entitled to fine a respondent for violating what it perceives to be the "spirit" of the regulations, especially at this level of fine.

Fourth, there was no leak or release of any controlled substance. This factor has been cited numerous times in cases as a mitigating factor in imposing the penalty. Criteria for imposing a penalty are set forth in the case of *In re: M.A. Bruder & Sons*, RCRA-5-99-005, 2002 WL 1493844. That case states that the ALJ is not required to use any particular penalty policy, such as the penalty computation matrix asserted by the EPA in this case, use of the matrix is helpful in determining a penalty and in maintaining some uniformity in penalty imposition.

In the instant case, the Tribunal accepted the EPA's penalty computation without question, and even imposed a slightly higher penalty than requested. It is respectfully submitted that in doing so, the Tribunal abused its discretion.

Although the EPA's experts identified the potential impact of a catastrophic leak on the surrounding area, there is no indication that such a leak ever occurred. Under these circumstances, it is improper to penalize Euclid as if a leak or some other serious violation had occurred. Even if the technical noncompliance with the regulations may warrant imposition of some penalty, the penalty imposed is not justified merely by reference to an expert report discussing what might have happened in the event that a leak would have occurred. Euclid's tank leak detection methodology, even if not strictly in compliance with the regulations, is more than sufficient to prevent any environmental impact from a potential leak such as the one referenced in the EPA expert's report, and does not warrant a fine of the magnitude of the fine imposed in this case.

Moreover, there is no indication that there was ever a significant possibility that Euclid's tank release detection methodology would have ever resulted in an unresolved leak developing. All of the evidence indicates that Euclid performed tank release detection appropriately under the regulations. The only exception, for this facility, was the period of time when Euclid used the inventory reconciliation method after DC adopted the mandatory ATG method. During this period, there was no release of any controlled substance into the environment. As Euclid began to use the ATG method, it encountered failing results and inconclusive results from the tests. As required by the regulations, Euclid ensured that these results were not caused by a leak.

Based on the record in this case, the imposition of a fine of this magnitude is an abuse of discretion.

The ALJ opined, in footnotes beginning on page 23 of the Initial Decision, that Euclid had numerous violations spanning an extensive period of time. While Euclid is not maintaining that it is in full technical compliance on all counts for the entire period of time, it is not appropriate to characterize the alleged, and for the most part not proven, technical violations of the regulatory scheme as being so outrageous as characterized by the ALJ. The EPA is not entitled to retroactively characterize Euclid's behavior, which is at worst a close case of regulatory interpretation, as justifying a penalty of this magnitude.

Count 35 (Initial Order page 34). The above discussion pertains in general and also particularly to Count 1. With respect to Count 35, the second DC facility (Initial Decision at 34), the bases articulated for imposing the penalty are addressed above. In addition, the ALJ found that Euclid could not utilize inventory control for the site without segregating the gasoline tanks from the diesel tank. There was no evidence presented that the inclusion of a diesel tank in the mix of tanks being monitored by inventory control caused the entire inventory control method to fail. The only evidence was the opinions expressed by the EPA witnesses. They did not cite to any documents which discuss this requirement. The inventory control method was designed to produce results which comply with the regulatory requirements. There is no demonstration in the record that a leak would not be detected based on the inventory testing, solely because there is more than one type of product in the tanks.

The inventory reconciliation amounts never exceeded, in total, the amounts which would have triggered an investigation into a leak. That is, even taking all of the inventory for all of the tanks combined, there was never an unexplained inventory loss which would have been sufficient even to require further investigation even had the leak involved a single tank. Under these circumstances, even if it can be argued that the use of a multi-tank reconciliation is a violation, there is no proof that there was ever an inventory loss sufficient to trigger an inquiry into a leaking tank.

With respect to tank tightness testing, the test results provided by Euclid indicated a passing result. A tank does not leak at an earlier period and then stop leaking later. The passing result obtained by Euclid as a result of the requests of the DCDOH establish that the tank was never leaking during the applicable period because a tank leak only becomes progressively worse and does not spontaneously stop.

With respect to ATG, Euclid had a Veeder Root TLS 250 performing ATG on the site. Records of the tests are incomplete, but the testimony establishes that Euclid was monitoring the tanks.

Interstitial monitoring involves use of probes between the two walls of a double-walled tank. If there is a leak, the liquid will flow into the interstitial space and trigger a probe alarm. The use of interstitial monitoring for leak detection, although required by the DC regulations, was not enforced by DC. As noted above, Euclid had been through a number of DC inspections in which its tank release detection methods were not cited. Prior to the instant investigation, DC was satisfied with Euclid's leak detection methodology.

Under all of these circumstances, imposition of a fine of the magnitude imposed by the ALJ constitutes an abuse of discretion and is otherwise grossly excessive and improper.

Count 54 (Initial Order page 52). In discussion of the inventory control method of leak detection related to this count (Initial Decision at 42), the Tribunal accepts many of the explanations set forth above why it was appropriate for Euclid to utilize inventory control for leak detection. The rejection by the Tribunal of Euclid's inventory control methodology related to other counts should be reviewed in light of this discussion.

In imposing the fine of $100,000, the ALJ relies solely on the lack of recordkeeping of passing ATG results. As discussed above, the EPA cannot prove a positive violation by merely proving a lack of record keeping for a period longer than the regulations require and experts confirm is reasonable.

Imposing a fine of this magnitude for lack of recordkeeping and for failure to perform consistent release detection on a waste oil tank is, it is respectfully submitted, improper.

Count 57 (Initial Order page 43). The only proof of a violation which the EPA could establish was that Euclid did not install an ATG system until December of 1999, whereas DC regulations, as approved by the EPA, required ATG as of May of 1998. As discussed above, given the conduct of the DC enforcement branch, this violation does not warrant a substantial penalty.

The ALJ notes that the ATG at the site was not programmed to perform automatic tests. There were no records of a passing test during the relevant period. This evidence, as discussed above, is not sufficient to establish a violation of any particular regulatory language given Euclid's conduct of tank leak detection overall.

Without reiterating the rationale discussed above generally and for the other DC counts, with respect to Count 57, under all of these circumstances, the imposition of a penalty in the amount of $65,000 is grossly excessive and amounts to an abuse of discretion.

3I. THE MARYLAND AND VIRGINIA SITES

Count 6 (Initial Order page 24). As discussed above, the method of inventory control utilized by Euclid never indicated that there was an inventory loss on the entire tank field, and so the inventory control method should have been accepted.

With respect to the allegations related to the ATG, as discussed above, the absence of passing results is not determinative. Complainant did not offer any proof that there were any ATG alarms during the period at issue, or that there were any situations where the alarms did not receive the appropriate response.

The only evidence offered was that on the day of an inspection, the operator did not seem to be conversant with the operation of the ATG system.

On this evidence, the Tribunal imposed a penalty of $89,878. This amount is not justified by the level of proof, and it is grossly excessive.

Count 9 (Initial Order page 26). In this Count, the ALJ bases a ruling against Euclid on the evidence presented that at the time of an inspection by Virginia, the Euclid representative was not able to provide records for tank release detection. However, the opinion of the ALJ notes that there was some evidence of ATG tests.

Although Mr. Chowney, Euclid's representative, did not have access to the inventory control records, Euclid did introduce evidence of inventory reconciliation for tank tightness testing. The Spottswood Trail facility is included in the spreadsheet introduced by Euclid as a reconciliation of its tank inventory. As the ALJ notes on page 26, Euclid is entitled to use this method of tank release detection.

Inexplicably, the ALJ observes that Euclid did not provide any evidence of inventory reconciliation for this location; however, the inventory reconciliation was received in evidence as previously noted above.

Accordingly, it is improper to penalize Euclid under this Count. It is Complainant which bears the burden of proof, and its only evidence related to this Count was testimony of a Virginia inspector who visited the site and was unable to obtain records at that visit for tank leak detection. Euclid introduced without challenge evidence that it was performing conforming inventory control at this site.

Count 10 (Initial Order page 28). The Respondent's position on Count 10 is set forth above, at page 14 and following. With respect to the Tribunal's statement that Euclid is bound by statements in its Amended Answer where it admits that the tanks contained greater than 1 inch of regulated substance, Euclid rebutted the Complainant's allegations at trial by showing actual volume reports from the tank remover that there was no more than a small amount of residue in the tanks when they were removed from service. The EPA never proved, and could not prove, that the residue was more than one

inch of regulated substance in the tanks.

The Tribunal cites two cases for the proposition that Euclid cannot introduce evidence contrary to its Answer. In the first case, *State Farm Auto Ins. v. Worthington*, 405 F.2d 683 (8th Cir. 1968), the court, on appeal from a Missouri case, held that an insurance claimant was not bound by a guilty plea to manslaughter, but could later explain that plea in a civil case to recover insurance proceeds. The case of *Giannone v. U.S. Steel Corp*, 238 F.2d 544 (3rd Cir., 1956) is a Pennsylvania case where the court allowed selected allegations from a prior complaint to be introduced into evidence in a subsequent case.

In Virginia, however, an allegation in a pleading is not deemed to be an admission unless there is an objection at trial to the admission of contrary evidence. In *Translift Eqpt. Co. v. Cunningham*, 243 Va. 84, 360 SE2d. 683 (1987), the court permitted the injured party to introduce evidence at variance to the party's allegations in the complaint. The court in *Cunningham* stated that a handicapped individual injured when his wheelchair was thrown off of lift for handicapped bus passengers was not precluded from correcting his pretrial statements made at least two years after accident as to position of lift operator, when individual realized he had been mistaken after he reviewed videotape of accident. Under Virginia rules of evidence, only admissions in pleadings which are offered in evidence have any preclusive effect at trial.

The law of the Commonwealth of Virginia, where the facility is located, permits the Respondent to prove facts at variance with an admission in pleadings, and so the evidence of the actual volume of the tanks was properly admitted as being the only evidence of the liquid in the tanks after they were decommissioned.

Under the circumstances, the only evidence tending to show any violation is the absence of inventory records and the penalty should not be imposed. Complainant bears the burden of proof and a mere absence of records does not meet this burden.

Count 15 (Initial Opinion at page 29). In this Count, Euclid is being charged with failure to properly conduct inventory control because the inventory involved multiple tanks. Euclid's position on this is set forth above.

Euclid is also charged with failing to produce passing ATG test results. As explained above, the lack of documentation of a passing result is not sufficient evidence of failure to utilize ATG properly.

Count 22 (Initial Opinion at page 31). As specified above, the inventory reconciliation method is not necessarily defective because the Respondent combined the inventory figures. If multiple tank reconciliation is not prohibited by the regulations, then the fact that each tank contains a different kind of motor fuel does not invalidate the inventory control method.

Likewise, as discussed above, there is no requirement in the regulations that an ATG provide a passing result.

Count 30 (Initial Decision page 32). The ALJ based imposition of the penalty, in part, on evidence that the current to the cathodic protection system at the site was not energized. Euclid relied on certified contractors to install and maintain its cathodic protection system at this site. The ALJ's ruling was also based on the observation that one of the tanks was never cathodically protected. However, this tank had been installed and tested by certified contractors and any defects cannot be attributed to Euclid.

Euclid's inventory control system, even taking all 4 tanks into account, never had an unexplained product loss which would have indicated a leak. The penalty imposed is very excessive under the circumstances.

Count 35 (Initial Decision page 34). The ALJ notes that Euclid is not entitled to use inventory reconciliation for tank tightness testing for some of the period at issue. However, there is no indication that Euclid did not perform inventory reconciliation and so it had at least that method of tank leak detection.

In imposing the penalty of $168,985, the ALJ relies on the inference, drawn from the failure to list interstitial probes on the tank registration form, that the probes are not present. There is no direct evidence presented by Complainant that interstitial probes were not present the whole time.

Installation of interstitial probes at the time when the ATG system was upgraded to a Veeder Root 350 does not prove that the probes were not in place when the older ATG was in place. There is insufficient evidence to justify imposing any penalty with respect to this count.

Count 39 (Initial Decision page 35). The evidence with respect to this Count consists only of the hearsay testimony of Rajah Khawar, the facility manager, that he did not use the ATG system to perform in-tank testing. This does not mean that no one from Euclid performed the testing. Complainant failed to produce any evidence which would prove, to sustain a penalty of $85,964, that Respondent was out of compliance. There was, for example, never any leak at the facility. Complainant has not met the burden of proof or even made out a *prima facie* case. The results of a sporadic inspection do not establish that Euclid has never performed the requisite testing.

Count 43 (Initial Decision page 37). The evidence presented was limited to failure to generate a passing test result during an inspection, coupled with incomplete records and hearsay evidence that the facility manager on duty that day was not familiar with the use of the ATG to perform tank tightness tests. As observed above, this falls short of the evidence required to establish noncompliance and to justify a penalty of $88,619.

Count 47 (Initial Decision page 39) The Tribunal declined award the EPA a penalty based on this count. The evidence presented by the EPA was that Euclid's behavior with respect to this facility was similar to the evidence presented in Counts 39 and 43. The ALJ may have had doubts as to the adequacy of the evidence.

Count 50 (Initial Decision page 40). The ALJ relies on an inspection which did not show that the tanks had passed a test. As specified above, there is no requirement that the tanks pass a test so long as the failing results are checked out to ensure that the failure is not related to a leak. The alarm conditions observed by John Cignatta when he visited the site were going to be resolved by Euclid's contractors. There was no evidence that the alarm conditions were not resolved in due course. The absence of waste oil records alone is not sufficient to establish a violation.

Count 54 (Initial Decision page 42) The ALJ's opinion in this Count is based solely on the lack of record retention of ATG test results. As discussed, this does not meet the burden of proof to sustain the alleged violation.

Count 57 (Initial Decision page 43) The ALJ observes that the evidence against Euclid on this Count is lacking. The only violation the EPA has proven, as Euclid admitted, is that Euclid did not get around to installing the ATG for one year period, from December 1998 until December 1999. During this entire period, Euclid was utilizing inventory control with the acquiescence of the DCDOH. While Euclid should have installed the ATG earlier, failure to do so under the circumstances does not warrant the penalty imposed.

Count 62 (Initial Decision page 45) The only evidence produced to sustain this Count was that Euclid delayed installing an ATG for one year and 11 months. With respect to the remainder of this Count, the only evidence presented was lack of record retention.

Count 70 (Initial Decision page 46) The ALJ relied on the tank registration statement to justify the penalty. The notification statement did not indicate that the facility was equipped with an ATG prior to the date on which Euclid retained a tank test record. Other than the inferences drawn from the absence of records, there is no evidence to justify the imposition of the penalty.

3J. Allegations of neglect of alarm conditions. In discussion of various Counts of the Complaint, the Initial Decision finds that Respondent did not monitor sensor alarms at 8 of its facilities. However, the evidence submitted by Respondent, including cross examination of Complainant's witnesses, discloses that Complainant is basing this allegation on interviews with non-managerial personnel at the service stations. The testimony of Leon Buckner , (TR-10 & TR-11) generally, and the testimony of Andre Miller, Tr-11, establishes that Respondent had a system in place to investigate and remediate the various problems arising in connection with service station operation, including alarm conditions.

4. Line Release Detection Counts. Counts alleging improper line release detection are as follows:

No.	Facility	Count	Jurisdiction
1.	420 Rhode Island	2	DC
2.	1400 W St.	4	DC
3.	42832 Mosby Hwy	7	VA
4a.	13793 Spottswood Trail	11 post-closing	VA
4b.	13793 Spottswood Trail	12 pre-closing	VA
5.	4123 Ocean Gate (Trappe)	16	MD
6.	4606-68th Ave.	20	MD
7.	3507 Enterprise	23	MD
8.	8248 Ritchie Hwy.	24	MD
9.	5342 Sheriff Rd.	25	MD
10.	7713 Allentown Rd.	27	MD
11.	2301 University Blvd	28	MD
12.	3900 Frederick	31	MD
13.	4225 Connecticut	36	DC
14.	6181 Annapolis	40	MD
15.	6038 Baltimore Ave	44	MD
16.	7887 Barlow Rd	48	MD
17.	3800 Rhode Island	51	MD
18.	1576 Wisconsin	55	DC
19.	22 Florida Ave	58	DC
20.	15501 New Hampshire	63	MD
21.	5001 Ga.	66	DC
22.	5420 New Hampshire Ave.	68	DC
23.	5608 Buckeystown	71	MD

4A. Line Release Detection Equipment and Line Release Detection Methodology. 40 CFR §280.44 specifies the requirements for conducting line release detection, with reference to §280.41 and §280.43. Those provisions of the regulations, and the corresponding provisions of the state regulations, permit line release detection requirements to be satisfied by installation of equipment which would alert the operator to the presence of a release of a regulated substance.

As discussed above, the tanks involved in Count 12 were removed in April, 1999, along with the related lines. Respondent cannot be charged with maintaining any documentation or evidence of equipment used for line release detection as of the date of the filing of this Complaint, and therefore it is not proper to charge Respondent with violating the requirements for line release detection with respect to this tank.

There was testimony elicited that certain facilities, when inspected by EPA and state personnel, had so-called "tight boots." The boot is a rubber fitting around the outer wall of a double-walled piping system. If the boots are tight, this interferes or blocks the ability of the interstitial monitoring system and/or the sump monitoring system to detect a

line leak. Boots are tightened when the piping system is installed and, later, when the system is periodically tested. Installation and testing can be done only by a contractor licensed by the State. The owner of the lines, i.e. Respondent, has no occasion to tighten the piping boots, and would have no reason to tighten the boots. Respondent utilized outside contractors to perform all maintenance and testing during the periods at issue. Accordingly, even if the boots on a piping system are tight while the service station is in operation, the Respondent cannot be shown to be at fault. The testimony indicates that several individuals, none of whom were Respondent's employees at the time, worked on the line boots.

With respect to the height of flapper valves (which will be discussed at length below), Jackie Ryan, Complainant's witness, testified that one reason that an environmental inspector does not check this measurement is because the valves are required to be installed by a certified tank installer. Tr-2 at 125-126. Therefore, this problem had never been addressed by the states when they originally inspected the sites and issued permits to open the stations, and later when they inspected for violations.

Many of the reasons set forth by Complainant for finding violations in this case pertain to situations where the Respondent reasonably relied on state-certified contractors to ensure that the pollution control equipment was working properly. The allegations that the boots were tight is one such instance. Even if the presence of tight boots is a violation of the line release detection requirements, Respondent should not be penalized for this because there is no evidence that Respondent utilized other than state-certified contractors. It is not reasonable to impose a responsibility on a station owner to open up sumps and disassemble components of a tank system to perform an independent compliance check, especially where, as here, there is no outward sign of a malfunction. Mr. Beck, Euclid's expert, testified, Tr-14 at 214-216 that a mechanical line leak detector would be an acceptable method of line leak detection, and that these detectors would function even if the boots were tight.

The other significant factor on which Complainant relies to establish that the line release detectors were not operating properly is the observation of water in some of the sumps. A sump is a below-grade installation which looks something like a barrel. The sump holds components of the fuel transmission line such as piping and pumps. Sumps are equipped with a sensor which is liquid-sensitive. When liquid, such as gasoline or water, comes into contact with the sensor, an alarm is generated alerting the operator to the presence of liquid in the sump. The operator is then required to ascertain whether the sump contains a controlled substance, such as would be present in the event of a leaking fuel line. If the sump contains water, the operator is expected to make arrangements to have the water bailed out by a state-certified contractor. Non-certified individuals may not discharge liquid from a sump into the environment. Any discharges from sumps must be routed through an approved filter or otherwise properly disposed of.

Respondent testified that Leon Buckner or Koo Yuen or an outside contractor is notified in the event of an alarm. Obviously, after notifying the appropriate individual at Euclid, the attendant then resets the Veeder Root system to prevent the alarm from continuing to sound. *See* Tr-10 at 119 and following; 135 and following; 144-149 (testimony of Leon Buckner).

It is not possible to remove water from every sump immediately when the water impacts the sensor. Respondent had in place a reasonable and responsible system for notification of management and outside contractors of alarm conditions. Water may persist in a sump until it is legally removed without violating the regulations.

Testimony was elicited by Complainant that for some sumps, it appears as if the height of the sensor above the floor of the sump was raised. There is no specific regulatory requirement for the height of the sump sensor. Complainant did not elicit any testimony to the effect that the raised sensors failed to meet the other requirements of the regulations. Even if, hypothetically, a sump chronically floods with water, if the sensor is raised above the chronic flood point, that sensor will detect a leak in the line because the line leak will increase the liquid level in the sump and so trigger the sump sensor. Raising sensors in chronically flooded sumps is a reasonable accommodation to the exigencies of operating this type of system.

40 CFR §280.44(a) also permits the use of a line leak detection method which restricts the flow of a regulated substance, as an alternate to the alarm system. There was no evidence presented that any of the Euclid stations were not equipped with flow restrictors on their product lines. A flow restrictor stops the gasoline pump if there is back pressure. For example, when a customer fills their tank, the back pressure on the nozzle stops the gasoline flow. Similarly, if there was a situation where a line was leaking, the backup of gasoline in the sump or at another collection point would set off the flow restrictor and shut down the gasoline pump, eliminating or greatly reducing the capacity for spills. Mr. Berko and Ms. Owens testified that they observed an isolated incident where it appeared as if one of the flow restrictors on one of the pumps was malfunctioning. Even if this was the case, all equipment can be expected to malfunction and the Respondent cannot be charged with unreasonable requirements to avoid the occasional malfunction. Such malfunctions are maintenance issues. It is not appropriate to penalize a gas station for each maintenance issue unless it is clearly demonstrated that the maintenance issue is causing harm to the environment. Otherwise, every gas station would be subject to significant penalties because every station at one time or another experiences routine need for equipment repairs.

The presence of these devices meets the line leak detection requirements even if it is determined that the sump sensors do not meet these requirements.

4B. Retention of Line Tightness Test Results. Complainant has made much of the gaps in the record of line tightness test results. Line tightness tests are required by 40 CFR §280.41(b)(1). However, with respect to the requirements for a test, that section

references 40 CFR §280.44(c)) which, in turn, references 40 CFR §280.43 (g) and (h).

40 CFR §280.43(g) authorizes use of a double-wall containment system, such as the double-wall piping system used by Euclid, if the system is equipped with leak sensors as specified. Euclid's systems are so equipped. All of Respondent's systems were installed by certified installers and so it can be presumed that the other specifications of that section were met. There are no allegations that any of the piping systems were improperly installed. Significantly, there are no specific requirements for testing in the federal regulations.

40 CFR §280.43(h) permits any other method which can detect the specified leak.

There is therefore nothing in the record which would indicate that the federal standards are not being met by the Respondent.

Complainant has demonstrated some gaps in the records for testing of the line leak detector systems. Generally, these records are required to be maintained for a period covering the current test and the immediately preceding test. The testimony of Respondent's witnesses is to the effect that the detector system tests were performed, although in some instances more than 12 months apart. Complainant has not affirmatively shown that the tests were not performed merely by showing that Respondent does not have a copy of the test results. Complainant had access to the names and contact information for the contractors utilized by Respondent and Complainant nevertheless relies solely on inferences which can be drawn from missing records. The same rationale pertaining to missing tank leak detection records applies, as discussed throughout this Brief. None of the systems were found to be inoperable during the course of Complainant's investigation.

If a passing test result is obtained, it is reasonable to discard the records of prior tests. If a system such as the line release detection system passes a test today, that means that the line was also functional at the time of the last test. A system such as the line leak detection system does not fail the test at an earlier period and then pass at a later date. Many of the Tribunal's findings are based solely or primarily on the failure of Euclid to produce a record of passing test results. The absence of a passing record does not in any way indicate that Euclid did not perform an earlier test or that there was an earlier uncorrected test failure.

Complainant has proven at best that Respondent has failed to maintain records of the test results. It has not proven that the systems fail to comply with the line leak detection requirements.

Counts 2 and 4 and 11 and 16 and 23 and 27 and 28 and 36 and 40 and 58 and 63 and 66 and 68 and 71 (Initial Decision page 50, 51, 54, 55, 58, 61, 63, 64, 65, 71, 72, 73, 74). This penalty is based solely on evidence consisting of Euclid's failure to produce records of tests more than one year prior to the date of the investigation.

Documentation for tests within the one year period were produced. The absence of other records does not establish the violation or justify a penalty of the magnitude of that imposed.

The ALJ relies in part for some of these Counts on the fact that the Euclid registration form does not mention that the facility uses interstitial monitoring. The mere absence of a mention of interstitial monitoring does not prevent Euclid from asserting that interstitial monitoring was used. There are no regulations which provide that the neglect to mention interstitial monitoring on the initial disclosure means that, even if the system exists, you cannot rely on it to meet the requirements of line monitoring. Furthermore, the fact that records of the test were produced at some point clearly indicates that any failure to note interstitial monitoring on the initial tank registration form is an oversight.

With respect to Count 66, the ALJ also bases the penalty assessment on tight boots. This condition is discussed above. Boots are tightened by state-certified line testing personnel when the tests are conducted. Euclid cannot be held strictly liable if these personnel neglect to loosen the boots at the conclusion of a test.

Count 7 (Initial Decision page 52). This penalty is based solely on Euclid's failure to produce records of tests more than one year prior to the date of the investigation. Documentation for tests within the one year period were produced. The absence of other records does not establish the violation or justify a penalty of the magnitude of that imposed.

The Desai brothers are lessees of Euclid. There is no showing that Euclid did not monitor the lines at the facility. The presence of a small amount of diesel fuel in a sump is not conclusive if the amount of fuel was insufficient to trigger the alarm. Accordingly, the allegations in paragraph 7 were not proven and no penalty should have been assessed.

Count 12 (Initial Decision page 55). As discussed above, this is the tank which was taken out of service in 1997 and removed in 1999. The violation is based solely on Euclid's failure to produce records of line tightness tests. There is nothing in the record sufficient to charge Euclid with the responsibility to retain records for a tank which had been dug up and scrapped. No penalty should have been sustained with respect to this tank.

Count 20 (Initial Decision page 56). This penalty is based in part on Euclid's failure to produce records of tests more than one year prior to the date of the investigation. Documentation for tests within the one year period were produced. The absence of other records, standing alone, does not establish the violation or justify a penalty of the magnitude of that imposed.

The ALJ relies in part on the fact that the Euclid registration form does not mention that the facility uses interstitial monitoring. The mere absence of a mention of interstitial monitoring does not prevent Euclid from asserting that interstitial monitoring was used. There are no regulations which provide that the neglect to mention interstitial monitoring on the initial disclosure means that even if the system exists, you cannot rely on it to meet the requirements of line monitoring.

The presence of water in the sumps and rust stains also does not establish that there was water in the sumps continuously for all periods. The testimony of Andre Miller, Tr-11, establishes that Respondent had a system in place to investigate and remediate the various problems arising in connection with service station operation, including alarm conditions.

Count 24 (Initial Decision page 58). The only evidence supporting the penalty imposed in this Count is that Euclid did not list interstitial monitoring on its initial tank registration notification form. As the ALJ notes, "While there may be little evidence in the record to go on here, EPA does highlight the one key piece of evidence shedding light on the interstitial monitoring claim. That evidence consists of the UST notifications sent to MDE . . . which "did not list interstitial monitoring as a method of release detection."

The evidence for this Count is clearly insufficient to sustain a penalty, especially of the magnitude sustained by the Tribunal, $15,152. The record contains no evidence that the site itself lacked interstitial monitors.

Count 25 (Initial Decision page 60). Euclid hereby incorporates the arguments related to notification and recordkeeping, above.

The ALJ also found, in this case, that the penalty should be assessed because there was water in the sumps. The testimony of the testimony of Andre Miller, Tr-11, establishes that Respondent had a system in place to investigate and remediate the various problems arising in connection with service station operation, including alarm conditions.

The water was in the sumps for a period between June 6 and June 17. This is the limited time that EPA has even arguably proven a violation with respect to this site. There is no proof that Euclid or Euclid's personnel (as opposed to the lessee on the site) repositioned the sump sensors, or that the repositioned sensors would not have alarmed in the event of a release. The EPA did not establish that the sumps were not being monitored.

There is no evidence that a sump sensor must be maintained at the bottom of the sump, especially if the sump is known to flood periodically. Neither manufacturer specifications nor regulations are in evidence to sustain this rationale of the Tribunal.

Count 31 (Initial Decision p. 63). In addition to relying on a lack of records and failure to indicate the interstitial monitoring on the MDE notification form, all of which have been addressed above, this Count also relies on lack of sump sensors and tight boots.

Euclid had the piping system installed by a certified installer, and cannot bear so large a magnitude of blame for any deficiencies in the installation. If sump sensors were not present, then there would have been no reason to have tight boots. The boots are rubberized fittings on the lines which are tightened to facilitate a test of the line sensor system. If the boots were tightened, this indicates that a certified line tester conducted a line test. Euclid is entitled to rely on a qualified and certified inspectors to conduct tests. Tests were conducted, according to the ALJ, on February 23, 2000 and again on April 28, 2003. Both tests were passing tests. Euclid is entitled to rely on a passing test from a certified inspector and should not be penalized over $129,000 under these circumstances. It is an abuse of discretion to impose a penalty of this magnitude, which is also $45,746 more than was requested in the Complaint.

Counts 44 and 48 and 51(Initial Decision page 66, 67, 69). Euclid reiterates the discussion of initial notification and recordkeeping.

The ALJ credits testimony that one of the sump sensors was in continuous alarm for a period of 5-1/2 months. Euclid utilized the services of an outside contractor to respond to alarms and to maintain the sumps. The magnitude of penalty imposed in this case does not give Euclid credit for the fact that it is not the entity servicing the sumps at the relevant time.

The total penalty imposed under these 3 Counts is $148,744. Considering the amount of the penalty alone indicates an abuse of discretion, where the penalty imposed on Count 31 alone exceeds $129,000.

Count 55 (Initial Decision page 70). Imposing a penalty of $73,287, the ALJ observed, ". . . what little evidence there is supports the EPA's position. The evidence is a UST notification sent to the District of Columbia Department of Health by Respondent for this facility that does not list interstitial monitoring as a method of release detection for piping."

This is not evidence in any way sufficient to sustain a penalty of this magnitude, or any penalty for that matter. The Complainant must demonstrate affirmatively that this site does not have interstitial monitors. The Complainant and its experts visited all of the sites continuously over a period of approximately one year. If this site lacked monitors, the Complainant could have simply produced testimony to that effect.

5. Corrosion Protection. Counts alleging improper cathodic protection are as follows:

No.	Facility	Count	Jurisdiction
1.	42832 Mosby Hwy	8	VA
2a.	13793 Spottswood Trail	13 post-closing	VA
2b.	13793 Spottswood Trail	14 pre-closing	VA
3.	4123 Ocean Gate (Trappe)	17	MD
4.	4123 Ocean Gate (Trappe)	18 (modified)	MD
5.	3900 Frederick	32	MD
6.	4225 Connecticut	37	DC
7.	6038 Baltimore Ave	45	MD
8.	3800 Rhode Island	52	MD
9.	22 Florida Ave	59	DC
10.	5608 Buckeystown	73	MD

The most significant problems with the findings in the Initial Decision that Respondent violated the corrosion protection requirements are summarized as follows: (1) there were significant errors made by Complainant's expert in his report regarding certain aspects of corrosion protection; (2) Complainant did not conclusively demonstrate that "coating and wrapping" is not appropriate corrosion protection for metal fittings and pumps connected to fiberglass tanks and piping; (3) there are differences of opinion among certified corrosion protection testers as to testing methodology, and as to whether a particular system is adequately protected; (4) in instances where the power to the corrosion protection system was shut off, there was no evidence that Respondent had anything to do with turning off the power; and (5) the mere absence of production of documents regarding testing records on the record of this case does not conclusively establish that the cathodic protection tests were not performed.

There was considerable disagreement between the EPA expert and Euclid's expert on a number of topics. Respondent is charged with failing to cathodically protect certain equipment, such as pumps and the metal fittings on fiberglass tanks and pipes, if this equipment is in contact with the ground. The total penalty imposed is over $13,000 for the counts involved in this dispute.

Complainant equates the term "in contact with the ground" with being in contact with a pea gravel filler which is used actually to isolate the metal from the soil or sand. The regulations do not define the term "in contact with the ground" to include pea gravel, or any material other than the common use definition of soil. Complainant believes that it can penalize Respondent because the pea gravel used to backfill certain installations comes up to the level of metal fittings on fiberglass installations and up to the level of pumps.

Thomas Mollica testified, Tr-11 at 231 and following, that there is no way to cathodically protect pumps and metal fittings which are components of fiberglass systems. He stated that generally these items were coated and that, in the industry, this was considered adequate cathodic protection. Thomas "Ted" Beck testified, Tr-14 at 110 and following, testified that MDE specifies that this type of installation may be cathodically protected by coating and wrapping, citing Information Fact Sheets published by MDE.

Mr. Beck testified, Tr-14 at 113 and following, that a short length of metal pipe at Trappe was determined not to be coated and wrapped in connection with an inspection by MDE. The MDE representative was satisfied if the pipe was either moved above ground or coated with a plastic jacket. When the pipe was jacketed, MDE was satisfied. The MDE representative also approved cathodic protection on a more extensive underground metal pipe at Trappe by virtue of the fact that the line was coated and wrapped, without the need for any additional cathodic protection.

At the very least, there is a conflict in the testimony of John Cignatta and Respondent's experts. Mr. Mollica stated unequivocally that a fuel pump in a sump, in contact with pea gravel or even soil, could not be protected using the anode method. Among other reasons, the fuel pump is an electrical apparatus which would not be sensitive to the electric charge provided by an anode. He also stated that it would not be practical to protect other steel structures that way. Drop tubes connected to the tank were, as Mr. Mollica stated, electrically isolated from the tank and so would not participate in the cathodic protection via anode. He also testified that there was no practical way to use an anode system to protect metal fittings on a fiberglass pipe. Therefore, the only practical method, and the method universally accepted in the industry, is coating and/or wrapping method discussed above, as was done by the Respondent at the Trappe, Annapolis Road, and Spottswood Road locations.

Respondent respectfully submits that the testimony of its experts is more credible than the testimony of Mr. Cignatta on these points. Even if, for the sake of argument, Mr. Cignatta's testimony is held to be the only acceptable method of cathodic protection for these structures, Respondent was entitled to rely on state-certified experts who designed, installed and tested the tank and piping systems, and who universally accepted the coating and wrapping method.

In any event, Respondent is entitled to be guided by MDE inspectors regarding whether coating and wrapping is acceptable. There is no basis to penalize Respondent in hindsight based on reasonable and state-acceptable methods of cathodic protection. As previously noted, Jackie Ryan, Complainant's witness, testified that one reason that an environmental inspector does not check this measurement is because the valves are required to be installed by a certified tank installer. Tr-2 at 125-126. In the industry, whatever the shortcomings of the certification process, it is clear that a good deal of reliance is place on the integrity of certified installers, testers and maintenance personnel. Respondent is entitled to rely upon this certification process.

This argument applies to Counts 17 and 18 (Trappe); 37 (4225 Connecticut Ave.); and 73 (5608 Buckeystown Pk.), discussed below.

There was testimony that certain facilities did not have adequate cathodic protection, as follows:

Facility	Count	Jurisdiction
42832 Mosby Hwy	8	VA
13793 Spottswood Trail	13 post-closing	VA
13793 Spottswood Trail	14 pre-closing	VA
3900 Frederick	32	MD
22 Florida Ave	59	DC
6181 Annapolis Road	41	MD

The contention that Respondent is not responsible for verifying the history of the cathodic protection status of a tank taken out of service in early 1999 has already been discussed in connection with Count 14.

With respect to the remaining counts, there was considerable disagreement regarding the proper method of testing the tanks involved. Mr. Cignatta testified, in general, that all of the tests were improperly performed and that none of the facilities were cathodically protected. Mr. Mollica and Mr. Denny and Mr. Beck, on the other hand, testified just the opposite.

Respondent pointed out some fundamental errors in Mr. Cignatta's report. Additionally, it was established that Mr. Cignatta was at least present on the site of the University Blvd. facility when liquid was pumped out of a sump and discharged into the environment without the presence of certified maintenance personnel or the proper filtration. Mr. Cignatta admits that he recommends Mr. Mollica for installation of cathodic protection systems. Tr-15 at 127. Without belaboring these points, Respondent would like to point out that these matters certainly do not reflect well on Mr. Cignatta's credibility. Even if these matters do not fully impeach Mr. Cignatta's credibility, the discrepancy in the tests conducted by Mr. Cignatta's firm and by Mr. Mollica's firm, as testified to throughout the hearing, is a clear indication that there can be differing results obtained by firms who are both state certified. Respondent should not be penalized for relying on the testing performed by Mr. Mollica's organization or any other state-certified cathodic protection tester and installer.

The evidence demonstrated that the cathodic protection systems at 22 Florida Avenue and 3900 Frederick Rd. had been de-energized for a period of time. There was also testimony that at Frederick Road, a site which was otherwise protected, one of the tanks was not connected to the cathodic protection electrical system. Tr-12 at 20 and following. The only reason why the system had been de-energized would have been to permit testing or maintenance on the system. The reason that the tank would not have

been connected is that a state-certified contractor either did not connect the tank to the system upon installation, or disconnected it for some other reason. There is no evidence that any of Respondent's personnel performed this testing or maintenance. All of the evidence in the case is that these functions were performed by state-certified personnel. Accordingly, although Respondent may be ultimately responsible for the integrity of its UST installations, Respondent cannot be held strictly liable for the errors of outsiders.

Count 8 (Initial Decision page 78). The only evidence of a violation is the fact that Euclid did not retain records of prior tests. It is reasonable for Euclid not to retain records of tests prior to the current test. The cathodic system passed the test on February 25, 2002. A cathodic system does not go from failing to passing. If the system was working in 2002, it had been working since it was installed. Imposition of a penalty solely on the basis of missing records is not warranted, where the evidence that the system is operational at the later date is sufficient evidence that the system worked continuously throughout the relevant period. It is reasonable for Euclid to discard records of testing for prior periods.

Counts 13 and 14 (Initial Decision page 79) Respondent also adopts the argument set forth above regarding the requirement to cathodically protect the tank system at the Spottswood Trail location, as alleged in Counts 13 and 14. Spottswood Trail tanks and piping were pumped out in 1997 and removed in April of 1999, at which time the site obtained a clean bill of environmental health from the Virginia officials. Records regarding this tank system were not retained. It is not appropriate to penalize Respondent for any alleged deficiencies regarding the compliance of this tank system under the circumstances.

Count 17 (Initial Decision page 81). The sole basis for the ALJ imposing a penalty of $47,962 on this Count is differences of opinion between the EPA's expert and the independent, certified corrosion tester who performed the tests, Guy Denny. Euclid had in its possession Mr. Denny's report stating that the corrosion protection system at the site was operational and met the requirements for corrosion protection. The EPA's expert re-tested the site and identified what that expert characterized as deficiencies in Mr. Denny's testing techniques.

There is no evidence that Euclid had any reason not to rely on Mr. Denny's testing methodology or report showing that cathodic protection was fully complaint. Imposing a penalty of that magnitude under the circumstances is wholly unwarranted.

Count 18 (Initial Decision page 82). Although Thomas Beck was not qualified as a corrosion protection expert, his testimony on this site was received without an objection being sustained. Even if Mr. Beck's testimony is not expert testimony, he did simply point out that Maryland does not require the extent of cathodic protection described by the EPA's expert. A recent printout from the Maryland web site describing the requirements is attached. As can be seen, the fittings at this site fully complied with Maryland's requirements and no penalty should have been assessed.

Count 32 (Initial Decision page 84). The ALJ assessed a penalty of $101,689 for this site, finding (1) that the Hobbs meter of the cathodic protection system indicated that the system was turned off for an extended period of time and (2) that Euclid's cathodic protection inspectors did not follow the procedures outlined by the EPA's expert when they conducted the tests at the site and provided Euclid with a passing report for the cathodic protection system. Mr. Denny and Mr. Ristaino are independent cathodic protection inspectors not affiliated with Euclid.

As the Initial Opinion observes, Euclid had the site inspected by certified cathodic protection inspectors, both of whom gave the site a passing grade. With respect to the testing of the system, Euclid is entitled to rely on the test results of certified testers to avoid a penalty of the magnitude of that imposed.

With respect to the Hobbs meter, Euclid did not have any direct involvement in the installation of the cathodic protection system. There would be absolutely no reason for anyone affiliated with Euclid to turn this system off. It draws a minimum of current and costs almost nothing to operate. The system was installed and maintained by third parties certified by the state.

Under this set of facts, the penalty assessed is grossly excessive.

Counts 41 and 73 (Initial Decision pages 88 and 92). A penalty was imposed because metal components of a fiberglass piping system were in contact with pea gravel. These components were coated and wrapped, as recommended by the Maryland Department of the Environment for metal components of a fiberglass tank and piping system.

No penalty should have been assessed here. Cathodic protection is required only when metal comes in contact with the "ground." Nowhere in the regulations is pea gravel equated with contact with the "ground." Pea gravel is much different than soil; it is much more permeable to water and it is much more chemically inert.

The fittings in this case were coated and wrapped as required by the Maryland regulations. Additionally, the system was installed by a certified installer.

Count 45 (Initial Decision page 89). As conceded by the EPA, the waste oil tank involved here was cathodically protected at all times. Euclid should not be penalized for a disagreement between the two experts. For purposes of reliance, Euclid should be entitled to rely on a state-certified cathodic protection tester.

The 6038 Baltimore Avenue facility is cathodically protected and the waste oil tank is within the cathodic protection field. Thomas Mollica testified, Tr-12 at 31 and following, that this tank was cathodically protected, and that John Cignatta, Complainant's expert, agreed that the tank was protected (Tr-12 at 33).

Mr. Yuen's testimony beginning Tr-13 at 76 indicates that he relied on the operators to maintain the integrity of the waste oil tanks. While this may not absolve Respondent of responsibility, it is a reasonable approach to take where the operators are the ones performing oil changes and interfacing with the public. Mr. Yuen also testified that the waste oil is sold to an outside contractor who would visit the sites at least monthly and pump the tanks dry. Under these circumstances, inventory control for tank leak detection is not going to be effective to determine whether a tank leaks because the volume will fluctuate considerably. Since the waste oil contractor is interested in acquiring as much waste oil as possible, it is not likely that a significant amount of waste oil remains in the tanks after they are pumped out.

Under the circumstances, any penalty assessed for failure to cathodically protect waste oil tanks should be minimal. One of the tanks is protected, and the other was believed not to be in need of protection.

Count 52 (Initial Decision page 91). With respect to the tank at 3800 Rhode Island Avenue, as described in Count 52, Respondent stipulated that this tank is a steel tank without cathodic protection. Mr. Yuen testified that the waste oil tank at this location was represented to be fiberglass when he purchased the station. Tr-13 at 83 and following. He stated that the MDE records and the other information, upon which he relied, clearly indicated that this was a fiberglass tank. Other waste oil tanks at Euclid had been unearthed and replaced with fiberglass tanks if there had been a problem. Apparently these two locations were not replaced. Tr-13 at 76 and following.

In fact, Respondent, when informed by Complainant's expert that one of the waste oil tanks was unprotected steel, immediately dug up this tank, only to discover that it was actually fiberglass.

Euclid is entitled to rely on the records of the Maryland Department of the Environment. It need not dig up every tank at every site to determine its composition. This Count is a case of mutual mistake and imposition of a penalty is inappropriate.

Count 37 (Initial Decision page 93). A penalty was asserted related to a galvanized metal pump controller. Had this controller been in contact with the "ground" or soil, Euclid would not be able to argue that it was cathodically protected according to the regulations. However, this device was in contact only with pea gravel. There is nothing in the regulations which equates pea gravel contact to soil contact and so this penalty should not have been imposed.

Count 59 (Initial Decision page 93). A penalty of $86,973 was imposed because the cathodic protection current had been turned off for a period of time and because the EPA did not agree with the test methodology utilized by Euclid. As discussed above, Euclid has no incentive to turn the current off. Euclid is entitled to rely on a certified tester.

The ALJ also notes that records of cathodic protection tests are missing. It would not be unusual for an operator to discard the previous test when being presented with a subsequent passing test. A cathodic protection system does not go from a failing state to a passing state. If the system passes, according to a test by a certified tester, that indicates that the system is fully operational in conformity with the regulations.

6. OVERFILL PROTECTION

Mr. Cignatta testified that Respondent's overfill devices were not in compliance with the regulations. Specifically, this testimony related to the contention that the devices were not installed at a height sufficient to shut off the flow of fuel being delivered to UST's when the fuel level reached 95% of tank capacity. Other contentions of Complainant are that the audible overfill alarms are not audible because they are not installed on the outside of the buildings at the service station sites. These contentions relate to the following counts of the Complaint:

No.	Facility	Count	Jurisdiction
1.	4606-68th Ave.	20	MD
		21	MD
2.	5342 Sheriff Rd.	25	MD
		26	MD
3.	2301 University Blvd	28	MD
		29	MD
4.	3900 Frederick	31	MD
		33	MD
5.	4225 Connecticut	36	DC
6.	6181 Annapolis	40	MD
		42	MD
7.	6038 Baltimore Ave	44	MD
		46	MD
8.	7887 Barlow Rd	48	MD
		49	MD
9.	3800 Rhode Island	51	MD
		53	MD
10.	22 Florida Ave	58	DC
		60	DC
11.	5608 Buckeystown	71	MD
		74	MD

Complainant's witnesses testified extensively as to the improper height of installation of the flapper valves and ball float devices. There was no testimony or other evidence elicited by Complainant to the effect that any of these devices were ever installed by anyone other than a certified installer. Mr. Beck testified at length concerning the installation procedures for these devices. Tr-14 at 118 - 137. Mr. Beck testified that the flapper valves come with installation instructions and a cardboard cutout

which helps the installer determine the height for installing the valve. Typically, field installers follow these instructions and install the device at the indicated height. Apparently, this height is not exactly set to meet the 95% capacity delivery shutoff requirement. Mr. Beck also noted that Maryland regulations discuss an alternate method of overfill protection which provides that any method which prevents the delivered fuel from coming into contact with the top of the tank is an acceptable method. In the tanks at issue here, none of the valve were so high as to allow the product to reach the top of the tan, therefore it meets the MDE regulations as an acceptable method of overfill protection.

It was discovered during the course of the investigation that the flapper valves on one of the tanks at 5432 Barlow Rd. (Count 25) were installed upside down, and so they would not function. Again, the valves were not installed by Respondent or any of Respondent's employees. While Respondent bears ultimate responsibility for the integrity of its pollution control devices, it is not appropriate to penalize Respondent under the circumstances. It is clear from the testimony that Respondent immediately replaced these valves when the problem was discovered. Tr-14 at 136 and following and at 186.

Mr. Beck testified that he utilized the manufacturer's instructions to obtain the actual measurement for installation of flapper valves on the Euclid facilities. He also testified that the instructions come with the valve and that they are used by himself and other installers. These instructions are simply the instructions used by the actual installers. Respondent cannot be charged with any inaccuracies or errors flowing from these instructions being followed by qualified certified personnel installing the flapper valve devices.

With respect to the ball float check valves, Complainant admits that the problems it identified with these valves resulted from an accepted industry practice which is now being reexamined. Complainant's Brief Page 221. Again, it is not proper to penalize Respondent under these circumstances.

Respondent's position on these issues is simply that it is improper to penalize Respondent for minor variations in installation of overfill devices, where these devices were installed by certified installers in conformity with the manufacturers' instructions. Respondent obtains absolutely no benefit from any errors associated with the installations.

Counts 21, 26, 29, 33, 34, 42, 46, 49, 53, 60, 74 (Initial Decision page 95, 96, 98, 99, 100, 101, 102, 103, 104) The discussion above is relevant to the penalties imposed for these sites. The rationale for imposing penalties totaling collectively $129,437 under the facts elicited at the hearing is severely flawed. Euclid, while it may have owned the sites, had absolutely nothing to do with the installation of the overfill protection devices at these sites. There is no evidence that any of the sites, even the one with the inoperable overfill device, ever had any release into the environment caused by

an overfill. The sites were not only inspected by the states in connection with the issuance of permits for the opening of the sites, but also inspected periodically by the states for environmental compliance. No problems were identified at any point until the EPA came in, years after the installation of the allegedly offending devices. Charging penalties on this basis creates an "enforcement lottery" where the sites slated for enforcement are charged with large penalties for events beyond their control.

7. SPILL PREVENTION

Count 34 (Initial Decision page 105). Mr. Beck testified, Tr-14 at 184-186 that the most likely cause of the gap between the fill tube and the spill bucket was improper conduct by one of the delivery drivers. This is a maintenance issue. Every installation at a service station is subject to deterioration and needs to be repaired occasionally. There is no basis on which to impose a penalty under the circumstances. The problem would have been identified at the next line test performed at the facility and fixed then.

The penalty matrix is also improperly utilized in this instance. There is no proof that the small gap identified by the EPA's expert could have resulted in any significant release of petroleum.

8. FINANCIAL RESPONSIBILITY

The discussion below relates to the penalties imposed in the Initial Decision with respect to **Counts 3 , 5, 38, 56, 61, 67 and 69 (Initial Decision pages 107 and 108)** that the Respondent failed to meet the financial responsibility requirements set forth in DCMR Title 20 § 6700, et seq. These Counts reference the District of Columbia locations. There are 7 service stations located in the District of Columbia. These 7 stations have fewer than 100 UST's in total.

Respondent, at the trial, demonstrated *de facto* and actual compliance with the financial responsibility requirements by (1) introducing evidence that Respondent had insurance coverage for the District of Columbia locations and that Respondent had a reasonable belief that this insurance satisfied the financial responsibility requirements of the District of Columbia, and (2) demonstrating that the financial net worth tests for establishing financial responsibility were met for all years at issue.

Eric Dana testified for Respondent that his insurance firm specializes in pollution control insurance, commencing TR-11 at 94 and following. His firm is qualified to write pollution control insurance in the District of Columbia which meets the financial responsibility requirements. Tr-11 at 95. Mr. Dana testified that he discussed the financial responsibility requirements of the District of Columbia with Mr. Koo Yuen, Respondent's CEO, in connection with an inquiry made by Mr. Yuen regarding the scope of coverage of a general liability insurance policy written by Nationwide beginning in 1994. Tr-11 at 127 and following. Mr. Dana advised Mr. Yuen, in connection with this inquiry, that it is very possible that Respondent believed that the Nationwide policy

satisfied the financial responsibility requirements. In response to cross examination, at Tr-11, p. 143, Mr. Dana reiterated that there are a number of misunderstandings as to what type of insurance complies with financial responsibility requirements. Mr. Dana never advised Mr. Yuen clearly that the Nationwide policy did not meet the financial assurance requirements until April of 2002. Tr-11 at 149-150. In the course of this discussion with Mr. Dana in April 2002, upon being notified that the Nationwide policy was not adequate, Respondent immediately secured additional coverage from Mr. Dana's company to meet these requirements.

Mr. Yuen testified, Tr-13 at 22-27; TR-14 at 16-17, that prior to the meeting with the Complainant in April of 2002, he believed that Euclid's insurance coverage met the relevant financial responsibility requirements. This belief was based on conversations with Mr. Lynch, the Nationwide agent, as well as with Mr. Dana.

The ALJ rejected this testimony (Initial Decision at 109) on the grounds that Mr. Dana informed Mr. Yuen that the financial responsibility insurance was not in place in April of 2002. In response, Euclid immediately procured insurance on April 29, 2002. Prior to that date, Euclid had a reasonable belief that it was insured. This belief mitigates against imposition of a penalty totaling $124,876. Euclid discovered the problem only a short period of time before the filing of the initial Complaint in this case by the EPA. At most, Euclid should be penalized only for the month of April, 2002 rather than for the entire period beginning in September 1997.

The testimony at the trial, although rejected by the ALJ (improperly, we submit) clearly establishes that Euclid did not need insurance because it had an alternate financial responsibility mechanism in place. Under the facts presented at the hearing, the EPA has not demonstrated that Euclid did not *de facto* meet the relevant requirements. Since Euclid met the requirements, and since Mr. Dana's testimony established the date on which Euclid did not have coverage, the imposition of any substantial penalty on the Financial Responsibility Counts is not proper.

Mr. Yuen testified that the tangible net worth of Euclid's interest in the 23 facilities at issue in this case ranged from an amount of more than 20% in excess of the regulatory requirements in 1997 to more than 60% in excess of these requirements in 2002. Moreover, these tangible net worth figures are "bottom line" figures which include a large offset each year for negative retained earnings resulting from losses incurred prior to the periods at issue. These prior period losses would not affect the ability of Respondent to realize value from the sale of assets, and would arguably not be counted in the "tangible net worth" of the facilities, which would consist of the total worth of all of the assets of the businesses subject only to secured debt and possibly to general business liabilities. Complainant's expert Joan Meyer accepts this definition. Tr-6 at 35-36. Respondent meets the requirements even if all of its liabilities and negative retained earnings are offset against the value of its assets.

This case is brought under the District of Columbia regulations ("DCMR"),

beginning at Title 20, §6700 *et seq.* The DCMR and EPA regulations require that Respondent maintain a certain dollar net worth as a threshold to meet the financial responsibility requirements. 20 DCMR § 6704 *et seq;* 40 CFR §280.93. Respondent may meet the financial responsibility test using either of the two mechanisms described in the DCMR. 20 DCMR §6703; 40 CFR §280.94(a)(1). To meet the financial test of self-insurance, the Respondent must have a tangible net worth in excess of the amount stated and, under DCMR, sufficient net worth for decommissioning. Under the EPA regulations for closure, which arguably do not apply under the Amended Complaint, the following requirements must be satisfied: (1) two of the following three ratios: (A) a ratio of total liabilities to net worth less than 2.0; (B) a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and (C) a ratio of current assets to current liabilities greater than 1.5; and (2) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates. The financial statements of the Respondent clearly meet each of these tests, both for purposes DCMR and for purposes of CFR.

In connection with this case, Ed Davis, CPA, prepared accountants' reports which meet the requirements of the regulations, stating that there were no matters which came to the accountant's attention which would adversely affect the financial statements. Respondent's Exhibit X-9. Admittedly, this accountant's report was not prepared contemporaneously, but with the exception of being late, it fully complies with the applicable requirements.

Ed Davis testified, Tr-10 at 45-48, that the fair market value, rather than historical cost, is appropriate to state the "tangible net worth" of an entity on financial statements. Therefore, in preparing this accountants' report, Mr. Davis utilized the fair market values of the real estate assets.

These fair market values were supplied by Mr. Yuen. Mr. Yuen testified as to extensive experience in the gasoline service station business, including more than 30 years of multiple operations, buying, selling, leasing and developing gasoline service station properties in each jurisdiction. Mr. Yuen's valuation for each of the properties was, in his view, conservative. Tr-13 at 8-15 and Tr-13 at 28 and following. Complainant never produced any evidence to rebut Mr. Yuen's valuation. Dr. Meyers did generally attempt to question Mr. Yuen's values, but did not introduce any substantive challenges to any of the values. Tr-6 at 73 and following.

At the hearing, it was left open whether Mr. Yuen would be qualified as a valuation expert, although his opinion as to the values of the 23 properties at issue was accepted as fact testimony on the valuation issue. Tr-13 at 33-37. It is clear from his testimony that Mr. Yuen is an expert in the valuation of service station real estate. Even someone without any experience in this area can see that the valuations stated in the schedule, compared with the location of the facilities, appear reasonable.

With the exception of Mr. Yuen's testimony concerning value, there was no other testimony in the record concerning the value of the properties. The ALJ credits the EPA expert, Joan Myers, as casting "considerable doubt" on the net worth figures asserted by Mr. Yuen. Initial Opinion at 114-115. However, Ms. Myers never rebutted a single value by opining that any of Mr. Yuen's values was incorrect. She merely speculated that perhaps the values were lower than Mr. Yuen asserted because some of the properties had a spread between the purchase price and Mr. Yuen's value which she did not accept. She gave no competent reason for not accepting any of the values. Dr. Myers did not know why the value of personal property would decline over time. Apparently, she is not familiar with the concept of depreciation, or the concept that used equipment is worth less than new equipment. Ms. Myers had nothing competent or admissible to say about the values.

The owner of a parcel of real property is considered to be competent to testify as to the fair market value of the real property even if the owner would not otherwise qualify as an expert in real estate valuation. In *Brannon v. State Roads Commission*, 305 Md. 793; 506 A.2d 634 (1984), the court held that:

> . . . the landowner is the most logical person to testify as to the property's value because of his familiarity with it. Indeed, the landowner occupies a special position where he testifies as to the value of his property. Unlike the expert witness, the owner of the property is presumptively competent to express his opinion of its value. [Citing cases]. This presumption is based upon the owner's familiarity with the land, that "merely by virtue of his ownership . . . he may be presumed to have sufficient knowledge of the price paid, the rents or other income received, and the possibilities of the land for use, [so as] to have a reasonably good idea of what it is worth. [Citing *District of Columbia v. 13 Parcels of Land, etc.*, 534 F.2d 337 (CA-DC, 1976).] 305 Md at 801-802; 506 A.2d at 638-639.

Accordingly, Mr. Yuen is competent to testify as to the fair market values of the real properties in this case to the same extent as a valuation expert.

The ALJ also rejected the guarantee among the trusts and Euclid for the cost of remediation of Euclid's sites and the closure of the sites, almost out of hand. This guarantee is not a "financial guarantee" under the regulations, but a commitment to utilize the resources of the trusts to pay for any required remediation of the sites.

As argued below, Courts have held that a trustee of a trust is entitled to be treated the same as a landowner for the purpose of determining valuation of land in the trust. *Colonial Pipeline Co. v. Gimbel*, 54 Md.App. 32, 456 A.2d 946 (1983). If the trust makes a commitment to assist with the funding of environmental remediation, this commitment is the equivalent of including the net worth of the trusts in Euclid's net worth for purposes of meeting the applicable regulatory requirements.

Contrary to the ALJ's assertion in the Initial Opinion at 114, Mr. Yuen discusses the methodology for determining the values of the properties at length at Tr-13 page 28 - 33.

The applicable federal and DC regulations also provide that Respondent must have a letter signed by the chief financial officer for each year at issue. Respondent does not contend that such a letter was contemporaneously prepared. However, Mr. Yuen testified that all of the required representations for the CEO letter were in effect for each of the years at issue. Tr-13 at 18-23. For Mr. Yuen to write a CEO letter to himself would not have had any significant purpose. The failure of Mr. Yuen to write this letter contemporaneously does not mean that the requirements of the financial assurance regulations were not met.

The ALJ accepts Joan Meyers' seeming confusion of the requirements for submitting a guarantee as a means of meeting the financial tangible net worth test with the requirements for establishing financial responsibility as a consolidated entity, which were met by Respondent. Initial Opinion at 112. The testimony of Dr. Meyers is at TR-6 at 44 *et seq*. The rationale of her testimony to the effect that a contemporaneous financial assurance letter from the CEO is critical, may apply in situations where the entity providing the net worth is not consolidated with the entity which is obligated by the financial responsibility requirements. However, that rationale does not apply in this situation, where the net worth is the worth of a combined entity with a single individual in the same position. The failure of Respondent to present a CEO letter contemporaneously, while a technical violation of the regulations, is not a serious violation and Complainant has presented no evidence that this failure vitiates compliance with the requirements to sustain a penalty of $129,437.

Dr. Meyers also seems to assume that the financial statement must be "independently audited." TR-6, 44 *et seq*. The independent audit requirement, in Ms. Myer's view, appears to be that the financial statements are "certified." There are three levels of financial statement presentation by a certified public accountant: audited (i.e. the accountant expresses an opinion that the financial statements fairly present the results of financial operations); reviewed (i.e. the accountant has determined that the financial statements are presented in conformity with generally accepted accounting principles and that there are no matters brought to the accountant's attention which would indicate any material inaccuracies) and compiled (i.e. the accountant prepared the financial statement but expresses no opinion as to any matters related to the financial statement, subject to regulations to inhibit accountants from compiling misleading or inappropriate financial statements). Tr-10 at 40 (testimony of Ed Davis).

The ALJ notes that audited financial statements are not required to secure a Dun & Bradstreet rating of 4A or 5A. Initial Decision at 113. The Initial Decision quotes from the preamble to the EPA financial responsibility regulations related to the requirement that "the reporting and certification requirements are stricter" in the case of self-insurance, and that that alternative "requires that the financial statement s of an

owner or operator using the financial test be independently audited." In ruling against Euclid, the ALJ observes that there is no evidence that Euclid had audited financial statements. However, as observed above, the preamble to regulations is not equivalent to a regulatory requirement. Give the fact that there are precise definitions of the levels of audited financial statements adopted by the Financial Accounting Standards Board and other accounting regulators, the regulations should clearly state the level of verification, if any, by an accountant which is required.

The applicable regulations in no event require any particular type of financial statement, so long as the accountant's opinion contains the language from the regulations to the effect that "no matters came to the attention of the accountant which indicate that the financial results should be adjusted." This language is contained in the Respondent's accounting reports. There is absolutely no regulatory requirement for an audited or reviewed statement. Generally, regulations as specific as those at issue would be expected to be expressly state if the intent was to require audited financial statements. Under general principals of regulatory interpretation, there is no basis for imputing a specific type of audit where the regulations are silent regarding this requirement.

Dr. Meyers also states that the financial statements must be prepared in conformity with generally accepted accounting principles ("GAAP"); however, again, there is no such requirement in the regulations. Moreover, Mr. Davis testified that there are acceptable deviations from GAAP, permitting Respondent to value the real estate at its fair market value, and that these exceptions applied in this case. Tr-10, at 44 and following. Recognized exceptions to the basic rules of GAAP are themselves considered generally accepted accounting treatments of the affected items. The ALJ rejects this testimony out of hand. Initial Decision at 114. There is no citation to precedent or expert testimony which supports this rejection.

The ALJ also rejects Mr. Yuen as a valuation expert, footnote 80 on page 114 of the Initial Decision, despite the fact that it is clear that Mr. Yuen purchased and oversaw the operations of 23 gas station properties in the three jurisdictions. Had there been any question about Mr. Yuen's expertise, due process would have mandated that *voir dire* be conducted to establish whether he was an expert. Since this issue was left open, this brief proceeding could have occurred after the hearing.

Moreover, if Koo Yuen is not an expert, then he cannot be held fully responsible for all of the acts and omissions complained of and so the assertion of a penalty of the magnitude asserted is wholly unwarranted.

For that matter, if the ALJ was convinced that Mr. Yuen lacked expertise, then how could he have been held responsible for improper functioning of drop tubes or cathodic protection systems or other matters involving state-certified independent contract installers and maintenance personnel?

The ALJ relies highly on the testimony of Dr. Myers, who admittedly never

audited or provided any financial consulting services to a gas station, while rejecting, out of hand, the testimony of Ed Davis, CPA, whose whole livelihood is doing just that. Dr. Meyers never materially impeached the financial results which were shown on Respondent's financial statements, which clearly demonstrates that the Respondent met the financial assurance requirements, with the exception of the requirements for contemporaneous accountant report and contemporaneous CEO letter.

Ed Davis testified that the compilation accounting, utilizing a consolidation of the assets and liabilities of the 23 locations and the results of financial operations of Euclid of Virginia, Inc. was the appropriate method of accounting for determining compliance with the financial responsibility regulations under the federal and District of Columbia regulations. Tr-10 at 41-42. Both DC and the EPA accept financial statements submitted to Dunn & Bradstreet as complying with the applicable regulations, and compiled statements of the type prepared by Respondent are accepted by Dunn & Bradstreet, even though these particular statements were not submitted to Dunn & Bradstreet. Tr-10 at 43-44.

It is inappropriate to impose more than a *de minimus* penalty on Euclid for alleged violations of the financial responsibility counts. Complainant demonstrated only that Euclid had failed to write a letter to itself stating that it was guaranteeing the cost of remediation and closure, and that Euclid failed to send a letter to DC each year.

Writing a letter to itself is futile, and Euclid did not notify DC simply because it had a good faith belief that it was covered by insurance.

CONCLUSION AND REQUEST FOR RELIEF

Complainant has conflated a number of technical violations into what almost appears to be a situation where Euclid is singled out for destruction as an example to others. While there is not full compliance with all of the regulatory standards in every instance, the degree of actual harm to the environment demonstrated by Euclid is negligible. The degree of potential harm to the environment is also much less than characterized. During 2001 and following, Euclid was in the process of upgrading the environmental controls on all of its stations. By 2004, it had state-of-the-art tank and line detection devices. By that year, it was possible to centrally control the flow of tank and line test results.

While accusing Euclid of being a danger zone, the EPA itself failed to comply with the simple requirement that it notify the states prior to commencing the instant case.

Coincidentally, page one of the Metro Section of *The Washington Post* for February 13, 2007 has an article disclosing that Maryland and Virginia are two decades late in complying with orders to provide pollution control plans to the EPA.