UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

Euclid of Virginia, Inc.,	**)**	**RCRA-3-2001-5001**
	)	
Clark Automotive Services, Inc.,	**)**	**RCRA 3-2001-5002**
	)	
Respondents	**)**	

Resource Conservation and Recovery Act - Underground Storage Tank Systems
State Programs - Maintenance of Records-Interpretation of Regulation

Where State of Maryland's UST program had been approved to operate in lieu of the federal program under RCRA § 9004 and Code of Maryland Regulation (COMAR) provided that required records could either be kept at the UST site and immediately available for inspection by the Department or at a readily available alternative site and provided for inspection to the Department upon request and there was no evidence that the MDE inspector had asked to inspect the records at the alternative site and Complainant acknowledged that requested records were provided within two weeks, which was considered to be reasonable, count of complaint alleging failure to maintain records would be dismissed, "readily available" within meaning of cited COMAR modifying "alternative site" rather than "availability of records".

Resource Conservation and Recovery Act- Underground Storage Tank Systems-State Programs and Enforcement-Res Judicata-Issue Preclusion.

Under EAB precedent, fact that the State of Maryland had been granted authorization to operate its UST program in lieu of the federal program pursuant to RCRA § 9004(d), and Respondent, owner of a UST site, failed to install spill catchment basins and overfill prevention equipment by the COMAR deadline of December 22, 1998, and Maryland DE issued a complaint and assessed a penalty, which Respondent paid, for a period of noncompliance which on the face of the complaint ran from the date of an inspection on May 12, 1999, until the site was brought into compliance on August 3, 1999, neither res judicata or issue preclusion operated as a bar to an EPA complaint which, inter alia, sought to assess a penalty for the mentioned violation for the period from December 22, 1998, to the date of a DE inspection on May 12, 1999.

Resource Conservation and Recovery Act-UST Systems-Determination of Penalty-UST Penalty Guidance.

Where Respondent failed to install spill catchment basins and overfill protection equipment by regulatory deadline and UST Penalty Guidance provided that proposed penalties include recapture of the economic benefit from noncompliance, that is "avoided costs" or

"delayed costs", and because Respondent tardily installed the equipment, economic benefit properly included only delayed costs (expenditures) and Complainant did not establish delayed costs or expenditures used in calculating alleged economic benefit, proposed penalty was reduced by alleged economic benefit.

Resource Conservation and Recovery Act- UST Systems-Authorized State Programs-Owners and Operators-Burden of Proof.

Where Complainant issued separate complaints against Euclid of Virginia, Inc and Clark Automotive Services, Inc. upon the premise that Euclid was the owner and Clark was the operator of the UST site identified in the complaints and evidence failed to establish that Clark had any control over, or responsibility for, USTs at the site or any connection with the sale or dispensing of gasoline at the site, complaint against Clark was dismissed.

Appearances:

For Complainant:	Rodney Travis Carter, Esq. Russell Swan, Esq. Office of Regional Counsel United States Environmental Protection Agency Philadelphia, Pennsylvania
For Respondent:	Thomas F. De Caro, Jr., Esq. Upper Marlboro, MD

INITIAL DECISION

These proceedings under Section 9006 of the Solid Waste Disposal Act, as amended ("RCRA"), 42 U.S.C. § 6991e, were commenced on March 7, 2001, by the issuance of separate complaints by the Associate Director for Enforcement, Waste and Chemical Management Division, U.S. EPA, Region 3, charging Euclid of Virginia, Inc., as owner, and Clark Automotive Services, Inc., as operator, with violations of the Act and underground storage tank ("UST") regulations promulgated by the State of Maryland ("COMAR") at a facility located in Silver Spring, Maryland, variously known as "Cloverly Auto Care", "Cloverly Citgo" and/or "Cloverly Exxon". Among other things, the complaints allege that Euclid of Virginia, Inc. is a corporation incorporated in the District of Columbia, that Clark Automotive Services, Inc. is a corporation incorporated in the State of Maryland, that pursuant to RCRA § 9004 the State of Maryland has been granted final authorization to enforce its UST program in lieu of the Federal program[1] and

[1] The State of Maryland was granted final approval to operate its UST program in lieu of (continued...)

that from September 15, 1995, to at least July 13, 1999, Respondents maintained at the mentioned facility three "underground storage tank systems" which contained "regulated substances" as defined in Code of Maryland regulations ("COMAR"),and thus these systems were petroleum UST systems as defined in COMAR. Count I alleged that at the time of an inspection on September 16, 1998, certain records, relating to, inter alia, corrosion analysis, UST system repair, and recent compliance with release detection which were required by COMAR to be immediately available for inspection at the facility, or at a readily available alternative site and provided for inspection upon request, were not available. Count II alleged that from at least December 22, 1998, to July 13, 1999, the three UST systems at the facility contained regulated substances and were not in compliance with spill and overfill prevention equipment requirements of COMAR. Complainant did not request any specific penalty amounts in the complaints. Although in its prehearing exchange Complainant indicated that it is seeking a penalty of $9,519.66 against each of the Respondents, the claim against each Respondent has been reduced to $5,110.05 on Post-Hearing Brief (Id.14-20).

Respondent Euclid through counsel filed a timely answer denying the alleged violations and requesting a hearing.

Under date of July 6, 2001, Respondent Clark through counsel filed a motion to dismiss upon the ground that it merely rented a repair bay at the site and had no involvement with the dispensing of petroleum products therefrom. Alternatively, Clark moved that this proceeding be consolidated with the proceeding against Euclid. Opposing the motion, Complainant pointed out, inter alia, that the motion involved factual questions which should be resolved at a hearing and that the motion to consolidate was premature because Clark had not filed an answer (Response, dated July 12, 2001) Thereafter, Clark filed an answer reiterating that it merely rented repair bays at the facility and had no involvement with the sale of gasoline or the underground tanks at the facility and no duties or responsibilities relating thereto. Clark requested a hearing.

By an order, dated August 14, 2001, the motion to dismiss was denied upon the ground that "operator" as defined in COMAR means "a person in control of, or having responsibility for, the daily or periodic operation, or the repair, maintenance, closure, testing, or installation, of the UST system" (COMAR 26 § 10.02.04(B)(40)), and that, obviously, whether Clark met that definition involved factual questions. The proceedings were, however, consolidated pursuant to Rule 22.12(a) (40 C.F.R. Part 22).

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[1](...continued)
the Federal program pursuant to RCRA § 9004 on June 30, 1992 (57 Fed. Reg. 29034). Upon such approval, the Maryland program became a requirement of RCRA Subtitle I, enforceable by the Administrator as well as the State. Maryland regulations applicable to USTs are set forth in Code of Maryland Regulations Title 26, Department of the Environment, Subtitle 10, Oil Pollution and Tank Management, Chapter__, hereinafter COMAR 26 § 10__.The State of Maryland is not included in the codified list of approved State Underground Storage Tank Programs (40 C.F.R. Part 282).

A hearing on this matter was held in Washington, D.C. on January 29, 2002

Based upon the entire record, including the proposed findings and briefs of the parties, I make the following:

Findings of Fact

1. Euclid of Virginia, Inc ("Euclid") is a corporation incorporated in the District of Columbia. Mr. Koo L. Yuen is the president of Euclid.

2. Clark Automotive Services, Inc. ("Clark") is a corporation incorporated in the State of Maryland. It appears that Clark formerly owned the UST site at issue herein (Testimony of Koo L.Yuen, Tr.179).

3. Euclid is and has since April of 1995 been the owner of the gasoline service station (UST site) identified in the complaints, that is, Cloverly Auto Care, a/k/a Cloverly Citgo and/or Cloverly Exxon, sometimes referred to as "Cloverly Lowest Price", located at 15501 New Hampshire Avenue, N.E., Silver Spring, Maryland.

4. From September 15, 1995, until at least July 13, 1999, the site identified in finding 3 included three "Underground Storage Tank " (UST) systems as that term is defined in COMAR 26 § 10.02.04(B)(37) (64) and (66). On September 16, 1998, the facility referred to above was inspected by Mr. Gerald Donovan, a representative of EPA, and Mr. James Chilcote, a representative of MDE, to determine if the USTs at the facility were in compliance with RCRA Subtitle I and COMAR (Tr. 23, 24; RCRA Underground Storage Tank Inspection Report, C's Exhibit 3; Routine Inspection [Report] (handwritten), Exhibit 10)..

5. Mr. Chilcote testified that six underground storage tanks were located at the site, four for motor fuel, one for heating oil and one for used oil (Tr.24). The tanks for motor fuel, three for gasoline and one for diesel , were of 10,000 gallon capacity, while the tanks for heating and used oil were of 1,000- and 550-gallon capacity, respectively. The gasoline and used oil tanks were seven years old, having been installed in 1991, while the tanks for diesel and heating oil were over 20 years old. The tanks were steel-walled, fiber glass reinforced protection clad and cathodic protection was present (Exhibits 3 and 10). It appears that the tank for diesel fuel had been improperly abandoned.[2] Mr. Chilcote asked the station manager, Mr.

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[2]. Site Sketch Photo Log, UST Inspection Report (Exhibit 3); Routine Site Inspection (Exhibit 10). A UST system that has been temporarily closed for more than six months must be permanently closed if it does not meet the performance standards of COMAR 26 § 10.03.01 for new UST systems or the upgrading requirements in COMAR 26 § .10.03.08 (COMAR 26 §

(continued...)

R.K. Saxena, for documentation pertaining to inventories, testing requirements, age of tanks and insurance and was told that he would have to contact the owner, Mr. Yuen.[3] It should be noted that the documentation specifically requested by Mr. Chilcote, e.g., testing requirements [results], age of tanks, and insurance, is not included in the complaint as documentation allegedly unavailable at the time of the inspection. Rather, the complaint describes the unavailable records as those listed in COMAR 26 § 10.04.05 (C) (supra note 3). While it is not clear that those records were specifically requested by Mr. Chilcote either at the inspection or in his telephone conversation with Mr. Yuen (infra finding 6), Complainant has acknowledged that the required records were provided within a couple of weeks (Post-Hearing Brief at 16). There is, however, no evidence or allegation that Mr. Chilcote or anyone else from either MDE or EPA ever requested that the records be presented for inspection at a readily available alternative site (COMAR 26 § 10.04.05 D (2), supra note 3).

6. Mr. Chilcote called Mr. Yuen from the station the very day of the inspection. Apparently as a result of this call, Euclid as owner submitted a Notification of

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[2](...continued)
10.10.01 C.). A letter from Quality Environmental Solutions, Inc, (QES) to Power Fuel and Transport, LLC. , dated January 13, 2000, submitting a proposal for an environmental assessment of the Cloverly Auto Care site, refers to the removal in November, 1999 of a 550-gallon used oil UST, a 1,000- gallon fuel oil UST and 4,000-gallon diesel UST. (R's Exhibit 3-B). Although it is not clear, in this proposal and other correspondence included in the mentioned exhibit, Power Fuel and Transport is treated as the owner of the site.

[3]. COMAR 26 § 10.04.05 C. is entitled "Record Keeping" and provides that "Owners and operators shall maintain the following information:
(1) A corrosion expert's analysis of site corrosion potential if the analysis is required by the Department [of the Environment] as part of an alternative method of corrosion protection under COMAR 26 § 10.03.01B(4) or .02A(3);
(2) Records of operation of corrosion protection equipment pursuant to Regulation .02 of this chapter;
(3) Records of UST system repairs pursuant to Regulation .04G of this chapter;
(4) Records of compliance with release detection required by COMAR 26.10.05.06;
(5) Results of site investigation conducted at permanent closure pursuant to COMAR 26.10.10.05; and
(6) Records of UST system upgrades pursuant to COMAR 26.10.03.08.
Section 10.04.05 D is entitled "Availability and Maintenance of Records"and provides:
(1) Owners and operators shall keep the required records either:
(a) At the UST site and immediately available for inspection by the Department; or
(b) At a readily available alternative site, and these records shall be provided for inspection to the Department upon request.

Underground Storage Tanks for a UST site identified as "Cloverly Lowest Price,"15501 New Hampshire Avenue, Silver Spring, MD, under date of September 18, 1998 (infra finding 7). As to other required [requested] documentation, Mr. Chilcote testified that he received it within a couple of weeks (Tr.26). With respect to records of tank tightness testing [4], he regarded the records as available within reason. [5]. The Observation section of the RCRA UST Inspection Report (Exhibit 3), states, inter alia, that Notification for Underground Storage Tanks and Financial Assurance Records were not available at the time of the UST inspection, that Spill, Overfill and Vapor recovery/Stage II for stations pumping more than 100,000 gallons were not present [6] and, that this information

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[4].COMAR § 10.05.02. C (1) provides that: UST systems that meet the performance standards in COMAR 26 §.10.03.01 and .02 and the daily inventory requirements in COMAR 26. §§10.04.01E–G ,may use precision tightness testing in accordance with Regulation .04D of this chapter, at least every 5 years until December 22,1998; (2) UST systems that do not meet the performance standards in COMAR 26 §.10.03.01 and .02 may use daily inventory controls, in accordance with COMAR 26. §10.04.01E–G, and annual precision testing in accordance with Regulation .04D of this chapter, until December 22, 1998, when these systems shall be upgraded under COMAR 26 §10.03.08 or permanently closed under COMAR 26 §10.10; and .... Underground piping that routinely contains regulated substances must have an annual line tightness test (COMAR 26 § 10.05.02 D.(b)). Euclid is not charged with failure to have records of annual line tightness tests available at the time of the inspection.

[5].Tr. 39. Records of tank tightness tests on the gasoline tanks conducted by Eldreth Environmental Services on July 21,1994, and on the other tanks on July 28, 1994, which indicated that all of the tanks passed were submitted to Cloverly Citgo by a letter, from Eldreth Environmental Services, dated August 1, 1994 (Exh.3-B). It is not clear if these were [some of the] records submitted in response to Mr. Chilcote's request.

[6]. Title 26 §11.24.01 of the Annotated Code of Maryland provides, B.(1) that an "Approved Stage II vapor recovery system (approved system)" means " (a) A properly installed Stage II vapor recovery system for which CARB has issued an Executive Order certifying the system using procedures in effect in California before April 1, 2001; or...." Among the mass of documents included in Respondent's Exhibit 3-B is an order by the California Air Resources Board (CARB) finding that the Healy ORVR Phase II Vapor Recovery System conforms with all the requirements set forth in the Certification Procedures, and results in a vapor recovery system which is at least 95 percent effective for attendant and/or self-service use at gasoline service stations, when used in compliance with this Order and when used in conjunction with a [CARB-certified] Phase I vapor recovery system, which has been certified by the Board and meets the requirements contained in Exhibit 2 of this Order. COMAR 26 § 10.03.03 D. provides: On July 1, 1998, new or complete replacement UST systems, which utilize vapor recovery, shall be equipped to prevent the release of product from the vapor recovery fitting by (1) installing at the stage one fitting a spill catchment basin with a minimum capacity of 5 gallons; or...Because

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and a copy of the contract for the 1998 upgrades were to be faxed to the inspectors, which did not occur.[7] The Report also states that " Cathodic protection present[.] [T]est results not available at time of this UST inspection" The Routine Site Inspection [report] (Exhibit 10) states that vapor recovery is Coaxial Stage I and that the station sells 110,000 gallons of gasoline per month.

7. Mr. Chilcote testified that the inventory records were on site and that Respondent was doing proper statistical inventory reconciliation (Tr. 38, 39). Although the RCRA UST Inspection Report (Exhibit 3) states that statistical inventory reconciliation (SIR) was not used, this is contrary to Mr. Chilcote's testimony and the Routine Site Inspection [report] which was handwritten by him at the time of the inspection and which answers affirmatively the question of whether proper inventory records were present and that statistical inventory reconciliation was used (Exhibit 10). Mr. Chilcote's statement is in accord with the Notification of USTs submitted by Euclid (infra finding 8) and is accepted as accurate. Asked what else he observed, Mr. Chilcote replied that there were several violations, one was that no Stage II vapor cover had been installed (Tr.27). However, it is not apparent that this was a violation because COMAR 26 § 10.03.03 D referring to vapor recovery as of July 1, 1998, applies only to new or complete replacement UST systems (supra note 6) .Mr. Chilcote also testified that the tanks had not been upgraded to meet the December 22, 1998 deadline [for spill/overfill protection]. This deadline for required upgrading was three months in the future at the time of the inspection.

8. Under date of September 18, 1998, Euclid submitted a "Notification for Underground Storage Tanks" (R's Exhibit 3-B). The Notification reflected, inter alia, that there were three underground storage tanks of 10,000 gallon capacity at the facility, that these tanks had been installed in 1991 and were of cathodically protected steel, that the tanks contained gasoline, that the piping was constructed

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[6](...continued)
Euclid's UST systems were not new or complete replacement systems, this section does not appear to be applicable.

[7]. COMAR 26 §10.03.08 provides in pertinent part:
.08 Upgrading of Existing UST Systems.
A. Not later than December 22,1998, all UST systems containing a regulated substance, except heating oil for consumptive use, shall comply with one of the following requirements:
(1) New UST system performance standards under this chapter;
(2) The upgrading requirements in §§ B–D of this regulation; or
(3) Closure requirements under COMAR 26.10.10, including applicable requirements for corrective action under COMAR 26.10.09.

of fiberglass reinforced plastic and cathodically protected. and that neither the tanks nor the piping had ever been repaired. Additionally, the Notification indicated that manual tank gauging and statistical inventory reconciliation (SIR) were used for release detection and that an overfill protection device and a Stage I vapor recovery system had been installed. Manual tank gauging and SIR were acceptable methods of release detection for the tanks described in the Notification until December 22, 1998 (COMAR 26 § 10.05.02 (C) (supra note 4).

9. On February 26, 1999, the facility known as Cloverly Lowest Price was inspected by a representative of MDE to determine if it used Stage II vapor recovery (Report of Observations, C's Exhibit 11). The report states that inspection of MPD's revealed regular nozzles [for the hoses from the dispensers]. and no Stage II. In addition, the report states the attendant indicated that the station had a throughput of 50[K]-70K per month. The facility identified as Cloverly Auto Care was again inspected by Mr. Chilcote of MDE on May 12, 1999 (Tr.28, 29 ; Report of Observation, C's Exhibit 12). The report reflects that he spoke with the manager's wife, Sadna, who had no knowledge of any scheduled work to remove the improperly abandoned tanks and that, in a telephone conversation, Mr. Yuen confirmed that he did not have a commitment from a contractor [for that purpose] as yet.

10. Mr. Chilcote again inspected the facility on July 13, 1999 (Tr.29; Report of Observations, Exhibit 13). He found that no changes had been made, i.e., the out of service USTs [for used oil, heating oil and diesel] were still in the ground and the three gasoline USTs had not been upgraded to include spill catchment basins [and overfill prevention equipment]. He immediately issued a cease and desist order which meant that Euclid could continue selling existing product, but was prohibited from receiving further deliveries until the required upgrades were completed (Tr.29, 30). Mr. Chilcote again visited the site on August 3, 1999. He testified that the required upgrades were in progress (Tr.30). His Report of Observations of that date, however, states that spill catch basins and overfill shut-offs have been installed on the three gasoline [tank] fills (Exhibit 14).

11. On August 9, 1999, the Director of the Waste Management Administration for the State of Maryland issued a complaint and order (COV-99-090) against Euclid of Virginia, Inc. (Exhibit 15). Among other things, the complaint recites that Euclid is a Virginia corporation registered to do business in the State of Maryland, that Euclid owns and operates several gasoline service stations in Maryland and is subject to COMAR regulations, which, inter alia, require the installation of spill and overfill prevention equipment and that a UST system which is temporarily closed for more than six months must be permanently closed, if it does not meet the upgrade requirements. The complaint further recites that "Cloverly Lowest Price", 15501 New Hampshire Avenue, Silver Spring, Maryland, which is owned

by Euclid, was inspected by Mr. James Chilcote on May 12, 1999, and that the inspection revealed that three UST systems, i.e., 1,000 gallon diesel, 1,000 gallon #2 heating oil and 550-gallon used oil, were out-of-service and improperly abandoned. Additionally, the three active 10,000-gallon gasoline USTs did not have spill catchment basins and overfill protection [prevention] equipment had not been installed. A follow-up inspection on July 13, 1999, by Mr. Chilcote revealed that the same non-complying conditions still existed. Euclid was ordered to close all substandard UST systems by removal in accordance with Maryland regulations and notified that the Waste Management Administration was seeking a civil penalty in the amount of $6,000.

12. Mr. Chilcote testified that the MDE complaint (COV-99-090) for the failure to have spill catchment basins and overfill prevention equipment covered the period from his inspection on May 12, 1999, to August 3, 1999 (Tr.32, 33). On cross-examination, however, he stated that he saw nothing in the complaint that specified a specific time-period [for the noncompliance alleged]. He also testified that the invoice for the penalty (R's Exhibit A) did not specify a time limit for which the penalty was assessed (Tr.36, 37). In further testimony, he asserted that he was unaware of any MDE policy to assess a fine for a discrete period and leave other periods [of the violation] for further enforcement proceedings (Tr.37, 38).

13. A letter from the Maryland Department of the Environment., dated September 24, 1999, to Euclid encloses an invoice in the amount of $13,500, which represents the settlement of civil penalty proceedings for the action referred to in finding 11 and for an unrelated action (COV-99-057) involving a station owned by Euclid in Baltimore (R's Exhibit 3-D). The letter states that the penalty is to be paid in nine installments of $1,500 each beginning on October 14, 1999, and ending June 15, 2000. Mr. Yuen testified that the penalty was paid in full over nine installments (Tr.196).

14. Mr. Gary W. Morton is a case development officer employed by EPA and custodian of the files in the proceedings against Respondents herein (Tr.50, 51, 57). He testified that the file revealed an attempted telephone contact with Mr. Yuen and two Section 9005 information requests (Tr. 59). The first such request is dated March 23, 2000, and was addressed to Mr. Koo Yuen, Cloverly Auto Care, 4225 Connecticut Avenue, Washington, D.C. (C's Exhibit 18). The request contained 30 questions addressed to such matters as notification of USTs, documentation of insurance, financial information, spill/overfill compliance and compliance with leak detection requirements (Tr. 60). Mr. Morton described the request as basically a document asking respondent to demonstrate that it is in compliance with UST regulations. Question 12 of the § 9005 information letter asked Mr. Yuen to provide a description of the release detection methods as required by COMAR 26 10.05.04 and .05 and 40 CFR Subpart D for USTs installed in 1980 or later and proof (such as contractor invoices, tank testing

results and inventory control records with monthly reconciliation or manual tank gauging records), that a release detection method was provided by December 22, 1993, by December 22,1994, by December 22, 1995, by December 22, 1996, and by December 22, 1997. The request was returned with a handwritten notation by Mr. Yuen: "I, Koo L. Yuen Pres of Euclid of VA, Inc. [c]erti[fy] that the material provided here to Mr. David Toth, [was] examined by me. Koo L. Yuen. 4-05-00." Although the precise documents provided with the response are not clear, Mr. Yuen regarded this statement as certification that the information provided was true and accurate (Tr.191). Mr. Morton testified that, although certain materials were provided with the return of the request, no narrative was supplied and the information furnished did not comply with the request (T.61).

15. Thereafter, Mr. Yuen was informed by telephone that the response to the Section 9005 request was incomplete and under date of September 30, 2000, a similar request was directed to Mr. Yuen, Euclid of Virginia, Inc at the Connecticut Avenue address referred to in finding 12 (C's Exhibit 19). The letter states that the previous response was incomplete and that a written narrative response was required to each request in the letter in addition to any documents which may be supplied. Question No. 9 of this letter asked for [a listing] of documents or materials, related to Euclid's obligations regarding its USTs , which were located at the facility at the time of the inspection on September 16, 1998, and Question 10 asked for a listing of documents, related to Euclid's obligations as to USTs, which were made available to the inspectors at the time of the inspection. Question 12 recited that the time of the inspection on September 16, 1998, the facility representative indicated that the facility uses tank tightness testing with inventory control and asked for records of tank tightness testing with inventory control, including records from September 1998 to the date of your reply to this letter. Mr. Morton testified that a handwritten response was received from Euclid which did not answer the questions (Tr. 64, 65). Mr. Yuen testified and his written response at the top of the letter states that he received the letter on 12/9/2000. (Tr. 217.). Mr. Yuen's handwritten response on the letter (Exhibit 24) is as follows:"Rec. on 12/9/2000 Dear Mr. Donald Lott [:] All of the Below Info has been furbished] to your Office at least twice and Maryland MDE has a complete file, and this case is closed. K L Yuen" . Although paragraph 16 of the complaint alleges that Respondent was not maintaining the records required by COMAR 26 § 10.04.05 C at the facility or at a readily available alternative site and that Respondent did not make these records available for inspection by MDE upon request, the complaint does not refer to the § 9005 requests and does not cite these requests as proof that it requested the records. Moreover, Complainant has not cited the § 9005 letters in its Post Hearing Brief as proof that the records were in fact requested.

16. Mr. Morton inspected Euclid's site at issue here on September 11, 2001 to obtain records of leak detection and to determine if it was in compliance with spill and

overfill requirements (Tr.65; Summary of Cloverly Auto Care a.k.a Cloverly Citco [Citgo] Inspection, dated September 12, 2001, Exhibit 21). His inspection summary reflects that spill and overfill [prevention] equipment was in place and that two of the spill buckets (catchment basins) contained gasoline and the third contained a soiled cloth. He described this condition as a maintenance issue.[8] He testified and his inspection report states that required records, e.g., monthly leak detection, tank tightness testing, annual line tightness testing and tank closure were not available. Although he appears to have requested the records from the facility representative, Mr. Naeem Uddin, and to have been informed that no records were available and to have attempted to call Mr. Abdul Ghafar, who is identified as the operator, he (Morton) acknowledged that he made no attempt to call Mr. Leon Buckner or Mr. Yuen with regard to the records.[9] Be that as it may, this inspection was conducted subsequent to the issuance of the complaints and may not be relied upon to support the alleged failure to maintain records. Mr. Morton testified that EPA has not received the information requested in the information requests.

17. Notwithstanding the foregoing, the precise information sought by EPA which it did not obtain or already possess is unclear. For example, Question 21 asks for records concerning closure which are capable of demonstrating compliance with closure requirements and which appear to be directed primarily to releases and the abatement thereof. Mr. Morton acknowledged that closure information is required by the Notification of UST form (Tr. 92, 93). The Notification, dated September 18, 1998, submitted by Euclid (finding 7), however, is prior to the closure of USTs at the Cloverly facility and does not include any closure information. Mr. Morton testified that Mr Yuen did not provide information requested by Question 23, which, inter alia, asks for dipstick readings, dispensing meter recording sheets, monthly reconciliation and tank tightness records for the period 1999 to date (Tr.93, 94). However, he was uncertain as to this testimony, affirming only that the Agency did not have tank tightness [test results]. Tank tightness tests were conducted in 1994 (supra note 5) and these tests are not required to be conducted more frequently than every five years (COMAR 26 § 10.04.01 (J)) . Under cross-examination, Mr. Morton testified that among documents furnished by Mr. Yuen in response to the information requests was an insurance notification form [certificate] and a Notification of Underground Storage Tanks (Tr.76). Mr. Yuen's efforts to comply with the information requests are described infra and, there is no count in the Complainant for failure to comply with Section 9005 information requests.

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[8]. Tr.74. COMAR 26 § 10.04.01 B provides that overfill catchment basins shall be kept clean and dry.

[9]. Tr. 66, 68, 69. The inspection report states that daily stick readings are sent to Leon Buckner. Mr. Buckner's relationship to the facility or to Euclid is not specified.

18. The diesel and heating oil tanks were the only tanks at the Cloverly facility more than 20 years old at the time of the September 1998 inspection, the other tanks having been installed in 1991 (findings 5 and 8). The diesel tank was determined to be the one abandoned and the used oil and the heating oil tanks were subsequently taken out of service. Euclid has made no contention that it employed other than manual tank gauging and statistical inventory reconciliation (SIR) as a method of leak detection prior to December 22, 1998, and has admitted that it did not have spill and overfill prevention equipment installed until [early] August of 1999.

19. Mr. Donald Jones, founder and vice president of Quality Environmental Solutions (QES), an environmental consulting firm, first visited the Euclid of Virginia site at issue here in January of 2000 to conduct a subsurface investigation for the purpose of determining whether any contamination resulted from the three tanks which had been removed, i.e., the diesel tank, a tank for heating oil and a tank for used oil (Tr.167, 169). He stated that "we"submitted a work plan which included sampling soil and groundwater to the MDE, which was approved, and that the results, also submitted to the MDE, showed relatively low levels [of contamination]. The MDE determined that no further action was required. Low levels of contamination were also found as a result of sampling monitoring wells, which apparently existed from the time the site was an Exxon Station (Tr.169, 170). Although Mr. Jones did not explain what he meant by low levels of contamination, a Summary of Groundwater Quality and Monitoring Data (included with R's Exhibit 3-B) shows, inter alia, concentrations of Benzene in samples from monitoring wells of 18, 36.3 and 38 mg/l; concentrations of Toluene of 3.8., 27 and 32.8 mg/l; and concentrations of Xylene of 48, 62 and 63 mg/l. Tests on soil samples showed concentrations of Benzene of 2.2, 5.2 and 6.9 mg/l; concentrations of Toluene of 4.3, 17.8 and 37 mg/l; and concentrations of Xylene of 11.4, 26 and 97 mg/l.

20. Mr. Jones testified that he maintained contact with the site by arranging with Mr. Yuen what he termed "compliance audits" which involve visiting the sites on a regular basis and checking dispensers, sumps, leak detection systems, overfill protectors and identifying maintenance issues (Tr. 170).Although he had not inspected the Cloverly facility since January of 2000, he visited the facility the day before the hearing and found the spill buckets in place and functioning as they were supposed to (Tr.171, 173). He did not regard the fact that the spill buckets contained gasoline or gasoline soaked rags as of any consequence. Questioned as to a statement in a Routine Site Inspection [report], conducted by Mr. Chilcote of the MDE on January 14, 2002 (R's Exhibit C), to the effect that he observed free product on groundwater in two of the three monitoring wells at the facility, Mr. Jones replied that it did not tell anything about current compliance. He explained the wells have been there for many, many years and, because of low water tables caused by current drought conditions, product was showing up in wells where it [

had not been observed] for many years (Tr.174, 175). He stated that he would have to look at it, but that sometimes you could tell if it were old, dark product versus [something more recent]. He noted that Mr Chilcote's report did not [answer this question] one way or the other.

21. Mr. Koo L Yuen, president of Euclid of Virginia, testified that his schedule permits him to visit each site [facility] owned [by Euclid] about once very quarter (Tr. 178,179). Explaining the relationship between Euclid and Clark Automotive Services at the 15501 [New Hampshire Avenue] site, he stated that Clark was the former owner who sold the business [site] to him [Yuen or Euclid] in April 1995 (Tr.179, 199, 200). He testified that Mr. Clark desired to operate the automotive service and repair portion of the facility and that for that purpose he (Clark) leased the three- bay garage from Euclid.[10] Mr. Yuen pointed out that Euclid was the landlord and that Clark was the tenant. He emphasized that Clark had nothing to do with gasoline marketing or the gasoline portion of the business. He denied that Clark had any responsibility or obligation for maintenance of gasoline dispensing equipment at the facility, but acknowledged that he (Clark) might repair, [e.g.], a broken nozzle as a courtesy (Tr.179-80).

22. Asked when it came to his attention that the Cloverly site needed upgrading, Mr. Yuen replied that "we" basically have three older stations which did not have the overfill spill bucket and "automatic [g]a[u]ge monitoring" and that Cloverly happened to be one of those sites (Tr. 180). He stated that most of his other sites had been upgraded with rebuilding and "things like that", but because of zoning at this particular site in Montgomery County modifications or expansions were not allowed unless the service station use was surrendered, so we basically [were] "grandfathered" [under the zoning law] (Id.). He admitted being aware of the deadline of December 22, 1998 [for upgrading], but explained that because of the enormous capital required, it was necessary to budget the work (Tr. 180-81). He testified that he had bids from several contractors for a "complete tear down" or remodeling, including installation of necessary environmental equipment prior to December 22, [1998] but was unable to proceed because of the zoning ordinance (Tr.182). In this situation, he complained that because this was a small job, he could not obtain a reasonable price for the. work. He acknowledged, however, that after Mr. Chilcote threatened to stop deliveries, he was able to have the "overfill/ overspill" buckets installed in the beginning part of August 1999 with no interruption in deliveries by agreeing to pay a premium price (Tr. 183, 204). In other testimony, he indicated that the work was scheduled to be performed in September, but that Mr. Chilcote's ultimatum probably pushed him to having it done a month earlier (Tr. 205).

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[10]. In its prehearing submission, Euclid stated that there was no written lease with Clark.

23. Mr. Yuen testified that on a rounded-off basis, he spent approximately $67,000 in upgrading the Cloverly New Hampshire Avenue site (Tr.184). A document "Transaction Detail By Account"for the period January 1, 1999, through May 4, 2000 (R's Exhibit C), which Mr. Yuen explained represented on a cash basis all the money paid to contractor[s] that have to do with upgrades or improvements of the facility related to the gasoline portion of the business, confirms this testimony, showing a total of $66,510.12. Mr. Yuen stated that this included automatic tank gauging, WAPA-2 [vapor] recovery, overfill/overspill buckets, site assessment, doing what ever was required by EPA and Maryland concerning abandoned tanks, installing a tank for heating oil above ground, and [generally] bringing our station into compliance (Tr.184-85).

24. Mr. Yuen testified that he was familiar with record keeping requirements for sites dispensing petroleum products (Tr. 186). He stated that at 15501 [New Hampshire Avenue] the records were kept by his employee who operated the site and that prior to the improvement, that is the installation of automatic tank gauging, they used statistical inventory reconciliation. He explained that it was inventory at the beginning [of the month] plus purchases minus closing [end of the month] inventory and that this figure would be compared with sales (Tr. 187-88, 214). He noted that, if these figures were not equal you had a plus or minus variance, and that usually a plus variance will offset a minus variance the next day.

25. Mr. Yuen stated that the log books are normally maintained at the station and that Mr. Chilcote never had a problem with our inventory record because these records were always available at the site (Tr. 188, 217). This is confirmed at least in part by Mr. Chilcote (finding 7). Asked whether he was familiar with the requirements for tank testing, Mr. Yuen replied in effect that he had installed "automatic tank gauging", i.e., a Veeder Root 350-R which cost about $10,000, that [with this system tank] inventories would reconcile and it would do the tank and line tightness tests, making it unnecessary to employ an outside entity to perform annual tests as was formerly done.[11] Mr.Yuen emphatically denied that there had been any releases of petroleum products into the environment since he took over the [Cloverly] site (Tr.189-90). He also denied knowledge of any other record keeping requirements which were not met.

26. Asked whether he had supplied all of the information requested in the Section 9005 letters, Mr. Yuen replied that obviously he did not do this [answer detailed questionnaires] all of the time. He indicated that he basically looked down the list

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[11]. Tr 189. Veeder-Root machines monitor the status of the UST systems and can detect whether there are leaks from the tanks. *See* Automatic Tank Gauging Systems for Release Detection: Reference Manual for Underground Storage Tank Inspectors. August 2000 EPA, Solid Waste and Emergency Response. 48-62, http://www.epa.gov/OUST/pubs/atg_0900.pdf.

and produced [the information] documents he had in his records which were readily accessible (Tr. 190-91, 206-07). He testified that he did not have underground plans such as underground electric, pipe and sewer drawings. He doubted if anybody had such plans (Tr.223). He stated that we have "cathodic protection" and what-have-you, but that he did not provide that, because he assumed it had already been provided to EPA or Maryland at one time. He maintained that he tried to fulfill the requests to the best of his ability at the moment, which was why he signed the letter at the top saying that the information provided was true and accurate to the best of his knowledge (finding 14). However, as to how long [prior owners had owned the USTs, etc.], he asserted that this required research and access to the records (Tr. 192-93). Moreover, he emphasized that he had been penalized by the Maryland DE and that they had a complete record. He claimed that he provided 90[%] of the information requested by EPA and that anything not supplied was redundant because it could be obtained from the Notification of USTs (Tr.193-94). He regarded the second EPA information request as redundant and bordering on harassment (Tr. 211-12)..

27. Although as indicated (finding 13), the civil penalty proceeding instituted by the Maryland DE was settled, there was apparently a limited fact hearing at which Mr. Yuen testified (Tr.197). He denied that there was any discussion of any kind concerning the period of time covered by the penalty and opined that the penalty had to cover the entire period for which he was not in compliance (Tr.198). He acknowledged, however, that he did not know how Maryland computed the proposed penalty, which he claimed was $25,000, asserting that they just pulled that figure "out of the hat" (Tr.199, 201). He stated that we believed that was too much of a burden and unfair, so we settled for [approximately] half of that. The settlement included another station in Baltimore which had not been upgraded by December 22, 1998. Even though the MDE complaint in the record for the New Hampshire Avenue Station at issue here seeks a penalty of $6,000 (finding 11) , he maintained that a majority of the $13,500 settlement pertained to not having what he referred to as " overfill/overspill bucket[s] " [in the instant matter] (Tr.224). Moreover, the MDE complaint included an unspecified amount for improperly abandoned tanks.

28. Mr. Donald Lott is Chief of the RCRA Compliance and Enforcement Branch of EPA Region 3, and all recommendations for enforcement action involving hazardous waste under RCRA Subtitle (C) and USTs under Subtitle (I) require his concurrence or approval (Tr.110-11, 112). He had concurred in the issuance of the complaint against Euclid herein and was familiar with the calculation of the proposed penalty (Tr. 113-14). He testified that the penalty for this complaint as with any complaint [involving USTs] was based upon the Penalty Guidelines for USTs (Exhibit 1) and stated "[w]e rely very heavily on that" (Tr.114). He explained that the starting point step is the calculation of a gravity-based penalty and that added to that is an economic benefit factor (Tr. 115). Next the inflation

adjustment rule is applied [to the gravity-based component] and these elements are combined to reach a specific penalty for each count.

29. Mr. Lott pointed out that Count I involved failure to maintain UST records and that the UST Penalty Guidance at 16 contains a chart of matrix values with the potential for harm on one axis and the extent of deviation from the requirement on the other (Tr. 117). He testified that in this instance "we" determined that both axes warranted a major designation which resulted in a matrix value of $1500 (Tr.117-18). He asserted that the absence of records goes to the core of the UST regulatory program, because without access to those records EPA is unable or very close to being totally unable to account for possible releases to the environment and any potential impact failure to comply with UST regulations might have on human health and the environment. He maintained that extent of deviation was major, because there was a complete absence of the information we [the regulations] required. This assertion is inaccurate, because Euclid was maintaining proper inventory records (finding 7). Moreover, of the records required to be maintained by owners or operators pursuant to COMAR 26 § 10.04.05 C (supra note 3) only (2), relating to operation of corrosion protection equipment, [12] and (4), relating to release detection, [13] are applicable here. Complainant has not truly

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[12].COMAR 26 § 10.04.02 provides in pertinent part:

G. For UST systems using cathodic protection, records of operation of cathodic protection shall be maintained in accordance with Regulation .05 of this chapter and shall demonstrate compliance with the performance standards in this regulation. These records shall include the following:

(1) The results of the last three inspections and the last assessment required in §F of this regulation [which requires that the cathodic protection system be inspected every 60 days to ensure that it is functioning properly and have a complete assessment of "the impressed current system by a corrosion protection expert when the impressed current system reaches 5 years of age and every 5 years thereafter]. (2) The results of the last two inspections required in §D of this regulation [which requires that (1) all field-installed cathodic protection systems shall be tested within 6 months of installation and at least every year after that and (2) all factory-installed cathodic protection systems shall be tested within 6 months of installation and at least once every three years after that.].

[13]. COMAR 26 § 10.05.06, entitled "Release detection Record Keeping", provides UST system owners and operators shall maintain records in accordance with COMAR 26 10.04.05 demonstrating compliance with the applicable requirements of this chapter. The following records shall be maintained for 5 years:

A. Written performance claims pertaining to any release detection systems used, and the manner in which those claims have been justified or tested by the equipment manufacturer or installer;

(continued...)

evaluated the significance of the absence of the records required to be maintained by owners or operators pursuant to COMAR § 10.04.05 C, because a corrosion expert's analysis pursuant to § 10.04.05 C (1) can only be required by the Department if an alternative method of corrosion protection has been approved and there is no evidence that such an approval had been requested or granted; there are no records of UST system repairs in accordance with (3), because no such repairs had been made or have been shown to have been necessary; records of the site investigation specified by (5) at permanent closure were not required because permanent closure had not been effected as of the time of the inspection [14] and records of UST system upgrades as specified by (6) were not required because such upgrades had not been accomplished and were not required until December 22, 1998 (supra notes 4 and 7).

30. Mr Lott, however, defended the information requests and Count I of the complaint, alleging failure to maintain records required by COMAR 26 § 10.04.05 C, and asserting that these were specific records that we did not have (Tr. 146-47). Moreover, he stated that we had no evidence that the records ever existed much less that they were maintained some place. He emphasized that [in addition to the § 9005 information requests] the information had been requested during the inspection and was not provided. He maintained that we can't assume the records exist, if we are not given an opportunity to review the records and that our information was that from the date of the inspection until the complaint was issued, these records did not exist (Tr.147). Asked to explain the inspection report written by Mr. Chilcote which indicates that proper inventory records were being maintained and that SIR was being used (finding 7), Mr. Lott pointed out that inventory records are just some of the records requested during an inspection (Tr.149). Asked about Mr. Chilcote's testimony that he received records requested within a couple of weeks, Mr. Lott replied that we have not seen those records and do not know whether they comply with the record keeping requirements of the

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[13](...continued)
B. The results of any sampling, testing, or monitoring; and
C. Written documentation for all calibration, maintenance, and repair of release detection equipment permanently located on-site, and any schedules of required calibration and maintenance provided by the release detection equipment manufacturer or installer.

[14]. Although Euclid may have been in violation of the requirement that USTs which are out of service for more than 6 months be permanently closed (COMAR 26 § 10.10.01 C), it could not appropriately be charged in separate counts with failure to effect permanent closure and failure to maintain records thereof because the requirement to maintain records of closure is dependent upon closure being accomplished. The same observation is applicable to (6), as the requirement to maintain records of UST system upgrades is dependent upon an upgrade having been accomplished.

regulation (Tr.149-50).

31. Asked to explain the significance of ,e.g., the absence of a corrosion expert's analysis of the corrosion potential, if required as an alternate method of corrosion protection (§ 10.04.05 C (1)), when no such alternate method had been requested or granted ; of the absence of records of UST system repairs if no such repairs had been effected or were necessary (§ C (3); and of the absence of records of permanent closure (§ C (5)), if no such closure had been effected, Mr Lott replied that because we had not received a [satisfactory] response to our 9005s, we had no knowledge of whether there was a need for those particular records and had to assume that there should have been some records (Tr.151-52). He pointed out, however, that we did not cite [Respondents] five [or six] times for failure to maintain records, but only once and that as long as there was at least one of the listed requirements [of § 10.04.05 C] that they were not maintaining, the count was considered to be valid (Tr.153-54). He explained that at the time the complaint was issued, we had to assume a "worst case scenario ", i.e., that all of the records [listed in § 10.04.05 C] were necessary. He acknowledged that some of the records were not required and that this effected the gravity of the violation.

32. Because Count I of the complaint will be dismissed, findings on the proposed penalty for that count will be limited to those necessary to an understanding of Complainant's reduction of the penalty on Post-hearing Brief. Suffice it to say, that no adjustments in the gravity-based penalty were made for "violator specific adjustments",e.g., degree of cooperation/noncooperation, degree of willfulness or negligence, history of noncompliance and other unique factors or for environmental sensitivity (Tr. 118-19; 120). A table in the Penalty Guidance indicates that a multiplier of 2.5 is applied for days of noncompliance up to 365 days and that the multiplier is increased by 0.5 for every six-month period or fraction thereof [the violation continued] (Id.21). Mr. Lott testified that the days of noncompliance multiplier used for Respondent's failure to maintain records was [or should have been four] based on 744 days from the date of inspection (September 16, 1988) to the date they anticipated issuing the complaint (Tr. 121, 135). Although there is no apparent or necessary connection between availability of records and issuance of the complaint, he explained that at the time the penalty was calculated he was informed by his staff that this period (744 days) was the appropriate period of noncompliance (Tr.136-37). However, on Post-Hearing Brief, Complainant has accepted Mr Chilcote's testimony that the records were received within a couple of weeks, reducing the noncompliance multiplier to one (Id. 16). The proposed penalty for Count 1 is thus $1750.24, comprised of $1500 for the gravity- based component, 10% or $150 for the inflation adjustment component and $100.24 for alleged economic benefit..

33. Turning to Count 2, which concerns the fact that Euclid failed to install spill and overfill prevention equipment by the regulatory deadline of December 22, 1998,

Mr. Lott testified that the extent of the deviation was complete, making that major and the potential for harm was also major because without [the equipment] there was no way to ensure that an environmental insult would not occur (Tr.129). This resulted in a matrix gravity-based penalty of $1500). Mr. Lott stated that there was no reason to raise or lower "violator specific adjustments"[for matters such as degree of cooperation/noncooperation, degree of wilfulness or negligence, history of noncompliance} and a factor of 1.0 was applied maintaining what he referred to as the "status quo" in that regard. Environmental sensitivity was considered to be low and again a factor of 1.0 was applied (Tr.130). The "days of noncompliance" were determined to be 141 days, that is, from the date of the mandatory requirement, December 22, 1998, to the date of the MDE inspection on May 12, 1999. The complaint alleges that the period of noncompliance runs from December 22, 1998, to July 13, 1999. Mr. Lott maintained that the MDE complaint did not cover any period prior to May 12, 1999 (Tr. 130-31). He explained that generally when a state assesses a penalty, EPA does not take an action for that particular period of violation (Tr. 138-39). He pointed out that in this instance the [Maryland] complaint did not refer back to a previous period of time [earlier than the May 12 inspection] Therefore, he asserted that the [the EPA and Maryland complaints] were two independent, non-overlapping actions.

34. A table in the Penalty Guidance indicates that a multiplier of 1.5 is applied to days of noncompliance ranging from 91 to 180 days (Id.21). This multiplier times the matrix gravity-based penalty of $1500 equals $2,250 and the inflation adjustment rule added another ten percent or $225 for a total of $2,475 (Tr.131).The next task was to determine economic benefit and Mr. Lott testified that we looked at local suppliers to determine the cost of material involved in installing the equipment (Tr.131). He stated that we took the same factors as applied [to Count 1] in determining avoided costs, i.e., avoided expenditures, times interest [discount rate], times number of days, times 1 minus marginal tax rate, divided by 365. The Guidance, however, reflects that the marginal tax rate is used only in calculating avoided costs. The Detailed Summary of the proposed penalty (Exhibit 2), however, does not include any specific material, equipment or labor costs and it is not clear what costs are included in "avoided expenditures". Mr. Lott pointed out that calculating delayed costs is different than calculating avoided costs, explaining that [delayed costs] were calculated by [taking] delayed expenditures times the interest or discount rate times the number of days of noncompliance divided by the number of days in the year (Tr.132). He testified that all of these values plugged in resulted in an economic benefit to Euclid of $884.81 which added to the gravity based penalty totaled $3,359.81 for Count 2. While the claimed economic benefit of $884.81 is confirmed by the Penalty Summary (Exhibit 2), the economic benefit is shown as $1,025.33 in the Penalty Summary submitted with Complainant's prehearing exchange. There is no explanation for the difference.

35. Mr. Lott testified that the complaint against Clark Automotive Services, Inc., was based on the understanding that Clark was the operator and Euclid was the owner of the Cloverly facility identified in the complaint (Tr.157-58). He further testified that the proposed penalty assessed against Clark (Docket No.5002), included the identical counts as the complaint against Euclid and that the penalty was calculated in exactly the same manner (Tr.133).

Conclusions

1. Euclid of Virginia, Inc is the owner of the Cloverly Auto Care UST site identified in the complaints located at 15501 New Hampshire Avenue, N.E., Silver Spring, Maryland. At all times relevant to the complaints, the UST systems at the site contained oil, a regulated substance. The USTs are thus subject to Code of Maryland regulations ("COMAR"), Subtitle 10, Oil Pollution and Tank Management.

2. Count I of the complaints allege that Respondents violated the record keeping requirements of COMAR 26 § 10.04.05 C by failing to have available for immediate inspection at the Cloverly facility or at a readily available alternative site upon request records pursuant to § 10.04.05 C, subparagraphs (1) through (6). While it is not clear that these were among records specifically requested by Mr. Chilcote at the time of his inspection on September 16, 1998, Complainant has accepted the premise that requests for the specific records were encompassed within other categories of records Respondent was requested to produce at the time of the inspection or in a telephone conversation with Mr. Yuen on that date. Complainant has acknowledged that the requested records were provided in a couple of weeks, which was apparently considered to be reasonable by the MDE. Count I, alleging failure to maintain records will be dismissed, "readily available" in the regulation modifying "alternative location" rather than records and there being no evidence that Respondent was requested to present the records for inspection at an alternate site.[15]

3. Under EAB precedent, the fact that the State of Maryland has been granted authorization to operate its UST program in lieu of the federal program pursuant to RCRA § 9004(d) and that the MDE had issued a complaint and assessed a penalty

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[15]. The complaints do not refer to RCRA § 9005 information requests and although Mr. Morton testified that EPA did not receive the information requested in the § 9005 letters and Mr. Lott clearly regarded Euclid's responses to the letters as inadequate (findings 15 and 30), the precise information (documents) provided by Euclid in response to the requests is unclear (finding 16). Accordingly, even if the complaints were deemed to be amended subsilentio to allege failure to furnish records required by § 9005 information request letters, the result would be the same.

for Respondent's failure to install spill catchment basins and overfill prevention equipment by the regulatory deadline of December 22, 1998, which on the face of the complaint covered the period from the date of an inspection on May 12, 1999, until the equipment was installed on August 3, 1999, neither res judicata or issue preclusion (collateral estoppel) operates to bar EPA from issuing a complaint and assessing a penalty for the mentioned failure for the period December 22, 1998, to May 12, 1999.

4. UST Penalty Guidance contemplates that the economic benefit of noncompliance will be recaptured by including "avoided costs" or "delayed costs" in the penalty calculation and because Respondent installed the necessary equipment to come into compliance, only delayed costs were applicable and it was not clear how economic benefit was determined, proposed penalty will be reduced by alleged economic benefit.

5. Complainant has issued separate complaints against Euclid of Virginia, Inc and Clark Automotive Services, Inc. upon the premise that Euclid is the owner and Clark is the operator of the UST site identified in the complaints. .However, Complainant has failed to establish that Clark has any responsibility for, or control over, USTs at the site or any connection with sale or dispensing of gasoline at the site. Therefore, Complainant has failed to establish that Clark is an operator as defined in COMAR and the complaint against Clark will be dismissed.

Discussion

I. Failure to Maintain Records

The complaints charge Respondents with the failure to maintain records required by COMAR 26 § 10.04.05 C (1) through (6) (supra note 3). These records were allegedly among records requested by Mr. Chilcote of the Maryland Department of the Environment at the time of an inspection of the Cloverly site identified in the complaints on September 16, 1998. Mr. Chilcote requested records, e.g., those pertaining to inventories, testing requirements, age of tanks, and insurance, from the facility manager, Mr. R.K. Saxena (finding 5). The only records available, however, were records pertaining to inventories and he was informed that he would have to contact the owner, Mr. Yuen, for other records. Mr. Chilcote called Mr, Yuen from the station that very day and received the required or requested records within a couple of weeks (finding 6). While it is not clear that Mr. Chilcote specifically requested the records listed in § 10.04.05 (C), Complainant, in calculating the penalty, has reduced the days of noncompliance multiplier to one based on Mr. Chilcote's testimony that the records were received within a couple of weeks (Post-Hearing Brief at 16). This is the basis for the reduction of the proposed penalty against each Respondent to $5,110.05 noted at the outset of this decision. This acknowledgment is accepted.

Respondent argues that Mr. Chilcote and the MDE were satisfied with Euclid's record

keeping (Reply Brief at 1).The MDE complaint, which presumably included all violations which could appropriately be charged to the date of the complaint (August 9, 1999), does not contain a count or charge concerning the failure to maintain records. Accordingly, Respondent's assertion in this regard appears to be accurate. More telling is the fact that Complainant has misinterpreted the COMAR applicable here (supra note 3).

COMAR 26 § 10.04.05 D (1) provides that owners and operators shall keep the records required [by paragraph C) either:

> (a) At the UST site and immediately available for inspection by the Department; or
> (b) At a readily available alternative site, and these records shall be provided for inspection to the Department upon request.

It is immediately apparent that "readily available" in the quoted provision of the regulation refers to the "alternative site" and not to the records. There is no evidence or allegation that Mr. Chilcote or anyone else representing MDE or EPA ever requested to examine the records at the alternative site, Euclid's headquarters, 4225 Connecticut Avenue, Washington, D.C., which Respondent alleges is approximately five miles from the Cloverly site in question (Reply Brief at 1). Providing the records within a couple of weeks was apparently considered to be reasonable by MDE and there is no evidence to the contrary. Accordingly, Count I of the complaint alleging failure to maintain records will be dismissed.

It should be noted, however, that only two of the six categories of records identified in the complaint are applicable to Respondent here (finding 29). Moreover, Mr. Lott's testimony that Complainant had not seen the records and did not know whether the records complied with regulatory requirements (finding 30) may not overcome Mr. Chilcote's testimony that the records were received within a couple of weeks of the inspection, Complainant's acknowledgment to that effect on Post-Hearing Brief and the absence of any indication from MDE that the records provided were inadequate in any respect. It is therefore clear that any the penalty assessed for Count I would be substantially less than that proposed by Complainant.

II. Under EAB Precedent, Neither Res Judicata or Issue Preclusion Operate As A Bar To EPA's Complaint

At the hearing, Respondent's counsel argued that, because MDE had already assessed a penalty for these exact violations and there was no indication of a time limit on the penalties imposed and the penalty of $13,500 was paid, " administrative double jeopardy" applied [to bar EPA's complaint]. [16] This argument is applicable only to the count for failure to install spill

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[16] . Tr. 162. Counsel asserted :

> The Respondent in this case has already been penalized by the Maryland Department of

(continued...)

catchment basins and overfill prevention by the COMAR deadline of December 22, 1998, because the MDE complaint included a count for improperly abandoned tanks in addition to the failure to meet the mentioned upgrade deadline and did not include a count for failure to maintain records. It should also be noted that the settlement amount of $13,500 included another UST site owned by Euclid in Baltimore. Moreover, double jeopardy, strictly speaking, is applicable only in the criminal context.[17] Respondent, however, asserts that there is no basis in law for assessing an identical penalty to that assessed by MDE for failure to accomplish the required upgrades in a timely manner (Reply Brief at 2) and this argument will be treated as raising the doctrines of res judicata and/or issue preclusion (collateral estoppel).

As indicated (supra note 1), Maryland was granted final approval to operate its UST program in lieu of the federal program pursuant to RCRA § 9004 on June 30, 1992.[18] Although the requirement that a State have adequate authority to enforce compliance with its UST program in order to obtain approval to administer and enforce its UST program in lieu of the Federal program makes little sense, if EPA is to step in and assess a penalty for every perceived shortcoming in the period of violation and penalty assessed by a State, the word "primary" before "enforcement" in § 9004(d)(2) dispels any notion that State enforcement was intended to be exclusive. Moreover, the only prerequisite to the Administrator issuing an order or commencing a civil action against a person in an authorized State determined to be in violation of any requirement of this subchapter (Subchapter I) is that notice be given to the State in which the violation occurred.[19] That being said and noting that there is no provision in § 9004 similar to §

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[16](...continued)
the Environment for these very exact violations, and there's no indication that there's any time limitation on the penalties imposed by the MDE. The penalty amount that was imposed is $13,500 which was eventually paid off by the Respondent in this case, and so we have a, double jeopardy situation if you will, in the administrative sense.

[17].See, e.g., Hudson et al. v, United States, 552 U.S. 93, 118 S.Ct. 488 (1997).

[18]. RCRA § 9004(d) provides in pertinent part:

(2) If the Administrator determines that a State program complies with the provisions of this section and provides for adequate enforcement of compliance with the requirements and standards adopted pursuant to this section, he shall approve the State program in lieu of the Federal program and the State shall have primary enforcement responsibility with respect to the requirements of its program.

[19] RCRA § 9006 (a)(2).. The record indicates that the letter from the Associate Director for Enforcement, Waste and Chemical Management Division, dated March 7, 2001, to Euclid, enclosing the complaint and compliance order, was copied to Mr. Herb Mead, DME. As § 9006(a)(2) does not specify a period in advance of issuance complaint in which notice to the State must be given, this constitutes compliance with the notice requirement.

3006 (d) in Subchapter C, [20] the language of § 9004(d)(2), "[i]f the Administrator determines that the State program ..... provides for adequate enforcement of compliance with the requirements and standards adopted pursuant to this section..." (supra note 19), leaves no room for doubt that State authorization includes enforcement of all elements of its UST program.[21]

As indicated above, Respondent's argument that the fact that DME assessed a penalty for Respondent's failure to accomplish the required upgrades by the deadline of December 22, 1998, established by COMAR, precludes EPA from assessing a penalty for the same violation will be regarded as raising the doctrines of res judicata and issue preclusion (collateral estoppel). The Supreme Court has noted: "(a) fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction....cannot be disputed in a subsequent suit between the same parties or their privies". Montana v United States, 440 U.S. 147 at 153 (1979). The court explained that "(u)nder res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action", while under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving the same parties". (Id.). Application of these doctrines is not limited to determinations made by courts, but applies as well to [final] determinations of administrative bodies. United States v Utah Construction and Mining Company, 384 U.S. 394, 16 L,Ed, 2d 642 (1966). See also Restatement (Second) Judgments § 83

Because MDE and EPA are enforcing the identical regulation, COMAR § 10.03.08,

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[20].RCRA § 3006 (d) provides:

(d) Effect of State Permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

[21]. In Harmon Industries, Inc. v. Browner, 199 F.3rd 894 (8th Cir.1999), the court held, inter alia, that while the language of RCRA § 3006 (b) authorizing a State to carry out its program "in lieu of " the Federal program referred to the program itself, the administration and enforcement of the program are inexorably intertwined. The court, therefore, held that the "same force and effect" language of § 3006 (d) precluded the EPA from taking enforcement action and assessing a penalty for violations addressed by the State in a final consent decree entered in State court. Cf. United States v. Power Engineering Company, 303 F.3d 1232 (10th Cir. 2002) "(in lieu of" language in RCRA § 3006 (b) held to be limited to issuance and enforcement of permits, "same force and effect" language of § 3006(d) held intended only to make it clear that a Federal permit was not required, statute deemed ambiguous and court deferred to EPA interpretation.)

requiring that upgrading of existing UST systems be accomplished not later than December 22, 1998, the only serious question in determining whether res judicata or collateral estoppel applies is whether there is privity between MDE and EPA as to such enforcement. In Harman, the court, applying Missouri law in accordance with the Full Faith and Credit Act (28 U.S.C. § 738), held that privity is not dependant upon the subjective interests of the parties and that because the State of Missouri advanced the exact same legal right under the statute as did EPA, the requirement that the parties be identical was satisfied. There is no indication that the result would be any different if Maryland law were to be applied.[22] .In rejecting EPA's argument that sovereign immunity precluded the application of res judicata to the United States unless the United States was an actual party in the prior lawsuit, the court relied on Montana v. United States (supra) and held that the "laboring oar"in the prior litigation, which the Supreme Court held was necessary in order to actuate principles of estoppel in litigation to which the United States was not a party, was satisfied by the "in lieu of" and "same force and effect" language of RCRA §§ 6926 (b) and (d).While the language that the State program operates"in lieu of" the Federal program is contained in § 9004 (d)(2) (supra note 19), RCRA Subchapter I, which establishes the UST regulatory program does not contain the "same force and effect" language of § 6926 (d) or language comparable thereto. The rationale of Harmon, however, that the Missouri Department of Natural Resources and EPA are identical for claim preclusion purposes is not dependent on the "same force and effect" language of § 6926 (d), but was based on the fact that they were enforcing the same legal right, i.e., the same RCRA statutory or regulatory requirement. Harmon's rejection of the sovereign immunity defense did rely heavily on the "same force and effect" language of § 6926 (d) and it is not clear that the court would have reached the same result absent § 6926 (d).

Be the foregoing as it may, the Environmental Appeals Board has repeatedly held that it has adopted EPA's interpretation of RCRA §§ 3006 and 3008, applicable to hazardous waste programs, and by implication § 9006, applicable to Federal enforcement of UST programs, that is, that the only prerequisites to EPA enforcement in States authorized to administer their own programs are a determination of a violation and notice to the State in which the violations occurs, a practice known as "overfiling". See The Beaumont Company, RCRA Appeal No.94-3, 1997 WL 273141 (E.P.A.) (EAB 1997) and Bill-Dry Corporation, RCRA Appeal No. 98-4, 8 E.A.D. 575 (EAB 2001). While the EAB in Bill-Dry distinguished Harmon upon the ground "overfiling" was not involved, it nevertheless made it clear that it would follow the "well-established "Agency reading of the statute that overfiling is permissible. Accordingly, it must be held that there is no legal impediment to EPA's complaint herein and the fact that MDE issued a complaint and assessed a penalty for Euclid's failure to install spill catchment basins and overfill prevention equipment by the regulatory deadline of December 22, 1998, is relevant, if at all, only to the

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[22]. See, e.g., Cassidy v Board of Education, 316 Md.50; 557 A.2d.227(Md.Ct App. 1989) (rule of claim preclusion (res judicata) requires: 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; 2) that the claim presented in the current action is identical to the one determined in the prior adjudication, and 3) there was a valid final judgment on the merits).

amount of the penalty. Although the complaint herein was based on the premise that the MDE complaint for failure to accomplish required upgrades did not cover any period of violation prior to May 12, 1999, and Mr. Lott testified that generally when a state assesses a penalty, EPA does not take action for that particular period of violation (finding 33), under EAB decisions this is solely a matter of EPA discretion.

III. Determination of Penalty-UST Penalty Guidance

The penalty for Count II of $3359.81 ($3360) calculated by Complainant is based upon the UST Penalty Guidance (finding 35). The Guidance is considered to provide an appropriate method of determining penalties for violations of UST regulations insofar as the gravity-based component is concerned. Complainant, however, has not substantiated the economic benefit component ($885) of the proposed penalty. Because the equipment was installed, although tardily, only delayed costs or expenditures are applicable in determining economic benefit. The formula at page 12 of the Guidance uses an equity discount rate (18.1% at the time the Guidance was published in November 1990) for determining delayed costs... The BEN User's Manual states that the discount/ compound rate represents the weighted average cost of capital for a typical company (Exhibit 20 at 3-14). The Manual also states that WACC represents the return a company can earn on monies not invested in pollution control (Id.3-15). Viewed as such, an 18.1% WACC appears to be divorced from reality.[23] Complainant has not explained the WACC used in calculating the economic benefit. Mr. Lott testified that "we" looked a local suppliers to determine the cost [of material and labor] in installing the equipment, no figures are given and it is not clear what costs are included in "delayed expenditures" for the purpose of applying the Guidance formula. Applying the inverse of the formula on page 12 of the Guidance, including an 18.1% equity discount rate, it appears that the economic benefit of $885 was based on installed equipment (delayed) costs in excess of $12,500. Although Mr, Yuen testified that the Veeder-Root 350-R cost about $10,000 (finding 25), this machine is designed to detect leaks rather than spill or overfill prevention while a tank is being filled. It is concluded that Complainant has not substantiated the economic benefit component of the proposed penalty for Count II and the sum of $885 will be deducted from the proposed $3360 penalty.

IV. Clark Automotive Services, Inc. Has Not Been Shown To Be An Operator

As indicated (ante at 3),COMAR 26 § 10.02.04 (40) defines "operator" as meaning "a person in control of, or having the responsibility for, the daily or periodic operation, or the repair, maintenance, closure, testing, or installation, of the UST system." The record shows that Euclid purchased the Cloverly site at issue from Clark in 1995 and that Clark leased the three-bay garage (finding 21). Mr. Yuen testified that Euclid was the landlord and Clark the tenant and that Clark desired to operate the automotive service and repair portion of the facility. He denied that Clark

[23]. The Introduction to the BEN User's Manual reflects that it is intended primarily for settlement purposes (Id.1-1). While stating that it may be used in trials and hearings, it points out that an expert is necessary to explain its methodology and calculations.

had any responsibility or obligation for the maintenance of gasoline dispensing equipment at the facility or anything to with gasoline marketing or the gasoline portion of the business. (Id.) There is no evidence contradicting Mr. Yuen's testimony. Although Complainant argues that Mr. R. K. Saxena, the manager of the facility at the time of the inspection on September 16, 1998, was an employee of Clark (Reply Brief at 1), there is no record evidence to support this contention. It is also worthy of note that the § 9005 information requests issued by Complainant were addressed to Mr.Yuen, Cloverly Auto Care or Euclid of Virginia, Inc. at the Connecticut Avenue address rather than to Clark. In sum, there is simply no evidence that Clark had any control of, or responsibility for, the daily or periodic operation, or the repair, maintenance, testing or installation of the UST systems at issue. Complainant has failed to carry its burden that Clark was an operator as defined by COMAR of the Cloverly facility at issue and the complaint against Clark will be dismissed.

ORDER

1. The complaint against Clark Automotive Services, Inc. is dismissed.

2. Count I of the complaint against Euclid, alleging failure to maintain records required by COMAR, is dismissed.

3. In accordance with RCRA § 9006, 42 U.S.C.§ 6991e), a penalty of $2,475 is assessed against Euclid of Virginia, Inc. for failure to install spill catchment basins and overfill prevention equipment by the regulatory deadline of December 22, 1998, established by COMAR.[24] Payment of the full amount of the penalty shall be made by sending or delivering a cashier's or certified check payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

   Regional Hearing Clerk
   U.S. EPA Region 3
   P.O. Box 360863M
   Pittsburgh, PA 15351-06859

Dated this _____day of May 2003.

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[24]. Unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 (40 C.F.R. Part 22) or unless the EAB elects to review this decision sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).

_____
Spencer T. Nissen
Administrative Law Judge

In the *Matter of Euclid of Virginia, Inc., and Clark Automotive Services, Inc.,*
Docket Nos. RCRA 03-2001-5001 and RCRA 03-2001-5002

CERTIFICATE OF SERVICE

I certify that the foregoing, dated May 1, 2003, was sent this day to the Regional Hearing Clerk and to the following addressees listed below:

_____
Nelida Torres
Legal Staff Assistant

Dated: May 1, 2003

By Facsimile and Regular Mail:

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